

THE FUTURE OF INTERNATIONAL REGULATORY COOPERATION: TTIP AS A LEARNING PROCESS TOWARD A GLOBAL POLICY LABORATORY

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I

INTRODUCTION

Countries may differ in their regulation of important issues such as health, safety, environment, security, and financial markets. A world of states with different legal systems implies some differences in specific regulations.¹ But regulatory variation does not stem only from differences among countries' legal systems. Countries may face different problems, stimulating different regulatory responses. Or they may have different preferences regarding their regulatory responses to a common problem.² And domestic interest groups, such as local businesses and workers, may press the state for regulations that shield them from international competition.

Moreover, the state is not a monolith—within each state or union of states, different agencies and subsidiary units may also differ from each other in their regulatory approaches. At the same time, these agencies may share ideas across

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This article is also available at <http://lcp.law.duke.edu/>.

* Duke University and Resources for the Future. The authors are grateful for discussion and comments by Reeve Bull, Elvire Fabry, Michael Fitzpatrick, Neysun Mahboubi, Richard Revesz, Richard Stewart, Jeff Weiss, and participants in the Symposium on New Approaches to International Regulatory Cooperation at the Institute for International Law & Justice at New York University School of Law and the conference on Enhancing the Transatlantic Trade and Investment Partnership: Reducing Regulatory Barriers at the Regulatory Studies Center at George Washington University, and for helpful research assistance by Kristie Beaudoin and Cliff Wirajendi.

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1. See generally KONRAD ZWEIGERT & HEIN KÖTZ, *AN INTRODUCTION TO COMPARATIVE LAW* (Tony Weir trans., Oxford Univ. Press 3d ed. 1998).

2. See, e.g., Alberto Alemanno, *Public Perception of Risks Under WTO Law: A Normative Perspective*, in RESEARCH HANDBOOK ON ENVIRONMENT, HEALTH AND THE WTO 270–71 (Geert van Calster & Denise Prévost eds., 2012) (noting that because public perceptions of food safety are culturally determined, food-safety regulations differ among countries and are, therefore, not necessarily systematically due to protectionism).

borders with their counterpart agencies in other states.³ Empirical research indicates that, rather than adhering to discrete “legal families” or “national styles of regulation,”⁴ actual regulations often differ across countries and even within legal systems: countries can be highly selective in specific regulatory choices, yielding a complex pattern of particular regulations on particular issues.⁵ For example, in contrast to claims that European risk regulation is generally more precautionary than U.S. risk regulation, empirical research finds that U.S. and European risk regulation over the past four decades has exhibited overall average *parity*, with occasional divergences as selective precaution is applied on *both* sides to *particular* risks—including greater precaution against some risks in Europe (such as genetically modified foods, hormones in beef, toxic chemicals, and climate change), and at the same time greater precaution against other risks in the United States (such as mad cow disease in beef and in blood, choking hazards in food, particulate matter air pollution, and terrorism).⁶ Rough overall regulatory parity can include a variety of regulatory differences on specific issues.

This empirical reality of regulatory parity and variation has an immediate implication for debates over international regulatory cooperation (IRC). Fears that agreements such as the Transatlantic Trade and Investment Partnership (TTIP) would require Europe to lower its regulatory standards are based on a premise that European standards are typically more stringent than U.S. standards. But as just noted, the reality is that although some European regulatory standards for some issues are more stringent than U.S. standards, some U.S. standards for other issues are more stringent than European standards. Thus, even if TTIP led to full regulatory convergence, which it may not, such convergence would plausibly yield a mix of changes on each side. It could conceivably lead to harmonizing upward to the highest standard in each jurisdiction on each issue, rather than harmonizing downward to the lowest standards, or converging to an agreed optimal standard. Or it could leave some

3. ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 12–15 (2004) [hereinafter A NEW WORLD ORDER]; Anne-Marie Slaughter, *America's Edge: Power in the Networked Century*, 88 FOREIGN AFFAIRS, no. 1, Jan.–Feb. 2009, at 94.

4. On “legal families” of countries, see ZWEIGERT & KÖTZ, *supra* note 1, at 63–73. On “national styles of regulation,” see generally DAVID VOGEL, NATIONAL STYLES OF REGULATION: ENVIRONMENTAL POLICY IN GREAT BRITAIN AND THE UNITED STATES (1986).

5. See generally THE REALITY OF PRECAUTION: COMPARING RISK REGULATION IN THE UNITED STATES AND EUROPE [hereinafter REALITY OF PRECAUTION] (Jonathan B. Wiener, Michael D. Rogers, James K. Hammitt & Peter H. Sand eds., 2011) (documenting complex variation in U.S. and European risk regulation from 1970 to the present).

6. See Jonathan B. Wiener, Brendon Swedlow, James K. Hammitt, Michael D. Rogers & Peter H. Sand, *Better Ways to Study Regulatory Elephants*, 2/2013 EUROPEAN JOURNAL OF RISK REGULATION 311, 314–19 (2013) (describing quantitative and qualitative methodologies for studying relative precaution and regulatory variation); Jonathan B. Wiener, *The Real Pattern of Precaution*, in REALITY OF PRECAUTION, *supra* note 5, at 520–34 (synthesizing the study's findings of selective precaution across numerous cases in both Europe and the United States over four decades); see also JOAKIM ZANDER, THE APPLICATION OF THE PRECAUTIONARY PRINCIPLE IN PRACTICE 2 (2010) (finding variation in precautionary policies within Europe as well as across the Atlantic).

regulatory variation in place—a scenario that offers opportunities for learning over time, as explored further in this article.

Meanwhile, given the reality of regulatory variation, countries face incentives to engage in IRC to coordinate their regulations. The gains from international trade in open markets may motivate agreements to reduce regulatory barriers to trade. Multinational businesses may press states for a level playing field of harmonized regulatory standards across countries. In addition, the gains from combating shared problems, such as transboundary health, environmental, security, and financial risks, may motivate states and multinational advocacy groups to seek agreements on joint international regulatory measures.⁷

IRC denotes a series of steps to coordinate regulation across countries. It often arises from the confluence of regulatory reform efforts, generally undertaken at the national level, with trade liberalization efforts that, by definition, occur across borders.⁸ Governments are undertaking a wide array of IRC mechanisms today.⁹ IRC has been endorsed by President Obama's Executive Order (EO) 13,609, and is currently being pursued in international trade negotiations such as TTIP between the United States and the European Union (EU), and the Trans-Pacific Partnership (TPP) among the United States and a dozen countries bordering the Pacific Ocean.¹⁰ As a result of this rapid and multiplex spread of IRC, a web of formal and informal intergovernmental regulatory relationships is emerging that simultaneously empowers and constrains governments' abilities to solve problems through regulation.

We focus on an important consideration that may be neglected in current efforts to attain international regulatory convergence: The benefits of learning from regulatory variation, and the design of institutions to promote such

7. See generally SCOTT BARRETT, *WHY COOPERATE? THE INCENTIVE TO SUPPLY GLOBAL PUBLIC GOODS* (2007).

8. Alberto Alemanno, *Is There a Role for Cost-Benefit Analysis Beyond the Nation-State? Lessons from International Regulatory Co-operation*, in *THE GLOBALIZATION OF COST-BENEFIT ANALYSIS IN ENVIRONMENTAL POLICY* 104, 105 (Richard Revesz & Michael Livermore eds., 2013) [hereinafter *COST-BENEFIT ANALYSIS*].

9. For an overview, see Reeve T. Bull, Neysun Mahboubi, Richard B. Stewart & Jonathan B. Wiener, *New Approaches to International Regulatory Cooperation: The Challenge of TTIP, TPP, and Mega-Regional Trade Agreements*, 78 *LAW & CONTEMP. PROBS.*, no. 4, 2015, at 1. According to the Organization for Economic Cooperation and Development (OECD), these arrangements include supranational institutions, such as the European Union (EU); international multilateral agreements, such as the WTO Agreement on Technical Barriers to Trade; regional agreements, such as the North American Free Trade Agreement; bilateral agreements, such as the Australia–New Zealand Closer Economic Relations Trade Agreement; and regulatory agreements between subnational governments, such as negotiations among Canadian provinces to reduce trade barriers and accords linking carbon markets between California and Quebec. See *ORG. FOR ECON. COOPERATION & DEV., INTERNATIONAL REGULATORY CO-OPERATION: ADDRESSING GLOBAL CHALLENGES* 19–74 (2013) [hereinafter *OECD 2013*]; *ORG. FOR ECON. COOPERATION & DEV., REGULATORY COOPERATION FOR AN INTERDEPENDENT WORLD* 17 (1994) [hereinafter *OECD 1994*].

10. For a typology of IRC activities, see *ORG. FOR ECON. COOPERATION & DEV., INTERNATIONAL REGULATORY CO-OPERATION: RULES FOR A GLOBAL WORLD* 8–10 (Oct. 14, 2012) [hereinafter *OECD 2012*].

learning. In part II, we briefly survey the range of mechanisms for IRC, with examples including U.S.–EU, U.S.–Canada, and Australia–New Zealand efforts, among others. These IRC efforts can be seen as moves along a spectrum from fully uncoordinated regulatory heterogeneity—variation—toward fully coordinated regulatory homogeneity—convergence.

In part III, we highlight the pros and cons of IRC. The benefits of IRC include reducing trade barriers, which leads to more open markets and improved regulatory approaches. The costs of IRC include not only the time spent negotiating agreed standards but also the reduction in regulatory variation itself. Regulatory variation may be desirable to match heterogeneous local preferences. Further, we emphasize a distinct additional benefit of regulatory variation: the opportunity for learning about the impacts of differing policies. Such learning can come from observing policy variation in practice, from purposeful experimentation with policy alternatives, and from studying transitions over time as IRC pushes from variation toward convergence. Even if regulatory convergence is desirable, there can be many possible forms and levels of regulatory convergence, such as the choice among the array of regulatory instruments or among standards at different levels of stringency. Simply seeking convergence does not indicate which form or level of regulation would be ideal. Nor does it indicate which mechanism of IRC should be employed to move from variation to convergence. Hasty convergence to one current approach may reduce trade barriers but may also entrench a suboptimal or arbitrary selection. Learning about the impacts of regulatory variation—and about the impacts of different mechanisms for IRC—can thus be essential to making intelligent choices about any moves to convergence.

In part IV, we discuss the institutional framework needed to promote these benefits from both regulatory variation and cooperation. In federal systems, a central government may oversee variation among its member states, study the impacts of these varying policies, and select the best policy approach for broader federal adoption.¹¹ But at the international or global scale, there is no central government.¹² Although IRC has so far put a priority on reducing regulatory variation to reduce trade barriers, we argue that learning from regulatory variation should also be an important feature of any IRC effort. Interestingly, part of TTIP being discussed so far may offer a new model of IRC capable of promoting the alignment of regulations while at the same time capitalizing on gains from studying regulatory variation. Its horizontal framework for regulatory coherence carries the potential to become a new mechanism of IRC, perhaps giving rise to what we propose: A transatlantic

11. See Wallace E. Oates, *An Essay on Fiscal Federalism*, 37 J. ECON. LIT. 1120, 1121 (1999) (explaining benefits of diverse policies in a federal system, including the ability of the central federal government to study and select the best option).

12. Although both TTIP and TPP envisage the setting up of institutional mechanisms to administer the agreements, these will not likely be entrusted with autonomous regulatory authority. In part II, *infra*, we discuss examples of IRC that do include setting up new joint regulatory authorities, such as the joint food-safety regulator created by Australia and New Zealand.

regulatory laboratory, in which regulators, experts, and others can study and learn from both observed and experimental tests of differing regulatory approaches.¹³ As a model for other IRC efforts in other trade agreements and regions, this idea of a transatlantic regulatory laboratory may, in turn, represent a stepping-stone toward a global policy laboratory.

II

MECHANISMS AND EXAMPLES OF IRC

A. Background

The trend toward international cooperation among regulators has become a significant feature of regulatory policy in recent years.¹⁴ Regulators are becoming the new diplomats. As Anne-Marie Slaughter has observed, they are “on the front lines of issues that were once the exclusive preserve of domestic policy, but that now cannot be resolved by national authorities alone.”¹⁵ Although regulation has been a state prerogative, in an increasingly interdependent world, many regulatory issues are addressed in international fora where delegates from multiple national agencies may in turn produce a wide array of “supra regulations” at both multinational and regional levels.¹⁶ Early calls for IRC included recommendations by the Administrative Conference of the United States (ACUS) recommendations in *Federal Agency Cooperation with Foreign Government Regulators*¹⁷ and the Organisation for Economic Co-operation and Development (OECD) report, *Regulatory Co-operation for an Interdependent World*.¹⁸ More recently, the OECD issued its *Recommendations on Regulatory Policy and Governance*, of which recommendation number twelve calls for strengthened IRC,¹⁹ and the OECD

13. Wiener, *supra* note 6, at 522; Jonathan B. Wiener, *The Diffusion of Regulatory Oversight, in COST-BENEFIT ANALYSIS*, *supra* note 8, at 136; *see also infra* Part IV.

