# REGULATORY GLOBALIZATION AS A RESPONSE TO REGULATORY COMPETITION

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## INTRODUCTION

In this Article, I identify the preconditions under which regulatory globalization is most likely to occur. Regulatory globalization is the process by which regulatory agencies extend their reach internationally. It can occur in several ways. For example, regulators can enter into agreements with corresponding regulators in other jurisdictions and agree to coordinate their efforts. Alternatively, regulators can form international regulatory institutions, such as the Bank for International Settlements in Basel, Switzerland, that meet formally and promulgate regulations such as the Basle Accord on bank capital.

At the outset, I wish to emphasize that my analysis is descriptive and not normative. While the framework that I develop may have normative (policy) implications, my analysis does not suggest that the increasing trend toward regulatory globalization is necessarily either "good" or "bad" from a policy perspective. Rather, the trend toward regulatory globalization reflects a basic survival response on the part of bureaucrats whose regulatory power is threatened by increased competition and private-sector globalization.

This Article identifies three specific sets of conditions under which one is likely to observe regulatory globalization.[1] These three conditions may be characterized as involving: (1) regulatory globalization as "regulatory cartelization"; (2) regulatory globalization as "regulatory imperialism"; and (3) regulatory globalization as "regulatory policy lever." By this I mean that efforts to achieve regulatory globalization occur in the following three contexts: (1) in order to permit regulators to act in a cartel-like fashion, so as to prevent regulatory arbitrage, which occurs when firms migrate to foreign

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[1] This issue of why we observe regulatory globalization at certain times, but not others, is related to the question posed by Oona Hathaway regarding when and why countries choose to subscribe to international treaties. *See* Oona A. Hathaway, *The Cost of Commitment*, 55 STAN. L. REV. 1821 (2003).

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jurisdictions to avoid the grasp of a domestic regulator ("regulatory cartelization"); (2) in circumstances where governmental actors or regulators can increase their power by persuading or forcing other countries to adopt regulations favored by the first country ("regulatory imperialism"); and (3) in circumstances where an administrative agency lacks domestic political support for a favored policy, and uses regulatory globalization to make it more difficult for local political rivals to block that policy ("regulatory policy lever").

I wish to stress that regulatory globalization is not guaranteed to occur under these conditions, only that it is far more likely, because under the conditions I specify, the bureaucrats who run administrative agencies have strong incentives to engage in regulatory globalization. However, bureaucrats may not always be successful in their attempts to achieve regulatory globalization.

First, I argue that regulatory globalization is a natural, predictable response to the threat of irrelevance. Regulators would prefer to regulate on their own, without help from their international colleagues, but when economic change threatens regulators with obsolescence, they respond by banding together with their international colleagues to increase their regulatory reach in order to capture competitors who have slipped from their grasp. In this context, I want to make it clear that I am writing in the spirit of those political scientists who treat administrative agencies like firms and who model the behavior of those organizations from the perspective of the rational self-interest of such organizations.[2] Alternatively, it is possible to argue that administrative agencies either inevitably are "captured" by the interest groups that they ostensibly are regulating, or else they simply aggregate and reflect the preferences of the legislative or executive branch politicians responsible for their funding. It certainly is possible (though rare) for administrative agencies to become captured, and it also is possible for administrative agencies to reflect the preferences of the politicians who sponsor and fund them. It is far more common, however, for administrative agencies to develop their own internal cultures, and for them to substitute private, internally rational bureaucratic objectives for the public objectives that characterized their origination.[3]

Regulatory globalization is a natural bureaucratic response to a real or perceived threat of domestic regulatory obsolescence. In order for administrative agency officials to be willing to make the sort of compromises

[2] ANTHONY DOWNS, INSIDE BUREAUCRACY (1967) is an important example of this approach.

[3] *Id.*

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necessary to regulatory globalization with respect to a particular issue, they must receive some benefits. For this reason, it is safe to assume that regulatory globalization furthers the agendas of the agencies whose regulators advocate such globalization. Of course social, economic, and political conditions and traditions differ markedly from country to country. Therefore, the calculus of the net costs and benefits to an agency of a particular global regulatory initiative is likely to vary profoundly from country to country. Thus, for example, one country may press for a global regulatory response to a particular issue for "imperialistic" motives, while an agency in another country may favor a global regulatory response to the same issue in order to obtain a "regulatory policy lever." As long as each regulatory agency finds that the benefits of coordination outweigh the costs, a global regulatory strategy will emerge, even though the benefits to one country may be different from the benefits to another country.

In other words, the key to regulatory globalization is the presence of gains to bureaucrats from reaching a global agreement on regulatory outcomes. The three conditions I describe for achieving regulatory globalization can be viewed as three sorts of benefits that regulatory agencies enjoy as a result of agreeing to coordinate their regulatory response to particular policy issues. When two or more nations find that these benefits outweigh the costs (which come in the form of diminished autonomy), we should expect to observe regulatory globalization.

Thus, the first condition under which regulatory globalization is likely to occur is when increased competition, specifically increased global competition among private sector actors, makes it difficult or impossible for administrative agencies unilaterally to regulate national firms. Thus, increased global competition inexorably leads to increased coordination and cooperation among international regulators. This increased competition is caused by a number of factors. Technological change and greater efficiencies in transportation networks have increased global competition by making it easier for distant companies to compete with local businesses. Similar market advances have made it easier for local manufacturers and service providers to engage in regulatory arbitrage by moving their operations overseas. These developments have had a direct effect on regulators, because they have made it easier for firms to mitigate the effects of unwanted regulation or to avoid such regulation altogether by moving their activities beyond the jurisdiction of the regulator that has promulgated the unwanted regulation.

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My second argument is that regulatory globalization is likely to occur when there is a significant gulf between the policy preferences of an administrative agency and the policy preferences of one or more of its constituencies. Administrative agencies have many constituencies, including: (1) bureaucrats in other administrative agencies who may have different policy preferences, or who may have an interest in laying claim to some corner of the first administrative agency's bureaucratic turf; (2) the groups within the executive and/or the legislative branch that provide funding and oversight of the administrative agency; and (3) the constituencies that the administrative agency is charged with regulating.

The third condition under which regulatory globalization is likely to be observed is when the bureaucracy in one country is capable of imposing its will on the bureaucracy of another country. If a country is powerful enough, and willing to expend the necessary political capital, it can export its own regulation to other countries. As a theoretical matter, there are many possible reasons why a country might want to export one or more of its domestic laws to another country. For example, citizens in a particular country might feel sufficiently strongly about an issue from a moral perspective that they want to influence the regulatory practices of another country for philosophical or ethical reasons. Regulatory agencies in one country can increase their level of domestic political support by pursuing policies that pressure or attempt to influence the policymakers in a second country to adopt policies that the citizens in the first country find appealing. Alternatively, a regulatory agency in one country may be forced to attempt to export its regulations to another country in order to improve its domestic regulatory power. This, as will be seen, can happen where regulated entities can avoid the regulations in one country by moving their activities to another, less-regulated environment. Regulators will react to this phenomenon, known as regulatory arbitrage, in a number of ways. Weak regulators may simply have to abandon their efforts to regulate the activity. Alternatively, regulators may engage in negotiations with their bureaucratic counterparts in other countries with the aim of achieving regulatory coordination, which ultimately leads to regulatory globalization. Finally, if the country is strong enough, and if the regulatory agency can muster sufficient support, the agency may be able to succeed not just in coordinating its regulation with agencies in other jurisdictions: it may actually succeed in exporting its regulatory regime to other jurisdictions that would not otherwise have adopted such regulations.

