NZIER
NEW ZEALAND INSTITUTE OF ECONOMIC RESEARCH

International regulatory cooperation

Case studies and lessons learnt

NZIER report to MFAT & MBIE

October 2018 (updated)

About NZIER

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Each year NZIER devotes resources to undertake and make freely available economic research and thinking aimed at promoting a better understanding of New Zealand's important economic challenges.

NZIER was established in 1958.

Authorship

This paper was prepared at NZIER by Derek Gill. It is an updated version of a report for the NZ Government finalised in August 2018.

It was quality approved by John Yeabsley.

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Key points

Four case studies

NZIER were commissioned to prepare four vignettes as case studies of International Regulatory Cooperation (IRC) focused on drawing out the lessons learnt. The four case studies were:

- Trans-Tasman competition law involving Australia and New Zealand
- Asia Region Funds Passport involving a range of East Asia countries with the launch including Australia, Japan, Korea, Malaysia, New Zealand and Thailand
- ASEAN intellectual property cooperation
- ASEAN cosmetics harmonisation.

Unity in diversity

While the domains and countries involved were very different, there were a number of lessons learnt that could be applied to IRC in other domains. The lessons learnt, which are bolded below, fell naturally under five focus questions:

Why have IRC?

There are range of reasons that make IRC a 'win-win' for the countries involved including:

- Increased interoperability
- Improved regulatory effectiveness
- Reductions in non-tariff measures
- Increased globalisation
- Other drivers such as geo-political factors.

Different Imperatives: A key lesson from the case studies is that **these reasons can be different for different countries and the imperatives can change over time.** If those advantages disappear, then the IRC will lose all momentum.

What should IRC focus on?

- **Sweet spot:** The clear lesson from all the case studies was that IRC should focus on the areas where the mutual gains are greatest rather than spreading effort across the board.
- **Be selective**: IRC offers choices about whether the focus of cooperation is on regulatory policy regimes or specific regulatory practices such as enforcement. Policy convergence is not an essential or a pre-condition for cooperation.
- **New easier than existing**. Cooperation on new domains where no regulatory policy regime is in place is easier than areas where existing regulatory policy regimes and practices are well entrenched.
- **Start small and keep moving:** An initial focus on informal cooperation such as sharing information enables the move into more formal arrangements like enforcement cooperation or other options like harmonisation.

What type of IRC is most suitable?

- **Consider all IRC types**: Full harmonisation is not the only destination as cooperation can take a variety of forms. This suggests selecting the type of IRC on the 80/20 principle where the immediate net gains are greatest.

  In the case of ASEAN cosmetics, full regulatory policy harmonisation enabled access to major export markets and improved consumer safety. In the other cases the key was to **start small selecting the least demanding form of IRC** that gets you over the line rather than being too ambitious on and not succeeding at all.
- **Diminishing marginal returns**: Cooperation is costly, and costs markedly increase with the intensity of IRC while the marginal benefits often diminish. Starting small enables consideration of moving along the spectrum if the balance between the costs and benefits for deeper integration stacks up.

What are the drivers?

The critical drivers are a mix of 'hard' and 'soft' factors:

- **Membership**: Having the right countries and the right people in the room from those countries.
- **Leadership** is crucial, but the style of leadership was very varied. One public entrepreneur who championed the initiative (Asia Region Funds Passport), one distributed leadership and individual country champions (ASEAN IP), another with rolling leadership (trans-Tasman Competition Law).
- **Secretariat**: A good secretariat provides vital glue and continuity as what happens 'after the IRC meeting is over is just as important as what happens in the meeting'.
- **Relationships**: 'It's a hearts and minds game, relationships underpin the network'.
- **Trust**: 'It's critically important to choose partners where there is mutual confidence…, or at least good prospects for building it'.
- **Sustained commitment**: IRC, like most good things, takes time and sustained commitment.

What are the supporting conditions and potential derailers?

The following supporting factors are important enablers or potential derailers but are not critical to the success or failure of the IRC.

- **Political mandate helps but it's not sufficient**: A shared public commitment lends legitimacy and keeps up the IRC momentum.
- **Legal mandate matters:** when the regulatory regime explicitly accommodates cooperation (e.g. mutual recognition) or gives the regulator an explicit mandate to cooperate, then IRC is enabled.
- **Resourcing matters:** Cooperation involves additional work and takes resources that could be applied elsewhere. In only one case was extra resourcing made available to encourage IRC.
- **Partnership with industry:** While all the cases were largely driven at the regulator to regulator level, working with industry and other stakeholders can lay the groundwork to facilitate faster implementation.
- **Power imbalances:** IRC is more likely to succeed when the parties manage conflict effectively and use mechanisms to address power imbalances.

- **Capability matters:** IRC between economies at different levels of development can be particularly difficult when mutual recognition of the equivalence of other regimes is required.
- **Context matters:** While all the case studies are about inter-government networks driven by government officials, contextual differences in cultures, traditions and institutions shaped the way the officials engaged and behaved.

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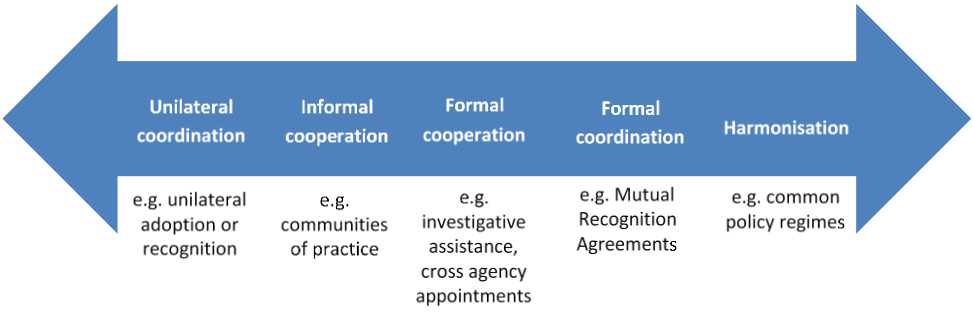
1. The approach

The OECD (2013) defines International Regulatory Cooperation (IRC) as "any agreement or organizational arrangement, formal or informal, between countries to promote some form of cooperation in the design, monitoring, enforcement, or ex post management of regulation."

There is no generally accepted taxonomy for classifying IRC. This is because of the multiple dimensions of IRC. IRC can vary with: the number of actors (bilateral, sub-regional/regional, plurilateral, multilateral); and the techniques used (networks of national regulators, Mutual Recognition Agreements, formal regulatory partnerships etc.). IRC can operate under informal or more formal legal structures including regulatory provisions in Free Trade Agreements, and regulatory agreements.

The typology shown in Figure 1 below shows how IRC can take many positions along a spectrum. At one end of the continuum is unilateral recognition through adoption of another country's regulatory settings or standards and at the other harmonisation through convergence of policies and practices. Beyond harmonisation is full integration through common rules for joint institutions. In between are a range of intermediate points such as cooperation through communities of practice, dialogue and information sharing, explicit cooperation on policies and procedures, and coordination through Mutual Recognition Agreements.

Figure 1 The IRC continuum on how to cooperate



Source: NZIER based on the MBIE IRC Toolkit and Petrie (2016)

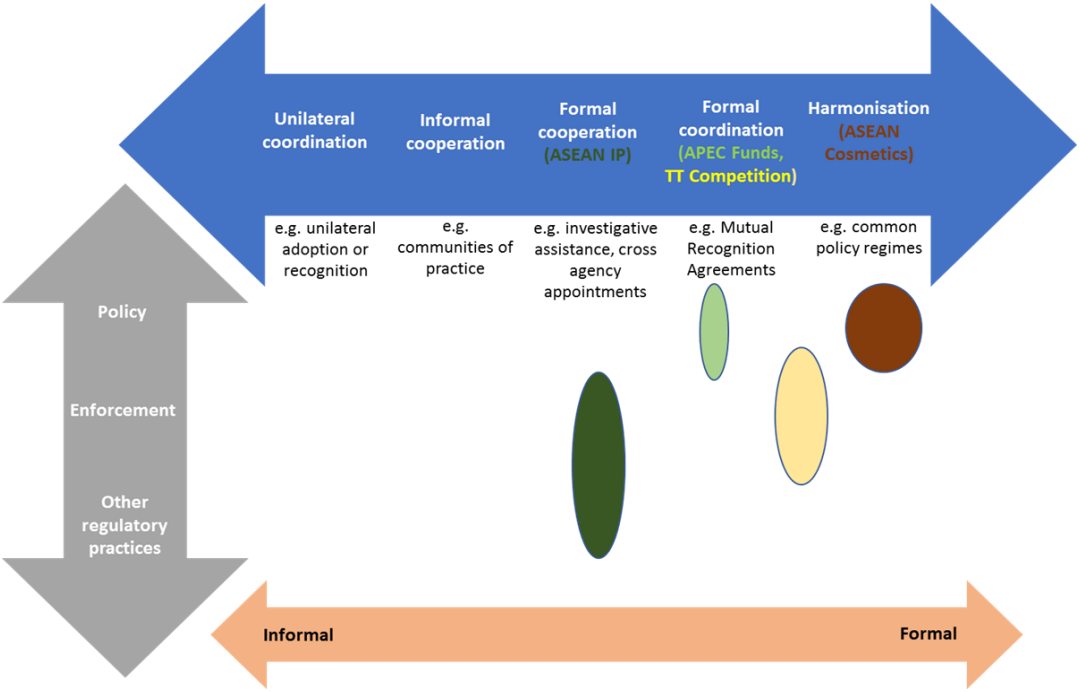
IRC is part of the good regulatory practice because consideration needs to be given to issues of consistency with international norms and models. When entering into IRC arrangements countries need to make decisions at three levels:

- Who they cooperate with (bilateral, regional, plurilateral, multilateral)
- How intensively they cooperate (along the left to right continuum in Figure 1)
- What they cooperate on (e.g. regulatory policy, enforcement, other practices such as education, licensing and governance in Figure 2).

Figure 2 builds on the continuum of *how* to cooperate (in Figure 1) and highlights *what* the IRC focuses on using the four case studies. The vertical axis, like the horizontal one, is a continuum. This is because cooperation on enforcement practices, such as information sharing and investigation assistance between the New Zealand and Australian competition authorities, required policy support and legislative backing as is discussed in more detail in Appendix A.

The vertical axis highlights that the focus of IRC can be centred on different aspects: on approaches to regulatory policies (making rules), regulatory practices (interpreting, applying and enforcing rules) or regulatory organisational management (supporting rules administration). While the precise mix of regulatory functions undertaken vary across regulators, most carry out some of the following activities: education and assistance, entry and exit control, checking compliance (inspecting, auditing, monitoring), intelligence collection, enforcement (conduct of operations, investigations, and sanctions). Organisational governance includes corporate support functions like staff training, data sharing, knowledge management and record keeping, measurement, and research. (See the Abbot et al (OECD 2018, p16) for a more extended discussion of the range of governance and operating practices of IRC networks and how their focus often extends beyond policy to other regulatory practices).

Figure 2 IRC choices on what to cooperate on



Source: NZIER

NZIER prepared four IRC case studies: trans-Tasman competition law, Asia Region Funds Passport and two ASEAN examples on intellectual property (IP) and cosmetics. The cases were selected using the criteria in Table 1.

