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The Agility paradigm: Rethinking regulatory policy commitments in Free Trade Agreements

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The Agility Paradigm: Rethinking Regulatory Policy Commitments in Free Trade Agreements

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In an era marked by rapid technological advancement and an intensifying imperative for sustainability, the concept of agile regulation has emerged as a new paradigm in regulatory governance. Agile regulation champions a flexible approach essential for regulatory frameworks to evolve alongside changing circumstances. International regulatory cooperation is of importance in fostering knowledge sharing and evidence dissemination between states while mitigating regulatory disparities that stifle cross-border innovation, impede collective action against shared risks, and increase trade costs. Against this backdrop, the article delves into the role of free trade agreements (FTAs) in advancing the agile regulation agenda. It discusses how FTAs facilitate regulatory processes and cross-border partnerships that embody agility in their legal and institutional frameworks. As many recent FTAs endorse regulatory policies and practices, including those grounded in good regulatory practices and international regulatory cooperation (IRC), they stand poised to reinforce agile regulation by embracing flexibility and adaptability in response to evolving circumstances. However, the article also examines the political legitimacy implications of the trade-(agile)-regulation nexus, including concerns, such as corporate capture and the potential loss of regulatory specificities at the national level.

Keywords: agile regulation, international regulatory cooperation, good regulatory practices, mega-regional free trade agreements, corporate influence, regulatory autonomy, international economic governance

1 INTRODUCTION

In an era of rapid technological advancement and growing urgency for sustainability, the concept of agile regulation has emerged as a new paradigm for effective and future-proof regulatory approaches.[1] The concept of 'agile regulation' or 'regulatory agility' embodies a flexible approach

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[1] Agile Nations Charter, https://www.canada.ca/en/government/system/laws/developing-improving-federal-regulations/modernizing-regulations/agile-nations.html (accessed 6 July 2024). OECD, *Recommendation of the Council for Agile Regulatory Governance to Harness Innovation* (2021) C/MIN(2021)23/FINAL; OECD, *Recommendation of the Council on International Regulatory Co-operation to Tackle Global Challenges* (2022)

that should enable regulatory frameworks to keep pace with evolving circumstances, such as artificial intelligence (AI), climate technologies, quantum technologies as well as health and pharmaceuticals.[2] The Agile Nations Charter signed by seven countries notes that '[a] more agile approach to rulemaking is needed in order to unlock the potential of innovation'.[3] The Charter advocates for international cooperation between regulators by emphasizing its significance in sharing knowledge and evidence, and in preventing needless discrepancies in regulations that hinder cross-border innovation and impede collective action to tackle shared risks.[4]

The objective of regulatory agility has become a prominent focus in various governance contexts, such as at the Organization for Economic Co-operation and Development (OECD) and the World Economic Forum (WEF). Agile regulation that promotes economic growth and innovation has a bearing on FTAs and their interaction with regulatory policy approaches. Mechanisms of good regulatory practices and IRC activities have previously emerged as a feature of FTAs, especially in the age of mega-regionalism.[5] The trend, which started roughly ten years ago, has been influenced by the leading trading blocs and has had its justification in the economic costs of diverging national regulations.[6] As this article argues, the agile regulation agenda introduces a fresh impetus for regulatory policy commitments under FTAs. The agenda precisely calls upon states to embrace regulatory approaches that not only adhere to good regulatory practices but also promote IRC activities between states.

OECD/LEGAL/0475; World Economic Forum (WEF), *Agile Regulation for the Fourth Industrial Revolution. A Toolkit for Regulators* https://www.weforum.org/about/agile-regulation-for-the-fourth-industrial-revolution-a-toolkit-for-regulators/ (accessed 6 July 2024).

2 A. Aladesanmi, *Agile Regulation and the Future of Governance,* The RegReview (6 July 2023), https://www.theregreview.org/2023/05/01/aladesanmi-agile-regulation-and-the-future-of-governance/ (accessed 6 July 2024). The WEF highlights that these circumstances pertain to emerging technologies, such as artificial intelligence (AI), gene editing, the internet of things, autonomous vehicles, 3D printing, nanotechnology, advanced materials, energy storage, drones, and quantum computing. *See* n. 1 above, 6.

3 The signatory states of the Agile Nations Charter are Canada, Denmark, Italy, Singapore, Japan, UAE and the UK. *See* n. 1 above, 1d.

4 *Ibid*., 1e.

5 H.-W. Liu & C.-F. Lin, *Regulatory Rationalisation Clauses in FTAs: A Complete Survey of the US, EU and China* 19(1) Melb. J of Intern'l Law (2018), at 12, 16, 18, 22-23.

6 OECD, *International Regulatory Co-operation and Trade - Understanding the Trade Costs of Regulatory Divergence and the Remedies* https://www.oecd.org/gov/international-regulatory-co-operation-and-trade-9789264275942-en.htm (accessed 6 July 2024).

While the scope of agility, regulatory policies, and IRC is large,[7] the present article's inquiry is limited to the function of FTAs in supporting the agile regulation agenda. How do FTAs facilitate regulatory proceedings and cross-border regulatory partnerships, which are agile and adaptable in their legal and institutional form? In other words, the article probes the impact of the agile regulation agenda on the intersection of trade and regulation within FTAs and questions the extent of its impetus. For the commitments dealing with good regulatory practices that are promoted through FTAs, the agile regulation agenda correlates with existing regulatory tools but adds novel (more technology-based) practices. For IRC commitments under FTAs, the agility impetus could stimulate more frequent and extensive regulatory collaboration and exchange among trade partners. Consequently, FTAs stand poised to reinforce agile regulation by endorsing innovative forms and practices of regulatory policies that exhibit greater flexibility and adaptability in response to evolving circumstances. At the same time, FTAs and trade negotiations, in general, cannot be overburdened with regulatory issues without causing suspicion that there could be trade-offs between regulatory and market access issues that might impact the political legitimacy of such trade-regulation nexus. Hence, this article delves into the functional aspect of economic regulation by examining both good regulatory practices and IRC commitments within FTAs, while addressing the legitimacy and public interest concerns that have been raised, including corporate capture and the loss of regulatory specificities.[8]

Against this backdrop, the remainder of the article is structured into four parts. It starts by connecting the agile regulation agenda with regulatory policies and highlights their relevance for international trade agreements (Section 2). The article then revisits FTA commitments of good regulatory practices (Section 3), and subsequently, the commitments pertaining to IRC activities (Section 4). The conclusion seeks to evaluate the findings by also pointing to the more systemic implications of the evolving trade-regulation nexus for global economic governance and the evolution of the regulatory state (Section 5).

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[7] According to the OECD's recurrent definition, IRC encompasses '[a]ny agreement or organizational arrangement, formal or informal, between countries to promote some form of cooperation in the design, monitoring, enforcement, or ex post management of regulation'. This broad definition includes supranational organizations, transnational governmental networks, formal regulatory cooperation partnerships, mutual recognition agreements, as well as the recognition and incorporation of international standards. *See* e.g., OECD, *Recommendation of the Council on International Regulatory Co-operation to Tackle Global Challenges*, *see* n. 1 above, pt II.

[8] The term 'specificities' instead of 'autonomy' is used here to better cater to the idea that countries differ in their regulatory traditions, requirements, standards, and practices.

