



Regulatory Cooperation in Mega-Regional Trade Agreements

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ABSTRACT

Trade friction in the age of global value chains is primarily due to regulatory diversity. While due to the lack of disciplines in the WTO context on the exercise of regulatory powers by states, it is difficult to eradicate the diversity, regulatory cooperation is key to reducing the restraints that heterogenous regulations may impose on international trade. Recent mega-regional trade agreements have gone beyond the WTO disciplines and put forward novel and ambitious approaches to regulatory cooperation to address behind-the-border non-tariff measures. After a critical review of the new regulatory cooperation mechanisms in three mega-regional trade agreements, this article argues that these new regulatory cooperation mechanisms have spelled out a thick web of procedures that can be used to deliver better quality domestic regulations as well as enhance governmental coordination through joint institutions that monitors the consistency of proposed regulations with treaty commitments. It is still too early to assume that these new initiatives will significantly impact ameliorating the adverse effects of regulatory diversity in international trade. Nevertheless, they break new ground in international economic rule-making and hold great promise.

Keywords: Regulatory cooperation, Good Regulatory Practices, Mega-regional trade agreements, behind-the-border non-tariff measures, CETA, USMCA, CPTPP

INTRODUCTION

With traditional barriers to trade such as import tariffs and quantitative restrictions having fallen dramatically, the predominant concern of international trade community has shifted to heterogenous regulatory, non-tariff measures (NTMs), which Pascal Lamy, the former WTO Director General, called “the real 21st Century trade issues”.¹ Examples of such NTMs are different product standards, separate licensing requirements for providers of services, and duplicative certification and conformity assessment procedures for goods, services and production processes. The regulatory diversity is unavoidable because it is rooted in differences between WTO Members with regard to, *inter alia*, political and legal systems, income levels, cultures, attitudes to risk aversion, technical capacity, or even data and appropriate tools to analyze

risks and formulate measures.² The costs imposed by regulatory diversity takes on special significance in contemporary global supply chain trade since products are impacted by an ever greater number of regulatory jurisdictions.³

The OECD defines international regulatory cooperation as “any agreement or organizational agreement, formal or informal, between countries to promote some form of cooperation in the design, monitoring, enforcement, or ex-post management of regulation, with a view to support the converging and consistency of rules across borders.”⁴ The increase in regulatory cooperation in global trade governance is unsurprising. To begin with, there are few feasible alternatives for reducing the restraints that non-discriminatory regulations may impose on international commerce. Unlike tariffs, NTMs cannot be eliminated

¹ Shawn Donnan, ‘EU and ASEAN to pave way for trade pact talks’, *Financial Times* (6 September 2004).

² WTO TBT Committee, ‘Regulatory Cooperation between Members- Background Note by the Secretariat’, G/TBT/W/340 (7 September 2011), at 1-2.

³ Michael J Ferrantino, ‘Using Supply Chain Analysis to Analyze the Costs of Non-Tariff Barriers to Trade and the Benefits of Trade

Facilitation’, U.S. International Trade Commission Office of Economics Working Paper WTO Working Paper No. 2012-01A (January 2012), at 4-5.

⁴ OECD, *International Regulatory Cooperation: Addressing Global Challenges* (OECD Publishing, 2013) 19.



because they serve important social regulation purposes such as promoting public health and safety, safeguarding the environment, and ensuring the proper functioning of markets.⁵ Moreover, states frequently face similar regulatory challenges despite their historical, cultural, political and legal differences. They can improve their domestic regulatory process by learning from each other's regulatory choices, being more aware of likely effects of their domestic regulations on parties outside their jurisdictions and developing common standards and frameworks to similar risks.⁶

Regulatory cooperation can take various forms. From the least to the most legally binding, regulatory cooperation includes dialogue/exchange of information; recognition and incorporation of international standards; transgovernmental networks of regulators; mutual recognition; trade agreements with regulatory provisions; joint rule-making through intergovernmental organizations; regulatory cooperation partnerships; specific negotiated agreements; and regulatory harmonization through supranational institutions.⁷ Almost all these cooperation forms are adopted in modern trade agreements. Take the WTO as an example. The Agreement on the Technical Barriers to Trade (TBT Agreement) and the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) contain extensive provisions on harmonization through international standards, as well as mutual and unilateral recognition of technical regulations and conformity assessment procedures.⁸ In addition, the adoption of good regulatory practices has been regularly discussed at the TBT Committee.⁹

More recently, international regulatory cooperation has been identified as a key governance challenge with the advent of mega-regional trade agreements (FTAs), such as the EU-Canada Comprehensive Economic and Trade Agreement (CETA), the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and the United States-Mexico-Canada Agreement (USMCA).¹⁰ Indeed, so important are nontariff and regulatory issues that they are the very focus of the majority of the substantive chapters of the recent mega-regional FTAs.¹¹

But precisely how do mega-regional FTAs approach regulatory cooperation? Compared to regulatory cooperation mechanisms in the WTO Agreements, what is innovative about the new disciplines on regulatory cooperation in the new mega-regional FTAs? Are they fit for purpose? This article explores these questions.

The article proceeds as follows. Part 2 provides a conceptual framework for regulatory cooperation in international trade law, including the economic benefits of regulatory cooperation, the challenges in implementing regulatory cooperation in practice and the distinction between regulatory cooperation and other related concepts such as regulatory coherence and good regulatory practices. Part 3 provides a critique of the existing regulatory cooperation mechanisms in the WTO Agreement. Part 4 examines closely the key features of regulatory cooperation chapters of CPTPP, CETA, and the USMCA. Part 5 concludes the article.

REGULATORY COOPERATION IN INTERNATIONAL TRADE AGREEMENTS: A CONCEPTUAL FRAMEWORK

Untangling the Concepts of Regulatory Cooperation, Regulatory Coherence and Good Regulatory Practices

The idea of regulatory coherence originated in the United States Administrative law and then further evolved in the Organization for Economic Cooperation and Development (OECD) and the Asia Pacific Economic Cooperation (APEC) before having been exported to regional and international economic fora.¹² Originally designed to limit the scope of discretion enjoyed by administrative bodies, regulatory coherence is concerned about the use of good regulatory practices (GRPs) to ensure rationality, democratic accountability, and the rule of law in domestic regulatory process. A key component of GRPs metrics is the regulatory impact assessment (RIA), defined as a "process of systematically identifying and assessing the expected effects of regulatory proposals, using a consistent analytical method".¹³ The OECD advocates cost benefit analysis for proposed regulations and emphasizes the need for evidence-based decision making. Other key elements of regulatory coherence include transparency and public

⁵ Thomas J. Bollyky and Petros C. Mavroidis, 'Trade, Social Preferences and Regulatory Cooperation: The New WTO-Think', 20 (1) *Journal of International Economic Law* 1 (2017), at 12.

⁶ Marianna B. Karttunen, *Transparency in the WTO SPS and TBT Agreements: The Real Jewel in the Crown* (Cambridge University Press, 2020), at 101.

⁷ OECD, above n 4, 22-25.

⁸ Jonathan B Wiener and Alberto Alemanno, 'The Future of International Regulatory Cooperation: TTIP as a Learning Process toward a Global Policy Laboratory', 78 (1) *Law and Contemporary Problems* 103 (2015), at 108.

⁹ TBT Committee, 'Eighth Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade under Article 15.4', G/TBT/41 (19 November 2018), 2-8.

¹⁰ Reeve T Bull et al, 'New Approaches to International Regulatory Cooperation: The Challenge of TTIP, TPP and Mega-Regional Trade Agreements', 78 (1) *Law and Contemporary Problems* 1 (2015), at 2; Robert Basedow and Celine Kauffmann, 'International Trade and Good Regulatory Practices: Assessing the Trade Impacts of Regulation', OECD Regulatory Policy Working Papers No. 4 (OECD, 2016), at 10.

