

DEVELOPING A DOMESTIC FRAMEWORK FOR INTERNATIONAL REGULATORY COOPERATION

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I

INTRODUCTION

In recent years, the emergence of the World Trade Organization and the negotiation of a complex array of bilateral and multilateral free trade agreements have led to a substantial reduction in tariffs and other traditional barriers to free trade.¹ Though residual tariffs pose an ongoing impediment to international commerce, traditional trade barriers have become exceedingly weak by historical standards and have further eroded in the last several decades, particularly as developed economies have sought the increasing integration of their trade channels.² Thus, free trade advocates have largely shifted their focus to nontraditional trade barriers. Perhaps the single largest obstacle to enhanced international trade is the persistence of disparities between individual nation-states' regulations.³ Unnecessary regulatory disparities pose a far more insidious threat to international trade than do tariffs,

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1. For instance, average tariffs between the United States and the European Union (EU) currently stand at roughly three percent. *European Commission, Countries and Regions: United States*, EUROPEAN COMMISSION (Oct. 31, 2014), <http://ec.europa.eu/trade/policy/countries-and-regions/countries/united-states>. U.S. tariffs are, on average, well below ten percent, a precipitous decline from the roughly sixty-percent rates that prevailed at earlier periods in U.S. history (for example, in the aftermath of the Smoot–Hawley Tariff). Paul Krugman, *US Tariff History*, N.Y. TIMES, THE OPINION PAGES (Nov. 7, 2009, 1:33 PM), <http://krugman.blogs.nytimes.com/2009/11/07/us-tariff-history>.

2. See Michael T. McCarthy, *International Regulatory Cooperation, 20 Years Later: Updating ACUS Recommendation 9I-1, 5–7* (Oct. 19, 2011) (draft), <http://www.acus.gov/sites/default/files/documents/COR-IRC-report-10-19-11.pdf> (citing the rise of the World Trade Organization, the negotiation of the Agreement on Technical Barriers to Trade, and efforts to align international standards as major factors in the increased integration of international regulatory frameworks).

3. ORG. FOR ECON. COOPERATION & DEV. [OECD], *INTERNATIONAL REGULATORY COOPERATION: ADDRESSING GLOBAL CHALLENGES* 15 (2013).

for nation-states legitimately implement regulations designed to protect their citizens with varying levels of protection depending on the risk-tolerance levels of the nations' respective citizenries.⁴ Though many regulatory differences represent a studied effort to tailor protections to public risk tolerances, a number of regulations differ simply for historical, nonsubstantive reasons,⁵ and still other disparities emerge as a result of rent-seeking behavior by domestic industries pursuing an unfair advantage vis-à-vis foreign competitors.⁶ Unfortunately, distinguishing legitimate from illegitimate regulatory differences is a difficult and politically fraught process, for very few regulations lack any nominal welfare-enhancing justification.⁷

In the last several years, U.S. regulators have made initial forays into the enormously complex task of identifying and correcting unnecessary regulatory disparities. In December 2011, the Administrative Conference of the United States adopted Recommendation 2011-6, which urged U.S. agencies to seek opportunities for regulatory cooperation with foreign authorities when doing so would either advance the agencies' regulatory missions or remove unnecessary barriers to trade without undermining those missions.⁸ Partly in response to the Administrative Conference's recommendation, President Barack Obama issued Executive Order 13,609 in May 2012. EO 13,609 directs agencies subject to presidential regulatory review to summarize their international regulatory cooperation activities in their Regulatory Plans and to minimize unnecessary differences between U.S. regulatory requirements and those of key trading partners both in promulgating future rules and in conducting retrospective review of existing rules.⁹ EO 13,609 thus places a high priority upon a cross-border issue that many agencies had largely neglected insofar as it was viewed as outside the ambit of their overall regulatory missions.¹⁰

Nevertheless, without additional reforms designed to promote international

4. Reeve T. Bull, *Far from Eroding Regulatory Protections, TTIP's Cooperation Regime Could Bolster Sound Regulation*, BLOOMBERG BNA DAILY REPORT FOR EXECUTIVES, July 23, 2014, at 3, <https://www.acus.gov/publication/far-eroding-regulatory-protections-ttip-s-cooperative-regime-could-bolster-sound>.

5. McCarthy, *supra* note 2, at 8.

6. K. William Watson & Sallie James, *Regulatory Protectionism: A Hidden Threat to Free Trade*, 723 CATO INST. POL'Y ANALYSIS 1, 2 (2013).

7. *See id.* at 5 ("Even if a particular regulation serves a protectionist end, its most vocal and visible supporters may be activists or organizations pursuing an independent agenda that has no particular sympathy for domestic industry.").

8. Administrative Conference of the United States, Recommendation 2011-6, International Regulatory Cooperation, 77 Fed. Reg. 2257, 2259 (Jan. 17, 2012). Recommendation 2011-6 built upon a predecessor, Administrative Conference Recommendation 91-1, which similarly urged U.S. agencies to collaborate with overseas entities as appropriate. Administrative Conference of the United States, Recommendation 91-1, Federal Agency Cooperation with Foreign Government Regulators, 56 Fed. Reg. 33,842 (July 24, 1991).

9. Exec. Order No. 13,609, § 3, 77 Fed. Reg. 26,413, 26,414 (May 4, 2012).

10. *See* McCarthy, *supra* note 2, at 19–21 (noting how numerous agencies are uncertain of their legal authority to engage in international regulatory cooperation and only do so if they see it as directly advancing their regulatory mission).

regulatory cooperation on the part of U.S. agencies, EO 13,609 is unlikely to effect a significant change in the regulatory landscape. By proposing a framework for scrutinizing existing U.S. regulations and eliminating unnecessary international disparities, this article builds upon the impetus of EO 13,609 and other high-level efforts at promoting global regulatory convergence.

Specifically, this article proposes empowering members of the public—including individual citizens, businesses, and public interest organizations—to request that an agency justify existing regulatory disparities. The responding agency may then pursue one of three potential courses. First, if it finds that the regulatory disparity serves no legitimate purpose, it may choose to harmonize a regulation with that of a trading partner, recognize compliance with the overseas regulation as equivalent to compliance with the corresponding U.S. regulation, or otherwise seek greater compatibility between the differing regulations. If, on the other hand, the agency believes that the disparity is justifiable, then it may pursue one or both of two courses of action. If the agency maintains that the disparity can be justified solely on technical grounds—for example, U.S. regulators relied upon particular studies that are more accurate than those used by foreign regulators—then it may produce the relevant studies, and the requesting party can then determine whether to challenge the regulation. If the disparity is based upon a policy determination by the agency—for example, U.S. regulators determined that existing studies, though incomplete, merited regulatory action to mitigate a particular risk—then the requesting party can seek to demonstrate that the agency has over- or under-regulated in light of the true public risk tolerance. The burden would then shift to the agency to justify a regulation that does not reflect the actual public risk tolerance.

This article also addresses several potential objections to the aforementioned framework. First, it examines the risk that the proposed mechanism would create additional outlets for industry to capture regulators or complicate the regulatory process by forcing agencies to justify regulatory disparities. The article concludes that, though this risk is not negligible, it is likely relatively inconsequential insofar as public interest organizations will have an equal opportunity to advocate for stronger regulations and agencies will serve as a bulwark in favor of welfare-enhancing regulations. Second, the article considers the prospect that unilaterally adopting such a system may put U.S. firms at a competitive disadvantage if trading partners do not enact similar reforms. Though the U.S. economy would arguably benefit even from unilateral regulatory convergence efforts, which would provide benefits for consumers and many exporters while nevertheless inflicting some harm on other firms,¹¹ U.S. trade representatives should also advocate similar reforms for trading partners to achieve the greatest possible benefit for U.S. firms. Finally, the article considers the potential costs these reforms would create for U.S.

11. HENRY HAZLITT, *ECONOMICS IN ONE LESSON* 80–84 (2010).

agencies, a problem that could be greatly mitigated by requiring challenging entities to bear some or all of the associated expenses.

Importantly, the proposed framework for achieving enhanced regulatory compatibility is not intended to create a “race to the bottom” or to induce agencies to abandon their public welfare–enhancing mandates in favor of promoting maximum free trade. Indeed, public interest organizations would be equally capable of exploiting the contemplated procedures to attempt to strengthen relatively weak U.S. regulations, for example, an environmental group seeking to achieve greenhouse gas emission limits comparable to those prevailing in the European Union (EU). Furthermore, the agency’s regulatory mandate would always remain the preeminent consideration; the process would merely identify regulatory disparities that create unnecessary trade barriers without any countervailing public welfare benefits, are based on inaccurate or outdated technical findings, or reflect a level of risk tolerance that differs from the level favored by the general public. In many instances, the analysis would demonstrate that citizenries in different nation-states prefer disparate levels of regulatory protection. Notably, the proposed system would not infringe upon the unassailable prerogative of sovereign nations to define the extent of regulatory protection that satisfies their citizens. Nevertheless, one can confidently assert that historical accidents, delays in amending regulations to reflect scientific advances, and failures of regulators to accurately gauge public risk tolerance account for many of the discrepancies endemic to current national regulatory regimes. This proposed framework provides a neutral, effective mechanism both for achieving enhanced regulatory compatibility and for ensuring that regulatory entities serve the best interests of the regulated public.