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This Article begins by articulating a model of regulatory competition based on the assumption that, all else being equal, bureaucrats and nation-states will try to maximize the breadth and scope of their power. Power is expressed in terms of the ability of regulators to assert their will in an autonomous fashion over the people and firms that they regulate. Globalization reduces regulators' power by enabling regulated entities to move away from jurisdictions in which regulators exercise power in ways that such entities disapprove. Thus, globalization forces regulators to cooperate with one another whether they want to or not.

In other words, regulators do not respond to globalization passively. And, consistent with this theory, there has been an explosion in the quantity and scope of regulatory globalization in those areas that have experienced the most private-sector globalization. For example, as capital markets and currency markets have become more globalized, the ability of regulators in a particular country to regulate domestic firms has declined significantly. The response has been massive regulatory globalization. Perhaps the most prominent example of this phenomenon to date has been the series of actions culminating in the single monetary union joining the fifteen participating European Union (EU) member countries. In addition, the Basle Committee on Banking Supervision provides a rule-setting body in the field of banking supervision.[4] The International Association of Insurance Supervisors coordinates international standards in insurance supervision.[5] The International Organization of Securities Commissions (IOSCO) develops international standards to govern the securities markets within its ninety-two member countries.[6] The

[4] The Basle Capital Adequacy Accord is essentially a "gentleman's agreement" among central bankers in the countries that make up the Basle Supervisors Committee of the Bank for International Settlements. *See* Hal S. Scott, *The Competitive Implications of the Basle Capital Accord*, 39 ST. LOUIS U. L.J. 885, 885 (1995). The Basle Supervisors Committee consists of the Group of Ten (G-10) countries (Belgium, Canada, France, Germany, Italy, Japan, the Netherlands, Sweden, United Kingdom, and the United States), plus Switzerland and Luxembourg. Many other nations, including the EU countries not members of the G-10 (Denmark, Greece, Ireland, Portugal, and Spain) and others, have adopted the Basle Accord in order to enhance their reputations in the international financial community, and to "enable them to operate in countries like the United States that require conformity with Basle standards as a condition for entry." *Id.*

[5] *See* Press Release, Bank for International Settlements, The International Association of Insurance Supervisors (IAIS) Fifth Annual Conference: New Global Insurance Standards Adopted (Oct. 6, 1998) (The IAIS "seeks to establish international standards on insurance supervision and conducts training seminars for insurance supervisors from emerging markets. The Association also seeks to coordinate its efforts with other global financial regulators, particularly those from the banking and securities industries."), *at* http:// www.bis.org/press/p981006b.htm (last visited Aug. 25, 2003).

[6] *See* International Organization of Securities Commissions (IOSCO), *at* http://www.iosco.org (last visited Aug. 25, 2003).

Committee on the Global Financial System provides a forum for central bankers to coordinate their activities,[7] while the World Federation of Exchanges (FIBV) provides this coordination function for stock exchanges.[8] Finance ministers use a variety of forums, including the G-8, the G-10 and the G-22. The Organisation for Economic Cooperation and Development (OECD), the International Monetary Fund (IMF), the World Bank, and the Bank for International Settlements (BIS) also provide forums for international cooperation in the world of finance, as does the Financial Stability Forum.

The goal of these organizations is "global cooperation: among regulators, between regulators and standard setters, and between regulators and market participants."[9] For example, "IOSCO is pursuing these goals in such areas as common disclosure standards, uniformity in accounting principles, and common principles for securities regulation."[10]

Part I of the Article articulates a theory of bureaucratic incentives that provides the theoretical underpinnings for the theory of regulatory globalization developed in what follows. In Parts II-IV, I explore some ideas about the sets of conditions under which one is most likely to observe regulatory globalization. In Part V of the Article, I examine some of the implications of my analysis by suggesting ways that the theory of regulatory globalization might improve our ability to predict the outcomes generated by efforts at international regulatory cooperation.

## I. BUREAUCRATS' INCENTIVES AND REGULATORY GLOBALIZATION

Bureaucrats, like other rational economic actors, have a keen survival instinct. Similarly, administrative agencies, like firms in the private sector, also want to survive and flourish. One manifestation of this rather obvious phenomenon is that bureaucracies, all else equal, will try to maintain their independence. This basic desire for independence and autonomy makes the trend toward regulatory globalization surprising, at least on the surface. After all, regulatory globalization entails coordination, compromise, and sometimes

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7 *See* Bank for International Settlements, Committee on the Global Financial System, *at* http://www.bis.org/cgfs/ (last visited Aug. 25, 2003).

8 *See* World Federation of Exchanges, *at* http://www.world-exchanges.org (last visited Aug. 25, 2003).

9 David Brown, Q.C., Remarks at the Second International Forum on Financial Markets (Nov. 22, 1999), *at* http://www.osc.gov.on.ca/en/About/News/Speeches/davidbrown_keyissuesforregulation_19991122.html (last visited Aug. 25, 2003).

10 *Id.*

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(as in the case of the European Monetary Union) even the wholesale abdication of important attributes of power and sovereignty. Thus, one would think that regulatory globalization would be achieved only rarely and grudgingly. As Robert Keohane has observed, because governments in general, and bureaucracies in particular, "put a high value on the maintenance of their own autonomy, it is usually impossible to establish international institutions that exercise authority over states."[11] In other words, "regulators would prefer not to cede or to share authority with their counterparts from other countries. Thus, regulators in a particular country generally will not sacrifice autonomy by coordinating their activities with regulators from other countries."[12]

For this reason, regulatory globalization is a phenomenon that demands an explanation because it involves behavior that appears to be contrary to the self-interest of the very bureaucracies that are engaged in the globalization process.[13] My theory is that bureaucrats would prefer to remain autonomous as they attempt to develop strategies that allow them to retain their authority and avoid having to share power with colleagues in other jurisdictions. Unfortunately for the bureaucrats, this is not always possible. Regulatory globalization occurs as a strategy of last resort. It is employed as a regulatory strategy when it is the only way for the bureaucrats in an administrative agency to avoid irrelevance.

This analysis suggests that there are substitutes for regulatory globalization that administrative agencies may attempt to employ as an alternative to globalization. The ideal position, from the point of view of the regulator, is to have zero regulatory globalization. In this situation, regulators would be able to obtain a perfect division of the world into discrete geographical jurisdictions. Each administrative agency would maximize its own bureaucratic self-interest by retaining complete, plenary, and unavoidable regulatory authority over domestic firms within the scope of their regulatory authority.

For example, in the period immediately following World War II, this was the position in which the U.S. Securities and Exchange Commission (SEC)

[11] ROBERT O. KEOHANE, AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY 88 (1984).

[12] Enrico Colombatto & Jonathan R. Macey, *A Public Choice Model of International Economic Cooperation and the Decline of the Nation State*, 18 CARDOZO L. REV. 925, 926 (1996).

