

12-1-2016

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Recommended Citation

Magnuson, William (2016) "Unilateral Corporate Regulation," *Chicago Journal of International Law*: Vol. 17: No. 2, Article 5.
Available at: <https://chicagounbound.uchicago.edu/cjil/vol17/iss2/5>

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Unilateral Corporate Regulation

William Magnuson*

Abstract

Corporations today wield unprecedented power in politics and society, and they have a tremendous effect on human welfare around the globe. At the same time, they are increasingly difficult to regulate. Corporations are savvy and mobile, and they can relocate to avoid burdensome domestic regulation with surprising ease. The agility of corporations creates a dilemma for government decisionmakers seeking to balance the need to attract the wealth that corporations create with the desire to pursue other policy priorities. One approach that governments have used to address this dilemma is international cooperation, and a growing number of scholars have argued that formal or informal agreements are necessary to solve many of the regulatory problems associated with corporate agility. This emphasis on multilateral solutions, however, obscures the extent to which countries, and in particular large economic powers, can and do unilaterally impose their domestic regulations on international firms. This Article argues that unilateral corporate regulation can solve, or at least mitigate, many of the global problems that government decisionmakers face. At the same time, a state's assertion of unilateral regulatory authority in any particular issue area is costly and may reduce the effectiveness of regulation in other areas. More broadly, it is such a powerful tool that governments must proceed cautiously before utilizing it. The Article concludes by providing a framework for designing and implementing unilateral corporate regulation in such a way that improves policy outcomes and reduces unintended consequences.

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I. INTRODUCTION

The modern multinational corporation is larger and more powerful than ever.¹ Corporations control enormous amounts of cash and other assets, and they use these assets to pursue business goals in a diverse array of sectors and industries. They also have an increasing ability to relocate to new markets and new jurisdictions in order to pursue greater profits. In many ways, this is undoubtedly a good thing: it allows them to respond to shifting consumer demand, provide products at lower prices, and generate wealth.

At the same time, the agility of corporations in restructuring and relocating presents a problem for governments seeking to regulate corporate behavior. Governments may desire to constrain the actions of corporations in a number of ways, including taxing their profits, monitoring their employment policies, and preventing predatory behavior, but any regulation that imposes costs on corporations may cause those corporations to move offshore to jurisdictions that do not impose those costs.² For a current example of the amount of time and energy that companies devote to avoiding regulatory costs, one need only consider the explosion in recent years of so-called inversion transactions, in which U.S. companies buy foreign companies and reincorporate abroad, in some cases reducing their tax rates from 35% to 12% or even lower.³ If corporations can plausibly threaten to relocate in the face of heavier regulatory burdens,

¹ See DAVID J. SIEGEL, ORGANIZING FOR SOCIAL PARTNERSHIP 51 (2010) (arguing that multinational corporations rival governments in their reach and power); Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 461–62 (2001) (arguing that modern corporations “may have as much or more power over individuals as governments”).

² See Joseph Nye, *Two Views of World Order*, in GLOBAL COMPANIES: THE POLITICAL ECONOMY OF WORLD BUSINESS 165–66 (G. Ball ed., 1975) (arguing that multinational corporations will use their mobility to shape or avoid domestic regulations); William J. Carney, *The Political Economy of Competition for Corporate Charters*, 26 J. LEGAL STUD. 303 (1997) (discussing the mobility of firms in choosing their state of incorporation and the effect on regulatory competition).

³ See Andrew Ross Sorkin, *A Tidal Wave of Corporate Migrants Seeking (Tax) Shelter*, N.Y. TIMES, Jan. 25, 2016, http://www.nytimes.com/2016/01/26/business/dealbook/a-tidal-wave-of-corporate-migrants-seeking-tax-shelter.html?_r=0; Shayndi Raice, *How Tax Inversions Became the Hottest Trend in M&A*, WALL ST. J., Aug. 5, 2014, <http://www.wsj.com/articles/how-tax-inversions-became-the-hottest-trend-in-m-a-1407240175>; Robert Cyran, *Tax Inversions Spinning Out of Control*, N.Y. TIMES, July 30, 2014, <https://perma.cc/X7JX-E8SH>. The U.S. government has reacted to the uptick in inversion transactions by condemning companies that engage in inversions as “deserters” and issuing new rules significantly restricting how and when inversions may be used. See Leslie Picker & Michael J. de la Merced, *U.S. Moves to Thwart Use of Foreign Inversions as Tax Dodge*, N.Y. TIMES, Apr. 4, 2016, <http://www.nytimes.com/2016/04/05/business/dealbook/us-acts-to-end-use-of-foreign-acquisitions-to-dodge-taxes.html>; John D. McKinnon & Damian Paletta, *Obama Administration Issues New Rules to Combat Tax Inversions*, WALL ST. J., Sept. 22, 2014, <http://www.wsj.com/articles/treasury-to-unveil-measures-to-combat-tax-inversions-1411421056>.

governments may be hesitant to enact otherwise beneficial corporate regulations.⁴ Regulatory competition between governments might lead to destructive policies, as governments attempt to attract the wealth that corporations bring to their country.⁵

It is a common refrain that these kinds of global problems require global solutions. In this view, the increasing mobility of corporations poses regulatory dilemmas for national governments that can only be resolved through international cooperation.⁶ If countries agreed to maintain certain tax rates,

⁴ Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225, 226 (1985) (finding that “firms that change their state of incorporation are sensitive to the legal regime under which they operate, and differences in the laws play a significant role in their decision”); Victor Fleischer, *Regulatory Arbitrage*, 89 TEX. L. REV. 227, 274–80 (2010) (analyzing the effects of regulatory arbitrage on regulatory competition between states).

⁵ As Margaret Cole, the former Director of Enforcement at the U.K.’s Financial Services Authority, said in 2006, “London’s philosophy of ‘light touch’ regulation has helped it in becoming the world’s leading center for mobile capital.” Margaret Cole, *The U.K. FSA: Nobody Does It Better*, 12 FORDHAM J. CORP. & FIN. L. 259, 266–67 (2007). There is a lively debate among scholars about whether regulatory competition between countries leads to better or worse regulation—the familiar “race to the bottom”-“race to the top” debate. See David Vogel & Robert A. Kagan, *Introduction*, in DYNAMICS OF REGULATORY CHANGE: HOW GLOBALIZATION AFFECTS NATIONAL REGULATORY POLICIES 4–5 (David Vogel & Robert A. Kagan eds. 2004) (discussing the literature on the “race to the bottom” phenomenon and its opponents); Ratner, *supra* note 1, at 462 (“[T]he desire of many less developed states to welcome foreign investment means that some governments have neither the interest nor the resources to monitor corporate behavior, either with respect to the [multinational’s] employees or with respect to the broader community.”); William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663, 665–66 (1974). *But see* Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251 (1977) (arguing that states with more efficient laws will attract corporations); Frank H. Easterbrook & Daniel R. Fischel, *Voting in Corporate Law*, 26 J.L. & ECON. 395, 398 (1983) (describing the “power of competition among jurisdictions to produce legal doctrines beneficial to shareholders”); Erin A. O’Hara & Larry E. Ribstein, *From Politics to Efficiency in Choice of Law*, 67 U. CHI. L. REV. 1151, 1163 (2000) (“Individuals and firms who have an incentive to minimize their transaction and information costs and an ability to choose legal regimes that accomplish this goal over time may cause the law to move toward efficiency, if only because inefficient regimes end up governing fewer and fewer people and transactions.”). This article will not settle that debate. Instead, it assumes that states in some circumstances perceive an interest in regulating companies but are constrained by the need to attract corporations to their jurisdictions.

⁶ See Joseph E. Stiglitz, *Regulating Multinational Corporations: Towards Principles of Cross-Border Legal Frameworks in a Globalized World Balancing Rights with Responsibilities*, 23 AM. U. INT’L L. REV. 451, 547–48 (2008) (arguing that international agreements are required to improve the regulation of multinational corporations globally); Andrew T. Guzman, *Choice of Law: New Foundations*, 90 GEO. L.J. 883, 932 (2002) (arguing that the regulation of multinational corporations to enhance global efficiency “requires international cooperation”); RAYMOND VERNON, SOVEREIGNTY AT BAY: THE MULTINATIONAL SPREAD OF U.S. ENTERPRISES 271 (1971) (arguing that the clash between multinational corporations and governments can only be resolved through international harmonization); Lucian Arye Bebchuk & Andrew T. Guzman, *An Economic Analysis of Transnational Bankruptcies*, 42 J.L. & ECON. 775, 780 (1999) (arguing that the inefficiency of territorial bankruptcy laws “highlights the need for a reciprocity requirement or, ideally, international treaties on the

employee protections or environmental regulations, then corporations could not relocate to other jurisdictions in order to avoid those regulations.⁷ Undesirable regulatory competition could be halted. But international cooperation suffers from a series of well-known flaws: it is difficult to reach consensus,⁸ international enforcement mechanisms are weak,⁹ and agreements often have little effect on the behavior of the relevant actors.¹⁰ For all these reasons, multilateralism is not always a good option.

The reliance on multilateralism as a solution to global problems obscures the extent to which states can and do act unilaterally to resolve, or at least mitigate, the problems associated with corporate agility. In many cases, unilateral regulation

subject”); NEIL HOOD & STEPHEN YOUNG, *THE ECONOMICS OF MULTINATIONAL ENTERPRISE* 238–39 (1979) (arguing that the most efficient solution to the control of multinational enterprises is multilateral regulation). For works in the transnational governmental networks theory, see Anne-Marie Slaughter, *The Real New World Order*, 76 *FOREIGN AFF.* 183, 184–85 (1997) (“[T]oday transgovernmentalism is rapidly becoming the most widespread and effective mode of international governance.”); Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 *VA. J. INT’L L.* 1 (2002); David Zaring, *International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations*, 33 *TEX. INT’L L.J.* 281 (1998); Anu Piilola, *Assessing Theories of Global Governance: A Case Study of International Antitrust Regulation*, 39 *STAN. J. INT’L L.* 207 (2003). But see Reuven S. Avi-Yonah, *National Regulation of Multinational Enterprises: An Essay on Comity, Extraterritoriality, and Harmonization*, 42 *COLUM. J. TRANSNAT’L L.* 5, 18 (2003) (setting forth areas in which harmonization is unnecessary to regulate corporations); Detlev F. Vagts, *The Governance of the Multinational*, 23 *WIS. INT’L L.J.* 525, 537 (2005) (“A worldwide government organization to control multinationals is more or less unthinkable.”); Pierre-Hugues Verdier, *Transnational Regulatory Networks and Their Limits*, 34 *YALE J. INT’L L.* 113, 115 (2009) (“[Transgovernmental networks] face several fundamental limitations . . . and, as a result, are unlikely to meet the high expectations raised by their advocates.”).

⁷ See Philipp Genschel & Thomas Plumper, *Regulatory Competition and International Cooperation*, 4 *J. EUR. PUB. POL.* 626, 628–31 (1997) (arguing that international cooperation may contribute to upward pressure on the level of corporate regulation).

⁸ Robert H. Mnookin, *Strategic Barriers to Dispute Resolution: A Comparison of Bilateral and Multilateral Negotiations*, 8 *HARV. NEGOT. L. REV.* 1, 15 (2003); William Magnuson, *The Domestic Politics of International Extradition*, 52 *VA. J. INT’L L.* 839, 873 (2012).

⁹ See Anu Bradford & Omri Ben-Shahar, *Efficient Enforcement in International Law*, 12 *CHI. J. INT’L L.* 375, 380–93 (2012) (explaining the fundamental difficulties of enforcing international law); ROBERT E. SCOTT & PAUL B. STEPHAN, *THE LIMITS OF LEVIATHAN: CONTRACT THEORY AND THE ENFORCEMENT OF INTERNATIONAL LAW* 110–46 (2006) (describing when states do and do not enforce international law). But see Oona Hathaway & Scott J. Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 *YALE L.J.* 252, 307 (2011) (arguing that “outcasting” may serve as a useful tool to enforce international law).

¹⁰ See Oona Hathaway, *Do Human Rights Treaties Make A Difference?*, 111 *YALE L.J.* 1935, 1940 (2002) (finding that the ratification of human rights treaties is “not infrequently associated with worse human rights ratings than otherwise expected”); Beth A. Simmons, *Compliance with International Agreements*, 1 *ANN. REV. POL. SCI.* 75, 89 (1998); Alan O. Sykes, *The (Limited) Role of Regulatory Harmonization in International Goods and Services Markets*, 2 *J. INT’L ECON. L.* 49 (1999); DANIEL W. DREZNER, *ALL POLITICS IS GLOBAL: EXPLAINING INTERNATIONAL REGULATORY REGIMES* 12–13 (2007).

by one country can provide robust constraints on corporate behavior abroad. Indeed, a number of states now implement and enforce unilateral regulations of international business, and these efforts appear to be increasing.¹¹ By asserting novel theories of jurisdiction and tweaking the scope and target of their laws, states have attempted to reach corporate activity even when the activity occurs outside of their borders.¹² Unilateral regulation holds the alluring promise of offering many of the benefits of multilateral agreement without the costs and limitations normally associated with international cooperation.¹³ If one state acting alone can impose sufficient costs on foreign corporations to induce them to change their behavior, this approach may be a viable alternative to international negotiation.¹⁴

This Article argues that many global problems in corporate law can be resolved through unilateral corporate regulation. Section II describes the increasing mobility of companies and the concomitant regulatory dilemma that governments face. This Section also outlines the maladaptiveness of international institutions to solving these problems. Section III explores the phenomenon of unilateral corporate regulation as an alternative solution to the harms associated with regulatory arbitrage by corporations. This Section explains the conditions under which unilateral regulation can be effective and provides a summary of the kinds of unilateral regulation countries can adopt.

Finally, Section IV describes the limitations inherent in unilateral regulation, including the potential for harmful regulation to spread across jurisdictions, and provides some guidelines for a smarter deployment of this policy tool. The implementation of unilateral corporate regulation is costly and may reduce the effectiveness of the state's regulations in other issue areas. In addition, unilateral

¹¹ See William Magnuson, *International Corporate Bribery and Unilateral Enforcement*, 51 COLUM. J. TRANSNAT'L L. 360, 399–407 (2013) (describing the increasing use of anti-bribery laws as a unilateral enforcement mechanism).

¹² See Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199, 1208 (1998); Magnuson, *supra* note 11.

¹³ See Gabriella Blum, *Bilateralism, Multilateralism, and the Architecture of International Law*, 49 HARV. INT'L L.J. 323, 349–54 (2008) (discussing the limitations of multilateralism); Bruno Simma, *Consent: Strains in the Treaty System*, in THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW 485, 485–94 (R. St. J. Macdonald & Douglas M. Johnston eds., 1983) (same); Robert O. Keohane, *Reciprocity in International Relations*, in INTERNATIONAL INSTITUTIONS AND STATE POWER: ESSAYS IN INTERNATIONAL RELATIONS THEORY 132 (Robert O. Keohane ed., 1986), first published in 40 INT'L ORG. 1, 1–27 (1986).

¹⁴ See Anu Bradford, *The Brussels Effect*, 107 NW. U. L. REV. 1, 3 (2012) (arguing that the E.U. has an unrivaled “unilateral power to regulate”); 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, 55–80 (2000) (describing how E.U. privacy law has constrained U.S. domestic privacy policies and practices).

corporate regulation may carry with it a greater risk of over-regulation, harmful regulation, and policy conflict between states.¹⁵ For these reasons, unilateral regulation must be deployed sparingly and with caution. This Section argues that unilateral corporate regulation is most likely to be beneficial and effective when (1) there is a global consensus on the nature of the problem, (2) the corporate behavior at issue imposes strong externalities on other countries, and (3) the regulating state adopts the most targeted form of unilateral regulation possible.

II. AGILE CORPORATIONS AND THE FAILURE OF MULTILATERALISM

Corporations today are more mobile than ever—through strategic reincorporation, creation of foreign subsidiaries, or other means, corporations can take advantage of shifting business conditions worldwide.¹⁶ Corporate mobility can be quite beneficial for consumers, as it may allow corporations to respond better and more quickly to shifting consumer demand. Indeed, it can rightfully be described as one of the primary benefits of a modern, globalized world. At the same time, corporate mobility creates a problem for governments attempting to regulate the behavior of corporations inside and outside their borders. If corporations can easily shift operations abroad, they also can evade regulations that would otherwise constrain their behavior.¹⁷ Corporate mobility may in turn lead to regulatory competition between countries, with governments vying to adopt the most business-friendly rules in order to attract corporations and the benefits associated with them.¹⁸ Of course, the ultimate effects of regulatory

¹⁵ These concerns are connected with the broader concept of “international comity,” a basic premise of foreign relations law. See William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 2071, 2120–24 (2015).

¹⁶ See William W. Bratton, Joseph A. McCahery & Erik P.M. Vermeulen, *How Does Corporate Mobility Affect Lawmaking? A Comparative Analysis*, 57 AM. J. COMP. L. 347, 361 (2009) (examining the impact of increased corporate mobility in the E.U.); John Armour, *Who Should Make Corporate Law? EC Legislation Versus Regulatory Competition*, 58 CURRENT LEGAL PROBS. 369 (2005); Jens C. Dammann, *Freedom of Choice in European Corporate Law*, 29 YALE J. INT'L L. 477 (2004); Martin Gelter, *The Structure of Regulatory Competition in European Corporate Law*, 5 J. CORP. L. STUD. 247 (2005).

¹⁷ There is strong evidence that corporations choose their country of incorporation based on regulatory costs, including minimum capital requirements and setup costs. See Marco Becht, Colin Mayer & Hannes F. Wagner, *Where Do Firms Incorporate? Deregulation and the Cost of Entry*, 14 J. CORP. FIN. 241, 242 (2008); Marco Becht, Colin Mayer & Hannes F. Wagner, *Corporate Mobility and the Costs of Regulation* 7 (Eur. Corp. Gov. Inst.-Working Paper Series in Law, Working Paper No. 70/2006, May 2006). Another important area of regulatory arbitrage involves the rights of creditors. See Luca Enriques & Martin Gelter, *How the Old World Encountered the New One: Regulatory Competition and Cooperation in European Corporate and Bankruptcy Law*, 81 TUL. L. REV. 577, 612–13 (2007).

¹⁸ Within the U.S., Delaware has been one of the primary beneficiaries of regulatory competition between states. Nearly one half of all public companies in the U.S. are incorporated in Delaware, and, in 2011, the state collected \$860 million in taxes and fees from its absentee corporate residents,

competition on welfare, and whether it leads to better or worse law, are a matter of some controversy.¹⁹ However, where countries perceive that regulatory arbitrage by corporations contributes to a “race to the bottom,” or, more simply, conflicts with their primary policy goals, governments may wish to prevent corporations from engaging in regulatory arbitrage.