II

TOWARD A DOMESTIC FRAMEWORK FOR INTERNATIONAL REGULATORY COOPERATION

When first formulated in the late nineteenth and early twentieth centuries, the doctrines of public administration envisioned a class of apolitical regulatory experts that would impartially assess the major risks confronting a given society using the scientific method and then erect regulatory protections designed to achieve the greatest public good with the smallest possible outlay of resources.¹² Though the rise of the administrative state across the globe has indubitably delivered significant benefits to citizens of the modern industrialized world, the vision of a cadre of technocrats devoting resources to the most vexing regulatory problems has proven overly simplistic. In reality, regulatory intervention has followed what can best be characterized as a “crisis and response” model: regulators will largely overlook a potential risk until it has

12. See Woodrow Wilson, *The Study of Administration*, 2 POL. SCI. Q. 197, 197 (1887) (“The object of administrative study is to rescue executive methods from the confusion and costliness of empirical experiment and set them upon foundations laid deep in stable principle.”).

manifested itself, at which point they will adopt elaborate regulations designed to foreclose any repeat occurrence (very often overregulating in the process).¹³

Because regulators in different nations will not face the same panoply of salient risks at any given point in time, regulations will diverge in the initial instance absent a robust system of international coordination that has not heretofore existed, and these disparities will crystallize over time as a result of regulatory inertia. Thus, the overall appetite for relatively strong or weak regulation within a given nation will depend upon the preexisting regulatory landscape. For instance, a series of regulatory failures in the public health context in the EU in recent decades, which may largely have resulted from relatively weak regulatory protection, helps explain the ratcheting up of European regulatory protection vis-à-vis that prevailing in the United States from the 1980s onward.¹⁴ In addition, within any given sector, the level of protection adopted may vary in response to random fluctuations in the regulatory failures that recently arose in any one nation. For instance, though the United States and Western European nations have adopted very stringent regulations to protect against the hazards posed by nuclear power, the occurrence of the Three Mile Island disaster in the United States and the absence of any equivalent meltdown in the EU may explain the comparatively greater risk tolerance of France and other EU nations that rely heavily on nuclear power generation.¹⁵

In short, the existing regime suffers both from a lack of coordination among trading partners and from the failure of regulators to analyze risk systematically and allocate regulatory resources accordingly. One possible solution to this dilemma would entail the creation of a supernational regulatory entity, which would marshal the most up-to-date research to analyze existing risks and then

13. See, e.g., Reeve T. Bull, *Building a Framework for Governance: Retrospective Review and Rulemaking Petitions*, 67 ADMIN. L. REV. 101, 107–13 (2015) (“As a general matter, societies have not objectively assessed the probability of known risks and then determined how best to allocate existing resources to protect against the most significant risks. Instead, governments tend to react to highly visible, well publicized calamities that capture the public interest, regulating so as to minimize the likelihood of a repeat occurrence.”); Karl S. Okamoto, *After the Bailout: Regulating Systemic Moral Hazard*, 57 UCLA L. REV. 183, 186 (2009) (“As the U.S. government responds to the immediate crisis, attention has turned to the question of a broader regulatory response Yet, at the same time, we run the risk of doing even more harm by overreacting.”); Robert V. Percival, *Regulatory Evolution and the Future of Environmental Policy*, 1997 U. CHI. LEGAL F. 159, 173 (1997) (“The myopic tendency of regulatory policy to overlook the effects of long-term, chronic exposures in favor of responding to the headline-grabbing crisis of the moment is well documented.”).

14. See David Vogel, *The Politics of Risk Regulation in Europe and the United States*, in 3 THE YEARBOOK OF EUROPEAN ENVIRONMENTAL LAW 2–3, 24–34 (H. Somsen et al. eds., 2003) (cataloguing various regulatory failures over the course of the 1980s and 1990s in Europe). By the same token, the existence of a legacy of relatively strong regulatory protections in the United States may have resulted in fewer major failures, potentially contributing to a general apathy concerning systemic risks and a willingness to water down existing protections.

15. See Jonathan B. Wiener, *Whose Precaution After All? A Comment on the Comparison and Evolution of Risk Regulatory Systems*, 13 DUKE J. COMP. & INT’L L. 207, 227 (2003) (indicating that European nations generally take a more “precautionary” approach than does the United States in the nuclear power arena).

either mandate or recommend that individual nations adopt appropriate regulations.¹⁶ As a normative matter, however, such a solution would be largely irreconcilable with the principles of national sovereignty that govern modern international law.¹⁷ Furthermore, a centralizing approach would likely create significant inefficiencies.¹⁸ As F.A. Hayek has demonstrated, a system that aggregates the decentralized expertise existing in a large group of individuals is far more likely to produce an efficient outcome than a highly concentrated system relying upon a small group of experts.¹⁹ Thus, a more attractive solution might entail encouraging enhanced information sharing among regulators in sovereign states and erecting procedures within those states to promote the minimization of unnecessary regulatory divergences (while still preserving the autonomy to enact disparate regulations if deemed appropriate).

EO 13,609 adopts, in theory, precisely this approach: it urges U.S. agencies to identify regulations that are likely to have significant international impacts and to consider the regulatory frameworks adopted by foreign governments in appropriate circumstances.²⁰ Though this is an important advance and represents the highest level of executive branch commitment to international regulatory cooperation to date in the United States, it is unlikely to work a significant sea change in the regulatory landscape, for three reasons.

First, the EO tasks a regulatory working group with identifying opportunities for international cooperation²¹ and requires that agencies describe anticipated international regulatory cooperation activities in their Regulatory Plans and in the Unified Agenda.²² It is not entirely clear, however, whether the Office of Information and Regulatory Affairs (OIRA) or any other body has the authority to direct agencies to pursue any specific actions. Most agencies have historically failed to place a strong emphasis on coordination with international counterparts,²³ and the EO may not significantly alter this state of affairs.

Second, the EO provides that “the Administrator of OIRA may solicit input, from time to time, from representatives of business, nongovernmental

16. See, e.g., STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* 55–81 (1993) (proposing a centralized superagency that would be tasked with coordinating risk-management decisions across all individual agencies in the United States).

17. See U.N. Charter, art. 2, para. 1 (“The organization is based on the principle of the sovereign equality of all its Members.”).

18. See 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, at 132 (warning against an excessive emphasis on harmonization, which might stifle regulatory experimentation).

19. F.A. HAYEK, *THE ROAD TO SERFDOM* 94–95 (Bruce Caldwell ed., 2007).

20. Exec. Order No. 13,609, § 3, 77 Fed. Reg. 26,413, 26,414 (May 4, 2012).

21. *Id.* § 2 at 26,413–14.

22. *Id.* §§ 3(a)–(b) at 26,414.

23. See McCarthy, *supra* note 2, at 19–21 (highlighting reasons why some U.S. agencies have placed a relatively low priority on international regulatory cooperation, including uncertainty regarding legal authorization to engage in such activities, relatively minimal political emphasis on the issue, and potential legal barriers on the sharing of information across borders).

organizations, and the public” to inform the discussions of the regulatory working group.²⁴ Yet the system it creates relies chiefly on agencies or OIRA to identify opportunities for international cooperation rather than erecting any broader mechanism to leverage the expertise of the private sector or the input of the general public.

Third and finally, the EO does not explicitly distinguish between *technical* regulatory issues (for example, what level of benzene exposure creates a statistically significant increase in cancer rates) and *policy-based* regulatory issues (for example, what level of benzene exposure should be deemed “safe”). The contours of successful regulatory cooperation heavily depend on the nature of the problem being confronted, and past efforts at cooperation have not carefully delineated these two types of problems.

The remainder of this article constructs a framework for supplementing the regime created by EO 13,609. It aims to provide a rubric for characterizing regulatory problems so as to facilitate international cooperation, identify potential reforms that exploit the expertise residing in the private sector and the general public, and create a framework for requiring agencies to justify existing regulatory disparities in order to promote regulatory accountability. The reforms proposed would not result in regulatory convergence in all instances because they would recognize the right of sovereign states to adopt differing levels of regulatory protection, but they would significantly contribute to the process of weeding out unnecessary divergences. The article focuses solely upon potential innovations to be considered by regulatory agencies in the United States, but similar principles apply to innovations contemplated by other nations or trading blocs.

