

## **REVERSED HARMONIZATION OR HORIZONTALIZATION OF EU STANDARDS?:**

### **DOES WTO LAW FACILITATE OR CONSTRAIN THE BRUSSELS EFFECT?**

DOMINIQUE SINOPOLI\* AND KAI PURNHAGEN\*\*

#### **ABSTRACT**

EU law establishes an internal market. To achieve that goal, it acts to a large extent as a regulator, setting standards. These standards are often legally binding inside of the jurisdiction of the European Union, but increasingly travel beyond the borders of the European Union on the back of the traded goods. In some areas, this leads to a “Brussels Effect,” where EU standards factually harmonize legislation at transnational level, creating a “race to the top” in international standards. This generates a level playing field for transnational trade, directed by the European Union as a de facto transnational regulator. Professor Anu Bradford brought forward the argument that a de facto or de jure transnational harmonization by EU standards might be facilitated or constrained by the World Trade Organization (“WTO”). The WTO could strike down such regulations as purely domestic ones without taking into account the fact that these EU standards have factually already achieved what the WTO aspires: removing barriers to trade between its member countries by establishing equal treatment of all trading partners as the norm. We will call this phenomenon of the Brussels Effect the “Reversed Harmonization Effect.” The WTO could also facilitate the Brussels Effect by providing a specific forum for negotiations, which favors the European Union as a dominant regulator, leading to a horizontalization of standards across the WTO. One may hence claim normatively that the

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\* PhD Researcher at Wageningen University, Law and Governance Group. MSc from Wageningen University '13 and BSc from Cornell University '11; dominique.sinopoli@wur.nl.

\*\* Assistant Professor at Wageningen University, Law and Governance Group and Distinguished Visitor at Erasmus University of Rotterdam, Rotterdam Law School, Rotterdam Institute for Law and Economics. PhD '11, and M.Res. (Law) from the European University Institute Florence '08; M.J.I. from the Justus-Liebig-University Giessen '09, LL.M. from the University of Wisconsin-Madison '07 and State Exam in Law from the State of Hessen '06.

WTO should take into account a broader view on the economic effect of these measures beyond their formal domestic jurisdiction by differing between domestic and horizontalized standards.

This piece examines whether this normative claim is well-founded in the law of the WTO using the example of food trade. We will investigate whether current WTO law as applied “in action” has the potential to facilitate or constrain the Brussels Effect. Three famous trade disputes are analyzed to investigate this hypothesis. We conclude that, in the areas investigated, WTO law has very limited potential to jeopardize the Brussels Effect. From our study, we hence find no evidence that would support such a normative claim.

Abstract.....	92
Introduction.....	93
I. The Brussels Effect.....	98
A. Background.....	98
B. Application.....	100
II. World Trade Organization and Trade in Foods.....	100
A. SPS and TBT Agreements.....	101
B. Codex Alimentarius.....	102
III. Does the WTO Law Facilitate or Constrain the Brussels Effect?... 104	
A. Does the WTO Food Law Regime Facilitate the Brussels Effect?.....	104
B. Does the WTO Legal Regime Constrain the Brussels Effect?.....	106
1. GMOs.....	106
2. Hormones.....	111
3. Dolphin-Tuna.....	114
IV. Analysis and Conclusion.....	117

## INTRODUCTION

Critics of globalization argue that free trade leads to a “race to the bottom,” in which governments lower their regulatory standards to attract economic activity and improve their competitive position in the global market.<sup>1</sup> They fear that this may lead to a downward

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<sup>1</sup> William L Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663, 666 (1974); ALAN TONELSON, *THE RACE TO THE BOTTOM: WHY A WORLDWIDE WORKER*

harmonization of standards.<sup>2</sup> Other scholars have challenged this claim and shown that trade liberalization instead frequently triggers a “race to the top,” which is the idea that regulatory standards are being driven upward and strict standards may actually form a competitive advantage.<sup>3</sup> Vogel described this phenomenon as the California Effect:

Trade and agreements to promote [regionalization and globalization] affect not only the flow of goods among nations, but also the movement of regulations across national boundaries. Nations are thus increasingly importing and exporting standards as well as goods.<sup>4</sup>

Simmons argues that the dominant regulator in a market has the potential to change the market and regulatory situation for the rest of the world.<sup>5</sup>

Bradford builds upon the California Effect by examining the global regulatory power of the European Union.<sup>6</sup> The Brussels Effect she describes provides an example of a dominant regulator whose power leads to the harmonization of global standards. The European Union exports its standards to the rest of the world and sets the global rules in a range of areas, such as competition, privacy, environment, chemicals, and food, resulting in a “Europeanization” of global regulatory standards.<sup>7</sup> Bradford identified various factors that may place limits on the Brussels Effect, one of which is the law of international organizations such as the World Trade Organization (“WTO”).<sup>8</sup>

This Article takes the next step and seeks to further explore the proposition that the WTO places limits on the Brussels Effect. It is

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SURPLUS AND UNCONTROLLED FREE TRADE ARE SINKING AMERICAN LIVING STANDARDS 14–15 (2002).

<sup>2</sup> Bruce A. Silverglade, *The WTO Agreement on Sanitary and Phytosanitary Measures: Weakening Food Safety Regulations to Facilitate Trade?*, 55 FOOD & DRUG L.J. 517 (2000).

<sup>3</sup> DAVID VOGEL, TRADING UP: CONSUMER AND ENVIRONMENTAL REGULATION IN A GLOBAL ECONOMY (1995); DYNAMICS OF REGULATORY CHANGE: HOW GLOBALIZATION AFFECTS NATIONAL REGULATORY POLICIES 3 (David Vogel & Robert A. Kagan eds., 2004) [hereinafter DYNAMICS]; Gregory Shaffer, *Globalization and Social Protection: The Impact of EU and International Rules in the Ratcheting up of U.S. Privacy Standards*, 25 YALE J. INT’L L. 1 (2000) [hereinafter Shaffer, *Globalization and Social Protection*]; Gregory Shaffer, *The Power of EU Collective Action: The Impact of EU Data Privacy Regulation on US Business Practice*, 5 EUR. L.J. 419 (1999) [hereinafter Shaffer, *The Power of EU Collective Action*].

<sup>4</sup> DYNAMICS, *supra* note 3, at 2.

<sup>5</sup> Beth Simmons, *The International Politics of Harmonization: The Case of Capital Market Regulation*, in DYNAMICS OF REGULATORY CHANGE: HOW GLOBALIZATION AFFECTS NATIONAL REGULATORY POLICIES 42–71 (David Vogel & Robert A. Kagan eds., 2004).

<sup>6</sup> Anu Bradford, *The Brussels Effect*, 107 NW. U. L. REV. 1, 3 (2012).

<sup>7</sup> *See id.* at 6.

<sup>8</sup> *Id.* at 54–56.

expected that if the WTO indeed constrains the global regulatory power of the European Union, the Brussels Effect will be greater where Union and WTO laws diverge. Previous findings on the impact of WTO laws on influencing the interplay of EU data protection laws on US data privacy standards have already illustrated that WTO rules can work as both a shield and a sword for EU regulation.<sup>9</sup> In analyzing the influence of the European Union's data protection Directive on US standards, Shaffer illustrated that international trade liberalization rules did not have a significant impact on "the ability of governments to require greater social protection."<sup>10</sup> Even more, international trade law often does not have any impact on the extra-jurisdictional effects of social data protection law.<sup>11</sup> Subsequently, several scholars looked more comprehensively into the phenomenon of the extraterritoriality of specific EU regulatory regimes such as competition law<sup>12</sup> and the law of chemicals.<sup>13</sup> More than a decade after Gregory Shaffer's analysis, Joanne Scott took up this "extraterritorial" reach of EU law as a basis to comprehensively analyze the extraterritorial effect and the effect of territorial extension of EU law on the areas of environmental law, aviation law, and the law of financial markets.<sup>14</sup> With respect to the topic of whether WTO law might constrain such an extraterritorial Brussels Effect, she contends that WTO law may permit an extraterritorial reach of EU laws if they are "sufficiently flexible."<sup>15</sup> These pieces have comprehensively looked at the extraterritorial application of EU law in a variety of specific fields. What unites these pieces is that they apply a specific European Union-centered analysis. A thorough analysis of the effects of WTO laws on this extraterritorial effect from the perspective of WTO law is missing, which we will provide in turn. In order to keep the level of analysis comprehensible we will focus on the area of food safety and quality regulation. This highly important and relevant area is becoming increasingly transnational and is one that "directly, personally

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<sup>9</sup> Shaffer, *Globalization and Social Protection*, *supra* note 3, at 8; Shaffer, *The Power of EU Collective Action*, *supra* note 3, at 425–26.

