World Trade Review (2018), 17: 4, 575–607
 doi:10.1017/S1474745617000519 First published online 28 December 2017

The Treatment of Regulatory Convergence in Preferential Trade Agreements

RODRIGO POLANCO LAZO*
World Trade Institute, University of Bern, Switzerland
PIERRE SAUVÉ**
World Bank Group's Trade and Competitiveness Global Practice, Geneva, Switzerland

Abstract: This article explores the concept of 'regulatory convergence' in the context of the evolving literature on legal convergence and divergence. Such a concept has emerged as an overarching horizontal discipline in the latest generation of preferential trade agreements and aims to reduce unnecessary regulatory incompatibilities between countries in order to facilitate cross-border trade and investment.

Differing approaches to regulatory convergence found in recently concluded PTAs, or are currently under negotiation, are examined, with a special focus on the 'regulatory cooperation' approach embedded in CETA, the path of 'regulatory improvement' taken by members of the Pacific Alliance, and the 'regulatory coherence' track included in the TPP. We also refer to the TTIP negotiations conducted between the EU and the US.

The article offers a broad understanding of the different ways in which regulatory convergence is implemented across PTAs, and the legal complexities resulting from the ambiguity of the concept. It further describes the scope and effects of the different mechanisms used to achieve regulatory convergence, on both substantive and procedural matters.

1. Introduction

The openness of markets depends not only on what happens at the border but also on a plethora of 'behind the border' policy choices made by governments. The presence of chapters on 'regulatory cooperation', 'regulatory improvement', and 'regulatory coherence' in preferential trade agreements (PTAs) that have recently been concluded, or are currently under negotiation, create legal precedents that may

* Email: rodrigo.polanco@wti.org.
** psauve@worldbank.org.

Previous versions of this article were presented at the ICTSD-IBD RTA Exchange (Geneva, 28 March 2017), the Latin American Studies Association (LASA) 50th Congress (27–30 May 2016, New York), and at the International Society of Public Law (ICON·S) 2015 Conference (New York University, 1–3 July 2015). The authors would like to thank Gráinne de Búrca, Henry Gao, Jörg Zimmermann, and two anonymous reviewers of the *World Trade Review* for their helpful comments and suggestions.

inform the design of other PTAs and the evolution of global norms at the World Trade Organization (WTO). In this context, the Canada–European Union Comprehensive Trade and Economic Agreement (CETA), the Chile–Colombia–Mexico–Peru Pacific Alliance Protocol (PAAP), the uncertain Trans-Pacific Partnership Agreement (TPP), and the now suspended US–EU Transatlantic Trade and Investment Partnership (TTIP), represent major new developments in trade governance.

Such developments raise important questions to which this article seeks answers: What are the main conceptual similarities and differences between the notions of regulatory cooperation, coherence, and improvement? Do semantics matter or are all these iterations of a broader concept? What is the substantive remit of the obligations that states assume when committing to these disciplines and what will be required to implement them? Are they achievable solely through legally 'binding' commitments, or could 'soft' (non-binding) commitments play a role?

In exploring this new frontier in international trade law and policy, this article introduces the concept of 'regulatory convergence' as an overarching notion of reducing unnecessary regulatory incompatibilities between countries in order to facilitate cross-border trade and investment.

The article is organized as follows. Section 2 explores the legal and political foundations of the notion of regulatory convergence. Section 3 looks at the origins of regulatory convergence in an international context while Section 4 maps and compare its different denominations in recent PTAs. The final section ponders the positive and negative effects of this new discipline, concluding that both substantive and procedural obligations linked to this concept and its implementation could raise legitimate concerns about the distinction between 'rule-making' and 'rule-taking' nations in global governance.

2. The notion of regulatory convergence

It is not uncommon for policy problems to have multiple solutions that can be implemented through different legal means. There are several reasons why regulatory divergence might occur: local preferences, public policy choices, information asymmetries, and network effects, among them (Chirico and Larouche, 2013: 12–15). In addition, the legal framework and social norms that countries have inherited from the past display strong path dependent characteristics that intrinsically limit the cross-country convergence of legal systems, and countries usually choose rules that are primarily consistent with their own traditions (Glaeser and Shleifer, 2002; La Porta *et al.,* 2008).

The rationale behind the introduction of regulatory convergence provisions in PTAs stems from the idea that regulatory diversity may entail significant costs that can hinder cross-border exchanges (Hoekman, 2015), and that the maintenance of needlessly burdensome cross-border differences in regulations can result in a number of additional negative policy impacts, including higher transaction

costs stemming from information asymmetries (Chirico and Larouche, 2013: 23–24). Divergent regulatory requirements can lead to costly duplication in product development, manufacturing, and testing – obstacles that are important for all internationally active businesses and especially so for small or medium-size firms (SMEs), for which such fixed costs can be a deciding factor in whether or not to export or invest, including across borders (Malmström, 2015: 2–3). Lack of transparency or clarity of regulations, as well as excessive, inefficient, or ineffective regulations, create unnecessary delays or impose costs on traders and investors (Sheargold and Mitchell, 2016).

Regulatory convergence can also be understood through the theory of legal convergence,[1] which holds that significant distinctions between legal systems are frequently cosmetic in character (Canuel, 2011: 80). While different legal systems may apply differing solutions to a problem starting from different points of departure, they can ultimately lead to similar outcomes (Mattei *et al.*, 2000: 508). In some cases, functional convergence may occur even as formal regulations diverge (Crettez *et al.*, 2014: 20–21). Some scholars have gone so far as to suggest that there is often a unique, optimal, solution to a legal problem, and thus countries should spontaneously converge towards the same rule even without any interactions among them (a process dubbed 'natural convergence') (Merryman, 1994). Without a minimum level of convergence, the modern multi-layered legal order may otherwise result in far-reaching fragmentation of legal norms and principles, legal instruments, and methods; thereby generating legal uncertainty (Lierman, 2014: 611–613).

Several scholars have argued that a key driver of legal convergence is the growing perception of policymakers, traders, investors, and academics that convergence occurs through repeated interactions at the international level. Vectors of this phenomenon include improvements in communication means or the perceived need (or pressure) to comply with a dominant culture (that of regulatory hegemons); for example, by using 'legal transplants' (Crettez *et al.*, 2014: 20). Therefore, international law can be a key driver of legal convergence, through dissemination of shared standards and underlying values or ideologies, and by facilitating the adoption and implementation of uniform laws (Street, 2013: 11). Seen in this way, interaction *between* rule-makers becomes a key driver of regulatory convergence.

However, it bears noting that regulatory convergence is an incomplete process. Equal rules may mean different things under differing legal systems (e.g. same rule, different meaning) or within differing implementation cultures (e.g. same rule, different application). The pace, form, and degree of regulatory convergence

1 The study of legal convergence has been the object of significant recent academic scrutiny in private international law and comparative law. This stands in contrast to public international law, where the idea of fragmentation has tended to be more amply debated. See: Boele-Woelki *et al.* (eds.) (2010); Koskenniemi (2006); Broude and Shany (2011). However, recent works are also pointing back to convergence in public international law: Andenas and Bjorge (eds.) (2015). Andenas (2014); Platsas (2009).

https://doi.org/10.1017/S1474745617000519 Published online by Cambridge University Press

also differ across sectors, influenced by variations in knowledge over time, the magnitude of the costs (and benefits) of change, sources of market failure, bureaucratic cultures, and the importance of the process from a cultural or social point of view (Crettez *et al.*, 2014: 26). At the same time, through the evolution of jurisprudence, tribunals are typically willing to accept a degree of divergence in the application of laws.[2] Even where PTA members agree to similar regulations, the identical wording of terms can mean different things for each country in the context of their respective legal systems or in the application of such regulations in practice. Regulatory convergence involves many actors with 'regulatory capacity' and different degrees of autonomy, and its effectiveness would require coordination across the whole State (Young, 2015: 1253, 1258–1259) Furthermore, the causes of regulatory divergence may evolve over time, either fostering convergence or nurturing further divergence. In short, both regulatory convergence and divergence are dynamic and incomplete processes (Hoekman, 2015: 613).

Divergence is also widespread as regards the mechanisms to achieve regulatory convergence, with different nomenclatures – regulatory cooperation, coherence, improvement, coordination, or harmonization, among others – with no agreed typology. Scholars use these concepts interchangeably, without much clarification of underlying differences – if any.

Yet, some do draw distinctions between them. For Mavroidis, while 'regulatory cooperation' denotes the presence of an international element, 'regulatory coherence' describes the quality of a domestic regulatory process (Mavroidis, 2016: 8). Arvíus and Jachia identify two 'segments' of regulatory cooperation organized around increasing steps of complexity and levels of engagement ('ladders of ambition'). The first segment is the disciplines on national regulatory practices (observation of good regulatory practices and transparency measures); and the second is the different levels of trans-national regulatory cooperation (recognition of tests, conformity assessment procedures, and accreditation systems, and their results; recognition of functionally equivalent technical regulations; and the establishment of fully harmonized technical regulations) (Arvíus and Jachia, 2015). Drezner defines regulatory coordination as 'the codified adjustment of national standards in order to recognize or accommodate regulatory frameworks from other countries' (Drezner, 2008: 11). Mumford considers that regulatory coherence requires a multidimensional strategy with three interrelated elements: (i) coherence between domestic laws and domestic agencies; (ii) coherence between domestic and international policy goals; and (iii) coherence between the laws and agencies of two or more economies (Mumford, 2014: 3–5). Young believes that regulatory convergence means that countries' regulations become more similar without

2 Chirico and Larouche (2013: 22). Yet, even within one single legal family there can be significant differences, as the same concept may have different interpretations and legal effects in American than in British law and even within sub-national entities in the United States (Cordero-Moss, 2014: 9).

https://doi.org/10.1017/S1474745617000519 Published online by Cambridge University Press

necessarily being the same, which would constitute 'regulatory harmonization' (Young, 2015: 1256–1259).

Without following any specific taxonomy, others have focused on the different sources and modes of regulatory convergence. On the sources, it is important to note that the distinction between public and private regulations is not always clear, having different sources of regulations interacting in a continuum that includes state-led, private-led, and collaborative regulations, following the 'governance triangle' developed by Abbot and Snidal (2010). The OECD has identified 11 forms of international 'regulatory co-operation', (IRC), with a range that goes from the least to the most legally binding.[3]

This article considers that regardless of the above semantics, all mechanisms should be viewed as forming part of the overarching notion of 'regulatory convergence', since they all aim to reduce unnecessary regulatory incompatibilities between countries, but in a process that is both dynamic and incomplete.

Focusing on those PTAs that have included a chapter on regulatory convergence as a case study, we advance the idea that regardless of their denomination, all regulatory convergence mechanisms include substantive or procedural aspects that are aimed at two different types of regulatory outcomes. In some agreements, regulatory convergence aims to achieve *substantive* regulatory harmonization (similar or equivalent regulations – 'substantive convergence'). Other agreements consider harmonization of the *processes* by which regulations are developed, adopted, publicized, and implemented (similar or equivalent procedures – 'procedural convergence'). While mechanisms that address problems related to the quality of the regulations and their effects are mainly substantive in nature, mechanisms that address problems of design and implementation of regulations are largely procedural in character (Sheargold and Mitchell, 2016: 592). With different denominations (Hoekman and Mavroidis, 2015: 2–3), both approaches are present in the PTAs examined in this article.

