

1. Europe's power surplus: legal empathy and the trade/regulation nexus

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INTRODUCTION

In a book that seeks to problematize the self-avowed mission of the EU to be a good global actor, or more precisely a 'Good Global Governance Actor' in all its complexity, we focus on the challenge associated with using its trade and regulatory policies in tandem (which we refer to as the trade–regulation nexus) as its main source of influence on the global economy, while setting an example for multilateral cooperation in doing so. This question has become all the more acute at a time when many are asking in national capitals, in Brussels, but also in the rest of the world, what the EU's strategic vision ought to be in a post-Trump, post-Brexit and (hopefully) post-pandemic world.

As the other chapters of this book illustrate, there is little question that the EU can be considered a trade power with well-established policies anchored in a framework of rule-based governance.³ Through the creation and develop-

¹ Disclaimer: this chapter represents the exclusive opinions of the authors and does not represent the views of EU institutions.

² This chapter is a significantly revised and abridged version of a paper by the same authors, 'The power surplus: Brussels calling, legal empathy and the trade-regulation nexus', first published by CEPS, 2021. That paper can be found at <<https://www.ceps.eu/ceps-publications/the-power-surplus/>>. We would like to thank Alan Beatie, Steven Blockmans, Elaine Fahey, Robert Howse, Elisabeth Goldberg, Joanne Scott and three anonymous reviewers for their insightful feedback on a previous draft.

³ Inter alia, Sophie Meunier and Kalypso Nicolaïdis, 'The European Union as a Conflicted Trade Power' (2006) 13(6) *Journal of European Public Policy* 906; Chad Damro, 'Market Power Europe' (2012) 19(5) *Journal of European Public Policy* 682; Alasdair R. Young and John Peterson, *Parochial Global Europe: 21st Century Trade Politics* (Oxford University Press 2014).

ment of the WTO and an extensive network of free trade agreements, it has played a decisive role in the development of global trade governance.⁴ Nor is there any doubt of the impact of EU regulations abroad in fields ranging from competition policy to digital regulation, food and consumer safety or environmental protection. But to what extent can these powers help bring about, promote and implement multilateral agreements or standards and, more broadly, an ethos of multilateralism?

We propose to address this question in three steps.

First, analytically, we suggest that what we call here ‘Europe’s power surplus’ – its capacity to influence conduct beyond its jurisdiction through conditional access to the biggest market in the world – is not only due to its sheer market size and active regulatory policies but also to its own experience in managing the trade–regulation nexus internally. Scholars have long analysed these impacts under the broad categories of ‘external governance’ or ‘EU policy diffusion’ (Borzel and Risse), ‘policy externality’ (Egan and Nicolaïdis), or more specifically ‘functional extension’ (Lavenex), ‘territorial extension’ (Scott), ‘trading up’ (Vogel), or the ‘Brussels effect’ (Bradford).⁵ They may disagree on the balance between coercive, contractual and spontaneous adoption of EU rules, but the broad consensus is that this trade-regulatory realm is where the EU’s external power is greatest. Here we offer a typology of different forms of external EU regulatory impact based on the territorial scope and aims of the policies and review the role that regulatory cooperation has played so far in the context of EU trade agreements.

Second, and normatively, we note that the most widespread view, especially in policy circles, is that we should see as benign and indeed desirable the external impact of EU regulatory policies as essentially a consequence of ‘market forces’ that are independent of any proactive external policies by EU institutions. As this book illustrates, there is indeed strong evidence of

⁴ Ignacio Garcia Bercero, ‘What Do We Need a World Trade Organization for? The Crisis of the Rule-Based Trading System and WTO Reform’ (Bertelsmann Stiftung, 28 May 2020).

⁵ See inter alia, Joanne Scott, ‘Extraterritoriality and Territorial Extension in EU Law’ (2014) 62(1) *The American Journal of Comparative Law* 87; Kalypso Nicolaïdis and Michelle Egan, ‘Transnational Market Governance and Regional Policy Externality: Why Recognize Foreign Standards?’ (2001) 8(3) *Journal of European Public Policy* 454; Sandra Lavenex, ‘The Power of Functionalist Extension: How EU Rules Travel’ (2014) 21(6) *Journal of European Public Policy* 885; Tanja A. Börzel and Thomas Risse, ‘From Europeanisation to Diffusion: Introduction’ (2012) 35(1) *West European Politics* 1; Sandra Lavenex and Frank Schimmelfennig (eds), *EU External Governance: Projecting EU Rules beyond Membership* (Routledge 2013); Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford University Press 2020).

the capacity of the EU to influence global regulatory developments through such a 'Brussels effect', a term used by Bradford to emphasize the passive nature of the EU's regulatory reach. But in our view, such an essentially unilateral strategy as a response to global regulatory challenges risks leading to complacency and underinvestment in active regulatory cooperation policies. Moreover the 'market led' external influence of EU regulatory policies faces three challenges: the emergence of China as a regulatory power for new technologies and its increasing economic presence in the EU neighbourhood; the nature of the digital and green transitions which limits market leverage either for technological or political reasons; and the growing need to reconsider its relations with neighbouring countries, including the UK, to achieve regulatory proximity other than incorporation into the single market. In short, as with any wielding of power, the EU needs to deploy it with purpose and with care, with an eye not only to *effective* external influence but also a *legitimate* claim to broker status when it comes to resetting multilateralism, as demands perceived as illegitimate are counterproductive in the longer run.

