8-2018

Regulatory rationalisation clauses in FTAs: A complete survey of the US, EU, and China

Ching-Fu LIN

Han-wei LIU
Singapore Management University, hanweiliu@smu.edu.sg

REGULATORY RATIONALISATION CLAUSES IN FTAS: A COMPLETE SURVEY OF THE US, EU AND CHINA

CHING-FU LIN* AND HAN-WEI LIU†

Mechanisms on regulatory coherence or good regulatory practices have emerged as one of the unique features of preferential trade agreements (PTAs) in the age of mega-regionalism. Led by the United States, for instance, the Trans-Pacific Partnership *('*TPP*'), now known as the* Comprehensive and Progressive Agreement for Trans-Pacific Partnership *('*CPTPP*') introduces a standalone chapter that focuses on the domestic rule-making process. Such design is unique for it goes beyond traditional output-oriented proxies by including a set of input-oriented elements that apply to the rulemaking process of each party, before a regulatory action is taken. These elements, like transparency, public consultation, regulatory impact assessment, inter-agency coordination and review, are in large part modelled on the American* Administrative Procedure Act *('*APA*') and several executive orders with a view to 'rationalising' the administrative lawmaking process and to responding to the concerns about a regulatory state. For years, the US has been exporting this* APA*-style regulatory philosophy elsewhere: from the Organisation of Economic Co-operation and Development ('OECD') and the Asia-Pacific Economic Cooperation ('APEC') to trade negotiations to which it is a party, including the above-mentioned* TPP *and the* Transatlantic Trade and Investment Partnership *('*TTIP*'). Notwithstanding these efforts, however, there are hurdles for regulatory coherence to be further diffused as a new global norm since it goes beyond trade to involve complicated economic, social and political endowments of different trading partners. The role of another two major players, namely China and the European Union, is hence of particular significance in this context. This article seeks to sketch out the contour of the emerging regulatory coherence by mapping the trajectory of its historical development and offering a comprehensive survey of how China, European Union, and the United States have managed it across different contexts.*

CONTENTS

* Associate Professor of Law, National Tsing Hua University. SJD/LLM (Harvard); LLB/BS (National Taiwan University). The author can be reached at chingfulin@mx.nthu.edu.tw.

† Lecturer, Monash University. PhD (Graduate Institute, Geneva); MJur (Oxford); LLM (Columbia); LLB/LLM (National Chengchi University). The author can be reached at hanwei.liu@monash.edu. An earlier draft of this article was presented at the Workshop on 'The New Plurilateralism: The Emerging Standard for Global Economic Governance?' held by Warwick Law School and Monash Law School, September 14–15, 2017. We are very grateful to Professors Markus Wenger (Warwick), Gabrielle Marceau (World Trade Organization/University of Geneva), Chien-Huei Wu (Academic Sinica) and Heng Wang (UNSW), as well as two anonymous reviewers for their valuable comments. Thanks also go to Enid Yu, Allen Hsieh and Jung-Min Chang at the National Tsing Hua University for research assistance, and to the Editors of the *Melbourne Journal of International Law*. Usual disclaimers apply. All translations are by the authors, except where otherwise indicated.

I INTRODUCTION

The ramifications of regulatory diversities for trade and investment have in the past decades prompted policymakers and scholars to reconfigure international economic law to facilitate international cooperation among regulatory agencies via several plurilateral initiatives. Among these, the rise of regulatory coherence —one that originated in United States administrative law and then further evolved in the Organisation for Economic Co-operation and Development ('OECD') and the Asia-Pacific Economic Cooperation ('APEC') — has been of significance in recent mega-regional trade negotiations, such as the *Trans-Pacific Partnership Agreement* ('*TPP*'), recently renamed and revised as the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* ('*CPTPP*'),[1] the *Transatlantic Trade and Investment Partnership* ('*TTIP*')[2] and the *Comprehensive Economic and Trade Agreement* ('*CETA*'),[3] as well as for the future development of a multilateral trading system.

Regulatory coherence has emerged as a promising mechanism for addressing the heterogeneous approaches to rule-making by rationalising the domestic regulatory environment. The accumulated network effect of these mega-regional initiatives arguably marks the starting point of a new trajectory that is poised not only to eclipse the existing international economic order, but simultaneously build a new normative infrastructure. Although the World Trade Organization already employs a myriad of proxies to address non-tariff barriers ('NTBs'), by focusing more on 'regulatory outputs', such an approach has merely scratched the surface of the problem.[4] In contrast, regulatory coherence directs much of its attention to 'regulatory inputs' instead. By employing a set of benchmarks, such as notice and comment, public consultation, cost–benefit analysis, inter-agency

---

[1] *Trans-Pacific Partnership Agreement*, signed 4 February 2016, [2016] ATNIF 2 (not yet in force) ('*TPP*'). On November 11, 2017, the 11 remaining *TPP* parties launched a *TPP*-replacement deal after the US' exit, the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, signed 8 March 2018, [2018] ATNIA 1 (not yet in force) ('*CPTPP*'). While the *CPTPP* has suspended 20 original *TPP* provisions, the chapter on regulatory coherence remains intact and therefore will not affect our analysis. Depending upon the context, this paper uses the terms *TPP* and *CPTPP* interchangeably. For a background, see, eg, New Zealand Ministry of Foreign Affairs & Trade, CPTPP *vs* TPP <https://www.mfat.govt.nz/en/trade/free-trade-agreements/agreements-under-negotiation/*CPTPP*-2/tpp-and-*CPTPP*-the-differences-explained/>.

[2] Office of the Press Secretary, The White House, 'Remarks by President Obama, UK Prime Minister Cameron, European Commission President Barroso, and European Council President Van Rompuy on the *Transatlantic Trade and Investment Partnership*' (Media Release, 17 June 2013) <https://www.whitehouse.gov/the-press-office/2013/06/17/remarks-president-obama-uk-prime-minister-cameron-european-commission-pr>.

[3] *Comprehensive Economic and Trade Agreement*, Canada–European Union, signed 30 October 2016, 60 *Official Journal of the European Union* 1080 (provisionally entered into force 21 September 2017) ('*CETA*').

[4] The existing WTO framework does, however, maintain certain procedural mechanisms that would arguably make domestic regulations better. Prime examples include science-based measures and the discussions of 'good regulatory practices' for domestic regulation under the aegis of the Committee on Technical Trade Barriers ('TBT Committee'): *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A ('*Agreement on the Application of Sanitary and Phytosanitary Measures*') ('*SPS Agreement*'); Simon Lester and Inu Manak, 'Addressing Regulatory Trade Barriers in Mega-Regional Trade Agreements' in Thilo Rensmann (ed), *Mega-Regional Trade* (Springer International Publishing, 2017) 337, 347–8. See also discussions in Part II(B).

coordination and regulatory impact assessment, this regulatory coherence seeks to ensure rationality, democratic accountability and the rule of law in the domestic rule-making process. In return, regulatory coherence promises to reduce the adverse effects of domestic regulations on international trade without overly interfering with the right of individual states to regulate. Yet, as promising as global regulatory coherence appears to be, it has attracted controversy for some potential adverse impacts — say, arguably, undercutting a government's policy space (or regulatory autonomy, however that may be perceived) as well as for its impacts on existing multilateral and bilateral agreements (and vice versa). This controversy explains to some degree why, despite the broad general acknowledgment of regulatory coherence, major trading powers like the US, the European Union and China seem to embrace this notion in a somewhat different manner. Their varied approaches would, in turn, implicate whether and the extent to which the notion of regulatory coherence will be incorporated as part of the normative infrastructure of the future global trading system.

Against this backdrop, this paper focuses on three lines of inter-related research inquiry. First, by tracing its origins and trajectory, Part II seeks to unpack the self-interests underlying America's efforts to push regulatory coherence forward through various avenues, including initiatives in the context of mega-regionalism. These contexts can help identify major hurdles for trade negotiators to address so as to set regulatory coherence as the new global norm in the future. Part III, then, examines how the three major trading powers (ie the US, the EU and China) address this issue in both bilateral and plurilateral settings. The analytical result offered here on the interactions between these major players underscores the varying institutional designs in mega-regional agreements, thereby shedding light on the emerging contour and direction of global regulatory coherence. The paper concludes in Part IV by assessing the overall implications of regulatory coherence and the challenges ahead.

II THE RISE OF REGULATORY COHERENCE IN INTERNATIONAL ECONOMIC LAW

There has been an increasing demand for greater regulatory coherence in trade and investment agreements at bilateral, plurilateral and multilateral levels, which has resulted in the inclusion of additional rights and obligations.[5] These regulatory coherence norms have emerged in the context of the shift from traditional, easily recognisable barriers like tariffs and quotas to domestic, 'behind-the-border' measures that constitute non-tariff barriers to trade.[6] The WTO has been fruitful in coping with discriminatory measures while falling short in addressing duplicative, non-transparent or inefficient (yet non-

---

[5] See Elizabeth Sheargold and Andrew D Mitchell, 'The *TPP* and Good Regulatory Practices: An Opportunity for Regulatory Coherence to Promote Regulatory Autonomy?' (2016) 15 *World Trade Review* 587.

[6] See generally Robert E Hudec, *The* GATT *Legal System and World Trade Diplomacy* (Butterworth Legal Publishers, 2nd ed, 1990) 232; Robert Howse, 'From Politics to Technocracy — And Back Again: The Fact of the Multilateral Trade Regime' (2002) 96 *American Journal of International Law* 94, 101; Alan O Sykes, 'The (Limited) Role of Regulatory Harmonization in International Goods and Services Markets' (1999) 2 *Journal of International Economic Law* 49.

discriminatory) regulations that create obstacles to trade in goods and services.[7] While regulatory coherence has been regarded in the sphere of international economic law and governance as a means to combat the abovementioned barriers and forge deeper economic integration, the roots of regulatory coherence are found in a domestic — or, more precisely, American[8] — setting closely related to democratic accountability and the rule of law.

The philosophy that has governed American administrative law has led the US regulatory coherence and rationality requirements to include, among others, transparency and public consultation, regulatory impact analysis, inter-agency coordination and compatibility and judicial or administrative review. While the term regulatory coherence does not readily denote all the above elements — which go beyond the narrow understanding of coherent forms and procedures for

---

[7] See Robert W Staiger and Alan O Sykes, 'International Trade and Domestic Regulation' (Working Paper No 15541, National Bureau of Economic Research, November 2009) 43.

