

REGULATORY COOPERATION AND THE TRUMP ADMINISTRATION

*David Zaring**

Regulatory harmonization has allowed financial institutions to conform to similar standards—absent international or administrative law—for the past forty years. In light of the Trump administration’s economic and international approaches to foreign countries, one might expect regulatory harmonization to be threatened. This article suggests that regulatory cooperation has proven to be resilient to administrative change, and “sticky” in that it makes exiting cooperative regulation difficult. While the Trump administration’s policies have affected regulatory harmonization, several factors indicate that American financial regulators remain committed to the process.

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INTRODUCTION

One of the great achievements of international relations in the past forty years has been the transformation of the regulation of financial institutions. It is a story that brought us from a world in which there was no good way for regulators – or investors, for that matter – to know what financial institutions were doing abroad, to

* David Zaring is an Associate Professor of Legal Studies at the Wharton School.

one in which an international process governs the most important rules under which any financial institution of any size operates. It is a story about a new form of global governance—the regulatory network—that has provided detailed, organized, and binding governance without adhering to the traditional mechanisms of international or administrative law. This process of “regulatory harmonization,” requires domestic regulators to get together with their foreign counterparts in an effort to conform their requirements to one another – to agree to do things the same way.

One might think that this story of progress would be threatened by the new economic and international policies of the Trump administration. One of the clearest departures from the political orthodoxy of either party by this administration has been a change in how it wants the United States to handle its economic relationships with foreign countries. If the establishment consensus was broadly in favor of free trade, executed through agreements with foreign governments, the Trump administration shows real skepticism about the benefits those deals have brought to American workers, and has accordingly sought to renegotiate or even exit from them.¹

But the Trump administration has not ended the regulatory harmonization practices that have so transformed financial regulation, or regulatory harmonization more generally.² Instead, President Trump’s regulators have continued to embrace international coordination.³ The evidence suggests that the enduring appeal of regulatory harmonization to American policymakers could stabilize foreign policy between the Trump administration and the administrations that came before it.⁴

This is not to say that regulatory harmonization has been unaffected by the Trump administration’s economic policies. Many of the actions in regulatory harmonization during the last two decades have involved an effort to include it as a mandate in new trade deals.⁵ As some of those proposed deals were abandoned and others

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1. Ana Swanson, *Trump’s Trade Approach Diverges Sharply from Free Trade Republicans*, N.Y. TIMES (Nov. 15, 2017), <https://www.nytimes.com/2017/11/15/business/trump-free-trade-republicans.html> [<https://perma.cc/D2GW-XMRK>].
 2. Clyde Wayne Crews Jr., *Trump’s New 2018 Deregulatory Agenda*, FORBES (Dec. 18, 2017, 8:30 PM), <https://www.forbes.com/sites/waynecrews/2017/12/18/trumps-new-deregulatory-agenda/#3287378f2f60> [<https://perma.cc/456V-YMA2>].
 3. Gabriel T. Rubin, *Trump Team Keeps Approach to Global Financial Rules, for Now*, WALL ST. J. (Jan. 22, 2018, 1:44 PM), <https://www.wsj.com/articles/trump-team-keeps-approach-to-global-financial-rules-for-now-1516642352> [<https://perma.cc/4MY2-VHJ7>].

4. *Id.*
5. *Id.*

renegotiated, it does appear that this effort to promote uniform standards through the trade treaty channel has been checked. Moreover, these regulatory coherence chapters of multilateral trade deals would not have only affected financial regulatory harmonization. They would broadly apply to all aspects of the trading relationship.

In this article, I review the enduring commitment of American financial regulators to international regulatory harmonization. I show how regulatory cooperation in insurance regulation has checked an effort by the Trump administration to reduce federal involvement in insurance oversight. Lastly, I review the emerging efforts to include regulatory harmonization chapters in trade deals that the Trump administration has decided to eschew.

I draw two conclusions from this practice so far. First, it suggests that regulatory cooperation is “sticky,” and not necessarily only to the taste of internationalists. Perhaps because of path dependence, perhaps because it works, and perhaps because of a degree of socialization afforded by four decades of active regulatory cooperation, the development of common standards for the financial markets has proven to be a hard habit to break. Moreover, the regular consultation and promulgation of rules in consultation with foreign regulators has proven to be a stabilizer of policy across administrations.

I. THE TRUMP ADMINISTRATION’S SUSTAINED COMMITMENT TO FINANCIAL REGULATORY COOPERATION

Much of what has happened in international financial regulation began as an effort to solve coordination problems that appeared to be intractable under international law. After World War II, twenty three largely western countries⁶ entered into the first multilateral trade deal, the General Agreement on Tariffs and Trade (GATT), and created the first two global international financial institutions, the World Bank and the International Monetary Fund.⁷ But they found it impossible to make progress on the creation of an International Financial Organization and abandoned the work after a modest effort.⁸

There is still no international financial organization or global treaty outlining how financial firms should be treated when

6. See Press Brief, *Fiftieth Anniversary of the Multilateral Trading System*, World Trade Org., available at https://www.wto.org/english/thewto_e/minist_e/min96_e/chrono.htm (last visited Feb. 8, 2019).

7. BRETTON WOODS PROJECT, *What are the Bretton Woods Institutions?* (Aug. 23, 2005), <https://www.brettonwoodsproject.org/2005/08/art-320747/>.

