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HARMONIZING REGULATIONS IN THE FINANCIAL SERVICES INDUSTRY THROUGH THE TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP

INTRODUCTION

Inconsistent regulation across jurisdictions leads to inefficiencies, ineffective enforcement, and ultimately the effective deregulation of industries through jurisdictional shopping. The financial services industry[1] is no exception to this rule and, in fact, could be the poster industry highlighting the detriment caused by inconsistent regulation. December 2007 marked the start of the worst worldwide financial crisis since the World War II.[2] This financial crisis was caused by a variety of factors, but ineffective oversight and inconsistent regulation of the financial services industries in the United States and the European Union played a very important role in creating the environment that resulted in the unsound and sometimes criminal financial practices that contributed to the worldwide recession.[3] Harmonizing financial regulations between the U.S. and the EU will help to provide a more stable, more profitable, and more sustainable worldwide financial industry.

In July 2013, the United States and the European Union entered into negotiations on the Transatlantic Trade and Investment Partnership (TTIP).[4] If completed, TTIP will be the largest free trade agreement in the world, accounting for more than half of the world's gross domestic product (GDP) and thirty percent of the world's trade.[5] TTIP, coined the term "Economic NATO," which has the potential to spur the global economy out of its current waning state, strengthen the commitment between two of the world's largest

[1] *Financial Services Industry Definition*, CENSUS.GOV, http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=52&search=2012%20NAICS%20Search (refers to a variety of services provided by different entities under the Finance and Insurance Sector as defined by the U.S. Department of Commerce. These include but are not limited to transactions involving the creation, liquidation, or change in ownership of financial assets and/or in facilitating financial transactions).

[2] THE NATIONAL BUREAU OF ECONOMIC RESEARCH, BUSINESS CYCLE DATING COMMITTEE REPORT, 1 (Sept. 20, 2010), http://www.nber.org/cycles/sept2010.pdf.

[3] *Declaration: Summit on Financial Markets and the World Economy*, G20.ORG (Nov. 15, 2008), https://www.g20.org/sites/default/files/g20_resources/library/Washington_Declaration_0.pdf.

[4] CONG. RESEARCH SERV., R43158, PROPOSED TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP (TTIP): IN BRIEF 3 (2013) (hereinafter CRS BRIEF).

[5] *Id.* at 3.

superpowers, and ultimately become the global standard for many regulatory issues going forward.[6] TTIP has three primary goals: to increase market access through the elimination of trade barriers; to enhance regulatory coherence and cooperation; and to develop new rules in the emerging "21st century" areas of trade.[7] These goals apply to almost all sectors of the economy.[8] However, some sectors have been specifically excluded from negotiations, while the inclusion of others is still in debate.[9] The financial services industry is one sector that, despite both sides' negotiators expressing their support for inclusion, is still being debated on each side's home political landscapes.[10] As such, whether or not financial services will be included in the final agreement is still very much in the air.[11] This Comment will primarily focus on the goal of enhancing regulatory coherence and cooperation, specifically within the financial services industry using TTIP as a mechanism for achieving this goal.

TTIP could become the leading example in regulatory cooperation, and because it would include more than forty percent of the world's economy,[12] the rest of the world would have no choice but to follow or be left behind. Most Free Trade Agreements (FTA) in the past have been largely concerned with the reduction of tariffs.[13] However, because average U.S. and EU tariffs are already quite low,[14] TTIP's focus is on non-tariff trade barriers with an emphasis on the harmonization of regulations between the parties.[15] Economic gains from greater regulatory compatibility could be significant,[16] yet many observers have expressed some skepticism about whether a comprehensive agreement on regulatory issues between the two sides can be reached.[17]

[6] Trine Flockhart, *Can TTIP Be an "Economic NATO"?*, GMF BLOG (Oct. 13, 2014), http://blog.gmfus.org/2013/10/14/can-ttip-be-an-economic-nato/.

[7] CRS BRIEF, *supra* note 4, at 1.

[8] *See generally id.*

[9] *Id.* at 8.

[10] *See infra* Part I.A.

[11] CRS BRIEF, *supra* note 4, at 7–8.

[12] WILLIAM H. COOPER, CONG. RESEARCH SERV., RL30608, EU-US ECONOMIC TIES: FRAMEWORK, SCOPE, AND MAGNITUDE 2 (Apr. 2, 2013).

[13] CRS BRIEF, *supra* note 4, at 6; *see generally* North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter *NAFTA*]; United States-Korea Free Trade Agreement, U.S.-Korea., Apr. 1, 2007, *available at* http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text (focusing on the reduction of tariffs between the parties) [hereinafter *KORUS*].

[14] CRS BRIEF, *supra* note 4, at 6.

[15] *Id.*

[16] *Id.*

[17] *Id.*

While the U.S. and European negotiators have officially stated their willingness to include financial services in the TTIP negotiations, several officials and experts on each side have voiced their concerns about doing this.[18] In particular, the TTIP's impact on European and U.S. financial reforms that are currently being implemented in the wake of the financial crisis is of particular concern.[19] For example, U.S. officials are worried that including financial services in TTIP could effectively end up being a "race to the bottom" and significantly water down the Dodd-Frank Act.[20] U.S. Trade Representative, Ambassador Michael Froman, specifically declared "that nothing we do in a trade agreement should undermine the ability of regulators on both sides to regulate in the public interest."[21] Additionally, Ambassador Froman emphasized the Administration's support for the inclusion of financial services in TTIP, and the need to continue regulatory cooperation in other venues such as the G-20 and other international bodies in parallel with TTIP.[22]

In contrast, the European Council's confidential negotiating instructions, which were leaked, set encompassing goals for financial services in the TTIP, calling for a "common framework" that is "binding on all regulators and other competent authorities."[23] Binding national regulators to the treaty's new principles and rules would extend much further than previous trade pacts made by the U.S.[24] "EU negotiators reportedly are weighing proposals for new requirements to share data among regulators, improve coordination of the implementation of international financial agreements (such as Basel III on

[18] SIMON JOHNSON & JEFFERY SCHOTT, FINANCIAL SERVICES IN THE TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP, PETERSON INST. FOR INT'L ECON. 1 (2013), *available at* http://piie.com/publications/pb/pb13-26.pdf.

[19] *Id.*

[20] "Race to the bottom" is a phrase that refers to the lowering of standards in the pursuit of consistency due to the lack of being able to reach an agreement on more stringent standards. *See Race to the Bottom Definition*, FINANCIAL TIMES LEXICON, http://lexicon.ft.com/Term?term=race-to-the-bottom (last visited Dec. 12, 2014). It should be noted that many U.S. companies are actually in favor of including financial services in hopes that a race to the bottom will occur and it will loosen many of the Dodd-Frank regulations.

[21] Readout of Meeting between U.S. Trade Representative Michael Froman and EU Internal Market and Services Commissioner Michel Barnier, OFF. OF U.S. TRADE REP. (July 16, 2013), http://www.ustr.gov/about-us/press-office/press-releases/2013/july/readout-amf-barnier.