Table 1 Criteria for case selection

Criteria	
1	Government to Government (including regulator to regulator not sub-national or private)
2	Well documented (existing research has captured the origins, evolution and experience)
3	Low sensitivity (interlocutors can be frank as the case isn't overly sensitive or confidential)
4	Cover the low to middle end of the spectrum (include a mixture of light touch coordination and more formal structured co-operation)
5	Include a range of sector and mixture of plurilateral and bilateral cases.

Figure 2 highlights how the different cases were centred on different aspects of regulation. The case studies covered coordination on both regulatory policy and enforcement (trans-Tasman Competition law), regulatory policy harmonisation (ASEAN cosmetics), mutual recognition of licencing (Asia Region Funds Passport) and cooperation mainly focused on enforcement and other regulatory practices (ASEAN IP).

The case studies were arrayed along the IRC spectrum (shown in Figures 1 & 2) with one exception. None of the cases focused on informal cooperation such as communities of practice.

Several examples of more informal IRC arrangements were canvassed in the research based on semi-structured interviews for the New Zealand country study of IRC for Economic Research Institute for ASEAN and East Asia (ERIA). The lessons learnt, the drivers and enablers discussed in the informal cases were very similar to those in the four case studies covered by this paper. The range of governance membership and operating arrangements, including the extent of formality, are discussed extensively in an OECD study of 144 IRC inter-government networks (Abbott et al 2018).

The approach in each case study was based on an initial review of the publicly available documents followed by semi-structured interviews with handful of key interlocutors for each case. Selected interviewees also reviewed a draft of their case.

The emphasis was on producing 5-6 page vignettes that brought out the essence of the case. This required boiling down a lot of material to what in the researcher's view were the key points. The focus was to develop a chronology and simple narrative of the main events and to extract the lessons that could be applied to other examples of IRC.

To synthesise the lessons learnt, the lessons from each case were extracted and grouped together. These lessons were discussed at a workshop with members of the New Zealand Government Regulatory Practice Initiative Steering Group (or G-REG). We also drew on the insights from the interviews undertaken for a parallel ERIA project on IRC in New Zealand. We then checked back against other published summaries of lessons learnt on IRC to ensure there were no major omissions or inconsistencies. The findings were further tested at the ERIA IRC technical workshop on 10 October 2018. This paper is a slightly revised version of a report prepared for the NZ Government in August 2018 building on the discussions in the October workshop.

The lessons learnt naturally grouped under 5 focus questions:

1. Why have IRC?
2. What should IRC focus on?
3. What type of IRC is most suitable?
4. What are the main drivers?
5. What are the supporting conditions and potential derailers?

The focus of this study was on what makes IRC work effectively. We were not asked to review the merits and drawbacks of IRC overall.

The rest of this paper draws out the lessons learnt under these headings, followed by a cautionary note about generalising lessons from small samples. The final version of each case study is included in the appendices.

2. Why have IRC?

The MBIE IRC toolkit identified that there are a range of reasons for participating that make IRC a win-win for the countries involved including:

- Increased interoperability
- Regulatory effectiveness
- Reductions in non-tariff measures
- Increased globalisation
- Other issues such as geo-political factors.

The merits (or otherwise) of IRC were not within the scope of this study. IRC is not a goal in itself. IRC is integral to good regulatory practice because, as part of the design and operation of a regulatory regime, consideration needs to be given to issues of consistency with international norms and models. IRC may also contribute to wider agenda. Trans-Tasman cooperation on competition law was part of a wider agenda for a Single Economic Market, and ASEAN Cosmetics harmonisation contributed to the development of the ASEAN Economic Community. Good regulatory practice involves considering the potential role for IRC.

A repeated theme in the case studies was that all the participants must see IRC as a win-win. The technical term for this in game theory is the participation constraint.

The key lesson that emerged from the case studies **is that the reasons for participating can be different for different countries and those can change over time.**

Interview participants discussed how they triaged issues on the IRC agenda into those of direct concern on which they took an active part, those of indirect interest on which they took a watching brief, and those of no national consequence.

The balance of advantage from IRC can shift over time and if the perceived overall advantage disappears for one country, then the IRC will lose momentum and if informal may break down completely. Interviewees for the parallel ERIA led-IRC project highlighted that the proposed Australia-New Zealand joint regulator (Trans-Tasman Therapeutics) ultimately had to be abandoned before the treaty could come into force. The protracted length of time for the negotiations meant that the 'win' for Australia had been eroded to the point that the participation constraint was breached.

3. What should IRC focus on?[1]

The previous section discussed how IRC is not an end in itself but is integral to good regulatory practice. Participating in IRC involves decisions about:

- The extent of cooperation – who should the cooperation include?
- The focus of cooperation – what should they cooperate on (e.g. which aspects of regulatory policy, enforcement, other practices)?
- The locus of cooperation – how intensive should cooperation be?

On *what to focus on*, the clear lesson from all the cases was the need to **concentrate the IRC effort on the sweet spot: the specific areas where the mutual gains are greatest rather than spreading effort across the board**.

IRC can be selective as IRC offers choices about whether the focus of cooperation is on regulatory policy regimes or specific regulatory practices such as enforcement. Policy convergence is not an essential or a pre-condition for cooperation.

The case of trans-Tasman competition law:

> *highlights that coordination need not inevitably lead to full harmonisation. Despite the closer cooperation between the two competition authorities on enforcement practice, recent changes in the Australian competition policy regime have not been reflected in New Zealand. Indeed, the Australasian experience highlights the potential role for regulatory competition as well as coordination. For example, New Zealand could act as the trail blazer on parallel imports, and Australia was able to overcome domestic opposition to the move based on New Zealand's experience.*

With the Asia Region Funds Passport there:

> *was a deliberate choice to focus on mutual recognition of licensing requirements and to limit the funds it applied to. Coverage was limited initially to 'plain vanilla' funds by eligible fund managers that met specific criteria. …….A more ambitious approach would have been to aim for full interoperability which raised a wider range of complex technical legal interface issues such as rules on disclosure, distribution, disputes and redress procedures. This highlights the importance of starting small rather than shooting for the moon and missing altogether.*

Returning to trans-Tasman competition law:

> *The focus of cooperation was selective with an emphasis on enforcement including investigation and remedies for mergers and cartels where there was a win-win for both authorities. There is limited cooperation in other areas (restrictive trade practices, organisational management).*

These cases also showed the advantages of **starting small and keeping moving**. The Trans-Tasman competition law regimes are very similar, so cooperation started with a narrow policy question (removal of anti-dumping) but this led onto cooperation on selected

[1] In Sections 3, 4, 5 and 6, text in italics has been lifted directly from the case studies. Text in single quotes has been used to identify un-attributable quotes from the research.

enforcement practices. Cooperation on specific regulatory practices such as enforcement or licencing doesn't require moving to harmonisation of regulatory policy regimes.

Co-operation on new domains where no regulatory policy regime is in place is easier than areas where existing regulatory policy regimes and practices are well entrenched.

In the case of ASEAN cosmetics some:

> *member states faced the legal difficulties of aligning existing standards, definitions, and processes of cosmetics with the European model. If the ASEAN members wish to remain consistent with the EU, these difficulties will be repeated every time the EU updates the ingredients listings. This is in contrast with countries with no existing regulation, like Singapore, which were able to implement the ASEAN Cosmetics Directive more quickly.*

All the cases started with a focus on regulatory policy and three then moved onto cooperation on regulatory practices such as enforcement. (It is too early to tell how the Asia Region Funds Passport project will evolve).

The experience with trans-Tasman competition shows that similarity of regimes makes cooperation on enforcement easier. But regulatory policy **convergence is not an essential condition for cooperation**. There is extensive IRC amongst censorship regulators, for example, but the focus of cooperation is exclusively on dialogue on regulatory practices as the regulatory policy regimes are so different.

4. What type of IRC is most suitable?

Decisions on ***how*** intensive cooperation should be (the locus) are largely independent of considerations of **what** should IRC focus on (discussed in the previous section) and ***who*** to cooperate with (which is discussed in the next section under membership).

On the question of how intensively to cooperate, **full harmonisation is not the only destination as there are several other resting places** along the IRC continuum. IRC can involve a range of forms including informal networks of regulators through to more formal Mutual Recognition Agreements or harmonisation. A useful rule is 'form follows function' so the degree of formality of the IRC selected should matched to the intensity and type of regulatory coordination needed to achieve the regulatory outcomes sought.

ASEAN IP brings out the difficulty of leaping to full harmonisation and the merit of starting small, using international standards and moving along the continuum if the cost/benefit analysis for deeper integration stacks up:

> *Cooperation within ASEAN on IP is a story of an overly ambitious start in 1995 and then steady progress following a more bottom-up approach to interoperability. This case highlights the difficulty of harmonisation as an initial goal and the difficulty of attempting this in an area as vexed as IP for a group as diverse as the ASEAN countries. Full harmonisation is not the only destination however. The ASEAN bottom-up approach focused on interoperability, with gradual policy convergence through ratification of international treaties.*

Trans-Tasman competition law was particularly instructive because of a deliberate and evidenced decision not to fully harmonise regulatory policy or enforcement:

> *The 2004 Australian Productivity Commission (APC) report examined and rejected the case for full harmonisation. This highlighted how the law of diminishing returns also applies to IRC. It found that increasing cooperation imposed increased costs while the benefits were marginal…. coordination need not inevitably lead to full harmonisation.*

The key in three cases was to **start small selecting the least demanding form of IRC that gets you over the line rather than shooting for the moon and missing altogether.** But every rule of thumb has exceptions.

In the case of ASEAN cosmetics, full harmonisation enabled access to major export markets and improved consumer safety. This case highlights that when access to major export markets is the primary objective, setting high technical standards from the start may be easier than trading up later.

It's an:

> *example of relatively rapid implementation of harmonised technical standards and an unusual balancing of the free trade agenda and consumer protection. Its history tells the story of how a potential regulatory 'race to the bottom' became an immediate 'trading up' to the world's highest standards.*

What all the cases bring out is **the need to select the type of IRC where the net gains are greatest. This is because cooperation is costly, and costs markedly increase with the intensity of IRC while the marginal benefits often diminish.**

5. What are the critical drivers?

There a number of factors that influence how well an IRC initiative works. Here we attempt to distinguish between first order conditions that are critical for achieving success from second order supporting conditions that can assist but are not essential. The critical success factors identified in the discussion at the G-REG workshop were mixture of hard and soft factors:

Membership: Multilateral or plurilateral processes face the risk of the convoy problem and going at the pace of the slowest vessel. The Asia Region Funds Passport case establishing a small core working group of committed countries which meant the initiative got to go forward:

> *The experience with ARFP brings out the importance for other IRC initiatives of building a coalition of the willing to build up momentum and carry it forward.*

What came through all the cases was the importance of having the right people in the room:

> *Keeping the group at the technical expert regulator level meant the parties were able to cut through a host of small prickly issues.*

Leadership is crucial but how leadership is provided varied as there can be a public entrepreneur who personally championed the initiative (Asia Region Funds Passport), distributed leadership and individual country champions (ASEAN IP) or revolving leadership (trans-Tasman competition law). Consider the contrast between trans-Tasman competition law:

> *The story has no heroes but is the culmination of hard work by a wide range of officials who worked issues through to an actionable practical agenda. It is a story of incremental change rather than step change*

and the Asia Region Funds Passport:

> *The role of the Australian Treasury, and one key person in that organisation, who championed the initiative in the region and kept it moving forward. This highlights how a public entrepreneur is often at the heart of a change process.*

Secretariat: The importance of a well-functioning secretariat providing coordination, undertaking planning and acting as an honest broker emerged in discussion of several the cases. This was particularly important for plurilateral and multilateral IRC but less so for bilateral arrangements. Having a good secretariat function provides the vital glue as 'what happens after the IRC meeting is over is just as important as what happens in the meeting'.

