

Asia and Europe Regulatory Connectivity and Coherence

DEREK GILL, NEW ZEALAND INSTITUTE OF ECONOMIC RESEARCH
AND VICTORIA UNIVERSITY OF WELLINGTON

This paper addresses the state of regulatory connectivity between Europe and Asia (Asia–Europe Meeting [ASEM] countries). It explores the wide range of possible approaches to international regulatory cooperation and finds that implementation is often hard and there are no simple ‘silver bullet’ solutions. The best approach will depend on the goals, the contexts in the respective countries, and the balance of risks with each approach. The key policy implication is that countries should consider the full range of regulatory cooperation approaches, and use the least demanding form of international regulatory cooperation (IRC) required to achieve their objectives. Unilateral action to achieve regulatory convergence is an important tool for countries to consider first.

The paper highlights how practice, driven forward by initiatives such as the Trans-Pacific Partnership, is leading theory. Theory is lagging as suitable frameworks are still being developed to adequately characterise the dimensions of IRC and the possible approaches. As cooperation is a long game, ASEM provides an important opportunity to identify the first initial steps that need to be taken.

Introduction

The reduction of tariffs in successive international trade negotiations and, more importantly, the significant reduction in the cost of transport due to containerisation have increased international trade significantly. However, non-tariff barriers such as technical barriers to trade (technical regulations, mandatory standards, related conformity assessment procedures, etc.) and divergence in regulatory policies and practices continue to provide obstacles to trade. The lack of regulatory coherence arising from the interaction of regulations within and between countries can combine to produce unintended and unnecessary barriers to trade. ‘While some non-tariff measures are “born” as intentional restrictive and protectionist non-tariff barriers, most are not’ (Marshall School of Business, 2008, p. i).

Note: I am grateful for the reviewer’s comments on an earlier draft. The opinions expressed in this paper are the sole responsibility of the author.

The aim of international regulatory cooperation (IRC) is to improve regulatory coherence and connectivity by improving the design and execution of the operation of regulations on goods or services as they cross national boundaries. IRC has become very topical in recent years with the Trans-Pacific Partnership (TPP),¹ the Transatlantic Trade and Investment Partnership, and various European Union (EU) regional initiatives with accession and neighbouring countries. IRC is also being driven by concerns about non-tariff barriers (NTBs) generally as well as the inclusion of TBT provisions, bilateral free trade agreements (FTAs), and regional FTAs.

This paper examines the state of regulatory connectivity between Europe and Asia (ASEM countries) by exploring what the opportunities and barriers are. To do this, we set the scene briefly on why regulatory connectivity matters before exploring in subsequent sections the achievements and opportunities facing ASEM countries.

Regulatory connectivity and coherence can play an important role in physical, institutional, and people connectivity. Regulatory coherence has a number of dimensions: (i) coherence between different domestic laws, (ii) coherence between different domestic regulatory practices, and (iii) coherence between the law and practices of different economies. The third element, coherence between different countries, is addressed through greater international regulatory cooperation.

IRC can be seen as a continuum with full autonomy at one end through informal cooperation through formal cooperation (such as mutual recognition) to full harmonisation and integration at the other.

IRC can occur at a number of levels—policies, the practices of regulatory agencies (apart from enforcement), judicial and quasi-judicial enforcement, and adjudication (Ladley and Gill, 2008). At each level is a continuum in the range of levels of intensity of integration. Moreover, there is an independent decision on the degree of integration at each level of policy integration, regulatory practices, enforcement, and adjudication. As a result, there is a wide range of possible approaches, and no simple ‘silver bullet’ solutions.

The Objectives of and Gains from International Regulatory Cooperation

Greater regulatory connectivity and coherence offer economic gains from reduced NTBs and improved regulatory quality, and yields other benefits such as geopolitical gains.

¹ For an analysis of the regulatory coherence provisions in Chapter 23 of the TPP, see Ciuriak and Ciuriak (2016).

Economic Growth

The first objective is the promotion of economic growth through improved transparency and reduced non-tariff barriers to trade, arising from reduced compliance costs, increased competition, reduced prices, more rapid diffusion of innovation, and improved ability for small and medium enterprises to participate in trade. While the potential gains are clear, the extent of these gains, however, are more contested. In the case of mutual recognition agreements (MRAs), the Organisation for Co-operation and Development (OECD) observes 'the impact of MRAs on trade by lowering cost is found to be positive in the empirical literature. Nonetheless, the empirical evidence is not very powerful. In fact, little is known about cost differential of conformity assessment with and without a MRA' (Correia de Brito et al., 2016, p. 11).