[22] JOHNSON & SCHOTT, *supra* note 18, at 1–2.

[23] *Directives for the Negotiation of the Transatlantic Trade and Investment Partnership between the European Union and the United States of America,* at para. 25, 27, GENERAL SECRETARIAT OF THE COUNCIL (June 17, 2013), http://www.s2bnetwork.org/fileadmin/dateien/downloads/EU-TTIP-Mandate-from-bfmtv-June17-2013.pdf.

[24] *See infra* Part I.B.

capital requirements), and restrict the extraterritorial application of financial regulations, among others."[25]

The financial crisis that began in the U.S. banking and financial services industries caused global financial instability on a scale not seen since The Great Depression. In response to this crisis, most developed countries have actively strengthened financial regulations aimed at preventing future collapses, albeit on different time tables and with different ideas on how to achieve long term financial stability.[26] Several international organizations and conferences have also been working on these issues as well. These include: the Basel Committee for Banking Supervision (Basel),[27] the Financial Markets Regulatory Dialogue (FMRD),[28] the International Organization of Securities Commissions (IOSCO),[29] the Financial Stability Board (FSB),[30] and the G-20.[31] While these forums are necessary and helpful, the urgency of the financial crisis has waned along with the urgency to cooperate.[32] As a result, many of the reforms suggested by these organizations are receiving less than emphatic support by the attending nations.[33]

TTIP might be able to succeed in financial reform where others have failed for several reasons. First, fewer participants means fewer competing interests and thus more ability to reach common ground. Second, the sheer weight of the entire TTIP agreement will help spur cooperation on contentious issues as neither side will be willing to toss out the entire agreement based on relatively minor disagreements in policy.[34] Third, the U.S. and EU are significant allies, thus the talks are less likely to break down over external issues.[35]

This is not to imply that TTIP lacks significant hurdles in achieving regulatory harmonization. For example, TTIP negotiations are expected to

[25] JOHNSON & SCHOTT, *supra* note 18, at 2.

[26] *See infra* Part II.

[27] JOHNSON & SCHOTT, *supra* note 18, at 2.

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.*; *see infra* Part II.C (for a more in depth analysis of the reforms currently being discussed in these forums).

[32] *See infra* Part II.C.

[33] *Id.*

[34] *See infra* Part VI.C.

[35] This is not without limitation, as Europe has recently threatened to end the talks if privacy issues are not addressed as a result of the NSA spying scandal. *NSA Spying Threatens to Undermine U.S. Foreign Policy,* Associated Press, Oct. 25, 2013, http://www.cbc.ca/news/world/nsa-spying-threatens-to-undermine-u-s-foreign-policy-1.2252893.

conclude in December 2014 at the very earliest, with many expecting them to go much longer.[36] Thus, the parties' internal regulations in conflict with the TTIP might have to be delayed, upsetting lawmakers on both sides.[37] Another major hurdle of regulatory harmonization is not infringing on the sovereignty of the states involved and the ability of their regulators to safeguard their own financial systems.[38]

In order to achieve significant and meaningful regulatory harmonization, TTIP will need to address a few major disparities that currently exist as well as provide a framework going forward that will ensure future consistency, transparency, and cooperation among regulators. TTIP will need to designate a common accounting system in order to eliminate the uneconomical redundancies that occur when multiple states require their own separate and distinct financial reporting methods. It also needs to identify loopholes in each side's regulations that companies currently exploit and then determine a joint solution in closing them. Another major area that needs to be addressed is providing safeguards against firms taking unnecessary risks that jeopardize the global financial system.

In order to achieve these goals, TTIP's framework should include guidelines for: the synchronization of existing regulations, regulatory policy initiation and development, effective regulatory implementation, cross-border supervision, high transparency standards, and enforcement of the harmonized regulations.[39] Each one of these will help to ensure regulatory harmonization between the U.S. and EU, as well as spur economic growth through increased access to transatlantic markets.[40] Consistency across borders is best achieved if cooperation starts at the beginning, facilitates the flow of information between parties, provides a mechanism for quick and effective implementation, and gives an effective mode of communication and transparency between regulators and industry.[41]

If successful, TTIP will have an immediate and significant global impact.[42] The partnership will significantly reduce costs associated with non-tariff trade

[36] JOHNSON & SCHOTT, *supra* note 18, at 2.

[37] *Id.* at 7.

[38] *Id.* at 2.

[39] INST. OF INT'L FIN., PROMOTING GREATER INTERNATIONAL REGULATORY CONSISTENCY 3–4 (June 2013).

[40] *See generally id.*

[41] *See generally id.*

[42] *See infra* Part VI.

barriers that currently hinder investment, trade, and therefore job opportunities.[43] As a result, TTIP could possibly boost the world out of its most recent economic downturn.[44] TTIP would reinforce the United States' and Europe's commitment to each other as critical partners and allies in the international community. Furthermore, TTIP could serve as the prominent example of global regulatory cooperation.[45] The EU and the U.S. would be the leaders in global financial regulation, forcing Asia and emerging markets to follow suit.[46]

TTIP also has potential negative impacts such as an inequitable distribution of costs and benefits.[47] Some critics say that it might derail contemporary efforts in the G-20 and Basel conventions and that the bilateral agreement will leave many stakeholders out with no input on the process.[48] Additionally, regulatory harmonization might slow the already sluggish regulatory process and prevent governments from reacting swiftly to future crises.[49] Despite these potential negative impacts, the advantages of including financial services in TTIP will greatly outweigh the disadvantages as long as negotiators take the right approach and do not cause a "race to the bottom" by eroding current regulation efforts.

This Comment will provide a brief background and history of the TTIP agreement and some of the debate surrounding the inclusion of financial services into the agreement. Then Part II will discuss how the current EU and U.S. financial regulations that are currently either being implemented or in the legislative process will not be supplanted by TTIP but instead will either be reinforced or made even stronger. Part III will shed light on the significant costs associated with inconsistent regulation and the overall savings that can be achieved through harmonization. Part IV identifies three major areas where harmonization can have an immediate and lasting effect on the U.S. and EU economies. Part V will provide a potential roadmap for achieving regulatory harmonization through TTIP. Part VI will discuss the global impact of TTIP, if it is successful in achieving harmonization, and the future of the financial

[43] CRS BRIEF, *supra* note 4, at 5.

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] For example, depending on what accounting system is approved, firms in the U.S. or EU could face significant conversion costs to become compliant. *See infra* Part IV.A.

[48] CRS BRIEF, *supra* note 4, at 5.

[49] JOHNSON & SCHOTT, *supra* note 18, at 2.

services sector. The Comment will conclude with a summary of the arguments made.

I. BACKGROUND

TTIP emerged from a summit in November 2011 after U.S. and EU officials established a High-Level Working Group (HLWG) in an effort to strengthen the transatlantic economic partnership.[50] This part will provide a basic history of TTIP's progression from inception to its current status, and a brief history of U.S. reluctance to include financial services in previous free trade agreements.

