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Normative Impacts and Legitimacy Dimensions in the Intersection of Trade and Agile Regulation within Comprehensive Free Trade Agreements

Stefanie Schacherer*

Abstract

The article revisits the rationale of regulatory policy commitments in FTAs and assesses their normative impact considering the emerging paradigm of regulatory agility. It argues that commitments on best regulatory practices and regulatory cooperation can lead to more efficient, effective, and flexible regulations thereby preparing countries to implement future-proof and agile regulation to tackle current challenges stemming from technology and sustainability. Moreover, by promoting international regulatory cooperation activities, comprehensive FTAs further evolve into open-ended, living agreements, which are prone to establish dynamic bilateral or plurilateral regulatory relationships. However, the article also shows that the functionalist rationale perspective on the trade-(agile)regulation nexus may have certain implications for political legitimacy. This is critically assessed by addressing concerns such as corporate capture and the potential loss of national regulatory autonomy.

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 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

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¹ Agile Nation Charter (2021), available at <https://www.canada.ca/en/government/system/laws/developing-improving-federal-regulations/modernizing-regulations/agile-nations.html>; 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) OECD/LEGAL/0475; World Economic Forum (WEF), ‘Agile Regulation for the Fourth Industrial Revolution. A Toolkit for Regulators’ (2020) available at <https://www.weforum.org/about/agile-regulation-for-the-fourth-industrial-revolution-a-toolkit-for-regulators/> (all accessed 17 January 2024).

² Ayo Aladesanmi, ‘Agile Regulation and the Future of Governance’ (May 2023) The RegReview, available at <https://www.theregreview.org/2023/05/01/aladesanmi-agile-regulation-and-the-future-of-governance/> (accessed 17

approach to rulemaking is needed in order to unlock the potential of innovation”.³ The Charter advocates for international cooperation between regulators by emphasising 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 Organisation 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 free trade agreements (FTAs) and their interaction with regulatory policy approaches. Mechanisms of Good Regulatory Practices (GRPs) and international regulatory cooperation (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 GRPs but also promote IRC activities between states.

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

January 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, quantum computing, see WEF, above note 1, 6.

³ Signatory states are Canada, Denmark, Italy, Singapore, Japan, the United Arab Emirates (UAE) and the United Kingdom (UK). See Agile Nations Charter, above note 1, 1d.

⁴ Ibid, 1e.

⁵ Han-Wei Liu and Ching-Fu Lin, ‘Regulatory Rationalisation Clauses in FTAs: A Complete Survey of the US, EU and China’ (2018) 19(1) Melbourne Journal of International Law, 12, 16, 18, 22-23.

⁶ OECD, ‘International Regulatory Co-operation and Trade - Understanding the Trade Costs of Regulatory Divergence and the Remedies’ (2017) available at <https://www.oecd.org/gov/international-regulatory-co-operation-and-trade-9789264275942-en.htm> (accessed 17 January 2024).

⁷ According to a recurrent definition of the OECD, 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’ (2022) above note 1, pt II.

regulation agenda on the intersection of trade and regulation within FTAs and questions the extent of its impetus. For the GRP commitments that are promoted through FTA, the agile regulation agenda correlates with existing GRPs and adds some 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 undermine the political legitimacy of the trade-regulation nexus. Hence, this article delves into the functional aspect of economic regulation by examining both GRP and IRC commitments within FTAs, while also addressing the legitimacy and public interest concerns that have been raised, including corporate capture and the loss of national regulatory autonomy. The analysis aims to stimulate reflection on how to balance the economic efficiency arguments of agility, on the one hand, and the evolution of the regulatory state, on the other hand.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 GRP (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 (Section 5).

2. Connecting the Dots: Agility, Regulatory Policies, and FTAs

Agile regulation is an adaptive and flexible approach to governance, emphasising responsiveness to changing circumstances. It involves several novel regulatory practices taking advantage of

⁸ Giandomenico Majone, 'From the Positive to the Regulatory State: Causes and Consequences of Changes in Mode of Governance' (1997) 17(2) *Journal of Public Policy*, 139-167, 140. The author sees the emergence of the regulatory state due to a number of basic strategies, including privatisation, liberalisation, deregulation, fiscal retrenchment, economic and monetary integration and various policy initiatives relating to regulatory management tools (considering them as "New Public Management paradigm").

technology for data gathering and impact monitoring.⁹ This entails, for instance, the advancement of more robust monitoring and sensing capabilities to promptly identify emerging risks. Such risk could typically stem from technological innovation but likewise from health and pharmaceutical products, supply chains, climate change, and food safety. Therefore, part of agile regulation is to create mechanisms and government agency bodies that have the mission to identify and anticipate future challenges.¹⁰ Data gathering is becoming essential in this respect. As such regulators use regulatory experimentation to generate evidence and information that can be used in decision making to help reduce that uncertainty.¹¹

Compliance mechanisms are also tailored according to risks. An example of risk-based enforcement is in the field of cybersecurity where regulatory oversight and enforcement actions are based on the level of risk associated with different types of organizations and their technological systems. For instance, a financial institution that handles sensitive customer data and facilitates online transactions would be considered a high-risk entity. Regulatory agencies would likely subject such an institution to more stringent cybersecurity requirements, regular audits, and more frequent assessments to ensure that they have robust security measures in place.¹² The significance of agility also became visible amid the COVID-19 pandemic, as national regulatory authorities embraced what was coined as “effective agile regulation” to facilitate access to crucial health products.¹³

In essence, the agility agenda seeks to balance between fostering innovation and safeguarding welfare objectives. It aims to establish a regulatory framework that fosters innovation without

⁹ OECD, ‘Recommendation of the Council for Agile Regulatory Governance to Harness Innovation’ (2021), above note 1, pt IV.1. The OECD recommends adopting “forward-looking by developing institutional capacity and assigning clear mandates accordingly conducting systematic and coordinated horizon scanning scenario analysis anticipating and monitoring the regulatory implications of high impact innovations and fostering continuous learning and adaptation”.

