Peter Mumford

Regulatory Coherence
blending trade and regulatory policy

Regulatory coherence has over the past four years become a term of art for domestic regulatory systems which interface seamlessly with the systems of other countries. And yet a precise or at least agreed definition remains elusive and descriptions often confuse ends and means. This article sets out to provide greater clarity, and in doing so illustrates that regulatory coherence can be thought of as both an 'end' (regulation that supports international trade and investment) and a 'means' (good regulatory practice). The adoption by countries of regulatory coherence objectives and practices increasingly blends trade and domestic regulatory policy.

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'Behind the border' barriers – the new frontier for trade policy?

For those of us who have been involved in negotiating international agreements in areas as diverse as technical barriers to trade (TBTs), services regulation, intellectual property and competition policy, the idea that 'behind the border barriers' to trade is the new frontier for trade policy is unsurprising. What has been discussed and agreed in international forums has for a long time had implications for domestic regulatory policy settings. Notwithstanding this, there are now a large number of reports which highlight the importance of 'behind the border' regulatory barriers to trade, relative to 'traditional' barriers, and in particular tariffs. The following passage is representative:[1]

> As much as 80 percent of the total potential gains from the TTIP [Transatlantic Trade and Investment Partnership] would

come from cutting costs that arise from administrative procedures and divergent regulations (so-called non-tariff barriers or NTBs), as well as from liberalising trade in services and public procurement. Although tariffs between the US and the EU are already low (on average 4 percent), the cost of dealing with unnecessary bureaucracy can add a tariff-equivalent of 10–20 percent to the price of goods. (Karmakar, 2013, p.2)

A number of factors are contributing to this 'behind the border' narrative, with two having particularly important effects. The first is that tariff barriers have come down very significantly for most traded goods in most major markets,

domestic regulation on global business operations, including value chains. In recent years this 'voice' has used the term 'regulatory coherence' as an expression of what it wants.

There are concerns that this 'business-centric' impetus will result in the interests of businesses, and in particular large international businesses, being put ahead of broader social, economic or environmental objectives in the design of new laws, and this 'contrary voice' has also expressed its concerns in the language of regulatory coherence (Kelsey, 2013). Advocates for regulatory coherence have pushed back at this concern, arguing that the objective is efficient and effective regulation which is good for consumers as well as business, and neither the right of countries to regulate nor important

and Transatlantic Trade and Investment Partnership (TTIP), and in international forums such as the Asia Pacific Economic Community (APEC). It is also used in the Bipartisan Congressional Trade Priorities Act of 2014 which is currently before the United States Congress and which proposes a new set of negotiating objectives for the Trade Promotion Authority (TPA – the power granted to the US president to negotiate international agreements). If one assumes that the bill is a product of intensive engagement between multiple parties in Washington over a period of time (and which spill over into US trade discussions and forums such as APEC), then the increasing prominence of the term becomes explicable.

However, within the literature on regulatory coherence the various descriptions are somewhat mixed. For example, there is a confusion of 'ends', such as lower regulatory costs for businesses operating across borders, and the means to achieve these ends, such as harmonised standards. In addition, some descriptions focus on cooperation between states to achieve regulatory coherence, and others on the improvement of regulation and regulatory processes within states. The following is an example that combines many of these elements:

> **With a view to providing clarity, New Zealand has articulated an outcome-based description which grounds regulatory coherence firmly at the interface between domestic regulation and international trade and investment liberalisation.**

which makes other barriers both more obvious and more material (constituting a relatively higher proportion of the cost of goods). The second is that the growth of both global value chains and services trade is exposing a broader range of domestic regulatory barriers. For example, occupational regulation is becoming a constraint on cross-border services exports, and international firms which operate in more than one country (the implication of locating different parts of the value chain in different countries) develop a keen interest in both the quality and 'interoperability' of domestic laws and institutions that affect both their global and domestic business operations.

The practical implication of this is that firms, and those who represent business, are using their 'voice' to argue that more attention should be given to 'behind the border' barriers to trade, or, to be absolutely clear, the effect of

objectives in areas such as health, safety and the environment will be compromised (Clancy, 2013).

Are 'behind the border barriers' and their expression in the goal of regulatory coherence the new frontier of trade policy? There is certainly a view that this is the case.