Institutions create strong vertical lines of accountability and control. Cooperation requires working across the vertical silos. A robust process backed by a good secretariat can create offsetting horizontal loyalties and collective responsibility for the IRC. Interviewees observed that revolving leadership and secretariat responsibilities based on say alphabetic order is likely to erode the glue. Having a capable 'honest broker' host the secretariat role is more likely to help the glue hold.

Relationships: While hard factors like the membership, leadership and secretariat are all important, it is the soft factors like trust and relationships that are the hardest to build and sustain. As one interviewee observed 'it's a hearts and minds game, relationships underpin the network'.

Trust: 'It is critically important to choosing partners where there is mutual confidence…, or at least good prospects for building it.'

This theme came out most clearly in the case of trans-Tasman competition law:

> *It is a testament to the degree of trust that New Zealand's government officials had in the Australian public institutions such as the APC and the ACCC, and the people leading them that the Australian Productivity Commission was able to undertake a review of Trans-Tasman competition regulatory policy. Formal input from the New Zealand Government into the review was very limited although a New Zealand Government principal regulatory policy analyst was seconded to the APC to be part of the project team. Mutual trust was crucial: it is critically important to choose partners where there is mutual confidence in the institutions and the people in them. (emphasis added)*

Sustained Commitment: IRC, like most good things, takes time and sustained commitment. Three of the cases have been playing out over two decades. In the case of ASEAN IP 'after 20 years of continued effort and steady progress harmonisation is back on the agenda'. The time required reflects the tyranny of distance and resources constraints. The Asia Region Funds Passport case highlighted that a:

> *key barrier was distance, which limited the frequency of the meetings. The project required getting key people with busy day jobs from the 5 or 6 economies together for two-day meetings with some people facing a day of travel on either side. This limited the project to a schedule of 2-3 meetings a year.*

6. What are the supporting conditions and potential derailers?

In addition to the critical success factors discussed in the previous section, there are other important factors. Other conditions are important enablers or potential derailers but are not critical to the success or failure of the IRC. These include:

Political mandate helps but it's not sufficient. To varying degrees in all the cases political mandate and legitimacy came through as a useful but not critical supporting condition[2]. A shared public commitment, such as a Leaders' Declaration that is refreshed regularly, provides support and helps secure resources and support. 'A central organising concept lends legitimacy and keeps up the momentum on IRC' and 'the APEC banner provided legitimacy'. But political mandate while helpful was never enough on its own for IRC to get momentum. Almost all of the case studies involved inter-government networks which were strongly driven out of the respective bureaucracies.

Legal mandate matters. If the regulatory regime explicitly enables IRC, then it is easier to make progress. Legal frameworks that do not clearly provide both the flexibility and mandate to cooperate can act as a binding constraint (Mumford 2018). Conversely a legal mandate to cooperate provides a positive signal to regulators and is more likely to result in cooperation.

Resourcing matters. Cooperation involves additional work and takes resources that could be applied elsewhere. In only one case was extra resourcing made available to encourage IRC.

Partnership with industry. While all the cases were largely driven at the regulator to regulator or official to official level, working with industry and other stakeholders can lay the groundwork to facilitate faster implementation.

Power imbalances. IRC is more likely to succeed when the parties manage conflict effectively and use mechanisms to address power imbalances If there is one dominant country with an effective veto, then the IRC will need to be selected and designed carefully.

Capability matters. IRC between economies at different levels of development can be particularly difficult when mutual recognition of the equivalence of other regimes is required:

> *ASEAN IP coordination highlighted the difficulty of IRC between countries of different levels of economic development and national capability. Mutual recognition between countries of different levels of development is particularly difficult because of the extent of regulatory trust required in other countries regimes and systems. For patent search recognition, ASEAN used a form of non-binding mutual recognition based on voluntary adoption. Under this programme the patent search and examination results of one office may be used as a reference in the search and examination process of other national IP offices. However, this is non-binding as the other IP offices are not obliged to adopt the findings and conclusions. Cambodia, however, has moved a step further*

[2] See Gill (2018) for survey results for New Zealand IRC decision makers which suggests that political will and support was one of least important factors contributing to the persuasiveness of IRC.

with the automatic recognition of patents registered in Singapore as well as Japan, the EU and China.

Ambiguity about the role for mandated targets. In some of the cases (e.g. ASEAN IP) there was a positive role for 'demanding but achievable goals and targets provided commitment to achieving progress on a handful of narrowly focused activities'. New Zealand practitioners took the contrary view that targets can derail progress because the emphasis on 'hitting the target means that you miss the mark'. Stretch goals risk can create a sense of failure if not achieved. There was perceived to be a tension between long term relationships working on emergent issues with short term targets.

Contingency and Context Matters. While all the case studies were about inter-government networks driven by public officials, the contextual differences in cultures, traditions and institutions shaped the way the officials engaged and behaved. In the case of ASEAN IP:

The interoperability approach built upon 'the ASEAN way'. This is based on working in an informal, non-adversarial, cooperative and consensus-based way which acknowledges and respects the extent of diversity across legal traditions, political systems, stages in development, size, administrative capacity and capability, and religious and cultural traditions. It was also based on 'country champions' and no one country playing a dominant leadership role.

In the case of New Zealand and Australia competition law there were several:

conditions that supported increased trans-Tasman cooperation on competition law:

- *First, Australia and New Zealand have a shared history, language and values, and a similar culture, political, legal and economic institutions…….*
- *Second, there was political commitment to greater economic integration ….*
- *Third with close geographic and economic links many companies operate in and/or trade between both countries. …..*
- *Fourth, New Zealand unilaterally adopted a competition law framework largely modelled on what is now named the Australian Competition and Consumer Act.*

7. Concluding comments

Figure 3 IRC focus questions

Source: NZIER

Any summary like Figure 3 and Tables 2 and 3, drawn from such as limited number of case studies, a dozen interviews, and a workshop, necessarily needs to have some caveats.

Firstly, context matters. There are unique political, social and domain specific factors that may limit how broadly the lessons from a small set of cases can be applied. The lists in Figure 3 are intended as tools rather than rules, and as lines of inquiry rather than hard and fast prescriptions.

Secondly, dynamics matter. IRC, like any form of interagency collaboration is a dynamic process. The 'sweet spot' moves over time. The balance of advantage from IRC can shift over time and if the perceived overall advantage disappears for one country, then the IRC may lose momentum or even break down. Like all group dynamics this can include forming, storming, norming, performing and then potentially deforming. The lessons learnt in Figure 3 look over the 20-year life of IRC processes. Different critical success factors apply at different stages of the process.

Thirdly, generalisation from cases is hard. Every rule has an exception – so the lessons presented are at best rules of thumb that apply in general and on average to a range of circumstances but not necessarily in every case. For example, starting small did not apply in the case of ASEAN cosmetics which showed how full regulatory policy harmonisation based on trading up is a valid regulatory policy option. These lessons can be tested, elaborated and expanded as further IRC cases are developed.

These caveats aside IRC is essentially a special case of interagency cooperation, a reasonably standard practice that has been extensively researched (see Bryson et al (2006) for a synthesis). IRC is a special case because factors like differences in culture, context, and country capabilities, and the tyranny of distance are more important for IRC. But the role of the drivers like leadership, trust, and relationships are equally important for IRC and interagency cooperation generally.

Table 2 IRC lessons learnt: Putting it all together - locus and focus

When to have IRC?

Different Imperatives. A key lesson from the case studies is that the reasons for IRC participation can be different for different countries and the imperatives can change over time. If those advantages disappear, then the IRC will lose all momentum.

What should IRC focus on?

Sweet Spot. IRC should focus on the areas where the initial mutual gains are greatest rather than spreading effort across the board.

Be selective. IRC offers choices about whether the focus of cooperation is on regulatory policy regimes or specific regulatory practices such as enforcement. Policy convergence is not an essential or a pre-condition for cooperation.

New easier than existing. Cooperation on new domains where no regulatory policy regime is in place is easier than areas where existing regulatory policy regimes and practices are well entrenched.

Start small and keep moving. Focusing cooperation on selected areas with clear tangible benefits builds trust and confidence and "can be a springboard for more formal (and integrated) forms of cooperation over time" (Mumford 2018).

What type of IRC is most suitable?

Consider all types. Use all the keys on the piano as full harmonisation is not the only option as there are a number of other types of IRC.

Diminishing marginal returns. Need to select the type of IRC where the initial net gains are greatest. This is because cooperation is costly, and costs markedly increase with the intensity of IRC while the marginal benefits often diminish.

80/20 rule. Select the least demanding form of IRC that gets you over the line initially rather than shooting for the moon and missing altogether.

Table 3 IRC lessons learnt: Drivers and enablers

What are the drivers?

Membership. Both in terms of the right countries and the right people in the room from those countries.

Leadership. Leadership is crucial, but the style of leadership was very varied: one public entrepreneur who championed the initiative (Asia Region Funds Passport), one distributed leadership and individual country champions (ASEAN IP), another with rolling leadership (trans-Tasman competition law).

Secretariat. A good secretariat function provides vital glue and continuity as what happens 'after the IRC meeting is over is just as important as what happens in the meeting'.

Relationships. 'It's a hearts and minds game, relationships underpin the network.'

Trust. 'It's critically important to choose partners where there is mutual confidence…, or at least good prospects for building it.'

Sustained Commitment. IRC, like most good things, takes time and sustained commitment.

Enablers

Political mandate helps but it's not sufficient. A shared public commitment lends legitimacy and keeps up the momentum on IRC.

Legal mandate matters. If the regulatory regime explicitly accommodates co-operation (e.g. mutual recognition) or gives the regulator an explicit mandate, then cooperation in more likely.

Resourcing matters. Cooperation involved additional work and takes resources that could be applied elsewhere. In only one case was extra resourcing made available to encourage IRC.

Partnership with industry. While all the cases were largely driven at the regulator to regulator level, working with industry and other stakeholders can lay the groundwork to facilitate faster implementation.

Power imbalances. IRC is more likely to succeed when the parties manage conflict effectively and use mechanisms to address power imbalances.

Capability matters. IRC between economies at different levels of development can be particularly difficult when mutual recognition of the equivalence of other regimes is required.

Context matters. While all the case studies are about inter-government networks driven by public officials, contextual differences in cultures, traditions and institutions shaped the way the officials engaged and behaved.

8. Selected references

Australian Government Department of Finance and Administration and Ministry of Economic Development, New Zealand Arrangements for facilitating trans-Tasman government institutional co-operation ANZSOG Views from the Inside No 1 (Undated).

Bryson, J. M., Crosby, B. C., & Middleton Stone, M. 2006. 'The Design and Implementation of Cross-Sector Collaborations: Propositions from the Literature'. *Public Administration Review* (Special Issue), 44-55.

Gill, D. 2018. 'Internationally Networked Government: the case of International Regulatory Cooperation in New Zealand.' Conference paper to the ERIA Second Technical Workshop on International Regulatory Cooperation (publication forthcoming).

Mumford, P. 2018. 'Regulatory Cooperation', in Drake-Brockman, J and Messerlin, P (eds), *Potential Benefits of an EU-Australia Free Trade Agreement: Key Issues and Challenges*, University of Adelaide Press, Adelaide, forthcoming.

