

# NEW APPROACHES TO INTERNATIONAL REGULATORY COOPERATION: THE CHALLENGE OF TTIP, TPP, AND MEGA-REGIONAL TRADE AGREEMENTS

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## I

### INTRODUCTION: THE RISE OF IRC AND MEGA-REGIONAL TRADE AGREEMENTS

International regulatory cooperation (IRC) has become a hot topic in recent years. President Obama has issued an executive order to prompt federal agencies to engage in IRC under oversight by the Office of Management and Budget<sup>1</sup> and has championed two highly important new IRC initiatives: the Transatlantic Trade and Investment Partnership (TTIP), and the Trans-Pacific Partnership (TPP). These initiatives respond to basic global trends that pose fresh opportunities and challenges for domestic regulation and for IRC. These include the persistence, notwithstanding relatively low tariff levels, of behind-the-border regulatory and other impediments to trade and investment; controversy over whether these differences in national regulations are justified by differing national preferences or are unwarranted obstacles; unrealized opportunities to promote global integration of services and other sectors through global supply chains; relatively sluggish growth in Organization for

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1. Exec. Order No. 13,609, 77 Fed. Reg. 26,413 (May 1, 2012).

Economic Cooperation and Development (OECD) countries, especially in the European Union (EU) and Japan; the dramatic economic and geopolitical rise of China and other emerging economies; the emergence of the United States as a global energy powerhouse; and Russia's challenges to the EU.

In furthering economic goals by addressing regulatory barriers to international commerce, IRC must operate in the context of changing international power balances and geopolitical concerns. Its advocates must also consider whether and how to strengthen regulatory programs to deal with the adverse side effects of heightened economic growth, including environmental and social externalities and deprivations visited on vulnerable and poorly organized groups.

This symposium addresses IRC in the context of cooperative arrangements between public authorities, including states, government regulators, and international organizations; it does not directly address the rapidly growing field of private and hybrid public-private global regulation, although such private standards may be invoked by public authorities.<sup>2</sup> At the forefront of new intergovernmental strategies for IRC are TTIP, composed by the United States and the EU, and TPP, developed by twelve Pacific Rim countries including the United States and Japan.<sup>3</sup> These proposed mega-regional agreements not only aim to further reduce tariffs (in the case of TPP, to zero) and other border measures that impede trade, but they also contain ambitious arrangements for regulatory cooperation to address trade barriers created by divergent regulatory measures and approaches for goods and services; deal with other structural barriers such as those created by government procurement policies and state-owned enterprises; address global supply chains, e-commerce, competition policy, transparency, and anti-corruption; and enhance protection for investment and intellectual property. The regimes' wide range of subjects and their ambitious scope justify the label "mega-regional." The recent grant in July 2015 by the U.S. Congress of Trade Promotion Authority (TPA, often dubbed "fast track") to President Obama has given fresh impetus to both the TPP and TTIP negotiations, which could well be concluded in 2016. Meanwhile, several other mega-regional agreements are being generated in the Asia-Pacific region.<sup>4</sup>

This article is organized as follows: Part II discusses the drivers motivating

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2. See TIM BÜTHE & WALTER MATTLI, *THE NEW GLOBAL RULERS: THE PRIVATIZATION OF REGULATION IN THE WORLD ECONOMY* (2011); BENEDICT KINGSBURY & RICHARD B. STEWART, *GLOBAL PRIVATE AND HYBRID GLOBAL REGULATION* (forthcoming 2016).

3. Other participating countries are Canada, Mexico, Australia, New Zealand, Malaysia, Singapore, Vietnam, Chile, Peru, and Brunei. New Zealand Ministry of Affairs & Trade, *Trans-Pacific Partnership (TPP) Negotiations*, <http://mfat.govt.nz/Trade-and-Economic-Relations/2-Trade-Relationships-and-Agreements/Trans-Pacific/index.php>.

4. These include the Regional Comprehensive Economic Partnership, comprised of the ASEAN members and Japan, China, Korea, India, Australia, and New Zealand as well as a Japan-China-Korea Trilateral Free Trade Agreement. See, e.g., Junji Nakagawa, *Sub-Regional Issues of Plurilateral FTAs: Global Supply Chains and FTAs in East Asia and the Pacific*, 8 *ASIAN J. WTO & INT'L HEALTH L. & POL'Y* 439, 457 (2013) (discussing the need for mega-regional regimes to support the development and enhance the performance of global supply chains).

IRC and the challenges facing IRC. Part III addresses the various institutional structures and techniques for IRC. IRC governance issues and concerns are addressed in part IV. Innovations to overcome obstacles to IRC are discussed in part V. The individual articles contributing to this issue are discussed where they pertain to the subjects addressed in each of these parts.

## II

### NOVEL CHALLENGES AND OPPORTUNITIES FOR IRC

#### A. IRC Drivers

TTIP and TPP, as well as the other new initiatives for IRC examined in this symposium, respond to three powerful drivers.

The first driver is mutual economic benefit through liberalized trade and investment. Reducing regulatory and other barriers promises more competitive markets, lower prices, broader diffusion of innovations, and enhanced consumer welfare, as well as other benefits from liberalization of countries' domestic economies and regulatory governance structures. Government pronouncements and the media have focused on the economic gains, the magnitude of which has been hotly contested.

A second driver for the new IRC initiatives is strategic.<sup>5</sup> TTIP has been dubbed an "Economic NATO."<sup>6</sup> TTIP and TPP together account for two-thirds of world trade, putting the United States in a position to exercise considerable leverage. If TTIP succeeds in promoting a high degree of EU–U.S. regulatory convergence, its regulatory measures and approaches, and its investment and intellectual property arrangements, could, through a variety of mechanisms, become the de facto global standards, restoring in part the past European and American primacy in the World Trade Organization (WTO) and other multilateral bodies. At the same time, the rise of mega-regional trade zones could diminish the role of the WTO and undermine multilateralism. Through TPP, the United States and Japan seek to enlist other Pacific Rim countries in economic integration and governance reform to counter China as well as to promote their respective economic objectives.<sup>7</sup> The Abe Administration in

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5. See Daniel Hamilton & Stephen Blockmans, *The Geostrategic Implications of TTIP*, CENTRE FOR EUROPEAN POLICY STUDIES AND CENTER FOR TRANSATLANTIC RELATIONS (Apr. 20, 2015), <http://www.ceps.eu/publications/geostrategic-implications-ttip> (hereinafter *Geostrategic Implications of TTIP*).

6. C. Boyden Gray, Issue Brief for Atlantic Council Global Business and Economics Program, *An Economic NATO: A New Alliance for a New Global Order*, (Feb. 21, 2013), <http://www.atlanticcouncil.org/publications/issue-briefs/an-economic-nato-a-new-alliance-for-a-new-global-order>.

7. China has exhibited an ambivalent attitude and strategy toward TPP. See Ming Du, *Explaining China's Tripartite Strategy towards the Trans-Pacific Partnership Agreement*, 10 J. INT'L. ECON. L. 18, 417 (May 2015) (addressing "why China changed its initial suspicious attitude to a more neutral stance toward the TPP . . . the short-term and long-term effects of the TPP on China's economic growth and geopolitical influence . . . [and] the myriad of challenges posed by the TPP [for China] moving forward").

Japan and many in the EU also see mega-regional regulatory cooperation as a wedge to break up entrenched domestic political economic and bureaucratic interests within their own jurisdictions, emulating China's strategy in joining the WTO.

A third driver of IRC is strengthening the capacity of states to deliver effective regulatory protection to their citizens. As IRC generates more transborder economic activity and associated gains in prosperity, it may also generate greater adverse effects from uncorrected market failures operating on a broader scale. Additionally, global economic integration, technological changes, and the rise of global supply chains undermine the ability of states to act unilaterally to protect their citizens. Intergovernmental cooperation is needed to fill growing regulatory gaps resulting from intensifying global economic integration, whether in financial markets, food and pharmaceutical safety, environmental protection, public health, or international security. In these circumstances, regulatory failures in some jurisdictions spill over into others. As a result, domestic regulators who would generally prefer not to cede or share authority with counterparts from other countries may be forced or persuaded to do so in order to carry out their missions.

IRC is needed for effective regulatory implementation and enforcement when goods and services, such as pharmaceuticals, food, automobiles, banking, air travel, and others, cross borders through global supply chains. Adoption of equivalent regulatory measures promises to reduce "leakage" of investment to jurisdictions with laxer regulatory standards and to address competitiveness concerns. The environmental and labor provisions in TPP, which are designed to strengthen regulatory programs in (developing) country parties, reflect this objective and also respond to concerns of developed country environmental groups and organized labor.

In addition to strengthening regulatory programs, IRC can economize scarce regulatory resources by sharing the burden among regulators of multiple trading partners. Successful regulatory cooperation achieves economies of scale and cost sharing in gathering information and performing analyses. IRC can also promote collaborative learning regarding best regulatory practices and decisional processes. Further, as national regulators must increasingly confront the consequences of their regulatory decisions for other jurisdictions and of others' regulatory decisions for one's own jurisdiction, IRC may ultimately promote greater mutual regard for the welfare of others' citizens.

## B. Confronting the Challenges of IRC

Many of the contributions in this issue, including those by C. Boyden Gray,<sup>8</sup> Reeve Bull,<sup>9</sup> Fernanda Nicola,<sup>10</sup> Anne Meuwese,<sup>11</sup> Jonathan Wiener and Alberto

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8. C. Boyden Gray, *Upgrading Existing Regulatory Mechanisms for Transatlantic Regulatory Cooperation*, 78 LAW & CONTEMP. PROBS., no. 4, 2015.

9. Reeve T. Bull, *Developing a Domestic Framework for International Regulatory Cooperation*, 78 LAW & CONTEMP. PROBS., no. 4, 2015.