A number of scholars have argued that formal or informal multilateral cooperation presents the only real hope for a solution to the problems of corporate mobility and regulatory arbitrage.²⁰ By harmonizing and unifying regulations across jurisdictions, countries can simultaneously reduce the ability of corporations to relocate in order to avoid regulation and lessen concerns about harmful regulatory competition between states.

Multilateralism, however, suffers from a number of important limitations. First, the negotiation of multilateral agreements is often a long and difficult process, involving a large number of parties and disparate national interests.²¹ Second, monitoring of treaty parties’ compliance with their obligations is complicated, as incentives to monitor are often low for any individual member and the aggregate costs of monitoring can be high.²² Finally, the enforcement of multilateral agreements is often weak or nonexistent due to a number of factors, including the costs of enforcement and the lack of an authoritative supranational institution.²³ Due to these structural weaknesses, multilateralism has failed to solve the dangers of corporate agility and has led to a search for alternative solutions.

accounting for a quarter of its entire budget. See Leslie Wayne, *How Delaware Thrives as a Corporate Tax Haven*, N.Y. TIMES, June 30, 2012, at B1, http://www.nytimes.com/2012/07/01/business/how-delaware-thrives-as-a-corporate-tax-haven.html?_r=0.

¹⁹ A number of scholars have argued that regulatory competition between jurisdictions leads to a “race to the top,” and thus causes countries to optimize their laws. See Armour, *supra* note 16, at 377–78; Dammann, *supra* note 16, at 478. Other scholars have argued that regulatory competition produces the opposite effect, a “race to the bottom.” See Ratner, *supra* note 1, at 462. Still others argue that regulatory competition leads to both effects, depending on the particular circumstances. See Zsuzsanna Fluck & Colin Mayer, *Race to the Top or Bottom? Corporate Governance, Freedom of Reincorporation and Competition in Law*, 1 ANNALS FIN. 349, 352 (2005).

²⁰ See generally *supra* note 6. See Stiglitz, *supra* note 6, at 547–48.

²¹ See Mnookin, *supra* note 8, at 14–18 (describing the additional complexities associated with multi-party negotiations); Blum, *supra* note 13, at 351–54 (describing the inefficiencies of multilateral international negotiations).

²² See Kal Raustiala, *Form and Substance in International Agreements*, 99 AM. J. INT’L L. 581, 582 (2005) (arguing that there is often a tradeoff between substantive obligations and the monitoring of those obligations).

²³ See *id.* at 605 (stating that “the international legal system is distinguished by the rarity of courts and the weakness of those that exist”); ROBERT O. KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* 88 (1984) (arguing that, because governments “put a high value on the maintenance of their own autonomy, it is usually impossible to establish international institutions that exercise authority over states”).

A. Agile Corporations

Corporations today have an unprecedented ability to adapt to changing business conditions. Advances in technology,²⁴ the emergence of multiple capital market centers,²⁵ and the flourishing of alternative corporate forms²⁶ have all contributed to this phenomenon, giving corporations tremendous flexibility and mobility in the face of change. Corporate agility, that is, the ability of corporations to reorganize and restructure their operations in reaction to changing business conditions, has thus changed the landscape of international business.²⁷

Corporate agility provides a number of benefits to consumers. Corporations that can react quickly to changes in consumer preferences, share information across borders, and locate and exploit low-cost resources can create better products at lower prices.²⁸ Just as importantly, the relocation of offices and the creation of subsidiaries allow corporations to localize their products, providing goods that satisfy domestic consumer requirements and tastes faster and more efficiently.²⁹ Similarly, alternative corporate forms and structures, such as reincorporations or offshore shell companies, can be used for a number of legitimate transactional purposes, including smoothing the transfer of assets, protecting trade secrets, and avoiding predatory governments.³⁰

²⁴ See Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155, 1159 (2007) (noting the “growth of global communications technologies, the rise of multinational corporate entities with no significant territorial center of gravity, and the mobility of capital and people across borders”).

²⁵ See Comm. on Capital Mkts. Regulation, *The Competitive Position of the U.S. Public Equity Market* 1, 1 (2007), available at <https://perma.cc/BM2P-ELDJ> (arguing that the relative attractiveness of non-U.S. public markets has increased dramatically in recent years).

²⁶ See *They Sell Sea Shells*, ECONOMIST, Apr. 7 2012, at 69, <https://perma.cc/Z7B4-4AHF> (discussing the increased use of shell companies by corporations).

²⁷ This is not to say that relocation is always, or even often, costless. Corporations build factories, buy office buildings, and hire workers in their jurisdictions, and transitioning to new jurisdictions can involve transaction costs. But the point here is a different one: the cost-benefit analysis in today’s world has shifted in favor of mobility.

²⁸ See Martin Christopher, *The Agile Supply Chain: Competing in Volatile Markets*, 29 INDUS. MKTG. MGMT. 37, 38 (2000); ROBERT H. LOWSON, STRATEGIC OPERATIONS MANAGEMENT: THE NEW COMPETITIVE ADVANTAGE (2002); ROBERT H. LOWSON, RUSSELL KING & ALAN HUNTER, QUICK RESPONSE: MANAGING THE SUPPLY CHAIN TO MEET CONSUMER DEMAND (1999).

²⁹ See Susan P. Douglas & Yoram Wind, *The Myth of Globalization*, 22 COLUM. J. WORLD BUS. 19, 27–28 (1987) (arguing that, given growing internationalization, corporations can often receive greater returns through adapting products to the characteristics of individual markets).

³⁰ See Tim Castelli, *Not Guilty By Association: Why the Taint of their Blank Check Predecessors Should Not Stunt the Growth of Modern Special Purpose Acquisition Companies*, 50 B.C. L. REV. 237 (2009).

On the other hand, corporate agility can be used for more nefarious purposes. Companies can use offshore shell corporations to evade taxes.³¹ They can move jurisdictions to avoid being subject to environmental laws, consumer protection laws, or corruption laws.³² Banks can reincorporate to take advantage of laxer capitalization requirements in other countries.³³ Companies, therefore, can and do use an array of sophisticated strategies to avoid regulatory costs. To the extent that countries view these regulations as beneficial, or that the regulated activity causes externalities, countries may desire to reduce or prevent regulatory arbitrage by their corporations.

At the same time, regulatory competition between states may prevent states from adopting their preferred policies.³⁴ In other words, a state might desire to enact regulations to safeguard the financial system or protect the environment,³⁵ but if these regulations would cause corporations to leave the state's jurisdiction, then government officials might be persuaded to water the regulations down, or forego them altogether.³⁶ Similarly, states might adopt progressively lower corporate income taxes in order to attract foreign companies.³⁷ Some scholars argue that this kind of regulatory competition leads to a beneficial "race to the top," because corporations tend to migrate to jurisdictions that offer efficient

³¹ In 2006, a bipartisan U.S. Senate report outlined the scope of the problem, describing the variety of offshore shell companies and other strategies that corporations used to hide assets and transactions from the IRS. *Report on Tax Haven Abuses: The Enablers, the Tools and Secrecy*, released in conjunction with S. Comm. on Homeland Security and Governmental Affairs Permanent Subcomm. on Investigations, August 1, 2006 Hearing (109th Cong.) available at <https://perma.cc/4CCS-F1PF>.

³² See Magnuson, *supra* note 11, at 58–59 (arguing that companies may refrain from entering or affirmatively leave the U.S. market in order to avoid liability for bribery payments).

³³ See Becht, Mayer & Wagner, *supra* note 17, at 241 (finding that minimum capital requirements and setup costs drive a corporation's decision where to incorporate).

³⁴ States derive a number of benefits from incorporations, including greater tax revenue, higher employment, and patronage for other companies. See Lucian Arye Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1435, 1451 (1992).

³⁵ See Kirsten H. Engel, *State Environmental Standard-Setting: Is There a "Race" and Is It "To the Bottom"?*, 48 HASTINGS L.J. 271, 351–52 (1997) (arguing that empirical evidence suggests that regulatory competition between states with respect to environmental law is detrimental to social welfare).

³⁶ See Joel P. Trachtman, *International Regulatory Competition, Externalization, and Jurisdiction*, 34 HARV. INT'L L.J. 47, 77 (1993) (noting the multiple policies that states pursue and the constraints imposed on them by international regulatory competition).

³⁷ See Efraim Chalamish, *The Future of Bilateral Investment Treaties: A De Facto Multilateral Agreement?*, 34 BROOK. J. INT'L L. 303, 319 (2009) ("Such disruption is evident in international taxation, wherein harmful tax competition reduces tax rates and developing countries are forced to sacrifice tax revenues in order to join bilateral double-taxation treaties.").

regulations,³⁸ while others argue that, at least in some areas, regulatory competition causes states to enact suboptimal policies, either because of capture, agency costs, or externalities.³⁹ Regardless of the ultimate effect of regulatory competition on social welfare, regulatory competition is clearly an important factor in state decisionmaking today.

For these reasons, the increasing mobility and sophistication of corporations present governments with a dilemma. They can enact laws to constrain and limit corporate behavior in their borders, but these laws can be evaded if corporations reincorporate offshore or shift operations and assets abroad. To the extent that states also have an interest in maximizing the number of corporations incorporated within their borders,⁴⁰ they may be forced to abandon corporate regulations that impose significant costs on companies. In order to solve this dilemma, states have often turned to international agreements, a solution with an entirely different set of problems.

B. Frail International Institutions

States turn to international cooperation to solve a number of international problems. They use treaties and other forms of international law to reduce barriers to trade, prevent the spread of nuclear weapons, protect human rights, and pursue a variety of other important policy goals. Multilateral agreements can serve a useful purpose in clarifying the expectations of states and encouraging coordination and cooperation between governments.⁴¹ By setting down the obligations of states and

³⁸ See Peter Dodd & Richard Leftwich, *The Market for Corporate Charters: "Unhealthy Competition" Versus Federal Regulation*, 53 J. BUS. 259, 260–61 (1980); Frank H. Easterbrook, *Managers' Discretion and Investors' Welfare: Theories and Evidence*, 9 DEL. J. CORP. L. 540, 549–50 (1984). The ratcheting up of regulation has been described as the "California effect," due to the role that California has played in increasing environmental regulations, including automobile emissions standards, through the U.S. See DAVID VOGEL, *TRADING UP: CONSUMER AND ENVIRONMENTAL REGULATION IN A GLOBAL ECONOMY* 259 (1995).

³⁹ See Lucian Arye Bebchuk & Allen Ferrell, *A New Approach to Takeover Law and Regulatory Competition*, 87 VA. L. REV. 111, 132–35 (2001); Bebchuk, *supra* note 34, at 1458–96.

⁴⁰ For a discussion of whether U.S. states do in fact have such an interest, see Bebchuk, *supra* note 34, at 1451–55.

⁴¹ See Jack L. Goldsmith & Eric A. Posner, *International Agreements: A Rational Choice Approach*, 44 VA. J. INT'L L. 113, 118 (2003) ("The primary purpose of a treaty . . . is to record the actions that count as cooperative moves in an ongoing repeated prisoner's dilemma and similar games involving a mixture of cooperation and conflict, and the actions that will count as coordination in coordination games."); Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113, 1138 (1999).

the consequences of not complying, treaties can have a significant impact on state decisionmaking.⁴²

Perhaps it is unsurprising, then, that many scholars have posited that global corporate law problems require global solutions.⁴³ In areas as diverse as bankruptcy,⁴⁴ securities regulation,⁴⁵ environmental protection,⁴⁶ and antitrust,⁴⁷ scholars have argued that international cooperation, either through formal treaties or through informal government networks, provides the optimal solution to corporate regulatory arbitrage. International cooperation can resolve the regulatory dilemmas presented by corporate agility by enabling national regulators to credibly commit to harmonized regulatory frameworks. As long as a sufficient number of countries agree to abide by these rules, the space for regulatory competition can be restrained.

And in fact, states have long been drawn to multilateralism to solve cooperation problems associated with corporate regulatory arbitrage.⁴⁸ To provide

⁴² See Andrew T. Guzman, *The Design of International Agreements*, 16 EUR. J. INT'L L. 579, 588–89 (2005) (arguing that treaties affect state decisionmaking by increasing the costs of violations); Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 203–05 (1996) (arguing that treaties affect state decisionmaking by causing domestic institutions to internalize treaty norms).

⁴³ See Stiglitz, *supra* note 6, at 547 (arguing that international agreements are required to improve the regulation of multinational corporations globally); Guzman, *supra* note 6, at 932 (arguing that the regulation of multinational corporations often “requires international cooperation”); VERNON, *supra* note 6 (arguing that the clash between multinational corporations and governments can only be resolved through international harmonization); Bebchuk & Guzman, *supra* note 6, at 780 (arguing that the inefficiency of territorial bankruptcy laws “highlights the need for a reciprocity requirement or, ideally, international treaties on the subject”); HOOD & YOUNG, *supra* note 6, at 238–39 (arguing that the most efficient solution to the control of multinational enterprises is multilateral regulation); Vagts, *supra* note 6, at 537 (“[I]ndividual governments are not well-positioned to cope with multinationals because they are too large and diverse to easily yield to regulation, and they are mobile enough to slip away when one country’s prosecutors or tax collectors become too inquisitive.”); Jonathan R. Macey, *Regulatory Globalization as a Response to Regulatory Competition*, 52 EMORY L.J. 1353, 1353 (2003) (“[T]he 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.”).

⁴⁴ See Jay Lawrence Westbrook, *A Global Solution to Multinational Default*, 98 MICH. L. REV. 2276, 2277 (2000) (“Universalism—administration of multinational insolvencies by a leading court applying a single bankruptcy law—is necessarily the correct long-term solution.”).

⁴⁵ See Uri Geiger, *The Case for the Harmonization of Securities Disclosure Rules in the Global Market*, 1997 COLUM. BUS. L. REV. 241, 297–316 (1997) (exploring the “factors that make the harmonization of securities disclosure rules superior to regulatory competition”).

⁴⁶ See Jonathan B. Wiener, *Think Globally, Act Globally: The Limits of Local Climate Policies*, 155 U. PA. L. REV. 1961, 1964 (2007) (arguing that the policy challenge of climate change requires policymakers to “think globally, act globally”).

⁴⁷ See Andrew T. Guzman, *Is International Antitrust Possible?*, 73 N.Y.U. L. REV. 1501 (1998).

⁴⁸ Indeed, there have been sporadic calls for an international treaty on multinational corporations, but they have mostly led to soft-law guidelines on the treatment of multinational enterprises. Prominent

just one example, in 1987, states agreed to adopt uniform risk-based capital requirements on banks under the aegis of the Basel Accord in order to avoid systemic risk to the financial system and to prop up the eroding power of regulators.⁴⁹ The fear was that differences between nations with regard to capital requirements for banks—that is, the amount of capital that banks must have in liquid assets to cover withdrawals and losses—could give banks from some countries an advantage over banks from others.⁵⁰ These differences put pressure on domestic regulators to lower capital requirements in their own countries in order to attract banks, even at the cost of an increasingly unstable financial system.⁵¹ Through the Basel Accord, central bankers agreed to refrain from such regulatory competition and maintain certain minimum capital requirements.⁵² The Basel Accord has led to two follow-up regulatory frameworks, Basel II and Basel III, to update the recommendations and impose more robust regulations on international banks.⁵³

Despite the appeal of multilateralism as a solution to collective action problems in corporate law, international cooperation suffers from well-known limitations. First, it is notoriously difficult to negotiate and agree on the substance

examples include the OECD Guidelines for Multinational Enterprises, the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, and the UN Global Compact. See DETLEV F. VAGTS, WILLIAM S. DODGE & HAROLD HONGJU KOH, *TRANSNATIONAL BUSINESS PROBLEMS* 199 (2008).

⁴⁹ Although the Basel Accords are not formally binding, most member countries implement its recommendations. See Ethan B. Kapstein, *Resolving the Regulator's Dilemma: International Coordination of Banking Regulations*, 43 INT'L ORG. 323, 331–32 (1989); Thomas Oatley & Robert Nabors, *Redistributive Cooperation: Market Failure, Wealth Transfers, and the Basle Accord*, 52 INT'L ORG. 35, 35 (1998).

⁵⁰ See Kapstein, *supra* note 49, at 326–27.

⁵¹ Kapstein has described the strategic situation of governments before the Basel Accords as follows:

The rapid changes in capital markets have left regulators wondering if international banking is a disaster waiting to happen. Domestic regulators feel trapped: if they impose regulatory “costs” on financial firms that other countries fail to impose, they make their institutions less competitive in the world marketplace. The regulations already make it more difficult to attract domestic and foreign investment in financial services; however, the failure to impose prudent regulations could open the door to uncontrollable systemic risks.

Id. at 326–27.

⁵² See Oatley & Nabors, *supra* note 49, at 35.

⁵³ Anne-Marie Slaughter uses the Basel Accords as an example of cooperative government networks, what she calls “the new world order.” ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* 42–43 (2004). The Basel Accords are often viewed as an example of multilateralism that works: an international problem was identified, countries came together to negotiate a treaty, and the treaty changed the behavior of the relevant actors. But as will be discussed below, there are reasons to doubt that multilateralism can always serve as such an effective response to global corporate harms.

of cooperative norms.⁵⁴ By their very nature, multilateral agreements require the consent of multiple parties, each with different interests and different domestic politics.⁵⁵ An increase in the number of participating parties generally decreases the area of potential agreement and thus reduces the likelihood of a negotiated agreement being reached.⁵⁶ At the same time, international negotiations involve two-level games, in which each party is negotiating with the other parties, but also with domestic groups at home.⁵⁷ The U.S., for example, requires treaties to be ratified by the Senate. If domestic groups have different interests than those of the negotiating actor, the probability of bargaining failure increases yet again. Furthermore, the negotiating party itself can change during the duration of negotiations, as countries elect new governments and appoint new foreign officials.⁵⁸

Second, the monitoring of compliance with cooperative arrangements is often problematic.⁵⁹ If states cannot monitor the behavior of other states and identify violations of obligations, the incentives for states to comply with their obligations decreases. But as the number of parties to an agreement increases, a

⁵⁴ See James D. Morrow, *Modeling the Forms of International Cooperation: Distribution Versus Information*, 48 INT'L ORG. 387 (1994) (discussing distributional and informational problems involved in international negotiations); James D. Fearon, *Bargaining, Enforcement, and International Cooperation*, 52 INT'L ORG. 269 (1998) (discussing the interrelated nature of bargaining and enforcement issues in international negotiations); Michael J. Gilligan, *Is There a Broader-Deeper Trade-off in International Negotiations?*, 58 INT'L ORG. 459 (2004) (discussing the process of creating multilateral agreements).