Improved Regulatory Quality

A second potential gain comes from strengthening the capability of states to deliver effective regulation to citizens and businesses. These gains arise from the cost effective development and implementation of rules and improved regulatory capacity and capability. The latter is particularly important for smaller or less developed states with weaker regulatory capability. New Zealand pursued the goal of a joint therapeutic regulator with Australia (unsuccessfully ultimately) in part because of concerns that New Zealand lacked the ability to sustain a credible domestic regulatory capability in such a highly technical and specialised field. (See Ladley and Gill for a discussion of the less developed states in the Pacific.)

Gains also arise from increasing the effectiveness of regulation across borders. This is an important factor given the growth in global supply chains. These chains limit the ability of individual states to regulate their citizens and businesses because the reach of powers of the regulators often do not extend beyond one country's borders. This makes it difficult to monitor and enforce compliance with a regime in another country with the domestic powers that regulators have. Moreover, with global chains there is increased potential for regulatory failures to spread across national boundaries.

IRC is criticised for the loss of autonomy in the exercise of regulatory sovereignty. This is a potentially valid concern particularly as the degree of cooperation becomes more intensive. But sovereignty without capability is a hollow exercise of form over substance. The critical question is, does the proposed initiative adversely impact on the effective exercise of sovereignty? IRC offers the scope for more effective exercise of national regulatory sovereignty through the adoption of international standards and norms backed by support from regulators in other jurisdictions. In some cases, this support could include technical assistance from overseas counterparts.

Other Potential Benefits

IRC can also offer other benefits. One of the potential gains from IRC are geo-political. One of the multiple drivers for Closer Economic Relations (CER) between Australia and New Zealand came from Australian concerns about the geo-political implications of continued poor economic performance by New Zealand (Nixon and Yeabsley, 2002, p. 139). (See Box 1 for a discussion of CER). Other potential benefits for some forms of IRC include getting a seat at the table to influence international standard setting, and allowing scope for regulatory competition (under some forms of mutual recognition) (Mumford, 2012).

The previous section discussed how there is a wide range of possible approaches to IRC. Being clear about the objectives sought, the potential gains from IRC, and being realistic about the capability to implement are important to get alignment between the approach adopted and the intended objectives. The next section turns to a discussion of the opportunities and achievements facing regulation in ASEM countries.

Achievements and Opportunities

IRC offers opportunities because there is a wide range of alternative approaches—a key challenge is to choose the right approach to achieve the desired objective that is capable of being delivered. While there is general agreement that there is a spectrum from autonomous regulation at one end to full regulatory integration at the other, there is no agreed taxonomy in the literature for the intermediate points in between.² This is because there are a number of variables and, hence, a range of permutations and combinations. The key dimensions for IRC include:

- The objectives sought – reducing particular NTBs, improving regulatory quality, augmenting regulatory capability, or managing international spillovers
- The numbers of players involved – bilateral, plurilateral, or multilateral
- The parties involved – while IRC is focused on government actors, private accreditation is increasingly being substituted for MRAs and growing private ‘regulation’ is increasingly being adopted by governments
- The focus – policy, enforcement, other regulatory practices, adjudication
- The locus – comprehensive sectoral coverage, inclusive with a negative list of sector or product exclusions, limited to a positive list of inclusions, sector specific
- The legal architecture – international organisations, international agreements, regional agreements, bilateral agreements.

² See Bull et al. (2015, p. 15) for a longer discussion of this vexed issue.

Box 1: Australia and New Zealand – Closer Economic Relations to a Single Market

Australia and New Zealand have a shared history, language and values, a similar culture, political, legal and economic institutions, and a high political commitment to greater integration. This has provided a solid platform of mutual understanding and trust on which to build the closer economic relationship. The free trade area established by the Closer Economic Relations Trade Agreement in 1983 led over time to further integration under a goal of the Single Economic Market. In some areas integration has well advanced—the Intergovernmental arrangement relating to Trans-Tasman Mutual Recognition (TTRMA) includes recognition of respective regulatory regimes as well as conformity assessment procedures. The EU is the only other jurisdiction with mutual recognition of regulatory regimes.