Alemanno,<sup>12</sup> and Robert Howse<sup>13</sup> discuss IRC issues in the context of the TTIP and TPP mega-regionals. Building on first-generation initiatives such as Mercosur (discussed in the contribution by Marian Mota Prado and Vladimir Bertrand<sup>14</sup>) and the North American Free Trade Agreement (NAFTA), TTIP and TPP set a high level of ambition and embody innovative institutional structures to achieve these ambitions. TTIP and TPP are framed as “living agreements,” creating a standing joint regulatory coordinating body (RCB) that will engage high-level political officials with the aim of spurring continual initiatives to reduce regulation-based trade barriers over time in a variety of regulatory sectors. Recognizing the difficulties in achieving convergence on substantive regulatory measures, TTIP and TPP also seek, under the banner of “regulatory coherence” or “regulatory integration,” to promote cross-sector cooperation on regulatory decision-making processes, including intensive consultation, information sharing, risk-assessment procedures, regulatory-impact-assessment procedures, public participation, mutual learning from best practices, and joint review and analysis of the performance of regulatory measures and strategies.<sup>15</sup>

Another innovative form of IRC, addressed in Jeffrey Dunoff’s contribution, is regulatory cooperation among international regulatory organizations.<sup>16</sup> Other contributions deal with more general issues in IRC. Robert Ahdieh’s article applies game theoretic analysis of the potential for regulatory cooperation notwithstanding conflicting interests among jurisdictions.<sup>17</sup> Wiener and Alemanno discuss the considerable potential for learning from regulatory differences rather than striving only for uniformity.<sup>18</sup> Francesca Bignami and Giorgio Resta provide a detailed account of EU–U.S. conflict and cooperation in the field of data privacy.<sup>19</sup>

The diverse efforts to advance IRC confront a variety of familiar and

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10. Fernanda G. Nicola, *The Politicization of Legal Expertise in the TTIP Negotiation*, 78 LAW & CONTEMP. PROBS., no. 4, 2015.

11. Anne Meuwese, *Constitutional Aspects of Regulatory Coherence in TTIP: An EU Perspective*, 78 LAW & CONTEMP. PROBS., no. 4, 2015.

12. Jonathan B. Wiener & Alberto Alemanno, *The Future of International Regulatory Cooperation: TTIP as a Learning Process toward a Global Policy Laboratory*, 78 LAW & CONTEMP. PROBS., no. 4, 2015.

13. Robert Howse, *Regulatory Cooperation, Regional Trade Agreements, and World Trade Law: Conflict or Complementarity?*, 78 LAW & CONTEMP. PROBS., no. 4, 2015.

14. Mariana Mota Prado & Vladimir Bertrand, *Regulatory Cooperation in Latin America: The Case of Mercosur*, 78 LAW & CONTEMP. PROBS., no. 4, 2015.

15. See, e.g., European Commission, *Textual Proposal for Chapter on Regulatory Cooperation in TTIP*, 6–8 (Feb. 2015), [http://trade.ec.europa.eu/doclib/docs/2015/february/tradoc\\_153120.pdf](http://trade.ec.europa.eu/doclib/docs/2015/february/tradoc_153120.pdf).

16. Jeffrey L. Dunoff, *Mapping a Hidden World of International Regulatory Cooperation*, 78 LAW & CONTEMP. PROBS., no. 4, 2015.

17. Robert B. Ahdieh, *Coordination and Conflict: The Persistent Relevance of Networks in International Financial Regulation*, 78 LAW & CONTEMP. PROBS., no. 4, 2015.

18. See Wiener & Alemanno, *supra* note 12 at 132–35.

19. Francesca Bignami & Giorgio Resta, *Transatlantic Privacy Regulation: Conflict and Cooperation*, 78 LAW & CONTEMP. PROBS., no. 4, 2015.

recurring obstacles. These include differences among participating jurisdictions in their economic, social, and political circumstances; their existing standards and modes of regulation (including conformity determinations and implementation and enforcement arrangements); their regulatory preferences and cultures; their regulatory decision-making institutions and procedures and their administrative, constitutional, and legal structures and cultures and capacities; and the sheer and often inevitable complexity of many regulatory programs. Many changes in regulatory measures and processes generate controversy and opposition. Changes involve adjustment costs for regulators, the regulated, and the public. Domestic interest groups including firms, workers, and environmental and social-advocacy groups may view proposed changes as adverse, and may often be more politically influential than those who will benefit from the change.

Further, regulators tend to resist loss of decisional autonomy and changes in established ways of regulating. They may well embrace IRC when it advances their regulatory mission; for example, transnational coordination in antitrust. But individual agencies and regulators may not see strong incentives in the prospect of collective global or transnational benefits such as general increases in economic activity resulting from regulatory cooperation, and they might accordingly underinvest in IRC. The precise character and extent of these obstacles varies depending on the sector in question and the configuration of different interest groups and jurisdictions that stand to gain or lose from change. Moreover, the costs and benefits of the same regulatory change may vary across countries. Differences in levels of development, for example among the TPP countries, may make regulatory convergence more difficult. Even if the parties have similar levels of development and have already achieved a high degree of integration, as in the case of TTIP, differences in risk preferences and long-entrenched regulatory cultures can still create substantial obstacles.

Steps to advance IRC must also confront often-vocal normative challenges to its governance and the consequences for national regulatory policies. Critics fear that shifting regulatory decisionmaking to transnational bodies creates a two-level game that can be used by the executive and well-organized economic interests to enhance their power, enable them to circumvent domestic legislative and judicial mechanisms for participation and accountability, and “launder” the regulatory policies that they favor through IRC mechanisms.<sup>20</sup> A related critique is that the negotiation of mega-regional and other IRC regimes has been clouded in secrecy, and that transparency and opportunities for civil

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20. Barry Steinhardt, *Problem of Policy Laundering*, AMERICAN CIVIL LIBERTIES UNION (Aug 13, 2004), [http://26konferencja.giodo.gov.pl/data/resources/SteinhardtB\\_paper.pdf](http://26konferencja.giodo.gov.pl/data/resources/SteinhardtB_paper.pdf); see also Alvin Y.H. Cheung, *Intra-Executive Regulatory Policy Laundering Through Mega-regional Negotiations*, Paper presentation at ICON-S International Society of Public Law Conference: Public Law in an Uncertain World (July 2, 2015) (on file with author); Eyal Benvenisti & George W. Downs, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, 60 STAN. L. REV. 595, 629 (2007).

society participation in their decisionmaking is limited at best.<sup>21</sup> Environmental, health-and-safety, and labor advocates contend that as a consequence, IRC, especially in the form of mega-regional deals, will lead to a weakening of regulatory protections—a tendency that they worry is reinforced by competitiveness pressures and lowest-common-denominator dynamics in IRC regimes that include developing countries. EU nongovernmental organizations (NGOs) and parliamentarians have criticized TTIP on several of these grounds, and NGOs in the United States, New Zealand, and Australia have similarly attacked TPP. To meet such criticisms, IRC arrangements can seek to ensure that jurisdictions with higher standards maintain them, and that the mega-regional agreements harmonize standards upward rather than downward. The environmental and labor provisions in TPP are a response to these criticisms, seeking to enhance regulatory protections in developing country parties. The extent to which they can be expected to produce stronger standards and effective enforcement in developing country parties may nonetheless be modest;<sup>22</sup> many developing countries and their firms tend to view the higher standards as impositions designed to impair their competitive position.

Some states, certainly weak states, will suffer some loss of decisional independence or “regulatory sovereignty” as a result of participating in IRC and adopting the standards that IRC generates. Indeed, powerful jurisdictions may be able to leverage IRC to secure broad adherence to regulatory measures and approaches. These may include: cost-benefit analysis, evidence-based regulation, heightened environmental, health-and-safety and labor standards, and heightened investment and intellectual property protections. These measures may advance their constituents’ interests but provoke contestation and resistance from other states who regard them as adverse. Meanwhile, the effects of mega-regional agreements may also spill over to states not participating in IRC that nonetheless face strong incentives to adopt regulatory standards and approaches adopted by IRC regimes with economic clout, such as TTIP. The mega-regionals’ regulatory norms may be taken up by international standard-setting organizations and private transnational codes, become a condition of development assistance, or represent an off-the-shelf resort for

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21. See, e.g., Marija Bartl & Elaine Fahey, *A Post National Marketplace: Negotiating the Transatlantic Trade and Investment Partnership (TTIP)*, in *TRANSATLANTIC COMMUNITY OF LAW: LEGAL PERSPECTIVES ON THE RELATIONSHIP BETWEEN THE EU AND US LEGAL ORDERS* 210 (Elaine Fahey & Deirdre Curtin eds., 2015); Marika Armanovica & Roberto Bendini, European Parliament: Directorate-General for External Policies, *Civil Society’s Concerns about Transatlantic Trade and Investment Partnership* (Oct. 14 2014), [http://www.europarl.europa.eu/RegData/etudes/IDAN/2014/536404/EXPO\\_IDA\(2014\)536404\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2014/536404/EXPO_IDA(2014)536404_EN.pdf); *Trans-Pacific Partnership (TPP): Job Loss, Lower Wages and Higher Drug Prices*, PUBLIC CITIZEN, <http://www.citizen.org/TPP> (last visited Nov. 4, 2015).

22. See Ching-Wen Hsueh, *A Greener Trade Agreement: Approaches to Environmental Issues in the TPP Negotiations*, 8 *ASIAN J. WTO & INT’L HEALTH L. & POL’Y* 521 (Sept. 2013); see also Joshua P. Meltzer, *The Trans-Pacific Partnership Agreement: The Environment and Climate Change*, in *TRADE LIBERALIZATION AND INTERNATIONAL CO-OPERATION: A LEGAL ANALYSIS OF THE TRANS-PACIFIC PARTNERSHIP AGREEMENT* (Tania Voon ed., 2014) (discussing environmental chapters in the U.S. FTA).

states with weak administrative capacity.