[13] Of course it is conceivable, though unlikely, that regulatory globalization might be accomplished over the objection of the administrative agency whose work is being globalized. This is unlikely because, generally speaking, it is the administrative agencies themselves that must organize the globalization process.

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found itself. In the immediate post-War period, there were no public capital markets outside of the United States, and, as a result, the SEC did not face any serious threats to its regulatory power. This changed as securities markets developed elsewhere. Once such markets develop, capital can migrate to rival jurisdictions, and financial service firms can also relocate. But even under these conditions, international regulatory cooperation in the form of regulatory globalization will not necessarily appear. This is because regulators will respond to the threat that their regulatory "clientele" is searching for a less constricting regulatory environment by employing a variety of strategies, including "exit fees, administrative delays, and outright prohibitions" to prevent the firms they regulate from switching "suppliers."[14]

Over the past two decades, for example, entrepreneurial lawyers devised a brilliant strategy for permitting their clients to enter U.S. capital markets without complying with the onerous U.S. regulations on initial public offerings administered by the SEC. This strategy centered around the development of American Depository Receipts (ADRs), which provide a means for foreign issuers to market their securities to U.S. investors. ADRs are carefully designed and constructed to avoid being characterized as securities. They are issued in the United States by U.S. banks and backed by the deposit in those banks of securities backed by non-U.S. issuers. ADRs thus represent a clever means for foreign issuers to avoid the reach of U.S. securities law. The introduction of ADRs was alarming to the SEC, which saw a clear threat to its jurisdiction. The SEC's response was to negotiate with the banking industry and obtain a compromise—in the form of continued SEC regulation.[15] Had the SEC failed in obtaining this compromise, resort to regulatory "harmonization" undoubtedly would have been necessary in order for the SEC to protect its regulatory turf.

Thus, it is only upon the failure of other strategies that seek to prevent firms from exiting a particular regulator's jurisdiction that regulators will turn to regulatory globalization as an alternative to complete irrelevance. In the

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[14] *See* Edward J. Kane, *Tension Between Competition and Coordination in International Financial Regulation*, *in* GOVERNING BANKING'S FUTURE: MARKETS VS. REGULATION 33, 37 (Catherine England ed., 1991); Kenneth E. Scott, *The Dual Banking System: A Model of Competition in Regulation*, 30 STAN. L. REV. 1 (1977).

[15] *See* American Depositary Receipts, SEC Release No. 33-6894, 56 Fed. Reg. 24,420 (May 23, 1991); CALLY E. JORDAN & GIOVANNI MAJNONI, FINANCIAL REGULATORY HARMONIZATION AND THE GLOBALIZATION OF FINANCE (World Bank, Policy Research Working Paper No. 2919, Oct. 2002), *available at* http://papers.ssrn.com/sol3/delivery.cfm/SSRN_ID343260_code021023500.pdf?abstractid=343260 (last visited Aug. 25, 2003).

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banking context, therefore, technological changes and competition from foreign regulators made it increasingly difficult for regulators to protect their bureaucratic turf. These changes "have made it increasingly less costly for financial firms to penetrate U.S. and foreign regulators' administrative fences by cleverly adapting their institutional structures to squeeze through loopholes in the system of prohibited activities."[16] Thus, technological change, market processes, and other exogenous variables may deprive regulators in a particular country of the power to act unilaterally. Such change can cause regulators acting alone to become irrelevant. When this happens, the regulators in a particular country will have strong incentives to attempt to achieve regulatory globalization.

## II. BUREAUCRATIC SURVIVAL: REGULATORY GLOBALIZATION AS REGULATORY CARTELIZATION

Regulatory globalization is pursued by entrepreneurial administrative agencies as one of a number of possible responses to exogenous market forces that threaten to make the agency, or its mission, irrelevant. Other responses by regulatory agencies to threatened obsolescence that previously have been identified in the literature include: (1) agency "imperialism" in the form of "turf grabbing"; (2) greater proclivity toward agency "capture" by the agency's special interest group constituents; and (3) manufactured or fabricated crises to make it appear that there is something for the agency to do.[17]

In the simplest possible terms, threatened irrelevance provides incentives for bureaucrats within agencies to press for regulatory globalization. Because regulators would prefer to retain power, and do not want to share their power with their counterparts in other countries, they have to be given an incentive to make the sacrifice in autonomy that is represented by regulatory globalization. Threatened irrelevance provides such an incentive.

For example, a regulator's autonomy in the field of consumer protection is not much threatened by regulators in other jurisdictions. Consequently, we see little regulatory globalization in that area. By contrast, in the field of global

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[16] Kane, *supra* note 14, at 37.

[17] Jonathan R. Macey, *Administrative Agency Obsolescence and Interest Group Formation: A Case Study of the SEC at Sixty*, 15 CARDOZO L. REV. 909, 918 (1994) (noting that administrative agencies might also distort information flows to the public to prevent people from realizing that the agency is obsolescent).

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finance, as noted before, there are significant threats to regulators' autonomy, and consequently we have seen massive efforts at regulatory globalization in these areas. As capital markets became global, threatened obsolescence deprived regulators of the ability to remain independent. They were forced to engage in the power sharing (and concomitant power reduction) that occurs during the process of regulatory globalization.

Whenever the companies and institutions being regulated by a particular bureaucracy can evade regulation by "going global," the conditions for "regulatory globalization" arise. In other words, as technology has advanced and strong capital markets have developed in other countries, the phenomenon of "regulatory arbitrage" has become more prevalent. Regulatory arbitrage occurs when competitors locate their activities in those jurisdictions that offer the most attractive set of regulations.

Regulatory arbitrage necessarily reduces bureaucrats' power because it reduces the degrees of freedom that regulators have when they develop regulatory policy. Regulators facing regulatory arbitrage must respond in a way that allows them to retain their market share of regulated entities. If bureaucrats cannot stop the process of regulatory arbitrage in any other way, they must respond by coordinating with their counterparts in other countries.

Thus far, I have been discussing one component of the "demand" for regulatory services provided by the firms and institutions being regulated. The elasticity of demand by such firms and institutions for regulation is a function of the alternatives available to them. In the absence of viable alternative regulatory regimes, the demand for the regulation in a particular country will be quite high.

For example, the United States has unusually deep and robust capital markets. This, in turn, creates a sort of "demand" for the services of the SEC, as firms must avail themselves of the SEC's regulations in order to gain access to U.S. capital markets. While this demand has weakened gradually over the post-War period as rival capital pools have developed in Europe and Asia, the United States remains a force to be reckoned with in global capital markets. For instance, Italy's capital markets are weaker than those in the United States. Both geographical and cultural factors make it relatively easy for Italian companies to gain access to capital markets and trading venues in nearby Germany or the United Kingdom. For this reason, Italian capital market regulators are significantly weaker than their U.S. counterparts, and correspondingly feel a more urgent need to engage in regulatory globalization.

