



Making 'Regulatory Coherence' Coherent

Law360, New York (April 25, 2011) -- To many supporters of a robust U.S. international trade policy agenda, the current landscape looks bleak. The list of things that have not happened seems to grow longer by the month. The three free trade agreements concluded by the last administration (with Colombia, Korea and Panama) have yet to be approved by Congress (though prospects seem to have grown somewhat brighter in recent weeks).

Progress in the "Doha Round" of World Trade Organization negotiations that were launched in 2001 continues to disappoint. The only other major trade negotiation in which the United States is participating, the so-called "Trans-Pacific Partnership" negotiation, promises to be a complex process, requiring the parties to reconcile their new commitments to one another with the commitments that individual parties had made to other parties in previous agreements.

Meanwhile, two major U.S. trade preferences programs (the Generalized System of Preferences and the Andean Trade Preferences program) have lapsed, and a years-long effort to create a relatively modest new preference program for Pakistan and Afghanistan appears to have fallen off the executive and congressional radar screens.

Trade Adjustment Assistance, the program that helps workers harmed by increased imports, has lapsed. There has been barely any discussion of legislation that would terminate application to Russia of the so-called Jackson-Vanik Amendment to the Trade Act of 1974, (such termination being necessary in order to permanently and unconditionally normalize trade relations with Russia, which in turn is a necessary precondition to U.S. acceptance of Russia as a WTO member). The administration has yet to unveil a new model bilateral investment treaty, thus stalling the negotiation of new "BITs" that would provide valuable protections to U.S. investors overseas. The list goes on and on.

This discouraging lack of progress stands in marked contrast to the ambition of President Obama's stated objective of increasing U.S. exports by 2015 to double their level in 2010. One wonders how the administration plans to get there from here. At least part of the answer seems to lie with an initiative that is becoming a more prominent feature on the international trade policy landscape: the pursuit of "regulatory coherence" between the United States and its trading partners.

Regulatory coherence is a concept that has been talked about for years, but really seemed to gain traction in the context of a high-level U.S.-EU dialogue begun in 2007 under the banner of the Transatlantic Economic Council ("TEC").

In the TEC's founding document, the April 2007 Framework for Advancing Transatlantic Economic Integration signed by U.S. President George Bush and German Chancellor Angela Merkel (in her capacity as then-president of the European Council), the United States and the European Union recommitted themselves to a robust regulatory cooperation agenda, promising, among other things, "to remov[e] unnecessary differences between [their] regulations to foster economic integration."

The Framework laid out ambitious goals for regulatory cooperation in six specific sectors (cosmetics, medical devices, medicinal products, automotive, nanomaterials and electrical equipment). It also provided for cross-sectoral cooperation on matters pertaining to the rulemaking process, such as impact assessment, including risk assessment and cost-benefit analysis — the idea being that if our rulemaking processes were better aligned, the significance of any substantive divergences in the rules on any given topic should be diminished.

The TEC has convened five times since 2007, and at each meeting the U.S. and EU co-chairs have reported progress toward achieving the objective of enhanced regulatory coherence. However, the trend has been to describe that progress in general terms and to agree on forward-looking "work plans."

For example, in the December 2010 report of its fifth meeting, the TEC "tasked the High Level Regulatory Cooperation Forum to continue working on joint principles and best practices for the development of regulations" and "agreed to share relevant lists of planned regulations well in advance." Absent from the report (or earlier reports) is any discussion of "unnecessary differences" between U.S. and EU regulations that have been removed or averted due to enhanced cooperation.

The TEC appears to have given an important push toward greater cooperation between regulators on both sides of the Atlantic through, for example, enhanced information-sharing and temporary exchanges of personnel between U.S. and EU sister agencies. In subtle ways, greater regulatory cooperation may already be reducing the friction that one necessarily encounters when one takes a good or service produced under one regulatory regime and seeks to supply it in a territory where a different regulatory regime applies.

If regulators in the consumer's territory have a better understanding of how things are done in the supplier's territory, they may exercise their discretion in ways that facilitate trade. However, the anticipated removal of unnecessary differences in U.S. and EU regulation apparently has yet to occur.