¹¹ Bernard Hoekman, 'Fostering Transatlantic Regulatory Cooperation and Gradual Multilateralization', 18 *Journal of International Economic Law* 609 (2015), at 609.

¹² Phoenix XF Cai, 'Regulatory Coherence and Standardization Mechanisms in the Trans-Pacific Partnership', 5 *British Journal of American Legal Studies* 505 (2016), at 511.

¹³ Council of the OECD, *Recommendation of the Council on Regulatory Policy and Governance* (OECD, 2012), at 4.

consultation, inter-agency coordination and compatibility, and administrative and judicial review. In return, regulatory coherence can support the development of compatible regulatory approaches and promises to reduce the adverse effects of burdensome, duplicative, or divergent domestic regulations on international trade.¹⁴ By contrast, regulatory cooperation is the process of interaction or closer partnership between national regulators, aimed at reducing regulatory divergence and enhancing regulatory interoperability.¹⁵ Regulatory cooperation covers a wide scope of cooperative mechanisms, ranging from dialogue and an agreement to notify and consult on a new or proposed regulatory measure or to an obligation to adopt international standards or to recognize or harmonize with another nation's regulations.¹⁶ In short, regulatory coherence is concerned about the use of GRPs focusing on the quality of the *domestic* regulatory processes, regulatory cooperation implies an international element.¹⁷

While regulatory coherence and regulatory cooperation can be conceptually separated, they are by no means practically insulated and mutually exclusive. Regulatory coherence is fundamental to effective regulatory cooperation because the latter often requires GRPs such as transparency and consultation throughout the regulatory development process and exploring alternative approaches to regulation. Likewise, regulatory cooperation among national regulators is an effective way of peer learning and disseminating GRPs.¹⁸ The lack of strict separation of the two closely related terms in treaty design has led scholars to use interchangeably.¹⁹ For example, the term regulatory coherence appears to be used in an expansive manner to include regulatory cooperation in mega-regional FTAs in which the United States has played a leading role. Article 25.1 of the CTTTP defines regulatory coherence as "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*". Similarly, regulatory cooperation is included as part of the chapter on GPRs in the USMCA.²⁰

On the other hand, the regulatory cooperation chapter of some recent FTAs, such as the CETA, has incorporated the idea of regulatory coherence as well. For example, one of the objectives of the regulatory cooperation chapter in CETA is to "improve the planning and development of regulatory proposals, promote transparency and predictability in the development and establishment of regulations, enhance the efficacy of regulations, identify alternative instruments, and recognize the associated impact of regulations..." Some of the illustrative regulatory cooperation activities are in essence GRPs.²¹

The Economic Rationale of Regulatory Cooperation

The basic economic rationale behind regulatory cooperation between countries is that, by reducing unnecessary regulatory diversity as well as the costs associated with necessary regulatory diversity, regulatory cooperation can facilitate trade by lowering costs to exporters, increasing economies of scale, and enhancing the transparency and predictability of regulation in export markets.²² Two key mechanisms of regulatory cooperation, harmonization and mutual recognition are used as examples to illustrate their economic benefits as well as the limits of such benefits.

Harmonisation involves the adoption of the identical standards by two or more jurisdictions.²³ Until the 1980s, setting product standards had been primarily an internal matter for firms or the domain of private sector technical bodies at the national level. International standards were few and far between.²⁴ However, with the rise of heterogeneous product standards and their associated economic loss, harmonisation through international standards has increasingly served as instruments of trade liberalisation. First, the use of identical standards leads to products manufactured in different countries more homogeneous and therefore better substitutes for both producers and consumers. Second, the adoption of common standards acts as a quality signal to improve consumer confidence in importing countries about the quality of the goods produced abroad. Third, identical standards will enhance compatibility between imported and domestic products, allowing network externalities to more readily spill over internationally. Fourth, the adoption of identical standards eliminates the need for

¹⁴ Ching-Fu Lin and Han-Wei Liu, 'Regulatory Rationalization Clauses in FTAs: A Complete Survey of the US, EU and China', 19 (1) *Melbourne Journal of International Law* 149 (2018), 150-151.

¹⁵ The U.S. Chamber of Commerce, 'Regulatory Coherence & Cooperation in the TTIP' (17 February 2015) 1-2.

¹⁶ OECD, above n 4, 22-25.

¹⁷ Gabriel Gari, 'Recent Preferential Trade Agreements' Disciplines for Tackling Regulatory Divergence in Services: How Far Beyond GATs', 19 (1) *World Trade Review* 1 (2020), at 23.

¹⁸ Han-Wei Liu & Ching-Fu Lin, 'The Emergence of Global Regulatory Coherence: A Thorny Embrace for China?', 40 (1) *University of Pennsylvania Journal of International Law* 133 (2018), at 151.

¹⁹ Elizabeth Sheregold & Andrew D. Mitchell, 'The TPP and Good Regulatory Practices: An Opportunity for Regulatory Coherence to Promote Regulatory Autonomy?', 15(4) *World Trade Review* 587 (2016), 590-593.

²⁰ Article 28.17 of USMCA.

²¹ Article 21.3 (b) and Article 21.4 of CETA.

²² WTO TBT Committee, above n 2, at 3-5.

²³ Bernard Hoekman, 'Trade Agreements and International Regulatory Cooperation in a Supply Chain World' (EUI Robert Schuman Centre for Advanced Studies 2015/04), at 4.

²⁴ Walter Mattli and Tim Buthe, 'Setting International Standards: Technological Rationality or Primacy of Power?', 56 *World Politics* 1 (2003), 1-2.

firms to comply with different set of regulations, and the associated costs. Finally, to the extent that different standards have artificially segmented the domestic from foreign markets, harmonisation will enhance competition.²⁵

The empirical literature provides robust evidence on the positive impact of harmonisation in increasing international trade flows. Moenius studied data covering 471 industries in 12 European countries and found that shared standards have a positive and significant effect on bilateral trade. He estimated that a 10 per cent increase in the number of shared standards enhances bilateral trade by about 3 per cent.²⁶ Similarly, focusing on the electronics sector, Reys examined the response of US firms to the harmonisation of EU standards with IEC standards. His study found that increasing harmonisation increases US exports to the EU. In particular, the increase was due to more new US small- and medium-sized firms entering into the EU market.²⁷ There is also evidence showing that developing countries may benefit from harmonisation of product standards in international trade. Focusing on the exports of textiles, clothing and footwear, Shepherd found that a 10 per cent increase in the total number of non-harmonised EU Standards led to a 6 per cent decrease in product variety from trading partners. By contrast, a 10 per cent increase in the proportion of EU standards harmonised with ISO standards led to an increase of 0.2 per cent in the variety of imports to the EU, mainly from low-income countries.²⁸

Despite many benefits of harmonization, there are natural limits on the extent of harmonization to reduce regulatory heterogeneity. Normatively it is questionable international harmonization is always the best policy option to address regulatory heterogeneity. It is often socially productive to respect differences in national preferences where those preferences reflect legitimate differences such as risk tolerance, levels of development, geography, cultures and values.²⁹ As a positive matter, harmonization is not often successfully pursued at the global level due to limits to the resources, the time-lag between the identification of need for an international standard and the agreed outcome, and the difficulty in achieving consensus on an international standard.³⁰ Moreover, the gains from harmonisation are

not distributed evenly among countries since not all of them possess expertise or bargaining power to enable them to take full part in international standards-setting activities. Consequently, harmonisation may generate asymmetric compliance costs for different countries.³¹