[8] Regulatory coherence contemporary genesis can be traced back to the United States' *Administrative Procedure Act*, 5 USC (1946) ('*APA*'). The *APA* established the legal infrastructure of the 'administrative state' in the US and the fundamental principles and procedures for the nature and enforcement of administrative law in that country. Historically, the *APA* was involved in a politically contentious, post-New Deal context wherein Congress became concerned about the expanding powers of the new deferral agencies that President Franklin D Roosevelt created in 1933. Enacting the *APA* allowed Congress to strike a legislative balance when disciplining, standardising and overseeing these federal agencies. This balance evolved as a result of the courts' application and interpretation of the *Act*, Congress's adoption of subsequent laws concerning relevant issues and the management and practical use of the *APA* via presidential executive orders. For a comprehensive discussion of the development of the 'administrative state' in the US, see generally Robert L Rabin, 'Federal Regulation in Historical Perspective' (1986) 38 *Stanford Law Review* 1189; Peter L Strauss et al, *Gellhorn and Byse's Administrative Law: Cases and Comments* (Foundation Press, 11th ed, 2011); Steven P Croley, 'Theories of Regulation: Incorporating the Administrative Process' (1998) 98 *Columbia Law Review* 1; Elena Kagan, 'Presidential Administration' (2001) 114 *Harvard Law Review* 2245. See also George B Shepard, 'Fierce Compromise: The *Administrative Procedure Act* Emerges from New Deal Politics' (1996) 90 *Northwestern University Law Review* 1557; Daniel E Hall, *Administrative Law: Bureaucracy in a Democracy* (Pearson 5th ed, 2011) 2; Committee on the Judiciary, 'Administrative Procedure Act' (House Report No 1980, House of Representatives, 1946); Organisation for Economic Co-operation and Development, *Public Notice and Comment Rulemaking (United States)* (2016) <https://www.oecd.org/gov/regulatory-policy/USA-Public-Notice-and-Comment.pdf>.
Some remarks are warranted here. First, the *APA*-style regulatory model does not necessarily fit into other jurisdictions because of different constitutional traditions and legal infrastructures. In Australia, for instance, the delegated legislation has been subject to parliamentary control under the Westminster tradition. It was not until the late 1980s that Victoria began to introduce public consultation and other elements akin to the *APA*. Other states and the Commonwealth followed suit by adopting similar initiatives. Internally, this movement was driven by, among other factors, the expansion of the secondary legislation and the demand of a new framework to rationalise the exercise of regulatory power amid the overall trend of neoliberalism and deregulation. See Margaret Allars, 'Transparency and Rule-Making in Australia' (2016) 3 *International Journal of Open Government* 179. Externally, continuous dialogues and peer reviews through the trans-governmental networks in the Organisation for Economic Co-operation and Development ('OECD') and Asia-Pacific Economic Cooperation ('APEC') aided the notion of good regulatory practices to further penetrate Australia (and other countries). Thus, while we argue that the US has been promoting the notion of regulatory coherence from an international trade law perspective, we do share the view that various reforms in developed countries predated what the *TPP* has done. Many of these initiatives and debates has been well documented and theorised by Professors Ian Ayers and John Braithwaite in their seminal work on 'responsive regulation'. See Ian Ayers and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992).

regulatory actions as such (so indeed, it may look like a misnomer in this sense) — it has subsequently been used by the US and other jurisdictions to label, market and cover those elements in the arena of international trade relations. In any case, these elements, altogether, constitute the building blocks of the contemporary concept of regulatory coherence for global economic governance.

A *Key Elements of Regulatory Coherence*

The first element of regulatory coherence is transparency and public consultation, as evidenced in US administrative law and mirrored in the new legal terrain linked back to that government's expanding role in discrete and limited regulatory measures during the New Deal era.[9] The aim of the transparency and public consultation requirement is to inform all stakeholders of the purpose and background of the rule; offer sufficient participation; and hence facilitate informed, rational and coherent administrative measures.[10] The demand for transparency reflects the common law legacy in the US, the American Revolution's historical causes against abuse of power and the checks and balances as created in the *United States Constitution*.[11]

The second element of regulatory coherence centres on the concept of regulatory impact analysis ('RIA'). As early as 1978, President Jimmy Carter issued *Executive Order 12044*, which required regulations to follow a basic form of economic analysis, and set up the Regulatory Analysis Review Group to facilitate inter-agency oversight.[12] Subsequently, President Ronald Reagan issued in 1981 *Executive Order 12291* to promote RIA, according to which agencies have accepted as an integral part of 'good regulatory practices'[13] so as 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.[14]

---

9 Sylvia Ostry, 'China and the WTO: The Transparency Issue' (1998) 3 *UCLA Journal of International Law & Foreign Affairs* 1, 2. With few exceptions, the *APA* allows two procedural venues for creating regulations: An on the record, trial-like approach that is rarely utilised these days and a less formal, commonly used 'notice and comment rule-making' process (the precise/specific rulemaking process to which scholars and practitioners conventionally refer). Both procedures stress the transparency requirement, but the latter features a structured set of general obligations for to public consultation: *APA*, §§ 553, 556–7. The Supreme Court ensured the marginalisation of a formal, trial-like, rulemaking process in 1972: *United States v Florida East Coast Railway Co*, 410 US 224 (1973). See Robert W Hamilton, 'Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking' (1972) 60 *California Law Review* 1276, 1312–13.

10 See Alan B Morrison, 'The *Administrative Procedure Act*: A Living and Responsive Law' (1986) 72 *Virginia Law Review* 253, 255–8.

11 See Ostry, above n 9, 4–5.

12 *Executive Order No 12044*, 43 Fed Reg 12661 (23 March 1978).

13 See the discussion above in Part II(B).

14 *Executive Order No 12291*, 46 Fed Reg 13193 (17 February 1981) ('*Executive Order No 12291*'). See 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' (1994) 57 *Law and Contemporary Problems* 167.

As per the *Executive Order 12291*, moreover, 'regulatory action shall not be undertaken unless the potential benefits to society from the regulation outweigh the potential costs to society'.[15] Incorporating RIA (particularly, its cost–benefit analysis) to the rulemaking process and to broader public policymaking echoed the demands for democratic accountability.

The third element is inter-agency coordination and compatibility. In 1993, President Bill Clinton replaced *Executive Order 12291* with *Executive Order 12866* on 'Regulatory Planning and Review',[16] thereby expanding the scope of regulatory coherence. This order was, at heart, to 'enhance planning and coordination with respect to both new and existing regulations' and 'restore the integrity and legitimacy of regulatory review and oversight'.[17] Consequently, it not only strengthened the role of RIA as required during the Reagan era,[18] but also underscored the significance of coordination and compatibility across federal agencies. Such regulatory principles serve to reduce inconsistency, incompatibility or duplication of the various regulations adopted at the federal level.[19] Inter-agency coordination and compatibility stress the coordinated reviews of agency rule-makings to ensure that a single agency's regulatory decisions do not conflict with the applicable law or another agency's current or planned actions.[20]

The final element, the normative anchor of administrative and judicial review, works with the other elements as an institutional design intended to hold the government accountable. In this way, the courts examine and determine whether a statute, an administrative regulation or even a treaty trespasses on the limits defined by the *Constitution* or existing law. Such systematic reviews are not unique to the US.[21] Rather, the novelty of this US practice is the administrative review of federal agency actions,[22] the aim of which is to determine whether regulations 'have become unjustified or unnecessary as a result of changed circumstances' and also ensure that they remain 'compatible with each other and

---

15 *Executive Order No 12291* s 2(b).

16 *Executive Order No 12866*, 58 Fed Reg 51735, (4 October 1993) 199 ('*Executive Order No 12866*').

17 Ibid Preamble. For a relevant discussion on the US 'regulatory systems coherence', see Steve Charnovitz, 'US Efforts to Ensure that Regulation Does Not Present Trade Barriers' (Think Piece, E15 Task Force on Regulatory Systems Coherence, November 2015).

18 The general regulatory philosophy of this executive order was 'in deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating'. In addition, federal agencies are required to 'identify and assess available alternatives to encourage the desired behaviour, such as user fees or marketable permits, or providing information upon which choices can be made by the public'. *Executive Order 12866*, ss 1(a)–(b)(3).

19 Ibid s 1(b)(10).

20 Ibid s 4. *Executive Order 12866* also established a centralised planning mechanism for early interagency coordination of regulatory actions, thereby facilitating consultation and the resolution of potential divergences and achieving a common understanding of priorities. Although amended and supplemented multiple times since its issuance, *Executive Order 12866* has effectively established certain crucial pillars of regulatory coherence necessary for the proper functioning of an administrative state.

21 Judicial reviews are perceived and practiced differently in many jurisdictions (eg, a massive variation exists in legal systems regarding the rationale, scope, and intensity of any review, procedural designs and available remedies).

22 Christopher C DeMuth and Douglas H Ginsburg, 'White House Review of Agency Rulemaking' (1986) 99 *Harvard Law Review* 1075, 1081–2.

not duplicative or inappropriately burdensome in the aggregate'.[23] During any review, the agency must identify any congressional mandate that imposes on the agency any obligation to pass or maintain regulations it sees as unnecessary due to changed circumstances.[24]

B *Normative Diffusion: The Rise of Regulatory Coherence as a Trade Governance Objective*

The US enacted the *Administrative Procedure Act* ('*APA*') at the time when the post-War, new trading system was reshaped. The US State Department presented the Suggested Charter for an International Trade Organization of the United Nations to supplement its Proposals for Expansion of World Trade and Employment in September of 1946.[25] In the proposed charter, art 15, 'Publication and Administration of Trade Regulations — Advanced Notice of Restrictive Regulations',[26] was subsequently included as art 38 in the *Havana Charter* for the International Trade Organization,[27] and without significant revision, *General Agreement on Tariffs and Trade* art X ('*GATT*').[28] Article X of the *GATT*, as Sylvia Ostry remarks, 'replicates most of the American approach' to transparency and public consultation; its inclusion was not so contested since 'border barriers such as tariffs and quotas are, for the most part, quite transparent'.[29]

During the Uruguay Round negotiation, there were efforts to further develop certain elements of regulatory coherence in the WTO, evidenced by the

---

23 *Executive Order 12866* s 5.

24 Ibid.

25 Department of State, Government of the United States, 'Suggested Charter for an International Trade Organization of the United Nations' (Publication No 2598, Commercial Policy Series 93, September 1946); Department of State, Government of the United States, 'Proposals for Expansion of World Trade and Employment' (Publication 2411, Commercial Policy Series 79, November 1945).

26 Ibid art 15.

27 *Havana Charter for an International Trade Organization*, opened for signature 24 March 1948, UN Doc E/Conf 2/78 (not yet in force).

28 See Ostry, above n 9, 5–6. As Ostry noted, although the title of art X of the *General Agreement on Tariff and Trade*, 'Publication and Administration of Trade Regulations', does not include the words 'advanced notice of restrictive regulations,' the article's language does not vary considerably from the original US proposal offered in 1946: *General Agreement on Tariffs and Trade*, signed 30 October 1947, 55 UNTS 188 (entered into force 1 January 1948) ('*GATT*').

29 Ostry, above n 9, 5–8. However, art X of the *GATT* fell short of an effective mechanism to address the challenges brought about by the new 'protectionism' — that is, the protectionist trade policy shifts from tariffs and quotas to 'behind-the-border' regulatory barriers to trade. The traditional barriers to trade (tariffs and quotas) have declined, whereas non-tariff measures (such as domestic standards and regulations) have increased as determinants of market access. Domestic regulations are critical for ensuring the environment, public health, and safety and competition, but they may unnecessarily interfere with international trade (especially those regulations without adequate prior notification or, in some cases, scientific justification). Due to the gradual shift of protectionism from tariffs to rulemaking (ie, non-tariff barriers to trade), subsequent *GATT* negotiations were found not to be adequately equipped to deal with non-transparent non-tariff measures. Finally, the Tokyo and Uruguay Rounds resulted in several system improvements, including an emphasis on advance notice and the opportunity to inquire and/or comment. See Ostry, above n 9, 11. See also Thomas J Bollyky, 'Regulatory Coherence in the *TPP* Talks' in C L Lim, Deborah K Elms and Patrick Low (eds), *The* Trans-Pacific Partnership*: A Quest for a Twenty-First Century Trade Agreement* (Cambridge University Press, 2012) 171, 172.

comprehensive transparency requirements in the covered agreements. WTO members are required to publish and give notice on laws, regulations and modes of administration in *GATT* arts X:1 and X:2, with other agreements incorporating similar disciplines.[30] *GATT* art XX,[31] *General Agreement on Trade in Services* art XIV,[32] *Agreement on Technical Barriers to Trade* ('*TBT Agreement*') art 2.1[33] and *Agreement on the Application of Sanitary and Phytosanitary Measures* ('*SPS Agreement*') annex A,[34] provisions that evaluate the necessity of regulation and considering alternatives, together with other related financial and

---

[30] See Andrew D Mitchell, Elizabeth Sheargold and Tania Voon, 'Good Governance Obligations in International Economic Law: A Comparative Analysis of Trade and Investment' (2016) 17 *Journal of World Investment & Trade* 7.

