

Singapore Management University

Institutional Knowledge at Singapore Management University

Research Collection Yong Pung How School Of
Law

Yong Pung How School of Law

1-2018

The emergence of global regulatory coherence: A thorny embrace for China?

Han-wei LIU

Singapore Management University, hanweiliu@smu.edu.sg

Ching-Fu LIN

Follow this and additional works at: https://ink.library.smu.edu.sg/sol_research



Part of the [Asian Studies Commons](#), and the [International Law Commons](#)

Citation

LIU, Han-wei and LIN, Ching-Fu. The emergence of global regulatory coherence: A thorny embrace for China?. (2018). *University of Pennsylvania Journal of International Law*. 40, (1), 133-189.

Available at: https://ink.library.smu.edu.sg/sol_research/4412

This Journal Article is brought to you for free and open access by the Yong Pung How School of Law at Institutional Knowledge at Singapore Management University. It has been accepted for inclusion in Research Collection Yong Pung How School Of Law by an authorized administrator of Institutional Knowledge at Singapore Management University. For more information, please email cherylds@smu.edu.sg.

THE EMERGENCE OF GLOBAL REGULATORY COHERENCE: A THORNY EMBRACE FOR CHINA?

HAN-WEI LIU* & CHING-FU LIN**

ABSTRACT

The last two decades have witnessed various governance initiatives across institutions, domestic and international, in response to mushrooming regulatory trade barriers. Among the efforts to balance regulatory autonomy and international cooperation, “regulatory coherence” or “good regulatory practices” seems a promising solution that centers upon bottom-up domestic regulatory rationalization. While existing literature has documented how recent mega-regional trade blocs seek to harness regulatory barriers through mechanisms of international cooperation, it has arguably overlooked certain crucial issues. In particular, how has regulatory coherence emerged as a new global norm vis-à-vis the default in-

* Lecturer, Monash University (Australia). Ph.D. (Graduate Institute, Geneva); LL.M. (Columbia); M.Jur. (Oxford); LL.M./LL.B. (National Chengchi University, Taiwan). Part of the research is funded by Taiwan’s Ministry of Science and Technology for the project on “Regulatory Coherence in the Age of Mega-regionalism.”

** Associate Professor of Law, National Tsing Hua University (Taiwan). S.J.D./LL.M. (Harvard); B.S./LL.B. (National Taiwan University, Taiwan).

This paper is part of our multi-year project on regulatory coherence, its global diffusion, and normative implications for mega-regionalism. Another part of this project, an empirical survey of relevant clauses in the free trade agreements signed by the United States, the European Union, and China, has been published by *Melbourne Journal of International Law*. We are very grateful to Professors Shin-Yi Peng (National Tsing Hua University, Taiwan), Chien-Huei Wu (Academia Sinica, Taiwan), Julia Qin (Wayne State), Paul Mertenskötter (NYU), Thomas Streinz (NYU), and participants at the 6th Biennial Conference of the Asian Society of International Law in Seoul, Korea, August 2017, where we presented an earlier draft of this paper. Thanks also go to Enid Yu, Jung-Min Chang, Sylvia Lu, Yi-Ting Chen, and Roger Kai at National Tsing Hua University for their research assistance. Usual disclaimers apply.

ternational economic and legal order? What are the limits to the global normative diffusion of regulatory coherence when considering the diverse contexts and agendas of emerging economies, most notably China?

This article aims to contribute the existing scholarship by making two major claims. First, built upon a historical approach, this paper traces the trajectory of the development of regulatory coherence. With the United States being the primary driving force, the concept of regulatory coherence mirrors the key elements of Administrative Procedure Act and has diffused across various jurisdictions through multiple venues, like the Asia-Pacific Economic Cooperation and Organisation for Economic Co-operation and Development. Yet, despite its penetration, the entrenchment of regulatory coherence as a new global norm is conditioned upon complex political economy issues, particularly the role of China. By exploring the evolution of legal and political underpinnings for the past decades, this article contends that China has taken what we describe an “experimental approach” by prudently addressing regulatory coherence at both domestic and international levels, largely due to the democratic implications of regulatory reforms. Such an approach may in the end define the boundary of regulatory coherence as an emerging global norm.

TABLE OF CONTENTS

1.	Introduction.....	136
2.	The Era of Mega-Regionalism: The Emergence of Global Regulatory Coherence	139
	2.1. <i>The Concept of Regulatory Coherence</i>	139
	2.1.1. <i>The American Origins of Regulatory Coherence</i>	140
	2.1.2. <i>Transparency and Public Consultation</i>	141
	2.1.3. <i>Regulatory Impact Analysis</i>	143
	2.1.4. <i>Interagency Coordination and Compatibility</i>	144
	2.1.5. <i>Administrative and Judicial Review</i>	146
	2.1.6. <i>Regulatory Coherence and Regulatory Cooperation</i> ..	147
	2.2. <i>Normative Diffusion: The Emergence of Regulatory Coherence as Governance/Trade Objective at Regional and International Levels</i>	151
3.	China’s Evolving Regulatory Regime in a Globalized World	162
	3.1. <i>Legal and Institutional Reform: Early Efforts in the Pre- and Post-WTO Era</i>	162
	3.1.1. <i>Transparency and Public Consultation</i>	165
	3.1.2. <i>Regulatory Impact Analysis</i>	169
	3.1.2.1. <i>Interagency Coordination and Compatibility</i> .	170
	3.1.2.2. <i>Administrative and Judicial Review</i>	172
	3.2. <i>Recent Developments in Core Elements of Regulatory Coherence</i>	175
4.	China’s Long March Toward Regulatory Coherence	178
	4.1. <i>The Future of Regulatory Coherence: A Thorny Embrace for China’s PTAs?</i>	179
	4.2. <i>Panda in the Room: Coping with the Democratic Ramifications of Regulatory Coherence</i>	181
5.	Conclusion.....	188

1. INTRODUCTION

Over the past few decades, global governance has received considerable attention from scholars working in various concentrations. International lawyers and political scientists have addressed vast increases—in reach as well as form—of cooperative mechanisms transcending national borders by using various theoretical frameworks, including transgovernmental networks, global administrative law, informal international lawmaking, and transnational private regulations. In the same vein, and in part driven by the ramifications of heterogeneous regulatory approaches, international economic law scholars have been devoted to exploring new ways to facilitate international regulatory cooperation through trade and investment treaties. While these scholars embrace various routes, they share common goals regarding regulation: the reduction of obstacles, the enhancement of legitimacy and accountability, and the promotion of compatibility among regulatory efforts at various levels.

The concept of regulatory coherence manages the ramifications of diversified regulatory approaches through rationalizing domestic regulatory processes. Diverging regulations in states and their cross-border implications represent a sphere of scholarly attention and intellectual discourse in international economic law. While neoliberalism-embedded globalization and economic development have largely defined the world order over the past few decades, they have also fueled tensions between international cooperation and regulatory autonomy. For many, divergent regulatory approaches reflect the results of diverse cultural, economic, and political endowments in different countries and fall squarely within the scope of national sovereignty. For others, however, they may simultaneously constitute non-tariff barriers (NTBs) that serve protectionist purposes. While the World Trade Organization (WTO) introduces a set of proxies (e.g., necessity test, international standard, and scientific evidence) in its covered agreements—notably, the Agreement on Technical Barriers to Trade (TBT) and the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS)—there are salient limitations,¹ largely due to the incapacity

¹ See e.g., Robert W. Saiger & Alan O. Sykes, *International Trade, National Treatment, and Domestic Regulation*, 40 J. LEGAL STUD. 149 (2011) (arguing that the WTO legal framework does little to address excessive nondiscriminatory regula-

of such institutional designs to go beyond merely scratching the surface of regulatory divergences by addressing regulatory outputs and their trade implications.

This is where the normative construction of regulatory coherence enters in by addressing regulatory inputs, as demonstrated by the institutional design embraced by recent mega-regional agreements such as the Trans-Pacific Partnership (TPP)² and the Transatlantic Trade and Investment Partnership (TTIP).³ TPP and TTIP incorporated “good regulatory practices” that anchor United States administrative law⁴ and that have also been endorsed by the Organization for Economic Cooperation and Development (OECD) and the Asia Pacific Economic Cooperation (APEC).⁵

While these developments appear to indicate the emergence of regulatory coherence as the new global norm, it remains unclear whether and to what extent such a norm can go hand in hand with emerging economies, in particular China. Although China’s legal system has witnessed a sea change during the post-WTO era, its regulatory interventions from time to time have been characterized as protectionist because of the inadequate level of transparency, stakeholder participation, and third-party review throughout the decision-making process. While forging key elements of regulatory coherence (such as transparency and public consultation, regulatory impact analysis, interagency coordination and compatibility, and administrative and judicial review) in the form of new global rules may brush away fears regarding China’s beggar-thy-neighbor policy, these requirements may also place new pressures on Chinese leaders by enabling stakeholders—both foreign and domestic—to have a say in the rulemaking process at a much earlier

tions).

² *Trans-Pacific Partnership*, N.Z. Ministry of Foreign Aff. & Trade (not yet in force), ch. 25, <https://mfat.govt.nz/en/about-us/who-we-are/treaties/trans-pacific-partnership-tpp/text-of-the-trans-pacific-partnership> [<https://perma.cc/32QC-ZBM>], [hereinafter TPP].

³ Council Directive 11103/13 of 17 June 2013, Directives for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America, 11–12, <http://data.consilium.europa.eu/doc/document/ST-11103-2013-DCL-1/en/pdf> [<https://perma.cc/4EN5-HR5Y>].

⁴ There is no universally agreed upon definition of the term “good regulatory practices.” For the present purpose, we loosely refer to “regulatory coherence” and “good regulatory practices” interchangeably.

⁵ See *infra* Part II.B.

er stage and to a much greater extent than what is required by the WTO. At a deeper level, regulatory coherence may entail a transformation of domestic regulatory processes and institutions in China, requiring more rigorous forms of democratic accountability and rule of law.

Will China embrace regulatory coherence as the new benchmark for the twenty-first century? How does regulatory coherence—a concept drawn from the Anglo-Saxon legal tradition—fit into China’s existing regulatory infrastructure, as well as its economic, political, and social context? Will path dependence lead China in a different direction? Given the United States’ withdrawal from TPP under President Trump,⁶ China’s approach would presumably have implications for the way in which regulatory barriers are managed in mega-regionalism—which may in turn spill over into multilateralism through the Regional Comprehensive Economic Partnership (RCEP) and the massive “One Belt, One Road” (OBOR) Initiative, other emerging pillars of global trade governance.⁷ Notwithstanding its significance, however, the role of China in this regard has been largely left untouched in the growing body of literature on regulatory coherence and cooperation.⁸ This article seeks to broaden the debate by addressing the ramifications of international regulatory cooperation for China—and vice versa.

This article argues that, despite the emergence of global regulatory coherence, its real impact is contingent upon diverse contexts in different countries, among which China’s unique circumstances pose numerous obstacles to both its regulatory systems and the future of international cooperation. While China’s current system has substantial institutional infrastructure in theory, in practice

⁶ Press Release, Office of the U.S. Trade Representative, *The United States Officially Withdraws from the Trans-Pacific Partnership* (Jan. 30, 2017), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/january/US-Withdraws-From-TPP> [https://perma.cc/QZV8-J34M].

⁷ *Guiding Principles and Objectives for Negotiating the Regional Comprehensive Economic Partnership*, Austl. Dep’t of Foreign Aff. & Trade (Aug. 30, 2012), <https://dfat.gov.au/trade/agreements/negotiations/rcep/Documents/guiding-principles-rcep.pdf> [https://perma.cc/UX5G-T79M]; Alexious Lee, *A Brilliant Plan: One Belt One Road*, CREDIT LYONNAIS SECURITIES ASIA (2015), <https://www.clsa.com/special/onebeltoneRoad/> [https://perma.cc/M9ED-N7DD].

⁸ For a notable exception, see Henry Gao, *TPP, Regulatory Coherence and China’s Free Trade Strategy from A to Z*, 7 EUR. Y.B. INT’L ECON. L. 507 (2016).

some fundamental flaws persist and shape development of regulatory coherence in the country and beyond. China seems to have adopted an “experimental approach” with prudent engagement of regulatory coherence both at domestic and international levels. This approach provides ample opportunities to map the emerging contours of global regulatory coherence and its limits.

This article proceeds with Part 1, by exploring the origins, development, and key elements of regulatory coherence. Part 2 analyzes the emergence and global normative diffusion of this movement as the new rule of the game, especially in the recent mega-regional agreements vis-à-vis the ground rules set by the WTO’s multilateral trading system. Part 3 traces the transformation of China’s administrative law through the pre- and post-WTO eras. Despite reforms, the gap between the law on the books and the law in action remains. Part 4 identifies potential limits inherent in the legal infrastructure of China, considering the underlying political, economic, social, and cultural contexts. Such limits mirror China’s recent approaches to regulatory coherence in the sphere of economic integration and may in turn shed light on the future development of global regulatory coherence. Part 5 concludes.

2. THE ERA OF MEGA-REGIONALISM: THE EMERGENCE OF GLOBAL REGULATORY COHERENCE

2.1. *The Concept of Regulatory Coherence*

The past decade has witnessed a growing push for the inclusion of additional requirements to promote regulatory coherence in trade and investment agreements at the bilateral, regional, and multilateral levels.⁹ Regulatory coherence obligations have been contemplated as part of the shift from traditional and easily recognizable barriers, such as tariffs and quotas, to domestic regulations and “behind the border” measures that effectively constitute non-tariff barriers to international trade.¹⁰ Indeed, the multilateral rules

⁹ See Elizabeth Sheargold & Andrew D. Mitchell, *The TPP and Good Regulatory Practices: An Opportunity for Regulatory Coherence to Promote Regulatory Autonomy?* 15 *WORLD TRADE REV.* 587 (2016) (noting that chapters relating to regulatory cooperation are likely to appear more frequently in new preferential trade agreements).

¹⁰ See ROBERT E. HUDEC, *THE GATT LEGAL SYSTEM AND WORLD TRADE*

under the WTO appear to be successful in addressing discriminatory measures but fall short in addressing inefficient, unclear, redundant—yet non-discriminatory—regulations that are burdensome on trade in goods and services.¹¹ While demand for regulatory coherence may be high during efforts to reduce non-tariff barriers to trade and forge deeper economic integration by addressing unclear, non-transparent, inefficient, or duplicative regulations under the purview of international economic law, the concept of regulatory coherence has domestic (or more precisely, American) origins that are steeply embedded in democratic accountability and the rule of law.

2.1.1. *The American Origins of Regulatory Coherence*

The contemporary genesis of regulatory coherence can be traced back to the United States' Administrative Procedure Act (APA), enacted by Congress in 1946.¹² The APA established the legal infrastructure of the "administrative state"¹³ in the United States, establishing the fundamental principles and procedures in relation to the nature and enforcement of administrative law in the country.¹⁴ From a historical perspective, the APA was created during a politically contentious, post-New Deal period when Congress was concerned about the expanding powers of the new federal agencies created by President Franklin D. Roosevelt, beginning in

DIPLOMACY 232 (2nd ed. 1990); ANDREW LANG, *WORLD TRADE LAW AFTER NEOLIBERALISM* 169–70 (2011); Robert Howse, *From Politics to Technocracy—and Back Again: The Fate of the Multilateral Trading Regime*, 96 AM. J. INT'L L. 94, 101 (2002); Alan O. Sykes, *The (Limited) Role of Regulatory Harmonization in International Goods and Services Markets*, 2 J. OF INT'L ECON. L. 49 (1999).

¹¹ See Robert W. Saiger & Alan O. Sykes, *International Trade and Domestic Regulation* 43 (Stanford Law and Economics Olin Working Paper No. 387, 2009) (explaining how inefficiently stringent standards may emerge under certain circumstances even if regulatory discrimination is prohibited).

¹² Administrative Procedure Act [hereinafter APA], Pub. L. No. 79–404, 60 Stat. 237 (1946).

¹³ For a comprehensive discussion on the development of the "administrative state" in the U.S., see generally Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189 (1986); Steven P. Croley, *Theories of Regulation, Incorporating the Administrative Process*, 91 COLUM. L. REV. 1 (1998); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

¹⁴ See generally PETER L. STRAUSS ET AL., *GELLHORN AND BYSE'S ADMINISTRATIVE LAW: CASES AND COMMENTS* (11th ed. 2011).

1933.¹⁵ With the enactment of the APA, Congress arguably struck a legislative balance to discipline, standardize, and oversee these federal agencies. This balance evolved over time due to the application and interpretation of the Act by courts, the adoption of subsequent laws concerning relevant issues by Congress, and the management and practical use of the APA through Presidential Executive Orders.¹⁶

The philosophy governing American administrative law stipulates that only Congress may enact laws and delegate powers to the executive branch, which makes rules to enforce the law.¹⁷ Therefore, when a federal agency crafts regulations, its power is derived from a statutory command and is exercised in accordance with applicable APA principles and procedures to ensure the legality and rationality of those regulations. As such, administrative law requirements include, *inter alia*, transparency and public consultation, regulatory impact analysis, interagency coordination and compatibility, and ex-post scrutiny of judicial or administrative review, which also constitute integral elements of the contemporary concept of regulatory coherence.