8. See *id.* (stating that only the World Bank and International Monetary Fund were created at this conference).

they do business abroad.⁹ There is, however, a great deal of international financial regulation.¹⁰ Today, the networked domestic regulators—the Basel Committee on Banking Supervision, the Committee on Payments and Market Infrastructures, the Financial Action Task Force, and many more—continue to promulgate a dizzying array of standards, agreements, best practices, principles, and rules.¹¹ Intertwined with these substantive efforts to coordinate the global regulation of finance has been an effort to improve the procedures followed by the coordinators.¹²

This evolution, both procedural and substantive, makes for a compelling story about a global regulatory enterprise with few peers not only interesting for the substance, or the process, but also for the institutions that have been created to manage and develop a global regime. These institutions declaim legal authority and are comprised of regulators from the most important financial markets coming together and agreeing on common approaches to supervising those markets.¹³ There is no treaty, nor are there tribunals;¹⁴ there are only handshake agreements (backed up by peer review, to be sure) to handle similar problems universally.¹⁵

Moreover, regulators have expanded the scope of regulatory targets and the complexity of these institutions has evolved, particularly since the financial crisis.¹⁶ The old efforts to deal with the cross-border externalities of finance, which were limited in their ambitions and range¹⁷, have been cast aside. In their place, a new

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9. COUNCIL ON FOREIGN RELATIONS, *The Global Finance Regime* (Jan. 23, 2012), <https://www.cfr.org/report/global-finance-regime> [<https://perma.cc/F69F-828H>].
 10. *Id.*
 11. Alexander Reisenbichler, *The Domestic Sources and Power Dynamics of Regulatory Networks: Evidence from the Financial Stability Forum*, 22 REV. OF INT'L POL. ECON. 996, 997, n. 2, 1017 (2015).
 12. *Id.* at 997-8; see also Jack L. Goldsmith & Eric A. Posner, *International Agreements: A Rational Choice Approach*, 44 VA. J. INT'L L. 113, 133 (2003) (analogizing these regulatory schemes to instances within domestic contract law where parties may decide if the agreement is legally binding or not).
 13. Sungjoon Cho and Claire R. Kelly, *Promises and Perils of New Global Governance: A Case of the G20*, 12 CHI. J. INT'L L. 491, 515 (2012).
 14. *Id.* at 498-9; David Zaring, *Finding Legal Principle in Global Financial Regulations*, 52 VA. J. INT'L L. 685, 691 (2012).
 15. Goldsmith, *supra* note 12, at 132.
 16. See generally Cho, *supra* note 13 (discussing the rise and expansion of regulatory bodies since the 2008 financial crisis).
 17. Daniel Hemel, *Regulatory and Cross Border Coordination: Challenging the Conventional Wisdom*, 28 YALE J. ON REG. 213, 222 (2011).

order has emerged. That order is hierarchical, procedurally regular, and politically supervised.¹⁸

At the center of the new status quo, at least since the last financial crisis, is the Financial Stability Board (FSB).¹⁹ The Board is the middle manager of international financial regulation. It coordinates the efforts of regulatory networks to establish common standards for the oversight of financial firms, does some of that work in its own right, and reports to the political leadership provided by the Group of Twenty (G20) on the progress of harmonization initiatives.²⁰

As Randal Quarles, the Federal Reserve Board's vice chairman for financial supervision, has observed, "About one of the important international bodies created since the crisis to promote global financial stability [is] the Financial Stability Board."²¹

One might expect an administration unconvinced by international agreements to be skeptical of the value of the FSB. But as Quarles, a Trump appointee, has explained, "America's active participation in the FSB is important to our nation."²² In his view, and I think it is fair to say that this is the view of most American financial regulators:

[t]he FSB does not impose obligations, it addresses problems-problems that are of great importance to the United States and which, because of the global nature of the financial system, we cannot address alone. The United States and other governments created the FSB and participate in it because it is in our national interests to do so, and that is really the basis of its effectiveness. The United States is not weaker or less independent by participating in the FSB or other standard-setting bodies. On the contrary, when rightly structured our participation in these groups makes our financial system significantly stronger by ensuring that the U.S. perspective is part of the discussions and reflected in standards agreed to.²³

18. Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT'L L. 1, 22 (2002).

19. Zaring, *supra* note 14, at 700; Randal K. Quarles, Vice Chairman for Supervision of the Board of Governors of the Federal Reserve System, America's Vital Interest in Global Efforts to Promote Financial Stability (June 27, 2018), available at <https://www.bis.org/review/r180716d.htm> [<https://perma.cc/GKT5-MQRM>].

20. For an analysis, see Zaring, *supra* note 14, at 700-01.

21. Quarles, *supra* note 19.

22. *Id.*

23. *Id.*

In fact, Quarles has emerged as a leading candidate to assume the chairmanship of the board, a role that reflects the American interest in preserving international regulatory harmonization even in an era of reduced international cooperation on other economic matters.²⁴ But their commitment to the pre-Trump regime of international policymaking over banking regulation indicates one way in which the ties between regulators from different countries can stabilize policymaking between one administration and the next.