<sup>10</sup> Shaffer, *Globalization and Social Protection*, *supra* note 3, at 8.

<sup>11</sup> Shaffer, *The Power of EU Collective Action*, *supra* note 3, at 426–29.

<sup>12</sup> Florian Wagner-von Papp, *Competition Law, Extraterritoriality and Bilateral Agreements*, in RESEARCH HANDBOOK ON INTERNATIONAL COMPETITION LAW (Ariel Ezrachi ed., 2012).

<sup>13</sup> Joanne Scott, *From Brussels with Love: The Transatlantic Travels of European Law and the Chemistry of Regulatory Attraction*, 57 AM. J. COMP. L. 897 (2009).

<sup>14</sup> Joanne Scott, *Extraterritoriality and Territorial Extension in EU Law*, 62 AM. J. COMP. L. 87 (2014).

<sup>15</sup> *Id.* at 115–16.

and continually affect(s) the well-being of every citizen.”<sup>16</sup> There are several famous international trade disputes in this area and many political and social tensions surrounding food regulation. We will use various trade issues in the area of food safety to investigate this hypothesis.

What is ironic is that, if the Brussels Effect indeed leads to harmonization of food safety standards, then it is line with the aims of the WTO: leveling trade barriers and non-discrimination.<sup>17</sup> If the WTO constrains the Brussels Effect, however, then it may actually work against these goals as a form of reversed harmonization. It is therefore ironic that what may be considered a trade barrier can actually lead to harmonization. This proposition will be further explored in the analysis section.

Parts I and II provide a foundation for the Article. Part I includes background information on the Brussels Effect: what it is, how unilateral regulatory globalization works, and which factors, such as the WTO, may place limits on the effect. Part II examines the harmonization approach of the WTO through the Agreement on the Application of Sanitary and Phytosanitary Measures (“SPS Agreement”) and the Codex Alimentarius Commission, and the relationship with the Brussels Effect. Part III identifies cases of the Brussels Effect in the food sector. Food-related trade issues raised in the Dispute Settlement Understanding (“DSU”) system are selected and subsequently analyzed for incidence of the Brussels Effect. The cases are assessed to determine if WTO law constrains the Brussels Effect. Part IV addresses the hypothesis that the Brussels Effect is greater where WTO law and law of the dominant regulator diverge. It is important to keep in mind that dominant regulators may push for international treaties that force their own standards on other nations.<sup>18</sup> Therefore, the relationship between dominant regulators and the Codex Alimentarius Commission is also addressed. The possible ironic situation that the WTO constrains the Brussels Effect even though it leads to harmonization—a goal of the WTO—is also examined.

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<sup>16</sup> Christopher Ansell & David Vogel, *The Contested Governance of European Food Safety Regulation*, in *WHAT’S THE BEEF?: THE CONTESTED GOVERNANCE OF EUROPEAN FOOD SAFETY* 3, 4 (Christopher Ansell & David Vogel eds., 2006).

<sup>17</sup> *Overview*, WORLD TRADE ORG., [https://www.wto.org/english/thewto\\_e/whatis\\_e/wto\\_dg\\_stat\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/wto_dg_stat_e.htm) (last visited Mar. 13, 2016) (“The WTO’s founding and guiding principles remain the pursuit of open borders, the guarantee of most-favoured-nation principle and non-discriminatory treatment by and among members, and a commitment to transparency in the conduct of its activities.”).

<sup>18</sup> Simmons, *supra* note 5, at 50–51.

While it is recognized that there are likely many instances of the Brussels Effect beyond what are reported in trade disputes, the limit will be on cases in which the WTO has been involved, since the focus of this paper is on the role of the WTO. Therefore, there is a lot that lies outside the scope of this article. Three cases have been selected for this study, chosen according to what the authors believed to be ones that best illustrate the possible constraint to the Brussels Effect. The criteria we chose from were: food-related disputes, variety in measures, and involvement of the European Union or the United States as a dominant regulator. In order to allow for a sound analysis of the effects, we chose established settlements where a sufficient time span elapsed after they became published in order to be able to sufficiently study their effects. For this reason, we also refrained from basing our analysis on more recent settlements.

The challenges of launching a case within the WTO dispute settlement system mean that countries are likely to do so only when they expect a positive outcome. Considerable efforts and resources are required to raise a WTO case, particularly for developing countries. Additionally, countries may have other reasons not to raise an issue within the WTO, such as to avoid media attention on a particular topic<sup>19</sup> or to avoid further tensions. Downes has warned of the limitations of extrapolating from WTO disputes, since the cases may be too specific to apply the results elsewhere, and because it is not always clear if regulations applied are a result of the SPS Agreement or the legal strategy of a jurisdiction.<sup>20</sup> Therefore, it is recognized that the conclusions drawn in this paper do not necessarily apply to all cases concerning the Brussels Effect and the WTO. However, unlike national law, WTO black-letter law is the outcome of a political compromise between contracting parties which does not lend itself to solving detailed questions. In fleshing out the WTO legal system, the WTO dispute settlement regime hence also plays a much stronger role in law creation than in national regimes. While the specifics of each individual case do not lend themselves to extrapolate the outcomes of the dispute to other cases, the generalized reasoning of the WTO dispute settlement institutions on the WTO legal system needs to be taken into account when interpreting the WTO legal system.

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<sup>19</sup> MARK A. POLLACK & GREGORY C. SHAFFER, WHEN COOPERATION FAILS: THE INTERNATIONAL LAW AND POLITICS OF GENETICALLY MODIFIED FOODS 179 (2009).

<sup>20</sup> CHRIS DOWNES, THE IMPACT OF WTO SPS LAW ON EU FOOD REGULATIONS 110–11 (2014).

## I. THE BRUSSELS EFFECT

This section will provide the basis for the analysis to come. We will first explain the Brussels Effect (A.), before we move on to illustrate how we will apply the phenomenon of the Brussels Effect in this Article (B.).

### A. BACKGROUND

The Brussels Effect provides an example of a dominant regulator whose power leads to the harmonization of global standards. The European Union exports its standards to the rest of the world, and sets the global rules in a range of areas, such as competition, privacy, environment, chemicals and food, resulting in a “Europeanization” of global regulatory standards.<sup>21</sup> Bradford identified various factors which may place limits on the Brussels Effect, one of which is international organizations such as the WTO.<sup>22</sup>

The EU has the world’s largest internal market, supported by strong regulatory institutions. Trading with the EU requires foreign companies to adjust their conduct or production to EU standards—which often represent the most stringent standards—or else forgo the EU market entirely. Rarely is the latter an option. While the EU regulates only its internal market, multinational corporations often have an incentive to standardize their production globally and adhere to a single rule. This converts the EU rule into a global rule—the “*de facto* Brussels Effect.” Finally, after these export-oriented firms have adjusted their business practices to meet the EU’s strict standards, they often have the incentive to lobby their domestic governments to adopt these same standards in an effort to level the playing field against their domestic, non-export-oriented competitors—the “*de jure* Brussels Effect.”<sup>23</sup>

Market forces are strong enough to create “involuntary incentives” for businesses to adjust to stricter standards. Even though exporting businesses would prefer other standards, they reluctantly adopt EU standards due to the opportunity costs of not doing so. Bradford identifies five conditions for this phenomenon, called unilateral regulatory globalization:

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<sup>21</sup> Bradford, *supra* note 6, at 6.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 5–6.

- 1) market power;<sup>24</sup>
- 2) regulatory capacity;<sup>25</sup>
- 3) preference for strict rules;<sup>26</sup>
- 4) predisposition to regulate inelastic targets;<sup>27</sup> and
- 5) nondivisibility of standards.<sup>28</sup>

The Brussels Effect occurs only when the exporter applies the stricter EU standards to all of its products or services, whether they are exported to the European Union or elsewhere in the world. An exporter has an incentive to do this when it is more cost-effective to adopt a single global standard rather than adjust production to meet varying regulatory standards.<sup>29</sup>

The Brussels Effect does not occur in all instances of trade. Various external and internal factors place limits on the “Europeanization” of global standards.<sup>30</sup>

1. *Alternative markets*: The European Union has limited regulatory power in certain areas where alternative markets exist. Businesses are currently typically not willing to forgo the large European Union market. However, as demand grows in emerging markets, businesses will no longer be so dependent on the EU market for their products and services;
2. *Other nations*: Other nations may wish to constrain the Brussels Effect: strict European Union standards may be perceived negatively in other countries. Additionally, the regulatory power of the European Union is limited in cases where other nations have regulatory standards higher than those of the EU;
3. *International institutions*: The World Trade Organization (WTO) works to lower trade barriers. Countries are not allowed to restrict imports from countries with more lenient standards unless they can prove it is necessary for the social goals stipulated in the respective legal regimes (GATT, SPS Agreement);
4. *Internal conflicts*: Internal conflicts and growing diversity within the European Union, especially as more nations are joining the Union, place constraints on the Brussels Effect. Not all consumers

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<sup>24</sup> Anu Bradford, *The Brussels Effect*, 107 NW. U. L. REV. 1, 11–12 (2012).