14. Bull et al., *supra* note 9; NEW WORLD ORDER, *supra* note 3, at 15–18; Lorenzo Allio & Stéphane Jacobzone, *Regulatory Policy at the Crossroads: the Role of the OECD in Mapping an Agenda for the Future*, in *BETTER BUSINESS REGULATION IN A RISK SOCIETY* 209, 218–19 (Alberto Alemanno, Frank den Butter, André Nijssen & Jacopo Torriti eds., 2012); Bengt Jacobsson, *Regulated Regulators: Global Trends of State Transformation*, in *TRANSNATIONAL GOVERNANCE: INSTITUTIONAL DYNAMICS OF REGULATION* 205, 222 (Marie Laurie Djelic & Kerstin Sahlin-Andersson eds., 2006).

15. NEW WORLD ORDER, *supra* note 3, at 63.

16. Walter Mattli & Ngaire Woods, *In Whose Benefit? Explaining Regulatory Change in Global Politics*, in *THE POLITICS OF GLOBAL REGULATION* 1, 1–43 (Walter Mattli & Ngaire Woods eds. 2009) (surveying research explaining regulatory outcomes at the global level through supply and demand forces that include cooperation among national regulators as well as among private transnational actors).

17. *See generally* ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATION 91-1: FEDERAL AGENCY COOPERATION WITH FOREIGN GOVERNMENT REGULATORS (1991).

18. *See generally* OECD 1994, *supra* note 9.

19. *ORG. FOR ECON. COOPERATION & DEV., RECOMMENDATION OF THE COUNCIL ON REGULATORY POLICY AND GOVERNANCE* 5 (Mar. 22, 2012).

has provided a detailed typology of numerous mechanisms of IRC.²⁰ Following a renewed ACUS report and recommendation on IRC,²¹ President Barack Obama issued EO 13,609, calling on all U.S. federal agencies to promote IRC²² and, thereby, to help invigorate the negotiations in TTIP and TPP.

Preceding the current negotiations on TTIP and TPP, past examples of IRC include the U.S.–EU Transatlantic Economic Council (TEC); the U.S.–Canada Regulatory Cooperation Council (RCC); and the Australia–New Zealand Mutual Recognition Agreement (MRA) and subsequent Trans-Tasman Mutual Recognition Arrangement (TTMRA). These three efforts at IRC aim primarily to reduce trade barriers through mutual recognition, harmonized standards, or, in the latter case, joint regulation.²³

There are also sector-specific mechanisms for IRC among government agencies addressing the same subject matter. For example, the food and drug agencies of the United States, EU, Canada, Australia, and Japan, after having collaborated through the Global Harmonization Task Force, established the International Medical Device Regulators Forum in 2013.²⁴

More broadly, to reduce unnecessary barriers to trade, the World Trade Organization (WTO) has convened efforts to reconcile differing regulations. Such efforts have included the Agreement on Technical Barriers to Trade (TBT) and the Agreement on Sanitary and Phytosanitary measures (SPS).²⁵ Although the WTO has been successful in removing tariffs and other barriers to trade at the border, it has faced greater difficulty in its efforts against nontariff barriers, which can be prominent obstacles to trade exchanges.²⁶ This is largely due to the methodological and political difficulties encountered in distinguishing legitimate regulations from disguised protectionism.²⁷ Given the current difficulty for the WTO in effectively addressing such concerns, some countries seem willing to go beyond traditional international treaty-making to

20. OECD 2012, *supra* note 10, at 8–10; OECD 2013, *supra* note 9, at 12–32.

21. MICHAEL T. MCCARTHY, ADMIN. CONFERENCE OF THE UNITED STATES, INTERNATIONAL REGULATORY COOPERATION, 20 YEARS LATER: UPDATING ACUS RECOMMENDATION 91-1 (2011).

22. Exec. Order No. 13,609, 77 Fed. Reg. 26413 (May 1, 2012).

23. See *infra* Part II.C.

24. Zachary Brennan, *U.S. FDA Working with International Partners on Improved Data-Sharing Systems*, INTERNATIONAL PHARMACEUTICAL REGULATORY MONITOR (May 10, 2012). To know more, see *About IMDRF*, INTERNATIONAL MEDICAL DEVICE REGULATORS FORUM, <http://imdrf.org/about/about.asp> (last visited Feb. 27, 2015).

25. See generally DENISE PREVOST, BALANCING TRADE AND HEALTH IN THE SPS AGREEMENT: THE DEVELOPMENT DIMENSION (2009); RESEARCH HANDBOOK ON THE WTO AND TECHNICAL BARRIERS TO TRADE (Tracey Epps & Michael J. Trebilcock eds., 2013); JOANNE SCOTT, THE WTO AGREEMENT ON SANITARY AND PHYTOSANITARY MEASURES: A COMMENTARY (2007).

26. See generally Jörg-Philip Terhechte, *Non-Tariff Barriers to Trade*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2014).

27. See, e.g., Gabrielle Marceau & Joel Trachtman, *The Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement, and the General Agreement on Tariff and Trade, A Map of the World Trade Organization Law of Domestic Regulation of Goods*, 36 J. WORLD TRADE 351, 352 (2002).

explore new avenues of cooperation.²⁸

Similar issues of interstate trade barriers can arise within federal systems like the United States or quasi-federal associations like the EU. Both the United States and the EU have long employed legal doctrines to prevent their member states from discriminating against out-of-state producers. In the United States, these doctrines include the U.S. Constitution's Dormant Commerce Clause, which restricts member states' power to burden interstate commerce;²⁹ its Supremacy Clause, which authorizes federal preemption of state law;³⁰ the federal Spending power;³¹ and engagements in cooperative federalism through state implementation of federal standards.³²

Analogously, the EU has long worked to reduce regulatory trade barriers among its member states and move toward a single European market. Through high-profile cases regarding beer bottles, waste disposal, and food safety aimed at defining the notion of "obstacle to intra-Community trade," and through the European Standardization System's promotion of the joint development of technical product specifications, the EU has established legal doctrines akin to the U.S. Dormant Commerce Clause.³³ These doctrines protect the single European market from trade barriers erected by member-state regulation and have enlarged the scope for trade among its expanding set of member states.³⁴ Akin to cooperative federalism in the United States, the EU often provides that EU regulations are to be transposed or implemented by the member states with discretion to tailor the EU rules to fit member-state legal systems.³⁵

Similarly, Australia has taken steps to reduce regulatory trade barriers and promote the national market among the states in its federal system and with New Zealand. Australia conducted a National Competition Council effort from 1995 through 2006 that helped reduce regulatory barriers among its several

28. See Alberto Alemanno, *The Transatlantic Trade and Investment Partnership and the Parliamentary Dimension of Regulatory Cooperation*, European Parliament Policy Report 21 (2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2423562.

29. U.S. CONST. art. I § 8, cl. 3.

30. U.S. CONST. art. VI., cl. 2.

31. U.S. CONST. art. I, § 8, cl. 1.

32. See, e.g., Daniel A. Farber & Robert E. Hudec, *Free Trade and the Regulatory State: A GATT's-Eye View of the Dormant Commerce Clause*, 47 VAND. L. REV. 1401, 1402–03 (1994) (comparing dormant commerce clause analysis with GATT Art. XX analysis); Richard L. Revesz, *Federalism and Environmental Regulation: Lessons for the EU and the International Community*, 83 VA. L. REV. 1331, 1340 (1997) (noting that the U.S. Supreme Court prohibits the states from discriminating against products from other states); Richard B. Stewart, *International Trade and the Environment: Lessons from the Federal Experience*, 49 WASH. & LEE L. REV. 1329, 1335 (1992) ("The Supreme Court found in the Commerce Clause the implied power for the Court to invalidate state measures that unduly burdened the functioning of the common market among the states.").

33. ALBERTO ALEMANNO, *TRADE IN FOOD: REGULATORY AND JUDICIAL APPROACHES IN THE EC AND THE WTO* 138 (2007).

34. See generally CATHERINE BARNARD, *THE SUBSTANTIVE LAW OF THE EU—THE FOUR FREEDOMS* (4th ed. 2013).

35. See generally Michal Bobek, *The Effects of EU Law in the National Legal Systems*, in *EUROPEAN UNION LAW* 140 (Catherine Barnard & Steve Peers eds., 2014).

member states and territories pursuant to the 1992 MRA.³⁶ This effort involved a series of reports from the states on regulatory obstacles to trade, a “competition test” putting the burden on the state to show the public net benefits from a policy that posed barriers to entry, and a schedule of penalties or payments for states that retained or reformed their entry barriers.³⁷

In contrast to international agreements among sovereign nation states, these federal systems or quasi-federal unions typically have centralized government institutions—legislative, executive, and judicial—with constitutional powers that include monitoring the policies adopted by the member states, refereeing conflicts among the member states, adopting supervening policies that guide or preempt the member states’ policies, and enforcing such decisions. Thus, the central government can observe the performance of policies across the member states and adopt the best policy to apply to all in a system akin to the “laboratory of federalism” envisioned by U.S. Supreme Court Justice Louis Brandeis and modeled by economists.³⁸

This central government role is largely absent at the international level. For instance, the WTO can referee trade disputes among its member states and can issue decisions that authorize trade remedies, such as retaliatory tariffs. However, neither the WTO nor any other international trade institution enjoys the powers that central federal governments have to enforce against noncompliance, to invalidate an offending member state’s policy, or to adopt new supervening policies that preempt those of the member states. Such measures at the international level would generally require states to consent to such powers in an international accord.³⁹ For example, the EU is a supranational organization whose member states have consented to authorizing its coercive power to enforce its decisions. In particular, the EU Commission may, under Article 258 of the Lisbon Treaty on the Functioning of the European Union,⁴⁰ bring an EU member state that fails to abide by EU law in

36. See NATIONAL COMPETITION COUNCIL, <http://ncc.gov.au> (last visited Aug. 28, 2015).

37. *Id.*

38. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); Nicole J. Saam & Wolfgang Kerber, *Policy Innovation, Decentralised Experimentation, and Laboratory Federalism*, 16 J. ARTIFICIAL SOCIETIES & SOC. SIMULATION, 7, 1.2–1.3 (Jan. 31, 2013); Oates, *supra* note 11, at 1131–34.

39. See Bull et al., *supra* note 9, at 8–9 (distinguishing five structures for IRC and noting that adoption of regulatory standards generally involves agreement among member states, such as through regulatory treaties to protect the global environment). On the need for states’ consent to international treaty law, see Daniel A. Farber, *Environmental Federalism in a Global Economy*, 83 VA. L. REV. 1283, 1314 (1997) (“The basic principle of international law, after all, is that it binds states only with their own consent.”); Louis Henkin, *International Law: Politics, Values and Functions*, 216 RECUEIL DES COURS D’ACADEMIE DE DROIT INTERNATIONAL 27 (1989) (“[A] State is not subject to any external authority unless it has voluntarily consented to such authority.”); Geoffrey Palmer, *New Ways To Make International Environmental Law*, 86 AM. J. INT’L L. 259, 272 (1992) (“The whole structure and content of treaty law is based on the principle of consent”); John K. Setear, *An Iterative Perspective on Treaties: A Synthesis of International Relations Theory and International Law*, 37 HARV. INT’L L.J. 139, 158 (1996).

40. Consolidated version of the Treaty on the Functioning of the European Union, Dec. 13, 2007, 2012 OJ C326/202.

front of the Court of Justice of the EU. In such a case, the Court may order that State to pay a penalty fee or lump-sum damages.⁴¹ To take another example, the UN Security Council enjoys, at least in principle, coercive powers, but it still faces a veto by its permanent members and, moreover, seems unlikely to venture into policing states' regulatory policies.⁴² Unlike national or federal governments, most IRC mechanisms to date lack the power to create and enforce supervening regulatory rules—unless that power is accorded by the member states to an IRC mechanism.⁴³

B. Mechanisms of IRC

IRC can be pursued through several mechanisms. In a world of multiple jurisdictions, consider a spectrum from fully uncoordinated regulatory heterogeneity at one end, to fully uniform regulatory homogeneity at the other. At the heterogeneous end of this spectrum, a fully decentralized system could have utterly divergent regulations—that is, different for each jurisdiction or even different for each person.⁴⁴ At the homogeneous end of this spectrum, a fully centralized system could have utterly convergent regulations—that is, universal harmonization, or even a single joint global regulation.

