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# FREE TRADE THROUGH REGULATION?

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## ABSTRACT

*How should the executive branch respond to globalization? The president's executive order on international regulatory cooperation provides a blueprint. The branch will turn to regulatory cooperation to make progress in freeing trade and will encourage a particular approach to that cooperation—harmonization—that was eschewed during the successful European integrative project. The executive order, which is assessed in this Article, represents a welcome political endorsement of a phenomenon that was previously pursued by agencies acting largely on their own remit. It is also an attempt to galvanize the use of regulatory cooperation by other agencies disinclined to pursue it in the past. In addition to analyzing how the executive order is meant to work, this Article argues that while the executive's approach is promising, it must be paired with a commitment to political oversight to ensure that regulatory globalization remains legitimate. There are signs that the president is beginning to provide this commitment through the executive order; the Article identifies a roadmap for its continuation and a role for Congress as well.*

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## INTRODUCTION

“Promoting International Regulatory Cooperation” is the title of Executive Order 13,609 (“EO 13,609” or “EO”), but the order aspires to be about more than just cooperation.<sup>1</sup>

Cass Sunstein, the law professor-cum-regulator who presided over the promulgation of the order, has sold it as an economic tool. Sunstein argues that EO 13,609 has “a simple goal: to promote exports, growth, and job creation by eliminating unnecessary regulatory differences across nations.”<sup>2</sup> Public Citizen, a consumer advocacy group, described the order as a “smokescreen for deregulation.”<sup>3</sup> The Administrative Conference of the United States, a federal agency designed to facilitate good regulatory practices, characterizes it as an example of one of its “Significant Current Implementation and Advisory Activities.”<sup>4</sup> And emotional conservatives have speculated that the EO “opens a direct path to bring United Nations regulations to the grass roots of our body politic.”<sup>5</sup>

The attention is not unwarranted, even if some of the handwringing might be. This Article argues that EO 13,609 is evidence of a policy shift by the president on both trade policy and on the nature of regulatory globalization, and, as such, speaks to how these orders can be used to make policy.<sup>6</sup> Specifically, the president has endorsed regulatory cooperation

1. Exec. Order No. 13,609, 3 C.F.R. § 255 (2012), *reprinted in* 5 U.S.C. § 601 (2012) [hereinafter EO 13,609].

2. Cass Sunstein, *The White House vs. Red Tape*, WALL ST. J., <http://online.wsj.com/article/SB10001424052702304811304577369934135888006.html> (last updated Apr. 30, 2012, 7:30 PM). Sunstein, a law professor ordinarily, was the Office of Information and Regulatory Affairs (“OIRA”) Administrator at the time EO 13,609 was issued.

3. Press Release, Pub. Citizen, Obama’s “Regulatory Cooperation” Executive Order Is a Smokescreen for Deregulation (May 1, 2012), <http://www.citizen.org/pressroom/pressroomredirect.cfm?ID=3597>. For further discussion, see Sean Moloney, *Obama Seeks to Promote “International Regulatory Cooperation,”* REG BLOG (May 2, 2012), <http://www.regblog.org/2012/05/02/02-moloney-international/>.

4. David M. Pritzker, *A Brief History of the Administrative Conference*, 83 GEO. WASH. L. REV. 1708, 1728–30 (2015).

5. See Whenifhow, Comment to *Obama Administration Issues Executive Order Promoting International Regulatory Cooperation*, FREE REPUBLIC (May 12, 2012, 10:07 AM), <http://www.freerepublic.com/focus/f-chat/2882964/posts>.

6. For example, the U.S. Chamber of Commerce released a statement characterizing the issuance of the EO as “a paradigm shift for U.S. regulators” and a “landmark” occasion. Press Release,

across borders and made it the centerpiece of the effort to reduce barriers to trade. Choosing to make American-agency-to-foreign-agency agreements a critical foreign policy tool is new, as is the way the EO directs agencies to achieve that objective.

The EO envisions a world in which American rules are harmonized with foreign ones—as Sunstein has said, its goal is to “eliminat[e] unnecessary disparities across nations.”<sup>7</sup> The order suggests that this harmonization process would be best served if international rules were developed through American-style procedure.<sup>8</sup> The EO also represents a shift in the priorities of trade policy, and specifically a frustration with the current status of trade negotiations. Trade policy used to be a matter of tariff reduction, but that is no longer the case. As Reeve Bull and Adam Schlosser have observed, “the crucial component of [modern trade] negotiations will likely prove to be something that isn’t normally the focus of trade negotiations: regulatory cooperation.”<sup>9</sup> It is a shift in focus facilitated by an executive order that indicates a presidential commitment to this sort of cooperation.

The policy revealed by the EO assumes that progress on free trade can be made through the regulators, who are usually perceived to resist

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U.S. Chamber. Com., U.S. Chamber Welcomes Executive Order on International Regulatory Cooperation (Apr. 30, 2012), <https://www.uschamber.com/press-release/us-chamber-welcomes-executive-order-international-regulatory-cooperation>. On the other hand, Jonathan Macey has evinced skepticism about the commitment to the process. See Jonathan Macey, *Are Any Creditors “Particularly Deserving”?: On the Enduring Attraction of the Ring-Fence Approach to Cross-Border Insolvencies of Financial Institutions*, 31 YALE J. ON REG. 695, 720 (2014) (“[I]t is plausible that the homage paid by U.S. politicians and regulators to the virtues of international regulatory cooperation may be mere lip-service.”).

7. Cass R. Sunstein, *The Regulatory Lookback*, 94 B.U. L. REV. 579, 597 (2014).

8. See DAVID ANDREW SINGER, *REGULATING CAPITAL: SETTING STANDARDS FOR THE INTERNATIONAL FINANCIAL SYSTEM* 122–23 (Eric Helleiner & Jonathan Kirshner eds., 2007) (arguing that there are three broad categories of international regulatory harmonization); John D. Andriele, Note, *A Winning Hand: A Proposal for an International Regulatory Schema with Respect to the Growing Online Gambling Dilemma in the United States*, 37 VAND. J. TRANSNAT’L L. 1389, 1415–16 (2004) (discussing harmonization theory as it relates to developing international regulation of Internet gambling); Uri Geiger, *The Case for the Harmonization of Securities Disclosure Rules in the Global Market*, 1997 COLUM. BUS. L. REV. 241, 298–317 (1997) (positing that harmonization could be useful in addressing many of the market failures of regulatory competition); Bryan Thomas Shipp, *Filling Gaps in European Union Securities Law: Contractually Organized Supervision & the College of Euronext Regulators*, 23 AM. U. INT’L L. REV. 387, 389–91 (2008) (discussing harmonization of E.U. member state securities law); David Zaring, *Finding Legal Principle in Global Financial Regulation*, 52 VA. J. INT’L L. 683, 706–08 (2012) (suggesting that six principles organize global financial regulation and that one of those, national treatment, is a primary motivator of harmonization efforts in the field).

9. Adam C. Schlosser & Reeve T. Bull, *Regulatory Cooperation in the TTIP*, REG BLOG (Aug. 27, 2013), <http://www.regblog.org/2013/08/27-schlosser-reeve-ttip.html>.

progress in favor of their regulatory missions; regulators usually impose burdens on commerce, rather than reduce them.<sup>10</sup> Accordingly, it is a counterintuitive strategy.

But it is defensible, probably inevitable, and likely even a worthy endorsement of regulatory globalization. However, regulatory globalization will only partly gain legitimacy from the steps taken by the EO. Part IV of this Article offers a framework for the acquisition of that legitimacy. Part III analyzes the EO itself and suggests that while the EO welcomes any kind of international regulatory cooperation, it offers an endorsement of harmonization as a particularly useful mechanism of it. But first, this Article begins in Part I by describing two alternative approaches to international regulatory cooperation: harmonization and mutual recognition. Then in Part II, it describes how international regulatory cooperation has become the centerpiece of substitutes for the latest round of world trade negotiations.

Anxiety about regulatory protections threatened by trade barriers negotiated in secret has been the foundation of some of the strongest domestic protests this country has seen<sup>11</sup> and regular expressions of congressional concern.<sup>12</sup> Turning to the bureaucracy to achieve international relationships that diplomats and legislatures have been unable to effectuate poses real legitimacy risks. The recommendations that follow in Part IV of this Article as to how to make international regulatory cooperation—a subject too important to leave only to the regulators—better and more legitimate, could not be more necessary.

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10. See, e.g., JOHN H. JACKSON, SOVEREIGNTY, THE WTO AND CHANGING FUNDAMENTALS OF INTERNATIONAL LAW 230–32 (2006) (observing that regulators are often unwilling to reduce non-tariff barriers to trade).

11. For example, the protest at the World Trade Organization's ("WTO") ministerial conference held in Seattle, Washington (the "Battle in Seattle," which inspired the eponymous 2007 movie) was described as the largest demonstration in the nation in recent history, with the number of demonstrators placed at over 40,000. See generally Clyde Summers, *The Battle in Seattle: Free Trade, Labor Rights, and Societal Values*, 22 U. PA. J. INT'L ECON. L. 61 (2001) (providing more information on the protest and the underlying motivations).

12. An apt illustration of this concern may be found in the ongoing U.S.-Canada softwood lumber dispute. Congress has repeatedly resisted compliance with decisions of binational panels organized pursuant to Chapter 19 of the North American Free Trade Agreement ("NAFTA"). The panels found (against the U.S.'s position) that the Canadian softwood lumber industry does not receive what amounts to a government subsidy, and that Canadian lumber imported to the U.S. should not be subject to a countervailing tariff. Despite its announcement that it would not comply with the panel's most recent ruling and its pursuit of an appeal of an adverse decision in a parallel WTO proceeding, however, the U.S. eventually agreed to a compromise with Canada. The result was the Softwood Lumber Agreement 2006, which appears to have put a halt to the twenty-plus-year dispute, at least for the time being. See Sarah E. Lysons, Commentary, *Resolving the Softwood Lumber Dispute*, 32 SEATTLE U. L. REV. 407, 410–15 (2009).