Third, we turn to *how* this is to be done and argue that the EU *already* possesses a regulatory template which is itself the result of inter-state cooperation – this is how it differs from other actors in the world. Its experience in compromise internally between different legal systems, including common and civil law but also different national legal traditions, provides EU law with a degree of completeness and reproducibility that other legal systems cannot display. We refer to this EU template as 'the regulatory compatibility paradigm', grounded on the twin practices of 'managed mutual recognition' and 'legal empathy' – whereby lawmakers and judges both lead and reflect a continuous dialogue between member states in which they have no choice but to engage with each other's different rules and legal systems, assess whether the differences between them are legitimate differences and adapt their behaviour accordingly. While these concepts are deeply embedded in an ecosystem that requires supranational institutions, we argue that, properly adapted, they are relevant for the exercise of the EU's power surplus outside its borders and suggest specific ways in which such translation can take place.

In laying out this argument, we do not propose to review the extensive literature describing and analysing international regulatory cooperation (IRC), including the extensive work conducted by the OECD on regulatory policy and governance.⁶ Our concern is essentially normative and prescriptive. While recognizing the significance of the 'Brussels effect', we believe that, as it seeks more systematically to extend its normative influence to the regulation

⁶ For a summary, see *International Regulatory Co-operation: Addressing Global Challenges* (OECD Publishing 2013).

of transborder concerns, a ‘good global governance’ approach to the external aspect of its regulatory policies calls for the territorial extension of legal empathy for reasons of both legitimacy and effectiveness. To be sure, we need to be mindful of the potential tension between the EU’s external action objective (such as in the list of Article 21(2) TEU) and the protection of its own values and interests – a tension to be managed on a case-by-case basis.

The argument unfolds as follows. Section 1 presents the typology introduced above. Section 2 discusses the broader context, the risks of either underuse or overuse of such power, and the broader models inspiring EU external action around the trade–regulatory nexus. Section 3 proposes a unifying conceptual framework which adapts the EU internal norms of recognition, compatibility and empathy to its external action. We conclude by offering some suggestions as to how the EU can best exercise its power surplus in the future.

1 THE GLOBAL IMPACT OF EU REGULATORY POLICIES: A TYPOLOGY

The evolution of EU regulatory policies has increasingly encompassed the need to regulate conduct outside the EU territory. If the EU has rightly criticized the US’s extraterritorial application of its legislation it may be because it knows better through being accused of reproducing patterns of action reminiscent of the imperial past of some of its member states. Yet, as Scott argues, while the enactment of such extraterritorial legislation by the EU is extremely rare, it does make frequent recourse to what she calls ‘territorial extension’ in order to gain regulatory traction over activities that take place abroad. Whereas extraterritoriality covers the efforts by a state to regulate the foreign conduct of persons not present within its territory, territorial extension ‘occurs when the application of a State’s law rests upon a territorial “trigger” in that it requires conduct or presence within the territory of the regulating State’. In other words, once the application of EU law abroad has been triggered in this way, the EU’s determination (most frequently of market access) is influenced by how foreign actors conduct themselves on their own territory – a kind of *de facto* extraterritoriality – thus creating a wedge between other countries’ sovereignty and regulatory jurisdiction. As the focus of EU regulation moves towards the digital economy, which is global by nature, and the response to global environmental challenges, the territorial extension of EU regulatory powers is bound to increase.

In order to better understand the sources of EU external regulatory influence, we propose a typology of EU regulatory interventions, based on the territorial scope of the objectives pursued, and including for each of the EU’s aims and instruments (Table 1.1).

Table 1.1 Typology of EU regulatory intervention and concomitant regulatory cooperation

Territorial focus of regulatory intervention	Primary aim of regulatory cooperation policies	External instruments of regulatory cooperation
<i>Exclusive domestic focus</i>	Market access for EU exporters	Shaping international standards (sometimes supported by trade agreements and regulatory dialogues)
<i>Domestic focus combined with regulation of conduct abroad</i>	Trade facilitation and promotion of regulatory efficiencies through a regulatory division of labour	Equivalency; Mutual Recognition Agreements
<i>Transborder focus</i>	Change in practices in third countries	Promoting international agreements

Type 1: Regulations with exclusive domestic focus

These are primarily regulations dealing with consumption externalities (health, safety, environment protection, etc.) where the regulator's concern is that any product or service placed in the market complies with domestic rules. How the product or service is regulated in third markets is of no regulatory concern provided the product conforms with EU rules when exported to the EU. Most of the rules relating to the single market for goods fall under this category. This does not mean, however, that the EU is indifferent to third country regulations. As an economy heavily dependent on exports, the EU has an interest in promoting compatible regulations in third countries, most often through active participation in international standard-setting bodies, which then provide the basis for EU standards or regulations.⁷ Industrial standards in particular, which have played a critical role in the development of the single market, are often based on ISO/IEC standards, and EU regulations in the car sector are almost entirely based on UN/ECE regulations. Codex standards are also frequently used in the agriculture sector, although in a number of areas the EU applies stricter standards. Through its support for international standards, the EU has therefore contributed to global governance in the regulatory field, which in turn serves as a vehicle to further both EU regulatory and market access goals.