IRC must also address decision-making failures that prevent jurisdictions from agreeing on cooperative measures that would be in their mutual long-term interests. The hub-and-spoke institutional design and negotiating strategy of TTIP and TPP, which combine working groups of regulators in various sectors with a central regulatory coordinating structure, can enhance the chances for agreement relative to fragmented single-sector approaches followed in the past by expanding the number and type of regulatory issues in play and by allowing for cross-issue compromises as well as enlisting high-level political leadership to push cooperation forward in specific sectors. The regulatory negotiation (“reg-neg”) procedures discussed by C. Boyden Gray<sup>23</sup> are another response that could afford opportunities for participation by a broader range of actors beyond the governments that are officially parties to the IRC regime.

Success in regulatory cooperation should not necessarily be equated with uniformity in regulatory measures. Additionally—as the contributions by Bull<sup>24</sup> and Wiener and Alemanno<sup>25</sup> make clear—differences in regulatory standards can yield significant advantages, including the ability to tailor measures to local preferences and to glean important insights from regulatory variation. Furthermore, there are many productive forms of regulatory cooperation beyond harmonization of standards, including closer ongoing communication and information exchange among domestic regulators in specific sectors, cross-cutting joint or convergent processes for regulatory assessment and risk analysis, and cooperation on implementation and enforcement strategies. Over the long run, these forms of regulatory cooperation, emphasized in TTIP and TPP in recognition of the obstacles to harmonizing standards, may result in significant functional convergence in regulatory programs and reduction in trade barriers.

### III

#### INSTITUTIONAL STRUCTURES AND TECHNIQUES FOR IRC

##### A. Structures of IRC

Institutionally, five basic structures of IRC regimes have emerged:

First are *free trade agreements* (FTAs), which do not themselves set regulatory standards for goods and services, but include trade disciplines (for example, tariff reduction, and non-discrimination in regulation) and procedural requirements (for example, transparency) that apply to domestic regulatory measures. These disciplines, as in the GATT (General Agreement on Tariffs and Trade) and the WTO and regional trade agreements such as Mercosur and NAFTA, may promote negative harmonization (constraining regulatory

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23. See Gray, *supra* note 8, at 41–47.

24. See generally Bull, *supra* note 9.

25. See generally Wiener & Alemanno, *supra* note 12.



differences that impede trade). They may also aid in the process of positive harmonization (agreement on shared regulatory standards or procedures), as has occurred in the EU. The WTO, most notably in the Sanitary and Phytosanitary Measures (SPS) and Technical Barriers to Trade (TBT Agreements), provides specific incentives for development of international standards and their adoption by members. The WTO also shapes domestic and transnational regulatory governance through broader systemic influences.<sup>26</sup>

A second structure is that of *international agreements* and *organizations* which set regulatory standards in specific sectors; examples include the Montreal Protocol (ozone-depleting substances), the Basel Committee (capital adequacy standards for banks), and Codex Alimentarius (food and plant safety). In addition to official intergovernmental agreements on treaties and similar international accords among states, these structures may include transnational governance through private or hybrid public–private codes.

Various forms of *bilateral cooperation among domestic regulators* are a third structure that may generate common regulatory standards (but more often mutual recognition arrangements, sharing of information and best practices, and ongoing consultation). In some cases such bilateral cooperation occurs through adoption or incorporation by reference of private and hybrid public–private codes.

The fourth structure is represented by *mega-regionals*, which include trade, regulatory cooperation and investment, and other measures, and combine elements of the three IRC structures noted above.

*IRC among international organizations* (as discussed in the contribution by Jeffrey Dunoff)<sup>27</sup> is the fifth structure. The global allocation of IRC activity among these institutional forms, part of the emerging field of global organizational ecology,<sup>28</sup> reflects differences in field and the character of the regulations in issue, the legal and functional attributes of the different regime types, and considerations of political economy that lead states and other actors seek to channel IRC to fora in which they enjoy relative advantages of power and influence.

Several of the contributions in this issue—those by Gray,<sup>29</sup> Meuwese,<sup>30</sup> and Nicola<sup>31</sup>—focus on TTIP as an FTA combined with mechanisms for ongoing regulatory cooperation across many sectors. TTIP is a mega-regional (fourth model), which represents a hybrid of the first model (trade liberalization) and the third (cooperative bilateral regulation in specific sectors). Other examples of such hybrids include NAFTA, Mercosur, and TTP. More ambitious than any

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26. See generally Gregory C. Shaffer, *How the WTO Shapes Regulatory Governance*, 9 REG. & GOVERNANCE, 1 (2015) (providing a framework for assessing the regulatory implications of the WTO).

27. See Dunoff, *supra* note 16.

28. See TRANSNATIONAL LEGAL ORDERS (Terrence C. Halliday & Gregory Shaffer eds., 2015).

29. See Gray, *supra* note 8.

30. See Meuwese, *supra* note 11.

31. See Nicola, *supra* note 10.

of these other hybrid models, TTIP responds to the failure to reach agreement on new WTO measures to address nontariff barriers to trade and the limitations of bilateral or multilateral regulatory regimes limited to particular sectors. TTIP aims to establish an institutional platform for ongoing regulatory cooperation across sectors that will not only *broaden*, but *deepen* regulatory cooperation. Recognizing the limits of a strategy that relies on harmonizing hard-law standards, TTIP envisages coordination of the processes for developing and implementing regulatory norms. As Nicola observes, TTIP represents an effort by the EU and the United States to compensate for their loss of hegemonic domination of the WTO and to meet the challenge of China and other emerging economies by establishing a new joint regime for regulatory cooperation in order to stimulate transatlantic economic growth and generate standards that will de facto govern transactions throughout the world.<sup>32</sup> In the process, TTIP may marginalize other arrangements for international regulatory standard-setting.

## B. Techniques for IRC

As a helpful heuristic, it may prove instructive to identify the array of techniques for IRC as they fall along a continuum—a spectrum ranging from fully uncoordinated regulatory heterogeneity on one end, to fully uniform regulatory homogeneity (universal harmonization, or a single global law) on the other. In the intermediate regions of this spectrum are several approaches that can be built between decentralized heterogeneity and centralized homogeneity. The five structures outlined above in part III.A may each employ one or more techniques across this spectrum. An OECD “stocktaking” paper<sup>33</sup> identifies eleven types of IRC mechanisms amid a complex web of actors, epistemic networks, law, and norms, which are not mutually exclusive. Other options may also be identified. Drawing on these eleven types, and alluding to the different structures that may employ them, yields the following identification of key techniques for IRC along the spectrum from regulatory heterogeneity to regulatory homogeneity or convergence: for each of these techniques, the structure involved may be bilateral, regional, multilateral; among international organizations; or among private actors such as businesses, advocacy groups, and individuals.

### 1. *Fully uncoordinated regulatory heterogeneity.*

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32. *See id.* at 1 (explaining how the EU–U.S. pursuit of the TIPP and TPP partnerships aimed to generate robust “economic growth while [simultaneously] strengthening the Western bloc to contain the rising Chinese power and the regulatory challenges posed by the expansion of the Chinese markets.”).

33. ORG. FOR ECON. CO-OPERATION & DEV., INTERNATIONAL REGULATORY CO-OPERATION: RULES FOR A GLOBAL WORLD 8–10 (Oct. 14, 2012), [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=GOV/RPC\(2012\)8/REV1&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=GOV/RPC(2012)8/REV1&docLanguage=En) (offering a typology of eleven IRC mechanisms); *see also* ORG. FOR ECON. COOPERATION & DEV., INTERNATIONAL REGULATORY CO-OPERATION: ADDRESSING GLOBAL CHALLENGES 19–74 (2013) (discussing types of transnational relations in IRC).

2. *Dialogue*: informal exchange of information and personnel exchanges to foster mutual understanding of each other's regulations, such as the Transatlantic Economic Council.

3. *Procedural soft law*: cooperation among states based on non-legally binding 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. Grays's contribution suggests transnational regulatory negotiation ("reg-neg") as one promising approach.

4. *Private codes*: Coordinated technical standards adopted by multinational private standards development organizations, such as transnational industry associations, or the International Organization for Standardization (ISO).

5. *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 reference to ISO standards, or agreement on common testing protocols, such as those for automobiles.

6. *Transgovernmental networks*: cooperation among agencies or units of national governments, based on peer-to-peer ties developed through frequent interaction rather than formal negotiation of agreements. Examples include the International Competition Network and the Basel Committee on Banking Supervision. These could also involve diffusion of similar regulatory approaches across separate national regulatory bodies, such as through learning or emulation. Coordinated, or joint, regulatory impact assessments, for individual rulemakings or for multiple policies, ex ante or ex post, may contribute to such diffusion and learning, as discussed in the contributions by Bull<sup>34</sup> and by Wiener and Alemanno.<sup>35</sup>

7. *Mutual recognition agreements* in national regulatory law: retaining different national standards, but agreeing to allow market access upon approval by the other jurisdictions' regulatory authority.

8. *International agreements*: multilateral accords to reduce regulatory barriers to trade, as in NAFTA and the WTO.

9. *Membership in international organizations* promoting regulatory cooperation: such as the International Labor Organization, OECD, and Asia-Pacific Economic Cooperation. Cooperation among international organizations (as discussed in the contribution by Jeffrey Dunoff)<sup>36</sup> is a strong form of this technique.

10. *Formal regulatory partnerships* between countries: such as the U.S.–Canada Regulatory Cooperation Council, the Mexico–U.S. High Level Regulatory Cooperation Council, the EU–U.S. High Level Regulatory Cooperation Forum (on oversight and impact assessment structures), or the

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34. Bull, *supra* note 9.