<sup>25</sup> *Id.* at 12–14.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 16–17.

<sup>28</sup> *Id.* at 17–19.

<sup>29</sup> *See id.* at 48.

<sup>30</sup> *See id.* at 48–63.

and businesses within the EU benefit from strict regulatory standards.<sup>31</sup>

The major addition of the Brussels Effect to the California Effect is that it focuses on measures at a global level, acknowledging that there is a global regulatory space evolving which goes beyond regulating at the borders in the traditional sense of international economic law.

## B. APPLICATION

In this paper, the Brussels Effect is considered to be the concept of a dominant regulator who exports its standards to the rest of the world, leading to the harmonization of global standards either by law or factual economic power. It is recognized that this concept is not only limited to the European Union, but can be applied to the United States or other countries that may be the dominant market in some cases. The United States in particular was more powerful in the past few decades, a role that the European Union is now filling; therefore, the United States showed instances of the Brussels Effect during that period. In this paper examples of the Brussels Effect are shown with the European Union and United States as dominant regulators.

## II. WORLD TRADE ORGANIZATION AND TRADE IN FOODS

Food regulations are (mostly) national or regional, yet trade is global, creating problems of “linkage.”<sup>32</sup> International trade problems occur when countries and regions have different regulations and businesses or authorities are confronted with multiple requirements.<sup>33</sup> Differences in technical standards such as labeling requirements and premarket approvals are examples of non-tariff barriers. At the global level, the WTO and its agreements play a major role in reducing barriers to international trade and promoting the harmonization of national regulations.<sup>34</sup> Increasingly, these international agreements have an effect beyond their classical role and regulate behind the borders of their members by determining a level playing field for trade inside of the

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<sup>31</sup> *Id.* at 62–63.

<sup>32</sup> DENNIS PATTERSON & ARI AFILALO, *THE NEW GLOBAL TRADING ORDER: THE EVOLVING STATE AND THE FUTURE OF TRADE* 86–93 (2008).

<sup>33</sup> *Id.*

<sup>34</sup> BERNARD M. HOEKMAN & PETROS C. MAVROIDIS, *THE WORLD TRADE ORGANIZATION: LAW, ECONOMICS AND POLITICS* 1 (2007).

respective countries as well. Acknowledging this new role of international economic law, we will look into how the relevant WTO agreements might influence the Brussels Effect in trade in foods. To this end, we will first illustrate how the WTO de facto regulates the world food market (A.), and how this has changed the authority of the Codex Alimentarius (B.).

#### A. SPS AND TBT AGREEMENTS

Although there are several international organizations that frame international trade law, only the WTO has the power to issue legally binding obligations upon its Members.<sup>35</sup> Although a huge number of disputes on WTO law concern trade in foods, food safety has never been a prime issue for the WTO.<sup>36</sup> This comes as no surprise, as the WTO is primarily an organization with an aim of removing barriers to trade between its Member Countries, by establishing equal treatment of all trading partners as the norm.<sup>37</sup> The WTO has, however, become the major international de facto regulator in global food trade.<sup>38</sup> The regulatory gate through which food safety travels to WTO law is Art. XX (b) GATT,<sup>39</sup> which recognizes that certain exceptions to free trade can be necessary to protect social values like health and (food) safety.<sup>40</sup> The Article is further substantiated in the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (hereinafter SPS Agreement),<sup>41</sup> which applies to all sanitary and phytosanitary measures (hereinafter SPS measures) that may affect international trade. These

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<sup>35</sup> ALBERTO ALEMANNI, *TRADE IN FOOD: REGULATORY AND JUDICIAL APPROACHES IN THE EC AND THE WTO* 227 (2007).

<sup>36</sup> Huei-chih Niu, *A Comparative Perspective on the International Health Regulations and the World Trade Organization's Agreement on the Application of Sanitary and Phytosanitary Measures*, 1 *ASIAN J. WTO & INT'L HEALTH L. & POL'Y* 513, 515 (2006).

<sup>37</sup> See Kai Purnhagen & Bernd van der Meulen, *Chapter 194: Consumer Protection Legislation*, in *ENCYCLOPEDIA OF FOOD AND HEALTH* 296, 296–300 (Benjamin Caballero et al., eds., 2016).

<sup>38</sup> Alessandra Arcuri, *The Coproduction of the Global Regulatory Regime for Food Safety Standards and the Limits of a Technocratic Ethos*, (Robert Schuman Ctr. for Advanced Studies, Paper No. 97, 2014), available at <http://ssrn.com/abstract=2500705>; David E. Winickoff & Douglas M. Bushey, *Science and Power in Global Food Regulation: The Rise of the Codex Alimentarius*, 35 *SCI., TECH. & HUM. VALUES* 356 (2010).

<sup>39</sup> General Agreement on Tariffs and Trade, Art. XX(b), Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194.

<sup>40</sup> Purnhagen & Meulen, *supra* note 37.

<sup>41</sup> Agreement on the Application of Sanitary and Phytosanitary Measures, Jan. 1, 1995, 1867 U.N.T.S. 493 [hereinafter SPS Agreement].

regulations have, however, no intention to provide for food safety, or to regulate behind the borders. In addition, the Agreement on Technical Barriers to Trade (hereinafter TBT Agreement)<sup>42</sup> aims to ensure that technical regulations and standards are non-discriminatory and do not create unnecessary obstacles to trade. In line with the trade rationale of WTO law, these agreements aim to harmonize market entry measures around the world in order to create market access at an equal level for all Member Countries. The level of harmonization is then determined outside of WTO law by international standards, guidelines, or recommendations, where they exist.<sup>43</sup> If measures of a Member Country conform to these international measures, then they are presumed to be consistent with the SPS and/or TBT Agreement and GATT 1994.<sup>44</sup> WTO law does not completely turn a blind eye to food safety concerns, however: Members may apply SPS measures, which result in a higher level of protection than would be achieved by measures based on international standards if there is a scientific justification to apply a stricter standard,<sup>45</sup> and if it is not inconsistent with the other requirements of the Agreement, such as non-discrimination and not a disguised restriction on international trade.<sup>46</sup>

#### B. CODEX ALIMENTARIUS

The SPS Agreement states that if food safety measures are based on standards, guidelines, or recommendations established by the Codex Alimentarius Commission, then they are presumed to be consistent with WTO law (Annex A, 3(a)), thereby making the Codex Alimentarius Commission a de facto global regulator.<sup>47</sup> The Codex Alimentarius Commission was established in 1963 with the purpose of minimizing international trade barriers through the promotion of harmonized food standards.<sup>48</sup> For decades its standards were entirely voluntary: they

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<sup>42</sup> Agreement on Technical Barriers to Trade, Jan. 1, 1995, 1868 U.N.T.S. 120 [hereinafter TBT Agreement].

<sup>43</sup> SPS Agreement, *supra* note 41, at Art. 3.1; TBT Agreement, *supra* note 42, at Art. 2.4.

<sup>44</sup> See SPS Agreement, *supra* note 41, at Art. 3.1.

<sup>45</sup> SPS Agreement, *supra* note 41, at Art. 3.3.

<sup>46</sup> SPS Agreement, *supra* note 41, at Art. 2; see also DOWNES, *supra* note 20, at 91–126.

<sup>47</sup> Arcuri, *supra* note 38; Winickoff & Bushey, *supra* note 38.

<sup>48</sup> *Codex Timeline from 1945 to the Present*, CODEX ALIMENTARIUS COMM'N, <http://www.codexalimentarius.org/about-codex/codex-timeline/en/> (last updated Feb. 1, 2016).

served (and still do serve) as model regulations for national legislation<sup>49</sup> and private standard setters.<sup>50</sup> As Codex standards were perceived as being of only “marginal importance,”<sup>51</sup> countries were entirely free to ignore them.