Given the EU-friendliness of many international standards, it should come as no surprise that the EU has used its bilateral trade agreements to promote them. This is reflected in horizontal provisions of the chapters on technical barriers to trade and sanitary and phytosanitary measures, but also in specific

⁷ See for instance Robert Howse, 'Regulatory Measures' in Martin Daunton, Amrita Narlikar and Robert M. Stern (eds) *The Oxford Handbook on The World Trade Organization* (Oxford University Press 2012).

sectoral commitments. For instance, the free trade agreements with Korea and Japan include car sectoral annexes through which both sides accept largely basing their car regulations on UN/ECE regulations.

In certain areas of regulation – such as chemicals or certain aspects of food safety – there are no constraining international standards (albeit there are certain voluntary standards) or the EU is seeking domestically a level of protection that is higher than that applied internationally. It is interesting to note that, outside ‘neighbourhood countries’, which pursue regulatory approximation because of their desire to associate more closely with the EU or even aspire to EU membership, the EU has not used trade agreements for the purpose of seeking adoption of those product regulations which are stricter than international standards. Compare for instance the provisions of the EU–Korea sectoral annex on cars with those of the sectoral annex on chemicals. While the first includes binding commitments based on UN/ECE regulations, the latter only includes rather general cooperation provisions (although Korea has modelled its regulation on the EU’s Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) regulation irrespective of formal commitment).

To summarize, the main motivation for the EU to engage in international regulatory cooperation activities for type 1 regulations is to facilitate market access for EU exporters. The EU’s preferred tool to achieve this objective has been a policy of active participation in the development of international standards, sometimes supported by the negotiation of free trade agreements. While EU regulators may also engage in dialogues to promote EU rules based on higher standards than those agreed internationally, this has not been consistently pursued as a policy or identified as a priority external objective.

Type 2: Regulations with primary domestic focus, but including some aspects of conduct abroad

A significant number of EU regulations, while aimed at achieving domestic regulatory objectives, include provisions that regulate certain aspects of conduct abroad. The EU has been careful not to claim extraterritorial jurisdiction, but such rules nevertheless amount to what Joanna Scott has called the territorial extension of EU law: the EU regulator is required, as a matter of law, to take into account conduct or circumstances abroad, in granting access to the single market or authorizing certain transactions with foreign subjects.

The regulation of conduct abroad is a feature of those product regulations where the safety or effectiveness of a product is linked to the conditions under which a product is manufactured. Most countries require that pharmaceutical products or medical devices are manufactured in facilities that comply with international standards of good manufacturing practices (GMPs). Many imported food products need to originate in facilities that have been subject

to proper inspections. These patterns are even more pronounced in trade in services, where the safety and consumer characteristics of the service are intrinsically linked to regulation abroad, be it how doctors are trained or how banks are supervised.

While as with type 1 regulations, regulatory cooperation aims to facilitate *market access*, for type 2 regulations, the corollary aim is to achieve *regulatory efficiencies* through a division of labour with foreign regulators who are entrusted to take action to verify compliance with EU standards. The greater the differential between the cost of oversight in the EU versus the home country of the exporter, the greater the incentive for various degrees of subcontracting and reallocation of responsibility. It is important to note that regulatory cost savings go together with a *significant reduction of compliance costs* for the regulated subjects which can rely upon supervision by their home regulator and avoid duplication of inspections or more burdensome procedures to accede to the EU market.

As we move to fields like data privacy or other aspects of digital regulation, such as artificial intelligence, the link between the aim of protecting EU citizens and the extension of EU rules abroad becomes more explicitly supplemented by a broader ambition, that of promoting EU values in the hope that, as foreign entities seek to comply for the sake of market access, they will effectively comply for all their users, not only Europeans.

The most frequently used instrument for the EU to address conduct outside its territory is an autonomous determination that the legislation or practices of the third country are *equivalent* to those of the EU. In the absence of such determination, individual transactions may still be possible, but at greater cost. There are of course variations as to what is meant by 'equivalency', and the procedure to be followed, depending on the provisions of individual pieces of legislation. In some cases, the main concern of the EU may relate to *effectiveness*, e.g. the *same standards of protection* or supervision by third country authorities. In other cases, the bar is lowered to merely requiring that the standards or supervision applied are *comparable* to those of the EU.