OECD. 2013. *International Regulatory Co-operation: Addressing Global Challenges.* OECD Publishing, Paris, http:// dx.doi.org/10.1787/9789264200463-en.

Abbot, K. C. Kauffmann and J Lee. 2018. 'The contribution of trans-governmental networks of regulators to international regulatory co-operation'. OECD Regulatory Policy Working Papers No 10. OECD http:// dx.doi.org/10.1787/538ff99b-en.

Petrie, M. 2016. 'Jurisdictional Integration: A framework for measuring and predicting the depth of international regulatory cooperation in competition policy.' *Regulation & Governance*, Volume 10, Issue 1.

Appendix A Trans-Tasman competition law

Executive summary

This brief case study discusses the increasing cooperation on competition law between the Australia and New Zealand over the last 25 years. New Zealand and Australia have deliberately stopped short of full policy or administrative harmonisation, so the two countries have different competition policy regimes and separate competition authorities for enforcement.

The initial focus of trans-Tasman competition cooperation was on trade remedies and competition policy, but the main focus has now shifted to the regulatory practices of the competition authorities: the Australian Competition and Consumer Commission (ACCC) and the Commerce Commission (CC) in New Zealand. The cooperation is selective, particularly focused on enforcement including investigation and remedies for mergers and cartels. There is limited cooperation in other areas (restrictive trade practices, organisational management).

The story has no heroes but is the culmination of hard work by a wide range of officials who worked issues through to an actionable practical agenda. It is a story of incremental change rather than step change. Making progress required working through technically complex issues involving evidence, sharing of information and enforcement of judgements. Cooperation focused on areas of practice that benefited both competition authorities while contributing to a wider agenda of deepening economic integration.

The Australasian experience with cooperation on competition policy IRC is not something that can be forced along. Key lessons from this case study include:

IRC is a long game: it requires investment of time and effort to build up trust and networks and this soft stuff is the hard stuff

Trust is crucial: it is critically important to choose partners where there is mutual confidence in the two sets of institutions, or at least good prospects for building it

Start small: cooperation is costly, and costs markedly increase with the intensity of IRC while the marginal benefits diminish

Focus IRC where the mutual gains are greatest: IRC on regulatory practices does not require full policy harmonisation

Keep moving: the initial focus was on policy with the regime to bypass anti-dumping but moved onto regulatory practices

Mandate: A shared public commitment lends legitimacy and keeps up the momentum on IRC.

Derek Gill
NZIER May 2018

Acknowledgements – The author would like to acknowledge MFAT and MBIE, the Government departments that sponsored the series of case studies, and to thank the people that made themselves available for interviews and to review an earlier draft of the case. The author retains responsibility for any remaining errors and omissions.

How it worked – shifting emphasis from policy to practice

Cooperation occurred in two overlapping phases. In the first 'big policy' phase the policy challenge was to achieve a single economic market and the imperative was to ensure that competition policy and trade remedies enabled rather than got in the way of closer economic integration.

BOX 1 Competition policy and trade remedies

1983: Closer Economic Relations (CER) comes into force: comprehensive bilateral free trade agreement; covers substantially all trans-Tasman trade in goods and services.

1986: New Zealand's Commerce Act introduced; largely modelled on the Australian Competition and Consumer Act (CCA). Many similarities in the structure of the CCA and the Commerce Act (mergers and agreements that substantially lessen competition, taking advantage of market power for an anti-competitive purpose, authorisation on public benefit grounds).

1988: MOU on the Harmonisation of business law between Australia and New Zealand.

1990: Introduction of section 46A of the Competition and Consumer Act (CCA) and section 36A of the Commerce Act in New Zealand on the misuse of substantial market power in a trans-Tasman market (which precluded trade remedies such as anti-dumping actions).

2004: Australian Productivity Commission (APC) release a report on trans-Tasman competition policy. It does not support full harmonisation of policy regimes or creation of a single trans-Tasman competition regulator but does recommend closer cooperation between the two competition authorities. The New Zealand Government had limited formal involvement in the report but is informally kept in the loop at key phases.

2008: Agreement on Trans-Tasman Court Proceeding and Regulatory Enforcement which included:

- Powers for the collection of information and documents by a competition authority on behalf of the other in relation to trans-Tasman markets
- Providing for mutual recognition and enforcement of judgments of each jurisdiction.

2009: Single Economic Market Outcomes Framework including three competition policy streams:

- Firms operating in both markets face the same consequences for the same anti-competitive conduct
- Businesses can have certain approvals considered on a 'single track' (but with separate decisions)
- Competition and consumer law regulators in both jurisdictions can share confidential information for enforcement purposes
- Cross-appointment of associate members on the ACCC and CC.

2010: Enactment of the Agreement on Trans-Tasman Court Proceedings and Regulatory Enforcement (reflected in Trans-Tasman Proceedings Act 2010).

2015: Australia announced the results of a major review of competition policy and these are enacted in changes to the CCA. New Zealand has not undertaken a similar competition policy review.

The big policy phase

The first big policy phase was the province of policy analysts. In particular, the New Zealand lead department for competition policy (now called the Ministry of Business, Innovation and Employment) went to some lengths to foster links with their Australian counterparts in the Treasury (the lead on competition policy) and the ACCC.

Box 1 above highlights the role of key events in the first phase since the introduction of CER in 1983.

Box 2 Australian and New Zealand competition and consumer protection regimes, APC 2004

The report considered three options: full integration of laws and procedures and a single institutional framework; partial integration which retained the two national regimes, but established a single system to handle matters that had Australasian dimensions; and a package of measures to achieve greater coordination including:

Retaining, but further harmonising, the two sets of laws in relation to competition and consumer including formalising the policy dialogue between the two Governments on competition policy

Providing for businesses to have certain approvals considered on a 'single track' (but with separate decisions)

Enhancing cooperation between the ACCC and the CC including in relation to enforcement and research

Providing for the investigative powers of the regulators to be used to assist the regulator in the other country

Enhancing the information sharing powers between regulators (safeguards should be included to ensure that confidential information shared between regulators can remain protected from disclosure.

Commenting on full integration the report concluded (Finding 5.1 PXXVT):

Implementing and maintaining a single competition and consumer protection regime for Australia and New Zealand (full integration) would not generate benefits that outweigh the associated costs. The resulting benefits would be moderate, given that the two countries' competition and consumer protection regimes are already similar, there is extensive cooperation and coordination between Australian and New Zealand regulators, and only a small number of cases handled by those regulators have Australasian dimensions. The costs of implementation and maintenance would be substantial. It would require agreement on many complex issues, including how each country's sovereignty would be affected.

The report rejected the other full and partial integration options. Since then legislative changes have been enacted and the ACCC and the CC have worked together on the package of measures proposed in the APC report.

Three features of the brief chronology above particularly deserve comment. The first was the 2004 APC report which *examined and rejected the case for full harmonisation*.

This highlighted how **the law of diminishing returns also applies to IRC**. It found that increasing cooperation imposed increased costs while the benefits were marginal.

Second it highlights that **coordination need not inevitably lead to full harmonisation**. Despite the closer cooperation between the two competition authorities on enforcement practice, recent changes in the Australian competition policy regime have not been reflected in New Zealand. Indeed, the Australasian experience highlights the potential role for regulatory competition as well as coordination. For example, New Zealand could act as the trail blazer on parallel imports, and Australia was able to overcome domestic opposition to the move based on New Zealand's experience. More generally the experiences highlight how cooperation on regulatory practices does not necessitate policy harmonisation: these are separate decisions.

Third it is a testament to the degree of trust that New Zealand's government officials had in the Australian public institutions such as the APC and the ACCC, and the people leading them that the APC was able to undertake a review of trans-Tasman competition policy.3 Formal input from the New Zealand Government into the review was very limited although a New Zealand Government principal policy analyst was seconded to the APC to be part of the project team. **Mutual trust was crucial: it is critically important to choose partners where there is mutual confidence in the institutions and the people in them**. For example, it is now the practice for Australian expert lay members to sit with New Zealand High Court judges on Commerce Act cases.

The little policy phase – focus on selected regulatory practices

In the second phase, the focus was on regulatory practices and the application of competition policy shown in Box 3.

Box 3 Little policy phase focused on legal policy and administrative practice

2000s: Regular meetings between Commissioners of the ACCC and CC.

2006: Cooperation Protocol covering merger reviews.

2007: Cooperation Agreement: allowing the competition authorities to use their investigative powers to assist the regulator in the other country.
Late 2000s: extensive practical co-operation in merger reviews and competition investigations, e.g. case teams discussing theories of harm and investigation plans, joint consideration and information requests to leniency applicants, joint market inquiries in relation to mergers.

2013: Cooperation Agreement – enhancing the information sharing powers between regulators including coverage of compulsorily acquired information and investigative assistance (safeguards should be included to ensure that confidential information shared between regulators can remain protected from disclosure).

This involved addressing a range of technical challenges for the legal infrastructure around evidence, sharing of information, and enforcement of judgements. It required sustained technical spade work to provide remedies to a range of intensively practical operational problems. The APC report had provided a broad road map but making progress required a practical actionable agenda.

[3] A subsequent review of the Single Economic Market was jointly undertaken by the Productivity Commissions of the two countries in 2012.

The focus of cooperation was selective with an emphasis on enforcement including investigation and remedies of mergers and cartels, where there was a win-win for both authorities. There is limited cooperation in other areas (restrictive trade practices, organisational management). Key achievements included:

- Scope for businesses to have certain approvals considered on a '*single track'* (but with separate decisions)
- Enabling the competition authorities in one country to *use their investigative powers to assist the authority* in the other country
- Deepening the cooperation between the two authorities at multiple levels *including cross-appointment of associate members*.

The initial cross-appointment process led to New Zealand subsequently appointing an Australian, Dr Jill Walker formerly of the ACCC, as a full time Commissioner of the CC from 2015. Dr Walker now represents New Zealand at the OECD Competition Committee.

Understanding the context for cooperation

The gradual deepening in cooperation between the ACCC and CC over the last 25 years did not occur in isolation. There were four conditions that supported increased trans-Tasman cooperation on competition policy:

- First, Australia and New Zealand have a *shared history, language and values*, and similar cultural, political, legal and economic institutions. To the extent there is conflict it is mainly on the sports field
- Second, there was *political commitment* to greater economic integration following the Australia-New Zealand CER Agreement signed in 1983 and the Single Economic Market Outcomes Framework agreed between the Australian and New Zealand Prime Ministers in August 2009
- Third with *close geographic and economic links* many companies operate in and/or trade between both countries. Business was concerned the practices of the respective competition authorities didn't hinder deepening economic integration. The business community, while not driving the agenda, was generally supportive of greater integration
- Fourth, *New Zealand unilaterally adopted a competition policy framework* largely modelled on the Australian CCA. The Commerce Act established the CC in New Zealand, which while it has a slightly different mix of functions it is very similar to its Australian counterpart, the ACCC.

Australasian experience

Across the globe – cooperation between competition authorities has been increasing through multilateral networks such as the International Competition Network and the OECD Committee on Competition.[4] Indeed, Slaughter (2004) highlights the growing role of international government networks in a wide range of policy domains. Staff in competition authorities in advanced countries tend to have similar analytical frameworks and a shared understanding about the role and procedures of competition authorities. There is significant movement in staff between the authorities and OECD countries. Interestingly although between one-quarter and one-third of CC staff have come from other jurisdictions at any one time. There are currently no ACCC personal on staff at the CC other than some short-term secondments.