Regulatory convergence can thus be achieved both through a top-down process, e.g. via harmonization at the international level, or through a bottom-up process, e.g. through the implementation of good regulatory practices (Chirico and

3 In that order, this typology includes: (i) dialogue/ad-hoc exchange of information (e.g. transatlantic dialogues); (ii) soft law (guidelines, principles, codes of conduct); (iii) recognition/incorporation of international standards (e.g. International Organization for Standardization – ISO); (iv) unilateral convergence through good regulatory practices (e.g. Council of Australian Governments – COAG – best practice regulation); (v) trans-governmental networks of regulators (e.g. Basel Committee on Banking Supervision); (vi) mutual recognition agreements – MRAs (e.g. 1999 Trans-Tasman Mutual Recognition Arrangement between New Zealand and Australia); (vii) trade agreements with regulatory provisions (e.g. CETA chapter on regulatory cooperation); (viii) joint standard setting through inter-governmental organizations (e.g. OECD Model Tax Convention); (ix) formal regulatory cooperation partnerships (e.g. US–Canada Regulatory Cooperation Council); (x) specific negotiated regulatory agreements between countries (e.g. Montreal Protocol); and (xi) integration/harmonization through supranational or joint-institutions (e.g. EU institutions and directive) (See OECD, 2013; Malyshev and Kauffmann, 2015: 2)

https://doi.org/10.1017/S1474745617000519 Published online by Cambridge University Press

Larouche, 2013: 27–31). None of the above distinctions is always clear-cut, but they are used in what follows to try to illustrate the different types of regulatory convergence found in PTAs.

3. The origins of regulatory convergence

3.1 Regulatory convergence at the WTO

Behind-the-border' measures have raised policy concerns since the establishment of the General Agreement on Tariffs and Trade (GATT), as they affect products or people once they are within the territory of the relevant country, diluting or even nullifying the value of tariff bindings and affecting trade. For that reason, drafters of the GATT included general rules covering broad categories of measures, notably the 'national treatment' and the 'most-favoured nation treatment' (MFN) obligations in articles I and III of the agreement.[4] Similar provisions are respectively enshrined in articles XVII and II of the General Agreement on Trade in Services (GATS) with respect to services and services suppliers.[5]

Over time, more specific disciplines were negotiated in the WTO, as Members recognized that the effective implementation of good regulatory practices was key to minimizing unnecessary barriers to trade and investment (Bollyky, 2012: 174–175). Once a product (a good or a service) has crossed a border, regulatory protectionism may impose a disadvantage on imported products by discriminating against them in a manner that is not necessary for the attainment of legitimate public policy objectives (Sykes, 1999). Regulatory protectionism often involves trade barriers that operate in a grey area. They are not as easy to detect or measure as are tariffs or quotas applied at the border. Areas such as food inspection, product labelling, and safety guidelines are governed by internal health, safety, and technical regulations, all of which can be designed or implemented in such a way as to raise costs for foreign firms in comparison with domestic firms and give domestic firms and products an advantage in the home market (Fishbein and Trebilcock, 2007: 37).

The question arises of whether trade and investment liberalization can be achieved without infringing the freedom of governments to pursue legitimate regulatory objectives. One of the main problems lies in distinguishing between 'unintended protectionism', where domestic policies enacted with no protectionist intent discriminate against foreign competitors, using 'disguised protectionism',

4 Under GATT Article III, countries should grant to imported products treatment no less favourable than 'like' domestic products; and under GATT Article I. countries shall accord immediately and unconditionally treatment to products of any other Member treatment no less favourable than that it accords to like products of any other country.

5 *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995), annex 1B (*General Agreement on Trade in Services*).

https://doi.org/10.1017/S1474745617000519 Published online by Cambridge University Press

where a government uses a legitimate objective as an excuse to design domestic policies that inhibit foreign competition (Mattoo and Subramanian, 1998: 303–304).

If a country was not constrained in its use of regulatory measures, the latter could be widely used to manipulate the terms of trade. The most important agreements constraining such discrimination are the WTO Agreement on Technical Barriers to Trade[6] (TBT Agreement), which deals with technical regulations, standards, and procedures for testing and certification; and the Agreement on Sanitary and Phyto-Sanitary Measures[7] (SPS Agreement), which deals with food safety and animal health.

The inclusion of regulatory convergence provisions in PTAs draws on the above WTO agreements, but such provisions differ in at least two aspects: respect to their scope and implementation mechanisms.

Regarding scope, the regulatory convergence chapters under review in this article go beyond technical barriers (technical regulations, standards, and conformity assessment procedures) and sanitary and phytosanitary measures, by addressing a broad range of regulations that may affect trade and investment. However, all agreements reviewed allow States to exclude certain measures from the scope of regulatory convergence.

As regards implementation mechanisms, both WTO agreements and PTAs with regulatory convergence chapters share similar tools, such as transparency obligations, recognition of equivalence, or mutual recognition agreements, and have treaty bodies to oversee treaty implementation. However, regulatory convergence chapters may also include other tools, notably regulatory impact assessments and the participation of different stakeholders in the rule-making process. Nevertheless, there is one further key difference. While TBT and SPS disciplines address the quality of regulatory interventions by creating international obligations (Mavroidis, 2016: 6) – e.g. that States shall refrain from creating unnecessary obstacles to international trade, or that SPS decisions must be grounded in scientific principles and sufficient scientific evidence – the commitments found in PTAs under review either are excluded from dispute settlement mechanisms or are only facultative in nature.

As the WTO is not a standard-setting body, the principal means through which it promotes regulatory convergence is by encouraging members to use international standards and to exercise temperance in their regulatory choices, opting for least-trade or investment-restrictive ways of satisfying public policy objectives or minimizing the adverse effects on trade and investment where these exist. Neither the TBT nor the SPS Agreements compel WTO members to use

6 *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A (*Agreement on Technical Barriers to Trade*).

7 Ibid., annex 1A (*Agreement on the Application of Sanitary and Phytosanitary Measures*).

https://doi.org/10.1017/S1474745617000519 Published online by Cambridge University Press

international standards.[8] However, although WTO members may adopt SPS measures or technical regulations that depart from international standards (United Nations, 2012: 198), in such cases the burden of proving the necessity of the measure shifts to the country adopting any regulation that departs from the international norm – something that could be particularly burdensome for developing or least developed economies.

Reconciling the objectives of domestic regulation and international trade is not always straightforward. WTO rules have been effective in limiting *discriminatory* regulatory measures, but arguably less so in eliminating economically inefficient, unclear, and redundant but non-discriminatory regulations that can obstruct international trade and investment and nullify or impair treaty commitments.

Yet, for the most part, trade agreements have not led to significant improvements in collaborative dialogue between regulatory agencies (Bollyky (2012: 173). If the introduction of regulatory convergence disciplines in PTAs were successful in this regard, it would likely inform the evolution of WTO-embedded global norms. Yet, for the reasons explained in what follows, it appears unlikely that PTA chapters on regulatory convergence will exert such effects.

3.2 Regulatory convergence in international economic law

The notion of regulatory convergence is relatively new in international trade and investment regulations. 'Regulatory cooperation' emerged in the mid-1990s within the Organisation for Economic Co-operation and Development (OECD), in the work of member states of the Asia-Pacific Economic Cooperation (APEC) forum, and in political spaces like the Transatlantic Economic Council (TEC).

3.2.1 OECD

In an early attempt to define 'regulatory cooperation', a 1994 OECD study noted that it required 'institutional and procedural frameworks within which national governments, sub-national governments, and the wider public can work together to build more integrated systems for rule-making and implementation, subject to the constraints of democratic values, such as accountability and openness' (Jacobs, 1994: 15).

OECD members were the first to consider concerted actions directed at improving the quality of their regulatory systems, particularly by using Regulatory Impact

8 According to TBT Agreement Art. 2.4, WTO members are required to use relevant international standards as a basis for their technical regulations except when such international standards would be an ineffective or inappropriate means for the fulfillment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems. Similarly, under SPS Agreement Art. 3.1, WTO members are required to base their sanitary and phytosanitary measures on international standards or guidelines, but they may choose to depart from them if there is a scientific justification, or as a consequence of adopting a higher level of protection.

Analysis (RIAs).[9] In 1997, another OECD study drew attention to the fact that, from an initial sample of one or two countries in 1980, improvements in regulatory decisions through impact assessment of new regulatory proposals was becoming an increasingly common reform tool. By 1996, more than half of OECD members had adopted RIA programs assessing an increasing proportion of laws and other regulations affecting citizens (Jacobs, 1997: 13). In 2009, the OECD noted the mainstreaming of the RIA process, observing that it formed a core component of the regulatory management strategy of all Member states and was a widely used means of improving the quality of regulatory decision-making and in informing decision-makers on whether and how to regulate to achieve public policy goals (OECD, 2009: 12–13).

Domestic stakeholders are key drivers of the adoption of RIAs. This includes groups concerned with the costs of regulations and the impact of regulations on business activity, those who see regulations as a tool to promote certain values like transparency and accountability, and those concerned with the impact of regulations in other areas, such as job creation or the environment (Jacobs, 1997: 13).

3.2.2 The APEC–OECD checklist

In the context of a joint initiative on regulatory reform conducted with the OECD, APEC economies developed a work program on regulatory reform with a strong emphasis on openness and market competition. At their 2000 Summit, APEC members reached an agreement to establish the APEC–OECD Integrated Checklist on Regulatory Reform (the 'APEC–OECD Checklist') (APEC–OECD, 2005: 1). The checklist is a voluntary tool that members may use to evaluate their respective regulatory reform efforts. It contains key issues that should be considered during the process of development and implementation of regulatory policy, with due consideration given to the need for required flexibility in the methods applied, as it also recognizes the diversity of economic, social, and political environments and values of APEC economies (ibid.).