Other banking regulators have described the work of international financial regulation in similar terms.²⁵ Trump's choice for the chairmanship of the Federal Reserve Board, Jerome Powell, has described international regulatory cooperation as "essential," and has, if anything, suggested that American capital rules should be more consistent with the global regime set forth in the third iteration of the Basel Capital Accord.²⁶ Admittedly, this would constitute a form of modest deregulation, for American capital rules currently exceed Basel's minimum requirements, but it is worth emphasizing that the deregulation would only go so far as international commitments permit.²⁷

The pattern is repeated among other American financial regulators. The Treasury Department has sought more transparency from international financial regulatory process, but has stated that it "generally supports efforts to finalize remaining elements of the international reforms at the Basel Committee."²⁸ Treasury Secretary Steven Mnuchin in 2017 issued a statement of support for the Basel process.²⁹

24. Nick Timiraos, *Trump's Stances Weaken Support for U.S. Official to Lead Global Banking Body*, WALL ST. J. (Aug. 27, 2018, 12:14 AM), <https://www.wsj.com/articles/trumps-stances-weaken-support-for-u-s-official-to-lead-global-banking-body-1535308713> [https://perma.cc/7FNT-9LUL].

25. *Id.*

26. Michelle Price & Pete Schroeder, *Top U.S. Regulators Confident Watchdogs Can Ease Volcker Rule*, REUTERS (Oct. 3, 2017, 2:22 PM), <https://www.reuters.com/article/us-summit-regulation-volcker/top-u-s-regulators-confident-watchdogs-can-ease-volcker-rule-idUSKCN1C81M1> [https://perma.cc/DVU7-BLXH].

27. David Dayen, *Trump's Regulators Want to Kill a Key Financial Rule That Even Republicans Support*, NEW REPUBLIC (Jan. 23, 2018), <https://newrepublic.com/article/146708/trumps-regulators-want-kill-key-financial-rule-even-republicans-support> [https://perma.cc/9PB8-8NJA].

28. DEP'T OF THE TREASURY, A FINANCIAL SYSTEM THAT CREATES ECONOMIC OPPORTUNITIES: BANKS AND CREDIT UNIONS, 16 (2017).

29. Press Release, U.S. DEP'T OF THE TREASURY, Treasury Secretary Mnuchin's Statement on Basel III (Dec. 7, 2017), available at

This general support for international financial regulation may suggest that the process has managed to convince even financial supervisors inclined to deregulate of its value, or that these regulators recognize that the globalization of finance has left them with no choice but to participate in a global effort to oversee it. At a minimum, it appears that regulators have developed a taste for international financial regulation that is relatively stable across administrations.

II. REGULATORY HARMONIZATION AS AN ANTIDOTE TO DEREGULATION: THE COVERED AGREEMENT AND INSURANCE

A second example of this resilience of regulatory cooperation, at least in matters financial, concerns the decision by the Trump administration to sign a so-called covered agreement with the European Union on insurance supervision finalized during the last week of the Obama administration.³⁰ The Trump administration has otherwise retreated from an emerging federal role in insurance supervision, most notably by getting out of the business of supervising the largest insurance companies at the federal level.³¹

A. Overview

While the government is getting out of the business of the direct regulation of large insurers, a role traditionally left to the states,³² regulatory cooperation has kept it in the business of insurance regulation.³³

The so-called covered agreement with the European Union illustrates how the growing internationalization of insurance (or almost anything, really) can impel American regulators, even those of a deregulatory bent, to engage with their foreign counterparts. The Trump administration, after some hemming and hawing, announced

<https://home.treasury.gov/news/press-releases/sm0232>
[<https://perma.cc/8QCG-X9WZ>].

30. Andrew G. Simpson, *Trump Administration to Sign Insurance Regulation Pact with European Union*, INSURANCE JOURNAL (July 17, 2017), <https://www.insurancejournal.com/news/national/2017/07/17/457712.htm> [<https://perma.cc/NCS9-9MZ9>].
31. For an analysis, see David Zaring, *The Federal Deregulation of Insurance*, 97 TEXAS L. REV. J. (forthcoming 2018).
32. Simpson, *supra* note 30.
33. *U.S. and EU Covered Agreement*, U.S. DEP'T OF THE TREASURY, https://www.treasury.gov/initiatives/fio/Pages/EU_Covered_Agreement.aspx [<https://perma.cc/75TH-E6GA>].

on July 14, 2017 that the Treasury Secretary would sign the covered agreement.³⁴ He duly did so September 22, 2017.³⁵

In particular, the covered agreement creates a federal role in overseeing the capital rules for reinsurers, and limits the kind of rules the states can impose on insurers.³⁶ In reinsurance, the agreement reduces regulatory barriers to foreign competition in the U.S. and E.U.³⁷ Its group supervision principles, in contrast, harmonize the regulatory approaches of the supervision of large insurance companies' operation in both jurisdictions.³⁸ The agreement also includes an information exchange component designed, among other things, to deepen regulatory ties between American and European insurance supervisors.³⁹ The agreement thus sets regulatory parameters for the E.U. and U.S. insurance industries, and requires the Federal Insurance Office (FIO) to monitor and oversee the implementation of the agreement in the U.S., which must be done by state regulators.⁴⁰

B. The Covered Agreement

It is perhaps useful to further interrogate the way the covered agreement operates, for it does not embody a uniform commitment to globalism, and, in its details, is indicative of the careful and stop-and-start nature of regulatory harmonization.⁴¹

As for reinsurance, the covered agreement is best understood as an effort to reduce regulatory barriers to foreign competition in the

34. *Id.*

35. *Id.*; see also John S. Pruitt et al., *Legal Alert: US-EU Covered Agreement: An Overview*, CAPTIVE (Sept. 24, 2018), https://www.captive.com/news/2018/09/24/us-eu-covered-agreement-an-overview?utm_source=Captive+Wire&utm_campaign=d343fd3d73-EMAIL_CAMPAIGN_2017_08_04_COPY_01&utm_medium=email&utm_term=0_7413756522-d343fd3d73-111835165 [https://perma.cc/423U-T6PG] for background on the agreement's adoption.