To facilitate trade in cases in which harmonization is either undesirable or unfeasible, the equivalence and mutual recognition agreements (MRAs) may provide another avenue for regulatory cooperation. Whilst equivalence is unilateral recognition of an exporting Member's regulation, an MRA is an agreement in which two or more members recognise the equivalence of each other's regulations. MRAs and equivalence are highly desirable policy tools in international trade because they increase trade flows through greater administrative efficiency, including the elimination of extra fees and delays associated with additional approval in the country of destination. The reduction of transaction costs leads to the reduction in consumer prices of final goods.³² MRAs are particularly useful to developing countries looking for new export markets. Wilson shows that developing countries are likely to secure a 52.3% increase in exports if there is in place a MRA. The positive effects are even more significant in the agricultural sector.³³ Moreover, even though harmonization is in general expected to boost trade more than mutual recognition, some economists consider that mutual recognition can avoid the negative impact on trade brought by harmonization because it allows a country to choose one standard and sell products meeting that standard to its trading partners. A firm can freely access its partner's markets without the additional cost of harmonizing its standards. Therefore, when love for variety is important for trade or when costs of adaptation to a new harmonized technology are high, mutual recognition should be expected to boost trade more than harmonization.³⁴

However, there are some practical difficulties to make full use of MRAs and equivalence in international trade. To begin with, the evaluation of equivalence for regulations usually involves a complicated process of identifying legitimate objectives and parameters that can be used for

²⁵ World Trade Report, *Exploring the Links between Trade, Standards and the WTO* (2005) 54.

²⁶ Johannes Moenius, 'Information versus Product Adaptation: The Role of Standards in Trade' (February 2004) 15–17, <https://ssrn.com/abstract=608022> (Accessed 1 September 2021).

²⁷ Jose-Daniel Reyes, 'International Harmonisation of Product Standards and Firm Heterogeneity in International Trade', *The World Bank Policy Research Paper* 5677 (2011) 18–19.

²⁸ Ben Shepherd, 'Product Standards, Harmonisation, and Trade: Evidence from the Extensive Margin', *World Bank Policy Research Working Paper* 4390 (2007), at 23.

²⁹ Alan O Sykes, 'The (limited) Role of Harmonisation in International Goods and Services Market', *2 Journal of International Economic Law* 49 (1999), 66-67.

³⁰ Richard E Baldwin, 'Regulatory Protectionism, Developing Nations, and a Two-Tier World Trade System', *Brookings Trade Forum* 237 (2000), 264–265.

³¹ WTO Report 2005, above n 25, at 54.

³² Anabela Correia de Brito, Celine Kauffmann and Jacques Pelkmans, 'The Contribution of Mutual Recognition to International Regulatory Co-operation', *OECD Regulatory Policy Working Papers No.2* (OECD Publishing, 2016), at 54–56.

³³ Humberto Zuniga Schroder, *Harmonization, Equivalence and Mutual Recognition of Standards in WTO Law* (Wolters Kluwer, 2011) 135.

³⁴ WTO Trade Report, *Trade and Public Policy: A Closer Look at Non-Tariff Measures in the 21st Century* (2012) 150.

comparison.³⁵ Given the thematically diverse and wide range of regulations, the equivalence assessment has to be carried out sector-by-sector, or even product-by-product. If there is any change in the relevant regulation of one of the parties to an MRA, a new evaluation of equivalence may be required. Thus, it is very costly to negotiate an MRA in practice.³⁶ Moreover, since regulations are assumed to be equivalent in achieving a certain policy objective under MRAs, MRAs require a certain degree of trust among countries regarding their respective ability adequately to monitor the validity of testing abroad. Therefore, MRAs are more likely to occur in regional agreement among developed countries than at the multilateral level, excluding developing countries.³⁷ Consequently, these policy tools have only achieved limited success so far.³⁸ Up to 2020, 150 MRAs have been notified to the TBT Committee and OECD countries initiate most of them.³⁹

A CRITIQUE OF REGULATORY COOPERATION IN THE WTO LEGAL FRAMEWORK

The only GATT discipline on regulatory NTMs is the non-discrimination requirements in Article III, which was originally designed to prevent importing countries from eroding tariff reductions with other domestic policy instruments. Thus, a GATT is free under the GATT to implement regulations *unilaterally* to pursue any legitimate objectives, as long as it does not discriminate against imported like products. However, the non-discrimination obligation has nothing to say about the *quality* of the regulatory intervention. The regulations may be excessively stringent, idiosyncratic, unnecessary, or costly to comply with, without running afoul of the non-discrimination obligation.⁴⁰

With focus of the WTO shifted to NTMs, the TBT Agreement and the SPS Agreement were added during the Uruguay Round. A key objective of the TBT Agreement and the SPS Agreement is the avoidance of unnecessary trade barriers while recognizing the right of Members to pursue legitimate regulatory objectives at a desired level they deem appropriate. Although regulatory cooperation *per se* is not specifically mentioned, the TBT and SPS

Agreements have employed a myriad of tools to promote international regulatory cooperation between the WTO Members.⁴¹ The enhanced regulatory cooperation has led some scholars to argue that the WTO has evolved from negative integration (prohibiting discriminatory non-tariff barriers to trade) to the positive integration (common policies to shape the conditions under which markets operate).⁴²

First, an international standard is by definition the outcome of multilateral cooperation. The preamble of the TBT Agreement captures the important role of international standards in facilitating international trade. Articles 2.4 and 5.4 of the TBT Agreement provide that WTO Members are obliged to use relevant international standards as a basis for their technical regulations and conformity assessment procedures (CAPs) unless they are in effective or inappropriate to achieve their regulatory objectives. In addition, Article 2.6 requires Members to participate in international standard-setting activities. Moreover, Paragraph G of Annex 3 of the TBT Agreement requires, *inter alia*, that standardizing bodies participate in international standard-setting activities within the limits of their resources.

Second, disciplines on mutual recognition and equivalence of technical regulations and CAPs also promote cooperation between WTO Members because they help ensure that traders do not face duplicative requirements or procedures when regulations differ across markets. Article 2.7 of the TBT Agreement imposes a legal obligation on WTO Members to “give positive consideration” to accepting as equivalent technical regulations of other Members, even if these regulations differ from their own, provided they are satisfied that these regulations adequately fulfill the objectives of their own regulations.

Third, transparency provisions may serve to trigger useful regulatory cooperation between Members. As one of the fundamental norms of the WTO trading system, transparency is said to be the most important work of the WTO, more so than conducting formal rounds of negotiations and settling trade disputes.⁴³ Article 2.9 and 5.6 of the TBT Agreement lay down a multilateral transparency framework for WTO Members, including

³⁵ Frode Veggeland, ‘Trade Facilitation through Equivalence and Mutual Recognition: The EU Model’, Norwegian Agricultural Economics Research Institute Report 2006-3, at 31.

³⁶ Communication from the European Union, ‘A Policy Framework for the Facilitation of Trade in the Fields of Standardisation and Conformity Assessment: A Toolbox of Instruments’, WTO Doc. G/TBT/W/173/Add.1 (19 April 2002), at para 51.

³⁷ WTO Report 2005, above n 25, at 55.

³⁸ Ministry of Business, Innovation & Employment of New Zealand, ‘Evaluation of Conformity Assessment Mutual Recognition Agreements and Arrangements’ (April 2018), at 11.

³⁹ Note by the Secretariat, ‘Twenty-Sixth Annual Review of the Implementation and Operation of the TBT Agreement’, G/TBT/45 (18 February 2021), at 26.