2 CONNECTING THE DOTS: AGILITY, REGULATORY POLICIES, AND FTAS

The agile regulation agenda seeks to be a flexible approach to governance, emphasizing responsiveness to changing circumstances. In essence, it aims to establish regulatory frameworks that foster innovation without compromising the protection of citizens against potential adverse effects, especially, originating from technological progress, namely, from innovation itself. In other words, risk anticipation and risk mitigation are at its heart. Risk regulation typically addresses market failures such as health, safety, labour, security, or environmental risks. Effective risk regulation enhances welfare, but it often generates costs in international trade due to regulatory divergence and burdensome administrative compliance costs.[9] Indeed, risk regulation is said to be the primary factor contributing to regulatory barriers to trade.[10] For these reasons, the agile regulatory framework also contains efforts to reduce non-tariff barriers to trade to facilitate investment in innovation.[11]

2.1 AGILE REGULATION: EVERYTHING OLD IS NEW AGAIN?

Regulatory agility builds on the objective of regulatory quality improvement, where regulatory management and governance receive more focus. This means that regulatory divergence is perceived not only as a factor that raises trade costs, but also as a potential hindrance to innovation, which in return might have negative welfare implications (e.g., loss of productivity and competitiveness). Conversely, innovation combined with an enabling agile regulatory framework can have positive welfare outcomes.[12] In this respect, the agility agenda seeks to provide new impetus to think about the challenges that revolve around the necessity to tailor regulatory

[9] J. Pelkmans, *Lowering Regulatory Trade Costs*, 22 WTR 497 (2023), 497.
[10] *Ibid*.
[11] OECD, *Better Regulation for the Green Transition' OECD Public Governance Policy Papers*, https://www.oecd.org/en/publications/better-regulation-for-the-green-transition_c91a04bc-en.html (accessed 6 July 2024).
[12] The Agile Regulation Agenda considers welfare issues as indicated by the UK government finding that 'regulatory reform could help unlock the economic and social benefits … of new and upcoming technological innovations', *see* BEIS, *The Prioritisation of Future Innovations*, Research Paper No. 2020/042, pt v.

frameworks to circumstances characterized by rapid transformations and innovation but also the uncertainty regarding the origins and extent of risks.[13]

However, uncertainty, risks, and changing circumstances are not new challenges for regulators. According to Robert Baldwin and others, regulation inherently serves as a means of controlling risks, laying the foundation for discussions on all facets of regulation, including standard-setting, information-gathering, and behaviour modification.[14] Unsurprisingly, a plenitude of regulatory strategies has been developed in the past, which either seek to control risk or seek to integrate risk-based thinking through more flexible approaches. These strategies include concepts, such as 'responsive regulation'[15], 'risk-based regulation'[16], 'smart regulation'[17], 'experimental regulation'[18] and more recently 'adaptive regulation'[19] and 'anticipatory regulation'[20]. The agile regulation agenda features many of the elements of these strategies. The agenda combines the ideas of responsiveness, risk-based, and experimental approaches for rulemaking, seeking to leverage technology for data gathering and impact monitoring. It can be understood as an update and further sophistication of regulatory strategies and tools that already exist.[21]

The starting point of agile regulation are the good regulatory practices, which seek to improve regulatory quality and include tools such as regulatory impact assessment (RIA), cost-benefit analysis, stakeholder consultation, and *ex-post* consultation. In this respect, signatories of the Agile Nations Charter stated their willingness to promote good regulatory practices on rulemaking within

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13 A. Lang, *How Should We Think About Agility? Regulatory Agility and New Landscapes of Global Regulatory Governance*, Cambridge Friday Lunchtime Lecture Series (online) 25 February 2022.

14 R. Baldwin, M. Cave & M. Lodge, *Understanding Regulation: Theory, Strategy, and Practice* (Oxford Univ. Press, 2012) 83. See also, C. Hood, H. Rothstein & R. Baldwin, *The Government of Risk: Understanding Risk Regulation Regimes* (Oxford Univ. Press, 2001) 3-8.

15 I. Ayres & J. Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford Univ. Press, 1992) 25. 'Responsive regulation' has the central tenant that compliance is more likely when a regulatory agency operates a range of enforcement sanctions extending from persuasion till license suspension.

16 Baldwin, Cave & Lodge, n. 14 above, 281-295.

17 *Ibid*., 265-267.

18 S. Ranchordás, *Experimental Regulations and Regulatory Sandboxes – Law Without Order?* in: Law and Method Special Issue: Experimental Legislation in Times of Crisis (S. Ranchordás & B. van Klink eds., 2021).

19 L. S. Bennear and J. B. Wiener, *Adaptive Regulation: Instrument Choice for Policy Learning over Time,* HKS Working Paper (2019) https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/files/Regulation%20-%20adaptive%20reg%20-%20Bennear%20Wiener%20on%20Adaptive%20Reg%20Instrum%20Choice%202019%2002%2012%20clean.pdf (accessed 6 July 2024).

20 M. Oyola-Lozada et al., *Anticipatory Regulation for Pandemic Responses: Are We There Yet?* Trends in Biotechnology (27 March 2024), https://www.sciencedirect.com/science/article/abs/pii/S0167779924000647 (accessed 6 July 2024).

21 OECD, '*Recommendation',* n. 1 above, pt II-1.

their jurisdiction.[22] As just mentioned, the agility agenda also entails several concrete updates of regulatory tools that deserve to be highlighted here. First, agility includes the idea of improving regulatory responsiveness, flexibility and adaptability to risks and challenges. This entails, for instance, the advancement of monitoring and sensing capabilities to promptly identify emerging risks. Therefore, part of agile regulation is to create mechanisms and government agency bodies that have the mission to identify and anticipate future challenges allowing regulators to better decide when the appropriate moment to regulate occurs.[23] Second, agility is about regulatory experimentation. Here, the agenda overlaps with the goals of experimental regulation as it advocates for the adoption of regulatory instruments designed to test new policies or legal solutions for a defined period.[24] This also includes working with businesses to enable testing 'under regulatory supervision', often referred to as regulatory sandboxes.[25] The idea is that albite testing a regulatory approach is inherently more costly, it may allow for a more accurate evaluation of the impacts of the regulatory approach on all stakeholders involved.

Third, agile regulation also builds on the ideas of risk-based regulation. The latter centres on regulatory actions aligned with an evaluation of the risks of non-compliance and calculations regarding the impact that the non-compliance will have on the regulatory body's ability to achieve its objectives.[26] Under the agility framework, the risks of non-compliance are to be assessed by gathering and using data.[27] For instance, in cybersecurity, risk-based enforcement tailors regulatory oversight and compliance actions according to the risk level of organizations and their systems. A financial institution that handles sensitive customer data and facilitates online transactions would be considered a high-risk entity. Regulatory agencies could subject such an institution to more stringent requirements, regular audits, and more frequent assessments to ensure that they have robust security measures in place.[28] Finally, and perhaps most crucially for the argument presented in this article, is the newfound momentum the agility paradigm is providing to IRC. Bilateral, regional, and multilateral regulatory cooperation is necessary to address the

22 Agile Nations Charter, n. 1 above, para. 4.
23 WEF n. 1 above, 11.
24 Ranchordás n. 18 above, 4.
25 WEF n. 1 above, 21.
26 J. Black and R. Baldwin, *Really Responsive Risk-Based Regulation* 32 Law & Policy 181 (2010), 181.
27 WEF n. 1 above, 29.
28 WEF n. 1 above, 30. For instance, the G20 TechSprint initiative, launched in April 2020, showcases technology's potential to tackle regulatory compliance (regtech) and supervisory (suptech) challenges. *See* https://www.bis.org/press/p200810.htm (accessed 6 July 2024).

transboundary policy implications of innovation.[29] Indeed, IRC appears to be the logical addition, especially given the intensified shared global challenges and the ongoing progress in economic integration, which affects all areas of public interest. This renders unilateral state regulation often ineffective.[30] Furthermore, the effectiveness of agile regulatory tools is further enhanced when countries collaborate by exchanging their methodologies, such as testing approaches (such as sandboxes), and sharing the results of their impact assessments and monitoring efforts. It seems furthermore logical that in the context of agility, the primary aim of IRC efforts is not about agreeing on the same or similar standards.[31] The new goal is to ensure interoperability of regulatory systems through alignment at the level of regulatory procedures.[32] Regulatory interoperability requires the establishment of transborder cooperative capacity for detecting and responding to risks as they arise based on broadly shared objectives that are typically framed in general terms.[33] Conversely, international experience that has been generated through IRC, is critical in the development and revision of regulation and should be integrated into regulatory tools and practices.[34]

2.2 WHAT IS THE TRADE-(AGILE)-REGULATION NEXUS?

In recent decades, the interconnection between regulatory and trade policy has grown. Good regulatory practices and IRC commitments are frequently incorporated into trade agreements, either within existing cross-cutting or sector-specific chapters, or more recently, as integral components of standalone chapters. The trade-regulation nexus arises from the important objective of IRC and good regulatory practices to facilitate international trade and investment.[35] Diverging

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29 OECD, *Recommendation*, n. 1 above, III-2.

