The Transatlantic Trade and Investment Partnership (TTIP) and the Comprehensive Economic and Trade Agreement (CETA) contain unprecedented commitments to regulatory cooperation—the hallmark of a new wave of free trade agreements that emphasizes non-tariff barriers to trade. Regulatory cooperation in its most ambitious form, harmonization, is the presumed gold standard for the EU’s free trade agreements (FTAs) with Canada and the US. However, harmonization is not an obvious policy choice given that empirically and normatively there is no self-evident evolution from the creation of uniform standards to harmonization, which seeks to eliminate differences between regulatory standards on grounds of economic efficiency. Harmonization is laden with theoretical and normative assumptions as we explore here. And harmonization is itself a powerful background assumption, one that ought to give us pause as the first best policy option in regulatory cooperation negotiations. An alternative path, as we suggest, is to treat harmonization as a conditional rather than categorical imperative in the new generation of FTAs.

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There is a well-known hierarchy of regulatory cooperation from regulatory dialogue and exchange of information, to mutual recognition and equivalence, to harmonization. Harmonization is presumed to be the ultimate and most desirable outcome because it purportedly improves efficiency by reducing barriers to trade and thus better facilitates the flow of goods and services. The push for harmonization in trade originated in the early days of the General Agreement on Tariffs and Trade and its inquiry into non-tariff barriers. The result was the Technical Barriers to Trade Agreement in 1995, which asked countries to harmonize their standards with those that were internationally agreed upon, where available. Yet harmonization at the multilateral level is highly challenging for a number of (self-evident) reasons and so developed countries have sought to harmonize in a bilateral capacity. The most well known case is the North American Free Trade Agreement (NAFTA) and the recent reincarnations in the TTIP and CETA agreements have attracted significant controversy to this end. While difficult to implement, the harmonization imperative is now deeply ingrained and stands as the preeminent goal when negotiating international trade agreements.

In many respects harmonization is an obvious solution to a variety of cooperation and standardization problems, an obligation that is especially salient within the natural sciences. Historically, standardization was a serious hurdle faced by many scientific disciplines. For example, in order to conduct clinical trials on newly developed drugs there first needed to be agreement on what constituted a ‘dose,’ so the effects measured were not attributed to variation in the amount administered. One relatively successful attempt to arrive at a stable dosage unit was developed in 1910 by two Americans searching for a standard method for testing digitalis. By administering small doses of foxglove to cats, and slowly increasing the amount until it proved fatal, the pharmacist could determine what constituted one ‘cat unit’.

Despite a continued evolution in dosage beyond the cat unit, harmonization standards have created the conditions for comparison and coordination across several areas beyond the natural sciences, including trade.

Why then should harmonization give us pause? The problems begin to arise and multiply as its justification shifts all too easily from the requirements of scientific communication to arguments for improving global trade. The International Standardization Organization currently stands as the largest international standard producing institution in the world, striving for global harmonization in measurement for units ranging from the ‘metre’ and the ‘second’ to ‘social responsibility’ and ‘water quality.’ With a membership of 162 countries, its mandate is to provide “technological know-how” for developing countries in order to “facilitate free and fair global trade.” Konishi et al., in a recent opinion piece, similarly assert that in the presence of varying definitions of ‘Flavoring Substances’ and regulatory standards between the US, EU, and Japan, harmonization will not only avoid “unnecessary additional testing” but also “foster

global trade.”  

The redundant testing can be understood as an obvious problem from a scientific standpoint, however, the suggestion that harmonization will lead to an increase in global trade is made without warrant and speaks to a curious lacuna that the harmonization imperative obscures.

Specifically, what underwrites this position is the long-standing assumption that regulatory cooperation will reduce barriers to trade, transaction costs and instances of price discrimination. These rationales are at the forefront of WTO agreements on non-tariff barriers and are embodied in the objectives of the Regulatory Cooperation (RC) chapters in TTIP and CETA. However, empirically there is a weak relationship between harmonization and trade. One study found that “good institutions” (i.e. those with efficient bureaucracies, strong property rights management, and low levels of corruption) are much more significant determinants of international trade levels than the degree of harmonization, while another found that infrastructure quality, labour force education, or political stability are much more influential factors than harmonization. While these findings might be subject to several methodological points of criticism, the normative and theoretical support for the harmonization imperative is even less secure.