⁴⁰ Ming Du, ‘Domestic Regulatory Autonomy under the TBT Agreement: From Non-Discrimination to Harmonization’, 6 (2) Chinese Journal of International Law (2007), at 281-282.

⁴¹ WTO & OECD, *Facilitating Trade through Regulatory Cooperation: The Case of the WTO’s TBT and SPS Agreements and Committees* (2019) 4-5.

⁴² Robert Basedow, ‘The WTO and the Rise of Plurilateralism- What Lessons can We Learn from European Union’s Experience with Differentiated Integration? 21 (2) Journal of International Economic Law 411 (2018), at 414.

⁴³ Petros C Mavroidis and Robert Wolfe, ‘From Sunshine to a Common Agent: The Evolving Understanding of Transparency in the WTO’, 21(2) *Brown Journal of World Affairs* 117 (2015), 117-118.

publication of a notice, notifications, provision of copies and reasonable time between notification and implementation for comments and publication, whenever they plan to adopt a measure that may have a significant effect on trade. The advance notification gives Members the opportunity to make comments regarding the proposed regulations at an early stage and to have their comments considered in the regulatory process.⁴⁴ Since the TBT Agreement entered into force, over 31,531 notifications have been submitted.⁴⁵ The prompt publication requirement for adopted TBT measures greatly reduces the cost and difficulty of obtaining information from their trading partners. The provision of a reasonable period before the entry into force of a published measure enables exporters to adjust to new requirements.⁴⁶ The obligation to provide justification supplements the other transparency obligations by enabling WTO Members to obtain information beyond the existence and content of technical regulations, such as its legitimate objective and the reasons for its deviation of international standards.⁴⁷ In addition, Article 10.1 of the TBT Agreement provides that each member shall ensure that an enquiry point exists which is able to answer all reasonable inquiries from other Members and interested parties. These transparency provisions enhance the consultation processes domestically, allow other Members, in particular developing countries, to adapt to newly adopted standards, and help to avoid conflict and prevent disputes.

Fourth, the TBT Committee and the SPS Committee were established to provide a forum for regulatory cooperation where WTO Members can learn about each other's regulatory systems and discuss draft regulations affecting international trade.⁴⁸ In particular, the Committee provides a forum for WTO Members to raise "specific trade concerns" (STCs) to provide feedback on proposed draft measures notified to the committee or the implementation of the existing regulations that may create unnecessary obstacles to trade. Since the TBT Agreement entered into force, over 700 STCs have been discussed in the Committee.⁴⁹ The discussions among WTO Members promote shared understanding of regulatory systems,

contribute to peer learning, and significantly defusing trade tensions in the TBT and SPS areas.⁵⁰ Moreover, the TBT and SPS Committees periodically adopt decisions and recommendations to help members to implement more efficiently specific provisions of the SPS and TBT Agreements.⁵¹

All these regulatory cooperation mechanisms have encouraged the reduction of regulatory heterogeneity and associated trade costs. However, it is questionable whether they are adequate given the increasingly significant NTMs in international trade and the expansion of the GATT/WTO membership. It is submitted that the WTO still represents largely a negative integration model with non-discrimination remaining the baseline for integration among the majority of WTO Members. Additional tools, mechanisms and institutional support going beyond current WTO rules are needed to improve regulatory cooperation.⁵²

To begin with, although WTO disciplines have given Members a launch pad for international regulatory cooperation, there is little evidence that regulatory cooperation provisions in the WTO Agreements have convinced WTO Members not to adopt unilateral regulatory measures that are nevertheless duplicative, unnecessarily divergent, or inefficient.⁵³ For example, regulatory authorities may impose duplicative rules and CAPs because of lack of awareness or concern with the trade costs of these redundancies, lack of confidence in its foreign counterpart to monitor and enforce the rules competently or simply for the purpose of rent-seeking to generate income for the regulatory agencies. Likewise, regulatory authorities may impose divergent, but more stringent, less stringent, or similarly stringent rules because of different social preferences, different attitudes towards risk, particular institutional structures and rulemaking procedures, or capacity restraints. Importantly, the regulatory incoherence in each of these scenarios is not necessarily inconsistent with the provisions in the TBT and SPS Agreements.⁵⁴ But the

⁴⁴ Henrik Horn, Petros C Mavroidis and Erik N Wijkstrom, 'In the Shadow of the DSU: Addressing Specific Trade Concerns in the WTO SPS and TBT Committees', 47 (4) *Journal of World Trade* 729 (2013), at 733.

⁴⁵ Technical Barriers to Trade Information Management System, <http://tbims.wto.org/> (accessed on 9 September 2021).

⁴⁶ Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, adopted 24 April 2012, para 272.

⁴⁷ Denise Prevost, 'Transparency Obligations under the TBT Agreement', in Tracey Epps and Michael Trebilcock, *Research Handbook on the WTO and Technical Barriers to Trade* (Edward Elgar, 2015) 162.

⁴⁸ Art 13.1 of the TBT Agreement and Art 12.2 of the SPS Agreement.

⁴⁹ Technical Barriers to Trade Information Management System, <http://tbims.wto.org/> (accessed on 9 September 2021).

⁵⁰ Henrik Horn et al, above n 44, at 730; Robert Wolfe, 'Reforming WTO Conflict Management: Why and How to Improve the Use of 'Specific Trade Concerns'', 23 *Journal of International Economic Law* 817 (2020), at 822.

⁵¹ Erik N. Wijkstrom, 'The Third Pillar: Behind the Scenes, WTO Committee Work Delivers', E15 Task Force on Regulatory Systems Coherence Think Piece (August 2015), at 2-5.

⁵² Alexia Brunet Marks, 'The Right to Regulate (Cooperatively)', 38 (1) *University of Pennsylvania Journal of International Law* 1 (2016), at 50-51.

⁵³ Robert W. Stiger & Alan O. Sykes, 'International Trade, National Treatment and Domestic Regulation', 40 (1) *Journal of Legal Studies* 149 (2011) 150.

⁵⁴ Bollyky and Mavroidis, above n 5, 12-13.

outcome remains inefficient for trade and for achieving effective international regulatory oversight.

Furthermore, the existing WTO regulatory cooperation obligations are limited. For example, the TBT and SPS Agreements include provisions encouraging MRAs and equivalence arrangements to help address the problem, but they are limited to best endeavors and do not provide the framework needed for engaging regulatory authorities on adopting regulatory cooperation arrangements. Article 2.7 appears to impose on WTO Members only a “best efforts” obligation because the nature of the obligation is only to “give positive consideration” to an equivalence recognition request. Moreover, even the obligation of positive consideration is conditional upon a subjective criterion that this WTO Member is satisfied with the effectiveness of a foreign technical regulation.⁵⁵ Moreover, Article 2.7 does not give any guidance on how it is implemented in practice. Even if Article 2.7 only considers unilateral recognition of equivalence, the equivalence system is technically feasible and politically acceptable only on a bilateral, country-by-country basis.⁵⁶ The fact is, though, that recognition agreements are routinely signed between like-minded, homogeneous players (often in the context of FTAs), and few participants prepare harmonized standards for the world.

Moreover, the WTO Appellate Body’s interpretation of relevant disciplines was not helpful to promote regulatory cooperation either. Take Art 2.4 of the TBT Agreement as an example. Art 2.4 requires WTO Members to use relevant international standards as a basis for their technical regulations unless they are ineffective or inappropriate to achieve their regulatory objectives.