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One straightforward implication of the analysis presented here is that private-sector globalization generates a decline in the demand for the services of regulators, and leads to more regulation. Thus, in part, regulatory globalization can be viewed as a sort of "clientele effect," in which the threat that a regulator's clientele is losing interest in the "services" being offered by a particular regulator leads to regulatory globalization. But this is not the only threat that drives regulators to sacrifice their autonomy by seeking regulatory globalization. In addition to the regulated entities that "demand" regulation, it is also the case that politicians and certain special interest groups have a keen interest in the contours of regulation. Conditions for regulatory globalization emerge when a regulatory agency sees an erosion of the support of the oversight committees or politicians responsible for the agency's continued funding. Under these conditions, regulatory globalization can provide a much-needed justification for the continued relevance of the administrative agency.

For example, the promulgation of the Basle capital adequacy rules created a strong increase in the demand for the services of bank regulators.[18] The new capital guidelines are significantly more sophisticated—and by orders of magnitude more complicated—than their predecessors.[19] This meant that the quantity and quality of bank regulators had to increase in order to monitor and enforce the rules adequately. This, in turn, enhanced the prestige, power, and funding of bank regulatory agencies in those countries adopting the Accord.

Thus, my theory predicts that where domestic support for the activities of a particular regulatory agency is especially strong, that agency will feel few incentives to make the necessary sacrifices in autonomy required to achieve regulatory globalization. By contrast, where domestic support of a regulatory agency begins to falter, the conditions for regulatory globalization will emerge, because the agency will view such globalization as a viable strategy for obtaining continued or increased funding and support.

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[18] *See supra* note 4 and accompanying text.

[19] The earlier U.S. capital adequacy rules were simple leverage ratios that calculated capital adequacy by merely measuring the amount of the bank's capital (assets minus liabilities) as a percentage of the bank's assets. The relative riskiness of those assets was not taken into account at all. By contrast, the capital adequacy rules developed under the Basle Accord require banks and bank regulators to apply a "risk-weighting" to both the bank's assets and the value of its off-balance sheet liabilities, in order to calculate the amount of the bank's risk-weighted capital. *See* JONATHAN R. MACEY ET AL., BANKING LAW & REGULATION, 276-97 (3d ed. 2001). Further refinements have made the capital guidelines still more sophisticated, and complicated.

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A recent example of this in the United States was provided by the passage of the Sarbanes-Oxley Act.[20] The wave of accounting scandals in the United States—most notably those involving Adelphia, Enron, Global Crossing, Tyco, WorldCom, and Xerox—has created a huge increase in demand for the services of the SEC, particularly in the area of accounting reform. Whatever might be said of the new statute from the perspective of domestic securities regulation, it represents a major step backwards for regulatory globalization. The statute reflects a massive endorsement of existing SEC power and an expansion of such power into corporate governance, an area that the SEC has tried—and failed—to enter in the past.[21] For example, decades of effort by the organized stock exchanges and international regulatory bodies to coordinate international accounting standards have been set back, as Sarbanes-Oxley calls for the creation of a new private entity, the Public Company Accounting Board, subject to SEC oversight and given broad authority over those practicing accounting in the United States. Its authority includes the power to enforce compliance with the Act, as well as with professional standards (which the Accounting Oversight Board will define) and the U.S. securities laws relating to the preparation and issuance of audit reports and the obligations and liabilities of accountants. In other words, the well-documented globalization of the securities markets does not necessarily translate into regulatory globalization. Rather, it is the ebb and flow of demand for the services of regulators that will determine whether regulators are willing to accept globalization.

The above discussion has important general implications for regulatory globalization. Events that increase domestic demand for regulators tend to decrease regulators' demand for regulatory globalization. As many have observed, one of the primary factors influencing the demand for regulation is crisis.[22] Crisis begs for, and often leads to, regulatory response. Crisis and its close cousin, disaster, provide a "window of opportunity in which the normal resistance to change can be overcome."[23] When crisis and disaster strike,

[20] The Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified at 15 U.S.C. § 7245 (2002)), passed the Senate 99-0 and the House 423-3.

[21] Business Roundtable v. SEC, 905 F.2d 406 (D.C. Cir. 1990).

[22] *See* ROBERT HIGGS, CRISIS AND LEVIATHAN: CRITICAL EPISODES IN THE GROWTH OF AMERICAN GOVERNMENT (1987); Jonathan R. Macey, *Regulation and Disaster: Some Observations in the Context of Systematic Risk*, *in* BROOKINGS-WHARTON PAPERS ON FINANCIAL SERVICES 405 (Robert E. Litan & Anthony M. Santomero eds., 1998).

[23] Macey, *supra* note 22, at 413.

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regulation is thought to be necessary "to return society to its prior, well-ordered state."[24]

These observations lead to the conclusion that, ironically, crisis reduces rather than increases regulators' desire to participate in the globalization process. The greater the immediate threat, the easier it is for administrative agencies to act unilaterally. The U.S. reaction to the terrorist attacks of September 11, 2001, provides support for these observations. There was a real crisis, and hence no hesitation on the part of the United States in making a unilateral response in the form of a militarily supported "regime change" in Afghanistan. By contrast, the threat to the United States from Saddam Hussein's regime in Iraq is less immediate, and hence the United States' failure to obtain a United Nations-endorsed (or at least a multilateral) solution to the Iraqi threat appears to be far less legitimate. Indeed, at least at the time of this writing, the Iraqi invasion appears to have been both a foreign policy and a domestic political error of significant proportions.

Thus, while it may be the case that national economies are moving inexorably toward globalization and financial integration, the same is not true of regulation, which is driven by political forces that are more complex and less predictable than economic forces. Administrative agencies, under my theory, sometimes will push hard for regulatory globalization and sometimes will make strong efforts to avoid it, depending on whether it is in their best interests under the circumstances, at any particular time.

My theory of regulatory globalization also helps explain the success of perhaps the most striking example of international cooperation in history: the project of creating a European Monetary Union (EMU). The EMU represents a stunning example of national governments abdicating regulatory power in favor of what at best can be viewed as a power-sharing arrangement in which the European System of Central Banks, which is composed of the European Central Bank and the national central banks of all fifteen EU Member States,[25] has taken over the currencies of eleven EU countries,[26] and thereby deprived the local central banks in these countries of the power to print money and conduct monetary policy.

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[24] *Id.*

[25] Organisation of the European System of Central Banks (ESCB), *at* http://www.ecb.int/about/escb.htm (last visited Aug. 25, 2003).

[26] Germany, France, Italy, Spain, Portugal, Austria, Belgium, the Netherlands, Luxembourg, Ireland, and Finland.