However, progress in other areas has been slower. In a joint study by the Australian Productivity Commission and the New Zealand Productivity Commission, it was observed (2012, p. 6):

Implementing agreements to reduce behind the border barriers—typically regulatory in nature is more complicated than reducing tariffs. Work programs strengthening trans-Tasman economic relations have taken many years in some cases. For example, the first consultation paper on establishing a joint therapeutic products agency was released in 2000, yet the new agency is not due to be operational until 2016. In other areas—such as a mooted merger of stock exchanges and the integration of banking supervision and competition policy regimes—deeper integration has not been achieved.

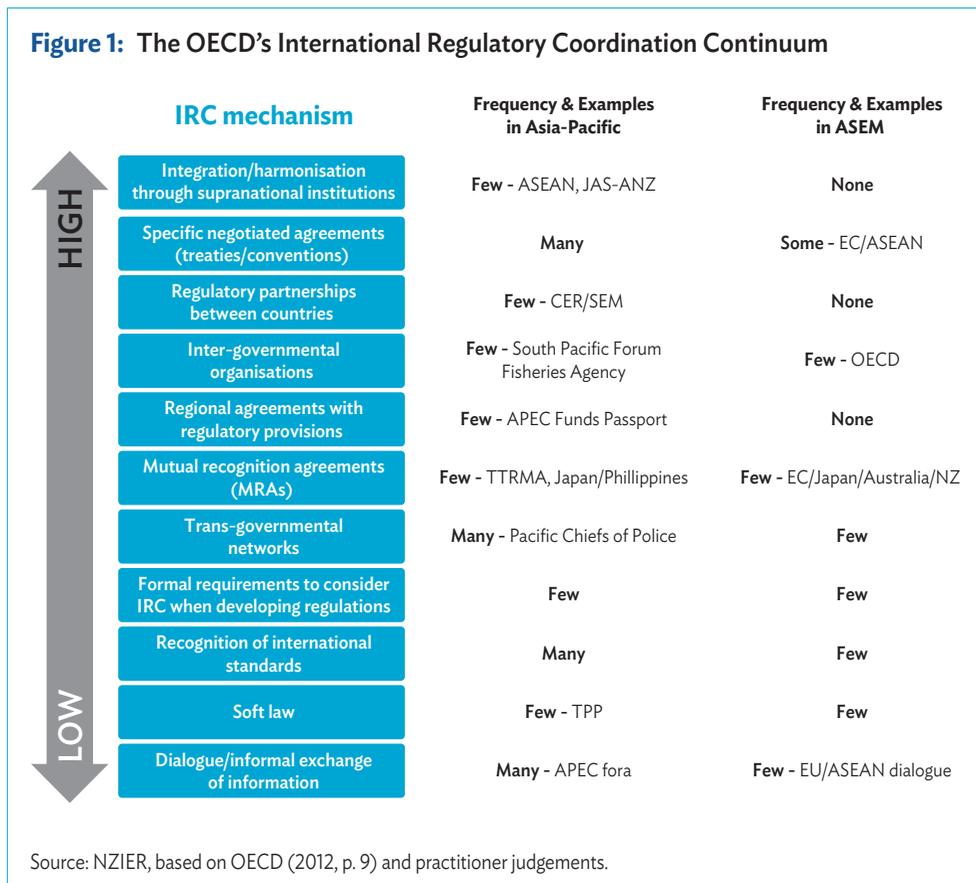
In relation to competition policy and consumer protection regimes, the decision not to integrate more deeply reflected the results of an analysis that the costs of doing so would outweigh the benefits (APC, 2004). Establishment of a full service joint regulator for therapeutic products proved a bridge too far. Since the joint study was published, the design work was completed but the proposal for a joint regulator was essentially abandoned in 2015.

As a result, no joint regulators cover the full spectrum of policies, practices, and enforcement. In food safety standards, New Zealand has essentially joined the Australian body with minor modifications to the governance arrangements. In the case of JAS-ANZ, a separate (international) body was created to provide for a joint accreditation system for conformity assessment bodies. However, administration and enforcement of any joint standards remain with the respective domestic agencies.

New Zealand and Australia show what can be achieved through a combination of political commitment and sustained bureaucratic effort when they are built on a foundation of trust. 'It should be acknowledged that it will be exceedingly difficult for other countries to imitate this model of mutual recognition due to the context as well as its ambition' (Correia de Brito et al., 2016, p. 68).