A. Categorizing Regulatory Disparities

In attempting to minimize or eliminate disparities between regulations prevailing in different trade partners, it is imperative to recognize the multiple potential causes for such divergences. In theory, regulatory differences might reflect one of four separate causes, or some combination thereof:

1. *Accidental Regulatory Divergences*: Regulators seldom coordinate with each of their overseas counterparts prior to adopting a regulation, and each nation may adopt a differing approach as a mere matter of historical accident rather than as a conscious decision.²⁵

2. *Disparate Risk Assessments*: Risk assessment is the process by which regulators attempt to quantify both the magnitude of a risk and the probability that it will take place.²⁶ In theory, it is an objective process that is governed by

24. Exec. Order No. 13,609, § 2(d), 77 Fed. Reg. 26,413, 26,414 (May 4, 2012).

25. Adam C. Schlosser & Reeve T. Bull, *Regulatory Cooperation in the TTIP*, REGBLOG (Aug. 27, 2013), <http://www.regblog.org/2013/08/27/27-schlosser-reeve-ttip/> (“Regulators often fail to engage one another, and, once rules are on the books, they are extremely difficult to change.”).

26. E.g., Donald A. Brown, *Superfund Cleanups, Ethics, and Environmental Risk Assessment*, 16 B.C. ENVTL. AFF. L. REV. 181, 181 (1988); Joel D. Smith, *Massachusetts v. EPA: A Change of Climate*

the scientific method. If regulators in one nation are relying upon more cutting-edge research than their counterparts elsewhere, their regulations may differ.

3. *Disparate Risk Tolerances*: Risk management is the process by which regulators use the data produced during the risk-assessment phase and, combining such data with relevant policy considerations, determine society's risk preferences and what regulations are required to achieve those preferences.²⁷ Unlike risk assessment, this process is essentially subjective and ultimately depends upon the risk tolerance of the population at issue.²⁸ If separate citizenries exhibit disparate levels of tolerance, then regulations will justifiably differ.

4. *Political Considerations*: Politics (rather than impartial, technocratic agency decisionmaking) may ultimately influence regulations in two ways. First, all agency powers ultimately derive from authorizing statutes,²⁹ and Congress is not obligated to conduct rigorous risk assessments or gauge the public risk tolerance prior to enacting a statute.³⁰ Agencies lack any authority to derogate from statutory requirements. Thus, political compromises reached in Congress, no matter how irrational or susceptible to rent-seeking by special interests, bind the agencies. Of course, Congress often delegates quite broadly to agencies, which then assume the policymaking mantle.³¹ Though reviewing courts will scrutinize agencies' risk-assessment conclusions, they typically accord a very high degree of deference to scientific fact-findings,³² and agencies are not legally

at *EPA Clouds the DC Circuit's Review of Risk-Based Policy Decisions*, 33 *ECOLOGY L.Q.* 653, 664 (2006).

27. Smith, *supra* note 26, at 664.

28. Admittedly, separating issues involving risk assessment from those concerning risk management can be challenging. For instance, the level of confidence required to accept a proposition as "proven" (for example, a 95% versus a 99% confidence interval), though fundamental to scientific investigations, essentially represents a risk management determination. Carl F. Cranor, *Science Courts, Evidentiary Procedures and Mixed Science-Policy Decisions*, 4 *RISK* 113, 126-28 (1993). Though segregating problems into one category or the other is a difficult task, it is not impossible. See, e.g., BIPARTISAN POLICY CENTER, *IMPROVING THE USE OF SCIENCE IN REGULATORY POLICY 15-16* (2009), <http://bipartisanpolicy.org/wp-content/uploads/sites/default/files/BPC%20Science%20Report%20fnl.pdf> (arguing in favor of a clear distinction between scientific and policy issues). For instance, risk assessment studies might focus solely on defining the relevant statistical parameters of a problem and avoid any conclusions concerning causation. See Jeffrey N. Martin, *Procedures for Decisionmaking under Conditions of Scientific Uncertainty: The Science Court Proposal*, 16 *HARV. J. ON LEGIS.* 443, 505 (1979) (describing how a proposed science court might go about separating technical issues from associated policy judgments).

29. C. KOCH, JR., *ADMINISTRATIVE LAW AND PRACTICE* § 1.22, at 39 (1985).

30. In this respect, the U.S. Congress differs somewhat from the EU Commission, which generally conducts an impact analysis and often conducts outreach to relevant stakeholders and citizen groups prior to proposing a new regulation or directive (which are roughly analogous to U.S. statutes). RICHARD PARKER & ALBERTO ALEMANNI, *TOWARDS EFFECTIVE REGULATORY COOPERATION UNDER TTIP: A COMPARATIVE OVERVIEW OF THE EU AND US LEGISLATIVE AND REGULATORY SYSTEMS 22-32* (2014), http://trade.ec.europa.eu/doclib/docs/2014/may/tradoc_152466.pdf.

31. See *Mistretta v. United States*, 488 U.S. 361, 372 (1989) ("So long as Congress 'shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power.'" (quoting *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928))).

32. *Ethyl Corp. v. EPA*, 541 F.2d 1, 27 & n.18 (1976).

obligated to ensure that their risk-management determinations properly reflect the overall public risk tolerance (even assuming that could be straightforwardly defined). Given the lack of any objective methodology for ascertaining risk tolerance, the political preferences of government bureaucrats and of interest groups seeking to influence the agency may greatly impact risk-management determinations,³³ both through the formal notice-and-comment process and through informal contacts with agency officials.³⁴ Because political considerations vary greatly from nation to nation (and even regulatory authority to regulatory authority), they can contribute to regulatory disparities.

An effective approach to international regulatory cooperation must remain closely attuned to the context in which any given divergence arises. The potential contexts are arranged in ascending order of difficulty of international regulatory cooperation efforts, with accidental regulatory disparities being the most simple to resolve. Correcting “accidental” regulatory disparities and ensuring that regulators are acting on the most up-to-date scientific information is relatively straightforward, and this article builds a framework for achieving these ends. Promoting regulatory convergence in the risk-management context is considerably more challenging. This article also offers proposed reforms for rationalizing risk management, helping to ensure that it is more closely attuned to the public risk tolerance. Such changes, however, would not necessarily lead to greater international convergence in all cases, though they likely would in some instances. Political considerations, in turn, neither can nor should be eliminated from the regulatory calculus. Nevertheless, this article’s proposed improvements to the risk-management process would help mitigate the more pernicious aspects of politicized agency decisionmaking, ensuring that regulations reflect true public risk preferences rather than the whims of bureaucrats or the desires of rent-seekers.

The remainder of this article focuses chiefly on methods for achieving greater convergence of existing regulations. Obtaining convergence for prospective regulations should be somewhat simpler to achieve insofar as regulators come to internalize cooperative norms and seek input from overseas

33. Insofar as regulated entities influence the risk-management determination, the process is highly susceptible to rent-seeking behavior. In addition to soliciting special protections, industry groups may pursue a form of covert trade protectionism, lobbying for generally applicable regulations that disproportionately benefit large, domestic firms at the expense of small businesses or foreign competitors (for example, seeking a prohibition of all flavored cigarettes other than menthols, which almost exclusively targets foreign producers). See HANS-HERMANN HOPPE, *A THEORY OF SOCIALISM AND CAPITALISM* 105 (2010) (“The imposition of regulations . . . implies a redistribution of property titles away from innovators and onto the established producers, products, and technologies.”); Watson & James, *supra* note 6, at 3, 5.

34. See *Sierra Club v. Costle*, 657 F.2d 298, 401–02 (1981) (holding that the Administrative Procedure Act does not bar *ex parte* contacts between agency officials and outside parties in the informal rulemaking context); ESA L. SFERRA-BONISTALLI, *EX PARTE COMMUNICATIONS IN INFORMAL RULEMAKING* 25 (2014), <http://www.acus.gov/report/final-ex-parte-communications-report> (“The D.C. Circuit’s cases dealing with *ex parte* contacts generally seem to agree that there is no general prohibition on or specific procedures for addressing *ex parte* contacts in informal rulemaking.”).

counterparts and relevant stakeholders prior to adopting new rules. Nevertheless, the general approach to classifying regulatory disparities by type and soliciting appropriate stakeholder input should also guide the ongoing process of promoting optimal convergence of future regulations.

B. The “Low-Hanging Fruit”: Accidental Regulatory Disparities

In a few instances, U.S. and foreign regulations do not differ because each nation’s regulators rely on disparate scientific studies (risk assessment), because each nation’s citizenry exhibits a unique level of risk tolerance (risk management), or even because each nation’s politicians or bureaucrats have consciously chosen to erect a unique set of policies. Rather, they differ because trading partners have historically failed to coordinate regulatory policy and therefore often enact divergent regulatory approaches merely as a matter of historical accident. For instance, rather than requiring businesses to affix different warning labels on hazardous products depending upon the version that each nation has accepted, it would be far more effective for all nations to agree upon a common design.³⁵ In this case, harmonizing the regulations would remove an unnecessary trade barrier and create opportunities for businesses on both sides of the Atlantic.