[31] *GATT* art XX specifies certain policy objectives a WTO member may resort to as an exception to other *GATT* obligations:

> 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 …

For a thorough discussion, see Donald H Regan, 'The Meaning of "Necessary" in *GATT* art XX and *GATS* art XIV: The Myth of Cost-Benefit Balancing' (2007) 6 *World Trade Review* 347.

[32] *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered in force 1 January 1995) annex 1B ('*General Agreement on Trade in Services*') art XIV ('*GATS*'). Similarly, art XIV of the *GATS* lists specific policy goals that WTO members can 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 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 …

GATS art XIV. See Regan, above n 31.

[33] *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A (*Agreement on Technical Barriers to Trade*) art 2.1 ('*TBT Agreement*'). This states that

> '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'.

[34] Annex A of the *SPS Agreement* provides four specific objectives that render a governmental measure an *SPS* measure.

technological capabilities as enshrined under *GATT* art XX,[35] *TBT Agreement* art 2.2[36] and *SPS Agreement* art 5.6[37] are all prime examples.[38]

The role of the effective implementation of regulatory coherence to reduce unwanted barriers to trade has long been recognised by the WTO. The Committee on Technical Barriers to Trade ('TBT Committee') has taken the lead in this regard.[39] WTO Members, in 2006, officially placed on the agenda of the TBT Committee the notion of good regulatory practices,[40] encouraging the exchange of information and implementation experiences.[41] Such exchanges, for the most part, were conducted under the thematic sessions of the TBT Committee in March 2013, June 2013 and March 2014.[42] The Committee's Sixth Triennial Review pointed out the crucial role of regulatory coordination and offered an indicative list of voluntary mechanisms of good regulatory practice.[43] The most recent Triennial Review in 2015 further considered regional initiatives related to effective regulatory practices and explicitly mentioned the 2005 APEC–OECD Integrated Checklist on Regulatory Reform (see the following discussion).[44] In a way, the TBT Committee recognised the relevance and significance of sound regulatory practices.[45]

---

35 *GATT* Art XX. See also Appellate Body Report, *Brazil — Measures Affecting Imports of Retreaded Tyres*, WTO Doc WT/DS332/AB/R (3 December 2007) [145]–[147].

36 *TBT Agreement* art 2.2 provides that

> 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 …

37 *SPS Agreement* art 5.6 states that

> when 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.

38 For a more thorough explanation, see, eg, Sheargold and Mitchell, above n 5, 17–23.

39 See Thomas J Bollyky, 'A Role for the World Trade Organization on Regulatory Coherence' (Think Piece, E15 Task Force on Regulatory Systems Coherence, August 2015) 1 <http://e15initiative.org/wp-content/uploads/2015/07/E15-Regulatory-Bollyky-final.pdf>.

40 *Summary Report of the WTO TBT Workshop on Good Regulatory Practice*, WTO Doc G/TBT/W/287 (6 June 2008). For further relevant discussion, see Bollyky, 'Regulatory Coherence in the *TPP* Talks', above n 29, 178–9.

41 *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 (13 November 2009) [18]–[19] ('*Fifth Triennial Review*').

42 *Thematic Session on Good Regulatory Practice*, WTO Doc G/TBT/GEN/143 (11 March 2013); *Second Thematic Session on Good Regulatory Practice*, WTO Doc G/TBT/GEN/143/Add.1 (25 June 2013); *Third Thematic Session on Good Regulatory Practice*, WTO Doc G/TBT/GEN/143/Add.2 (26 March 2014).

43 *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 (29 November 2012) [4]. Triennial reviews are carried out according to the mandate in art 15.4 of the *TBT Agreement*.

44 *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 (3 December 2015) 3–4.

45 *Decisions and Recommendations Adopted by the WTO Committee on Technical Barriers to Trade Since 1 of January 1995*, WTO Doc G/TBT/1/Rev.12 (21 January 2015) (Note by the Secretariat) 6–8, 13; *Fifth Triennial Review*, WTO Doc G/TBT/26, [8]–[9], [14].

A number of other countries and free trade agreements ('FTAs') have also embraced regulatory coherence in different ways.[46] For instance, developed countries like Australia and New Zealand have underscored regulatory coherence in their domestic settings.[47] The international spread of RIA is illustrated by the adoption of, and ongoing discussions on, the concept as well as varied practices across countries and regions such as East Africa, Mexico, South-East Europe, Sri Lanka and the United Kingdom.[48] While an individual chapter on regulatory coherence is not found in the majority of FTAs, disciplines relating to some elements of the concept such as strengthened transparency requirements are common.[49] Examples of a notice and comment requirement and a review mechanism are seen in, for instance, the *Korea–United States Free Trade Agreement*,[50] the *Peru–Singapore Free Trade Agreement*,[51] and the *New Zealand–China Free Trade Agreement*.[52] According to Elizabeth Sheargold and Andrew D Mitchell, there is also an emerging pattern of incorporating transparency mandates in investment agreements, like the US Model Bilateral Investment Treaty (2012).[53]

Remarkably, major international forums, including the OECD, APEC and the World Bank, have accepted and advanced the notion of regulatory coherence and a regulatory reform agenda, highlighting their relevance to the rule of law, trade and development and a more effective and efficient approach to public

---

46 Thomas J Bollyky argued that such a phenomenon 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 Bollyky, 'Regulatory Coherence in the *TPP* Talks', above n 29, 177–8. See also OECD Regulatory Policy Committee, 'Recommendation of the Council on Regulatory Policy and Governance' (Recommendation, 22 March 2012) 8 http://www.oecd.org/governance/regulatory-policy/49990817.pdf ('*OECD Regulatory Policy and Governance Recommendation*').

47 See Nicholas Bagley and Richard L Revesz, 'Centralized Oversight of the Regulatory State' (2007) 106 *Columbia Law Review* 1260, 1260–9. The Australian Commonwealth's Office of Best Practice Regulation ('OBPR') administers the Regulatory Impact Analysis requirements in conjunction with the Australian Ministry of Finance and Deregulation (which replaced the Business Regulation Review Unit from 1985 to 1989 and the Office of Regulation Reform from 1989 to 2006) and the Productivity Commission of Australia. See Rosalyn Bell, 'Regulatory Impact Analysis: Australia's Experience' (Presentation delivered at the OECD Regulatory Reform Workshop, Stockholm, 3–4 June 2013) <https://www.oecd.org/gov/regulatory-policy/Breakout-session-2-Rosalyn%20Bell-RIA-Australia's-experience.pdf>; New Zealand Productivity Commission, 'Regulatory Institutions and Practices' (Inquiry Report, New Zealand Productivity Commission, 30 June 2014).

48 See Colin Kirkpatrick and David Parker, 'Regulatory Impact Assessment: An Overview' in Colin Kirkpatrick and David Parker (eds), *Regulatory Impact Assessment: Towards Better Regulation?* (Edward Elgar Publishing, 2007) 1, 10–15.

49 See Sheargold and Mitchell, above n 5, 593–4.

50 *Free Trade Agreement between the Republic of Korea and the United States of America*, signed 30 June 2007 (entered into force 15 March 2012).

51 *Free Trade Agreement between Peru and Singapore*, signed 29 May 2008 (entered into force 1 August 2009).

52 *Free Trade Agreement between the Government of New Zealand and the Government of the People's Republic of China*, signed 7 April 2008 (entered into force 1 October 2008).

53 See Sheargold and Mitchell, above n 5, 593–4.

policymaking.[54] One noticeable and overarching instrument is the 2005 APEC–OECD Integrated Checklist on Regulatory Reform ('APEC–OECD Checklist'), which was created as a voluntary mechanism for governments 'to evaluate their respective regulatory reform efforts'.[55] Previous efforts to promote regulatory coherence arguably converged in the APEC/OECD,[56] which further facilitated the regulatory coherence discourses and policy debates at various levels.

The APEC–OECD Checklist emphasises the use of RIA in regulatory processes and the need for an integrated mechanism in charge of inter-agency coordination.[57] The checklist underscores transparency and public consultation and their benefits to stakeholders as well as regulators.[58] The APEC and OECD, as remarked by Thomas J Bollyky, both endorse transparency and public consultation and expand the scope of participation sufficiently enough to cover all stakeholders across national boundaries and bureaucratic levels.[59] It should also be noted that, the APEC–OECD Checklist similarly uphold the importance of the rule of law and its international dimensions.[60]

---

54 See relevant discussion in Bollyky, 'Regulatory Coherence in the *TPP* Talks', above n 29, 177–8. See also *OECD Regulatory Policy and Governance Recommendation*, above n 46, 41–57; World Bank and International Finance Corporation, 'Doing Business in a More Transparent World' (Report, 2012) 16–25; Small and Medium Enterprise Department, World Bank Group, 'Simplification of Business Regulation at the Subnational Level: A Reform Implementation Toolkit for Project Teams' (Toolkit, International Finance Corporation and World Bank Group, 2006) 4; OECD Public Management Committee, 'Regulatory Policies in OECD Countries: From Interventionism to Regulatory Governance' (Report, 2002) 28.

55 APEC–OECD Regulatory Reform Programme, 'APEC–OECD Integrated Checklist on Regulatory Reform' (Report, 2005) ('*APEC–OECD Checklist*'). Some commentators regard the APEC and OECD as the key drivers for the promotion of regulatory coherence, which 'has emerged mainly within international networks of governance': Rodrigo Polanco, 'The *Trans-Pacific Partnership Agreement* and Regulatory Coherence' in Tania Voon (ed), *Trade Liberalisation and International Co-operation: A Legal Analysis of the* Trans-Pacific Partnership Agreement (Edward Elgar Publishing, 2013) 231. Others have noted that the OECD and APEC have been promoting regulatory reform for decades, and some efforts have included approaches to improving domestic regulatory processes to facilitate international trade and investment: Sheargold and Mitchell, above n 5, 4.

56 Since its establishment, APEC has focused on promoting a high quality regulatory environment, transparency, efficiency and unnecessary burdens to ensure economic development and trade in the Asia-Pacific region. In 1994, the APEC created a Sub-Committee on Standards and Conformance to promote the elimination of trade distortions from inefficiency, unnecessary or conflicting regulations and standards among member economies. See Bollyky, 'Regulatory Coherence in the *TPP* Talks', above n 29, 181. OECD countries were the earliest movers to improve their regulatory systems. Indeed, by 1996, more than half of the OECD countries had adopted regulatory impact analysis, then further noted in 2009 as one of the most widely used methods for improving the quality of rulemaking processes. Polanco, above n 55, 234–5; Scott H Jacobs, 'An Overview of Regulatory Impact Analysis in OECD Countries' in Organisation for Economic Co-operation and Development (ed), *Regulatory Impact Studies: Best Practices in OECD Countries* (1997) 13, 13; OECD, *Regulatory Impact Analysis: A Tool for Policy Coherence* (OECD, 2009) 13.