30 WEF n. 1 above, 42.

31 A. Lang, *"Global Disordering": Practices of Reflexivity in Global Economic Governance,* Europ. J. of Intern'l Law, (2024) 42/47.

32 U. Gasser, *Interoperability in the Digital Ecosystem* (2015) Harvard Univ. Berkman Center for Internet & Society Research Publication No. 2015-13, 25-26: 'The relationships between interop and the law are many, complex, and tangled. … the law can help establish, adjust, or maintain interop. At the same time, interoperability is also a feature of the legal system itself, termed legal interoperability. Legal interoperability, broadly defined, is the process of making legal norms work together across jurisdictions.'

33 *Ibid*., 26.

34 OECD, *Better Regulation for the Green Transition*, n. 11 above, 32.

35 *See* US-Taiwan FTA, Art 3.2(1): 'The Parties, through their Designated Representatives, recognize that implementation of practices by all regulatory authorities to promote regulatory quality through greater transparency, objective analysis, accountability, and predictability can *facilitate international trade and investment and promote economic growth*, while contributing to the ability of the authorities of the territory

regulatory requirements across countries have become the main source of costs for transnationally active corporations.[36] The differences in regulation and policy choices made by governments require businesses to get informed about each market's regulatory requirements, specify products and services, establish their investment according to national procedures and prove regulatory compliance to domestic authorities.[37]

Historically, commitments between states to address trade barriers and national regulation date to the 1947 General Agreement on Tariffs and Trade (GATT). The way the GATT and other later trade agreements traditionally addressed the trade-regulation nexus was through the obligations for states to adopt their national law in compliance with the principles of national treatment and most-favoured-nation (MFN) treatment. Over time, more specific disciplines were negotiated in the World Trade Organization (WTO) to reduce trade barriers. The most important treaties in this respect are the Technical Barriers to Trade (TBT) Agreement and the Sanitary and Phytosanitary (SPS) Agreement. Since the WTO does not have the competence to set standards, its principal means to promote regulatory convergence among its members is by encouraging them to use international standards and make regulatory choices that comply with WTO law. Thus, the central aim has been to confine competitive distortions resulting from regulatory disparities among countries to a level that was justifiable and necessary. The aim was to discourage any harmful forms of regulatory competition and to encourage beneficial regulatory competition, especially through the development of harmonized international minimum standards that were to be implemented by WTO members.[38] The latter helped to establish the operational equivalence of distinct regulatory regimes thereby streamlining trade through a reduction in non-tariff measures.[39] While the WTO has been successful in limiting discriminatory regulatory measures and promoting

represented by each Party to achieve their public policy objectives (including health, safety, labour, environmental, and sustainability goals) at the level they consider appropriate. …' Emphasis added.

36 *See* M. Petriccione, *Reconciling Transatlantic Regulatory Imperatives with Bilateral Trade* in *Transatlantic Regulatory Cooperation: Legal Problems and Political Prospects* (G. Bermann, M. Herdegen & P. L. Lindseth, eds., Oxford Univ. Press, 2001) 207-208.

37 OECD, *International Regulatory Co-Operation: Addressing Global Challenges*, at 39, *see* https://www.oecd.org/env/international-regulatory-co-operation-9789264200463-en.htm (accessed 6 July 2024). *See also*, OECD, *International Regulatory Co-operation and Trade*, n. 6 above.

38 Agreement on Technical Barriers to Trade (14 Apr. 1994) Marrakesh Agreement Establishing the World Trade Organization Annex 1A, [hereafter TBT Agreement], Art. 2.4.

39 B. Hoekman & C. F. Sabel, *In a World of Value Chains: What Space for Regulatory Coherence and Cooperation in Trade Agreements?* in *Megaregulation Contested: Global Economic Ordering after TPP* (B. Kingsbury, D. M. Malone, P. Mertenskötter, R. B. Stewart, T. Streinz & A. Sunami, eds., Oxford Univ. Press, 2019) at 217.

certain international minimum standards, no significant improvements have been achieved to promote cooperation and dialogue between regulatory agencies of the WTO members.[40]

In parallel, the OECD embarked on a series of initiatives regarding IRC and good regulatory practices, with the first comprehensive study on the subject published in 1994.[41] The OECD consistently updates and advocates for best regulatory practices and has actively promoted IRC in its various forms, including through FTAs.[42] Today, the OECD also promotes agile regulation and makes the new agility paradigm part of its regulatory policy agenda.[43] As previously emphasized, the agile regulation agenda extends beyond the realm of FTAs. Nonetheless, FTAs through their commitments to IRC and good regulatory practices are among the strategies that can promote the agenda. If IRC and good regulatory practices can be achieved while still upholding regulatory objectives, there seems to be – at least in theory – no reason for trade and regulatory policies not to remain mutually reinforcing and hence to promote agile and future-proof regulatory solutions through FTAs.[44] Especially, the IRC elements contained in FTAs and their open-ended nature might offer significant benefits for state-to-state cooperation on agile regulation. FTAs in this respect create a framework for cooperation without specifying a result, which can be beneficial for regulatory matters around risk and uncertainty.

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40 This is notwithstanding that trade and investment disciplines have impacted national regulation, through the non-discrimination standard, through fair and equitable treatment, or through the requirement of science-based approaches in the SPS Agreement. On alternative efforts concerning regulatory cooperation at the WTO, *see* B. Hoekman & C. F. Sabel, *Open Plurilateral Agreements, International Regulatory Cooperation and the WTO,* Robert Schuman Centre for Advanced Studies, EUI Working Paper No. RSCAS 2019/10.

41 OECD, *Regulatory Co-operation for an Interdependent World,* https://www.oecd-ilibrary.org/governance/regulatory-co-operation-for-an-interdependent-world_9789264062436-en (accessed 6 July 2024).

42 OECD, *Recommendation of the Council on Regulatory Policy and Governance* https://www.oecd.org/gov/regulatory-policy/2012-recommendation.htm (accessed 6 July 2024). The OECD proposes twelve principles related to regulatory policies: 1. Whole-of-government policy for regulatory quality; 2. Transparency and participation in the regulatory process; 3. Mechanisms and institutions to actively provide oversight of regulatory policy; 4. Regulatory impact assessment (RIA) in the formulation of new regulatory proposals; 5. Review of the stock of significant regulation; 6. Reports on the performance of regulatory policy; 7. Governance of regulators; 8. Review of the legality and procedural fairness of regulations and decisions; 9. Risk-based approach; 10. Regulatory coherence across supranational, national and sub-national levels of government; 11. Regulatory policy at sub-national levels of government; 12. International regulatory cooperation.

43 Agility is part of the OECD's approach on regulatory policies. *See*, OECD, n. 11 above; *see also* OECD, *Recommendation,* n. 11 above.

44 I. Garcia Bercero & K. Nicolaidis, *The Power Surplus. Brussels Calling, Legal Empathy and the Trade-Regulation Nexus*, CEPS Pol. Insights, PI 2021/05 (2021) 25, https://ssrn.com/abstract=3832579 (accessed 6 July 2024).