Thus, to the extent a regulated entity identifies such a historical disparity that is not justified by more accurate scientific data or by a determination to provide a specific level of regulatory protection, it should have the opportunity to petition the responsible agency and seek removal of the regulatory discrepancy. The instrument by which the regulated entity identifies the disparity need not comprise a formal rule-making petition under the Administrative Procedure Act (APA), which triggers a series of legal obligations for the agency to dispose of the petition and justify its response.³⁶ Instead, the petition could merely involve the submission of a notice to the agency urging it to scrutinize a particular regulation in light of disparate approaches prevailing in one or more key trading partners. If the agency concludes that the disparity could be eliminated or mitigated, the agency could adopt a rule effectuating a revision; it could urge a trading partner to amend its regulations; or, if altering the existing policy requires legislation, it could encourage Congress to act. If, however, the agency decides that the disparity is justified in light of differing risk-assessment or risk-management determinations, it would announce this conclusion, and the challenging entity would either abandon its claim or raise a further challenge to the underlying risk analysis, as described in parts II.D–E.

35. An international standard-setting organization has in fact devised a set of common labels for chemical safety. See generally UN Econ. Comm’n for Europe, *Globally Harmonized System of Classification and Labelling of Chemicals* (GHS), U.N. Doc. ST/SG/AC.10/30/Rev.4 (2011), http://www.unece.org/trans/danger/publi/ghs/ghs_rev00/00files_e.html. U.S. agencies have not required the use of these globally accepted standards in all instances, though. *Id.*

36. 5 U.S.C. §§ 553(e), 555(b), (e) (2012).

Of course, the agency may be ill-served by adopting a policy of harmonizing all such regulations with those prevailing in trading partners. In some instances, the U.S. approach is objectively superior,³⁷ and the optimal outcome would entail a trading partner's adopting U.S. regulations. Furthermore, amending the regulations could create costs for certain regulated parties,³⁸ which the net benefits arising from harmonization may or may not offset. For those cases in which reliance interests favor retaining the existing regulatory scheme prevailing in one or more trading partners, a preferable approach may entail adopting a series of mutual recognition agreements whereby each participant acknowledges that the regime prevailing in another state is equivalent to its own and recognizes compliance therewith as tantamount to compliance with the domestic regulations.³⁹

C. Toward International Regulatory Cooperation in Risk Assessment

The scientific disciplines, though often perceived as monolithic and more-or-less settled bodies of knowledge containing a series of objectively proven "truths," in reality involve robust substantive debates concerning appropriate theories for explaining natural phenomena.⁴⁰ Notwithstanding these substantive differences, all credible natural scientists subscribe to the scientific method as the procedural mechanism best suited to testing existing paradigms and uncovering facts by which to challenge or support prevailing theories.⁴¹ Though scientists will frequently propose disparate explanations for observed phenomena, particularly in developing fields characterized by rapidly

37. For instance, the EU and the United States have adopted somewhat different approaches to regulating the length of semi-tractor-trailers, such that the cab of European trucks generally sits atop the engine compartment, whereas U.S. trucks place the cab behind the engine compartment. McCarthy, *supra* note 2, at 9–10. The more aerodynamic U.S. design has better fuel economy. *Id.* at 10. The EU merely adopting the U.S. scheme would therefore implement an objectively superior regulatory approach while eliminating an unnecessary trade barrier.

38. In the tractor-trailer example, retooling EU truck manufacturing facilities to adopt the U.S. design may prove more costly than the combined savings of superior fuel economy and enhanced trade justify.

39. Kalypso Nicolaidis & Gregory Shaffer, *Transnational Mutual Recognition Regimes: Governance without Global Government*, 68 LAW & CONTEMP. PROBS. 263, 266–67 (2005).

[M]utual recognition represents the operation of a third, "middle way" of transnational economic governance, one that is already happening in a global economic order—that of recognizing foreign regulatory determinations implicit in the import of traded goods and services. Mutual recognition principles constitute an exercise of the territorial principle of national treatment, and a cooperative, "mutualized" approach to the inherent demand for, and challenge of, extraterritoriality in a global economic order.

Id.

40. As the famed historian of science Thomas Kuhn observed, the natural sciences are characterized less by a sustained progression toward the discovery of universal laws or principles than by a series of paradigm shifts by which successive generations of scientists devise models to explain observed phenomenon that more fully accord with the prevailing "facts" perceived by their contemporary colleagues. See generally THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2012).

41. JOHN L. CAMPBELL, *INTRODUCTION TO SCIENCE AND THE SCIENTIFIC METHOD* 11 (2008) (cataloguing the scientific method's rise to general acceptance in the community of scientists).

expanding knowledge, they will agree upon the need to marshal empirical evidence to test their hypotheses.

In this light, scientists addressing issues of risk assessment should, in theory, be capable of deciding upon an objectively optimal result given the scientific data available. Of course, some lag between scientific innovations and their integration into regulatory decisionmaking is inevitable. Were researchers to prove beyond cavil an ineluctable connection between cellular telephone usage and brain tumors, regulators would inevitably take several months or years to enact regulations designed to mitigate these harms (and may never do so if, in conducting the risk-management determination, they deem the risk to be tolerable or the personal autonomy interests in unfettered telephone access to be sufficiently important). This phenomenon is largely a result of the informal agency procedures that Professor Wendy Wagner has described as “stopping rules,” that is, points at which agencies will decide to foreclose consideration of any additional evidence in order to render a regulatory decision.⁴²

Some use of stopping rules is inevitable: in a Kuhnian universe, any agency that seeks absolute certainty prior to regulating will not regulate at all, for the paradigms of science are constantly cycling through a process of creative destruction.⁴³ Nevertheless, scientific understanding will evolve over time as existing paradigms are shored up with additional confirmatory experimentation and old paradigms eventually yield to new ones; an agency cannot merely establish policy based on the best science currently available and then adhere to that policy indefinitely. Rather, the agency must constantly readjust its regulations to respond to new evidence.⁴⁴

Regulators in each sovereign nation will presumably set somewhat different stopping rules than those prevailing in sister nations, and new research may be more readily accessible in some countries than in others. Thus, regulatory disparities are likely to prevail in the lag time between the introduction of new

42. WENDY WAGNER, *SCIENCE IN REGULATION: A STUDY OF AGENCY DECISIONMAKING APPROACHES* 26–27 (2013), http://www.acus.gov/sites/default/files/documents/Science%20in%20Regulation_Final%20Report_2_18_13_0.pdf; see also Sheila Jasanoff, *Transparency in Public Science: Purposes, Reasons, Limits*, 69 *LAW & CONTEMP. PROBS.* 21, 38 (2006) (identifying a lack of stopping rules as creating a situation in which irrelevant public input can bog down the scientific decision-making process).

43. See Wagner, *supra* note 42, at 26.

Science-based dialog, if done in keeping with the norms of science, has no clear stopping point. Science is continually evolving and, in theory, policy should be constantly evolving with it Since scientific questions will never be resolved completely, a decision subjected to stopping rules will be revisited again later, through an adaptive process that considers the new evidence and adjusts the original rule or decision as necessary.

Id.

44. See *id.* at 26, 124 (The resulting regulatory decision will be revisited with new evidence at some future date, often established in the stopping rule itself.); see also Administrative Conference of the United States, Recommendation 2013-3, *Science in the Administrative Process*, ¶ 4, 78 *Fed. Reg.* 41,352, 41,358 (July 10, 2013) (recommending that agencies not only establish “checkpoints” at which they will render a decision on the basis of the available evidence but also identify when they will “reopen consideration of research or debate”).

scientific research and its integration into the regulations of all nations. Information-sharing among scientists worldwide can somewhat mitigate this problem by ensuring that new studies will diffuse as rapidly as possible across international boundaries. In that light, the Administrative Conference of the United States has recommended that regulatory scientists work with their international counterparts to share data sets, divide responsibility for conducting otherwise duplicative tests, and achieve the efficiencies that arise from maintaining a global network of researchers.⁴⁵ Nevertheless, the key stumbling block to ensuring that all regulatory regimes reflect the most up-to-date risk-assessment data is more likely to arise from inertia associated with effectuating regulatory change than from inadequate coordination amongst scientists across borders.

One possible means of ensuring that U.S. agencies rely upon the most up-to-date scientific research would be for regulated entities and other parties to file a petition for rulemaking whenever new information emerges that casts into doubt the viability of risk assessments underpinning existing regulations. The APA specifically authorizes this mechanism of spurring regulatory activity, providing that “[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.”⁴⁶ Though agency denials of such petitions are subject to “‘extremely limited’ and ‘highly deferential’” review,⁴⁷ the Supreme Court has recently shown a willingness to scrutinize agencies’ refusals to undertake rulemakings and to more closely parse their purported justifications for inaction.⁴⁸

A petition for rulemaking may prove appropriate for cases in which an agency refuses to address new scientific evidence, but it is a rather blunt mechanism that is employed infrequently.⁴⁹ Once the petition has been filed, the agency is legally obligated to provide some form of response,⁵⁰ though the justification can be relatively pro forma for petitions that present little to no argumentation warranting a formal reply.⁵¹ The process can become even more protracted and convoluted if the petitioner challenges the agency’s denial of the petition on judicial review.⁵² In this light, a different solution that allows the agencies and challenging entities to reach a mutually agreeable solution and

45. Administrative Conference of the United States, Recommendation 2011-6, International Regulatory Cooperation, ¶¶ 3–6, 77 Fed. Reg. 2257, 2260–61 (Jan. 17, 2012).