¹⁰ WEF, above note 1, 11.

¹¹ For instance, Canada has been using experimental regulation in the areas of light sport aircraft, digital credentials and wallets, as well as supply chain transparency and labelling of chemical products, see <https://www.canada.ca/en/government/system/laws/developing-improving-federal-regulations/modernizing-regulations/regulatory-experimentation.html> (accessed 13 January 2024).

¹² WEF above note 1, 30. An example hereto is the G20 TechSprint initiative, launched in April 2020, which aims to highlight the potential for technologies to resolve regulatory compliance (regtech) and supervisory (suptech) challenges, <https://www.bis.org/press/p200810.htm> (accessed 13 January 2024).

¹³ Tippi K Mak and others, ‘Global Regulatory Agility During Covid-19 and Other Health Emergencies’ (BMJ, 2020) 1-2.

compromising the protection of citizens against potential adverse effects, especially, stemming from technological progress. In other words, risk anticipation and risk mitigation are at its heart. At the same time, it is worth noting that the regulation of risks is hardly new in regulatory policies.¹⁴ Traditionally, however, regulators had superior information regarding the risks they faced and the possibilities of mitigating them than the regulated entities.¹⁵ However, in situations of uncertainty, this information gap is narrowed. Neither the regulated entity nor the regulator can consistently foresee all potential hazards, making it more beneficial for them to collaborate in identifying and addressing them.¹⁶ Therefore, the novel regulatory tools suggested in the agile agenda, such as anticipatory regulation, stakeholder-involvement, data-driven regulation, and outcome-focused regulation bring about a shift to regulatory processes and the specific regulatory relationships which are more flexible and dynamic.

A noteworthy factor has been the recognition that IRC and GRP enhance the quality of regulations and enhance the ability of states to implement effective regulations that promote welfare objectives. Participants of Agile Nations Charter stated their mutual understanding and willingness to promote GRPs on rulemaking within their jurisdiction. Intensified global economic integration (touching all public interest areas) renders unilateral state regulation, often ineffective, and regulatory gaps have emerged. In this perspective, IRC has been defined to be a key pillar of agile regulation helping to address welfare objectives transnationally benefitting all parties involved (i.e., states, corporations, and citizens).¹⁷ As far as IRC is concerned, agile regulation adds the nuance of being less focused on substantive convergence around international standards but more on ensuring interoperability of regulatory systems through alignment at the level of regulatory procedures, in particular, through building a transborder cooperative capacity for detecting and

¹⁴ Christopher Hood, Henry Rothstein, and Robert Baldwin, *The Government of Risk: Understanding Risk Regulation Regimes* (OUP 2001) 3-8.

¹⁵ Bernard Hoekman and Charles F. Sabel, 'In a World of Value Chains: What Space for Regulatory Coherence and Cooperation in Trade Agreements?' in Benedict Kingsbury, David M. Malone, Paul Mertenskötter, Richard B. Stewart, Thomas Streinz and Atsushi Sunami (eds.), *Megaregulation Contested: Global Economic Ordering after TPP* (OUP 2019) 229.

¹⁶ *Ibid*, 229.

¹⁷ WEF, above note 1.

responding to risks as they arise on the basis of broadly shared objectives framed in general terms.¹⁸

Finally, regulatory agility is concerned and 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 adaptation costs for companies, but also as a potential hindrance to innovation, which in return would have negative welfare implications (e.g., loss of productivity and competitiveness). Conversely, innovation combined with an enabling regulatory framework can have positive welfare outcomes.¹⁹ In this respect, the agility agenda provides new impetus to think about the challenges that revolve around the necessity to tailor regulatory frameworks to global circumstances characterised by rapid transformations and uncertainty regarding the origins and extent of risks.

a. What is the trade-(agile)-regulation nexus?

In recent decades, the interconnection between regulatory and trade policy has grown. GRP 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 GRP to facilitate international trade and investment.²⁰ Diverging regulatory requirements across countries

¹⁸ Urs Gasser, ‘Interoperability in the Digital Ecosystem’ (2015) Harvard University Berkman Center for Internet & Society Research Publication No. 2015-13, 25-26 <https://ssrn.com/abstract=2639210> (accessed 19 January 2024): “The relationships between interop and the law are many, complex, and tangled. As described above, 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”. A current example of a policy area where legal interoperability has become a key objective are sustainable finance taxonomies, see UNDP, ‘Common Framework of Sustainable Finance Taxonomies’ (2023) xxii: “Interoperability implies that taxonomies must be based on similar guiding principles, have design elements such as objectives, classification systems for sectors and activities that are comparable and are similar in approaches and methodologies used for defining eligibility.”

¹⁹ Agile regulation agenda considers welfare issues as indicated by the UK government finding that “regulatory reform could help unlock the economic and social benefits (including health, welfare, environmental and other non-market benefits) of new and upcoming technological innovations”, see BEIS, ‘The Prioritisation of Future Innovations’ (2020) Research Paper No 2020/042, v.

²⁰ E.g., 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 represented by each Party to

have become the main source of costs for transnationally active corporations.²¹ 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 to prove regulatory compliance to domestic authorities. Consequently, diverging regulations impose costs on businesses.²²

Historically, commitments between states to address “behind the border” issues (i.e., trade barriers) and national regulation dates to the 1947 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 WTO to reduce barriers to trade. 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 of setting 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 harmonised international minimum standards that were to be implemented by WTO members.²³ The latter helped to establish the operational equivalence of distinct regulatory regimes thereby streamlining trade through a reduction in non-tariff measures.²⁴ While the WTO has been successful in limiting discriminatory regulatory measures and promoting certain international

achieve their public policy objectives (including health, safety, labour, environmental, and sustainability goals) at the level they consider appropriate. [...]” Emphasis added.