[4] The OECD inventory has identified around 140 MoUs and the OECD has developed recommendations for competition enforcement http://www.oecd.org/daf/competition/2014-rec-internat-coop-competition.pdf

Where New Zealand and Australia stand out is the depth of cooperation on enforcement reflected in the cross appointment of Commissioners to consider trans-Tasman mergers and expert lay members from one country sitting with judges from the other. These formal cross appointments reinforce the more informal relationships and cooperative practices underway at multiple levels across the two authorities.

This case suggests **IRC is not something that can be forced along**. The increased cooperation between the two competition authorities has been a long march – the relationship has gradually deepened in selected areas where working closer was a win-win for both. IRC is a long game: it requires investment of time and effort to build up trust and networks. The general lesson is the crucial role of building and sustaining relationships as the soft stuff is the hard stuff.

Cooperation is costly and as the intensity of IRC increases costs while the benefits diminish. The APC report rejected both full and partial harmonisation in favour of greater cooperation. The implication for IRC generally is to firstly identify the initial sweet spot at the lowest level of cooperation and then look to deepen cooperation over time once trust has developed and additional mutual benefit can be identified. The simple lesson learnt is start small rather than shooting for the moon.

IRC can occur across a range of functions – policy, regulatory practices such as enforcement, as well as support functions like staffing and research. The initial focus was on policy with the regime to bypass anti-dumping. However, policy harmonisation does not require adoption of identical regimes. (Indeed, the opposite is the case – there may be benefits in regulatory competition.) Another lesson for IRC from this case study is to keep focus on where the gains are greatest and cooperate 'where it makes the job easier'.

A political mandate helps but is not enough on its own. A shared public commitment based on the drive for greater integration into a Single Economic Market lends legitimacy to efforts by agencies to cooperate more deeply. This help keeping up the momentum on IRC.

Conclusion – implications for IRC generally

This case study is the story of a gradual deepening of cooperation on competition policy between the ACCC and the CC in New Zealand over the last 25 years. The story has no heroes but is the culmination of hard work by a wide range of officials who worked issues through to an actionable practical agenda. It is a story of incremental change rather than step change. Making progress required working through technically complex issues involving evidence, sharing of information and enforcement of judgements. This required detailed technical spade work and intensively practical work on solving operational problems.

So, what are the lessons emerging from this case study that are relevant for IRC initiatives in other jurisdictions? It is important to bear in mind the unique factors that may limit generalisability of the lessons learnt from this case study and how broadly the lessons can be applied. Most importantly is to understand the context of the cooperation. The first of these is the spirit of ANZAC. New Zealand and Australia have their differences but share a common cultural and historic heritage. This enables an ease of cross-country working that is rare in other parts of the world.

Second this issue had low political salience. Closer integration with Australia was a policy goal that almost all political parties could subscribe too. The highly technical nature of the subject matter meant involvement of Ministers was minimal. Having a technocratic imperative with low political salience helps make the boat go faster. Having the right

people in the room and keeping the group at an expert regulator to expert regulator level meant the parties could cut through the technical issues.

These caveats aside the key lessons from this case include:

- *IRC is a long game*: it requires investment of time and effort to build up trust and networks
- *Trust is crucial:* it is critically important to choose partners where there is mutual confidence in the two sets of institutions, or at least good prospects for building it
- *Start small*: cooperation is costly, and costs markedly increase with the intensity of IRC while the marginal benefits diminish
- *Focus IRC where the mutual gains are greatest*: IRC on regulatory practices does not require full policy harmonisation
- *Keep moving*: the initial focus was on policy with the regime to bypass anti-dumping but moved onto regulatory practices
- *Mandate*: A shared public commitment lends legitimacy and keeps up the momentum on IRC.

Key references

Australian Productivity Commission. 2004. Australian and New Zealand Competition and Consumer Protection Regimes.

Slaughter, Mary Anne. 2004. A New World Order: Government Networks and the Disaggregated State. Princeton: Princeton University Press.

Walker, Jill. 2014. Australia-New Zealand Enhanced Co-operation: ACCC-NZCC cross-appointment. Presentation to the OECD roundtable on enhanced enforcement co-operation.

Appendix B APEC Asia Region Funds Passport

Executive summary

The aim of the Asia Region Funds Passport (ARFP) initiative is to streamline the regulatory processes for cross-border offers by enabling mutual recognition of fund licensing. Once ARFP is operating in early 2019, a fund manager in one of the participating APEC economies in the Asian region will be able to offer their products to retail investors in other passport member economies.

Currently there is limited transferability of funds across borders and Asian funds are largely assembled, distributed and administered within each jurisdiction. Most of the demand for cross-border funds in the region is met from Asian retail funds based in the EU. There are significant economies of scale in funds management so there are large potential benefits to investors from reducing the share of the returns on managed funds absorbed by expenses.

This case study discusses the key events since the announcement in 2010 leading up to the proposed launch in 2019. There were a range of complex technical regulatory challenges to resolve including whether the host or home country law applies, the common regulatory arrangements required and the rules for eligibility of passport funds. There were also tactical challenges about which economies should be involved and the scope of mutual recognition (limited to licensing or including disclosure, distribution and disputes). It highlights the importance of having a small core group of committed countries and the role of key people in getting the initiative over the line.

While every example of IRC is unique, there are a number of lessons to learn from the ARFP that are relevant to other IRC initiatives:

- *IRC like most good things take time:* it took eight years of sustained effort to get the launch in place
- *Start small:* select the least demanding form of IRC (in this case licensing) that gets you over the line rather than shooting for the moon and missing altogether (disclosure, distribution and disputes)
- *Build a coalition of the willing:* plurilateral negotiations amongst diverse economies are difficult to close out. Establishing a small core working group of committed countries meant the initiative got to go forward
- *The key role of a public entrepreneur:* willing to personally champion the initiative and go the extra distance to push it through
- *Have the right people in the room:* keeping the group at the technical expert regulator level meant the parties were able to cut through a host of small prickly issues
- *Political mandate helps but it's not sufficient:* the APEC banner provided legitimacy and a political mandate which was helpful but was never enough on its own
- *Context and capability matters:* IRC between economies at different levels of development can be particularly difficult when mutual recognition of other regimes is required.

Derek Gill, NZIER, June 2018

Acknowledgements – The author would like to acknowledge MFAT and MBIE, the Government departments that sponsored the series of case studies, and to thank the people that made themselves available for interviews and to review an earlier draft of the case. The author retains responsibility for any remaining errors and omissions.

How it works – mutual recognition of fund licensing

Asian-domiciled managed funds have not been benefiting from the growing demand for cross-border funds in the region and most of this demand is met from funds based in Europe or the US. Currently there is limited transferability of funds management across borders and Asian funds are largely assembled, distributed and administered within each jurisdiction. Each economy has its own regime covering the licensing, distribution, disclosure requirements, and options for redress. ARFP streamlines the regulatory processes for cross-border offers by enabling mutual recognition of fund licensing. When implemented, ARFP will enable operators of collective investment schemes (CIS) such as a fund manager, to offer their products to retail investors in other member economies, without the need to meet different licensing requirements.

How the Asia Region Funds Passport initiative was developed

The genesis of the ARFP was a study that highlighted the potential for the large Australia fund management industry, which is underpinned by the Australian superannuation regime, to develop financial services exports. The concept was introduced to the APEC Finance Ministers in 2010. Since then, interested Asian APEC economies along with New Zealand and Australia, have been engaged in a series of policy dialogues on the design of the key features of a funds passport scheme, identifying and resolving any technical and policy challenges; and developing options to take the scheme forward.

Box 1 highlights the role of key events in the process since the initiative was launched.

BOX 1 The journey from concept to launch

2009: The Australian Financial Centre releases a report (the Johnson report) which argued for greater financial services exports of Australian managed funds. The Australian Treasury picks up this recommendation and drives the proposal forward.

2010: APEC Finance Ministers declaration launches ARFP as an exploratory process.

2010: A series of exploratory meetings are held amongst interested economies. This led to the formation of a core working group (with a changing composition) of the most committed economies.

2013: Australia, Korea, New Zealand and Singapore sign a Statement of Intent and Framework, which is an agreement to pilot the arrangement.

2014: APEC Policy Support Unit publishes a cost benefit analysis documenting the business case and showing the potential benefits to be USD20 billion per annum (assuming expense margin savings of 20 basis points).

2016: Memorandum of Cooperation is signed by Australia, Japan, Korea, New Zealand and Thailand.

2017: There is individual country consultation to check if any legal changes are required to give effect to the mutual recognition of licensing under the ARFP.

Early 2019: Planned launch of a pilot ARFP initially involving the licensing regimes for six countries: Australia, Japan, Korea, Malaysia, New Zealand, and Thailand.

There are several features of the brief chronology outlined in Box 1 that particularly deserve comment. The *first was the role of the Australian Treasury*, and one key person in that organisation, who championed the initiative in the region and kept it moving forward. This **highlights how a public entrepreneur is often at the heart of a change process**.

The *second was the impact of establishing a small core working group* from committed economies. The initial stage of the process involved a series of meetings in which economies outlined their positions. This helped to build a shared understanding but did not give the initiative any momentum. The core group was inclusive rather than exclusive. Initially the core was Australia, Korea, New Zealand and Singapore and they were joined later, at various stages, by Malaysia, the Philippines, Thailand and Japan. In the end six countries have agreed to launch the initiative: Australia, Japan, Korea, Malaysia, New Zealand, and Thailand. Singapore and the Philippines decided not to be involved in the initial launch. The experience with ARFP brings out the importance for other IRC initiatives of **building a coalition of the willing** to build up momentum and carry it forward.

The case also highlights the difficulty of IRC between economies at different levels of development because of the **extent of regulatory trust required with mutual recognition** of other economies' regimes and systems.

In this case, economies' eligibility to join ARFP was linked to three main criteria:

1. Having a positive financial sector assessment program (FSAP) review by the IMF of the managed fund regulatory system
2. Having a robust information sharing regime in place through the International Organisation of Securities Commissions Multilateral MoU
3. Having a clean bill of health on anti-laundering from the Financial Action Task Force.

The *third key feature was a deliberate choice to focus on mutual recognition of licensing requirements* and to limit the funds it applied to. Coverage was limited initially to 'plain vanilla' funds by eligible fund managers that met specific criteria. These included having a track record of managing assets, having appropriate financial resources, and key personnel with appropriate qualifications. A more ambitious approach would have been to aim for full interoperability which raised a wider range of complex technical legal interface issues such as rules on disclosure, distribution, disputes and redress procedures. This highlights the importance of **starting small rather than shooting for the moon and missing altogether.**

The *fourth key feature* was **having the right people in the room**. The EU had pioneered the concept of passport funds through a scheme known as Undertakings for Collective Investment in Transferable Securities (UCITS). The UCITS provided a model for the ARFP. Keeping the group at the technical expert regulator to expert regulator level meant the parties could cut through a host of prickly technical issues.

The *fifth key feature was the role of APEC* which provided the umbrella under which the initiative was developed. **APEC provided legitimacy and a political mandate** which was helpful but was never enough on its own.

The last feature was the **length of time** required to get the pilot over the line. It took eight years of sustained effort to get the launch in place and the initial launch will not include either of the two major financial centres in the region: Singapore or Hong Kong. This length of time reflected both technical and other barriers.