In the intermediate regions of this spectrum are several steps between decentralized heterogeneity and centralized homogeneity. Even without overt coordination, similar regulatory approaches may diffuse across countries through borrowing or through common responses to the same problem. An OECD “stocktaking” paper identified eleven types of IRC mechanisms amid a complex web of actors, epistemic networks, law, and norms.⁴⁵ In roughly increasing order of regulatory homogeneity or convergence, bracketed by full heterogeneity and full homogeneity, these eleven mechanisms for IRC include:

1. Dialogue: informal exchange of information and personnel exchanges to foster mutual understanding of each other's regulations, such as the TEC;
2. Soft law: cooperation based on nonbinding instruments that enable interested parties from other countries to participate in regulatory rulemaking, including through notice and comment, stakeholder input, and access to information, such as the OECD Guidelines and Principles;
3. Private codes: Coordinated technical standards adopted by multinational

41. See generally Melanie Smith, *The Evolution of Infringement and Sanction Procedures: Of Pilots, Diversions, Collisions and Circlings*, in THE OXFORD HANDBOOK OF EU LAW 350 (Damian Chalmers & Anthony Hull eds., 1st ed. 2015).

42. See generally LORAINIE SIEVERS & SAM DAWS, THE PROCEDURE OF THE UN SECURITY COUNCIL (4th ed. 2014).

43. This power has been called positive integration. JAN TINBERGEN, INTERNATIONAL ECONOMIC INTEGRATION 78 (2d ed. 1965). An example of the member states of an IRC mechanism deciding to accord it the power to create supervening regulatory standards is the Australia–New Zealand food-safety regime, discussed *infra* in part II.C.3.

44. See Cass R. Sunstein, Impersonal Default Rules vs. Active Choices vs. Personalized Default Rules: A Triptych (May 19, 2013) (preliminary draft) (available at <http://ssrn.com/abstract=2171343>).

45. OECD 2012, *supra* note 10, at 8–10; see also OECD 2013, *supra* note 9, at 19–74. These mechanisms are also discussed in Bull et al., *supra* note 9, Part III.

private standards development organizations, such as transnational industry associations, or the International Organization for Standardization (ISO);

4. Intergovernmental reliance on private codes: The incorporation of international private codes into national legislative instruments by means of a reference to one or more standards, such as the standards of the ISO⁴⁶ or The Council of Australian Governments Best Practices Regulation;

5. Transgovernmental networks: cooperation among agencies or units of national governments, based on peer-to-peer ties among regulators developed through frequent interaction rather than formal treaty negotiation. Examples include the International Competition Network and the Basel Committee on Banking Supervision;

6. Mutual recognition agreements in national regulatory law: agreements that retain different national standards but allow market access upon approval by the other's regulatory authority. An example is the TTMRA between Australia and New Zealand;

7. Regional and international agreements with provisions to reduce regulatory barriers to trade, and in some cases to develop harmonized new regulatory standards, such as the WTO, the North American Free Trade Agreement, the South American Mercosur bloc, and possibly TTIP and TPP;

8. Membership in international organizations: promoting regulatory cooperation and sometimes developing international regulatory standards with member states' consent, such as the International Labor Organization, the International Civil Aviation Organization, the International Maritime Organization, and the OECD;

9. Regulatory partnerships between countries: informal dialogue or formal negotiation of harmonized regulatory standards, such as through the U.S.–European Commission High Level Regulatory Cooperation Forum, the U.S.–Canada RCC, the Mexico–U.S. RCC, or the TTMRA;

10. Integration and harmonization through a supranational or joint institution: development of the same regulatory standard in each national regulation. These include bilateral or multilateral accords to adopt the same regulatory standard in each state party, such as international treaties on environment, health, and safety. EU and U.S. federal legislation that supersede member state law are strong forms;

11. Joint regulator: the creation of a single regulatory agency or body to promulgate regulations covering two or more jurisdictions, such as the Joint Food Standards Australia and New Zealand (FSANZ) agency.⁴⁷ At the

46. See TIM BÜTHE & WALTER MATTLI, *THE NEW GLOBAL RULERS—THE PRIVATIZATION OF REGULATION IN THE WORLD ECONOMY* 5 (2011) (noting that the International Organization for Standardization and the International Electrotechnical Commission account for eighty-five percent of all international product standards); Peter Strauss, *The Troubling Conjunction of Public and Private Law*, in *COMPARATIVE LAW AND REGULATION* (Francesca Bignami & David Zaring eds.) (2015) [hereinafter *COMPARATIVE LAW AND REGULATION*].

47. OECD 2012, *supra* note 10, at 8–10.

extreme would be a single global regulator administering a single global regulatory law.

Although useful for explanatory and systematic purposes, this typology does not exhaust all possible forms of IRC. The OECD report was taking stock of efforts to date, and the process of IRC exhibits evolution and innovation of new forms over time. Moreover, these mechanisms are not mutually exclusive, and multiple IRC mechanisms can be used at the same time in the same field. Actual measures may be hybrids or share the features of several IRC mechanisms.⁴⁸

C. Three Case Studies

In order to illustrate the state of the IRC debate and different mechanisms for regulatory convergence, three of the most recent and significant efforts undertaken at promoting regulatory cooperation among OECD countries are outlined below. Given their differing levels of ambition and ongoing development, they depict the current debate surrounding the future of IRC, and they may offer a useful benchmark for assessing the IRC model being developed in TTIP. They also illustrate the need to study and learn from variation in both national regulations and IRC mechanisms, as discussed in parts III and IV below.

1. IRC Efforts between the United States and the European Union

The United States and Europe have enjoyed close economic ties at least since World War II. The European Commission declares on its website that

The transatlantic economic and trade relationship is the backbone of the world economy. Together, the European Union and the United States of America account for nearly half of the world's GDP (47%) and one-third of global trade. Every day, goods and services worth EUR 2 billion are traded between them. Some 15 million jobs depend on the links between the EU and US economies. There is broad acknowledgement that this privileged relationship holds more potential for both sides [through] efforts to further promote economic convergence and, more specifically, to reduce the regulatory obstacles to doing business across the Atlantic. Diverging regulations or duplicative requirements often cause unnecessary barriers and costs . . .

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48. In the article introducing this issue, Bull, Mahboubi, Stewart, and Wiener identify several structures for organizing IRC and several techniques for promoting IRC, with the important feature that different techniques may be employed in different structures, yielding a complex and evolving pattern of IRC efforts. Bull et al., *supra* note 9, at 8–12.

49. *EU-US Cooperation*, DG Internal Market, Industry, Entrepreneurship and SMEs, EUROPEAN COMMISSION, http://ec.europa.eu/growth/industry/international-aspects/cooperation-governments/eu-us/index_en.htm (last visited Nov. 23, 2015); see also EUROPEAN PARLIAMENTARY RESEARCH SERVICE, *TTIP – Regulatory Cooperation* (Feb. 17, 2015), <http://epthinktank.eu/2015/02/17/ttip-regulatory-cooperation/> (last visited Nov. 23, 2015) (linking to numerous reports); EUROPEAN COMMISSION, *TTIP and Regulation: An Overview* (Feb. 10, 2015), at 4 (“Governments regulate to protect people from risks, in particular, to their health and safety, the environment etc. But differences in regulation can also restrict trade. Some of these differences are unavoidable, especially when the objectives of regulations are different. In many cases, however, regulations are different for reasons unrelated to the level of protection they aim at, for instance because regulators in different countries

There are surely regulatory differences between the United States and the EU that warrant attention. But characterizations of U.S. and EU regulatory systems as sharply divergent, such as the notion of a precautionary Europe versus a reactive United States, are exaggerated. The reality of U.S. and EU risk regulation over the past four decades is overall average parity punctuated by occasional divergences that go in both directions—selective precaution on both sides of the Atlantic sometimes applied to different risks.⁵⁰ More generally, the United States and Europe are more alike than stereotypes imply.⁵¹

In 1998, the United States and the EU launched the Transatlantic Economic Partnership (TEP), which conducted a series of meetings and, in 2002, issued *Guidelines for Regulatory Cooperation and Transparency*.⁵² By 2005, after the launch of its Better Regulation initiative,⁵³ the European Commission had indicated new interest in promoting regulatory convergence across the Atlantic.⁵⁴ The Administrator of the U.S. Office of Information and Regulatory Affairs (OIRA) and his European Commission counterparts then launched the U.S.–European Commission High Level Regulatory Cooperation Forum (HLRCF) in 2005.⁵⁵ The HLRCF meets approximately annually and conducts a variety of bilateral activities to share information and ideas on better regulatory approaches, methods of regulatory analysis, and priorities for reform.⁵⁶ The HLRCF played a role in sharing ideas on regulatory impact assessment (RIA) and oversight; the European Commission issued Impact Assessment Guidelines in 2005, 2006, 2009 and 2015, and created the EU Impact Assessment Board (IAB) in 2006 (renamed the Regulatory Scrutiny Board in 2015).⁵⁷

developed solutions on the basis of domestic considerations rather than in cooperation with regulators from other countries. In these cases, regulatory cooperation can avoid unnecessary divergences or inconsistencies and make it easier to trade products and supply services, lowering costs and boosting economic growth. These are the differences that TTIP intends to address.”), http://trade.ec.europa.eu/doclib/docs/2015/february/tradoc_153121.1.2%20TTIP%20and%20regulation%20overview.pdf.

50. Wiener, *supra* note 6, at 521.

51. PETER BALDWIN, *THE NARCISSISM OF MINOR DIFFERENCES: HOW AMERICA AND EUROPE ARE ALIKE* 10 (2009).

52. UNITED STATES–EUROPEAN UNION HIGH-LEVEL REGULATORY COOPERATION FORUM, *GUIDELINE ON REGULATORY COOPERATION AND TRANSPARENCY* (2002), <http://www.whitehouse.gov/sites/default/files/omb/oira/irc/2002-guidelines-on-reg-coop-and-transparency.pdf>.

53. See Jonathan B. Wiener, *Better Regulation in Europe*, 59 *CURRENT LEGAL PROBS.* 447, 447–48 (2006).

54. *THE EUROPEAN UNION AND UNITED STATES INITIATIVE TO ENHANCE TRANSATLANTIC ECONOMIC INTEGRATION AND GROWTH* (2005), http://ec.europa.eu/enterprise/policies/international/files/economic_initiative_summit_05_en.pdf.

55. See *United States-European Commission High-Level Regulatory Cooperation Forum*, OFFICE OF MGMT. & BUDGET, http://www.whitehouse.gov/omb/oira_irc_europe (last visited Feb. 27, 2015).

56. *Id.*

57. See EUROPEAN COMM’N, *IMPACT ASSESSMENT BOARD REPORT FOR 2012* (Jan. 2013), http://ec.europa.eu/smart-regulation/impact/key_docs/docs/iab_report_2012_en_final.pdf. The IAB, attached to the EU Commission Secretariat General, operates as the EU counterpart to U.S. OIRA (created in 1980). For a comparative analysis of the IAB and OIRA, see generally Jonathan B. Wiener & Alberto Alemanno, *Comparing Regulatory Oversight Bodies across the Atlantic: The Office of*

The HLRCF was soon followed by the creation of the TEC in 2007.⁵⁸ Launched by German Chancellor Angela Merkel in her role as President of the European Council, U.S. President George W. Bush, and European Commission President José Manuel Barroso, the TEC was the successor to the TEP. The TEC meets annually and periodically delegates tasks to the HLRCF.⁵⁹ The TEC addresses several topics of U.S.–EU economic integration, including regulatory cooperation.⁶⁰ Stakeholder groups have been asked to advise the TEC, including the Transatlantic Consumer Dialogue and the Transatlantic Business Dialogue.⁶¹

Meanwhile, the Transatlantic Legislators' Dialogue between the European Parliament and U.S. House of Representatives was launched in 1999.⁶² In 2007, the TEC asked the Transatlantic Legislators' Dialogue to serve as a formal advisory body to the TEC.⁶³ The increasing authority of the European Parliament on regulatory issues⁶⁴ after the adoption of the Lisbon Treaty in 2009, made the Dialogue even more relevant to TEC activities, as did transatlantic frictions over specific legislation. Examples of such legislation include counterterrorism laws, such as the SWIFT accord on tracking funds,⁶⁵

Information and Regulatory Affairs in the U.S. and the Impact Assessment Board in the EU, in COMPARATIVE ADMINISTRATIVE LAW 309 (Susan Rose-Ackerman & Peter Lindseth eds., 2010). For further comparative analyses of the IAB and OIRA, see generally Cesar Cordova-Novion & Stephane Jacobzone, *Strengthening the Institutional Setting for Regulatory Reform: The Experience from OECD Countries* (OECD Working Papers on Public Governance No. 19,2011); Wiener, *supra* note 13; Jonathan B. Wiener & Daniel Lima Ribeiro, *Impact Assessment: Diffusion and Integration*, in COMPARATIVE LAW AND REGULATION, *supra* note 46. On May 19, 2015, the European Commission released important new documents on its Better Regulation efforts, including changing the name of the Impact Assessment Board to the Regulatory Scrutiny Board, revising the Board's membership and tasks, and issuing new Impact Assessment Guidelines and supporting materials. See *Better Regulation: Key Documents*, EUROPEAN COMMISSION, http://ec.europa.eu/smart-regulation/better_regulation/key_docs_en.htm (last visited Aug. 23, 2015).