When the SPS Agreement came into force in 1995, the Codex Alimentarius Commission was named as an organization that could establish international standards for food safety.<sup>52</sup> It has since gained considerable legal authority.<sup>53</sup> Codex standards are now used by WTO dispute panels for resolving trade issues and for determining whether national food safety regulations are non-tariff barriers or not.<sup>54</sup> “With the adoption of the SPS Agreement, states have delegated significant authority to supranational bodies to set and enforce food safety rules and standards and have agreed to be bound by the decisions of bodies that adjudicate disputes that arise over these rules.”<sup>55</sup> WTO members can either base their measures on Codex Alimentarius law or deviate from these standards and provide scientific evidence demonstrating that stricter standards are necessary for life or health purposes.<sup>56</sup> In practice, however, conforming with Codex provisions can create a presumption of compliance with international law and therefore lower the threat of potential costs of litigation before the WTO.<sup>57</sup> The WTO legal system

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<sup>49</sup> See, e.g., JESSICA VAPNEK & MELVIN SPREIJ, PERSPECTIVES AND GUIDELINES ON FOOD LEGISLATION, WITH A NEW MODEL FOOD LAW, FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS ROME 31–34 (2005), available at [http://www.fao.org/fileadmin/user\\_upload/legal/docs/ls87-e.pdf](http://www.fao.org/fileadmin/user_upload/legal/docs/ls87-e.pdf) (explaining the intertwinedness of national actors and Codex).

<sup>50</sup> Kai Purnhagen, *Mapping Private Regulation – Classification, Market Access and Market Closure Policy, and Law’s Response*, 49 J. WORLD TRADE 309 (2015).

<sup>51</sup> DOWNES, *supra* note 20, at 205.

<sup>52</sup> VAPNEK & SPREIJ, *supra* note 49, at 38.

<sup>53</sup> See Michael A. Livermore, *Authority and Legitimacy in Global Governance: Deliberation, Institutional Differentiation, and the Codex Alimentarius*, 81 N.Y.U. L. REV. 766, 774 (2006); see also Ravi Afonso Pereira, *Why Would International Administrative Activity Be Any Less Legitimate? – A Study of the Codex Alimentarius Commission*, 9 GER. L.J. 1693, 1703 (2008); Winickoff & Bushey, *supra* note 38; Grace Skogstad, *The WTO and Food Safety Regulatory Policy Innovation in the European Union*, 39 J. COMMON MKT. STUD. 485, 495–96 (2001); *About Codex*, CODEX ALIMENTARIUS COMM’N <http://www.codexalimentarius.org/about-codex/en/> (last updated Feb. 1, 2016).

<sup>54</sup> VAPNEK & SPREIJ, *supra* note 49.

<sup>55</sup> Grace Skogstad, *Internationalization, Democracy, and Food Safety Measures: The (II) Legitimacy of Consumer Preferences?*, 7 GLOBAL GOVERNANCE 293, 293 (2001).

<sup>56</sup> David G. Victor, *WTO Efforts to Manage Differences in National Sanitary and Phytosanitary Policies*, in DYNAMICS OF REGULATORY CHANGE: HOW GLOBALIZATION AFFECTS NATIONAL REGULATORY POLICIES 227, 230–31 (David Vogel & Robert A. Kagan, eds, 2004).

<sup>57</sup> DOWNES, *supra* note 20, at 205–06.

hence provides a huge incentive for businesses to comply with Codex standards instead of relying on their own risk assessment. This is a strong example of how WTO law increasingly moves from a system to enable trade to one that also regulates standards behind the borders of its members.

### III. DOES THE WTO LAW FACILITATE OR CONSTRAIN THE BRUSSELS EFFECT?

This section will discuss whether the new WTO trade regime in foods described in brief above relates to the Brussels Effect. We will first illustrate how this regime incentivizes dominant regulators to push for the recognition of their domestic food standards at WTO level. We will conclude, however, that this incentive does not facilitate the Brussels Effect (A.). Subsequently we analyze Bradford's claim that the WTO regime may limit the Brussels Effect for the area of food trade.<sup>58</sup> We will show with the example of three cases settled at WTO level (genetically modified organisms ("GMOs"),<sup>59</sup> hormones,<sup>60</sup> and dolphin/tuna<sup>61</sup>) that the WTO food regulation regime has very limited potential to constrain the Brussels Effect (B.). As a result, the evidence from the case studies presented here does not support Bradford's proposition.

#### A. DOES THE WTO FOOD LAW REGIME FACILITATE THE BRUSSELS EFFECT?

Codex standards have factually become a binding authority in the WTO, widening the capacity of WTO law to a system which regulates behind the borders. What looks like a victory for transnational standardization has a considerable impact on the balance of power between WTO Members. As Member Countries are more concerned about what they include as a Codex standard, national legislators now

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<sup>58</sup> Bradford, *supra* note 24, at 54. Bradford acknowledges later in her paper that this claim at the beginning might not be as watertight as her initial claim makes us believe and that there is a potential that the WTO might even facilitate the Brussels Effect. See Bradford, *supra* note 24, at 56.

<sup>59</sup> See Panel Report, *European Communities — Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R (Sept. 29, 2006) [hereinafter Panel Report, *Biotech Product*].

<sup>60</sup> See Panel Report, *European Communities — Measures Concerning Meat and Meat Products (Hormones), Complaint by the United States*, WT/DS26/R/USA (Aug. 18, 1997).

<sup>61</sup> See Panel Report, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/R (Sept. 15, 2011).

“have an incentive to bring Codex standards more closely in line with domestic policy goals since the negative domestic consequences of adopting an international standard are least when the divergence between the international standard and the optimal domestic regulation are smallest.”<sup>62</sup> Codex standards now “act to restrict and structure the policy choices of states.”<sup>63</sup> It is likely that those trading blocs with bigger negotiation power will dominate negotiations on the transnational setting of standards, conventionally investigated as a north/south conflict.<sup>64</sup> In this sense, the new Codex role in WTO law accelerates the already-existing risk that dominant regulators may push for international treaties that impose their own standards on other countries.<sup>65</sup> “If national administrators are encouraged to believe that their policy options will be unduly constrained by international law, this may change the way they interact with other countries in international bodies, such as Codex Alimentarius, aimed at facilitating and managing the global food trade.”<sup>66</sup> As such bigger trading blocs include the European Union or the United States, the impact of EU and US regulations on the Codex Alimentarius Commission and the WTO also need to be addressed.

As the European Union is largely dependent on imports from WTO member countries for a large number of foodstuffs,<sup>67</sup> the negotiation power of the European Union is likely to be limited in the area of food law in cases where alternative markets exist. In addition, the European Union might be a strong trading block in the WTO but not the only one. According to achieve voting power, the European Union would at least have to have China and the United States in the boat when enforcing their standards in WTO disputes. Given the fact that quarrels between the United States and the European Union over food standards are often subject to WTO disputes,<sup>68</sup> it is not likely that such consensus will be easy to reach. What is thus likely is that the WTO will see (or already sees) a north/south conflict, where standards set by northern

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<sup>62</sup> Livermore, *supra* note 53, at 786.

<sup>63</sup> *Id.* at 778.

<sup>64</sup> See Karin Mickelson, *South, North, International Environmental Law, and International Environmental Lawyers*, 11 Y.B. INT'L ENVTL. L. 52, 54 (2000) (noting similar developments in international environmental law).

<sup>65</sup> See Simmons, *supra* note 5, at 50–51.

<sup>66</sup> DOWNES, *supra* note 20, at 2–3.

<sup>67</sup> See *EU-27 – Trade Balance with EXTRA EU-27*, EUROSTAT (Jan. 9, 2013) [http://ec.europa.eu/agriculture/statistics/trade/2012/eur27ag/page\\_147.pdf](http://ec.europa.eu/agriculture/statistics/trade/2012/eur27ag/page_147.pdf).

<sup>68</sup> See POLLACK & SHAFFER, *supra* note 19, at 177–234 (providing an example of the WTO trade dispute with the U.S. over GMO regulation).

countries dominate southern ones.<sup>69</sup> It is therefore unlikely that the trading bloc's increased interest to enforce their standards in WTO disputes will lead to an increase of EU standards, a fact that is important for making our argument in this piece. The fact that Codex provisions have become factually binding law means they are unlikely to increase the Brussels Effect.

## B. DOES THE WTO LEGAL REGIME CONSTRAIN THE BRUSSELS EFFECT?

In this section we elaborate on whether the WTO regime limits the Brussels Effect in the area of food trade, leading to what we call reversed harmonization. Bradford has brought forward the claim that the WTO regime is one of five factors that may put limits on the Brussels Effect.<sup>70</sup> By analyzing dispute settlement reports on 1) GMOs, 2) hormones, and 3) dolphin/tuna at the WTO level we will show that, at least within the limits of the cases analyzed, the contrary is true: The WTO food regulation regime has very limited potential to hinder the Brussels Effect.

