Do International Trade Agreements Have a Role to Play in Financial Regulation?

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The global financial crisis of 2007-08 revealed the extent to which the global financial system was highly interconnected and risk could be transmitted quicker than expected through such connections, exposing the fragility of the system.[1] In the years since the crisis, the connections among national financial markets have begun to recover and once again are trending upwards.[2] Not surprisingly one of the lessons of the crisis is that there needs to be more effective coordination among national regulators in order to better manage the interconnected financial markets.[3] While national regulators, working together, have implemented in the past eight years regulatory reforms that have made the global financial system on whole more resilient,[4] cross-border regulatory coordination remains *ad hoc*, and regulatory harmonization is generally elusive.

In general, national regulators do not view cross-border regulatory coordination as their top priority. Rather their priorities are determined by their respective official mandates, such as: protecting investors; maintaining the safety and soundness of financial institutions; ensuring that markets are fair, efficient and transparent; facilitating capital formation; and reducing systemic risk.

Cross-border regulatory coordination, however, does creep back in as a desirable policy objective to the extent that the lack of such coordination undermines the ability of regulators to carry out their official mandates. The lack of cross-border regulatory coordination, for example, may impact investor protection by exposing retail investors to high-risk products offered from other jurisdictions.[5] Capital formation may be hindered by regulatory differences preventing investors from having access to foreign markets or financial services providers unable to serve foreign

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1 *See, e.g.,* Janet Yellen, *Interconnectedness and Systemic Risk: Lessons from the Financial Crisis and Policy Implications* (January 4, 2013).

2 *See, e.g.,* McKinsey Global Institute, *A decade after the global financial crisis: What has (and hasn't) changed?* (Aug. 2018), *available at* https://www.mckinsey.com/industries/financial-services/our-insights/a-decade-after-the-global-financial-crisis-what-has-and-hasnt-changed.

3 *See* G20 Leaders' Statement, The London Summit (Apr. 2, 2009), *available at* https://www.imf.org/external/np/sec/pr/2009/pdf/g20_040209.pdf.

4 *See* Mark Carney, FSB Chair's letter to G20 Leaders meeting in Buenos Aires (Nov. 27, 2018), *available at* https://www.fsb.org/2018/11/fsb-chairs-letter-to-g20-leaders-meeting-in-buenos-aires/.

5 *See, e.g.*, International Organization of Securities Commissions (IOSCO) Statement of Concerns Related to Binary Options, *available at* https://www.iosco.org/library/pubdocs/pdf/IOSCOPD614.

customers. Regulatory differences may lead to higher costs to raising capital and to providing financial services. Systemic risk may be increased by regulatory differences causing fragmented trading markets and limits on the ability of firms to diversify risk.[6] Finally, lack of regulatory coordination may affect negatively market efficiency and transparency by obstructing the sharing of market information across borders.

While there are significant benefits to greater regulatory coordination, there is a tension between the drive to coordinate and, ultimately, to harmonize regulation and the need to ensure appropriately high prudential, market conduct and financial stability standards. These standards are essential to the protection of working class families and other retail participants whose financial well-being are exposed to the effectiveness of the financial system: as retail investors who search for investments with disclosed risks; as beneficiaries of investment and pension funds which participate in the wholesale financial markets; as taxpayers who may be required to rescue failing financial institutions; and as employees of, or service providers to, companies which are dependent on a safe and well-functioning financial market to support investments and payments.

Given these high domestic stakes, cross-border regulatory coordination – despite its benefits – must overcome a number of hurdles. First and foremost, a national regulator must be convinced that coordinating regulation with a foreign authority does not mean weakening its own regulatory regime. The national regulator must be comfortable that the foreign regulator's regime is of comparable quality. Determining comparability is quite challenging as a financial regulatory regime is really the complex function of several variables, including rules (as defined by statutes, regulations and guidance), supervisory practices and enforcement programs.[7] In the few cases where regulators have attempted to cut through such complexity and sought to formally coordinate regulation with other regulators, they have tended to engage in bilateral discussions with familiar foreign regulators on narrow regulatory topics subject to significant caveats and conditions.

This paper suggests that there may be a role for international trade agreements to facilitate cross-border coordination of financial regulation both on a bilateral and multilateral scale. To understand how international trade agreements can be useful to cross-border financial regulation, it is necessary first to understand why currently conceived international trade agreements are ill-designed to drive cross-border regulatory coordination.