2.1.2. *Transparency and Public Consultation*

The idea of transparency in American administrative law is reflected in the new legal terrain connected to the expanding role of

¹⁵ Since 1933, several federal agencies were created pursuant to the new statutes enacted by the Democratic Congress and President Franklin D. Roosevelt, as part of the New Deal legislative plan to address the social and economic challenges faced by the U.S. after the Great Depression. Some argue that the opponents as well as the supporters of President Roosevelt fought over the passage of the APA "in a pitched political battle for the life of the New Deal," involving a ten-year period of "painstaking and detailed study and drafting." See George Shepard, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557 (1996); DANIEL E. HALL, *ADMINISTRATIVE LAW BUREAUCRACY IN A DEMOCRACY* 2-10 (5th ed. 2011); *Administrative Procedure Act*, H.R. JUDICIARY COMM. REP. NO. 79-1989 (1946).

¹⁶ See generally STRAUSS ET AL., *supra* note 14; OECD, *Pilot Database on Stakeholder Engagement Practices*, <http://www.oecd.org/gov/regulatory-policy/pilot-database-on-stakeholder-engagement-practices.htm> [<https://perma.cc/H8CL-AL72>] (illustrating how countries have implemented recommendations for regulatory policy and governance); see also the discussion *infra* in this Part on several Executive Orders issued by different U.S. presidents.

¹⁷ U.S. CONST. art. I, §§1, 8; see also *Am. Trucking Ass'n, Inc. v. Envtl. Prot. Agency*, 175 F.3d 1027 (1999).

government with discrete and limited regulatory measures enacted during the New Deal era.¹⁸ The APA, with few exceptions, allows two procedural venues for creating regulations: an on-the-record, trial-like approach that is rarely employed these days;¹⁹ and a less formal, commonly utilized “notice and comment rulemaking” process,²⁰ which is the rulemaking process conventionally referred to by scholars and practitioners.²¹ While both procedures stress the transparency requirement, the latter features a structured set of general obligations pertaining to public consultation. With regard to transparency and public consultation in the rulemaking process, the APA requires “general notice of proposed rulemaking” to be published in the Federal Register:

After notice . . . the agency shall give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.²²

Specifically, a federal agency is required to publish a notice of proposed rulemaking in the Federal Register, which includes the draft regulatory text, a preamble explaining the need for the rule, and a summary of factual and scientific bases for the rule, to advise various potential stakeholders of the issues involved so they may respond with comments, data, or other arguments.²³ The agency

¹⁸ Sylvia Ostry, *China and the WTO: The Transparency Issue*, 3 UCLA J. INT'L L. & FOR. AFF. 1, 2 (1998) (discussing U.S. leadership in using domestic administrative law to shape a transparent international trade system).

¹⁹ See *United States v. Florida East Coast Railway Co.*, 410 U.S. 224 (1973) (discussing the Supreme Court's marginalization of formal, trial-like rulemaking process in 1972); see also APA, §§556–57 (addressing the agency's obligations when conducting proceedings, investigations, and reviews).

²⁰ 5 U.S.C. §553.

²¹ See Robert W. Hamilton, *Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking*, 60 CALIF. L. REV. 1276, 1312–13 (1972) (discussing the procedural notice and comment rule making process under U.S. administrative law).

²² See 5 U.S.C. §553 (b) and (c) (requiring general notice of a rulemaking proposal to be published in the Federal Register by publicly issuing a statement of basis and purpose).

²³ See generally DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL OF THE ADMINISTRATIVE PROCEDURE ACT 31–35 (1947) (discussing the historical materials

considers the information and comments received while forming its decision to finalize, revise, or withdraw the proposed rule.²⁴ After the public consultation process is completed, the agency is required to publish the final regulation accompanied by reasoned responses of the regulatory agency to the comments received (which together constitute part of the object for potential judicial review) in the Federal Register, which usually enters into force in 30 to 60 days.²⁵

The objective of the transparency and public consultation requirement is to apprise all interested persons of the general purpose and basis of the rule, provide adequate participation and protection of private interests, and facilitate informed, rational, coherent, and legal administrative action.²⁶ This institutional design, with its high level of transparency, reflects the United States' common law heritage – with roots in the American Revolution and intended to ensure against overaccumulation of power – the checks and balances established through the three branches of the government, the changing relationship between the administrative state and interest group representation, and the contemporary reformation of administrative law.²⁷

2.1.3. *Regulatory Impact Analysis*

In 1981, President Ronald Reagan issued Executive Order 12291 partly in response to growing concerns about the regulatory state and its power, thereby implementing the concept of the regulatory impact analysis (RIA), which has been embraced as a key element

regarding notice-and-comment rulemaking after the APA's enactment for the reference of other federal agencies).

²⁴ *Id.*

²⁵ *Id.*

²⁶ See Alan Morrison, *The Administrative Procedure Act: A Living and Responsive Law*, 72 VA. L. REV. 253, 256–58 (1986) (discussing how federal agencies needed to create fact-gathering procedures because the rule-making process was not meeting the demands of fact-based policies).

²⁷ See Ostry, *supra* note 18, at 4–5 (discussing how U.S. administrative law influenced the formation of GATT through its historical formation and its unique structural characteristics of independent regulatory agencies); see also Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1975) (discussing the development and disintegration of the traditional model of American administrative law).

of “good regulatory practices,”²⁸ in order to “reduce the burdens of existing and future regulations, increase agency accountability for regulatory actions, provide for presidential oversight of the regulatory process, minimize duplication and conflict of regulations, and insure well-reasoned regulations.”²⁹ The Executive Order provided that “[r]egulatory action shall not be undertaken unless the potential benefits to society from the regulation outweigh the potential costs to society.”³⁰ In addition, agencies were required to prepare regulatory impact analyses of all major rules and submit them to the Office of Management and Budget (OMB) for review.³¹ While debated and criticized,³² Executive Order 12291 essentially forged the concept of regulatory impact analysis, and in particular cost-benefit analysis, as a central element of rulemaking that generally applies at the federal level. The embedding of RIA in the rulemaking processes, and more broadly, public policy development, was a response to increased demand for democratic control by constituents, motivated by various interests that have different stakes in and diverse approaches to the administrative process.

2.1.4. Interagency Coordination and Compatibility

President Bill Clinton advanced the concept of regulatory coherence in 1993 by revoking Executive Order 12291 and replacing it with a new Executive Order, 12866, pertaining to “Regulatory Planning and Review.”³³ A key objective of this Executive Order was to “enhance planning and coordination with respect to both new and existing regulations” and to “restore the integrity and legitimacy of regulatory review and oversight.”³⁴ This Executive

²⁸ See the discussion *infra* in Part II.B.

²⁹ Executive Order No. 12291, 46 Fed.Reg. 13193, 127 (Feb. 17, 1981).

³⁰ *Id.*, Sec. 2(b).

³¹ *Id.*, Sec. 3(c) (requiring agencies to prepare Regulatory Impact Analyses of major rule when submitting notices of proposed rulemaking and all final rules to the Director).

³² See e.g. E. Donald Elliott, *TQM-ing OMB: Or Why Regulatory Review Under Executive Order 12,291 Works Poorly and What President Clinton Should Do About It*, 57 LAW & CONTEMP. PROBS. 167 (1994) (discussing the complexities, criticisms, and shortcomings of Executive Order 12291).

³³ Executive Order No. 12866, 58 Fed. Reg. 51735, 199 (Sept. 30, 1993).

³⁴ *Id.*, preamble.

Order not only strengthens the RIA process required during the Reagan era,³⁵ but also emphasizes the importance of interagency coordination and compatibility. The regulatory philosophy and principles, as stated in the Executive Order, are to avoid inconsistency, incompatibility, or duplication among various regulations adopted by federal agencies.³⁶

With these goals, the OMB performs coordinated reviews of agency rulemakings to ensure that regulatory decisions made by one agency do not conflict with applicable law or “the policies or actions taken or planned by another agency.”³⁷ With the advisory assistance of its Office of Information and Regulatory Affairs (OIRA), which serves as a “repository of expertise” on regulatory methodologies and interagency coordination procedures, the OMB guides federal agencies and assists the President and the Vice President in overall regulatory planning.³⁸ A centralized planning mechanism was also established through Executive Order 12866, providing for early interagency coordination of regulatory actions, facilitating consultation and resolution of potential divergences, and achieving a common understanding of priorities.³⁹ While amended and supplemented multiple times following its issuance,⁴⁰ Executive Order 12866 effectively established some of the

³⁵ As the general regulatory philosophy of this Executive Order, “[I]n deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating.” *Id.*, Sec. 1(a). In addition, federal agencies are required to “identify and assess available alternatives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public.” *Id.*, Sec. 1(b)(3).

³⁶ *Id.*, Sec. 1(b)(10) (requiring that “[e]ach agency . . . avoid regulations that are inconsistent, incompatible, or duplicative with its other regulations or those of other Federal agencies.”).

³⁷ *Id.*, Sec. 2(b).

³⁸ *Id.*

³⁹ *Id.*, Sec. 4 (detailing planning procedures agencies shall adopt in order “to have an effective regulatory program.”).

⁴⁰ President George W. Bush issued Executive Order 13258 in 2002 as well as Executive Order 13422 in 2007 to amend 12866. In 2011, President Barack Obama promulgated Executive Order 13563 that strengthened the program on Regulatory Planning and Review and emphasized the importance of public participation. The Obama Administration further issued another Executive Order 13610 in 2012 to expand provisions on public participation, agency priority setting, and regulatory accountability; see generally Steve Charnovitz, *US Efforts to Ensure that Regulation Does Not Present Trade Barriers*, International Centre for Trade and Sustainable Development [ICTSD] & World Economic Forum, (2015), <http://e15initiative.org/wp-content/uploads/2015/09/E15-Regulatory-Systems->

fundamental elements of regulatory coherence necessary for the proper functioning of the administrative state.

2.1.5. *Administrative and Judicial Review*

Judicial review, together with other mechanisms, is an institutional design implemented to hold governments accountable—through which a court determines if a statute, an administrative regulation, or even a treaty trespasses the limits defined by the Constitution or existing law. Systematic reviews by courts are not unique to the United States. Rather, as a general principle, they are perceived and practiced differently in many jurisdictions; there exists a massive variation in legal systems as to the rationale, scope, and intensity of review, procedural designs, and available remedies. The United States Constitution does not explicitly create a mechanism of judicial review, whose authority is instead inferred from the history, structure, and provisions of the Constitution.⁴¹ The APA determines the scope of and the procedures for judicial review of federal agency rulemaking, although the courts have ruled in support of judicial authority in reviewing administrative actions.⁴² With respect to a final rule promulgated by an agency, stakeholders, interest groups, or other members of the public may challenge the rule before the court, seeking to strike down the rule on a number of grounds, including agency action deemed “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”⁴³ Nevertheless, in reviewing the agency action (especially when it concerns an interpretation of a statute), the court will in principle defer to the technical expertise of the agency

Coherence-Charnovitz-FINAL.pdf [https://perma.cc/S4GU-WDTS] (discussing economic growth in the U.S. and the challenges and opportunities experienced when reducing regulations for trade liberalization).

⁴¹ See *Marbury v. Madison*, 5 U.S. 137 (1803) (illustrating judicial review when the Court struck down a statute enacted by Congress due to its unconstitutionality).

⁴² See e.g. *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971) (holding that the importance of the right violated implicated the existence of a remedy for the administrative violation at issue).

⁴³ APA, 5 U.S.C. §706 (2) (for other grounds in which the court might find agency actions unlawful include: action is “contrary to constitutional rights,” “in excess of statutory jurisdiction,” “without observance of procedure required by law,” or “unsupported by substantial evidence.”).

and strike down the rule if it is contrary to the “unambiguously expressed intent of Congress.”⁴⁴

A unique feature of United States practices is the internal administrative review of federal agency actions,⁴⁵ whose mechanism is again provided in Executive Order 12866. More specifically, this Executive Order mandates that all agencies must submit to the OIRA an institutionalized plan to periodically review existing significant regulations.⁴⁶ Such a review mechanism is designed to determine whether regulations “have become unjustified or unnecessary as a result of changed circumstances” and to ensure that they remain “compatible with each other and not duplicative or inappropriately burdensome in the aggregate.”⁴⁷ This mechanism allows the agency concerned as well as the OIRA to decide if any such rules need to be modified or eliminated to increase effectiveness or reduce burdens.⁴⁸ During such a review, the agency is also required to identify any congressional mandate that imposes an obligation on the agency to promulgate or retain regulations it regards as unnecessary or outdated due to changed circumstances.⁴⁹ To ensure the efficacy of the centralized review of both new and existing regulations, the OIRA is charged with promoting “greater openness, accessibility, and accountability in the regulatory review process.”⁵⁰ Finally, because the abovementioned administrative and judicial reviews represent two distinct approaches, nothing in Executive Order 12866 affects available judicial review venues.⁵¹

⁴⁴ *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

⁴⁵ See Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1081-82 (1986) (discussing the advantages and disadvantages of requiring agencies to conduct a cost-benefit analysis of their regulations).

⁴⁶ *Supra* note 33, Sec. 5.

⁴⁷ *Id.*

⁴⁸ *Id.*, Sec. 6(b) (defining the OIRA responsibilities when providing guidance and oversight to ensure that each agency’s actions are consistent with applicable law and not in conflict with another agency’s policies).

⁴⁹ *Id.*

⁵⁰ *Id.*, Sec. 6 (b)(2)(C)(4).

⁵¹ *Id.*, Sec. 10 (stating: “This Executive order is intended only to improve the internal management of the Federal Government and does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.”).

2.1.6. Regulatory Coherence and Regulatory Cooperation

Taken together, the APA, Executive Orders pertaining to regulatory planning and review, and subsequent practices by governmental branches in the United States broadly encompass all of the elements of regulatory coherence (although the term has never been mentioned),⁵² which has subsequently been exported to regional and international fora.⁵³ As previously mentioned, these elements of regulatory coherence reflect the American Revolution, common law heritage, constitutional design and diffusion of power, and peculiar characteristics of the legal system (such as the substantial use of independent agencies)⁵⁴ in the United States – all designed to limit the range of discretion enjoyed by administrative bodies. As a commentator rightly pointed out, the APA and Executive Order 12866 have not addressed international cooperation so as to cope with different regulatory measures taken by foreign economies that create disproportionate burdens or foster unnecessary obstacles to trade.⁵⁵ It was not until President Barack Obama issued Executive Order 13609 in 2012 that the United States put explicit emphasis on the importance of international regulatory cooperation in the domestic rulemaking process.⁵⁶ This Executive Order established an interagency working group led by the OIRA to address unnecessary regulatory differences between the United

⁵² See Rodrigo Polanco, *The Trans-Pacific Partnership Agreement and Regulatory Coherence: A Legal Analysis of the Trans-Pacific Partnership Agreement*, in TRADE LIBERALIZATION AND INTERNATIONAL COOPERATION: A LEGAL ANALYSIS OF THE TRANS-PACIFIC PARTNERSHIP AGREEMENT 231, 246 (Tania Voon ed., 2013) (discussing the objectives of the TPP in harmonizing national regulations to facilitate trade); see Organization for Economic Co-operation and Development [OECD], *Regulatory Reform in the United States: Enhancing Market Openness Through Regulatory Reform*, at 11, (1999) <http://www.oecd.org/unitedstates/2756360.pdf> [<https://perma.cc/L5D5-XBBD>].

⁵³ See discussion on normative diffusion *infra* in Part II.B.; Cf. Polanco, *supra* note 52, at 231 (“the notion of regulatory coherence has emerged mainly within international networks of governance.”).

⁵⁴ See Ostry, *supra* note 18, at 4–5 (discussing how U.S. administrative law influenced the formation of GATT through its historical formation and its unique structural characteristics of independent regulatory agencies).

⁵⁵ Charnovitz, *supra* note 40.

⁵⁶ Executive Order No. 13609, 77 FR 26413 (May 1, 2012); see Polanco, *supra* note 52, at 246 (referencing Executive Order No. 12866, issued under the Clinton Administration, to demonstrate United States government’s interest in regulatory coherence).