35. Wiener & Alemanno, *supra* note 12.

36. Dunoff, *supra* note 16.

Trans-Tasman cooperation arrangements between Australia and New Zealand.

11. *Integration and harmonization* through a given *supranational* or *joint institution*: agreement to adopt 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 legislation and U.S. federal legislation applied through member states are strong versions of this (as discussed in the contribution by Meuwese).<sup>37</sup>

12. *Joint regulator*: The creation of a single regulatory agency or body to promulgate joint regulations with the same standard covering two or more jurisdictions. A leading example is the joint Food Standards Australia and New Zealand (FSANZ).

13. *A single global regulatory law*.

#### IV

##### IRC GOVERNANCE ISSUES AND ANXIETIES

The governance issues associated with intergovernmental regulatory cooperation fall along three dimensions: horizontal structures and procedures for IRC decisionmaking; vertical relations between IRC decisional processes and their regulatory outputs and domestic regulatory structures, decisional processes, and measures; and external impacts of IRC regimes on their relations with jurisdictions that are not members of the cooperation regime. The interplay among these dimensions ultimately determines the consequences of the IRC enterprise for the welfare and concerns of diverse individuals in many jurisdictions.

##### A. The Horizontal Dimension; Decision-making Structures and Processes for IRC Regimes

As regards the horizontal dimension, precisely which governmental officials participate and make decisions differs in each of the five types of structures.<sup>38</sup> The officials are primarily trade officials and negotiators in the first type, officials from specific regulatory agencies in the second and third types, and a combination of these along with senior executive officials in the fourth type. In the fifth type international bureaucrats play a decisive role. FTAs, mega-regionals, and international regulatory organizations are established by treaty and have relatively formalized structures and procedures. Intergovernmental networks vary in degree of legalization. Many arrangements and processes for bilateral cooperation are highly informal, although in some cases they operate under memoranda of agreement between the respective government agencies.

The decision-making arrangements must promote participants' agreement

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37. Meuwese, *supra* note 11.

38. *See supra* Part III.A.

on measures for regulatory cooperation.<sup>39</sup> Although the governance arrangements in decision-making procedures for TTIP and TPP have yet to be resolved in detail, they will include an institutional platform for ongoing regulatory cooperation across sectors. In the case of TTIP, it will include an RCB to establish and oversee implementation of an agenda for specific initiatives by sectoral working groups of domestic agency officials. The objective would be to steer efforts toward sectors and issues promising the greatest progress in agreements with high payoffs in reducing regulatory barriers. For example, these could include the automotive sector, technical barriers in engineering and machinery, and certain aspects of chemicals regulation.<sup>40</sup> In the hub-and-spoke design, the central RCB would promote harmonized cross-sectoral regulatory decision-making processes, including regulatory impact and risk-assessment processes. It is increasingly recognized that regulatory cooperation must extend to the mechanisms and procedures for developing, implementing, and enforcing regulatory measures; Nicola concludes that the relative lack of success in past efforts at transatlantic regulatory cooperation is due in significant part to neglect of this approach.<sup>41</sup> High-level officials would oversee the work of the RCB and the enterprise as a whole and could supply political muscle to push through agreements that sector-specific regulators might resist or be unable to achieve. An institutional model for an RCB is the U.S. OMB Office of Information and Regulatory Affairs, which under President Obama's executive order acts as a convening and agenda-setting apparatus for IRC initiatives by specific agencies.

Although achieving effective internal agreement is critical, the interests and concerns of nonstate actors and third-party jurisdictions affected by IRC decisions must also be considered in the institutional design. TTIP and TPP governance arrangements have been sharply criticized. Prominent among the criticisms is secrecy in the process of negotiating the agreements (some parties have responded with selective disclosure of draft texts) and in their internal decisional procedures. Nonetheless, the institutional design of these new mega-regional bodies, which include a high-level and politically visible coordinating body and an emphasis on cross-cutting regulatory decision-making processes that afford opportunity for public input, can provide substantial opportunities for transparency and participation, which in turn engage nonstate actors and thereby provide a basis for review by, for example, parliamentary bodies.

Currently, there is often only limited transparency regarding internal IRC

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39. This topic is addressed in part IV of this Introduction and a number of the contributions.

40. EU Commission, *Detailed Explanation on the EU Proposal for a Chapter on Regulatory Cooperation*, (May 6, 2015), [http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc\\_153431.1.1\\_Detailed\\_explanation\\_of\\_the\\_EU\\_proposal\\_for\\_a\\_Chapter\\_of\\_reg\\_coop.pdf](http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153431.1.1_Detailed_explanation_of_the_EU_proposal_for_a_Chapter_of_reg_coop.pdf). A comprehensive presentation of the trade, regulatory, and other issues in play in TTIP is provided by Jeffrey J. Schott & Cathleen Cimino, *Crafting a Transatlantic Trade and Investment Partnership: What Can Be Done*, PETERSON INST. FOR INT'L ECON (Mar. 2013), <http://www.iie.com/publications/pb/pb13-8.pdf>; Armanovia & Bendini, *supra* note 21.

41. See Nicola, *supra* note 10.

decisional processes. Though that may be important for securing agreement, closed decision-making procedures exclude representatives of broader constituencies with a stake in the outcome. Many sector-based international regulatory bodies (the second category) have, however, increasingly adopted global administrative law procedures for transparency and public participation regarding proposed standards and other normative products.<sup>42</sup> Some also give reasons for the standards and other measures proposed or adopted. Arrangements for independent review of decisions are generally limited. In some regimes, “stakeholders” representing business, environmental, and social interests and concerns have an assigned role in the body’s decision-making processes to facilitate consultation and input but do not exercise decision-making power.<sup>43</sup> IRC bodies have adopted such procedures to improve the quality of their regulatory products, promote their uptake by domestic officials and other users, and increase their acceptance by broader publics especially when their regulatory decisions generate significant externalities and distributional consequences.<sup>44</sup> Demands for public governance procedures are generally absent or muted in the case of international bodies that adopt technical standards to solve coordination games and informal bilateral IRC arrangements.

#### B. The Vertical Dimension: Relation between IRC Regimes and Domestic Regulatory Governance

The vertical axis of IRC governance concerns the relation between the IRC institution and domestic legal and political regulatory structures, processes, and measures. This relation is by no means solely top-down. As in all transnational regulatory arrangements, there is recursive multilevel interweaving of initiative, influence, and response in all directions. Apart from some treaty-based international bodies, the regulatory norms and decisions generated transnationally through IRC are not legally binding on domestic administrations; formal regulatory sovereignty is preserved. This is the case with TTIP and TPP. Nonetheless, IRC norms and decisions often have a substantial effect on domestic regulatory orders, especially when the relevant domestic regulatory officials have participated in the IRC decisionmaking that produced them and have statutory authority to adopt them.<sup>45</sup> Domestic political and legal mechanisms for supervising regulatory agencies and holding them accountable for their decisions remain in operation. Thus, agency decisions to implement transnationally agreed-upon measures may be subject to procedural

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42. See generally Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 15 (Autumn 2005).

43. See Michael A. Livermore, *Authority and Legitimacy in Global Governance: Deliberation, Institutional Differentiation, and the Codex Alimentarius*, 81 N.Y.U. L. REV. 766, 782 (2006).

44. See Richard B. Stewart, *Remedying Disregard in Global Regulatory Governance: Accountability, Participation and Responsiveness*, 108 AM J. INT’L L. 211, 220 (2014).

45. See generally Richard B. Stewart, *The Global Regulatory Challenge to U.S. Administrative Law*, 37 N.Y.U. INT’L. L. & POL. 695 (2005).

disciplines such as requirements to prepare regulatory impact analyses and—in the United States—public notice and opportunity for comment. These mechanisms’ effectiveness is, however, often substantially diminished when the basic decisionmaking has already occurred at the transnational level.

As discussed above, these circumstances have fueled both process-based and substantive critiques of transnational regulatory regimes by environmental, consumer, labor, and social groups. These criticisms—especially pronounced in Europe (in the case of TTIP) and in New Zealand and Australia (in the case of TPP)—apply to many IRC bodies that already exist, such as the WTO, and have generated widely adopted standards and measures. Because TTIP and TPP are new, prominent, and more-ambitious regimes, they have attracted exceptionally sharp criticism but also provide opportunities for institutional and procedural measures to meet the criticisms.<sup>46</sup>

Concerns about regulatory sovereignty and circumvention of domestic governance arrangements are most acute when IRC bodies generate harmonized, substantive regulatory requirements. As reflected in the emphasis in TTIP and TPP on “regulatory coherence,” one response to these concerns is to focus IRC on less-intrusive regulatory objectives, including cooperation on regulatory impact analysis (RIA) and risk-assessment processes, and to focus on intensive consultation and information-sharing.

At the root of the criticisms is the fact that all administrative regulation involves a delegation of authority, creating attendant principal–agent problems. In IRC, the delegation is beyond the state. Such delegations can significantly enhance the regulatory capacity of participating states, but simultaneously create deeper principal–agent problems that exist in the purely domestic context.<sup>47</sup> One response is to build decision-making mechanisms within the IRC body, to promote accountability and responsiveness to relevant affected interests and concerns. These mechanisms can include not only the Global Administrative Law mechanisms, but others such as RIA, which in its procedural aspect can provide participation opportunities while in its substantive aspect can discipline decisionmaking by promoting a more transparent analysis and a consideration of regulatory alternatives and their consequences for those affected. The U.S. experience indicates that this discipline can reduce rent-seeking and promote better quality regulations in the general interest.<sup>48</sup> Applied at the transnational level, the analytic discipline and information-forcing attributes of RIA may also promote international regulatory integration.<sup>49</sup> The hub-and-spoke structure of TTIP and TPP is well-

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46. See Dan Ciuriak & Harsha Vardhana Singh, *Mega-Regionals and the Regulation of Trade: Implications for Industrial Policy*, 6–9 (2015), <http://ssrn.com/abstract=2460501>.