⁵⁵ See James K. Sebenius, *Negotiation Arithmetic: Adding and Subtracting Issues and Parties*, 37 INT'L ORG. 281, 308 (1983) (arguing that the greater the number of parties to negotiations, "the higher the costs, the longer the time, and the greater the informational requirements for a negotiated settlement"); Barbara Koremenos, *Contracting around International Uncertainty*, 99 AM. POL. SCI. REV. 549, 554 (2005) ("[I]ncreasing the number of actors involved is likely to make the negotiation process lengthier given the existence of multiple equilibria.").

⁵⁶ See Mnookin, *supra* note 8, at 15–16 (explaining why a unanimity rule in multilateral negotiations can impede agreements); See Nicole Simonelli, *Bargaining Over International Multilateral Agreements: The Duration of Negotiations*, 37 INT'L INTERACTIONS 147, 165 (2011) (finding that an increase in the number of negotiating states leads to longer negotiations). It should be noted, however, that an increase in the number of negotiating parties may also increase the potential area for linkage, that is, an exchange of benefits in different policy areas.

⁵⁷ See Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L ORG. 427 (1988); I.M. DESTLER, *AMERICAN TRADE POLITICS: SYSTEM UNDER STRESS* 111–14 (4th ed. 2005).

⁵⁸ Rachel Brewster, *Unpacking the State's Reputation*, 50 HARV. INT'L L.J. 231, 250–54 (2009) (discussing the fluctuating interests of government officials with respect to international law).

⁵⁹ See Guzman, *supra* note 42, at 581 (arguing that, in multilateral agreements, "mechanisms for monitoring and review are often weak or non-existent"); Kal Raustiala, *Police Patrols & Fire Alarms in the NAAEC*, 26 LOY. L.A. INT'L & COMP. L. REV. 389, 393 (2004) (discussing the mechanisms that states use to monitor treaty compliance).

state's ability to monitor the behavior of its partners decreases.⁶⁰ While it may be easy for states to determine whether other states are imposing tariffs on imports, it is much harder to determine whether other states are adequately enforcing their corruption laws⁶¹ or reducing greenhouse gas emissions.⁶² Effective monitoring in some areas might require intrusive policing and reporting obligations.⁶³ These sorts of monitoring issues are deeply sensitive in a world of sovereign states.

Finally, multilateral agreements suffer from significant enforcement problems.⁶⁴ There is no supranational institution with general powers to adjudicate disputes between nations and punish transgressors, so states must rely for the most part on self-enforcement mechanisms to ensure compliance with international agreements.⁶⁵ But the imposition of sanctions is often quite costly for the states *imposing* the sanctions, not just for the state that is receiving the sanctions.⁶⁶ The high cost of enforcement disincentivizes states from sanctioning

⁶⁰ See Blum, *supra* note 13, at 371–72 (arguing that bilateral agreements allow more effective monitoring of practices than multilateral agreements). Of course, the incentives of particular domestic actors may differ from the incentives of the state as a whole. See Ronald B. Mitchell, *Sources of Transparency: Information Systems in International Regimes*, 42 INT'L STUD. Q. 109, 120 (1998) (“Even corporate actors may have strong incentives to monitor and report on treaty-relevant behavior. Any company that chooses or is compelled to comply with a particular regulatory regime has strong incentives to monitor to ensure that their competitors are also complying.”).

⁶¹ See Magnuson, *supra* note 11, at 374–75 (discussing the difficulties of monitoring international anti-corruption agreements).

⁶² See Peter J. Wilcoxen & Warwick J. McKibbin, *A Better Way to Slow Global Climate Change* 1–8, Policy Brief #17 (Brookings Institute, 1997), available at <http://perma.cc/D5FV-DTUP> (arguing that an international climate change treaty with tradable emissions permits would be difficult and expensive to monitor).

⁶³ The controversial issue of nuclear monitors in Iran is just one example of how reticent countries are to allow intrusive monitoring of their actions. See Steven Erlanger, *Iran Nears Deal on Inspecting Atomic Site, U.N. Chief Says*, N.Y. TIMES, May 22, 2012 at A1, available at http://www.nytimes.com/2012/05/23/world/middleeast/un-nuclear-monitor-strikes-deal-with-iran-reports-say.html?_r=0.

⁶⁴ See Guzman, *supra* note 42, at 589 (“The standard enforcement tools of international law are . . . a great deal weaker than those present in domestic systems.”).

⁶⁵ See Lori Fisler Damrosch, *Enforcing International Law Through Non-Forcible Measures*, 269 RECUEIL DES COURS 9, 19 (1997) (“A fundamental (and frequent) criticism of international law is the weakness of mechanisms for enforcement.”); Guzman, *supra* note 42, at 580–81 (“States cannot write enforceable promises in the same way as private parties, but one would expect them to use the tools at their disposal to make their agreements more, rather than less, credible. Yet states do not do so.”) Of course, some international institutions, such as the WTO, have tribunals to adjudicate disputes. These tribunals, however, have limited jurisdiction to hear disputes and a limited ability to enforce sanctions on parties.

⁶⁶ Monetary sanctions could in some circumstances fully compensate an injured party, but they are rarely included in multilateral agreements. See Andrew T. Guzman, *The Cost of Credibility: Explaining Resistance to Interstate Dispute Resolution Mechanisms*, 31 J. LEGAL STUD. 303, 304 & n. 3 (2002).

acts of non-compliance. Thus, the sanctions for violating obligations under multilateral treaties are often weak or nonexistent.⁶⁷ Similar critiques can apply to transgovernmental networks.⁶⁸ Without a credible threat of sanctions, multilateral agreements may lack the ability to influence the behavior of states in a strong way.⁶⁹

Thus, multilateral agreements are difficult to negotiate, monitor, and enforce. Furthermore, these difficulties interact with each other, as the enforcement problem may make states less willing to negotiate costly international agreements, and the monitoring problem may reduce states' interest in establishing strong sanctions for non-compliance.⁷⁰ For these reasons, multilateralism is not always an attractive option for states attempting to solve collective action problems.⁷¹

Reputational sanctions, on the other hand, are a net loss for the parties. See Guzman, *supra* note 42, at 595–96.

⁶⁷ For example, the WTO's Dispute Settlement Understanding authorizes states to suspend trade concessions with respect to goods from the non-compliant state, but only to offset ongoing violations, not to compensate for previous violations. See Rachel Brewster, *Shadow Unilateralism: Enforcing International Trade Law at the WTO*, 30 U. PA. J. INT'L L. 1133, 1134 (2009); William J. Davey, *Sanctions in the WTO: Problems and Solutions*, in THE LAW, ECONOMICS AND POLITICS OF RETALIATION IN WTO DISPUTE SETTLEMENT 360, 367 (Chad P. Bown & Joost Pauwelyn eds., 2010). Just as importantly, the suspension of concessions is costly *both* for the sanctioned state and the sanctioning state. See Guzman, *supra* note 42, at 595. For a discussion of costly sanctions in the domestic context, see Steven Shavell, *Criminal Law and the Optimal Use of Nonmonetary Sanctions as a Deterrent*, 85 COLUM. L. REV. 1232 (1985); A. Mitchell Polinsky & Steven Shavell, *The Optimal Use of Fines and Imprisonment*, 24 J. PUB. ECON. 89 (1984); Louis Kaplow, *A Note on the Optimal Use of Nonmonetary Sanctions*, 42 J. PUB. ECON. 245 (1990).

⁶⁸ See Verdier, *supra* note 6, at 115.

⁶⁹ There is a large literature discussing the ways in which international agreements can affect state behavior even in the absence of explicit sanctions. For example, constructivist theories focus on the ways that countries internalize international law in a way that promotes obedience. See Andrew T. F. Lang, *Reconstructing Embedded Liberalism: John Gerard Ruggie and Constructivist Approaches to the Study of the International Trade Regime*, 9 J. INT'L ECON. L. 81 (2006); Koh, *supra* note 42; Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623 (1998); Magnuson, *supra* note 8. But at the very least, the lack of credible sanctions for non-compliance with most international agreements raises problematic questions about the mechanisms for how these instruments influence state behavior.

⁷⁰ See Raustiala, *supra* note 22, at 582 (arguing that “the widespread preference for contracts often unduly weakens the substance and structure of multilateral agreements when states are uncertain about compliance costs” and that “[s]tates often compensate for the risk of their own noncompliance by weakening monitoring or watering down commitments”).

⁷¹ See Anu Bradford, *International Antitrust Negotiations and the False Hope of the WTO*, 48 HARV. INT'L L.J. 383, 397–400 (2007) (attempting to explain why states have failed to reach agreement on an international anti-trust regime).

C. The Failure of Multilateralism: Tax Havens, Money Launderers, and Regulatory Deserts

The structural constraints on multilateralism have tended to undercut efforts to solve the problems of corporate agility. In numerous areas, countries have attempted to reach international agreement on widely applicable corporate regulations in order to bind each other to enforceable standards for corporate behavior. These efforts have often resulted in either stalled negotiations or weak levels of cooperation, and corporate regulatory arbitrage remains an ever-present phenomenon. Although examples abound, this Section will focus on a few particularly enlightening cases.

One important area of potential corporate regulatory competition between countries is taxation.⁷² Countries with low rates of taxation are, perhaps obviously, attractive to corporations because, all else equal, they allow corporations to retain more of their profits. But countries also depend on corporate taxation for government revenue, and if countries compete vigorously on corporate tax rates, they can end up undercutting this important revenue source.⁷³ This competitive dynamic has been exacerbated by the increasing mobility of capital, which allows companies to operate on a global basis from headquarters in the Cayman Islands or the Seychelles, countries recognized as tax havens.⁷⁴ In the 1990s, the

⁷² See OECD, HARMFUL TAX COMPETITION: AN EMERGING GLOBAL ISSUE (1998); Reuven S. Avi-Yonah, *Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State*, 113 HARV. L. REV. 1573 (2000).

⁷³ Tax havens may also create a number of externalities that affect other countries. For example, some scholars have argued that tax havens increase the likelihood of financial crises and may facilitate money laundering. See Luca Errico & Alberto Musalem, *Offshore Banking: An Analysis of Micro- and Macro-Prudential Issues*, IMF Working Paper, 99/5 (1999), available at <https://perma.cc/X5RD-U7M9>; Donato Masciandaro, *Offshore Financial Centres: The Political Economy of Regulation*, 26 EUR. J. L. & ECON. 307, 310 (2008). On the other hand, some scholars have argued that tax havens may be beneficial, by allowing corporations to move to jurisdictions that have the optimal balance of tax and government services. See J.C. SHARMAN, HAVENS IN A STORM: THE STRUGGLE FOR GLOBAL TAX REGULATION 24 (2006).

⁷⁴ See OECD, *supra* note 72, at 13 (“The decision to have a high rate of tax and a high level of government spending or low taxes and limited public outlays, the mix of direct and indirect taxes, and the use of tax incentives, were all matters which [historically] were decided primarily on the basis of domestic concerns and had principally domestic effects.”). The OECD has identified four factors for determining whether a country is a tax haven:

The necessary starting point to identify a tax haven is to ask (a) whether a jurisdiction imposes no or only nominal taxes . . . and offers itself, or is perceived to offer itself, as a place to be used by non-residents to escape tax in their country of residence. Other key factors which can confirm the existence of a tax haven . . . are: (b) laws or administrative practices which prevent the effective exchange of relevant information with other governments on taxpayers benefiting from the low or no tax jurisdiction; (c) lack of transparency and (d) the absence of a requirement that the activity be substantial, since it would suggest that a jurisdiction may be attempting to attract investment or

Organization for Economic Cooperation and Development (OECD) began to spearhead efforts to harmonize international tax laws and prevent harmful tax competition.⁷⁵ However, despite strong support for a multilateral agreement by many countries, the efforts to conclude a binding multilateral tax treaty were stymied by the complexities of multilateral negotiations.⁷⁶ The OECD ended up publishing non-binding recommendations on tax cooperation that states could, but need not, adopt. In addition, the OECD began to compile and publicize a list of jurisdictions considered to be tax havens.⁷⁷ Frustrated by the lack of progress in international negotiations, most countries, including the U.S., now focus their efforts on concluding bilateral tax treaties with other jurisdictions.⁷⁸ Government revenues lost to tax havens continue to be enormous, with some estimates as high as \$255 billion per year.⁷⁹

Another related area of corporate law that has been undercut by the failure to reach international consensus is the prevention of money laundering.⁸⁰ Money laundering refers to any of a variety of tactics that entities use to disguise the

transactions that are purely tax driven (transactions may be booked there without the requirement of adding value so that there is little real activity, *i.e.* these jurisdictions are essentially “booking centres”).

OECD, *supra* note 72, at 22. *See also* Dhammika Dharmapala & James R. Hines, Jr., *Which Countries Become Tax Havens?*, 7 (Nat'l Bureau of Econ. Research, Working Paper No. 12802, 2009), available at <https://perma.cc/89V6-5L5Y> (discussing the reasons why countries become tax havens and noting that countries that are tax havens are more likely to be affluent than countries that are not tax havens).

⁷⁵ *See* OECD, *supra* note 72, at 7–12.

⁷⁶ Perhaps the primary difficulty in achieving consensus was that “tax haven” jurisdictions saw little benefit from adopting tax reforms. As one Caribbean banking official stated, “It’s hard to believe that a report that calls for your extermination is a reasonable proposition.” *See* SHARMAN, *supra* note 73, at 121 (quoting Interview with Anonymous Caribbean Official, in Commonwealth, Sydney, Austl. (Oct. 30, 2002)). *See also* Diane M. Ring, *Prospects for a Multilateral Tax Treaty*, 26 BROOK. J. INT’L L. 1699 (2001); Victor Thuronyi, *International Tax Cooperation and a Multilateral Treaty*, 26 BROOK. J. INT’L L. 1640 (2001).

⁷⁷ *See* OECD, *supra* note 72, at 43–44, 52–53.

⁷⁸ The success of bilateral treaties has been mixed. *See* Charles H. Gustafson, *The Role of International Law and Practice in Addressing International Tax Issues in the Global Era*, 56 VILL. L. REV. 475, 480–92 (2011) (discussing the shift to bilateralism in tax cooperation).

⁷⁹ RONEN PALAN, RICHARD MURPHY, & CHRISTIAN CHAVAGNEUX, TAX HAVENS: HOW GLOBALIZATION REALLY WORKS 63 (2010). As much as 16% of the world’s financial assets may be hidden in offshore accounts. *See* Adam Davidson, *My Big Fat Belizean, Singaporean Bank Account*, N.Y. TIMES, July 24, 2012, at MM14, available at <http://www.nytimes.com/2012/07/29/magazine/my-big-fat-belizean-singaporean-bank-account.html>.

⁸⁰ It should be noted that some scholars have argued that tax evasion and money laundering are complements. *See* Beth A. Simmons, *The International Politics of Harmonization: The Case of Capital Market Regulation*, 55 INT’L ORG. 589, 606 (2001).

(usually illegal) source of income.⁸¹ For example, corporations attempt to hide profits from prohibited transactions with sanctioned states, such as Iraq or Libya.⁸² Even more worrisome, terrorist organizations use money laundering to fund their operations.⁸³ Because money laundering allows entities to evade government regulations, countries expend enormous resources in attempting to prevent it.⁸⁴ With the rise of international banking, however, the ease of money laundering has increased exponentially in recent decades.

Countries have long attempted to increase international cooperation in preventing money laundering, and these efforts have met with varying degrees of success. The Financial Action Task Force (FATF) was created in 1989 by the G-7 to investigate international money laundering and provide recommendations for improvement.⁸⁵ FATF also publishes a list of non-cooperative jurisdictions, much as the OECD publishes a list of tax havens.⁸⁶ But again, efforts to reach a binding multilateral agreement on financial transparency to prevent money laundering, even with strong support from the U.S. and France, faltered, at least partially because of the perception that the cost of implementing such measures would fall primarily on small, “offshore” centers while the majority of the benefits would

⁸¹ See President's Commission on Organized Crime, Interim Report to the President and Attorney General, *The Cash Connection: Organized Crime, Financial Institutions, and Money Laundering* 7 (1984) (defining money laundering as “the process by which one conceals the existence, illegal source, or illegal application of income, and then disguises that income to make it appear legitimate”).

⁸² See Lucinda A. Low, Owen Bonheimer, & Negar Katirai, *Enforcement of the FCPA in the United States: Trends and the Effects of International Standards*, in *THE FOREIGN CORRUPT PRACTICES ACT 2008: COPING WITH HEIGHTENED ENFORCEMENT RISKS* at 784 (PLI Corp. Law & Practice, Course Handbook Series No. 13908, 2008), WL 1665 PLI/CORP 711 (describing a suit against BNP Paribas, the French bank, for violating money laundering statutes in connection with kickbacks from the U.N. Oil-For-Food scandal).

⁸³ Indeed, one of the cornerstones of the USA PATRIOT Act's provisions to combat terrorist financing was an attempt to force banks to monitor and prevent money laundering. See Eric J. Gouvin, *Bringing Out the Big Guns: The USA PATRIOT Act, Money Laundering, and the War on Terrorism*, 55 BAYLOR L. REV. 955, 970 (2003).

⁸⁴ Money laundering regulations also impose significant costs on the financial institutions responsible for enforcing these regulations. See Deborah Ball & Cassell Bryan-Low, *U.S. Banks Oppose Tighter Money Rules*, WALL. ST. J., Mar. 20, 2011, at C2, available at <http://www.wsj.com/articles/SB10001424052748704355304576214852895407540>.

⁸⁵ See Richard K. Gordon, *On the Use and Abuse of Standards for Law: Global Governance and Offshore Financial Centers*, 88 N.C. L. REV. 501, 565–66 (2010).

⁸⁶ See, for example, Fin. Action Task Force, *Report on Non-Cooperative Countries and Territories* 1–2 (2000), available at <https://perma.cc/A7NJ-ET6Y>. The purpose of these lists is to “name and shame” the countries that refuse to abide by international norms on money laundering. Although no formal sanctions are levied by the FATF, both private and public institutions may use these lists for their own countermeasures. See Nicholas W. Turner, *The Financial Action Task Force: International Regulatory Convergence Through Soft Law*, 59 N.Y.L. SCH. L. REV. 547, 554–55 (2015).

accrue to onshore jurisdictions.⁸⁷ Negotiations were unable to overcome these difficulties. Today, even some wealthy, democratic governments, such as Switzerland, have been accused of undercutting the regime.⁸⁸ Recent revelations about widespread money laundering involving several large banks only contribute to the perception that multilateral mechanisms are ineffectual.⁸⁹

In extreme cases, regulatory competition by states, combined with weak governmental structures in some less-developed countries, can lead to states largely abstaining from any form of regulation over certain powerful corporations within their borders.⁹⁰ These “regulatory deserts” can be quite attractive to certain kinds of companies—for example, those that rely heavily on cheap labor and do not depend on networks of other well-regulated businesses. Freeport-McMoran, a mining company, exercised effective control over certain areas of Irian Jaya, now Indonesia, during the 1990s, and Texaco did much the same in the Colombian rainforest.⁹¹ While regulatory deserts might also be explained as simply a failure of governance, not a failure of international cooperation, they have wider effects on global business, as multinational corporations today compete with other multinational corporations. To the extent that corporations can relocate activities and resources to jurisdictions with little or no regulatory burdens, they can gain a competitive advantage over their more heavily regulated competitors.