58. See *EU–USA Regulatory Cooperation*, *supra* note 49 (noting the creation of the Transatlantic Economic Council in 2007); *Transatlantic Economic Council*, U.S. DEP'T OF STATE, <http://www.state.gov/p/eur/rt/eu/tec/index.htm> (last visited Feb. 27, 2015) (describing the Transatlantic Economic Council).

59. See FRAMEWORK FOR ADVANCING TRANSATLANTIC ECONOMIC INTEGRATION BETWEEN THE EUROPEAN UNION AND THE UNITED STATES OF AMERICA (2007), http://ec.europa.eu/enterprise/policies/international/files/tec_framework_en.pdf.

60. *Id.*

61. See *International Aspects*, EUROPEAN COMMISSION, <http://ec.europa.eu/growth/industry/international-aspects/> (Nov. 28, 2015). For the TACD specifically see *About TACD*, TRANS ATLANTIC CONSUMER DIALOGUE, <http://tacd.org/about-tacd/> (Nov. 28, 2015). For the TABD, see *History and Mission*, TRANS-ATLANTIC BUSINESS COUNCIL, <http://www.transatlanticbusiness.org/about-us/history-mission/> (Nov. 28, 2015).

62. *The 1999 Joint Statement on Establishment of TLD*, EUROPEAN PARLIAMENT, http://www.europarl.europa.eu/intcoop/tld/what_is/joint_statement_en.htm (Nov. 28, 2015).

63. Kristin Archick & Vincent Morelli, *The U.S. Congress and the European Parliament: Evolving Transatlantic Legislative Cooperation*, CONG. RESEARCH SERV. 5 (Mar. 20, 2012).

64. See *id.* at 8 (noting the increased influence of the European Parliament).

65. Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for the purposes of the Terrorist Finance Tracking Program, Official Journal of the EU 195/5 (July 27, 2010), <http://eur-lex.europa.eu/resource.html?uri=cellar:84c098b4-275c-49d7-bbf8->

and corporate governance laws, such as the Sarbanes–Oxley Act of 2002.⁶⁶ Other examples span from chemical regulation laws to limits on greenhouse gas emissions.⁶⁷ The failed ratification of the Anti-Counterfeiting Trade Agreement, which was rejected by the European Parliament, presents yet another example.⁶⁸ Further, the European Parliament has now created its own Impact Assessment Unit to assess legislative amendments and to follow the work of the Commission’s IAB.⁶⁹

At the TEC’s request, the HLRCF produced a joint statement, *Common Understanding on Regulatory Principles and Best Practices*, in June 2011.⁷⁰ In this document,

the United States (U.S.) and the European Commission (EC) reaffirm their shared commitment to the following regulatory principles, as embedded in the EC’s Communication on Smart Regulation and Impact Assessment Guidelines, and Executive Orders 12866 and 13563 in the U.S.:

- (1) evidence-based policy-making for all regulatory measures likely to have significant impacts, with consideration of all relevant benefits and costs;
- (2) transparency and openness, allowing participation by citizens and stakeholders;
- (3) analysis of relevant alternatives;
- (4) monitoring and evaluation of the effectiveness of existing regulatory measures; and
- (5) use of approaches that minimize burden and aim for simplicity.⁷¹

That same year, the U.S. Chamber of Commerce released a report recommending U.S.–EU cooperation on RIAs of trade impacts.⁷² ACUS reprised its 1991 report on regulatory cooperation by issuing a new report and a new recommendation on IRC in December 2011.⁷³

Soon after, President Obama issued EO 13,609.⁷⁴ EO 13,609 calls on all U.S. federal agencies to “reduce, eliminate, or prevent unnecessary differences in regulatory requirements,” new and existing, that may pose barriers to trade; to

73e978be1818.0016.01/DOC_2&format=PDF (last visited Nov. 23, 2015).

66. Sarbanes–Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in sections of 11, 15, 18, 28 and 29 U.S.C.).

67. Archick & Morelli, *supra* note 63, at 9–10.

68. *Id.* at 11. On July 4, 2012, the European Parliament declined its consent, effectively rejecting it, 478 votes to thirty-nine with 165 abstentions. *Id.*

69. See *Meeting with the Team of the New Directorate for Impact Assessment and European Added Value*, EUROPEAN PARLIAMENT (Jan. 10, 2012), http://www.europarl.europa.eu/the-secretary-general/en/activities/recent_activities/articles/articles-2012/articles-2012-october/articles-2012-october-2.html; Better Law-Making in Action: How Does Ex Ante Impact Assessment Work in the EU?, PARL EUR. DOC. PE 528.809 (2015), [http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/528809/EPRS_BRI\(2015\)528809_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/528809/EPRS_BRI(2015)528809_EN.pdf).

70. UNITED STATES-EUROPEAN COMMISSION HIGH-LEVEL REGULATORY COOPERATION FORUM, COMMON UNDERSTANDING ON REGULATORY PRINCIPLES AND BEST PRACTICES 1 (June 2011), <http://www.whitehouse.gov/sites/default/files/omb/oira/irc/common-understanding-on-regulatory-principles-and-best-practices.pdf> [hereinafter U.S.–EC HLRCF].

71. *Id.*

72. JOHN F. MORALL, III, U.S. CHAMBER OF COMMERCE, DETERMINING COMPATIBLE REGULATORY REGIMES BETWEEN THE US AND THE EU 4–8 (2011).

73. McCarthy, *supra* note 21, at 27–36.

74. Exec. Order No. 13,609, 77 Fed. Reg. 26413 (May 1, 2012).

identify which forthcoming regulations may have significant international impacts; and to consider approaches taken in foreign regulations as part of the work plan of an RCC. The EO asks the Regulatory Working Group created in EO 12,866⁷⁵ and chaired by the OIRA Administrator, to oversee this effort.

More broadly, the United States and EU have exchanged ideas on several topics to improve regulatory policy.⁷⁶ These include the adoption of Environmental Impact Assessment (EIA); Regulatory Impact Assessment (RIA); regulatory oversight bodies, such as the U.S. OIRA and the EU IAB; and economic incentive instruments, such as emissions trading systems for air pollutants including sulfur dioxide in the United States and for greenhouse gases in the EU.

To date, IRC between the United States and EU has emphasized the development of a common approach to the preparation of regulation through RIA, transparency, and sectoral negotiations between agency counterparts. Importantly, the HLRFCF calls for

(1) evidence-based policy-making for all regulatory measures likely to have significant impacts, with consideration of all relevant benefits and costs; . . . (3) analysis of relevant alternatives; [and] (4) monitoring and evaluation of the effectiveness of existing regulatory measures⁷⁷—features that will be crucial to regulatory learning.

To be sure, this is an ongoing process in which “innovative approaches will be necessary . . . the two sides will need to be creative, flexible, and open minded in developing and negotiating solutions that respond to the specific characteristics of the transatlantic economic relationship.”⁷⁸

2. IRC Efforts between the United States and Canada

The United States and Canada are major trading partners with thousands of miles of unfenced, shared borders and deeply interdependent economies. They are also both federal systems with opportunities to learn from each other about improving regulatory policies and institutions. To strengthen these relationships, President Barack Obama and Prime Minister Stephen Harper launched an innovative IRC arrangement that, though falling short of an international trade agreement, provides an original IRC mechanism aimed at enhancing regulatory cooperation—the U.S.–Canada RCC.⁷⁹

Under the terms of reference of the U.S.–Canada RCC, the Council is expected to enhance regulatory cooperation through increased regulatory

75. Exec. Order 12,866, 58 Fed. Reg. 51735 (Sept. 30, 1993).

76. FABRIZIO DE FRANCESCO, *TRANSNATIONAL POLICY INNOVATION: THE OECD AND THE DIFFUSION OF REGULATORY IMPACT ANALYSIS* 57–72 (2013); Wiener, *supra* note 53, at 449–58; Wiener, *supra* note 6, at 551–55; Jonathan B. Wiener, *The Diffusion of Regulatory Oversight, in COST-BENEFIT ANALYSIS*, *supra* note 8, at 126–36; Wiener & Ribeiro, *supra* note 57.

77. U.S.–EC HLRFCF, *supra* note 70, at 1. On the value of these measures for regulatory learning, see *infra* Part IV.

78. HIGH LEVEL WORKING GROUP ON JOBS AND GROWTH, FINAL REPORT 2 (2013).

79. See *U.S.–Canada Regulatory Cooperation Council*, INTERNATIONAL TRADE ADMINISTRATION, <http://www.trade.gov/rcc> (last visited Feb. 27, 2015); *North America, United States–Canada Regulatory Cooperation Council (RCC)*, OFFICE OF MANAGEMENT AND BUDGET, http://www.whitehouse.gov/omb/oira_irc_north_america (last visited Feb. 27, 2015) (describing the RCC).

alignment and transparency, such as early warnings; greater alignment in regulations and recognition of regulatory practices, such as testing procedures, inspection and certification activities, et cetera to avoid duplications;⁸⁰ and smarter, less burdensome regulations in specific sectors.⁸¹ As a result, the relevant executive branch agencies in the United States and Canada work together—by following a previously agreed-upon biannual action plan—to identify and align existing federal regulatory systems or, absent such alignment, to encourage the adoption of other measures that make it easier to conduct business between the two countries.⁸² The U.S.–Canada RCC seeks to reduce obstacles to trade across the U.S.–Canada border and, thereby, enables resources to be focused on policing the external borders around the United States and Canada.⁸³

The U.S.–Canada RCC issued its *Joint Action Plan on Regulatory Cooperation* in December 2011. The plan addressed twenty-nine sectoral topics in four key areas: agriculture and food, health and consumer products, environment, and transport.⁸⁴ Bilateral working groups involving many different agencies of each government convened to prepare two-year work plans, which were issued on July 30, 2012.⁸⁵ Meanwhile, President Obama issued EO 13,609 in May 2012,⁸⁶ adding impetus to U.S. agencies' interactions with their counterparts in Canada.

Examples of the kinds of regulatory harmonization that the U.S.–Canada RCC has promoted include: creating the Common Electronic Submission Gateway for pharmaceutical drug approval applications to be submitted simultaneously to both Health Canada and the U.S. Food and Drug Administration; aligning product approvals and maximum residue limits for pesticides by the U.S. EPA and the Canadian Pest Management Regulatory Agency; and reconciling conflicting rules on product packaging.⁸⁷

80. Instead of requiring firms to go through these steps in both countries, the RCC encourages moves toward mutual recognition of each other's regulatory determinations so that inspection, filing, testing, and approval in one country will suffice to market products in both countries. See REGULATORY COOPERATION COUNCIL JOINT ACTION PLAN (2011), https://www.whitehouse.gov/sites/default/files/omb/oira/irc/us-canada_rcc_joint_action_plan.pdf.

81. TERMS OF REFERENCE FOR THE UNITED STATES–CANADA REGULATORY COOPERATION COUNCIL (2011), https://www.whitehouse.gov/sites/default/files/omb/oira/irc/us-canada_rcc_terms_of_reference.pdf.

82. See REGULATORY COOPERATION COUNCIL JOINT ACTION PLAN (2011), https://www.whitehouse.gov/sites/default/files/omb/oira/irc/us-canada_rcc_joint_action_plan.pdf; REGULATORY COOPERATION COUNCIL JOINT FORWARD PLAN (2014), <https://www.whitehouse.gov/sites/default/files/omb/oira/irc/us-canada-rcc-joint-forward-plan.pdf>.

83. See *U.S.–Canada Regulatory Cooperation Council*, INTERNATIONAL TRADE ADMINISTRATION, <http://www.trade.gov/rcc> (last visited Apr. 11, 2015).

84. REGULATORY COOPERATION COUNCIL, JOINT ACTION PLAN ON REGULATORY COOPERATION 11–25 (2011).

85. Cass Sunstein, *Regulatory Cooperation in Action*, THE WHITE HOUSE (July 30, 2012), <https://www.whitehouse.gov/blog/2012/07/30/regulatory-cooperation-action>.