The AB has ruled that there is no “general rule-exception” relationship between the first and the second parts of Article 2.4. To challenge a WTO Member’s technical regulation on the grounds that it is inconsistent with Article 2.4, the allocation of the burden of proof does not shift to the defending WTO Member deviating from the relevant international standard. The *complainant* has to bear the burden of establishing that the relevant international standard has not been used “as a basis for” the technical regulation, *as well as* that the international

standard is both “effective” and “appropriate” to fulfil the legitimate objectives pursued by the Member through the technical regulation.⁵⁷ The AB’s rejection of a general rule-exception relationship in respect of international standards has transformed Article 2.4 into a positive requirement for the complainant to prove that international standards would function as an effective and appropriate alternative to the disputed TBT measure.⁵⁸ This interpretation has accorded a greater degree of deference to sovereign policy choices. However, it might be argued that a good opportunity for the AB to promote regulatory cooperation through international standards was missed. Textually, there is a clear legislative mandate stating that international standards must be given priority, except when they are ineffective or inappropriate to serve as a basis. The term ‘except’ can only be understood as referring to an ‘exception’. If this is the case, then it seems reasonable for the party who deviates from the relevant international standard to assume the burden of proof. This interpretation is also consistent with one of the key objectives of the TBT Agreement to promote harmonization.⁵⁹

Finally, the current WTO rules focus mainly on regulatory outputs with insufficient attention to regulatory inputs from interested stakeholders in the domestic rule-making process.⁶⁰ WTO Members have officially placed on the agenda of the TBT Committee the notion of GRPs for domestic regulations, encouraging the exchange of information and implementation experiences.⁶¹ A detailed set of voluntary best practices in developing and applying regulations was proposed at the TBT Committee.⁶² However, without a greater mandate and more institutional support, these efforts seem more likely to serve as guidelines for unilateral actions by Members, rather than the first step towards establishing a forum for cooperation between WTO members.⁶³

REGULATORY COOPERATION IN MEGA-REGIONAL FTAs

In view of the failed Doha Round and the current stagnation of WTO negotiations, the focus of attention on reducing unnecessary, duplicative and cumbersome NTMs has moved

⁵⁵ Ludvine Tamiotti, ‘Article 2 TBT’, in Rudiger Wolfrum, Peter-Tobias Stoll & Anja Seibert-Fohr (eds), *WTO, Technical Barriers to Trade and SPS Measures* (Nijhoff, 2007) 226.

⁵⁶ A. Beviglia Zampetti, ‘Mutual Recognition in the Transatlantic Context: Some Reflections on Future Negotiations’, in Thomas Cottier and Petros C Mavroidis (eds), *Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law* (University of Michigan Press, 2000) 318.

⁵⁷ WTO Appellate Body Report, *European Communities – Trade Description of Sardines (EC – Sardines)*, WT/DS231/AB/R, adopted 23 October 2002, para 275.

⁵⁸ Erich Vranes, *Trade and the Environment: Fundamental Issues in International Law, WTO Law, and Legal Theory* (Oxford University Press, 2009) 313.

⁵⁹ Petros C. Mavroidis, ‘Last Mile for Tuna (to a Safe Harbour): What is the TBT Agreement All About?’, 30 (1) *European Journal of International Law* 279 (2019), 294-295.

⁶⁰ Simon Lester and Inu Manak, ‘Addressing Regulatory Trade Barriers in Mega-Regional Trade Agreements’, in Thilo Rensmann (ed), *Mega-Regional Trade Agreements* 337 (Springer, 2017) 347-348.

⁶¹ TBT Committee, above n 9, at 2-8.

⁶² TBT Committee, ‘Good Regulatory Practice: Voluntary Mechanisms and Related Principles’, Proposal by the Chairman (27 October 2014), JOB/TBT/119.

⁶³ Bollyky and Mavroidis, above n 5, at 15.

away from the WTO towards FTAs. Consequently, new or additional requirements and mechanisms on regulatory cooperation have emerged as one of the unique features of recent FTAs.⁶⁴

CETA

The CETA is a new trade agreement between the EU and Canada, entering into force provisionally on 21 September 2017. The CETA breaks new ground for FTAs in the sense that it includes an innovative chapter on regulatory cooperation.⁶⁵ The idea of eliminating undue regulatory divergences between Canada and the EU through regulatory cooperation was not new. As early as 1976, a Joint Cooperation Committee was established to streamline regulatory practices in different sectors and has resulted in the conclusion of several MRAs and equivalence agreements. Efforts towards a stronger regulatory cooperation component integrated in a comprehensive trade agreement was not successful and the cooperation between Canada and the EU was defined as an “informal, executive-led process of consultation, information and best practice exchange” before the CETA was negotiated.⁶⁶ By contrast, the new CETA regulatory cooperation chapter applies to the development, review and methodological aspects of a wide range of regulatory measures, including not only the TBT Agreement and the SPS Agreement, but also trade regulations covering goods, services, trade and sustainable development, trade and labor, and trade and environment.⁶⁷

The overarching goal of the CETA Regulatory Cooperation chapter is to address regulatory trade barriers, including regulatory protectionism (unnecessary barriers to trade), regulatory divergence (regulatory compatibility, recognition of equivalence, and convergence), and regulatory effectiveness (good regulatory practices).⁶⁸ Article 21.4 provides an indicative list of 19 regulatory cooperation activities that parties are encouraged to undertake. These activities range from bilateral discussions on regulatory governance and exchanging information, sharing texts of proposed regulations, conducting post-implementation reviews of regulations to greater convergence through mutual recognition and the use of international standards in sectors identified by parties. In addition, the CETA encourages cooperation by calling for consideration of regulatory measures by the other party on similar issues and provides opportunities for stakeholders and interested parties to engage in regulatory cooperation activities.⁶⁹ These provisions give a clear picture of what specific activities are expected in regulatory cooperation, and emphasize sustained interaction

between regulatory agencies so as to prevent unnecessary barriers from arising in the first place, while also seeking opportunities to bridge the gap in preexisting regulatory divergence.

The CETA also establishes the Regulatory Cooperation Forum (RCF), a specialized committee as well as new institutional forum chaired by senior representatives from both parties, to facilitate and promote regulatory cooperation between the parties. The functions of the RCF include providing a forum to discuss regulatory policy issues; assisting individual regulators to identify potential partners for cooperation activities; reviewing regulatory initiatives; and encouraging the development of bilateral cooperation activities.⁷⁰ However, the RCF has no direct power to adopt legally binding decisions. As such, there is no supervisor or even censor for the regulatory work of the parties. That said, since the RCF may submit draft decisions to the CETA Joint Committee for adaptation and such drafts are usually highly technical in nature, it is possible that the discussions at the RCF have a determining effect on the Joint Committee’s decision-making and shape the regulatory agenda of the parties to some extent.⁷¹ In many ways, the functions of the RCF mirror that of the Regulatory Cooperation Council created in 2011 with a mandate to identify and recommend opportunities to enhance regulatory cooperation between the US and Canada.⁷²

The CETA sets out ambitious obligations and establishes a new institutional framework for regulatory cooperation and the reduction of regulatory divergence between Canada and the EU. However, it is important to highlight the voluntary, procedural, and open-ended nature of regulatory cooperation activities between the parties. In many cases, neither specific form of regulatory cooperation or specific outcome is required.⁷³ As the CETA does not set detailed “hard” obligations, the parties generally retain wide discretion on whether and how to conduct regulatory cooperation. To reinforce the voluntary nature of the CETA, Article 21.2.6 specifies that “regulatory cooperation on any specific matter is voluntary. Parties are not obligated to engage in any particular regulatory cooperation activity. They only have the obligation to provide reasons when they are not willing to participate in a new initiative or withdraw from ongoing initiatives of regulatory cooperation”. As if these provisions were not clear enough, Canada and the EU signed a Joint Interpretative Instrument in October 2016, reiterating that regulatory authorities do not have an obligation to engage in cooperation, or to apply the outcome of their cooperation. This

⁶⁴ Bernard Hoekman and Petros C. Mavroidis, ‘Regulatory Spillovers and the Trading System: From Coherence to Cooperation’, E15 Task Force on Regulatory Systems Coherence Overview Paper (April 2015).