46. 5 U.S.C. § 553(e).

47. *Massachusetts v. EPA*, 549 U.S. 497, 527–28 (2007) (quoting *Nat’l Customs Brokers & Forwarders Ass’n v. United States*, 883 F.2d 93, 96 (D.C. Cir. 1989)).

48. See *Massachusetts*, 549 U.S. at 527–35 (finding the EPA’s rejection of a rulemaking petition urging the EPA to regulate motor vehicle greenhouse gas emissions to be “arbitrary and capricious”).

49. William V. Luneburg, *Petitioning Federal Agencies for Rulemaking: An Overview of Administrative and Judicial Practice and Some Recommendations for Improvement*, 1988 WISC. L. REV. 1, 58 (1988).

50. 5 U.S.C. § 555(b), (e).

51. See *id.* § 555(e) (requiring only a “brief statement of the grounds for denial” and permitting summary denial when the reasons therefor are “self-explanatory”).

52. 5 U.S.C. §§ 704, 706.

that relies upon alternative means of dispute resolution⁵³ in the event of a disagreement may pretermit the need for a formal petition for rulemaking, though that device would remain available as a last resort.

As in the case of accidental disparities, the agency might create an informal process—separate from the rulemaking petition process—that would allow stakeholders to submit evidence bearing upon the continued validity of agency risk assessments.⁵⁴ If a stakeholder identifies a disparity between a regulation adopted by the United States and the approach pursued by one or more trading partners and can demonstrate that the discrepancy has arisen as a result of a U.S. agency's reliance on outdated technical information, then the agency could update or amend its regulation to reflect the current wisdom of the scientific community. If, by contrast, the agency demonstrates that it has relied upon more up-to-date science, or that its reliance upon outdated information has not adversely affected its regulations, then the stakeholder should accept the agency's determination.

In certain circumstances, of course, the agency and stakeholder may interpret the same evidence differently, resulting in a conflict that requires calling upon the services of an outside adjudicator. In the scientific context, the “gold standard” for deciding among competing technical claims is the peer-review process.⁵⁵ Federal agencies regularly convene peer-review panels as advisory committees subject to the Federal Advisory Committee Act,⁵⁶ and the

53. The Administrative Conference of the United States has urged federal agencies to seek out opportunities for utilizing alternative dispute-resolution mechanisms to address disputes more efficiently. *See* Administrative Conference of the United States, Recommendation 86-3, Agencies' Use of Alternative Means of Dispute Resolution, ¶ 1, 51 Fed. Reg. 25,641, 25,643 (July 16, 1986).

Administrative agencies, where not inconsistent with statutory authority, should adopt the alternative methods discussed in this recommendation for resolving a broad range of issues. These include many matters that arise as a part of formal or informal adjudication, in rulemaking, in issuing or revoking permits, and in settling disputes, including litigation brought by or against the government.

Id.

54. In order for a party that wishes to introduce new scientific evidence to determine whether the agency has already considered its data, the party must be able to ascertain the research upon which the agency relied. Though the Freedom of Information Act technically only requires an agency to disclose any records upon the receipt of a formal request (assuming that none of the various exceptions is met), 5 U.S.C. § 552, agencies can and should voluntarily provide nonconfidential information related to scientific conclusions—including relevant studies and the data undergirding those studies—in order to apprise the public of their decision-making processes. *See, e.g.*, Administrative Conference of the United States, Recommendation 2013-3, Science in the Administrative Process, ¶ 3, 78 Fed. Reg. 41,352, 41,358 (July 10, 2013) (recommending that each agency “identify and make publicly available . . . references to the scientific literature, underlying data, models, and research results that it considered”). This should include both studies upon which the agency relied as well as studies that the agency considered but that did not ultimately inform its final decision. *Id.* When agencies rely upon privately funded research, they also should encourage the preparer of the research to disclose the underlying data. *Id.* ¶ 10.

55. Memorandum from Joshua B. Bolten, Director, Office of Mgmt. & Budget, Issuance of OMB's “Final Information Quality Bulletin for Peer Review,” M-05-03 3-5 (Dec. 16, 2004), http://www.cio.noaa.gov/services_programs/pdfs/OMB_Peer_Review_Bulletin_m05-03.pdf.

56. *See Types of Federal Advisory Committees*, U.S. GEN. SERVS. ADMIN., <http://www.gsa.gov/portal/content/248961> (last visited Feb. 11, 2014) (listing scientific advisory boards

agency could initiate this process in the event of a dispute with a stakeholder involving the scientific evidence underlying a given regulation. If the panel's conclusions ultimately call into question the risk assessment undergirding a particular rule, the agency would not necessarily be bound to amend its regulation. Numerous considerations other than the technical accuracy of underlying scientific studies animate agency decisionmaking, but the challenging party could cite the panel's conclusion as evidence if it elected to pursue a petition for rulemaking. Conversely, if the panel decides in favor of the agency, the challenger would ideally abandon any effort to amend the regulation, and the agency could cite the panel's conclusions if the challenger nevertheless persisted in filing a petition for rulemaking.

This procedure would allow agencies to leverage the expertise of private-sector entities to identify new scientific developments justifying reassessment of existing regulations, thereby conserving agency resources that otherwise would be dedicated to this task. Of course, adopting the contemplated reforms would also create offsetting costs for agencies, likely requiring them to reassess regulations more frequently than they otherwise would. The government could presumably further reduce its costs by requiring any challenging entity to defray the expenses incurred in connection with the expert panel. Unfortunately, placing the pecuniary burden on challenging entities would favor relatively powerful concerns, such as large businesses, and potentially disadvantage less favorably positioned entities such as public interest organizations or small businesses. In this light, agencies might create a "superfund" mechanism, assessing a fee for all challenges filed by industry groups or other relatively affluent entities that would cover the costs of challenges they raise as well as challenges brought by individual citizens, public interest organizations, small businesses, or other relatively impecunious entities (perhaps implementing a mechanism whereby such groups could seek a waiver of the relevant fees).

Importantly, such a system for challenging the technical bases of agency regulations need not be confined to the international regulatory cooperation context. Though a disparity between the scientific analysis undergirding U.S. and overseas regulations may serve as *prima facie* evidence that either the American or foreign approach is outdated in light of new discoveries, scientific evidence may justify a readjustment of existing regulations even in the absence of such an international disparity.

D. Toward International Regulatory Cooperation in Risk Management

Risk-assessment problems can theoretically be resolved objectively by analyzing the science underlying differing approaches and determining which accords most closely with the prevailing state of scientific knowledge. By contrast, risk-management problems defy such solutions and ultimately depend, in theory, upon the overall level of risk tolerance exhibited by the general

public whom national governments purport to protect.

In issuing a risk-management determination, national governments are, in essence, rendering a normative judgment concerning the level of risk to which a society is willing to expose its citizens (and concomitantly determining the amount of societal resources that will be dedicated to mitigating that risk, thereby potentially limiting economic growth and foreclosing the possibility of assigning scarce resources to addressing other risks).⁵⁷ In most modern governments, which necessarily rely upon some scheme of representation, the sovereign people have effectively delegated that decision-making power to elected representatives.⁵⁸ In the United States, the courts traditionally required that those representatives elected by the people (that is, Congress) make all overarching policy decisions, prohibiting the delegation of that function to unelected bureaucrats in the executive branch through the so-called “non-delegation doctrine.”⁵⁹ This prohibition, however, has essentially become a dead letter,⁶⁰ and the Supreme Court has now openly acknowledged that agencies can exercise a policymaking role so long as Congress articulates an “intelligible principle” to guide that function.⁶¹

In theory, agency officials are well-positioned to translate the public risk tolerance into an appropriate set of risk-management determinations, taking account of the general public sentiment (through soliciting public comments,⁶² conducting opinion polls, or simply observing the public reaction to major events) while correcting for the cognitive errors that may skew lay decisionmaking. In reality, regulators seldom undertake a formal process of determining the public risk tolerance, and they are not necessarily well-positioned to translate such public preferences into a risk-management determination, for several reasons. First, regulators may be bound by statutes that reflect certain political commitments rather than a carefully reasoned risk-management determination. Second, even where agencies enjoy considerable discretion in rendering a risk-management determination (because Congress has delegated authority very broadly), regulators may allow their own political views to influence the process of ascertaining the public risk tolerance. By the same token, regulators are susceptible to capture by special interests, which,

57. For discussions of the problem of risk-risk tradeoffs, see John D. Graham & Jonathan Baert Wiener, *Confronting Risk Tradeoffs*, in *RISK VS. RISK: TRADEOFFS IN PROTECTING HEALTH & THE ENVIRONMENT* 1, 1 (John D. Graham & Jonathan Baert Wiener eds., 1995); see also Richard W. Parker, *Grading the Government*, 70 U. CHI. L. REV. 1345, 1403-04 (2003); Cass R. Sunstein, *Health-Health Tradeoffs*, 63 U. CHI. L. REV. 1533, 1535 (1996).