86. See *supra* note 74.

87. For the Common Electronic Submissions Gateway, see RCC PERSONAL CARE PRODUCTS AND PHARMACEUTICALS WORKING GROUP: COMMON ELECTRONIC SUBMISSION GATEWAY (ESG)

3. IRC Efforts between Australia & New Zealand

Australia and New Zealand also present a long history of cooperation. New Zealand was part of the Federal Council of Australasia in the 1890s and was invited to be a member of the Commonwealth of Australia in 1901 but declined and became a separate country. The two countries shared Olympic teams in 1908 and a joint army corps in World Wars I and II. In 1983, the Closer Economic Relations Trade Agreement substantially advanced efforts to reduce barriers to trade.⁸⁸ A Memorandum of Understanding on Harmonization of Business Law was issued jointly in 1988 and a Memorandum of Understanding on Business Law Coordination in 2000.⁸⁹

Mutual recognition plays a major role in IRC between Australia and New Zealand. The MRA⁹⁰ and the TTMRA⁹¹ significantly boosted regulatory cooperation across the Tasman Sea.⁹² Prodded by the Australian National Competition Council, the MRA helped align regulatory policies among the member states and territories within Australia.⁹³ The TTMRA extended this effort across the border to New Zealand by creating a process for mutual recognition, which provided that sales of goods and occupations would be valid in both countries once licensed or valid in either country.⁹⁴ It does allow exceptions, however; temporary exceptions can be granted by bilateral Ministerial Councils for health and safety reasons, and permanent exceptions are included in the TTMRA for a list of products.⁹⁵ Mutual recognition does not apply to certain other aspects of sales of goods, such as minimum age limits for young people to buy alcohol, which may vary between Australia and New Zealand.⁹⁶ The Ministerial Councils issue annual cooperation reports, and every five years, the regime is evaluated by the Australian Productivity Commission and its New Zealand counterpart.⁹⁷ The states and territories of Australia

PLAN (2012), <http://www.trade.gov/rcc/documents/Common-Electronic-Submissions-Gateway.pdf>. Regarding product approvals and maximum residue levels for pesticides see CROP PRODUCTS PROTECTION WORKING GROUP: CROP PROTECTION PRODUCTS WORK PLAN (2012), <http://www.trade.gov/rcc/documents/Crop-Protection-Products.pdf>.

88. See AUSTRALIA NEW ZEALAND CLOSER ECONOMIC RELATIONS TRADE AGREEMENT (1983), <http://www.dfat.gov.au/trade/agreements/anzcerta/Documents/anzcerta1.pdf>.

89. *Memorandum of Understanding on Coordination of Business Law between Australia and New Zealand*, AUSTRALIAN GOVERNMENT, THE TREASURY (Feb. 22, 2006), <http://archive.treasury.gov.au/contentitem.asp?ContentID=1073>.

90. Agreement Relating to Mutual Recognition (May 11, 1992) https://www.coag.gov.au/sites/default/files/mra_text.pdf.

91. Trans-Tasman Mutual Recognition Arrangement (May 1, 1998), https://www.coag.gov.au/the_trans-tasman_mutual_recognition_arrangement.

92. Elena Churchman, *Mutual Recognition Agreement and Equivalence Agreements*, in RESEARCH HANDBOOK ON ENVIRONMENT, HEALTH AND THE WTO 280 (Geert van Calster & Denise Prévost eds., 2012).

93. See *About Us*, AUSTRALIAN NATIONAL COMPETITION COUNCIL, http://ncc.gov.au/about/about_us (last visited Feb. 27, 2015).

94. Trans-Tasman Mutual Recognition Arrangement, *supra* note 91.

95. *Id.*

96. *Id.*

97. AUSTRALIAN PRODUCTIVITY COMMISSION REVIEW OF MUTUAL RECOGNITION SCHEMES

remain involved through the Council of Australian Governments and its Committee on Regulatory Reform.⁹⁸

Even more ambitiously, Australia and New Zealand have pursued IRC to create joint regulation and even a joint regulatory agency. Australia and New Zealand entered into a Joint Food Standards Setting Treaty,⁹⁹ which led to the creation of a joint Food Standards Code and to a single regulator, Food Standards Australia and New Zealand (FSANZ).¹⁰⁰ Thus, food safety is jointly regulated by a single body with standards that cover both countries. The two countries were considering an extension to create joint standards and a joint regulator for therapeutic pharmaceutical drug licensing, the Therapeutic Products Agency, but the two sides agreed to cease these efforts in November 2014.¹⁰¹

Moreover, Australia and New Zealand have taken steps to evaluate and learn from variation in their regulatory standards. The Single Economic Market Agreement created a Trans-Tasman Outcomes Implementation Group to assess regulatory outcomes, as opposed to inputs or processes, as a measure for mutual recognition and harmonization.¹⁰²

All of these steps have been facilitated by the longstanding, close relationship between Australia and New Zealand and by the large share of each country's trade represented by the other. The Australian Productivity Commission found that the TTMRA process has been largely successful and should also expand its coverage and strengthen its implementation.¹⁰³

4. Comparing the Cases

These cases vary in their histories, institutions, actors, functions, powers, and policy instruments, from the least integrated model of integration, the U.S.–EU experience, to the most integrated, the Australia–New Zealand version.

(Jan. 2009), <http://www.pc.gov.au/projects/study/mutual-recognition-schemes>; AUSTRALIAN PRODUCTIVITY COMMISSION, RESEARCH REPORT ON MUTUAL RECOGNITION SCHEMES (Sept. 2015), <http://www.pc.gov.au/inquiries/completed/mutual-recognition-schemes#report> (last visited Nov. 23, 2015).

98. See COUNCIL OF AUSTRALIAN GOVERNMENTS, <https://www.coag.gov.au> (last visited Aug. 28, 2015).

99. Agreement Between the Government of Australia and the Government of New Zealand Concerning a Joint Food Standards System, Austl.–N.Z., Dec. 5, 1995, <http://www.foodstandards.gov.au/about/background/documents/41A%20Treaty%20amendments%202012%20UNOFFICAL.pdf>.

100. See FOOD STANDARDS AUSTRALIA NEW ZEALAND, <http://www.foodstandards.gov.au/code/Pages/default.aspx> (last visited Aug. 28, 2015).

101. See *Statement of Intent*, ANZTPA, <http://www.anztpa.org/about/soi.htm> (last visited Aug. 28, 2015); *Joint statement by Hon Peter Dutton MP, Minister for Health for Australia, and Hon Dr Jonathan Coleman, Minister of Health for New Zealand, regarding ANZTPA*, AUSTRALIAN GOVERNMENT DEPARTMENT OF HEALTH, <http://www.health.gov.au/internet/ministers/publishing.nsf/Content/health-mediarel-yr2014-dutton100.htm> (last visited Aug. 23, 2015) (announcing their agreement to cease efforts to create the ANZTPA).

102. TRANS-TASMAN OUTCOMES IMPLEMENTATION GROUP REPORT NOVEMBER 2014 (2014), http://ttoig.treasury.gov.au/content/six_monthly/downloads/november_2014.pdf.

103. AUSTRALIAN PRODUCTIVITY COMM'N (2009), *supra* note 97 at XXXIX–XLIX; AUSTRALIAN PRODUCTIVITY COMM'N (2015), *supra* note 97, at 2 (recommending more effective implementation).

These three models entail different levels of cooperation and employ different instruments. Further careful empirical evaluation of the benefits and costs of these three efforts is warranted—illustrating the value of learning from variation across IRC mechanisms.

The various and multiplex U.S.–EU initiatives on IRC hoped to reduce trade conflicts and trade barriers, especially via the TEC, and to share ideas on better regulation. As recognized by the final report of the High Level Working Group on Jobs and Growth launching the TTIP negotiations, the results to date have been modest.¹⁰⁴ Yet these same initiatives played an important role in preparing the ground for a renewed regulatory cooperation dialogue between the two sides of the Atlantic.¹⁰⁵ They promoted dialogue between the IAB and OIRA through the HLRCF and helped shape the creation of the EU IAB.¹⁰⁶ These developments are of great potential importance to future methodological convergence in regulatory processes and provided an important point of reference for the TTIP negotiations.¹⁰⁷ The U.S.–Canada RCC effort is still underway; its twenty-nine sector-specific Work Plans have recently been launched.¹⁰⁸ The Australia–New Zealand efforts on IRC, by comparison, are the most longstanding and ambitious. They began as early as 1983 and have included not only meetings to identify unnecessary regulatory differences but also two formal agreements on mutual recognition, the MRA in 1992 and the TTMRA in 1998.¹⁰⁹ Moreover, Australia–New Zealand cooperation has created a single regulatory code and a single regulatory agency on food standards.¹¹⁰

In practice, of course, efforts toward IRC are constrained by several factors that may vary across countries. These constraints include the concerns of some interest groups that IRC will mean harmonizing down (a race to the bottom), and the concerns of other interest groups that IRC will mean harmonizing up (a race to the top); restrictions on sharing information across countries or agencies; limited agency staff and resources; and preexisting constitutional and statutory requirements for making regulatory changes, both substantive (regarding regulatory standards) and procedural (regarding legislative and

104. FINAL REPORT HIGH LEVEL WORKING GROUP ON JOBS AND GROWTH (2013), http://trade.ec.europa.eu/doclib/docs/2013/february/tradoc_150519.pdf.

105. Office of Management and Budget, *Europe*, THE WHITE HOUSE, https://www.whitehouse.gov/omb/oira_irc_europe (last visited Aug. 28, 2015).

106. See Jonathan B. Wiener & Alberto Alemanno, *Comparing Regulatory Oversight Bodies Across the Atlantic: The Office of Information and Regulatory Affairs in the U.S. and the Impact Assessment Board in the EU*, in COMPARATIVE ADMINISTRATIVE LAW 309, 333 (Susan Rose-Ackerman & Peter Lindseth eds., 2010).

107. Wiener & Alemanno, *supra* note 57, at 332–33.

108. See REGULATORY COOPERATION COUNCIL JOINT FORWARD PLAN (2014), <https://www.whitehouse.gov/sites/default/files/omb/oira/irc/us-canada-rcc-joint-forward-plan.pdf>.

109. Trans-Tasman Mutual Recognition Arrangement, *supra* note 91.; Agreement Between the Government of Australia and the Government of New Zealand Concerning a Joint Food Standards System, *supra* note 99.

110. Agreement Between the Government of Australia and the Government of New Zealand Concerning a Joint Food Standards System, *supra* note 99.

administrative procedures such as transparency, confidentiality, public input, and executive and judicial review).¹¹¹

Advancing IRC can be intertwined with the domestic politics of international free-trade negotiations, such as the need to secure legislative ratification of trade deals, at least in separation-of-powers systems like that of the United States. In the U.S. system, the President typically seeks so-called “fast-track” Trade Promotion Authority from Congress in order to prevent amendments, thereby safeguarding the credibility of the commitments in the international trade deal.¹¹²

III

PROS AND CONS OF IRC

IRC poses both benefits and costs. This part highlights the most important of these pros and cons. In addition to the benefit of reducing trade barriers through regulatory convergence and the counterpart benefit of matching local preferences through regulatory variation, we emphasize an oft-neglected benefit of regulatory variation: the opportunity to learn about the impacts of different regulatory approaches and thereby maintain optimal variation or select the optimal approach for convergence.¹¹³

A. Benefits of IRC

1. Reducing Trade Barriers

Using IRC to reduce trade barriers can be desirable when the benefits of expanding trade through harmonizing regulations are greater than the benefits of such regulatory differences, that is, greater than the costs of harmonizing differing regulations.¹¹⁴ Globalization has meant increased flows of trade in goods, services, data, and people across national borders. Differing regulations, even if not discriminatory against out-of-state producers, may pose barriers to

111. See AUSTRALIAN PRODUCTIVITY COMM'N, AUSTRALIAN AND NEW ZEALAND COMPETITION AND CONSUMER PROTECTION REGIMES 52 (Dec. 2004); MCCARTHY, *supra* note 21, at 25–27.

112. Trade Promotion Authority can be conferred under 19 U.S.C. 2191. In June 2015, President Obama won Congressional approval for fast-track Trade Promotion Authority for the current TPP negotiations, thus limiting Congress to an up or down vote without amendments when the trade deal is eventually presented to Congress. Greg Nelson, *On Trade, Here's What the President Signed into Law*, THE WHITE HOUSE (June 29, 2015), <https://www.whitehouse.gov/blog/2015/06/29/trade-here-s-what-president-signed-law>. Similarly, in the EU, EU Parliament approval is required for an international trade agreement to enter into force with respect to the EU, but the Parliament can either vote in favor of the negotiated text or against it without being able to amend it. See European Parliament Rules of Procedure OJ 2011 L116, 1, 90(7) and 90(9).