²¹ See Mauro Petriccione, ‘Reconciling Transatlantic Regulatory Imperatives with Bilateral Trade’ in George Bermann, Matthias Herdegen, Peter L. Lindseth (eds), *Transatlantic Regulatory Cooperation: Legal Problems and Political Prospects* (OUP 2001) 207-208.

²² OECD, ‘International Regulatory Co-Operation: Addressing Global Challenges’ (2013) 39 available at <https://www.oecd.org/env/international-regulatory-co-operation-9789264200463-en.htm> (accessed 17 January 2024); OECD, ‘International Regulatory Co-operation and Trade - Understanding the Trade Costs of Regulatory Divergence and the Remedies’ (2017), above note 6.

²³ TBT, Art 2.4.

²⁴ Hoekman and Sabel, above note 15, 217.

minimum standards, no significant improvements have been achieved to promote cooperation and dialogue between regulatory agencies of the WTO members.²⁵

In parallel, the OECD embarked on a series of initiatives regarding GRP and IRC, with the first comprehensive study on the subject published in 1994.²⁶ The OECD consistently updates and advocates for best regulatory practices and has actively promoted IRC in its various forms, including through FTAs.²⁷ Today, the OECD also promotes agile regulation and made the new agility paradigm part of its regulatory policies agenda.²⁸ As previously emphasised, the agile regulation agenda extends beyond the realm of FTAs. Nonetheless, FTAs through their commitments on IRC and GRP are among the strategies to promote this agenda. If IRC and GRP 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.²⁹ Especially, the IRC elements contained in FTAs and their open-ended nature might lie 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.

²⁵ 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 Bernard Hoekman and Charles F. Sabel, ‘Open Plurilateral Agreements, International Regulatory Cooperation and the WTO’ (2019) Robert Schuman Centre for Advanced Studies, Global Governance Programme EUI Working Paper No. RSCAS 2019/10 https://scholarship.law.columbia.edu/faculty_scholarship/2304 (accessed 19 January 2024).

²⁶ OECD, ‘Regulatory Co-operation for an Interdependent World’ (1994) available at https://www.oecd-ilibrary.org/governance/regulatory-co-operation-for-an-interdependent-world_9789264062436-en (accessed 17 January 2024).

²⁷ OECD, ‘Recommendation of the Council on Regulatory Policy and Governance’ (2012) available at <https://www.oecd.org/gov/regulatory-policy/2012-recommendation.htm> (accessed 17 January 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.

²⁸ Agility has become part of the OECD’s ‘Better Regulation’ agenda. See, OECD, ‘Better Regulation for the Green Transition’ OECD Public Governance Policy Papers (2023) available at <https://www.oecd.org/publications/better-regulation-for-the-green-transition-c91a04bc-en.htm> (accessed 24 January 2024).

²⁹ Ignacio Garcia Bercero and Kalypso Nicolaidis, ‘The Power Surplus. Brussels Calling, Legal Empathy and the Trade-Regulation Nexus’, (2021) CEPS Policy Insights, PI 2021/05, 25 <https://ssrn.com/abstract=3832579> (accessed 19 January 2024).

b. 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. Moreover, regulatory cooperation in FTAs, especially mega-regionals, was considered to create networks or even coalitions between like-minded states to set the rules and standards for the global economy.³⁰ Many recently concluded FTAs continue these developments.³¹ 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 stand-alone 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”.³²

The first aspect of this latter example, and other FTAs, is that contain GRP norms or also called regulatory coherence norms. 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, regulatory impact assessment, 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 GRP (or regulatory coherence) primarily centres on

³⁰ In the context of TTIP, one author framed this coalition as the “Economic NATO”. See Boyden 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, Elizabeth Golberg, ‘Regulatory Cooperation – A Reality Check’ (2019) Harvard Kennedy School, M-RCBG Associate Working Paper No. 115, 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, Kingsbury and others, ‘Introduction: The Essence, Significance, and Problems of the Trans-Pacific Partnership’ in Benedict Kingsbury, David M. Malone, Paul Mertenskötter, Richard B. Stewart, Thomas Streinz and Atsushi Sunami (eds.), *Megaregulation Contested: Global Economic Ordering after TPP* (OUP 2019) 54.

³¹ Rodrigo Polanco Lazo and Pierre Sauvé, ‘The Treatment of Regulatory Convergence in Preferential Trade Agreements’ (2018) 17 *World Trade Review* 575, 576-580; Paul Mertenskötter, ‘Global Administrative Law Related Provisions in the Trans-Pacific Partnership’, NYU IILJ MegaReg Project Working Paper, 2019 <https://www.iilj.org/megareg/remote-control/> (accessed 19 January 2024).

³² EU-Japan EPA, Art 18.1.1.

procedural convergence - meaning, aligning the way regulations are adopted.³³ Importantly, these commitments are not subject or sector specific. Bernard Hoekman and Charles Sabel have classified these commitments as comprehensive and top-down.³⁴

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, other substantive chapters, such as trade and environment, trade and labour or intellectual property.³⁵ These provisions are, hence, subject 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.³⁶ The idea behind is to minimise substantive regulatory divergence between national regulations. Hoekman and Sabel have labelled the objective of IRC and these provisions to be substantive convergence,³⁷ and classified their integration in international economic law to be 'piecemeal' and bottom-up.³⁸ On IRC, it is critical to note that certain mechanisms of cooperation can also be found in the standalone chapters, which, as just mentioned, mainly deal with procedural convergence. In other words, FTAs contain an comprehensive 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.³⁹ However, it distinguishes between those provisions that deal with GRPs, which concerns the process of

³³ Hoekman and Sabel, above note 15, 219.

³⁴ Ibid.

³⁵ E.g., CETA on the registration of trademarks, 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.

³⁶ E.g., CETA, Art 10.8.

³⁷ Hoekman and Sabel, above note 15, 219. The authors moreover classify such IRC commitments with a substantive convergence objective as "regulatory cooperation in the strict sense".

³⁸ Ibid.

