國際經濟法下之管制調和：從實證出發

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摘要

為調和各國管制差異，並降低「管制型貿易障礙」對於國際貿易的不利影響，國際組織推動「管制調和／合作」，倡議將該等概念及程序納入管制決策過程中，尤其透過「管制影響評估」方法，確保國內管制措施以科學證據為基礎、平衡成本與效率，亦兼顧利害關係人利益，俾使管制「品質」得以提升。本文第一部分透過較有系統之方式，以 WTO 文獻為素材，透過實證數字的客觀呈現，找出管制合作的「潛在動能」。第二部分繼續由經驗出發，以 CETA/CPTPP/USMCA 文本為主，盤點比較三大管制專章（管制合作／管制調和／良好管制實踐）所謂「里程碑」區域進展，尤其深入分析「管制影響評估」及「利害關係人參與」等核心工具，由批判角度指出其對於減少「管制型貿易障礙」的功能有限。本文最後由管制調和機制的「本質」出發，嘗試理解究竟透過國際協定義務加諸主權國家行政管制紀律，對於經貿秩序能帶來何等實質助益？我們認為，第一，核心問題在於管制自主權。軟性義務壓倒性地佔據管制專章文本的事實，反映了談判者的低度企圖心，更凸顯政治現實。第二，管制專章在方法論上之「建設性模糊」，無法有效抑制利益團體之尋租行為，亦即管制俘虜問題。第三，「管制影響評估抗辯」在 WTO 爭端解決程序的力道甚為有限。作者總結，在經貿場域，管制影響評估程序操作下的「最適管制方案」來自火星，WTO 制度下的「貿易最小侵害方案」來自金星。觀察三大管制專章，管制調和之路仍為漫長。

關鍵字：管制型貿易障礙、管制調和、管制合作、良好管制實踐、管制影響評估、跨太平洋夥伴全面進步協定、加拿大－歐盟全面經濟貿易協定、美國－墨西哥－加拿大協定

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Abstract

In order to mitigate the negative effect of regulatory trade barriers, it has been promoted at the international level to incorporate the concept of 'regulatory coherence,' especially the application of regulatory impact assessment (RIA), into the decision-making process. By ensuring that the regulations are consistent with scientific evidence, balancing cost and benefits, and weighing properly the interests of different stakeholders, the quality of the regulations may be improved. The first part of this paper is an empirical study to demonstrate the political momentum for pursuing a higher level of regulatory coherence. The second part continues to analyze the effectiveness of promoting regulatory coherence through international trade agreements, with an emphasis on the recent significant progress, that is, the chapters relating to regulatory coherence/regulatory cooperation/good regulatory practice enshrined in the three recently sighed FTAs—CPTPP, CETA, and USMCA. The final part of this paper is a critical examination of the WTO DS cases in order to point out the challenges for the regulatory coherence. We conclude that, first, the soft nature of the three chapters demonstrates the inherent sensitivity of interfering with states' sovereign rights. After all, regulatory decision-making implies the exercise of a state's regulatory autonomy. Second, given that the RIA has been widely adopted but uniquely practiced, a somewhat deeper and more concrete view of methodologies employed in the incorporation of RIA is necessary. Without a clearly defined threshold for how these processes operate, regulators may be vulnerable to regulatory capture. Lastly, the elements of good regulatory practice and the the criteria used to determine legitimate regulatory measures differ in many ways. Therefore, the fact that the regulator had applied the RIA in its decision-making process may not lead to the conclusion that there are no other less trade restrictive alternative measures. To conclude, the RIA process and the necessary test under the WTO are from different planets – Mars and Venus. How, then, can regulatory coherence rules contribute to international economic order?

Keywords: Regulatory Trade Barriers, Regulatory Coherence, Regulatory Cooperation, Good Regulatory Practices, Regulatory Impact Analysis, CPTPP, CETA, USMCA