113. In addition to studying variation across national regulations, the learning process that we propose could also study variation across the IRC mechanisms being pursued by groups of countries around the world (described in part II *supra*). Learning from variation across IRC will be important in evaluating which approaches to IRC are associated with which impacts and outcomes, and thereby in selecting the best approaches to IRC.

114. See generally OECD 2013, *supra* note 9.

this increase in trade by requiring conformity to different standards in different countries.¹¹⁵ IRC seeks to make national standards more similar or convergent in order to accommodate the gains that firms and consumers would enjoy from more open trade.

2. Reducing Interjurisdictional Spillovers

Another potential adverse consequence of differing regulatory standards may be that they shift risky activities from more-regulated to less-regulated jurisdictions while still generating transboundary spillovers—interstate externalities. For example, differing limits on greenhouse gas emissions may induce “leakage” of emitting activities from more-regulated to less-regulated jurisdictions.¹¹⁶ Controlling interjurisdictional spillovers is arguably the major rationale for central governments of federal systems to adopt supervening regulations that preempt variation across member states.¹¹⁷ In international systems without a central government, IRC may reduce interjurisdictional spillovers by moving along the spectrum from uncoordinated, heterogeneous regulations toward more-coordinated, homogeneous regulations—convergence via harmonization or joint regulation, thereby reducing the incentive for regulated activities and their impacts to shift.

Growing interconnectedness means that activities in one country, such as pollution, finance, transport, telecommunications, and terrorism, increasingly have impacts in other countries that propagate more rapidly through shared networks.¹¹⁸ Accordingly, demand has grown for IRC to support collective action for shared risk management, such as treaty negotiations in which countries cooperate on international regulatory standards and the creation of new international institutions.¹¹⁹ Here, IRC is not just harmonizing national standards but is adopting new international standards and joint risk management systems to attain shared benefits.¹²⁰ This type of IRC seeks to deal with transboundary impacts and management of global public goods.

3. Reducing Perverse Regulatory Competition

A longstanding concern regarding uncoordinated regulation in multiple jurisdictions is that governments might compete by adjusting their regulatory

115. See ALBERTO ALEMANNI, *THE TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP AND THE PARLIAMENTARY DIMENSION OF REGULATORY COOPERATION* 21 (2014).

116. Jonathan B. Wiener, *Think Globally, Act Globally: The Limits of Local Climate Policies*, 155 U. PA. L. REV. 1961, 1967–70 (2007).

117. Richard L. Revesz, *Federalism and Interstate Environmental Externalities*, 144 U. PA. L. REV. 2341, 2343 (1996).

118. Jonathan B. Wiener, *The Rhetoric of Precaution*, in *THE REALITY OF PRECAUTION*, *supra* note 5, at 3–4; *NEW WORLD ORDER*, *supra* note 3, at 1–4.

119. See Barrett, *supra* note 7, at 1–2 (describing public goods and their universal desirability); Robert O. Keohane, *The Demand for International Regimes*, in *INTERNATIONAL REGIMES* 141, 170 (Stephen D. Krasner ed., 1983) (noting that public goods give rise to demand for international regimes).

120. Alemanni, *supra* note 8, at 104.

standards in order to attract desirable residents.¹²¹ Jurisdictions might race to the bottom by relaxing standards to attract industry; alternatively, they might race to the top by tightening standards to attract households, workers, investors, and cleaner industry. Yet these scenarios are contested.¹²² Provided that interjurisdictional spillovers are well controlled, advocates of regulatory competition argue that it may desirably induce jurisdictions to offer a varied array of choices enabling each prospective resident to select his or her preferred combination of attributes,¹²³ and that efforts to suppress such regulatory competition may only drive it into other policy domains, such as public-spending programs, with even worse outcomes.¹²⁴

B. Costs of IRC

If IRC means moving toward greater convergence and regulatory homogeneity, it poses several costs. Several of these arise from the foregone benefits of regulatory heterogeneity or variation.

1. Negotiation Costs

An obvious cost of IRC is the time spent negotiating and carrying out coordination agreements, which could be spent on other endeavors. The cost is not just the time spent, but also its opportunity cost—what those public officials could have accomplished doing something else. And it is not just the time in the negotiations themselves, but also in implementing any agreed IRC measures; monitoring other countries' compliance; seeking remedies for violations, which themselves may be costly in diplomatic relations; and so on.

2. Mismatching Local Preferences and Circumstances

Variation in national regulations can be worthwhile to match heterogeneous local preferences and circumstances. For example, different populations may prefer different portfolios of environmental risk, economic risk, and security risk, and, hence, different combinations of regulatory protections. Or the benefits and costs of regulations could vary because of differing local

121. Daniel C. Esty & Damien Gérardin, *Regulatory Co-Opetition*, in *REGULATORY COMPETITION AND ECONOMIC INTEGRATION: COMPARATIVE PERSPECTIVES* 30, 37 (Daniel C. Esty & Damien Gerardin eds., 2001).

122. See, e.g., Anthony Ogus, *Competition Between National Legal Systems: A Contribution of Economic Analysis to Comparative Law*, 48 *INT'L & COMP. L.Q.* 405, 406 (1999).

123. See Wallace E. Oates & Robert M. Schwab, *Economic Competition Among Jurisdictions: Efficiency Enhancing or Distortion Inducing?*, 35 *J. PUB. ECON.* 333, 350 (1988) (arguing that interjurisdictional competition is efficiency-enhancing); Ogus, *supra* note 122, at 406 (arguing against the position that “convergence of national laws (at least in the business sphere) is invariably desirable and that, if necessary, it should be promoted by mandatory harmonisation”); Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 *J. OF POL. ECON.* 416, 424 (1956) (“If consumer-voters are fully mobile, the appropriate local governments, whose revenue-expenditure patterns are set, are adopted by the consumer-voters.”).

124. See Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the “Race to the Bottom” Rationale for Federal Environmental Regulation*, 67 *N.Y.U. L. REV.* 1210, 1245–54 (1992) (discussing the negative implications of attempts to suppress interjurisdictional competition).

circumstances, such as different population densities, degrees of exposure to pollution, susceptibility to disease, or economic dependence on regulated industries. IRC—via harmonization, joint regulation, or other steps toward convergence on homogeneous regulatory standards—could conflict with such varying preferences and circumstances. Regulatory variation could, in principle, increase social well-being if it better matches regulations to local needs and interests.¹²⁵

Indeed, the gains from international trade themselves derive from the differing comparative advantages across countries.¹²⁶ These advantages, in turn, derive from differing technologies, skills, and preferences.¹²⁷ To some extent, regulatory variation across countries could reflect these underlying differences and hence countries' different advantages. In such cases, seeking a level playing field or regulatory homogeneity could turn out to undermine the comparative advantage basis for the expected gains from trade.¹²⁸

Of course, regulatory variation in practice may not optimally match local preferences and circumstances. Variation could derive from past choices that are no longer optimal given ongoing economic and social changes, notably globalization and consumer interest in products from other jurisdictions. Regulatory variation could be attempting to protect from international competition the very industries that lack comparative advantage, with associated costs to the protectionist jurisdiction's own consumers.

3. Regulatory Error

As regulations converge toward greater homogeneity, societies come to depend on fewer or even a single regulatory approach. Hence, societies face the risk that any regulatory error from this approach would be magnified more than in a world of diverse regulatory approaches. Just as investment portfolio diversity and biological diversity reduce the risk of being wiped out by a systemic crash, regulatory diversity can reduce the risk of a major error in the choice of the regulatory approach and its consequences. Regulatory variation can serve as a kind of portfolio-diversification strategy or insurance, hedging against regulatory error, including poor design, risk–risk trade-offs, and other flaws that may render policies ineffective or perversely harmful.¹²⁹ The cost of not diversifying may be especially acute when IRC yields not only harmonization of national standards but joint regulation and a joint regulatory body. It is a risk of centralization and uniformity—especially if the regulatory

125. Oates & Schwab, *supra* note 123, at 350; Ogus, *supra* note 123, at 406; Revesz, *supra* note 125, at 1211–12; Gregory Shaffer, *Reconciling Trade and Regulatory Goals: The Prospects and Limits of New Approaches to Transatlantic Governance through Mutual Recognition and Safe Harbor Agreements*, 9 COLUM. J. EUR. L., 29, 34–35 (2002); Tiebout, *supra* note 123, at 424.

126. See generally JAGDISH N. BHAGWATI, ARVIND PANAGARIYA & T. N. SRINIVASAN, LECTURES ON INTERNATIONAL TRADE (2d ed. 1998).

127. *Id.*

128. Revesz, *supra* note 32, at 233.

129. Saam & Kerber, *supra* note 38, at 12.

approach selected for convergence has not been studied and compared to alternatives. Hedging against such risks of regulatory error can favor investing in a diversified portfolio of regulatory variation.

4. Lost Learning

IRC, if it means convergence toward regulatory homogeneity, may forego the benefits of learning from regulatory variation. Variation in regulatory approaches can offer an opportunity for learning about policy impacts from differing approaches and, thus, how to improve regulation in the future. This benefit of learning from regulatory variation is important even if local preferences do not vary, because different regulatory approaches can yield different impacts on the same population. If preferences or circumstances do vary, the opportunity for learning from regulatory variation is only strengthened.

At the far end of the spectrum, utterly uncoordinated regulatory heterogeneity would mean very high barriers to trade, but, at the other end, utterly uniform global regulatory homogeneity via convergence toward universal harmonization or a single joint world regulation would mean little or no opportunity for learning from variation. In the middle of this spectrum, regulatory variation can yield observed differences in impacts that inform subsequent improvement, including possible eventual convergence on an agreed-upon superior approach. This observation of policy variation is the “laboratory” of experimentation cited by Justice Brandeis and modeled by economists.¹³⁰ Convergence without studying prior variation can mean harmonization on an arbitrary or suboptimal approach, so learning from variation is valuable even if convergence is the ultimate goal.

The benefits of learning from regulatory variation might be even greater at the global level than within one federal system because more data may be available on more policies, and the variation in policy designs and impacts may be even wider. Moreover, learning from variation deserves special emphasis in the context of international regulatory cooperation because the centralized institutions for studying variation among subsidiary jurisdictions and for selecting the optimal approach tend to be weaker at the international level than at the national or federal level.¹³¹ And learning can derive not only from variation across national regulations, but also from variation across approaches to IRC.

Beyond learning from observing variation as it occurs, regulatory alternatives can be tested through purposeful experimentation. These experiments can be conducted in the laboratory—that is, with volunteers in a

130. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); Oates, *supra* note 11, at 1132; Saam & Kerber, *supra* note 38, at 12–13; *see also* David Markell, *States as Innovators: It's Time for a New Look to Our "Laboratories of Democracy" in the Effort to Improve Our Approach to Environmental Regulation*, 58 ALB. L. REV. 347, 410 (1994) (noting that an “enormous amount of creative activity is occurring in our laboratories of democracy”).

131. *See supra* Part II.

university research setting,¹³² or in the field—that is, with real policies applied to real populations.¹³³ One jurisdiction can experiment by trying out different policies for different subgroups or different policies over time. Governments implicitly conduct such policy experiments, but they ought to structure these experiments carefully to compare treatment options, monitor performance, and evaluate outcomes.¹³⁴

Such policy experiments could in theory be randomized, akin to the randomized clinical trials used to test medical treatments.¹³⁵ Randomized clinical drug trials typically involve double-blind selection among control and treatment groups, using placebos to conceal control group selection, but such double-blind methods may be difficult to maintain for regulatory policies. Regulatory policies are made transparent for important reasons of accountability and democratic governance—at least where required by notice-and-comment or freedom-of-information laws. Without randomization and blind controls, any use of experimental methods in regulation would need to be designed to account for the behavioral influences that may arise when regulated communities know which treatment they are receiving.¹³⁶ Moreover, public knowledge that the policy is an experiment—and hence alterable once the experiment is run—may undermine the credibility of government commitments, which may in turn influence how people behave in response to the policy.

But governments change policies all the time; ex ante transparency about temporary experimentation in order to learn therefore may actually be more honest and credible about the overall endeavor over time than policies that are initially proclaimed as permanent but are also later undone, yielding public cynicism and distrust of government. The more that policies are easily reversible—that is, where the cost of reversing a policy choice is low—the more that policymakers can purposefully propagate policy variation in order to test outcomes and learn.¹³⁷

Of course, learning from variation and experimentation also implies that there are some costs of trial and error—some policies may fare worse than others. The risk of some distributed errors, as well as some successes, is

132. See Jens Ludwig, Jeffrey R. Kling & Sendhil Mullainathan, *Mechanism Experiments and Policy Evaluations*, 25 J. ECON. PERSP. 17, 17–18 (2011) (describing experimental policy evaluations in laboratory settings).