57 The APEC–OECD Checklist has four pillars: regulatory reform, regulatory policies, competition policy and market liberalisation policies. See *APEC–OECD Checklist*, above n 55, 2–3.

58 *APEC–OECD Checklist*, above n 55, 17

59 See Bollyky, 'Regulatory Coherence in the *TPP* Talks', above n 29, 175–8.

60 *APEC–OECD Checklist*, above n 55, 15: 'Every well-functioning rulemaking process will have a procedure for examining the proposed regulatory action for legality and compliance with other requirements, such as adherence to WTO obligations'.

The 2011 APEC Leaders' Declaration dedicated a section and an annex to regulatory convergence and cooperation to remove unjustifiably burdensome and out-of-date regulations, to boost employment and productivity, and to protect the environment, public health, safety and security.[61] Annex D required its members, more specifically, to take concrete steps towards good regulatory practices; to ensure inter-agency coordination with an institutionalised approach; to use RIA in the regulatory process; and to establish transparency and public consultation procedures as per the Integrated Checklist.[62] This declaration further elaborated on regulatory cooperation, as 'greater alignment in regulatory approaches, including international standards, is necessary to prevent needless barriers to trade from stifling economic growth and employment'.[63]

Ultimately, the *APA* executive orders pertaining to regulatory planning and review and subsequent practices by governmental branches in the US have broadly encompassed all the elements of regulatory coherence despite never mentioning the term.[64] The *APA* subsequently exported them to regional and international settings. As multiple threads of development in the *GATT*/WTO, various FTAs, and the APEC/OECD have clearly demonstrated, regulatory coherence has emerged as the new governance benchmark in the international economic legal order.

III THE EMERGING CONTOUR OF GLOBAL REGULATORY COHERENCE

As demonstrated here, regulatory coherence features the hallmarks of US administrative law and has been diffused from a domestic legal order into international settings via trans-governmental networks (eg OECD and APEC). Regulatory coherence in these networks typically takes the shape of non-binding instruments; however, the US-led *TPP* sought to 'harden' this governance tool by incorporating it as part of the trade agreement.[65] Although such efforts are now on hold following President Trump's withdrawal from the *TPP*, regulatory coherence may still find a way through bilateral arrangements in the post-*TPP* era —especially when the *CPTPP* negotiations continue. Presumably, however, the ability of regulatory coherence materialising as a new global norm in the long run will depend not only on the US, but also on the EU and China's approaches in different trade pacts amid the trend of mega-regionalism as discussed below.

In what follows, we survey all the FTAs signed by the US, the EU, and China with their trading partners and analyses their institutional design and treaty language to examine and assess each FTA's relevant position in the trajectory of the normative development of global regulatory coherence (see Figure 1 below).

---

61 Asia-Pacific Economic Cooperation, *2011 Leaders' Declaration* (12–13 November 2011) <https://apec.org/Meeting-Papers/Leaders-Declarations/2011/2011_aelm>.

62 Asia-Pacific Economic Cooperation, *2011 Leaders' Declaration — Annex D*: *Strengthening Implementation of Good Regulatory Practices* (12–13 November 2011) <https://apec.org/Meeting-Papers/Leaders-Declarations/2011/2011_aelm/2011_aelm_annexD>.

63 Asia-Pacific Economic Cooperation, *2011 Leaders' Declaration*, above n 61.

64 See Polanco, above n 55, 246; Organisation for Economic Co-operation and Development, *Regulatory Reform in the United States* (1999) 59.

65 By 'hardening', we mean the attempts to transform regulatory coherence into a formal treaty form. It should be noted as well that the *TPP* has softened the impacts of chapter 25 on Regulatory Coherence by using terms like 'should,' 'shall endeavour to' and 'recognise', and exempting issues arising from this chapter from the dispute settlement mechanism.

Drawing upon the insights of the 'Concept of Legalization' by Kenneth Abbot et al,[66] we see the commitments of China, US and EU in terms of regulatory coherence as roughly falling along the spectrum of 'harder' and 'softer' laws (ie the X-axis) based on three major proxies: (1) the level of delegation (eg delegating legislative power or third party judicial review), (2) precision of words (eg clear, specific, and details treaty language), and (3) obligation (whether it is binding or not — the traditional understanding of hard law and soft law). The Y-axis, by contrast, denotes the actual coverage of the respective elements of regulatory coherence — ie transparency and public consultations, regulatory impact assessment, interagency coordination and compatibility, and administrative and judicial review. Based on these qualifications shaped by the X-axis and Y-axis, we roughly mark the FTAs concluded by the three major trading powers on four quadrants.

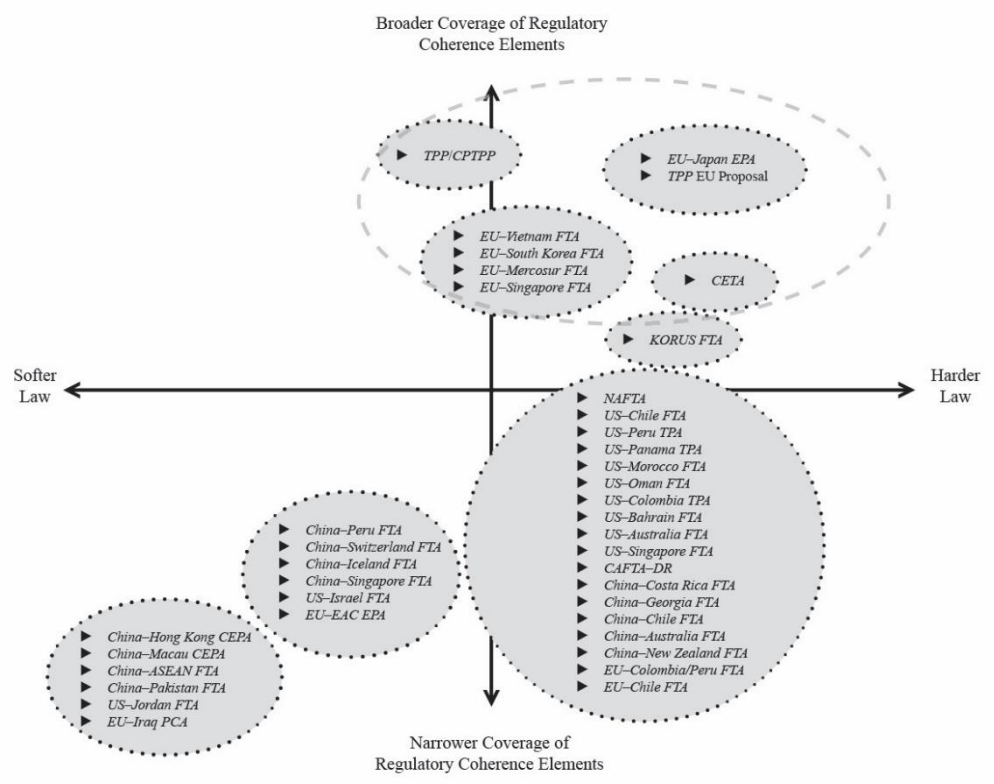

Figure 1: Typology of FTAs Based on Their Regulatory Coherence Provisions

A *US-Centric Regulatory Coherence as a Default Rule:* TPP/CPTPP

That said, the US was primarily responsible for the post-WWII architecture of the international economic order, which reflected the American values and governance models of that period.[67] Such order has continued to exert significant

---

66 See Kenneth W Abbott et al, 'The Concept of Legalization' (2000) 54 *International Organization* 401. Cf Gregory C Shaffer and Mark A Pollack, 'Hard vs Soft Law: Alternatives, Complements, and Antagonists in International Governance' (2010) 94 *Minnesota Law Review* 706, 715–16.

67 See Ostry, above n 9, 2.

influence on configuring and reconfiguring the norms and practices in the global trading system. As the preceding discussion clearly demonstrates, a notable normative diffusion exists, from which the notion of regulatory coherence — originally an American regulatory yardstick — has emerged as a trade governance objective at both the regional and multilateral levels. This development has now been elevated to the mega-regional level. A handful of flagship trade deals have moved to reflect or embrace diverse forms and substances of regulatory coherence. Among such agreements, the *TPP*, which marks the very first attempt of the US to strategically extend the full-fledged notion of regulatory coherence to FTAs, stands out as the most ambitious institutional design in terms of the coverage of regulatory coherence elements.

Prior to the *TPP* negotiations — which represent a milestone where the US tried to experiment and develop provisions in the new generation of FTAs — the US' practices revealed a sticky 'path dependence' in terms of incorporating regulatory coherence requirements in the bilateral or regional trade agreements. Our survey on the FTAs signed by the US and its trading partners indicated that most FTAs have followed the institutional design set out by the *North American Free Trade Agreement* ('*NAFTA*')[68] in the early 1990s. The *NAFTA* engraves two basic elements of regulatory coherence — notice and comment and review mechanisms — in a standalone cross-cutting chapter on 'transparency,' albeit in a narrower and less demanding sense.[69] More specifically, the *NAFTA* stipulates that 'to the extent possible, each Party shall: (a) publish in advance any such measure that it proposes to adopt; and (b) provide interested persons and Parties a reasonable opportunity to comment'.[70] Furthermore, parties 'shall establish or maintain judicial, quasi-judicial or administrative tribunals or procedures for the purpose of the prompt review … of final administrative actions … covered by this *Agreement*'.[71] Most subsequent FTAs signed by the US contain such a *NAFTA*-type transparency chapter with similar if not identical provisions, including the *US–Chile FTA*,[72] *US–Peru Trade Promotion Agreement*,[73] *US–Panama Trade Promotion Agreement*,[74] *US–Morocco FTA*,[75] *US–Oman FTA*,[76] *US–Colombia Trade Promotion Agreement*,[77] *US–Bahrain FTA*,[78] *US–Australia*

---

68 *North American Free Trade Agreement*, Canada–Mexico–United States, signed 17 December 1992, [1994] CTS 2 (entered into force 1 January 1994) ('*NAFTA*').

69 Ibid ch 18.

70 Ibid art 1802.

71 Ibid art 1805.

72 *United States–Chile Free Trade Agreement*, signed 6 June 2003 (entered into force 1 January 2004).

73 *United States–Peru Trade Promotion Agreement*, signed on 12 April 2006 (entered into force 1 February 2009).

74 *United States–Panama Trade Promotion Agreement*, signed 28 June 2007 (entered into force 31 October 2012).

75 *United States–Morocco Free Trade Agreement*, signed 15 June 2004 (entered into force 1 January 2006).

76 *United States–Oman Free Trade Agreement*, signed 19 January 2006 (entered into force 1 January 2009).

77 *United States–Colombia Trade Promotion Agreement*, signed 22 November 2006 (entered into force 15 May 2012).

78 *United States–Bahrain Free Trade Agreement*, signed 14 September 2004 (entered into force 11 January 2006).