The EMU appears to be a significant counter-example to the theory that posits that bureaucrats inevitably will seek to maximize their own power.[27] However, the emergence of the EMU fits quite comfortably within the "regulatory cartelization" model developed in this Article. The EMU reflects the rational response (in the form of regulatory globalization) by European central bankers who were confronted with the specter of obsolescence in the very area of their primary activity: the conduct of monetary policy. The problem facing the central bankers was that "[t]he integration of the world's capital markets, driven by a combination of technological change and financial innovation, has increasingly constrained the ability of central banks to set and implement their own monetary policies."[28] In global financial markets, central banks in smaller countries have a more difficult time effecting monetary policy than central banks in larger countries, because the resources of international currency traders are often equal to or superior to the financial resources of the central banks. In particular, central banks attempt to control money supply in order to affect interest rates and, ultimately, the rate of inflation. But central banks can only retain their ability to control monetary policy to the extent that the bank acts as a monopolist over the supply of bank reserves.[29] But, as Benjamin Friedman has observed, the erosion of the demand for bank-issued money, the proliferation of non-bank credit, and aspects of the operation of bank clearing mechanisms have undermined the ability of central banks to implement monetary policy.[30] This problem was, prior to the creation of the EMU and the European Central Bank, particularly acute in the Western European countries that adopted the single European currency (Euro). This was because these countries were both relatively small in size and financially sophisticated such that they experienced an erosion in demand for bank-issued money, a proliferation of non-bank credit, and the development of aspects of the operation of bank clearing mechanisms—precisely those factors that Friedman identified as tending to undermine the ability of central banks to implement monetary policy.[31]

Thus, consistent with my theory, the European central banks that agreed to join the Euro were not immune to concerns about ceding bureaucratic turf.

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27 *See* WILLIAM A. NISKANEN, BUREAUCRACY AND PUBLIC ECONOMICS (1994).

28 Brian K. Kurzmann, *Challenges to Monetary Unification in the European Union: Sovereignty Reigning Supreme?*, 23 DENV. J. INT'L L. & POL'Y 135, 141 (1994).

29 Benjamin M. Friedman, *The Future of Monetary Policy: The Central Bank as an Army with Only a Signal Corps?*, 2 INT'L FIN. 321, 325 (1999).

30 *Id.* at 327, 330, 332.

31 *Id.*

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Rather, they saw that the regulatory cartelization represented by the creation of the EMU was the best available response to the specter of irrelevance. From a bureaucratic perspective, having some, albeit imperfect, influence over the viable monetary policy of the European Union is preferable to having complete influence over the irrelevant monetary policy of a European country whose central banks must attempt to implement monetary policy in increasingly sophisticated global capital markets.

## III. REGULATORY GLOBALIZATION AS REGULATORY IMPERIALISM

The second set of conditions under which we are likely to observe global imperialism emerges when a regulatory agency is capable of unilaterally injecting its own policy preferences into the domestic regimes of other countries. Efforts by the SEC and the Department of State to export U.S. prohibitions on insider trading to international capital markets is a paradigmatic example of this sort of regulatory globalization.

The SEC and the Department of State, in an effort that sometimes has strained international relations, have sought to enforce insider trading laws internationally.[32] However, this task has been complicated by the reluctance of foreign countries to cooperate with U.S. efforts to enforce a ban on trading by insiders. Particular pressure has been exerted on the Swiss.[33] Countries like Switzerland have historically refused to divulge information about their account holders due to their strict bank secrecy laws.[34] Such laws and customs appear almost to invite insider trading.[35]

However, as a consequence of concerted lobbying and persistent diplomatic initiatives, recently the SEC has largely succeeded in its efforts to export U.S. insider trading laws to Switzerland.[36] Early attempts to obtain Swiss cooperation with insider trading enforcement efforts in the United States were largely unsuccessful. In particular, the Treaty on Mutual Assistance in Criminal Matters, under which Switzerland agreed to provide information to

[32] David D. Haddock & Jonathan R. Macey, *Controlling Insider Trading in Europe and America: The Economics of the Politics*, *in* LAW AND ECONOMICS AND THE ECONOMICS OF LEGAL REGULATION 149, 151 (J.-Matthias Graf von der Schulenburg & Göran Skogh eds., 1986).

[33] *Id.*

[34] Jennifer Hanneman, Comment, *The Evolution of Cooperation Between Authorities in the United States and Switzerland in the Enforcement of Insider Trading Laws*, 16 WIS. INT'L L.J. 247, 247 (1997).

[35] John Templeman, *The Stone Wall of Swiss Secrecy*, BUS. WK., Apr. 29, 1985, at 92.

[36] *See* James A. Kehoe, Comment, *Exporting Insider Trading Laws: The Enforcement of U.S. Insider Trading Laws Internationally*, 9 EMORY INT'L L. REV. 345 (1995).

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assist in criminal prosecutions for securities fraud, was unsuccessful because, unlike the United States, Switzerland traditionally did not regard insider trading as a crime.[37] Following several years of negotiations between the United States and Switzerland, a Memorandum of Understanding and ultimately an exchange of "Diplomatic Notes" were achieved, making it far easier for the United States to obtain the cooperation of Swiss authorities and Swiss bankers in pursuing off-shore insider trading.[38] These diplomatic initiatives culminated in 1988 with the creation of the first Swiss law prohibiting insider trading,[39] and the Swiss Securities Exchange Act of 1995,[40] which have led to increased cooperation of Swiss authorities in the SEC's prosecution of insider trading.[41]

The efforts to expand the scope of insider trading enforcement beyond U.S. borders is hardly surprising. The SEC garners a tremendous amount of political support, prestige, and funding from its efforts to enforce the rules against insider trading.[42] Modern technology allows people access to securities markets around the world and makes it increasingly easy to evade local rules against insider trading.[43] While technology also can be used by regulators and law enforcement officials to identify insider trading, such technology can be thwarted where, as in Switzerland, trading firms and banks consummate transactions with U.S. brokerage firms via "omnibus trading accounts," which enable the Swiss firms to buy and sell securities for (the secret accounts of) customers in the bank's name. This method of doing business prevents the SEC, other regulators, and law enforcement officials from identifying the actual party to the transaction, thus allowing inside traders sometimes to avoid being identified and prosecuted.[44] Since Swiss banks hold approximately half of the world's privately managed assets,[45] the SEC's ability to regulate insider

[37] Ellen R. Levin, Comment, *The Conflict Between United States Securities Laws on Insider Trading and Swiss Bank Secrecy Laws*, 7 NW. J. INT'L L. & BUS. 318, 334 (1985).

[38] Hanneman, *supra* note 34, at 257-59.

[39] Article 161 of the Swiss Criminal Code, adopted in December 1987, prohibits insider trading in Switzerland. *See* STGB, CP, CP, art. 161.

[40] *See* Thomas P. Bischof, *The Swiss Securities Exchange Act and Investment Fund Act: A New Regulatory Framework for the Swiss Capital Markets*, 20 N.C. J. INT'L L. & COM. REG. 457 (1995).

[41] Hanneman, *supra* note 34, at 267.

[42] *See* David D. Haddock & Jonathan R. Macey, *Regulation on Demand: A Private Interest Model, with an Application to Insider Trading Regulation*, 30 J.L. & ECON. 311 (1987).

[43] Ronald Bornstein & N. Elaine Dugger, *International Regulation of Insider Trading*, 1987 COLUM. BUS. L. REV. 375, 376 (1987).

[44] JoAnn M. Navickas, *Swiss Banks and Insider Trading in the United States*, 2 INT'L TAX & BUS. LAW. 159, 159-60 (1984).

[45] Scott Kraft, *Swiss Open the Vaults of Secrecy*, L.A. TIMES, Oct. 12, 1995, at A1.