The technical barriers arose because there were a range of complex technical regulatory challenges to resolve including whether the host or home country law applies, the common regulatory arrangements required and the rules for eligibility of passport funds. But with sustained will and determination, most technical barriers can be overcome. A second key barrier was distance, which limited the frequency of the meetings. The project required getting key people with busy day jobs from the five or six economies together for two-day meetings with some people facing a day of travel on either side. This limited the project to a schedule of two to three meetings a year.

The most difficult non-technical barrier was the different regulatory mindsets. Both Australia and New Zealand run more principle-based licensing regimes whereas other jurisdictions (such as Singapore) run more prescriptive regimes.

Understanding the context for cooperation

The funds industry is world-wide business which is characterised by significant economies of scale so there is significant benefit in having a world scale industry. It also an industry where fund management can absorb a significant part of the return. The expense ratio of the EU funds available locally is typically 0.9 percent. By contrast many the funds in Asia are small and are therefore not able to achieve economies of scale. As a result, the costs of managing funds in some of these economies are as high as 2.6 percent on average.

The ARFP, by enabling streamlining the regulatory processes for cross-border offers, is intended to increase the extent of fund management in the region and reduce the share of the returns on managed funds absorbed by expenses. However, ARFP is competing with two other cross border funds initiatives in the region.

The first, the Mutual Fund Recognition Programme between Hong Kong and mainland China, is still under discussion. The second, the ASEAN Collective Investment Schemes Framework, was announced in mid-2014 and includes Singapore, Malaysia and Thailand. The ASEAN CIS Framework is intended to facilitate cross-border offers of CIS to retail investors as part of the ASEAN regional capital market integration plan.

ARFP has attracted six countries some with significant funds management industries. It is hoped that the successful operation of the ARFP will attract others including big financial centres such as Singapore (or Hong Kong) to join.

Conclusion – implications for IRC generally

This case study highlights that **IRC, like most good things, take time**. It took eight years of sustained effort to get the launch in place. Thus, IRC is a long game: as it requires investment of time and effort to build up trust and networks. The crucial lesson is the role of building and sustaining relationships as the soft stuff is the hard stuff.

This case study is a story of a long march by a small group of economies committed to the concept of passport funds and championed by one agency and one person in particular. The pilot launch in 2019 is the culmination of hard work by a wide range of officials who worked on resolving the highly technical problems posed by the subject matter. Making progress required working through technically complex issues about the which economy's law would applies, the common regulatory arrangements required and the rules for eligibility of passport funds. There were also tactical challenges about scope (limited to licensing or including disclosure and disputes) and which economies should be involved.

So, what are the lessons emerging from this case study that are relevant for IRC initiatives in other jurisdictions?

While every example of IRC is unique, there are a number of lessons that can be learnt from the ARFP that are relevant to other IRC initiatives:

- *IRC like most good things take time:* it took eight years of sustained effort to get the launch in place
- *Start small:* select the least demanding form of IRC (in this case licensing) that gets you over the line rather than shooting for the moon and missing altogether (disclosure and disputes)
- *Build a coalition of the willing:* plurilateral negotiations amongst diverse economies are difficult to close out. Establishing a small core working group of committed economies meant the initiative got go forward
- *The key role of a public entrepreneur:* – willing to personally champion the initiative and go the extra distance to push it through
- *Have the right people in the room:* keeping the group at the technical expert regulator level meant the parties were able to cut through a host of small prickly issues
- *Political mandate helps but it's not sufficient:* the APEC banner provided legitimacy and a political mandate which was helpful but never enough on its own
- *Context and capability matters:* IRC between economies at different stages of development is particularly difficult when mutual recognition of other regimes is required.

Key references

APEC Policy Support Unit. 2014. *Asia Region Funds Passport: A Study of Potential Economic Benefits and Costs.*
Asia-Pacific Economic Cooperation (APEC). 2014. *Consultation Paper: Arrangements for an Asia Region Funds Passport*, available at http://treasury.gov.au/ConsultationsandReviews/Consultations/2014/Asia-Region-Funds-Passport.
Godwin, Andrew and Ian Ramsay. 2015. *The Asia Region Funds Passport Initiative – Challenges for Regulatory Coordination* Company and Commercial Law Review, 236-243.

Appendix C ASEAN intellectual property

Executive summary

Cooperation within ASEAN on intellectual property (IP) is a story of an overly ambitious start in 1995 focused on top-down harmonisation and then steady progress following a more bottom-up approach. The ASEAN IP cooperation story starts with the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) which introduced intellectual property law into the international trading system for the first time when it came into force in 1995. ASEAN responded with an IP framework focused on TRIPS-mandated IP rights. The framework included the ambitious idea of exploring the possibility of moving to full IP harmonisation with a region-wide set of IP laws for patents and trademarks and one regional IP office. Implementing IP harmonisation faced many setbacks and proved to be an overly ambitious initial goal.

Over time a more bottom-up approach emerged. IP harmonisation was put on the back burner and under the interoperability approach, cooperation on IP was intensified in a few selected areas. Significant emphasis was placed on accession to international IP treaties as well as the IP dialogue with the EU and the World Intellectual Property Organization (WIPO). Intra-ASEAN cooperation initiatives included focus on:

- Reducing patent processing times through the use of other ASEAN countries' patent search facilities (voluntary adoption of patent search)
- Creating an online repository of information of ASEAN countries' IP regimes
- Capability building of government IP offices, the judiciary and the private sector
- Convergence of IP practices around common guidelines and processes.

While every example of International Regulatory Cooperation (IRC) is unique, there are several lessons that can be learnt from IP cooperation across the ASEAN region that are relevant to other IRC initiatives:

- *Start small:* full harmonisation was an unachievable initial goal: select the least demanding forms of IRC, rather than the most ambitious and risk being unsuccessful
- *IRC can be selective:* cooperation on specific regulatory practices such as enforcement and unilateral adoption doesn't require moving to harmonising policy regimes
- *The importance of distributed leadership:* different country champions have taken the lead on the individual workstreams, but this was underpinned by the catalyst role of Singapore as thought leader keeping the flame alive
- *The role for mandated targets:* Demanding but achievable goals and targets provided commitment to achieving progress on a handful of narrowly focused activities
- *Mandate matters:* aspirational Leaders' Declarations that were regularly refreshed were useful attention focusing devices by providing a reference point for the engagement of the intellectual property offices of the different countries
- *IRC, like most good things, take time:* after 20 years of continued effort and steady progress harmonisation is back on the agenda
- *Context and capability matters:* IRC between countries of different levels of development can be particularly difficult (voluntary adoption is easier than harmonisation).

Derek Gill, NZIER, July 2018

Acknowledgements – The author would like to acknowledge MFAT and MBIE, the Government departments that sponsored the series of case studies, and to thank the people that made themselves available for interviews and to review an earlier draft of the case. The author retains responsibility for any remaining errors and omissions.

How it worked – shifting the initial focus from full harmonisation to interoperability and convergence

Cooperation on IP in ASEAN occurred in two slightly overlapping phases with two distinctly different approaches. In the first harmonisation phase, a top-down IP framework focused on TRIPS-mandated IP rights. The framework included the ambitious idea of a top-down approach to harmonisation including exploring the possibility of moving to full IP harmonisation with a regional IP office administering regional IP laws for patents and trademarks. The second interoperability phase took a more bottom-up approach promoting cooperation in areas of mutual interest in the law and legal practices of ASEAN members. This approach "enabled its members to move forward collectively but at varying paces" (Ng, 2013 p130). Interoperability has led to greater convergence through the adoption of World International Property Organisation (WIPO) treaties and harmonisation of practices through common guidelines and approaches to enforcement.

The interoperability approach built upon 'the ASEAN way'. This is based on working in an informal, non-adversarial, cooperative and consensus-based way which acknowledges and respects the extent of diversity across legal traditions, political systems, stages in development, size, administrative capacity and capability, and religious and cultural traditions. It was also based on 'country champions' and no one country playing a dominant leadership role.

Intellectual property poses fundamental challenges for ASEAN and the ASEAN way. IP refers to legal rights in the intangible creations of the human mind, such as designs, inventions, and artistic works. IP includes registered rights such as Patents, Trade Marks, Industrial Designs, Plant Variety Rights, and Geographical indication as well as rights in confidential information, and copyright or authors' rights, which do not rely on registration.

ASEAN countries have inherited different IP regimes from their colonial era legal systems. In many cases, these have been overlaid over different customary law traditions. For example, cultural heritage in Indonesia (batik, shadow-play, weaving etc.) is seen as collectively rather than individually owned. To varying extents IP is protected by the law.

The challenge for the design of an IP regime is how to draw the right balance between the opposing interests of IP rights' holders and IP users. Giving rights to IP holders to encourage inventions and cultural creation needs to be balanced against the wider interest of consumers in having access to the widest possible range of goods and services at the lowest competitive price. Moreover, the balance of advantage between protection of IP users and IP rights' holders differs markedly depending upon the level of economic development. Intellectual property rights are not an arcane piece of technical regulation, they are at the forefront of international economic policy debates across the globe.

Understanding the context for cooperation

The genesis of IP cooperation across the ASEAN region was with the TRIPS agreement which introduced IP law into the international trading system for the first time when it took effect in 1995. The 1990s saw the emergence of the new economy and this was the heyday for IP which was seen as a major source of wealth generation. Delays in IP registrations, weak enforcement, the quality of investigations, confidence in the internal working of IP offices all undermined confidence in the IP regimes in ASEAN countries. Coordination of IP regimes was an important issue if ASEAN was to benefit from the increasing levels of connectivity and international trade.

How ASEAN intellectual property interoperability has developed

Box 1 highlights the key events relating to IP since the formation of ASEAN.

BOX 1 The journey to date

1967: Bangkok Declaration agreed by five founding member countries: Indonesia, Malaysia, Philippines, Singapore and Thailand. Subsequently joined by Brunei Darussalam (1994), Viet Nam (1995), Laos PDR (1997), Myanmar (1997) and Cambodia (1999).

1994: The Agreement on Trade-Related Aspects of Intellectual Property Rights, negotiated as part of the Uruguay Round, ratified and comes into force on 1 January 1995 for the 162 members of the World Trade Organization (WTO). TRIPS set down minimum standards for how many forms of IP should be regulated when dealing with nationals from other WTO member nations.

1995: ASEAN Framework Agreement on Intellectual Property Co-operation, the first ASEAN IP framework, dealt with all the TRIPS-mandated IP rights. It also included the ambitious goal of an ASEAN regional trademark and patent system.

1996: Establishment of the ASEAN Working Group on Intellectual Property Cooperation made up of the intellectual property offices of the ASEAN members states.

1998: Hanoi Plan of Action 1999-2004 provided for enhanced cooperation, based on the principles in the TRIPS agreement's focus on enhancing protection, facilitation and cooperation.

2004: ASEAN Intellectual Property Rights Action Plan 2004-2010 included a focus on fostering IP creation and increasing capability building and business development for ASEAN National IP offices. It also signalled a move away from establishing one set of regional IP laws and one regional IP office.

2005: Work Plan on Copyright focused on policy, legislation and enforcement as well as capacity building and promoting public awareness.

2007: Target date for the introduction of the ASEAN Economic Community brought forward from 2020 to 2015.

2011: ASEAN Intellectual Property Action Plan 2011-2015 had two intra-ASEAN IP cooperation and inter-ASEAN IP cooperation programs with international organisations and key partners. The goal of one ASEAN regional trademark and patent system was put on the back burner. Instead it set out a more flexible cooperation model which emphasised intensified cooperation in selected areas with a number of different countries taking the lead on specific initiatives with defined performance measures.