The EU has developed an extensive practice of territorial extension as regards financial services regulations. There are around 40 equivalence provisions in different EU rules in the financial services sector and the Commission has so far adopted almost 300 equivalence decisions for more than 30 countries.⁸

The EU GDPR includes a form of equivalency provision through the procedure to establish that the legislation of a third country provides adequate

⁸ https://ec.europa.eu/info/publications/190729-equivalence-decisions_en last accessed 31 January 2022.

protection of personal data privacy. To date the EU has reached 12 adequacy decisions for third countries, as well as a *sui generis* arrangement with the US, ‘Privacy shield’, which was, however, invalidated by the ECJ in July 2020. Many more countries have adopted legislation that is modelled on the GDPR, in order not to fall foul of the EU’s market access conditions, in what constitutes possibly the best illustration of the de jure Brussels effect. Nevertheless, cooperation with non-EU authorities for the enforcement of GDPR has not been an easy task.

Crucially, the EU need not stop at purely unilateral determination of equivalency. Its assessment of conduct abroad is often made easier if there are appropriate cooperative arrangements, formal or informal, with regulators in the third country that is home to the conduct being regulated. This is where regulatory cooperation enters the picture. The prerequisite for subcontracting of inspection, supervision and enforcement is, of course, a modicum of trust between the EU and the home country. The question is: how is this trust generated?

First, in the case of unilateral adequacy or equivalence determinations, even in the absence of a formal agreement, such decisions are often preceded by substantial discussions with the third country concerned. These can be quite intensive and, in some instances, result in changes of third country practices or even legislation. Most interesting for our purposes, the discussions sometimes include an element of *mutuality or reciprocity* where the EU also adjusts its modus operandi (see for instance discussions with Japan referred to below, or ‘substitute compliance’ under US law). This suggests that the main reason why the EU prefers autonomous decision-making is to maintain *greater flexibility as to the ex post management of equivalency* and to avoid the complexities of formal conclusion of international agreements. This point goes to the heart of whether EU action ought to be unilateral or mutual.

EU trade policy has played a limited role in support of external objectives for regulations in the services sector. The financial services chapter in EU trade agreements does not go significantly beyond reaffirming the WTO prudential carve-out under GATS.

The EU has also taken the view that *trade agreements are not an appropriate forum to consider regulatory issues relating to data privacy*. When third countries have raised the issue of facilitating data flows in trade negotiations, the EU has proposed opening up separate, albeit parallel, discussions on the conditions for an adequacy decision. Hence, in the case of Japan, both sides reached decisions as to the adequacy of their respective privacy regimes at around the time of the conclusion of the negotiations for the Economic Partnership Agreement that came into force on 1 February 2019.

Regulatory cooperation for Type 2 regulations has so far been primarily linked to autonomous equivalency determinations, although there have been

a number of mutual recognition agreements in areas of certification or good manufacturing practices. The EU and its member states are active participants in relevant international regulatory forums where standards are being developed in the financial sector. As regards digital standards, the EU has played the leading role on privacy regulation, but so far there is no cooperation forum that brings together like-minded regulators, despite the fact that the GDPR has provided the inspiration for privacy regulation in a large number of countries. The EU is currently considering the possible negotiation of digital partnership agreements, which may provide a new model to tackle challenges linked to the regulation of the digital economy.

Type 3: Regulations that respond to transboundary concerns

In a number of regulatory domains, the EU's primary objective is more purely 'extraterritorial', as it seeks to contribute towards tackling *global externalities*. A territorial connection is maintained in so far as imports of the products affected contribute towards the transboundary concerns that the regulations seek to address. EU rules seek to address global externalities or at least to ensure that the EU market does not contribute towards such negative externalities. Ideally EU action should be combined with actions by others or inspire others to take comparable action. Indeed, in the absence of broader international agreements, the effectiveness of EU action may be limited despite the size of its market.

The most pressing global environmental challenges are of course climate change and loss of biodiversity. Until recently, the EU has focused primarily on the regulation of emissions within its territory. It has introduced due diligence legislation to seek to prevent imports of illegally harvested timber and had proposed legislation to introduce portions of flights outside EU territory in its trading scheme for emissions, although these provisions were not applied due to strong external contestation. More recently the EU has proposed legislation to apply a border carbon adjustment mechanism to ensure that imported products are subject to the same carbon pricing as domestic producers to avoid 'carbon leakage'. There is also a proposal to prevent the marketing of products linked to deforestation. Other forthcoming proposals will introduce mandatory due diligence requirements relating to human rights and environmental criteria, as well as a ban on the marketing of products linked to forced labour. All these proposals relate to restrictions on the marketing of a product in the EU on the basis of conditions relating to its production. It is important to note that all the proposals so far presented are based on a legitimate regulatory objective and are not justified as a response to competitiveness concerns due to the cost imposed on EU producers by regulatory requirements. The debate about 'extraterritorial' regulation should therefore be kept separate from the issue of which instruments are appropriate to maintain a 'level playing field'.