47. See *Nat. Res. Def. Council v. Env'tl. Prot. Agency*, 464 F.3d 1 (D.C. Cir. 2006) (refusing to give legal effect to Montréal Protocol decision to limit U.S. methyl bromide as a fungicide on basis of purported concerns over delegating lawmaking authority to an international body).

48. John F. Morrall III & James W. Broughel, *Regulatory Impact Analysis in Federal Rule Making*, Mercatus Center at George Mason University, <http://ssrn.com/abstract=2501096>, at 6–8, 28.

49. Rodrigo Polanco, *CETA and TTIP 26*, paper presented at ICON-S Global Public Law

suiting for development of cross-cutting governance processes to address the critics' concerns. Because they are led by powerful Western jurisdictions committed to liberal values, these mega-regionals are well-positioned to serve as a laboratory and influence decisional practices in other global regulatory bodies, even as they face resistance from China and other emerging economies.

Yet some critics worry that procedures for transparency, participation, and regulatory impact assessment disproportionately advantage business groups or countries with greater resources to use them. European parliamentarians and NGOs have branded TTIP transparency provisions as "licenses for businesses to lobby."<sup>50</sup> Nicola echoes this concern but also, together with Meuwese and Bignami, offers suggestions for innovative means to build transnational IRC regimes that are at once effective, accountable, and broadly responsive to interests and concerns that might otherwise be disregarded or marginalized.<sup>51</sup>

A different angle of response to the principal-agent problems associated with IRC is to extend domestic political and legal controls to the international level. Legislatures can impose *ex ante* conditions on the delegation, including reporting and other procedural requirements, as Congress does through TPA provisions. Legislatures can monitor the performance of IRC regimes and threaten action. The U.S. executive and Congress have taken steps to promote transparency and stakeholder participation in IRC negotiations. There are also techniques that courts can use to secure more effective judicial review of standards and other measures generated by IRC regimes and thereafter implemented by domestic agencies.<sup>52</sup>

A further technique for addressing concerns about regulatory sovereignty and circumvention of domestic governance disciplines is to target IRC not on common substantive regulatory standards but on less-intrusive measures, including mutual recognition and cooperation on RIA and risk-assessment processes, as well as intensive consultation, information sharing, and review and analysis; this approach is reflected in the emphasis in TTIP and TPP on "regulatory coherence" as opposed to regulatory harmonization.

A thorough assessment of the governance consequences of IRC, including mega-regionals, must also take into account the democracy-enhancing potential of transnationally agreed norms for domestic administrative decisionmaking.<sup>53</sup> Thus, WTO provisions requiring transparency, participation, reason-giving, and review for domestic administrations have served to enhance the quality and promote accountability of their regulatory decisionmaking.<sup>54</sup> TPP is expected to

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Conference at New York University School of Law (July 2, 2015) (on file with author).

50. Corporate Europe Observatory, *TTIP: Covert Attacks on Democracy and Regulation*, 4 (Sept. 2014), [http://corporateeurope.org/sites/default/files/ttip\\_covert\\_attacks.pdf](http://corporateeurope.org/sites/default/files/ttip_covert_attacks.pdf).

51. See Nicola, *supra* note 10, at 196–203; see also Meuwese, *supra* note 11, at 171–74; Bignami & Resta, *supra* note 19, at 265–66.

52. For further discussion of these mechanisms see Stewart, *supra* note 45.

53. See Robert O. Keohane et al., *Democracy-Enhancing Multilateralism*, 63 INT. ORG 1, 11 (2009).

54. See Richard B. Stewart, Michelle Ratton & Sanchez Badin, *The World Trade Organization:*



extend and strengthen the use of such procedures by parties. In the case of TTIP, Anne Meuwese points out that RIA procedures will provide opportunities for public participation in European administrative processes for adoption of regulations that currently are available only on a limited basis.<sup>55</sup> Gray's proposal for more extensive use of regulatory negotiation<sup>56</sup> could also broaden opportunities for effective participation in IRC decisionmaking to a wide range of actors including third-party countries.

Another set of governance issues related to the vertical elements of IRC is the challenge of achieving horizontal equivalence in the IRC processes across very different institutional structures and procedures for regulatory decisionmaking in the participating jurisdictions. As discussed by Meuwese, significant transatlantic differences in constitutional and political structures pose obstacles to deeper EU–U.S. regulatory cooperation under TTIP.<sup>57</sup> One important issue is whether IRC undertakings will extend to U.S. states and EU member states. In the United States, relevant regulatory programs are relatively highly centralized in the federal government and administrative agencies play a major role in regulatory decisionmaking under procedures that include notice and comment on proposed rules and established mechanisms for regulatory-impact analysis and OMB review. In Europe, relevant regulatory authority is to a greater extent shared between the EU and the member states. On the other hand, the U.S. federal government has far less authority over public procurement by state and local governments than does the EU. Differences in European and U.S. federal lawmaking procedures must also be confronted when EU regulatory legislation is adopted by the Council and Parliament on the proposal of the Commission, which prefers informal modes of consultation in preparing its proposals. Regulatory impact analyses ensuring public participation occur only at a later stage and generally do not apply to the subsequent issuance of regulations. In the United States, notice-and-comment procedures and regulatory impact analyses do not apply at all to congressional legislation, but they do generally apply to administrative regulations. The U.S. Office of Information and Regulatory Affairs is a long-established body with substantial authority to review agency rulemaking. Tasked by President Obama with promoting IRC, it will serve as the U.S. lead in the TTIP and TPP RCB processes and it will link with participation by the U.S. sectoral agencies in the regulatory cooperation process. The EU is still in the process of developing an institution with equivalent authority and capacity. TPP can be an impetus for developing such bodies, including in Japan.

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*Multiple Dimensions of Global Administrative Law*, 9 J. INT'L CONST. L. 556 (2011).

55. Meuwese, *supra* note 11, at 162.

56. Boyden, *supra* note 8, at 41–47.

57. *See id.*; *see also* Richard Parker & Alberto Alemanno, *Towards Effective Regulatory Cooperation under TTIP: A Comparative Overview of the EU and US Legislative and Regulatory Systems*, EUROPEAN COMMISSION (2014), [http://trade.ec.europa.eu/doclib/docs/2014/may/tradoc\\_152466.pdf](http://trade.ec.europa.eu/doclib/docs/2014/may/tradoc_152466.pdf).

### C. The External Dimension: Impacts on and Relations with Non-Parties and Their Citizens

When a limited number of jurisdictions participate in an IRC regime, the regulatory products generated are likely to affect, in both favorable and unfavorable ways, countries outside the regime and their citizens. The most obvious concern is with IRC measures that create regulatory or other barriers to trade with the parties to the IRC scheme. To date, such externalities have not been a major issue. In most cases, sector-based international organizations that set regulatory standards are wide open. The WTO has gradually enlarged its membership to include nearly all nations. Most bilateral IRC activities and those of the first generation of mega-regionals have not had major adverse trade impacts on other countries that excited great concern. In some intergovernmental regulatory networks established by developed countries, adverse impacts on nonmember developing countries have been an issue, generally addressed by affording them some form of associate membership and offering capacity-building assistance.

TTIP and TPP's ambitious agendas for market liberalization, regulatory convergence, and investment and intellectual property protections have generated attention to the regimes' consequences for non-party countries and their citizens,<sup>58</sup> as well as to their impact on international trade in an economic, regulatory multilateral system.<sup>59</sup> If TTIP enables the United States and the EU together to effectively determine regulatory standards for much of the globe, it would represent a dramatic renaissance of transatlantic trade regulatory hegemony. To the extent that TTIP promotes trade and investment generally, all countries will benefit, albeit to differing extents. At the same time, regulatory standards and measures adopted through TTIP could threaten some countries with competitive disadvantage or otherwise adversely affect them. TPP poses similar issues, albeit in a less powerful frame. Further, as already noted, the regulatory measures developed by powerful mega-regionals are likely to be more broadly disseminated and adopted by other countries, including developing countries with limited capacities. Accordingly, nonmember countries and their citizens may have legitimate claims to have some form of say in these mega-regionals' decisionmaking.

Addressing nonmember influence in the WTO's decisionmaking, Howse notes that the GATT Article XXIV authorizes regional free trade regimes composed of only some WTO members, and allows them, subject to certain conditions, to establish preferential trade terms for the FTA participants

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58. See Raj Bhala, *Trans-Pacific Partnership or Trampling Poor Partners? A Tentative Critical Review*, 11 MANCHESTER J. INT'L ECON. L. 2 (2014); Dan Ciuriak, *India's Response to the Challenge of the Mega-Regionals*, Conference Paper at Changing Global Economic Scenario: Implications for India's Trade Policy and Make in India Program (May 12, 2015), <http://ssrn.com/abstract=2606720>; Michelle Egan, *Is TTIP Really that Different?* (Feb. 10, 2014), <http://ssrn.com/abstract=2393755>; Peter Yu, *TPP and Trans-Pacific Perplexities*, 37 Fordham Int'l L. J. 1129 (2014); Hamilton & Blockmans, *supra* note 5.