36. *Id.*; *Bilateral Agreement Between The United States Of America And The European Union On Prudential Measures Regarding Insurance And Reinsurance, U.S.-E.U.*, Sept. 21, 2017, T.I.A.S. 18-404 [hereinafter *Bilateral Reinsurance Agreement*].

37. *Bilateral Reinsurance Agreement*, *supra* note 36.

38. *Id.*

39. Simpson, *supra* note 30.

40. *The Federal Industry, Hearing on H.R. 3762 Before the Subcomm. on Hous. and Ins., Comm. On Fin. Serv., and U.S. House of Reps.*, 115th Cong. 11-12 (2017) (statement of Katharine L. Wade, Chair of the National Association of Insurance Commissioners' International Relations Commission).

41. *Bilateral Reinsurance Agreement*, *supra* note 36.

U.S. and E.U.⁴² The agreement serves to remove posted collateral and local presence requirements for E.U. and U.S. reinsurers doing business across the Atlantic.⁴³ The reinsurance portion of the agreement thus reduces trade barriers in both the United States and the European Union in a way likely to benefit American consumers.⁴⁴ It is something like a trade deal, contained within the narrower confines of a limited agreement on international insurance regulation.⁴⁵ In particular, the requirement that foreign reinsurance firms post 100% collateral to do business in certain American jurisdictions makes little sense for well-supervised European reinsurers.⁴⁶ This problem has been apparent for years,⁴⁷ and yet any reduction in the collateral requirements, which thereby would open up the U.S. reinsurance market and introduce new competitors, to the benefit of insurance companies and ultimately consumers, has been slow.⁴⁸

The agreement prevents U.S. state insurance regulators from requiring E.U. reinsurers to post such high levels of collateral as a condition for U.S. firms to be credited for their contracts with E.U. reinsurers.⁴⁹

The United States also got something for American re-insurance companies.⁵⁰ One of the covered agreement's objectives,

42. Simpson, *supra* note 30.

43. *Id.*

44. *Id.*

45. And it was assessed as such. The American Insurance Association, an industry group, said that the "agreement on prudential matters will end the discriminatory actions against U.S. insurers and reinsurers, increase U.S. competitiveness, and boost the international standing of the U.S. state-based insurance regulatory system." Marguerite Seidel, *AIA Statement on U.S.-EU Covered Agreement*, AM. INS. ASS'N (July 14, 2017), <http://www.aiadc.org/media-center/all-news-releases/2017/july/aia-statement-on-u-s-eu-covered-agreement> [https://perma.cc/PG8N-TCMC].

46. See generally Ernst Csiszar, *Issues Relating to Collateral Requirements Imposed upon Alien Reinsurers of United States Ceding Insurers*, THE GENEVA PAPERS ON RISK AND INSURANCE - ISSUES AND PRACTICE, 522 (2005) (discussing the issues regarding collateral requirements for non-US insurers doing business in the United States).

47. *Id.* at 523-4.

48. *Id.*

49. Bilateral Reinsurance Agreement, *supra* note 36, at Art. 3.

50. See *The National System of State Regulation and Covered Agreement*, NAT'L ASS'N OF INS. COMMISS'RS, https://www.naic.org/cipr_topics/topic_covered_agreement.htm [https://perma.cc/W2MF-X5ER] (last updated July 10, 2018) ("In exchange, the EU will not impose local presence requirements on U.S. firms

as announced in its Article I, is “the elimination, under specified conditions, of local presence requirements.”⁵¹ Specifically, the agreement relieves U.S. reinsurers from the obligation to establish a local presence—i.e., a branch or subsidiary—in the E.U.⁵² The local presence requirement in the E.U. was also a real burden on the ability of American reinsurers to access that market.⁵³ The elimination of that burden should level the playing field for American and European reinsurance firms by making it easier for American reinsurers to access the European market without opening an office in every jurisdiction in which they do business.⁵⁴

The agreement also contains provisions on group supervision.⁵⁵ Under the E.U.’s “Solvency II” regime, European insurers are subject to group supervision, and foreign insurers seeking to do business in the E.U. are required to establish that they are supervised in a comparable way.⁵⁶ Most disquieting for American firms is that the E.U. reserved for itself the right to impose additional capital and other regulatory requirements on firms based in countries that were not determined by the E.U. to have a supervisory system that is “equivalent” to the Solvency II supervisory system.⁵⁷

The covered agreement provides that this requirement will not be imposed upon American insurers doing business in Europe, provided that they can establish that they are being adequately supervised as groups.⁵⁸ The “consolidated” form of supervision assesses the solvency and soundness of insurance firms

operating in the EU, and effectively must defer to U.S. group capital regulation for U.S. entities of EU-based firms”).