### 1. GMOs

Bradford presented GMOs as one of five cases demonstrating the Brussels Effect.<sup>71</sup> In 2003, the United States,<sup>72</sup> Canada,<sup>73</sup> and Argentina<sup>74</sup> challenged the EU's de facto moratorium and its member state bans on GMOs.<sup>75</sup> The moratorium and bans restricted imports of agricultural and food products from the complainant countries, among others. A panel was established later that year.

The panel ruled in favor of the United States, Canada, and Argentina, but mainly for procedural reasons. The panel avoided making a decision of whether or not GMOs pose a risk to health and whether the European Union had based its decision on a risk assessment.<sup>76</sup> It instead

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<sup>69</sup> See Mickelson, *supra* note 64, at 54.

<sup>70</sup> Anu Bradford, *The Brussels Effect*, 107 NW. U. L. REV. 1, 54 (2012).

<sup>71</sup> *Id.* at 32–35.

<sup>72</sup> Panel Report, *Biotech Product*, *supra* note 59, at 6.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> See POLLACK & SHAFFER, *supra* note 19, at 177–234.

<sup>76</sup> There is no Codex Alimentarius standard on GMOs. It states on the website:

targeted the European Union's moratorium, which had been in place from June 1999 to August 2003, and found that the European Union's excessive delays in the GMO approval process were in violation of Article 8 (regarding approval procedures) and Annex C(1)(a) (which states that approval procedures should be undertaken and completed without "undue delay") of the SPS Agreement. The European Union announced its intention to implement the recommendations and rulings of the panel.<sup>77</sup>

The European Union in the case of GMOs shows most elements of a Brussels Effect. The European Union has built the regulatory capacity that allows it to influence regulation of GMOs. GMOs also work very well within the framework of the Brussels Effect: they are considered to be an inelastic product, because regulation cannot be avoided by moving the regulatory targets (i.e. consumers) to another jurisdiction. GMOs are non-divisible products in practice.<sup>78</sup> Although it is possible to grow GM and conventional crops on different fields, it is very difficult to prevent transfer of seeds and crops by the wind or other means. Additionally, crops would have to be segregated through all processing and distribution steps, including "separate equipment, storage areas, and shipping containers, and establish trait identification systems that allow for the tracking of produce from the farm to the consumer."<sup>79</sup> To try to segregate GM and conventional crops is at best very expensive, and very difficult if not impossible to execute. GM crops are therefore nondivisible in practice.

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Codex is strongly committed to promote safe foods. Amongst safe foods, Codex does not give any preference to certain kinds of foods over others. Such choice belongs to consumers. Codex has adopted principles and guidelines to assess food safety of foods derived from recombinant-DNA plants, animals and microorganisms. If a government chooses to build a regulatory mechanism to address the food safety of so-called GM foods, then they can use Codex text as a basis for it. This being said, each government is free to adopt its own policy as to the use of GM organisms in the agriculture and other sectors. At the moment, there are no internationally-agreed recommendations on the food labelling of GM foods. Governments are therefore applying their own regulations."

*FAQs – Questions About Specific Codex Work*, CODEX ALIMENTARIUS, <http://www.codexalimentarius.org/faqs/specific-codex-work/en/> (last updated Feb. 1, 2016).

<sup>77</sup> *Dispute Settlement: Dispute DS291, European Communities – Measures Affecting the Approval and Marketing of Biotech Products, Implementation of Adopted Reports*, WORLD TRADE ORG., [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds291\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds291_e.htm) (last visited Feb. 29, 2016) (citing the WTO Dispute Settlement Body meeting of Dec. 19, 2006).

<sup>78</sup> Anu Bradford, *The Brussels Effect*, 107 NW. U. L. REV. 1, 33–34 (2012).

<sup>79</sup> *Id.* at 34.

It is less clear, however, if the European Union has the required market power. The European Union is the United States' fifth largest export market, making up only 8 percent of US agricultural exports.<sup>80</sup> Therefore, it appears that farmers and producers should be able to forgo the EU market and sell their products elsewhere. The European Union has, however, already influenced many other countries, such as Australia, Brazil, China, and Japan, who are posing restrictions on GMO products and are requiring labeling for GMOs and their products.<sup>81</sup> The United States is therefore more limited in diverting its agricultural and food products elsewhere.<sup>82</sup> Nevertheless, the United States has displayed limited evidence of "trading up."<sup>83</sup>

It can be argued that the United States also displayed elements of a Brussels Effect in the case of GMOs. Both the United States and the European Union pushed their views on other countries and tried to convince them to support or be against GMOs, respectively. For example, the United States Department of Agriculture ("USDA") stated that one of its goals was "to facilitate the marketing of bioengineered products in both the domestic and international markets."<sup>84</sup> As a second example, in 2001, the Chinese government communicated to the United States that it would accept US safety certifications for GMO crops.<sup>85</sup> Several months later the Chinese officials reversed their decision, and the United States stated that that reversal was "unacceptable."<sup>86</sup> The Chinese government responded by issuing temporary safety certificates allowing GMO imports, and within two years permanent regulations were enacted. One Non-Governmental Organization ("NGO") official complained, "the U.S. is trying to impose its standards on the rest of the world."<sup>87</sup> Many developing countries, including India, Brazil, South Korea, Egypt,

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<sup>80</sup> *Id.* at 33.

<sup>81</sup> *Id.*; see also DYNAMICS, *supra* note 3, at 89.

<sup>82</sup> Bradford, *supra* note 78, at 33.

<sup>83</sup> *Id.*; *Statement of Policy—Foods Derived from New Plant Varieties*, U.S. FOOD & DRUG ADMIN. (May 29, 1992), <http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/Biotechnology/ucm096095.htm>.

<sup>84</sup> DANIEL W. DREZNER, *ALL POLITICS IS GLOBAL* 166 n.91 (2007) (citing *Agricultural Biotechnology—Frequently Asked Questions*, U.S. DEP'T OF AGRIC. (last modified Feb. 8, 2016), <http://www.usda.gov/wps/portal/usda/usdahome?navid=AGRICULTURE&contentid=BiotechnologyFAQs.xml>).

<sup>85</sup> DREZNER, *supra* note 84, at 166.

<sup>86</sup> *Id.* at 166–67.

<sup>87</sup> *Id.* at 167.

Kenya, South Africa, and Thailand have become more accepting of GMO products, by approving crops or having pilot programs.<sup>88</sup>

The European Union has also shown similar examples of trying to impose its standards of anti-GMO regulations on other countries. Thanks to the European Union's six-year moratorium on GMO imports, many trade-dependent countries had to adapt to EU law. But not only the moratorium tied other countries to EU GMO regulation: The *Bablok* case requires all honey imported into the European Union that contains GMOs to undergo an authorization procedure for GMO products.<sup>89</sup> As virtually any honey has the potential to contain GMOs,<sup>90</sup> and importers may not always file for such an authorization procedure, planters of GMO crops near bee hives all around the world run into liability risks if a bee collects GMO pollen which contaminates the honey.<sup>91</sup> In this way, EU GMO regulation has the potential to regulate farming around the globe with very strict standards.<sup>92</sup> Zambia's president said in 2003, for example, that the nation would "rather starve" than accept GM corn (food aid from the United States).<sup>93</sup> There was concern that the corn seed could contaminate the entire seed supply in the country and then Zambia wouldn't be able to export products to the European Union. Similar events happened in other African nations.<sup>94</sup> Even in the United States, farmers who were concerned about exporting products to the European Union caused a new Monsanto product, GM wheat, to not gain market access.<sup>95</sup> This "Roundup-Ready" wheat was submitted for approval in the United States and Canada, but concern from farmers and several industry associations that it could hurt their chances of export led to the withdrawal of the product from the approval procedures.<sup>96</sup> It is currently not on the market.

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<sup>88</sup> *Id.* at 167–68.

<sup>89</sup> Case C-442/09, *Bablok v Bayern*, 2011 E.C.R. I-7419.

<sup>90</sup> See Matthias Lamping, *Shackles for Bees? The ECJ's Judgment on GMO-Contaminated Honey*, 3 EUR. J. RISK REG. 123, 127–28 (2012).

<sup>91</sup> See Kai Purnhagen & Justus Wesseler, *The 'Honey' Judgment Bablok and Others vs. Freistaat Bayern of the Court of Justice of the European Union: Implications for Coexistence*, in THE COEXISTENCE OF GENETICALLY MODIFIED, ORGANIC AND CONVENTIONAL FOODS: GOVERNMENT POLICIES AND MARKET PRACTICES. (Nick Kalaitzandonakes, et al. eds., 2016).