Regulatory coherence defined

Regulatory coherence in a trade context is relatively recent. For example, prior to 2010 the main references to it in Google Scholar, such as they were, were in the context of coherence between multiple levels of government (in federal systems) and 'policy coherence': for example, the alignment of domestic agencies and laws with a national regulatory reform objective. This changed in 2010–11, and the probable reason for this is that the term started to be used in relation to major trade negotiations, and in particular the Trans-Pacific Partnership (TPP)

> Regulatory coherence is not about less regulation nor is it about more regulation. It is about improving the process by which APEC economies develop regulations, generate best practices, and find common acceptable standards and timings in which to implement them. It doesn't require loss of regulatory power or sovereignty. It results in more effective regulation that does not distort markets. Regulatory coherence fosters an optimal regulatory environment that allows the market to be more open, competitive, and innovative. (National Center for APEC and APEC Business Advisory Council, 2012, p.1)

With a view to providing clarity, New Zealand has articulated an outcome-based description which grounds regulatory coherence firmly at the interface between

domestic regulation and international trade and investment liberalisation. In doing so, it reiterates that regulatory coherence is as much to do with what countries do internally, as what happens between countries.[2]

Regulatory coherence requires a multidimensional strategy that has the following interrelated elements:

a. *Coherence between domestic and international policy goals.* When developing domestic regulatory policies that may have an impact on trade and investment, these impacts should be identified and taken into account as part of the policy process.

b. *Coherence between domestic laws and agencies.* In situations where a number of domestic regulatory agencies all deal with the same trade or investment transaction – for example, a good or service that must comply with multiple laws and be dealt with by multiple regulatory agencies – a consistent and efficient approach is taken.

c. *Coherence between the laws and agencies of two or more economies.* The third element is generally known as regulatory cooperation. It reflects the goal of reducing the regulatory barriers to trade and investment created by different laws in different countries through cooperation between economies.

There are two main explanations for the apparent lack of 'coherence' in descriptions of regulatory coherence. The first is that different businesses have different experiences in the international trading environment, reflecting different markets, goods and services, and locations in value chains. One business might find that it has to deal with a lot of red tape in a market and would like fewer and more certain procedures. Another might find that its product is having to meet different standards in multiple markets and would like greater standardisation. Some may experience issues with border controls; others with migration requirements. Businesses, markets and regulatory regimes are highly heterogeneous, and hence so are the issues of concern to business. And business generally focuses on ends, not means.

The second reason emerges from public policy, or, to be specific, the public policy responses to the issues raised by business. Relative to business, public policy focuses as much on means as on ends, and in relation to ends has a broader set of objectives. For example, businesses may seek global standards, as this makes it easier for them to do business. Public policy must have regard to the broader purposes of standards, such as health, safety and environmental outcomes. It is not unnatural for businesses to give primacy to business impacts, whereas public policy will treat such impacts as one factor among the mix that need to be taken into account.

Different governments will also focus on different public policy prescriptions,

depending on where they think the main pressure points are, and their assessment of what is within the art of the possible. For example, one government might at a particular point in time focus on customs facilitation, while another will seek to reduce the costs of doing business within the country or on improving consultation.

Notwithstanding the complexity which arises out of the different ways in which goals are framed and the heterogeneity of ambitions and experiences, it is possible to describe some common elements, and to illustrate through these an increased blending of trade policy and mechanisms to ensure the quality of domestic regulation (regulatory management).

The domestic context – good regulatory practice

The dominant approach to regulatory management in domestic jurisdictions

has its genesis in the work of the OECD in the 1990s, commencing with the 1995 OECD Recommendation on Improving the Quality of Government Regulation and followed by the 1997 OECD Policy Recommendations on Regulatory Reform. The centerpiece of regulatory management was regulatory impact analysis (RIA), a systematic approach to the development of regulation. The US was the first mover, and the OECD's approach to regulatory management was based on the US model. New Zealand was an early follower when it implemented an RIA regime in the late 1990s. Today, most OECD countries have implemented RIA regimes, along with other elements of regulatory management.

The process of diffusion continued

through APEC in particular, with a key initiative being the 2005 APEC–OECD Integrated Checklist on Regulatory Reform, and now some non-OECD APEC economies have implemented regulatory management practices, including regulatory impact analysis. The OECD has also continued both to refine its approach to regulatory management and its advocacy. Initiatives include the 2005 OECD Guidelines for Regulatory Quality and Performance, and, most recently, the 2012 OECD Recommendation on Regulatory Policy and Governance. In 2011 APEC leaders committed to taking 'specific steps by 2013 to implement good regulatory practices in our economies, including by ensuring internal coordination of regulatory work; assessing regulatory impacts; and conducting public consultation'.[3] APEC's 2014 *Economic Policy Report* will focus on good regulatory practices.