But of course, these various domains of external regulatory intervention remain controversial, with fears of a slippery slope towards protectionism or unilateral imposition of European standards. The strong negative reaction to the EU proposal to include emissions outside its territory in the Aviation Directive and the WTO challenge to the ban on the marketing of seal products are signs that the EU needs to be mindful of the risk of external contestation of regulations primarily aimed at activities outside its territory. To be sure, the WTO Appellate Body has upheld the right to apply trade restrictive measures to respond to global environmental challenges, or for ethical reasons, as seen with GATT/WTO case law going back to the 1990s (*Tuna, Dolphin, Shrimp, Turtle, Seals*). The design of the measure needs to be particularly careful so as to be able to fulfil the conditions of Article XX of GATT, including reassurance with regard to the non-protectionist motivation of the regulation.

The Commission is conscious of the importance of ensuring the legitimacy of regulations dealing with global externalities. Thus, in its recent trade policy strategy, it states:

The legitimacy of applying production requirements to imports is based on the need to protect the global environment or to respond to ethical concerns. Whenever the EU considers applying such measures to imported products, this will be done in full respect of WTO rules notably the principle of non discrimination and proportionality, aiming at avoiding unnecessary disruption of trade.

The design of the CBAM aims to ensure consistency with WTO obligations. In the first instance, importers are not subject to a higher burden than domestic producers – i.e. that the measure is non-discriminatory in its design and in its application. The CBAM proposal also provides that account should be taken of measures taken by the exporting country to internalize carbon costs. In order to facilitate trade, there is the possibility of concluding agreements with countries that apply different forms of carbon pricing.

The practice so far of type 3 regulations is too limited to draw definitive conclusions as to the objectives pursued through regulatory cooperation and the preferred type of instruments to be used. The legitimacy of EU action is clearly enhanced when the EU is seeking to achieve an internationally recognized goal. This ‘purity of motives’ is also important in terms of defending autonomous measures under WTO law. In particular, it is critical to be able to show that the measure is clearly motivated by a legitimate objective covered by Article XX of GATT (or justified as a non-discriminatory measure under Article III) and is not intended or designed to address competitiveness concerns. As to the instruments used, most of the actions taken so far by the EU have included the option of concluding international agreements as an alternative to autonomous measures restricting imports. It is clear, however, that reaching an international

agreement on comparable measures to achieve goals such as climate neutrality would take time and is unlikely to cover all large emitters, thereby raising the question as to how to avoid 'carbon leakage' by non-participants in the agreement. The Nordhaus concept of a 'climate club' is intellectually attractive but very hard to implement in practice.⁹ What we are likely to see are more messy and tentative approaches in which a significant number of countries take action to enhance climate ambition, including different forms of addressing the problem of 'carbon leakage'. Dialogue amongst regulators will be critical for both efficiency and legitimacy and to ensure a maximum of coordination and compatibility between different autonomous actions. The more the EU seeks to regulate to respond to global environmental challenges, the more autonomous action will need to be embedded in a broader regulatory cooperation strategy.

2 THE EU'S REGULATORY 'POWER SURPLUS': HOW SHOULD IT BE USED?

Considering these three types of trade-regulatory influence, we come back to our question: how should the EU as a 'good global actor' behave in a world of increasingly unfettered power politics where its ambition naturally bends towards seeking to increase its own influence in shaping global economic governance? Without being able to address this vast question in any satisfactory detail, we note that the EU's power surplus can be both underused and overused, calling for either a softening or a hardening of such power depending on the context.

First, the EU needs to ascertain the continued relevance but also limits of the model of *externalizing the single market*, which has been its *modus operandi*, especially since the 1990s, driven in part by the (partial) completion of 'Europe 1992' and the need to retool many of the relevant experts. While EU circles emphasize the *voluntary* nature of such export of single market rules as the result of spontaneous *de jure* or *de facto* adoption of EU regulatory templates, it must recognize that the external projection of EU regulations is an exercise in structural power.¹⁰ In this light, while some argue that rule export through the neighbourhood policy is more legitimate than towards more distant states, this model has become contested even in that context. And neighbourhood countries are not always willing or able to adopt the legal and institutional reforms that would warrant 'internal market treatment'. Normatively, the

⁹ William Nordhaus, 'The Climate Club: How to Fix a Failing Global Effort' (2020) 99 *Foreign Affairs* 10.

¹⁰ See Michael Barnett and Raymond Duvall, 'Power in International Politics' (2005) 59(1) *International Organization* 39.

shared concern across these countries has to do with loss of democratic control incentives which, especially in democratic transitions, pre-empt the usual dynamics of politics these countries are supposed to nurture.¹¹ Maintaining the incentive for some regulatory alignment in the neighbourhood may therefore require recognizing greater ownership and agency by third country regulators and a good design of trade facilitation tools.

Second, EU actors need to ask when these two logics – to assert itself geopolitically and to bolster its reputation as a principled multilateral power – are compatible and when the first may undermine the second. It is tempting to exercise market power if you can convince yourself that your ends are good and legitimate, such as protecting your own citizens. But even for type 1 and 2 regulations, efforts are necessary to mitigate the negative impacts of the regulatory change flowing from the market regulations demanded from vulnerable developing countries or to seek cooperation from third country regulators when it comes the regulation of activities outside the EU jurisdiction. Moreover, as the direct territorial trigger for such influence becomes more tenuous for type 3 regulations, the EU needs to be more ambitious in channelling its power surplus towards what some would call ‘productive power’, e.g. its influence over how other actors see what is possible and desirable. This would argue for combining any autonomous action with an active policy of cooperation and dialogue, including recognition of the regulatory actions taken by others.