As this discussion illustrates, states have become increasingly aware of the difficulties of regulating multinational corporations in an era of capital mobility. While they have often attempted to resolve these difficulties by turning to multilateralism, multilateralism is not a panacea and often fails to achieve the goals of its participants. The failure of multilateralism as a response to corporate agility has led to a search for alternatives capable of solving the problems associated with corporate agility.

III. THE PROMISES AND PERILS OF UNILATERAL REGULATION

Corporate agility presents a problem for countries. Governments have an

⁸⁷ See Gordon, *supra* note 85, at 569; Richard K. Gordon, *Anti-Money-Laundering Policies: Selected Legal, Political, and Economic Issues*, in 1 CURRENT DEVELOPMENTS IN MONETARY AND FINANCIAL LAW 405, 413–14 (1999).

⁸⁸ See Jean-Michel Berthoud, *Secrecy Hampers Money Laundering Fight*, SWISSINFO.CH, Jan. 30, 2012, available at <https://perma.cc/S53B-UTR2>.

⁸⁹ See Jill Treanor and Dominic Rushe, *HSBC Pays Record \$1.9 Billion Fine to Settle US Money-Laundering Accusations*, THE GUARDIAN, Dec. 11, 2012, available at <https://perma.cc/A2F8-MXFD>; Danielle Douglas, *France's BNP Paribas to Pay \$8.9 Billion to U.S. for Sanctions Violations*, WASHINGTON POST, June 30, 2014 available at <https://perma.cc/K6ZD-WW96>.

⁹⁰ See Ratner, *supra* note 1, at 462–63 (arguing that some less-developed states have no interest in monitoring corporate behavior in their borders).

⁹¹ See *id.* at 462; Michael C. Howard, *Mining, Development, and Indigenous Peoples in Southeast Asia*, 22 J. BUS. ADMIN. 93 (1994).

interest in regulating the activities of corporations within their borders, but they also have an interest in the *success* of those corporations. Successful corporations are engines of growth in an economy, and they can create great wealth for society at large. Thus, government regulation must strike a balance between imposing appropriate regulatory burdens on corporations and ensuring that those corporations thrive and prosper. If a government enacts a law that is too costly for domestic corporations, those corporations will either move abroad, if possible, or fail, if not.

But suppose that a state *does* want to enact a regulation—for example, imposing criminal liability on corporations for bribing foreign officials—that will impose significant costs on domestic corporations. And suppose further that this regulation, if imposed solely on domestic corporations, will give foreign corporations a competitive advantage. A state could turn to international negotiations and attempt to convince other countries to adopt similar rules, thereby negating any advantages that foreign corporations might receive from a unilateral regulation. But, as noted in the previous Section, multilateralism is often difficult to achieve.

An alternative approach is for a state to impose similar regulatory costs, either directly or indirectly, on the foreign corporations unilaterally.⁹² If a state can cause foreign companies to comply with its regulations, either by bringing litigation against them, putting pressure on their home country, or taxing their products, then corporate agility becomes less problematic. Companies can relocate and restructure, but as long as the regulating state can continue to impose costs on them, the possibilities for regulatory arbitrage are reduced.

Unilateral regulation, however, is not always possible. It depends on at least two conditions being met: first, the regulating state must have the political will to regulate foreign corporations; and second, it must have sufficient power to impose costs, either directly or indirectly, on those corporations. Each of these criteria is essential to a successful assertion of unilateral regulation. This Section will examine these criteria and provide a typology of the kinds of unilateral regulation that states use to regulate multinational corporations. It will sketch out some preliminary arguments about these categories and discuss the factors that states must take into account when deciding whether to adopt unilateral regulations. It will argue that, in some areas, unilateralism provides a partial solution to global corporate problems.

⁹² Daniel W. Drezner, *Globalization, Harmonization, and Competition: The Different Pathways to Policy Convergence*, 12 J. EUR. PUB. POL. 841, 841–859 (2005); 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, 50–52 (David Vogel & Robert A. Kagan eds. 2004); Bradford, *supra* note 14, at 1.

A. When is Unilateral Regulation Possible?

Before examining the varieties of unilateral regulation, a preliminary question must be addressed: when can we expect unilateral regulation to occur?⁹³ Not all problems can be addressed through unilateral action, and not all countries are willing to adopt the policies necessary to make unilateral regulation effective. This Section posits that unilateral regulation requires that (1) the regulating state has the political will to assert regulatory authority over corporations operating abroad, and (2) the regulating state has the ability to impose costs on such corporations.

1. Political will.

Unilateral corporate regulation can only occur when a state perceives an interest in regulating the subject corporation or behavior.⁹⁴ The question here is whether a single state, acting alone, believes that it will receive sufficient benefits from unilateral regulation such that the benefits will offset the costs of enacting and enforcing the regulation.⁹⁵ If a state's unilateral regulation will destroy domestic industries or significantly reduce the attractiveness of its capital markets, the state may decide that the costs of regulation outweigh the benefits. It should be noted, however, that if government decisionmaking is skewed by capture, corruption, or other distortions, the decision to regulate could be made on other, less rational grounds.⁹⁶

⁹³ See Joel P. Trachtman, *Unilateralism, Bilateralism, Regionalism, Multilateralism, and Functionalism: A Comparison with Reference to Securities Regulation*, 4 *TRANSNAT'L L. & CONTEMP. PROBS.* 69, 110 (1994) (arguing that, “[a]s a temporal matter, unilateral initiatives might be expected to precede bilateral, regional, or multilateral initiatives, or to succeed the breakdown of such initiatives”).

⁹⁴ Of course, the concept of a “state interest” is complex and controversial. See Jack L. Goldsmith & Eric A. Posner, *Moral and Legal Rhetoric in International Relations: A Rational Choice Perspective*, 31 *J. LEGAL STUD.* 115, 129–31 (2002). At the simplest level, a state has an interest in acting in a certain way if the benefits offset the costs. But what benefits should be considered benefits? And how do we calculate these benefits? These are perennial problems, and they are only magnified at the international level, where domestic actors at various levels have differing assessments of costs and benefits. It is sufficient for our purposes that states *have* interests, or at least preferences, with regard to law.

⁹⁵ See Duncan Snidal, *The Limits of Hegemonic Stability Theory*, 39 *INT'L ORG.* 579 (1985); CHARLES KINDLEBERGER, *THE WORLD IN DEPRESSION, 1929–1939* (1973); Charles Kindleberger, *Systems of International Economic Organization*, in *MONEY AND THE COMING WORLD ORDER* (David Calleo, ed. 1976); KEOHANE, *supra* note 23.

⁹⁶ For a classic analysis of how collective action problems skew government decisionmaking, see MANCUR OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965). See also Kay Lehman Schlozman & John T. Tierney, *ORGANIZED INTERESTS AND AMERICAN DEMOCRACY* 123–24 (1986); Sam Peltzman, *Toward a More General Theory of Regulation*, 19 *J.L. & ECON.* 211 (1976); George J. Stigler, *The Theory of Economic Regulation*, 2 *BELL J. ECON. & MGMT. SCI.* 3 (1971); MICHAEL JOHNSTON, *SYNDROMES OF CORRUPTION: WEALTH, POWER, AND DEMOCRACY* 71–72 (2005); Bebchuk, *supra* note 33, at 1459–61; Richard L. Hasen, *Lobbying, Rent-Seeking, and the Constitution*, 64 *STAN. L. REV.* 191, 226–36 (2012).

To begin, then, a state must see benefits from regulating international corporations. In other words, the regulation must create benefits for the regulating state, either by advantaging domestic groups, increasing revenue, or prohibiting practices harmful to the country. These benefits need not be purely monetary. States have demonstrated interests in promoting human rights⁹⁷ and corporate social responsibility abroad.⁹⁸ Large states, as opposed to small states, are more likely to perceive a benefit from unilateral regulation, as they can internalize a greater portion of the benefits from regulation.⁹⁹ Similarly, if the behavior of foreign corporations affects the interests of powerful domestic interest groups, we would expect states to be more likely to enact unilateral regulations, as they will have a disproportionate influence on government policies.¹⁰⁰

Second, the costs to the regulating state of enacting and enforcing the unilateral regulation must be sufficiently low.¹⁰¹ One particularly important cost is associated with international law. If a well-established and generally accepted rule of international law prohibits states from unilaterally asserting power over foreign corporations in a certain manner, states will face considerable barriers to acting. Many large, wealthy states—such as the U.S. or many countries in the E.U.—have incorporated international law into their own domestic law, thereby escalating the costs of non-compliance.¹⁰² And many small, developing states fear reprisals from

⁹⁷ See Hathaway & Shapiro, *supra* note 9, at 1942–62 (discussing extant theories on why states enter into human rights treaties); William Phelan, *The ECHR as a Self-Enforcing, Cost-Imposing, Reciprocal Human Rights Regime Between Established Democracies* (unpublished manuscript) (on file with the author) (providing a domestic politics theory of why states enter into costly human rights regimes).

⁹⁸ Ernst-Ulrich Petersmann, *International Economic Law, 'Public Reason,' and Multilevel Governance of Interdependent Public Goods*, 14 J. INT'L ECON. L. 23, 38–40 (2011) (arguing that corporate social responsibility may be a public good that is in the reasonable self-interest of all citizens and states); Larry Catá Backer, *Multinational Corporations, Transnational Law: The United Nations' Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law*, 37 COLUM. HUM. RTS. L. REV. 287, 288 (2006).

⁹⁹ See Snidal, *supra* note 95, at 579.

¹⁰⁰ This is a familiar dynamic in international trade law. Countries often impose tariffs on sensitive domestic industries from other countries, in order to put pressure on foreign governments to change their practices. See Daryl J. Levinson, *Collective Sanctions*, 56 STAN. L. REV. 345, 400 (2003); Rachel Brewster, *The Surprising Benefits to Developing Countries of Linking Trade and Intellectual Property*, 12 CHI. J. INT'L L. 1, 45 (2011).

¹⁰¹ See Snidal, *supra* note 95, at 598–602.

¹⁰² In other words, where international law has been incorporated into domestic law, actors that violate behavioral norms face domestic enforcement and penalties, not just international ones. For a description of the ways in which international law is incorporated into domestic law, see Carlos M. Vazquez, *Customary International Law as U.S. Law: A Critique of the Revisionist and Intermediate Positions and a Defense of the Modern Position*, 86 NOTRE DAME L. REV. 1495 (2011) (discussing the status of international law under U.S. law); THE EUROPEANISATION OF INTERNATIONAL LAW: THE STATUS OF INTERNATIONAL LAW IN THE EU AND ITS MEMBER STATES (Jan Wouters, Andre Nollkaemper, & Erika de Wet, eds., 2008) (discussing the same under the laws of the E.U. and its members). On

larger trading partners for violating international law in a way deleterious to the interests of those partners.¹⁰³

Although international law does not always provide strong constraints on state action,¹⁰⁴ and, in many cases, its dictates are either ambiguous¹⁰⁵ or contentious,¹⁰⁶ it does establish some limits on what paths states can take to regulate behavior beyond their borders. These limits can be usefully classified as procedural and substantive.

The most important procedural rule that international law imposes on states in this context is a jurisdictional hurdle.¹⁰⁷ In order for states to be able to regulate foreign corporations directly, they must have jurisdiction (1) to proscribe the regulated behavior and (2) to enforce the regulation against the particular defendant or property.¹⁰⁸ These jurisdictional hurdles are generally met when the corporation is a national of the regulating state or is located within the territory of

the other hand, the role of international law in the U.S. system is fraught and contentious, so it may not always effectively constrain U.S. lawmakers. See David H. Moore, *Constitutional Commitment to International Law Compliance?*, 102 VA. L. REV. 367, 445 (2016).

¹⁰³ Industries in developing countries often depend heavily on access to foreign markets. At least in the context of the WTO, any violation of such international trade agreements can lead to such access being restricted. *But see* Brewster, *supra* note 100, at 1 (describing the increasing power of *developing* countries to sanction violations of international trade by developed countries).

¹⁰⁴ See Nico Krisch, *Weak as Constraint, Strong as Tool: The Place of International Law in U.S. Foreign Policy*, in UNILATERALISM AND U.S. FOREIGN POLICY: INTERNATIONAL PERSPECTIVES 41 (David M. Malon & Yuen Foong Khong eds., 2003); W. Michael Reisman, *Unilateral Action and the Transformations of the World Constitutive Process: The Special Problem of Humanitarian Intervention*, 11 EUR. J. INT'L L. 3, 3 (2000); Philippe Sands, *American Unilateralism*, 96 AM. SOC'Y INT'L L. PROC. 85, 89 (2002).

¹⁰⁵ See Hersch Lauterpacht, *Codification and Development of International Law*, 49 AM. J. INT'L L. 16, 19 (1955) (“[T]he absence of agreed rules partaking of a reasonable degree of certainty is a serious challenge to the legal nature of what goes by the name of international law.”). See also George Norman & Joel P. Trachtman, *The Customary International Law Game*, 99 AM. J. INT'L L. 541, 548 & n. 34 (2005); Jonathan Remy Nash, Essay, *Standing and the Precautionary Principle*, 108 COLUM. L. REV. 494, 500 (2008).

¹⁰⁶ See JOHN F. MURPHY, *THE EVOLVING DIMENSIONS OF INTERNATIONAL LAW: HARD CHOICES FOR THE WORLD COMMUNITY* 12–55 (2010) (discussing the various sources of disagreement between states on the content of international law).

¹⁰⁷ International law rules of jurisdiction are generally a matter of customary international law. See CEDRIC RYNGAERT, *JURISDICTION IN INTERNATIONAL LAW* 21–22 (2008); Vaughan Lowe, *Jurisdiction*, in *INTERNATIONAL LAW* 335, 341–42 (Malcom D. Evans ed., 2006). As such, they may be expected to suffer from vagueness- and legitimacy-related problems. On the other hand, many states have incorporated these rules into domestic frameworks, and thus they have a strong effect on state behavior. See Jordan J. Paust, *Federal Jurisdiction over Extraterritorial Acts of Terrorism and Nonimmunity for Foreign Violators of International Law under the FSLA and the Act of State Doctrine*, 23 VA. J. INT'L L. 191, 191–92 (1983).

¹⁰⁸ See International Bar Association, *Report of the IBA Task Force on Extraterritorial Jurisdiction* 7–8 (2009) [hereinafter IBA Report]; Sarah H. Cleveland, Essay, *Embedded International Law and the Constitution Abroad*, 110 COLUM. L. REV. 225, 231–32 (2010).

the regulating state.¹⁰⁹ However, if neither of these conditions is true, the state must rely on some other, potentially controversial, basis for jurisdiction. These include the “effects test,” under which a state may assert jurisdiction over actions that have effects within the territory of the state,¹¹⁰ and the “protective principle,” under which a state may regulate extraterritorial conduct that “is directed against the security of the state or against a limited class of other state interests.”¹¹¹ The essential point here is that, as the nexus between the regulating state and the regulated corporation or activity decreases, the acceptable bases of jurisdiction under international law decrease as well.¹¹² This requirement substantially limits a state’s ability to regulate foreign corporations.

In addition to procedural limits on a state’s ability to enact unilateral regulations, international law also places substantive limits on how states can treat foreign corporations.¹¹³ For example, international law places strict limits on a state’s ability to expropriate the property of foreign nationals and requires compensation for certain inequitable treatment.¹¹⁴ In addition, the World Trade Organization (WTO) provides a comprehensive set of rules governing international trade.¹¹⁵ These rules, binding on all 164 member-states, generally

¹⁰⁹ Nationality-based and territoriality-based jurisdiction are widely known as acceptable rationales for state regulation. See John H. Knox, *A Presumption Against Extrajurisdictionality*, 104 AM. J. INT’L L. 351, 355–61 (2010).

¹¹⁰ See IBA Report, *supra* note 108, at 12.

¹¹¹ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(3) (1987).

¹¹² In addition, customary international law prohibits states from exercising jurisdiction over actions outside their borders when doing so would be “unreasonable,” an open-ended inquiry that supports the general position that international law imposes limits on aggressive extraterritoriality. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(1).

¹¹³ The issue of corporate rights under international law is a controversial one. Traditionally, states were the sole subjects of international law, and some scholars argue that corporations have no rights under international law unless explicitly granted them under treaties or national law. See Julian G. Ku, *The Limits of Corporate Rights Under International Law*, 12 CHI. J. INT’L L. 729, 732 (2012). Others argue that corporations may benefit from international legal rules, including human rights treaties. See MARIUS EMBERLAND, *THE HUMAN RIGHTS OF COMPANIES: EXPLORING THE STRUCTURE OF ECHR PROTECTION* (2006); Lucien J. Dhooge, *Human Rights for Transnational Corporations*, 16 J. TRANSNAT’L L. & POL’Y 197, 200 (2007); Michael K. Addo, *The Corporation as Victim of Human Rights Violations*, in *HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS* 187 (Michael K. Addo ed., 1999). For the purposes of this article, it is unnecessary to pursue this debate, as some international treaties (such as investment treaties) undisputedly *do* regulate the manner in which states may treat foreign corporations.

¹¹⁴ Campbell McLachlan et al., *INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES* ¶ 8.03 (Loukas Mistelis et al. eds., 2007).

¹¹⁵ The WTO is an exception in the world of multinational organizations in that it has an internal tribunal, the Dispute Settlement Body, with a well-developed jurisprudence and a history of high compliance rates with its decisions. As such, violation of its rules can entail significant costs for the

require governments to tax and regulate imported and locally-produced goods equally (the national treatment requirement)¹¹⁶ and to extend any advantages granted to products from one member state to products from all other member states (the most favored nation requirement).¹¹⁷ States are also subject to an increasing number of bilateral investment treaties (BITs), in which they guarantee that they will treat foreign investment from certain corporations in certain ways—for example, many BITs include clauses guaranteeing “fair and equitable treatment” to foreign investment.¹¹⁸

But even lawful unilateral corporate regulations may be costly to states. If the regulation requires significant monitoring costs—such as active policing or intrusive investigative work—in order to achieve its purpose, then the likelihood of unilateral regulation is reduced. So, for example, if the only way for a state to enforce carbon emissions laws on foreign corporations is to monitor factories around the world, then the cost of the regulation may exceed its benefits to the regulating state. Similarly, if the very enactment of unilateral regulation creates costs for the regulating state, by, for example, generating conflict with other countries, the likelihood of regulation will decrease.¹¹⁹ A state must consider the consequences of enacting regulations on relationships with other states and what their potential responses might be. If boomerang regulation, in which opposing countries enact harmful regulation aimed at the regulating state, is both expected and harmful to domestic interests, then unilateral regulation becomes more difficult.¹²⁰

non-compliant state. See Warren F. Schwartz & Alan O. Sykes, *The Economic Structure of Renegotiation and Dispute Resolution in the World Trade Organization*, 31 J. LEGAL STUD. S179, S200-03 (2002).