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Evolutions or adaptations have also taken place within countries. In New Zealand these have included scanning and planning, best regulatory practice principles and performance indicators, and, more recently, stewardship requirements.[4]

At the most basic level, regulatory management requires countries to maintain robust and transparent processes and supporting governance arrangements (such as clear government expectations and oversight bodies) to provide an assurance that both new and existing regulation is efficient and effective. Regulatory impact analysis is a key feature of regulatory management and incorporates other features such as evidence-based policy, effective consultation, and risk and cost-benefit analysis. Collectively the strategies and tools for regulatory management are known as good regulatory practice (GRP).

Good regulatory practice in an international context

Partial elements of GRP can be found in existing international agreements. For example, the World Trade Organization (WTO) Agreement on Technical Barriers to Trade includes a provision that:

> technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfillment would create. … In assessing such risks, relevant elements of consideration are, *inter alia*: available scientific and technical information, related processing technology or intended end-uses of products. (Article 2.2)

Elements of GRP can also be found in the domestic regulation provisions in the WTO General Agreement on Trade in Services, including the following:

> With a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in

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RISs will normally contain:
- A description of existing arrangements and the status quo (base case in the absence of further government intervention);
- A problem definition;
- Objectives;
- Options: identification of the full range of practical options;
- An impact analysis: analysis of the costs (or possible economic losses), benefits and risks of options, with quantification (to the extent possible);
- Consultation undertaken;
- Conclusions and recommendations;
- Implementation plans and risks;
- Likely levels of compliance and enforcement; and
- Arrangements for monitoring, evaluation and review

(drawn from NZ CabGuide)

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services, the Council for Trade in Services shall, through appropriate bodies it may establish, develop any necessary disciplines. Such disciplines shall aim to ensure that such requirements are, *inter alia*:

> (a) based on objective and transparent criteria, such as competence and the ability to supply the service;
> (b) not more burdensome than necessary to ensure the quality of the service;
> (c) in the case of licensing procedures, not in themselves a restriction on the supply of the service. (Article VI (4))

Until such time as these disciplines are developed, WTO parties are required to observe such requirements, to the extent that could be reasonably expected, in a way that does not nullify or impair market access commitments made under the agreement (article VI (5a)).

Such provisions, with their emphasis on least-cost regulation and evidence-based policy, are features of GRP but do not represent a complete system. In fact, one commentator has noted: 'In practice, however, the objectives of domestic regulation and international trade have been difficult to reconcile. WTO rules are effective in limiting discriminatory regulatory measures, but have done little to eliminate the inefficient, unclear, redundant but non-discriminatory regulations that hinder international trade' (Bollyky, 2012, p.173).

There are at least two known examples of more comprehensive GRP provisions in regional and bilateral contexts:[5]

- The 1996 Trans-Tasman Mutual Recognition Arrangement (TTMRA), which provides that: 'Standards for Goods and Occupations may be determined by Ministerial Councils under the terms of the Arrangement. Such determinations will be governed by the *Principles and Guidelines for Standard Setting and Regulatory Action by Ministerial Councils and Standard-Setting Bodies* endorsed by the Council of Australian Governments in April 1995.' These are in effect GRP guidelines.
- The introduction of an RIA regime for European Union legislation in 2002.

The TTMRA, as an arrangement within the framework of the Australia–New Zealand Closer Economic Relations Trade Agreement (CER), and the European Union RIA requirement can be regarded as special cases, as CER and the EU are the most comprehensive economic partnerships in the world.

The proposition in this article is that GRP is assuming more prominence in trade policy generally as a means of achieving regulatory coherence.[6] Currently, the clearest evidence of this can be found in the report of the United States–European Union High Level Working Group on Jobs and Growth, which set the scene for the Transatlantic Trade and Investment Partnership currently being negotiated, and the Bipartisan Congressional Trade

Priorities Act of 2014, containing the principal negotiating objectives for the United States in the context of the Trade Promotion Authority. The current TPA, given to the president pursuant to the Bipartisan Congressional Trade Priorities Act of 2002, has expired, and the 2014 act has not yet passed, but the negotiating objectives in the latter will nonetheless be significant in congressional consideration of the TPP and in the development of the TTIP.

In a section on regulatory issues and non-tariff barriers, the High Level Working Group notes that:

> A significant portion of the benefit of a potential transatlantic agreement turns on the ability of the United States and EU to pursue new and innovative approaches to reduce the adverse impact on trade and investment of non-tariff barriers, with the aim of moving progressively toward a more integrated transatlantic marketplace.