States and its major trading partners across borders.⁵⁷

It should be emphasized that the concept of regulatory coherence has (at least to date) largely focused on the domestic administrative context and processes and must be distinguished from the idea of regulatory cooperation. When employed at the international level, however, the term regulatory coherence is frequently referred to in regional and multilateral trade discussions, and yet there is no practical or scholarly consensus regarding its definition.⁵⁸ Some scholars approach regulatory coherence in an expansive manner, mingling elements of transparency and public consultation, regulatory impact analysis, harmonization of regulatory standards, and mutual recognition,⁵⁹ and this is plausibly due to the fact that in practice, recent preferential trade agreements (PTAs) and megaregional agreements have not provided strict organizational separation in terms of treaty design. Others draw a

⁵⁷ See generally Reeve T. Bull et al., *New Approaches to International Regulatory Cooperation: The Challenge of TTIP, TPP, and Mega-Regional Trade Agreements*, 78 *LAW & CONTEMP. PROBS.* 1, 1–29 (2015) (discussing how new global trends and the rise of multi-lateral partnerships might pose challenges to domestic regulatory frameworks); Cf. Cass Sunstein, *Reducing Ted Tape: Regulatory Reform Goes International*, Blog on Obama White House Archives (May 1, 2012, 11:09 AM), <https://obamawhitehouse.archives.gov/blog/2012/05/01/reducing-red-tape-regulatory-reform-goes-international> [<https://perma.cc/KC77-WZMR>] (discussing how President Obama's new Executive Order 13563 "Improving Regulation and Regulatory Review" promotes International Regulatory Cooperation, and in turn, will help American exports, economic growth, and job creation).

⁵⁸ See Theodore Posner & David Wolff, *Making "Regulatory Coherence" Coherent*, *LAW360* (April 25, 2011) at 3 ("One reason for a bit of skepticism is that the concept of "regulatory coherence" means different things to different people. There is no one, commonly accepted understanding of the concept."). Polanco cited Posner and Wolff and further noted that the introduction of regulatory coherence into international treaty-making poses a number of questions without clear answers, the most essential being its very definition. "Until we have a more focused understanding of what we mean by regulatory coherence, it will be difficult to study and measure it as a distinct political phenomenon." Polanco, *supra* note 52, at 231.

⁵⁹ See e.g. Polanco, *supra* note 52, at 231; Sheargold & Mitchell, *supra* note 9, at 5–8. Sheargold & Mitchell take the Transatlantic Trade and Investment Partnership (TTIP) as an example, stating that regulatory coherence is included in the general idea of "regulatory issues and non-tariff barriers to trade," which embraces a broad range of elements for international cooperation. Therefore, according to their interpretation, regulatory coherence may "involve several different aspects: transparency, the efficiency and quality of regulation, and harmonization of regulatory standards across jurisdiction." Polanco also noted that, regulatory coherence means substantive regulatory harmonization for some, a harmonization process for the development and adoption of regulations for others, and mutual recognition of regulations for still others.

clear line between the two terms, arguing that regulatory coherence refers to good regulatory practices and provisions alike, while regulatory cooperation denotes measures aimed at reducing divergence among jurisdictions through methodologies such as mutual recognition, harmonization, or even joint rulemaking.⁶⁰

We are of the view that the two concepts indeed have different focuses and rationales. Regulatory coherence, as analyzed above, is embedded in democratic accountability and the rule of law, and is particularly aimed at the reform and discipline of domestic regulatory processes. Regulatory cooperation, on the other hand, is the process of interaction or partnership between regulators from different governments intended to reduce divergences and increase interoperability across borders.⁶¹ Governments undertake a myriad of regulatory cooperative mechanisms today, ranging from soft law and private codes, transgovernmental dialogue and networks, mutual recognition and harmonization, to regional and interna-

⁶⁰ See e.g. Bernard M. Hoekman & Petros C. Mavroidis, *Regulatory Spillovers and the Trading System: From Coherence to Cooperation*, THE E15 INITIATIVE STRENGTHENING THE GLOBAL TRADE SYSTEM, at 2-3, (April 2015) <http://e15initiative.org/wp-content/uploads/2015/04/E15-Regulatory-OP-Hoekman-and-Mavroidis-FINAL.pdf> [<https://perma.cc/ETZ7-9K3S>] (discussing domestic regulation, trade, and international spillovers); see also Marjorie Chorlins Vice President For Eur. Aff. U.S. Chamber of Commerce, Address at the Regulatory Coherence and Cooperation in the Transatlantic Trade and Investment Partnership (July, 15 2015) (discussing the U.S. government's support for regulatory coherence and cooperation during the TTIP negotiations); Jonathan B. Wiener & Alberto Alemanno, *The Future of International Regulatory Cooperation: TTIP as a Learning Process Toward a Global Policy Laboratory*, 78(4) LAW & CONTEMP. PROBS. 103 (2015) (discussing the challenges and benefits of international regulatory cooperation). It should be noted that some also see regulatory coherence as flip sides of regulatory divergence, which may also be addressed by way of regulatory cooperation; see Simon Lester & Inu Manak, *Addressing Regulatory Trade Barriers in Mega-Regional Trade Agreements*, in MEGA-REGIONAL TRADE AGREEMENTS 337 (Thilo Rensmann ed., 2017) (addressing how regulatory trade barriers are prompting states to discuss international regulatory cooperation).

⁶¹ See Wiener & Alemanno, *supra* note 60, at 105 ("international regulatory cooperation denotes a series of steps to coordinate regulation across countries."); see also Alberto Alemanno, *Is There a Role for Cost-Benefit Analysis Beyond the Nation-State? Lessons from International Regulatory Cooperation*, in THE GLOBALIZATION OF COST-BENEFIT ANALYSIS IN ENVIRONMENTAL POLICY 104, 105 (Richard Revesz & Michael Livermore eds., 2013) (stating that regulatory cooperation often emerges from the interplay of regulatory reform efforts at the national level and trade liberalization efforts across borders); see also Simon Lester & Inu Barbee, *The Challenge of Cooperation: Regulatory Trade Barriers in the Transatlantic Trade and Investment Partnership*, 16 J. INT'L ECON. L. 847, 856-57 (2013) (discussing attempts to promote international regulatory cooperation to reduce "unnecessary differences in regulatory requirements").

tional agreements, regulatory partnerships between governments, and joint regulatory institutions.⁶² Nonetheless, while the definitions of regulatory coherence and regulatory cooperation can be conceptually separated, the two concepts are by no means practically insulated and mutually exclusive.⁶³ On the contrary, they interact at many levels and are often mutually reinforcing. For instance, regulatory cooperation among governments is an effective means of mutual learning and of disseminating of good regulatory practices.⁶⁴ Likewise, the RIA of a domestic regulation with potential extraterritorial effects may include an assessment of impact on international trade and burdens on foreign suppliers. Rigorous regulatory coherence by a government usually translates to transparent, participatory, and accountable rulemaking processes, which in turn directly benefit, or indirectly serve as fitting infrastructure for, international regulatory cooperation.

⁶² See OECD, INTERNATIONAL REGULATORY COOPERATION: RULES FOR A GLOBAL WORLD 8–10 (Oct 14, 2012) (categorizing eleven types of mechanisms for international regulatory cooperation); see also Bull et al., *supra* note 57, at 8–12 (outlining structures of and techniques for international regulatory cooperation); see also OECD, INTERNATIONAL REGULATORY COOPERATION: ADDRESSING GLOBAL CHALLENGES 19–74 (2013) (“[S]ynthesiz[ing] the knowledge and evidence . . . on the various mechanisms used by governments to promote regulatory cooperation.”); OECD, REGULATORY COOPERATION FOR AN INTERDEPENDENT WORLD 17 (1994) (“There is no overall and cross-country consensus yet . . . on the range and definition of the different mechanisms . . . to promote IRC.”).

⁶³ A boundary case (or an example of practical overlap) may be the transparency requirements under various WTO-covered agreements. The content of the requirement includes notification and consultation (which is in essence a design of regulatory coherence), but the objective rests in promoting inter-governmental regulatory cooperation (as the requirements target the importing Member-exporting Member relationship); see *infra* the discussion below in this Part on the WTO transparency requirements.

⁶⁴ Committee on Technical Barriers to Trade, *Decisions and Recommendations Adopted by the WTO Committee on Technical Barriers to Trade Since 1 January 1995*, WTO Doc. G/TBT/1/Rev.13 (Mar. 8, 2017), at 9; Committee on Technical Barriers to Trade, *Fifth Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade Under Article 15.4*, WTO Doc. G/TBT/26 (Nov. 13, 2009), paras. 14–15; see also Wiener & Alemanno, *supra* note 60, at 126 (“Variation in regulatory approaches can offer an opportunity for learning about policy impacts from differing approaches and, thus, how to improve regulation in the future.”).

2.2. *Normative Diffusion: The Emergence of Regulatory Coherence as a Governance/Trade Objective at Regional and International Levels*

The United States was primarily responsible for the post-war architecture of international economic order, which reflected the American values and governance models of that period.⁶⁵ As the following analysis indicates, there has been a notable normative diffusion, from which regulatory coherence, originally an American concept, has emerged as a trade governance objective at both regional and multilateral levels.

The APA was enacted during negotiations over the new trading system, when the United States State Department presented the Suggested Charter for an International Trade Organization of the United Nations to elaborate on its Proposals for Expansion of World Trade and Employment in September 1946.⁶⁶ Article 15 of the proposed charter was entitled “Publication and Administration of Trade Regulations—Advanced Notice of Restrictive Regulations,”⁶⁷ which was subsequently incorporated into the Havana Charter for the ITO as Article 38 and, without significant revision, as Article X of the GATT.⁶⁸ As observed by Ostry, Article X of the GATT “replicates most of the American approach” to transparency and public consultation, and the incorporation of such a norm was not controversial, as “[b]order barriers such as tariffs and quotas are, for the most part, quite transparent.”⁶⁹ However, Article X of the GATT fell short of an effective mechanism to address the challenges brought about by the new “protectionism” — that is, the shift of protectionist trade policy from tariffs and quotas to “behind-the-border” regulatory barriers to trade.⁷⁰

⁶⁵ Ostry, *supra* note 18, at 2.

⁶⁶ US DEPARTMENT OF STATE, SUGGESTED CHARTER FOR AN INTERNATIONAL TRADE ORGANIZATION OF THE UNITED NATIONS (1946).

⁶⁷ *Id.*

⁶⁸ See Ostry, *supra* note 18, at 5–6 (noting that although the title of Article X of the GATT, “Publication and Administration of Trade Regulations,” does not include the words “advanced notice of restrictive regulations,” the language of the Article does not vary considerably from the original US proposal in 1946).

⁶⁹ *Id.* at 6–8. Article X of the GATT may be also regarded as an administrative law provision. See Richard B. Stewart et al., *The World Trade Organization: Multiple Dimensions of Global Administrative Law*, 9 INT’L J. CONST. L. 556, 570 (2011) (arguing that Article X was key to “the emergence of global administrative law.”).

⁷⁰ As noted earlier, the traditional barriers to trade (tariffs and quotas) have

The Uruguay Round, launched in 1986, pushed along some elements of regulatory coherence, which were then incorporated by the WTO. The vastly expanded transparency requirements in the covered agreements—which ask WTO members to publish and give proper notice regarding laws, regulations, and modes of administration—serve as a suitable illustration. Articles X:1 and X:2 of the GATT include transparency requirements, while other agreements also incorporate similar obligations to publish covered measures in a timely manner.⁷¹ Other notable examples of incorporating regulatory coherence elements include identifying regulatory objectives (Article XX of the GATT,⁷² Article XIV of the GATS,⁷³ Article 2.1 of the TBT Agreement,⁷⁴ and Annex A of the

declined and non-tariff measures (such as domestic standards and regulations) have increased as determinants of market access. Domestic regulations are of crucial importance to ensure the environment, public health and safety, and competition, but may unnecessarily impede international trade (especially those without adequate prior notification or, in some cases, scientific justification). Due to the gradual shift of protectionism from tariffs to rulemaking (*i.e.*, non-tariff barriers to trade), subsequent GATT negotiations were not adequately equipped to cope with non-transparent non-tariff measures. Finally, the Tokyo and Uruguay Rounds brought some improvement to the system, including an emphasis on advance notice and opportunity to inquire and/or comment; Ostry, *supra* note 18, at 11; Thomas J. Bollyky, *Regulatory Coherence in the TPP Talks*, in *THE TRANS-PACIFIC PARTNERSHIP: A QUEST FOR A TWENTY-FIRST CENTURY TRADE AGREEMENT* 171, 172 (Chin L. Lim et al. eds., 2012).

⁷¹ See Andrew D. Mitchell et al., *Good Governance Obligations in International Economic Law: A Comparative Analysis of Trade and Investment*, 17 *J. WORLD INV. & TRADE* 7, 25 (2016) (charting the good governance requirements for various provisions).

⁷² GATT, art. XX specifies certain policy objectives that a WTO Member may resort to as an exception to other GATT obligations. It reads “Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: (a) necessary to protect public morals; (b) necessary to protect human, animal or plant life or health; . . . (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption” General Agreement on Tariffs and Trade, art. XX, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT]. For a thorough discussion, see Donald H. Regan, *The Meaning of “Necessary” in GATT Article XX and GATS Article XIV: The Myth of Cost-Benefit Balancing*, 6 *WORLD TRADE REV.* 347 (2007).

⁷³ Similarly, Article XIV of the GATS lists specific policy goals for WTO Members to invoke as an exception. “Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement

SPS Agreement⁷⁵) and evaluating the necessity of regulation, considering reasonably available alternatives, and financial and technological capabilities (Article XX of the GATT,⁷⁶ Article 2.2 of the TBT Agreement,⁷⁷ and Article 5.6 of the SPS Agreement⁷⁸).⁷⁹

The WTO has increasingly recognized that the effective implementation of regulatory coherence can be an important means of reducing unnecessary barriers to trade, and the Committee on Technical Barriers to Trade (TBT Committee) has demonstrated the most momentum.⁸⁰ In 2006, WTO Members formally incorporated good regulatory practices in the agenda of the TBT Committee,⁸¹

shall be construed to prevent the adoption or enforcement by any Member of measures: (a) necessary to protect public morals or to maintain public order; (b) necessary to protect human, animal or plant life or health” General Agreement on Trade in Services, art. XIV, Apr. 15, 1994, 1869 U.N.T.S. 183 [hereinafter GATS]; see Regan, *supra* note 72.

⁷⁴ Agreement on Technical Barriers to Trade art. 2.1, Apr. 15 1994, 1868 U.N.T.S. 12 (1994) [hereinafter TBT Agreement] (“Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country.”).

⁷⁵ See Agreement on the Application of Sanitary and Phytosanitary Measures, Annex A, Apr. 15 1994, 1867 U.N.T.S. 493 (1994) [hereinafter SPS Agreement] (providing four specific objectives that render a governmental measure an SPS measure).

⁷⁶ GATT, art. XX; see also Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WTO Doc. WT/DS332/AB/R (adopted Dec. 3, 2007), paras. 145–147 (discussing the evaluation of the effectiveness of a particular regulation.).

⁷⁷ See TBT Agreement, art. 2.2 (“Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create.”).

⁷⁸ See SPS Agreement, art. 5.6 (“[W]hen establishing or maintaining sanitary or phytosanitary measures to achieve the appropriate level of sanitary or phytosanitary protection, Members shall ensure that such measures are not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection, taking into account technical and economic feasibility.”).

⁷⁹ For a more thorough explanation, see e.g. Sheargold & Mitchell, *supra* note 9, at 603–09 (discussing the purposes of, alternatives to, and justifications for regulation).

⁸⁰ See generally Thomas J. Bollyky, *A Role for the World Trade Organization on Regulatory Coherence*, E15Initiative, at 1(ICTSD & World Economic Forum, Aug. 2015).

⁸¹ Committee on Technical Barriers to Trade, *Summary Report of the WTO TBT Workshop on Good Regulatory Practice*, WTO Doc. G/TBT/W/287 (June 6, 2008), 1–

which further encouraged Members to exchange information regarding their implementation experiences.⁸² Most of these exchanges took place in the Committee's thematic sessions on good regulatory practices in March 2013, June 2013, and March 2014.⁸³ The Sixth Triennial Review of the TBT Committee stressed the importance of international regulatory coordination and agreed to identify a non-exhaustive list of voluntary mechanisms and principles of good regulatory practice.⁸⁴ The most recent Triennial Review in 2015 further discussed regional initiatives pertaining to good regulatory practices and specifically referred to the 2005 APEC-OECD Integrated Checklist on Regulatory Reform (see the discussion below), which encourages APEC members to adopt a holistic approach to the development of regulations.⁸⁵ On balance, the TBT Committee has recognized that:

Good Regulatory Practices (GRP) can contribute to the improved and effective implementation of the substantive obligations under the TBT Agreement. Effective implementation through best practices is seen as an important means of avoiding unnecessary obstacles to trade. Institutionalizing the various mechanisms, processes, and procedures of GRP through laws, regulations, and guidance, as well as through the creation and designation of institutions within Member governments to oversee regulatory processes, is seen as a

28; see Bollyky, *supra* note 70, at 178–79 (discussing the benefits of “an integrated approach to regulatory coherence.”).