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## I. THE PATHS OF INTERNATIONAL REGULATORY COOPERATION

Two traditional approaches to international regulatory cooperation have been dubbed mutual recognition and harmonization. This Section describes the two approaches and reviews the legal literature on both, to offer background on potential methods of regulatory cooperation.

Some regulators have considered international regulatory cooperation a genre best served through mutual recognition. If the E.U. thinks it is organic, it could be labeled as such in the U.S.; if a Peugeot truck model meets French safety standards, the U.S. would deem that model safe as well, without going through its own independent inquiry. Mutual recognition encourages American regulators to outsource some government *enforcement* functions to cognate foreign agencies.<sup>13</sup> If those agencies make a determination about a regulated entity's compliance with the foreign standard, American regulators will assume that the determination would hold for its American standard. In this way, mutual recognition might be thought of as the full faith and credit clause of international regulatory cooperation.

Others prefer to cooperate through harmonization, that is, making American and European standards for organic food, or truck safety, consistent so that companies could produce their goods and provide their services secure in the knowledge that regulatory compliance in all of their markets would work the same way. Harmonization outsources, through a negotiated process, the *rulemaking* function. But once the standards are harmonized, American regulators do their own enforcement and implementation work—just because a Peugeot truck meets French safety standards, does not mean that they get a pass on American safety standards. However, because those standards have been harmonized, the Peugeot truck *should* pass both, or fail both, at the same time. Harmonization is often thought to be particularly difficult to achieve, but there are various kinds of harmonization, some of which are easier to achieve than others. The very close construction of rules, as exemplified by the spread of common capital standards for financial institutions, is difficult, but not impossible, to achieve. It is simpler to pursue the more low-key attempts to establish rough baselines around which every regulator would build its own standards. Harmonization might accordingly be thought of as the uniform code or model laws approach to international regulatory cooperation.

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13. Sunstein cites this example in his op-ed defending the order. *See* Sunstein, *supra* note 2.

In the past, American regulators have pursued both mutual recognition and harmonization efforts with their foreign counterparts. American securities regulators have sought to enter into mutual recognition regimes with two other jurisdictions, meaning the disclosures made by public companies listed in (in these cases) Australia or Canada would be honored in the United States, albeit without much success.<sup>14</sup> Banking regulators have sought to harmonize the capital requirements they impose on financial intermediaries—that is, the amount of money banks must set aside to deal with crises—across the globe, which has been done successfully through the series of so-called Basel capital adequacy accords.<sup>15</sup>

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14. For information on the U.S.-Australia mutual recognition efforts, see Mutual Recognition Arrangement Between the United States Securities and Exchange Commission and the Australian Securities and Investments Commission, Together with the Australian Minister for Superannuation and Corporate Law, U.S.-Austl., Aug. 25, 2008, [http://www.sec.gov/about/offices/oia/oia\\_mutual\\_recognition/australia/framework\\_arrangement.pdf](http://www.sec.gov/about/offices/oia/oia_mutual_recognition/australia/framework_arrangement.pdf) [hereinafter U.S.-Australia Mutual Recognition Arrangement]; Jennifer G. Hill, *Regulatory Show and Tell: Lessons from International Statutory Regimes*, 33 DEL. J. CORP. L. 819, 842 (2008) (describing the U.S.-Australia Mutual Recognition Arrangement as illustrative of increased U.S. interest in international regulatory regimes); Eric J. Pan, *Challenge of International Cooperation and Institutional Design in Financial Supervision: Beyond Transgovernmental Networks*, 11 CHI. J. INT'L L. 243, 258 (2010) (citing the U.S.-Australia Mutual Recognition Arrangement as an example of a legal framework that plays a part in standardizing international financial markets); Pierre-Hugues Verdier, *Mutual Recognition in International Finance*, 52 HARV. INT'L L.J. 55, 82–86 (2011) (describing the nature of the U.S.-Australia Mutual Recognition Arrangement); Press Release, Sec. & Exchange Comm'n, SEC, Australian Authorities Sign Mutual Recognition Agreement (Aug. 25, 2008), <http://www.sec.gov/news/press/2008/2008-182.htm>. For information on U.S.-Canadian mutual recognition efforts, see Susan Wolburgh Jenah, Commentary, *A Blueprint for Cross-Border Access to U.S. Investors: A New International Framework*, 48 HARV. INT'L L.J. 69, 72–74 (2007) (providing an overview of the SEC-Canadian establishment of a Multi-Jurisdictional Disclosure System (“MJDS”), under which securities issuers in both the U.S. and Canada may use the same disclosure forms when selling securities in either country); Lonnie S. Keene, *Globalization and Competition: A Proposal to Liberalize Foreign Securities Disclosure Regulation*, 29 N.Y.U. J. INT'L L. & POL. 337, 361–62 (1997) (same); and Press Release, Sec. & Exchange Comm'n, Schedule Announced for Completion of U.S.-Can. Mutual Recognition Process Agreement (May 29, 2008), <http://www.sec.gov/news/press/2008/2008-98.htm>. *But see* Amir N. Licht, *The Mother of All Path Dependencies Toward a Cross-Cultural Theory of Corporate Governance Systems*, 26 DEL. J. CORP. L. 147, 159 n.31 (2001) (citing the SEC-Canadian MJDS as an example of harmonization efforts in the field of securities regulation, and in this way implicitly rejecting the distinction made here).

15. The Basel accords, which are now on their third iteration, dictate capital reserve requirements and commitment to the principles of supervision created by the so-called Basel Committee on Banking Supervision. *See* BASEL COMM. ON BANKING SUPERVISION, *BASEL III: A GLOBAL REGULATORY FRAMEWORK FOR MORE RESILIENT BANKS AND BANKING SYSTEMS* (2010); BASEL COMM. ON BANKING SUPERVISION, *PRINCIPLES FOR SOUND LIQUIDITY RISK MANAGEMENT AND SUPERVISION* (2008). *See also* Letter from Michel Pébureau, EFR Chairman, & Clemens Börsig, Sponsor EFR Steering Group G20, to Christine Lagarde, Minister of Fin. in Fr. (Feb. 16, 2011), <http://www.efr.be/documents/news/75.2011.02.%20EFR%20Letter%20to%20G20%20Finance%20Minister%20Lagarde%2016.02.2011.pdf> (urging G20 commitment to implement Basel II and III). *See generally* David Zaring, *Rulemaking and Adjudication in International Law*, 46 COLUM. J. TRANSNAT'L L. 563, 572–78 (2008) (providing an overview of the Basel process).

The distinction between mutual recognition and harmonization was first drawn by scholars in reference to European integration. Some have argued, as Anne-Marie Slaughter and Larry Helfer put it, that the European Court of Justice pushed mutual recognition, “thereby providing an alternative to the slow and difficult process of harmonization around a unitary standard.”<sup>16</sup> Mutual recognition, on this reading, proved to be one of the engines of the knitting together of Europe. Moreover, it did so in a way that preserved national institutions. As George Berman has argued, European integrators “can leave the Member State regimes in place, and simply require each to give full faith and credit to the certifications made by the others.”<sup>17</sup> And there is little doubt that it did serve as something of a full faith and credit provision on the European integration project.

If Europe represented an expression of a choice to be made when integrating across borders, American observers have generally responded to the mutual recognition versus harmonization debate with a “yes, please!” Scholars like them both, and the support of either simply demonstrates the commitment of a large proportion of these scholars to the project of international governance.<sup>18</sup> The exception is Alan Sykes, who has argued that harmonization is normatively inferior to mutual recognition because it lacks a political constituency (something not evidenced by the support of the business community for regulatory cooperation progress) and does not permit regulatory experimentation.<sup>19</sup>

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16. Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 330 (1997).

17. George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331, 372 (1994).

18. Some of this has been expressed in terms of the enthusiasm for the Global Administrative Law Project, an arm of NYU Law School’s Institute for International Law and Justice which studies, and to some degree embraces, global regulatory cooperation. See Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 15, 15 (discussing the rise of the nascent field of global administrative law and “patterns of commonality,” including cross-border regulatory cooperation, that underlie the field); Eric J. Pan, *Structural Reform of Financial Regulation*, 19 TRANSNAT’L L. & CONTEMP. PROBS. 796, 799 (2011) (describing not only the challenges facing Canada in reforming its securities regulation system, but also comparing the regulatory systems of the U.S. and several other countries and discussing the importance of “coordination and information sharing among regulatory agencies”); Richard B. Stewart, *A New Generation of Environmental Regulation?*, 29 CAP. U. L. REV. 21, 138 (2001) (“In a further effort to promote equivalency, harmonization, and mutual recognition . . . the Global Environmental Labeling Network (“GEN”) was formed by national and multinational eco-label licensing organizations.”). But see Pierre-Hugues Verdier, *Transnational Regulatory Networks and Their Limits*, 34 YALE J. INT’L L. 113, 167 (2009) (arguing that transnational regulatory networks (“TRNs”) suffer many inadequacies and cautioning against “excessive optimism [of TRNs] in favor of a pragmatic understanding of the circumstances under which networks can effectively promote international regulatory cooperation”).

19. Alan O. Sykes, *The (Limited) Role of Regulatory Harmonization in International Goods and Services Markets*, 2 J. INT’L ECON. L. 49, 49 (1999).