The checklist comprises four pillars: (i) regulatory policy; (ii) competition policy; (iii) market liberalization policy; and (iv) regulatory reform. Regulatory policies are to be designed in order to maximize efficiency, transparency, and accountability, based on an integrated approach to the process of making rules (Bollyky, 2012: 174–176). Competition policies should promote economic growth and efficiency by eliminating or minimizing the distorting impact of laws, regulations, and administrative practices and procedures (ibid.). Market liberalization policies are aimed

9 RIAs have been defined as 'a process of systematically identifying and assessing the expected effects of regulatory proposals, using a consistent analytical method, such as cost/benefit analysis'. The RIA process is comparative and *ex ante* in character. It determines the underlying regulatory objectives sought and identifies all the policy interventions capable of achieving them. All 'feasible alternatives' must be assessed, using the same method, to inform decision-makers about the effectiveness and efficiency of different options and enable the most effective and efficient options to be systematically chosen (OECD, 2008).

at ensuring that a country can obtain the benefits of globalization and international competition by eliminating or minimizing the distorting effects of border and 'behind the border' regulations and practices (APEC–OECD, 2005: 2–3). Finally, regulatory reforms are to be developed horizontally as a 'reflection on the degree of integration of regulatory, competition and market openness policies across levels of government, and on the accountability and transparency mechanisms needed to ensure their success' (ibid.: 2).[10]

In the APEC–OECD Checklist, RIAs play a central role in the design of regulatory policies by allowing for comparisons *between* policies, thereby enhancing efficiency and promoting predictability. However, RIAs alone cannot build a regulatory policy. Governments need to focus on achieving an integrated system, involving all sectors of the state acting in a coordinated and mutually supportive fashion, thereby avoiding the 'isolation or undue capture of the regulator'. Experience shows that it is often difficult for regulators to reform themselves, as close identification with the objectives of an out-dated regulatory regime, countervailing pressures from different parts of society, or personal or bureaucratic interests, all challenge self-reform efforts (ibid: 15). To achieve this goal, the Checklist proposes two mechanisms: the creation of a central coordinating body and the establishment of a coordination mechanism. As regulations apply across multiple areas, controlling for their quality and consistency improves with shared responsibility between regulators and a central quality control entity or mechanism (ibid.).

High standards of transparency applied on a non-discriminatory basis can ensure that stakeholders understand how laws and regulations affect them, also ensuring their consistent application (ibid.). The Checklist addresses the participation of national and foreign stakeholders in the creation of regulations, through appropriate and well-publicized procedures of public consultation. Such consultations should not be limited to insiders but rather be open to all interested parties, including affected business, trade unions, wider interest groups such as consumer or environmental organizations, and other pertinent levels of government (ibid.).

Finally, the APEC–OECD Checklist suggests a procedure for evaluating a proposed regulatory action's compliance with international obligations, such as conformity with international commitments under the WTO, PTAs, and international investment instruments (ibid.).

3.2.3 The Transatlantic Economic Council

In 2007, during the process of forming the Transatlantic Economic Council (TEC) to 'oversee and accelerate government-to-government cooperation in furthering

10 The origin of the regulatory reform movement dates back to the domestic deregulation efforts of the 1970s and 1980s, which focused on improving regulatory agency rule-making and streamlining administration, mainly in the United States, Australia, and New Zealand (Bollyky, 2012: 174–175).

economic integration' (Posner and Wolff, 2011: 2), the US and the EU[11] addressed the issue of 'regulatory cooperation' for the first time by establishing a framework for fostering cooperation and reducing regulatory burdens.[12]

The TEC created a political space to avoid increased cross-border trade costs stemming from any duplicative regulations. To meet these objectives, two kinds of cooperative efforts were established: first, steps to advance regulatory integration in specific sectors (cosmetics, medical devices, pharmaceuticals, automobiles, electrical equipment, and nano-materials);[13] and, second, actions to promote the exchange of experiences and information among regulators. To this end, the TEC developed a methodological framework allowing comparisons to be made between regulatory impact declarations, risk assessments, and cost–benefit analyses relating to regulations (Polanco Lazo, 2013: 233).

Both mechanisms are different in nature and pursue different objectives. While risk assessments are much closer to a standardization process, familiar in international trade circles, cost–benefit analysis aims to be a cooperative effort. It does not seek to make the rules generated by regulators comparable, but rather aims to inform the processes used by regulators to produce regulations.[14]

The TEC did not prove successful in promoting regulatory convergence between the US and the EU, and its first two meetings stumbled 'over efforts to resolve disputes involving sales of poultry, cosmetics, and electrical equipment' (Ahearn, 2009). Obstacles to bilateral regulatory cooperation remained, particularly in the areas of food safety, environment, and security, where both parties maintained diverging risk perceptions and differing regulatory philosophies in highly politicized policy environments (Mildner and Ziegler, 2009). Following its first five meetings, the TEC stopped meeting at the Ministerial level in 2010, and discussions on regulatory issues resumed in 2013 when negotiations on a Transatlantic Trade and Investment Partnership (TTIP) were launched, although cooperation through the TEC is still being pursued at a technical level (European Commission, 2015a).

3.3 Regulatory convergence in early preferential trade agreements

Tangible processes of regulatory convergence, whether under regulatory cooperation or regulatory coherence schemes, have proven scarce, and generally more difficult to effect in practice (Mattoo and Sauvé, 2011: 248). It was only around 2010–11 that the term emerged in trade policy circles, particularly in the context of discussions that would lead to the conclusion of the TPP (Mumford, 2014: 4).

11 See: 'Framework for Advancing Transatlantic Economic Integration between the European Union and the United States of America' (30 April 2007), section II, http://eeas.europa.eu/us/docs/framework_trans_economic_integration07_en.pdf (accessed 30 August 2017).

12 Ibid.

13 ibid., Annex 1. See also Woolcock *et al.* (2015).

14 'Framework for Advancing Transatlantic Economic Integration between the European Union and the United States of America', Annex 1.

https://doi.org/10.1017/S1474745617000519 Published online by Cambridge University Press

Before analysing the innovative advances made within PTAs, the following section offers a brief depiction of the treatment of the regulatory convergence process in a number of important earlier PTAs.

3.3.1 ANZCERTA

With a view to promoting regulatory convergence, the Australia–New Zealand Closer Economic Relations Trade Agreements (ANZCERTA)[15] concluded in 1983 established joint institutions, including common regulatory agencies, to develop 'joint food standards, harmonized approaches to certification of quality management systems, and mutual recognition of product standards and occupational qualifications' (Steger, 2012: 114–115). The agreement also saw the establishment of a joint competition authority and the replacement of trade remedy provisions by competition law once tariffs were fully phased out between the Parties.

The ANZCERTA approach aims at a significantly deeper level of integration, with regulatory harmonization features such as a joint regulatory agency for food standards (established in 1995), a mutual recognition arrangement for product standards and professional qualifications (the 1997 Trans-Tasman Mutual Recognition Arrangement), and a common food standards code (the 1999 FSANZ) (Sheargold and Mitchell, 2016: 594). However, in subsequent PTAs concluded with other countries, both Australia's and New Zealand's approach to regulatory convergence has been generally softer and less institutionalized, without clearly defined mechanisms of regulatory convergence, neither in the form of regulatory cooperation or regulatory coherence, until the conclusion of the TPP (Steger, 2012: 118).[16]

3.3.2 NAFTA

The North American Free Trade Agreement of 1994 (NAFTA),[17] addressed matters of regulatory coherence in a somewhat oblique manner, reflecting the Parties' proclivity to treat regulatory issues in a vertical, sector-specific, manner,

15 'Closer Economic Relations Trade Agreement, 28 March 1983, Australia–New Zealand', http://dfat.gov.au/trade/agreements/anzcerta/Pages/australia-new-zealand-closer-economic-relations-trade-agreement.aspx (accessed 30 August 2017).

16 Non-binding cooperation activities are included in the Australian FTAs with Singapore (2003, only for educational activities), Chile (2011), Malaysia (2012, only for specific sectors: automotive, agriculture, tourism, clean coal technology, and electronic commerce) and with South Korea (2014). Non-binding economic cooperation activities are included in the New Zealand FTAs with China (2008, only in the field of conformity assessment in relation to electrical and electronic equipment and components), the P4 (with Brunei Darussalam, Chile, and Singapore – 2005), Malaysia (2009) and South Korea (2015, only for agriculture, forestry, and fisheries cooperation). The FTA with Hong Kong (2010) only included cooperation for educational activities.

17 Canada–Mexico–United States, 'North American Free Trade Agreement (NAFTA), Dic. 17, 1992' (1993) 32 International Legal Materials 289.

rather than horizontally, thus limiting cross-linkages. To fill this institutional gap, *ad hoc* or informal cooperative arrangements, mostly of a bilateral nature, were created between Canadian and American or between American and Mexican counterparts (Hart, 2007: 34).

After the failure of a joint Security and Prosperity Partnership (SPP),[18] a trilateral process of technical negotiations that aimed to eliminate 'the tyranny of small differences' in regulations (Anderson and Sands, 2007: 1, 18) by means of regulatory cooperation over a broad spectrum of sectors', two bilateral councils were established. Both the Canada–US Regulatory Cooperation Council (RCC) (United States Department of Commerce, 2015) and the Mexico–US RCC (United States Department of Commerce, 2013) have a mandate to identify and recommend opportunities to enhance bilateral regulatory cooperation through different mechanisms such as increased regulatory transparency, reduced burdens and costs of regulations in specific sectors, and greater recourse to the mutual recognition of regulatory practices.

Although other committees and working groups have been established under the NAFTA, their impact with respect to regulatory convergence has generally proven 'minimal' because of the lack of oversight or of implementation power. Additionally, problems were exacerbated after the September 2001 terrorist attack, after which the United States significantly strengthened its border protection controls (Steger, 2012: 112).

3.3.3 ASEAN

Among the ten member states of the Association of Southeast Asian Nations (ASEAN),[19] the approach to regulatory convergence has generally been to align domestic norms to international standards and to develop MRAs on conformity assessment and on professional services between ASEAN members (Steger, 2012: 116). This has been done mainly through the Consultative Committee on Standards and Quality (ACCSQ) with the goal of 'One Standard, One Test, Accepted Everywhere' (ASEAN, 2014a), and the implementation of the 1998 ASEAN Framework Agreement on Mutual Recognition Arrangements (ASEAN, 2014b). Under these agreements, ASEAN members have reached MRAs on medical services, architecture, accountancy, and tourism services among other areas (Sheargold and Mitchell, 2016: 595).

With ongoing steps towards the end-2015 realization of the ASEAN Economic Community (AEC), ASEAN Members have aimed for greater regulatory convergence and harmonization and the strengthening of policy coordination (Peetman, 2013: 1–2). To this date, little has been achieved in developing common ASEAN

18 For a further explanation, why the SPP failed and who was involved in the process, see Hart (2007).

19 'The Asean Declaration (Bangkok Declaration) Bangkok, 8 August 1967', www.asean.org/news/item/the-asean-declaration-bangkok-declaration (accessed 30 August 2017).

https://doi.org/10.1017/S1474745617000519 Published online by Cambridge University Press

standards or common regulatory procedures, beyond efforts at alignment (harmonization) with international practices, or the conclusion of MRAs. This might be explained by the variable geometry approach to integration that ASEAN has pursued, given the marked differences in development levels and institutional capacities among member states. Cho has pointed out that ASEAN has traditionally followed a 'non-legalized' path, often described as the 'ASEAN way', with a view to avoiding internal tensions, favouring decisions taken based on consultations and by consensus (Cho, 2016).