⁸² See Committee on Technical Barriers to Trade, *Fifth Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade under Article 15.4*, WTO Doc. G/TBT/26 (Nov. 19, 2009), 5–6 (discussing recommendations to facilitate trade through the exchange of information).

⁸³ Committee on Technical Barriers to Trade, *Thematic Session on Good Regulatory Practice*, WTO Doc. G/TBT/GEN/143 (Mar. 11, 2013); Committee on Technical Barriers to Trade, *Second Thematic Session on Good Regulatory Practice*, WTO Doc. G/TBT/GEN/143/Add.1 (June 25, 2013); Committee on Technical Barriers to Trade, *Third Thematic Session on Good Regulatory Practice*, WTO Doc. G/TBT/GEN/143/Add.2 (Mar. 18–19, 2014).

⁸⁴ Committee on Technical Barriers to Trade, *Sixth Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade under Article 15.4*, WTO Doc. G/TBT/32 (Nov. 29, 2012), para. 4. The triennial reviews are carried out in accordance with the mandate under Article 15.4 of the Agreement on Technical Barriers to Trade.

⁸⁵ Committee on Technical Barriers to Trade, *Seventh Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade under Article 15.4*, WTO Doc. G/TBT/37 (Dec. 3, 2015), at 3–4.

means of giving effect to GRP. Effective internal policy coordination, including among regulators, standardizing bodies and trade officials implementing the TBT Agreement, is stressed. Additionally, regulatory cooperation between Members is an effective means of disseminating GRP.⁸⁶

Beyond the WTO, there has also been growing recognition and use of regulatory coherence in many other countries, as well as in some PTAs.⁸⁷ Indeed, the deregulation and regulatory relief mindset in the aforesaid aspects of United States administrative law have “evolved over time into a broader agenda of regulatory reform and good regulatory practices” that strive to promote transparency, cost-effectiveness, quality, and efficiency in regulatory actions.⁸⁸ Such an agenda of regulatory coherence has subsequently been embraced in many other developed countries, such as Australia and New Zealand.⁸⁹ The internationalization of regulatory impact analysis has been further observed by many commentators

⁸⁶ Committee on Technical Barriers to Trade, *Decisions and Recommendations Adopted by the WTO Committee on Technical Barriers to Trade Since 1 of January 1995: Note by the Secretariat*, WTO Doc. G/TBT/1/Rev.13 (Mar. 8, 2017), 6; see also Committee on Technical Barriers to Trade, *Fifth Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade under Article 15.4*, WTO Doc. G/TBT/26 (Nov. 13, 2009), paras. 8–9 and 14 (discussing the value of good regulatory practices).

⁸⁷ See Bollyky, *supra* note 70, at 177–78 (noting that this phenomenon was aligned with the context of the regulatory reform movement which can be traced back to the deregulation and regulatory relief initiatives in the 1970s and 1980s); see also Council of the OECD, *Recommendation of the Council on Regulatory Policy and Governance* (March 22, 2012), at 8 (discussing OECD’s recommendations for the implementation, evaluation, and purpose of regulations).

⁸⁸ Bollyky, *supra* note 70, at 177–78; see also Scott Jacobs & Peter Ladegaard, *Regulatory Governance in Developing Countries*, Washington, D.C. (International Finance Corporation, 2010), at vii (discussing the promotion of “a regulatory system that is effective, efficient, transparent, and accessible.”).

⁸⁹ See Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1260–39 (2007) (discussing Reagan-era centralized review of regulations); see also Rosalyn Bell, *Regulatory Impact Analysis: Australia’s Experience*, Presentation delivered at the OECD Regulatory Reform Workshop, Stockholm (June 3–4, 2013), at <https://www.oecd.org/gov/regulatory-policy/Breakout-session-2-Rosalyn%20Bell-RIA-Australia's-experience.pdf> [<https://perma.cc/VTY2-HGBV>] (last visited May 30, 2017) (discussing the results of a study conducted by the Australian Productivity Commission); NEW ZEALAND PRODUCTIVITY COMMISSION, *REPORT ON REGULATORY INSTITUTIONS AND PRACTICES*, <http://www.productivity.govt.nz/sites/default/files/regulatory-institutions-and-practices-final-resort.pdf> [<https://perma.cc/MA49-PPBR>] (discussing regulatory reform in New Zealand).

around the world, covering the adoption of RIA, ongoing discussions, and varied practices in countries and regions such as the United Kingdom, Sri Lanka, Mexico, East Africa, and Southeast Europe.⁹⁰ In addition, while existing PTAs do not usually include a chapter devoted to regulatory coherence, provisions related to some elements of the concept (such as strengthened transparency requirements) are well represented to ensure that trading partners are informed of developments in relevant regulations and standards.⁹¹ Examples of a generally applicable notice-and-comment requirement, as well as a review mechanism, can also be found in PTAs such as, *inter alia*, the Korea–United States Free Trade Agreement (Chapter 21),⁹² the Peru–Singapore Free Trade Agreement (Chapter 15),⁹³ and the New Zealand–China Free Trade Agreement (Chapter 13).⁹⁴ Furthermore, some commentators have observed the growing practice of including transparency obligations in investment agreements, including the US Model BIT (2012).⁹⁵

Remarkably, both the concept of regulatory coherence and the regulatory reform agenda have been embraced by numerous international and intergovernmental organizations, including the APEC, OECD, and World Bank, as promoting the rule of law, trade and development, and as a more effective and efficient approach to public policy objectives.⁹⁶ Among these intergovernmental efforts,

⁹⁰ See REGULATORY IMPACT ASSESSMENT TOWARDS BETTER REGULATION? 10-15 (Colin Kirkpatrick & David Parker eds., 2007) (discussing the use of RIA in developed and developing countries).

⁹¹ See Sheargold & Mitchell, *supra* note 9, at 594 (discussing transparency and mutual recognition provisions in PTAs).

⁹² Free Trade Agreement, S. Kor–U.S., June 30, 2007.

⁹³ Free Trade Agreement, Peru–Sing., May 29, 2008.

⁹⁴ Free Trade Agreement, N.Z.–China, Apr. 7, 2008.

⁹⁵ Sheargold & Mitchell, *supra* note 9, at 593.

⁹⁶ See relevant discussion in Bollyky, *supra* note 70, at 172–73; see also OECD, Regulatory Policy and Governance 41–57 (“Regulatory policy has already made a significant contribution to economic development and societal well-being.”); World Bank, Doing Business 2012: Doing Business in a More Transparent World, (International Finance Corporation/World Bank Group), at 16–25 (discussing the effects of regulations and regulatory reform on social and economic outcomes); World Bank, Simplification of Business Regulation at the Subnational Level: A Reform Implementation Toolkit for Project Teams (International Finance Corporation/World Bank Group) v-1, at 4–7 (2006) (describing the benefits of regulatory simplification); see also OECD, Regulatory Policies in OECD Countries: From Interventionism to Regulatory Governance 28 (2002) (reporting recent economic success of certain countries as a result of “the adoption of coherent and effective

one prominent and comprehensive instrument is the 2005 APEC-OECD Integrated Checklist on Regulatory Reform (APEC-OECD Checklist), designed as a voluntary tool for governments to utilize “to evaluate their respective regulatory reform efforts.”⁹⁷ Arguably, previous efforts to promote regulatory coherence converged in the APEC/OECD,⁹⁸ which further advanced the discourse—and negotiations, such as those in TPP—at various levels.

The APEC-OECD Checklist is the product of the cooperative initiative on regulatory reform undertaken by the APEC and the OECD and launched during the 2000 Ministerial Conference in Brunei Darussalam, with the objectives of advancing regulatory quality, efficiency, transparency, accountability, economic growth, and market openness.⁹⁹ Based on the pooled experience and knowledge of the APEC and the OECD, the Checklist underscores key issues to be considered throughout the entire regulatory process, from development to implementation, while “recognizing that the diversity of economic, social, and political environments and values of member economies require flexibility in the methods.”¹⁰⁰ With regard to the horizontal criteria for regulatory re-

regulatory policy.”).

⁹⁷ APEC-OECD Integrated Checklist on Regulatory Reform 1 (2005). Some commentators regard APEC and the OECD as the key drivers for the promotion of regulatory coherence, which “has emerged mainly within international networks of governance.” Polanco, *supra* note 52, at 231. Others also note that the OECD and the APEC have been promoting regulatory reform for decades, and some of their efforts have included approaches to improving domestic regulatory processes that can facilitate international trade and investment. Sheargold & Mitchell, *supra* note 9, at 590.

⁹⁸ APEC has focused on the promotion of high-quality regulatory environment, transparency, efficiency, and unnecessary burdens to promote economic development and trade in the Asia-Pacific region since its establishment. In 1994, APEC created a Sub-Committee on Standards and Conformance to promote the elimination of trade distortions arising from inefficiency, unnecessary, or conflicting regulations and standards among member economies. Bollyky, *supra* note 70, at 181. OECD countries were the earliest movers to take actions to improve their regulatory systems, as over half of the OECD countries had by 1996 adopted RIA, which was further noted in 2009 as one of the most widely used processes for improving the quality of rulemaking processes. Polanco, *supra* note 52, at 234–35; Scott H. Jacobs, *An Overview of Regulatory Impact Analysis in OECD Countries*, in REGULATORY IMPACT STUDIES: BEST PRACTICES IN OECD COUNTRIES 13 (OECD ed., 1997); OECD, *Regulatory Impact Analysis: A Tool for Policy Coherence* 13 (OECD, 2009).

⁹⁹ The APEC-OECD Checklist comprises of four pillars: regulatory reform, regulatory policies, competition policy, and market liberalization policies. APEC-OECD Checklist, at 1–36.

¹⁰⁰ APEC-OECD Checklist, preamble.

form, the Checklist highlights the use of RIA in the regulatory process, as well as the need for an integrated system that supports and coordinates all sectors of the government.¹⁰¹ Effective inter-ministerial systems for managing and coordinating regulatory efforts, preferably a central body or an institutionalized mechanism, are strongly recommended.¹⁰² However, the APEC-OECD Checklist acknowledges the following:

It is often difficult for regulators to reform themselves. Special interests, close identification with the objectives of outdated regulation, and countervailing pressures from different parts of society make such self-reform even more complex. In addition, modern regulations and regimes apply across multiple areas. Regulatory quality control and consistency may benefit when responsibility is shared between regulators and a central quality control entity.¹⁰³

Therefore, it is critical that governments have clearly defined regulatory coherence principles that guide them in formulating good regulatory practices. Toward this end, the Checklist also emphasizes transparency and public consultation, as well as the benefits to stakeholders as well as regulators, as reflected in the aforementioned United States administrative law. According to the instrument, “appropriate and well-publicised procedures for effective and timely inputs from interested national and foreign parties” advance the quality of rulemaking and reduce compliance costs for stakeholders.¹⁰⁴ According to Bollyky, since the APEC and the OECD embrace the concepts of transparency and public consultation, and expand the scope of participation to cover all interested persons across borders and bureaucratic levels, they remain among the most difficult points of regulatory coherence to understand and implement.¹⁰⁵ Finally, the APEC-OECD Checklist emphasizes the rule of law and its international dimension, stating “[it] means that all properly functioning regulatory systems and every regulatory action . . . must be based in law,” and suggests that member governments evaluate the conformity of their proposed regulations

¹⁰¹ APEC-OECD Checklist, at 9.

¹⁰² APEC-OECD Checklist, at 9 and 15; *see also* Bollyky, *supra* note 70, at 237.

¹⁰³ APEC-OECD Checklist, at 15.

¹⁰⁴ APEC-OECD Checklist, at 17.

¹⁰⁵ Bollyky, *supra* note 70, at 238.

with international commitments, especially relevant WTO obligations.¹⁰⁶ This approach strongly echoes our argument that the two concepts, regulatory coherence and regulatory cooperation, are often interactive and mutually reinforcing.¹⁰⁷

The 2011 APEC Leaders' Declaration dedicated a section and an annex to regulatory convergence and cooperation, with the aim of eliminating unjustifiably burdensome and outdated regulations, increasing productivity and jobs, and protecting the environment, public health, safety, and security.¹⁰⁸ Annex D required member economies to take specific steps to implement good regulatory practices: to ensure internal coordination of regulatory work among trade, standards, and regulatory agencies by an institutionalized method; to incorporate the element of RIA in the regulatory process (specifically, the evaluation of less restrictive alternatives); and to adopt transparency and public consultation procedures pursuant to the APEC-OECD Integrated Checklist.¹⁰⁹ Notably, the Declaration also touched upon some aspects of regulatory cooperation, emphasizing that "greater alignment in regulatory approaches, including to international standards, is necessary to prevent needless barriers to trade from stifling economic growth and employment."¹¹⁰

Efforts in the APEC-OECD forum have propelled the inclusion of a full chapter devoted to regulatory coherence in TPP, which represents a major development in this global normative diffusion.¹¹¹ The TPP is the first megaregional agreement to incorporate

¹⁰⁶ See APEC-OECD Checklist, at 15 ("[e]very well functioning rule-making process will have a procedure for examining the proposed regulatory action for legality and compliance with other requirements, such as adherence to WTO obligations.").

¹⁰⁷ In the previous section we offer an example, where the RIA of a domestic regulation with potential extraterritorial effects may include the assessment of impact on international trade and burdens on foreign suppliers; see *supra* Part II.A.

¹⁰⁸ 2011 APEC Leaders' Declaration, Honolulu, Hawaii, United States (Nov 12-13, 2011).

¹⁰⁹ 2011 APEC Leaders' Declaration, Annex D, Strengthening Implementation of Good Regulatory Practices, Honolulu, Hawaii, United States (Nov 12-13, 2011).

¹¹⁰ 2011 APEC Leaders' Declaration.

¹¹¹ TPP, Chapter 25. The Chapter is highlighted as an achievement of PTA negotiation to eliminate unnecessary regulatory barriers and to make the regulatory systems of TPP parties more compatible and transparent. For a concise discussion, see Ian Fergusson & Bruce Vaughn, *The Trans-Pacific Partnership Agreement* (CRS Report for Congress No. R40502, Congressional Research Ser-

all of the elements of regulatory coherence, primarily due to the fact that all of the TPP Parties are also APEC members and have previously agreed upon the relevance and importance of improving regulatory processes at the global level.¹¹² The TPP Chapter on Regulatory Coherence requires Parties to implement good regulatory practices in their rulemaking processes for a more effective and efficient achievement of their policy objectives, as well as the facilitation of international trade, investment, economic growth, and employment.¹¹³ While the Chapter leaves the scope of application up to the Parties to determine, they are expected to achieve “significant coverage” of regulatory measures.¹¹⁴ The Regulatory Coherence Chapter explicitly refers to good regulatory practices intended to discipline government actions throughout the rulemaking process. Good regulatory practices apply to the planning, design, issuance, implementation, and review of covered regulatory measures, where Parties must enhance stakeholder engagement, respond to comments, and explain regulatory rationale, and review and revise regulatory measures.¹¹⁵ The regulatory coherence rules in TPP include, more specifically, notice and comment procedures, stakeholder participation, duty to explain, access to information, and mutual consultation. With enhanced stakeholder involvement (comment, response, and consultation) and Parties’ commitment to conduct ex-post assessments, potential causes of trade disputes may be identified and addressed at earlier stages, which in turn reduces the likelihood of unpleasant surprises and trade conflicts after a measure is adopted and implemented. The increased transparency and predictability in the rulemaking process may also help Parties prevent unnecessary disputes, resolve

vice, Dec 12, 2011), at 8.

¹¹² See Thomas J. Bollyky, Better Regulation for Freer Trade (Policy Innovation Memorandum No. 22), at 2–3.

¹¹³ TPP, Article 25.2.

¹¹⁴ TPP, Article 25.3.

¹¹⁵ TPP, Articles 25.5.6, 25.5.7, and 25.8. For a discussion on the implications of the TPP Regulatory Coherence Chapter, see Sheargold & Mitchell, *supra* note 9, at 597–600 (“While these provisions may provide a framework for future integration and the reduction of regulatory divergence among TPP parties, in their current form they are very general provisions, which provide little specificity or concrete vision for what that future cooperation might entail.”). Yet Sheargold and Mitchell suggest that the novelty and significance lie in the TPP’s reference to good regulatory practices in the treaty language in relation to the regulatory autonomy of governments. *Id.*

frictions within a definite timeframe, and avoid lengthy and costly dispute settlement. Notably, a Party to TPP “shall endeavour to ensure that it has processes or mechanisms to facilitate the effective interagency coordination and review of proposed covered regulatory measures,” preferably by establishing a central coordinating body.¹¹⁶ While the detailed institutional arrangements are left to each TPP Party, it seems clear that such a provision was introduced by the United States with the model of the OIRA in mind.¹¹⁷

The above is an endeavor to trace the contours of the emergence of global regulatory coherence, from administrative law in the United States to other jurisdictions, international organizations (such as the WTO, APEC, and OECD), and trade agreements. The most recent evidence—the above-named TPP chapter—significantly transforms the relatively voluntary nature of regulatory coherence at the international level (as APEC-OECD best practices) to a potentially enforceable treaty obligation to actively launch processes and create mechanisms (whatever room for discretion is left to the Parties to determine their preferred methodology or institutional design).¹¹⁸ Intriguingly, as a key player in the domain of international trade, China has arguably remained rather silent and indifferent in the entire course of development.¹¹⁹ Such a state of play surely merits further analysis of the unique Chinese context, as well as its interaction with the recent initiative on regulatory coherence, to which we now turn.