Meanwhile, the pursuit of regulatory coherence as an international trade policy objective has migrated from the U.S.-EU relationship to other U.S. trade relationships.

In a notice published last month, the U.S. Department of Commerce invited stakeholders to identify opportunities for cooperation among the United States, Canada and Mexico "to reduce or eliminate regulatory divergences that disrupt trade in goods in the region, as well as any existing or emerging sectors that may benefit from regulatory coordination between these countries." The notice expressly linked this effort to the president's National Export Initiative, describing "unnecessary differences in product regulations" as "the main impediments to greater trade and investment."

U.S. officials also have focused on regulatory coherence in the context of the aforementioned Trans-Pacific Partnership negotiation, and this has become a priority objective of U.S. business in that negotiation. Thus, in laying out TPP objectives in a letter to the president last month, the president's Export Council urged the adoption of "mutually coherent regulatory systems." Moreover, the Office of the U.S. Trade Representative has advanced a proposal for a separate chapter on regulatory coherence in an eventual TPP trade agreement.

Regulatory coherence has emerged as a major theme in other areas as well. For example, as the 2011 chairman of the Asia-Pacific Economic Cooperation forum, the United States has emphasized it as a major area of work within APEC. It was highlighted by President Obama and Brazil's President Dilma Rousseff in concluding a Trade and Economic Cooperation Agreement on the occasion of President Obama's visit to Brazil last month.

In short, regulatory coherence seems to be popping up everywhere. This has certain obvious advantages for proponents of greater U.S. initiative in the international trade policy arena. For starters, the pursuit of greater regulatory coherence may actually help to achieve its stated objective of promoting economic growth and increased employment.

Second, from a political standpoint, regulatory coherence is advantageous to the U.S. Executive Branch, because it is an objective that can be pursued without the need for implementing legislation. While the administration undoubtedly is consulting with the Congress on its negotiating objectives, it does not need to count votes to determine whether advancing a regulatory coherence agenda is viable from a domestic political standpoint.

Third, it is possible that even if this effort does not lead to a noticeable reduction or elimination of unnecessary regulatory divergences, it will help to head off costly and time-consuming dispute settlement proceedings. Through enhanced regulatory dialogue, one country may be able to persuade another to craft a regulation in a way that enhances consistency with trade agreement obligations; alternatively, the proponent of the regulation may be able to demonstrate that what appears to be inconsistent with trade agreement obligations is not really so.

Still, it would be premature to celebrate a new era of regulatory coherence as a dominant feature of the international economic scene, in the way that free trade agreements and bilateral investment treaties have come to dominate the scene in recent decades. One reason for a bit of skepticism is that the concept of "regulatory coherence" means different things to different people. There is no one, commonly accepted understanding of the concept.

To some, it means a harmonization of substantive regulations. To others, it means a harmonization of the processes by which regulations are developed and adopted. To still others, it means mutual recognition of regulations or forbearance in the enforcement of a country's regulations as to producers, traders and investors of another country. Until we get a more focused fix on what we mean by regulatory coherence, it will be difficult to study it and measure it as a distinct policy phenomenon.

An additional reason celebration of regulatory coherence may be premature is what would seem to be the inherent difficulty in promoting regulatory coherence through multiple distinct initiatives. Coherence as between regulations in the United States and the European Union will not necessarily be the same as coherence between regulations in the United States and Mexico, for example.

Theoretically, countries may be able to achieve greater coherence within the boundaries of their individual bilateral relationships while expanding or reinforcing incoherence as between different bilateral relationships. To avoid this consequence, the standards around which regulations cohere would have to be the same in each bilateral relationship.

In fact, it is possible that is precisely what the United States hopes will happen. On the other hand, precisely because other countries may perceive “regulatory coherence” as a seemingly benign label disguising a U.S. objective of imposing its standards on them, they may approach such initiatives with extreme caution.

It is clear that regulatory coherence as a concept has captured the imagination of senior officials in the U.S. government. And, they may well be on to something. But, as with any major new initiative, there are important conceptual questions that must be answered. We will continue to watch with interest.

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