Differences have been perceived between the two approaches to regulatory cooperation, however. Harmonization has been perceived as more democratic, with mutual recognition more likely to benefit powerful states. William Bratton and Joseph McCahery have argued, for example, that harmonization presents a story of spontaneous order, or, as they put it,

Efficient local legal regimes can evolve by trial and error, achieving harmonization without requiring central adjustment. The market then can balance between regulatory diversity and harmonization. Mobile capital will gravitate to the jurisdictions with the best rules; those rules, having risen to the top, will then serve as focal points for imitating jurisdictions. Harmonization results on a bottom-up rather than a top-down basis.<sup>20</sup>

Other scholars think that mutual recognition requires international elaboration that benefits powerful states, despite the European experience suggesting that internationalization might not be necessary in such a regime. Paul Berman, for example, describes mutual recognition as more internationalist: “mutual recognition regimes tend to elide distinctions between domestic and international regulation by ‘intermingling domestic laws in order to *constitute* the global.’”<sup>21</sup> This means that “mutual recognition regimes often provide for international oversight or adjudication” to identify whether full faith and credit was indeed being given.<sup>22</sup> Jeffrey Dunoff and Joel Trachtman agree that international initiatives “that provide for mutual recognition[] take jurisdiction away from one state and transfer it to another.”<sup>23</sup> Pierre-Hugues Verdier also fits within this camp, as he has considered places in financial regulatory cooperation where mutual recognition is the appropriate choice and argues it works best with sophisticated jurisdictions and bilateral arrangements, absent some sort of European strong multilateral government system.<sup>24</sup>

Agencies have also varied in their responses, with some adopting cooperation through a mutual recognition process and others through harmonization efforts. The American champions of mutual recognition

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20. William W. Bratton & Joseph A. McCahery, *The New Economics of Jurisdictional Competition: Devolutionary Federalism in a Second-Best World*, 86 GEO. L.J. 201, 273 (1997) (footnote omitted).

21. Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155, 1224 (2007) (alteration in original) (quoting Kalypso Nicolaidis & Gregory Shaffer, *Transnational Mutual Recognition Regimes: Governance Without Global Government*, 68 L. & CONTEMP. PROBS. 263, 266 (2005)).

22. *Id.* at 1225.

23. Jeffrey L. Dunoff & Joel P. Trachtman, *Economic Analysis of International Law*, 24 YALE J. INT'L L. 1, 17 (1999).

24. Verdier, *supra* note 14, at 60–63.

include the Food and Drug Administration (“FDA”), in some cases,<sup>25</sup> and the Securities and Exchange Commission (“SEC”), in others,<sup>26</sup> though other agencies have explored the possibilities of the approach.<sup>27</sup>

The champions of harmonization have been the banking regulators, as suggested above, who have taken that process to its furthest extent through the Basel capital adequacy accords and everything else encapsulated by the Basel regulatory process.<sup>28</sup>

But, in general, agencies have been unsure which approach is more likely to realize their interests. Either, of course, could work—harmonization and mutual recognition are two different kinds of procedures for addressing globalization; there is no reason to assume that a particular procedure stacks the deck in favor of a particular substantive outcome, as Laurence Tribe has famously observed.<sup>29</sup> The arguments by scholars for and against the adoption of harmonization or mutual recognition as a principal tool of European integration should be understood as a matter of marginal differences, not fundamental distinctions.

Nonetheless, the two approaches do affect regulatory cooperation in different ways and require different sorts of institutionalization. Harmonization requires iterated international engagement by agencies, while mutual recognition does not.<sup>30</sup> This is because harmonization depends upon the development of the rule to be harmonized, and that

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25. More modest mutual recognition efforts have been pursued by the FDA with European drug regulators. See Linda R. Horton & Kathleen E. Hastings, *A Plan that Establishes a Framework for Achieving Mutual Recognition of Good Manufacturing Practices Inspections*, 53 FOOD & DRUG L.J. 527, 527 (1998).

26. See *supra* note 14 and accompanying text.

27. Other initiatives include a recent agreement between the United States and European Union that will facilitate customs and security clearance procedures; a U.S.-European Commission mutual recognition agreement signed in 1998 that covers, among other things, standards for marine equipment; and several mutual recognition agreements between the FCC and foreign agencies covering standards for telecommunications equipment. See *Updates*, 24 INT’L QUARTERLY 601, 607–08 (2012); *Mutual Recognition Agreements (MRA) on Marine Equipment*, U.S. COAST GUARD, <http://www.uscg.mil/hq/cg5/cg5214/mra.asp> (last modified Jan. 12, 2016); *Mutual Recognition Agreements*, FCC: EQUIP. AUTHORIZATION, <http://transition.fcc.gov/oet/ea/mra/> (last updated Jan. 31, 2014).

28. See Zaring, *supra* note 15, at 572 (noting that international rulemaking has functioned through harmonization as exemplified by financial regulators like the Basel Committee on Banking Supervision).

29. Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1064 (1980) (“[P]erfecting the processes of governmental decision is radically indeterminate and fundamentally incomplete. The process theme by itself determines almost nothing unless its presuppositions are specified, and its content supplemented, by a full theory of substantive rights and values . . .”).

30. Though both will require mutual monitoring after the initial agreement, unless the regulators party to the cooperation trust one another to a very strong degree.

process presumably entails the mutual input of the agencies seeking to harmonize their policies. Harmonization also presumes a standardization among agencies that mutual recognition does not require. This leads to regulatory requirements that should be identical across borders, as opposed to requirements that could be quite different, if acceptably so.

A presidential commitment to harmonization is thus a more internationalist approach to the project of regulatory globalization. The extent to which the EO endorses that approach and subsequently results in more harmonization efforts than mutual recognition efforts, amounts to a meaningful distinction in the way the executive branch intends to approach foreign affairs.

## II. REALIZING FREER TRADE THROUGH REGULATORY AGREEMENT

The dramatic slowing of progress in the so-called Doha Round has led the executive branch, which is still committed to international trade, to pursue free trade through other means. The United States has decelerated its World Trade Organization (“WTO”) efforts and has instead pursued regional efforts like the Trans-Pacific Partnership (“TPP”) and Transatlantic Trade and Investment Partnership (“TTIP”).<sup>31</sup> It has tried to conclude bilateral negotiations like the various re-trade deals with Latin

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31. For more information on the TPP and the administration’s interest in the trade agreement, see generally Timothy Brightbill et al., *International Trade*, 46 INT’L LAW. 81, 83 (2012) (describing the TPP as “an agreement to increase trade, investment, and economic development among the TPP partner countries, as well as promote innovation and economic growth and development”); Michael A. Carrier, *SOPA, PIPA, ACTA, TPP: An Alphabet Soup of Innovation-Stifling Copyright Legislation and Agreements*, 11 NW. J. TECH. & INTELL. PROP. 21, 24–25 (2013) (describing the TPP and its potential negative implications in the context of copyright law); and Meredith Kolsky Lewis, *The Trans-Pacific Partnership: New Paradigm or Wolf in Sheep’s Clothing?*, 34 B.C. INT’L & COMP. L. REV. 27, 27–37 (2011) (providing an overview of the TPP and describing the Obama administration’s interest in pursuing the agreement). For more on the TTIP and the nascent negotiations shaping the contours of the agreement, see Mark K. Neville, Jr., *Proposed Transatlantic Trade and Investment Partnership: An FTA with the E.U.*, J. INT’L TAX’N, Sept. 2013, at 22 (offering five observations regarding the likely impact of a TTIP agreement and examining desired outcomes on a number of issues from a U.S. perspective); Michael Froman, Remarks by United States Trade Representative Michael Froman at the Transatlantic Trade and Investment Partnership First Round Opening Plenary (July 8, 2013), in 19 L. & BUS. REV. AM. 135, 135–36 (2013) (welcoming attendees to the first round of negotiations of TTIP and discussing the ideologies animating President Obama’s and European leaders’ interests in engaging in discussions); and Reid Whitten, *Just the TTIP (Transatlantic Trade and Investment Partnership): A Review of the Transatlantic Partnership Agreement One Year After it Is Introduced to America*, NAT’L L.R. (Feb. 6, 2014), <http://www.natlawreview.com/article/just-ttip-transatlantic-trade-and-investment-partnership-review-transatlantic-partne> (offering an overview of TTIP, commenting on the status of trade negotiations in the first year after introduction of the agreement by President Obama in his State of the Union Address, and providing predictions of how the agreement will continue to develop in the coming year).

America.<sup>32</sup> All of these agreements contain provisions promoting regulatory cooperation, which has become a centerpiece of the new trade policy—a point underscored by the EO as a directive to pursue the reduction of regulatory barriers not through a treaty, but through soft law negotiations and agreements with foreign agencies.

To achieve this end, the type of cooperation pursued is important. Kal Raustiala has argued that harmonization has created an alternative to trade rules, which as a general matter, facilitates mutual recognition.<sup>33</sup>

Presidents of either party have averred a commitment to free trade, but the prospects of progress on trade through a global multilateral treaty have dimmed during the last two administrations. The trade consensus represented by the WTO has been stymied over the prospect of further concessions in trade in agricultural products, which have been exempted from much of the trade pact's tariff discipline and disputes over special concessions that permit formerly poor, but now increasingly wealthy, developing countries to retain some tariffs on manufactured goods.<sup>34</sup>

In this sense, the EO goes beyond the requirements of America's trade treaties. The EO also embodies a commitment to viewing international trade obligations as encouraging a search for this sort of harmonization.