³⁹ This article excludes the analysis of regulatory cooperation provisions in specific chapters. Furthermore, are excluded specific regulations or sectors that deal with regulatory harmonisation that can be the consequence of specific

adopting regulation at the national level, and those provisions that add an international dimension consisting of dialogue and exchange on regulatory matters, i.e., IRC. In fact, most stand-alone 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 USMCA's chapter 28, designated 'Good Regulatory Practices', one finds commitments towards the end regarding the promotion of regulatory compatibility and cooperation adding a more substantive convergence element.⁴⁰ 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 globalised world".⁴¹ Broadly conceived, international regulatory cooperation 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.⁴² The common thread among GRP 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.⁴³ Ultimately, the shared goal is to mitigate potential competitive distortions arising from regulatory processes. Kingsbury and others argued that the promotion of GRP is also designed to indirectly promote convergence in substantive regulatory standards and arrangements.⁴⁴

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 Economic Partnership Agreement (EPA), the EU-Canada Comprehensive Economic Trade

commitments in FTAs. This, furthermore, excludes specific chapters on transparency (such as CPTPP, Ch 26 'Transparency and Anti-Corruption).

⁴⁰ USMCA, Art 28.17.

⁴¹ WTO/OECD, 'Facilitating Trade through Regulatory Cooperation. The Case of the WTO's TBT/SPS Agreements and Committees' (2019), available at https://www.wto.org/english/res_e/publications_e/tbtsps19_e.htm (accessed 17 January 2024)

⁴² Jeffery L. Dunoff, 'Mapping the Hidden World of International Regulatory Cooperation' (2015) 78 *Law and Contemporary Problems* 267, 267.

⁴³ Andrew 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.

⁴⁴ Kingsbury and others, above note 30, 44. The USMCA states that "good regulatory practices also are fundamental to effective regulatory cooperation".

Agreement (CETA), the US-Taiwan FTA and the Australia-UK FTA.⁴⁵ Furthermore, although still in the early stages, there are efforts related to ‘Transparency and Good Regulatory Practices’ within the US-led Indo-Pacific Economic Framework (IPEF, Pillar I), as well as in the ‘Standards and Conformance’ Section of the Singapore-Australia Green Economy Agreement.⁴⁶ All these developments emphasise that the subject will remain relevant for international economic agreements in the foreseeable future.

Table 1: Overview of horizontal chapters dealing with GRP and/or IRC.

Agreement	Entry into force	Name of stand-alone horizontal chapter(s)	Objective emphasised	
			Promotion of GRP (i.e., procedural convergence)	Promotion of IRC (i.e., substantive convergence)
US-Taiwan FTA	Not yet in force (signed June-23)	Good Regulatory Practice		
UK-Australia FTA	May-23	Good Regulatory Practice		
United States-Mexico-Canada Agreement (USMCA)	Jul-20	Good Regulatory Practice		
EU-Japan EPA	Feb-19	Good Regulatory Practice and Regulatory Cooperation		
Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)	Dec-18	Regulatory Coherence		
EU-Canada CETA	Sep-17	Regulatory Cooperation		

Source: WTO Regional Trade Agreements Database

⁴⁵ Two treaties that have been stalled contain noteworthy GRP and IRC provisions, namely the EU-China Comprehensive Agreement on Investment (CAI), and the EU-US Transatlantic Trade and Investment Partnership (TTIP).

⁴⁶ See also Singapore-Australia Digital Economy Agreement, Art 33.

When examining and evaluating the normative impacts of the listed chapters, it is important to distinguish between the different core meanings of GRP, on the one hand, and IRC, on the other hand. The reason is that the argument put forward in this article is that the agility impetus operates differently for GRP than it does for IRC commitments. For the former, agility supplements the set of regulatory tools, and for the latter, agility might be a catalyst for more frequent and more extensive IRC. Therefore, the following analysis operates in two steps, first considering GRP commitments, and second, how international cooperation on substantive rules and standards are buttressed through IRC commitments.

3. Commitments of ‘Good Regulatory Practices (GRP)’ in FTAs

The emergence of GRP and regulatory coherence in FTAs garnered attention in international trade law circles during the mid-2010s, particularly as negotiations for mega-regional agreements were underway.⁴⁷ 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 GRP elements.⁴⁸ Existing literature has delved into the origins of GRP, the spread of its normative influence, the potential constraints imposed by national constitutional law, as well as the concerns regarding the legitimacy associated with GRP.⁴⁹

⁴⁷ Non-exhaustive list: Han-Wei Liu and Ching-Fu Lin, ‘Constitutional Traditions as Boundaries in Standardising Administrative Rulemaking Through Trade Agreements’ (2022) 71 Int’l & Comp. L.Q. 889; Han-Wei Liu and Ching-Fu Lin, ‘Regulatory Rationalisation Clauses in FTAs’, above note 5; Thomas J. Bollyky, ‘Regulatory Coherence in the TPP Talks’ in C. L. Lim, Deborah Kay Elms and Patrick Low (eds) *The Trans-Pacific Partnership: A Quest for a 21st Century Trade Agreement* (CUP 2012), 171-186; Han-Wei Liu and Ching-Fu Lin, *The Emergence of Global Regulatory Coherence: A Thorny Embrace For China?*, (2018) 40 U. Pa. J. Int’l L. 133; Rodrigo Polanco Lazo R and Pierre Sauvé P, ‘The Treatment of Regulatory Convergence in Preferential Trade Agreements’, above note 31; Reeve T. Bull and others, ‘New Approaches to International Regulatory Cooperation: The Challenge of TTIP, TPP, and Mega-Regional Trade Agreements’, (2015) 78 Law & Contemp Problems. 1, 1-29; Elizabeth Sheargold and Andrew D. Mitchell, ‘The TPP and Good Regulatory Practices: An Opportunity for Regulatory Coherence to Promote Regulatory Autonomy?’ (2016) 15 World Trade Rev. 587.

⁴⁸ 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”.