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trading depended, to a significant degree, on its ability to prosecute the insider trading being initiated in Switzerland. In order to protect its ability to regulate insider trading, "the SEC mounted an aggressive, and ultimately successful, campaign [aimed at] persuading the Swiss government to cooperate in prosecuting inside traders."[46]

Of course, not every administrative agency will be successful in inducing other countries to change their laws or to agree to facilitate efforts to improve enforcement of local laws. Clearly, the country has to have, and be willing to expend, political capital in order to achieve such results. Thus far, I have identified one situation in which governmental actors will be motivated to expend effort and political capital in order to achieve regulatory coordination and cooperation with foreign countries. This occurs when such coordination and cooperation are necessary in order to enable the administrative agency to achieve local policy objectives, such as curbing domestic insider trading.

Sometimes, however, we observe the government expending significant political capital to affect international practice in order to impose its will on the international community, even when such regulatory globalization will not affect domestic policy or practice at all. This sort of globalization occurs when highly politicized, well-organized special-interest groups have been galvanized into an effective political coalition in order to export their ideology and/or their religious convictions to other jurisdictions. Efforts to achieve this sort of "imperialistic" regulatory globalization can be found in the field of women's reproductive rights.

For example, in one of his first official actions in office, President Bush issued an executive memorandum on January 22, 2001, revoking the center-piece of the Clinton Administration's policy on population assistance and reinstating President Reagan's so-called "Mexico City" policy, which denied federal funds to governmental or non-governmental family planning organizations that provided abortion counseling or abortion services overseas,

[46] Hanneman, *supra* note 34, at 247-48; *see also* Kehoe, *supra* note 36, at 353. Of course, to the extent that the Swiss did not intend actually to enforce vigorously its own insider trading rules, the internal political costs to the Swiss of acquiescing to U.S. pressure would be reduced considerably. *Cf.* Hathaway, *supra* note 1, at 1834-42 (showing that as the likelihood of enforcement goes down, the probability of treaty ratification goes up).

including organizations that lobbied foreign governments on the issue of abortion.[47]

While this action went largely unnoticed by most Americans, among certain groups, the action was highly salient politically. President Bush's decision to reinstate the Mexico City policy came symbolically on the 28th anniversary of the U.S. Supreme Court's decision in *Roe v. Wade*, and elicited strong reactions from family planning organizations, the development community, and our European allies, as well as from many members of Congress.[48]

> Several lawmakers, including Nita Lowey (D-NY), Nancy Pelosi (D-CA), Carolyn Maloney (D-NY), and James Greenwood (R-PA), introduced legislation in the 106th Congress to remove or ban the Mexico City restrictions on population assistance. While none of those bills were [sic] ultimately passed, it is expected that similar legislation will be introduced in both chambers during the 107th Congress.[49]

Despite massive protests by pro-choice reproductive rights groups and other women's rights groups, as well as the objections of its own Secretary of State,[50] the Bush Administration, by taking this position, was able to galvanize

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[47] *See* U.S. House of Representatives, International Relations Committee Democratic Office, Foreign Policy Briefs, "Mexico City" Policy and U.S. International Family Planning Assistance, Jan. 2001, *at* http://www.house.gov/international_relations/democratic/fpb_mexico_city.html (last visited Aug. 25, 2003):

> The "Mexico City" policy was first announced in 1984 by the Reagan Administration at the Second U.N. International Conference on Population in Mexico City. On January 22, 1993, President Clinton issued a Memorandum to USAID removing the Mexico City restrictions. However, these restrictions were enacted in the FY2000 Foreign Operations Appropriations Act as part of a compromise between President Clinton and Congressional Republicans to pay U.N. arrears. The terms of the compromise allowed the President to waive some of the requirements in return for a $12.5 million reduction in the population assistance from $385 to $372.5 million. In FY2001 appropriations, Congress increased population assistance to $425 million and did not reenact this restriction, but instead inserted language to prevent USAID from obligating any of the funds until February 15, 2001, allowing the new President to put in place any restrictions or conditions on the family planning program.
>
> In his Memorandum of January 22, 2001, President Bush rescinded the Memorandum issued by President Clinton in 1993, thereby reinstating the Mexico City policy of 1984. President Bush has indicated through subsequent press statements that he will not seek a reduction in the funding levels for population assistance below the $425 million passed by Congress in FY2001.

*Id.*

[48] *Id.*

[49] *Id.*

[50] Philip H. Gordon, *Listen to Powell*, FIN. TIMES, July 31, 2002, at P13, *available at* http://www.brook.edu/views/op-ed/gordon/20020731.htm (last visited Aug. 25, 2003).

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the support of a core group of backers, those religious groups that are strongly anti-abortion.[51] Opponents of these policies have complained loudly. They assert that the religious right is "pushing its international agenda as much as it has pushed its agenda domestically," and observe that "[i]t looks like they have a significant amount of influence."[52]

Supporters of the Bush Administration's initiatives respond by saying that they are "just making headway on issues that have always been near and dear to them," which is what such leaders said when they successfully lobbied the Bush administration in July 2002 to rescind $34 million earmarked for U.N. family planning programs that included reproductive health services and contraceptives.[53] As Gary Bauer, a former presidential candidate and head of the conservative group American Values pointed out, "[a]mong Christian conservatives, there has always been an interest in foreign affairs."[54]

The issue here, of course, is not whether these foreign policy initiatives are either advisable or appropriate. Rather, the point is that regulatory globalization, and efforts to achieve regulatory globalization, are used to further the domestic interests of governmental actors. This is done in two ways: (1) by securing cooperation necessary to make an administrative agency more effective in accomplishing its domestic regulatory goals; and (2) by projecting the values and preferences of a powerful local special interest group abroad, thereby allowing the political actors to solidify their political support from such groups.

In Part IV, I will examine a third and final context in which we are likely to see efforts by government actors to achieve regulatory globalization: when regulators have strongly developed preferences, but cannot transform them into policy because of domestic opposition. As the following discussion demonstrates, where this is the case, the regulators can use regulatory globalization as a "policy lever" to make it more difficult for others to oppose their views.

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[51] *See* John Gershman, *U.S. Decision Reflects Pressure of Anti-Choice Zealots*, *at* http://www.presentdanger.org/frontier/2002/1112choice_body.html (last visited Aug. 25, 2003).

[52] Kelley Beaucar Vlahos, *Religious Right Makes Headway in Bush Policy*, July 27, 2002, (quoting C. Welton Gaddy, executive of the Interfaith Alliance), *at* http://www.foxnews.com/story/0,2933,58870,00.html (last visited Aug. 25, 2003).

[53] *Id.*

[54] *Id.*

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## IV. REGULATORY GLOBALIZATION AS A "POLICY LEVER"

It is not surprising that bureaucrats in one country may have far more in common with their bureaucratic colleagues in other countries than with either the entities they regulate or the politicians who oversee and finance their activities. Regulators can reach agreements with their counterparts in other countries that simultaneously advance the bureaucrats' own agendas and put pressure on their domestic constituencies to acquiesce in the new regulatory framework in the spirit of global cooperation.