2.3 HOW DO FTAS INTEGRATE REGULATORY ISSUES?

With the increase in the negotiation and adoption of comprehensive and mega-regional economic agreements, there has been an increasing demand for the integration of regulatory policy aspects. Regulatory cooperation commitments in FTAs, especially in mega-regionals, were considered to create networks or even coalitions between like-minded states to set the rules and standards for the global economy.[45] Other FTAs have continued this trend.[46] FTAs integrate regulatory policy concerns in two distinct ways. First, through provisions that apply horizontally to a broad range of economic activities and types of property. These provisions can be found in separate standalone chapters or sections. For instance, the EU-Japan Economic Partnership Agreement (EPA) contains a Section titled 'Good Regulatory Practices and Regulatory Cooperation', and states that '[t]he objectives of this Section are to promote good regulatory practices and regulatory cooperation between the Parties with the aim of enhancing bilateral trade and investment'.[47]

The first aspect of these standalone chapters is their incorporation of good regulatory practices or also called regulatory coherence commitments. Their function is to secure agreement among trade partners on a common model of decision-making in regulatory matters. The provisions deal with transparency, public consultation, RIA, inter-agency coordination and review. The goal of the commitments is to bring about more intelligible and coherent regulatory landscapes across the parties. Put differently, the aim of the promotion of good regulatory practices (or regulatory coherence) primarily centres on procedural convergence – meaning, aligning the way regulations

45 *See* B. C. Gray, *An Economic NATO: A New Alliance for A New Global Order*, Issue Brief, Atlantic Council Global Business and Economic Program (2013). *See also*, E. Golberg, *Regulatory Cooperation – A Reality Check,* Harvard Kennedy School, M-RCBG Assoc. Working Paper No. 115 (2019), at 28. 'Progress in regulatory cooperation requires a certain familiarisation process under which regulators develop an understanding of the partner's practices and procedure and build trust over time'. *See also*, B. Kingsbury et al., *Introduction: The Essence, Significance, and Problems of the Trans-Pacific Partnership*' in *Megaregulation Contested: Global Economic Ordering after TPP* (B. Kingsbury, D. M. Malone, P. Mertenskötter, R. B. Stewart, T. Streinz & A. Sunami, eds., Oxford Univ. Press, 2019) at 54.

46 R. Polanco Lazo & P. Sauvé, *The Treatment of Regulatory Convergence in Preferential Trade Agreements,* 17 WTR 575 (2018) at 576-580.

47 EU-Japan EPA, Art. 18.1.1.

are adopted.[48] Importantly, these commitments are not subject or sector-specific. Bernard Hoekman and Charles Sabel have classified these commitments as comprehensive and top-down.[49]

Second, FTAs integrate regulatory policy issues in the specific chapters on regulatory domains often combined with vertical provisions in sector-specific annexes. This second type of regulatory cooperation provisions are, for instance, integrated in the FTA's TBT chapter, SPS chapter, and other substantive chapters, such as trade and environment, trade and labour or intellectual property.[50] These provisions are, hence, subject-specific or sector-specific. They typically initiate a process of small steps starting with mutual review of inspection practices or methods of testing conformity of standards leading eventually to recognition of regulatory equivalence, as well as references to international standards.[51] The idea behind this is to minimize substantive regulatory divergence between national regulations. Hoekman and Sabel have labelled the objective of IRC and these provisions to be substantive convergence[52] and classified their integration in international economic law to be 'piecemeal' and bottom-up.[53] On IRC, it is critical to note that mechanisms of regulatory cooperation can also be found in the standalone chapters. In other words, FTAs also contain a sector-agnostic IRC integration, which is more flexible and open-ended than IRC under the sector-specific chapters.

The present analysis focuses solely on the sector-agnostic standalone chapters.[54] However, it distinguishes between those provisions that deal with good regulatory practices, which concern the process of adopting regulation at the national level, and those provisions that add an international

48 Hoekman & Sabel, n. 39 above, at 219.

49 *Ibid*.

50 E.g., CETA on the registration of trademarks, see CETA, Art. 20.14: 'Each Party shall provide for a system for the registration of trademarks in which reasons for the refusal to register a trademark are communicated in writing to the applicant, who will have the opportunity to contest that refusal and to appeal a final refusal to a judicial authority. Each Party shall provide for the possibility of filing oppositions either against trademark applications or against trademark registrations. Each Party shall provide a publicly available electronic database of trademark applications and trademark registrations.' For instance, Articles 21.1 to 21.9 in the CETA on intellectual property contains several provisions on regulatory cooperation.

51 *See* e.g., CETA, Art. 10.8.

52 Hoekman & Sabel, n. 39 above, at 219. The authors moreover classify such IRC commitments with a substantive convergence objective as 'regulatory cooperation in the strict sense'.

53 *Ibid*.

54 This article excludes the analysis of regulatory cooperation provisions in sector specific chapters. Also excluded are specific regulations or sectors that deal with regulatory harmonization that can be the consequence of specific commitments in FTAs. This also excludes specific chapters on transparency (such as CPTPP, Chapter 26 'Transparency and Anti-Corruption').

dimension consisting of dialogue and exchange on regulatory matters, i.e., IRC. In fact, most standalone horizontal chapters in FTAs promote common approaches to decision-making and set a more open-ended framework for exchange and cooperation on regulatory matters of common concerns between the parties. In the United States-Mexico-Canada Agreement's (USMCA) Chapter 28, designated 'Good Regulatory Practices', one finds commitments toward the end regarding the promotion of regulatory compatibility and cooperation adding a substantive convergence element going beyond regulatory tools.[55] In a joint report of the WTO and the OECD we find that '[i]nternational regulatory cooperation (IRC) is an integral part of good regulatory practices in today's globalized world'.[56] Broadly conceived, IRC consists of arrangements to promote cooperation in the design, monitoring, and enforcement or *ex-post* management of regulation, with a view to supporting the consistency of rules across national borders.[57] The common thread among good regulatory practices and IRC provisions is their influence on the framework of regulatory governance. In essence, they all play a role in shaping how regulatory decisions are determined, with the shared goal of achieving greater alignment across partner countries' regulatory practices.[58] Ultimately, the shared goal is to mitigate potential competitive distortions arising from regulatory processes. Benedict Kingsbury and others argued that the promotion of good regulatory practices also serves to indirectly promote convergence in substantive regulatory standards and arrangements.[59]

Some of the most recent strategies, which have emerged to deal with regulatory coherence and cooperation commitments – in horizontal, standalone and sector-agnostic chapters – are the Comprehensive and Progressive Trans-Pacific Partnership (CPTPP), the USMCA, the EU-Japan EPA, the EU-Canada Comprehensive Economic Trade Agreement (CETA), the US-Taiwan FTA and the Australia-UK FTA.[60] Furthermore, although still in the early stages, there are efforts related to 'Transparency and Good Regulatory Practices' within the US-led Indo-Pacific Economic

55 USMCA, Art. 28.17.

56 WTO/OECD, 'Facilitating Trade through Regulatory Cooperation. The Case of the WTO's TBT/SPS Agreements and Committees' (2019), https://www.wto.org/english/res_e/publications_e/tbtsps19_e.htm (accessed 6 July 2024).

57 J. L. Dunoff, *Mapping the Hidden World of International Regulatory Cooperation* 78 Law and Contemp. Prob. 267 (2015), at 267.

58 Lang, n. 13 above.

59 Kingsbury et al., n. 45 above, 44.

60 Two stalled treaties with comprehensive provisions on good regulatory practices and IRC are the EU-China Comprehensive Agreement on Investment (CAI) and the EU-US Transatlantic Trade and Investment Partnership (TTIP).

Framework (IPEF, Pillar I), as well as in the 'Standards and Conformance' Section of the Singapore-Australia Green Economy Agreement.[61] All these developments emphasize that the trade-regulation nexus remains relevant for international economic agreements in the foreseeable future.