Third, the coercive use of the regulatory power ought to be exceptional and strategically targeted through a clear distinction between the types of actors on the receiving end of EU regulatory power. Third countries which seek to weaponize their own power against EU interests ought to be the object of countermeasures in accordance with public international law. This is what EU decision-makers mean by ‘not being naïve’, in a world where various other powers increasingly engage in what the US military coined as ‘lawfare’. Conversely, the EU needs to avoid the ad hoc use of issue-linkages outside the scope of the regulation per se, by using its regulatory powers in pursuit of unrelated goals, if it has not been provoked to do so. In general, issue linkages need to be handled with care, not only because they may alienate partners and unleash retaliatory cycles but perhaps more importantly, to signal the EU approach to regulatory cooperation globally.¹²

¹¹ Tom Theuns, ‘Promoting Democracy through Economic Conditionality in the ENP: A Normative Critique’ (2017) 39(3) *Journal of European Integration* 287.

¹² Kalypso Nicolaïdis, ‘Brexit Negotiations: Linkages Need to Be Handled with Care’ (UK in a Changing Europe, March 2020).

3 AN INTEGRATED APPROACH TO THE REGULATORY COMPATIBILITY PARADIGM: FROM MANAGED MUTUAL RECOGNITION TO LEGAL EMPATHY

The most effective way to tread this narrow path between the underuse and overuse of Europe's power surplus, we argue, is to maximize consistency between the EU's internal and external approaches to the trade–regulatory nexus, while taking into account the unique features of the EU's internal ecosystem.¹³

Internal dimension

The story has been widely told and analysed of the changing mix between the three core principles underpinning trade liberalization in a regulated world, namely national treatment (or host country rules), mutual recognition (or home country rules) and harmonization.¹⁴ But for our purposes, the story needs to be amended in three ways.

First, some version of mutual recognition is always part of the equation. Even when member states agree on common substantive standards, the key to good regulation is good supervision. If goods and services are to move freely across borders, their (host) country of destination must trust the (home) state of origin with providing the right stamp, certification, licence, supervision and the like.¹⁵

Nevertheless, and this is the second point, even in the EU ecosystem there is no such thing as pure mutual recognition, automatically recognizing each other's standards and certificates for the rest of time. Instead, the EU single market is a layered system of conditional access, which we refer to as 'managed mutual recognition'.¹⁶ The four main dimensions along which mutual recog-

¹³ For a version of this argument, see Kalypso Nicolaïdis, 'Brexit and the Compatibility Paradigm. A Guide for the Mutual Recognition Perplexed' (UK in a Changing Europe, March 2018).

¹⁴ For an overview see Stephen Weatherill, *The Internal Market as a Legal Concept* (Oxford University Press 2016).

¹⁵ Adrienne Heritier, 'Mutual Recognition: Comparing Policy Areas' (2007) 14(5) *Journal of European Public Policy* 800; Sandra Lavenex, 'Mutual Recognition and the Monopoly of Force: Limits of the Single Market Analogy' (2007) 14(5) *Journal of European Public Policy* 762; Jacques Pelkmans, 'Mutual Recognition in Goods. On Promises and Disillusions' (2007) 14(5) *Journal of European Public Policy* 699. For a broad interdisciplinary approach see Kalypso Nicolaïdis, 'Mutual Recognition: Promise and Denial, from Sapiens to Brexit' (2017) 70(1) *Current Legal Problems* 227.

¹⁶ On this concept see inter alia, Kalypso Nicolaïdis, 'Trusting the Poles? Constructing Europe through Mutual Recognition' (2007) 14(5) *Journal of European*

nition can be managed or fine-tuned are: (a) prior conditions for equivalence, from spontaneous convergence to approximation and inter-institutional agreements; (b) varying degrees of automaticity of access (for example, residual host country requirements); (c) reduced scope of activities or features covered by recognition; and (d) *ex post* guarantees or safeguards, including mutual monitoring and ultimately provisions for reversibility. Hence, for reasons of political expediency as well as regulatory efficiency, the burden of cooperation is shifted in time from *ex ante* to *ex post* costs, so that liberalization can appear to occur immediately, while it will need to be managed through ongoing cooperation and adjudication.

Thirdly, the managed mutual recognition game is an ingenious *dynamic* process, involving trade-offs between these dimensions that may change over time. If trust is broken when, say, the exporting state downgrades its regulations, host states can reassert their own control. How mutual recognition is managed varies with each specific area, but in each we find a variant of the same overall managed mutual recognition approach, namely that the host state of the consumers extends as much deference to the home state of the producer as possible, and exercises as much interference as necessary.