The basis for so-called "traditional" international trade agreements stem from three justifications. First, international trade agreements are viewed as necessary to achieve the economic benefits of free trade. The law of comparative advantage powerfully lays out the rationale for encouraging the free trade of goods (and services) to maximize a country's wealth. Thus, the main objective of international trade agreements is to reduce trade barriers to enable a country to specialize in the production of goods and services where the country enjoys relative productivity advantages

With respect to financial regulation, the economic case for free trade seems only partially relevant. We can imagine some comparative advantage benefits to removing regulatory differences in the financial sector. There are many examples of specialization by jurisdictions in different financial

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[6] *See* Financial Stability Board, Report on Market Fragmentation (June 4, 2019), *available at* https://www.fsb.org/wp-content/uploads/P040619-2.pdf.
[7] *See* Eric J. Pan, *Understanding Financial Regulation*, 2012 Utah L. Rev. 1897.

sectors such as the importance of global financial centers as hubs of infrastructure and expertise or the concentration of investment funds in jurisdictions like Luxembourg and Hong Kong or investment banks in the United States. But regulation is not the same as a tariff imposed on a set of goods. Regulation serves additional important public objectives. Regulation reflects the societal preferences of a jurisdiction with respect to tolerance for risk and views on the role of financial markets in relation to the broader economy. Thus, the benefits of free trade may not be as simple as looking for ways to remove regulatory differences, but rather to look for the right combination of regulatory differences to optimize each jurisdiction's preferences regarding the role of financial regulation in their respective markets.

Second, international trade agreements are viewed as essential to build a rules-based system to govern how trade takes place and to provide legal certainty to market participants engaged in cross-border trade. Signatories to trade agreements bind themselves to rules on how to give market access to foreign market participants and to participate in formal dispute resolution systems that allow market participants, mainly through their home country, to enforce compliance with these rules.[8]

Here too the benefit of international trade agreements is not entirely appropriate for financial regulation. A rules-based treaty system is inherently inconsistent with financial regulation which, as noted earlier, relies on a combination of *ex ante* and *ex post* regulatory tools (i.e., rules, certification, supervision and enforcement) with room for regulatory discretion in the application of such tools (e.g., exemptions, no-action relief, settlements, monitoring agreements, selective reporting requirements).[9] It would not be possible to dictate through an international trade agreement a particular regulatory outcome.[10] Furthermore, broader international trade agreement obligations like national treatment and most-favored-nation would be difficult to monitor and enforce given the degree of regulatory discretion that is part of financial regulation.

Third, international trade agreements reflect political preferences which may be contrary to the preferences of financial regulators. Dani Rodrik argues that trade agreements are shaped primarily by rent-seeking firms that are looking to export their services to foreign markets.[11] By pushing international trade agreements to apply classic international trade principles of market access in goods to regulated activities, these exporters may be seeking to de-prioritize these alternative policy objectives such that the primary goal of international trade agreements is to open up markets to export firms at the expense of requiring export firms to meet local regulatory requirements.[12]

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[8] Note that sometimes the dispute resolution allows direct participation by private parties. *See, e.g.*, Daniel M. Price, *Private Party vs. Government, Investor-State Dispute Settlement: Frankenstein or Safety Valve*, 26 Can.-U.S. L.J. 107 (2000).

[9] The use and variety of ex ante and ex post tools also makes financial regulation unique compared to other regulatory areas such as environmental regulation, food and drug regulation, and transportation regulation.

[10] One of the challenges of international trade agreements is the inherent rigidity of international treaty language and the limited capacity to re-interpret treaty language to deal with regulatory issues. *See* Eric J. Pan, *Authoritative Interpretation of Agreements: Developing More Responsive International Administrative Regimes*, 38 Harv. Int'l L.J. 503 (1997).

[11] *See* Dani Rodrik, *What Do Trade Agreements Really Do?* 32 J. Econ. Perspectives 73, 75-76 (2018).

[12] *See supra* note 11, at 83-84.