<sup>92</sup> *Id.* at 8.

<sup>93</sup> DREZNER, *supra* note 84, at 169.

<sup>94</sup> *Id.*

<sup>95</sup> POLLACK & SHAFFER, *supra* note 19, at 263.

<sup>96</sup> *Id.*

The industry associations “called for a reliable system for segregating and tracing crops before GM wheat was introduced.”<sup>97</sup>

The United States, Canada, and Argentina won the trade dispute against the European Union.<sup>98</sup> This positive ruling has done little to change the regulation of GMOs in the European Union. The United States had requested that the European Union speed up the approval process for new and pending GMO authorizations, address the European Union’s “zero-tolerance” policy, and challenge EU member state bans on GMOs.<sup>99</sup> The EU Commission approved fifteen varieties of GMOs for sale in the European Union from 2004 to 2008, despite member state opposition, and some EU countries, such as Spain, began growing GM crops.<sup>100</sup> Despite being approved for use in food and feed, they are mostly used only for feed.<sup>101</sup> The European Food Safety Authority (“EFSA”) also published positive assessments for other GM varieties.<sup>102</sup>

“Legal victories, of course, do not mean commercial ones.”<sup>103</sup> Even though the Commission approved the production and sale of various GM crops and products, they are still not accepted by consumers and therefore only minimally present on the market.<sup>104</sup> Additionally, EU member states are still allowed to reject the Commission’s approvals and implement national bans against GMOs.<sup>105</sup>

Due to pressure from the member states, the Commission has asked EFSA to “address more explicitly potential long-term effects and bio-diversity issues in their risk assessments for the placing on the

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<sup>97</sup> *Id.*

<sup>98</sup> Panel Report, *European Communities — Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R (Sept. 29, 2006), at 8.6 -8.64.

<sup>99</sup> POLLACK & SHAFFER, *supra* note 19, at 225.

<sup>100</sup> Council Regulation 1829/2003, *Genetically Modified Food and Feed*, 2003 O.J. (L 268) 18 (EC); Council Regulation 1830/2003 of the European Parliament and of the Council of 22 September 2003 concerning the Traceability and Labeling of Genetically Modified Organisms and the Traceability of Feed and Feed Products Produced from Genetically Modified Organisms and Amendment Directive 2001/18/IEC, 2001 O.J. (L 268) 18.10.2003.

<sup>101</sup> *Eight Things You Should Know About GMOs*, EUROPEAN PARLIAMENT (Oct. 27, 2015), <http://www.europarl.europa.eu/news/en/news-room/20151013STO97392/Eight-things-you-should-know-about-GMOs>.

<sup>102</sup> *Panel on Genetically Modified Organisms*, EUROPEAN FOOD SAFETY AUTH. (EFSA) (last visited Feb. 11, 2016), <http://www.efsa.europa.eu/en/panels/gmo>.

<sup>103</sup> POLLACK & SHAFFER, *supra* note 19, at 229.

<sup>104</sup> *See Eight Things You Should Know About GMOs*, *supra* note 101.

<sup>105</sup> POLLACK & SHAFFER, *supra* note 19, at 229.

market of GMOs.”<sup>106</sup> This causes difficulties for two reasons. First, it is difficult to assess long-term effects of GMOs, and there is much uncertainty surrounding the issue. This would make the European Union’s arguments stronger and more defensible when challenged by arguments under the SPS Agreement. Second, business would be discouraged from seeking GMO approval in the European Union due to the high costs associated with additional tests for long-term and biodiversity effects.<sup>107</sup> This causes more extensive delays in GMO approvals or no further EU approvals on the market.

Transatlantic trade in GMOs thus remains very limited, and the European Union is making transatlantic trade in GMOs even more limited. Additionally, “if the EU combines a zero-tolerance threshold with a refusal to assess without delay and approve varieties for consumption that EFSA has found to be safe, then the EU will not only affect international trade but also seriously constrain other countries’ abilities to make choices over this technology.”<sup>108</sup> The WTO regime, it seems, had minimal impact on the Brussels Effect.

## 2. *Hormones*

In 1996, the United States and Canada requested a panel with the European Union over its prohibition on the use of six specific hormones for growth promotion purposes in meat and meat products.<sup>109</sup> The panel found that the ban on imports of meat and meat products from cattle treated with hormones was inconsistent with Articles 3.1 (measures must be based on international standards, where they exist), 5.1 (measures should be based on scientific risk assessment), and 5.5 (measures must avoid distinctions in levels of protection) of the SPS Agreement.<sup>110</sup> The EU refused to comply with the WTO dispute panel’s ruling on beef hormones, and the United States and Canada responded with retaliatory tariffs against various European products.<sup>111</sup>

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<sup>106</sup> *Report from the Commission to the Council and the European Parliament on the Implementation of Regulation (EC) No 1829/2003 of the European Parliament and of the Council on Genetically Modified Food and Feed*, at 11, COM (2006) 626 final (Sept. 25, 2006).

<sup>107</sup> POLLACK & SHAFFER, *supra* note 19, at 229.

<sup>108</sup> *Id.* at 231.

<sup>109</sup> See Panel Report, *European Communities — Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/R/USA (Aug. 18, 1997).

<sup>110</sup> *Id.* at ¶¶ 8.159, 8.206.

<sup>111</sup> *Id.* at ¶¶ 2.35.

In 2003, the European Union stated that it had carried out a risk assessment and the findings indicated that the hormones posed a risk for consumers. It therefore claimed that there was no longer a reason for the retaliatory tariffs since it was now in compliance with its WTO obligations. The United States argued that the new EU directive<sup>112</sup> did not have any scientific basis since several studies had found no health risk due to consumption of meat treated with hormones.<sup>113</sup> In fact, the Codex Alimentarius Commission had set standards for five of the six hormones that the European Union had banned.<sup>114</sup>

The European Union in this case shows most elements of a Brussels Effect. The European Union has built the regulatory capacity that allows it to influence regulation of hormones. By banning the use of hormones in beef, it clearly applies strict standards. Beef is considered to be an inelastic product, because regulation cannot be avoided by moving the regulatory targets (i.e., consumers) to another jurisdiction. The European Union's market power is not entirely clear. US exports of beef to the European Union represent only a small percentage of total US beef exports.<sup>115</sup> "U.S. meat exports to the EC represented less than 5 percent of total American meat exports, which were worth approximately 1.3 billion dollars in 1988, 90 percent of which went to Japan. (Total annual American beef production amounts to 20 billion dollars.)."<sup>116</sup> However, over 90 percent of EU beef imports were from Brazil, Argentina, and Uruguay, among other nations.<sup>117</sup>

In addition to the United States and Canada, hormones are approved for use in Australia, New Zealand, South Africa, and Japan, so it seems that there are possibilities to divert trade elsewhere. On the other

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<sup>112</sup> See Directive 2003/74/EC, of the European Parliament and of the Council of 22 September 2003 Amending Council Directive 96/22/EC Concerning the Prohibition on the Use in Stockfarming of Certain Substances Having a Hormonal or Thyrostatic Action and of Beta-agonists, 2003 O.J. (L 262/17).

<sup>113</sup> RENÉE JOHNSON, CONG. RESEARCH SERV., R40449, THE U.S.-EU BEEF HORMONE DISPUTE 9 (2015), available at <http://fas.org/sgp/crs/row/R40449.pdf>.

<sup>114</sup> According to Article 3.1 of the SPS Agreement, WTO members shall base their measures on international standards unless there is a scientific justification to do otherwise. Codex did not set any limits for the three natural hormones, and set limits for residues of two of the three synthetic hormones. SPS Agreement, *supra* note 41, at Art. 3.1.

<sup>115</sup> *Total U.S. Beef Exports 2004-2013 (Including Variety Meat)*, U.S. MEAT EXPORT FED'N, <https://www.usmef.org/downloads/Beef-2004-to-2013.pdf>; *Leading Markets for U.S. Beef Exports. (January-December 2013)*, U.S. MEAT EXPORT FED'N, <https://www.usmef.org/downloads/statistics/2013-12-beef-exports.pdf>.

<sup>116</sup> DYNAMICS, *supra* note 3, at 169.