In this story, compatibility and legal empathy play a crucial role. Managed mutual recognition involves intense coordination over time which can only work if the free movement can be predicated on acceptable differences based on mere *compatibility* or *comparability*, rather than sameness between regulatory regimes, restricted by a strong rule of reason, and allowing for legitimate concerns on the part of host states when it comes to ‘competition over rules’. In turn, such compatibility is gauged through legal empathy which can be defined as:

the process of engaging in comparative dialogues on the differences between national laws, to explore, understand and learn from these differences through detailed investigation into each other’s motives in order to ground voluntary or binding mutual actions.¹⁷

Public Policy 682; Kalypso Nicolaïdis and Gregory Shaffer, ‘Transnational Mutual Recognition Regimes: Governance without Global Government’ (2005) 68(3/4) *Law and Contemporary Problems* 263.

¹⁷ For an initial statement see Kalypso Nicolaïdis, ‘Mutual Recognition: Promise and Denial’ (n. 15); and Kalypso Nicolaïdis, ‘My EUtopia: Empathy in a Union of Others’ in Mathieu Segers and Yoeri Albrecht (eds), *Re: Thinking Europe: Thoughts on Europe: Past, Present and Future* (Amsterdam University Press 2016). For a recent thorough elaboration of the concept, see Barend Van Leeuwen, ‘Legal Empathy in the Internal Market: Free Movement Law as a Comparative Dialogue’ (2021) 46(5) *European Law Review* 625.

In short, if empathy can be defined as the ability to put oneself in the shoes of another, legal empathy consists in a deep engagement with each other's system, assessing how far a relationship can go despite differences.

External dimension

To what extent is this concept of 'legal empathy' relevant for the external projection of EU regulatory powers? To be sure, external cooperation allows for a logic of balance in market gains from liberalization (a different logic altogether), while internal EU liberalization is, at least in theory, solely based on regulatory convergence, compatibility and thus legal empathy. Moreover, it could be argued that international regulatory cooperation, as discussed under our initial typology, unlike the kind of cooperation underpinning the single market, does not rely on the same depth of supranational institutions (our EU ecosystem) and that, when it comes to the global arena, parties to different forms of cooperation arrangements are much keener than EU member states to maintain their regulatory autonomy, as made clear for instance by the OECD programme on better regulations. In the absence of a common legislation with direct effect and a judiciary with legitimacy to adjudicate on regulatory preferences, the benefits of the single market cannot be replicated abroad.

Nevertheless, we must not throw out the baby with the bathwater. There are in fact margins of freedom offered by the history of the single market which provides subtle guidelines rather than fixed rules for exercise of EU regulatory powers externally. To the extent that the EU system results from a constantly renegotiated compromise between different national legal approaches and governance philosophy, this exercise in legal empathy is indeed more suitable for export – even without an 'ecosystem' – than the US federalism, which critically depends on an *ex post* litigation apparatus that is almost impossible to replicate abroad. In support of this proposition, we can refer to the critical role played by international standards in the development of the single market or the significant number of equivalency determinations in areas such as financial services regulation. As the EU increasingly engages with the regulation of conduct abroad, the importance of 'legal empathy' is only likely to increase.

Indeed, we believe that the design and dynamics of global-regulatory cooperation can well be inspired by principles underlying the EU approach and the lessons drawn from it over the years.

- (1) *Compatibility of underlying regulatory regimes*: Before seeking to export its own standard, can the EU systematically ask on what grounds and through what type of engagement foreign standards can be deemed 'compatible'? If legal empathy means calibrating one's demands in light of your partner's point of departure, it may make sense to be intentionally modest in its regulatory cooperation ambitions because of its part-

ners' sensitivities. It is also crucial to assess whether differences lie in ends or simply means used. On the other hand, the determination of compatibility can be pragmatic in its modulation depending on the respective regulatory ends pursued and probably requires more *ex ante* cooperation externally than internally. This prerequisite is obviously stricter for type 1 regulations, whereas for type 2, the issue is likely to be more the extent of trust in the capacity of the home regulator to verify compatibility with EU standards. In type 3, compatibility can be laxer still, provided EU rules are not undermined. In view of the variety of equivalency regimes in the EU, it is important for legitimacy purposes to have as much clarity *ex ante* as to the criteria to be used for an equivalency assessment.

- (2) *Transparency*: Compatibility in the end is in the eyes of the beholder. Citizens of the host country (as consumers) need to be reassured that their protections are not undermined by a determination of compatibility. This is particularly the case for type 1 and 2 regulations where the centre of gravity is on maintaining the domestically set level of protection. But citizens of the home country (as producers) also need reassurances against arbitrary restrictions on trade, whether leading to unnecessary costs for type 1 and 2 regulations or being unfairly discriminatory in the case of type 3 regulations. Thus, underpinning regulatory compatibility assessment with transparency and consultation exigencies will empower both the host state and home state citizens. To be sure, in the case of digital tech, transparency is all the more necessary given the challenges involved with algorithms or inspecting data flows.
- (3) *Scope*: As discussed above, the liberalizing power of managed mutual recognition lies with its dynamic nature – to the extent that the degree of compatibility may vary, parties do not have to adopt an all-or-nothing approach. While international regulatory cooperation cannot provide the same benefits as those of the single market, such limitations due to lack of trust and supporting institutions are dynamic. Restrictions in scope can be used more systematically on the external front to allow for earlier engagement in dialogue and allow for progressive expansion of scope as trust develops.
- (4) *Mechanisms for ex post assessment, including reversibility*: The dynamic nature of managed mutual recognition implies that *ex post* assessment of the continued compatibility between regulatory regimes is critical. Crucially, and to the extent that the EU's counterpart shares basic notions of democracy and the rule of law, mechanisms for assessing such compatibility need to be reciprocal. These should include exchange of views on possible changes of the regulatory framework or on concerns relating to implementation. At any point in time, there should be the possibility of reversibility, although this should be preceded by consultations and