The Obama administration has turned to alternative arrangements to develop free trade. It has, for example, showered attention on the TPP, a spaghetti bowl of interlocking bilateral agreements on trade principles between America and a variety of countries in Asia and Oceania.<sup>35</sup> It has also pursued the TTIP, which would perform a similar function for trade

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32. The International Trade Administration indicates that as of January 1, 2015, the U.S. was party to fourteen Free Trade Agreements ("FTAs") with twenty nations, and eleven more were under negotiation. *Free Trade Agreements*, INT'L TRADE ADMIN., <http://trade.gov/fta/> (last visited Feb. 4, 2013).

33. Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT'L L. 1, 52 (2002).

34. For a review of the problems, and a suggestion about the way forward, see Sungjoon Cho, *Doha's Development*, 25 BERKELEY J. INT'L L. 165, 170 (2007) (describing how a "deadlock over agriculture, as well as an irreconcilable divergence on . . . issues between developing and developed countries, finally torpedoed" Doha negotiations). Doha, to be sure, has not yet entirely been abandoned. For a review, see Stephen W. Brophy et al., *The Year in Review: International Trade*, 48 A.B.A./SEC. INT'L L. 87, 87 (2014) ("During 2013, the WTO's Doha Round of trade negotiations inched forward.")

35. The Office of the U.S. Trade Representative website describes the TPP as "an ambitious, next-generation, Asia-Pacific trade agreement that reflects U.S. economic priorities and values"; one that will "boost U.S. economic growth and support the creation and retention of high-quality American jobs by increasing exports in a region that includes some of the world's most robust economies and that represents more than 40 percent of global trade." *The United States in the Trans-Pacific Partnership*, OFF. U.S. TRADE REPRESENTATIVE (Nov. 2011) <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2011/november/united-states-trans-pacific-partnership> .

between the U.S. and E.U.<sup>36</sup> Both make international regulatory cooperation progress the centerpiece of the effort.<sup>37</sup> As Simon Lester and Inu Barbee have observed of the TTIP, a “recent survey of trade experts indicated that regulatory issues are ‘the most important overall to the agreement.’”<sup>38</sup> In the case of the TPP, it is “regulatory coherence” that the United States, Australia, and New Zealand have urged the parties located in Asia to adopt.<sup>39</sup>

The development of the TPP and TTIP reflects a concern among American leaders, and particularly within the American business community, that the free trade principles encompassed by the WTO’s agreements have failed to reduce sufficiently the technical barriers and regulatory health and safety barriers to trade. Indeed, it is probably fair to say that, on this reading, the barriers unaddressed by WTO treaties on Technical Barriers to Trade (“TBT”) and Sanitary and Phytosanitary Standards (“SPSS”) remain the principal barriers to free trade.<sup>40</sup> After all,

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36. In June 2013, President Obama, in conjunction with European Commission President Barroso and European Council President Van Rompuy, publicized the launch of negotiations between the United States and the European Union on the new TTIP agreement. *White House Fact Sheet: Transatlantic Trade and Investment Partnership (T-TIP)*, OFF. U.S. TRADE REPRESENTATIVE (June 2013), <http://www.ustr.gov/about-us/policy-offices/press-office/fact-sheets/2013/june/wh-ttip>. The U.S. Office of the Trade Representative touted the new accord as “an ambitious, comprehensive, and high-standard trade and investment agreement that offers significant benefits in terms of promoting U.S. international competitiveness, jobs, and growth” that would aim to, among other things, lessen the cost resulting from incongruent regulations and standards by promoting “greater compatibility, transparency, and cooperation . . .” *Id.* Ultimately, the agreement would aim to remove all tariffs on trade. *Id.*

37. As former trade negotiator Shaun Donnelly observed, “TTIP is only worth doing if the regulatory side is covered, such as getting rid of the precautionary principle.” *Regulation—None of Our Business?*, CORP. EUR. OBSERVATORY (Dec. 16, 2013), <http://corporateeurope.org/trade/2013/12/regulation-none-our-business> (footnote omitted).

38. Simon Lester & Inu Barbee, *The Challenge of Cooperation: Regulatory Trade Barriers in the Transatlantic Trade and Investment Partnership*, 16 J. INT’L ECON. L. 847, 848 (2014). See also Inu Barbee & Simon Lester, *Financial Services in the TTIP: Making the Prudential Exception Work*, 45 GEO. J. INT’L L. 953, 970 (2014) (considering the regulatory cooperation issue in the case of harmonizing banking standards).

39. For a discussion by a member of the Council on Foreign Relations, see THOMAS J. BOLLYKY, *THE TRANS-PACIFIC PARTNERSHIP: A QUEST FOR A TWENTY-FIRST-CENTURY TRADE AGREEMENT* 171 (C.L. Lim et al. eds., 2012).

40. CHRISTIANE KRAUS, *IMPORT TARIFFS AS ENVIRONMENTAL POLICY INSTRUMENTS* 181 n.7 (2000) (“Technical Barriers of [sic] Trade (TBT) and Sanity and Phytosanitary Standards (SPSS) Codes . . . are designed to prevent countries from using product-related standards and technical as well as sanitary and phytosanitary regulations to create unnecessary obstacles to trade.”). These agreements do not affirmatively require this sort of harmonization—the Agreement on the Application of Sanitary and Phytosanitary (“SPS”) Measures and the Agreement on TBT make room for it, but do not require such cooperation. See *The WTO Agreement on the Application of Sanitary and Phytosanitary Measures*, art. 3 ¶¶ 1, 3, WORLD TRADE ORG., [https://www.wto.org/english/tratop\\_e/sps\\_e/spsagr\\_e.htm](https://www.wto.org/english/tratop_e/sps_e/spsagr_e.htm) (last visited June 30, 2016) [hereinafter SPS Agreement] (stating that members should base their measures on international standards, given the goal of harmonizing sanitary and phytosanitary measures, but that

tariffs, especially those between developed world countries, have for the most part been reduced to something quite close to zero.<sup>41</sup>

The remaining constraints on would-be exporters are often bureaucratic ones: the need to obtain licenses to operate in other countries or to meet various health and safety standards before products can be shipped into foreign markets. It is these sorts of measures, instead of, say, a 20 percent duty on goods, that now slow international trade.

One way to resolve the problems posed by these final regulatory barriers to free trade would be to set up a strong WTO regime to address them. But progress on the so-called Doha Round of negotiations has proven to be glacial; indeed, the Round began in 2001 and has lasted far longer than prior trade rounds, without much to show for it, despite a comparatively unambitious to-do list.<sup>42</sup> The prospects for a strong new free trade accord within the WTO ambit are distinctly unpromising, if not entirely impossible.<sup>43</sup>

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members may adopt higher standards if they choose); *Agreement on Technical Barriers to Trade*, §§ 2.6–2.7, WORLD TRADE ORG., [http://www.wto.org/english/docs\\_e/legal\\_e/17-tbt\\_e.htm](http://www.wto.org/english/docs_e/legal_e/17-tbt_e.htm) (last visited June 30, 2016) [hereinafter TBT Agreement] (stating that, similar to the SPS Agreement, the goal of the TBT Agreement is harmonization of technical regulations, although members are only asked, not required, to give “positive consideration” to accepting as equivalent technical regulations of other members).

41. For the most part, this has been accomplished through FTAs. Under NAFTA, for example, trade barriers between the United States and Mexico were phased out over a period of years. *Fact Sheet: North American Free Trade Agreement (NAFTA)*, U.S. DEP’T AGRIC. FOREIGN AGRIC. SERV. (Jan. 2008), [http://www.fas.usda.gov/sites/development/files/nafta1.14.2008\\_0.pdf](http://www.fas.usda.gov/sites/development/files/nafta1.14.2008_0.pdf). The Trade Administration indicates that as of January 1, 2015, the United States was party to fourteen FTAs with twenty nations, and eleven more were under negotiation. *Free Trade Agreements*, *supra* note 32. Other nations are similarly engaged in FTAs. See, e.g., HAROLD S. BLOOMENTHAL & SAMUEL WOLFF, *SECURITIES AND FEDERAL CORPORATE LAW* § 27:117 (2d ed. 2015) (stating that tariffs on trade among Brazil, Argentina, Paraguay and Uruguay have been zero since 1995); Lewis, *supra* note 31, at 31–32 (noting that the Trans-Pacific Strategic Economic Partnership Agreement calls for “Chile, New Zealand, and Singapore to reduce tariffs to zero on all goods by 2017, and for Brunei to reduce tariffs to zero on all but a handful of products”).

42. The Doha Round is the most recent series of trade negotiations among WTO member nations. *The Doha Round*, WORLD TRADE ORG., [http://www.wto.org/english/tratop\\_e/dda\\_e/dda\\_e.htm](http://www.wto.org/english/tratop_e/dda_e/dda_e.htm) (last visited Feb. 4, 2013). For analysis on the ways in which the Doha Round negotiations have failed to progress as planned, see *Goodbye Doha, Hello Bali*, *ECONOMIST: TRADE* (Sept. 8, 2012), <http://www.economist.com/node/21562196> (asserting that the negotiations were dead as of the Fall of 2012 due to the number of countries involved and the breadth of the matters to be covered).

43. After almost a decade of deadlocked trade talks, the WTO members agreed to a relatively modest package of standards at the end of 2013, meaning that all hope is not yet lost for the Doha Round. See Michael Schuman, *All 159 WTO Members Have Agreed on Something, for the First Time Ever*, *TIME* (Dec. 9, 2013), <http://world.time.com/2013/12/09/all-159-wto-members-have-agreed-on-something-for-the-first-time-ever/>; *Doha Delivers*, *ECONOMIST: FREE EXCHANGE* (Dec. 9, 2013, 1:48 AM), <http://www.economist.com/blogs/freeexchange/2013/12/world-trade-organisation>.