Much of the recent work on harmonization takes its normativity for granted—the puzzle to be addressed by researchers today is what accounts for variation in attempts of policy convergence. This causal claim also stands as a tacit normative assumption that emerges alongside economic globalization; as economic interactions intensify, regulatory diversity arises as a problem to be solved with harmonization as the accepted solution. The normative assumption is that trade liberalization is the antithesis of protectionism, which comes at the cost of regulatory autonomy. And interestingly this logic is evident in the discernable shift in the European Commission (EC) to justify regulatory cooperation on the basis of protection of people and the environment, rather than economic efficiency, as evidenced by a recent memo.

Indeed, the EC has taken steps in TTIP (that it did not take in CETA) to safeguard its regulatory autonomy by inserting language on human, animal and environmental health and welfare protection into the chapter on regulatory cooperation. The chapter has

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articles on transparency and public participation (which CETA’s RC chapter does not have) and the EU’s revised proposal excludes the chapter from provisions of the dispute settlement mechanism. These revisions come on the heels of significant and sustained opposition both from within the European Parliament and non-governmental trade campaigners. Despite these reassurances from the EC, there remain competing sets of objectives (i.e. sufficient regulatory autonomy and regulatory cooperation, or economic efficiency and the protection of human, animal and environmental health) contained in both agreements. These competing sets of principles have been tested time and again in both formal and informal trade disputes among states and increasingly between states and investors. This is largely due to the significant latitude for interpretation in trade agreements and CETA is no different. For example, what constitutes informing parties “as soon as possible” of a restrictive measure, or “unnecessary divergences” in regulatory standards? This illustration reveals a shift in thinking about how to justify harmonization in the wake of resistance from a number of stakeholders on the grounds of regulatory autonomy.

Lacking empirical support, yet normatively valued by major players in the global economy, the harmonization imperative now hinges crucially on its theoretical justification. However, it is here that harmonization faces its most significant challenges. First, the concept of non-tariff barriers to trade (NTBs) stands as a residual category to which the same logic of tariff trade barriers is generally applied, with the assumption that these are functionally equivalent when it comes to increasing international trade. The problem arises in assuming that in both cases the absence of trade is the result of protectionism. Alternatively, for some types of NTBs, when shifting the focus from producers to consumers, there are several non-protectionist reasons for rejecting harmonization: (i) the cost of switching standards may be high; (ii) consumer tastes may be heterogeneous; and closely related to the second is that (iii) consumers may have non-economic reasons to prefer particular national standards (e.g. preferences for non-pasteurized milk). Since drawing protectionist conclusions when observing a lack of trade or harmonized standards vis-à-vis NTBs can lead to problematic conclusions, theoretically equating non-tariff and tariff trade barriers obscures these insights—indeed they are not the same and may require a different theoretical rationale.

Second, these non-economic reasons mentioned above extend beyond mere consumer preferences. Even if the positive effects of harmonization on trade were theoretically sound and empirically supported, policy-making is not merely a technical consideration, “but rests instead on deeply value-laden choices with respect to how a polity wishes to be governed, especially in an era when invention and progress demand the sacrifice of absolute certainty.” The trade benefits of harmonization must be weighed against these potential other non-economic costs to a state’s epistemic culture.

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(i.e. the difference between the US’ approach to risk-management versus the EU’s application of the ‘precautionary principle’).

Lastly, clarifying the distinction between \textit{ex post} and \textit{ex ante} harmonization, and the slippage between the two, frustrates the tacit imperative to adopt harmonization policies. Where \textit{ex post} harmonization has occurred as an unintended consequence, with attending benefits for international trade, this does not warrant the inference that \textit{ex ante} harmonization policies ought to be pursued. Majone makes this case by challenging the assumption underwriting \textit{ex ante} harmonization prescriptions that competition impedes cooperation.\textsuperscript{12} Instead of conceiving of them as antithetical they ought to be integrated, with the implication that \textit{ex post} harmonization may result from a variety of competitive processes rather than resulting from a top-down \textit{ex ante} approach.