⁶⁵ Rodrigo Polanco Lazo and Pierre Sauve, ‘The Treatment of Regulatory Convergence in Preferential Trade Agreements’, 17(4) *World Trade Review* 575 (2018), at 590.

⁶⁶ Stanko S. Krstic, ‘Regulatory Cooperation to Remove Non-tariff Barriers to Trade in Products: Key Challenges and Opportunities for the Canada-EU Comprehensive Trade Agreement’, 39 (1) *Legal Issues of Economic Integration* 3 (2012), at 4-5.

⁶⁷ Article 21.1 of CETA.

⁶⁸ Article 21.2 and 21.3 of the CETA; Lester and Manak, above n 60, at 359.

⁶⁹ Article 21.5 and 21.8 of the CETA.

⁷⁰ Article 21.6 of CETA.

⁷¹ Nils Meyer-Ohlendorf, Christiane Gerstetter and Inga Bach, ‘Regulatory Cooperation under CETA: Implications for Environmental Policies’ (The Ecologic Institute, 1 November 2016) 18.

⁷² Simon Lester and Inu Barbee, ‘The Challenge of Cooperation: Regulatory Trade Barriers in the TTIP’, 16 *Journal of International Economic Law* 847 (2013), 860-863.

⁷³ Article 21.4, Article 21.5 and 21.7 of the CETA.

has led some commentators to argue that regulatory cooperation under the CETA is to some extent “a journey with no clear destination”.⁷⁴ Others pointed out that successful regulatory cooperation relies on clear and precise rules and joint institutions to implement such rules.⁷⁵ A Joint Study commissioned by the EU and Canada prior to the commencement of the CETA negotiations recognized the need of additional binding rules for effective regulatory cooperation.⁷⁶ However, the final regulatory cooperation chapter in the CETA seems to fall short of the original ambition.

CPTPP

Starting from a modest FTA, originally known as the Trans-Pacific Strategic Economic Partnership Agreement (P-4 Agreement) among Brunei, Chile, New Zealand, and Singapore, the Trans-Pacific Partnership (TPP) Agreement quickly rose to prominence since the United States joined the negotiations in 2008. The Obama Administration continued the talks and framed the TPP as the centerpiece of the United States’ strategic pivot to the Asia-Pacific region.⁷⁷ After nineteen rounds of negotiations, the 12 member countries (USA, Canada, Japan, Mexico, Chile, Peru, Australia, New Zealand, Vietnam, Singapore, Malaysia, and Brunei) signed the TPP pact in early 2016. However, the deal was never ratified by the U.S. congress and President Trump formally withdrew from the TPP on his first day in office in January 2017. The remaining TPP countries have forged ahead with a new version of the pact, known as the CPTPP, keeping most of the original text intact.⁷⁸

One of the most innovative parts of the CPTPP is the chapter on regulatory coherence. It marks the groundbreaking first step in codifying as a global norm that countries should establish central coordination and review mechanism for regulation and follow GRPs, in particular RIA, to help achieve domestic policy objectives and promote regulatory cooperation.⁷⁹ Each CPTPP party retains the flexibility to determine the scope of measures that are subject to the regulatory coherence obligations, with the proviso that “each Party should aim to achieve significant coverage”.⁸⁰

The regulatory coherence chapter has five key elements. First, it encourages each CPTPP member to consider establishing a central coordinating body to facilitate the effective interagency coordination and review of proposed covered regulatory measures. Such a central coordinating body is

charged with reviewing proposed regulatory measures to determine whether they were developed using GRPs, strengthening interagency consultation and coordination among domestic agencies to help avoid potential overlap, duplication and inconsistency; and development of recommendations for systemic improvements with respect to regulation.⁸¹

Second, it urges CPTPP members to implement GRPs when developing proposed regulatory measures that are covered by the chapter. These GRPs mainly focus on the conduct of RIA procedures, including assessing the need for a regulatory proposal, examining feasible alternatives, explaining the grounds for selecting a particular alternative, and relying on the best relevant scientific, technical, economic or other information.⁸² On the specific methodology for RIA, the CPTPP highlights the relevance of the cost-benefit analysis in examining feasible alternative regulatory measures and explaining why a particular alternative is selected. While recognizing that quantification and monetization of some costs and benefits may be difficult, the CPTPP require members to consider the costs and benefits of alternative regulations “to the extent feasible”. This is consistent with the OECD and APEC guidelines which suggest that cost-benefit analysis is the preferable tool for evaluating a regulation and its alternatives in a RIA.⁸³ Other GRPs include ensuring that regulations are plainly written; taking into account potential impact of proposed regulations on small and medium sized enterprises; making information on new measures publicly available, and reviewing measures at regular intervals to determine whether they should be revised or repealed.⁸⁴

Third, the regulatory coherence chapter sets up a Committee on Regulatory Coherence composed of CPTPP government representatives. The Committee is tasked with overseeing the implementation and operation of the chapter as well as identifying future priorities, including potential sectoral initiatives and cooperative activities. The Committee shall meet within one year of the date of entry into force of the CPTPP and thereafter as necessary. At least once every five years after the date of entry into force of the CPTPP, the Committee shall consider developments in the area of GRPs as well as the parties’ experiences in implementing this chapter with a view towards improving the provisions of this chapter.⁸⁵

Fourth, the regulatory coherence chapter contains several cooperation mechanisms for the parties to coordinate

⁷⁴ Meyer-Ohlendorf et al, above n 71, at 4.

⁷⁵ Debra P. Steger, ‘Institutions for Regulatory Cooperation in “New Generation” Economic and Trade Agreements’, 39(1) *Legal Issues of Economic Integration* 109 (2012), 124-126

⁷⁶ Global Affairs Canada, ‘Canada-European Union Joint Report: Towards a Comprehensive Economic Agreement’ (5 March 2009) para 3.9.

⁷⁷ Ming Du, ‘Explaining China’s Tripartite Strategy towards the TPP’, 18 (2) *Journal of International Economic Law* 407 (2015), 411-414.

⁷⁸ James McBride and Andrew Chatzky, ‘What is the Trans-Pacific Partnership (TPP)?’, Council on Foreign Relations Background (4 January 2019).

⁷⁹ Jeff Weiss, ‘The Regulatory Coherence Chapter of the Trans-Pacific Partnership Agreement: Making the Link between Adherence to Good Regulatory Practice Principles and Promoting International Trade and Regulatory Cooperation’, *Yale Journal of Regulation* (11 February 2016) <<https://www.yalejreg.com/nc/the-regulatory-coherence-chapter-of-the-trans-pacific-partnership-agreement-making-the-link-between/>> Accessed 11 September 2021.

⁸⁰ Article 25.3 of CPTPP.

⁸¹ Article 25.4 of CPTPP.

⁸² Article 25.5 (2) of CPTPP.

⁸³ Shergold & Mitchell, above n 19, at 599.

⁸⁴ Article 25.5 (3) (4) (5) (6) of CPTPP.

⁸⁵ Article 25.6 of CPTPP.

regulatory activities, including information exchange with other parties and interested persons, training programs, and strengthening cooperation between regulatory agencies. information exchanges among regulators.⁸⁶ Compared with the CETA, the possible regulatory cooperation activities envisaged in the CPTTP is certainly much less ambitious.