<sup>117</sup> JOHNSON, *supra* note 113, at 18.

hand, other major markets, such as Russia and China, have also banned hormones in beef.<sup>118</sup> Beef is somewhat a divisible product—it is possible to treat some cattle with and others without hormones. The products then have to remain segregated throughout processing and distribution. It is also sometimes possible to perform tests to detect the presence of added hormones.<sup>119</sup> Slaughterhouses often found it uneconomical to process both hormone-treated and untreated beef, however, since their production runs were quite small and it was both expensive and difficult to separate the products.<sup>120</sup>

It has been argued that it was the pressure from citizens that convinced the European Union to implement its ban on hormones. As a result of the EU ban, however, other countries such as Argentina and Uruguay have taken action to prevent the use of hormones in cattle.<sup>121</sup> “The need to meet the demands of these markets has motivated Argentinian and Uruguayan beef producers to adopt production practices designed to allay international concerns about animal disease and residual growth hormones in beef.”<sup>122</sup> Uruguay banned growth hormones in 1978 and Argentina in 2004.<sup>123</sup>

The United States has also started a program called the USDA’s Non-Hormone Treated Cattle (“NHTC”) program in which farms, ranches, feedlots, and cattle-management groups can apply to be audited and therefore approved as sources of non-hormone beef which can be exported to the European Union.<sup>124</sup> The program’s purpose is explicitly to allow exports of non-hormone treated beef to the European Union.<sup>125</sup>

The European Union refused to comply with the WTO dispute panel’s ruling of beef hormones. The United States and Canada responded with retaliatory tariffs against various European products. The

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<sup>118</sup> *Australia Government Issues Advisory on China’s Hormone Ban*, U.S. MEAT EXPORT FED’N, <https://www.usmef.org/australian-government-issues-advisory-on-chinas-hormone-ban/>.

<sup>119</sup> Unless it is a hormone which is also produced naturally by the animal. JOHNSON, *supra* note 113, at 118.

<sup>120</sup> DYNAMICS, *supra* note 3, at 161.

<sup>121</sup> Michael J. McConnell & Kenneth Matthews, *Global Market Opportunities Drive Beef Production Decisions in Argentina and Uruguay*, U.S. DEP’T OF AGRIC. (USDA) (Apr. 01, 2008), available at <http://www.ers.usda.gov/amber-waves/2008-april/global-market-opportunities-drive-beef-production-decisions-in-argentina-and-uruguay.aspx#.VuSB3eIrLIV>.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> RENÉE JOHNSON, CONG. RESEARCH SERV., R40449, *The U.S.-EU Beef Hormone Dispute 19-20* (2015), available at <https://www.fas.org/sgp/crs/row/R40449.pdf>.

<sup>125</sup> Non-Hormone Treated Cattle Program, U.S. DEP’T OF AGRIC. (USDA), <https://www.ams.usda.gov/services/imports-exports/nhtc> (last visited Apr. 10, 2016).

European Union was well within its rights as a WTO member to not comply and accept the retaliatory tariffs. This highlights a weakness of the WTO and the dispute settlement system.<sup>126</sup> It seems that the WTO in fact had little impact on the Brussels Effect.

### 3. *Dolphin-Tuna*

In the Eastern Tropical Pacific Ocean (“ETP”) schools of yellowfin tuna typically swim underneath schools of dolphin. When tuna is fished with purse seine nets, dolphins may be trapped in the nets as well, and they often die unless they are released. The US Marine Mammal Protection Act (“MMPA”)<sup>127</sup> established requirements for tuna fishing. The MMPA prohibited the “taking” (hunting, killing, capture) of marine mammals, including dolphins.<sup>128</sup> Fishermen in many places around the world used purse seine nets as a means to catch tuna.<sup>129</sup> The United States placed restrictions on the number of dolphins that could be killed in the catching of tuna.<sup>130</sup> Due to the high incidence of dolphin deaths, the United States banned many imports of tuna from these places.<sup>131</sup> The United States also placed a ban on imports from “intermediate” nations who processed tuna from fishing nations with a high dolphin mortality rate.<sup>132</sup>

Mexico requested a panel in 1991 against the US ban.<sup>133</sup> The panel found that the United States could apply regulations on only the quality or content of imported tuna, but not on the way it was produced (product vs. process issue).<sup>134</sup> The focus of the panel was on whether the measure was consistent with the GATT, and not whether the policy was

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<sup>126</sup> William A. Kerr & Jill E. Hobbs, *Consumers, Cows and Carousels: Why the Dispute Over Beef Hormones is Far More Important than its Commercial Value in THE WTO AND THE REGULATION OF INTERNATIONAL TRADE: RECENT TRADE DISPUTES BETWEEN THE EUROPEAN UNION AND THE UNITED STATES* 192 (Nicholas Perdakis & Robert Read eds., 2005).

<sup>127</sup> Marine Mammal Protection Act, 16 U.S.C. § 1373 (1972) [hereinafter MMPA].

<sup>128</sup> *Id.* at § 103.

<sup>129</sup> *Fishing Techniques: Tuna Purse Seining*, FOOD AND AGRIC. ORG. OF THE UNITED NATIONS: FISHERIES AND AQUACULTURE DEP'T, <http://www.fao.org/fishery/fishtech/40/en> (last visited Mar. 18, 2016).

<sup>130</sup> MMPA, *supra* note 127, at § 302.

<sup>131</sup> *Id.* at § 101(a)(2).

<sup>132</sup> *Id.* at § 101(a)(2)(D).

<sup>133</sup> *Mexico etc Versus US: 'Tuna-Dolphin'*, WORLD TRADE ORG., [https://www.wto.org/english/tratop\\_e/envir\\_e/edis04\\_e.htm](https://www.wto.org/english/tratop_e/envir_e/edis04_e.htm) (last visited Feb. 11, 2016).

<sup>134</sup> DYNAMICS, *supra* note 3, at 118.

environmentally correct.<sup>135</sup> The ban was considered an extra-territorial application of the MMPA.<sup>136</sup> All GATT members, including the thirty-five member GATT Council, supported the panel's decision and not the United States.<sup>137</sup>

In 2008, Mexico challenged the United States' use of a "dolphin-safe" label on tuna products.<sup>138</sup> Mexico argued that the measure was discriminatory and unnecessary under the GATT and TBT Agreement.<sup>139</sup> The WTO ruled that the US labeling program was indeed discriminatory because tuna caught in the ETP had to meet additional criteria to qualify for the "dolphin-safe" label.<sup>140</sup> The Panel recommended that the Dispute Settlement Body request the United States bring its measures into conformity with the TBT Agreement.<sup>141</sup>

This case meets most of the requirements for a Brussels Effect. The United States has the regulatory capacity to enforce its rules in the United States and abroad. The requirement to use proper nets for the safety of dolphins is a strict standard. Since this is a standard that regulates a consumer market, it is also inelastic and cannot be moved to another jurisdiction. At the time of the original dispute, the United States was the biggest market for canned tuna products.<sup>142</sup> Since then, the

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<sup>135</sup> See *Mexico etc Versus US: 'Tuna-Dolphin'*, *supra* note 133.

<sup>136</sup> See *id.*

<sup>137</sup> DYNAMICS, *supra* note 3, at 113.

<sup>138</sup> Panel Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/R (Sept. 15, 2011). The dispute concerned the following measures: (1) 16 U.S.C. § 1385 ("Dolphin Protection Consumer Information Act"), (2) 50 C.F.R. § 216.91 ("Dolphin-safe labeling standards") and § 216.92 ("Dolphin-safe requirements for tuna harvested in the ETP [Eastern Tropical Pacific Ocean] by large purse seine vessels") and (3) the ruling in *Earth Island Institute v. Hogarth*, 494 F.3d 757 (9th Cir. 2007). "The law required companies selling "dolphin-safe" tuna to be able to demonstrate that their product was caught using methods that limited dolphin deaths. It also required all other tuna to be labeled "caught with technologies that are known to kill dolphins." DYNAMICS, *supra* note 3, at 106.

<sup>139</sup> *Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, *supra* note 138, at 16.

<sup>140</sup> *Tuna Tracking and Verification Program, NOAA Fisheries*, NAT'L OCEANIC AND ATMOSPHERIC ADMIN., <http://www.nmfs.noaa.gov/pr/dolphinsafe/tvp.htm> (last visited Apr. 10, 2016).

<sup>141</sup> *Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, *supra* note 138, at 293.