A. History of TTIP

The HLWG was tasked with identifying "policies and measures to increase U.S.-EU trade and investment to support mutually beneficial job creation, economic growth, and international competitiveness."[51] On February 11, 2013, the HLWG issued its final report recommending the immediate need for both sides to initiate formal domestic procedures necessary to launch negotiations on a comprehensive trade and investment agreement.[52] Two days later, the Obama administration and European leaders issued a joint statement announcing their intent to pursue the HLWG's recommendation.[53] One month later, on March 20, 2013, President Obama notified the U.S. Congress of his intent to enter into negotiations on a comprehensive trade and investment agreement with the European Union.[54] On June 17, 2013, President Obama and European leaders announced the first round of negotiations for TTIP would take place during the week of July 8, 2013.[55] The second round of negotiations

[50] U.S.-EUR. UNION HIGH LEVEL WORKING GRP. ON JOBS AND GROWTH, FINAL REPORT 1 (Feb. 11, 2013), *available at* http://trade.ec.europa.eu/doclib/docs/2013/february/tradoc_150519.pdf.

[51] *Id.*

[52] *Id.*

[53] *U.S., EU Announce Decision to Launch Negotiations on a Transatlantic Trade and Investment Partnership*, OFF. OF THE U.S. TRADE REP. (Feb. 13, 2013) (statement from U.S. President Barack Obama, Eur. Council President Herman Van Rompuy, and European Comm'n President José Manuel Barroso), *available at* http://www.ustr.gov/about-us/press-office/press-releases/2013/february/statement-US-EU-Presidents.

[54] Letter from Demetrios Marantis, Acting U.S. Trade Representative, to Cong. (Mar. 20, 2013), *available at* http://www.ustr.gov/about-us/press-office/press-releases/2013/march/administration-notifies-congress-ttip.

[55] U.S. President Barack Obama, U.K. Prime Minister David Cameron, and Eur. Comm'n President José Manuel Barroso, Remarks on the Transatlantic Trade and Investment Partnership (Jun. 17, 2013), *available at*

was planned for the week of October 2, 2013; however, due to the U.S. government shutdown, the talks were postponed until the week of November 11, 2013, followed by the third round during the week of December 16, 2013.[56] The fourth, fifth, sixth, and seventh rounds occurred during the weeks of March 10, 2014; May 19, 2014; July 14, 2014; and September 29, 2014, respectively.[57] The eighth round has not been scheduled as of November 12, 2014.

After the first week of closed negotiations, officials from both sides began making remarks regarding the inclusion of financial services in the negotiations. EU Internal Markets Commissioner, Michael Barnier, began pushing to include financial regulation in trade talks to avoid haphazard deal making with different U.S. regulators.[58] However, Treasury Secretary, Jacob Lew "emphasized that prudential and financial regulatory cooperation should continue in existing and appropriate global fora, such as the G-20, Financial Stability Board, and international standard setting bodies, consistent with existing ambitious international timelines," a Treasury spokeswoman said.[59] Secretary Lew also said, "we will not let the pursuit of international consistency force U.S. to lower our standards."[60] Mr. Barnier countered by saying he thought the "reticence on the side of the U.S. Treasury" to include financial services in trade talks was not so much an issue of substance but rather of "the division of competences between the Treasury and the independent regulators in the United States."[61]

This rift started a flurry of speculation over whether financial services would ultimately be included in the TTIP negotiations with no real resolution on the matter as of November 2014. However, other U.S. officials have since issued statements regarding their support for the inclusion of financial services into TTIP. On October 30, 2013, U.S. Senator Orrin Hatch stated, "no sector

http://www.whitehouse.gov/the-press-office/2013/06/17/remarks-president-obama-uk-prime-minister-cameron-european-commission-pr.

[56] Press Release, Office of the U.S. Trade Representative, Announcement of Next Round of Transatlantic Trade and Investment Partnership Negotiations (Nov. 2013).

[57] *Readouts from T-TIP Negotiating Rounds,* Office of the US Trade Representative, http://www.ustr.gov/trade-agreements/free-trade-agreements/transatlantic-trade-and-investment-partnership/readouts (last visited Nov. 13, 2014).

[58] Jamila Trindle and Tom Fairless, *U.S. Wants Fin. Services Off Table in EU Trade Talks*, WALL ST. J., (July 15, 2013), http://online.wsj.com/news/articles/SB10001424127887323394504578607841246434144.

[59] *Id.*

[60] Jack Lew, Sec'y, U.S. Dep't Treasury, Remarks at the 2013 Delivering Alpha Conference Hosted by CNBC and Institutional Investor (July 17, 2013).

[61] Trindle, *supra* note 58.

should be excluded from our efforts to enhance regulatory convergence, including financial services." Further, he went on to say, "[g]iven the central importance of the financial sector to every other aspect of industrialized economies, I do not see how financial services regulation can be excluded from a meaningful T-TIP agreement."[62] European officials have also stepped up their rhetoric regarding the inclusion of financial services in TTIP. UK Deputy Prime Minister Nick Clegg said, "I think it's essential that financial services [are] included in a comprehensive TTIP deal."[63] Clegg went on to say that since the crash in 2008 the regulations created in an effort to safeguard the world economy have diverged instead of converged, which leaves the whole system more fragile.[64] TTIP, he said, is needed to remedy this divergence and help to make the system more stable.[65] With the increased pressure from Europe and the support of key officials such as Sen. Hatch, financial services are gaining ground to be included in TTIP. However, prior to the sixth round, the U.S. had still not budged in its stance of excluding financial services.[66] As a result, the EU stated its increased pressure by insisting that any issues regarding market access to financial services in the EU are also off the table.[67] While the progress on including financial services in the TTIP agreement has been less than ideal, it still remains a possibility.

B. Historical Treatment of Financial Services in U.S. FTAs

The historical treatment of financial services in FTAs plays an important part as to why U.S. officials have been reluctant to include the harmonization of regulations within TTIP. Unlike other traditional FTAs—such as the Canada-U.S. Free Trade Agreement (CUSFTA),[68] the North American Free Trade Agreement (NAFTA),[69] the Korea-US Free Trade Agreement (KORUS),[70] and the General Agreement on Trade in Services (GATS) from the World Trade Organization (WTO)[71]—TTIP hopes to increase market

[62] *The Transatlantic Trade and Inv. P'ship: Achieving the Potential: Hearing Before the S. Comm. on Fin.,* 113th Cong. (2013) (statement of Sen. Orrin Hatch, Member, S. Comm. on Fin.).

[63] Nick Clegg, U.K. Prime Minister, TTIP and the Fifty States Conference (Sept. 24, 2013).

[64] *Id.*

[65] *Id.*

[66] James Crisp, *Financial services off the table at next round of TTIP talks*, EURACTIV (June 16, 2014), http://www.euractiv.com/Parts/euro-finance/financial-services-table-next-round-ttip-talks-302808.