3.3.4 MERCOSUR

At its inception, the Common Market of the South (MERCOSUR)[20] embraced a 'standardization policy' which aimed at identifying and eliminating technical regulations that created trade obstacles, and making national conformity assessment procedures compatible through regional harmonization initiatives (Lesser, 2007). In pursuing this objective, MERCOSUR member states established a Standardization Committee[21] with the mission of elaborating voluntary standards, promoting cooperation to facilitate harmonization, aligning members' regulations on international standards, promoting training in standardization and quality control, and encouraging the development of certification systems and MRAs. An *ad hoc* group was also established to work on harmonizing technical regulations and the mutual recognition of conformity assessment procedures (Steger, 2014: 116–117).

However, the Standardization Committee is no longer part of the formal structure of MERCOSUR, as the Protocol of Ouro Preto (1995) suppressed it without providing further explanations on the reasoning behind this decision. In December 1999, MERCOSUR signed an agreement with the Mercosur Association of Standardization (AMN),[22] a non-profit, non-governmental association, made up of the national standardization bodies of MERCOSUR countries, which became the body responsible for the management of voluntary technical standardization in the region.[23]

To this day, MERCOSUR still does not have a permanent structure mandating the harmonization of rules. The regional grouping's impact has been weak, although some progress was registered on issues such as intellectual property, competition laws, and trade in services (Falcón, 2005: 45–46). In certain areas, such as the automotive industry, regulatory integration has proceeded through the

20 MERCOSUR was created by the treaty signed at Asuncion on 26 March 1991, and is currently composed of Argentina, Brazil, Paraguay, Uruguay, and Venezuela, pending a ratification of the accession of Bolivia

21 MERCOSUR/GMC/RES Nro. 02/92: Comité Mercosur de Normalización.

22 'AMN – Asociación Mercosur de Normalización' www.amn.org.br/ (accessed 30 August 2017).

23 'Convenio de Cooperación entre el Mercosur y la Asociación Mercosur de Normalización. Mercosur/Cmc/Dec No. 12/99' (7 December 1999), http://gd.mercosur.int/SAM%5CGestDoc%5Cpubweb.nsf/70DC3DC1226549DB0325806000583874/$File/DEC_012-1999_ES_Conv-Coop_MCS_Asoc-MCS_Normalizaci%C2%A2n_Acta%202_99.pdf (accessed 30 August 2017).

adoption of voluntary standards approved by MERCOSUR countries, but private sector interests have generally exerted the predominant influence in their creation (Moisés and Jacoby, 2014: 187).

3.3.5 EU–South Korea FTA

The EU–South Korea Free Trade Agreement of 2011 took a step forward with respect to regulatory convergence by promoting 'regulatory cooperation' between the Parties through the exchange of information, experiences, and data as well as through deepened scientific and technical cooperation. It also set up dialogue platforms and committees to encourage regulators to avoid needless or unjustified differences in future rule making, subject to an affirmation of Parties' sovereign right to regulate in the public interest. The agreement further commits both Parties to good regulatory practices, such as transparency, public consultations, and the adoption of international standards whenever possible (Malmström, 2015: 3–4).

The adoption of international standards has been important in specific sectors, such as pharmaceuticals and the automotive industry. For instance, both Parties have agreed to recognize the standards emanating from the World Forum for Harmonization of Vehicle Regulations within the framework of the United Nations Economic Commission for Europe (UNECE). They further agreed to refrain from introducing any new domestic technical regulations diverging from UNECE Regulations and to review any technical regulations that differ from UNECE norms every three years from the agreement's entry into force.[24]

The EU and South Korea also committed to take into account international provisions, practices, and guidelines for pharmaceutical products and medical devices, including those developed by the World Health Organization (WHO), the OECD, the International Conference on Harmonization of Technical Requirements for Registration of Pharmaceuticals for Human Use (ICH), the Global Harmonization Task Force (GHTF), and the Pharmaceutical Inspection Convention and Pharmaceutical Inspection Cooperation Scheme.[25]

Though multiple factors are at play in the bilateral relationship, the regulatory convergence framework put in place appears to have generated some positive impacts. For example, EU exports of pharmaceutical products to South Korea are up by a third since the treaty's entry into force while exports of cars are up by 90% (Malmström, 2015: 3–4). Still, the long-term effects of the agreement's regulatory provisions need to be seen for what they are – there are no signs of common EU–South Korea standards, nor have common regulatory procedures emerged beyond alignment with international standards.

24 EU–South Korea FTA, Annex 2-C Motor Vehicle and Parts, Arts. 2 and 4.
25 EU–South Korea FTA, Annex 2-D Pharmaceutical Products and Medical Devices, Art. 5.

4. Regulatory convergence chapters in recent PTAs: CETA, the Pacific Alliance and the TPP

This section offers a comparative reading of provisions contained in the only PTAs that currently include regulatory convergence chapters: CETA, the Pacific Alliance,[26] and the TPP.

When the CETA was concluded in August 2014, the text included a dedicated chapter on 'regulatory cooperation' (Chapter 21).[27] This marked a first in a PTA setting. CETA affirms the Parties' aim to 'promote good regulatory practices' and to 'reduce regulatory differences' through facilitation of joint initiatives, including data collection and analysis, regulatory impact analyses, and regulatory proposals, joint high-level dialogue on regulatory matters, and specific sectoral cooperation initiatives dealing with consumer safety, among others (Steger, 2014).

The members of the Pacific Alliance (PA) – Chile, Colombia, Mexico, and Peru – have concentrated their efforts at regulatory convergence on a broad swathe of behind the border issues able to deepen intra-regional trade and investment ties and the mobility of talents and ideas. Another focus of cooperative efforts among PA members has been on improving regulatory processes and their transparency.[28] On 3 July 2015, the PA's Parties signed a Protocol Amending the First Additional Protocol to the Framework Agreement of the Pacific Alliance (PAAP, in force since 1 May 2016), which includes (in its Annex 4) a new chapter on 'Regulatory Improvement'.[29] In this chapter, the PA countries affirm their shared desire to improve their regulatory performance through the establishment and systematic implementation of tools such as transparency and public consultation, review, and *ex ante* and *ex post* measurement of the impact of regulations and the simplification of procedures.[30]

26 In the study of the Pacific Alliance Additional Protocol, we have also included the 'regulatory coherence' chapter of the Chile–Uruguay FTA (2016) that closely follows the model of the PAAP.

27 'Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union' (*European Commission–Trade*, 29 February 2016) http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf (accessed 30 August 2017).

28 Ministerio de Comercio, Industria y Turismo de Colombia, '100 Preguntas de La Alianza Del Pacífico' (5 February 2016) www.mincit.gov.co/tlc/publicaciones.php?id=7180 (accessed 30 August 2017).

29 Alianza del Pacífico, 'First Amending Protocol to the Framework Agreement of the Pacific Alliance' (*Documentos*, 3 July 2015) https://alianzapacifico.net/?wpdmdl=4580 (accessed 30 August 2017) (hereinafter PAAP).

30 Alianza del Pacífico, 'Temas de Trabajo' (*Alianza del Pacífico*, 8 February 2016) https://alianzapacifico.net/temas-de-trabajo/ (accessed 30 August 2017). The origin of chapter 15 bis on regulatory improvement can be traced back to the Fifteenth Meeting of the High-Level Group (HLG) of the Pacific Alliance, held in May 2013 in Santiago de Chile, when the HLG agreed to set up a technical group whose mandate was to negotiate a chapter on regulatory improvement from June 2013. Although the Declaration of Presidents of Cartagena de Indias, of 10 February 2014, mandated the conclusion of a chapter on regulatory reform within the Alliance for the second half of 2014 (and separated from the Additional Protocol), the negotiations were extended until mid-2015 and the chapter ended up being a modification of the PAAP.

On 4 February 2016, after almost seven years of negotiations, the TPP was signed by 12 negotiating countries. TPP negotiations stemmed in large measure from the proliferation of regulatory and non-tariff barriers (NTBs), which had become a major hurdle for businesses seeking enlarged access to member country markets. Negotiating efforts focused on improving regulatory practices, eliminating unnecessary barriers, reducing regional divergences in standards, conducting regulatory processes in a more trade-facilitative manner, eliminating redundancies in testing and certification, making regulatory systems of member countries more compatible and transparent, increasing stakeholder engagement, and promoting cooperation on specific regulatory issues.[31]

Although the TPP chapter on 'regulatory coherence' was concluded after CETA and the PAAP, its negotiations and advances on regulatory convergence predate both agreements. However, the ratification process of the TPP has been stalled in the wake of the January 2017 decision of the United States to withdraw from the agreement. In November 2017, the remaining 11 TPP countries agreed on the core elements of a 'Comprehensive and Progressive Agreement for Trans-Pacific Partnership' (CPTPP) (DFATA, 2017).

Table 1 offers a comparative reading of the treatment of regulatory convergence matters across the three agreements using ten parameters.

4.1 Definition

CETA's chapter on regulatory cooperation does not include a definition of such a discipline. In contrast, both the PAAP and TPP respectively define regulatory improvement and regulatory coherence.

In the PAAP, 'regulatory improvement' is defined 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.[32]

The TPP's definition of 'regulatory coherence' is essentially identical to the one of the PAAP,[33] with one telling difference: while the TPP refers to the use of 'good

31 United States Trade Representative, 'Trans-Pacific Partnership (TPP) Trade Ministers' Report to Leaders' (12 November 2011) https://ustr.gov/about-us/policy-offices/press-office/press-releases/2011/november/trans-pacific-partnership-tpp-trade-ministers%E2%80%99-re (accessed 30 August 2017); Fergusson and Vaughn (2011: 8); Bollyky (2012: 171).

32 PAAP, Art. 15 bis2.1. The same definition is included in the Chile–Uruguay FTA, Art. 15.1.

33 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 – TPP, Art. 25.2.1.

https://doi.org/10.1017/S1474745617000519 Published online by Cambridge University Press

Table 1. The treatment of regulatory convergence under CETA, the Pacific Alliance, and the Trans-Pacific Partnership

		CETA	Pacific Alliance	TPP
1	**Definition**	No definition of regulatory cooperation	Definition of regulatory improvement	Definition of regulatory coherence
2	**Scope of Application**	Clearly defined. Explicit reference to WTO agreements.	Requires definition by member states and 'significant' coverage. In case of conflict with any other chapter, the latter prevails. No specific reference to other agreements.	Requires definition by member states and 'significant' coverage. In case of conflict with any other chapter, the latter prevails. No reference to other agreements in the chapter, found in other parts of the agreement.
3	**Guiding Principles and Objectives**	(i) Right to regulate, with explicit reference to human, animal, and plant life or health, and the environment; (ii) facilitating trade in goods and services and investment (iii) transparency; (iv) cooperation activities with parties and relevant trading parties.	(i) Right to regulate, without pre-identified priorities; (ii) facilitating trade in goods and services and investment; (iii) transparency; (iv) cooperation activities with parties and non-parties.	(i) Right to regulate, without pre-identified priorities; (ii) facilitating trade in goods and services and investment; (iii) transparency; (iv) cooperation activities with parties.
Internal mechanisms				
4	**Coordination and Review Process**	Not included	Included	Included
5	**Regulatory Impact Assessment**	Briefly mentioned	Explained with detail	Explained with detail
6	**Transparency and Participation**	Detailed in another chapter, not specially focused in RIAs. Facultative participation.	Detailed in another chapter, and with special focus in RIAs. Facultative participation.	Detailed in another chapter, and with special focus in RIAs. Facultative participation.
External Mechanisms				
7	**Establishment of Treaty Bodies**	Regulatory Cooperation Forum (RCF) and a Point of Contact	Regulatory Improvement Committee (RIC) and a Point of Contact	Committee on Regulatory Coherence (CRC) and a Point of Contact
8	**Cooperation Activities**	Detailed cooperation activities both general and in specifics sectors	General cooperation activities	General cooperation activities
9	**Compatibility with Regulatory Measures of Other Parties**	Facultative consideration	Facultative consideration	Facultative consideration
10	**Implementation and Dispute Settlement**	No exclusion of dispute settlements, but only facultative commitments	Exclusion of dispute settlement	Exclusion of dispute settlement

regulatory practices', for the PA regulatory improvement refers to the use of 'good international regulatory practices'. Such a subtle difference would appear to acknowledge that good practices are most likely to be 'imported' and not to arise from within the PA member countries. Thus, seemingly the PAAP focuses on the use of international best regulatory practices, not on the creation of new ones (according to the PAAP, Parties can consider the *existing* measures of member states or of regional forums).