Table 1: Overview of horizontal chapters dealing with good regulatory practices and/or IRC.

Agreement	**Entry into force**	**Name of standalone horizontal chapter(s)**	**Objective emphasized**	
			Promotion of good regulatory practices (i.e., procedural convergence)	Promotion of IRC (i.e., substantive convergence)
US-Taiwan FTA	Not yet in force (signed June-23)	Good Regulatory Practices		
UK-Australia FTA	May-23	Good Regulatory Practices		
USMCA	Jul-20	Good Regulatory Practices		
EU-Japan EPA	Feb-19	Good Regulatory Practices and Regulatory Cooperation		
CPTPP	Dec-18	Regulatory Coherence		
EU-Canada CETA	Sep-17	Regulatory Cooperation		

Source: WTO Regional Trade Agreements Database

When examining the listed chapters, it is important to distinguish between the different core meanings of good regulatory practices, on the one hand, and IRC, on the other hand. The argument put forward in this article is that the agility impetus operates differently for commitments regarding good regulatory practices than it does for IRC commitments. For the former, agility complements the set of regulatory tools, and for the latter, agility might be a catalyst for more frequent and more extensive IRC. Therefore, the following operates in two steps, first considering commitments of

[61] *See also,* Singapore-Australia Digital Economy Agreement, Art. 33.

good regulatory practices, and second, examining how international cooperation on substantive rules and standards are buttressed through IRC commitments.

3 COMMITMENTS OF GOOD REGULATORY PRACTICES IN FTAS

The emergence of good regulatory practices or regulatory coherence in FTAs garnered attention in international trade law circles during the mid-2010s, particularly as negotiations for mega-regional agreements were underway.[62] There is a wealth of excellent literature on the subject, with a notable focus on the TPP/CPTPP, which stood out as the first mega-regional pact to incorporate a comprehensive set of regulatory practices.[63] Existing literature has delved into the origins of good regulatory practices, the spread of their normative influence, the potential constraints imposed by national constitutional law, as well as the concerns regarding the legitimacy associated with the promotion of good regulatory practices.[64]

Today, commitments of good regulatory practices have become standard practice for trade treaties negotiated by the US, the EU, Canada, Australia, and the UK.[65] In a recent report, the OECD

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62 For a non-exhaustive list, *see*: C. Guan & Q. Xu, *The Boundary of Supranational Rules: Revisiting Policy Space Conflicts in Global Trade Politics*, J of World Trade 55, no. 5 (2021), 853–880; H.-W. Liu & C.-F. Lin, *Constitutional Traditions as Boundaries in Standardising Administrative Rulemaking Through Trade Agreements* 71 Int'l & Comp. L.Q. (2022) 889; Liu & Lin, n. 5 above; T. J. Bollyky, *Regulatory Coherence in the TPP Talks* in *The Trans-Pacific Partnership: A Quest for a 21st Century Trade Agreement* (C. L. Lim, D. K. Elms and P. Low, eds, Cambridge Univ. Press, 2012), at 171-186; H.-W. Liu & C.-F. Lin, *The Emergence of Global Regulatory Coherence: A Thorny Embrace For China?* 40 U. Pa. J. Int'l L. (2018) 133; Polanco Lazo & Sauvé, n. 46 above; R. T. Bull et al., *New Approaches to International Regulatory Cooperation: The Challenge of TTIP, TPP, and Mega-Regional Trade Agreements* 78 Law & Contemp Problems. 1 (2015), at 1-29; E. Sheargold and A. D. Mitchell, *The TPP and Good Regulatory Practices: An Opportunity for Regulatory Coherence to Promote Regulatory Autonomy?* 15 World Trade Rev. (2016) 587; A. Alemanno, *The Regulatory Cooperation Chapter of the Transatlantic Trade and Investment Partnership: Institutional Structures and Democratic Consequences* (2015) 18 J. of Intern'l Eco. Law (2015) 625; P. Mertenskötter and R. B. Stewart, *Remote Control: TPP's Administrative Law Requirements as Megaregulation*, in in *Megaregulation Contested: Global Economic Ordering after TPP* (B. Kingsbury, D. M. Malone, P. Mertenskötter, R. B. Stewart, T. Streinz & A. Sunami, eds., Oxford Univ. Press, 2019) at 384-412; D. P. Steger, *Institutions for Regulatory Cooperation in New Generation Economic and Trade Agreements,* 39 Legal Issues of Eco. Integration (2012) 109.

63 CPTPP, Art. 25.3 '… regulatory coherence refers to the use of good regulatory practices in the process of planning, designing, issuing, implementing and reviewing regulatory measures in order to facilitate achievement of domestic policy objectives, and in efforts across governments to enhance regulatory cooperation in order to further those objectives and promote international trade and investment, economic growth and employment'.

64 H.-W. Liu & C.-F. Lin, in particular, demonstrated why China is reluctant to further the normative diffusion of regulatory coherence norms (or good regulatory practices), *see* Liu & Lin, *The Emergence of Global Regulatory Coherence: A Thorny Embrace For China?,* n. 62 above; A. Meuwese analysed the obstacles to provisions from an EU constitutional law perspective, see A. Meuwese, *Constitutional Aspects of Regulatory Coherence in TTIP: An EU Perspective, Law and Contemporary Problems,* 78 4, New Appr. Int'l Reg. Coop. (2015), 153-174.

65 *See* Table 1.

describes, by referring to 'regulatory management tools', good regulatory practices as encompassing 'different tools available to implement regulatory policy and foster regulatory quality including, in particular, RIA, stakeholder engagement, and *ex-post* evaluation'.[66] As elaborated by Han-Wei Liu and Ching-Fu Lin, the foundational principles of these regulatory practices find their origins in US administrative law.[67] For instance, transparency and consultation can be traced as far back as the common law legacy in the United States. The concept of RIAs first emerged in the 1970s and underwent subsequent expansions in the following years.[68] Other countries and regions later followed by implementing improved regulatory procedures, e.g., the EU 'Better Regulation' agenda, which aims to enhance the quality of legislation and policy-making within the EU by streamlining processes, conducting impact assessments, and ensuring transparency and stakeholder engagement.[69]

Apart from the US system where it originates, commitments of good regulatory practices might raise constitutional concerns for countries. Each state has its own policies, procedures, and institutions to govern how regulations are developed, administered, and reviewed. The critical aspect is that good regulatory practices pertain to the entirety of a decision-making system, rather than isolated components. Therefore, Kingsbury and others coined it a set of 'extensive administrative law requirements'.[70] Hoekman and Sabel found that the constitutional costs of implementing such regulatory practices are high.[71] Moreover, the specification of good regulatory practices in FTAs can amount to imposition of the procedure of the dominant countries, such as the US, raising questions as to why the US model is the best model for emulation.[72] Lastly, there has been a widespread assumption that the demand for the adoption of comprehensive FTAs integrating regulatory policy issues has been driven by large corporations pressuring governments

66 OECD, *Recommendation*, n. 1 above, pt 1.
67 Liu & Lin, n. 5 above, at 152.
68 *Ibid*, 153-155: Jimmy Carter's Executive Order 1971 Executive Order 12044, President Ronald Reagan's Executive Order 12291 in 1981; President Bill Clinton's 1993 Executive Order 12866 on Regulatory Planning and Review.
69 European Commission, *Better Regulation Guidelines*, https://commission.europa.eu/law/law-making-process/planning-and-proposing-law/better-regulation/better-regulation-guidelines-and-toolbox_en (accessed 6 July 2024).
70 Kingsbury et al., 45 above, 40.
71 Hoekman & Sabel, n. 39 above, 225.
72 *Ibid*., 225, 227; Mertenskötter & Stewart n. 62 above, 398-403.

to improve the alignment of regulatory practices in ways expected to help their profitability.[73] These considerations are critical, although tempered by the fact that the provisions in the standalone chapters under examination are best endeavour provisions.[74] Without doubt, commitments of good regulatory practices in FTA should remain sensitive to domestic specificities and the interests of foreign partners. The implications for the regulatory state and the 'corporate capture' arguments should prompt a reflection on the creation of safeguard mechanisms designed to address these potential risks of which some are revisited here.[75] This could be done in the FTA itself or during the subsequent domestic implementation or transposition of the good regulatory practices.