For example, the OECD has identified 11 different types of IRC mechanisms which are a mixture of legal structures, types, and numbers of players arranged on a continuum from low to high levels of regulatory integration. These mechanisms are shown in the first column of Figure 1. The second column reviews the relative frequency of the use of different government IRC mechanisms within ASEM countries in the Asia-Pacific region on a simple scale (none, few, many) and includes some illustrative examples. The third column looks at the relative use of various plurilateral IRC mechanisms between ASEM countries in Asia and Europe (but excluding multilateral IRC arrangements through the World Trade Organization and the UN systems).

It is important to note that systematic data on the number of arrangements is generally lacking apart from a few exceptions, such as the mapping of MRAs undertaken by the OECD (Correia de Brito et al., 2016). As a result, the assessments in Figure 1 of the relative frequency of the use of IRC are generally based on qualitative practitioner judgements rather than firm quantitative information.



IRC Achievements

Within ASEM countries in the Asia-Pacific region is a range of arrangements across the IRC continuum, shown in the second column of Figure 1. The arrangements are concentrated at the low integration end of the spectrum. These low integration arrangements involve soft law 'best endeavour' undertakings or agency-to-agency trans-government networks rather than formal intergovernmental organisations and agreements.

At the low integration end, there are more numerous examples in the Asia-Pacific region. A number of ASEM countries are also members of the Asia-Pacific Economic Cooperation (APEC) which provides for dialogue and exchange of information across a wide range of economic issues. This dialogue provides the basis for specific programmes such as the Asia Regional Funds Passport Initiative (Godwin and Ramsay, 2015). Similarly, APEC has an initiative to rationalise and simplify technical barriers to trade provisions across bilateral and regional trade agreements.

A number of countries have become signatories to the TPP and when it comes into force they will be bound by the regulatory coherence chapter. This requires domestic regulation making to include greater transparency and allow interested parties from other countries to comment on regulatory proposals and have their views taken into account and to participate in rule making.

At the high integration end of the continuum are two examples. ASEAN has an ambitious agenda to achieve greater economic integration through the ASEAN Economic Community (AEC) established in 2015. The common goal of Australia and New Zealand of moving to a single economic market is discussed in Box 1. New Zealand and Australia have mutual recognition of regulatory regimes (the only region outside the EU to this degree of integration) and a joint standards setter, but no full joint regulators.

The third column of Figure 1 looks at the relative frequency of plurilateral arrangements between ASEM countries in Asia and Europe and suggests there are a few high IRC integration arrangements and those that exist are concentrated at the low integration end of the spectrum. The EU and ASEAN have a Dialogue on Connectivity that covers security, economic/trade, and sociocultural cooperation. Apart from this example, the author has not been able to identify other examples of high integration arrangements such as regulatory partnerships between EU countries and a significant number of ASEM countries. There are, however, a range of bilateral agreements that have regulatory provisions between the EU and ASEAN and between the EU and the developed ASEM countries in the Asia-Pacific region such as Australia, Korea, Japan, New Zealand, and Singapore.

One area where comparative data is available is for MRAs. With a few notable exceptions, these are limited to mutual assessment of conformity assessment results. Moreover, the European Commission’s MRAs are mainly limited to countries of similar capabilities that ‘trust each other’s regulatory procedures, institutions and infrastructure’ (Lesser, 2007, p. 7). Similarly MRAs within the Asia-Pacific region are almost solely between the developed countries. The author has identified two significant regional initiatives: within APEC economies, an MRA on telecommunications equipment and within ASEAN countries, a framework for the mutual recognition of professional services (architectural, surveying, medical, dental, engineering, nursing, accounting, and tourism).

While to date there has been limited progress at the regional level in Asia-Pacific (apart from the limited targeted initiatives discussed above), ASEAN has an ambitious agenda of achieving greater economic integration through the AEC. For example, the Economic Blueprint, one of the three blueprints adopted for the ASEAN Community, aims to achieve the free flow of skilled labour within ASEAN by 2025. Box 2 discusses the regulatory components of the AEC in more detail.

The AEC Blueprint provides a useful foundation on which ASEM can build.