[67] *Id.*

[68] Canada-U.S. Free Trade Agreement, Jan. 2, 1988, 27 I.L.M. 293 [hereinafter *CUSFTA*].

[69] NAFTA, *supra* note 13.

[70] KORUS, *supra* note 13.

[71] General Agreement on Trade in Services, Dec. 15, 1993, 33 I.L.M. 1167 [hereinafter GATS].

access and eliminate non-tariff trade barriers through the harmonization of regulations.[72] Whereas in the past, FTA provisions on financial services were merely an extension of most favored nation (MFN) treatment.[73] They allowed market access but did not remove or even attempt to reconcile differing policies that proved to be significant barriers to entry into the market because of their cost to foreign firms.[74] For example, in CUSFTA the financial services "terms allowed mutual access to each other's markets, subject to 'normal regulatory and prudential considerations' (Article 1702, paragraph 4)."[75] In other words, CUSFTA merely let U.S. and Canadian financial firms operate in one another's markets, but there was no attempt whatsoever to harmonize regulations in each market.

NAFTA, ratified in 1994, was the first to even provide the opportunity for regulatory harmonization though it did not require it.[76] Article 1406:2 provided that "[a] party may recognize prudential measures of another Party or of a non-Party,"[77] but Article 1410:1 allowed prudential measures by each country to strengthen the safety, integrity, and stability of financial firms and the broader financial system.[78] Both GATS and KORUS followed in the spirit of NAFTA by providing discretionary harmonization.[79] GATS and KORUS, while including more extensive MFN and national obligations, specifically carry a very broad prudential exemption that effectively renders any of these obligations moot with any vague reasoning for safety, soundness, integrity, or financial responsibility to individual institutions.[80] Again, although one Party has claimed its institutions are safe due to its own regulations, it does not prevent the other Party from imposing its own regulations on the other Party's companies.[81]

By following the example set in NAFTA in its other FTAs, the U.S. has been able to safeguard its financial industries by requiring more stringent regulations within the U.S. that place U.S. firms in a better position in regards to compliance, because international firms may lack restrictions in their home

[72] JOHNSON & SCOTT, *supra* note 18, at 4.
[73] *Id.* at 3.
[74] *Id.*
[75] *Id. See* CUFTA, *supra* note 68.
[76] NAFTA, *supra* note 8.
[77] *Id.* at 658.
[78] *Id.* at 659.
[79] *See generally* GATS, *supra* note 71; KORUS, *supra* note 13.
[80] JOHNSON & SCOTT, *supra* note 18, at 3.
[81] *Id.*

country.[82] Additionally, U.S. firms can more easily open shop in a country with fewer regulations. In other words, the NAFTA and GATS model for financial services has been extremely favorable to the U.S. and its firms, which is one significant reason for the reluctance in broader regulatory harmonization.[83] However, with TTIP, the U.S. is not dealing with developing countries' immature regulatory schemes. Instead, it is dealing with Europe's mature and robust regulatory scheme, which contains some standards that might be considered even stronger than the U.S.'s. As a result, with TTIP, the U.S. has an opportunity not only to increase its GDP but also its chance to become the de facto world standard by harmonizing its regulations with the EU.

II. CURRENT U.S. AND EU FINANCIAL REGULATION

Since the crash of 2007, the U.S. and the EU have implemented or are in the process of implementing sweeping financial regulations aimed at safeguarding against future global crises. This Part will broadly summarize the main pieces of legislation that are particularly relevant to the harmonization of financial regulations. First, it will discuss major changes in U.S. legislation and in particular the Dodd-Frank Act. Second, it will highlight the reforms taking place within the EU. Last, it will discuss the reforms that are being discussed in other global forums, such as the G-20.

A. US Regulations

The U.S. passed the Dodd-Frank Act in 2010.[84] The Dodd-Frank Act implements a variety of changes. The Act creates the Consumer Protection Financial Bureau to ensure consumers get clear and accurate information when purchasing a variety of financial products.[85] Dodd-Frank creates the Financial Stability Oversight Council (FSOC) to look out for the next big problem and address systemic risks within the financial industry.[86] The Act ends "Too Big to Fail" bailouts by explicitly stating that taxpayers will not be responsible for

[82] *See generally* CUSFTA, *supra* note 68; GATS, *supra* note 71; KORUS, *supra* note 13.

[83] JOHNSON & SCOTT, *supra* note 18, at 4.

[84] Wall Street Reform and Consumer Protection Act, 12 U.S.C.A. § 5301 (2010).

[85] STAFF OF S. COMM. ON BANKING, 111TH CONG., BRIEF SUMMARY OF THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT 2–3 (July 1, 2010), *available at* http://www.banking.senate.gov/public/_files/070110_Dodd_Frank_Wall_Street_Reform_comprehensive_summary_Final.pdf.

[86] *Id.* at 3–4.

bailing out failing financial companies.[87] Dodd-Frank implements the Volcker Rule to prohibit conflicts of interest between banks and hedge funds.[88] The FSOC can extend regulation to non-banks by requiring at-risk firms to submit to supervision by the Federal Reserve.[89] The Act creates transparency and accountability in the derivatives market by closing regulatory gaps, requiring central clearing, and creating a higher standard of conduct.[90] It reforms the mortgage industry by prohibiting unfair lending practices, ensuring the borrower's ability to pay, and establishing penalties for irresponsible lending.[91] Last, it empowers regulators to aggressively pursue fraud, and other misdeeds.[92] This list is by no means comprehensive. However, it highlights some of the larger provisions in the bill. The majority of these changes have not been implemented as of July 2013.[93] In fact, the U.S. House of Representatives has passed eight bills in this year alone that would roll back certain provisions in the Dodd-Frank Act.[94]

B. EU Regulations

In response to the financial crisis, the European Commission established the High-Level Expert Group on Bank Structural Reform in 2012, whose findings became known as the Liikanen Report.[95] The EU has introduced the European Market Infrastructure Regulation (EMIR), increasing the stability of the derivative markets,[96] and the Capital Requirements Directive and Regulation (CRD IV), raising capital requirements to levels suggested in BASEL III.[97] Other reforms are in the process of being finalized, such as the

[87] *Id.* at 5–7.

[88] *Id.* at 5.

[89] *Id.*

[90] *Id.* at 8.

[91] *Id.* at 8–9.

[92] *Id.* at 2.

[93] *See* Donna Borak, *Regulators Still in Dodd-Frank Quagmire Three Years Later*, AM. BANKER (July 19, 2013), *available at* http://www.americanbanker.com/issues/178_139/regulators-still-in-dodd-frank-quagmire-three-years-later-1060744-1.html.

[94] Eric Lipton, *House Votes to Repeal Dodd-Frank Provision*, N.Y. TIMES (Oct. 31, 2013), *available at* http://dealbook.nytimes.com/2013/10/30/house-passes-bill-on-derivatives/?_r=0.