⁴⁹ Han-Wei Lui and Ching-Fu Lin, in particular, demonstrated why China is reluctant to further the normative diffusion of regulatory coherence norms (i.e. GRP), see Han-Wei Lui and Ching-Fu Lin, *The Emergence of Global Regulatory Coherence: A Thorny Embrace For China?*, above note 47; Anne Meuwese analysed the obstacles to GRP from an EU constitutional law perspective, see Anne Meuwese ‘Constitutional Aspects of Regulatory Coherence In TTIP: An EU Perspective, Law and Contemporary Problems, (2015) 78 4, New Appr. Int’l Reg. Coop., 153-174.

Today, GRP commitments have become standard practice for trade treaties negotiated by the US, the EU, Canada, Australia, and the UK.⁵⁰ Despite different designations (‘regulatory coherence’, GRP, or ‘regulatory improvement’, etc.).⁵¹ In a recent report, the OECD describes, by referring to “regulatory management tools”, GRPs as encompassing “different tools available to implement regulatory policy and foster regulatory quality including, in particular, regulatory impact assessment, stakeholder engagement, and ex post evaluation”.⁵² As elaborated by Han-Wei Liu and Ching-Fu Lin, the foundational principles of GRP find their origins in US administrative law.⁵³ For instance, transparency and consultation, can be traced as far back as the common law legacy in the United States. The concept of regulatory impact assessments (RIAs) first emerged in the 1970s during President Jimmy Carter's administration and underwent subsequent expansions in the following years.⁵⁴ Other countries and regions later followed by implementing improved regulatory procedures, e.g., the EU “Better Regulation”, 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.⁵⁵

Apart from the US system where it originates, GRP commitments might raise significant constitutional concerns for many countries. Each state has its own policies, procedures, and institutions to govern how regulations are developed, administered, and reviewed. The crucial aspect is that GRP pertains to the entirety of a decision-making system, rather than isolated components. Therefore, Kingsbury and others coined it a set of “extensive administrative law

⁵⁰ See Table 1 here above.

⁵¹ Additional Protocol to the Framework Agreement of the Pacific Alliance (PAAP) Annex 4 on ‘Regulatory Improvement’, and Art 15bis 2.1 defines “regulatory improvement” as “the use of international best regulatory practices in the planning, preparation, adoption, implementation and review of regulatory measures to facilitate the achievement of objectives of national public policy, and the efforts of governments to improve regulatory cooperation in order to achieve these objectives and to promote international trade, investment, economic growth and employment”.

⁵² OECD, ‘Recommendation of the Council for Agile Regulatory Governance to Harness Innovation (2021), above note 6, pt 1.

⁵³ Liu and Lin, above note 5, 152.

⁵⁴ Ibid, 153-155: Jimmy Carter’s 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.

⁵⁵ European Commission, ‘Better Regulation Guidelines’ (2021), available at https://commission.europa.eu/law/law-making-process/planning-and-proposing-law/better-regulation/better-regulation-guidelines-and-toolbox_en (accessed 17 January 2024).

requirements”.⁵⁶ Hoekman and Sabel also found that the constitutional costs of GRP are high.⁵⁷ Moreover, the specification of GRP 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.⁵⁸ 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 to improve the alignment of regulatory practices in ways expected to help their profitability.⁵⁹ These considerations are critical. GRP commitments in FTA should remain sensitive to domestic democratic considerations and the interests of foreign partners. At the same time, GRP provisions in the chapters addressing regulatory matters in the FTAs under examination are legally binding, nor are they subject to the dispute settlement mechanism of the treaty. Nonetheless, the implications for the nation state and the ‘corporate capture’ arguments must prompt the creation of safeguard mechanisms (in FTAs or their subsequent implementation) designed to address these potential risks of which some are revisited here.⁶⁰ The following considers some of the key aspects for concern.

First, transparency and public consultation are key components of GRP. They should 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, stakeholders, and “interested persons” 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”.⁶¹ The EU-Japan EPA, requires that each Party shall “offer, on a non-discriminatory

⁵⁶ Kingsbury and others, above note 30, 40.

⁵⁷ Hoekman and Sabel, above note 15, 225. The authors also argued that the GRP commitments do not at the same time sufficiently promote progress towards equivalence of regulation.

⁵⁸ Hoekman and Sabel, above note 15, 225 and 227.

⁵⁹ Kingsbury and others, above note 30, 40.

⁶⁰ In a political science study on the (CP)TPP, Ian Osgood has 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, Ian Osgood, ‘Sales, Sourcing, or Regulation – Evidence from TPP on What Drives Corporate Support for Trade’ in Benedict Kingsbury, David M. Malone, Paul Mertenskötter, Richard B. Stewart, Thomas Streinz and Atsushi Sunami (eds.), *Megaregulation Contested: Global Economic Ordering after TPP* (OUP 2019) 297-300.

⁶¹ Australia-UK FTA, Art 26.6.

basis, reasonable opportunities for any person to provide comments”⁶². 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.⁶³ Public consultation is, in principle, an element that infuses more democratic participation into the realm of trade agreements. The corporate capture concerns do not arise in theory but might arise in practice. One such concern is that participation in public consultation could show disproportionate participation and influence of business associations and other corporate interest parties given that public interest actors tend to not have sufficient 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. The results indicate that the council may function as a platform for advancing a deregulatory-based agenda with a focus on business interest in general.⁶⁴ These findings give ground for concern and hence, the monitoring of consultation processes under FTAs should receive scrutiny.

A second element of GRP is the concept of regulatory impact assessment (RIA). For instance, CPTPP parties “should generally encourage relevant regulatory agencies, consistent with its laws and regulations, to conduct regulatory impact assessments when developing proposed covered regulatory measures that exceed a threshold of economic impact, or other regulatory impacts, where appropriate”.⁶⁵ The provisions also state that the impact assessment may encompass a range of procedures to determine possible impacts.⁶⁶ The general idea behind RIAs is to improve the

⁶² EU-Japan EPA, Art18.7.