4.2 *Scope of application*

CETA's regulatory cooperation chapter has a clearly defined scope of application, which includes the development, review, and methodological aspects of regulatory measures of the Parties' regulatory authorities that are covered by WTO agreements, including the TBT and SPS Agreements, the GATT 1994, and the GATS, all of which should be deemed incorporated in CETA, as the parties explicitly reaffirm their rights and obligations.[34] Although the list of agreements seems to be illustrative, there are no concrete mechanisms to expand the scope of application of this chapter beyond the discussion of regulatory policy issues of mutual interest that the Parties have identified, for example through consultations or at the regulatory cooperation forum level.

In contrast, PAAP and TPP feature a definition of the 'covered measures' to which the chapter applies. These are measures of general application related to any matter covered by the respective agreements, adopted by regulatory agencies with which compliance is mandatory. In determining the scope of covered regulatory measures, each Party should aim to achieve 'significant' coverage, defining the scope of application promptly after the date of entry into force of the agreement (no later than one year after for the TPP and three years for the PAAP) and make it publicly available.[35] Neither the PAAP nor the TPP refer to their relation with other agreements in their respective regulatory improvement or regulatory coherence chapters.[36]

A further important limitation of the PAAP and the TPP is that in the event of any inconsistency between their respective chapters on regulatory improvement and regulatory coherence, and any other chapter of the PAAP or the TPP, the latter will prevail.[37] There is no similar provision in CETA.

34 CETA, Arts. 21.1, and 21.2.1. Art. 21.1. The chapter also replaces the Framework on Regulatory Co-operation and Transparency between the Government of Canada and the European Commission done at Brussels on 21 December 2004 (European Commission, 2004), and covers the activities previously undertaken in the context of that framework (CETA, Art. 21.2).

35 See PAAP, Arts. 15 bis 1 and 15 bis 3; and TPP, Arts, 25.1 and 25.3. A similar provision with almost the same wording as the PAAP is found in the Chile–Uruguay FTA, Art. 15.3.

36 The same applies for the Chile–Uruguay FTA chapter on regulatory coherence.

37 PAAP Art. 15 bis 10; TPP, Art. 25.10; Chile–Uruguay FTA, Art. 15.9.

https://doi.org/10.1017/S1474745617000519 Published online by Cambridge University Press

4.3 *Guiding principles and objectives*

Although CETA specifically upheld the principle of the right to regulate in its investment chapter and in chapters dealing with trade and labour and trade and the environment,[38] there is no explicit mention of the right to regulate in the treaty's regulatory cooperation chapter.

All three PTAs under review treat the state's regulatory autonomy differently. In CETA, the Parties commit to ensuring high levels of protection for human, animal, and plant life or health, and the environment, while in the PAAP and the TPP, they reaffirm each Party's sovereign right to establish regulations, identify its regulatory priorities and implement measures to address them, at the scope and the levels deemed appropriate by the government.[39]

While the CETA emphasizes the prevention of unnecessary barriers, enhancement of the climate for competitiveness and innovation (including through the pursuit of regulatory compatibility, recognition of equivalence, and convergence), and the promotion of transparency measures, in both the PAAP and the TPP emphasis is laid on inputs received from interested stakeholders in the development of regulatory measures. PAAP countries aim to 'improve' regulations, the business environment, and foster intensified competition.[40] One of the declared goals of the TPP was to ease the conditions and costs of trade between Parties 'while affirming their right to regulate in pursuit of legitimate policy objectives' (Fergusson *et al.*, 2015: 41).

CETA foresees limited regulatory cooperation, which is in principle recognized only between parties and with their 'relevant trading partners', and is open to others 'only if practicable and mutually beneficial'. In contrast, the PAAP focuses on activities of cooperation and capacity building between the parties but is open to international regulatory cooperation with non-parties without exclusion. For its part, the TPP considers cooperation only between treaty partners, although activities with other countries are not expressly limited as in CETA.[41]

Compared to the PAAP and TPP, the CETA more clearly delineates its regulatory objectives. These include: contributing to the protection of human life, health, or safety; animal or plant life or health; and the environment (mainly through research, pre-market review, and risk analysis); and improving regulatory quality and convergence (by avoiding or reducing unnecessary differences, identifying alternatives, and minimizing administrative costs).[42] Again, CETA's larger focus

38 CETA, Arts. 8.9, 23.2 and 24.3.

39 CETA, Art. 21.2.2; PAAP, Art. 15 bis 2; TPP, Art. 25.2.2; Chile–Uruguay FTA, Art. 15.2.

40 PAAP, Art. 15bis 2.

41 CETA, Arts. 21.2.3 and 21.7; PAAP, Art. 15 bis 7; TPP, Art. 25.7. The Chile–Uruguay FTA follows the same wording as the TPP, referring to cooperation, capacity building, and strengthening activities, only between the parties (art. 15.2).

42 CETA, Art. 21.3.

on the content of regulations is consistent with its substantive approach to regulatory convergence.

4.4 *Mechanisms of regulatory convergence*

PAAP, and the TPP consider both internal and external mechanisms of regulatory convergence. Internal mechanisms relate to bottom-up processes of coordination and review, and the implementation of good regulatory practices, such as regulatory impact assessments, transparency, and stakeholder participation. External mechanisms are those that follow a top-down process, such as the establishment of treaty bodies or cooperation activities between parties to the agreement.[43]

CETA's focus seems to have been placed on *substantive* convergence and not on the domestic regulatory processes of parties. For example, other parties may comment on proposed regulatory changes, but private stakeholders have no guaranteed participation, as their involvement is facultative for both the EU and Canada.[44] Another example of this substantive focus is 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.[45]

In contrast, the PAAP and the TPP focus on internal mechanisms of regulatory convergence within each country, such as domestic mechanisms that facilitate or increase interagency coordination or consultation, establishing and maintaining a national or central coordinating body, or detailing some basic characteristics of those mechanisms or processes.[46]

4.5 *Compatibility with regulatory measures of the other parties*

All three PTAs call for a general 'consideration' of other treaty parties' regulatory measures, but they leave plenty of room for divergence. Whereas the CETA bases such divergence in domestic legislation, the PAAP and TPP call on Parties to consider development at regional and international levels.

In CETA, both sides undertake, *when appropriate*, to consider the regulatory measures or initiatives of the other Party on the same or related topics, although such a consideration does not prevent either Party from adopting differing measures or approaches, for reasons that include differing institutional and legislative setup, circumstances, values, or priorities.[47]

43 The same mechanisms described in this section for the PAAP are also valid for the Chile–Uruguay FTA.

44 CETA, Arts. 21.4.4, 21.4.5, and 21.8.

45 CETA, Art. 21.4 (g) (iii).

46 TPP, Art. 25.4; PAAP, Art. 15bis 4; Chile-Uruguay FTA, Art. 15.4. Regarding TPP, this outcome contrasts with some of the initial objectives of the regulatory coherence chapter, focused on the harmonization or, alternatively, the mutual recognition of regulatory measures that exert a major influence on international trade. See Barfield (2011).

47 CETA, Art. 21.5.

https://doi.org/10.1017/S1474745617000519 Published online by Cambridge University Press

In the PAAP and TPP, each Party should *encourage* its relevant regulatory agencies to consider regulatory measures in other Parties, as well as relevant developments in international, regional, and other fora when planning covered regulatory measures, but only to the extent appropriate and consistent with its law.[48]

4.6 *Implementation mechanisms and dispute settlement*

An important limitation of the PAAP and TPP chapters on regulatory improvement and regulatory coherence is that they are not subject to the dispute settlement provisions of both agreements. This means that instances of non-compliance with the obligations of the chapter are not directly enforceable by the Member States.[49]

Yet, for purposes of transparency and to serve as a basis for forward-looking capacity-building, PAAP and TPP members undertook to issue a regular report on the implementation of the chapter on regulatory improvement/coherence.[50]

Both the PAAP and the TPP stipulate that for purposes of transparency and to serve as a basis for cooperation and capacity-building activities, each Party shall submit a 'notification of implementation' to the free trade commission (FTC) through national contact points. In this notification, each party shall describe the steps taken since the entry into force of the treaty and those steps intends to take in implementing the regulatory improvement/coherence chapter. The FTC will examine these notifications and ask questions or discuss specific aspects of the notification of that Party.[51]

Although there is not explicit exclusion from the dispute settlement mechanism, the limitations inherent in the CETA approach to regulatory convergence become readily apparent: the Parties commit to engage in regulatory cooperation only if it does not limit their ability to carry out their regulatory, legislative, and policy measures.[52] There can be little room for conflict if the commitments undertaken by the

48 PAAP, Art. 15 bis 5.4; TPP, Art. 25.5.8; Chile–Uruguay FTA, Art. 15.5.8.

49 PAAP, Art. 15 bis 11; TPP, Art. 25.11; Chile–Uruguay FTA, Art. 15.10.

50 In the PAAP, this report should be issued within two years after the date of entry into force of the agreement and at least once every three years thereafter. TPP and the Chile–Uruguay FTA have the same date for the initial report and four years for those subsequent. PAAP, Art. 15bis 9; TPP, Art. 25.9; Chile –Uruguay FTA, Art. 15.8.

51 The respective committee (RIC or CRC) may use its review and discussion of the notification as a basis for identifying opportunities for assistance and cooperation activities which must in any case be coordinated with other committees and bodies established by the treaty. In its first notification, each Party shall describe the actions taken and those that it plans to implement, including: (i) establishing a body or mechanism to facilitate effective interagency coordination and review of project or proposals of covered regulatory measures; (ii) encouraging their competent regulatory authorities to conduct regulatory impact assessments; (iii) ensuring that projects or proposals of covered regulatory measures are made accessible; (iv) reviewing covered regulatory measures already in place, and (v) making an annual notice available that reports on covered regulatory measures intended to be issued or modified during the next 12 months. In its subsequent notifications, each Party is to describe the actions taken since the previous report and its plans to implement them. PAAP, Art. 15bis9; TPP, Art. 25.9; Chile–Uruguay FTA, Art. 15.8.