Box 2: AEC and Good Regulatory Practices

The AEC Blueprint 2025 lists the following strategic measures for implementing and institutionalising Good Regulatory Practices (GRP) in ASEAN:

- Ensure that regulations are pro-competitive, commensurate with objectives, and non-discriminatory.
- Undertake regular concerted regional programmes of review of existing regulatory implementation processes and procedures for further streamlining and, where necessary, recommendations for amendments and other appropriate measures which may include termination.
- Institutionalise GRP consultations and informed regulatory conversations with various stakeholders in order to identify problems, come up with technical solutions, and help build consensus for reform.
- The regulatory agenda may include the setting of both targets and milestones in order to facilitate a regular assessment of the regulatory landscape, and periodic review of progress and impacts in the region.
- Undertake targeted capacity building programmes with knowledge partners such as OECD and ERIA to assist ASEAN Member States in the regulatory reform initiatives which take into account the different development levels, development needs, and regulatory policy space of each ASEAN Member State.

Challenges and Risks

This section discusses the key obstacles, risks, and issues that need to be managed to achieve greater regulatory connectivity.

The first issue is the expectations gap. The OECD's mixed experience with MRAs is instructive. 'MRAs were probably overrated in terms of benefits, without fully realising the costs and challenges' (Correia de Brito et al., 2016, p. 11). In part MRAs have provided limited benefits because private accreditation systems have been able to provide the requisite coordination more effectively. This experience suggests shooting low for the least demanding form of IRC required to achieve the objectives rather 'than shooting for the moon'.

The second issue is the implementation gap. There is often a marked gap between the rhetorical goals and actual achievements on IRC (Jetschke, 2009). The OECD reports that in the US/EU MRA after a number of years of being signed, only two of the six sectoral agreements were operational with around 20 percent of the goods intended actually covered (Correia de Brito et al., 2016, p. 11).

The third issue is the importance of a platform of trust and adequate levels of capability to support deeper levels of integration. The experience from New Zealand and Australia suggests that, while much is possible, the degree of integration that can be achieved has limits, even when there is a shared history, similar culture and institutions, and high political commitment. The economic theory of clubs posits that the optimal club size is one where the additional economies of scope and scale are equal to the extra costs of collective action (Mueller, 1989, pp. 150–153). As the extent of integration in Figure 1 increases, the costs increase too, while the additional benefits at the margin are limited. Similarly the more diverse the countries seeking to cooperate and the more disparate the level of capability, the higher the cost of collective action and shallower the optimal level of integration within the club will be.

The fourth issue is the risk of international divergence in regimes. Divergence can arise when parties are called to harmonise on regional regulatory regimes which are not aligned with international or super-regional settings.

The fifth issue is the related risk of diversion. Regulatory diversion can arise when scarce resources are devoted to regional convergence and are diverted from supra-regional or multilateral convergence. For example, regional rules of origin requirements can mean other countries are disadvantaged if they must continue to fulfil separate requirements.

These issues are particularly important for smaller and less developed countries where capability constraints mean that these countries can have difficulties completing and implementing the bilateral or regional provisions they have already agreed to. As a result, the degree of regulatory cooperation that was planned is not achieved.

Policy Implications

Greater regulatory connectivity can be used to achieve a range of goals including reduced technical barriers to trade, improved regulatory quality, or wider geopolitical integration. There is a wide range of possible approaches, implementation is often hard, and there are no simple ‘silver bullet’ solutions. The best approach will depend on the goals, the contexts in the respective countries, and the balance of risks with each approach. That said some tentative policy conclusions can be drawn.

One key challenge is to manage down the expectations gap. Based on a review of Mutual Recognition Agreements, the European Commission observed ‘Traditional MRAs ... have proven difficult to negotiate and even more difficult to implement. It is not worth pursuing new negotiations of this type of MRA’. Instead they advocate pursuing enhanced MRAs based on common or equivalent standards mainly focused on accession countries. With respect to ASEAN countries, the paper envisaged a technical dialogue with a view in the longer term ‘for Enhanced MRAs in selected sectors where equivalent standards exist’ (European Commission, 2004, p. 10).

The key dimensions of IRC—approach, focus, locus, parties, players, and architecture (discussed above)—provide a useful framework for the directions for reform:

- On approach – be clear about what the objectives are – reducing particular NTBs, improving regulatory quality, augmenting regulatory capability or managing international spillovers
- On focus – work on coordination of new policies rather than existing provisions, the practices of regulators, or enforcement
- On numbers – harmonise to international, not bilateral, rules and standards, working with international standard-setting bodies where necessary
- The locus – focus on sectors where the gains are highest (such as international value chains) and avoid long-standing trade irritants
- On the parties involved – start with private codes such as coordinated standards developed by private standards organisations which in some cases can then be incorporated into law by reference
- On legal architecture – use the least demanding form of IRC required to achieve the objectives rather ‘than shooting for the moon’, for example, by encouraging the adoption of key model provisions and internationalise successful regional initiatives in specific sectors (Lesser, 2007, p. 9).