⁶³ E.g., European Commission, ‘Better Regulation Guidelines’, above note 55. 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.”

⁶⁴ Ronan O’Brien, ‘Moving Regulation out of Democratic Reach: Regulatory Cooperation in the CETA and its Implications’ (2016) Working Paper No 158, Arbeitskammer Wien, <https://econpapers.repec.org/paper/clrmwugar/158.htm> (accessed 19 January 2024) 1, 7.

⁶⁵ CPTPP, Art 25.5(1).

⁶⁶ CPTPP, Art 25.5(1). The remainder of Art 25:

quality of national regulation by lowering the costs of regulation and the impact of regulation. The impacts on business are important but, in principle, also those on the wider public meaning the environmental and distributive impacts of regulation. Examining the RIA provision of the CPTPP, two critical elements emerge. The first pertains to the just mentioned importance of the scope of impacts considered in such regulatory assessments. Ayelet Berman has shown that the US focuses on the impacts of its regulations on business, trade and investment.⁶⁷ US administrative practice has not assessed other kinds of impacts in the past, namely falling short on social, environmental, or health impacts.⁶⁸ This results in assessments where the scope is often too narrow, so many effects are not analysed at all.⁶⁹ The CPTPP provision makes an explicit reference to the economic impacts and adds “or other regulatory impacts”.⁷⁰ The provision provides moreover a considerable margin for the contracting states to determine the procedure as well as the impacts that are measured. This means in return that it is up to the national regulator to make sure that other broader impacts, e.g., related to sustainability and distributive justice are part of the assessment.

The second crucial aspect of RIAs to scrutinise is who decides on the scientific knowledge and studies used in the RIA and employed in evaluating the costs and benefits of a particular regulation. CPTPP, Article 25.5(2), letter d 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 assessment of the risk and the benefits of

2. Recognising that differences in the Parties’ institutional, social, cultural, legal and developmental circumstances may result in specific regulatory approaches, regulatory impact assessments conducted by a Party should, among other things:

- a. assess the need for a regulatory proposal, including a description of the nature and significance of the problem;
- b. examine feasible alternatives, including, to the extent feasible and consistent with laws and regulations, their costs and benefits, such as risks involved as well as distributive impacts, recognising that some costs and benefits are difficult to quantify and monetise;
- c. explain the grounds for concluding that the selected alternative achieves the policy objectives in an efficient manner, including, if an appropriate, reference to the costs and benefits and the potential for managing risks; and
- d. rely on the best reasonably obtainable existing information, including relevant scientific, technical, economic or the information, within the boundaries of the authorities, mandates and resources of the particular regulatory agency.

⁶⁷ Ayelet Berman A, ‘Taking Foreign Interests into Account: Rule-making in the US and EU’ (2017) 15 Int’l J. Const. L. 235, 250.

⁶⁸ Ibid.

⁶⁹ Ibid.

⁷⁰ CPTPP, Art 25.

regulation, are either made or financed by industry itself instead of government agencies.⁷¹ It has become a phenomenon that government agencies, national ministries, and parliaments are increasingly reliant on industry expertise.⁷² This trend is largely attributed to the growing complexity of regulation coupled with limited public resources. The extent to which corporate capture risk factors in the GRP implementation under FTAs will depend on the specific factual context and the states involved.⁷³ At a minimum, GRP provisions within FTAs should mandate independent sourcing of information that serves as the foundation for RIAs.

In sum, GRP commitments have not been without criticism. The points just raised deal with the democratic deficiencies, but the national autonomy concerns play in equally and should not be overlooked. Kingsbury and others posit that the techniques of regulatory practices and coherence, coupled with other disciplines within the CPTPP, “buttress a particular and distinctive method of regulatory alignment”.⁷⁴ Such imposition is made by a dominant state and brings about adaptation costs for developing countries. When FTAs are a coalition of like-minded states can have spill-over effects for third countries. While the US and EU, as major trading blocs, have largely been driven by economic interests, smaller or weaker countries might find themselves adopting regulatory reforms out of pressure. If implemented, national law needs to be aligned to GRP commitments. States should acknowledge the implementation and adaptation costs, carefully balancing these considerations with countries’ desires to join the trading system, attract foreign investment, and participate in global supply chains.⁷⁵

⁷¹ Justus Baron, Cher Li and Shukhrat Nasirov, ‘Why Do R&D-Intensive Firms Participate in Standards Organizations? The Role of Patents and Product-Market Position, Northwestern University Searle Center on Law, Regulation and Economic Growth https://www.law.northwestern.edu/researchfaculty/clbe/events/standardization/documents/baron_li_nasirov_may_2_019.pdf (accessed 19 January 2024). Consider also, Mariana Mazzucato and Rosie Collington, *The Big Con: How the Consulting Industry Weakens Our Businesses, Infantilizes Our Governments, and Warps Our Economies* (Penguin Press 2023).

⁷² Lorna Schrefler, ‘Reflections on the Different Roles of Expertise in Regulatory Policy Making’ in Monika Ambrus and others (eds), *The Role of ‘Experts’ in International and European Decision-Making Processes* (CUP 2014) 63-81.

⁷³ On the relationship between expertise, financing, and cooperation in global health, see Ayelet Berman A, ‘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, Melissa J. Durkee, ‘Industry Lobbying and “Interest Blind” Access Norms at International Organizations’ (2017) 111 *AJIL Unbound* 119; Ayelet Berman, ‘Industry, Regulatory Capture and Transnational Standard-Setting’, (2017) 111 *AJIL Unbound* 112.

⁷⁴ Kingsbury and others, above note 30, 44.

⁷⁵ Bull and others, above note 47, 7.