51. Bilateral Reinsurance Agreement, *supra* note 36, at Art. 3.
52. *The National System of State Regulation and Covered Agreement*, *supra* note 50.
53. *EU/U.S. Covered Agreement: What’s Next?*, HOGAN LOVELLS, <https://www.hlinsurancelaw.com/files/2017/02/EU-US-Covered-Agreement-What-Next.pdf> [<https://perma.cc/PH9H-F2EF>] (last visited Oct. 8, 2018).
54. Pruitt et al., *supra* note 35.
55. Bilateral Reinsurance Agreement, *supra* note 36, at Art 4.
56. *U.S.–EU Covered Agreement, FACT SHEET*, U.S. DEP’T OF TREASURY (Jan. 13, 2017), <https://www.insurancejournal.com/research/app/uploads/2017/01/Covered-Agreement-Fact-Sheet-011317-FINAL.pdf> [<https://perma.cc/Q5CC-JTM4>]. As Elizabeth Brown has said, “Solvency II will likely influence how insurance regulators outside of the EU regulate insurance, particularly those in the United States.” Elizabeth F. Brown, *The Development of International Norms for Insurance Regulation*, 34 BROOK. J. INT’L LAW 953, 972 (2009).
57. *U.S.–EU Covered Agreement, FACT SHEET*, *supra* note 56.
58. Pruitt et al., *supra* note 35.

with reference to all of their subsidiaries;⁵⁹ in the U.S., solvency is traditionally assessed at the subsidiary, or operating entity, level on a state by state basis so that each state regulatory monitors the solvency of each insurance company subsidiary doing business in that state.⁶⁰ The agreement was in this way designed to “establish[] that the [American] supervisory authority, and not the [European] supervisory authority, will exercise worldwide prudential insurance group supervision,” as the agreement provides in Article I.⁶¹ It means that U.S. insurance groups operating in the E.U. will be supervised at the worldwide group level by the relevant U.S. insurance supervisors rather than through a European process imposed on American insurers and based on Solvency II.

Finally, the agreement provides for an information exchange that will amplify and improve contacts between regulators in the U.S. and E.U.⁶² Information exchanges have proven to be the start of more elaborate cooperation by banking and securities regulators.⁶³ That precedent suggests that the agreement on information exchange can set the stage for further cooperation.

C. Conclusion

If the agreement itself can be celebrated for sensible policymaking, its most notable characteristic is its emergence in the context of an administration skeptical of foreign economic commitments and inclined to deregulate wherever possible.⁶⁴ The covered agreement retains a federal role in insurance supervision by requiring harmonization with European Union standards in the cases above, and requires the federal government, which has been reducing its role in insurance regulation, to oversee it.⁶⁵ In this way, international regulatory cooperation has altered the balance of

59. Bilateral Reinsurance Agreement, *supra* note 36, at Art. 1(c).

60. *See generally* Daniel Schwarcz, *A Critical Take on Group Regulation of Insurers in the United States*, 5 U.C. IRVINE L. REV. 537 (2015) (describing the U.S. regulatory structure for assessing solvency among insurance entities).

61. Bilateral Reinsurance Agreement, *supra* note 36, at Art. 1(c).

62. *Id.* at Art. 1(d).

63. *See* David Zaring, *International Institutional Performance in Crisis*, 10 CHI. J. INT'L L. 475, 485 (2010).

64. *See* Max Fisher, *What Is Donald Trump's Foreign Policy?*, N.Y. TIMES (Nov. 11, 2016), <https://www.nytimes.com/2016/11/12/world/what-is-donald-trumps-foreign-policy.html> [<https://perma.cc/JXH5-H5FR>] (discussing President Trump's policy of “America First,” and his willingness to break away from foreign agreements).

65. Bilateral Reinsurance Agreement, *supra* note 35 at Preamble; *see also* U.S.–EU Covered Agreement, FACT SHEET, *supra* note 56.

regulatory power between the federal government and the states in favor of the federal government. It is another example of how regulatory cooperation, in this case adopted through a non-treaty commitment made to European Union regulators, can stabilize American economic policymaking from one administration to the next.

III. THE TURN AWAY FROM TRADE AGREEMENT-DRIVEN REGULATORY HARMONIZATION

Over the past two decades, proposed trade deals have regularly included a commitment, by the parties to the deal, to some form of regulatory harmonization.⁶⁶ The regulatory coherence and cooperation components of multilateral trade deals have evolved from a more traditional set of commitments to transparent administrative procedure in trade negotiations in an effort to bring substantive regulatory standards into alignment across borders.⁶⁷

Some of the interest in regulatory harmonization through trade is long standing, and could even be seen in the GATT's Article X.⁶⁸ Article X provided for the publication and even-handed administration of trade rules by the contracting parties.⁶⁹ These transparency obligations were reaffirmed in the Uruguay round of agreements that created the WTO in 1994, which adopted the GATT.⁷⁰

But recently, developed countries have sought to go further.⁷¹ Regulatory cooperation offers not just its own appeal to

66. See generally Jeffrey J. Schott, Opinion, *Are Trade Agreements Good for Americans?: Trade Agreements Benefit Consumers and Producers*, N.Y. TIMES (Mar. 17, 2016, 3:20 AM), <https://www.nytimes.com/roomfordebate/2016/03/17/are-trade-agreements-good-for-americans> [<https://perma.cc/WH74-NSGP>] (discussing the regulatory harmonization that occurs in a trade deal).

67. See Phoenix X. F. Cai, *Regulatory Coherence and Standardization Mechanisms in the Trans-Pacific Partnership*, 5 BRIT. J. OF AM. LEGAL STUD. 505, 527 (2016) (providing an example of the regulatory coherence and its novelty).

68. The General Agreement on Tariffs and Trade art. X, *originally signed* Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 182 (revised and resigned on Apr. 14, 1994) [hereinafter GATT].