133. See Michael Greenstone, *Toward a Culture of Persistent Regulatory Experimentation and Evaluation*, in NEW PERSPECTIVES ON REGULATION 111, 118–19 (David Moss & John Cisternino eds., 2009); Rob van Gestel & Gijs van Dijck, *Better Regulation through Experimental Legislation*, 17 EUR. PUB. L. 539, 541–42 (2011).

134. Lawrence E. McCray, Kenneth A. Oye & Arthur C. Petersen, *Planned Adaptation in Risk Regulation*, 77 TECH. FORECASTING & SOC. CHANGE 951, 951–59 (2010); Sofia Ranchordàs, *Sunset Clauses and Experimental Regulations: Blessing or Curse for Legal Certainty*, 36 STATUTE L. REV. 28 (2015).

135. Michael Abramowicz, Ian Ayres & Yair Listokin, *Randomizing Law*, 159 PENN. L. REV. 929, 933 (2011); Greenstone, *supra* note 133, at 114; Ludwig et al., *supra* note 132, at 31–32.

136. Abramowicz et al., *supra* note 135, at 933.

137. Yair Listokin, *Learning Through Policy Variation*, 118 YALE L. J. 480, 553 (2008).

inherent in using diversification to reduce the risk of a bigger, long-term systemic error and to learn from experience with variation. Understandably, regulated communities may object to being the subjects of experimentation.¹³⁸ Still, the public may be more likely to accept policy experimentation, just as it accepts clinical-drug trials, if the outcomes of the policy options—efficacy, costs, and ancillary impacts—are understood to be uncertain *ex ante*, if the value of the policy experimentation endeavor in improving decisions is well explained, if the outcomes studies are made publicly available, and if communities have the option to volunteer as test subjects.¹³⁹ A credible and expert body to guide the design of policy experiments *ex ante*, monitor these policy experiments during implementation, and evaluate outcomes *ex post* will be essential to successful policy learning.¹⁴⁰

The value of learning from observed policy variation and from purposeful experimentation has been emphasized in recent literature on intellectual property law, notably patent law, both within the United States and internationally.¹⁴¹ If policy variation is highly valuable in patent law, then it may be even more valuable in areas of regulation which have even greater uncertainty about policy outcomes, such as health and environmental regulation and homeland security counterterrorism policies. These are areas in which trial-and-error costs may be high, but untested policy convergence and errors for lack of learning may yield even higher damages, costs, and eventual public outcry or dissatisfaction.

A different literature has advocated an approach similarly labeled “experimentalism”¹⁴²—a term used by Sabel and Simon to refer to regulation that sets broad performance objectives while empowering local regulatory officials to gather in-depth data on internal industry practices about complex technologies and to develop detailed knowledge to require best practices over time.¹⁴³ But this approach is not the same as experimentation across policy types. This type of “experimentalism” is just one policy type, that is, one instrument in the array of policy tools, and should be compared to other policy tools in studies of observed variation or purposeful policy experimentation. Indeed, the policy type that Sabel and Simon juxtapose to their version of “experimentalism”—the use of economic incentive systems, such as taxes or

138. Van Gestel & van Dijck, *supra* note 133, at 548–52.

139. Ayres & Listokin, *Randomizing Law*, *supra* note 135, at 963. Recruiting volunteer test subjects may be in tension with randomized trials.

140. Greenstone, *supra* note 133, at 119–21 (proposing a regulatory review board to evaluate outcomes of policy experiments); McCray et al., *supra* note 134 (advocating planned monitoring and evaluation).

141. John F. Duffy, *Harmony and Diversity in Global Patent Law*, 17 BERKELEY TECH. L.J. 685, 707–09 (2002); Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1584–1605 (2008) (arguing that U.S. federal courts have overvalued uniformity); Lisa Oullette, *Patent Experimentalism*, 101 VA. L. REV. 65, 87–104 (2015).

142. Charles F. Sabel & William H. Simon, *Minimalism and Experimentalism in the Administrative State*, 100 GEO. L.J. 53, 78–93 (2011).

143. *Id.*

tradable permits, which they label “minimalism”¹⁴⁴—is neither “minimalist” in the sense of minimal intervention or minimal stringency, nor is it anti-experimental. Rather, initial deployments of economic incentive instruments were themselves ambitious experiments,¹⁴⁵ and policy experimentation should also compare economic-incentive instruments to other policy types. In this sense, our advocacy of “experimentation” is broader than Sabel and Simon’s usage of “experimentalism” to the extent that the latter term one type of regulation whereas the broader term “experimentation” refers to conducting experiments to compare across multiple types of regulation.

Global interconnectedness is also facilitating the innovation and diffusion around the world of ideas for better approaches to regulation.¹⁴⁶ Some regulatory learning does not necessitate cooperation because independent actors learn simply by observing and imitating at a distance. But cooperation via communicating, exchanging ideas, and bringing experts together to work on shared problems can accelerate learning.¹⁴⁷ The exchange of regulatory memes can lead to hybridization of new approaches, not just convergence on one old approach.¹⁴⁸ To pursue these opportunities for innovation, IRC should take advantage of regulatory differences as a laboratory for comparison and learning.¹⁴⁹

Because policy impacts are uncertain *ex ante*, it is valuable to watch them unfold and compare outcomes.¹⁵⁰ Studying regulatory variation can help overcome the information gaps that often impair government policy design.¹⁵¹ In the face of uncertainty and variation, each policy can be seen as an experiment that yields a spillover benefit of new information, which others can use to make subsequent policy choices.¹⁵² The spillover value to other jurisdictions of

144. Sabel & Simon, *supra* note 142, at 74.

145. See Robert N. Stavins, *What Can We Learn from the Grand Policy Experiment? Lessons from SO₂ Allowance Trading*, 12 J. ECON. PERSPECTIVES 69 (1998); Richard B. Stewart, *A New Generation of Environmental Regulation?* 29 CAP. UNIV. L. REV. 21, 32–33 (2001); Richard Schmalensee and Robert N. Stavins, *The SO₂ Allowance Trading System: The Ironic History of a Grand Policy Experiment*, 27 J. ECON. PERSPECTIVES 103 (2013).

146. David Dolowitz & David Marsh, *Learning from Abroad: The Role of Policy Transfer in Contemporary Policy Making*, 13 GOVERNANCE 5 (2000); Wiener, *supra* note 53, at 448–49; Wiener, *supra* note 76, at 123.

147. See generally Frank Dobbin, Beth Simmons & Geoffrey Garrett, *The Global Diffusion of Public Policies: Social Construction, Coercion, Competition, or Learning?*, 33 ANN. REV. SOC. & L. 449, 463 (2007); PETER GALISON, *IMAGE AND LOGIC: A MATERIAL CULTURE OF MICROPHYSICS* (1997) (discussing “trading zones” in which experts in different disciplines exchange ideas toward new insights); *THE GLOBAL DIFFUSION OF MARKETS AND DEMOCRACY* (Beth A. Simmons, Frank Dobbin & Geoffrey Garrett eds., 2008) (documenting the international diffusion of major ideas about governance).

148. Wiener, *supra* note 53, at 448–49; Wiener, *supra* note 6, at 521.

149. See Greenstone, *supra* note 133, at 118–19 (explaining benefits of experimentation); Wiener, *supra* note 6, at 522 (proposing international policy laboratory); Wiener, *supra* note 76, at 136.

150. Greenstone, *supra* note 133, at 118–19; Listokin, *supra* note 137, at 483–84.

151. Saam & Kerber, *supra* note 38, at 12–13.

152. See Oates, *supra* note 11, at 1133 (noting that states may learn from other states so that the diffusion of successful policy innovations may be horizontal).

information about policy impacts also implies that individual jurisdictions may under-invest in producing this information. IRC, therefore, can play a constructive role in correcting this information market failure and promoting the evaluation and experimentation of regulatory variation.

The magnitude of the benefit of learning from variation will depend, among other things, on how well the impacts of regulatory variations are studied across countries, across agencies, across risks, across international regimes, and over time. Variation without good evaluation may not foster learning. The benefit of learning from regulatory variation and experimentation should also increase with the ex ante uncertainty about regulatory impacts, the inaccuracy or incompleteness of ex ante RIAs, the greater accuracy and completeness of ex post RIAs or retrospective reviews, the collection of relevant data during the period of regulatory implementation, and the careful evaluation of impacts compared to alternative scenarios.¹⁵³ The evaluation of policy impacts can be challenging because it requires, first, assessing the full portfolio of important benefits, costs, and ancillary impacts,¹⁵⁴ and second, comparing actual regulatory outcomes to a hypothetical counterfactual of what would have happened absent the regulation.¹⁵⁵

Even if IRC is pursuing convergence via harmonized standards, the process of IRC itself can be used as an experiment: the change in regulatory impacts can be studied during the transition from variation toward convergence. Such transitions toward convergence may be desirable—they may already be justified based on accumulated learning from past variation—but they too can be studied as they proceed through time to identify changing impacts associated with changing regulations. This evaluation may, in turn, be useful to other jurisdictions. Or the study of changing regulatory impacts during the transition from variation to convergence might reveal that the convergence was undesirable, perhaps because the initial variation was preferable or because the convergence should have moved to a different regulatory approach. In such a case, the evaluation should be taken into account in the next round of IRC to revise the policies again with continued study and evaluation. And even if regulatory convergence is desirable, the range of different IRC mechanisms to pursue convergence offers yet another dimension of variation deserving study

153. Greenstone, *supra* note 133, at 118–19.

154. John D. Graham & Jonathan B. Wiener, *Confronting Risk Tradeoffs*, in *RISK VS. RISK: TRADEOFFS IN PROTECTING HEALTH AND THE ENVIRONMENT* 1, 10–41 (John D. Graham & Jonathan B. Wiener eds., 1995) (calling attention to the neglect of ancillary impacts in risk management decisions and proposing a framework for assessing both target and ancillary impacts); RICHARD L. REVESZ & MICHAEL A. LIVERMORE, *RETAKING RATIONALITY* 47–49 (2008) (advocating attention to co-benefits as well as to countervailing risks); Jonathan B. Wiener, *Precaution in a Multirisk World*, in *HUMAN AND ECOLOGICAL RISK ASSESSMENT: THEORY AND PRACTICE* 1509, 1513–18 (Dennis D. Paustenbach ed., 2002) (advocating analysis of the full portfolio of policy impacts); Wiener, *supra* note 76, at 136 (advocating attention to the full portfolio of impacts in the diffusion of regulatory impact assessment across countries).

155. Cary Coglianese, *Empirical Analysis and Administrative Law*, 2002 U. ILL. L. REV. 1111, 1116 (2002).

to inform future selection of approaches to IRC.

In short, the future of IRC should include cooperation on learning. IRC should take advantage of learning from regulatory variation and transition, and from variation in the mechanisms of IRC, both through academic research and the creation of new international regulatory institutions for comparative policy evaluation. IRC institutions attempting to learn from regulatory variation should conduct the several types of studies discussed above, including observation of variation in practice as well as purposeful experiments when appropriate. If IRC were oriented toward regulatory learning, as the HLRCF had been recommending through evidence-based reviews, analysis, monitoring, and evaluation,¹⁵⁶ then learning could count as a benefit of IRC rather than foregone learning counting as a cost of IRC.

It remains to be seen, of course, what sort of institutional framework for IRC would best promote the benefits of learning from variation. One opportunity is to take advantage of the ongoing global diffusion of impact assessment¹⁵⁷ to study and gather data about regulatory performance around the world. A database of impact assessments could help provide the grist for quantitative, comparative policy evaluations. The emphasis on “evidence-based regulation” in the EU Better Regulation initiative may offer an opportunity to conduct selected policy experiments.¹⁵⁸ But IA systems to date have mostly produced *ex ante* forecasts of future impacts; we also need *ex post* or retrospective reviews to evaluate regulatory performance.¹⁵⁹ These *ex post* studies of regulatory outcomes would be analogous to patient-outcomes studies in medicine.¹⁶⁰ Other possible analogs include the Health Effects Institute studies of air pollution, expert panels created to study the cost effectiveness of healthcare options, and proposals to create a new independent body to conduct retrospective RIAs in the United States. The project of designing an institutional body to conduct or coordinate policy evaluation to learn from regulation variation at the international level could draw on these and other examples.

156. U.S.–EC HLRCF, *supra* note 70, at 1.

157. Wiener & Ribeiro, *supra* note 154.

158. van Gestel & van Dijk 2011, *supra* note 133, at 539–40.