4. International Regulatory Cooperation Activities Buttressed by FTAs

The analysis now turns to the second element of regulatory issues 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.⁷⁶ 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.”⁷⁷ The US-Taiwan FTA states that “regulatory cooperation means an effort between the 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”.⁷⁸

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.⁷⁹ 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, and planned and existing measures, information exchange with interested parties, training programs, inter-agency cooperation, and cooperation in international fora.⁸⁰ The IRC provisions are best-endeavour provisions.⁸¹ The non-binding

⁷⁶ OECD, ‘Recommendation of the Council on International Regulatory Co-operation to Tackle Global Challenges’ (2022) above notes 1 and 7.

⁷⁷ USMCA, Art 28.1

⁷⁸ US-Taiwan, Art 3.1.

⁷⁹ The exchange of information can be coined as the “lightest” form of IRC among regulators. See, OECD Toolkit of IRC Mechanism, available at <https://web-archive.oecd.org/2013-04-19/220658-irc-toolkit.htm> (accessed 19 January 2024).

⁸⁰ 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 maximise 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.

⁸¹ E.g., EU-Japan EPA, Art 18.6 “The Parties may engage in regulatory cooperation activities on a voluntary basis.”

character imposes a significant limitation on the extent of the top-down nature of IRC in FTA as it might not be sufficient to incentivise countries to fully engage in IRC.⁸² 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”.⁸³ 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. In the open-endedness of the IRC provisions in FTA, clearly lies their potential but also the risks associated with loss of democratic oversight and erosion of national peculiarities.

Hence, a critical question that pertains to the legitimacy of the mechanisms is who takes part in the work of the IRC treaty bodies, 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, therefore, focuses less on engaging in substantive IRC.⁸⁴ The EU approaches differ in this respect.⁸⁵ 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 also reviews regulatory initiatives, whether in progress or anticipated, that a Party considers and is allowed to develop best practices of regulatory cooperation initiatives in specific sectors.⁸⁶ The RCF can also assist regulators in identifying cooperation opportunities and reviewing regulatory initiatives. These elements highlight that the

⁸² OECD, ‘International Regulatory Co-operation and Trade. Understanding the Trade Costs of Regulatory Divergence and the Remedies, (OECD, 2017, 49.

⁸³ OECD, ‘International Regulatory Co-operation and Trade. Understanding the Trade Costs of Regulatory Divergence and the Remedies, (OECD, 2017, 49.

⁸⁴ CPTPP, Art 25.6. “The Committee shall also consider identifying future priorities, including potential sectoral initiatives and cooperative activities, involving issues covered by this Chapter and issues related to regulatory coherence covered by other Chapters of this Agreement.”

⁸⁵ E.g., EU-Japan EPA, Art 18.4, CETA, Art 21.6.

⁸⁶ The chapter builds on and replaces an existing agreement between the EU and Canada on regulatory cooperation (Framework on Regulatory Cooperation and Transparency between the Government of Canada and the European Commission, Brussels 21 December 2004).

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”.⁸⁷ Consequently, the cooperative dialogue is not limited to regulatory agencies.⁸⁸ 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. The question thus arises whether such institutional settings like the above involve legitimacy concerns. The pertinence of the questions harkens back to discussion on the potential erosion of national policy autonomy, through transnational authorities and standard setting bodies.⁸⁹ In the context of CETA the (recurrent) arguments against IRC were concerns that treaty bodies such as the RCF will be influenced by corporate pressure seeking to harmonise standards around the lowest common denominator thereby lowering critical social protection standards. Fears of this kind have animated opposition of civil society organisations to CETA and other deep trade agreements.⁹⁰

Based on the texts of the examined FTA, including CETA, it is not possible to confirm these fears. Whether and to what extent processes are 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, treaty bodies that deal with IRC have generally no decision-making powers and cannot supervise national regulatory work.⁹¹ The CETA explicitly states that “a Party is not required to enter into any particular regulatory cooperation activity and

⁸⁷ CETA, Art 21.6.3.

⁸⁸ Consider, 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.”

⁸⁹ See more generally, Dan Rodrik, *Straight Talk on Trade: Ideas for a Sane World Economy* (PUP 2019) 16-27; Tim Büthe and Walter Mattli, *The New Global Rulers: The Privatization of Regulation in the World Economy* (PUP 2011).

⁹⁰ Hoekman and Sabel, above note 15, 227-228.

⁹¹ 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, 21.6.4(c). For a more critical acclaim of CETA’s RFC, see, Michèle Rioux, Christian Deblock, Guy-Philippe Wells, ‘CETA, an Innovative Agreement with Many Unsettled Trajectories’ (2020) 10 *Open Journal of Political Science* 1, 50-60.

may refuse to cooperate or may withdraw from cooperation”.⁹² 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”.⁹³

While the criticism of IRC through FTAs often seems speculative, the orientation of the cooperation activities is important. If the focus is purely on 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.⁹⁴ 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 contracting states. Finally, the monitoring and *ex post* assessments of who participates in IRC bodies under FTA is critical once more. It matters who qualifies as “interest parties” and gets invited to cooperation forums such as the CETA RCF. The criteria for selecting the stakeholders are not defined in FTAs but relies on national law. This omission could be improved by setting certain minimal requirements that allows for a mixture of experts but also impacted groups, and vulnerable groups.

5. Conclusion: Agility, the Regulatory State and Global Economic Governance

The aim of this article was to revisit the rationale behind regulatory policy commitments in FTAs and to evaluate their normative influence considering the paradigm of regulatory agility. While the utilisation of FTAs as a strategy to promote GRPs and IRC predates the agile regulation agenda, this article argued that agility provides new impetus for these disciplines. Regulatory

⁹² CETA, Art 21.2.6. Reason giving, see also EU-Japan EPA. As noted in Article 21.5 CTEA, the RCF has replaced a previous regulatory cooperation framework between Canada and the EU

⁹³ US-Taiwan FTA, Art 3.2(1). See also, CETA, Art 21.3.