58. Edward L. Rubin, *Getting Past Democracy*, 149 U. PA. L. REV. 711, 718 (2001).

59. See, e.g., *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 521-23 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935).

60. See PETER L. STRAUSS ET AL., *GELLHORN AND BYSE'S ADMINISTRATIVE LAW* 66 (10th ed. 2003) (“Nearly two centuries of nondelegation caselaw reveals a Court that consistently talks a harsh line against the delegation of ‘legislative power,’ but rarely finds a statutory delegation it can’t sustain.”).

61. *Mistretta v. United States*, 488 U.S. 361, 372, 378 (1989).

62. 5 U.S.C. § 553(c).

among other things, may overwhelm the agency with information favoring their preferred outcome and thereby skew the decision-making process.⁶³ Domestic industries may devise a nominally welfare-enhancing justification for advocating a risk-management determination that preserves their existing market share,⁶⁴ and agency officials may be influenced to adopt policies favored by such groups.

A concerted effort to comprehensively assess all known risk factors worldwide and allocate scarce resources so as to achieve an optimal level of overall societal risk reduction would, in theory, resolve this dilemma.⁶⁵ But it would be perceived as profoundly antidemocratic insofar as it would require insulating regulators from public pressure, thereby empowering them to act even in the face of strong public opposition. Furthermore, government regulators tend to apply a highly abstracted risk calculus that relies only upon one or a few factors (for example, the number of deaths prevented annually), whereas the general public uses a much more complex, impressionistic model that may rely upon a significantly larger number of factors.⁶⁶

To some extent, the discrepancy between expert and lay decisionmaking may reflect the greater susceptibility of the latter group to cognitive errors. For instance, laypersons may be misguided by the framing of a particular question, whereas experts will apply a more rigorous, statistical calculus that corrects for

63. Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1324–25 (2010).

64. Watson & James, *supra* note 6, at 5.

65. The U.S. regulatory system attempts to achieve a more objective analysis by requiring executive branch agencies to conduct cost-benefit analysis of all proposed rules that result in an economic impact of \$100 million or more and by tasking OIRA with reviewing these analyses and coordinating among such agencies. *See generally* Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993) (“[I]n choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires another regulatory approach.”). Nevertheless, the system is far from comprehensive because it generally only applies to rules with a large economic impact, does not cover rules promulgated by independent regulatory agencies, and only governs prospective rules (though EO 13,610 and other directives have encouraged agencies to undertake retrospective review of existing rules). Though the principle of proportionality also imposes some discipline on decisionmaking in the EU, Christoph Henkel, *The Allocation of Powers in the European Union: A Closer Look at the Principle of Subsidiary*, 20 BERKELEY J. INT’L L. 359, 374–78 (2002), and the Commission conducts an impact assessment (which may or may not quantitatively assess potential costs and benefits) prior to putting forth proposed legislation, PETER L. STRAUSS ET AL., *ADMINISTRATIVE LAW OF THE EUROPEAN UNION: RULEMAKING* 63–71 (2008), European nations also lack any comprehensive system for dedicating regulatory resources to their optimal uses.

66. *See* Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 55–56 (1995).

There is a strikingly consistent finding in risk studies: laypeople assess risk through different value frameworks than those implicitly embedded in expert approaches. Laypeople do not look only or even primarily to expected annual mortality; they look as well to a number of factors determining the acceptability of different risks in different contexts.

Id.

this perception error.⁶⁷ Nevertheless, in many cases, the layperson's approach is not objectively worse than the expert's. For instance, the State of Oregon created an advisory panel to rank the severity of potential adverse health outcomes and then used the ranking to determine Medicaid funding for such ailments.⁶⁸ Though an expert would likely approach this problem by applying an objective metric, such as the likelihood of each disease to cause premature death, the public considered additional factors such as the preventability of each disease, its age of onset, and the extent to which it interferes with the enjoyment of life.⁶⁹ Hence, although agency experts act as proxies for the general public in ascertaining overall risk tolerance, their decisions are likely to diverge somewhat from true public preferences.

In this light, a preferable alternative may be to ensure that risk-management decisions are actually informed by the true societal risk tolerance by facilitating communication of citizens' views to regulators, while nevertheless correcting for the cognitive errors that skew individual decisionmaking. Expanding such input would help promote public risk-management decisions that hew more closely to the underlying risk tolerance of the general citizenry, but it would not, in theory, inherently lead to greater regulatory convergence (and may ultimately expand divergence) between different nations. Nevertheless, it would ensure that any regulatory divergence that survives reflects the genuine will of the general public and not merely the predilections of government regulators or the downstream effects of rent-seeking by domestic special interests pursuing protection from foreign competition. Furthermore, in devising a mechanism that can minimize the effects of cognitive errors while ascertaining the risk tolerance of members of the public, one need not be overly sanguine to assume that citizens in relatively modern, industrialized nations would likely prefer similar levels of regulatory protection in a broad array of areas. Thus, this mechanism would perhaps mitigate some of the wide gulfs in transatlantic regulatory policy that presently exist.

Administrative law scholarship contains a number of proposals for enhancing citizen input in agency policymaking. In theory, in notice-and-comment rulemakings, agencies could merely tabulate the number of comments favoring and opposing a particular policy and select the more popular option. Nonetheless, scholars and agencies have been well-nigh uniform in rejecting the proposition that the notice-and-comment process is a plebiscite,⁷⁰ given the

67. To illustrate, an average member of the public may view a "survival rate of 90%" as superior to a "risk of death of 10%," though an expert can easily see that these two states are identical. RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, & HAPPINESS* 36–37 (2009).

68. Pildes & Sunstein, *supra* note 66, at 92–94.

69. *See id.* at 57 (listing factors other than increased mortality risk that public decisionmakers consider germane).

70. *See, e.g.*, OFFICE OF THE FED. REGISTER, *A GUIDE TO THE RULEMAKING PROCESS* 6, https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf ("The notice-and-comment process . . . is not like a ballot initiative or an up-or-down vote in a legislature. An agency is not permitted to base its final rule on the number of comments in support of the rule over those in

intractable self-selection issues involved. Rather, the academic proposals rely either upon agency officials to screen public input and identify meritorious issues or upon some representation scheme whereby a subset of the public is selected to speak on behalf of the citizenry as a whole. For instance, Professor Nina Mendelson has proposed that agency officials tabulate public comments and carefully consider public policy preferences expressed therein when the comments are numerous, strongly favor a particular outcome, implicate an issue germane to the agency's statutory authorization, are coherent and persuasive, and point in a direction other than that initially favored by the agency.⁷¹

Professor Mariano-Florentino Cuéllar has advocated a process relying both on selecting a subsample of the populace to speak on behalf of the public and on empowering agency officials to separate the wheat from the chaff in the input received.⁷² Specifically, he has proposed creating an independent agency to select a random or stratified sample of individuals to furnish input on especially critical rulemakings.⁷³ Attorneys would serve as “regulatory public defenders” and present the relevant information supporting and undermining an agency proposal to the deliberating group. The attorneys would then identify the primary concerns articulated by the public participants and offer potential revisions to the proposed rule to address those concerns.⁷⁴

In a previous article, I explored another potential application of the representation model: assigning advisory committees composed of a demographically diverse group of citizens the task of debating a particular question of agency policymaking and reaching a collective decision on the appropriate course of action.⁷⁵ The agency or an impartial body acting on its behalf would assemble a small panel of citizens (likely no larger than twenty-five participants) and select a set of experts to brief the participants on the relevant information underlying a risk-management problem.⁷⁶ The committee members, led by a moderator, would then debate the key issues and ultimately decide upon an overall recommendation, ideally reaching unanimity or near

opposition to it.”); Cynthia R. Farina et al., *Rulemaking 2.0*, 65 U. MIAMI L. REV. 395, 430 (2011) (“The assumption that rulemaking is a plebiscite has plagued first generation e-rulemaking.”); Stuart W. Shulman, *The Internet Still Might (But Probably Won't) Change Everything*, 1 I/S: J. L. & POL'Y FOR INFO. SOC'Y 111, 138 (2004) (“Administrative law scholars worry about a perceived shift away from agency discretion and expert decisions toward the politics and the psychology of plebiscites. They are not alone. At a recent agency focus group, one participant stressed, ‘Rulemaking is not a democracy.’”).