Considering first public consultation, which serves to enhance the legitimacy and accountability of the regulatory process by fostering inclusivity. Public consultation is the practice of seeking input, feedback, and opinions from the public and interested stakeholders regarding proposed regulations or changes to existing ones. The Australia-UK FTA requires that each party endeavours to 'allow interested persons a reasonable opportunity, including adequate time, to consider the proposed regulatory measure and to provide comments'.[76] Under the EU-Japan EPA, each Party shall 'offer, on a non-discriminatory basis, reasonable opportunities for any person to provide comments'[77]. Under both examples, contracting states' regulatory authorities must consider the comments received. The term 'interested party' is not defined in both treaties. This means that the conditions are set out in national laws and practices.[78] Public consultation is, in

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73 Kingsbury et al., 45 above, 40.

74 Under the CPTPP these provisions are not subject to the dispute settlement mechanism of the treaty. *See*, CPTPP, Art. 25.11.

75 In a political science study on the (CP)TPP, I. Osgood revealed the breadth and depth of corporate political activity by analysing the significant lobbying by firms and associations of both the executive and legislative branch in the early stages of TPP negotiations, and how lobbying intensifies when the agreement moves toward signature and ratification. *See*, I. Osgood, Sales, *Sourcing, or Regulation – Evidence from TPP on What Drives Corporate Support for Trade* in in *Megaregulation Contested: Global Economic Ordering after TPP* (B. Kingsbury, D. M. Malone, P. Mertenskötter, R. B. Stewart, T. Streinz & A. Sunami, eds., Oxford Univ. Press, 2019) at 297-300.

76 Australia-UK FTA, Art. 26.6.

77 EU-Japan EPA, Art. 18.7.

78 E.g., European Commission, n. 69 above. The European Commission's Minimum Standards of consultation, and the standards determine that 'consultation is intended to provide opportunities for input from interested parties'. Further, those consulted should be 'those affected by the policy' and that in determining the relevant parties for consultation, the Commission should seek a balance between experts, groups that are interested in wider impacts of policies (e.g., environment), and a fair representation of different communities. *See also,* Australia-UK FTA, Art. 26.2, footnote 3: 'For greater certainty, this subparagraph does not prevent a Party from undertaking targeted consultations with interested parties under the conditions defined by its relevant rules and procedures.'

principle, an element that infuses more democratic participation into the realm of trade agreements. In other words, the corporate capture concerns do not arise in theory but might arise in practice. For instance, participation in public consultation could show disproportionate participation and influence of business associations and other corporate interest parties because public interest actors tend to lack sufficient financial resources to actively engage in the consultation process. Studies, specifically those conducted for the US-Canada Regulatory Cooperation Council, have revealed findings suggesting that the Council's activities were significantly influenced by business interests.[79] Such findings give ground for concern and should invite regulators to implement best practices for consultation processes.[80] This should include that consultation proposals reach all interested parties, such as market participants, consumers, and end-users, both nationally and internationally. Moreover, the dissemination should occur through various channels, including public hearings, in-person meetings, roundtable discussions, written submissions, and online consultations.

RIAs are another important feature of regulatory commitments in FTAs. For instance, CPTPP parties have committed to 'generally encourage relevant regulatory agencies, consistent with its laws and regulations, to conduct RIAs when developing proposed covered regulatory measures that exceed a threshold of economic impact, or other regulatory impacts, where appropriate'.[81] The provision also states that the impact assessment may encompass a range of procedures to determine possible impacts.[82] The general idea behind RIAs is to improve the quality of national regulation by lowering the costs of regulation and the impact of regulation. The impacts on business are important but also those on the wider public and the environment.[83] Examining the RIA provision of the CPTPP, two critical elements emerge. The first pertains to the aforementioned importance of the scope of impacts considered in such regulatory assessments. Ayelet Berman has shown that

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79 R. O'Brien, *Moving Regulation out of Democratic Reach: Regulatory Cooperation in the CETA and its Implications*, Working Paper No. 158 (2016), Arbeitskammer Wien, 7, https://econpapers.repec.org/paper/clrmwugar/158.htm (accessed 6 July 2024).

80 For example, International Council for Securities Association (ICSA), *Best Practices for Regulatory Consultation*, *see* Best Practice No. 5 (2013): 'Once a formal consultation is initiated, regulators should consult with market participants and other stakeholders and, where appropriate, with stakeholders and regulators in other jurisdictions as widely and effectively as possible.'

81 CPTPP, Art. 25.5(1).

82 CPTPP, Art. 25.5(1).

83 C. Parker & F. Haines, *An Ecological Approach to Regulatory Studies?*, J. of Law & Soc. 45(1) (2018), at 149-154.

US administrative law has mainly focused on the impacts of regulations on business, trade and investment.[84] US administrative practice has not assessed other kinds of impacts in the past, namely falling short on social, environmental, or health impacts.[85] For other OECD countries too, findings suggest that environmental impacts, for instance, are not yet sufficiently assessed in a systemic and granular manner in practice.[86] This results in RIAs where the scope is often too narrow, thereby ignoring critical impacts.[87] The CPTPP provision on RIAs allows contracting states to determine the procedure and impacts, with an explicit reference to economic impacts, while also mentioning 'other regulatory impacts'.[88] This means, in return, that it is the responsibility of the national regulator to ensure that other impacts, e.g., related to sustainability and distributive justice are part of the assessment.

The second aspect of RIAs is the question of who decides on the scientific knowledge and studies used in the RIA and employed in evaluating the costs and benefits of a particular regulation. Article 25.5(2d) of the CPTPP states that an RIA should make use of the 'best reasonable obtainable information'. However, in the context of technical regulation, it has become the common reality that most statistics, studies and assessments of the risks and the benefits of regulation, are either made or financed by industry itself instead of government agencies.[89] Moreover, government agencies, national ministries, and parliaments are increasingly reliant on industry expertise.[90] These trends are largely attributed to the growing complexity of regulation coupled with limited public resources. The extent to which corporate capture risk factors in the RIA implementation under FTAs will depend on the specific factual context and the states involved.[91] At a minimum,

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84 A. Berman, *Taking Foreign Interests into Account: Rule-making in the US and EU,* 15 Int'l J. Const. L. (2017) 235, 250.

85 *Ibid*.

86 OECD, n. 11 above, at 13.

87 *Ibid*.

88 CPTPP, Art. 25.

89 J. Baron et al., *Why Do R&D-Intensive Firms Participate in Standards Organizations? The Role of Patents and Product-Market Position*, Northwestern Univ. Searle Center on Law, Reg. and Eco. Growth, https://wwws.law.northwestern.edu/researchfaculty/clbe/events/standardization/documents/baron_li_nasirov_may_2019.pdf (accessed 6 July 2024). *See also*, M. Mazzucato & R. Collington, *The Big Con: How the Consulting Industry Weakens Our Businesses, Infantilizes Our Governments, and Warps Our Economies* (Penguin Press 2023).

90 L. Schrefler, *Reflections on the Different Roles of Expertise in Regulatory Policy Making,* in *The Role of 'Experts' in International and European Decision-Making Processes* (M. Ambrus et al., eds., Cambridge Univ. Press, 2014) 63-81.

91 *See also,* A. Berman, 'Between Participation and Capture in International Rulemaking: The WHO Framework of Engagement with Non-State Actors' (2021) 32(1) Eur. J. Int'l L., 227, 243-244. See also, M. J. Durkee,

RIA provisions in FTAs could state the contracting parties' common understanding that independent information serves as the foundation for impact assessments and cost-benefit analysis.