⁹⁴ Hoekman and Sabel, above note 15, 217.

rationalisation is being fostered and updated by new and more technology-based approaches. Agility could potentially foster new and more regulatory cooperation between states based on the general and subject neutral IRC provisions in FTAs. With the rapid technological changes and rising sustainability challenges, states have good reasons to cooperate with each other and exchange on regulatory best practices and approaches despite the geopolitical tensions present in international economic governance.⁹⁵ In fact, 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.⁹⁶ This link raises new and old questions for global economic governance and the understanding of the regulatory state.⁹⁷

Agility in this respect does not change the vision of the state that has become predominant in the era of hyper-globalisation⁹⁸ but arguably provides new justifications for this vision. It is about a vision of the regulatory state that has become a state that grows in tandem with the market by regulating to mitigate its failures and externalities.⁹⁹ Markets are mainly international and that is why the nation state constantly reaches its limits. It is a state that must substantiate its “right to regulate” under certain circumstances and must reconsider why and to what extent its regulatory objectives and approaches differ from those of other states. Regulatory divergence is closely related to the fact that states and societies differ in their risk assessments and anticipation, their general need for safety and their acceptance of regulatory intrusiveness. The tensions between the regulatory state and international markets increase for policy areas that pertain to the welfare state setting levels of protection in technology, health, privacy, food safety, environment, and climate. These policy areas might be internationalised to an important extent, yet their impacts are felt at

⁹⁵ E.g., UK Government Department for Business, Energy & Industrial Strategy, ‘International Regulatory Cooperation Strategy’ (2022) available at <https://www.gov.uk/government/publications/international-regulatory-cooperation-strategy> (accessed 17 January 2024).

⁹⁶ Kingsbury and others, above note 30, 3.

⁹⁷ Global (economic) governance typically refers to the variety of actors, processes, and instruments at the international level to “gain a normative grasp on global governance” see, Philipp Dann and Marie v. Engelhardt, ‘Legal Approaches to Global Governance and Accountability: Informal Lawmaking, International Public Authority, and Global Administrative Law Compared’ in Joost Pauwelyn, Ramses Wessel and Jan Wouters (eds), *Informal International Lawmaking* (OUP 2012) 106.

⁹⁸ On ‘hyper-globalisation’, see Rodrik, above note 89, 16-27

⁹⁹ Kingsbury and others, above note 30, 44.

the level of the nation state. Moreover, 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 GRPs and IRC is based on a functionalist rationale.¹⁰⁰ It integrates a vision of a state whose regulatory functions can, if necessary, be substituted to expert bodies and other stakeholders. Lastly, and herein probably lies its most novel feature, 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.

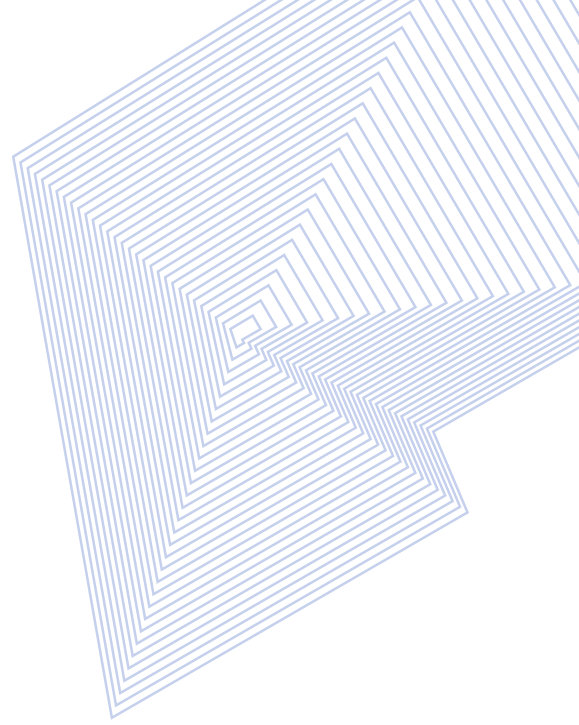
Agility is aligned with the objectives of GRP and IRC, as well as with the vision of the regulatory state in globalised markets. It is a functionalist legitimacy, and hence political legitimacy can be questioned. This article has tried to highlight that therefore the same legitimacy concerns occur in the agile-regulation-trade nexus as in the discussion surrounding mega-regionals and their incorporation of regulatory issues. These concerns relate to the decrease or loss of regulatory autonomy 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 governance structures with private sector engagement. Agile practices, such as using flexible oversight authority, or working closely with industry, could facilitate regulatory capture.¹⁰¹ Some of the crucial questions have been raised in the present analysis, such as how are stakeholders defined, who engages in practice in GRP and IRC activities, 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, GRP and IRC commitments in FTAs do not infringe on the regulatory autonomy of contracting states, mainly because these commitments are non-binding and depend on the implementation of the trading partners. It has also been argued that the practice of GRP and IRC in and of itself does not suggest that welfare objectives are being undermined by single-sided private influence. To ensure that all interests are being heard is a matter of process.

¹⁰⁰ On the sources of legitimacy see, Patrizia Nanz, 'Democratic Legitimacy and Constitutionalisation of Transnational Trade Governance: A View from Political Theory', in Christian Joerges and Ernst-Ulrich Petersmann (eds), *Constitutionalism, Multilevel Trade Governance and International Economic Law* (Hart 2011) 64-68.

¹⁰¹ Aladesanmi, above note 2.

In conclusion, agility provides new impetus for GRP and IRC and, conversely, the trade-regulatory nexus in FTAs is beneficial to implement the agility agenda and thereby assisting governments to tackle current challenges stemming from technology, health, and sustainability. At the same time, considering that the agility agenda finds its justification in efficiency and effectiveness, the foundation of legitimacy should arguably extend beyond these functionalist aspects. Legitimacy should also be ensured through the fairness of the process and the net-benefit outcomes for the broader public.¹⁰² 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.

¹⁰² The TTIP and CPTPP experience has shown that certain stakeholders suspected that there are implied trade-offs between economic gains and regulatory issues in favour of the former. See Garcia Bercero and Nicolaidis, above note 29, 25, and Kingsbury and others, above note 30, 44.



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