71. Nina A. Mendelson, *Rulemaking, Democracy, and Torrents of E-Mail*, 79 GEO. WASH. L. REV. 1343, 1375 (2010).

72. Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411 (2005).

73. *Id.* at 491.

74. *Id.*

75. See generally Reeve T. Bull, *Making the Administrative State “Safe for Democracy”: A Theoretical and Practical Analysis of Citizen Participation in Agency Decisionmaking*, 65 ADMIN. L. REV. 611 (2013).

76. *Id.* at 641–42.

consensus but casting a majority vote if necessity dictates.⁷⁷ Their prescriptions would not bind government agencies but rather would serve to elucidate the policy preferences of the regulated public.⁷⁸

In the international regulatory cooperation context, any of the aforementioned systems could, in theory, provide a mechanism for correcting historical divergences between international regulatory regimes that may not ultimately reflect the true underlying risk tolerance of the general public. Initially, a private party would identify a disparity between U.S. regulations and those of a trading partner. Agencies could arrange an informal process by which individuals could identify such disparities without submitting a petition for rulemaking.⁷⁹ In many if not most instances, the agency could provide a summary justification for its regulatory approach. For example, the U.S. approach may differ from that of some trading partners but not others and moving closer to the system of one trading partner would pull regulations away from those of other trading partners. In other cases, U.S. firms may attempt to weaken regulatory protections by pointing to lax regulatory regimes in developing nations, and agencies would be justified in summarily rejecting any proposal to erode regulatory protections to avoid a “race to the bottom” of progressively weakened standards.

For instances in which the U.S. approach substantively differs from that of a large number of trading partners with similarly strong levels of regulatory protection, individuals might file comments urging the agency to invoke one of the aforementioned citizen consultation procedures (or some combination or variation thereof). The optimal type of consultation would likely depend on the nature of the policy-making task. Professor Mendelson’s model may prove ideal when the agency cannot dedicate extensive resources to constructing a citizen advisory body and wants to obtain a general sense of the public reaction to a proposed policy rather than determine the precise percentage of individuals favoring the proposal with a high degree of precision. Professor Cuéllar’s model may be preferable when the public might articulate certain concerns with a policy proposal but may lack the sophistication to grapple with the competing tradeoffs and offer a recommendation to the agency. My representation model, in turn, may prove optimal when the agency is willing to allocate the resources to determine precisely how a demographically representative sampling of citizens will react to a proposal and when the problem is sufficiently

77. *Id.* at 644, 651–52.

78. *Id.* at 654.

79. Agencies could structure this informal comment–submission process in any number of ways. Most simply, the agency could create a comment page on its website for collecting such submissions. If it received a particularly large number of comments, it might utilize IdeaScale software to allow other users to rank submissions, thereby effectively prescreening comments to highlight particularly promising ideas. More formally, the agency might appoint an ombudsman to screen citizen submissions and identify those that are sufficiently well developed to merit consideration. *See generally* Administrative Conference of the United States, Recommendation 90-2, The Ombudsman in Federal Agencies, 55 Fed. Reg. 34,211 (Aug. 22, 1990).

straightforward that such citizens can come to a proposed resolution. As with the risk-assessment panels, the agency might implement a scheme whereby challenging parties bear the costs of procuring public input and less affluent entities use a “superfund” mechanism to subsidize challenges.

After the agency has solicited public input, it should then consider the views received when determining whether to effectuate any change in underlying policy. In many instances, citizens may express a level of risk tolerance justifying adoption of a regulatory approach that more closely resembles that of a key trading partner, in which case the agency should consider the propriety of amending its regulations accordingly. In other cases, citizens may ultimately prefer the stronger or weaker protections that prevail in the United States, and the agency will have acquired additional evidence justifying the approach it has adopted. In the former set of circumstances, however, the agency should not necessarily immediately amend its regulations to achieve greater regulatory convergence. Any number of factors may justify a disparate approach even if the public risk tolerance favors convergence: the authorizing legislation may bind the agency to the current regime (in which case the agency may urge Congress to amend the statute that forecloses the proposed action); the agency may lack the resources to alter the regulations or to operate the alternative regime once it is implemented; or the alternative approach, though nominally more efficient, may create separate problems (for example, it may have an especially deleterious effect on small businesses). Thus, enhanced public input in risk-management determinations is not intended as a panacea designed to eradicate regulatory divergence but rather as a mechanism for ascertaining the true public risk tolerance and for ensuring that agencies take this information into account when contemplating whether achieving enhanced regulatory convergence is feasible or desirable. Public input, therefore, both promotes greater responsiveness on the part of agencies and depoliticizes the risk-management process, diminishing the likelihood that bureaucrats’ political preferences or rent-seeking activities by regulated firms will control the final outcome.

In the event that an agency’s outreach efforts produce evidence justifying a revision to underlying regulations and the agency fails to act, the challenging party may either cite this evidence to Congress if a statutory amendment is required or file a petition for rulemaking relying upon the evidence. Given the numerous factors beyond public risk tolerance that may affect an agency’s decisionmaking, a court reviewing denial of a petition for rulemaking should tender a high degree of deference to the agency’s determination.⁸⁰ Nevertheless, if the agency can offer no compelling evidence justifying its decision to act in a manner contrary to public risk preferences, then a court may ultimately set

80. See Eric Biber, *Two Sides of the Same Coin: Judicial Review of Administrative Agency Action and Inaction*, 26 VA. ENVTL. L.J. 461, 467–69 (2008) (concluding that judicial deference is particularly appropriate when courts are determining whether an agency properly allocated its regulatory resources).

aside the rejection of such a petition as “arbitrary and capricious.”⁸¹ Though successful challenges would likely be somewhat rare given the high degree of deference accorded to agency dispositions of petitions for rulemaking,⁸² the existence of such a mechanism for challenging agency determinations would presumably provide a strong incentive for agencies to attempt to ascertain the true public risk tolerance initially.

Finally, as in the risk-assessment arena, this set of procedures could theoretically be invoked outside of the international regulatory cooperation context. Regulations may underprotect or overprotect the general public in light of true risk preferences regardless of whether they differ from those prevailing overseas. Examining the broader application of this process is beyond the scope of this article. Though a more widespread use of the aforementioned methodology in risk-management decisions may ultimately prove viable, it is particularly appropriate in the international regulatory cooperation context because the existence of a regulatory divergence between developed nations suggests that reasonable alternative approaches exist.

III

POTENTIAL OBJECTIONS AND RESPONSES

International regulatory cooperation initiatives almost universally disavow any interest in eroding existing regulatory protections. Yet pro-regulatory groups have expressed concern that such efforts will, in practice, precipitate a “race to the bottom” wherein trading partners agree to adopt the least trade-restrictive alternative, even if it provides scant protection for the overall public welfare.⁸³ In addition, efforts to promote international regulatory convergence within the United States may be minimally effective or, worse, counterproductive if regulators in major trading partners do not reciprocate. Finally, the procedures for identifying unnecessary regulatory divergences highlighted in the previous part are not costless endeavors, and the contemplated reforms may impose a financial burden on agencies. This part addresses each of these potential objections in turn.

81. 5 U.S.C. § 706(2)(A).

82. *Massachusetts v. EPA*, 549 U.S. 497, 527–28 (2007).

83. See, e.g., David Hunter, *Executive Order Embraces International Regulatory Race to the Bottom as Official Administration Policy*, CPRBLOG (May 2, 2012), <http://progressivereform.org/CPRBlog.cfm?idBlog=0F52AD3D-CB5E-DB59-373FC982EEFE109C>.

The priority for regulators is clear. Scour our regulations and compare them to those of our trading partners . . . to identify those areas of ‘unnecessary’ differences. What then? Eliminate the differences by rewriting U.S. regulations to those of our trading partners, so many of whom have terrible worker safety and environmental policies . . .

Id.; Jessica Randall, *International Regulatory Cooperation: Will Harmonization Protect the Public or Prioritize Corporate Profits?*, THE FINE PRINT (May 3, 2012), <http://www.foreffectivegov.org/node/12071> (“[T]oo often, international regulatory cooperation becomes a race to the bottom, elevating corporate trade concerns over public protections.”).

A. Potential Pro-Industry Bias of International Regulatory Cooperation

Each of the contemplated mechanisms for improving international regulatory cooperation explored in part II is designed to be objective: the Federal Advisory Committee Act mandates that scientific peer review boards commissioned by federal agencies be balanced,⁸⁴ and agencies should structure programs designed to ascertain public preferences on risk-management issues in a way that ensures the public's access to relevant information representing all credible points of view on a particular regulatory problem. The decision-making processes of either professional or lay advisory groups or of public commenters should not be inherently biased in a pro- or antiregulatory direction. Nevertheless, the proposed reforms rely upon private parties to initiate the process of scrutinizing existing regulations, and industry groups may have stronger incentives to exploit these mechanisms than would public interest or other pro-regulatory organizations.⁸⁵ Though industry- or public-interest-initiated examinations of existing regulations may enjoy roughly equal probabilities of success, industry groups may simply bring more challenges.