FTA,[79] *US–Singapore FTA*[80] and *Dominican Republic–Central America–US FTA* ('*CAFTA–DR*')[81] (see Figure 1, on the fourth quadrant). In a couple of unique cases, the US and its trading partners opted for '*NAFTA*-lite' — a much softer and narrower institutional design — where there is no cross-cutting chapter and the level of transparency requirement is low, including the *US–Jordan FTA*[82] and *US–Israel FTA*[83] (see Figure 1, on the third quadrant). Such a more conservative institutional design can also be seen in the majority of China's FTAs as well as the EU's FTAs with Iraq and the East African Community. Notably, the *US–Korea FTA* ('*KORUS FTA*')[84] falls on the 'harder law' and 'broader coverage' side of the spectrum (the first quadrant), for it includes a transparency chapter with more specific and demanding texts. For instance, the *KORUS FTA* provides that at the stage of 'proposed regulations', 'each Party shall publish the proposed regulations in a single official journal of national circulation and shall encourage their distribution through additional outlets', 'should in most cases publish … not less than 40 days before the date public comments are due', and 'shall include … an explanation of the purpose of and rationale for the proposed regulations'.[85] With respect to 'adopted regulations', the *KORUS FTA* requires parties not only to publish in the official journal with an explanation of the relevant purpose and rationale, but to 'address significant, substantive comments received during the comment period and explain substantive revisions [parties] made to the proposed regulations'.[86]

As abovementioned, the *TPP* represents the US' most ambitious move to uphold regulatory coherence elements in trade negotiations to the fullest extent possible. More specifically, considerable APEC/OECD efforts have resulted in an individual chapter on regulatory coherence in the *TPP*, marking a milestone in the US-driven global normative diffusion (note, however, that while the Trump Administration has pulled out from the *TPP* negotiations, the remaining 11 Parties have nevertheless agreed to move forward under the revised *CPTPP* and left the chapter on regulatory coherence intact).[87] The *TPP*/*CPTPP* marks the first mega-regional pact that contains all regulatory coherence elements (see

---

79 *United States–Australia Free Trade Agreement*, signed 18 May 2004 (entered into force 1 January 2005).

80 *United States–Singapore Free Trade Agreement*, signed 6 May 2003 (entered into force 1 January 2004).

81 *Dominican Republic–Central America–United States Free Trade Agreement*, signed 5 August 2004 (entered into force 1 March 2006). The treaty entered into force for El Salvador on 1 March 2006; for Honduras and Nicaragua on 1 April 2006; for Guatemala 1 July 2006; and for Dominican Republic 1 March 2007.

82 *United States–Jordan Free Trade Agreement*, signed 24 October 2000 (entered into force 17 December 2001).

83 *United States–Israel Free Trade Agreement*, signed 22 April 1985 (entered into force 19 August 1985).

84 *United States–Korea Free Trade Agreement*, signed 30 June 2007 (entered into force 15 March 2012).

85 Ibid art 21.1.3.

86 Ibid art 21.1.4.

87 *TPP* ch 25. This chapter is seen as an achievement in preferential trade agreement ('PTA') negotiations by eliminating unnecessary regulatory barriers and making the *TPP* parties' regulatory systems more compatible and transparent. For a concise discussion, see Ian F Fergusson and Bruce Vaughn, 'The *Trans-Pacific Partnership Agreement*' (Report No R40502, Congressional Research Service, 12 December 2011) 8.

Figure 1, where the *TPP*/*CPTPP* falls on the 'broader coverage' side of the map) as well as the US' first strategic attempt to include a full-fledged chapter on requirements for greater regulatory quality and rationalisation in a trade agreement. The US notably advocated for its inclusion, and all *TPP*/*CPTPP* parties as APEC members have already discussed and agreed on the relevance and importance of improving global-level regulatory processes.[88]

Chapter 25 of the *TPP*/*CPTPP* obliges parties to use good regulatory practices in rulemaking processes to ensure effective and efficient achievement of these parties' policy objectives while still fostering trade, investment, economic growth and employment.[89] The chapter let the parties define the scope of application, but they are expected to achieve 'significant coverage' of regulatory measures.[90] The chapter on regulatory coherence explicitly highlights good regulatory practices to discipline government actions throughout the rulemaking process. The planning, design, issuance, implementation and review of covered regulatory measures are all subject to good regulatory practices; parties are required to engage stakeholders, respond to comments and expound regulatory rationale and review and revise regulatory measures.[91] The *TPP*/*CPTPP*'s regulatory coherence includes, specifically, notice and comment procedures, stakeholder participation, access to information, duty to explain and mutual consultation, among others.[92] With enhanced stakeholder engagement and the parties' commitment to implement ex-post facto assessments in place, it is hoped that potential causes of trade disputes can be identified and managed at earlier stages. During the rulemaking process, increasing transparency and predictability, too, would prevent unnecessary disputes and resolve trade frictions more effectively. More crucially, the *TPP*/*CPTPP* requires that a party 'shall endeavour to ensure that it has the processes or mechanisms to facilitate the effective interagency coordination and review of proposed covered regulatory measures', preferably by way of a central coordinating body (ie the US Office of Information and Regulatory Affairs as the reference model).[93] As the actual implementation and concrete institutional designs are left to each *TPP*/*CPTPP* party under such 'best effort' wording and this chapter is not subject to dispute settlement, the *TPP*/*CPTPP* does not occupy the 'harder law' province of Figure 1.

Our discussion, thus far, depicts the trajectory of the emerging global regulatory coherence, from the US administrative law to other jurisdictions,

---

88 See Thomas J Bollyky, 'Better Regulation for Freer Trade' (Policy Innovation Memorandum No 22, Council on Foreign Relations, 19 June 2013) 2–3.

89 *TPP* art 25.2.

90 Ibid art 25.3.

91 Ibid arts 25.5.6–7, 25.8. For a discussion on the implications of the *TPP* Regulatory Coherence chapter, see Sheargold and Mitchell, above n 5, 597–600. As Sheargold and Mitchell noted, '[w]hile 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': at 11. Yet Sheargold and Mitchell also suggested that both novelty and significance rest in the *TPP*'s reference to good regulatory practices in the treaty language as they relate to the regulatory autonomy of governments.

92 *TPP* arts 25.4–5, 25.9

93 Ibid art 25.4.1. See also Sheargold and Mitchell, above n 5, 598; Bollyky, 'Regulatory Coherence in the *TPP* Talks', above n 29, 181; Fergusson and Vaughn, above n 87, 37.

international organisations like the WTO, APEC, and OECD, as well as trade agreements. The above-mentioned *TPP*/*CPTPP* chapter illustrates the trend that the nature of regulatory coherence has been gradually transformed from the relatively voluntary one at the international level (as what we have seen in the APEC/OECD best practices) to a more legalised treaty obligation — though there may be some room for the *TPP*/*CPTPP* parties to determine their preferred methodology and institutional designs, as they see fit.[94] The *TPP*/*CPTPP* has clearly opted for a US-centric regulatory coherence chapter as the default option for mega-regional norm-making, and *TPP*/*CPTPP* will continue to influence current and future negotiations on similarly related topics.

B *China's Long March towards Regulatory Coherence?*

Whereas the remaining 11 Pacific Rim countries have been struggling with saving the *TPP* after the US' exit, the Regional Comprehensive Economic Partnership ('RCEP')[95] — another pillar in mega-regionalism comprising 16 countries and accounting for approximately 30 per cent of the global GDP and more than a quarter of world exports — is likely to fill the gap by developing new rules for trade in much of Asia for the next decade and sort out the overlapping FTAs' spanning this particular region.[96] The RCEP initially emerged as an initiative centred on the Association of Southeast Asian Nations ('ASEAN'); however, China's role in shaping its design — including regulatory-based barriers — is undeniable.[97] Thus far, the RCEP negotiations have largely remained out of sight with no draft text of agreements available to the public. Nevertheless, what China has committed to its FTAs and domestic legal framework can shed light on the future RCEP approach to regulatory coherence, as discussed below.

While the *TPP* was being negotiated, China has been actively developed its own trade and investment agreements through bilateral and regional channels. As of this writing, the Chinese government has signed FTAs with 14 trading partners: Australia, ASEAN, Chile, Costa Rica, Georgia,[98] Hong Kong, Iceland, Macau, New Zealand, Pakistan, Peru, Singapore, South Korea and Switzerland, and has negotiated and/or updated several other FTAs, including the RCEP.[99] By

---

94 Jane Kelsey, *Preliminary Analysis of the Draft* TPP *Chapter on Domestic Coherence* (23 October 2011) Citizens Trade Campaign, 5 <https://www.citizenstrade.org/ctc/wp-content/uploads/2011/10/TransPacific_RegCoherenceMemo.pdf>.

95 See Department of Foreign Affairs and Trade, Australian Government, *Regional Comprehensive Economic Partnership* (2018) <http://dfat.gov.au/trade/agreements/negotiations/rcep/Pages/regional-comprehensive-economic-partnership.aspx>.

96 Association of Southeast Asian Nations, *About RCEP* (3 October 2016) <http://asean.org/?static_post=rcep-regional-comprehensive-economic-partnership#>.

97 Deborah Elms, *RCEP: Looking Ahead to 2017* (14 December 2016) Asian Trade Centre <http://www.asiantradecentre.org/talkingtrade//rcep-looking-ahead-to-2017>.

98 In May 2017, China concluded the PTA with Georgia as part of its One Belt One Road ('OBOR') initiative: Ministry of Economic and Sustainable Development of Georgia, *Georgia–China Free Trade Agreement Signed* (Press Release, 13 May 2017) <http://www.economy.ge/?page=news&nw=180&s=saqartvelosa-da-chinets-shoris-tavisufali-vachrobis-shesaxeb-xelshekruleba-gaformdeba&lang=en>. However, as of this writing, the official text has not yet been released.

99 See China FTA Network, *Homepage* (2018) <http://fta.mofcom.gov.cn/english/index.shtml>.

and large, these FTAs reveal China's hesitation to embrace the notion of regulatory coherence, as evident in several areas. That said, the *TPP* has produced a standalone chapter on regulatory coherence that applies to compulsory regulatory measures of 'general application'. Simply put, what the *TPP* drafters had in mind is to create cross-cutting disciplines on regulatory coherence for the development and implementation of more efficient, cost-effective, transparent and compatible regulations.[100] By contrast, however, none of China's FTAs has produced a similar arrangement. The term 'regulatory coherence' has been omitted from China's FTAs. Although five FTAs — *China–Australia*,[101] *China–Costa Rica*,[102] *China–New Zealand*,[103] *China–Switzerland*,[104] and *China–South Korea*[105] — do refer to the term 'good regulatory practice' in the TBT chapter, they offer anything but precise benchmarks to determine what constitutes 'good regulatory practice'. The only exception is a reference in the *China–Costa Rica FTA* that links it to the decisions and recommendations adopted by the WTO/TBT Committee. By way of reference, thus, good regulatory practice can be understood as covering core elements, ie transparency and public consultation, regulatory impact assessment, cost–benefit analysis, review mechanisms for existing technical regulations and conformity assessment and consideration of the special needs of developing countries.[106] In this light, the term 'good regulatory practice' seems — at least in the context of the *China–Costa Rica FTA* — to have the major hallmarks of regulatory coherence in the *TPP*. Even so, the function of good regulatory practice is deliberately compromised by conditioning its application upon the proviso that the 'parties recognise', on the one hand, and a narrower TBT context (as opposed to the overarching characteristics as designed by the *TPP*), on the other hand.

In addition, some of China's FTAs maintain certain transparency arrangements that relate to regulatory coherence. The way in which China's FTAs address this issue can be roughly classified as falling within three groups: first, in six FTAs (*China–Australia*,[107] *China–New Zealand*,[108] *China–Costa*

---

100 *TPP* art 25.1.

101 *Free Trade Agreement between the Government of Australia and the Government of the People's Republic of China*, signed 17 June 2015 (entered into force 20 December 2015) art 6.11 ('*China–Australia FTA*').

102 *Free Trade Agreement between the People's Republic of China and the Government of the Republic of Costa Rica*, signed 8 April 2010 (entered into force 1 August 2011) art 72 ('*China–Costa Rica FTA*').