159. OECD 2012, *supra* note 8, at ¶¶ 10 & 41–56; Greenstone, *supra* note 133, at 112; Wiener, *supra* note 76, at 136. Following President Obama’s issuance of EO 13,563, 76 Fed. Reg. 3 (2011), OIRA has begun to oversee retrospective impact assessments (*ex post* RIAs). See Cary Coglianese, *Moving Forward with Regulatory Lookback*, 30 YALE J. ON REG. 57, 58–59 (2013); Cass R. Sunstein, *The Regulatory Lookback*, 94 B.U. L. REV. 579, 589–91 (2014); Cass R. Sunstein, *Empirically Informed Regulation*, 78 U. CHI. L. REV. 1349, 1366 (2011). In addition, ACUS has undertaken a project to document and promote retrospective regulatory reviews. See ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATION 2014-5, RETROSPECTIVE REVIEW OF AGENCY RULES (2014); JOSEPH E. ALDY, LEARNING FROM EXPERIENCE: AN ASSESSMENT OF THE RETROSPECTIVE REVIEWS OF AGENCY RULES AND THE EVIDENCE FOR IMPROVING THE DESIGN AND IMPLEMENTATION OF REGULATORY POLICY 9–10 (2014).

160. Jonathan B. Wiener, *Managing the Iatrogenic Risks of Risk Management*, 9 RISK: HEALTH SAFETY AND ENV’T 39, 56–59 (1998).

IV

TTIP AS A STEPPING-STONE TOWARD A GLOBAL REGULATORY
LABORATORY

In laboratory federalism, a central government exists to observe the variation across the member states and select the best policy for adoption.¹⁶¹ For the most difficult and urgent problems posing broadly felt impacts, the central federal government may have economies of scale in expertise and resources as well as the authority to prevent interjurisdictional spillovers. Learning from variation across the member states may be most valuable for working out solutions to midlevel problems,¹⁶² especially those posing impacts mainly within each member state (though sometimes broader impacts too—consider learning from variation across national climate change policies). Solving easy problems, meanwhile, may not need much learning.¹⁶³

At the international scale, typically there is no central government to study, select, and adopt or revise policies. To realize the gains from learning about regulatory variation and to shape the selection and design of the best approaches, some kind of international body would be needed—a global policy laboratory. Without such a mechanism, convergence or harmonization could reduce trade barriers but forfeit the benefits of matching regulatory variation to local preferences and circumstances, or achieve convergence but at an arbitrary point or using a suboptimal policy design. IRC should include not only cooperation on reducing trade barriers via regulatory convergence but also cooperation on new mechanisms to learn about optimal approaches through study and evaluation of the impacts of regulatory variation—including variation across national policies, and variation across mechanisms of IRC.

A step in this direction seems to be contemplated by the negotiators of TTIP in their discussions surrounding regulatory coherence. This horizontal chapter of TTIP would contain principles and procedures on consultation, transparency, impact assessment, and a framework for future cooperation in order to provide a “gateway” for handling sectoral regulatory issues between the EU and the United States.¹⁶⁴ This would apply to all measures of general application, including both legislation and rules that have transatlantic trade impact.

Unlike previous IRC efforts toward regulatory convergence, this innovative mechanism appears capable of pursuing not only the immediate gains of

161. Oates, *supra* note 11, at 1132; Saam & Kerber, *supra* note 38, at 12–13. The role of the central government in selecting best approaches can also help correct subsidiary jurisdictions’ incentive to underinvest in the spillover benefits of information about policy performance. See Steven Callander & Bård Harstad, *Experimentation in Federal Systems*, 130 Q. J. ECON. 951 (2015).

162. K. Kollman, J.H. Miller & S.E. Page, *Decentralization and the Search for Policy Solutions*, 16 J. L. ECON. & ORG. 102, 102–03 (2000).

163. *Id.*

164. See generally EUR. COMM’N, EU–US TRANSATLANTIC TRADE AND INVESTMENT. PARTNERSHIP, TRADE CROSS-CUTTING DISCIPLINES AND INSTITUTIONAL PROVISIONS (2013).

regulatory convergence but also longer term learning from regulatory variation. Regulatory divergence would no longer be addressed only as a problem to be solved with a single template solution, that is, convergence, but would also be tackled as a more complex phenomenon that is not only a problem of regulatory barriers to trade but also an opportunity to furnish part of the solution. Thus, by building upon previous experiences of regulatory cooperation, the horizontal coherence chapter of TTIP has the potential to offer a new avenue enabling both sides to experiment and learn from regulatory variation.

In order to promote alignment of regulations across the Atlantic, TTIP provides an original cooperation mechanism that embeds for the first time the application of good regulatory practices, including consultation, transparency, and impact assessment (RIA), into a trade agreement without substantially altering the parties' respective ways of making legislation or rules.¹⁶⁵ The EU and the United States are not limiting themselves to concluding a traditional free-trade agreement with provisions to reduce past trade barriers but, instead, are striving to come up with a new model of economic integration based on a continuing mechanism for IRC.¹⁶⁶

TTIP does not purport to establish a single market spanning the Atlantic—and no joint regulatory authority is foreseen. It will instead reduce some regulatory barriers to trade, while prompting a new attentiveness by the respective regulators to the extraterritorial impacts of their existing and proposed regulations. Unlike previous IRC efforts, TTIP is set to create a standing mechanism—provisionally called the Regulatory Cooperation Body (RCB)—capable of identifying the sectors in which regulations could be aligned through regulatory cooperative instruments such as mutual recognition or best practices.¹⁶⁷ Along these lines, TTIP would become a living agreement, the provisions of which will continuously be updated without the need to reopen the initial international agreement¹⁶⁸ or to modify the parties' institutional frameworks.¹⁶⁹

165. For an initial analysis of the TTIP Regulatory Cooperation Chapter, see Alberto Alemanno, *The Regulatory Cooperation Chapter of the Transatlantic Trade and Investment Partnership: Institutional Structures and Democratic Consequences*, 18 J. INT'L ECON. L. 625 (2015).

166. *See id.*

167. INITIAL PROVISIONS FOR CHAPTER [] REGULATORY COOPERATION 11–12 (2015), http://trade.ec.europa.eu/doclib/docs/2015/february/tradoc_153120.pdf.

168. This process for updating an international treaty or trade agreement may operate differently from the traditional procedure for the adoption of international agreements through the signature and ratification of each new text. In the EU, this issue may be addressed by Article 218(7) of the Lisbon Treaty, which states,

When concluding an agreement, the Council may, by way of derogation from paragraphs 5, 6 and 9, authorise the negotiator to approve on the Union's behalf modifications to the agreement where it provides for them to be adopted by a simplified procedure or by a body set up by the agreement. The Council may attach specific conditions to such authorization.

Consolidated Version of the Treaty on the Functioning of the European Union, Dec. 13, 2007, 2012 OJ C326/202.

169. Recent suggestions that the Regulatory Cooperation Body (RCB or Council, RCC) to be

Under this framework for ongoing relations, the application of good regulatory practices, such as consultation, transparency, and impact assessment, with the supervision of the RCB, could induce the respective regulators to think in terms of extraterritorial impacts and lead them to align their regulatory outcomes while, at the same time, learning from variation. This ongoing process might initially address existing regulations by discussing whether to agree on the mutual recognition of either the parties' substantive standards or the results of their tests for conformity assessment. Second—amid the application of good regulatory practices—an analogous process might also be applied to new or revised regulations.

If well-handled, this ongoing RCB in TTIP has the potential to become a kind of transatlantic policy laboratory. Although there are still open questions about the functioning and institutional design of TTIP,¹⁷⁰ its underlying model of IRC seems promising for its ability to study the impacts of regulatory variation and evaluate them over time. TTIP could thereby help sustain continuing transatlantic regulatory cooperation while informing its members' consideration of whether and how convergence should occur in particular areas, without modifying their respective constitutional and administrative law systems. It could also help foster the exchange of ideas on improved administrative procedures on public input, transparency, ex ante and ex post impact assessment, proportionate analysis, adaptive regulation, and related topics. A standing framework for policy evaluation under TTIP may nudge regulators to discuss and confront their search for regulatory answers to the same problems.¹⁷¹ Additionally, TTIP could help the parties study regulatory variation by carefully comparing policy options, monitoring performance, and evaluating outcomes. If well designed, TTIP could create the framework for such learning.

Thus, for TTIP to develop a successful mechanism of IRC that learns from

created under TTIP may support such ongoing regulatory learning include remarks by Karel de Gucht, EU Trade Commissioner, in his speech on October 10, 2013 proposing an RCC to study U.S. and EU regulations and recommend joint standards. André Sapir & James Kanter, *European Trade Chief Proposes Trans-Atlantic Working Group*, N.Y. TIMES (Oct. 10, 2013), http://www.nytimes.com/2013/10/11/business/international/eu-trade-chief-proposes-trans-atlantic-working-group.html?_r=0; see also John Graham, former Administrator, U.S. Office of Information and Regulatory Affairs, Testimony before the Committee on Trade, European Parliament, Brussels, Belgium, on Regulatory Aspects of Trans-Atlantic Trade and Investment Partnership (TTIP), U.S.–EU Free Trade Agreement (Oct. 14, 2013) (suggesting an approach similar to that espoused by Karel de Gucht).

170. For example, the question arises how the broad scope of TTIP—which potentially might apply throughout the regulatory state—will relate to the prerogatives of the EU member states and individual U.S. states as well as those of the European Parliament and the U.S. Congress. See ALBERTO ALEMANNI, *THE TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP AND PARLIAMENTARY REGULATORY CO-OPERATION*, EUROPEAN PARLIAMENT POLICY REPORT 43–55 (2014) (discussing the scope of TTIP).

171. Critics worry that that the process could become unwieldy. See S. Lester & I. Barbee, *Regulatory Trade Barriers in the Transatlantic Trade and Investment Partnership*, 16 J. OF INT'L ECON. L. 847, 865 (2013) (“[I]f every regulation that has an impact on trade—i.e. just about all regulations—requires consideration of how the other side regulates the same issue, the role of bureaucracy in dealing with these issues could actually increase, and as a result this approach may actually raise more problems than it solves.”).

regulatory variation—both observed variation and purposeful experiments, and both national policies and IRC mechanisms—it will be essential that it develop institutions and personnel devoted to carefully comparing treatment options, monitoring performance through ex post RIA, and evaluating outcomes. It also appears crucial for the success of TTIP's newly developed IRC model—in particular, for its legitimacy and democratic accountability as well as its ability to elicit information that could assist in learning about policy performance—to invite public input before, during, and after decisions in each sectoral chapter and on future regulatory cooperation.

V

CONCLUSION

Although IRC has, so far, put a priority on reducing regulatory variation to reduce trade barriers, learning from regulatory variation should also be an important feature of IRC. Studying regulatory variation can help match regulatory policies to local preferences and circumstances, can help evaluate alternative policy options, and can help guide convergence to select optimal policy approaches rather than converging hastily on arbitrary or suboptimal approaches. IRC should thus include cooperation not only on reducing trade barriers through convergence but also on learning from variation about policy impacts and optimal policy design.

The horizontal coherence chapter being discussed within TTIP may offer a new model of IRC capable of promoting the alignment of regulations while at the same time realizing the longer-term opportunity to learn from regulatory variation. TTIP offers the potential to create a standing Regulatory Cooperation Body, which, if equipped to study and learn from observed and experimental regulatory variation, could become the transatlantic regulatory laboratory proposed here. This may in turn represent a stepping-stone toward a global policy laboratory.

Such an institutional innovation would be a new form of positive integration that, rather than fixating on reducing regulatory variation, could leverage the benefits of variation and lead over time to the design and selection of improved regulatory approaches. And this innovative process might occur not only without sacrificing regulatory autonomy but also by recognizing the value of regulatory variation in the search for better regulatory approaches.

Other countries willing to join TTIP or similar IRC agreements could also employ this kind of policy laboratory to study and evaluate regulatory variation. A more multilateral and global policy laboratory could assess larger data sets with wider variation in policies, circumstances, and outcomes. The horizontal coherence chapter of TTIP, if used to create a standing transatlantic regulatory laboratory, might indeed emerge as a model of IRC that may spread beyond TTIP toward the creation of a global policy laboratory.

Advocates of regulatory convergence—to reduce trade barriers—may, at first, find this proposal for learning from regulatory variation to be

counterintuitive. In some cases, the reasons for convergence and the regulatory approach to which convergence should lead may be immediately compelling. In other cases, regulatory variation may better match local preferences. But in many cases, even if convergence seems warranted, it may be unclear which regulatory approach should be selected for convergence, or which type of IRC mechanism should be used to pursue that convergence. Hence, even advocates of regulatory convergence may come to see that allowing—and evaluating—regulatory variation may add a learning opportunity to international regulatory cooperation that enables it to better improve both regulation and trade overall.