The conflict between the goals of international trade agreements and financial regulation can be seen in two examples. First, between 2013-2016, the European Union and United States attempted to negotiate the Transatlantic Trade and Investment Partnership (TTIP). One of the chapters that the European Union wished to include in the agreement was a chapter focused on financial services. At the strong encouragement of the United Kingdom, the EU negotiators wanted to create a treaty obligation for the European Union and United States to coordinate on the development of new regulation of financial services. The EU proposal would require both jurisdictions to consult with one another before the development of new regulations, have in place regulatory mechanisms to allow for mutual recognition of each other's financial regulatory requirements so that market participants only had to comply with their home country's rules and supervision, and an independent arbitral tribunal to adjudicate regulatory conflicts.

In order to appreciate the importance of this proposal to the European Union, it is helpful to recall that the TTIP negotiations occurred at a time when there was great frustration in Europe about the extraterritorial effect of U.S. financial regulation on European firms. By 2013, U.S. financial regulators, particularly the U.S. Commodity Futures Trading Commission, had started proposing and finalizing new regulations as part of their implementation of the Dodd-Frank Act of 2010. These regulations imposed significant new requirements on financial institutions, and the U.S. regulators indicated that they would require firms based outside of the United States to comply with these new regulations so long as those firms' financial services activity had a "direct and significant effect" on the United States.[13] This interpretation of regulatory jurisdiction would capture many international firms, particularly in global financial centers like London which had a significant amount of exposure to the U.S. market.[14] And given that the European Union had not yet implemented its own post-financial crisis reforms, there would be regulatory inconsistencies between the European Union and United States for the foreseeable future.

The large financial firms were generally supportive of the EU proposal. For them, the new U.S. regulations and lack of coordination with the European Union was creating compliance difficulties but also exposing them to competitive pressure as non-U.S. market participants were looking to do transactions with firms that did not have direct links with the United States in an effort to avoid having to comply with the new U.S. requirements. For the EU policymakers, the TTIP proposal represented a way to force U.S. regulators to work more closely with them. There was a concern that the speed in which the U.S. regulators were issuing new regulations gave the United States "first mover advantage" in setting the rules that would govern the post-financial crisis global system – not always in ways that the European Union thought were appropriate.

Consequently, great political pressure was brought to bear on the U.S. trade negotiators to include such a chapter in TTIP, but U.S. financial regulators strongly opposed this effort. The U.S. financial regulators made a legal argument that the propose trade obligations would violate the Administrative Procedure Act (APA) which governed how they engaged in rulemaking. The APA would not allow U.S. regulators to pre-consult with EU authorities or the commit *ex ante* to always

[13] *See, e.g.,* Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations, 78 FR 45292 (July 26, 2013), *available at* https://www.gpo.gov/fdsys/pkg/FR-2013-07-26/pdf/2013-17958.pdf.
[14] *See, e.g.,* Vladimir Guevarra, *CFTC Under Fire Abroad on Swaps,* Wall St. J. (Oct. 18, 2012) ("In a show of unity, finance authorities from the European Union, the U.K., France and Japan pressured a key U.S. counterpart to avoid rushing through proposals on the trading of swaps among U.S. and foreign firms.")

accept as equal whatever the European Union did. The APA also would make it impossible for U.S. regulators to agree to a dispute resolution mechanism which would allow the rulemaking authority of U.S. regulators to be overruled by an independent arbitral body. But behind the legal argument was the more fundamental objection that the U.S. regulators would be forfeiting their discretion to decide what was best for the U.S. financial markets. While regulatory coordination with the European Union – the second largest financial market in the world – may be desirable, TTIP would make regulatory coordination the most important objective, trumping all other objectives.

Ultimately, the European Union and United States did not agree on the financial services chapter, and discussions stopped entirely when negotiations ended on the rest of TTIP. The TTIP story, however, revealed in great detail the difficulty in trying to require regulatory coordination as part of an international trade agreement.

A second example that illustrates the difficulty of addressing financial regulation in a trade agreement is the Trans-Pacific Partnership (TPP). The TPP was a trade agreement, negotiated in 2016 but ultimately not ratified, among twelve countries that border the Pacific Ocean responsible for 40 percent of world trade. One of the controversial elements of TPP was the failure of TPP to fully prohibit a country from imposing data localization requirements. In the final draft of TPP, countries are required to allow the cross-border transfer of information by electronic means, *except* if that transfer is for a financial institution. Data localization requirements mean that a country could prevent a foreign firm from relocating data gathered in the local market outside of the jurisdiction, or at least, maintain a full copy of the data in the jurisdictions. Multinational companies opposed such requirements due to the cost of having to maintain special data retention facilities in different jurisdictions, and some national governments raised concerns that data localization requirements would enable foreign governments to gather and access private information about companies and their customers.