103 *Free Trade Agreement between the People's Republic of China and New Zealand*, signed 7 April 2008 (entered into force 1 October 2008) art 96 ('*China–New Zealand FTA*').

104 *Free Trade Agreement between the People's Republic of China and the Swiss Confederation*, signed July 2013 (entered into force 1 July 2014) art 6.5 ('*China–Switzerland FTA*').

105 *Free Trade Agreement between the People's Republic of China and the Government of the Republic of South Korea*, signed 1 June 2015 entered into force 20 January 2015) art 6.9 ('*China–Korea FTA*').

106 See *Decisions and Recommendations Adopted by the WTO Committee on Technical Barriers to Trade Since 1 January 1995*, WTO Doc G/TBT/1/Rev.13 (8 March 2017) (Note by the Secretariat) 6–8.

107 *China–Australia FTA* ch 13.

108 *China–New Zealand FTA* ch 13.

Rica,[109] *China–Chile*,[110] *China–Georgia*[111] and *China–South Korea*[112]), there is a cross-cutting, *NAFTA*-type chapter on 'Transparency'. Therefore, they roughly fall within the fourth quadrant in Figure 1, with other *NAFTA*-type FTAs (albeit with different institutional designs specifically). Four others — *China–Switzerland FTA*, *China–Iceland FTA*, *China–Peru FTA*, and *China–Singapore FTA* — have less rigorous transparency mandate.[113] Still others, like *China–Pakistan*, *China–ASEAN*, *China–Hong Kong*, and *China–Macau*, have minimal or non-existent requirements on this score.[114] All such FTAs fall in the neighbourhood of the third quadrant, with varied positions. As shown in Figure 1, while some of China's FTAs make themselves on the fourth quadrant because of stronger transparency mandates, others remain on the third quadrant. As things stand, none of the Chinese FTAs follow what the US and EU (as detailed below) have done by incorporating core elements of regulatory coherence in more recent mega-regional trade pacts.

It follows from the above analysis that the pattern of China's FTAs reveals its hesitance towards the notion of regulatory coherence. By treating good regulatory practices ambiguously in only a handful of its FTAs and eliminating them from the rest, China is strategically downplaying the role of regulatory coherence in global trade governance. As we have argued elsewhere, such a paradox reflects that nation's complicated social, legal and political underpinnings.[115] In response to market-oriented economic globalisation forces over the past few decades, China's legal infrastructure has experienced a dramatic sea change now oriented toward — at least nominally — the 'rule of law'. To date, one could easily identify the core elements of regulatory coherence or good regulatory practices (eg public consultation, regulatory impact assessment and review) in major Chinese instruments. Some examples shall suffice here. To harness potential inter-agency conflicts, the *Regulations on Procedures for the Formulation of Administrative Regulations* requires the State

---

109 *China–Costa Rica FTA* ch 12.

110 *China–Georgia Free Trade Agreement*, signed 13 May 2017 (entered into force 1 January 2018) ch 13.

111 *China–Chile Free Trade Agreement*, signed 18 November 2017 (entered into force 1 October 2006) ch 9.

112 *China–Korea FTA* ch 18.

113 *China–Iceland Free Trade Agreement*, signed 15 April 2013 (entered into force 1 July 2014); *China–Peru Free Trade Agreement*, signed 6 December 2009 (entered into force 1 March 2010); *China–Singapore Free Trade Agreement*, signed 23 October 2008 (entered into force 1 January 2009) ('*China–Singapore FTA*'). The *China–Switzerland FTA*, for instance, does not maintain a *NAFTA*-type chapter on transparency. Rather, it designates only a handful of provisions on transparency under the chapter on 'General Provisions', while laying down a set of transparency mandates in the context of the *TBT Agreement*: *China–Switzerland Free Trade Agreement*, signed 6 July 2013 (entered into force 1 July 2014) arts 1.5–6, 4.3.

114 For instance, transparency mandates under the *China-Singapore FTA* are addressed in a piece-meal fashion. Article 8 requires both parties to 'ensure transparency of its non-tariff measures', while art 38 sets out the transparency mandate under the trade remedies chapter. Chapter 7 of the *China-Singapore FTA* lays down a set of rules on exchange of information and cooperation by requiring both parties to share their respective 'experience in the implementation of the principle of transparency': *China–Singapore FTA* art 50. These disclosures mandates are subject to art 106 (Security Exceptions). See, eg, *China–Singapore FTA* arts 8, 38, 55, 106.

115 Han-Wei Liu and Ching-Fu Lin, 'China and Global Regulatory Coherence: An Uneasy Relationship?' (IILJ Working Paper No 2017/3, NYU School of Law, 1 November 2017).

Council to coordinate rulemaking initiatives through annual working plans;[116] the same regulations require, furthermore, the drafting agencies to reach a consensus with other agencies on the provisions that involve their powers and responsibilities or the provisions that are closely related to them.[117] More profoundly is the fact that notice and comments and public consultation have long been situated in China's legal regime. Since its promulgation in 2000, the *Legislation Law* has committed to be inclusive by allowing 'people['s] participat[ion] in lawmaking activities through various channels'.[118] Two follow-up rules — the above-mentioned *Regulations on Procedures for the Formulation of Administrative Regulations* and the *Regulations on Procedures for the Formulation of Rules* went beyond such a general mandate by laying down more specific requirements for stakeholder participation in the rulemaking activities.[119] Other elements of regulatory coherence like impact assessment and ex post review are also in some ways embedded in certain high-level policy papers and *Legislation Law*.[120] Under the 2004 Implementation Outline, for instance, regulatory agencies are required to formulate a 'science-based' administrative decision-making process and choose one that is least intrusive.[121] In 2010, the State Council expanded the 2004 Implementation Outline by issuing the 'Opinion of the State Council on Strengthening the Building of a Government Ruled by Law'. This opinion requires regulatory authorities to incorporate, among other techniques, 'cost-benefit analysis', 'social risk appraisal' and 'post-evaluation of government legislation' to further the quality of rule-making process.[122]

At this juncture, it is clear that the concept of regulatory coherence is not a different animal in China. While those key elements of regulatory coherence seem — at least nominally — to fit into the Chinese domestic legal infrastructure, the efficacy of these mechanisms may extend way beyond this 'thin' version of the rule of law and hinge on the 'thick' version of the rule of law, and even more so, democracy. This may well explain why — notwithstanding the decade-long reforms that have transformed its institutions to

---

116 «行政法规制定程序条例» [Ordinance concerning the Procedures for the Formulation of Administrative Regulations] (People's Republic of China) State Council, Writ No 321, 16 November 2001, art 7 ('*Ordinance concerning the Procedures for the Formulation of Administrative Regulations*').

117 Ibid art 13.

118 «中华人民共和国立法法» [Legislation Law of the People's Republic of China] (People's Republic of China) National People's Congress, Order No 31, 15 March 2000, art 5 ('*Legislation Law of the People's Republic of China*').

119 *Ordinance concerning the Procedures for the Formulation of Administrative Regulations* art 12; «规章制定程序条例» [Regulations on Procedures for the Formulation of Rules] (People's Republic of China) State Council, Decree No 322, 16 November 2001, arts 14–15. These two regulations generally require that drafting agencies should solicit opinions from relevant authorities, organisations, and citizens through panel discussions, symposia, hearings or otherwise.

120 See, eg, *Legislation Law of the People's Republic of China* art 52.

121 See «中国人民银行关于贯彻全面推进依法行政实施纲要的意见» [Opinions of the Bank of China on the Implementation of the Program for Comprehensively Promoting 'Administration by Law'], (People's Republic of China) State Council, 30 April 2004, [4]–[5].

122 «国务院关于加强法治政府建设的意见» [Opinions of the State Council on Strengthening the Building of a Government Ruled by Law] (People's Republic of China) State Council, Opinion No 33, 10 October 2010) [7].

align more with regulatory coherence — China has been dealing with this notion rather strategically in both trade and investment negotiations. Consequently, although the seven RCEP participating countries (ie Australia, Brunei, Japan, Malaysia, New Zealand, Singapore and Vietnam) may be, as what they have done in the *TPP*/*CPTPP*, ready for regulatory coherence,[123] whether this readiness will be accepted as part of the final text of the RCEP remains doubtful, especially given China's past practices and the underlying concerns.

C *EU's Approach to Regulatory Coherence: A Wholehearted Welcome?*

With tariffs between the US and EU economies being largely reduced, how to remove the bureaucratic red tape and costs caused by incompatible rules and regulations that impede trade in goods and services have long been central to the US–EU trade negotiators' agenda.[124] Therefore, while the terms regulatory cooperation and regulatory coherence have recently emerged as buzzwords in mega-regionalism, such notions are not new and mirror the trajectory taking place on both sides of the Atlantic. The earliest efforts can be dated back to the mid-1990s, when a group of US and European firms began to work to create the Transatlantic Business Dialogue ('TABD') to 'boost transatlantic trade and investment opportunities through the removal of costly inefficiencies caused by excessive regulation, duplication, and differences in the EU and US regulatory systems and procedures'.[125] Given its close tie with trade officials on both sides of the Atlantic, the TBAD has been an important focal point to identify and successfully press American and European policymakers to remove trade barriers on several occasions.[126] Beyond the TABD, there have been various other initiatives to facilitate US–EU regulatory cooperation: the New Transatlantic Agenda (1995),[127] the Transatlantic Economic Partnership (1998),[128] the Joint Statement on Early Warning and Problem Prevention

---

123 Unlike most other provisions, the *CPTPP*'s chapter on regulatory coherence is not enforceable under the chapter on dispute settlement. Rather, the *CPTPP* establishes a Committee on Regulatory Coherence to 'consider issues associated with the implementation and operation' of this chapter. Such a design seems to signal complicated concerns underlying these overarching disciplines. *TPP* arts 25.6, 25.11.

124 See generally Mark A Pollack and Gregory C Shaffer, 'Transatlantic Governance in Historical and Theoretical Perspective' in Mark A Pollack and Gregory C Shaffer (eds), *Transatlantic Governance in the Global Economy* (Rowan & Littlefield Publishers, 2001) 3.

125 Convened in 1995 by the US Department of Commerce and the European Commission, the Trans-Atlantic Business Dialogue ('TABD') served as the official dialogue between business leaders on both sides of the Atlantic and the US Cabinet secretaries and EU commissioners. The TABD Members are from senior management of companies in the US, Europe and the rest of the world. In 2013, the TABD and European-American Business Council ('EABC') were merged as the 'Trans-Atlantic Business Council' ('TABC'). See Trans-Atlantic Business Council, *History & Mission* (2014) <http://www.transatlanticbusiness.org/about-us/history-mission/>. For a history of the organisation, see generally David Vogel, *Barriers or Benefits? Regulation in Transatlantic Trade* (Brookings Institution Press, 2010).

126 Alexander M Donahue, 'Equivalence: Not Quite Close Enough for the International Harmonization of Environmental Standards' (2000) 30 *Environmental Law* 363, 373–4.

127 European Union External Action Service, *New Transatlantic Agenda* (1995) European Parliament <http://www.europarl.europa.eu/cmsdata/124321/new_transatlantic_agenda_en.pdf>.

128 European Union External Action Service, *Transatlantic Economic Partnership 1998* (18 May 1998) <http://www.eeas.europa.eu/archives/docs/us/docs/trans_econ_partner_11_98_en.pdf>.