59. Nicola, *supra* note 10; Howse, *supra* note 13.

without extending them to all WTO members.<sup>60</sup> Howse argues, however, that contrary to prevailing assumptions, this carve-out from GATT's MFN provisions for mutually preferential tariffs and other border measures for FTA members does not automatically extend to regulatory measures adopted under the umbrella of a mega-regional.<sup>61</sup> Building on the WTO Appellate Body's interpretation of GATT Article XX in the *U.S.—Shrimp* case<sup>62</sup> and provisions in the Technical Barriers to Trade, Sanitary and Phytosanitary Measures, and Trade in Services Agreements relating to development of international standards for domestic regulation, Howse argues that parties to FTA regimes that adopt regulatory standards owe other WTO members duties of regulatory due process.<sup>63</sup> Specifically, he contends that they must either open membership to other WTO members or afford them opportunities for participation in regulatory decisionmaking that will ensure fair consideration of their interests, and, further, they may not impose regulatory requirements on their products and services that place them at unjustified competitive disadvantage.<sup>64</sup> Other commenters have described an "open architecture" for TTIP that would permit other countries to join at least certain parts of its regulatory cooperation and other programs;<sup>65</sup> TPP is explicitly open to other countries in the Asia-Pacific Economic Cooperation. Another option is to negotiate parallel agreements with additional countries, following the precedent of the U.S. FTA with Chile after the enactment of NAFTA. If some participation rights are afforded to other countries, including potentially through regulatory impact assessment or regulatory negotiation, would they also be available to NGOs, business firms, and other non-state actors, or would there be two different participation tracks? Such opportunities for participation also pose the question of whether the interests and concerns would be addressed through impact assessments or IRC regulatory agendas, perhaps in connection with harmonizing preferential trade preferences for poorer developing countries.<sup>66</sup> In these ways, mega-regional IRC decisionmaking could assume a more inclusive perspective.

## V

### OVERCOMING OBSTACLES TO IRC

In the context of mega-regional trade agreements, a number of obstacles to achieving enhanced regulatory convergence exist at both the international and

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60. Howse, *supra* note 13, at 137–38.

61. *Id.* at 148.

62. Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/AB/R (adopted Oct. 12, 1998), [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds58\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds58_e.htm).

63. *Id.* at 150–51.

64. *Id.*

65. *TTIP's Geostrategic Implications: Hearing Before the Subcomm. On Terrorism, Non-Proliferation and Trade*, 114 Cong. 8 (2015) (statement of Daniel S. Hamilton, Executive Director of the Center for Transatlantic Relations).

66. See Hamilton & Blockmans, *supra* note 5, at 8–9.

domestic levels. First, there must be an alignment of incentives, such that not only the nations seeking greater regulatory alignment but also the domestic policymakers within the cooperating nations have an incentive to act. Second, the optimal type of regulatory cooperation depends upon the underlying rationale for an existing disparity. For instance, if regulations among the parties to a mega-regional agreement differ simply because the regulators have historically failed to coordinate with international counterparts when setting policy or because certain parties are relying on outdated technical information, it may prove relatively simple for all parties to the agreement to converge upon a common regulatory approach. If, on the other hand, the regulations differ because the populations of the participating nations vary in their risk preferences or because powerful political actors in different participant nations favor disparate levels of regulatory stringency, convergence may prove far more challenging or impossible. Third, the optimal approach to cooperation depends upon the stage at which coordination takes place. It is generally far simpler to achieve regulatory convergence when regulators engage with their overseas counterparts prior to enacting new laws, but this may prove impossible for areas in which most or all parties to an agreement already have a robust regulatory framework in place.

The remainder of this part considers innovations designed to overcome each of these challenges. It explores the incentives for achieving regulatory convergence at both the international and domestic levels, and it examines how regulatory cooperation might look at each stage of the policy-making process—including regulatory agenda-setting, rule formulation, and retrospective review. It concludes with a few reflections on how these innovations might be deployed in the context of TTIP and other mega-regional agreements.

#### A. Incentivizing IRC at the International Level

At the macro level, any voluntary coordinated policymaking process must involve a non-zero sum interaction that provides at least some benefit to all participants, lest individual players have a stronger incentive to defect than to reach an agreement. As Robert Ahdieh has shown, this dynamic may apply in a larger universe of interactions than previously thought: even in situations characterized by a clear conflict between the participating parties, the optimal strategy for all players may still involve reaching some form of agreement rather than perpetuation of the status quo.<sup>67</sup>

Jeffrey Dunoff provides a useful framework for mapping such interactions among international organizations. He shows that such organizations interact not only in creating norms that govern the actions of international actors but also in implementing the norms generated and in exchanging relevant information.<sup>68</sup> Like Ahdieh, Dunoff recognizes that the type of regulatory

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67. Ahdieh, *supra* note 17, at 88.

68. Dunoff, *supra* note 16, at 273–93.

problem encountered will influence the ease with which the participating organizations can reach some form of agreement. For instance, coordination problems (wherein mutual gains can be achieved by coalescing around a common set of norms) generally prove much simpler to resolve than collective action problems (wherein free riders can gain a competitive advantage by failure to act) or distributional problems (wherein one participant or group of participants stands to gain much more than others).<sup>69</sup> Dunoff also shows that certain interactions among international regulatory bodies can prove mutually beneficial, as when eliminating jurisdictional overlap among a series of regulatory entities, whereas others can involve the aggrandizement of one entity or an explicit conflict among two or more entities.<sup>70</sup>

In short, the economic calculus undergirding IRC is exceedingly complex, and one must remain sensitive to the incentives of the international organizations and nation-states involved when attempting to achieve increased regulatory convergence.<sup>71</sup>

## B. Incentivizing IRC at the Domestic Level

Even for instances in which macro-level incentives favoring regulatory cooperation exist, the decision of whether or not to act ultimately lies with regulators in individual nation-states, and they may still elect not to proceed if they lack any personal incentive to do so.

A good illustration of this phenomenon is the recent history of President Obama's Executive Order (EO) 13,609, which directs U.S. executive-branch agencies to avoid unnecessary divergences between domestic regulations and those of key trading partners.<sup>72</sup> The fact that the Obama Administration issued such an order strongly suggests that it believes that the benefits to the U.S. economy of IRC outweigh the costs, yet the last three years have not witnessed vastly expanded engagement between U.S. officials and their overseas counterparts or rapidly accelerating convergence between U.S. and foreign regulations.<sup>73</sup> Though this lackluster result may stem from any number of causes, one compelling explanation is the lack of any clear incentives for U.S. regulators to seek out opportunities for regulatory cooperation. As the Administrative Conference of the United States found prior to the issuance of EO 13,609, regulatory agencies receive no "credit" for economic savings achieved through eliminating unnecessary regulatory divergences, yet they would face significant fallout if any public harm were to ensue as a result of

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69. *Id.* at 276–78.

70. *Id.* at 297–80.

71. *Id.* at 294–95. In this connection, Dunoff provides a useful framework for cataloging interactions among international regulatory bodies, characterizing the type of exchange involved and enumerating historical instances thereof. *Id.* at 273–93.

72. Exec. Order 13,609, 77 Fed. Reg. 26,413 § 3 (May 1, 2012).

73. Cheryl Bolen, *If U.S.–Canada Cooperation Is a Good Idea, Why Aren't More Federal Agencies Doing It?*, BLOOMBERG BNA DAILY REP. FOR EXECUTIVES (Oct. 17, 2014), <http://www.bna.com/uscanada-cooperation-good-n17179897089/>.

their efforts to align U.S. regulations with foreign counterparts.<sup>74</sup> Though EO 13,609 now explicitly endorses IRC efforts, it includes no enforcement mechanism and does little to eliminate the aforementioned disincentives.<sup>75</sup>

As this experience teaches, domestic regulators will not pursue IRC unless they perceive some benefit in doing so. The motivating incentive can take the form of either a “carrot” or a “stick.” Specifically, domestic law can mandate that agencies pursue regulatory convergence, or high-ranking political officials can direct their subordinates to do so. Alternatively, if regulators view IRC as a mechanism for advancing their regulatory mission, they will pursue it voluntarily, absent any higher-level legal or political compulsion.

Several articles in this issue seek to erect a framework for incentivizing domestic regulators to engage with their international counterparts and pursue regulatory convergence when appropriate. These articles recognize that the type of cooperation involved will differ depending on the nature of the regulatory problem. For instance, it will likely prove much easier to achieve regulatory convergence if the nations involved exhibit a similar level of precaution with respect to the particular activity to be regulated.<sup>76</sup> Equally importantly, these articles note that the optimal type of cooperation varies depending on the stage during which regulatory coordination takes place. Specifically, they recognize at least three distinct stages in the policymaking process in which regulator-to-regulator cooperation may prove beneficial: (a) in the pre-regulatory agenda-setting stage, (b) while drafting a regulation, and (c) when reassessing an existing regulation to determine if it might be modified or eliminated.

### 1. Coordinated Agenda-Setting and Stakeholder Input

Ideally, domestic regulators will engage with their overseas counterparts prior to formulating a new policy: it is far simpler to ensure that unnecessary

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74. Michael T. McCarthy, *International Regulatory Cooperation, 20 Years Later: Updating ACUS Recommendation 91-1*, REPORT FOR THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 1, 40 (Oct. 19, 2011), <https://www.acus.gov/sites/default/files/documents/International-Reg-Cooperation-Report.pdf>.

75. See Reeve T. Bull, *Public Participation and the Transatlantic Trade and Investment Partnership*, 83 GEO. WASH. L. REV. 1262, 1265 (2015).