3. CHINA’S EVOLVING REGULATORY REGIME IN A GLOBALIZED WORLD

3.1. *Legal and Institutional Reform: Early Efforts in the Pre- and Post-WTO Era*

¹¹⁶ TPP, art. 25.4.1.

¹¹⁷ Sheargold & Mitchell, *supra* note 9, at 598; Bollyky, *supra* note 70, at 181; Fergusson & Vaughn, *supra* note 111, at 37.

¹¹⁸ TPP, arts. 25.3, 25.4.2, 25.5, 25.7.1, and 25.11; *see also* Jane Kelsey, *Preliminary Analysis of the Draft TPP Chapter on Domestic Coherence* 5 (Citizens Trade Campaign, Oct 23, 2011) (discussing obligations under TPP proposal).

¹¹⁹ As the time of writing, we are not aware of any active step taken by China to embrace or promote the elements of regulatory coherence at both domestic and international levels.

Any meaningful discussion of China's regulatory-based trade barriers, corresponding reforms, and approaches to regulatory coherence will inevitably touch upon limits on government activities. Such limits are often embedded in the Chinese administrative law regime and are closely intertwined with the notion of the "rule of law." The notion of rule of law has been highly contested in contemporary China.¹²⁰ Although the founding fathers of the People's Republic of China (PRC) seemed to embrace this idea by requiring civil servants to act according to law and serve the people's interests, since the nation's first constitution in 1954,¹²¹ the Cultural Revolution and other episodes in Maoist China revealed the ruling elites' preference for "governance through mass movements, campaigns, and charismatic appeals," rejecting "governance through law."¹²² For Mao, the concept of law and a legal system may have run counter to the revolution; what China needed was not "the

¹²⁰ It is argued that long before the PRC was established, the notion of rule of law and administrative laws have been part of China's legal system, though their purpose was to ensure that government officials faithfully carried out the Emperors' orders; see THE GREAT QING CODE 1-11 (William C. Jones trans., 1994) (highlighting the history and development of rule and law practices in China); Randall Peerenboom, *Globalization, Path Dependency and the Limits of Law: Administrative Law Reform and Rule of Law in the People's Republic of China*, 19 BERKELEY J. INT'L. L. 161, 186 (2001) [hereinafter Peerenboom, *Administrative Law Reform and Rule of Law in the PRC*] (discussing ongoing shifts in China's administrative legal regime and the extent to which it has been influenced by globalization). For a recount of rule of law in China after 1949, see Hungdah Chiu, *The 1982 Chinese Constitution and the Rule of Law*, in Occasional Papers/Reprints Series in CONTEMP. ASIAN STUD., 6-8 (No. 4-1985); Eric W. Orts, *The Rule of Law in China*, 34 VAND. J. TRANSNAT'L. L. 43 (2001); Jerome Alan Cohen, *Tiananmen and the Rule of Law*, in THE BROKEN MIRROR: CHINA AFTER TIANANMEN 323 (George Hicks ed, 1990); Pak K. Chew, *The Rule of Law: China's Skepticism and the Rule of People*, 20 OHIO ST. J. ON DISP. RESOL. 43 (2005).

¹²¹ See Zhonghua Renmin Gongheguo Xianfa [Const.] art. 18 (1954) ("All servants of the state must be loyal to the people's democratic system, observe the Constitution and the law and strive to serve the people."). The 1954 Constitution was later superseded by those promulgated in 1975, 1978, and 1982, respectively. The 1982 Constitution is the current constitution, which has been amended in 1988, 1993, 1999, and 2004.

¹²² See John Ohnesorge, *Chinese Administrative Law in the Northeast Asian Mirror*, 16 TRANSNAT'L L. & CONTEMP. PROB. 103 136-37 (2006) (highlighting the evolution of China's integration of administrative law and its role in private life). During the Cultural Revolution, for instance, "the few open law schools were closed and the law faculty sent to labor camps," while "law libraries and books were destroyed by the Red Guard." The legal profession, as James M. Zimmermann remarks, "disappeared overnight, and almost no laws were enacted and no law books published" at the time. JAMES M. ZIMMERMAN, CHINA LAW DESKBOOK: A LEGAL GUIDE FOR FOREIGN-INVESTED ENTERPRISES 53 (4th ed., 2014).

rule of law," but "the rule of individuals."¹²³ Moreover, the rule of law is often seen as having its root in liberal Western democracies, which contradicts the ideology shaped by the Chinese Communist Party.¹²⁴

Nevertheless, the late 1970s witnessed a sea change. In the post-Mao era, for Deng Xiao Ping and other leaders, the legitimacy of single-party socialism was largely dependent upon the nation's survival and prosperity, which in turn hinged on sustainable economic development.¹²⁵ These objectives were not going to be achieved with Mao's rule of man, but with a modernized legal system that would help China "gain the confidence of the global community" and "ensure the institutionalization of economic reform."¹²⁶ In a crucial step toward this end, the PRC passed the 1982 Constitution, which restored its legal system by including, among other provisions, administration in accordance with law (e.g., administrative procedures, right to sue, compensation),¹²⁷ the supremacy of the law,¹²⁸ and equality of all before the law.¹²⁹ Since then, China's administrative law legislation has, albeit slowly, begun to flourish. More than 130 pieces of administrative legislation were passed between 1982 and 1988.¹³⁰ In 1989, after almost a decade of legal reform, China promulgated its Administrative Litiga-

¹²³ See WILLEM VAN KEMENADE, *CHINA, HONG KONG, TAIWAN, INC.* 262 (Diane Webb trans., 1997); Jerome Alan Cohen, *Tiananmen and the Rule of Law*, in *THE BROKEN MIRROR: CHINA AFTER TIANANMEN* 323, 325 (George Hicks ed., 1990) (describing Mao as "the modern world's most famous proponent of lawlessness.").

¹²⁴ See, e.g., Richard Flathman, *Liberalism and the Suspect Enterprise of Political Institutionalization: the Case of the Rule of Law*, in *THE RULE OF LAW* 297 (Ian Shapiro ed., 1994) (examining the liberal philosophical underpinnings of many approaches to the rule of law). However, some scholars think that democracy should be conceptually separated from the principles of rule of law. See, e.g., William C. Whitford, *The Rule of Law*, 2000 WIS. L. REV. 723, 742; Eric W. Orts, *The Rule of Law in China*, 34 VAND. J. TRANSNAT'L L. 43, 49 (2001).

¹²⁵ See Randall Peerenboom, *Globalization, Path Dependency and the Limits of Law: Administrative Law Reform and Rule of Law in the People's Republic of China*, 19 BERKELEY J. INT'L L. 161, 163 (2001) [hereinafter Peerenboom, *Globalization, Path Dependency and the Limits of Law*] (acknowledging the impact of globalization in China's refocusing of its administrative legal priorities).

¹²⁶ ZIMMERMAN, *supra* note 122, at 53.

¹²⁷ See, e.g., Xianfa [Constitution], art. 2, 5, 41 (1982) (P.R.C).

¹²⁸ *Id.* at art. 5.

¹²⁹ *Id.* at art. 23.

¹³⁰ See FENG LIN, *ADMINISTRATIVE LAW: PROCEDURES AND REMEDIES IN CHINA* 116 (1996) (providing a review of notable developments in China's administrative legal framework).

tion Law, which signaled the Chinese leadership's endorsement of law-based administration.¹³¹

The pace of administrative law legislation accelerated in the 1990s. This trajectory mirrors, in part, Chinese leaders' focus on the transition to a "socialist economy,"¹³² and in part, the anticipation of China's accession to the WTO. While China moved toward a market-oriented economy in the process of globalization, a more predictable, accountable, and rule-based system of administration was needed. As a corollary, a number of administrative laws were enacted to, on one hand, "rationalize governance, enhance administrative efficiency, and rein in local governments," and, on the other, to "respond[] to people's demands for greater protection of their rights and interests" in order to address emerging challenges.¹³³ The passage of the Administrative Supervision Regulations (1990),¹³⁴ the Administrative Reconsideration Regulations (1990),¹³⁵ the State Compensation Law (1994),¹³⁶ and the Administrative Penalties Law (1996)¹³⁷ are prime examples. The former two pieces were, moreover, upgraded to laws in 1997 and 1999, respectively.¹³⁸

¹³¹ Xingzheng Susong Fa [Administrative Litigation Law] (promulgated by Nat'l People's Cong., Apr. 4, 1989, effective Oct. 1, 1990) (P.R.C.) (highlighting the Chinese Government's approach to codifying its domestic administrative law). Administrative Litigation Law was amended in November 2014. For a recount of China's judicial reform, see PEERENBOOM, CHINA'S LONG MARCH TO RULE OF LAW, *supra* note 11, at 239-79.

¹³² Xianfa [Constitution], art. 7 (1993) (P.R.C.) (expressing China's commitment to its socialist economy).

¹³³ RANDALL PEERENBOOM, CHINA'S LONG MARCH TO RULE OF LAW 399 (2002) [hereinafter Peerenboom, CHINA'S LONG MARCH TO RULE OF LAW].

¹³⁴ Xingzheng jiancha tiao li [Administrative Supervision Regulations] (promulgated by State Council, Dec. 9, 1990) (P.R.C.).

¹³⁵ Xingzheng fuyi tiao li [Administrative Reconsideration Regulations] (promulgated by Ministry of Commerce of People's Republic of China, Dec. 24, 1990) (P.R.C.).

¹³⁶ Guojia peichang fa [State Compensation Law] (promulgated by National People's Congress Standing Committee, May 12, 1994, effective Jan. 1, 1995) (P.R.C.).

¹³⁷ Xingzheng chufa fa [Administrative Penalties Law] (promulgated by National People's Congress, Mar. 17, 1996, effective Oct. 1, 1996) (P.R.C.).

¹³⁸ Xingzheng jiancha fa [Administrative Supervision Law] (promulgated by National People's Congress Standing Committee, May 9, 1997, effective May 9, 1997) (P.R.C.); Xingzheng fuyi fa [Administrative Reconsideration Law] (promulgated by National People's Congress Standing Committee, Apr. 29, 1999, effective Oct. 1, 1999) (P.R.C.).

Even more dramatic administrative law reforms took place following China's WTO accession in 2001. Without repeating the WTO's implications for China's domestic governance—which has been addressed extensively elsewhere¹³⁹—we instead focus on institutional reforms with a direct bearing on those key elements of regulatory coherence noted above.

3.1.1. *Transparency and Public Consultation*

Transparency is one of the core disciplines under the WTO, requiring Members to promptly publish all trade-related laws, regulations, and other government measures of general application before their implementation.¹⁴⁰ When compared to its Western counterpart, such a requirement was largely missing in China's administrative tradition. Thus, China was required to bolster its transparency obligations while negotiating its accession into the WTO. Broadly, the Accession Protocol expanded China's transparency obligations via two specific measures. First, China is required to enforce laws, regulations, or other measures that have been published.¹⁴¹ Second, China is required to make all laws, reg-

¹³⁹ See, e.g., Julia Ya Qin, *Trade, Investment and Beyond: The Impact of WTO Accession on China's Legal System*, 191 CHINA Q. 720 (2007) [hereinafter Qin, *The Impact of WTO Accession on China's Legal System*]; CHIEN-HUEI WU, *WTO AND THE GREATER CHINA: ECONOMIC INTEGRATION AND DISPUTE RESOLUTION* (2012) [hereinafter WU, *WTO AND THE GREATER CHINA*]; Chien-Huei Wu, *How Does TRIPs Transform Chinese Administrative Law?* 8 (1) GLOBAL JURIST 1 (2008); Ljiljana Biukovic, *Selective Adaption of WTO Transparency Norms and Local Practices in China and Japan*, 11 (4) J. INT'L. ECON. L. 803(2008). For the most recent and comprehensive account of China's trade law capacity building, see Gregory Shaffer & Henry Gao, *China's Rise: How It Took on the U.S. at the WTO* (UC Irvine School of Law Research Paper No. 2017-15), [<https://perma.cc/T4KB-UGHV>].

¹⁴⁰ See, e.g., General Agreement on Tariffs and Trade art. X, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT]; General Agreement on Trade in Services arts. III, Apr. 15, 1994, 1869 U.N.T.S. 183 [hereinafter GATS]; Agreement on Trade Related Intellectual Property Rights, art. 63, April 15, 1994, 1869 U.N.T.S. 299 [hereinafter TRIPS].

¹⁴¹ World Trade Organization, Ministerial Decision of 10 November 2001, Protocol on the Accession of the People's Republic of China, para. 2.(c).1., WT/L/432 (Nov. 23, 2001) [hereinafter Accession Protocol] ("China undertakes that only those laws, regulations and other measures pertaining to or affecting trade in goods, services, TRIPs or the control of foreign exchange that are published and readily available to other WTO Members, individuals and enterprises, shall be enforced[.]").

ulations, and other measures falling within the aegis of the WTO available through an official journal on a regular basis and respond to requests for information within a prescribed time frame.¹⁴²

Several instruments were adopted in the 2000s in response to these demands. The Legislation Law, promulgated in 2000, broke new ground by establishing a modernized administrative scheme. It also contributed to transparency in at least two ways. First, China's legal system has long been viewed as a black box with no clear hierarchy between laws, regulations, and many other normative documents. Past practice revealed that various "internal documents" – which should, in theory, have no binding effect – can be as equally effective as laws.¹⁴³ Thus, the Legislation Law brought order to the normative chaos by clarifying the jurisdictions of the various authorities and establishing a standardized rulemaking process.¹⁴⁴ Second, the Legislation Law fulfilled China's obligation under the Accession Protocol by requiring laws, regulations, and other measures to be published in government gazettes.¹⁴⁵ The Legislation Licensing Law, enacted in 2003, followed in the same vein by requiring the public disclosure of notable regulations on administrative licensing and prohibiting those that remained undisclosed from forming the basis of implementation of administrative licensing.¹⁴⁶ Moreover, save for concerns regarding national security, commercial secrets, and privacy, the Administrative Licensing Law required the government to disclose implementation of administrative licensing and the results thereof.¹⁴⁷ Shortly thereafter, in 2004, the State Council, in a guiding document called "Implementation Outline to Comprehensively Move Forward

¹⁴² *Id.* paras. 2(c)2–3.

¹⁴³ Xiaoxiao Li, *Adaption to WTO Standards: Changes and Adjustments to Business Laws and Regulations*, in *MODERN CHINESE LEGAL REFORM: NEW PERSPECTIVES* 151, 154–55 (XiaoBing Li & Qiang Fang eds., 2013) (noting that "China habitually went beyond the publicly announced laws and regulations to develop a number of 'internal decisions' or 'official documents,' which became more important than the laws.").

¹⁴⁴ Lifa Fa Legislation Law arts. 1, 7 (promulgated by Nat'l People's Cong., Mar. 15, 2000, effective July 1, 2000; amended in Mar. 15, 2015); *see also* Ohnesorge, *supra* note 122, at 138 (discussing, in Part III. A. 3, the evolution and standardizing effect of the Legislative Law on China's domestic administrative framework).

¹⁴⁵ Legislation Law, *supra* note 144, arts. 52, 62, 70.

¹⁴⁶ Xingzheng xuke fa [Administrative Licensing Law] (adopted by Standing Comm. Nat'l People's Cong., Aug. 27, 2003, effective July 1, 2004.) art. 5.

¹⁴⁷ *Id.*

Administration According to the Law," again underscored the importance of transparency in ensuring rule-based administration across government agencies at all levels.¹⁴⁸

Moreover, as part of its WTO-Plus obligations under the Accession Protocol, China went beyond the passive information disclosure requirements by providing "a reasonable period for comment to the appropriate authorities before such measures are implemented," with exceptions for certain situations.¹⁴⁹ China's efforts can best be exemplified, once again, by the Legislation Law, which committed China to "openness" by accommodating "people's participation in legislative activities through various channels" since its promulgation in 2000.¹⁵⁰ Several follow-up initiatives have also been developed with this goal. In 2001, the State Council issued the "Regulations on Procedures for the Formulation of Administrative Regulations"¹⁵¹ and "Regulations on Procedures for the Formulation of Rules"¹⁵² to implement the Legislation Law. While the Legislation Law offered comment opportunities in general, these two rules set forth detailed procedural requirements for government agencies to engage stakeholders. Generally, in drafting administrative regulations and rules, drafting agencies should solicit the opinions of relevant agencies, organizations, and citizens through symposia, panel discussions, hearings, or otherwise.¹⁵³ Next, when draft regulations and rules are submitted for approval by supervisory bodies, an introductory note regarding how these

¹⁴⁸ Quanmian tuijin yifa xingzheng shishi gangyao [Implementation Outline to Comprehensively Move Forward Administration According to the Law] [hereinafter 2004 Implementation Outline] (adopted by the State Council, Mar. 22, 2004).