NAFTA is an illustrative case of \textit{ex post} harmonization of sorts because the text of the agreement contained only a reference to the creation of a working group on standards-related measures. Today the members boast two decades of regulatory cooperation. However, the road has not been smooth, marked by disputes (like the US ban on Mexican avocados) and, at times, crises like the 2001 spate of potato wart or the 2003 outbreak of bovine spongiform encephalopathy (i.e. mad cow disease) in Canada. The Technical Working Group (TWG) on Pesticides aspires to be a “world model for common approaches to pesticide regulation and free trade in pesticides and food [...] while protecting human and environmental health [...]”\textsuperscript{13} Today, there are several high-profile pesticides accepted by the TWG that have attracted international controversy like neonicotinoids (an insecticide associated with declining bee populations) and glyphosate (the active ingredient in Roundup Ready and the centre of controversy about its potentially carcinogenic properties), and several Maximum Residue Levels have been changed to reflect new research. These issues beg questions about harm reduction and consumer protection given uncertainty around the long-term health implications of pesticide application. Given these theoretical challenges and coupled with its limited empirical support, it is entirely unobvious why harmonization stands as a categorical trade policy imperative when faced with regulatory diversity.

Despite these limitations the harmonization imperative continues, and the new generation of free trade agreements has placed regulatory cooperation on steroids in TTIP and CETA from the onset. While both agreements dedicate chapters to Regulatory Cooperation, CETA, which awaits ratification, has been the first concluded free trade negotiation with an RC chapter. CETA has high expectations to “minimise unnecessary divergences in regulations,” and the chapter contains explicit objectives to reduce differences in regulation through ongoing bilateral discussions and the establishment of a Regulatory Cooperation Forum.\textsuperscript{14} While NAFTA did not mention regulatory cooperation or convergence explicitly (and makes sparing references to harmonization and standardization), CETA’s RC chapter makes ample mention of these processes and has a

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\textsuperscript{12} Majone, 4–21.
\textsuperscript{14} Regulatory Cooperation chapter in CETA (see supra note 9).
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more explicit and complex proposed institutional arrangement. It remains to be seen if this chapter will become a model in other similar bilateral deals. While it is well recognized that harmonization is extremely difficult to achieve in practice, and CETA does not have a timeline for implementing its cooperation program, ambitious commitments remain subject to investor-dispute challenges, leaving the door open for significant losses both in terms of compensation to foreign investors and regulatory capacity.

Perhaps one might dismiss our critiques by asserting harmonization’s practical utility—harmonization is the worst form of international trade regulation, except for all the others. However, this would be to neglect a growing body of literature around various global governance issues that seeks to maintain diversity and achieve cooperative and coordinative benefits. In the face of these alternatives we propose that the ‘harmonization imperative’ that is currently the working background assumption and goal within international trade ought to be conditional rather than categorical. Practically speaking, this attempt to accommodate regulatory diversity while securing the benefits of cooperative international trade would be analogous to some of the more recent institutional solutions developed in the areas of environmental and economic global governance. ‘Regime complexes,’ for example, actively embrace an ambiguous macro-level policy in order for a diversity of implementation at the micro-level;15 ‘polycentric systems’16 and ‘cooperative decentralization’17 are also aimed at achieving similar outcomes.

Thus, for policy-makers the challenge will be to address this conditional complexity with flexible and de-centralized forms of institutions. And for scholars, two main lines of inquiry follow from this discussion: to theoretically elaborate, and empirically substantiate, the institutional alternatives mentioned above as well as the causes and processes by which this harmonization imperative has become so entrenched. This will open possibilities for foregrounding this assumption and create much-needed space for alternatives to be explored.

REFERENCES


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