76. Reeve T. Bull, *Answering TTIP's Critics: Regulatory Cooperation in Risk Assessment and Risk Management*, Essay based upon Remarks made at the George Washington University Regulatory Studies Center's Conference, *Enhancing the Transatlantic Trade and Investment Partnership: Reducing Regulatory Barriers* (Dec. 2, 2014), <http://regulatorystudies.columbian.gwu.edu/answering-ttip-critics-regulatory-cooperation-risk-assessment-and-risk-management>; see also Reeve T. Bull, *Far From Eroding Regulatory Protections, TTIP's Cooperative Regime Could Bolster Sound Regulation*, BLOOMBERG BNA DAILY REP. FOR EXECUTIVES No. 141, at B1 (July 23, 2014). For example, in the TTIP negotiations, regulation of automobile safety is an especially attractive area for promoting enhanced convergence insofar as the United States and EU already achieve very similar regulatory outcomes. *Id.* at B3. Regulation of genetically modified organisms, by contrast, is a significantly less-attractive area, as EU regulations are currently much stronger than their U.S. counterparts. Jonathan B. Wiener, *Better Regulation in Europe*, 59 CURRENT LEGAL PROBS. 447, 453, 458, 517 (2006) (noting the ongoing perceptual problems over easing regulations of genetically modified organisms in light of prior health crises in Europe).

divergences do not arise in the initial instance than to attempt to eliminate them after-the-fact, after expectation interests in the perpetuation of the status quo have emerged. To this point, regulators have had few incentives to work with foreign counterparts, and many regulatory regimes that might otherwise have proven attractive candidates for harmonization differ for this reason alone.<sup>77</sup> Gray explores one possible means for providing such incentives, noting that past IRC efforts have generally been characterized by a lack of high-ranking political leadership and that domestic regulators have been unwilling to act absent some pressure from above.<sup>78</sup> In this light, Gray urges the United States and the EU to task officials in the upper echelons of government with spearheading these efforts, recommending that the Vice President lead the charge in the United States and that the President of the European Commission do the same in the EU.<sup>79</sup>

As suggested earlier, regulators also might independently seek out opportunities for IRC if they believe that doing so will advance their agencies' regulatory missions. This outcome is most likely to be achieved if regulators consider trade impacts as early in the policy formulation process as possible. One means by which regulators might achieve this goal is by preparing an RIA that considers the international trade impacts of a proposed policy prior to formulating a rule.<sup>80</sup>

Another possible approach to achieving enhanced coordination in agenda-setting is the creation of a regulatory coordination body that convenes periodic meetings between regulators in all participating nations. For instance, in 2011, the United States and Canada created the Regulatory Cooperation Council, an organization that promotes ongoing interaction between U.S. and Canadian regulators.<sup>81</sup> In the TTIP negotiations, the European Commission has proposed the creation of a similar body to drive transatlantic regulatory cooperation.<sup>82</sup> The challenges associated with this approach increase exponentially as the number of participating parties expands, and it has generally proven most successful in the bilateral context. Nevertheless, the potential payoffs also increase along with the number of participating parties, making this an

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77. Bull, *supra* note 9, at 74.

78. Gray, *supra* note 8, at 35–38.

79. *Id.* at 38–39.

80. EUROPEAN UNION, TEXTUAL PROPOSAL ON REGULATORY COOPERATION IN TTIP, § II.2, Art. 7.2(c) (May 4, 2015), [http://trade.ec.europa.eu/doclib/docs/2015/april/tradoc\\_153403.pdf](http://trade.ec.europa.eu/doclib/docs/2015/april/tradoc_153403.pdf). At present, this RIA would likely consider trade impacts only on parties to a particular agreement (for example, the United States and the EU in the case of TTIP), though domestic regulators might increasingly come to consider impacts on non-parties as this type of analysis evolves. In addition, the RIA requirement should ideally apply not only to secondary legislation (for example, rules issued by U.S. administrative agencies or implementing and delegated acts of the EU Commission), but also to primary legislation (for example, statutes issued by the U.S. Congress and EU regulations and directives), though it may initially prove more feasible to apply it only to the former. *See id.* at § 1.2(a).

81. Gray, *supra* note 8, at 40–41.

82. Karl de Gucht, *Transatlantic Trade and Investment Partnership (TTIP)—Solving the Regulatory Puzzle*, Address at the Aspen Institute Prague Annual Conference (Oct. 10, 2013), [http://europa.eu/rapid/press-release\\_SPEECH-13-801\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-13-801_en.htm).

especially attractive approach to consider in the context of TTIP and other mega-regional trade agreements.

A final potential approach to achieving coordinated agenda-setting is promoting input from international stakeholders during the initial stages of the policymaking process. In this connection, Gray highlights the experience of U.S. agencies in the use of negotiated rulemaking, a process by which an agency convenes an advisory committee with representatives from all major stakeholder interests and tasks this group with formulating a draft rule.<sup>83</sup> A similar strategy might be deployed in the international context, identifying the key stakeholder groups in all trading partners and convening a committee to draft a rule that each participating nation will then introduce via its traditional rulemaking process. Of course, negotiated rulemaking has enjoyed a mixed record of success in the United States,<sup>84</sup> and the process becomes increasingly unwieldy as more and more stakeholders representing discrete interest groups join.<sup>85</sup> In this light, formal negotiated rulemaking may prove optimal only in circumstances characterized by a relatively small number of stakeholder interests, though promoting collaboration between rule writers and key stakeholders worldwide in the early stages of the policy-making process may prove attractive in a much wider array of contexts.

## 2. Coordinated Rulemaking

Promoting international coordination between policymakers at the agenda-setting stage is relatively unobjectionable as a matter of good regulatory practice: regulators should at least be aware of what their overseas counterparts are doing when deciding how to proceed. By contrast, promoting convergence in the final rules adopted is far more contentious given the prerogative of sovereign states to select the level of regulatory protection they deem optimal. Indeed, those that have criticized TTIP and other IRC efforts have generally done so on precisely this basis, arguing that regulatory convergence will erode national sovereignty<sup>86</sup> and will precipitate a regulatory “race to the bottom,” wherein regulators face strong incentives to adopt the weakest prevailing levels of protection to avoid placing their nations at a competitive disadvantage.<sup>87</sup>

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83. See Gray, *supra* note 8, at 42; see also 5 U.S.C. §§ 563, 565 (2015).

84. See Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L. J. 1255, 1309–10 (1997); see also Jeffrey S. Lubbers, *Achieving Policymaking Consensus: The (Unfortunate) Waning of Negotiated Rulemaking*, 49 S. TEX. L. REV. 987, 1004–05 (2008).

85. See 5 U.S.C. § 565(b) (2015) (establishing default limit of twenty-five members on “negotiated rulemaking committee[s]”); see also Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1, 52–53 (1982).

86. See EUROPEAN PARLIAMENT: DIRECTORATE-GENERAL FOR EXTERNAL POLICIES OF THE UNION, THE TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP AND THE PARLIAMENTARY DIMENSION OF REGULATORY COOPERATION, 8, 30 (2014), [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/433847/EXPO-AFET\\_ET\(2014\)433847\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/433847/EXPO-AFET_ET(2014)433847_EN.pdf); see also Ferdi de Ville, *Liberty and the EU-US Trade Talks*, EU OBSERVER (June 14, 2013), <https://euobserver.com/economic/120494>.

87. See *TTIP Puts the EU's Environmental and Social Policies on the Line*, EURACTIV (Jan. 15,



Ultimately, concerns about a regulatory “race to the bottom” are likely somewhat overwrought, given that the advocates of enhanced convergence have been unequivocal in disclaiming any such intentions, that countries also have incentives to maintain and export their own standards, and that domestic regulators are intimately involved in the process of IRC and face few incentives to water down their existing regulations.<sup>88</sup> Furthermore, those who raise such concerns generally erroneously assume that regulatory cooperation consists solely of harmonizing regulations to achieve a uniform level of protection. Thus, it is important to distinguish between coordination on technical fact-finding issues and coordination on substantive policy-making issues.<sup>89</sup>

Even if trading partners ultimately decide to adopt disparate rules that provide for differing levels of regulatory protection, they can still enhance regulatory decisionmaking and husband scarce regulatory resources by coordinating on the factual investigations that precede the adoption of a rule. Regulators often commission various tests, inspections, clinical trials, and other technical fact-finding endeavors prior to adopting a rule. Sharing these studies among all trading partners will ensure that each party is acting on the most up-to-date information available.<sup>90</sup> It will also avoid needless duplication of effort, thereby providing a strong incentive for regulators to preserve scarce resources by coordinating more closely with trusted overseas counterparts.<sup>91</sup>

By contrast, achieving enhanced convergence in the prevailing levels of protection is not as unassailably desirable. Indeed, as Wiener and Alemanno show, there are significant benefits associated with regulatory heterogeneity.<sup>92</sup> First, much as Justice Brandeis recognized with respect to regulatory “experiments” by U.S. states,<sup>93</sup> regulatory divergence can promote learning over time as regulators compile an empirical basis for assessing which approaches produce optimal outcomes.<sup>94</sup> Second, different populations often exhibit disparate risk preferences and prefer different trade-offs among competing

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2014), <http://www.euractiv.com/trade/ttip-puts-eus-environmental-soci-analysis-532724> (articulating the concerns of ten non-governmental organizations over the perceived impact TTIP would have on regulations in Europe); see also Sean Donnan & Joshua Chaffin, *Green and Consumer Groups Voice Fears over EU-US Trade Agreement*, FIN. TIMES, (Oct. 13, 2013), <http://www.ft.com/cms/s/0/1b2942a0-328f-11e3-b3a7-00144feab7de.html#axzz3gT1AGnaW>; Letter from Ctr. for Progressive Reform to Paul Verkuil, Chairman, Admin. Conf. of the United States (Mar. 21, 2013), [http://www.progressivereform.org/articles/ACUS\\_Harmonization\\_Letter\\_032113.pdf](http://www.progressivereform.org/articles/ACUS_Harmonization_Letter_032113.pdf).