A prime example of the use of regulatory globalization as a policy lever can be found in the international negotiations among banking regulators over the initial Basle Accord regarding bank capital. As noted above, U.S. regulators were interested in adopting international capital guidelines because capital requirements already existed in the United States. In addition, change and the globalization of markets reduced both the barriers to entry and the barriers to exit that had traditionally tended to keep financial institutions locked within domestic boundaries.[55] As banks and other financial institutions found it easier to migrate to more sympathetic regulators, national regulatory authorities increasingly found that they were competing with one another for market share. This led banking regulators in the United States and the United Kingdom to demand regulatory globalization in the form of "harmonization" of the rules regarding bank capitalization so that their regulatory power would not be eroded by the emigration of banks to more sympathetic regulatory jurisdictions, particularly Japan.[56] In Part II of this Article, I described this phenomenon as "regulatory cartelization."

While the United States and Japan were interested in fashioning the Basle Accord for purposes of achieving regulatory cartelization, there was resistance to these rules in Japan. Japan was gaining market share in global banking as a result of the migration of banking business into its jurisdiction by competitors who preferred Japan's liberal bank capital rules to the more rigorous rules of their home jurisdictions. Japanese bank regulators had long wanted to adopt bank capital rules, because doing so would enable them to expand their power base and prestige, but they "could not obtain the power unilaterally to impose minimum capital requirements on their own banks because Japanese banks

[55] *See* Kane, *supra* note 14, at 44.

[56] *See* Jonathan R. Macey, *The 'Demand' for International Regulatory Cooperation: A Public Choice Perspective*, *in* TRANSATLANTIC REGULATORY COOPERATION: LEGAL PROBLEMS AND POLITICAL PROSPECTS 147, 160 (George Berman et al. eds., 2000).

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[which did not want to deal with these new regulatory requirements] were able to resist this attempt."[57] The Basle Accords gave the Japanese bank regulators the necessary leverage to achieve the regulatory result they preferred, despite opposition from a powerful interest group, the Japanese banking industry: "from the perspective of the Japanese, the Basle Accords represented a hands-tying strategy in which the Japanese bureaucrats were able to collude with bureaucrats from other countries in order to obtain more discretionary regulatory authority."[58]

Thus, regulatory globalization can be used by (relatively) weak regulatory agencies as a strategy to accomplish objectives that they are unable to accomplish domestically. It is in this sense that regulatory globalization can be used as a policy lever. However, in order for an administrative agency to employ this policy lever, certain conditions must be met. In particular, regulators in other jurisdictions must share the policy objectives of the local regulators, so that an international agreement can be reached. However, as noted before, regulators are likely to share points-of-view and philosophical orientations with their counterparts in other jurisdictions, since they will have common goals and common challenges in meeting those goals.

The more difficult question is understanding why an international agreement puts additional pressure on local interest groups to acquiesce in a particular regulatory outcome with which they may disagree. There are several explanations for this. First, failure to participate in an international agreement has costs. Nations that fail to participate in international accords are viewed as non-cooperative, thus diminishing their ability to persuade other countries to compromise with them in reaching agreements on issues that they may find of great importance.

The desire of most nations to be viewed as generally cooperative with other countries in the international sphere may be viewed as the opposite of the phenomenon of American "exceptionalism," which is the term that describes the U.S. proclivity to go its own way in international affairs, without regard for the preferences of other nations.[59] Many people, particularly those active in the

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[57] *Id.*

[58] *Id.*

[59] In a compelling article, Harold Koh has shown that there are many aspects of American exceptionalism, some of which are highly laudable and others of which are fairly deplorable. *See* Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479 (2003). Professor Koh argues that we should pursue the twin policies of minimizing double standards in our foreign relations (as in, for example, our

foreign policy community, view regulatory cooperation as an end in itself. Cooperation in the international sphere is a form of global social norm.[60]

Foreign policy generalists (the professional foreign service personnel who make up the bulk of the diplomatic corps) view international cooperation as a goal in itself. Thus, at a minimum, when an administrative agency expresses a willingness to participate in an international agreement such as the Basle Accord, it generally will have the support of the professional foreign policy establishment. As noted above, most countries would prefer to be viewed as being willing to cooperate with other countries. Countries prefer to be viewed as cooperative in the regulatory sphere for the same reasons that they tend to obey international law. It is in their interest to do so. Moreover, international rules come to be internalized as norms of behavior, which, in turn, tend to become reflected in domestic law.[61] These factors strongly suggest that the existence of an international agreement will create domestic leverage that enables regulators to achieve policy results that would be unobtainable if the regulator attempted to act unilaterally.[62] The mere existence of an actually international agreement, or even a concerted international effort to forge such an agreement, exerts on policymakers a gravitational pull that moves them in the direction of compliance.

Moreover, international agreements often will only succeed if they are adopted by a substantial number of countries. Regulators who support a particular international agreement sometimes can directly coerce interest groups that do not support the agreement. For example, regulators threatened to exclude Japanese banks from U.S. markets if they did not end their efforts to block Japanese ratification of the Basle Accords.[63] This permitted Japanese bank regulators to

> report back to their bank clientele that they had no choice but to enter into the Accords, or else the consequences for Japanese banks would

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insistence on a "Second Amendment exclusion" from a proposed global ban on the illicit transfer of certain arms) and expanding our capacity for global leadership. *Id.*

[60] Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997) (book review).

[61] *Id.*

[62] Evidence of the general proclivity toward cooperation can be seen in the fact that some countries ratify international agreements, but do not comply with them, while other countries, most notably the United States, may comply with an international agreement despite not having ratified it. *See* Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 1977-80 (2002).

[63] Ethan B. Kapstein, *Resolving the Regulator's Dilemma: International Coordination of Banking Regulations*, 43 INT'L ORG. 323 (1989).

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be even worse. The Japanese regulators at Basle probably could have resisted the threat of exclusion from the US markets by promising to protect depositors against loss. But they most likely did not want to do so because signing the Basle Accords increased the power and autonomy of Japanese regulators.[64]

## V. REGULATORY GLOBALIZATION: SOME THOUGHTS ON SUBSTANTIVE OUTCOMES

My theory rests on two core assumptions about bureaucratic behavior. First, administrative agencies, like nations themselves, value sovereignty. Consequently, administrative agencies, like nation-states, will surrender the prerogatives of their power only grudgingly. Second, bureaucrats are rationally self-interested, and therefore will pursue or support efforts at regulatory globalization when, and only when, they perceive that it is in their interest to do so.

Within this framework, we see that regulators will not view regulatory globalization as an optimal, "best of all possible worlds" outcome, because such globalization necessarily implies a degree of compromise and loss of autonomy that inevitably comes with "power sharing" arrangements. Thus, I conclude that certain conditions must exist before regulatory agencies will pursue a strategy of regulatory globalization.

One of the conditions that leads to regulatory globalization is successful regulatory arbitrage. When it is possible for firms and industries easily to avoid the reach of domestic regulators, those regulators will have strong incentives to engage in "cartel-like" behavior, coordinating with regulators in the jurisdictions to which regulated entities are moving in order to retain even diluted influence over the activities of such entities.