[95] ERKKI LIIKANEN ET AL., HIGH-LEVEL EXPERT GROUP ON REFORMING THE STRUCTURE OF THE EU BANKING SECTOR: FINAL REPORT 1 (Feb. 2012), *available at* http://ec.europa.eu/internal_market/bank/docs/high-level_expert_group/liikanen-report/final_report_en.pdf.

[96] *Id.* at 74.

[97] *Id.* at 69.

Markets in Financial Instruments Directive II (MiFID II),[98] increasing consumer protection,[99] and the proposed directive on Bank Recovery and Resolution (BRR),[100] addressing "Too Big To Fail" recovery options.[101] Additionally, the UK has developed its own version of the Volcker Rule in its "Vickers Report" which is now part of the Financial Services ("Banking Reform") Act 2013.[102] Implementation of the major recommendations of the Liikanen Report was adopted by the European Commission in the Proposal on Banking Reform on January 29, 2014.[103] Many of the rules in the Proposal are variations on the U.S. and UK rules that have been implemented. These include a version of the Volker Rule, prohibiting proprietary trading,[104] a rule to eliminate "Too Big To Fail" banks,[105] rules regulating "Shadow Banking,"[106] and a rule to potentially separate certain trading activities.[107] As the EU just passed this proposal, it is in an earlier stage in implementing its financial reforms in response to the crisis. The majority of the proposal's provisions will enter into effect in June 2015, but some will not be implemented until 2018.[108] The EU is on a similar path as the U.S. and still has time to catch up, as long as the U.S. continues to delay the implementation of the major provisions of the Dodd-Frank Act.

[98] Directive 2014/65/EU, of the European Parliament and of the Council of 15 May 2014 On Markets In Financial Instruments And Amending Directive 2002/92/EC and Directive 2011/61/EU, 2014 O.J. (L 173) (349).

[99] LIIKANEN ET AL., *supra* note 95, at 74.

[100] Directive 2014/59/EU, of the European Parliament and of the Council of 15 May 2014 Establishing a Framework for the Recovery and Resolution of Credit Institutions and Investment Firms and Amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council, 2014 O.J. (L 173) 191.

[101] LIIKANEN, *supra* note 95, at 74.

[102] THE INDEPENDENT COMMISSION ON BANKING: THE VICKERS REPORT, 2013, H.C. SN06171, at 7 (U.K.).

[103] *Proposal for a Regulation of the European Parliament and of the Council on Structural Measures Improving the Resilience of EU Credit Institutions*, COM (2014) 43 final (Jan. 29, 2014).

[104] *Id.* at 7–8.

[105] *Id.* at 52.

[106] *Id.* at 3. "Shadow Banking" is defined as "the system of credit intermediation that involves entities and activities outside the regular banking system." *Id.*

[107] *Id.* at 8.

[108] *Id.* at 12.

C. International Forums' Reforms

Both the U.S. and the EU are members of the G-20, Basel, FMRD, FSB and IOSCO.[109] These forums have been working toward global financial reform.[110] While some international cooperation is occurring, the urgency of the financial crisis has waned and with it so has the urgency to cooperate.[111] As a result, many of the reforms suggested by these forums are receiving less than emphatic support by the attending nations.[112] The reforms that have been supported and passed by these organizations have significantly less teeth than the reforms being implemented by the U.S. and the EU. For example, the Basel III agreement set minimum requirements for equity capital using standardized measures.[113] It also allowed countries to raise requirements for firms considered to be of systemic importance.[114] However, the U.S. has already adopted a leverage ratio above the Basel III minimum.[115] Additionally, as a report to the G-20 by the BCBS in October 2012 acknowledged, "there is a high probability that just six of the 29 global systemically important banks identified by the FSB in November 2011 will be subject to Basel III regulations from the globally agreed start date."[116]

Though precedent was made in 2008 with thirty-six recommendations adopted by G-20 leaders was made through the agreed international agenda for action that overlooks the entire financial system, [117] as FSB noted,

> [d]elays in adopting legislative and regulatory frameworks are contributing to regulatory uncertainty, which remains a significant obstacle to further market implementation of the G20 commitments. This uncertainty is compounded by the potential for conflicts, inconsistencies, duplication and gaps in the application of jurisdictions' rules to cross-border activity. The incomplete state of

[109] *See id.* at 2, *Basel Committee Membership,* BANK FOR INT'L SETTLEMENTS (Nov. 17, 2014), http://www.bis.org/bcbs/membership.htm, *Ordinary Members of IOSCO,* OICU-IOSCO (Nov. 17, 2014), http://www.iosco.org/lists/display_members.cfm?alpha=u&orderBy=jurSortName&memid=1, *Associate Members of IOSCO,* OICU-IOSCO (Nov. 17, 2014), http://www.iosco.org/lists/display_members.cfm?alpha=e&orderBy=jurSortName&memid=2, Press Release, U.S. Dep't of the Treasury, U.S.–EU Financial Markets Regulatory Dialogue Joint Statement (July 11, 2014), http://www.treasury.gov/press-center/press-releases/Pages/jl2564.aspx.

[110] *Id.*

[111] INST. OF INT'L FIN., *supra* note 39, at 1.

[112] *Id.* at 2.

[113] JOHNSON & SCHOTT, *supra* note 18, at 8.

[114] *Id.*

[115] *See id.*

[116] INSTITUTE OF INT'L FIN., *supra* note 39, at 14.

[117] *Id.* at 13.

> development of regulatory proposals in most jurisdictions, including the lack of preliminary guidance in almost all FSB jurisdictions regarding the approach to cross-border activity, makes it more difficult to assess the extent to which any such cross-border issues in regulatory reforms might frustrate jurisdictions' collective achievement of the G20 goals.[118]

Thus, while these international organizations have certainly made progress never before seen on the global or international level, the progress is not on the scale or the timeline needed to ensure global financial stability. In fact, many of the reforms identified by these organizations are not expected to be fully implemented until 2019.[119] Secretary Lew's comments after the first round of TTIP discussions are somewhat surprising considering the lack of actual results achieved in these international forums.[120] His overall commitment to completing the Dodd-Frank reforms by the end of 2013 is expected, although at this point not likely. Instead of viewing TTIP as a threat to the implementation of Dodd-Frank, Secretary Lew could have seen it as an opportunity to implement the much stronger Dodd-Frank rules on a much larger scale. If TTIP negotiators were willing to have a race to the top (instead of the bottom), the U.S. and the EU could agree on a framework that would result in the strengthening of financial reforms for both sides. TTIP could then provide the negotiating power in these other international forums that could impose a stronger approach and a quicker timeline than currently exists.

III. COSTS OF INCONSISTENT REGULATION

The financial crisis underlined the significance of interdependent global markets and the need for international consistency in financial regulations. Inconsistency has proven to have significant costs across the board. Financial instability, increased costs to financial institutions, and increased costs to end users of the financial industry all occur due to inconsistencies in cross-border regulations.[121] Part III will discuss each of these costs in detail, which will help identify exactly what areas harmonization can help reduce significant costs in the financial services industry.