¹⁴⁹ Accession Protocol, *supra* note 141, para. 2.(C).

¹⁵⁰ Legislation Law, *supra* note 144, art. 5.

¹⁵¹ Xingzheng fagui zhiding chengxu tiaoli [Regulations on Procedures for the Formulation of Administrative Regulations] (issued by the State Council, Nov. 16, 2001, effective on Jan. 1, 2002) art. 11.

¹⁵² Guizhang zhiding chengxu tiaoli [Regulations on Procedures for the Formulation of Rules] (issued by the State Council, Nov. 16, 2001, effective on Jan. 1, 2002).

¹⁵³ See, e.g., *id.*, arts. 14-15 ("Practical experience should be summed up, and the opinions of relevant organs, organizations and citizens shall be extensively listened to."); Regulations on Procedures for the Formulation of Administrative Regulations, *supra* note 151, art. 12 ("Practical experience should be summed up, and the opinions of relevant organs, organizations and citizens shall be extensively solicited.").

opinions are addressed is needed.¹⁵⁴ There might be a second chance for public comment at the approval stage if the draft for approval involves, in the case of regulations, “major or difficult issues,” “immediate interests of citizens, legal persons, or other organizations,” or important matters approved by the State Council,¹⁵⁵ and, in the case of rules, “major issues.”¹⁵⁶ Similar procedural requirements were also included in the Administrative Licensing Law and the 2004 Implementation Outline: the former required the incorporation of some sort of public consultation in laws and/or regulations relating to administrative licensing,¹⁵⁷ while the latter underscored the importance of due process by protecting stakeholders’ right to information, comment, and remedy.¹⁵⁸

3.1.2. *Regulatory Impact Analysis*

Although regulatory impact analysis was not included in its WTO-Plus obligations, China also took steps to revise its administrative laws to incorporate certain elements of RIA. A good illustration of such steps is the above-mentioned Regulations on Procedures for the Formulation of Administrative Regulations and Regulations on Procedures for the Formulation of Administrative Rules. Under the former, for instance, agencies were required to delineate key issues and the manner in which the proposed project addressed them before the State Council included the project in its annual work plan at the beginning of each year.¹⁵⁹ Moreover, at

¹⁵⁴ See, e.g., Regulations on Procedures for the Formulation of Rules, *supra* note 152, art. 25 (“A draft rule and its explanation shall be signed by the principal responsible person of the legislative affairs office, who shall put forward a proposal that the draft rule and its explanation be submitted to the relevant meeting . . . for deliberation.”).

¹⁵⁵ Regulations on Procedures for the Formulation of Administrative Regulations, *supra* note 151, arts. 19, 21, 22.

¹⁵⁶ Regulations on Procedures for the Formulation of Rules, *supra* note 152, arts. 21, 23 (“Legislative affairs offices shall send draft rules for examination . . . to relevant organs, organizations and experts to solicit their opinions.”).

¹⁵⁷ Administrative Licensing Law, *supra* note 145, art. 19 (“Where an administrative license is to be established by means of drafting a law . . . the drafting entity shall consult the opinions through hearing and argumentation[.]”).

¹⁵⁸ 2004 Implementation Outline, *supra* note 148, para. 5.

¹⁵⁹ Regulations on Procedures for the Formulation of Administrative Regulations, *supra* note 151, arts. 6–8 (articulating the procedure for preparing an annual

the drafting stage, the administrative agencies were to follow the principles that administrative regulations represented, including “scientifically regulating administrative acts, promoting the shift of government functions toward economic adjustment, social management and public service.”¹⁶⁰ Thus, agencies were to conduct “in-depth investigations and researches [sic]” during the drafting process and explain the “necessity” of such regulation for the State Council’s examination.¹⁶¹ These mandates were later underscored by the 2004 Implementation Outline, which directs government agencies to formulate a “science-based” administrative decision-making process to improve administrative efficiency.¹⁶² The 2004 Implementation Outline requires drafting agencies to choose the option that is least harmful to the people when multiple scenarios can serve the same administrative purpose.¹⁶³ Moreover, the 2004 Implementation Outline instructs that, as a systemic matter, government agencies should take into account not only the ex-ante costs of the rulemaking process, but also ex-post social costs and law enforcement expenses by exploring cost-effective analysis mechanisms of government legislation—especially those related to economic affairs.¹⁶⁴

3.1.2.1. *Interagency Coordination and Compatibility*

One of the problems facing China’s trading partners is the complicated way in which its rulemaking authority is exercised. Since China’s economic reform in 1978, the emphasis on rulemaking and the rule of law has contributed to a significant expansion in the promulgation of normative documents at all levels of government.¹⁶⁵ Because several entities were vested with the power to legislate, the rulemaking arena was described as a “bewildering and inconsistent array of laws, regulations, provisions, measures,

legislation working plan).

¹⁶⁰ *Id.* art. 11.1.

¹⁶¹ *Id.* arts. 12, 16.

¹⁶² 2004 Implementation Outline, *supra* note 148, §§ 2.2, 3.5.

¹⁶³ *See id.* § 3.5.

¹⁶⁴ *See id.* § 6.17.

¹⁶⁵ *See* Laura Paler, *China’s Legislation Law and the Making of a More Orderly and Representative Legislative System*, *THE CHINA Q.*, 302 (2005) (examining “the significance of the Legislation Law (lifa la), passed by the National People’s Congress (NPC) in March 2000.”).

directives, notices, decisions, and explanations, all claiming to be normatively binding and treated as such by the creating entity.”¹⁶⁶ These normative documents resulted in numerous contradictions, tensions, and ambiguities within the rulemaking system, which slowed economic development and undermined the confidence of citizens and foreign investors in the legal system.¹⁶⁷ Such concerns were intensified by China’s WTO accession.¹⁶⁸ To address these concerns, China was required by the Accession Protocol to administer all of the laws, regulations, and other measures of central and local governments in a “uniform, impartial and reasonable manner,” and invalidate all local rules and measures inconsistent with its WTO obligations.¹⁶⁹ As a result, China embarked upon a series of clean-up campaigns. In October 2001, the State Council began to review 756 administrative regulations issued before the end of 2000—71 of which were invalidated—and required local governments to address rules and measures incompatible with the WTO disciplines.¹⁷⁰ Within three years of its WTO accession, China revised or terminated nearly 190,000 local rules and measures; by 2005, some 3,000 laws, regulations, and rules were also amended.¹⁷¹

The sweeping institutional reform went beyond the review of existing legal frameworks. To restore the order of the rulemaking

¹⁶⁶ Peerenboom, *Administrative Law Reform and Rule of Law in the PRC*, *supra* note 120, at 205; *see, e.g.*, Jan Michiel Otto & Yuwen Li, *An Overview of Lawmaking in China*, in *LAWMAKING IN THE PEOPLE’S REPUBLIC OF CHINA* 1, 1–18 (Jan Michiel Otto et al. eds., 2000) (highlighting China’s evolution from a ‘non-law’ system to a system with a robust legislative program).

¹⁶⁷ *See* Perry Keller, *Source of Order in Chinese Law*, 42 AM. J. COMP. L. 711, 711 (1994) (discussing the complexity and inconsistency within China’s legal system and their effects on the reliable application of the law).

¹⁶⁸ Qin, *The Impact of WTO Accession on China’s Legal System*, *supra* note 139, at 736. In China, entrenched localism, from time to time, resulted in local rules that contradict with laws and regulations passed by the central government. Thus, these special commitments were included to harness local protectionism.

¹⁶⁹ Accession Protocol, *supra* note 141, para. 2. (A).

¹⁷⁰ *See, e.g.*, SANG BAICHUAN ET AL. (桑百川等合着), TONGCHOU GUONEI FAZHAN HE DUIWAI KAIFANG (统筹国内发展和对外开放) [COORDINATING DOMESTIC DEVELOPMENT AND OPEN-UP] 31 (2011).

¹⁷¹ Wan Xuezhong (万学忠) & Zhang Wei (张维), *Rushi shi nian tuidong zhongguo fazhi Jincheng* (入世十年推动中国法治进程 [To Promote the Rule of Law in Ten Years of the WTO Accession]), NEWSLETTER OF THE LEGISLATIVE AFFAIRS OFFICE OF THE STATE COUNCIL (Dec. 9, 2011), http://www.legaldaily.com.cn/index_article/content/2011-12/09/content_3185561.htm [<https://perma.cc/MJP2-CKML>] (last visited: Apr. 25, 2017).

paradigm, Chinese leaders adopted a forward-looking approach by delimiting the jurisdiction of each rulemaking body and formulating a method to address multi-level legislative conflicts in the Legislation Law. In addition to spelling out the hierarchical legal order supporting the Constitution,¹⁷² the Legislation Law drew a clear division between the rulemaking power of the National People's Congress and other entities by specifying ten broad areas exclusively governed by laws, while underscoring the primacy of the National People's Congress through the right to annul normative documents of central administrative bodies or local governments found to be inconsistent with the Constitution and laws.¹⁷³ Given the long-simmering frustrations over confusion and ambiguities within the legal system, much of the design of the Legislation Law can be seen as a pushback from the National People's Congress to harness "the rush of administrative regulations issued by governments at various levels" and the ramifications that followed.¹⁷⁴

Later, the Regulations on Procedures for the Formulation of Administrative Regulations and the Regulations on Procedures for the Formulation of Rules both set forth detailed requirements to avoid potential conflicts inherent in the multi-level rulemaking process. The former, for instance, seemed to adopt the APA model by coordinating rulemaking initiatives through annual working plans. Article 7 provides in relevant part:

Where the relevant departments of the State Council deem that there is a need to formulate administrative regulations, they shall . . . state the main issues to be solved by such projects, the guidelines and policies that such projects are based on and the main systems to be established by such projects.¹⁷⁵

¹⁷² At the top of the pyramid is Constitution, followed by "falü" (laws, promulgated by the National People's Congress and its Standing Committee), "fagui" (regulations, enacted by the State Council and the sub-national people's congress), and "guizhang" (rules, issued by central government ministries and local governments). Legislation Law, *supra* note 144, arts. 78-82.

¹⁷³ See Keith J. Hand, *Understanding China's System for Addressing Legislative Conflicts: Capacity Challenges and the Search for Legislative Harmony*, 26 COLUM. J. ASIAN L. 139, 191-217 (2013) (articulating the practical difficulty of addressing legislative disorder and suggesting what can be done). The earliest efforts to create such a system can be dated back to the 1982 Constitution and certain organic laws.

¹⁷⁴ See Paler, *supra* note 165, at 308 (citing NPC Commission to Formulate Legislation Law, Xinhua, 25 October 1999).

¹⁷⁵ Regulations on Procedures for the Formulation of Administrative Regula-

Such control also existed in the drafting stage. Article 13 of the Regulations on Procedures for the Formulation of Administrative Regulations, for instance, required the drafting agency to “reach a consensus with other departments on the provisions that involve their powers and responsibilities or the provisions that are closely related to them.”¹⁷⁶ In cases in which consensus was not reached after “sufficient consultation,” the drafting agency was obliged to “state the circumstances of and the reasons for such non-consensus when submitting the draft of administrative regulations for examination.”¹⁷⁷

3.1.2.2. *Administrative and Judicial Review*

In tandem with its economic reform, China began to curtail the power of bureaucratic agencies in Administrative Litigation Law, as effective in 1990. The fundamental tenet of the 1990 Administrative Litigation Law was the support of judicial oversight to curb the abuse of administrative power and to promote accountability of government officials.¹⁷⁸ Despite such efforts, there were significant limits to the competence of the courts. Of greatest relevance for the present purpose are the standard of review and the scope of judicial oversight. First, arguably, the Administrative Litigation Law can be narrowly read to limit judicial review to the legality, and not the appropriateness, of administrative decisions.¹⁷⁹ The Law generally barred the courts from substituting their own judgments for those of administrative entities.¹⁸⁰ Second, and more

tions, *supra* note 151, art. 7.

¹⁷⁶ *Id.* art. 13.

¹⁷⁷ *Id.*

¹⁷⁸ See Pitman B. Potter, *Globalization and Economic Regulation in China: Selective Adaption of Globalized Norms and Practices*, 2 WASH. U. GLOB. STUD. L. REV. 119, 137 (2003) (examining mechanisms of judicial review of administrative decisions).

¹⁷⁹ *Id.* However, there was a gray zone, as Article 54 of Administrative Litigation Law did empower the courts to revoke the administrative decisions involving “abuse of authority” and “excess of authority.” Administrative Litigation Law, *supra* note 131, arts. 5, 54. Scholars were divided on the way to interpret these vague terms. See Peerenboom, *Administrative Law Reform and Rule of Law in the PRC*, *supra* note 120, at 237–38 (arguing that “[t]he more robust the interpretation, the closer the court gets to substituting its own judgment and replacing a review of legality with a review of appropriateness PRC scholars are even more divided about the meaning of abuse of authority.”).

¹⁸⁰ Potter, *supra* note 178, at 138–39.

crucially, judicial review was limited to concrete administrative acts; the validity of administrative laws, regulations, and orders of general application, as well as administrative decisions declared final by applicable laws, were exempt from judicial oversight.¹⁸¹ Overall, the Administrative Litigation Law of 1990 was limited in its effectiveness.

China's weak judiciary in the administrative realm faced critical challenges as a result of its WTO membership. To ensure that regulatory measures affecting trade are fairly administered, all WTO Members are obliged, as a general rule, to offer the opportunity for an objective and impartial review of administrative decisions.¹⁸² China's Accession Protocol took a similar but harsher approach by requiring China to "establish, or designate, and maintain tribunals, contact points and procedures for the prompt review of all administrative actions relating to the implementation of laws, regulations, judicial decisions and administrative rulings of general application," as referenced in the relevant provisions under the GATT, GATS, and TRIPs.¹⁸³ Such a tribunal, as the Accession Protocol provided, shall be "impartial and independent" of the agencies entrusted with administrative enforcement.¹⁸⁴ While

¹⁸¹ Administrative Litigation Law, *supra* note 131, art. 12.

¹⁸² See, e.g., General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153, art. X: 3 (1994) [hereinafter GATT 1994] (instating tribunals or procedures for review and correction of administrative actions); General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183, 33 I.L.M. 1167, art. 6.2 (1994) [hereinafter GATS] (requiring administrative tribunals or procedures to process prompt review of administrative decisions as called for); Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197, art. 41:4. (1994) [hereinafter TRIPS Agreement] (establishing the opportunity for a judicial authority to review administrative decisions).

¹⁸³ Accession Protocol, *supra* note 141, para. 2. (D).

¹⁸⁴ *Id.* GATT 1994 Article X: 3(c) provides that the existing procedures in force on the date of the GATT do not need to be substituted or eliminated even if they are not "fully or formally independent of the agencies entrusted with administrative enforcement" so long as such procedures, as a matter of fact, offer "objective and impartial" review; see GATT, *supra* note 182, art. X: 3(c). For a detailed comparison between judicial review requirement under the GATT, GATS, TRIPs, and China's Accession Protocol, see Chien-Huei Wu, *Mission (Im)Possible? Could the WTO Save Chinese Courts?* 3 (2) NAT'L TAIWAN UNIV. L. REV. 61 (2008) [hereinafter Wu, *Mission (Im)Possible*] (examining China's WTO obligation in the context of global standards of independence).

judicial review obligations under WTO-covered agreements are subject to compatibility requirements with the existing domestic legal framework, China's judicial review obligations are unconditional.¹⁸⁵ Moreover, the Accession Protocol prescribed that "individuals and enterprises affected by any administrative action" shall have the opportunity to appeal in all cases to a judicial body.¹⁸⁶

These requirements implicated the manner in which China disciplined its regulatory agencies. In anticipation of its WTO accession, China, as noted above, revised and upgraded the Administrative Reconsideration Regulation to the Administrative Reconsideration Law, offering a hierarchical intra-agency review of administrative acts.¹⁸⁷ Unlike the Administrative Litigation Law of 1990, the Administrative Reconsideration Law expanded the scope of review by subjecting certain abstract administrative acts to administrative reconsideration.¹⁸⁸ China's WTO accession was shortly followed by legislative amendments and judicial interpretations that granted rights to appeal for all WTO-related cases.¹⁸⁹ These review mechanisms were built upon, among others, the Adminis-

¹⁸⁵ See Wu, *Mission (Im)Possible*, *supra* note 184, at 65 (discussing China's "independent judicial review" obligation and what that obligation entails).

