

THE BRUSSELS EFFECT

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ABSTRACT—This Article examines the unprecedented and deeply underestimated global power that the European Union is exercising through its legal institutions and standards, and how it successfully exports that influence to the rest of the world. Without the need to use international institutions or seek other nations' cooperation, the EU has a strong and growing ability to promulgate regulations that become entrenched in the legal frameworks of developed and developing markets alike, leading to a notable "Europeanization" of many important aspects of global commerce. **The Article identifies the precise conditions for and the specific mechanism through which this externalization of EU's standards unfolds.** Enhanced understanding of these conditions and this mechanism helps explain why the EU is currently the only jurisdiction that can wield unilateral influence across a number of areas of law—ranging from antitrust and privacy to health and environmental regulation—and why the markets, other states, and international institutions can do little to constrain Europe's global regulatory power.

... C. Health Protection: Regulation of Chemicals

The EU has also become the preeminent global regulator of the chemicals industry. This reflects Europeans' elevated concern for the adverse effects that unsafe chemicals have on humans and on the environment. The Registration, Evaluation, Authorization, and Restriction of Chemicals (REACH) is an EU chemicals regulation that has had a substantial impact on a global scale.¹²⁰ The chemicals industry is multinational, and the EU is an important destination market for a vast number of chemicals as well as goods and preparations containing chemicals.¹²¹

REACH, which was enacted in 2007, builds on an idea of industry responsibility. Embracing the idea of "no data, no market," REACH places the burden of proof on manufacturers and importers as opposed to regulators.¹²² Manufacturers and importers are required to gather information on the effects that their substances have on human health and the environment, and to provide this information to EU authorities.¹²³ Another important feature of REACH is that it was enacted to regulate not only new chemicals that enter the stream of commerce but also tens of thousands of "existing substances" that had been placed on the EU market before they were regulated.¹²⁴ According to the Commission, these chemicals represent 99% of the total substances on the market.¹²⁵ The implementation of REACH is also guided by the "precautionary principle," which lowers the threshold for regulatory intervention.¹²

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... The global spread of REACH has met with resistance at the international level. As the regulation applies to approximately 30,000 chemicals, its impact on the \$600 billion U.S. chemical industry is profound.¹³¹ **Critics claim that REACH imposes significant costs and challenges on manufacturers and importers, particularly related to the supply chain, sales, and procurement.**¹³² At worst, the regulation is said to impede innovation and the development of new substances due to fears that they would not meet the more stringent European requirements.¹³³

132 See LAWRENCE A. KOGAN, EXPORTING PRECAUTION: HOW EUROPE'S RISK-FREE REGULATORY AGENDA THREATENS AMERICAN FREE ENTERPRISE 40–43 (2005), available at <http://www.wlf.org/upload/110405MONOKogan.pdf>.

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... III. THE EU'S MOTIVATIONS

The EU's exercise of global regulatory clout can spring from various motivations—both external and internal. Some commentators argue that the EU's external policies reflect “imperialistic” objectives whereas others emphasize the EU's role as a benevolent hegemon.¹⁸⁷ The charges of regulatory imperialism appear misguided. A more compelling account suggests that the EU is guided primarily by internal motivations stemming from its need to preserve the single market without undermining the competitiveness of European companies. Externalization of the single market also serves the bureaucratic interests of the European Commission and allows for the maximization of interest group support embracing corporations and consumer advocates alike.

A. External Motivations

In contrast to the United States' unilateralism in international affairs, the EU is often portrayed as a champion of multilateral cooperation and universal norms.¹⁸⁸ However, the EU's commitment to multilateralism and universalism must be qualified.

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...Some scholars suggest that the EU's motivations are imperialistic—that the EU is, in fact, seeking to exert political and economic domination over other countries.¹⁹⁰ The EU does have significant leverage over countries that seek closer cooperation with, or eventually membership in, the EU.¹⁹¹ But even outside of its immediate sphere of influence, critics maintain that the EU is engaged in a novel form of imperialism. Instead of pursuing its goals through military and political instruments, the EU has been accused of relying on economic and bureaucratic tools of dominion over countries that are dependent on access to its vast domestic market.¹⁹² Lawrence A. Kogan, criticizing the EU's extensive regulatory reach in environmental and food safety matters, put it bluntly:

[T]he EU has embarked upon an adventure in environmental cultural imperialism. This is a global practice reminiscent of an earlier European colonial era. And the fact that Europe is using “soft power” to enforce it will hardly make it more palatable to people who will be unable to feed themselves as a result.¹⁹³

While critics claim that the EU is exporting its standards without the consent of other states, the EU counters that it is not engaged in coercion—it is simply enforcing the norms of the single market equally on domestic and foreign players and merely asking others to play by its rules when operating in its home market.

¹⁹⁰ See, e.g., JAN ZIELONKA, EUROPE AS EMPIRE: THE NATURE OF THE ENLARGED EUROPEAN UNION 9–22 (2006); Jan Zielonka, *Europe as a Global Actor: Empire by Example?*, 84 INT'L AFF. 471, 471, 475 n.17 (2008) [hereinafter Zielonka, *Empire by Example*]; see also KOGAN, *supra* note 132, at 98

(arguing that Europe’s goal is to establish the precautionary principle not only as a regional standard but also “as an absolute global legal standard”).

...193 Lawrence A. Kogan, *Exporting Europe’s Protectionism*, NAT’L INT., Fall 2004, at 91, 99. The quoted passage relates to Kogan’s discussion of the EU’s GMO ban and the impact of that ban on developing countries in particular. See also Peter F. Drucker, *Trading Places*, NAT’L INT., Spring 2005, at 101 (arguing that one of the purposes of economic blocs—like the EU—is to export their regulations for protectionist purposes).
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... B. *Internal Motivations*

For those skeptical of the EU’s benevolent motives, the EU is simply seeking to level the playing field by exporting its costly regulations abroad under the guise of concern for consumer and environmental health and safety.²⁰⁶ According to the Czech president Václav Klaus, “[t]he claims for quasi-universal social rights are disguised attempts to protect high-cost producers in highly regulated countries, with unsustainable welfare standards, against cheaper labor in less productive countries.”²⁰⁷

206 See KOGAN, supra note 132, at 3–4, 101–02.

207 VÁCLAV KLAUS, *RENAISSANCE: THE REBIRTH OF LIBERTY IN THE HEART OF EUROPE* 16 (1997).
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... 2. *Internal Conflicts and the Growing Diversity*.—Not everyone within the EU benefits from its aggressive regulatory stance. EU consumers, who value access to cheap imports, may occasionally question whether the higher product standard justifies the higher cost products, in particular in challenging economic times. **Some EU corporations may also find that excessively high regulatory standards are unsustainable for the European economy. They argue that excessive reliance on the precautionary principle may slow economic growth and innovation**³⁰³ and price EU firms out of critical export markets.³⁰⁴ Some companies in the EU might have benefited from the unlevel playing field and lax regulations in markets where the Brussels Effect has not taken hold.

303 See Kogan, supra note 193, at 94; see also Leo Cendrowicz, *Is Europe Finally Ready for Genetically Modified Foods?*, TIME (Mar. 9, 2010), <http://www.time.com/time/business/article/0,8599,1970471,00.html> (discussing the costs to Europe of continued rejection of GMO-derived food products).