[118] FINANCIAL STABILITY BOARD, OTC DERIVATIVES MARKET REFORMS: FIFTH PROGRESS REPORT ON IMPLEMENTATION 4 (Apr. 15, 2013), *available at* http://www.financialstabilityboard.org/publications/r_130415.pdf.

[119] *See* INST. OF INT'L FIN., *supra* note 39, at 15.

[120] *See supra* Part I.

[121] *See* INST. OF INT'L FIN., *supra* note 39, at 9–11.

A. The Costs of Financial Instability

Inconsistencies in regulatory measures reduce capital, increase risk, and ultimately undermine the stability of the global financial market.[122] For example, international banks are currently forced to hold differing amounts of dedicated capital at many different locations across jurisdictions instead of being able to manage all branches from a centralized location.[123] This ends up reducing the amount of capital that can be introduced into the financial system.[124] Regulatory agencies face a much more difficult task in assessing the risks and vulnerabilities of both national and global markets due to diverging financial reporting requirements.[125] Additionally, the lack of cross-border interagency cooperation and coordination causes a serious deficit in detecting risks in international firms and the global market as a whole.[126] Most importantly of all, because financial crises are inevitable, the ability of national authorities to respond swiftly, decisively, and effectively to a global financial crisis is of paramount importance.[127] Unfortunately, inconsistency severely hinders this ability as can be evidenced by the ongoing fractured responses from countries around the world to the latest crisis nearly seven years later.[128]

B. Increased Costs to Financial Institutions

Inconsistent regulations serve as a significant barrier to entry into new markets for firms wanting to branch out internationally.[129] They cause significant increases in costs due to the need to comply with two or more different sets of rules,[130] giving domestic firms a distinct competitive advantage of lower operating costs.[131] For example, a U.S. company that only competes in U.S. markets only has to comply with the Generally Accepted Accounting Principles (GAAP) because that is the accounting standard in the U.S.,[132] whereas a firm that competes in both the EU and the U.S. must comply

[122] *Id.* at 15.

[123] *Id.* at 9.

[124] *Id.*

[125] *Id.* at 10.

[126] *Id.*

[127] *Id.*

[128] *See supra* Part II.

[129] *See* INST. OF INT'L FIN., *supra* note 39, at 9–12.

[130] *Id.* at 10.

[131] *Id.*

[132] Chris Dumont, *International Financial Reporting Standards: What You Need to Know*, INVESTOPEDIA (Oct. 23, 2014), http://www.investopedia.com/articles/fundamental-analysis/12/international-financial-reporting-standards.asp.

with GAAP and with International Financial Reporting Standards (IFRS).[133] This not only costs firms significant amounts to maintain two separate versions of their books but also hurts investors trying to reconcile the two sets of books.[134] As a result, international firms are not as competitive, and the inconsistent information could cause the firm to lose investors, widening the gap between domestic and international firms even more. Further, regulators' inconsistent responses to potential international conflicts of regulation can make it extremely difficult for firms to plan ahead.[135] Additionally, multiple reporting requirements often require more one type of IT or data collection system, which on their own have significant costs, but perhaps the biggest cost comes from the inability to accurately reconcile these systems, resulting in decisions based on imperfect or incomplete information.[136] All of these costs result in fewer firms participating in foreign markets, which results in lost opportunities and revenue for international firms.

C. Increased Costs to End Users

For end-users, insufficient consistency leads to reduced choice and higher costs. All the firms that decided to stay out of or leave foreign markets means less choice, reduced competition and higher prices for domestic consumers.[137] Investors face many of the same problems as consumers. They will have fewer choices in companies to invest in domestically along with the added problem of having to navigate multiple regulatory landscapes, accounting standards, and disclosure requirements of those international firms that do enter or stay in the market.[138] If firms have difficulty in reconciling their own information, investors have much more difficulty evaluating this information and making sound investments.[139] This results in less investment as a whole and again means higher costs for the funding that is available to firms.

[133] WORK PLAN FOR THE CONSIDERATION OF INCORPORATING INTERNATIONAL FINANCIAL REPORTING STANDARDS INTO THE FINANCIAL REPORTING SYSTEM FOR U.S. ISSUERS: FINAL STAFF REPORT 22, U.S. SEC. AND EXCH. COMM'N. (July 13, 2012) *available at* http://www.sec.gov/spotlight/globalaccountingstandards/ifrs-work-plan-final-report.pdf (providing an in depth comparison of the two systems) [hereinafter SEC STAFF REPORT].

[134] *See* INST. OF INT'L FIN., *supra* note 39, at 10.

[135] *Id.*

[136] *Id.* at 11.

[137] *Id.* at 10.

[138] *Id.*

[139] *Id.*

The IIF report aptly noted that, "[m]ore work needs to be done to assess the magnitude of these costs and their individual and cumulative impact but even without such analysis, it is clear that these effects are at the very least high, undesirable, and a deadweight loss to national economies and the global economy."[140] International regulatory inconsistency ultimately causes systemic inefficiencies in the financial services marketplace hurting everyone except the protected domestic firms who have no interest in international expansion. Harmonization of regulations through TTIP will help to eliminate and reduce these inefficiencies which will boost both the domestic and global economies for years to come.

IV. MAJOR AREAS THAT NEED HARMONIZATION

Part III addressed the costs of divergent regulations on trading partners. Part IV will focus on specific areas of regulation that if harmonized could drastically reduce those costs. The first area that needs harmonization is a common accounting standard. The second involves closing existing loopholes. Finally, the third area where harmonization is drastically needed is safeguarding against unnecessary risks. If TTIP can address these major issues and provide a framework for the future, it will make a serious impact on global financial stability, solidify the U.S. and EU positions in the global economy as the standard setters, and provide additional benefits discussed in further detail in Part VI.

A. Convergence into a Single Accounting Standard

Two major accounting standards currently exist in the modern financial world.[141] GAAP is only used as a regulatory standard in the U.S.,[142] but because of the U.S. domination in global financial services, it is an absolutely necessary standard for firms wishing to compete in U.S. markets and those wishing to entice American investors.[143] The IFRS on the other hand is an international standard that was created by the International Accounting Standards Board (IASB), an independent organization comprised of sixteen

[140] *Id.* at 11.

[141] *See supra* Part III (discussing GAAP and IFRS).

[142] Dumont, *supra* note 132.