Finally, recognizing that differences in institutional, social, cultural, legal and developmental circumstances among members may result in specific regulatory approaches, the CPTTP is quick to affirm each member's sovereign right to identify its regulatory priorities and establish and implement regulatory measures to address these priorities at the level that the member considers appropriate.⁸⁷ This is an open recognition of the fact that some regulatory diversity is inevitable and not necessarily inappropriate. Nothing in the CPTTP requires a member to use another country's regulatory measure as a basis of its own regulation.⁸⁸ To further dispel concerns that the inclusion of a regulatory coherence chapter may unnecessarily constrain a member's regulatory autonomy, the CPTTP makes it clear the regulatory coherence chapter is not subject to dispute settlement mechanisms.⁸⁹ Arguably this exclusion is necessary to encourage greater participation by states in view of the mixed level of development among the CPTTP parties, and the inclusion of a broad range of domestic regulatory measures within the scope of the regulatory coherence chapter.⁹⁰

USMCA

The United States, Canada and Mexico signed a new trade agreement USMCA in November 2018 to modernize and replace the 1994 North American Free Trade Agreement (NAFTA). The USMCA was the first major trade agreement negotiated by the Trump Administration and it is widely seen as indicative of how the US will engage in future international trade negotiations.⁹¹

The USMCA and CPTTP share a lot of similarities. First, the purpose of the chapter 28 on GRPs in the USMCA appears very similar to the regulatory coherence chapter in the CPTTP as it intends to "set forth specific obligations with respect to GRPs, including practices relating to the planning, design, issuance, implementation, and review of the parties' respective regulations".⁹² Second, similar to the CPTTP, the USMCA stresses the role of central regulatory coordinating body in promoting GRPs, performing key advisory, coordination and review functions to improve the quality of regulations, and developing improvements to domestic

regulatory system.⁹³ Finally, the USMCA also stresses the value of adopting internal procedures to provide for consultation, coordination and review in the development of regulations, using RIA when developing proposed regulations, and ensuring that regulations are clear, concise and easy for the public to understand.⁹⁴

Still, the USMCA has taken the regulatory coherence agenda to a new level with commitments that are more detailed and prescriptive.⁹⁵ First, while the CPTTP allows each party to determine the scope of regulatory measures that would be covered by the relevant disciplines, the USMCA places almost all regulatory measures within its ambit.⁹⁶ Second, compared to the CPTTP, the USMCA contains more detailed provisions on transparency. For example, there are "early planning" provisions in the USMCA that resemble an early warning system for new regulations, so that interested parties have enough time to provide feedback on proposed measures.⁹⁷ Each party shall publish annually a list of regulations that it reasonably expects within the following 12 months to adopt. Each regulation identified should be accompanied by a description of the proposed regulation, a timetable, a point of contact and an indication of sectors to be affected and its impact on trade.⁹⁸ The provision on transparent development of regulation further imposes specific requirements on publication of draft regulation and collection of comments.⁹⁹ Granted, as a core component of GRP, regulatory transparency is dealt with extensively in other CPTTP chapters such as Transparency and Anti-Corruption (chapter 26), TBT (chapter 8) and SPS measures (chapter 7). This may explain why it is not specifically addressed in the regulatory coherence chapter of the CPTTP. Third, the USMCA has further developed the content of GRPs in preparing and implementing regulations, such as the best practice in the use of reliable and high-quality information and expert advice, and the establishment of procedures for retrospective review of regulation.¹⁰⁰

Regulatory cooperation is also envisaged in the USMCA as part of the chapter on GRPs. Compared to its counterpart Article 25.7 of the CPTTP, Article 28.17 of the USMCA provides for a much more elaborated list of potential regulatory cooperation activities, including (1) early stage formal or informal exchange of information including coordination of research agenda; (2) exploring possible common approaches to the evaluation and mitigation of risks or hazards; (3) seeking to collaborate in relevant international fora; (4) co-funding of research in support of regulations and implementation tools of joint interest; (5) facilitating the

⁸⁶ Article 25.7 of CPTTP.

⁸⁷ Article 25.2 (2) of CPTTP.

⁸⁸ Thomas J. Bollyky, 'Regulatory Coherence in the TPP Talks', in Chin L. Lim, Deborah Kay Elms, and Patrick Low, *The Trans-Pacific Partnership: A Quest for a Twenty-first Century Trade Agreement* 171 (CUP, 2012) 182.

⁸⁹ Article 25.11 of CPTTP.

⁹⁰ Sheregold & Mitchell, above n 19, at 600.

⁹¹ M. Angeles Villarreal and Ian F. Fergusson, 'NAFTA Renegotiation and the Proposed United States-Mexico-Canada Agreement (USMCA)', Congressional Research Service R44981 (26 February 2019) 1-2.

⁹² Article 28.2 (2) of USMCA.

⁹³ Article 28.3 of USMCA.

⁹⁴ Article 28.4, 28.8 and 28.11 of USMCA.

⁹⁵ Ronald Labonte et al, 'USMCA (NAFTA 2.0): Tightening the Constraints on the Right to Regulate for Public Health', 15 *Global Health* 1 (2019), at 7.

⁹⁶ Art 28.1 of USMCA.

⁹⁷ Article 28.9 of USMCA.

⁹⁸ Article 28.6 of USMCA.

⁹⁹ Article 28.9 and 28.15 of USMCA.

¹⁰⁰ Article 28.5 and 28.13 of USMCA.

greater use of relevant international standards as the basis for regulations; (6) coordinating in the implementation of regulations and sharing compliance information, and (7) periodically exchanging information concerning any planned or ongoing post-implementation review or evaluation of regulations in effect affecting trade or investment. Similar to the CETA and CPTPP, the regulatory cooperation activities envisaged in Article 28.17 of the USMCA are casted in non-mandatory language. Therefore, the regulatory cooperation obligation remains a best-effort, soft obligation under the USMCA and the contracting parties are only committed to pursue it to the extent that they are willing to do so.¹⁰¹

Different from the CPTPP, the GRPs chapter in the USMCA is subject to the dispute settlement processes if there is “a sustained and recurring course of action or inaction that is inconsistent with a provision of this chapter”.¹⁰² This inclusion reflects that USMCA Parties are more comfortable with GRPs thanks to the closer economic integration and the learning experience gained from the NAFTA era. By contrast, there are quite a few developing countries with relatively underdeveloped regulatory regimes in the CPTPP. To subject the chapter to dispute settlement procedures in the CPTPP would aggravate their concerns that the GRPs might erode their regulatory autonomy and impose regulatory convergence.¹⁰³

SUMMARY OF THE FINDINGS

A common feature across all forms and degrees of regulatory cooperation is that it is a forward-looking process, aimed at the early identification of potential regulatory frictions. In this way, potential unnecessary regulatory diversities can be avoided before they become entrenched in national legislation and specific measures affecting trade.¹⁰⁴ Granted, there are important variations among the three mega-regional FTAs. For example, one may argue that the EU approach to regulatory cooperation, reflected in the CETA, is generally softer and less institutional than the US approach, as reflected in the USMCA.¹⁰⁵ Nevertheless, there are several significant trends in regulatory cooperation in these three mega-regional FTAs. A close look at these converging trends will shed light on how NMTs and unnecessary regulatory diversity are dealt with in the new generation of mega-regional FTAs.