¹¹⁶ General Agreement on Tariffs and Trade art. III(4), Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT] (“The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.”).

¹¹⁷ GATT art. I(1) (“With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation . . . any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.”).

¹¹⁸ See U.S. Dep’t of State, 2004 Model BIT, art. 5(1), available at <https://perma.cc/XV9C-8ZDB>; Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 AM. J. INT’L L. 45, 50 (2013); Benedict Kingsbury & Stephan Schill, *Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law* (2009), available at <https://perma.cc/K2C5-TWMH>.

¹¹⁹ See Bradford & Ben-Shahar, *supra* note 9, at 400–01.

¹²⁰ See Nico Krisch, *From Consent to Consultation: International Law in an Age of Global Public Goods* 12 (unpublished manuscript) (on file with author).

Of course, there may be ways for states to reduce the costs of unilateral corporate regulation. Monetary sanctions have proved to be a particularly powerful tool to offset the expense of monitoring and enforcing corporate rules. Settlements from the DOJ's foreign corruption unit, for example, accounted for almost half of the entire Criminal Division's \$2 billion in penalties in 2010.¹²¹ Foreign asset freezes similarly can involve large sums.¹²² These regulatory recoveries can act as a kind of tax on other countries for the regulating state's provision of the good in question, reducing the costs of the unilateral action.¹²³

As this discussion makes clear, an important feature of unilateral corporate regulation is that the assessment of costs and benefits occurs on a *unilateral* basis. That is, the regulating state assesses the costs and benefits of regulating international business without any direct consideration of wider costs and benefits to other countries. This, of course, may be problematic from the perspective of global welfare: if the costs of unilateral regulation fall primarily on the regulating state but the benefits accrue more broadly, we might expect an under supply of corporate regulation. Therefore, even if unilateral regulation is desirable from the perspective of global welfare, it might not be enacted. Conversely, even if unilateral regulation is *not* desirable from the perspective of global welfare, it might still be enacted. The consequences of this dichotomy will be discussed further below.

2. State power.

In addition to an interest in unilateral regulation, a state must also have the ability to engage in it. Ultimately, this means that the regulating state must be able to change the payoff structure to corporations of engaging in the regulated behavior. Thus, the regulating state must have some way of imposing costs on foreign corporations. The assertion of regulatory power is moot, after all, if foreign corporations have nothing at stake.

Often, it is quite easy for states to impose costs on foreign corporations. To the extent that foreign companies are present in the regulating state, either by having branches, employees, or assets located within the country, the state can plausibly threaten to sanction acts of non-compliance by the foreign corporation. So, the U.S. requires foreign companies located within its borders to pay tax on

¹²¹ See Christopher M. Matthews & Joe Palazzolo, *Jury Clears Two Businessmen in "Sting" Case on Bribery*, WALL ST. J., Jan. 31, 2012, at B3, available at <http://www.wsj.com/articles/SB10001424052970203920204577193322932194432>.

¹²² It has been estimated that Libya's frozen assets amounted to \$170 billion. See Evan Criddle, *Humanitarian Financial Intervention 2* (unpublished manuscript) (on file with author).

¹²³ See Snidal, *supra* note 95, at 598–602.

U.S.-based income.¹²⁴ If a corporation declines to pay this tax, the U.S. can seize the foreign corporation's assets in order to recover the assessed tax. As long as the class of corporations that are subject to the regulation are located within the territory of the regulating state, unilateral regulation is a simple matter. This sort of direct regulation is plausible for a wide range of states because it only requires the ability to reach domestically-located entities.

The imposition of costs on foreign corporations becomes more difficult, though, if the corporations are not located within the territory of the regulating state and merely sell products or services into the territory. In this case, there may be no assets in local banks to seize or employees to arrest. As a consequence, the ability of states to regulate corporations unilaterally is limited. In such cases, states have sometimes conditioned market access on compliance with local regulations. So, for example, states often require imported foods to meet certain health and safety requirements in order to enter the domestic marketplace.¹²⁵ Similarly, if corporations wish to sell stocks or bonds in the U.S., these products must comply with U.S. securities regulations.¹²⁶ These sorts of regulations are, in essence, a carrot to foreign corporations—if they comply with the unilateral regulation, they will have access to the regulating state's market. The attractiveness of the carrot, of course, will depend on the size and nature of the regulating state's market.¹²⁷

But what if the relevant corporations are neither located in the regulating state nor sell products into it? This situation is the most problematic for states

¹²⁴ It also requires domestic companies to pay tax on worldwide income, that is, income earned in any country. The effects of this tax on the behavior of domestic companies have been discussed at great length, but are largely irrelevant for the purposes of this article. *See generally, for example*, Charles E. McLure Jr., *Legislative, Judicial, Soft Law, and Cooperative Approaches to Harmonizing Corporate Income Taxes in the US and the EU*, 14 COLUM. J. EUR. L. 377 (2008); ROSANNE ALTSHULER, ET AL., LESSONS THE UNITED STATES CAN LEARN FROM OTHER COUNTRIES' TERRITORIAL SYSTEMS FOR TAXING INCOME OF MULTINATIONAL CORPORATIONS (2015).

¹²⁵ But even in this area, states have limited discretion to enact health requirements for imported foods. The WTO places significant limits on the way that states can pass such laws. *See* Andrew T. Guzman, *Introduction—International Regulatory Harmonization*, 3 CHI. J. INT'L L. 271, 273 (2002).

¹²⁶ For an analysis of the variety of laws applicable to foreign issuers, see Christopher Hung Nie Woo, *United States Securities Regulation and Foreign Private Issuers: Lessons from the Sarbanes-Oxley Act*, 48 AM. BUS. L. J. 119, 129–34 (2011); Stephen J. Choi & Andrew T. Guzman, *Portable Reciprocity: Rethinking the International Reach of Securities Regulation*, 71 S. CAL. L. REV. 903, 922 (1998); John C. Coffee, Jr., *Racing Towards the Top?: The Impact of Cross-Listings and Stock Market Competition on International Corporate Governance*, 102 COLUM. L. REV. 1757, 1823 (2002).

¹²⁷ Again, market access restrictions may run afoul of international law. The European Treaty, for example, requires the removal of most market access restrictions between member states. *See* Gareth Davies, *Understanding Market Access: Exploring the Economic Rationality of Different Conceptions of Free Movement Law*, 11 GERMAN L.J. 671, 673 (2010). For a discussion of the importance of asset location and market access on extraterritorial jurisdiction, see William S. Dodge, *The Structural Rules of Transnational Law*, 97 AM. SOC'Y INT'L L. PROC. 317, 318 (2003); William S. Dodge, *Antitrust and the Draft Hague Judgments Convention*, 32 LAW & POL'Y INT'L BUS. 363, 364 (2001).

interested in regulating international business. The regulated corporation or product has little or no nexus to the regulating country, and therefore jurisdictional problems are pronounced. Just as importantly, even if jurisdictional issues can be overcome, the regulating state must find some way to enforce sanctions, either directly or indirectly, on the foreign corporations. Some states may have no ability to do so, and thus unilateral regulation becomes impossible. Others might be able to put indirect pressure on foreign corporations through sanctions targeted at other actors that *do* have ties to the country, including, potentially, the home country of the foreign corporation.¹²⁸ In any case, the options available to countries in these situations are limited, and many countries will have no ability to impose unilateral regulations under these circumstances.

B. Types of Unilateral Regulation

States have attempted to regulate and constrain international corporations through a variety of unilateral actions. This Section will distinguish between three generic types of international regulation: corporation-level regulation, product-level regulation, and country-level regulation. The regulatory categories are distinguished by the direct target of the sanctions, whether it be corporate behavior abroad, products entering the country, or statewide activity. Of course, the ultimate target in each of these cases is corporate behavior, but the methods for reaching this behavior can differ significantly from case to case.

1. Corporation-level regulation.

The first type of regulation is direct, corporation-level regulation. Corporation-level regulation refers to regulation that is targeted at the corporate entity itself and its behavior. It is to be distinguished from more targeted, product-level regulation and less targeted, country-level regulation.¹²⁹ Corporation-level

¹²⁸ One area in which this has occurred is Section 301 actions in the U.S., which authorized the U.S. president to take unilateral action against countries that failed to protect U.S. intellectual property. See Myles Getlan, *TRIPS and the Future of Section 301: A Comparative Study in Trade Dispute Resolution*, 34 COLUM. J. TRANSNAT'L L. 173, 179 (1996). See also Alan O. Sykes, *Constructive Unilateral Threats in International Commercial Relations: The Limited Case for Section 301*, 23 L. & POL'Y INT'L BUS. 263, 316–17 (1992). The use of Section 301 has largely been curtailed after several members of the WTO challenged its legality. See Edward Lee, *Measuring TRIPS Compliance and Defiance: The WTO Compliance Scorecard*, 18 J. INTELL. PROP. L. 401, 406–407 (2011).

¹²⁹ It should be noted at the outset that the three types of unilateral regulation may shade into one another. That is, regulation targeted at a corporation's products (such as health and safety requirements) may also in a sense be targeted at the corporation, as it requires corporations to behave in certain ways. Similarly, product-level regulation may be similar to country-level regulation where products from certain countries are prohibited or regulated in a special manner. This typology aims to characterize the function and underlying motives of unilateral regulation. However, because of the complexity of such legislation—particularly in the number of actors and elements that may provide the impetus for any particular regulation—it is not possible to establish mutually exclusive categories. Instead, these categories should be thought of as points along a continuum.

regulation is the kind of regulation that we typically think of when we refer to extraterritorial corporate laws: it is regulation that requires corporations, even foreign corporations, to behave in certain ways and threatens sanctions for non-compliance.

Corporation-level regulation generally takes the following form. A country perceives an interest in regulating corporations in a certain way, such as prohibiting them from engaging in anti-competitive behavior. Domestic corporations argue that complying with the regulation will impose costs on them that foreign corporations do not face, and thus will place them at a competitive disadvantage with respect to companies from other countries that have not enacted regulation. Recognizing this situation, the regulating state extends the law to cover behavior by foreign corporations as well as domestic corporations. The result is unilateral corporate regulation—regulation that is aimed at global corporate behavior.

Corporation-level regulation is the simplest and most direct form of unilateral corporate regulation. Examples of it abound, from anti-corruption legislation¹³⁰ to antitrust regulation¹³¹ to secondary sanctions,¹³² all of which reach extraterritorial behavior by foreign corporations. Despite the prevalence of unilateral corporation-level regulation, such efforts to regulate the behavior of foreign corporations abroad have often met stiff resistance from other countries.¹³³ Whenever a government threatens to, or actually does, prosecute or otherwise sanction a foreign corporation, there is the risk of conflicting governmental interests. So, one government might have an interest in prohibiting the reproduction of patented medicines without the authorization of the patent-holder, but another country might have an interest in promoting the production of cheap, generic AIDS vaccines.¹³⁴ Even absent malicious motives, these two government policies can lead to conflict if one government prosecutes foreign

¹³⁰ See Magnuson, *supra* note 11, at 394 (arguing that the FCPA has been enforced aggressively against foreign corporations and thus represents an attempt at unilateral corporate anti-bribery regulation).

¹³¹ Joseph P. Griffin, *Extraterritoriality in U.S. and EU Antitrust Enforcement*, 67 ANTITRUST L.J. 159, 159 (1999) (discussing efforts by the U.S. and the E.U. to enforce competition laws on foreign corporations in order to protect domestic markets and consumers).

¹³² Secondary sanctions refer to efforts by a regulating state to prevent foreign corporations from doing business with a sanctioned state. See Harry L. Clark, *Dealing with U.S. Extraterritorial Sanctions and Foreign Countermeasures*, 20 U. PA. J. INT'L ECON. L. 61, 63–64 (1999) (discussing U.S. efforts to induce foreign corporations to abide by U.S. sanctions against third countries, such as Cuba and Iran).

¹³³ See *Developments in the Law—Extraterritoriality*, 124 HARV. L. REV. 1226, 1246 (2011) (describing the generally negative reaction of other countries to U.S. assertions of extraterritorial jurisdiction).

¹³⁴ See Graham Dutfield, *Delivering Drugs to the Poor: Will the TRIPS Amendment Help?*, 34 AM. J.L. & MED. 107, 121 (2008); Robert Bird & Daniel R. Cahoy, *The Impact of Compulsory Licensing on Foreign Direct Investment: A Collective Bargaining Approach*, 45 AM. BUS. L.J. 283, 283–84 (2008).

corporations in the other country for reproducing AIDS vaccines without the permission of the patent-holder. Unilateral corporation-level regulation also runs into sovereignty-related problems, as the question can arise why the regulating state has any interest in regulating the behavior of foreign corporations in foreign lands.¹³⁵

Of course, unilateral corporation-level regulation is not always resisted by other governments. In many cases, foreign governments may not have the tools to regulate the behavior at issue. In such instances, unilateral regulation by a different government that is able to monitor corporate behavior and enforce robust corporate laws may be welcomed by the home government. There is some evidence that a number of governments have in essence outsourced corporate regulation to powerful countries.¹³⁶ When unilateral corporation-level regulation is viewed as beneficial by other countries, it can be an especially effective solution to the problems of corporate agility, as it directly imposes costs on foreign companies regardless of where they are located.

One prominent example of corporation-level regulation is the Foreign Corrupt Practices Act (FCPA), which takes aim at corporate bribery abroad. The U.S. enacted the FCPA in 1977 after the Watergate investigations had uncovered the widespread use of slush funds by corporations to bribe foreign officials.¹³⁷ The FCPA prohibited U.S. companies from making payments, either directly or indirectly, to foreign officials in order to obtain business.¹³⁸

U.S. companies immediately complained about the competitive disadvantage the FCPA imposed on them and began to press for an international agreement on corruption.¹³⁹ Although progress on an international treaty was halting and

¹³⁵ The cultural imperialism critique has often been levied against U.S. anti-bribery norms. See Steven R. Salbu, *Extraterritorial Restriction of Bribery: A Premature Evocation of the Normative Global Village*, 24 *YALE J. INT'L L.* 223, 253–54 (1999).

¹³⁶ See Magnuson, *supra* note 8, at 866 (describing efforts by Israel, Columbia, and Mexico to outsource certain elements of law enforcement to the U.S.).

¹³⁷ See, for example, James Sterngold, *Kakuei Tanaka, 75, Ex-Premier and Political Force in Japan, Dies*, *N.Y. TIMES*, Dec. 17, 1993, at B14.

¹³⁸ 15 U.S.C. § 78dd-1(a). The FCPA criminalizes only the *giving* of bribes, not the receiving of them, and thus does not prohibit foreign officials from accepting bribes. See *United States v. Castle*, 925 F.2d 831, 835 (5th Cir. 1991) (describing the “overwhelming evidence of Congressional intent to exempt foreign officials from prosecution for receiving bribes, especially since Congress knew it had the power to reach foreign officials in many cases, and yet declined to exercise that power”).

¹³⁹ See Hongying Wang & James N. Rosenau, *Transparency International and Corruption as an Issue of Global Governance*, 7 *GLOB. GOVERNANCE* 25, 41 (2001). Anti-bribery norms appear to be sufficiently “sticky” to make it unlikely for legislators to repeal legislation once it is in place. See Kenneth W. Abbott & Duncan Snidal, *Values and Interests: International Legalization in the Fight Against Corruption*, 31 *J. LEGAL STUD.* S141, S162 (2002); Daniel K. Tarullo, *The Limits of Institutional Design: Implementing the OECD Anti-Bribery Convention*, 44 *VA. J. INT'L L.* 665, 675 (2004).

sporadic, the U.S. succeeded in convincing other countries to sign the OECD Anti-Bribery Convention in 1997.¹⁴⁰ Yet, despite the promise of a level playing field, countries failed to enforce their obligations under the Convention rigorously,¹⁴¹ leading many commentators to observe that American companies still faced a competitive disadvantage.¹⁴²

In recent years, however, the U.S. has begun to alter its enforcement strategy. Most importantly, the SEC and the DOJ have begun to prosecute foreign corporations at a much higher rate than previously.¹⁴³ In doing so, the agencies have asserted aggressive theories of extraterritorial jurisdiction, basing jurisdiction on such minimal contacts with the U.S. as a “telephone call to the United States, a letter mailed to the United States, the use of air or road travel, or the clearing of a check or wire transfer of funds through a financial institution in the United States.”¹⁴⁴ The U.S. has, in effect, asserted a power to regulate bribery globally, regardless of the nationality of the corporation or its effects in the U.S. This corporation-level regulation has led to a number of large settlements with foreign corporations and has forced many corporations to change the way they operate.¹⁴⁵

¹⁴⁰ Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, S. Treaty Doc. No. 105-43 (entered into force Feb. 13, 1999) (hereinafter, OECD Anti-Bribery Convention).

¹⁴¹ Between 2000 and 2010, U.S. enforcement actions outnumbered foreign enforcement actions by more than 3.5 to 1. *Trace Global Enforcement Report 2011*, TRACE INTERNATIONAL, at 1, 4 (2011), <https://perma.cc/Z6ZG-YU9R>.

¹⁴² They argue that the U.S. enforces the FCPA rigorously against its own corporations, while other countries do not enforce their anti-corruption laws against their corporations. As a result, U.S. corporations cannot bribe foreign officials to win government favor, while foreign corporations can. Tarullo, *supra* note 139, at 683; Rachel Brewster, *Stepping Stone or Stumbling Block: Incrementalism and National Climate Change Legislation*, 28 YALE L. & POL'Y REV. 245, 308–10 (2010).

¹⁴³ Non-U.S. companies have paid eight of the ten largest US settlements for FCPA violations. See Kimberly A. Parker, *Anti-Corruption Enforcement: Trends and Analysis 2010–2011*, in WHITE COLLAR CRIME 2011: PROSECUTORS AND REGULATORS SPEAK 390 (PLI Corp. Law & Practice, Course Handbook Series No. 28257, 2011). In 2010, foreign corporations accounted for 94% of the total penalties paid by corporations for FCPA violations. See *FCPA Digest of Cases and Review Releases Relating to Bribes to Foreign Officials under the Foreign Corrupt Practices Act of 1977*, Shearman & Sterling LLP, at vi (Jan. 2011), <https://perma.cc/4KE6-LC4R>. In 2011, foreign corporations accounted for 91% of DOJ fines for FCPA violations. See *DOJ Enforcement of the FCPA – Year in Review*, FCPA PROFESSOR (Jan. 11, 2012), <https://perma.cc/N4UF-6JQ3>.