¹⁸⁶ Accession Protocol, *supra* note 141, para. 2. (D); see also Julia Ya Qin, "WTO-Plus" Obligations and Their Implications for the WTO Legal System: An Appraisal of the China Accession Protocol, 37 J. WORLD TRADE 483, 496 (2003) [hereinafter Qin, *An Appraisal of the China's Accession Protocol*] (arguing that such obligation exceeded the WTO general requirements. For instance, there is no reference to appeal of a tribunal decision in the GATS, while appeal to a court of the decision by an independent tribunal under the GATT Article X is merely referred to as a "possibility.").

¹⁸⁷ See Ohnesorge, *supra* note 122, at 141 (illustrating the steps taken by China to develop a uniform standard for administrative litigation).

¹⁸⁸ Administrative Reconsideration Law, *supra* note 137, art. 7.

¹⁸⁹ In 2002, China's Supreme Court issued three judicial interpretations to facilitate the judicial review of WTO-related administrative decisions: Regulations on Several Problems in the Trial of Trade-Related Administrative Litigation Cases, Regulations on the Application of Law in the Trial of Anti-Subsidy Administrative Litigation, and Regulations on the Application of Law in the Trial of Anti-Dumping. In China, these judicial interpretations and opinions are essentially binding upon lower courts. See generally Nanping Liu, "Legal Precedents" with Chinese Characteristics: Published Cases in the Gazette of the Supreme People's Court, 5 J. CHINESE L. 107 (1991) (examining the extent to which decisions by the Supreme People's Court are considered precedential in China's legal system); Susan Finder, *The Supreme People's Court of the People's Republic of China*, 7 J. CHINESE L. 145 (1993) (discussing the role of the Supreme People's Court in the context of China's legal tradition).

trative Licensing Law and Legislation Law, which set boundaries to control the conduct of public officials. Although there is much room for improvement, on balance, as elaborated below, these and many other efforts in connection with WTO membership illustrate changes in Chinese review systems of administrative decisions concerning trade.

3.2. *Recent Developments in Core Elements of Regulatory Coherence*

Recent years have witnessed China's intensified efforts in the pursuit of more efficient and effective administration. During the Seventeenth National Congress of the Communist Party of China, held in October 2007, Chinese leaders reaffirmed their policy, stating: "We must keep to the path of political development under socialism with Chinese characteristics, and integrate the leadership of the Party, the position of the people as masters of the country, and the rule of law."¹⁹⁰ Further, political reforms must be oriented toward "socialist democracy" by improving institutions for democracy and diversifying relevant channels to engage citizens in the decision-making process.¹⁹¹ Governments should therefore "guarantee the people's rights to be informed, to participate, to be heard, and to oversee."¹⁹²

At about the same time, the State Council undertook a parallel initiative by issuing the *Regulation on the Disclosure of Government Information*, another milestone in China's administrative law regime.¹⁹³ Under this Regulation, governments at all levels are required to establish a process for disseminating "government information"—that is, "information made or obtained by administrative organs in the course of exercising their responsibilities and recorded and stored in a given form."¹⁹⁴ Specifically, government agencies should disclose, on their own initiative, information that "involves the vital interests of citizens, legal persons or

¹⁹⁰ Hu Jintao, Report to the Seventeenth National Congress of the Communist Party of China, Oct. 15, 2007, part VI.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ Zhonghua renmin gongheguo zhengfu xinxi gongkai tiaoli [Regulation on the Disclosure of Government Information] (promulgated by the State Council, Apr. 5, 2007, effective May 1, 2008).

¹⁹⁴ *Id.* arts. 2, 4.

other organizations,” “needs to be extensively known or participated in by the general public,” “shows the structure, function and working procedures of and other matters relating to the administrative organ,” and “other information that should be disclosed on the administrative organ’s own initiative according to laws, regulations, and relevant state provisions.”¹⁹⁵ Disclosures should be made “promptly and accurately” based on “the principles of justice, fairness, and convenience to the people.”¹⁹⁶ Such voluntary disclosure, as a general rule, must be done within twenty business days from the date the information is introduced or changed.¹⁹⁷ Government agencies should, moreover, respond to disclosure requests from the public within fifteen to thirty business days upon receipt of such requests.¹⁹⁸

Such disclosure obligations were implemented through detailed action plans. Launched in 2008 under the aegis of the State Council, the Legislative Affairs Office was delegated the authority to maintain the website of the China legislative information network system, to serve as a link to local government legislative affairs offices, and to publish laws, regulations, and departmental rules, as well as drafts which were open for comment.¹⁹⁹ Later, in 2010, the Supreme People’s Court issued the “Provisions of the Supreme People’s Court on Several Issues Concerning the Trial of Administrative Cases of Government Information Disclosure,” offering administrative remedies in cases in which government agencies failed to fulfill disclosure obligations.²⁰⁰ The State Council in 2010 issued “Opinions of the State Council on Strengthening the Building of a Government Ruled by Law.”²⁰¹ Based upon the 2004

¹⁹⁵ *Id.* art. 9.

¹⁹⁶ *Id.* arts. 5, 6, art. 18.

¹⁹⁸ *Id.* art. 24.

¹⁹⁹ Guowuyuan guanyu jigou shezhi de tongzhi (国务院关于机构设置的通知) [Notice of the State Council on the Establishment of Institutions] (compiled by State Council Legislative Office, Jan. 17, 2007, effective Apr. 24, 2008), CLI.2.312128(EN) (Lawinfochina).

²⁰⁰ Zuigao renmin fayuan guanyu shenli zhengfu xinxi gongkai xingzheng anjian ruogan wenti de guiding (最高人民法院关于审理政府信息公开行政案件若干问题的规定) [Provisions of the Supreme People’s Court on Several Issues concerning the Trial of Administrative Cases about Open Government Information] (promulgated by the Supreme People’s Court, July 29, 2011; effective Aug. 13, 2011), CLI.3.156701(EN) (Lawinfochina).

²⁰¹ Guowuyuan guanyu jiaqiang fazhi zhengfu jianshe de yijian (国务院关于加强法治政府建设的意见) [Opinions of the State Council on Strengthening the

Implementation Outline, the Opinions clarified the obligations of regulatory agencies in the rulemaking process. In addition to transparency, central and local administrative agencies were required to undertake “public solicitation of opinions, legality examination, and collective discussions” before issuing any “normative documents” – documents with direct, binding effects on the rights and obligations of citizens, legal persons, or other organizations.²⁰² To improve the quality of legal institutions, governments were to formulate and incorporate “cost-benefit analysis,” “social risk appraisal,” and “post-evaluation of government legislation” mechanisms in the decision-making process in general,²⁰³ while conducting “public hearings,” “expert consultations,” and “risk assessments” for all major policy decisions relating to economic or social development and the direct interests of the people.²⁰⁴ Moreover, the Opinions stressed that public participation must be “broadly representative,” public opinions should be considered,²⁰⁵ and feedback on such opinions and the underlying reasons should be published or addressed in a proper manner.²⁰⁶ All major policymaking processes were contingent upon risk assessments: “scientific surveys” and “comprehensive discussions of all sorts of risks that may be triggered by the policy” would enable governments to “determine risk levels and formulate corresponding reconciliation and management plans.”²⁰⁷

The movement toward administration reforms was reaffirmed by Chinese leaders through the Twelfth Five-Year Plan, issued on March 14, 2011.²⁰⁸ All of the key elements of regulatory coherence – transparency, public participation, risk assessments, and review – were once again underscored. Since then, China has taken two additional steps to perfect the administrative law regime.

Building of a Government Ruled by Law (promulgated by the State Council Legislative Office, Oct. 10, 2010), CLI.2.139971(EN) (Lawinfochina).

²⁰² *Id.* at III. 9.

²⁰³ *Id.* at III. 7.

²⁰⁴ *Id.* at IV. 11–12.

²⁰⁵ *Id.* at IV. 11.

²⁰⁶ *Id.*

²⁰⁷ *Id.* at IV. 12.

²⁰⁸ Guomin Jingji he Shehui Fazhan Di Shier Ge Wunian Guihua Gangyao (国民经济和社会发展第十二个五年规划纲要) [The Twelfth Five-Year Plan for National Economic and Social Development] (promulgated by the Nat'l People's Cong., Mar. 14, 2011, effective Mar. 14, 2011).

With a view toward a “well-off society” and deepened rule-based administration, the State Council in December 2015 repealed the 2010 Opinions by launching a multi-year program, namely, the “Implementation Outline for Building a Government Ruled by Law (2015-2020).”²⁰⁹ This 2015 Outline sought to enhance administrative efficiency by optimizing the structures and functions of regulatory agencies, while solving the problems of inter-agency conflicts and local protectionism. Through strict adherence to the Legislation Law and the key elements mentioned above, the State Council sought to promote a prompt, systemic, problem-solving, and effective legislative regime.

In theory, much of these developments in the contemporary Chinese administrative regime appear to indicate its compatibility with the concept of regulatory coherence. As a matter of practice, however, there are various obstacles due to China’s underlying political economy that may limit the role China can play in the emergence of global regulatory coherence.

4. CHINA’S LONG MARCH TOWARD REGULATORY COHERENCE

While China’s administrative law system appears to—at least nominally—embrace regulatory coherence, whether and how this concept can be translated into practice depends upon the country’s unique context. The political, social, and cultural context for the design and evolution of China’s legal infrastructure is a critical force in the development of regulatory coherence, both in discussion and in practice, in China and beyond. We leave for a later study a critical additional concern—the extra financial and administrative burden on developing countries stemming from regulatory coherence, as well as the risk of regulatory capture by powerful multinational enterprises on an international scale—which may challenge the very emergence of this concept as the global default rule.²¹⁰

²⁰⁹ Fazhi zhengfu jianshe shishi gangyao (法治政府建设实施纲要 (2015-2020)) [Implementation Outline for Building a Government Ruled by Law (2015-2020)] (promulgated by the State Council, Dec. 23, 2015), CLI.5.261778(EN) (Lawinfochina).

²¹⁰ The notion of regulatory coherence—or good regulatory practices—mirrors in a way what has been criticized by Antony Anghie in discussing the use of “good governance” as a means to imperial globalization and recolonization. As

4.1. *The Future of Regulatory Coherence: A Thorny Embrace for China's PTAs?*

Although legal and political reforms over the past few decades have largely transformed the Chinese administrative law regime, the overall pattern of China's PTAs demonstrates its reluctance to fully embrace regulatory coherence. As of this writing, China has concluded PTAs with fourteen trading partners, including Australia, the Association of Southeast Asian Nations (ASEAN), Chile, Costa Rica, Georgia, Hong Kong, Iceland, Macau, New Zealand, Pakistan, Singapore, South Korea, Switzerland, and Peru, while negotiating or updating another eleven PTAs, including the RCEP.

²¹¹

The overall structure of these PTAs reveals a rather complex pattern in China's approach to regulatory coherence. Unlike recent practice in megaregional trade negotiations, none of the above-mentioned Chinese PTAs contains a stand-alone chapter on regulatory coherence. These PTAs, instead, focus intently on regulatory cooperation by establishing a detailed process of interaction between Chinese regulatory agencies and their foreign counterparts through various schemes, such as mutual recognition agreements or arrangements (MRAs), information sharing, and the establishment of oversight bodies. A closer examination of the provisions under these PTAs, however, reveals some threads that link to regulatory coherence. First, some of China's PTAs do refer to "good regulatory practice." The China-Switzerland FTA, for instance, requires both Parties to incorporate good regulatory practice as part of the cooperation mechanism. Article 6.5 reads in relevant

argued by Anghie, good governance may appear to be a neutral concept, but in fact reflects and reproduces a set of principles related to free markets, democracy, and the rule of law created and promoted by the West and further imposed on the rest of the world. See ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* 247-54 (2005). Jane Kelsey specifically argued that preparation of RIA documents and the notice and comment would impose significant budgetary burdens on low-income developing countries, which, due to their limited resources, have other pressing issues to address. See Kelsey, *supra* note 118, at 3.

²¹¹ See generally CHINA FTA NETWORK, <http://fta.mofcom.gov.cn/english/index.shtml> [https://perma.cc/KAC5-6LTU] (last visited Sep. 23, 2017).

part:

With a view to increasing their mutual understanding of their respective systems, enhancing capacity building and facilitating bilateral trade, the Parties shall strengthen their technical cooperation in the following areas: . . .

(b) communication between each other's competent authorities, exchange of information in respect of technical regulations, standards, conformity assessment procedures and good regulatory practice.²¹²

Similar provisions can be found in China's PTAs vis-à-vis Australia,²¹³ New Zealand,²¹⁴ Iceland,²¹⁵ and Costa Rica.²¹⁶ Such provisions lead to two immediate observations. First, while these provisions appear to link good regulatory practice to the context of technical barriers to trade, nowhere in these PTAs is the term "good regulatory practice" defined. The only exception is Article 72.3 of the China-Costa Rica FTA, which provides that "the Parties recognize the importance of applying good regulatory practice under the TBT Agreement, taking into consideration the decisions and recommendations adopted by the WTO Committee on Technical Barriers to Trade . . ." ²¹⁷ Through the incorporation of the TBT Committee Decision, the notion of good regulatory practice should be read, at least in the context of the China-Costa Rica FTA, to include, among other items, transparency and public consultation schemes, regulatory impact assessment, approaches to minimize burdens on economic operators, review mechanisms for existing technical regulations and conformity assessment, and consideration of special development, financial, and trade needs of developing countries.²¹⁸ Viewed in this light, good regulatory

²¹² Free Trade Agreement, China-Switz., July 6, 2013, art. 6.5 [hereinafter China-Switzerland FTA].

²¹³ Free Trade Agreement, China-Austl., June 17, 2015, art. 6.11 [hereinafter China-Australia FTA].

²¹⁴ Free Trade Agreement, China-N.Z., Apr. 7, 2008, art. 96 [hereinafter China-New Zealand FTA].

²¹⁵ Free Trade Agreement, China-Ice., Apr. 15, 2013, art. 20 [hereinafter China-Iceland FTA].

²¹⁶ Free Trade Agreement, China-Costa Rica, Apr. 8, 2010, art. 72 [hereinafter China-Costa Rica FTA].

²¹⁷ *Id.* art. 72.3.

²¹⁸ See WTO Committee on Technical Barriers to Trade, *Decisions and Recommendations Adopted by the WTO Committee on Technical Barriers to Trade Since 1 Jan-*

practice reflects much of what is required by regulatory coherence. Nevertheless, China's obligation toward regulatory coherence is softened by the proviso that the Parties recognize. Second, while regulatory coherence by nature represents a set of overarching principles guiding a domestic regulatory process, China limits the scope of good regulatory practice exclusively to the TBT context. This practice is contrary to the arrangements in TPP and the proposed negotiation text of TTIP.

Thus, it appears that China has been inclined to dilute the importance of regulatory coherence, either by keeping the language vague or the scope of application narrow. In our opinion, such a practice reflects the Chinese government's view of its legal and political institutions – despite extensive reform – as below the desired conditions to assume full commitments with respect to regulatory coherence. This raises an immediate question: what hurdle, if any, lies ahead of China's march towards regulatory coherence? This question may implicate not only the manner in which China addresses regulatory coherence in its current PTAs, but also the way it negotiates relevant terms in the RCEP as well as OBOR settings and beyond.

4.2. Panda in the Room: Coping with the Democratic Ramifications of Regulatory Coherence

Regulatory coherence is, in essence, a multifaceted concept that may go beyond regulatory modernization by touching upon politically sensitive issues like government accountability, democratic control, and the rule of law. Whether and the extent to which China will implement all of these elements has direct bearing on the future of global regulatory coherence and merits further exploration. We argue that China has embraced some sort of experimental approach by implementing a “thin” regulatory coherence and remains ambivalent and cautious towards a “thicker” version of regulatory coherence.²¹⁹ As analyzed below, we argue that the gap be-

uary 1995, WTO Doc. G/TBT/1/Rev.13 (adopted Mar. 8, 2017).

²¹⁹ Here we build upon the “thin rule of law” and “thick rule of law” conceptual framework advanced by Randall Peerenboom in addressing China's legal reform. According to Peerenboom's theory, the thin version understands rule of law in instrumental terms, addressing the formal aspects of a government system, regardless of political underpinnings (e.g., democratic or non-democratic, capital-

tween laws on the books and laws in action appears significant in terms of the core elements of regulatory coherence.