a willingness to explain decisions and make good faith efforts to address concerns. If one of the parties decides to terminate equivalency, the other may be justified in taking a mirrored action in the same sector.

4 CONCLUSION: GLOBALIZING LEGAL EMPATHY?

This chapter has offered a reflection on the principles that might better underpin a strategic approach to the external aspects of EU trade and regulatory policies, suggesting ways in which academic ideas, including in the realm of trade law explored in this book, can augment the EU's own 2021 Trade Policy Strategy.¹⁸ We have argued that the EU needs to behave as a responsible and strategic power in how it uses its power surplus, in particular as it aims to influence the transition towards a digital and climate neutral global economy. In particular, a philosophy of 'legal empathy' ought to involve a greater focus on enhancing the regulatory compatibility between its own regulations and those of other jurisdictions through cooperation rather than passive imposition, thus increasing the 'agency' of non-EU countries and enhancing both the legitimacy and effectiveness of its action.

In doing so, we hope it is clear that we advocate a differentiated yet consistent approach, whether the EU is dealing with countries that are candidates for enlargement, countries from the neighbourhood, or beyond, with partners in various kinds of free trade agreements. In particular, we have been inspired by the fact that the EU–UK negotiations over their TCA have perhaps been the first such negotiations to bring so forcefully to the fore issues of legitimacy, consistency and reciprocity. We hope that some of the ideas presented here will also inspire better UK–EU cooperation in the future as well as being useful in relations with other countries in the neighbourhood. Another important geopolitical priority is Africa, where attracting sustainable investment is key. As African countries develop their own economic integration through the African Continental Free Trade Area, the EU could offer to strengthen regulatory dialogue and support the development of regulatory capacities with a particular focus on sectors where there is a potential to attract foreign investment.

Turning to policy sequencing, the impact assessment of EU regulatory initiatives could include a more systematic consideration of the opportunities for regulatory cooperation, in particular when such initiatives aim at dealing with transboundary concerns or otherwise regulate conduct abroad. These enhanced

¹⁸ Commission, 'Trade Policy Review: An Open, Sustainable and Assertive Trade Policy', COM(2021) 66 final.

impact assessments would allow the development of external cooperation strategies involving the competent regulators but also trade and development actors and EU delegations. Such strategies should identify the more appropriate tools, including work in international organizations, equivalency, or different form of plurilateral or bilateral agreements. In addition, existing equivalency regimes could be subject to *ex post* assessment, so as to consider the scope for introducing greater mutuality and progressive expansion in scope.

As the EU pursues strategic priorities linked to the climate and digital transition, and new areas such as artificial intelligence, it needs to strategically consider the best forums and alliances to do so – such as the recently established transatlantic Trade and Technology Council, the digital partnerships currently being explored in the Indo-Pacific, or initiatives to promote decarbonization of industrial sectors. While the TTIP experience has illustrated the risks of including broad regulatory cooperation objectives in the context of trade negotiations, the EU should not waste the opportunity to use its vast network of trade agreements to promote regulatory cooperation in a fully transparent manner.

When acting in the WTO context, respect for regulatory autonomy can be combined with promotion of good regulatory practices and greater compatibility of regulatory regimes. This could be achieved, not through deeper binding commitments, but rather through enhancing the WTO's deliberating function to explore 'compatibilities' supported by other international organizations and reaching out to civil society. Moreover, the EU could be ready to lead by example through early notification of regulatory initiatives with a significant trade impact, including the proposals to introduce a border carbon measure or mandatory due diligence legislation.

If, as this book argues, the EU is increasingly a victim of its own success, as it takes decisions with impacts on third countries or parties, 'leading by example' in the global governance realm will require a greater degree of self-reflexiveness if it wants to maximize its own agency and that of others in calibrating this success. Few will disagree with the idea that the power surplus generated by the external impact of EU trade and regulatory policies ought to support EU values – particularly if anchored in broader sustainable development goals which the EU champions. The shift in global governance from a growth-based (or Washington-consensus-based) paradigm to one based on sustainability over the past decade provides a conducive environment for such a philosophy as well as a push-back against those who argue that the EU will no longer be relevant in the 'Chinese century'. More than ever in this case, power will not be actualized without meaningful purpose to back it up.