¹⁴⁴ H. Lowell Brown, *Extraterritorial Jurisdiction Under the 1998 Amendments to the Foreign Corrupt Practices Act: Does the Government's Reach Now Exceed Its Grasp?*, 26 N.C. J. INT'L L. & COM. REG. 239, 359 (2001). One might query whether such contacts are sufficient to comply with the international law rules regulating extraterritorial jurisdiction. See discussion *supra* Section II.A.1.

¹⁴⁵ Examples include the adoption of anti-corruption compliance programs and the retention of independent compliance monitors. See Lucinda A. Low et al., *Enforcement of the FCPA in the United States: Trends and Effects of International Standards*, in THE FOREIGN CORRUPT PRACTICES ACT 2008: COPING WITH HEIGHTENED ENFORCEMENT RISKS 711, 716 (PLI Corp. Law & Practice, Course Handbook Series No. 13908, 2008).

The unilateral approach appears to have worked moderately well in inducing foreign corporations, or at least foreign corporations with substantial ties to the U.S., to enact anti-bribery compliance programs. It has also encouraged other countries to enforce their own anti-bribery laws.¹⁴⁶ It is unclear, however, whether this effect will be durable, as at least some corporations have indicated a desire to avoid U.S. jurisdiction because of the costs associated with FCPA compliance.¹⁴⁷

2. Product-level regulation.

An alternative approach to corporation-level regulation for states seeking to constrain the behavior of foreign corporations is product-level regulation.¹⁴⁸ Product-level regulation is more targeted than corporation-level regulation, as it does not aim to constrain corporate behavior generally. Instead, it requires products sold into the regulating country to meet certain standards of production—they must possess certain characteristics or have been made in certain ways. Thus, the regulating state does not purport to impose restrictions on the worldwide behavior of corporations, but merely regulates the bringing of goods into the country. One example of product-level regulation is the imposition of carbon taxes on imported products.¹⁴⁹

¹⁴⁶ See Sarah C. Kaczmarek & Abraham L. Newman, *The Long Arm of the Law: Extraterritoriality and the National Implementation of Foreign Bribery Legislation*, 65 INT'L ORG. 745, 745 (2011) (finding that countries that had their corporations targeted by the FCPA were more likely to enforce their own national anti-bribery laws).

¹⁴⁷ Four companies have delisted their stocks from the New York Stock Exchange shortly after settling FCPA prosecutions. See Thomas Gorman & William McGrath, *The New Era of FCPA Enforcement: Focus on Individuals and Calls for Reform*, SEC ACTIONS BLOG (Aug. 31, 2011), <https://perma.cc/XWJ3-4275>. In addition, at least 60 companies delisted securities from U.S. exchanges between 2007 and 2011 as a result of the high administrative, regulatory and other costs. See Comm. on Int'l Bus. Trans., *The FCPA and Its Impact on International Business Transactions: Should Anything Be Done to Minimize the Consequences of the U.S.'s Unique Position on Combating Offshore Corruption?* 21 (Dec. 2011), <https://perma.cc/H6H6-M3LD> [hereinafter, IBT Report]. It is impossible to know how many corporations have decided not to list their securities at all in order to avoid being subject to the requirements of the FCPA.

¹⁴⁸ This Section will focus on incoming product-level regulation, that is, the imposition of requirements on products brought *into* the regulating state. Product-level regulation also takes the form of outgoing regulation. An example of outgoing product-level regulation is arms export legislation, which prohibits or restricts the export of certain items, including dual-use items, with military applications. See AARON XAVIER FELLMETH, *THE LAW OF INTERNATIONAL BUSINESS TRANSACTIONS* 269–307 (2011). Although outgoing product-level regulation is often aimed at prohibiting *domestic* companies from exporting products, it is another way in which states can attempt to regulate the behavior of international corporations, by making it more difficult or costly for such corporations to behave in certain ways.

¹⁴⁹ See Doaa Abdel Motaal, “Emissions Offshoring”: *Repercussions for International Trade*, 5 CARBON & CLIMATE L. REV. 466, 466–67 (2011).

Product-level regulation is often aimed at the production process itself. For example, a country might require that imported tuna be caught using dolphin-friendly nets¹⁵⁰ or that imported textiles not be made by child workers.¹⁵¹ These kinds of product-level regulations resemble corporation-level regulation, as they refer to corporate behavior as opposed to product quality. They are, however, distinguished from corporation-level regulation because they do not require corporations to behave in certain ways or face civil or criminal punishment. They merely require incoming products to have been produced in certain ways before entering domestic markets.¹⁵²

Product-level regulation has the potential to be more targeted and, therefore, less controversial than corporation-level regulation. By focusing on a product, product-level regulation is more territorially restricted than corporation-level regulation. As such, unilateral regulation in this form falls more squarely within the limits of international jurisdictional rules and may generate less policy conflict with other governments. As mentioned earlier, a country's jurisdiction to regulate corporations and products within its territory is undisputed.

Product-level regulation is not, however, entirely free of dispute. It imposes costs on foreign corporations and thus may be resisted by the corporations or their home governments. Perhaps more importantly, import restrictions are heavily constrained by international agreements. The WTO requires its Member States to remove most import restrictions and only allows exceptions in limited circumstances.¹⁵³ Thus, to the extent that states have mutually agreed to refrain

¹⁵⁰ The U.S. enacted a similar law in 1988, prohibiting the import of tuna from countries that lacked laws and kill rates comparable to those of the U.S. When other countries challenged the embargo as a violation of the GATT, the GATT panel opinion stated that the U.S. had violated international trade law. The embargo eventually was lifted after an international agreement on the subject. See Richard W. Parker, *The Use and Abuse of Trade Leverage to Protect the Global Commons: What We Can Learn from the Tuna-Dolphin Conflict*, 12 GEO. INT'L ENVTL. L. REV. 1, 11–13 (1999).

¹⁵¹ There is some debate about whether import restrictions on products created using child labor would withstand WTO scrutiny. See, for example, Daniel S. Ehrenberg, *The Labor Link: Applying the International Trading System to Enforce Violations of Forced and Child Labor*, 20 YALE J. INT'L L. 361, 416 (1995); Matthew C. Bazzano, *Child Labor: What the United States and Its Corporations Can Do to Eliminate Its Use*, 18 HAMLIN J. PUB. L. & POL'Y 200, 216–17 (1996).

¹⁵² Of course, an import prohibition is, in a sense, a form of punishment, as it imposes a cost on the corporation. This characteristic, however, is common to all forms of unilateral corporate regulation: it aims to make certain behavior more costly corporations, even foreign ones.

¹⁵³ GATT Article XI states that “[n]o prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.” GATT, *supra* note 116, at art. XI. Article XX provides a list of exceptions to this requirement, including measures “necessary to protect public morals,” “necessary to protect human, animal or plant life or health,” and “relating to the conservation of exhaustible natural resources.” *Id.* at art. XX.

from using import restrictions, they may be prohibited from instituting certain kinds of product-level regulation unilaterally. Thus, ironically, while product-level regulation is the most targeted form of unilateral regulation and might naturally be viewed as the least controversial, it is in fact more heavily constrained by international law than corporation-level regulation.¹⁵⁴

One important area of product-level enforcement is securities regulation. The internationalization of securities trading in recent years has raised a dilemma for government regulators who want to ensure the efficiency, fairness, and competitiveness of their capital markets.¹⁵⁵ Although governments desire to attract securities trading to their markets, they also want to protect investors from securities fraud. But strong investor protections can potentially deter companies from listing their securities on domestic exchanges.¹⁵⁶ While there is a growing effort to achieve greater cooperation between securities regulators,¹⁵⁷ sharp differences in the level and nature of antifraud protections remain.¹⁵⁸

¹⁵⁴ This peculiar situation may be explained by the fact that countries have been more successful in negotiating multilateral agreements on trade and less successful in negotiating multilateral agreements on other corporate activities.

¹⁵⁵ See David Bach & Abraham L. Newman, *Transgovernmental Networks and Domestic Policy Convergence: Evidence from Insider Trading Regulation*, 64 INT'L ORG. 505, 520 (2010).

¹⁵⁶ See Amir N. Licht, *Games Commissions Play: 2x2 Games of International Securities Regulation*, 24 YALE J. INT'L L. 61, 64 (1999). For a discussion of the roots of this regulatory competition and the pressure for "light touch" regulation, see John C. Coffee, Jr., *System Risk After Dodd-Frank: Contingent Capital and the Need for Regulatory Strategies Beyond Oversight*, 111 COLUM. L. REV. 795, 818–22 (2011). Some scholars, however, have noted that *stricter* regulation will attract foreign companies to domestic exchanges, as companies attempt to bond themselves to the regime's high standards. See Jeffrey N. Gordon, *Ties that Bond: Dual Class Common Stock and the Problem of Shareholder Choice*, 76 CAL. L. REV. 1, 3 (1988). Some empirical studies, however, have argued that the bonding effect is weak. See Jordan Siegel, *Can Foreign Firms Bond Themselves Effectively by Renting U.S. Securities Laws?*, 75 J. FIN. ECON. 319, 321 (2005).

¹⁵⁷ The International Organization of Securities Commissions, an association of securities regulators from over 100 countries, has led efforts to harmonize disclosure requirements between jurisdictions. It has improved information-sharing among regulators, but has largely failed to make progress on accounting standards convergence. See David Zaring, *Finding Legal Principle in Global Financial Regulation*, 52 VA. J. INT'L L. 683, 699 (2012).

¹⁵⁸ The U.S. has negotiated with other countries to promote insider trading laws, but other countries, even if they agree to legislative changes, often are slow to make enforcement changes. For example, Japan prohibits insider trading, but the penalties for violations are based on the commission earned by those trading on the news, not the profits from the trade. Penalties proposed last year for violations were as low as \$630. See *Muddy Waters: The Deep Roots of Insider Trading*, ECONOMIST (June 16, 2012), <https://perma.cc/RDD5-XWTW>. See also Merritt B. Fox, *Securities Disclosure in a Globalizing Market: Who Should Regulate Whom*, 95 MICH. L. REV. 2498, 2503 (1997) (concluding that regulatory competition would lead to a race to the bottom). But see Stephen J. Choi & Andrew T. Guzman, *Portable Reciprocity: Rethinking the International Reach of Securities Regulation*, 71 S. CAL. L. REV. 903, 916 (1998) (arguing that regulatory competition between regimes on securities regulation would be beneficial).

The U.S. has responded to these dynamics with strong product-level regulation.¹⁵⁹ First, Section 5 of the Securities Act requires all issuers of securities to file a registration statement containing various disclosures, thereby insuring that all investors have access to basic information about the corporation's securities.¹⁶⁰ Section 5, however, only applies to offers and sales of securities that make use of interstate commerce.¹⁶¹ Second, Rule 10b-5 makes it unlawful for any person to defraud or deceive purchasers of securities.¹⁶² Rule 10b-5 only applies, however, if the deceptive conduct was "in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered."¹⁶³ Although there was some ambiguity about the extraterritorial reach of this anti-fraud rule, the U.S. Supreme Court has clarified that the rule focuses "not upon the place where the deception originated, but upon purchases and sales of securities in the United States."¹⁶⁴ In other words, the anti-fraud protections of the U.S. securities laws do not regulate deceptive practices generally by international corporations. It is only when the securities product is bought or sold *within* the U.S. that the U.S. asserts a regulatory interest in it.¹⁶⁵

The U.S., thus, has enacted unilateral product-level regulation to prevent the harms of securities fraud. It regulates securities when they "enter" the U.S., regardless of the source of those securities. It requires disclosures about those

¹⁵⁹ A large literature has developed around the international effects of U.S. securities law. *See generally*, for example, Choi & Guzman, *supra* note 158; Stavros Gadinis, *The Politics of Competition in International Financial Regulation*, 49 HARV. INT'L L.J. 447 (2008); Joel P. Trachtman, *Unilateralism, Bilateralism, Regionalism, Multilateralism, and Functionalism: A Comparison With Reference to Securities Regulation*, 4 TRANSNAT'L L. & CONTEMP. PROBS. 69 (1994); Beth A. Simmons, *The International Politics of Harmonization: The Case of Capital Market Regulation*, 55 INT'L ORG. 589 (2001).

¹⁶⁰ Securities Act of 1933 § 5(a), 15 U.S.C.A. § 77e (West 2012).

¹⁶¹ *Id.* at § 77e(a). The SEC has issued regulations providing a safe harbor for sales that are made abroad. *See* 17 C.F.R. §§ 230.901-904 (2011).

¹⁶² 17 C.F.R. § 240.10b-5 (2011).

¹⁶³ 15 U.S.C. § 78j(b). *See* SEC v. Zandford, 535 U.S. 813, 820 (2002).

¹⁶⁴ *Morrison v. Nat'l Australian Bank*, 130 S. Ct. 2869, 2884 (2010). In *Morrison v. National Australian Bank*, the Supreme Court held that Section 10(b), and thus Rule 10b-5, do not apply extraterritorially. *Id.* at 2883.

¹⁶⁵ After the *Morrison* decision, some commentators worried that U.S. anti-fraud provisions were too limited in their application. The 2008 Dodd-Frank Act granted the SEC jurisdiction to enforce the anti-fraud provisions of the Exchange Act to transactions that involve "any conduct within the United States that constitutes significant steps in furtherance of the violation, even if the violation is committed by a foreign adviser and involves only foreign investors; or (2) conduct occurring outside the United States that has a foreseeable substantial effect within the United States." Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, § 929P (2010) (codified at 12 U.S.C. §§ 5301 *et seq.*). On the other hand, some courts have held that, at least for private suits, U.S. investors who purchase securities overseas do not receive the protection of Rule 10b-5. *See* SEC, *Study on the Cross-Border Scope of the Private Right of Action Under Section 10(b) of the Securities Exchange Act of 1934*, at 34, (Apr. 2012), <https://perma.cc/P7R8-D5ZF>.

securities to meet certain standards of accuracy and completeness. Unilateral product-level regulation is facilitated by the dominance of U.S. markets and the ease of monitoring behavior.¹⁶⁶ This dominance has allowed the U.S. to resist pressure to forego strong investor protections.¹⁶⁷

3. Country-level regulation.

Finally, unilateral corporate regulation may take the form of country-level regulation. Country-level regulation is less targeted than either product-level regulation or corporation-level regulation, as it sanctions the home country of international corporations, rather than the relevant corporation or its goods. In this sense, country-level regulation is the least direct of all potential unilateral forms of regulation. Instead of imposing costs directly on the corporation or its products, it aims to constrain corporate behavior by putting pressure on the corporation's home government. An example of country-level regulation is the suspension or withdrawal of trade concessions or aid grants in response to intellectual property violations by corporations located in a country.¹⁶⁸

Country-level regulation is generally enacted when a regulating state views the problematic corporate behavior as widespread within a single country and sufficiently important to require broad-based retaliatory action. Often, it involves a perceived lack of adequate laws, or lack of enforcement of those laws, in the foreign country. For example, the U.S. has initiated sanctions against Japan for allegedly unfair business practices by Japanese film companies (and, in particular, Fuji).¹⁶⁹ The aim of country-level sanctions is to incentivize foreign governments to induce their corporations to behave differently.

Country-level regulation as a response to corporate agility offers a number of advantages over more targeted regulation. First, country-level regulation can

¹⁶⁶ It is less clear whether this will continue to be the case in the future. On a number of measures, the relative attractiveness and competitiveness of U.S. capital markets is declining. See Comm. on Capital Mkts. Regulation, *The Competitive Position of the U.S. Public Equity Market* 1 (2007), <https://perma.cc/MS4E-T29C>. Some scholars, however, have noted that foreign companies may be attracted to the U.S. as a way of bonding themselves to better corporate governance standards. See John C. Coffee, Jr., *The Future as History: The Prospects for Global Convergence and Its Implications*, 93 NW. U.L. REV. 641, 651–52 (1999).

¹⁶⁷ See Simmons, *supra* note 159, at 601 (“[I]f the dominant financial center is large and competitive enough, it seems utterly arbitrary to assume that it will sacrifice its national regulatory preferences to engage in a downward competitive spiral with foreign jurisdictions.”).

¹⁶⁸ The U.S. threatened monetary sanctions against Thailand and China in the 1990s in response to what was perceived as rampant IP violations by companies in those countries. These threats eventually led both countries to change their IP laws to provide better protection for U.S. companies. See Getlan, *supra* note 128, at 191–99.

¹⁶⁹ See generally John Linarelli, *The Role of Dispute Settlement in World Trade Law: Some Lessons from the Kodak-Fuji Dispute*, 31 L. & POL'Y INT'L BUS. 263 (2000).

leverage the influence of powerful domestic interests in foreign countries to achieve corporate change. Country-level regulations sometimes affect industries other than the ultimate target of the regulation, and, indeed, often directly aim at unrelated industries.¹⁷⁰ By imposing costs on more powerful or influential domestic actors, country-level regulations can be more effective at incentivizing foreign governments to take action. For example, sanctions on the automobile industry in the U.S. or the agriculture industry in France would fit the bill.

Second, country-level regulation does not need to identify with particularity the specific corporations that are engaging in the prohibited behavior. Instead, it identifies a general problem or practice in a country and imposes sanctions based on this general problem. This approach reduces the investigative costs involved with targeting particular companies and avoids the problem of corporations merely shifting business to alternate entities. Thus, country-level regulation takes advantage of asymmetric information and monitoring capabilities in foreign countries.¹⁷¹ In many cases, the regulating state is not in the best position to monitor and enforce corporate regulations, such as when the relevant behavior is difficult to observe without a domestic presence. Instead, by putting pressure on foreign governments to change the way they regulate corporations, country-level regulation can encourage regulatory agencies with better monitoring abilities to enforce the desired laws.

At the same time, country-level regulation is, by its very nature, conflict-inducing. At a minimum, it involves economic sanctions (either through reductions in aid or through increases in trade barriers) on a country-wide basis. Often, it involves targeting influential and important actors in a foreign country. At the extreme, it can lead to trade wars. These sorts of conflicts will likely dissuade countries from initiating country-level regulations except in situations of widespread harm.

Similarly, one of the primary strategies of country-level regulation, the suspension or withdrawal of trade concessions, is costly both to the regulated state *and* the regulating state.¹⁷² The most *effective* sanctions will likely be the most *costly*

¹⁷⁰ See Jide Nzelibe, *The Credibility Imperative: The Political Dynamics of Retaliation in the World Trade Organization's Dispute Resolution Mechanism*, 6 THEORETICAL INQ. L. 215, 224 (2005) (“[I]f retaliation targets a wide range of industries, mobilization will be difficult because of free-rider problems. Therefore, the injured state has an incentive to engage in targeted retaliation and focus on a discrete group of powerful industries that it believes will put sufficient pressure on politicians in the scofflaw state.”).