69. *Id.*

70. Muhammad Ijaz Latif, *Uruguay Round of GATT and Establishment of the WTO*, 65 PAK. HORIZON 53, 63 (2012).

71. See generally Elizabeth Trujillo, *Regulatory Cooperation in International Trade and Its Transformative Effects on Executive Power*, 25 IND. J. GLOBAL STUDIES 365 (2018) (explaining the regulatory cooperation in international trade).

standardization and harmonization of rules across borders. American regulators and businesses have also thought that it could improve their procedural protections abroad.⁷²

The United States, for example, does not pass rules without engaging in a lengthy notice and comment proceeding prior to the rule's passage.⁷³ What is more—agency missteps in complying with notice and comment requirements, including the requirement that the agency respond to substantive comments in promulgating the final rule—form a basis for the reversal of many rules on judicial review.⁷⁴

American administrative law is in some ways an outlier in this regard, but American exporters and multinational corporations find the prospect of American-style notice and comment in other jurisdictions to be appealing.⁷⁵ Thus far, the European Union has resisted the effort to institute notice and comment in producing its own directives or in the regulations promulgated by its members.⁷⁶ Institutionalizing something like notice and comment rulemaking in a trade deal has become something that American trade negotiators have increasingly tried to do.

A. Regulatory Harmonization in the Trans-Pacific Partnership

The Trans-Pacific Partnership (TPP) was signed on February 4, 2016 but is awaiting ratification from all parties,⁷⁷ and has since been withdrawn from by the United States.⁷⁸ President Trump vowed to

72. *Promote Global Regulatory Cooperation*, U.S. CHAMBER OF COM. (Aug. 15, 2017, 8:30 PM), <https://www.uschamber.com/issue-brief/promote-global-regulatory-cooperation> [<https://perma.cc/VBN8-4NGU>].

73. *See* Administrative Procedure Act of 1946 §4, 5 U.S.C. § 553 (2010) (outlining American process of notice and comment rulemaking).

74. *See, e.g.*, Chamber of Commerce of the United States v. SEC, 412 F.3d 133 (D.C. Cir. 2005); United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240 (2d Cir. 1977).

75. Richard B. Stewart, *The Global Regulatory Challenge to U.S. Administrative Law*, 37 N.Y.U. J. INT'L L. & POL. 695, 710 (2005).

76. *See* Interinstitutional Agreement Between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making, Apr. 13, 2016, 123 O.J.L. 1 and *Proposal for an Interinstitutional Agreement on Better Regulation*, COM (2015) 216 final (May 20, 2015).

77. CONG. RESEARCH SERV., R44489, THE TRANS-PACIFIC PARTNERSHIP (TPP): KEY PROVISIONS AND ISSUES FOR CONGRESS, 1-2 (2016).

78. *TPP: What is it and Why Does it Matter?*, BBC NEWS (July 27, 2016), <http://www.bbc.com/news/business-32498715> [<https://perma.cc/MY6A-TFX9>].

withdraw from the agreement on his first day in office;⁷⁹ he ultimately met that pledge.⁸⁰

The U.S. Trade Representative described TPP as “the first U.S. Free Trade Agreement to include a chapter on regulatory coherence, reflecting a growing appreciation of the relevance of this issue to international trade and investment” but also notes that nothing in TPP will require changes to U.S. regulations or regulatory procedures.⁸¹

TPP encourages a number of best regulatory practices, including publication of its rules, regulatory impact assessments, coordination between parties, and regular review of its procedures.⁸² These provisions have appeared in prior trade agreements like the GATT, in that they are procedural, although the inclusion of a requirement of a regulatory impact analysis – in the U.S., it would be considered a cost benefit analysis – is new and somewhat controversial.⁸³ The agreement would have encouraged notice and comment rulemaking, although language is significantly permissive regarding notice and comment timelines (“to the extent possible”) and do not require responses to comments.⁸⁴

Article 25.6 of the TPP would have established a Committee on Regulatory Coherence which is required to review regulatory practices at least once every five years with a view toward making recommendations for amending the Regulatory Coherence chapter to the implementing Commission.⁸⁵

Further, per Article 25.11, dispute settlement mechanisms in the TPP would have applied to the regulatory coherence chapter, meaning that those provisions are not subject to dispute settlement at

79. *Trump Says US to Quit TPP on First Day in Office*, BBC NEWS (Nov. 22, 2016), <https://www.bbc.com/news/world-us-canada-38059623> [<https://perma.cc/NW9M-QLAV>].

80. *Trump Executive Order Pulls out of TPP Trade Deal*, BBC NEWS (Jan. 24, 2017), <https://www.bbc.com/news/world-us-canada-38721056> [<https://perma.cc/6KC2-NHSE>].

81. U.S. Trade Representative, TPP CHAPTER 25 SUMMARY: REGULATORY COHERENCE 3 (2015), <https://ustr.gov/sites/default/files/TPP-Chapter-Summary-Regulatory-Coherence.pdf> [<https://perma.cc/7YE9-NRGH>].

82. *Id.* at 2-3.

83. *See, e.g.*, GATT, *supra* note 68.

84. U.S. TRADE REPRESENTATIVE, THE TRANS-PACIFIC PARTNERSHIP, CHAPTER 26: TRANSPARENCY AND ANTI-CORRUPTION 2-3 (2016), <https://ustr.gov/sites/default/files/TPP-Final-Text-Transparency-and-Anti-corruption.pdf> [<https://perma.cc/8VXS-XBBN>].