The points just raised deal mainly with the corporate capture argument, but the concerns regarding the loss of national regulatory specificities weigh in equally and should not be overlooked. Kingsbury and others posit that in the context of the CPTPP, the techniques of regulatory practices and coherence, coupled with other disciplines in the FTA, 'buttress a particular and distinctive method of regulatory alignment'.[92] Such imposition is made by dominant states and generates adaptation costs for developing countries. When FTAs are a coalition of like-minded states, they can have spill-over effects on third countries. Smaller or weaker countries might find themselves adopting regulatory reforms out of pressure. If implemented, national laws and administrative proceedings need to be aligned to good regulatory practices. States should acknowledge the potential implementation and adaptation costs and should carefully balance these considerations with the desire to join a comprehensive FTA, thereby seeking to attract foreign investment and participate in global supply chains.[93]

4 INTERNATIONAL REGULATORY COOPERATION ACTIVITIES BUTTRESSED BY FTAS

The analysis now turns to the second element of regulatory policy commitments in FTAs, which is IRC. As mentioned at the outset, IRC is a broad concept encompassing a wide set of mechanisms, i.e., any form of inter-state cooperation that involves regulation.[94] In the case of the USMCA, regulatory cooperation is defined as 'efforts between two or more Parties to prevent, reduce, or eliminate unnecessary regulatory differences to facilitate trade and promote economic growth while maintaining or enhancing standards of public health and safety and environmental protection'.[95] The US-Taiwan FTA states that 'regulatory cooperation means an effort between the

Industry Lobbying and "Interest Blind" Access Norms at International Organizations 111 AJIL Unbound 119 (2017); A. Berman, *Industry, Regulatory Capture and Transnational Standard-Setting* 111 AJIL Unbound 112 (2017).

92 Kingsbury et al., n. 45 above, 44.

93 Bull et al., n. 62 above, 7-8.

94 *See* n. 7 above.

95 USMCA, Art. 28.1

authorities of the territory represented by a Party and the authorities of the territory represented by the other Party to prevent, reduce, or eliminate unnecessary regulatory differences'.[96]

In terms of content, the horizontal standalone chapters on regulatory policies integrate aspects of IRC typically pertaining to dialogue between regulators and the exchange of information on regulatory matters.[97] In certain cases, they include the setting up of a forum or committee in which FTA parties can discuss regulatory topics of mutual interest. The recent Australia-UK FTA lists various disciplines falling under IRC, such as regulatory information exchange covering past experiences, risk assessment outcomes, as well as the sharing of information on planned and existing measures, information exchange with interested parties, training programs, inter-agency cooperation, and cooperation in international fora.[98] The IRC provisions are best endeavour provisions.[99] The non-binding character imposes a limitation on the extent of the top-down nature of IRC in FTA as it might not be sufficient to incentivize countries to fully engage in IRC.[100] These provisions can, however, serve as stepping stones to more ambitious regulatory cooperation in the future. As stated by the OECD, '[t]he eventual success of those processes to reduce avoidable trade frictions related to regulatory heterogeneity will depend on continued political support'.[101] Building on aspects of gathering support for open dialogues and exchange, several FTAs set up specific treaty bodies that have responsibilities to cooperate with trading partners and promote IRC. Within the open-endedness of the IRC provisions in FTA lies their potential but also the risks associated with loss of democratic oversight and erosion of national specificities or traditions.

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96 US-Taiwan FTA, Art. 3.1.

97 The exchange of information can be coined as the 'lightest' form or IRC among regulators. *See*, OECD, *Toolkit of IRC Mechanisms,* https://web-archive.oecd.org/2013-04-19/220658-irc-toolkit.htm (accessed 6 July 2024).

98 Australia-UK FTA (a) information exchange, dialogue, or meetings with the other Party, including in particular:
(i) exchanging experiences with regulatory tools and instruments, including regulatory impact assessments, risk assessments, retrospective reviews, and compliance with regulatory practices;
(ii) exchanging information on planned or existing regulatory measures to maximize the opportunity for common approaches;
(b) information exchanges, dialogues, or meetings with interested persons, including with SMEs, of the other Party;
(c) training programmes, seminars, and other relevant assistance;
(d) strengthening cooperation and other relevant activities between regulatory agencies; or
(e) seeking to collaborate in relevant international fora.

99 E.g., EU-Japan EPA, Art. 18.6: 'The Parties may engage in regulatory cooperation activities on a voluntary basis.'

100 OECD, n. 6 above, 49.

101 *Ibid*.

The critical questions that pertain to the legitimacy of the mechanisms are who takes part in the work of the IRC treaty bodies under FTAs, what are their responsibilities and what is the outcome of their deliberations. For instance, the CPTPP established a Committee on Regulatory Coherence, which is composed of government authorities and primarily, has the competence to discuss issues related to the provisions of regulatory coherence and regulatory tools.[102] EU approaches differ in this respect as EU FTAs set up treaty bodies that routinely interact and exchange on the parties' regulatory systems.[103] Article 21.6 of CETA establishes the Regulatory Cooperation Forum (RCF), which is co-chaired by senior representatives from both parties and includes relevant officials and regulatory agencies. The Forum serves to discuss regulatory policy issues of mutual interest that the Parties have identified through, among others, stakeholder consultations. The RCF is allowed to develop best practices of regulatory cooperation initiatives in specific sectors.[104] Moreover, the RCF can assist regulators in identifying cooperation opportunities and reviewing regulatory initiatives. These elements highlight that the RCF has responsibilities to push forward the objective of more substantive convergence, without being limited by a pre-defined policy area or sector of regulation. This element is combined with a flexible participation approach as the RCF members can 'by mutual consent invite other interested parties to participate in the meetings of the RCF'.[105] Consequently, the cooperative dialogue is not limited to regulatory agencies.[106] The combination of a potentially wide scope of topics that can be discussed and the participation flexibility has caused significant public concern in the past, most notably during the negotiations of CETA.[107] The question thus arises whether such institutional settings like the above involve legitimacy concerns. The pertinence of the questions harkens back to the discussion on the potential erosion

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102 CPTPP, Art. 25.6.

103 *See* e.g., EU-Japan EPA, Art. 18.4; CETA, Art. 21.6.

104 The chapter builds on and replaces the 'Framework on Regulatory Cooperation and Transparency between the Government of Canada and the European Commission', Brussels 21 December 2004.

105 CETA, Art. 21.6.3.

106 E.g., CETA, Art. 21.8 Consultations with private entities – 'In order to gain non-governmental perspectives on matters that relate to the implementation of this Chapter, each Party or the Parties may consult, as appropriate, with stakeholders and interested parties, including representatives from academia, think-tanks, non-governmental organisations, businesses, consumer, and other organisations. These consultations may be conducted by any means the Party or Parties deem appropriate.'