Thus, in international discussions about regulatory globalization, it seems likely that the most irrelevant bureaucrats will have the strongest incentives to compromise. For this reason, it is not surprising that we have seen astonishing amounts of regulatory globalization in the arena of banking and finance. Capital is the world's most mobile resource, as capital can be electronically transferred around the globe not only instantaneously, but also almost costlessly. For this reason, we have seen an "ongoing process of regulatory convergence" in the area of financial regulation. Regulators have had to

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64 Macey, *supra* note 56, at 160.

compromise or risk being relegated to a status of complete irrelevance. Of course, regulators in those countries with the largest pools of capital have remained the most relevant, and they will in all probability have the most influence on the process of regulatory globalization.[65]

Consistent with the view that bureaucrats will support regulatory harmonization when, and only when, it is in their interest to do so, I can identify another condition under which it is likely to exist: when an administrative agency lacks domestic support for its regulatory agenda. Needless to say, administrative agencies that lack such support lack power, because agencies are dependent upon politicians and interest groups for funding, prestige, and other forms of sustenance vital to survival in the political marketplace. When an administrative agency suffers because of withering, or non-existent, support at home for its preferred policies, efforts to achieve regulatory globalization can be an effective strategy, because when international agreements are reached, there can be strong pressure for countries to participate. Regulators in a particular country can reach an international "compromise" that reflects a regulatory outcome that has little support at home, and claim that they are required to adopt this compromise for the sake of international harmony and cooperation.

This is the position, for example, that Japanese banking regulators took with respect to negotiations over international capital accords. There was a large "policy gap" between the perspective of Japanese banking regulators and that of Japanese banks and politicians. The international agreement gave the banking regulators the ability to increase their domestic regulatory powers at the expense of other local interests.[66]

Finally—and contrary to the current wisdom, which assumes that the convergence of financial regulation is a "key feature" of financial integration and regulatory harmonization—my analysis implies that regulatory globalization will not inevitably occur. In particular, regulators who enjoy considerable political support at home generally will not feel the inclination to engage in the sort of compromise and power-sharing that is a necessary precondition to regulatory globalization. Ironically, as we have seen recently in the United States with the string of regulatory collapses that began with the

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[65] JORDAN & MAJNONI, *supra* note 15, at 1.

[66] For an excellent account of the disadvantages to the Japanese as a result of signing the international capital accord, see HAL S. SCOTT & SHINSAKU IWAHARA, IN SEARCH OF A LEVEL PLAYING FIELD: THE IMPLEMENTATION OF THE BASLE CAPITAL ACCORD IN JAPAN AND THE UNITED STATES (1994).

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Enron catastrophe, a crisis often increases domestic support for the work of the administrative agency responsible for dealing with the crisis.[67] For the SEC, these crises translated into a record $716 million in funding for the 2003 fiscal year, a forty percent increase over 2002.[68] Such support, under my theory, will reduce the SEC's incentives to cede power by coordinating its regulatory efforts with regulators in other jurisdictions. In particular, efforts to globalize or coordinate accounting rules, which have received substantial domestic political support, especially from the New York Stock Exchange, have been abandoned, and the United States is clearly pursuing a "go it alone" strategy for dealing with the global crisis in corporate governance and corporate accountability, despite the fact that these problems are not confined to the United States.

## CONCLUSION

Regulatory globalization is endemic. Thousands of multilateral agreements among nations are signed each year.[69] Similarly, the range and scope of international organizations, international regulatory coordination, and regulatory globalization in general are increasing across the globe. There is very little in the way of useful theory to explain when such regulatory globalization is likely to occur, and when it is not. This Article has cast some light on this question by identifying two conditions under which we are likely to observe regulatory globalization. First, we have seen that regulatory globalization is a competitive response employed by administrative agencies when they perceive a threat to their power. Where exogenous technological forces threaten to make an agency obsolete or irrelevant, a natural response is regulatory globalization. In short, when regulated firms attempt a "divide and conquer" strategy of isolating regulators and engaging in regulatory arbitrage, regulators have little choice but to band together and offer a coordinated response.

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[67] *See, e.g.*, *The Corporate and Auditing Accountability, Responsibility, and Transparency Act of 2002: Hearing on H.R. 3763 Before the Committee on Financial Services*, 107th Cong. 8 (Mar. 13, 2002) (testimony of Marc E. Lackritz, President, Securities Industry Association), *available at* http://financialservices.house.gov/media/pdf/031302ml.pdf (last visited Aug. 25, 2003); Dan Morgan, *GOP Wraps Up Spending Package*, WASH. POST, Feb. 13, 2003, at A1.

[68] Morgan, *supra* note 67.

[69] Barbara Koremenos, *Is the United States Exceptional?: An Empirical Analysis of International Agreements Signed by the U.S.*, *at* http://www.polisci.ucla.edu/menu/people/papers/capp2002.pdf (last visited Aug. 25, 2003).

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Next, we have observed that sometimes, though rarely, an administrative agency will be successful in simply exporting its regulatory regime to foreign countries. An administrative agency might do this in order to improve its political support at home, by exporting regulations that are domestically popular, or an agency might engage in bureaucratic imperialism in order to safeguard its ability to regulate domestically.

Finally, we have seen that regulators can use international coordination as a mechanism to improve their own domestic power vis-à-vis rival policy entrepreneurs in government. In particular, when a regulatory agency has policy preferences that diverge sharply from those offered by its rivals, the agency sometimes can "trump" its more powerful rivals by obtaining an international accord that reflects its preferred policy position, and then arguing that the accord must be ratified for the sake of international cooperation.

This Article has presented a very unromantic view of the process of regulatory globalization. Those with more idealized notions of the "global citizen" and the virtues of transnational regulatory cooperation may find this depiction unappealing.

Nevertheless, I believe that the insights in this Article can lead to a better understanding of a number of phenomena in the area of regulatory globalization that are not well understood. For example, I believe that this theory leads to a better grasp of U.S. exceptionalism. According to this doctrine, "the US sees itself as qualitatively different from other states. America therefore believes it can be exempted from certain norms, or rules of conduct, in particular instances."[70] Elements of exceptionalism have existed as an historical undercurrent in U.S. foreign policy, which, it is claimed, manifests itself in the form of U.S. efforts to exert its will internationally.[71] Our understanding of U.S. exceptionalism would be improved if we had a better understanding of the precise conditions under which we are likely to view "exceptionalist" behavior and those under which we are not. This question parallels a related question: When are we likely to observe U.S. policymakers attempting to exert their will internationally, and when are we less likely to observe such efforts?

[70] Canadian Centre for Foreign Policy Development, Edmonton Summary, Isolationism/Engagement and Unilateralism/Multilateralism, *at* http://www.ecommons.net/ccfpd/main.phtml?city=ed&show=ed_report_1 (last visited Aug. 25, 2003).

[71] *See* Koh, *supra* note 59.

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My theory shows that U.S. policymakers will tend to engage in "exceptionalist behavior" when, and only when, they have strong domestic backing to do so. In other words, such exceptionalist behavior, as we saw in the reproductive rights discussion above,[72] is less likely to reflect the broad national interest of the United States than to reflect the interests of a narrow, but politically powerful, special interest group. By contrast, the United States is likely to appear to be quite cooperative in situations in which its regulators are losing power due to regulatory arbitrage, and thus are highly motivated to enter into international agreements. We also are likely to see high levels of U.S. bureaucratic cooperation when U.S. regulators lack domestic political support for their policies. In such situations, international agreements are an attractive mechanism for bureaucrats to gain leverage in domestic political markets.

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72 *See supra* notes 47-54 and accompanying text.

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