The key implication for policy from the list above is that countries should consider the full range of regulatory cooperation options, and consistent with Occam's razor, use the least demanding form of IRC required to achieve the objectives. Deeper integration is hard to achieve and sustain. Broadening IRC through softer, more informal cooperation between countries is easier to achieve and support, particularly when countries are not similar. Improving IRC takes time as it is a long game that involves taking a series of small steps along the road. So taking the initial steps is important for laying the foundations for what is to follow.

New Zealand and Australia's experience with CER suggests the potential for countries to move over time beyond FTAs to more intensive specific regulatory cooperation arrangements. FTAs often create informal regulatory cooperation bodies which can lead to deeper relationships and promote understanding and trust. As a result, starting with more informal cooperation provides the foundation that can be a stepping stone to deeper cooperation arrangements over time. As cooperation is a long game, ASEM provides an important opportunity to identify the first initial steps that need to be taken.

In addition, the option of unilateral action to achieve regulatory convergence is an important informal tool for countries to consider as a first option. IRC is only a part of the suite of approaches to achieving regulatory coherence. Strengthening domestic regulatory management systems by commitment to greater transparency and GRP will also contribute to greater regulatory connectivity.³

A key theme of this paper is how practice is leading theory. IRC is being driven forward by initiatives such as the Trans-Pacific Partnership, the Transatlantic Trade and Investment Partnership, EU regional initiatives with accession and neighbouring countries and the increased focus on NTBs due to the divergence in regulatory regimes.

Theory is lagging behind practice. Firstly, suitable frameworks are still being developed to adequately characterise the dimensions of IRC and the possible approaches. These frameworks are an important foundation for organising the evidence about what works and the balance of risks with each approach. As Correia de Brito et al. (2016, p. 13) observed 'the choice among various cooperation approaches is not informed by a clear understanding of benefits, cost and success factors of diverse IRC options'. Secondly the tools are still lacking to adequately assess the distortions caused by NTBs and the potential gains from removing them (Dee and Ferrantino, 2005). Hopefully the recommendations from this paper can go a small way to bridging the gap between theory and practice, especially under the ASEM process.

³ See Intal and Gill (2016 forthcoming) for a discussion of regulatory management and good regulatory practices in the Asia-Pacific region.

Implications for ASEM

So in the 21st year of ASEM, what are implications for regulatory policies and institutions of the trends in regulatory coherence in Asia and Europe? Attention should focus on strengthening national regulatory policy frameworks through adoption of GRPs, advancing international regulatory cooperation through regional initiatives, and addressing the risk of trade diversion and regulatory exclusion.

Focusing on regulatory institutions, research led by ERIA and NZIER (2016, forthcoming) highlighted the key role of two institutional preconditions: political commitment to GRP backed by a body with the capability to drive the implementation of GRP into the practices of policy developers and regulators. ASEM leaders could reaffirm their commitment to the adoption and implementation of the principles of GRP. They could also commission a feasibility study for some work on capability building for institutions tasked with improving the regulatory management system and champion International Regulatory Competition.

At the level of individual nations' regulatory policies, unilateral action to achieve regulatory convergence is an important tool for countries to consider first. ASEM leaders could reaffirm their commitment to the adoption and implementation of principles of GRP domestically.

On regional regulatory policies, this paper argued for the use of the least demanding form of IRC required to achieve the objectives. Deeper integration is hard to achieve and sustain. Softer, more informal cooperation between countries is easier to achieve and support.

The Economic Research Institute for ASEAN and East Asia (ERIA) is currently scoping out an IRC study for 2017 to complement work already under way in other fora such as APEC and the OECD. It is particularly important that the IRC tools are tailored for smaller and less developed countries that face significant capability constraints.

ASEM leaders could reinforce their commitment to work continuing on developing practical toolkits and frameworks for IRC through international fora. The risk of trade diversion and regulatory exclusion needs to be addressed. Leaders could also commit to a scoping study on the capability requirements for IRC for smaller and less developed countries and the role for technical assistance in addressing these constraints.

In summary, ASEM can play an important role by strengthening national regulatory policy frameworks, advancing IRC through selected initiatives, and addressing the risk of trade diversion and regulatory exclusion.

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