In the United States, financial regulators were one constituency that opposed TPP abolishing data localization requirements. Their concern had to do with protecting the possibility of mandating that registered firms with business operations outside of the United States maintain a copy of their books and records in the United States in order to ensure that such books and records would be accessible to inspection by supervisory staff and eventually accessible to staff in case of enforcement actions. For U.S. regulators, requiring localization of books and records was a necessary reaction to foreign laws – whether they be blocking statutes, state secrecy statutes or data privacy laws – that were cited by registrants as legal barriers to them providing information to U.S. regulators upon request.

The TTIP and TTP examples show the difficulty of international trade agreements to use ex ante rules in any way that does not limit the use by financial regulators of *ex ante* and *ex post* regulatory tools to oversee the financial markets.

Is it possible that the financial regulators' objections to TTIP and TPP were not about protecting their ability to effectively carry out their regulatory mandates, but rather protecting their legal and political power to control the financial markets? One can imagine a story where financial regulators view international trade agreements as a threat to their bureaucratic power and influence. If the international trade agreements limit their ability to assert jurisdiction or limit their ability to access information, then the regulator's role in the market becomes less important as other actors, such as trade negotiators and foreign authorities, play a bigger role in determining financial regulatory outcomes.

It is difficult to refute completely such a line of an argument as financial regulatory agencies are by all means susceptible to public choice theory. But, from the perspective of retail investors and customers, limiting the power and discretion of U.S. financial regulators may not be a positive step as there is little reason to believe that the other actors, which would gain a bigger role in determining relevant financial regulation, would be likely to look out more effectively for retail interests.

As a result, the question remains how international trade agreements can facilitate regulatory coordination without hindering the ability of financial regulators to do their jobs? The answer suggested by this paper is that international trade agreements should move away from setting international rules that dictate certain regulatory *outcomes* but to focus on setting international rules that dictate certain regulatory *processes*.

Before describing how a process-oriented international trade agreement could work, it first may be useful to note how using international trade agreements to require financial regulators to follow common processes would enhance the likelihood of cross-border financial regulatory coordination. As noted before, the primary task that lies behind one financial regulator's willingness to coordinate with a foreign regulator is a belief that the foreign regulator has a comparable regulatory regime.

A comparability determination requires regulators to understand not only what are the relevant rules in the foreign jurisdiction but also how such rules are applied. In practice, such an analysis poses many challenges as a regulator may be unfamiliar with all of the factors that influence how a foreign regulatory system is established, including its legal system (including the role of precedence and the hierarchy of laws), governance and market characteristics.

For this reason, financial regulators tend to focus their efforts on building links with regulators with whom they have more extensive experience, closer market ties and more similar legal systems. One of the earliest cases of an effort to coordinate regulation was the Multijurisdictional Disclosure System (MJDS) between the United States and Canada, two jurisdictions which could not be closer in law, policy and markets.[15] Other successful efforts have been in regions with similar characteristics.[16]

Regulatory coordination is also concerned with the development of additional regulation, which may have the effect of creating new regulatory obligations or changing existing regulations. From a coordination standpoint, the objective would be to minimize regulatory differences and to implement new regulation in a like-minded manner. Given the differences that exist in each financial regulatory jurisdictions, coordination cannot be achieved through a simple copy-and-paste of rules and regulations or a mechanical comparison of regulatory text. Instead, there must

[15] SEC Release No. 33-6902 (July 1, 1991).
[16] *See* Pierre-Hugues Verdier, *Mutual Recognition in International Finance*, 52 Harv. Int'l L.J. 55 (2008).

be coordination of the rulemaking process as well as the process by which new regulation is applied and enforced.

To consider how international trade agreement can be applied to financial regulation, a useful starting point is the World Trade Organization's Technical Barriers to Trade (TBT) Agreement of 1995. The choice to look first to TBT may be surprising given that discussion of international trade and financial services has usually focused on the TBT's sister agreement, the General Agreement on Trade in Services of 1995 (GATS).[17] Technical barriers refers to regulations and standards that define the specific characteristics that a product should have, such as its size, shape, design, labeling, packaging, functionality or performance. While GATS was more explicitly focused on the task of removing limitations to the provision of cross-border services, TBT looks to ensure that technical regulations, standards, and conformity assessment procedures are not applied in a discriminatory manner to interfere with trade, which is closer to the task identified in this paper as the primary challenges to using international trade agreements to enhance financial regulatory coordination.