[143] SEC STAFF REPORT, *supra* note 133.

members from various nationalities including the U.S. and EU.[144] The IFRS has been adopted by more than 100 countries, including all of those within the EU.[145] While many similarities exist between the two standards, there are also significant differences that can result in large disparities in reporting income and expenses.[146] For example, the IFRS does not allow certain inventory methods, and certain development costs must be capitalized as opposed to expensed under GAAP.[147]

As mentioned in Part III, divergence in accounting standards is a major cost and burden to the global financial industry. Not only does it result in additional costs to international firms, it significantly hinders investors' ability to properly evaluate firms in other markets.[148] Since 2002, the IASB and the U.S. Financial Accounting Standards Board (FASB)[149] have been working together toward achieving convergence between IFRS and GAAP.[150] The G-20 reaffirmed this commitment to convergence in January 2013, when it called on standard setters to "set out by the end of 2013 their plans for achieving convergence on high-quality standards."[151]

The G-20, however, is not a binding organization, and as such, the accounting-standard push has hit a wall with the U.S.[152] In July 2013, the U.S. Securities and Exchange Commission (SEC) released its final staff report on global accounting-standard convergence.[153] In its report, the SEC staff cited several areas in which the accounting approaches diverge, such as impairment models for property, plant, and equipment, as well as inventory and intangible assets.[154] The significant expense that both large and small companies could

[144] *About the IFRS Foundation and IASB*, IFRS, http://www.ifrs.org/The-organisation/Pages/IFRS-Foundation-and-the-IASB.aspx (last visited Oct. 30, 2014); *see also Members of the IASB*, IFRS.ORG, http://www.ifrs.org/About-us/IASB/Members/Pages/Members-of-the-IASB.aspx (last visited Oct. 30, 2014).

[145] Paul Pacter, *Global Accounting Standards—From Vision to Reality*, THE CPA J. 6 (Jan. 2014), http://www.ifrs.org/Alerts/Publication/Documents/2014/CPA_Journal_Global_Accounting_Standards_January_2014.pdf.

[146] *See* SEC STAFF REPORT, *supra* note 133, at 14–17.

[147] *Id.*

[148] *See supra* Part III.

[149] The FASB is the governing body in charge of setting the standards in GAAP. *Facts about the FASB,* FASB, http://www.fasb.org/jsp/FASB/Page/PartPage&cid=1176154526495 (last visited Oct. 29, 2014).

[150] *Convergence between IFRSs and U.S. GAAP,* IFRS, http://www.ifrs.org/Use-around-the-world/Global-convergence/Convergence-with-US-GAAP/Pages/Convergence-with-US-GAAP.aspx (last visited Oct. 29, 2014).

[151] INST. OF INT'L FIN., *supra* note 39, at 16.

[152] SEC STAFF REPORT, *supra* note 133.

[153] *Id.*

[154] *Id.* at 14–17.

incur in any switch from GAAP to IFRS was also a sticking point.[155] The staff noted, "[m]any of the issuers indicated that the costs of full IFRS adoption could easily be among the most significant costs ever required from an accounting perspective."[156]

The EU should use TTIP to make the U.S. commit to the IFRS. In general, TTIP negotiations on financial services should not focus on specific regulatory measures, as they are too complex and detailed for this type of agreement. However, the accounting standard is one specific regulatory measure that definitely should be included in the negotiations. TTIP should be used to force the SEC's hand in the matter; even though the initial conversion cost for U.S. firms may be high, the overall net gain to the U.S. economy will be much greater.

B. Closing Loopholes in Existing Financial Regulations

Both parties have loopholes in their existing regulatory regimes that have been exploited over the years, and as long as there are regulations, lawyers will keep finding new loopholes to jump through that game the system. The financial crisis of 2008 is a prime example of firms exploiting gaps in regulatory scheme. Financial institutions developed new products that, while not illegal, helped them mask their risky investments and then sold them to unwitting third parties.[157] Both the EU and the U.S. have passed legislation and are currently in the process of implementing new rules that will hopefully prevent this from occurring in the future.[158] Using TTIP to harmonize these new rules will provide regulators with the best opportunity to prevent future abuses. First, harmonization will prevent firms from jurisdictional shopping between the two largest financial markets in the world. For example, if the EU implements a rule that is more favorable to financial firms with less protection for the consumer, then many large firms might relocate to Europe; in an effort to regain competiveness, the U.S. would have to lower its standards. This back and forth would continue until it was a "race to the bottom," resulting in

[155] *Id.* at 3.

[156] *Id.*

[157] Although illegal actions definitely contributed to the collapse, some of the methods used by these institutions were completely legal under the regulatory system at that time. *See Origins of the Financial Crisis: A Crash Course,* ECONOMIST (Sept. 7, 2013), *available at* http://www.economist.com/news/schoolsbrief/21584534-effects-financial-crisis-are-still-being-felt-five-years-article (outlining the many causes of the crash, both legal and illegal).

[158] *See supra* Part II.

effective deregulation.[159] However, harmonization with the full intent to keep the best parts of each side's new regulations will result in stronger, safer, and more effective regulations.

C. Safeguarding Against Unnecessary Risk Taking

As previously mentioned in Part II, financial institutions made extremely risky investments on such a large scale, that the entire world economy was brought to its knees when those investments failed.[160] While the current reforms being implemented are addressing some of those risks,[161] it will only be a matter of time before firms find loopholes in those regulations and exploit them. Harmonization and cooperation among the regulators in the U.S. and the EU should be able to identify and manage future risks and loopholes better than without such action. One, they will have more resources combined than either will ever have on its own. Two, they will have only one set of harmonized rules to analyze as opposed to two. Three, they will be able to share best practices that will make them more efficient at doing so.

V. HOW TO ACHIEVE REGULATORY HARMONIZATION THROUGH TTIP

The real challenge that TTIP faces in harmonizing financial regulations is how to implement a process that will yield meaningful cooperation between the U.S. and the EU without infringing on the sovereignty of either party. Part V will discuss potential solutions that the TTIP negotiators should consider when drafting the final agreement. The Institute of International Finance (IIF) developed a sixteen-point plan that would facilitate greater international regulatory consistency.[162] This Part draws on this plan and applies many of the concepts in the specific context of TTIP instead of a general global manner. First, it will discuss ways in which TTIP can facilitate the synchronization of existing regulatory policies. Second, it will establish guidelines for regulatory policy initiation and development. Third, it will provide a method for regulatory implementation. Fourth, it will discuss possible avenues for cross-border supervision. Fifth, it will discuss the need for transparency standards. Last, it will discuss the enforcement mechanism.

[159] INST. OF INT'L FIN., *supra* note 39, at 8; *see also* JOHNSON & SCHOTT, *supra* note 18, at 6–7.

[160] *See* Origins of the Financial Crisis, *supra* note 157.

[161] *See supra* Part II.

[162] INST. OF INT'L FIN., *supra* note 39, at 1.

A. *Synchronization of Existing Regulatory Policies*

TTIP should create a bilateral independent commission (BIC)[163] charged with evaluating each party's existing financial regulations and the disparities between the two. This commission should consist of top regulators from both sides and should have an aggressive schedule of deadlines to ensure progress in major areas of divergence. Additionally, this committee should identify key loopholes in their regulations that firms exploit and come up with a joint solution to close them. This commission should also serve as the starting point for new regulations and standards. BIC should also identify appropriate standard setters for the various areas of financial regulations such as the IASB for the accounting system.