It recommends that the two sides should seek to negotiate (inter alia):

> Cross-cutting disciplines on regulatory coherence and transparency for the development and implementation of efficient, cost-effective, and more compatible regulations for goods and services, including early consultations on significant regulations, use of impact assessments, periodic review of existing regulatory measures, and application of good regulatory practices. (High Level Working Group on Jobs and Growth, 2013)

In fact, the Council of the European Union's 'Directives for the negotiation on the Transatlantic Trade and Investment Partnership' has recently been declassified, and in the section on regulatory coherence confirms that:

> The Agreement will include cross-cutting disciplines on regulatory coherence and transparency for the development and implementation of efficient, cost-effective, and more

Bipartisan Trade Promotion Authority Act of 2002 (US Code 3802)	Bipartisan Congressional Trade Priorities Act of 2014 (HR 3830), pp.19-21
REGULATORY PRACTICES – The principal negotiating objectives of the United States regarding the use of government regulation or other practices by foreign governments to provide a competitive advantage to their domestic producers, service providers, or investors and thereby reduce market access for United States goods, services, and investments are – (a) to achieve increased transparency and opportunity for the participation of affected parties in the development of regulations; (b) to require that proposed regulations be based on sound science, cost-benefit analysis, risk assessment, or other objective evidence; (c) to establish consultative mechanisms among parties to trade agreements to promote increased transparency in developing guidelines, rules, regulations, and laws for government procurement and other regulatory regimes	REGULATORY PRACTICES – The principal negotiating objectives of the United States regarding the use of government regulation or other practices to reduce market access for United States goods, services, and investments are – (a) to achieve increased transparency and opportunity for the participation of affected parties in the development of regulations; (b) to require that proposed regulations be based on sound science, cost-benefit analysis, risk assessment, or other objective evidence; (c) to establish consultative mechanisms and seek other commitments, as appropriate, to improve regulatory practices and promote increased regulatory coherence, including through — (i) transparency in developing guidelines, rules, regulations, and laws for government procurement and other regulatory regimes; (ii) the elimination of redundancies in testing and certification; (iii) early consultations on significant regulations; (iv) the use of impact assessments; (v) the periodic review of existing regulatory measures; and (vi) the application of good regulatory practices; (d) to seek greater openness, transparency, and convergence of standards-development processes, and enhance cooperation on standards issues globally; (e) to promote regulatory compatibility through harmonization, equivalence, or mutual recognition of different regulations and standards and to encourage the use of international and interoperable standards, as appropriate
compatible regulations for goods and services, including early consultations on significant regulations, use of impact assessments, evaluations,	periodic review of existing regulatory measures, and application of good regulatory practices.[7]

In the case of the US, if we compare the 2002 and 2014 acts it can be seen that in the corresponding sections on regulatory practices, paragraph C in particular has significantly elaborated on the scope of good regulatory practices (as well as including a catch-all 'good regulatory practices' clause). Notable in both the EU documents and the 2014 act are references to the use of impact assessments and reviews of existing regulation.

The relationship between GRP and regulatory cooperation

GRP in the form of regulatory impact analysis and reviews of existing regulation, with its associated elements such as risk and cost-benefit analysis, evidence-based policy, transparency and consultation, is not, of course, the only pathway to regulatory coherence. Regulatory cooperation, which can take the form of harmonisation, mutual recognition, equivalence, cooperation between regulators, policy coordination and unilateral alignment or recognition of standards that apply in other countries, is a familiar approach which deals explicitly with differences between the regulatory requirements of different countries (and echoes paragraph (E) in the Bipartisan Congressional Trade Priorities Act of 2014). One commentator has described the relationship as follows:

Regulatory coherence is likely to consist of a number of mechanisms, including mutual recognition agreements in which officials on each side agree to accept products or services for the other side based on a 'tested once' criterion of specific sectors and products. Where harmonization or mutual recognition of existing regulations and standards cannot be achieved, then the TTIP seeks to create other forward-looking mechanisms to head off conflicts, including early consultations, impact assessments and regulatory reviews. (Hamilton, 2014, p.93)

Hamilton may be correct that GRP elements such as consultations, impact assessments and regulatory reviews are sometimes seen as an easier alternative to formal regulatory cooperation such as harmonisation and mutual recognition. However, it is equally plausible that GRP is an end in itself. Specifically, the benefits of GRP in a trade policy context can accrue from:

- more effective and efficient domestic regulatory systems: i.e. systems that achieve their primary objectives while keeping regulatory costs as low as possible;
- assessments of both new regulatory proposals and existing regulation that explicitly take trade openness objectives into account (Morrall, 2011) and consider options that facilitate trade; these could include the unilateral adoption of international standards or standards that are commonly used in international trade, or provision for formal cooperation mechanisms;
- more consultative processes for the development of new regulation or the review of existing regulation, which means that interested groups in other countries can participate and bring their perspectives to bear in what are normally domestic policy processes;
- greater transparency and engagement by regulators, which may result in better trust and understanding between regulators of the same goods or services in different jurisdictions of the regulatory approach taken by the other, paving the way for greater cooperation, acceptance of the standards that apply in the other jurisdiction, and potentially 'mutual recognition of compatible regulatory regimes' (ibid, p.i);[8]
- greater transparency and certainty for those wishing to enter or operating in a market about the regulatory requirements they face (von Lamp and Jeong, 2013).