107 E.g., O'Brien, n. 79 above; The Ecologic Institute, *Regulatory Cooperation under CETA: Implications for Environmental Policies*, https://trade-leaks.org/wp-content/uploads/2016/09/Regulatory-Cooperation-in-CETA.pdf ; S. Trew, *From NAFTA to CETA: Corporate Lobbying through the Back Door*, Canadian Centre for Policy Alternatives and The Corporate Observer (8 Feb. 2017), https://corporateeurope.org/en/pressreleases/2017/02/ceta-hands-legislative-reins-lobbyists-new-report-shows (all accessed 6 July 2024).

of national policy autonomy and loss of regulatory specificities, through transnational authorities and standard-setting bodies.[108] In the context of comprehensive FTAs, the (recurrent) arguments against IRC commitments have been concerns that treaty bodies, such as the RCF, will be influenced by corporate pressure seeking to harmonize standards around the lowest common denominator thereby lowering critical social protection standards.[109]

Whether and to what extent these concerns are valid and regulatory processes are indeed undermined by one-sided interests depends, here too, on how these mechanisms are being implemented. Confirming or refuting these fears requires more precise research on the activities and outcomes of the meetings of, for instance, the CETA RCF, as well as similar entities. At the same time, it is important to recall that treaty bodies that deal with IRC have generally no decision-making power and cannot supervise national regulatory work.[110] Moreover, the participation in these treaty bodies is *ad hoc* and voluntary. The CETA explicitly states that a 'Party is not required to enter into any particular regulatory cooperation activity and may refuse to cooperate or may withdraw from cooperation'.[111] The treaties under examination also uphold the parties' right to regulate in the public interest. As such the US-Taiwan FTA, underlines that the promotion of regulatory cooperation not only facilitates international trade but can also contribute to 'the ability of the authorities of the territory represented by each Party to achieve their public policy objectives (including health, safety, labour, environmental, and sustainability goals) at the level they consider appropriate'.[112]

However, IRC mechanisms should be monitored, and their work should be as transparent as possible.[113] The orientation of the cooperation activities is also important. If the focus is purely on

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108 *See also*, D. Rodrik, *Straight Talk on Trade: Ideas for a Sane World Economy* (PUP 2019) 16-27; T. Büthe & W. Mattli, *The New Global Rulers: The Privatization of Regulation in the World Economy* (PUP 2011).

109 Hoekman & Sabel, n. 39 above, 227-228.

110 It should be noted, however, that the CETA RFC reports to the CETA Joint Committee and through the Joint Committee its recommendation can become decision-making if accepted by both Parties, *see* CETA, Art. 21.6.4(c). For a more critical acclaim of CETA's RFC, *see*, M. Rioux et al., *CETA, an Innovative Agreement with Many Unsettled Trajectories,* 10 Open Journal of Political Science (2020) 1, 50-60.

111 CETA, Art. 21.2.6.

112 US-Taiwan FTA, Art. 3.2(1). *See also*, CETA, Art. 21.3.

113 The NGO Foodwatch eV has already challenged a decision of the European Commission refusing access to a preparatory documents relating to a meeting of the CETA RCF. The General Court rejected the request based on public interest grounds relating to international relations. See, *Foodwatch v. Commission*, T-643/21, Judgement of 6 Sep. 2023.

limiting trade costs thereby overlooking public interest concerns, i.e., the public's opinion on risks and their need for safety and mitigation in areas such as health, the environment, food safety, or data privacy, it becomes problematic. Hoekman and Sabel argue that the scrutiny of the results of regulatory cooperation will improve democratic oversight of the actual effects of these initiatives in each party's jurisdiction.[114] Indeed, close monitoring of the outcomes of IRC processes is crucial. This monitoring should not solely rely on civil society groups but should also involve independent bodies from the respective state parties. Finally, the monitoring and *ex-post* assessments of who participates in IRC bodies under FTA are critical once again. It matters who qualifies as 'interested parties' and gets invited to cooperation forums such as the CETA RCF. The criteria for selecting the stakeholders are not defined in FTAs but rather rely on national law. This omission could be improved by setting certain minimal requirements that allow for a mixture of experts but also impacted and vulnerable groups.

5 CONCLUSION

With the rapid technological changes and rising sustainability challenges, states have good reasons to cooperate and exchange regulatory tools and approaches.[115] States continue to conclude FTAs containing commitments relating to their regulatory policy and thereby bring national regulators closer together. In other words, the connection between agility and recent FTAs highlights that the relationship between the international economic system and rule- and standard-setting is increasing rather than decreasing. In this contextual setting, the present article aimed to revisit and rethink the rationale behind regulatory policy commitments in FTAs and to evaluate their normative influence considering the paradigm of regulatory agility. While the utilization of FTAs as a strategy to promote good regulatory practices and IRC predates the agile regulation agenda, this article argued that agility provides new impetus for these disciplines. First, regulatory rationalization through good regulatory practices is being fostered and updated by new and more technology-based approaches. Second, agility could potentially foster new and more regulatory cooperation between states based on the general and subject-neutral IRC provisions in FTAs.

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114 Hoekman & Sabel, n. 39 above, 217.

115 E.g., UK Government Department for Business, Energy & Industrial Strategy, *International Regulatory Cooperation Strategy*, *see* https://www.gov.uk/government/publications/international-regulatory-cooperation-strategy (accessed 6 July 2024).

The trade-(agile)-regulation nexus raises new and old questions for global economic governance and the understanding of the regulatory state. Agility in this respect does not change the vision of the state that has become predominant in the era of hyper-globalization[116] but arguably provides new justifications for this vision. It is the continuation of a vision of the regulatory state that has become a state, which grows in tandem with the market regulating its failures and externalities.[117] Yet markets are dynamic, unpredictable, and international, which causes the nation-state constantly to reach its limits. It is a state that must substantiate its right to regulate under certain circumstances, respond to new challenges, and reconsider why and to what extent its regulatory objectives and approaches differ from those of other states. The agility agenda is driven and justified by effectiveness, efficiency, and flexibility, which are necessary to balance between promoting innovation and tackling risks and uncertainty. In other words, its legitimacy and thus the legitimacy of its implementation through good regulatory practices and IRC is based on a functionalist rationale.[118] It integrates a vision of a state whose regulatory functions can, if necessary, be substituted by expert bodies and other stakeholders. Lastly, it envisions a state that integrates technology and data science in its regulatory processes. Hence promoting *smart* states. National regulatory systems must now strive for interoperability to guarantee the smooth functioning of the evolving trade system driven by new technologies.

Agility is aligned with the objectives of good regulatory practices and IRC promoted in FTAs, as well as with the vision of the regulatory state in globalized markets. These objectives are grounded in functionalist legitimacy, and their political legitimacy has and should be questioned. This article has sought to highlight that the same legitimacy concerns occur in the trade-(agile)-regulation nexus as is the case for the discussion surrounding mega-regionals and their incorporation of regulatory policy commitments. These concerns relate to the decrease or loss of regulatory specificities paired with fears of corporate influence on regulatory processes. With the agile regulation agenda, these questions must be revisited especially because the agenda promotes open

116 *See* Rodrik, n. 108 above, 16-27

117 Kingsbury et al., n. 45 above, 44.

118 *See also,* P. Nanz, *Democratic Legitimacy and Constitutionalisation of Transnational Trade Governance: A View from Political Theory*', in *Constitutionalism, Multilevel Trade Governance and International Economic Law* (C. Joerges and E.-U. Petersmann, eds., Hart, 2011) 64-68.

governance structures with private sector engagement. Agile practices, such as using flexible oversight authority, or working closely with industry, could facilitate regulatory capture. Some of the crucial questions remain: How are stakeholders defined? Who engages in public consultations? Who provides expertise and who finances the scientific studies that are used for regulatory assessments, *ex-ante* or *ex-post*, as well as the anticipation of risk? The article highlighted that, based on a textual reading alone, good regulatory practices and IRC commitments in FTAs do not infringe on the regulatory autonomy of contracting states, mainly because these commitments depend on the implementation of the trading partners. It has also been argued that the practice of promoting good regulatory practices and IRC in and of itself does not suggest that welfare objectives are undermined by single-sided private influence. To ensure that all interests are being heard is a matter of process. Undoubtedly, legitimacy should be ensured through the fairness of the process and the net benefit outcomes for the broader public. Therefore, a critical question for future research revolves around whether the agility agenda can be seen as a social agenda, wherein new technology-based regulatory approaches are fair and inclusive. At this juncture, the agility paradigm provides new impetus for good regulatory practices and IRC and, the regulatory policy commitments in FTAs might be beneficial strategies to implement the agility agenda and thereby assist governments to tackle current challenges, such as those stemming from technology and sustainability.