First, unlike the WTO which was narrowly modelled to target cooperation on a limited range of domestic laws and policies such as the TBT and SPS measures, the newer mega-regional FTAs impose regulatory cooperation obligations on a plethora

of domestic regulations, some of which are only implicitly trade related. For example, the CETA regulatory cooperation chapter applies to all trade regulations covering goods, services, trade and sustainable development, trade and labor, and trade and environment.¹⁰⁶ Similarly, the USMCA GRP chapter applies to all regulatory measures with which compliance is mandatory, except as set forth in Annex 28-A.¹⁰⁷ Even if the CPTPP is more flexible by allowing each party to determine the scope of regulatory measures that would be covered by the regulatory coherence chapter, each party is expected to achieve “significant coverage”.¹⁰⁸

Second, two of the three mega-regional FTAs (the CPTPP and USMCA) require State Parties to follow certain GRPs in the development of domestic regulations, such as notice and comment, public consultation, coordination among domestic regulatory agency and RIAs. The express aim of introducing GRPs to the FTA is to improve the quality of the contracting parties’ domestic regulation. In return, the implementation of GRPs will facilitate international trade, investment and economic growth as well as strengthen each party’s ability to achieve its public policy objectives.¹⁰⁹ The incorporation of GRPs reflects an extension of regulatory reach of mega-regional FTAs to regulatory inputs in the domestic rule-making process, in contrast to the traditional focus of the WTO on the content of regulations.¹¹⁰ Precisely because the domestic rule-making process itself has now fallen within the ambit of mega-regional FTAs, one legitimate concern is that a rigorous enforcement of GRPs might undercut the government’s policy space.¹¹¹ Such concern explains the exclusion of disputes concerning the failure to comply with GRPs from the dispute settlement mechanisms under the CPTPP and only limited jurisdiction on such disputes in the USMCA.¹¹²

Third, the regulatory coherence chapter should be read in conjunction with other substantive chapters such as the TBT and SPS chapters because each informs and shapes the other. Reading in this manner, compared to the WTO, the three mega-regional FTAs go into greater details and lay out more specific obligations with regard to international standards, mutual recognition and equivalence, transparency, and public participation. Take transparency as an example. Article 28.6 of the USMCA provides an “early planning system” for new regulations that are expected to be adopted within the following 12 months, so that the Parties have enough time to provide feedback on proposed measures. The notification should include a description of the planned regulation, a point of contact, an indication of sectors to be affected and any

¹⁰¹ Federico Ortino and Emily Lydgate, ‘Addressing Domestic Regulation Affecting Trade in Services in CETA, CPTPP and USMCA: Revolution or Timid Steps?’, 20 *Journal of World Investment and Trade* 680 (2019), at 702.

¹⁰² Article 28.20 of USMCA.

¹⁰³ Stuart Trew, ‘International Regulation and the Public Good’ (Canadian Centre for Policy Alternative, 2019) 32-34.

¹⁰⁴ WTO TBT Committee, above n 2, at 3.

¹⁰⁵ Steger, above n 75, 118.

¹⁰⁶ Article 21.1 of CETA.

¹⁰⁷ Art 28.1 of USMCA.

¹⁰⁸ Art 25.3 of CPTPP.

¹⁰⁹ Art 25.2.1 of CPTPP; Art 28.2.1 of USMCA. Ortino and Lydgate, above n 101, at 696.

¹¹⁰ The WTO Agreements such as the TBT and SPS Agreement contain some procedural requirements on notice and comment, publication and transparency. However, they are much more limited compared to the GRPs in mega-regional FTAs.

¹¹¹ Alberto Alemanno, ‘The Regulatory Cooperation Chapter of the Transatlantic Trade and Investment Partnership: Institutional Structures and Democratic Consequences’, 18 *Journal of International Economic Law* (2015), at 625.

¹¹² Article 25.11 of CPTPP; Article 28.20 of USMCA.

expected significant effect on international trade and investment, and timetables for subsequent actions including opportunities for public comment. Even though notification requirements are covered by the WTO, the timing and content of WTO notification requirements are much less stringent. For instance, Members do not tend to go into great details about the sectors affected by proposed measures and do not provide analysis of the expected impact on trade under the WTO. These are issues that usually are raised later by the countries affected by a proposed measure in the TBT and SPS committees.¹¹³ Article 8.6 of the CPTPP TBT chapter introduces specific rules for the mutual recognition of conformity assessment bodies of other CPTPP parties, explicitly requiring that the CPTPP parties shall give national treatment to each party's conformity assessment body to ensure that exported products need only be tested and certified once before accessing other TPP markets.

Fourth, all three mega-regional FTAs adopt a novel strategy that focuses on encouraging various forms of regulatory cooperation between the contracting parties, ranging from informal information change, coordinating regulatory approaches and the implementation of the regulations to concluding mutual recognition agreements and development of joint standards codes. Joint institutions, such as the RCF in the CETA, Committee on Regulatory Coherence in the CPTPP and Committee on Good Regulatory Practices in the USMCA are established to monitor the implementation of these rules.

Finally, a common feature of regulatory cooperation/regulatory coherence in the three mega-regional FTAs is that all three FTAs focus on improving *procedures* when planning, adopting and implementing domestic regulations and not on substantive harmonization of the content of domestic regulations.¹¹⁴ These key procedures are (i) ensuring economic rationality, usually through the mechanism of RIA; (ii) transparency and the legitimizing participation of relevant stakeholders, especially through notification and consultation mechanisms featuring open, prompt, and impartial public review and appeal processes; and (iii) governmental coordination through joint institutions that monitors the consistency of proposed regulations with treaty commitments.¹¹⁵ That said, compared with the CPTPP and the USMCA which focus more on domestic regulatory

processes, the CETA puts more emphasis on substantive convergence on regulatory approaches by demonstrating the preference for concurrent or joint risk assessments and regulatory impact assessments, achieving harmonized, equivalent, or compatible solutions, and using mutual recognition in selected cases.¹¹⁶ Given the great diversity among states on culture, legal traditions, and level of economic development, it is not surprising that negotiators did not choose to push for substantive harmonization unless there is sufficient trust and mutual understanding of different regulatory systems.

CONCLUSION

Trade friction in the age of global value chains is largely due to regulatory diversity. The Covid-19 pandemic and ensuing global economic and social crisis are a reminder of the interconnectedness of our world, and of the fact that domestic solutions, while necessary, will be insufficient on their own to address effectively threats of global nature.¹¹⁷ Regulatory cooperation has potential to transfer good regulatory practices, to level the playing field, to reduce costs, and to contribute to the reduction of unnecessary barriers to trade as well as mitigate the economic impact of necessary trade barriers.

Recent mega-regional FTAs have gone beyond the WTO disciplines and put forward novel and ambitious approaches to GRPs and regulatory cooperation, in an effort to address behind-the-border NTMs. This innovation is significant because it moves beyond the traditional negative integration model and creates a systemic governance framework to improve the quality of regulations. Although the new regulatory cooperation mechanisms do not impose any ground-breaking substantive new rules on specific regulatory subjects, it has spelled out a thick web of procedures that can be used to deliver better quality regulations. It is still too early to assume that these new initiatives will have any significant impact on ameliorating the negative effects of regulatory diversity in international trade. Nevertheless, they break new ground in international economic rule-making and hold great promise.

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¹¹³ Inu Manak, 'Regulatory Issues in the New NAFTA', International Economic Law and Policy Blog (10 October 2018).

¹¹⁴ Ortino and Lydgate, above n 101, at 694.

¹¹⁵ Lazo and Sauve, above n 65, at 600.

¹¹⁶ *Ibid.*, at 595; CETA Art 21.4 (g) (iii).

¹¹⁷ OECD, 'No Policy Maker is an Island: The International Regulatory Cooperation Response to the Covid-19 Crisis' (8 June 2020), at 6; Joost Pauwelyn, 'Export Restrictions in Times of Pandemic: Options and Limits under International Trade Agreements', 54 (5) *Journal of World Trade* 727 (2020), 727-747.