Conclusion

Regulatory coherence has become a term of art for domestic regulatory systems which interface as seamlessly as possible with the systems of other countries, but what it means in practice can only really be understood with reference to the practices that accompany it. Some of these are common features of trade policy agendas, such as regulatory cooperation, transparency and the adoption of least trade restrictive regulatory measures. Others are less known in trade policy contexts, but are commonly adopted as elements of domestic regulatory management. These can be grouped under the general heading of good regulatory practice. A particularly significant element is regulatory impact analysis, with systematic reviews of existing regulation emerging as a new element with equal significance.

Good regulatory practice has been promoted in international forums such as APEC for some time, but, with a limited number of exceptions, it has not been formally part of trade policy agendas. This is now changing. It is less clear where this will end up. Will there be joint trans-national regulatory impact analysis as recommended by one commentator in a TTIP context (Morrall, 2011), or will GRP retain its current status as 'best practice' rather than being formally mandated in trade agreements?

In my view, GRP is likely to retain its status as best practice, with a strong normative presumption that modern regulatory states embed GRP, including regulatory impact analysis and reviews of existing regulation, in their regulatory management systems. However, it is also likely that regulatory coherence as an outcome will become a more explicit objective when countries examine the impacts of new regulatory proposals and existing regulation, and the regulatory impact analysis process, which is inherently public, will make these impacts more transparent.

1 It should be noted that regulation may be excessive at the national level with commensurate costs to those who trade within those markets. However, regulation can be efficient at the national level but still impose costs for firms operating across multiple markets simply because the requirements they need to meet are different.
2 This definition was first presented at an APEC workshop on regulatory coherence (Moscow, 2012) and is now incorporated into a guide being developed by the Ministry of Business, Innovation and Employment on 'Regulatory co-operation in APEC within the framework of FTAs'.
3 The Honolulu Declaration: Toward a Seamless Regional Economy, http://www.apec.org/Meeting-Papers/Leaders-Declarations/2011/2011_aelm.aspx.
4 See http://www.treasury.govt.nz/economy/regulation.
5 The Agreement between New Zealand and the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu on Economic Cooperation has an objective to: 'encourage the use of good regulatory practices (as set out in Annex D ("Strengthening Implementation of Good Regulatory

Practices") of the 2011 APEC Leaders' Declaration) for the planning, design, implementation and review of regulation" (article. 2.f).

6 In addition to the examples used here, there are also interesting regulatory coherence-related developments in Latin America. There are outlined in Romero (2014).

7 http://www.access-info.org/documents/Access_Docs/ Advancing/EU/ST_11103_2013_DCL_1_EN.pdf, downloaded 20 October 2014.

8 Hoekman has, however, noted: 'While such processes [consultation and information exchanges in relation to new regulatory measures] are important to building trust and understanding of the operation of counterpart regulatory processes and norms, their effect in lowering trade costs may be limited' (Hoekman, 2013, p.29), suggesting that

something in addition is required, such as using a supply chain approach to look across regulatory areas to identify the package of feasible measures that can be taken to facilitate trade and investment. That being said, the evidence for Hoekman's conclusion on limited impacts was drawn from the EU-US experience and may be different for other jurisdictions.

Acknowledgements

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Upcoming Events

Date	Title	Speaker	Venue
Monday 1 December 12.30pm – 1.30pm	Comparative Situations of Maori and First Nations in the US	Professor Alan Parker Director, Northwest Indian Applied Research Institute	Victoria University of Wellington, Pipitea Campus, Old Government Buildings (Law School) GBLT2 All Welcome – No RSVP's required
Tuesday 2 December 5.30pm – 7.00pm	Adding Public Value at the Interface Between Government and the Community: Achieving a strong customer and client focus	John Benington Emeritus Professor, Warwick Business School	*Russell McVeagh Boardroom* RSVP Essential*
Wednesday 3 December 12pm – 1.45pm	Public Managers and Political Astuteness: Lessons for the New Zealand State sector	Professor Jean Hartley Department of Public Leadership and Social Enterprise, The Open University	*Rydges Hotel 75 Featherston Street, Wellington* RSVP Essential*

*RSVP's can be sent to igps@vuw.ac.nz

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