88. Bull, *supra* note 76, at B1.

89. Bull, *supra* note 77, at 105; Wiener & Alemanno, *supra* note 12.

90. See Bull, *supra* note 77, at 105; McCarthy, *supra* note 74, at 19–20; Wiener & Alemanno, *supra* note 12, at 104, 121; see also Reeve T. Bull & Adam C. Schlosser, *Regulatory Science and the TTIP*, PENN PROGRAM ON REGULATION: REG BLOG (July 14, 2014), <http://www.regblog.org/2014/07/14/14-bull-schlosser-regulatory-science-and-the-ttip/>.

91. McCarthy, *supra* note 74, at 10.

92. See Wiener & Alemanno, *supra* note 12, at 124–32.

93. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

94. Wiener & Alemanno, *supra* note 12, at 126–131. Moreover, if IRC does seek regulatory convergence, this empirical learning process from past policy variation can also help inform where and how to converge—the choice among several different options for convergence. *Id.*

risks, and it is therefore often more efficient to brook some degree of regulatory divergence.<sup>95</sup> As a separate matter, even if achieving increased substantive regulatory convergence is normatively desirable in theory (for example, if both U.S. and EU citizens exhibit a similar level of risk tolerance in a certain area), it may prove practically impossible due to political constraints in participating nations (for example, powerful industry groups in one party to an agreement may oppose increasing environmental protections to levels prevailing in other parties, even if the general public would prefer that level of protection).

Nevertheless, it is important to ensure that, to the greatest extent possible, the prevailing levels of protection represent the true preferences of the relevant population rather than the whims of an unelected bureaucrat or rent-seeking efforts by special interests to insulate themselves from competition. Though this can never be perfectly achieved in any system that relies upon agency officials informed by stakeholder input to select the preferred level of regulatory protection, Bull proposes that agencies convene citizen advisory committees to assess discrete problems of risk-management and to weigh in on the desired level of protection.<sup>96</sup> The agency would not be bound to follow the committee's recommendation, and citizen groups in different nations may ultimately express a preference for differing levels of protection (such that increased regulatory convergence may not ensue), but this approach would at least increase the likelihood that those regulatory divergences that survive truly reflect disparate risk preferences.

### 3. Coordinated Retrospective Review

Improved international coordination in the agenda-setting and rule-writing stages will promote enhanced regulatory convergence moving forward, but there remains a considerable body of existing regulation that may continue to pose trade barriers. TTIP seeks to resolve this dilemma by including a series of mutual recognition agreements, wherein the United States and the EU will acknowledge that certain existing regulations achieve equivalent results and therefore provide that compliance with U.S. rules is adequate to satisfy EU requirements and vice versa.<sup>97</sup> In theory, this should result in an optimal level of regulatory coherence in existing rules, and ongoing coordination efforts should ensure that additional sources of unnecessary divergence do not arise in future rules. In reality, the challenges connected with negotiating a FTA, including the potential political fallout associated with modifying regulatory approaches that disproportionately benefit domestic producers, will likely ensure that the agreement reached is suboptimal.<sup>98</sup>

As the political climate evolves, however, new opportunities for regulatory

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95. *Id.* at 125–26.

96. Bull, *supra* note 77, at 119, 123.

97. EUROPEAN UNION, TEXTUAL PROPOSAL ON REGULATORY COOPERATION IN TTIP, *supra* note 80, at Art. 10.2.

98. Armanovica & Bendini, *supra* note 21, at 11–12.

convergence may arise. In this light, it is important that any agreement include ongoing channels for coordination not only in the formulation of new policy but also in the reassessment of existing rules. At present, domestic regulators have few incentives for reevaluating their own regulations,<sup>99</sup> much less comparing those regulations to foreign approaches to determine if changes are warranted. If TTIP or any other agreement is to achieve enhanced regulatory cooperation in the sphere of retrospective review, it must include formal structures designed to ensure that domestic regulators periodically reassess their existing stock of rules in light of prevailing practices overseas.

Wiener and Alemanno suggest one possible approach to achieving this goal, exploring the creation of an international body that would coordinate ongoing retrospective reviews; evaluate the effectiveness of existing approaches, thereby exploiting the learning that can arise from regulatory heterogeneity; and promote enhanced regulatory convergence when appropriate.<sup>100</sup> Bull offers another potential approach, recommending the creation of a “prompt procedure” whereby private entities could petition agencies to reassess existing rules in light of prevailing international practices and, when appropriate, modify those rules to account more fully for the existing state of scientific evidence or for true public risk-preferences.<sup>101</sup>

### C. Deploying IRC Innovations in the Context of Mega-regional Agreements

If they are to prove successful, mega-regional agreements must remain sensitive to the aforementioned obstacles to regulatory cooperation, focusing on ensuring that proper incentives for regulator-to-regulator coordination exist, carefully analyzing each component of the regulatory ecosystem to determine the optimal type of coordination (remaining sensitive to disparate public risk preferences), and promoting coordination at all stages of the regulatory process. The primary mechanism for achieving these goals contemplated in the TTIP is a permanent RCB, which will provide an ongoing forum for both high-level regulatory officials and lower-level bureaucrats to coordinate at all stages of the regulatory process.

In theory, the RCB should provide strong incentives for regulatory cooperation in devising regulatory agendas, undertaking the technical aspects of policy formulation (for example, conducting joint RIAs), promoting substantive regulatory convergence, and reassessing existing laws with an eye toward weeding out unnecessary regulatory divergences and selecting improved policy designs. In practice, regulators in both the United States and the EU may lack adequate incentives to design or modify their regulations to promote greater convergence, especially if their authorizing laws do not explicitly direct them to do so. Thus, as Gray has suggested, creating an RCB may be inadequate unless

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99. Reeve T. Bull, *Building a Framework for Governance: Retrospective Review and Rulemaking Petitions*, 67 ADMIN. L. REV. 265, 280–81 (2015).

100. Wiener & Alemanno, *supra* note 12, at 130.

101. Bull, *supra* note 77, at 120–21.

high-ranking executive-branch officials in both the EU and United States make regulatory cooperation a high priority and place appropriate pressure on domestic regulators. Such a top-down approach might also be supplemented by a bottom-up approach involving ground-level regulators in the ongoing discussions. Ideally, regulatory cooperation will become a part of agency culture over time, as regulators increasingly come to see the process as an opportunity to draw upon the expertise of overseas partners rather than an additional procedural hurdle or an effort to dilute their domestic regulatory mission.

The RCB must also remain mindful of the precise nature of regulatory problems confronted. As the TTIP negotiations to date have shown, certain sectors wherein the two sides exhibit disparate levels of regulatory protection (for example, regulation of genetically modified foods) are unlikely candidates for increased regulatory harmonization in the short term, as any effort to relax one side's regulations will be assailed as a "race to the bottom" (or any effort to ratchet up the other side's regulations assailed as overregulation). Achieving substantive regulatory convergence is far more viable in areas characterized by similar levels of regulatory stringency (for example, automobile safety), but the RCB can still promote enhanced regulatory coherence by ensuring that both sides share technical information (for example, results of clinical tests), remain aware of the activities of their overseas counterparts, and strive to minimize unnecessary trade irritants. Consequently, lower-level agency officials on both sides should be closely involved in the RCB process, as they will most likely understand the complex factual records undergirding agency rules and will therefore be optimally positioned to identify such smaller-scale opportunities for enhanced regulatory coherence.

Finally, the RCB should strive to promote regulatory coordination as early in the policymaking process as possible while recognizing the challenges inherent in achieving increased convergence in areas already subject to extensive regulation. Going forward, in areas wherein the EU and the United States have not yet developed a robust regulatory framework (for example, the regulation of unmanned aircraft), the RCB should ensure that regulators on both sides are acting on a common factual record, are aware of the course of action contemplated by their overseas counterparts, and are striving to achieve an approach that minimizes trade barriers—even if they ultimately decide to adopt differing regulations. In areas already characterized by heavy regulation, political realities may often foreclose substantive convergence insofar as regulated entities have a vested interest in the perpetuation of the status quo. Nevertheless, as EU and U.S. regulators come to place a greater emphasis on retrospective review, the RCB will ensure that the two sides at least exchange relevant information concerning existing regulations; remain apprised of regulatory reforms on both sides; and, ideally, identify windows of opportunity wherein the political dynamics on both sides actually favor modification of existing laws to achieve greater convergence and more optimal policy approaches.

Outside of the TTIP context, these challenges are likely to prove even more pressing in mega-regional agreements that include regulatory partners at very different levels of economic development (such as TPP). In these agreements, achieving enhanced regulatory convergence may prove normatively undesirable (and, in any event, politically impossible), as developed nations have no interest in sacrificing hard-won regulatory protections and developing nations are unwilling to sacrifice economic growth by ratcheting up protections to developed world levels. In these agreements, partner nations may have to content themselves with promoting greater information-sharing among regulators and encouraging universal adoption of good regulatory practices such as evidence-based decisionmaking, RIA, and stakeholder input. Over time, substantive regulatory convergence of the type contemplated in TTIP may become feasible, and implementing such modest reforms will provide a base on which to build.

## VI

### CONCLUSION

In summation, the last several years have witnessed a flourishing of innovations in the IRC context that has allowed regulatory bodies to iron out unnecessary trade barriers while still maintaining the prerogative of sovereign states to adopt regulatory policies they deem appropriate. In deploying these innovations to achieve ever greater regulatory coherence, it is critical for those shaping future regulatory coordination to pay attention to the incentives of the key actors. International organizations, sovereign states, and individual regulatory actors will not act unless they deem the benefits of doing so to outweigh the costs. It is also imperative that those promoting regulatory convergence are mindful of the different stages at which coordination may prove valuable, the benefits associated with retaining some level of regulatory heterogeneity, and the value of information-sharing even in the absence of substantive regulatory harmonization. The articles in this issue elucidate a number of promising avenues for reform while remaining sensitive to the practical limitations and normative drawbacks of efforts to enhance regulatory convergence.