52 CETA, Art. 21.2.

Parties are only voluntary in character. This also affects the assessment of the Agreement's implementation, as activities like conducting, comparing, and sharing post-implementation reviews are also only facultative.

4.7 The transatlantic trade and investment partnership

The negotiation of the TTIP between the EU and the US should have been the natural next step in the evolution of regulatory convergence disciplines in PTAs, involving as the talks did both substantive and procedural approaches. Yet, it is far from clear at the time of writing when or whether such negotiations will resume, let alone conclude.

In June 2013, the 28 Member States of the EU provided the European Commission (EC) with a negotiating mandate for a Transatlantic Trade and Investment Partnership (TTIP) with the United States, whose predominant focus on tackling behind the border measures implied a need for an ambitious chapter on regulatory cooperation. The EU's proposal, which was revised in 2015, consisted of three main elements (European Commission, 2015b):

(a) Adherence to a number of good regulatory practices – transparency, stakeholder consultations, and an assessment of regulatory impacts that both the EU and the US have long promoted in international fora.

(b) Mutual agreement to accommodate regulatory exchanges upon reasoned request from the other side, clearly spelling out the steps each party is to take when receiving a request, and establishing focal points to facilitate the process. In cases where specific common interests have been identified – such as car safety standards – the cooperation process may bring in regulators to jointly examine methods, leading to greater compatibility through, for example, recognition of equivalence or harmonization of regulatory acts.

(c) An institutional mechanism: a Regulatory Cooperation Body (RCB) to frame enhanced regulatory cooperation, including a framework for promoting regulatory cooperation and compatibility through horizontal provisions complemented by a number of additional commitments in nine specific sectors: automotive; chemicals; cosmetics; pharmaceuticals; information, communication, and technology (ICT); engineering; financial services; medical devices; and textiles – almost the same areas that had been examined under the TEC. The proposed RCB would not have regulatory or rule-making competences *per se*, and both Parties would continue to regulate in accordance with their domestic regulatory frameworks, procedures, and principles. The degree to which this proposed body would differ from the TEC remained unclear at the time TTIP negotiations were suspended.

A July 2014 proposal by the US was reported to have sought to cover only federal rule-making on the US side but both Community-level and member

https://doi.org/10.1017/S1474745617000519 Published online by Cambridge University Press

states' legislation and regulations on the EU side (US Chamber of Commerce, 2015). According to the EU, the fact that certain sectors of relevance are regulated at the sub-national level by one Party and at the national (or Community) level by the other – insurance being one example – may be agreed in the sector-specific provisions of TTIP, which are being negotiated in parallel to the regulatory cooperation chapter (European Commission, 2015).

A subsequent proposal by the US Chamber of Commerce went beyond what the US government had proposed, seeking to set up a domestic coordination body for both Parties. To some extent, the US already has such an institution in the form of the Office of Information and Regulatory Affairs (OIRA), though such an Office exerts no authority over independent regulators (US Chamber of Commerce, 2015).

Hoekman noted that the focus of attention in the TTIP context revolved around mutual recognition and equivalence. Equivalence involves an agreement that the regulatory objectives of the parties involved are equivalent, and acceptance that implementation and enforcement mechanisms in the parties' jurisdictions are effective. This is a major difference with mutual recognition, which requires that norms involve considerably more similar approaches to testing, inspections, and sampling (Hoekman, 2015: 614).

> A necessary condition for an equivalence approach is trust: there must be a prior process of mutual assessment or evaluation of the regulatory goals and implementation regime in the relevant jurisdictions that results in a judgment that these are equivalent. The equivalence model has important potential benefits in terms of learning, the monitoring of upstream and downstream performance and the adoption of more effective or efficient regulatory approaches over time, thereby improving regulatory outcomes. Indeed, an important element of the approach is likely to be convergence toward more similar or common technical standards and regulatory enforcement approaches over time … Regulatory equivalence requires identification of areas of regulation and related implementation systems that pursue similar goals and have similar outcomes. (Ibid.: 614–615)

While the outcome of TTIP discussions remains indeterminate, the main emphasis placed in the bilateral talks seems to have been on promoting substantive convergence between the US and the EU around international instruments, and on producing more compatible regulatory outcomes that fulfil each side's public policy objectives. In that context, enhanced cooperation, exchanges of information, and stakeholder engagement would be favoured to help regulators produce outcomes informed by greater regulatory temperance and proportionality. This process would remain voluntary in character, and exchanges of information or mechanisms of recognition would be considered where common interests arose.

However, a TTIP negotiating draft leaked by Greenpeace Netherlands suggested a change in the US approach described above, with a newer focus addressing both procedural and substantive matters. The procedural part featured a section on 'Good Regulatory Practices', including regulatory impact assessment, decision-

making based on evidence, internal coordination of regulatory development, early information on planned acts (so-called 'prior notification' procedures), stakeholder consultations, transparency obligations in the description, development and access of regulations, and the possibility to review regulations. The substantive part proposed the adoption of a bilateral cooperation mechanism, information and regulatory exchanges, the promotion of regulatory compatibility and international cooperation, as well as the establishment of a Regulatory Cooperation Body.[53] It is notable that the TTIP Parties had yet to agree on a title for this chapter while negotiations proceeded, with the US proposing to call it 'Regulatory Coherence, Transparency and Other Good Regulatory Practices', while the EU advocated 'Regulatory Cooperation', in line with its agreements with South Korea and Canada.

5. Concluding observations

5.1 Semantics do not really matter

While PTAs originally addressed classic trade barriers, they have recently morphed into instruments that also promote regulatory convergence, building on the WTO experience in the areas of technical standards and SPS measures. Regulatory convergence has become a new frontier in PTA governance, even as no clear understanding of what the concept actually entails has taken root in policy or scholarly circles.

The introduction of principles of regulatory convergence in PTAs has taken different forms, spanning the notions of regulatory cooperation, improvement, or coherence, although the distinction between them is far from clear. Mumford has already pointed out the apparent lack of 'coherence' just in descriptions of regulatory coherence (Mumford, 2014: 5).

Until a clearer understanding emerges of what the notion of regulatory convergence actually entails, it will remain difficult to study and measure it as a distinct political and legal phenomenon (Posner and Wolff, 2011: 3). However, evidence from recent PTAs allows us to identify the main elements of this nascent concept.

Abstracting from semantic differences, the analysis put forward in this article shows that countries have followed different paths to reduce unnecessary regulatory differences. While some agreements favour an approach that fosters substantive convergence between countries (same, similar, or equivalent regulations), others promote procedural convergence inside countries (same, similar, or equivalent regulatory processes).

On substance, the existence of diverse approaches to regulatory convergence can be explained by the fact that while countries negotiating PTAs typically aim at

53 Greenpeace Nederland, 'Regulatory Cooperation' (May 2016), https://ttip-leaks.org/hektor/doc9.pdf (accessed 30 August 2017).

https://doi.org/10.1017/S1474745617000519 Published online by Cambridge University Press

'approximate' or 'functionally equivalent' regulations, they face distinctive challenges rooted in differing levels of development, diverse procedural traditions in issuing and enacting regulations, dissimilar protection levels and competing values, all of which can weigh on attempts at reaching agreement on whether differences in regulations are 'necessary'. The different approaches observed in the PTAs under review should accordingly not come as a surprise. Variance in approaches to regulatory convergence can actually be found *within* specific PTAs, as diverse tools of regulatory convergence are used in different sectors or chapters of a PTA. Mavroidis has concluded that homogeneity is a facilitating factor of regulatory convergence, which among heterogeneous players is often more targeted on specific product categories (Mavroidis, 2016: 6). The most common mechanisms envisaged to achieve substantive convergence in PTAs are the establishment of treaty bodies (up to now with rather limited or indirect regulatory powers) and a host of cooperation activities, both general and specific.

On the procedural front, the key characteristics that can be identified from the various approaches taken to minimize regulatory differences are: (i) economic rationality, usually using the mechanism of regulatory impact assessment (RIAs); (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 a public sector agency or public policy procedure that checks the consistency of proposed regulations with domestic and/or international policies and treaty commitments.

While the CETA chapter on regulatory cooperation follows a clear model of substantive convergence – probably under the assumption that both Canada and the EU share similar procedural mechanisms to develop regulations, the PAAP and TPP chapters on regulatory coherence chiefly target matters of procedural convergence, with far greater emphasis on intra-governmental regulatory reform efforts than on inter-governmental regulatory convergence *per se*. In the case of the TPP, this is likely a reflection of resistance by US regulators of seeing domestic prerogatives subject to potentially increased international scrutiny under trade agreements. It may also reflect the more defensive suspicions of NGOs in this contentious and sensitive new area of trade and investment diplomacy (Bollyky, 2012: 180). The PAAP clearly influenced the final contours of the TPP text on regulatory coherence, agreed almost six months before the closing of the TPP text featuring very similar provisions.[54]

The practice of reducing regulatory differences across countries suggests that such a task is singularly more complex, both administratively and politically, than the liberalization of traditional border impediments (Young, 2015: 1257).

54 Compare TPP Chapter 25 and PAAP Chapter 15 bis with 'Trans-Pacific Partnership (TPP) Regulatory Coherence [Leaked Text]' (*Citizens Trade Campaign*, 4 March 2010), www.citizenstrade.org/ctc/wp-content/uploads/2011/10/TransPacificRegulatoryCoherence.pdf (accessed 30 August 2017).

The CETA, PAAP, and TPP have all registered in advance in this regard, but with important shortcomings.

Although the CETA foresees an important number of cooperation activities, both general and sector-specific, the agreement does not entail a change in the nature of substantive regulatory convergence between both Parties, which still remains a *voluntary* undertaking under which neither Party is obliged to enter into particular regulatory cooperation activities, and where either Party may refuse to cooperate or withdraw from on-going cooperation initiatives.

Although the PAAP and TPP mark an important step forward on the path towards treaty-induced procedural regulatory convergence, certain of its features may dilute its overall impact. For example, cross-country differences in the agreed scope of 'covered measures' could lead to greater divergence, as several measures could be excluded from this new discipline. Similarly, a number of commitments are arguably too 'soft', and if not implemented in the same way across member states, could lead to further regulatory divergence within the regional bloc (e.g. as when Parties only 'endeavour to ensure' the establishment of a coordination and review process, or when they only 'encourage' the use of RIAs.)

5.2 The risks of coherence

There is an inherent tension in the treatment of regulatory divergence in PTAs. In negotiations, parties try to strike a balance between setting international regulations, or standardized procedures to develop them (which may erode the regulatory autonomy of states), and restating the right of states to regulate or their ability to decide an appropriate level of protection (which in turn leads to non-binding provisions in treaties that promote 'cooperation' or 'good regulatory practices'). All regulatory convergence mechanisms can be seen as diminishing the regulatory autonomy of States, limiting their choices in how to pursue public policy objectives (Sheargold and Mitchell, 2016: 589, 601).