Accordingly, the administration has turned instead to a new kind of scrutiny of technical and health and safety barriers to trade in this EO. The goal, as Michael Livermore and Richard Revesz have observed, is to find places “where regulatory harmonization can facilitate international trade.”<sup>44</sup> The business community for its own part has lobbied the other big player in international trade law—the E.U.—to take a similar approach.<sup>45</sup>

In 2015, the so-called Regulatory Working Group (“RWG”) released guidance on the EO that underscored the importance of trade consequences in exploiting the opportunities offered by international regulatory cooperation. It noted with approval that “USTR [Office of the U.S. Trade Representative] worked with other agencies to advance a U.S. proposal to strengthen the implementation of [good regulatory practices] throughout the Asia-Pacific region” that made internationally regulatory cooperation a greater possibility.<sup>46</sup> It also said that coordination should be done in a manner allowing regulators to “work closely with USTR to ensure that any regulatory cooperation activities developed or coordinated through the Working Group do not affect or impair USTR’s statutory authorities and responsibilities.”<sup>47</sup>

### III. EO 13,609 AS A TOOL OF TRADE AND HARMONIZATION

The language and implementation of the EO will interest those concerned about the larger question of the general importance of these diktats. But they also suggest, if mildly, that the EO is being implemented by officials more accustomed to pursuing international regulatory cooperation through harmonization rather than mutual recognition. The order itself does not require the preference, although it arguably makes the case for it. But its implementation reveals a White House that documents cooperation efforts that are more likely to include reports of harmonization rather than mutual recognition. Moreover, those agencies that have cited

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44. Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337, 1379 n.208 (2013).

45. For example, the U.S. Chamber of Commerce, in conjunction with its European counterpart, Business Europe, submitted a “series of proposals aimed to enhance current regulatory cooperation efforts and to develop the regulatory mechanisms necessary to truly unlock the potential of a U.S.-E.U. agreement.” CTR. FOR GLOBAL REGULATORY COOPERATION U.S. CHAMBER OF COMMERCE, 2012 YEAR IN REVIEW 7 (2012), [https://www.uschamber.com/sites/default/files/legacy/grc/GRC%20YEAR%20END%20\(final%201-3\)%5B1%5D\\_new.pdf](https://www.uschamber.com/sites/default/files/legacy/grc/GRC%20YEAR%20END%20(final%201-3)%5B1%5D_new.pdf).

46. REGULATORY WORKING GROUP GUIDELINES: EXECUTIVE ORDER 13,609, “PROMOTING INTERNATIONAL REGULATORY COOPERATION” 7 (June 26, 2015), [https://www.whitehouse.gov/sites/default/files/omb/inforg/eo\\_13609/eo13609-working-group-guidelines.pdf](https://www.whitehouse.gov/sites/default/files/omb/inforg/eo_13609/eo13609-working-group-guidelines.pdf) [hereinafter *Regulatory Working Group Guidelines*].

47. *Id.* at 11.

the EO in their own work have approached matters in the same way.

#### A. PARSING EO 13,609

The EO directs agencies to see if they can lessen regulatory burdens by regulating the same way their foreign counterparts do. The EO resolves this directive in favor of a harmonization approach to international regulatory cooperation, though it clearly also welcomes almost any form of international regulatory cooperation.<sup>48</sup> There also appears to be an effort to persuade agencies to be willing to modify their substantive goals if it would make cross-border cooperation more possible. Procedurally, the order indicates that the distinctive American approach to administrative law might be preserved domestically and even fostered abroad.

The EO itself, like most examples of the genre, is concise. It comes in at precisely 1300 words, just about as long as an expansive op-ed newspaper column.<sup>49</sup> The order proclaims that “[i]n an increasingly global economy, international regulatory cooperation, consistent with domestic law and prerogatives and U.S. trade policy, can be an important means of promoting” the goals of the executive branch.<sup>50</sup>

It pairs that point of policy with a caution, however—a bromide that a “regulatory system must protect public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation,” which, of course, is the purpose of all regulatory systems.<sup>51</sup>

The policy point and the cautious bromide of the EO reflect one of the principal impetuses of international regulatory cooperation. The traditional ends of regulation—protecting public health, promoting economic growth, and so on—are widely shared, no matter what the country. Given the “increasingly global economy,” which the EO highlights, the proposition of the order is that the rather generic goals of regulation may increasingly be realized by cooperation across borders between regulators with the same basic goals, rather than through efforts to create domestically distinctive

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48. Joost Pauwelyn et al., *When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking*, 25 EUR. J. INT’L L. 733, 752 (2014) (“To the extent that lawmaking powers are delegated to administrative agencies, transparency, reason-giving, and notice and comment procedures should apply to both the domestic *and* international activities and norm-making of these agencies, whether norms are binding under international law or not,” and citing the EO as an application of this).

49. Mark Lasswell, *Op-Ed Guidelines for the Wall Street Journal*, WALL ST. J.: OPINION (Nov. 13, 2013, 5:53 PM), <http://online.wsj.com/article/SB126841622758561059.html>.

50. EO 13,609, *supra* note 1.

51. *Id.*

regimes.<sup>52</sup> The goals also advise agencies that they should not compromise their standards solely to create international regulatory cooperation.

Accordingly, the order acknowledges that the “regulatory approaches taken by foreign governments may differ from those taken by U.S. regulatory agencies.”<sup>53</sup> But just because those differences are in fact different, does not mean that they are “necessary” to meet “shared challenges” that all agencies face, regardless of country.<sup>54</sup>

To that end, pursuing international regulatory cooperation can enable agencies to “identify approaches that are at least as protective as those that are or would be adopted in the absence of such cooperation,”<sup>55</sup> and also can “reduce, eliminate, or prevent unnecessary differences in regulatory requirements,”<sup>56</sup> which downplay American regulatory distinctiveness and touts the advantages of international consistency.

It also pursues international regulatory cooperation through a variety of mechanisms. For example, Section 3(d) of the order provides that agencies should “consider, to the extent feasible, appropriate, and consistent with law, any regulatory approaches by a foreign government that the United States has agreed to consider under a regulatory cooperation council work plan.”<sup>57</sup> Section 4(c), by the same token, defines international regulatory cooperation as a process whereby “national governments engage in various forms of collaboration and communication with respect to regulations.”<sup>58</sup>

These suggestions, while blandly general enough to cover any form of regulatory cooperation, encourage harmonization as a technique worth trying. The Office of Information and Regulatory Affairs (“OIRA”) issued a letter to agencies while it was working on the EO directing them “to harmonize relevant regulatory approaches [and] standards” with their foreign counterparts where possible.<sup>59</sup> Both Sections 3(d) and 4(c) encourage continued engagement and dialogue. That sort of engagement is consistent with harmonization, where regulators meet regularly to develop

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52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at § 257.

58. *Id.*

59. Memorandum from Miriam Sapiro, Deputy U.S. Trade Rep., & Cass R. Sunstein, Administrator OIRA, to the Heads of Exec. Dep'ts & Agencies & Indep. Regulatory Agencies 4 (May 19, 2011), <https://www.whitehouse.gov/sites/default/files/omb/memoranda/2011/m11-23.pdf>.

common standards and to review those standards in place. Of course, the permission of “various forms” of collaboration does not preclude approaches like mutual recognition, though recognition does not, in theory, require the degree of regulatory engagement that harmonization does.

EO 13,609 institutionalizes its commitments in two ways. First, it creates a process to pursue international regulatory cooperation through committees of federal agencies. The EO designates the already extant RWG to coordinate international regulatory cooperation.<sup>60</sup> Second, it requires federal agencies to consider international regulatory cooperation when devising their regulatory agendas.<sup>61</sup>

The RWG’s responsibilities are somewhat amorphous. It is supposed to “serve as a forum to discuss, coordinate, and develop a common understanding among agencies of U.S. Government positions and priorities with respect to . . . international regulatory cooperation” likely deemed “reasonably anticipated to lead to significant regulatory actions,” and is also meant to endorse “efforts across the Federal Government to support significant, cross-cutting international regulatory cooperation activities.”<sup>62</sup> The White House’s guidelines to the EO, however, make clear that the RWG is meant to be the chief coordinating body for regulatory cooperation. The RWG wrote the guidelines, for one thing, and the first sentence of those guidelines concludes that the EO “calls on the [RWG] to issue guidelines on the applicability and implementation of the Executive Order.”<sup>63</sup>

The group is also charged with examining the strategies that might develop regulations through international regulatory cooperation, “particularly in emerging technology areas;” best practices for that kind of cooperation; and perhaps a checklist for when agencies should engage in that kind of cooperation.<sup>64</sup>

The second action item in the EO is the imposition of new responsibilities on federal agencies. The RWG places the goal of

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60. The RWG was established by Executive Order 12,866. Exec. Order No. 12,866, 3 C.F.R. § 638 (1994), *reprinted as amended in* 5 U.S.C. § 601 (2012). It is chaired by the head of OIRA and is composed of “a representative from the Office of the United States Trade Representative and, as appropriate, representatives from other agencies and offices.” EO 13,609, *supra* note 1, at § 256.

61. Agencies have occasionally avoided doing this. *See, e.g.,* Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 HARV. L. REV. 1755, 1816 n.337 (2013) (“A recent executive order on international regulatory cooperation, however, calls for a great deal of coordination to be conducted through the Regulatory Working Group, which may revive the institution.”).

62. EO 13,609, *supra* note 1.

63. *Regulatory Working Group Guidelines*, *supra* note 46, at 1.

64. EO 13,609, *supra* note 1, at § 256.

international regulatory cooperation on the long-range planning agendas of agencies sorting out what to do next in meeting their regulatory missions.

