

巨型區域貿易協定時代下「法規一致性」之發展及其界線

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摘要

因管制政策與措施互異而衍生的貿易障礙問題，促使各國積極探尋各種國際合作規範與制度設計，以緩解不必要的負面影響；而追求國際合作與管制自主間平衡的手段中，近年尤以「法規一致性」(regulatory coherence)最受矚目。法規一致性係屬由下而上(bottom up)之規範調和模式，透過內國管制環境與程序的理性化(rationalization)，緩解不同管制措施所帶來的不利貿易效果。法規一致性的基本要件，如程序透明、預告暨評論程序(notice-and-comment procedure)、事後審查、成本效益分析、公眾參與等機制，歷史上起源於當代美國行政程序法之規定。透過 APEC 與 OECD 之推動，直至現今跨太平洋夥伴協定(Trans-Pacific Partnership, TPP；美國退出談判後，剩餘國改稱跨太平洋夥伴全面進展協定，Comprehensive and Progressive Agreement for Trans-Pacific Partnership, CPTPP)、跨大西洋貿易投資夥伴協定(Transatlantic Trade and Investment Partnership, TTIP)及加拿大與歐盟之全面性經濟與貿易協定(EU-Canada Comprehensive Economic and Trade Agreement, CETA)等所謂巨型貿易協定(megaregional agreement)，亦程度不同地納入諸多法規一致性的基本要件，使其儼然成為全球規範基準。然而，法規一致性究竟能否藉由規範擴散(norm diffusion)作為新一代經貿協定的範本時，歐盟與中國大陸的態度至為關鍵。本文試圖藉由法規一致性發展的脈絡，並由美國、歐盟及中國大陸的管制架構中勾勒出此概念未來可能的輪廓與潛在界線。

關鍵字：法規一致性、巨型貿易協定、TPP、CPTPP、TTIP

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** Lecturer, Monash University, Australia. 本文係作者針對全球經貿治理與法規一致性之規範互動現象進行長期研究計畫之部分成果，不同階段、針對不同面向之初步構想(針對中國內國法治、歐盟多層次治理等子議題)曾發表於英國華威大學法學院所舉辦之「The New Plurilateralism: The Emerging Standard for Global Economic Governance?」研討會(2017年9月14至15日)及亞洲國際法學會雙年會「Asia and International Law in Times of Uncertainty」(2017年8月25至26日)。作者感謝清華大學科技法律研究所余靜玫、陳怡靜及徐子茵分別在蒐集、彙整中英文資料及編輯上的協助，亦感謝匿名審查委員對於本文初稿提出之意見。本文文責由作者自負，併予敘明。本文初稿完成日：2018年1月5日。

Abstract

The ramifications of regulatory divergences for trade and investment have driven scholars and practitioners to reconfigure international economic law to facilitate deeper international cooperation among government agencies. Among other initiatives, the notion of “regulatory coherence” is of paramount significance. While traditional anti-protectionism proxies such as non-discrimination and necessity test focus more on “regulatory outputs,” regulatory coherence is concerned with “regulatory inputs” by introducing a set of benchmarks including notice-and-comment public consultation, cost-benefit analysis, inter-agency coordination, and regulatory impact assessment to ensure rationality, democratic accountability, and the rule of law in the rulemaking process. Rooted in U.S. administrative law, this notion has emerged and evolved in international forums such as the Organization for Economic Cooperation and Development (OECD) and the Asia Pacific Economic Cooperation (APEC) and moved on to the negotiation table of recent mega-regional agreements, most notably the Trans-Pacific Partnership Agreement (TPP)/Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and the Transatlantic Trade and Investment Partnership (TTIP). Despite such progress, however, there may exist hurdles for regulatory coherence to further diffuse as a new global norm due to its broad and complex economic, social, and political implications for different countries. This Article seeks to map out the trajectory and contours of regulatory coherence—in particular those in the free trade agreements signed by China, European Union, and the United States—to examine how elements of regulatory coherence have been embraced diversely, and assess potential boundaries for future norm diffusion.

Key words: regulatory coherence, mega-regionalism, CPTPP, TPP, TTIP