Mechanisms (1999),[129] the Consultative Forum on Biotechnology (2000),[130] the Guidelines for Regulatory Cooperation and Transparency (2002),[131] the Roadmaps for US–EU Regulatory Cooperation and Transparency (2004–05),[132] the EU–US High Level Regulatory Cooperation Forum ('HLRCF') (2005)[133] and the Transatlantic Economic Council (2007),[134] to name just a few.[135] Of particular relevance to regulatory coherence is the joint statement, 'Common Understanding on Regulatory Principles and Best Practices' issued by the HLRCF.[136]

The Common Understanding began by reaffirming both parties' commitment to the core principles, as embedded in the European Commission's Communication on Smart Regulation and Impact Assessment Guidelines and the US *Executive Orders 12866* and *13563* that included 'evidence-based policy-making for all regulatory measures' with the consideration of 'all relevant benefits and costs', 'transparency and openness, allowing participation by citizens and stakeholders', 'analysis of relevant alternatives', 'monitoring and evaluation of effectiveness of existing regulatory measures' and the 'aim for simplicity'.[137] These elements essentially mirror most of what is required by regulatory coherence, and they have been subsequently incorporated into the negotiating texts of the *TTIP*.

Cutting red tape is now on the *TTIP* agenda. Roughly, the *TTIP* addresses NTBs by dividing the rules on regulations into two parts — horizontal and sectoral. The horizontal parts touch on the issues of regulatory cooperation and regulatory coherence and set forth shared principles, best practices and cooperation mechanisms that apply to all sectors. The sectoral parts deal with specific economic sectors by reducing unnecessary duplication of regulatory

---

129 European Commission, 'Joint US–EU Statement on "Early Warning" Mechanism' (Press Release, 21 June 1999) <http://trade.ec.europa.eu/doclib/docs/2003/october/tradoc_111711.pdf>.

130 Community Research and Development Information Service, *EU–US Biotechnology Consultative Forum Launched* (10 August 2000) European Commission <http://cordis.europa.eu/news/rcn/15342_en.html>.

131 Office of Management and Budget, 'Guidelines on Regulatory Cooperation and Transparency' (Press Release, April 2002) <https://obamawhitehouse.archives.gov/sites/default/files/omb/oira/irc/2002-guidelines-on-reg-coop-and-transparency.pdf>.

132 European Commission, 'Roadmap for EU–US Regulatory Cooperation and Transparency' (Press Release, IP/04/816, 29 June 2004) <http://europa.eu/rapid/press-release_MEMO-04–165_en.htm>.

133 The White House, 'US–EU HLRCF Joint Statement on Standards in Regulation' (Press Release, 16 December 2010) <https://obamawhitehouse.archives.gov/sites/default/files/omb/oira/irc/hlrcf_dec_16_2010_joint_statement_on_standards_in_regulation__final.pdf>.

134 US Department of State, *Transatlantic Economic Council* (2017) <https://www.state.gov/p/eur/rt/eu/tec/>.

135 For a detailed recount, see Gregory Shaffer, 'Alternatives for Regulatory Governance under *TTIP*: Building from the Past' (2016) 22 *Columbia Journal of European Law* 403, 410–11.

136 United States and European Commission, 'Common Understanding on Regulatory Principles and Best Practices' (Joint Statement, High-Level Regulatory Cooperation Forum, 7–8 June 2011) <http://trade.ec.europa.eu/doclib/docs/2011/july/tradoc_148030.pdf>.

137 Ibid.

requirements and set the agenda for future cooperation.[138] The horizontal parts, as seen in the proposed text released by the EU in March 2016, form two chapters, namely, 'Regulatory Cooperation' and 'Good Regulatory Practices'. The former serves as a building block to allow regulators on both sides of the Atlantic 'to interact with their counterparts as they develop new rules and review existing one'.[139] The same proposed chapter elevates some of the elements of regulatory coherence to the level of regulatory cooperation by mandating that both US and EU regulators follow transparency and public participation,[140] and a periodic review,[141] and take into account all relevant impacts[142] when engaging in cooperation with their counterparts. The chapter lays out a set of detailed rules that somewhat parallel actual regulatory coherence, including '[i]nternal coordination,'[143] '[e]arly information,'[144] '[s]takeholder [c]onsultations,'[145] '[r]egulatory [i]mpact [a]ssessment',[146] '[f]eedback on the existing regulatory framework'[147] and '[r]etrospective [e]valuation'.[148]

Apart from the *TTIP*, the recently finalised text of the *EU–Japan Economic Partnership Agreement* (*EU–Japan EPA*) signals the EU's stance on regulatory coherence. *EU–Japan EPA* maintains Chapter 18 on 'Good Regulatory Practices and Regulatory Cooperation'.[149] In contrast to the current proposed *TTIP* text, *EU–Japan EPA* follows EU's 2015 version of proposed *TTIP* text by putting together good regulatory practices and regulatory cooperation mechanisms in the same chapter.[150] Despite such structural differences, sub-s 2 (Good Regulatory Practices) of this chapter incorporates virtually all elements of regulatory coherence and uses the term 'shall' in these provisions so as to give a strong

---

138 European Commission, '*TTIP* and Regulation: An Overview' (Working Paper, European Commission, 10 February 2015) 8 <http://trade.ec.europa.eu/doclib/docs/2015/february/tradoc_153121.pdf>.

139 Ibid 8.

140 European Union, '*TTIP* — EU Proposal for Chapter: Regulatory Cooperation' (Textual Proposal, 21 March 2016) art x.6.

141 See ibid art x.4: 'The Parties shall pursue and keep under periodic review ongoing regulatory cooperation and, in this context, shall periodically update each other on any developments related to their upcoming regulatory measures'.

142 Ibid art x.4(2)(a):

> When developing new or amending existing regulatory measures which will have or are likely to have an impact on cooperation … the Parties shall provide each other opportunities for cooperation and information exchange, at the earliest possible stage …

143 European Commission, '*TTIP* — EU Proposal for Chapter: Good Regulatory Practices' (Textual Proposal, European Commission, 21 March 2016) art 3.

144 Ibid art 5.

145 Ibid art 6.

146 Ibid art 8.

147 Ibid art 7.

148 Ibid art 9.

149 The negotiations of the *EU–Japan Economic Partnership Agreement* were finalised in December 2017, which is subject to approval by the European Parliament, EU Member States and Japan: European Commission, *EU and Japan Finalise* Economic Partnership Agreement (8 December 2017) European Commission <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1767>.

150 *EU–Japan Economic Partnership Agreement*, opened for signature 8 December 2017 (not yet in force) ch 18 ('*EU–Japan EPA*').

legal rigor to these requirements.[151] In this sense, the *EU–Japan EPA*, like the *TTIP*, stands out as one of the hardest and full-fledged FTAs in terms of regulatory coherence in Figure 1 (to the top right of the first quadrant). Nevertheless, as in the context of *TTIP* and *TPP*/*CPTPP* negotiations, *EU–Japan EPA* draws a red line by excluding this whole chapter from the application of the dispute settlement mechanism, which prevents it from moving to the furthest right end.[152]

Interesting though, while the EU seems signals a strong commitment to the notion of regulatory coherence in both *TTIP* and *EU–Japan EPA* negotiations (see Figure I, the first quadrant), the way in which it managed this issue in the *CETA* is somewhat obscure. The *CETA* includes a chapter on regulatory cooperation, which contains certain elements, but it also pares down the legalisation level of regulatory coherence. As noted in art 21.5 of this chapter, it is a replacement of the existing 'Framework on Regulatory Co-operation and Transparency between the Government of Canada and the European Commission', as established in 2004.[153] The chapter on regulatory cooperation governs the 'development, review and methodological aspects of regulatory measures'[154] through the institutionalised mechanism of dynamic bilateral cooperation.[155] This chapter underscores the regulatory coherence efforts to 'promote transparent, efficient and effective regulatory processes' through rigorous information exchange and the use of best practices,[156] which include inter alia public comment opportunities on proposed regulations, concurrent or joint risk assessments and regulatory impact assessments and a review of regulatory initiatives.[157] Further, whenever appropriate, parties may conduct consultations with private entities, interested parties and other stakeholders.[158] Additionally, the *CETA* follows its previous practice by designating a stand-alone chapter on transparency, which mirrors what has been done in the *NAFTA*.[159]

While a few important elements of regulatory coherence are reflected in the *CETA*, the wording of the agreement seems to downgrade the legal rigor

---

151 Article 18.4 of the *EU–Japan EPA*, for instance, provides that 'each Party shall maintain coordination processes or mechanisms to foster good regulatory practices, including those set forth in this Section', while arts 5–11 formulate a set of rules on notice and comments, public consultation, impact assessment and retrospective review. See generally *EU–Japan EPA* arts 4–11.

152 Ibid art 19: 'Chapter X (Dispute Settlement) shall not apply to this Chapter'. However, non-application of dispute settlement, in our view, may not be a proper proxy to determine the EU's stance on regulatory coherence since even in the US-led *TPP* negotiation context, the chapter on regulatory coherence is excluded from dispute settlement.

153 *CETA* art 21.2.5.

154 Ibid art 21.1.

155 Ibid art 21.6. More specifically, the Regulatory Cooperation Forum, co-chaired by senior representatives from Canada and the EU, deliberates on issues of regulatory policy identified by both Parties, reviews regulatory initiatives, and reports to the *CETA* Joint Committee on the implementation of this chapter.

156 Ibid art 21.2.4. See European Commission, *Framework on Regulatory Cooperation and Transparency* (14 December 2004) <http://ec.europa.eu/transparency/regdoc/rep/2/2004/EN/2–2004–1605-EN-1–0.Pdf>.

157 *CETA* arts 21.4, 21.6.

158 Ibid art 21.8.

159 Ibid ch 27.

presumed therein. Notably, Canada and the EU merely 'recognise the value of regulatory cooperation while 'reaffirm[ing] their rights and obligations' under the *TBT*, *SPS*, *GATT* and *GATS*.[160] Both sides also emphasise that they will 'endeavour to fulfil the objectives … in art 21.3'[161] by undertaking specific activities of regulatory cooperation that are 'voluntary' as a general principle.[162] They further clarify that 'a Party is not required to enter into any particular regulatory cooperation activity, and may refuse to cooperate or may withdraw from cooperation'.[163] Such soft terms and flexible designs indicate the reluctance of at least one of the parties in the *CETA* to bear a formal international legal obligation vis-a-vis regulatory coherence/cooperation.

In yet other bilateral settings, it is not uncommon to see EU FTAs that implicitly address some elements of regulatory coherence. Examples of the first camp include *EU–Korea FTA*,[164] *EU–Mercosur FTA*,[165] and the proposed text of *EU–Vietnam FTA*.[166] Chapter 12 of *EU–Korea FTA*, for instance, highlights the role of a 'predictable regulatory environment and efficient procedures and requires both parties to take 'good administrative behaviour' — one that is left undefined.[167] More specifically, both EU and Korea agree to 'operate in promoting regulatory quality and performance, including through exchange of information and best practices on their respective regulatory reform processes and regulatory impact assessments' and 'subscribe to the principles of good administrative behaviour'.[168] To this end, certain elements like transparency, stakeholder participation and impact assessment are included therein — albeit different degrees of legal obligations. Nevertheless, nowhere in this chapter defines the terms 'good administrative behaviour' and 'best practices'. Similarly, the proposed text of the *EU–Singapore FTA* (the negotiation of which was completed in 2014) includes a provision on 'regulatory quality and performance and good administrative behaviour', where both parties 'subscribe to the principles of good administrative behaviour, and agree to cooperate in promoting it … through exchange of information and best practices'.[169]

---

160 Ibid arts 21.1.1–3.

161 Ibid art 21.4.

162 Ibid art 21.1.6.

163 Ibid art 21.2.6. It should be noted, however, that when 'a Party refuses to initiate regulatory cooperation or withdraws from cooperation, it should be prepared to explain the reasons for its decision to the other Party'.