While the goal of TBT still suggests that the focus of the negotiating parties is to look for ways to lower barriers (i.e., try to maximize the delivery of goods from one jurisdiction to another), TBT set forth a number of legal principles to distinguish between technical barriers that existed in order to stymie competition and those technical barriers that existed to meet legitimate public policy objectives. Alan Sykes identified, in particular, six such legal principles.[18] Even though the TBT was not drafted with financial regulation in mind (the focus of TBT is on the trade of physical goods and the regulatory requirements that may be imposed on such physical goods), the legal principles embedded in TBT do have helpful application to the problem of cross-border financial regulation as TBT anticipated the challenge with cross-border coordination of financial regulation where coordination must respect the interest of domestic regulators to maintain appropriate prudential, market conduct and financial stability standards for their markets while attempting to remove as many regulatory differences as possible that may interfere with cross-border financial activity.

The first legal principal is the prohibition of direct discrimination against a foreign good or service. This legal principal is enshrined in the foundation international trade principle of national treatment. The TBT provides that "in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country."[19]

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[17] *See, e.g.,* Piritta Sorsa, IMF Working Paper No. 97/55, *The GATS Agreement on Financial Services: A Modest Start to Multilateral Liberalization* (May 1, 1997); Rolf H. Weber & Douglas W. Arner, *Toward a New Design for International Financial Regulation*, 29 U. Pa. J. Int'l L. 391, 425-27 (2007); George A. Papaconstantinou, *The GATS and Financial Regulation: Time to Clear-house?* 2019 World Trade Rev. 1. The focus on the GATS is not surprising as the GATS has a specific annex on financial services and appears to attempt the accommodation of the competing interests of financial regulation through a "prudential carve-out" to protect the "integrity and stability of the financial system" or "to protect investors, depositors, policyholders or person to whom a fiduciary duty is owed by financial services suppliers." *See* Andrew D. Mitchell, Jennifer K. Hawkins, and Neha Mishra, *Dear Prudence: Allowances under International Trade and Investment Law for Prudential Regulation in the Financial Services Sector*, 19 J. Int'l Econ. L. 787 (2016).
[18] Alan O. Sykes, *Regulatory Protectionism and the Law of International Trade*, 68 U. Chi. L. Rev. 1, 16 (1999).
[19] TBT, Art. 2.1.

When viewed as a baseline commitment, the national treatment principle is entirely appropriate to be also a baseline commitment for cross-border financial regulatory coordination. In fact, national treatment is an approach that U.S. market regulators use in their regulation of foreign financial services providers.[20] But national treatment in itself is not sufficient. The challenge for many foreign firms is not that they are being asked to do something different than domestic firms, but are being asked to do significantly more than what their home country regulators require. The question that needs to be addressed is why there is this gap between the regulatory requirements of one jurisdiction relative to another.

Second, the TBT polices protectionist motives by imposing the "sham principle." The TBT allows regulatory protections to be challenged – even if not discriminatory – if the true motive of the regulatory protection is to restrict trade. The TBT provides that "Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade."[21]

The sham principle is in many ways stating the obvious, which is that regulation – that exists primarily for the purpose of protecting the domestic financial industry – should not be permitted. The more complicated case is when a regulator uses regulation to protect its local market to support a legitimate financial regulatory objective. For example, the regulator may believe local banks do a better job of financial inclusion than foreign banks and, therefore, seeks to prevent foreign banks to operate in the jurisdiction. At a minimum, the sham principle should establish some burden on financial regulators to justify the necessity of their regulatory requirements if there is discrimination against foreign firms.