Section 3 of the EO requires agencies that submit regulatory plans to the White House to “include in that plan a summary of its international regulatory cooperation activities that are reasonably anticipated to lead to significant regulations.”<sup>65</sup> Agencies must also identify regulations that have “significant international impacts” in the Unified Agenda, which all agencies submit to the Office of Management and Budget (“OMB”) on an annual basis.<sup>66</sup> Moreover, when agencies engage in retrospective review of the necessity of various regulatory programs, they must consider “reforms to existing significant regulations that address unnecessary differences in regulatory requirements between the United States and its major trading partners.”<sup>67</sup>

In imposing new responsibilities on the RWG’s and agencies’ agenda-setting process, the EO is attempting to institutionalize American ordinariness, which might be reflected by a consistent international approach to cross-border regulatory problems.<sup>68</sup> The order is also replete with acknowledgment of American distinctiveness, particularly with regard to the unique aspects of American administrative procedure. In addition to considering good places where American rules might be harmonized with foreign ones, the RWG is charged with “the promotion of good regulatory practices internationally” and even “the promotion of U.S. regulatory approaches.”<sup>69</sup> The policy statement urges international regulatory cooperation only when “consistent with domestic law and prerogatives.”<sup>70</sup>

The EO thus endorses American administrative procedure with its transparency provisions, notice to relevant parties, opportunity to comment, and, if necessary, judicial review. But it makes clear that the substantive ends of regulation, if pursued consistent with American procedural minima, might be influenced by foreign perspectives on regulation.

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65. *Id.*

66. *Id.*

67. *Id.* at §§ 256–57.

68. John C. Reitz, *Recognition of Foreign Administrative Acts*, 62 AM. J. COMP. L. 589, 599 (Supp. 2014) (characterizing the EO as one “recognizing the need for the expansion of regulatory cooperation with U.S. trading partners and calling upon all federal agencies to eliminate unnecessary differences in regulatory requirements between the United States and its major trading partners”).

69. EO 13,609, *supra* note 1.

70. *Id.*

## B. IMPLEMENTING THE EXECUTIVE ORDER

The EO has been implemented modestly, but in such a way that harmonization is the primary mode of applying the order. The White House, in its actions following up on the order, has referenced harmonization efforts more than mutual recognition efforts. So have the agencies that have adopted the rule.

To be sure, the White House has not insisted on any particular form of regulatory cooperation. In its 2015 Guidance on the EO, the RWG stated, “A wide variety of activities could be considered to be ‘international regulatory cooperation,’ including information exchange, work sharing, aligning regulatory requirements, scientific collaboration, and pilot programs. The preferred form of cooperation will vary based on circumstances.”<sup>71</sup>

Specifically, federal regulators have referred to “mutual recognition” in actions citing the EO on at least five occasions: four of the annual overviews reviewing the obligation to submit a regulatory work plan to the OMB, as announced by the Regulatory Information Service Center,<sup>72</sup> and once by the Transportation Security Administration.<sup>73</sup> By contrast, “harmonization” appears in 60 of the 130 occasions when the EO is cited in the Federal Register, including those annual overviews of the regulatory work plans.<sup>74</sup>

For example, efforts by the Federal Aviation Administration (“FAA”)

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71. *Regulatory Working Group Guidelines*, *supra* note 46, at 18.

72. See *Search Results for* “‘exec! ord! 13609’ & ‘mutual recog!’”, WESTLAW, <https://a.next.westlaw.com/Search/Results.html> (enter “‘exec! ord! 13609’ & ‘mutual recog!’” in Westlaw’s Federal Register database). See, e.g., Introduction to the Unified Agenda of Federal Regulatory and Deregulatory Actions, 79 Fed. Reg. 76,456, 76,531 (Dec. 22, 2014) (describing, in each case, the U.S.-Canada Regulatory Cooperation Council as an “initiative between both federal governments aimed at pursuing greater alignment in regulation, increasing mutual recognition of regulatory practices and establishing smarter, more effective and less burdensome regulations in specific sectors”).

73. Transportation Security Regulations for Aircraft Repair Station Security, 79 Fed. Reg. 2119, 2123 (Jan. 13, 2014) (to be codified at 49 C.F.R. pt. 1554) (“TSA [Transportation Security Administration] has discussed and will continue to discuss current and proposed security requirements with its international partners in order to enhance the compatibility of security regulations and standards, including the possibility of developing protocols for reciprocity and mutual recognition of repair station security regulations.”).

74. See *Search Results for* “‘exec! ord! 13609’ & ‘harmon!’”, WESTLAW, <https://a.next.westlaw.com/Search/Results.html> (enter “‘exec! ord! 13609’ & ‘harmon!’” in Westlaw’s Federal Register database). See, e.g., Introduction to the Unified Agenda of Federal Regulatory and Deregulatory Actions, 78 Fed. Reg. 1318, 1323 (Jan. 8, 2013) (“Agencies are directed to attempt to reduce ‘redundant, inconsistent, or overlapping’ requirements, in part by working with one another to simplify and harmonize rules.”).

to develop standards have resulted in their own claims about harmonization. The FAA has sought to “eliminate differences between U.S. aviation standards and those of other civil aviation authorities by harmonizing” international standards with its rule.<sup>75</sup> The Architectural and Transportation Barriers Compliance Board has sought to “promote international regulatory cooperation and harmonization” by “making concerted efforts with a number of foreign governments throughout the development of” guidelines on information technology.<sup>76</sup> And a variety of American agencies have “engage[d] with other countries in the Wassenaar Arrangement, through which the international community develops a common list of items that should be subject to export controls.”<sup>77</sup>

More generally, the EO has already had an effect on a variety of regulatory initiatives across departments. The Department of Transportation, for example, has observed that “[f]ederal law and policy strongly favor the harmonization of domestic and international standards” and have applied that policy to hazardous material transportation.<sup>78</sup> The Department has interpreted the EO to require agencies to “consider whether the impacts associated with significant variations between domestic and international regulatory approaches are unnecessary,”<sup>79</sup> and the FAA has evaluated whether its rule on parts for airplane propellers was consistent with the EO.<sup>80</sup> So has the SEC in its broad rule on disclosure of payments by resource extraction issuers, issued pursuant to the Dodd-Frank Wall Street Reform Act.<sup>81</sup> The Federal Maritime Commission (“FMC”) went even further. It adjusted the payments required for bond riders who trade with China “in a spirit of comity and in conformity with Executive Order 13,609.”<sup>82</sup> The National Highway Traffic Safety Administration

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75. Federal Aviation Regulations for Installed Systems and Equipment for Use by the Flightcrew, 78 Fed. Reg. 25,840, 25,845 (May 3, 2013) (to be codified at 14 C.F.R. pt. 25).

76. Information and Communication Technology (ICT) Standards and Guidelines, 80 Fed. Reg. 10,880, 10,936 (Feb. 27, 2015) (to be codified at 36 C.F.R. pts. 1193, 1194).

77. Introduction to the Unified Agenda of Federal Regulatory and Deregulatory Actions, 79 Fed. Reg. 76,456, 76,498 (Dec. 22, 2014).

78. Hazardous Materials: Harmonization with International Standards (RRR), 78 Fed. Reg. 988, 988 (Jan. 7, 2013) (to be codified at 49 C.F.R. pts. 171–73, 175–78).

79. *Id.* at 1027.

80. Critical Parts for Airplane Propellers, 78 Fed. Reg. 4038, 4041 (Jan. 18, 2013) (to be codified at 14 C.F.R. pt. 35).

81. Disclosure of Payments by Resource Extraction Issuers, 77 Fed. Reg. 56,365, 56,370 (Sept. 12, 2012) (to be codified at 17 C.F.R. pts. 240, 249).

82. Adjustment of the Amount for the Optional Bond Rider for Proof of NVOCC Financial Responsibility for Trade with the People's Republic of China, 77 Fed. Reg. 51,935, 51,937 (Aug. 28, 2012) (to be codified at 46 C.F.R. pt. 515).

(“NHTSA”) has referred to the EO in its own rules.<sup>83</sup> One can see other agencies acting similarly.<sup>84</sup>

In many cases, the EO has been implemented in a pro forma manner. In 2015 alone, the Department of Energy’s controversial updated regulations regarding the assistance providable to foreign atomic energy concerns included an analysis that the agency “determined that the rule complies with all requirements” of the EO.<sup>85</sup> In the FAA’s similarly high profile rule on the permissibility of drones operating within the United States, there was “no effect” implicating the order.<sup>86</sup>

The FAA, the agency most likely to cite the EO, made a similar sort of “no effect” reference in many of its rulemakings, including its rule removing the prohibition against certain flights within the territory and airspace of Ethiopia,<sup>87</sup> its proposal to change the orders on limits of the use of various international airports,<sup>88</sup> among others.

Moreover, some agencies have taken the rule more to heart than others. In all, between March 1, 2015 and the EO’s promulgation on May 1, 2012, the FAA issued 42 of the 106 actions citing the order that have appeared in the Federal Register.<sup>89</sup> The Pipeline and Hazardous Materials Safety Administration has accounted for twenty-seven. The

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83. See, e.g., Federal Motor Vehicle Safety Standards; Lamps, Reflective Devices, and Associated Equipment, 77 Fed. Reg. 71,717, 71719 (Dec. 4, 2012) (to be codified at 49 C.F.R. pt. 571). Additionally, the NHTSA has amended the test pressure for temporary use spare tires to require a more rigorous standard be met in order to align the standard “with international and voluntary consensus standards,” partially in response to EO 13,609. Federal Motor Vehicle Safety Standards; New Pneumatic and Certain Specialty Tires, 78 Fed. Reg. 3843, 3843 (Jan. 17, 2013) (to be codified at 49 C.F.R. pt. 571). Pursuant to EO 13,609, NHTSA has also requested comment on “[t]he regulatory approaches taken by foreign governments” concerning a proposed rule that would mandate the installation of “event data recorders” in most light vehicles manufactured after September 1, 2014. Federal Motor Vehicle Safety Standards; Event Data Recorders, 77 Fed. Reg. 74,144, 74,155 (Dec. 13, 2012) (to be codified at 49 C.F.R. pt. 571).