85. U.S. TRADE REPRESENTATIVE, THE TRANS-PACIFIC PARTNERSHIP, CHAPTER 25: REGULATORY COHERENCE 4-5 (2016), <https://ustr.gov/sites/default/files/TPP-Final-Text-Regulatory-Coherence.pdf> [<https://perma.cc/S676-7W3E>].

all under the agreement.⁸⁶ The Australian scholars Andrew Mitchell and Elizabeth Sheargold argue that exempting regulatory coherence obligations from dispute settlement was designed to encourage greater participation by states in the regulatory harmonization process.⁸⁷

B. Regulatory Harmonization in the Transatlantic Trade and Investment Partnership

The Transatlantic Trade and Investment Partnership (TTIP) was being negotiated between the E.U. and the U.S. actively during the Obama Administration, but efforts to conclude a deal have largely ceased since the inauguration of President Trump.⁸⁸

When the agreement was being pursued actively, it was clear from both parties' stated objectives that regulatory coherence and coordination would be addressed in the final agreement to some degree.⁸⁹

The European Union published its proposed text on regulatory cooperation, and updated it as of March 2016.⁹⁰ The text provides generally that regulatory cooperation will be carried out transparently and made available for public comment, and specifically requires that a joint E.U.-U.S. Annual Regulatory Cooperation Program providing an overview of ongoing and planned regulatory cooperation initiatives be published by each party online and updated once per year.⁹¹ The program "shall include, as a minimum, all activities related to future regulatory cooperation covered by specific or sectoral provisions concerning goods and

86. *Id.* at 7.

87. Elizabeth Sheargold & Andrew D. Mitchell, *The TPP and Good Regulatory Practices: An Opportunity for Regulatory Coherence to Promote Regulatory Autonomy?*, 15 *WORLD TRADE REV.* 587, 600 (2016).

88. See Robert Wisner & Neil Campbell, *Bringing the Home State Back in: The Case for Home State Control in Investor-State Dispute Settlement*, 19 *BUS. L. INT'L* 5, 5 (2018) ("Since the inauguration of President Donald Trump, the United States has... largely abandoned a possible Transatlantic Trade and Investment Partnership (TTIP) with the European Union.").

89. See Bernd Lange, *Reasonable and Balanced Trade Agreement with the United States: TTIP Chapter on Regulatory Coherence*, EUR. PARLIAMENT, <http://www.europarl.europa.eu/legislative-train/theme-reasonable-and-balanced-trade-agreement-with-the-united-states/file-ttip-regulatory-coherence/10-2016> [https://perma.cc/2X47-GVRG] (last visited Oct. 19, 2018).

90. DIRECTORATE GENERAL FOR TRADE OF THE EUROPEAN COMMISSION, TTIP-EU PROPOSAL FOR CHAPTER: REGULATORY COOPERATION (2016), http://trade.ec.europa.eu/doclib/docs/2016/march/tradoc_154377.pdf [https://perma.cc/FLR3-5RSG].

91. *Id.* at art. x.6.

services in this Agreement and shall be published at the latest by the time of signature of this Agreement.”⁹²

An E.U. fact sheet on regulatory cooperation, published in January 2015, acknowledges the importance of regulatory cooperation while emphasizing that the Regulatory Cooperation Body would not have the power to change the rules set out in E.U. treaties about how regulations are developed.⁹³ Finally, on March 21 2016, an E.U. position paper titled “Regulatory Cooperation in TTIP: The Benefits” detailed the E.U.’s rationale for strong regulatory cooperation, including freeing resources based on harmonization.⁹⁴

The U.S. Trade Representative did not release a proposed text on regulatory cooperation, but published a TTP factsheet in March 2014 with general U.S. objectives, including regulatory coherence and transparency.⁹⁵ The factsheet characterizes TTIP as “an opportunity to develop cross-cutting disciplines on regulatory practices” and gives examples of such best practices as “greater transparency, participation and accountability” in regulatory development, “evidence-based analysis and decision-making, and a whole-of-government approach” in regulatory management, terms that do not convey much, but perhaps hint at the policy interest in the subject.⁹⁶ USTR has indicated its hope that the U.S. and E.U. will examine ways to “increase regulatory compatibility in specific sectors through a range of regulatory cooperation tools as well as other steps aimed at reducing or eliminating unnecessary regulatory differences.”⁹⁷ The U.S. aims to promote greater regulatory compatibility “with extensive input from stakeholders, and in collaboration with our regulators.”⁹⁸

The U.S. Chamber of Commerce, one of the most important of those stakeholders in the U.S., published its own detailed paper on its

92. *Id.*

93. *Regulatory Cooperation in TTIP*, EUR. COMM’N (2015), http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153002.1%20RegCo.pdf [<https://perma.cc/Z3GU-AZK9>].

94. EUR. COMM’N, *REGULATORY COOPERATION IN TTIP: THE BENEFITS* (Mar. 21, 2016), http://trade.ec.europa.eu/doclib/docs/2016/march/tradoc_154379.pdf [<https://perma.cc/8DQN-PAN8>].

95. *U.S. Objectives, U.S. Benefits In the Transatlantic Trade and Investment Partnership: A Detailed View*, OFFICE OF U.S. TRADE REPRESENTATIVE (Mar. 2014), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2014/March/US-Objectives-US-Benefits-In-the-TTIP-a-Detailed-View> [<https://perma.cc/NZ62-XGT3>].