First, numerous aspects of China's policymaking remain complex and opaque, which leaves further room for administrative discretion and corruption.²²⁰ Despite the progress in transparency, government information disclosure is subject to certain qualifications. Administrative agencies, for instance, should disclose information that "involves the vital interests of citizens, legal persons or other organizations," "needs to be extensively known or participated in by the general public," and "shows the structure, function and working procedures of and other matters relating to the administrative organs."²²¹ Further, this information "should [be] disclose[d] on . . . [the administrative organ's] own initiative" according to laws, regulations and relevant state provisions.²²² Moreover, agencies are required to review whether such disclosure is consistent with the Law of the People's Republic of China on Safeguarding State Secrets²²³ and take into account "state security, public security, economic security, and social stability."²²⁴ Thus, these provisions create room for discretion, which in turn undermines the transparency requirement. As an illustration, China's environmental protection agencies at the central and local levels have been repeatedly attacked for labeling environmental data as a "national secrets" issue and refusing relevant disclosure.²²⁵

Similarly, while the public consultation function is designed as a means of rationalizing the administrative rulemaking process, its

ism, or socialism). The thick version, by contrast, is concerned about legitimizing regulatory acts by incorporating adequate substantive elements into a law. See generally RANDALL PEERENBOOM, CHINA'S LONG MARCH TO RULE OF LAW 4-6 (2002).

²²⁰ See Trade Policy Review Body, *Trade Policy Review Report by the Secretariat – China Revision*, at 11, WT/TPR/S/264/Rev.1 (July 20, 2012).

²²¹ See Regulation on the Disclosure of Government Information, *supra* note 193, at art. 9.

²²² *Id.*

²²³ *Id.* at art. 14.

²²⁴ *Id.* at art. 8.

²²⁵ See Robert V. Percival & Zhao Huiyu, *The Role of Civil Society in Environmental Governance in the United States and China*, 24 DUKE ENVTL. L. & POL'Y F. 141, 179-80 (2013) (comparing government information disclosure of China and the U.S.); see also *Xin huanbao fa xiaoguo pinggu: Xinxi gongkai reng bu lixiang* (新环保法效果评估: 信息公开仍不理想) [An Evaluation of New Environmental Law: Information Disclosure is Far From Ideal], <http://www.ogichina.org/article/125/28624.html> [https://perma.cc/8EW6-CV3Q] (last visited: May 8, 2017).

function could be undermined by the manner in which drafting bodies interpret and carry out such a mandate in practice. In practice, public participation in the rulemaking processes in China remains relatively underdeveloped, with the primary objective being to inform the public rather than to solicit opinions for improving rulemaking.²²⁶ As a matter of interpretation, although the Legislation Law and its implementing regulations include the stage of notice and comment in the rulemaking process, these provisions can arguably be interpreted as “voluntary,” leaving discretion to the drafting agencies.²²⁷ Even when administrative bodies are willing to include notice and comment as part of their rulemaking practice, capacity building and financial burden appear to be critical challenges. According to Paler, “Hearing organizers have grappled with how to balance between witnesses and audience members, to ascertain when to hold a hearing and on what project, to reach results after official debate, and to generate interest in the face of public apathy.”²²⁸ Thus, frustration over procedural irregularities remains. Additionally, because hearing costs are greater than expert consultation, the source of funds and other compensation issues further complicate the matter.²²⁹ Another complication is the participation in public hearings. To some extent, the effectiveness of public consultation rests upon input from industry groups and civil society. Regarding the former, while general observation reveals that industry associations as a whole have become more influential in shaping China’s public policies through various routes,²³⁰ there are still constraints on the autonomy of these indus-

²²⁶ See Trade Policy Review Body, *supra* note 220, at 13.

²²⁷ Liu Xiao-mei (刘小妹), *Gongzhong Canyu Xingzheng Lifa De Lilun Sikao* (公众参与行政立法的理论思考) [On Public Participation in Administrative Legislation], *Xingzheng Faxue Yanjiu* (行政法学研究2007年第2期第45页) [2 ADMIN. L. REV. 40, 45 (2007)].

²²⁸ See Paler, *supra* note 165, at 317. An interesting development, as Horley pointed out, is that both central and local governments have tapped into new technologies by conducting notice and comment via the Internet. In a way, this can reduce the administrative and financial burdens of holding public hearings. See Jamie P. Horsley, *Public Participation in the People’s Republic: Developing a More Participatory Governance Model in China*, in *THE SEARCH FOR DELIBERATIVE DEMOCRACY IN CHINA* 289, 299 (2010).

²²⁹ *Id.*

²³⁰ See Guosheng Deng & Scott Kennedy, *Big Business and Industry Association Lobbying in China: The Paradox of Contrasting Styles*, 63 *CHINA J.* 101, 113 (2010) (illustrating the effects of industry associations on public policy in China).

try groups.²³¹ According to Stephanie Weil, even when industry groups in certain areas, e.g., the software industry, enjoy greater room to act on behalf of their members, their autonomy is nevertheless limited “as the government forbids absolute freedom in interest articulation.”²³² These obstacles to independence can arguably undermine the role of industry stakeholders in the public consultation process. Similarly, despite the growing number of non-governmental organizations (NGOs) over the past few decades²³³ and their increasingly crucial role in certain areas such as the environment, education, public health, and care of the disadvantaged,²³⁴ the development of NGOs in China is still in a nascent stage in terms of scale and capacity when compared to its Western counterparts.²³⁵ Given the political climate, generally NGOs operate in a repressed setting, with many of their activities falling under the oversight of the government.²³⁶ In 2016, China passed the Law on the Management of Foreign NGOs, tightening its control over the conduct of overseas NGOs²³⁷ and rendering it problematic for international NGOs to gain a foothold in the nation. The overall atmosphere may generate these chilling effects, thereby inhibiting NGOs from actively participating in public consultation.²³⁸

²³¹ See SCOTT KENNEDY, *THE BUSINESS OF LOBBYING IN CHINA* (2005) (discussing the influence of industry groups in the Chinese government’s decision-making process).

²³² STEFANIE WEIL, *LOBBYING AND FOREIGN INTERESTS IN CHINESE POLITICS* 77 (2017); see also *id.* at 45.

²³³ See generally, ANDREAS EDELE, *NON-GOVERNMENTAL ORGANIZATIONS IN CHINA* (2005).

²³⁴ See Kerry Brown, *China’s Challenges: Civil Society*, *THE DIPLOMAT* (Feb. 14, 2001), <http://thediplomat.com/2011/02/civil-society/> [<https://perma.cc/DD2Y-8QVA>] (describing NGOs’ roles in Chinese society).

²³⁵ See generally Shawn Shieh (谢世宏) & Amanda Brown-Inz (毕彦如), *Zhongguo Gongyi NGO Gailan* (中国公益 NGO 概览) [*China Public Welfare NGO Overview*], *ZHONGGUO FAZHAN JIANBAO* (中国发展简报 [CHINA DEV. BRIEF] (Jan. 14, 2013), <http://www.chinadevelopmentbrief.org.cn/upload/userfiles/files/NGO%20Directory-3-26.pdf>. [<https://perma.cc/J2DR-853Q>].

²³⁶ See Michael M. Gunter, Jr. & Ariane C. Rosen, *Two-Level Games of International Environmental NGOs in China*, 3 *WM. & MARY POL’Y REV.* 270 (2012) (analyzing the role of international environmental NGOs within China).

²³⁷ *Jingwai fei zhengfu zuzhi jingnei huodong guanli fa* (境外非政府组织管理办法) [Law on the Administration of Activities of Overseas Non-Governmental Organizations within the Territory of China] (promulgated by the Standing Comm. National People’s Cong., Apr. 28, 2016, effective Jan. 1, 2017).

²³⁸ See, e.g., Minxin Pei, *China’s Repression of Civil Society Will Haunt It*, *FINANCIAL TIMES* (Aug 5, 2008), <https://www.ft.com/content/46316820-6232->

Second, while there have been endeavors to manage the myriad conflicts that may jeopardize China's legal system by reducing the number of ministries²³⁹ and strengthening the rulemaking power of the National People's Congress against the State Council and local governments,²⁴⁰ interagency coordination remains a significant hurdle. In the area of energy policy, for instance, the decision-making paradigm is rather fragmented, with "over a dozen powerful players at the national level."²⁴¹ One of the most notable examples is the food safety governance system, where some fourteen agencies were involved in regulatory activities as of early 2013,²⁴² a situation that was acknowledged as a crucial problem by the State Council's Food Safety Supervision System Plan for 2012–2017.²⁴³ Such a fragmented regulatory environment poses great challenges to interagency coordination, creates blind areas for which agencies deny responsibility, and perpetuates loopholes in routine control.²⁴⁴ Although the 2009 Food Safety Law and the 2015 Amendment attempted to address interagency coordination deficits at various levels, the current state of affairs—multiple agencies merely organized in a loosely coordinated system with

11dd-9ff9-000077b07658 [https://perma.cc/CBD6-QN6L] (arguing that despite the explosion of the NGOs in China, "perhaps about 10 per cent of them can be considered genuine NGOs in the western sense.").

²³⁹ See Peerenboom, *Administrative Law Reform and Rule of Law in the PRC*, *supra* note 120, at 207 (noting reduction of number of ministries as possible solution to some conflicts in China's legal system).

²⁴⁰ See Paler, *supra* note 165, at 318 (describing attempts to solve challenges in China's legal system through increasing the power of the National People's Congress).

²⁴¹ CHEN GANG, *CHINA'S CLIMATE POLICY* 33 (1st ed. 2012).

²⁴² Yongning Wu & Yan Chen, *Food Safety in China*, 67 J. EPIDEMIOLOGY & COMMUNITY HEALTH 478, 478–79 (2013).

²⁴³ See M. Melinda Meador & Jie Ma, *The Food Safety Management System in China*, USDA FOREIGN AGRICULTURAL SERV., (2013) http://gain.fas.usda.gov/Recent%20GAIN%20Publications/The%20Food%20Safety%20Management%20System%20in%20Beijing_China%20-%20Peoples%20Republic%20of_4-26-2013.pdf [https://perma.cc/5EYV-5TR9] (providing overview of China's food governance system).

²⁴⁴ See Ching-Fu Lin, *Outsource Power, Import Safety? Challenges and Opportunities of the U.S.-China Food Safety Regulatory Cooperation*, 72(1) FOOD & DRUG L. J. 32, 41–42 (2017) (illustrating challenges of China's food governance system); see also NEIL COLLINS & JÖRN-CARSTEN GOTTWALD, *THE CHINESE MODEL OF THE REGULATORY STATE, HANDBOOK ON THE POLITICS OF REGULATION* (David Levi-Faur ed., 2011) (providing overview and challenges of China's food governance system); see generally FRANCIS SNYDER, *FOOD SAFETY LAW IN CHINA: MAKING TRANSNATIONAL LAW* 108–79 (2015).

overlapping competences, regulating different sections of the entire food supply chain—remains a challenge.²⁴⁵

Third, effective implementation of regulatory coherence is contingent upon a well-functioning and independent judiciary, which serves to review administrative actions, enforce the law, and provide appropriate remedies. The problem of law enforcement is very serious indeed, and the gap between written and enforced rules remains significant.²⁴⁶ The court does not have formal authority to review, let alone revoke, legislation or regulations; rather, it can merely engage in a limited and indirect form of “judicial review” when the judge applies and interprets relevant legislation and/or regulations in individual cases.²⁴⁷ Additionally, neither the Administrative Litigation Law nor the Administrative Reconsideration Law grants citizens the right to bring a case before the court to challenge certain administrative actions.²⁴⁸ To our knowledge, there has not been a case in which a court actually reviewed legislation or a regulation and revoked it based on the criteria of regulatory coherence, such as the lack of a duly performed RIA, transparency, or public consultation. However, it should be noted that at the administrative level, the State Council has in place a “filing and review system” that establishes detailed procedures for active monitoring and coordination of regulations and rules so as to resolve conflicts between them.²⁴⁹ Given the vast amount of

²⁴⁵ See Lin, *supra* note 244.

²⁴⁶ See Xin Chunying, *What Kind of Judicial Power Does China Need?* 1 INT’L J. CONST. L. 58, 61 (2003) (discussing the failures of China’s judicial system); see also MICHAEL A. SANTORO, CHINA 2020: HOW WESTERN BUSINESS CAN—AND SHOULD—INFLUENCE SOCIAL AND POLITICAL CHANGE IN THE COMING DECADE 54 (2009) (discussing western business’ role in improving the efficacy of China’s judicial system).

²⁴⁷ See generally Hand, *supra* note 173.

²⁴⁸ See generally ADMINISTRATIVE LAW AND ADMINISTRATIVE LITIGATION LAW 170–73 (Mingan Jiang ed., 6th ed., 2015).

²⁴⁹ The State Council established a separate filing and review system. The State Council mandated the reporting of rules in 1987, but it did not establish detailed procedures for review work until it issued the Provisions on Filing of Regulations and Rules in 1990 (“1990 Filing Provisions”). The 1990 Filing Provisions set out the scope of local regulations and rules to be reported, established the State Council Legislative Affairs Bureau as the principal office responsible for filing and review work, and set out procedures and standards for reporting and review. See Fagui Guizhang Bei’an Guiding (法规规章备案规定) [Provisions on the Filing of Regulations and Rules] (promulgated by St. Council, Feb. 18, 1990, effective Feb. 18, 1990); see also Hand, *supra* note 173, at 162–63 (describing the 1990 Filing Provisions).

local regulations, autonomous regulations, and rules filed, the State Council—without rigorous external scrutiny and pressure—has not delivered effective review and coordination, especially when it has suffered from serious “capacity problems.”²⁵⁰ On the other hand, the State Council may, upon request submitted by a provincial, autonomous region and municipal governments, approve the request and consider major issues concerning the application and interpretation of legislation as well as administrative regulations and rules.²⁵¹ In addition, governmental organizations, companies, civil society groups, and individuals may submit a “proposal” (rather than a “challenge”) to the State Council or responsible authorities in provincial and autonomous regional governments in cases in which the rules at issue may conflict with statutes or the Constitution.²⁵² Nevertheless, the central review mechanism has only responded to these proposals in extremely rare instances.²⁵³ In any event, such review work has not been conducted in a systematic manner,²⁵⁴ and its effectiveness relies solely upon the discretion of

²⁵⁰ The NPCSC and State Council did not have the organizational capacity to review the flood of legislation that lower-level organs filed annually, much less discipline organs that failed to report legislation or resolve difficult conflicts under the existing framework. The State Council office responsible for filing and review had only twenty staff members and was forced to abandon active review of all filed legislation. Instead, it decided to review legislation only when other state organs or citizens complained about conflicts. See Hand, *supra* note 173, at 163; see also Perry Keller, *Sources of Order in Chinese Law*, 42 AM. J. COMP. L. 711, 718 (1994) (discussing the NPCSC); Yahong Li, *The Law-making Law: A Solution to the Problems of the Chinese Legislative System?* 30 H.K. L. J. 120, 124–25 (2000) (arguing that the core issue of law-making in China is how to divide legislative power between the center and the states).

²⁵¹ See Regulations on Procedures for the Formulation of Administrative Regulations, *supra* note 151, art. 33.

²⁵² See Legislation Law, *supra* note 144, art. 90; Regulations on Procedures for the Formulation of Rules, *supra* note 152, art. 35.

²⁵³ Some scholars have highlighted the 2003 Zhigang Sun incident as a landmark case where the State Council has responded to the proposal. See generally Zhang Qianfan & Huang Yue, *From Constitution to Constitutionalism: the History, Status Quo, and Future of the Constitutional Review in Mainland China*, in 2006 Liangan Si Di Falv Fazhan-Shangce (2006兩岸四地法律發展-上冊) [LEGAL DEVELOPMENT IN MAINLAND CHINA, HONG KONG, MACAU, AND TAIWAN IN 2006, Te-chung Tang & Peng-Hsiang Wang eds., 2006], Vol. 1, at 45. But see Hand, *supra* note 173, at 142. As Hand observed in 2013, the central review mechanism has never responded to these proposals.

²⁵⁴ See Jue Huang, *Explanations on the Proposed Legislation Law of the People's Republic of China*, in CONSTITUTIONALISM AND CHINA 225–26 (Buyun Li et al, 2006) (discussing sporadic review of conflict proposals by the State Council and provincial and regional authorities).

the supervising authority and, ultimately, the will of the Party.

5. CONCLUSION

The last few decades have witnessed many initiatives across various domestic and international institutions in response to mushrooming regulatory-based trade barriers. Among the efforts to balance regulatory autonomy and international cooperation, regulatory coherence appears fairly promising according to a bottom-up rationalization of the domestic regulatory environment. Led by the United States, recent megaregional agreements have incorporated some core elements of regulatory coherence, further expanding its normative diffusion as a new global norm. Yet the global entrenchment of regulatory coherence is, in our view, contingent upon the capacity and the inclination of emerging economies, most notably, China. While China's decades-long institutional reforms have reshaped its legal infrastructure in a manner that is formalistically aligned with good regulatory practices, its PTAs highlight a lack of political will to assume a full commitment beyond its domestic reign. Because this experimental approach reflects China's dependence on trial-and-error in other areas, the fundamental challenge rests upon the rule of law, democratic accountability, and political reforms, which may perpetuate rather than alleviate obstacles to China's future advancement toward global regulatory coherence.