84. See *infra* notes 85–89 and accompanying text.

85. Assistance to Foreign Atomic Energy Activities, 80 Fed. Reg. 9359, 9375 (Feb. 23, 2015) (to be codified at 10 C.F.R. pt. 810).

86. Operation and Certification of Small Unmanned Aircraft Systems, 80 Fed. Reg. 9544, 9583 (Feb. 23, 2015) (to be codified at 14 C.F.R. pts. 21, 43, 45, 47, 61, 91, 101, 107 & 183).

87. Removal of Special Federal Aviation Regulation No. 87—Prohibition Against Certain Flights Within the Territory and Airspace of Ethiopia, 80 Fed. Reg. 5918, 5921 (Feb. 4, 2015) (to be codified at 14 C.F.R. pt. 91).

88. Slot Management and Transparency for LaGuardia Airport, John F. Kennedy International Airport, and Newark Liberty International Airport, 80 Fed. Reg. 1274, 1299 (Jan. 8, 2015) (to be codified at 14 C.F.R. pt. 93).

89. See *Search Results for “exec! ord! 13609”*, WESTLAW, <https://a.next.westlaw.com/Search/Results.html> (enter “exec! ord! 13609” in Westlaw’s Federal Register database; then restrict the dates between March 1, 2015 and May 1, 2012).

National Highway Traffic Safety Administration has accounted for eighteen. These three agencies—hardly the government’s largest or most active rulemakers—accounted for 82 percent of the references to the rule. As for the rest, the Transportation Security Administration issued only one such rule. The Nuclear Regulatory Commission, in conjunction with the pipeline regulator, also referenced the order. The Department of Energy cited the order twice, the Coast Guard once, the SEC once, the FMC once, OMB once, and the president once in another executive order. The Regulatory Information Service Center thrice described the benefits of the EO as did the Administrative Conference of the United States.

To be sure, some caution is warranted in drawing broad conclusions about the order. It has been implemented, at least so far, rather unevenly. As noted, only a few agencies have cited the order in their administrative actions, and those agencies are not deemed to be central to the American government. Most of the time, the order has been cited for the boilerplate proposition that it does not apply to the action being taken by the agency. And in the cases of agencies that are actively engaged in high-level and critical regulation cooperation with their foreign counterparts—among drug, finance, and securities regulators, for example—the EO has not been cited even when the agencies have taken actions designed to harmonize their rules with the rules of their foreign counterparts.<sup>90</sup>

International regulatory cooperation, of course, had a history that existed before the order was promulgated; this history may explain why cooperation has not always been attributed to the order’s requirements. Indeed, before turning to the application of the order, it is worth noting that as long ago as 1991, the Administrative Conference of the United States (“ACUS”), the federal agency charged with setting administrative policy, observed that “[i]f American administrative agencies could ever afford to

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90. For example, the FDA did not cite the EO in its recent notice and request for comment on some of its information collection practices “prepared under the auspices of the International Council for Harmonisation of Technical Requirements for Registration of Pharmaceuticals for Human Use.” Agency Information Collection Activities; Proposed Collection; Comment Request; E6(R2) Good Clinical Practice; International Council for Harmonisation, 81 Fed. Reg. 34,345, 34,345 (May 31, 2016). Neither the SEC nor the banking regulators cite the EO in their regulation implementing the so-called “Volcker Rule.” Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds, 79 Fed. Reg. 5,536, 5,536 (Jan. 31, 2014) (promulgating a rule establishing “certain prohibitions and restrictions on the ability of a banking entity and nonbank financial company supervised by the Board to engage in proprietary trading and have certain interests in, or relationships with, a hedge fund or private equity fund”). For a brief overview of regulatory cooperation, see David Zaring, *Three Challenges for Regulatory Networks*, 43 INT’L LAW. 211, 211–12 n.3 (2009) (reviewing the areas in which international regulatory cooperation may be found).

engage in regulatory activities without regard to the policies and practices of administrative agencies abroad, the character and pace of world developments suggest that that era has come to a close.”<sup>91</sup> And well before then, American agencies had begun cooperating with their foreign counterparts—indeed, it was the flowering of this cooperation that presumably led to the ACUS recommendation. In 2011, ACUS revisited the recommendation and continued to encourage all agencies to “consider strategies for regulatory cooperation with relevant foreign authorities when appropriate to further the agencies’ missions or to promote trade and competitiveness when doing so does not detract from their missions.”<sup>92</sup> The 2011 recommendation also promoted best practices in transparency, mutual alliance, information sharing, and coordination between American and foreign agencies.<sup>93</sup>

Moreover, the White House has paired the EO with country-to-country efforts to reduce regulatory barriers to trade—indeed, it lists these efforts as achievements to be paired with the order.<sup>94</sup> These efforts also broadly celebrate harmonization as the form of international regulatory cooperation to be pursued.

The United States-Mexico High-Level Regulatory Cooperation Council Work Plan identifies one of its objectives as “[l]inking harmonization and regulatory simplification to improvements in border-crossing and custom procedures.”<sup>95</sup> For instance, trucking safety standards is a particular area where this sort of harmonization is being pursued, and harmonization efforts also exist with regard to healthcare information sharing and offshore oil and gas development standards.<sup>96</sup> The United States-Canada Regulatory Cooperation Council, for its part, has also reported on harmonization efforts for meat inspection rules, the transportation of dangerous goods, medical device approvals, and natural gas transportation standards, although the countries have pursued mutual

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91. Admin. Conf. Recommendation 91-1: Federal Agency Cooperation with Foreign Government Regulators, 56 Fed. Reg. 33,841, 33,842 (July 24, 1991) (to be codified at 1 C.F.R. pt. 305).

92. Admin. Conf. Recommendation 2011-6: International Regulatory Cooperation, 77 Fed. Reg. 2257, 2259 (Jan. 7, 2012).

93. *Id.*

94. See Office of Mgmt. & Budget, *Regulatory Matters*, WHITE HOUSE, [https://www.whitehouse.gov/omb/international\\_regulatory\\_cooperation#eo13609](https://www.whitehouse.gov/omb/international_regulatory_cooperation#eo13609) (last visited Feb. 29, 2016) (links to high-level working groups that follow EO 13,609).

95. OFFICE OF MGMT. & BUDGET, UNITED STATES-MEXICO HIGH-LEVEL REGULATORY COOPERATION COUNCIL WORK PLAN 3 (Feb. 28, 2012), <https://www.whitehouse.gov/sites/default/files/omb/oira/irc/united-states-mexico-high-level-regulatory-cooperation-council-work-plan.pdf>.

96. *Id.* at 8, 9–12.

recognition objectives as well.<sup>97</sup> In the case of Europe, the United States-European Union High-Level Regulatory Cooperation Forum has been created to, as the White House puts it, “identif[y] opportunities for cooperation” and “help[] bridge gaps where responsibilities in the two administrations do not correspond exactly.”<sup>98</sup>

#### IV. IMPROVING INTERNATIONAL REGULATORY COOPERATION

The prospect of international regulatory cooperation is promising, and something that now has the explicit endorsement of the White House through EO 13,609. Nonetheless, there are some accidents waiting to happen that stem, above all, from the legitimacy problems posed by doing regulation at the global level. The EO only partially addresses how that legitimacy problem might be managed.

One way to think about the legitimacy problem is to take Peter Lindseth’s view of the problem of international regulation. As he has explained, global regulation is devised two steps away from the regulated, making it particularly difficult for the regulated to voice their concerns about the rules that ultimately affect them.<sup>99</sup> If those agencies are setting their policy through collaboration with their foreign counterparts, then the distance from people to agency to policy formation is doubled.<sup>100</sup>

Another way to look at the legitimacy problem, one that dovetails with the doctrine of domestic administrative law, is to focus on the interface and differences between domestic and international. International regulatory cooperation works through negotiated and informal means. It is very different from the standard, and more routinized, agency rulemaking that

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97. THE WHITE HOUSE, UNITED STATES-CANADA REGULATORY COOPERATION COUNCIL: JOINT FORWARD PLAN 21, 23, 33 (Aug. 2014), <https://www.whitehouse.gov/sites/default/files/omb/oira/irc/us-canada-rcc-joint-forward-plan.pdf>.

98. Office of Mgmt. & Budget, *Europe*, WHITE HOUSE, [https://www.whitehouse.gov/omb/oira\\_irc\\_europe](https://www.whitehouse.gov/omb/oira_irc_europe) (last visited Feb. 29, 2016).

99. Peter L. Lindseth, *Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community*, 99 COLUM. L. REV. 628, 633–35 (1999). Elsewhere, Lindseth takes the following crack at the definition of the democratic deficit: “[T]he transfer of normative power to agents that are not electorally responsible in any direct sense to the ‘people’ whose ‘sovereignty’ . . . the agents are said to exercise.” *Id.* at 633. Of course, the term applies to all sorts of international delegations, but is most associated with the European Union. For a discussion of the E.U.’s democratic deficit by an American constitutional lawyer, see Ernest A. Young, *Protecting Member State Autonomy in the European Union: Some Cautionary Tales from American Federalism*, 77 N.Y.U. L. REV. 1612, 1638–39 (2002).