¹⁷¹ See Kalypso Nicolaodis, *Mutual Recognition of Regulatory Regimes: Some Lessons and Prospects* (Jean Monnet Working Paper No. 7/97, 1997), <https://perma.cc/45C4-EPRD> (analyzing the benefits of cooperation between different domestic regulators).

¹⁷² It is widely accepted among trade scholars that lower barriers to trade are beneficial for most countries in most circumstances. Thus, to the extent that a country raises its trade barriers in an effort to impose costs on international corporations, it is a costly measure for the regulating state,

ones. The purpose of sanctions is to impose sufficient costs on a foreign government so as to incentivize the foreign government to constrain the behavior of its corporations. But in many cases, foreign governments will not be willing to act unless the cost of inaction is high. In order to increase the cost of inaction, the regulating state must increase either the level or the breadth of economic sanctions. Either of these measures will increase the cost of sanctions to the regulating state.¹⁷³

Finally, country-level regulations are heavily regulated under international trade law. The WTO prohibits states from enacting country-specific trade barriers except in special circumstances, such as when a country is engaging in dumping or otherwise violating international trade law.¹⁷⁴ If a country enacts country-level regulation in violation of WTO law, it is subject to sanctions under the WTO dispute settlement body.¹⁷⁵ Such sanctions can greatly increase the cost of unilateral regulation. For these reasons, most governments use country-level regulation sparingly, if at all.

One significant area of country-level regulation is intellectual property.¹⁷⁶ Intellectual property protection is a multi-faceted problem for corporations and governments because the producers of intellectual property (such as the pharmaceutical industry, the recording industry, and the film industry) desire to realize profits from both domestic and international sales of their products. But corporations abroad often have an interest in piggybacking on the intellectual property created by other corporations in order to avoid devoting resources to research and development. If a country does not enact (and, importantly, enforce) laws protecting the IP rights of foreign corporations, then its own corporations may be able to operate at an advantage over their competitors. These issues are complicated by the fact that some countries are net intellectual property

even if the measure is seen as largely in the long-term interest of the state. *See* Guzman, *supra* note 42, at 595; JAGDISH BHAGWATI, IN DEFENSE OF GLOBALIZATION 280–81 (2007).

¹⁷³ An alternative way to increase the perceived cost to foreign governments is to target politically influential industries, such as steel in the U.S. or agriculture in Europe. As already mentioned, this approach may make unilateral regulation more effective without greatly increasing its cost.

¹⁷⁴ *See* Mark Wu, *Antidumping in Asia's Emerging Giants*, 53 HARV. INT'L L.J. 1, 3 (2012).

¹⁷⁵ There is some question about the efficacy of WTO sanctions, which are generally prospective and do not allow for the recovery of past damages. *See* Rachel Brewster, *The Remedy Gap: Institutional Design, Retaliation, and Trade Law Enforcement*, 80 GEO. WASH. L. REV. 102, 102 (2011).

¹⁷⁶ *See* Alan O. Sykes, *supra* note 128, at 264–65; Brewster, *supra* note 98, at 2–3; NITSAN CHOREV, REMAKING U.S. TRADE POLICY: FROM PROTECTIONISM TO GLOBALIZATION 155 (2007); Peter Drahos, *Negotiating Intellectual Property Rights: Between Coercion and Dialogue*, in GLOBAL INTELLECTUAL PROPERTY RIGHTS: KNOWLEDGE, ACCESS AND DEVELOPMENT 161, 171 (Peter Drahos & Ruth Mayne eds., 2002); BERNARD M. HOEKMAN & MICHEL M. KOSTECKI, THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM: FROM GATT TO WTO 147 (1995); Alan O. Sykes, *TRIPS, Pharmaceuticals, Developing Countries, and the Doha "Solution"*, 3 CHI. J. INT'L L. 47, 47–48 (2002).

producers, and others are net intellectual property users.¹⁷⁷ Thus, the content of international property rules will have distributional consequences, as the adoption of a high level of protection for producers of intellectual property will be a net gain for producer-countries and a net loss for consumer-countries.¹⁷⁸ This dynamic has hindered international negotiations over an international intellectual property agreement.

Despite these obstacles, states have managed to negotiate a number of international agreements on the protection of intellectual property rights,¹⁷⁹ the most important of which is the WTO's Trade Related Intellectual Property Agreement (TRIPS). TRIPS obligates its members to establish minimum standards of IP protection under national law and create enforceable IP rights even for foreign IP owners.¹⁸⁰ TRIPS has not, however, solved international intellectual property problems, and a number of IP-dependent industries (such as the pharmaceutical industry and the software industry) have complained that countries are failing to enforce their IP laws adequately.¹⁸¹

As a response, the U.S. has used the threat of unilateral country-level sanctions to prevent corporations abroad from violating the rights of U.S. IP owners. The primary statute in this area is Section 301, a law that permits the president to use a broad array of measures against a country if the country engages in "unfair" trade practices, which include a lack of "adequate and effective protection of intellectual property rights."¹⁸² Sanctions can include reductions in aid, the suspension of trade concessions, or the creation of other import restrictions.¹⁸³ Notably, the statute specifies that the government may take action against *any* goods from the foreign country, without regard to whether the goods are connected to the targeted behavior.¹⁸⁴ In 1998, the U.S. used Section 301 to

¹⁷⁷ In general, developed countries are more likely to be producers of intellectual property than developing countries. See Arvind Subramanian & Jayashree Watal, *Can TRIPS Serve As An Enforcement Device for Developing Countries in the WTO?*, 3 J. INT'L ECON. L. 403, 404 (2000).

¹⁷⁸ See Brewster, *supra* note 100, at 15.

¹⁷⁹ Prominent examples include the U.N.-created World Intellectual Property Organization, the Berne Convention, and the Paris Convention.

¹⁸⁰ See Patricia L. Judd, *Toward a TRIPS Truce*, 32 MICH. J. INT'L L. 613, 622 (2011).

¹⁸¹ See David Leonhardt, *The Real Problem with China*, N.Y. TIMES, Jan 17, 2011, at B1; Press Release, Sec'y Timothy Geithner, *The Path Ahead for the U.S.-China Economic Relationship* (Jan. 12, 2011), <https://perma.cc/3JWF-NKP3>; Brewster, *supra* note 103, at 1.

¹⁸² 19 U.S.C. § 2411(d)(3)(B)(i). Section 301 also includes a provision, which is often referred to as "Special 301," that specifically addresses intellectual property. See Judith H. Bello & Alan F. Holmer, *"Special 301": Its Requirements, Implementation, and Significance*, 13 FORD. INT'L L.J. 259, 259 (1990). This section will not distinguish between Section 301 and its subpart Special 301.

¹⁸³ 19 U.S.C. § 2411(c)(1).

¹⁸⁴ 19 U.S.C. § 2411(c)(3)(B).

impose import restrictions on Brazil and threatened to do the same to India in response to corporate violations of IP rights, particularly in the area of pharmaceuticals.¹⁸⁵

This unilateral approach to international IP protection, however, faced strong resistance by other countries, which objected to the U.S.'s assertion of a right to unilaterally assess the adequacy of other countries' IP law. In 1998, the E.U. challenged Section 301 under the WTO's dispute settlement mechanisms.¹⁸⁶ Although the WTO panel found that Section 301 did not violate the terms of the WTO Agreement, it noted that this determination was based in part on the U.S. president's undertaking that all future Section 301 determinations would be made pursuant to WTO decisions.¹⁸⁷ Thus, the prospects for unilateral use of Section 301 have been significantly constrained by WTO law.

Still, the U.S. maintains a watch list of countries that are concerns for IP protection and may institute sanctions for actions that do not constitute violations of WTO duties.¹⁸⁸ In 2001, the United States Trade Representative (USTR) raised customs duties on products from Ukraine and suspended trade preferences to the country in response to rampant violations of U.S. IP rights in optical media, such as CDs and DVDs.¹⁸⁹ Ukraine later amended its copyright laws and increased enforcement against domestic corporations.¹⁹⁰ The U.S., thus, still implicitly, and sometimes explicitly, threatens unilateral action to prevent foreign corporations from misappropriating corporate intellectual property.¹⁹¹

The U.S. approach towards protecting the intellectual property of U.S. corporations illustrates some of the advantages and disadvantages of unilateral country-level regulation. First, Section 301 has permitted the U.S. to reach corporate behavior exhibiting little nexus to U.S. territory. Much of the intellectual property behavior that is problematic is located entirely within the borders of a

¹⁸⁵ See HOEKMAN & KOSTECKI, *supra* note 176, at 279.

¹⁸⁶ See generally Panel Report, United States—Sections 301-310 of the Trade Act of 1974, P. 8.1, WTO Doc. WT/DS152/R (Dec. 22, 1999).

¹⁸⁷ See *id.* at 329–30.

¹⁸⁸ The list currently includes a number of countries, including Argentina, China, Russia, and Thailand. Office of the U.S. Trade Rep., *2012 Special 301 Report* (Apr. 2012).

¹⁸⁹ See FELLMETH, *supra* note 188, at 522.

¹⁹⁰ See *id.* at 522.

¹⁹¹ It is important to point out here that the U.S. is not pursuing unilateralism *to the exclusion* of multilateralism. One prominent example of the U.S.'s efforts to gain greater multilateral agreement regarding the protection of intellectual property is the Trans-Pacific Partnership. See Kevin Granville, *The Trans-Pacific Partnership, Explained*, N.Y. TIMES (Aug. 20, 2016), http://www.nytimes.com/interactive/2016/business/tpp-explained-what-is-trans-pacific-partnership.html?_r=0. But the backlash against that treaty only highlights the drawbacks and limitations of multilateralism in today's world.

foreign country, and thus is outside the jurisdiction of U.S. law. Second, the U.S. has used Section 301 to reach corporations that would otherwise avoid regulation. One of the major problems in regulating intellectual property is that violations are often difficult to detect. Corporations may know that their IP is being pirated or used illegally, but they often do not know the identities of the violators.¹⁹² Even if they do identify the violators, the costs of individual prosecutions may outweigh the benefits of shutting down individual violators. By imposing costs on a country-wide basis, the U.S. incentivizes foreign countries to regulate the behavior of their own corporations.¹⁹³ Third, the U.S. assertion of unilateral regulatory power has run up against international trade agreements, as it potentially violates the terms of the WTO. Thus, U.S. discretion has been cabined by international law. At the same time, the U.S. still has the ability to withhold aid, as opposed to imposing trade restrictions, in order to pressure foreign countries to monitor their corporations. It is unclear to what extent this carrot has been used, although U.S. corporations routinely request government help in preventing the misuse of their intellectual property.¹⁹⁴

C. The Effectiveness of Unilateral Regulation

When a decision has been made to take unilateral action, states have a number of options at their disposal: they can adopt corporation-level regulation, product-level regulation, country-level regulation, or any combination of these approaches. In addition, each approach itself can involve a multitude of decisions: what behavior to target, which corporations to regulate, what sanctions to mete out, and many other related questions. Given the complexity of unilateral regulation, the effectiveness of particular approaches will likely be contingent on a number of complex factors. This Section will provide some preliminary observations on the matter.

The principal determinant of effectiveness is the extent to which a state can impose costs or bestow benefits on foreign corporations, and the cost of such

¹⁹² See Brewster, *supra* note 103, at 33.

¹⁹³ See Kaczmarek & Newman, *supra* note 146, at 745.

¹⁹⁴ In a 2009 cable from the Algerian embassy entitled “E-Barbary Coast: Profits and Piracy in the Algerian Software Market,” the State Department addressed the problem of piracy and its effects on U.S. business. The cable focused on the complaints of Microsoft that its software was being used without authorization by numerous companies. Microsoft representatives told the State Department that it was losing \$20m a year due to software piracy and that 80% of small- and medium-sized enterprises were illegally using Microsoft programs. Microsoft requested that the State Department take “more forceful action regarding Algerian IPR protection” in order to ensure that the Algerian government enforced its IP laws against infringers. Cable #09ALGIERS302_a, 09ALGIERS228, Wikileaks (Mar. 29, 2009, 16:33 UTC), <https://perma.cc/BU72-CZXA>. Algeria remains on the Section 301 priority watch list.

impositions or bestowals to the regulating state.¹⁹⁵ If a country can greatly decrease the profits of a foreign corporation through a simple and low-cost measure, then domestic regulatory action is likely to be effective. But if legislation is expensive to the state, or a corporation can easily avoid the legislation,¹⁹⁶ then unilateral efforts grow more difficult.¹⁹⁷

A number of factors may affect the costs and benefits of particular forms of unilateral regulation. This Section will focus on three factors: (1) the nature of the harm, (2) the importance of the regulated behavior to corporations, and (3) the type of actors involved. These factors are by no means comprehensive, but they are transversal and can provide substantial insight into the effectiveness of unilateral corporate regulation.

First, the effectiveness of unilateral regulation depends on the nature of the harm being regulated. In some circumstances, the harm stems from the manner in which a product is produced. For example, countries have often expressed an interest in prohibiting the use of child labor, even when the product of such labor is identical to products made using adult labor.¹⁹⁸ In other circumstances, the harm may be unconnected to any product but rather stem from business practices abroad, such as anti-competitive behavior or bribery.

Product-level regulation depends on the importation into or the presence within the regulating state of goods or services. Thus, it is most effective when the harm that is being regulated is related to the tangible or intangible presence of

¹⁹⁵ This Article is agnostic on the debate between rational choice scholars and constructivist scholars about the decisionmaking processes of state actors. There is a large literature discussing whether state actors rationally balance the costs and benefits of state policies to maximize social welfare, and even what it means to act “rationally.” See KEOHANE, *supra* note 23; Kenneth W. Abbott, *Enriching Rational Choice Institutionalism for the Study of International Law*, 2008 U. ILL. L. REV. 5, 10 (2008); Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 348–54 (2000). This article will not address that debate. Instead, for the purposes of this article, I will merely assume that state decisionmakers perceive costs and benefits of regulations, and that these perceptions affect the decisionmaker’s actions.

¹⁹⁶ The cost here includes long-term harm to a corporation’s reputation. It may be easy for a corporation to ignore human rights laws, but if having a reputation for violating human rights hurts a company’s bottom line, then that is a cost that corporations should take into account. *See generally*, for example, Kevin T. Jackson, *Global Corporate Governance: Soft Law and Reputational Accountability*, 35 BROOK. J. INT’L L. 41 (2010); Tim Bartley & Curtis Child, *Shaming the Corporation: Reputation, Globalization, and the Dynamics of Anti-Corporate Movements* (Aug. 7, 2011) (unpublished manuscript) (on file with author).

¹⁹⁷ An important point here is that the interests of foreign governments are not directly relevant to the analysis. They may, of course, affect the perceived costs and benefits of the regulating state, but only in an indirect way. Indeed, this is one of the essential features of unilateral regulation, as it involves a single state’s decision as opposed to an agreed-upon solution involving multiple states. Thus, unilateral regulations may well impose externalities on other states that are not fully taken into account by the regulating state.

¹⁹⁸ See Shima Baradaran & Stephanie Barclay, *Fair Trade and Child Labor*, 43 COLUM. HUM. RTS. L. REV. 1, 6–8 (2011).

a good within a country. Where the harm, however, stems from anti-competitive behavior abroad and does not involve products imported into the regulating state, then the effectiveness of product-level regulation is hindered. For example, if the regulated corporation has monopolized a foreign market, but does not import goods into the regulating state, then product-level regulation may be ineffective at imposing costs on the relevant corporations. Corporation-level regulation, aimed at the behavior abroad regardless of the importation of goods, may be more effective in these circumstances. But again, it relies on the ability of the regulating state to impose civil or criminal liability on the regulated corporations. If corporations are located abroad and do not have assets in the regulating state, then corporation-level regulation may fall short as well. In these circumstances, countries may be forced to adopt country-level unilateral regulations.

A second important factor in assessing the effectiveness of unilateral corporation regulation is the importance of the regulated behavior to corporations. The question here is whether the regulated behavior is sufficiently important to companies as to outweigh the cost of complying with the regulation. Product-level regulations are most effective when market access to the regulating state is essential to the operations of the regulated corporations. So, for example, if the U.S. passes a law that requires all imported cars to have steering wheels in the middle of the car, then it is likely that foreign carmakers will re-engineer their cars to comply with the new regulation, as long as the U.S. market is sufficiently important to their business. If, on the other hand, North Korea passes the same regulation, carmakers likely will not respond in the same way. Corporation-level regulation similarly is most effective when the prohibited behavior is unimportant to the corporation and corporations receive great benefits from maintaining a presence (either in the form of headquarters, bank accounts, or stock listings) in the regulated state.

Country-level regulation operates in a more indirect manner. The unilateral regulation may well target actors other than the corporations at issue, in order to exert greater pressure on foreign governments to change the behavior of their corporations. Thus, to a certain extent, the effectiveness of the regulation depends on the importance of particular behavior *both* to the target corporations that are the ultimate aim of the regulation and to the corporations whose operations or exports are directly affected by the regulation.

Third, the type of actors involved will heavily influence the effectiveness of unilateral corporate regulation. The relevant actors in this context are the regulating state, the target state, and the target corporations. Is the target corporation a large company or a small one, an export dependent one or a primarily in-country producer, a multinational company or a national one? Is the regulating state a large state or a small state, a wealthy state or a poor one, a developed country or a developing one, a capital-exporting country or a capital-importing one? Similar questions can be asked about the target state as well. The

nature of the regulator and the regulated is important because it conditions the kinds of costs that the regulator can impose on the regulated.

To take just one example, the U.S. has a perhaps unrivaled ability to regulate international business unilaterally.¹⁹⁹ The attractiveness of U.S. capital markets,²⁰⁰ the size and wealth of the U.S. consumer market,²⁰¹ the power of the U.S. dollar,²⁰² and the power of New York banks²⁰³ all contribute to the ability of U.S.

¹⁹⁹ The E.U., considered as a single unit, may have a comparable ability to regulate corporations internationally. See Bradford, *supra* note 14, at 5 (arguing that the E.U. “has become the predominant regulator of global commerce”). The E.U. has a bigger economy than the U.S., it has more Fortune 500 companies, and it attracts more investment. See Bernd Debusmann, *Who Wins in U.S. vs. Europe Contest?*, REUTERS (Feb. 12, 2010), <https://perma.cc/EPV9-BBM5>. While Britain’s departure from the E.U. will certainly reduce the E.U.’s market power, it remains to be seen whether Brexit will dramatically change the E.U.’s aggressive unilateralism in areas such as tax and antitrust. See, for example, *Corporate Taxation: The €13 Billion Bite*, ECONOMIST (Sept. 3, 2016), <https://perma.cc/KV7P-Y97E>; Mark Scott, *E.U. Rules Look to Unify Digital Market, But U.S. Sees Protectionism*, N.Y. TIMES (Sept. 13, 2016), <http://www.nytimes.com/2016/09/14/technology/eu-us-tech-google-facebook-apple.html?partner=bloomberg>.