Third, the TBT has provisions meant to address information deficiencies of regulators by mandating that regulators ask for, and consider, comments before issuing new regulations. The TBT provides that Members should "without discrimination, allow reasonable time for other Members to make comments in writing, discuss these comments upon request, and take these written comments and the results of these discussions into account."[22] In addition, the TBT seeks to overcome information deficiencies by encouraging regulators to base their regulations on international standards. The TBT states: "Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems."[23]

It should be noted that the TBT attempts to confirm the legitimacy of international standards by also encouraging signatories to full participate in the development of international standards. The TBT states "With a view to harmonizing technical regulations on as wide a basis as possible,

[20] [IOSCO Cross-border Task Force]. Ironically, the national treatment principle is not an obligation under the GATS. GATS, instead, relies on schedules of commitments by individual WTO members.
[21] TBT, Art. 2.2.
[22] TBT, Art. 2.9.4.
[23] TBT, Art. 2.4.

Members shall play a full part, within the limits of their resources, in the preparation by appropriate international standardizing bodies of international standards for products for which they either have adopted, or expect to adopt, technical regulations."[24]

This TBT principle is directly applicable to financial regulation and should serve as a key component of future international trade agreements that seek to address financial regulatory coordination. For U.S. regulators, the TBT's call for notice and comment is consistent with their obligations under U.S. law. The procedural rigor that U.S. regulators have to go through to issue new rules permits regulated entities, foreign authorities, and other members of the public to provide important input. Notice and comment also provides necessary transparency to the public about pending requirements, the regulator's rationale for such requirements and other useful information such as cost-benefit analysis. Such processes should be required in all WTO jurisdictions.

The stock that the TBT puts into reliance on international standards also can be translated to the area of financial regulation.[25] There has been a vigorous generation of international standards since the financial crisis. Standard-setting bodies, such as the International Organization of Securities Commissions, Basel Committee on Banking Supervision, International Association of Insurance Supervisors, Committee on Payments and Market Infrastructures, complemented by the coordination role played by the Financial Stability Board, have produced and continue to produce international standards and guidance in all financial regulatory areas.[26]

Furthermore, it is useful that many of these standard-setting bodies have developed their own assessment and peer review frameworks to evaluate whether member regulators have faithfully implemented the standards in relevant domestic rules and regulations. In addition, the International Monetary Fund and World Bank operate a Financial Sector Assessment Program to analyze entire sectors of a country's financial system for its consistency with relevant international standards.

The growing emphasis on international standards has even led some jurisdictions to explicitly incorporate international standards into their domestic laws.[27]

Given the elaborate international standard-setting apparatus that has developed since the financial crisis, the TBT principle should be part of future international trade agreements that seek to promote regulatory coordination. However, any reliance on international standards must be accompanied with commitments by signatories to improve how international standards are developed. While a complete critique of the international standards setting framework is beyond

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[24] TBT, Art. 2.6.
[25] For a discussion of the role of international standards setting in financial regulation, see Eric J. Pan, *Challenge of International Cooperation and Institutional Design in Financial Supervision: Beyond Transgovernmental Networks,* 11 Chi J. Int'l L. 243 (2010).
[26] For a list of standard-setting bodies, see https://www.fsb.org/work-of-the-fsb/about-the-compendium-of-standards/wssb/.
[27] *See, e.g.,* Regulation (EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds and amending Directives 2008/48/EC and 2014/17/EU and Regulation (EU) No 596/2014.

the scope of this paper, there are questions of the legitimacy of international standards given how consensus decision-making is used and the opportunities for strategic forum shopping.[28]

Fourth, the TBT seeks to mitigate information costs for regulated entities and costs associated with regulatory surprise by mandating governments provide for notice and comment and publication requirements.[29] As noted above, notice and comment requirements are useful not only for other regulators but also market participants that may be subject to regulation. Furthermore, requiring publication of new regulatory requirements goes to improving the transparency of regulation in order to maximize opportunity for regulatory conflicts to be identified and addressed.

Fifth, the TBT seeks to remove unnecessary costs of regulatory compliance by introducing the idea of a "least restrictive means requirement." The TBT provides that "Wherever appropriate, Members shall specify technical regulations based on product requirements in terms of performance rather than design or descriptive characteristics."[30] The objective of the provision is to encourage regulators to regulate using the less effective means necessary to achieve the relevant regulatory objective or, to put it another way, to be as high-level as possible in the regulation to avoid narrow technical requirements which would produce costly regulatory hurdles for foreign goods to be accepted in the host country.

The way that the least restrictive means requirement is used in TBT requires some translation to be applicable to the financial regulatory context. In financial regulation, the choice can be understood as a decision between promulgating regulation through detailed and prescriptive rules as opposed to higher-level principles. Analyzing the comparability of a foreign regime against principles as opposed to detail rules also implies focusing on the comparability of regulatory outcomes.