2016: ASEAN Intellectual Property Rights Action Plan 2016-2025 with four strategic goals (strengthening IP offices, developing IP platforms and infrastructures, expanding the IP eco-system, and fostering IP creation by geographic indications) supported by 19 separate initiatives led by a range of different countries. This includes agreement to study the feasibility of harmonisation through creating a unitary IP title.

Ng (2013) provides a detailed description of the individual contents of each ASEAN IP Plan.

There were two imperatives that shaped ASEAN responses:

- The political imperative for cooperation on IP to contribute to the ASEAN regional cooperation modernisation agenda focused on wealth generation for the region
- The technical imperative to reshape IP laws, which were a neo-colonial legacy, into a regime better suited to the challenges faced by the countries in the region.

The most notable feature in the timeline in Box 1 was the **ambitious agenda in 1995 aimed at exploring full harmonisation which proved overly ambitious**. Lack of sustained progress and external events including the impacts of the Global Financial Crisis and accession of new less developed member countries to ASEAN, led ASEAN leaders to conclude that 'ASEAN countries can't go at the same pace at the same time on IP'. Over time, proposals to establish one set of regional IP laws for patents and trademarks and a regional IP office were put on the back burner, and greater emphasis was placed on greater convergence through the adoption of WIPO treaties.

Another feature of the timeline is the announcement by ASEAN leaders of a series of Intellectual Property Rights Action Plans. These aspirational declarations were useful attention-focusing devices which provided a reference point for the engagement of the intellectual property offices of the different countries. This was particularly important since intellectual property falls under a variety of different ministries (Law, Commerce, Science) in different countries so there was no obvious ASEAN Ministers group to report to. While some workstreams made good progress some of the time, others did not progress as well. **The declarations provided the umbrella under which the workstreams were developed providing legitimacy and a political mandate**.

The third feature is **distributed leadership, with different countries taking the lead on different activities.** The ASEAN IP plans "emphasised teamwork and collective responsibility by appointing specific ASEAN country champions to lead the specific intuitive with defined deliverables and detailed performance indicators" (Ng and Austin, 2017 p19-20). The overall programme was underpinned by the catalyst role of Singapore as a thought leader keeping the flame alive.

The way of working that has evolved has involved a five-year work plan that set demanding but achievable goals for a handful of narrowly focused activities and then actively monitoring progress. Work plan projects were led by countries with a particular interest in seeing progress on that issue – a one-stop shop repository of ASEAN IP policies and practices (hosted by Singapore) reduction in backlogs (led by the Philippines and Cambodia), patent search and examination (led by Singapore), and cooperation on capacity building. More recently attention has now shifted to increased cooperation on enforcement.

Another interesting feature was 'ASEAN helps with ASEAN' on accelerated accession to international IP treaties such as The Hague Agreement on Industrial Designs, the Patent Cooperation Treaty, and the Madrid Protocol on Trademarks. There was a strong outward looking multilateral component to the ASEAN IP cooperation programmes as well as more intra-ASEAN focused activities.

The fifth feature was the model of change. Rather than an overarching grand design, what was developed instead was an emergent strategy based on organic change. This evolving plan was described by one person interviewed 'like trying to create DNA for a useful organism when not entirely sure what it looks like'.

The sixth feature was that IP coordination **highlighted the difficulty of IRC between countries of different levels of economic development and national capability**. Mutual recognition between countries at different levels of development is particularly difficult because of the extent of regulatory trust required in other countries regimes and systems. For patent search recognition, ASEAN used a form of non-binding mutual recognition based on voluntary adoption. Under this programme the patent search and examination results of one office may be used as a reference in the search and examination process of other national IP offices. However, this is non-binding as the other IP offices are not obliged to adopt the findings and conclusions. Cambodia, however, has moved a step further with the automatic recognition of patents registered in Singapore as well as in Japan, the EU and China.

The seventh feature is how IRC takes time. This is a story of 20 years of steady but sustained effort. **IRC is a long game as it requires investment of time and effort to build up trust and networks**. In 2015 there was a move beyond interoperability toward harmonisation with the agreement to study the feasibility of a unitary IP title.

Conclusion – implications for IRC generally

Cooperation within ASEAN on IP is a story of an overly ambitious start in 1995 and then steady progress following a more bottom-up approach to interoperability. This case highlights the difficulty of harmonisation as an initial goal and the difficulty of attempting this in an area as vexed as IP for a group as diverse as the ASEAN countries. Full harmonisation is not the only destination however. The ASEAN bottom-up approach focused on interoperability, with gradual policy convergence through ratification of international treaties.

ASEAN IP coordination is still 'work in progress'. After 20 years of cooperation, the ASEAN region is still basically ten countries with varying levels of IP protection and with different regimes and procedures for filing and examination to obtain IP protection. While improvements have been made through bilateral, regional and multilateral arrangements, the complexity and variety of IP regimes remains.

So, what are the lessons emerging from this case study that are relevant for IRC initiatives in other jurisdictions?

While every example of IRC is unique, there are several lessons that can be learnt from ASEAN's cooperation on IP that are relevant to other IRC initiatives:

- *Start small:* full harmonisation was an unachievable initial goal: select the least demanding forms of IRC, rather than the most ambitious and risk being unsuccessful
- *IRC can be selective:* cooperation on specific regulatory practices such as sharing practices and unilateral adoption doesn't require moving to harmonising policy regimes
- *The importance of distributed leadership:* different countries have taken the lead on the individual workstreams, but this was underpinned by the catalyst role of Singapore as thought leader keeping the flame alive
- *The role for mandated targets:* Demanding but achievable goals and targets provided commitment to achieving progress on a handful of narrowly focused activities
- *Mandate matters:* aspirational Leaders' Declarations that were regularly refreshed were useful attention focusing devices by providing a reference

point for the engagement of the intellectual property offices of the different countries

- *IRC, like most good things, take time:* after 20 years of continued effort and steady progress harmonisation is back on the agenda
- *Context and capability matters:* IRC between countries of different levels of development can be particularly difficult (voluntary adoption is easier than harmonisation or mutual recognition of conformity assessments or rules and standards).

Key references

Ng, ESK. 2013. ASEAN IP Harmonization: Striking the Delicate Balance *Pace International Law Review* Volume 25 Issue 1 Spring 2013.

Ng, ESK & GW Austin. 2017. 'International Intellectual Property and the ASEAN Way: Pathways to Interoperability.' Cambridge University Press.

Appendix D ASEAN cosmetics regulation

Executive summary

The harmonisation of ASEAN cosmetics regulation was one of the first concrete instances of intensive economic integration between ASEAN countries. It is a surprisingly successful example of relatively rapid implementation of harmonised technical standards and an unusual balancing of the free trade agenda and consumer protection. Its history tells the story of how a potential regulatory 'race to the bottom' became an immediate 'trading up' to the world's highest standards.
The ASEAN Cosmetics Directive essentially allows all ASEAN member states to adopt the main features of the regime of technical standards for cosmetics ingredients in the EU Cosmetics Directive. Rather than prior approval, compliance with the Directive is backed by pre-market notification and post-market surveillance for 'negative list' banned ingredients and 'positive list' permitted agents.
A key feature was industry interest in harmonisation based on EU standards, as the major cosmetic export manufacturers were already having to comply with those standards to access their major export markets in Europe and elsewhere in the world.
Harmonisation of cosmetics regulation across the ASEAN member states was achieved through a two-phase process:

- The first phase was in partnership with industry and dominated by voluntary action. Progress in the voluntary phase was driven by ASEAN cosmetics regulators working closely with the cosmetics industry associations.
- The second phase involved a more formal commitment by governments to fully harmonise. This second phase was mainly pushed forward by government regulators.

The important lessons from this case study for other examples of IRC are:

- *Focus IRC where the gains are greatest:* this is a case study of full policy harmonisation to achieve access to major export markets and improve consumer safety, but harmonisation is not the only destination as IRC can take a number of forms
- *Consider 'trading up' when access to major export markets is the primary objective:* setting high technical standards from the start may be easier than trading up later
- *Partnership with industry can lay the groundwork to facilitate faster implementation and a simpler approach:* industry is well placed to see the opportunities to reduce the burden of compliance without compromising future options
- *Political mandate helps but it's not sufficient*: commitments to freer trade and consumer safety brought industry and regulators together and provided legitimacy to what was initially an initiative in partnership with industry
- *Context and capability matters*: IRC between different countries of different levels of development and pre-existing regulation can be particularly difficult but progress can still be made where there is a burning imperative.

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How it works – compliance, notification and surveillance

The ASEAN Cosmetics Directive allows all ASEAN member states to adopt the main features of the cosmetics ingredients listings of the EU Cosmetics Directive, with minor modifications if required. The regime includes simpler compliance rules based on a 'negative list' of banned ingredients, a 'restricted list' of ingredients subject to specified limits, and a 'positive list' of permitted agents. Compliance with the Directive is backed by pre-market notification and post-market surveillance.

The ASEAN Cosmetic Directive reduces the burden of compliance on manufacturers and importers as well as on government regulators by requiring manufacturers and importers to:

- Comply with a single set of rules on ingredients, claims and labelling, instead of multiple sets of rules
- Notify regulators in any state where cosmetics are to be marketed before marketing takes place, instead of having to first obtain approval from government
- Keep the product's technical and safety information, supporting data for any claims, manufacturing methods and adverse event reports readily accessible to the regulator for post-market surveillance.

How the ASEAN Cosmetics Directive was developed

Harmonisation of cosmetics regulation across the ASEAN member states was achieved through a two-phase process:

- The first phase was initiated in partnership with industry and legitimised by the ASEAN governments' free trade agenda and was characterised primarily by voluntary action. Progress in the voluntary phase was achieved by ASEAN cosmetics regulators working with the cosmetics industry through the Cosmetic Product Working Group (CPWG) of the ASEAN Consultative Committee for Standards and Quality (ACCSQ)
- The second phase involved a more formal commitment by governments to fully harmonise. This second phase was mainly pushed forward by wider concerns about consumer safety and associated health issues. These imperatives allowed the more developed ASEAN member states to gain the cooperation of the less developed member states' governments.

In 1998, partly in response to pressure from large, influential cosmetics exporting manufacturers, ASEAN cosmetics regulators began working with the cosmetics industry associations to address the barriers to trade that faced the sector.

The ASEAN Cosmetics Directive was agreed on just four years after the ASEAN member states had committed in 1999 to the ASEAN Economic Community (AEC). This was the first Mutual Recognition Agreement (MRA) within ASEAN. It facilitated the move toward a fully harmonised regime of common technical standards and national regulator powers in the cosmetics industry.

The presence of major European cosmetics manufacturers in ASEAN member states was an enabling factor because manufacturers focused on exporting faced significant regulatory burdens. Different jurisdictions had differing approaches to standards and compliance (pre- and post-market controls).

Box 1 highlights the role of key events in the process since the initiative was launched.

BOX 1 The journey from concept to adoption

1992: ASEAN Free Trade Area (AFTA) agreement signed.

1998: ASEAN Framework Agreement on MRAs and establishment of the Cosmetic Products Working Group.

1999: Announcement of the ASEAN Economic Community to take effect 2025.

2003: Agreement on the ASEAN Harmonized Cosmetics Regulatory Scheme including a 5-year grace period, adoption of the ASEAN Cosmetics Directive (Phase 1) – voluntary measures and establishment of the ASEAN Cosmetic Committee.