Many of the provisions on regulatory convergence found in latest generation PTAs are aspirational in nature. This raises questions regarding their ultimate effectiveness. Some of them are also excluded from dispute settlement provisions, begging the question of why some countries want to foster regulatory convergence through 'legal' means (e.g. treaty-making) if their level of commitments is similar to those found in 'soft' (non-binding) instruments (e.g. OECD–APEC Checklist).

None of the PTAs examined in this article speak of 'good and bad' regulations, but if countries do not use the regulatory convergence tools described in them, regulations risk to be characterized as unnecessary or ineffective. Yet if the notion of regulatory convergence does not entail any legally binding and enforceable obligations, why should such soft law disciplines be embedded in an international treaty?

We can identify three risks related to the establishment of regulatory convergence disciplines in PTAs: 'regulatory challenge', 'regulatory capture', and 'regulatory gospel'.

As regards regulatory challenge, the fact that regulations fail to comply with procedural requirements established in a PTA could expose them to challenge under other provisions of these agreements, such as non-discrimination, fair and equitable treatment (FET), or, if they can amount to 'indirect' expropriation (ibid.: 589), using mechanisms such as investor–State dispute settlement (ISDS). Complying with these obligations, however, offers no guarantee that a tribunal will find the measure to be a reasonable or legitimate regulation (ibid: 612). This is because regulatory convergence does not work in the same way as provisions on national treatment, FET, or indirect expropriation. While the former usually require an *ex post* infringement of the rules governing international investment, regulatory convergence could allow an *ex ante* analysis of the rule even before its legal existence, without necessarily examining the effects of the measure in a given market (Polanco Lazo, 2013: 257).

Thus, even if a party undertakes a RIA and adopts a measure that has net benefits, such a measure could still be deemed inconsistent with investment obligations if it disproportionately affects foreign entities. Similarly, although the purpose of a measure subject to an impact assessment may not be to expropriate or treat a foreign investor unfairly, it could be considered to do so if the assessment does not appropriately balance certain policy goals with science- or evidence-based information.[55]

Regarding regulatory capture, transparency commitments found in the CETA, PAAP, and TPP, could raise additional problems in the absence of clear delineation of how the foreseen consultation processes should be conducted, and whether they should be opened to include other stakeholders and governments other than the one planning to regulate. For example, some fear of the fact that as 'interested persons' or 'stakeholders' are not clearly defined, this could lead to agenda capture by major corporations and business lobby groups (Kelsey, 2011: 9). But it could also be the case that the influence of private standards could decrease trade costs and facilitate convergence, particularly in sectors where private standards are commonplace, as in the automotive industry (Costa and Jacoby, 2014: 187).

High-income countries have been slow in many sectors to adopt international standards. This may undermine their relevance, particularly in the low- and middle-income countries least equipped to develop their own standards. Businesses increasingly rely on private or non-profit organization standards, third-party certifications, and their own safety and quality management systems to regulate their suppliers. The proliferation of alternative standards may however increase divergence, inflate trade costs, and undermine regulatory compliance and enforcement efforts (Bollyky, 2012: 173).

55 See Sheargold and Mitchell (2016: 604, 611, 612); in particular with respect to their analysis of *Clatyon and Bilcon* v. *Canada* (Award on Jurisdiction and Liability), PCA Case No. 2009–04 (17 March 2015).

Finally, the notion of regulatory convergence raises challenging questions of influence and legitimacy: which standard will dominate in any given situation and why? In a world of pronounced regulatory asymmetries, will the standards of the most powerful actors not tend to prevail? Will this increase the tendency towards convergence in the harmonization or adoption of dominant regulatory standards issued by the small group of rule-making nations that have greater power to negotiate ('regulatory hegemons')? (Kelsey, 2011: 6). Does it run the risk of resulting in the dissemination of 'the regulatory gospel' of 'regulation-exporting' states? (Slaughter, 2005: 172–177)

Studying the export and import of regulatory frameworks using network theory, Raustiala noted that because networks are characterized by extensive sharing of information, enforcement coordination efforts, and joint policymaking activities, 'the more regulatory agencies participate in coordinating and reciprocating enforcement efforts, the better off all other agencies are' (Raustiala, 2002: 1, 64).

Yet, other factors may be at play. For example, developing countries may prefer to ascribe to international standards – either public or private (such as in the case of ASEAN and the Pacific Alliance) for reasons of 'natural convergence'. On the other hand, regulatory convergence by 'developed economies' (as in CETA or TTIP) may not lead to emerging markets automatically upgrading to higher standards, either because they were not part of the negotiation that created the standard or because they are simply unable to meet and implement such standards. Domestic priorities and the vocal demands of a rising, price-sensitive, cohort of middle-class consumers will likely result in diverse regulatory regimes in emerging markets over the medium-term (Karmakar, 2013).

5.3 Living with differences

Regulatory convergence could play a major role in a wide range of subject areas subject to PTA disciplines, including technical barriers to trade, intellectual property rights, financial services, investment, competition policy, consumer rights, and the recognition of professional service qualifications (Stoler *et al.*, 2014: 25–26).

However, if PTAs seek to promote deeper economic integration and lend more targeted support to cross-border trade and investment in a world of global value chains, then Parties to such agreements must be prepared to offer greater clarity on the nature and level of the regulatory convergence they seek and its effect on behind-the-border barriers. Moreover, trade and investment negotiators, and their brethren in regulatory circles, should bear in mind that regulatory convergence could be facilitated by a variety of devices, but that such provisions need to be approached with adequate precaution to prevent undue or inappropriate influence from being exerted over sovereign policy and regulatory decisions.

In the end, the mere existence of regulatory divergence need not always be problematic. That the maintenance of different regulatory requirements entails compliance costs does not necessarily mean that such requirements are inefficient.

Alternative legal solutions adopted by countries might be neutral from an efficiency viewpoint (Mattei *et al.*, 2000: 509). Such differences can also be explained by legitimate cross-country differences in collective preferences, attitudes to risk and uncertainty, legal traditions, etc. (Chirico and Larouche, 2013: 23). Fostering deeper forms of regulatory convergence could generate even higher costs, particularly if enacted in the context of asymmetrical North–South relations and agreements. Moreover, even where regulatory divergence clearly increases compliance costs, it is possible that a push for deeper forms of convergence could generate even higher costs (ibid.). Addressing the competition-impairing effects of regulatory differences can be administratively and politically more challenging than eliminating traditional impediments to trade and investment liberalization.

References

Abbott, K. W. and D. Snidal (2010), 'International Regulation without International Government: Improving IO Performance through Orchestration', *The Review of International Organizations*, **5**: 315–344.

Ahearn, R. J. (2009), 'Transatlantic Regulatory Cooperation: Background and Analysis', Congressional Research Service, Washington, DC, https://fas.org/sgp/crs/row/RL34717.pdf (accessed 29 November 2017).

Andenas, M. (2014), 'Reassertion and Transformation: From Fragmentation to Convergence in International Law', *Georgetown of Journal of International Law*, **46**: 685–734.

Andenas, M. and E. Bjorge (eds.) (2015), *A Farewell to Fragmentation: Reassertion and Convergence in International Law* (1st edn), Cambridge University Press.

Anderson, G. and C. Sands (2007), 'Negotiating North America: The Security and Prosperity Partnership', White Paper, The Hudson Institute, www.channelingreality.com/NAU/HudsonNegotiatingNorthAmericaadvanceproof2.pdf (accessed 30 August 2017).

APEC–OECD (2005), *APEC–OECD Integrated Checklist on Regulatory Reform*, APEC–OECD Co-operative Initiative on Regulatory Reform 2005, Asia–Pacific Economic Cooperation (APEC) and Organization for Economic Co-operation and Development (OECD), 1, www.oecd.org/gov/regulatory-policy/41992858.pdf (accessed 30 August 2017).

Arvíus, C. and L. Jachia (2015), *Regulatory Cooperation: A Wikihow*, E15 Task Force on Regulatory Systems Coherence Think Piece, International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum, http://e15initiative.org/wp-content/uploads/2015/09/E15-Regulatory-Coherence-Arvius-and-Jachia-Final.pdf (accessed 28 August 2017).

ASEAN (Association of Southeast Asian Nations) (2014a), 'Standards and Conformance', ASEAN Secretariat, 2014, www.asean.org/communities/asean-economic-community/category/standards-and-conformance (accessed 30 August 2017).

—— (2014b), 'Asean Framework Agreement on Mutual Recognition Arrangements', ASEAN Secretariat, www.asean.org/communities/asean-economic-community/item/asean-framework-agreement-on-mutual-recognition-arrangements-2 (accessed 30 August 2017).

Barfield, C. (2011), 'The TPP: A Model for 21st Century Trade Agreements?', East Asia Forum, 25 July 2011, www.eastasiaforum.org/2011/07/25/the-tpp-a-model-for-21st-century-trade-agreements/ (accessed 30 August 2017).

Boele-Woelki, K., T. Einhorn, D. Girsberger, and S. Symeonides (eds.) (2010), *Convergence and Divergence in Private International Law – Liber Amicorum Kurt Siehr*, The Hague: Eleven International Publishing.

Bollyky, T. (2012), 'Regulatory Coherence in the TPP Talks', in C. L. Lim, D. K. Elms, and P. Low (eds.), *The Trans-Pacific Partnership: A Quest for a Twenty-first Century Trade Agreement*, Cambridge University Press: 171–186.