164 *EU–South Korea Free Trade Agreement*, signed 6 October 2010 (entered into force 13 December 2015) ('*EU–Korea FTA*').

165 For the proposed texts and negotiations, see European Commission, *Latest Round Reports and EU Proposals for the Trade Agreement with Mercosur* (22 January 2018) <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1769>.

166 European Commission, EU–Vietnam Free Trade Agreement*: Agreed Text as of January 2016* (20 January 2016) <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437>.

167 *EU–Korea FTA* arts 12.2, 12.7.

168 Ibid art 12.7.

169 European Commission, *EU–Singapore Trade and Investment Agreements (Authentic Texts as of April 2018)* (18 April 2018) art 13.7 <http://trade.ec.europa.eu/doclib/press/index.cfm?id=961>. The negotiations of the *EU–Singapore Free Trade Agreement* were completed on 17 October 2014.

At the other end of the spectrum is the *EU–Iraq Partnership and Cooperation Agreement*[170] (*'EU–Iraq PAC'*) and the *EU–East African Community Economic Partnership Agreement*[171] (*'EU–EAC EPA'*), which have very limited transparency mandates of general application. Finally, somewhere in the middle are the *EU–Colombia/Peru FTA* and the *EU–Chile FTA* — which designate a chapter (Title X: Transparency and Administrative Proceedings) that in some ways resembles the *NAFTA* institutional design.[172]

By and large, in contrast with China, the design of the EU's FTAs — particularly those concluded against the backdrop of mega-regionalism — reveals a broader trend that the EU has incrementally moved towards the notion of regulatory coherence. Such a trend is in fact in line with the EU's political agenda in recent years. As mentioned, dialogues on good regulatory practices have been on the agenda of the EU–US trade negotiators. Such efforts get a new momentum in recent years, when Jean-Claude Junker, in his President of the European Commission campaign of 2014, strongly committed to cut red tape by keeping EU 'bigger and more ambitious on big things, and smaller and more modest on small things'.[173] Later in 2015, the European Commission adopted the 'Better Regulation' package,[174] which translated Junker's political commitments into a more concrete program by 'opening up policy and lawmaking and listening more to the people it affects' and basing its decisions on 'evidence and a transparent process, which involves citizens and stakeholders' in the entire lifecycle of a policy.[175] For those existing ones, the Commission will assess and make them more 'effective and efficient without compromising policy objectives' through strengthening the 'Regulatory Fitness and Performance Programme' ('REFIT').[176] By subjecting major draft regulatory acts to various mechanisms like public consultation and systematic impact assessment, the European Commission seems to signal its moving towards a more US-type

---

170 *EU–Iraq Partnership and Cooperation Agreement*, signed 11 May 2012 (entered into force 1 August 2012).

171 *EU–East African Community Economic Partnership Agreement*, opened for signature 16 October 2014 (not yet in force) art 134.

172 *Trade Agreement between the European Union and Colombia and Peru*, opened for signature 26 June 2012 (entered into force 1 August 2013) arts 287–94; *EU–Chile Association Agreement*, signed 18 November 2002 (entered into force 1 February 2003).

173 Jean-Claude Junker, 'A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Changes' (Speech delivered at the European Parliament Plenary Session, Strasbourg, 15 July 2014) <http://ec.europa.eu/priorities/sites/beta-political/files/juncker-political-guidelines-speech_en_0.pdf>.

174 See European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Better Regulation for Better Results — An EU Agenda' (Communication, 19 May 2015). For a detailed account, see Alberto Alemanno, 'How Much Better is Better Regulation? Assessing the Impact of the Better Regulation Package on the European Union — A Research Agenda' (2015) 6 *European Journal of Risk Regulation* 344, 344–5.

175 See European Commission, *Better Regulation: Why and How* (2018) <https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how_en>.

176 European Commission, 'Better Regulation Agenda: Enhancing Transparency and Scrutiny for Better EU Law-Making' (Press Release, IP/15/4988, 19 May 2015) <http://europa.eu/rapid/press-release_IP-15-4988_en.pdf>.

'administrative practice'[177] that echoes regulatory coherence. By and large, EU addresses regulatory coherence in the context of the *TTIP* and *EU–Japan EPA* negotiations resonates the overall Better Regulation agenda, though technically, these texts resemble China's FTAs in the sense that none of them use the term 'regulatory coherence', but rather refers to the broader concept of 'good regulatory practices' — which, as the EU carefully explains, has 'no one definition or exhaustive list'.[178]

While all our discussions thus far seem to indicate a bright future for harnessing the ramifications arising from divergent regulatory models — at least on both side of the Atlantic, there are challenges for regulatory coherence as emerging as a default global norm, and thereby implications for the future development of regulatory coherence. We detail below.

IV CONCLUSION

There has been a growing recognition of the relevance and importance of regulatory coherence in the next generation of preferential trade agreements, as evidenced in the recent examples of megaregional agreements like the *TPP*/*CPTPP*, *TTIP*, *EU–Japan EPA*, and *CETA*. The key elements of regulatory coherence promise to address the adverse effects of domestic regulations on international trade without overly interfering with an individual state's right to regulate. Yet this focus has also attracted controversy due to its potential drawbacks and by arguably undercutting a government's regulatory autonomy as well as the normative implications for the future of international economic law. As discussed earlier, despite the broad acknowledgment of regulatory coherence, major trading powers, like the US, the EU, and China, do seem to interact with the notion of regulatory coherence (by embracing some elements of regulatory coherence to varied extents), but in different ways, which may point to further multi-centric development. The collective result of these newly signed and/or negotiated agreements is, therefore, now well poised to reconfigure the current global economic governance structure and generate new rules of the game.

The US pioneered the chapter on regulatory coherence in the *TPP*. Despite its withdrawal, many of the regulatory coherence elements are likely to survive in other US bilateral FTAs. Furthermore, as the *CPTPP* keeps the regulatory coherence chapter intact and the parties have just agreed to a deal (with controversial frictions eased) and moved on track to sign on 8 March in Chile,[179] the US influence in this new trend will — though ironically — last.

While these developments are still in progress, one might well expect the persistence of different approaches to regulatory coherence in mega-regional

---

177 See Richard W Parker and Alberto Alemanno, 'A Comparative Overview of EU and US Legislative and Regulatory Systems: Implications for Domestic Governance & the *Transatlantic Trade and Investment Partnership*' (2015) 22 *Columbia Journal of European Law* 61, 89: 'The European Commission appears to have drawn inspiration from US administrative practice and begun subjecting major draft regulatory acts to both public consultation and systematic Impact Assessment'.

178 European Commission, 'Good Regulatory Practices (GRPs) in *TTIP*: An Introduction to the EU's Revised Proposal' (Textual Proposal, 21 March 2016) 2 <http://trade.ec.europa.eu/doclib/docs/2016/march/tradoc_154381.pdf>.

179 World Trade Online, *Reports: TPP Countries, Including Canada, Agree on a Deal* (23 January 2018) <https://insidetrade.com/trade/reports-tpp-countries-including-canada-agree-deal>.

trade agreements due to certain interlocking issues. Although regulatory coherence, in theory, focuses more on improving regulatory quality by enhancing both efficiency and rationality of regulatory measures, such procedural requirements can be rather demanding in actual practice and indeed may well go beyond the reach of many countries' domestic institutions. For regulatory coherence to be further diffused at the next level, capacity building and special arrangements for the developing countries is a critical condition, for regulatory coherence touches on deep, social and political underpinnings.[180] The limited capacity in terms of both legal system, regulatory culture, and governmental infrastructure in many developing countries will likely constitute certain forms of boundaries to the future development of regulatory coherence.

Amid the current wave of anti-globalisation, the point where many would feel 'uncomfortable with the influence that international norms have on their domestic legal systems'[181] in terms of regulatory coherence has been a worrying issue, and poses challenging democratic implications. This claim, interestingly enough, applies to both the Chinese and the European contexts, yet arguably for opposite reasons. For China, although their decade long institutional reforms have made its legal infrastructures more aligned with its Western counterparts, the Chinese government retains ample discretion for bringing those core elements of regulatory coherence into practice. Such discretion reflects the underlying concerns about democracy and the notion of (thick) rule of law. Put bluntly, elevating those domestic laws on good regulatory practices to an international obligation might undercut China's policy space to reject certain key ideas that rest at the crux of democracy, like transparency, stakeholder participation and full-fledged judicial review. Naturally, taking the issue of regulatory coherence to the international plane is undesirable in this instance for political reasons, which has been shown in China's hesitance towards the full version of regulatory coherence in its FTAs.

The EU seems rather friendly to the notion of regulatory coherence, as signalled in its proposed texts for the *TTIP* as well as the recent *EU–Japan EPA*. Such a trend is in line with the fact that regulatory coherence (or rationalisation) is not new for EU policymakers and has long been on the EU–US negotiation table, and that Juncker's political agenda (eg 'Better Regulation/Better Lawmaking') has accumulated significant momentum and experience (especially when the EU *legislative* sphere has long incorporated elements of regulatory coherence). However, while the notion of regulatory coherence has been among top of the agenda of its policymakers and has recently received new impetus, it is not without controversy to fully embrace regulatory coherence requirements. For one, the fact that civil society's lack of capacity to effectively participate in various forums of rulemaking and inter-governmental cooperation would cast

---

[180] The founding father of the *TPP*, for instance, seems to consider the development level of its parties. See *TPP* art 25.4:

> The Parties recognise that while the processes or mechanisms referred to in paragraph 1 may vary between Parties depending on their respective circumstances (including differences in levels of development and political and institutional structures), they should generally have as overarching characteristics the ability to …

[181] Anne Meuwese, 'Constitutional Aspects of Regulatory Coherence in *TTIP*: An EU Perspective' (2015) 78 *Law and Contemporary Problem* 152, 154–5.

doubt on the role of public consultation in practice.[182] As industry associations and multinational corporations are much more capable of taking full advantage of transparency, public consultation, regulatory impact assessment, and ex post facto reviews, it may well be that consumer organisations, minority groups and other underrepresented individuals will be marginalised during the rulemaking process. All in all, that government rulemaking process might, therefore, be unduly influenced or even interfered with by a limited number of stakeholders who have a narrow range of perspectives — largely in favour of trade and deregulation. These self-interests could not only curtail the regulatory autonomy of governments to act in the public interest, but also pose credible threats to both distributional justice and democratic legitimacy.[183] While such concerns do not seem to constitute concrete impediments to the development of regulatory coherence, they might turn out to reinforce certain boundaries drawn by other countries for distinctive reasons.

---

182 See, eg, Nils Meyer-Ohlendorf, Christiane Gerstetter and Inga Bach, 'Regulatory Cooperation under *CETA*: Implications for Environmental Policies' (Report, Ecologic Institute, 1 November 2016) <https://www.greenpeace.de/sites/www.greenpeace.de/files/publications/20161104_greenpeace_studie_regulatorycooperationunderceta.pdf>; Lore Van den Putte, 'Involving Civil Society in Social Clauses and the Decent Work Agenda' (2015) 6 *Global Labour Journal* 221.

183 Ferdi De Ville, 'Regulatory Cooperation in *TTIP*: A Risk for Democratic Policy Making?' (Policy Brief, Foundation for European Progressive Studies, February 2016) <http://www.policy-network.net/uploads/media/154/9340.pdf>.