2007: ASEAN member states agree to accelerate progress towards the ASEAN Economic Community to 2015.

2008: Intended complete adoption of the ASEAN Cosmetics Directive (Phase 2).

2009: Adoption of three ASEAN community blueprints including advancing the ASEAN Economy Community to 2015.

2011: Final ratification of the ASEAN Cosmetics Directive (Phase 2) after a 3-year extension.

2013: Complete adoption of the ASEAN Cosmetics Directive into domestic laws.

There are several features of the brief chronology above that deserve comment.

The most obvious is the relatively rapid adoption of first world standards amongst a diverse group of countries at different stages of development. There were a number of factors that worked together to secure adoption: shared commitment to freer trade through the AEC, the need to address consumer safety (in the more developed ASEAN states) and health development objectives (in the less developed ASEAN countries), combined with the ease of implementation for countries with no pre-existing regulation. Unlike other examples of IRC when development stages of ASEAN countries did hinder achievement, such as IP harmonisation, it wasn't the case with cosmetics. **This case highlights how context and capability matter but don't always have the expected effect.**

The second was the role of the major exporting manufacturers who were active partners in the process and set a high standard for harmonisation from the start. Having a higher standard used through the world meant that the potential pay-off from achieving harmonisation was greater, with access to world markets, not just ASEAN markets. Had an ASEAN standard had been developed first, then harmonisation to EU standards would have been a difficult sell to the less developed member states. **This illustrates that an immediate 'trade up' to the highest standards can sometimes be easier than trading up later.**

The partnerships between the regulators and the major exporting manufacturers were pivotal to the success of cosmetics harmonisation and laid the groundwork during the pre-2007 voluntary phase, through the Cosmetic Product Working Group (CPWG). By working with industry, the CPWG was able to identify a simple approach that could reduce the burden of compliance both for government regulators and the industry while simultaneously improving consumer safety. The result was a win-win deal for ASEAN governments, which highlights how **partnership with industry can lay the groundwork to facilitate faster implementation and a simpler approach**.

A regionally focused regulatory process under the AEC agenda, could have resulted in a unique cosmetics ASEAN standard. Industry interests however ensured convergence on a common international standard. This **highlights how a government mandate may be necessary to provide legitimacy to the process, but the mandate is not sufficient to get the best outcome**.

Throughout the process, the major exporting cosmetics manufacturers played a significant role. Later, when the major players were already voluntarily complying with the new standards and processes, the focus shifted to smaller manufacturers whose activities mainly concerned marketing to domestic markets and across ASEAN borders. In this later phase, the primary concern was consumer safety. Consumer safety is particularly compromised where systems for following up on adverse effects are lacking. **This illustrates the importance of focusing IRC where the gains are greatest**. The major benefits from convergence were achieved in this case before full policy harmonisation was complete.

Phase 1: The voluntary stage – industry ambition meets the AEC agenda

The first phase of harmonisation was able to be achieved through voluntary participation. The general lifting of standards that ensued enabled the ASEAN members states to implement the ASEAN MRA of Product Registration Approvals for Cosmetics which allowed individual member states to agree to permit the import of cosmetic products that simply met another member state's regulatory requirements. This agreement provided further incentive for member states interested in improving the export potential of domestic industries to raise domestic standards in order to encourage ASEAN export markets to reduce barriers.

The first phase of the process involved exploring two tracks. One track involved primarily voluntary compliance of larger scale manufacturers who had supported the development of MRAs to reduce the burden of complying with different standards and regulation across the ASEAN member states. Government support for this phase was fully consistent with the ASEAN commitment to a Free Trade Area in that it helped to remove non-tariff barriers to trade between ASEAN member states.

However, if economic integration in the ASEAN area had been the main objective, advocates of the common standard may have settled for a lower standard instead of setting their sights on the European model. ASEAN member states have generally rejected EU approaches on the basis that their members are faced with greater challenges of diversity in culture, politics and economic factors, so much so that EU approaches are generally considered ill-suited to ASEAN.

It is clear, therefore, that although the main objective of governments would have been to reduce trade barriers between ASEAN member states, the major exporting manufacturers had a longer-term objective of facilitating trade with the rest of the world. This longer-term objective, and the limited progress under the MRA track, motivated the move towards the European model – specifically the 1976 EU Cosmetics Directive – as a means of facilitating exports to the rest of the world by adopting and adapting the most stringent standard, which was also being adopted by many other non-European countries.

For manufacturers located in countries whose consumer safety standards may be seen as behind those of first world countries, adopting a high and recognised standard, and ensuring that the region does so in an official capacity, would be an important marketing

strategy. It would minimise the ability of even small, non-exporting players to 'tarnish' the region's reputation through media reports of major safety issues.

Phase 2: The ASEAN Cosmetics Directive – full implementation under the health and consumer safety agenda

It is particularly interesting that it was wider concerns about consumer safety in ASEAN member states that pushed forward the second phase of harmonisation. In 2009, as part of the agreement to accelerate progress to full economic integration by 2015, ASEAN member states also committed to improve and harmonise consumer law.

This commitment reflected two concerns:

- That consumer safety would be reduced by increased competition associated with freer trade. Awareness that with freer trade, manufacturers of consumer goods associated with safety risks would face increased competition raised fears that existing standards may come under pressure to be reduced by governments (particularly governments of the less developed member states) as a means to give the domestic industry a competitive edge. Although this regulatory race to the lowest standards of safety has been shown not to be a necessary outcome of free trade (Vogel, 1995), ASEAN member states were motivated to ensure that their own citizens would not face increased risks as a result of possible future deterioration in standards
- That consumer safety was directly linked to health, a priority area under the ASEAN Socio-Cultural Community agenda: to improve human development through improvements in areas including not only education, work and community participation, but also health.

A new Committee encouraged member states to enact strict product liability regimes which would make it easier for consumers to be compensated for harms caused by unsafe products. ASEAN states have also introduced new or revised laws allowing regulators to set mandatory safety standards before products are put into circulation, and to enforce post-market controls such as bans and recalls of unsafe products.

Interestingly, although implementation of first world standards is generally thought to be more challenging in less developed countries, the ASEAN experience with cosmetics shows that this is not always true. ASEAN countries with existing cosmetics regulation (generally the more developed countries) faced more challenges to implementation than those with no pre-existing regulation (Jinachai and Anantachoti, 2014). However, the very same countries with well-established regulatory regimes also had the major economic interest in cosmetics export growth and influential exporting industry players to help push forward with the complex legal process

Significant implementation capability constraints still exist in the less developed ASEAN states which limit the extent to which regulation will be fully harmonised. This is mainly in relation to post-market surveillance capability.

The ASEAN experience with a Free Trade Agreement triggering improved consumer safety is not unique. In the case of the European Union (EU), the Treaty of Rome (1957) as interpreted in 1979, required mutual recognition of goods produced to safety standards required in one EU country would satisfy standards in an importing country. This mutual recognition or 'negative harmonisation' subject to safeguard measures if harm arose, was replaced a more active 'positive harmonisation' phase of EU-wide instruments setting agreed minimum safety standards. In order to avoid a regulatory race to the bottom, the

EU also developed a new and more effective approach to setting joint minimum safety standards and a harmonised compensation regime for consumers suffering injuries.

This increased focus on consumer safety in ASEAN states provided governments with the motivation to push forward the second stage of the ASEAN Cosmetics Directive to achieve full implementation by 2013.

Conclusions

A key feature of industry interest in harmonisation was that the major exporting manufacturers were already having to comply with EU standards to access their major export markets in Europe and elsewhere in the world. The ideal outcome of harmonisation for them, therefore, was not just any harmonised ASEAN regime, but harmonisation of ASEAN cosmetics regulation with European cosmetics regulation. As part of the initiation of the process of harmonisation, these influential exporters and their governments were able to set the standard, so that once consumer safety became the chief concern, the prospect of 'trading down' to a lower standard would be unpalatable.

Because of the groundwork having already been established pre-2007, commitment to full harmonisation in the non-voluntary phase was achieved in six years. However, delays did occur in adopting updates to the EU ingredient lists. In addition, the extent of compliance by small non-exporting manufacturers of less developed member states is not clear.

Although the process of harmonisation was relatively fast (compared with the EU or other ASEAN harmonisation), there were and are still important challenges:

- The more developed member states face the legal difficulties of aligning existing standards, definitions, and processes of cosmetics with the European model. If the ASEAN members wish to remain consistent with the EU, these difficulties will be repeated every time the EU updates the ingredients listings. This is in contrast with countries with no existing regulation, like Singapore, which were able to implement the ASEAN Cosmetics Directive more quickly
- The less developed member states have experienced delays due to a lack of human and technical resources for full implementation and are likely to continue experiencing such difficulties in their ongoing commitment to post-market surveillance. Important supporting systems are lacking. Specifically, there is no single information portal by which national laws can be accessed, or to enable ASEAN-wide incident reporting (as exists for food). Well before the ASEAN member states agreed in 2007 to accelerate progress towards an ASEAN Economic Community with full liberalisation and facilitation of trade, the cosmetics industry had already identified a need for harmonisation of cosmetics standards as a means to address non-tariff barriers to trade, not just between ASEAN member states but with the rest of the world.

Implications for IRC generally

The important lessons learnt from this case study are:

- ***Focus IRC where the gains are greatest***: this is a case study of full policy harmonisation both to improve consumer safety and to achieve access to major export markets, but harmonisation is not the only destination as IRC can take a number of forms.

- ***Consider 'trading up' when access to major export markets is the primary objective**:* setting high technical standards from the start may be easier than trading up later.
- ***Partnership with industry can lay the groundwork to facilitate faster implementation and a simpler approach:*** industry is well placed to see the opportunities to reduce the burden of compliance without compromising future options.
- ***Political mandate helps but it's not sufficient***: commitments to freer trade and consumer safety brought industry and regulators together and provided legitimacy to what was initially an initiative in partnership with industry.
- ***Context and capability matter***s: IRC between different countries of different levels of development and pre-existing regulation can be particularly difficult but progress can still be fast where there is a burning imperative.

Further reading

Nottage, L. (2015) *Cosmetics regulation under national and ASEAN law*. Policy Digest No. 22. Consumer Protection Digest and Case Studies: A Policy Guide (Volume II) ASEAN. http://www.aseanconsumer.org/accp/uploads/files/CPDCS_PGV2.pdf

Other references

Jinachai N, Anantachotti P. (2014). 'ASEAN Harmonisation: Compliance of Cosmetics Regulatory Scheme in Thailand within 5 years'. *IOSR Journal of Humanities and Social Science*; 19(3): 46-54.

Nottage, Luke R. and Thanitcul, Sakda, Economic Integration and Consumer Protection in Southeast Asia: ASEAN Product Liability Law and Safety Regulation (December 13, 2015). ASEAN Product Liability and Consumer Product Safety Law, Winyuchon Publication House, Thailand, 2016; *Sydney Law School Research Paper No. 15/100*. Available at SSRN: https://ssrn.com/abstract=2703130

United Nations Development Programme. *Advancing Human Development through the ASEAN Community*. Thailand Human Development Report 2014. http://hdr.undp.org/sites/default/files/thailand_nhdr_2014_0.pdf

Vogel, David. 1995. *Trading Up: Consumer and Environmental Regulation in a Global Economy*. Cambridge, MA: Harvard University Press. ISBN 0-674-90084-7.