96. *Id.*

97. *Id.*

98. *Id.*

objectives regarding regulatory coherence and cooperation in the TTIP on February 27, 2015.⁹⁹ In addition to indicating more general support for publication, transparency, and centralization of regulatory decisions, the Chamber has indicated its support for development of a filter to identify measures that have the most significant effect on the bilateral trade relationship and to prioritize cooperation on those activities.¹⁰⁰ To that end, the Chamber has urged the parts to adopt a Regulatory Compatibility Assessment for those measures that pass through the filter in order to make more information available to both parties (while not mandating regulatory decisions),¹⁰¹ and to create nonbinding Regulatory Equivalence Assessments to determine which regulations are equivalent between parties.¹⁰²

C. Conclusion

The Trump Administration's turn away from these mega-regionals¹⁰³ has shifted the effort to implement the otherwise generally informal commitments towards regulatory harmonization in a trade treaty. In that sense, the Trump administration has turned away from the full-throated embrace of international regulatory standards, which is a turn away from international regulatory cooperation in general. But the interest in achieving common standards in the business community remain strong.¹⁰⁴

We may see that regulatory harmonization continues to be pursued in practice, if not written into renegotiated trade deals of the future.

99. U.S. CHAMBER OF COM., REGULATORY COHERENCE & COOPERATION IN THE TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP (TTIP) (2015), https://www.uschamber.com/sites/default/files/regulatory_coherence_regulatory_cooperation_chamber_ttip_paper-final_2.pdf [<https://perma.cc/7C5B-ZXYV>] [hereinafter U.S. CHAMBER OF COM., *Regulatory Coherence*].

100. See, e.g., David Zaring, *Free Trade Through Regulation?*, 89 S. CAL. L. REV. 863, 864 n.6 (2016) (discussing the Chamber of Commerce's support for a domestic regulatory initiative).

101. U.S. CHAMBER OF COM., *Regulatory Coherence*, *supra* note 99, at 11-13.

102. *Id.* at 13-14.

103. Mega-regionals as deep integration partnerships between countries or regions with a major share of world trade and foreign direct investment. Tomas Hirst, *What are Mega-Regional Trade Agreements?*, WORLD ECON. F. (July 9, 2014), <https://www.weforum.org/agenda/2014/07/trade-what-are-megaregionals/> [<https://perma.cc/2A5E-5JQK>].

104. See Zaring, *supra* note 100 (discussing the desire for regulatory cooperation in globalization and trade).

CONCLUSION

Regulatory cooperation is not always something to celebrate, though I and others have marveled at the way it has resulted in a serious regime of financial regulation, beginning with nothing more than an increasingly elaborated set of deals among financial supervisors. There may be good reasons for less burdensome regulation in finance, or more generally – the Trump administration has come out in favor of financial deregulation at home. And in abandoning trade deals with regulatory coherence components, turned away from a formal commitment to regulatory harmonization, expressed through a treaty.

But what we see from the international commitments made by regulators is that they can curb deregulatory impulses, and continue international cooperation among countries that are feuding on trade or other grounds. In that sense, regulatory cooperation has—so far—proven to be a constraint on an administration that otherwise appears to be less interested in cooperation and strong global standards than its predecessors.

In this sense, regulatory cooperation is “sticky,” in that it is difficult to exit from cooperative processes even when those processes are not particularly deregulatory. This is so for a number of reasons, including path dependence, socialization, and the straightforward requirement that domestic regulators respond to the globalization of the marketplace.¹⁰⁵ Habits of international agreement, it turns out, are often hard to break.

This stickiness naturally leads to some consistency between administrations with different foreign policy priorities. Regulatory cooperation has also operated at a level below diplomacy and high politics.¹⁰⁶ But as economic matters become more and more

105. See Ian Greener, *Path Dependence*, ENCYCLOPÆDIA BRITANNICA (Sept. 1, 2017), <https://www.britannica.com/topic/path-dependence> [<https://perma.cc/HCX6-F93N>] (defining path dependence); see also ALASTAIR IAIN JOHNSTON, *SOCIAL STATES: CHINA IN INTERNATIONAL INSTITUTIONS, 1980-2000: SOCIALIZATION IN INTERNATIONAL RELATIONS THEORY*, at 20-21 (G. John Ikenberry & Marc Trachtenberg eds., 2008) (defining socialization); see generally DAVID VOGEL & ROBERT A. KAGAN, *DYNAMICS OF REGULATORY CHANGE: HOW GLOBALIZATION AFFECTS NATIONAL REGULATORY POLICIES* (2002), <https://cloudfront.escholarship.org/dist/prd/content/qt4qflc74d/qt4qflc74d.pdf?t=lc03gd> [<https://perma.cc/VWV8-S6N8>] (discussing domestic regulators response to globalization).

106. See BRIAN HOCKING ET AL., *FUTURES FOR DIPLOMACY: INTEGRATIVE DIPLOMACY IN THE 21ST CENTURY*, CLINGENDAEL: NETHERLANDS INSTITUTE OF INTERNATIONAL RELATIONS (discussing the growth and influence of regulatory cooperation amongst past norms of “high politics” and diplomacy).

important in foreign policy, sticky regulatory cooperation used to address those economic matters should help to smooth the transitions between administrations with different perspectives—and in so doing, limit the flexibility of policymakers to do something entirely different. Perhaps most interestingly, regulatory cooperation has these effects without in any way binding the hands of the new policymakers in any legal way.

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