Even accepting the premise that industry groups will be more capable of marshalling resources to initiate reviews of existing regulations, agencies can nevertheless structure the proceedings to ensure that corporate interests do not dominate the process. First, at least for challenges to historical regulatory divergences and prevailing risk assessments, the agency might stipulate that any regulatory alternative adopted must prove at least as protective as that it replaces. Indeed, many of the proposals for enhanced international regulatory cooperation have done precisely this. For instance, Administrative Conference Recommendation 2011-6 provides that agencies should pursue cooperation only “when doing so does not detract from their missions.”⁸⁶ In the risk-management arena, an agency may ultimately adopt a regulation providing weaker public protection, but it would do so only in light of evidence that the public is willing to tolerate a higher level of risk than the preexisting regime allowed.

Second, regulatory agencies themselves are explicitly tasked with protecting the public welfare,⁸⁷ and they would therefore have an incentive to ensure that a scientific or citizen advisory committee or public commenters had access to all relevant information supporting the prevailing state of affairs in the face of an industry challenge to an existing regulation.

Third and finally, public interest groups and other nonprofit organizations

84. See 5 U.S.C. App. § 5(b)(2) (requiring that membership of federal advisory committees “be fairly balanced in terms of the points of view represented and the functions to be performed”).

85. See WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON STATUTORY INTERPRETATION* 56–60 (2012) (demonstrating how special interests that experience concentrated effects—either positive or negative—as a result of legislative activity are more likely to lobby lawmakers than are interests that experience diffuse effects).

86. Administrative Conference of the United States, Recommendation 2011-6, International Regulatory Cooperation, ¶ 1, 77 Fed. Reg. 2257, 2260 (Jan. 17, 2012).

87. Richard B. Stewart, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. REV. 437, 440–41 (2003).

that are capable of pooling resources and advocating positions that regulatory beneficiaries might not otherwise defend⁸⁸ will undoubtedly seek enhanced regulatory convergence in contexts in which key trading partners provide stronger regulatory protections, for example, European environmental or labor laws.⁸⁹ The costs of merely filing a comment urging an agency to examine a particular regulatory disparity are likely to be minimal and well within the means of most public interest groups. If the comment prompts the agency to convene an expert or citizen advisory committee, the agency might employ a “superfund” mechanism that would cover the costs for public interest initiated challenges, as explored in part II.D.

B. Potential for Unreciprocated Regulatory Reform

The various mechanisms described in part II focus exclusively on spurring U.S. agencies to pursue enhanced regulatory convergence. In theory, U.S. entities (and even foreign entities) may exploit these procedures to remove unnecessary trade barriers in the United States while regulators in other trading partners merely maintain their preexisting approaches. At least at a superficial level, this unilateral act of largesse would ostensibly place the United States at a disadvantage vis-à-vis its trading partners. Closer analysis, however, suggests that even such an unreciprocated act of regulatory convergence might provide competitive benefits for the U.S. economy.⁹⁰ Such actions would undoubtedly increase costs for regulators, who must invest resources in amending the relevant rules, and for businesses that must alter their activities in order to comply with the new regime. Nonetheless, they also would create new opportunities for U.S. firms, whose exported products would now comply with regulations prevailing in key trading partners, and for consumers, who would enjoy expanded access to imported products. In this sense, the case for enhanced regulatory convergence resembles that for decreased tariffs: some economists have contended that the costs to protected industries of unilaterally revoking tariffs are far exceeded by the benefits to other industries and consumers (even if other nations retain their tariffs in full force).⁹¹

Nevertheless, if the United States can win similar concessions among trading partners by demanding reciprocity prior to erecting such a program for achieving regulatory convergence domestically, it should do so—for example,

88. See, e.g., William N. Eskridge, Jr., *Politics without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 304–05 (1988) (explaining how public interest groups can overcome collective action problems in private litigation).

89. David Marsden, *Labor Institutions, Risk Sharing, and Wage Inequality: A Comment on Blau and Kahn*, 23 COMP. LAB. L. & POL’Y J. 1063, 1065 (2002) (recounting an argument that U.S. “labor institutions are less interventionist” than their European counterparts); Wiener, *supra* note 15, at 213–14 (noting that U.S. environmental laws are popularly perceived as weaker than their European counterparts).

90. See HAZLITT, *supra* note 11, at 80–84 (noting that unilateral tariff reduction can provide economic benefits even if it goes unreciprocated).

91. TIM HARFORD, *THE UNDERCOVER ECONOMIST* 223 (2012).

by only permitting challenges to regulations that differ from those in nations that have adopted similar mechanisms for reviewing their regulations. If successful, the United States would create opportunities for evangelizing the principles undergirding the U.S. regulatory system⁹² and open new markets for U.S. firms. Indeed, the negotiations connected with the Transatlantic Trade and Investment Partnership (TTIP) have sought to establish formal mechanisms by which all parties to the agreement will implement reforms aimed at promoting regulatory convergence or intercompatibility,⁹³ and U.S. negotiators should seek similar concessions wherever possible.

C. Possible Costs for Agencies

The reforms described in part II could create considerable costs for agencies. Though the expense of operating advisory committees can be minimized through use of modern technologies such as video-conferencing and web discussion boards, the agency would still face nontrivial costs in convening both expert and citizen committees, particularly in the initial aftermath of enacting the proposed reforms.⁹⁴ Nevertheless, any expenditures associated with reassessing *existing* regulations for unnecessary international disparities would partially be offset, if not eclipsed, by savings arising from enhanced international coordination in enacting *new* regulations. In the risk-assessment arena, U.S. agencies occasionally duplicate analysis performed by private groups and by fully competent experts overseas; promoting greater coordination would allow agencies to husband resources by leveraging expertise residing in the private sector, relying upon the work of trusted foreign counterparts, and dividing responsibility with such overseas experts when undertaking an analysis in the first instance.⁹⁵

Absent an empirical analysis of the pecuniary costs and savings that enhanced international regulatory cooperation efforts may bring to agencies, it is impossible to determine whether the former would exceed the latter. If the expenses prove overly ponderous, as explored earlier, the agency might consider implementing a “superfund” program whereby fees collected in connection with challenges by well-funded parties serve to cover the agency’s costs and subsidize challenges by less affluent entities.

92. See Administrative Conference of the United States, Recommendation 2011-6, International Regulatory Cooperation, ¶ 8, 77 Fed. Reg. 2257, 2261 (Jan. 17, 2012) (“Agencies should promote to foreign authorities the principles that undergird the United States administrative and regulatory process . . .”).

93. Schlosser & Bull, *supra* note 25.

94. Bull, *supra* note 75, at 653.

95. See Administrative Conference of the United States, Recommendation 2011-6, International Regulatory Cooperation, ¶ 4, 77 Fed. Reg. 2257, 2260 (Jan. 17, 2012).

To deploy limited resources more effectively, agencies should, where appropriate and practicable, identify foreign authorities that maintain high quality and effective standards and practices and identify areas in which the tests, inspections, or certifications by agencies and such foreign agencies overlap.

Id.

IV CONCLUSION

In an era characterized by rapid technological change creating increasingly seamless cross-border connections and the concomitant globalization of every aspect of business in the private sector, the insular regulatory regimes that prevail in most modern states have become anachronistic. At the same time, efforts at global governance have largely failed, partly as a result of residual commitments to national sovereignty and partly as a consequence of the challenges of erecting a supernational governing entity. The challenges stem from the difficulty in coordinating various international actors while still preserving the ability of nation-states and smaller jurisdictions to respond to local concerns. Further, it is hardly beyond cavil that such a system of global governance is normatively desirable: as F.A. Hayek and other Austrian School economists have contended, centralized, bureaucratic solutions are generally suboptimal insofar as they stifle the remarkable efficiencies that arise from a decentralized process that aggregates the various pieces of relevant information otherwise dispersed throughout the broader society.

This article constructs a decentralized approach to international regulatory cooperation by exploring mechanisms for capturing the knowledge of nongovernmental experts and even everyday citizens in conducting robust risk assessments and accurately gauging the public risk tolerance. The existence of a major disparity between the regulatory approach adopted by the United States and that of one or more of its key trading partners should alert regulators to a potentially unnecessary divergence, and the mechanisms explored in this article should help ensure that any disparities that persist are fully justified on the basis of sound science and overall societal risk tolerance. Achieving complete convergence is neither feasible nor desirable—the sovereign people in a modern democracy will often choose a somewhat different balance between market freedom and regulatory protection than that prevailing in sister states. Yet the countless benefits of regulatory convergence across borders provide a powerful incentive for modern states to develop mechanisms that ensure any residual disparities are fully justified.