In recent international discussions about how to conduct comparability determinations, some jurisdictions have argued for a move to "outcomes-based" comparability determinations as a way to make it more likely a regulator would be willing to rely on foreign regulation.[31] Such a call would be consistent with the TBT principle of the least restrictive means requirement.

Application of the principle, however, should not be applied blindly. The decision to convey a requirement using a prescriptive rule rather than a principle may in itself be a regulatory strategy meant to achieve a particular regulatory objective.[32] For example, a financial regulator may believe it is desirable to issue highly prescriptive rules for markets where less sophisticated market participants are present because prescriptive rules are more transparent and have greater legal certainty; whereas a financial regulator may prefer to focus on the articulation of principles for wholesale markets where the on-going relationships of key market participants may reinforce effective compliance.

[28] This critique of international standards setting in financial regulation is the subject of separate paper by the author.
[29] TBT, Art. 10.
[30] TBT, Art. 2.8.
[31] *See* IOSCO Report on Market Fragmentation and Cross-border Regulation (June 2019), *available at* https://www.iosco.org/library/pubdocs/pdf/IOSCOPD629.pdf.
[32] *See* Eric J. Pan, *Understanding Financial Regulation*, 2012 Utah L. Rev. 1897.

Sixth, the TBT introduces additional obligations with respect to conformity assessment. The conformity assessment refers to the methods used by regulators to ensure that a particular good complies with local regulation.[33] Such testing and inspection procedures may be themselves barriers to the free trade of goods.

The analogue of this legal principle to financial regulation is more tenuous, but a major part of any financial regulatory regime is how a regulator identifies successful compliance with relevant requirements. Consider the methods of prudential supervision or an inspections and examinations system. Or consider the enforcement programs used by regulators to punish wrongdoing. The methods used are often regime-specific, reflecting differences in legal systems, resource constraints, and culture. At the same time international regulators have recognized that there is a need to work closer together on developing best practices in how supervision and enforcement are done.

And one can identify a related seventh legal principle, not included in Sykes's original list. This is the principle of equivalence and mutual recognition. The TBT states "Members shall give positive consideration to accepting as equivalent technical regulations of other Members, even if these regulations differ from their own, provided they are satisfied that these regulations adequately fulfil the objectives of their own regulations."[34] This legal principle would result in trading partners being able to avoid host country regulation through reliance on home country regulation, eliminating altogether technical barriers to trade.

Equivalence and mutual recognition are principles well-established in financial regulation. There are many examples of bilateral arrangements between authorities to recognize each other's regulatory requirements. One issue that will need to be addressed is whether selective mutual recognition arrangements are consistent with principle of most-favored-nation treatment.[35]

Even though the TBT is not designed with financial services in mind,[36] the TBT does set forth certain principles that indicate what a trade agreement relevant to cross-border financial regulation could look like. One commonality among the principles is the emphasis on agreeing on procedures that should be followed in imposing new regulatory requirements. A specialized trade agreement chapter on financial regulation could build upon these broad principles with more specific provisions dealing with the use of cost-benefit analysis, comply-and-explain mechanisms to encourage adherence to international standards, and requirements on information-sharing and cross-border data access.

This focus on process rather than outcome would better respect the balance that should be struck between making it easier for financial services to be provided across borders and the prudential, market conduct and financial stability objectives of financial regulators. The discretion of financial regulators to determine the regulatory regime best suited for their markets remains intact,

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[33] TBT, Art. 5.4.
[34] TBT, Art. 2.7.
[35] *See, e.g.,* Joshua A. Zell, *Just Between You and Me: Mutual Recognition Agreements and the Most-Favoured Nation Principle*, 15 World Trade Rev. 3 (2016).
[36] *See* Bernard M. Hoekman & Petros C. Mavroidis, *A Technical Barriers to Trade Agreement for Services?* EUI Working Papers RSCAS 2015/25, *available at* http://ssrn.com/abstract=2625640.

but it is accompanied by obligations of transparency and information sharing which would make it more likely regulators would expand the scope of cases when they are willing to eliminate or remove cross-border regulatory differences. To this end, international trade agreements may play a bigger-than-expected role in financial regulation.