<sup>142</sup> *Analysis of the Tuna Industry*, FOOD AND AGRIC. ORG., Figure 13B (Mar. 18, 2004), <http://www.fao.org/docrep/008/y5984e/y5984e0n.htm>. See also A.D. Owen & D.A. Troedson, *The European Market of Tuna*, in *THE ECONOMICS OF PAPUA NEW GUINEA'S TUNA FISHERIES* 251, 252 (Harry F. Campbell & Anthony D. Owen eds., 1994), available at <http://aci.ar.gov.au/files/node/2148/MN028%20part%202022.pdf>.

demand in Western Europe has surpassed that in the United States.<sup>143</sup> Canned tuna, however, is a divisible product. The United States has established requirements for storing dolphin-safe and non-dolphin-safe tuna on board fishing vessels and for processing operations. Tracking and tracing along with auditing of fishing vessels is done.<sup>144</sup>

Both the de facto and the de jure Brussels Effect can be seen in different ways in this case. Due to the threat of important restrictions and American consumer preferences, several nations adjusted their fishing procedures to meet the requirements of the MMPA. The Democratic Republic of the Congo, New Zealand, Senegal, and Spain, among others, pressed their fishing boats to comply with MMPA requirements for dolphin release procedures.<sup>145</sup> Bermuda, Canada, South Korea, and Nicaragua stopped using purse seine nets in the ETP.<sup>146</sup>

Even more importantly, Mexico changed its original stance on the issue. President Carlos Salinas de Gortari professed a “deep love of dolphins” and announced a plan to protect them.<sup>147</sup> Mexico also never submitted the panel report to the GATT Council for formal option, despite pressure from other nations.<sup>148</sup> Lastly, in May 1992, the United States, Mexico, and eight other nations, which together made up 99 percent of tuna fishing in the ETP, developed and signed an international

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<sup>143</sup> In 2008: Western Europe (76 million cases consumed), US (48 million cases consumed). *Global Tuna Market & Industry Dynamics*, PACIFIC ISLANDS FORUM FISHERIES AGENCY, 241 (June 2011), <https://www.ffa.int/node/567>.

<sup>144</sup> Enhanced Document Requirements To Support Use of the Dolphin Safe Label on Tuna Products, 78 Fed. Reg. 40997 (July 13, 2013) (to be codified as 50 C.F.R. 216.993) (“The DPCIA itself expressly mandates the use of written statements by captains to attest that either no purse seine net was intentionally deployed on or used to encircle dolphins during the trip in which the tuna were caught, and (in some cases) to also attest that no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna were caught. The tracking and verification system does not rely solely on certifications by fishing captains. As described elsewhere in this rule, certifications by an onboard observer or by an authorized representative of the nation participating in a qualified and authorized observer program are also used to help verify the dolphin-safe status of the harvested tuna for some fishing trips. The tracking and verification system also includes recordkeeping and inspections at processing facilities and certifications by importers and exporters.”); (“Regulations at 50 CFR 216.93(c)(4) and (d)(4) already require vessels to segregate non-dolphin-tuna and dolphin-safe tuna. Additionally, 50 CFR 216.93(f)(3) gives the Administrator, Southwest Region, timely access to all pertinent records and facilities to allow for audits and spot-checks on caught, landed, stored, and processed tuna. NMFS believes the current system is already working well and the increased authorities and requirements of this rule will fortify the verification program. In addition, the new observer requirements will afford NMFS an additional tool in verifying the dolphin-safe status of the harvested tuna.”).

<sup>145</sup> DYNAMICS, *supra* note 3, at 107.

<sup>146</sup> *Id.*

<sup>147</sup> *Divine Porpoises*, ECONOMIST, Oct. 5, 1991, at 31.

<sup>148</sup> DYNAMICS, *supra* note 3, at 116.

accord to protect dolphins, which included phasing out the use of purse seine nets.<sup>149</sup>

It is unlikely that the Mexican President Salinas had a sudden change of heart and interest in saving dolphins. It is instead likely that that this turnaround was brought about by political and economic pressure from Mexican fishermen and/or producers as potential voters, as it became more profitable to use other, dolphin-safe fishing methods.

The European Union also had a dramatic change in its views on fishing with purse seine nets. It had been an intermediate processor of tuna from countries such as Mexico, and its products were therefore banned in the United States. The European Union had fought this within the WTO dispute settlement system on two occasions.<sup>150</sup> In 1992, however, the European Parliament turned around and called for a ban on imports of tuna that were caught by methods that resulted in dolphin mortality.<sup>151</sup> This measure was not adopted by the European Council of Ministers, for fear that action would be taken against the European Union within the WTO.<sup>152</sup> The European Union did forbid ships from its own member states from using purse seine nets.<sup>153</sup> The European Union also uses a dolphin friendly label under Council Regulation (EC) No. 882/2003.<sup>154</sup>

#### IV. ANALYSIS AND CONCLUSION

The hypothesis was that the Brussels Effect is greater where WTO law and law of the dominant regulator diverge. Therefore, in cases where there is no relevant WTO law, the Brussels Effect is more likely to prevail. In all the cases above, the WTO poses limits, to varying extents, on the ability of a dominant regulator to impose its standards on other countries. The hypothesis proved true when we look in the black-letter law of the respective WTO rulings, but the actual effects in action were typically something different.

In the GMO case, the WTO ruled against the European Union for its de facto restrictions on GMO approvals. The effect of the ruling

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<sup>149</sup> *Id.*

<sup>150</sup> See *Mexico etc Versus US: 'Tuna-Dolphin'*, *supra* note 133.

<sup>151</sup> DYNAMICS, *supra* note 3, at 116.

<sup>152</sup> *Id.* at 116-117.

<sup>153</sup> *Id.*

<sup>154</sup> Council Regulation (EC) No. 882/2003 of 19 May 2003 Establishing a Tuna Tracking and Verification System, ¶ 25.3 2003 O.J. (L 127/1).

was limited in practice, however, since GMO products are currently minimally found on the EU market. Pollack and Shaffer described this as “reform without change.”<sup>155</sup> The European Union did significantly modify its legislation on GMOs since the WTO ruling.<sup>156</sup> It ended its moratorium on new GMO approvals and even approved seventeen GM crops between May 2004 and November 2008.<sup>157</sup> Despite being approved for food and feed, however, they are mostly only used for feed. There is still largely an absence of GMO products on the EU food market. The European Union changed its legislation so that it is justifiable under the WTO dispute settlement system, but otherwise it has not had much of an effect. In the hormones case, the WTO also ruled against the European Union’s ban on hormones in meat. Instead of changing its laws and allowing the import of hormone-treated beef, the European Union preferred to accept retaliatory tariffs imposed by the United States.<sup>158</sup> This case expressed a limit of WTO power. The WTO solution of retaliatory tariffs was an insufficient incentive for the European Union to change its behavior. The WTO ruled against the United States in the dolphin/tuna case for the extra-territorial application of US laws and for discriminating between WTO members. The United States changed its laws so that they were no longer discriminatory, but still exerted its influence by requiring that exporting countries meet its standards.<sup>159</sup>

The WTO has settled many disputes and solved many trade issues, but nevertheless, its impact is limited in situations where “social and regulatory approaches to technology and its risks are deeply engrained.”<sup>160</sup> In such situations regulatory convergence is “significantly constrained”<sup>161</sup> and “not even globalization’s powerful dynamics can push states into cooperating.”<sup>162</sup>

The Brussels Effect was identified in all cases: both a de facto and a de jure Brussels Effect occurred. When compared with the five essential factors for a Brussels Effect as discussed by Bradford,<sup>163</sup>

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<sup>155</sup> POLLACK & SHAFFER, *supra* note 19, at 260.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> Kerr & Hobbs, *supra* note 126, at 192; *European Communities — Measures Concerning Meat and Meat Products*, *supra* note 111.

<sup>159</sup> DYNAMICS, *supra* note 3, at 107.

<sup>160</sup> POLLACK & SHAFFER, *supra* note 19, at 23.

<sup>161</sup> *Id.*

<sup>162</sup> DREZNER, *supra* note 84, at 5.

<sup>163</sup> See Bradford, *supra* note 78, at 10–19.

however, the dominant regulator often did not meet all of the criteria. Frequently the products were divisible. Even though not all the boxes were checked, the effect was still present. This study found, therefore, that not all five criteria are necessary to see the effect.

Additionally, Bradford stated that international institutions such as the WTO may place limits on the Brussels Effect, which may lead to what we call reversed harmonization. This paper found that while the WTO “black-letter law” does place limits on the effect, WTO law *in action* does not. We hence could not find any evidence that the WTO leads to reversed harmonization or would facilitate horizontalization.

In all three cases above, it has been demonstrated that the WTO has attempted to constrain the Brussels Effect, and it ruled in such a way in the DSU system. The WTO ruling had little effect on the way the dominant regulator acted, however, and also on the end result. Essentially, the WTO tried to constrain the Brussels Effect, but had little success in doing so. It is important to keep in mind that this effect is based on only three cases in the WTO dispute settlement system. The results cannot necessarily be extrapolated to all instances of the Brussels Effect in the SPS area, or even beyond.