²⁰⁰ The attractiveness of U.S. capital markets is a matter of some debate today. Many scholars have argued that over-regulation of listed companies along with the rise of alternative sources of capital have contributed to a decline in the competitiveness of U.S. capital markets. See Comm. On Capital Mkts. Regulation, *Continuing Competitive Weakness in U.S. Capital Markets* (2015), <https://perma.cc/U5MR-VDYK>. Others note that the U.S. is still a dominant actor. In 2001, the domestic market capitalization of New York Stock Exchange and NASDAQ made up more than half of the capitalization of the entire World Federation of Exchanges, and the U.S. share of the value of global stock trading was 58%, and in 2005, 2,087 foreign firms had cross-listings in the U.S., and foreign listings on the three major exchanges in New York accounted for 30% of total global foreign listings. See Craig Doidge, G. Andrew Karolyi & Rene M. Stulz, *Has New York Become Less Competitive in Global Markets? Evaluating Foreign Listing Choices Over Time*, J. FIN. ECON. 91, 253–277 (2009). At the same time, the relative competitiveness of U.S. markets is falling on a number of metrics. See Comm. on Capital Mkts. Regulation, *supra* note 166.

²⁰¹ The importance of market access to the regulating state plays, as mentioned before, an essential role in determining the effectiveness of unilateral regulation, and in particular product-level regulation. See Thomas Oatley & Robert Nabors, *Redistributive Cooperation: Market Failure, Wealth Transfers, and the Basle Accord*, 52 INT’L ORG. 35, 49–52 (1998) (describing the importance of financial market power to U.S. efforts to regulate capital requirements).

²⁰² More than 35% of international financial transactions are denominated in dollars. The use of U.S. dollars in international commerce has greatly expanded the territorial reach of U.S. law, as most dollar-denominated transactions must “clear” through a U.S. bank. See *Dollar Power*, ECONOMIST (June 23, 2012), <https://perma.cc/G68D-YPUD>. While companies can structure their transactions in other currencies, the U.S. has used the power of the dollar to affect financial institutions. For example, in attempting to sanction Iran’s oil trade, the U.S. has enacted a law that denies access to the American banking system to any financial institution that facilitates trades with the Central Bank of Iran. See *id.* For a broader discussion of the efficacy of these efforts and the consequences for democratic accountability, see Suzanne Katzenstein, *Dollar Unilateralism: The New Frontline of National Security*, 90 IND. L.J. 293, 293 (2015).

²⁰³ The five largest U.S. banks (JP Morgan Chase & Co., Bank of America Corp., Citigroup, Inc., Wells Fargo & Co., and Goldman Sachs Group Inc.) held a combined \$8.5 trillion in assets at the end of

policymakers to enact effective unilateral corporate regulations. Companies that have stocks listed on a U.S. stock exchange, that sell goods into the U.S., or that use U.S. banks for transactions are most vulnerable to U.S. regulation. All of these ties between foreign corporations and the U.S. increase the likelihood that the U.S. will be able to assert jurisdiction over, and thus impose costs on, foreign corporations.

The nature of the target state may also have an important impact on the effectiveness of unilateral corporate regulations.²⁰⁴ To the extent that the regulating state opts for country-level regulation, these regulations have the potential to cause tensions between the regulating state and target state. If the target state is sufficiently powerful to enact retaliatory measures, then country-level regulations may be too costly to pursue. If, on the other hand, the target state relies heavily on the regulating state and does not have the means to enact strong countermeasures, then country-level regulations may be more effective.

This Section has argued that unilateral corporate regulation can serve as a feasible substitute for multilateral agreement in many issue areas, as long as there is a country with sufficient power that is willing to impose costs on foreign companies operating abroad. Individual countries have a number of means at their disposal to reach corporate behavior, and these means can provide robust constraints on global business. At the same time, unilateral regulation has real risks and downsides, and the following Section will outline some ways of avoiding these problems.

IV. A FRAMEWORK FOR UNILATERAL CORPORATE REGULATION

Unilateral corporate regulation can potentially solve, or at least significantly mitigate, many of the problems associated with corporate agility today. Large economic powers like the U.S. and the E.U. have the means to enforce their laws against a wide range of international actors and behaviors. By increasing the breadth and scope of domestic laws, and applying them to foreign companies operating abroad, states can reduce the anti-competitive effects of enacting legislation that imposes costly constraints on corporations. Unilateral corporate regulation can be a powerful and effective tool, and states are using it in an increasingly aggressive manner.

At the same time, unilateral regulation is not a panacea, and, in fact, may in some circumstances be worse than the problem it is intended to solve. Domestic

2011, an amount equivalent to 56% of the U.S. economy. See David J. Lynch, *Banks Seen Dangerous Defying Obama's Too-Big-To-Fail Move*, BLOOMBERG (Apr. 16, 2012), <https://perma.cc/T4ET-EV55>.

²⁰⁴ Daniel Drezner, for example, has argued that where great powers disagree on the appropriate level of regulation, it may lead to regulatory divergence and the emergence of policy convergence at multiple nodes. Drezner, *supra* note 92, at 841.

laws at times are blunt instruments that may either deter beneficial behavior or encourage harmful behavior. These problems are amplified at the international level, as the actions of one state can have reverberating effects on the actions of other states. This Section will describe the potential pitfalls of unilateral corporate regulation and provide a framework for future efforts.

A. The Limits of Unilateral Corporate Regulation

Unilateralism is risky. Even if a country *can* act effectively on its own to address a global problem, doing so will not always be welcomed by other countries, and indeed may not be the optimal solution to the problem. It is important to recognize that the risks are substantial and may provide strong reasons for states to forego unilateral action, even where such action is possible.

First, unilateral regulations carry a high risk of biased enforcement. When domestic laws extend to both local and foreign companies, those laws may well tend to have harsher consequences for foreign actors, either because of the enforcement strategies of prosecutors or the viewpoints of local courts and juries.²⁰⁵ Indeed, there is strong evidence that, at least in the U.S., similarly situated foreign companies receive significantly higher penalties than domestic ones.²⁰⁶ Recently, after several British banks were charged with violating money laundering statutes in the U.S., a number of British politicians cried foul, asserting that the U.S. was attempting to damage the reputation of London as a center of global finance.²⁰⁷ While it is difficult to disentangle worthy from unworthy prosecutions, the possibility of biased enforcement calls into question whether the regulation is serving its stated purpose.

Second, unilateral regulation can lead to over-regulation. If other countries react to one country's regulation by adopting their own legislation, there is a risk of regulatory warfare.²⁰⁸ Of course, this dynamic might lead to optimal

²⁰⁵ The conflicting judgments of U.S. and Korean courts about the patent claims asserted by Apple (a U.S. company) and Samsung (a Korean company) against each other give some credence to this claim. See Evan Ramstad, *Patent Bet Turns Sour for Korean Behemoth*, WALL ST. J., Aug. 27, 2012, at B4.

²⁰⁶ One U.S. study found that foreign corporations pay criminal fines twenty-two times larger than those paid by domestic corporations. Brandon L. Garrett, *Globalized Corporate Prosecutions*, 97 VA. L. REV. 1775, 1780 (2011).

²⁰⁷ In 2012, both Standard Chartered and HSBC, U.K.-based banks, were investigated for evading U.S. sanctions on Iran. Standard Chartered paid \$340 million to settle with New York regulators, while HSBC has set aside \$700 million to pay potential fines. U.K. politicians have begun to decry the "increasingly anti-British bias" of U.S. regulators and argued that enforcement was "start[ing] to shade into protectionism." Max Colchester, Liz Rappaport, & Damian Paletta, *In U.K., A Backlash Over Standard Chartered Probe*, WALL ST. J., Aug. 8, 2012, at B1.

²⁰⁸ An alternative, of course, would be for the responding state to react in a *different* issue area, by, for example, refusing to cooperate on other matters of importance to the regulating state. These sorts of issue linkages may be particularly prevalent or powerful where the two states interact frequently

enforcement, if overlapping regulation by multiple countries is essential to an effective regulatory regime. Where, however, national regulators adopt conflicting requirements or bring frivolous lawsuits against foreign companies, unilateral regulation may deter beneficial corporate behavior and destroy corporate efficiencies.²⁰⁹

Third, for some global problems, unilateral corporate regulation is incapable of achieving a durable and complete resolution of the issue. Unilateral regulation is a decidedly unstable system and in many instances is effective only over the short-term. Unilateral regulation relies on connections with the regulating state—connections that are easily severed. Companies can close foreign subsidiaries, delist, or avoid using financial institutions in the regulating state, and the harmful behavior may then leak to regions that are unregulatable. Thus, for certain problems, unilateral regulation can only provide a partial solution.²¹⁰ Furthermore, if unilateral regulation is only a partial solution, it may well impede a more complete solution if it disperses political pressure for action or complicates multilateral negotiations.²¹¹

Fourth, even if unilateral regulation is not biased, is not over-enforced, and can provide a durable solution to the relevant problem, it is an exhaustible resource: it can only be utilized in a limited number of areas. The implementation of unilateral corporate regulation is costly, as it involves legislation, monitoring systems, and enforcement mechanisms, each of which requires the devotion of political and economic resources. Just as importantly, unilateral regulation increases the marginal cost to corporations of being attached to the regulating state. As the regulating state's laws become more burdensome for foreign companies, a progressively greater proportion of companies will find the advantages of maintaining a corporate presence in the country offset by the costs. It may be that the FCPA, FATCA, or Dodd-Frank are not enough to dissuade companies from operating in the U.S., but as these regulations proliferate, a greater swath of companies will find the U.S. regulatory environment too burdensome, too oppressive, or too costly to justify entering the market. The

and deeply, as in the European Union. See Ernst B. Haas, *Why Collaborate? Issue-Linkage and International Regimes*, 32 *WORLD POL.* 357, 370–75 (1980).

²⁰⁹ See Richard A. Bierschbach & Alex Stein, *Overenforcement*, 93 *GEO. L.J.* 1743, 1744 (2005).

²¹⁰ These problems, of course, would also exist with respect to many multilateral agreements. The vast majority of international agreements are not unanimously adopted by all nation-states, after all. But the costs are likely higher in unilateral regulation, for all the reasons discussed above.

²¹¹ See Rachel Brewster, *supra* note 142, at 250–68. On the other hand, unilateral corporate regulation may also provide incentives for other states to negotiate seriously in multilateral arenas. For a discussion of the ways in which unilateralism can reinforce multilateral agreements and encourage treaty compliance (and vice-versa), see Maggie Gardner, *Channeling Unilateralism*, 56 *HARV. INT'L L.J.* 297, 297 (2015).

enactment of unilateral corporate regulations in one area, then, may reduce the effectiveness of unilateral corporate regulations in others.²¹² For these reasons, its use must be rationed: states need to weigh the importance of particular unilateral regulations against the value of other policy priorities. If a regulation will significantly decrease the impact of other more important corporate laws, then its enactment should be scrutinized more carefully.

Of course, determining the relative importance of corporate laws is difficult and controversial, a fact that raises a further difficulty—the normative quagmire. It is likely that our judgments about the desirability of unilateral corporate regulation will depend heavily on the substance of the regulation at issue. If we believe that the payment of bribes to foreign officials should be criminalized, then we will likely look favorably on the FCPA. If we believe that airlines should be taxed for their carbon emissions, then we will likely look favorably on the E.U.’s Emissions Trading System. If we do not share those beliefs, then unilateral regulation begins to look more problematic. When regulation of international corporate behavior is based on multilateral agreement, it is probable that at least some modicum of broad-based support for the regulation exists. When, instead, they are based purely on a unilateral determination by one country, no such guarantee exists. Thus, debates about the propriety of unilateral corporate regulation risk becoming bogged down in particularized disputes about the substantive elements of the regulation.

All of these difficulties suggest that unilateral corporate regulation should be employed selectively and cautiously. There are no simple solutions for any of these problems, and unilateral action will likely remain contentious and disputed for the foreseeable future. However, the foregoing analysis suggests that a few basic principles may help avoid some of the pitfalls of unilateral corporate regulation.

B. Rationing Unilateral Corporate Regulation

States have a limited capacity to use unilateral regulation to constrain corporate behavior. Each assertion of regulatory authority over companies operating abroad carries risks and costs, and even the most powerful countries face these limitations. Given that states must ration their use of unilateral regulation, it is incumbent on policymakers to construct methods for assessing the costs and benefits of particular assertions of regulatory authority.²¹³ This Section sets forth three criteria that should inform that analysis.

²¹² See Valentina G. Bruno & Stijn Claessens, *Corporate Governance and Regulation: Can There Be Too Much of a Good Thing?*, 19 J. FIN. INTERMEDIATION 461, 479 (2010).

²¹³ Of course, conflict of laws and jurisdictional rules may also provide a useful guide for policymakers. See Guzman, *supra* note 6, at 889. These rules, however, merely purport to set out the *legal* limitations

First, states should enact unilateral corporate regulation only when there is a global *consensus* on the nature of the problem. In other words, a government should only regulate corporate behavior beyond its borders when that behavior is generally accepted in the international community as harmful. If, instead, governments have radically different views about the basic value of the behavior, then governments should refrain from unilateral regulation.²¹⁴ For example, given the widespread acceptance of corruption as an under-regulated harm, it is reasonable for governments to undertake efforts to regulate corruption beyond their borders. The same conclusion would be appropriate for climate change.²¹⁵ On the other hand, nuclear energy, which provokes heated debate even about whether it constitutes a benefit or a harm, is probably best left to domestic regulation until a greater consensus develops on its desirability.²¹⁶ Global consensus is important because it indicates both the severity of the problem and the desire for action.

Second, states should use unilateral regulations only when the corporate behavior at issue imposes strong *externalities* on other countries. It is well known that when actors do not bear the full cost of their actions, they are more likely to engage in socially detrimental behavior.²¹⁷ Similarly, if a country does not bear the full cost of its corporations' behavior, it is likely to regulate that behavior at a sub-optimal level. Thus, when corporate behavior in one country imposes externalities on other countries, governments in other countries may justifiably regulate that behavior. Such regulation is desirable because it attempts to harmonize the

on regulatory authority, not prudential considerations for when a legally permissible action is in fact desirable.

²¹⁴ One difficulty in assessing global consensus is determining the level of specificity at which consensus should be required. For example, countries might agree that child labor is problematic, but they might disagree about whether 17-year-olds are children. *See, for example*, Convention 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, adopted June 17, 1999, 2133 U.N.T.S. 161 (entered into force Nov. 19, 2000) (defining a child as any person that is less than 18 years old); Convention 138 Concerning Minimum Age for Admissions to Employment, adopted June 26, 1973, 1015 U.N.T.S. 297 (entered into force June 19, 1976) (setting the general minimum age for employment at 15 years). Although there is no easy answer to this question, as long as the measure used to regulate the harm has some reasonable connection to a harm that *is* generally recognized as such, then it fulfills this criterion. This requirement could also be understood as a litmus test for the level of disagreement on an issue.

²¹⁵ For a discussion of the range of unilateral policies that nations have adopted to address climate change, see James W. Coleman, *Unilateral Climate Regulation*, 38 HARV. ENVTL. L. REV. 87, 87 (2014).

²¹⁶ *See* Mark P. Gibney, *The Extraterritorial Application of U.S. Law: The Perversion of Democratic Governance, the Reversal of Institutional Roles, and the Imperative of Establishing Normative Principles*, 19 B.C. INT'L & COMP. L. REV. 297, 305 (1996).

²¹⁷ *See generally, for example*, Steven Shavell, *Corrective Taxation Versus Liability as a Solution to the Problem of Harmful Externalities*, 54 J. L. & ECON. S249 (2011) (discussing ways to allocate the full costs of actions to prevent socially detrimental behavior).

interests of corporations with the interests of society as a whole. Global warming is the paradigmatic example of a problem with strong externalities—carbon emissions in one country harm countries everywhere. Thus, unilateral regulation to curb climate change would be justifiable under this prong. Purely domestic environmental harms, on the other hand, such as soil pollution or contaminants in lakes and ponds, would not be fertile ground for unilateral regulation.²¹⁸

Finally, when countries decide to act unilaterally, they should adopt the most *targeted* form of unilateral regulation possible. The law, thus, should be as narrowly tailored as possible, avoiding effects on either behaviors or actors that do not contribute materially to the relevant problem. Tailoring, of course, is important in any law because it ensures that the law is: (1) the least costly method of deterring bad behavior, and (2) the method that is least likely to deter good behavior.²¹⁹ But tailoring is particularly important in unilateral actions because of the potential for international conflict. When countries regulate activities outside their borders, the harms from unintentional consequences are amplified: not only are costs imposed on corporations that are not citizens of the regulating state, but the political ramifications of such regulations can be controversial. Thus, this factor will favor adopting product-level regulations over corporation-level regulations, and corporation-level regulations over country-level ones.

These prudential considerations can serve as a guide for determining how states should ration their use of unilateral corporate regulation. They will also reduce the potential for overlapping and conflicting regulation by multiple governments. If applied consistently, they offer the possibility of effective and efficient unilateral regulation of global corporate problems.

V. CONCLUSION

It is often said that global problems require global solutions. This Article has argued that, contrary to that mantra, many global problems in fact have unilateral solutions. And even when they do not have unilateral solutions, governments can still act unilaterally to *mitigate* those problems. Unilateral regulation can serve as a powerful restraint on global corporate behavior. At the same time, it is a potentially dangerous option, as unilateral regulation risks harming corporations with unduly burdensome laws, alienating other governments and impeding future

²¹⁸ This is not to argue that we should not *care* about problems with isolated effects. From a global welfare perspective, it might be helpful to take into account harms that are only in a foreign country (such as free speech or labor standards) if those harms are sufficiently large. It is merely to recognize that we have a limited ability to rectify problems abroad, and problems with worldwide effects are more likely to create distortions in global governance.

²¹⁹ One need only look to the emphasis that the Supreme Court puts on “narrow tailoring” in its strict scrutiny jurisprudence to understand the importance that American judges give to adopting targeted laws. See Ian Ayres & Sydney Foster, *Don't Tell, Don't Ask: Narrow Tailoring After Grutter and Gratz*, 85 TEX. L. REV. 517, 518 (2007) (describing the tailoring required in affirmative action programs).

cooperation. This Article has suggested some ways to improve and constrain unilateral regulation in order to reduce those risks. Ultimately, it is a call for action rather than inaction, optimism rather than fatalism, in the effort to resolve the increasingly dire problems of the modern world.