Broude, T. and Y. Shany (2011), *Multi-Sourced Equivalent Norms in International Law*, London: Bloomsbury Publishing.
Canuel, E. T. (2011), 'Comparing Exculpatory Clauses under Anglo-American Law: Testing Total Legal Convergence', in G. Cordero-Moss (ed.), *Boilerplate Clauses, International Commercial Contracts and the Applicable Law*, Cambridge University Press: 80–103.
Cho, S. (2016), 'Legalizing the ASEAN Way: Toward Comparativist Understanding of Legalization in the ASEAN Investment Regime', 11 May 2016, Brown-Bag Presentation, World Trade Institute, Bern.
Cordero-Moss, G. (2014), *International Commercial Contracts: Applicable Sources and Enforceability*, Cambridge University Press.
Costa, M. and W. Jacoby (2014), 'Informal Drivers of Regional Regulatory Integration: The Auto Sector in Central Europe and Latin America', in L. Bruszt and G. A. McDermott (eds.), *Leveling the Playing Field: Transnational Regulatory Integration and Development*, Oxford University Press: 183–204.
Crettez, B., B. Deffains, and O. Musy (2014), 'Legal Convergence and Endogenous Preferences', *International Review of Law and Economics*, **39**: 20–27.
Department of Foreign Affairs and Trade of Australia (DFATA) (2017), 'Trans-Pacific Partnership Ministerial Statement' (11 November 2017), http://dfat.gov.au/trade/agreements/tpp/news/Pages/trans-pacific-partnership-ministerial-statement.aspx (accessed 14 December 2017).
Drezner, D. W. (2008), *All Politics Is Global: Explaining International Regulatory Regimes*, Princeton, NJ: Princeton University Press.
European Commission (2015a), 'EU–US Cooperation' (10 June 2015), http://ec.europa.eu/growth/industry/international-aspects/cooperation-governments/eu-us/index_en.htm (accessed 30 August 2017).
——— (2015b), 'TTIP Detailed Explanation on the EU Proposal for a Chapter on Regulatory Cooperation', *European Commission – Trade*, 6 May 2015, http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153431.1.1%20Detail%20explanation%20of%20the%20EU%20proposal%20for%20a%20Chapter%20of%20reg%20coop.pdf (accessed 30 August 2017).
——— (2004) 'Information Note from Vice-President Verheugen to the College:EU–Canada Framework for Regulatory Co-operation', 14 December 2004, http://ec.europa.eu/transparency/regdoc/rep/2/2004/EN/2-2004-1605-EN-1-0.Pdf (accessed 29 November 2017).
Falcón, R. (2005), 'Armonización de Normas en el Mercosur', *Revista de Negócios Internacionais, Piracicaba*, **3**(*5*): 42–47.
Fergusson, I. F. and B. Vaughn (2011), The Trans-Pacific Partnership Agreement', Congressional Research Service, www.fas.org/sgp/crs/row/R40502.pdf (accessed 30 August 2017),
Fergusson, I. F., M. A. McMinimy, and B. R. Williams (2015), 'The Trans-Pacific Partnership (TPP) Negotiations and Issues for Congress', www.fas.org/sgp/crs/row/R42694.pdf (accessed 30 August 2017).
Fishbein, M. and M. Trebilcock (2007), 'International Trade: Barriers to Trade', in A. T. Guzman and A. O. Sykes (eds.), *Research Handbook in International Economic Law*, Cheltenham: Edward Elgar: 1–61.
Glaeser, E. L. and A. Shleifer (2002), 'Legal Origins', *The Quarterly Journal of Economics*, **4**: 1193–1229.
Hart, M. (2007), 'Trading up: The Prospect of Greater Regulatory Convergence in North America', Estudios y Perspectivas, **79**: 1–68, Economic Commission for Latin America and the Caribbean.
Hoekman, B. (2015), 'Fostering Transatlantic Regulatory Cooperation and Gradual Multilateralization', *Journal of International Economic Law*, **18**: 609–624.
Hoekman, B. M. and P. C. Mavroidis (2015), *Regulatory Spillovers and the Trading System: From Coherence to Cooperation*, E15 Task Force on Regulatory Systems Coherence, Overview Paper, International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum, http://cadmus.eui.eu/handle/1814/35862 (accessed 29 August 2017).
Jacobs, S. H. (1994), *Regulatory Co-Operation for an Interdependent World*, OECD Publishing, www.oecd-ilibrary.org/content/book/9789264062436-en (accessed 30 August 2017).
——— (1997), 'An Overview of Regulatory Impact Analysis in OECD Countries', *Regulatory Impact Analysis: Best Practices in OECD Countries*, Organization for Economic Co-operation and Development.
Karmakar, S. (2013), 'Prospects for Regulatory Convergence under TTIP', Bruegel Policy Contribution 2013/15, www.econstor.eu/handle/10419/106310 (accessed 30 August 2017).

Kelsey, J. 'Preliminary Analysis of the Draft TPP Chapter on Domestic Coherence', *Citizens Trade Campaign*, 23 October 2011, www.citizenstrade.org/ctc/wp-content/uploads/2011/10/TransPacific_RegCoherenceMemo.pdf (accessed 30 August 2017).

Koskenniemi, M. (2006), 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', Report of the Study Group of the International Law Commission, http://repositoriocdpd.net:8080/handle/123456789/676 (accessed 30 August 2017).

La Porta, R., F. Lopez-De-Silanes, and A. Shleifer (2008), 'The Economic Consequences of Legal Origins', *Journal of Economic Literature*, **46**: 285–332.

Lesser, C. (2007), 'Do Bilateral and Regional Approaches for Reducing Technical Barriers to Trade Converge Towards the Multilateral Trading System?', OECD Trade Policy Papers 28, Organization for Economic Co-operation and Development, www.oecd-ilibrary.org/content/workingpaper/051058723767 (accessed 30 August 2017.

Lierman, S. (2014), 'Law as a Complex Adaptive System: The Importance of Convergence in a Multi-Layered Legal Order', *Maastricht Journal of European and Comparative Law*, **21**: 611–629.

Malmström, C. (2015), 'Trade in the 21st Century: The Challenge of Regulatory Convergence', *European Commission – Trade*, 19 March 2015, http://trade.ec.europa.eu/doclib/docs/2015/march/tradoc_153260.pdf (accessed 30 August 2017).

Malyshev, N. and C. Kauffmann (2015), International Regulatory Co-operation: The Menu of Approaches, E15 Task Force on Regulatory Systems Coherence Think Piece, International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum, http://e15initiative.org/wp-content/uploads/2015/09/E15-Regulatory-Coherence-Kauffmann-and-Malyshev-Final.pdf (accessed 28 August 2017).

Mattei, U. A., L. Antoniolli, and A. Rossato (2000), 'Comparative Law and Economics', in B. Bouckaert and G. De Geest (eds.), *Encyclopedia of Law and Economics*, Cheltenham: Edward Elgar: 505–560.

Mattoo, A. and A. Subramanian (1998), 'Regulatory Autonomy and Multilateral Disciplines: The Dilemma and a Possible Resolution WTO Dispute Settlement System', *Journal of International Economic Law*, **1**: 303–322.

Mattoo, A. and P. Sauvé (2011), 'Services', in J.-P. Chauffour and J.-C. Maur (eds.), *Preferential Trade Agreement Policies for Development: A Handbook*, Washington, DC: World Bank: 235–274.

Mavroidis, P. C. (2016) *Regulatory Cooperation: Lessons from the WTO and the World Trade Regime*, E15 Task Force on Regulatory Systems Coherence – Policy Options Paper, E15 Initiative, International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum, http://diana-n.iue.it:8080/handle/1814/38749 (accessed 28 August 2017).

Merryman, J. H. (1994), *The Civil Law Tradition: Europe, Latin America, and East Asia*, Micchie, Co.

Mumford, P. (2014), 'Regulatory Coherence: Blending Trade and Regulatory Policy', *Policy Quarterly*, **10**: 3–9.

Organization for Economic Co-operation and Development (OECD) (2008), *Introductory Handbook for Undertaking Regulatory Impact Analysis (RIA)*, OECD Publishing, p. 3, www.oecd.org/gov/regulatory-policy/44789472.pdf (accessed 30 August 2017).

—— (2009), *Regulatory Impact Analysis*, OECD Publishing, www.oecd-ilibrary.org/governance/regulatory-impact-analysis_9789264067110-en (accessed 30 August 2017).

—— (2013), *International Regulatory Co-operation*, 22–51, www.oecd-ilibrary.org/content/book/9789264200463-en (accessed 28 August 2017).

Peetman, S. (2013), 'Standards Harmonization in ASEAN: Progress, Challenges and Moving Beyond 2015', ERIA Discussion Paper Series, www.eria.org/ERIA-DP-2013-30.pdf (accessed 30 August 2017).

Platsas, A. E. (2009), 'The Idea of Legal Convergence and International Economic Law', *International Journal of Private Law*, **2**(4): 385–399.

Polanco Lazo, R. (2013), 'The Trans-Pacific Partnership Agreement and Regulatory Coherence', in T. Voon (ed.), *Trade Liberalisation and International Co-operation: A Legal Analysis of the Trans-Pacific Partnership Agreement*, Cheltenham: Edward Elgar: 231–261.

Posner, T. and D. Wolff (2011), 'Making "Regulatory Coherence" Coherent', *International Trade Law*, **360**, 25 April, www.crowell.com/Practices/International-Trade/articles/Making-Regulatory-Coherence-Coherent-International-Trade-Law360 (accessed 30 August 2017).

Raustiala, K. (2002), 'The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law', *Virginia Journal of International Law*, **43**: 1–92.

Sheargold, E. and A. D. Mitchell (2016), 'The TPP and Good Regulatory Practices: An Opportunity for Regulatory Coherence to Promote Regulatory Autonomy?', *World Trade Review*, **15**: 587–612.

Slaughter, A.-M. (2005), *A New World Order*, Princeton, NJ: Princeton University Press.

Steger, D. P. (2012), 'Institutions for Regulatory Cooperation in "New Generation" Economic and Trade Agreements', *Legal Issues of Economic Integration*, **39**: 109–126.

——— (2014) 'CETA – A New Model for Regulatory Cooperation, Transparency and Coherence?', 6 May 2014, http://slideplayer.com/slide/2411068/ (accessed 30 August 2017).

Stoler, A. L., P. N. Pedersen, and S. Herreros (2014), 'Negotiating Trade Agreements for the 21st Century', Comercio Internacional 116: 1–40, Economic Commission for Latin America and the Caribbean (ECLAC), www.cepal.org/en/publications/4346-negotiating-trade-agreements-21st-century (accessed 30 August 2017).

Street, A. W. SC, 'The Art of Legal Convergence' (Presented at the UNSW Litigation Master Class, 26 March 2013), www.yumpu.com/en/document/view/51650331/the-art-of-legal-convergence- by-alexander-w-seven-wentworth (accessed 29 November 2017).

Sykes, A. O. (1999), 'Regulatory Protectionism and the Law of International Trade', *The University of Chicago Law Review*, **6**: 1–46.

United Nations (2012), United Nations Conference on Trade and Development, *World Investment Report 2012, Towards a New Generation of Investment Policies*, United Nations.

US Chamber of Commerce (2015), 'Regulatory Coherence & Cooperation in the Transatlantic Trade and Investment Partnership (TTIP)' (February 2015), www.uschamber.com/sites/default/files/regulatory_coherence_regulatory_cooperation_-chamber_ttip_paper-final_2.pdf (accessed 30 August 2017).

United States Department of Commerce (2013), 'US–Mexico High Level Regulatory Cooperation Council' (August 2013), http://trade.gov/hlrcc/ (accessed 30 August 2017).

——— (2015), 'US–Canada Regulatory Cooperation Council' (May 2015), www.trade.gov/rcc/ (accessed 30 August 2017).

Woolcock, S., B. Holzer, and P. Kusmu (2015), *The Transatlantic Trade and Investment Partnership: Challenges and Opportunities for Consumer Protection*, Paper No. 11, CEPS-CTR project 'TTIP in the Balance' and CEPS Special Report No. 115, Paul H. Nitze School of Advanced International Studies, Center for Transatlantic Relations and Centre for European Policy Studies, http://aei.pitt.edu/66136/ (accessed 29 August 2017).

Young, A. R. (2015), 'Liberalizing Trade, Not Exporting Rules: The Limits to Regulatory Co-ordination in the EU's "New Generation" Preferential Trade Agreements', *Journal of European Public Policy*, **22**: 1253–1275.