100. Lindseth, *supra* note 99, at 633–34 (“On the national level, administrative agencies are responsible politically, not to the people directly, but to their representative institutions . . . . Institutions exercising supranational normative power, however, exist in an even more attenuated ‘two step’ relationship with the people . . . of the various participating states.”).

interested domestic parties are familiar with—of course, that rulemaking culminates in judicial review, a fate for domestic regulation that simply is unavailable in the international context.<sup>101</sup> Thus, creating a legitimate interface between negotiated policy and procedurally regular implementation takes some work.

Hence the problems created by the legitimacy guaranteeing principles of domestic administrative law when the process of policy formulation goes global. For example, the requirement that rules be published in the Federal Register, a paragon of government transparency, is stretched when, say, a financial regulator takes a multipage document agreed to in Basel or in London and publishes it as a proposed rule, inviting notice and comment, in the United States. There is little to suggest that the notice and comment will help inform a final rule that has already been fixed through international agreement.

One doctrinal way to address these problems would be to place international regulatory cooperation within the bounds of the executive's traditionally received deference in foreign affairs.<sup>102</sup>

But four suggested changes are in order, some of which are ongoing, that are needed to make international regulatory cooperation better, and that will help to address some of the doctrinal banana peels presented by the phenomenon.

The first change is to spread good domestic procedure among the participants of international regulatory cooperation, which is one of the apparent goals of EO 13,609. American agencies seem to have taken this goal to heart. As Francesca Bignami argues, much of what the government has done lately looks like an effort to encourage good domestic practices among foreign counterparties, even as the effort has a whiff of “America’s way or the highway” about it:

[T]he current set of policy statements directs federal agencies to advocate sound (generally understood to be American) administrative law *tout court*. According to the ACUS recommendation, federal agencies should ‘promote to foreign authorities the principles that undergird the United States administrative and regulatory process,’ which in the Executive Order is captured by the direction to promote ‘good regulatory practices internationally, as well as the promotion of

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101. See Kate Andrias, *The President’s Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1064 n.149 (2013) (noting that the government has “put greater emphasis on centralization of rulemaking in negotiations with trade partners”).

102. See Jean Galbraith & David Zaring, *Soft Law as Foreign Relations Law*, 99 CORNELL L. REV. 735, 742 (2014).

U.S. regulatory approaches, as appropriate,' and in the ABA resolution by the recommendation to 'promote . . . the core principles of sound administrative and regulatory process.'<sup>103</sup>

Spreading good administrative practices, if "good" means "American," raises issues of policymaking imperialism. But it may be the price paid for the new willingness evinced by the White House to endorse international regulatory cooperation—the bitter that other countries must take with the sweet of EO 13,609. Section 2(a) of the EO promotes good regulatory practices.<sup>104</sup> In this way, it is one of the signature aspects of the order, designed to ensure that better domestic administration is a hallmark of international regulatory cooperation. It is through these processes that the cooperation will be executed, making its legitimacy all the more important.

The second change is to make for better international procedure. Here too, at least in finance, the evolution of international regulatory cooperation has been promising, even if not uniformly perfect. For example, banking regulators used to work with their foreign counterparts in utter secrecy.<sup>105</sup> Now there are the international equivalents of advanced notices of proposed rulemaking, made available on the websites of groups of regulators working to create an international financial oversight architecture (and it appears that their websites are regularly updated),<sup>106</sup>

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103. Francesca Bignami, *Designing Administrative Law: Free Trade vs. Accountability Networks*, I-CONNECT: BLOG OF THE INT'L J. OF CONST. L. & CONSTITUTIONMAKING.ORG (Oct. 27, 2012), <http://www.iconnectblog.com/2012/10/designing-administrative-law-free-trade-vs-accountability-networks/> (emphasis in original) (quoting Admin. Conf. Recommendation 2011-6: International Regulatory Cooperation, 77 Fed. Reg. 2257, 2259 (Jan. 7, 2012)).

104. EO 13,609, *supra* note 1, at § 256.

105. David Zaring, *International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations*, 33 TEX. INT'L L.J. 281, 303 (1998) ("The Basle [sic] Committee meets in secret and did not publicize its first Concordat until five years after the Committee's members created it.").

106. For example, the Financial Stability Board, successor to the Financial Stability Forum, charged with making recommendations aimed at promoting international financial stability, frequently invites interested parties to provide written commentary in response to its publication of consultative documents. *See, e.g.*, Press Release, Fin. Stability Bd., FSB Consults on an Initial Integrated Set of Recommendations to Strengthen Oversight and Regulation of Shadow Banking (Nov. 18, 2012), [http://www.financialstabilityboard.org/press/pr\\_121118.pdf](http://www.financialstabilityboard.org/press/pr_121118.pdf); Press Release, Fin. Stability Bd., FSB Consults on Making the Key Attributes Requirements Operational (Nov. 2, 2012), [http://www.financialstabilityboard.org/press/pr\\_121102.pdf](http://www.financialstabilityboard.org/press/pr_121102.pdf); Press Release, Fin. Stability Bd., FSB Consults on Measures to Address Systemically Important Financial Institutions (July 19, 2011), [http://www.financialstabilityboard.org/press/pr\\_110719.pdf](http://www.financialstabilityboard.org/press/pr_110719.pdf). Additionally, international accounting and auditing standards are developed through a process that allows for public comment prior to finalization of the standards. The Basel Committee regularly analyzes and provides commentary on these draft proposals. *See Comment Letters to Other Organisations*, BANK FOR INT'L SETTLEMENTS, <http://www.bis.org/bcbs/commentletters/commentletters.htm> (last visited Jan. 6, 2012).

while the G20 itself, comprised of the political leadership of heads of states and finance ministers, exerts altogether more supervision over the regulatory process.<sup>107</sup> But finance, though generally a particularly nontransparent arm of the regulatory state, is setting a bar that not every cooperative effort yet meets. And the G20 has taken much less interest in areas of regulation where cooperation is growing apace, such as antitrust law or food and drug safety.<sup>108</sup>

A third change is for international regulatory cooperation to become more than a simply technocratic exercise. It must have a degree of political involvement and supervision. The new EO evinces such involvement on behalf of the president, and that is a good thing. So is the involvement of the G20, which is, after all, a club of heads of state, even if all states or leaders do not enjoy participation in it.<sup>109</sup>

But it would be a better thing if, and this is the fourth recommendation, the legislature evinced a more comprehensive embrace of the international regulatory process. So far, Congress has encouraged international regulatory cooperation to happen when it goes through a series of idiosyncratic “go forth and collaborate” benedictions of already existing processes or encouragements to begin new ones. The Dodd-Frank Wall Street Reform and Consumer Protection Act, for example, is replete with these kinds of encouragements.<sup>110</sup> The recent amendments to the

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107. See Douglas W. Arner, *Adaptation and Resilience in Global Financial Regulation*, 89 N.C. L. REV. 1579, 1594 (2011) (characterizing September 2009 and June 2010 leaders’ summits as “most significant in affirming commitment to the agenda and major policy directions established in previous summits”).

108. The G20’s lack of interest in these regulatory areas makes sense given that recognition of the lack of transparency in international financial regulation was one of the driving forces behind formation of the G20 in the first place. *About G20*, G20 (Nov. 27, 2015, 10:13 AM), [http://www.g20.org/English/aboutg20/AboutG20/201511/t20151127\\_1609.html](http://www.g20.org/English/aboutg20/AboutG20/201511/t20151127_1609.html). However, the G20 did address food security (as opposed to safety) in its June 2012 meeting in Mexico. LEADERS OF G20, G20 LEADERS DECLARATION, (June 2012), [http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/19\\_06\\_12\\_g20\\_communique.pdf](http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/19_06_12_g20_communique.pdf).

109. Nineteen countries and the European Union comprise the G20 and its membership represents almost 90 percent of the global GDP. *About G20*, *supra* note 108. However, China is a member, while its neighbors to the south, Thailand, Burma, and Laos, are not; South Africa is the only country on the continent of Africa that is covered; and Mexico, Argentina, and Brazil are the only three countries represented of the twenty nations that comprise Central and South America.

110. See, e.g., 12 U.S.C. § 5495 (2006) (stating that the new Bureau of Consumer Financial Protection “shall coordinate with the [SEC], the Commodity Futures Trading Commission, the Federal Trade Commission . . . to promote consistent regulatory treatment of consumer financial and investment products and services”); 12 U.S.C. § 5535 (directing the newly established Private Education Loan Ombudsman to attempt to resolve borrower complaints “in collaboration with the Department of Education and with institutions of higher education, lenders, guaranty agencies, loan servicers, and other participants in private education loan programs”).

governing statute for the Department of Homeland Security specifically incorporate instructions for the agencies to consider international regulatory cooperation when coming up with a uniform approach to respond to the threat of cyber attack.<sup>111</sup> Congress should go further and develop some broad encouragement to all domestic agencies to collaborate with their foreign counterparts. Good governance types can insist that this encouragement be conditioned on the acceptance by those foreign counterparties of some basic principles of transparent and effective administrative procedure likely to legitimate the phenomenon, both in the United States and abroad.

### CONCLUSION

The executive branch has taken some promising steps to embrace regulatory globalization, and in so doing, pursue free trade through new means. With more attention to the legitimacy problems created by the phenomenon, at least one of the three branches of American government—and two if Congress does its part—will be well situated to make the modern approach to international regulation fit with American interests and more universally recognized principles of good governance.

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111. Exec. Order No. 13,636, 78 Fed. Reg. 11,739, 11,743 (Feb. 19, 2013) (“[W]ithin 90 days of publication of the final Framework, agencies . . . shall propose prioritized, risk-based, efficient, and coordinated actions, consistent with . . . Executive Order 13,609 of May 1, 2012 (Promoting International Regulatory Cooperation), to mitigate cyber risk.”).