TTIP should get a binding commitment from the U.S. to convert to the IFSR on a strict timeline that will provide adequate time for the conversion. Negotiating this directly within the TTIP agreement will provide the EU with more negotiating power and will not allow such a large and important divergence to continue. The U.S. is on the IASB and thus can lobby for changes in the rules through the appropriate forum during its implementation phase.[164] If the U.S. agrees to do this then it may bargain for a more favorable stance elsewhere in the agreement that might be able to subsidize the transition.

B. *Guidelines for Regulatory Policy Initiation and Development*

"Consistency is easiest to deliver if right from the start there is a common analyses of the risks and how to address them rather than after national regulators have developed their own approaches."[165] BIC should establish best practices guidelines for national regulators to use in identifying and addressing emerging risks and concerns.[166] Not only will this foster and encourage cooperation between the U.S. and EU regulators, but it will also enhance

[163] This acronym serves only as a generic placeholder name for the hypothetical commission and is not meant to represent any existing entity or organization.

[164] "The International Accounting Standards Board (IASB) is an independent group of 14 experts with an appropriate mix of recent practical experience in setting accounting standards, in preparing, auditing, or using financial reports, and in accounting education. Broad geographical diversity is also required." International Accounting Standards Board, IFRS, *http://www.ifrs.org/About-us/IASB/Members/Pages/Members-of-the-IASB.aspx* (last visited Nov. 3, 2014). Three of these experts are from the U.S., two former SEC employees and one former FASB member. *Id.*

[165] INST. OF INT'L FIN., *supra* note 39, at 20.

[166] *Id.* at 19.

communication through a common regulatory language and approach to problems. When these concerns arise, BIC should answer the following questions to determine the appropriate remedy: is a common or national approach needed; what is the regulation's priority; and what are the impacts of the proposed regulation.[167] If it is determined that a national approach is needed instead of a common approach, BIC should serve as an intermediary between the two national systems to mitigate possible divergences and assess any external impacts of the regulation.[168] BIC and national regulators should work towards regulations that effectively balance international consistency and local flexibility.[169] This balance should be considered when determining whether a minimum or maximum harmonization approach is taken with respect to the proposed regulation.[170] All proposed regulations or standards should have comprehensive impact assessments completed to determine the effects on both the micro- and macro-economic levels.[171] BIC should set appropriate deadlines for agreement based on the urgency and priority of proposed regulations.[172]

C. Regulatory Implementation

BIC should provide national agencies with detailed interpretations that facilitate mutual understanding and recognition between jurisdictions.[173] This will help to prevent inconsistent outcomes across jurisdictions and eliminate uncertainty within international firms. National regulators must buy into the system. They must communicate and coordinate with BIC throughout the implementation process in order to prevent unilateral divergence.[174] If national regulators identify fundamental problems in international standards, they should notify BIC of the issue and work together to find appropriate solutions that preserve cross-border consistency as much as possible.[175] If it is determined that exceptions or extensions need to be unilaterally applied then they should be approached with a collaborative effort to limit the divergence. BIC should create a system to catalog all financial services regulations,

[167] *Id.*

[168] *Id.* at 20.

[169] *Id.*

[170] *Id.*

[171] *Id.*

[172] *Id.*

[173] *Id.* at 22.

[174] *Id.* at 23.

[175] *See id.*

interpretations, and standards of all parties.[176] This system must be easily accessible by national regulators and will help to identify and prevent conflicting regulations. National regulators and BIC should work together to identify and report any material inconsistencies between national and international standards.[177] BIC should have a forward looking approach that focuses on long-term regulatory consistency that will safeguard and promote sustainable financial prosperity.[178]

D. Cross-border Supervision

In order to effectively detect risks and coordinate swift and appropriate responses to these risks, regulators must have access to data about both a firms local and international operations.[179] Without this information, a firm might be able to hide significant risks from one or any number of regulators. Because of this potential to mask risk, it is imperative that BIC identify any unnecessary barriers to cross-border sharing of data and information between regulators.[180] However, BIC should place an emphasis on protecting proprietary information and high data protection standards, while eliminating excessive barriers to data sharing between regulators.[181] Regulators must communicate with each other and BIC to ensure decisions in any jurisdiction are understood by all, so as to promote coordination and consistency.[182] BIC should be able to appoint crisis management groups that consist of top regulators in the various areas of financial services.[183] These groups should meet regularly to identify potential crisis areas and develop preventative and reactionary plans to promptly correct financial crises. BIC should periodically examine the effectiveness of inter-agency communication and address any problem areas if they arise.[184]

E. Transparency Standards

Because TTIP would be the first agreement of its kind to achieve such a high level of regulatory harmonization, transparency in rule-making,

[176] *See id.*
[177] *See Id.*
[178] *See id.*
[179] *Id.* at 25.
[180] *Id.*
[181] *Id.*
[182] *Id.*
[183] *See id.*
[184] *See id.*

implementation, and enforcement is absolutely necessary.[185] In order to preserve an appropriate level of transparency, most actions of both national regulators and BIC should be within the public purview and subject to scrutiny. Throughout the regulatory and supervisory process, BIC should be open to input from industry leaders, consumers, and other stakeholders.[186] Indeed, BIC should have regular meetings with industry advisory committees, consumer protection groups, and national lawmakers to discuss economic and regulatory issues.[187] Additionally, BIC should have continuous interaction with other global standard setters such as the G-20, BASEL, and others.[188] This will not only help it stay on top of other global trends but also help to exert its influence on those trends.

F. Enforcement

Enforcement of these regulations should follow the procedure of each party's established court system. A collaborative effort to harmonize mutually beneficial regulations will not infringe on nations' abilities to enforce their own laws, because the harmonization is not all-encompassing. A collaborative effort to harmonize mutually beneficial regulations and will not infringe on the ability of nations to enforce their own laws. Therefore, all enforcement actions must be solely up to the party whose regulation was violated. If a firm violates regulations in multiple jurisdictions, then it can be held liable in every jurisdiction.

If followed, the six suggestions could provide an adequate base for regulators to effectively harmonize U.S. and EU financial regulations in a timely manner so that gains discussed in the next section can be realized. These are mere suggestions, however, and are by no means the only way to go pursue harmonization. The negotiation process will surely foster other innovative and effective options for successfully harmonizing regulations. This Part shows a potential path towards realizing significant gains through the reduction of non-tariff barriers.

[185] *Id.* at 26.

[186] *Id.* at 26–27.

[187] *See id.*

[188] *See supra* Part II.C.

VI. Global Impact if TTIP Is Successfully Negotiated and Ratified

TTIP will provide wide-ranging and lasting effects on the global economy, the global power and political structure, as well as substantial gains to individuals throughout the U.S. and the EU. Part VI will discuss economic gains to the U.S. and EU as a result of harmonization in the financial industry, then address the impact to individual companies, investors, and consumers in the U.S. and EU. Next, it will look at the impact on the US/EU political landscape and how that will affect the rest of the global political arena. Finally, Part VI will discuss some of the opposing arguments that critique the impacts of TTIP.

A. Economic Gains for the U.S. and EU

In terms of the economic impact, a variety of studies have been completed that project the overall impact to the U.S., EU, and global economies. One of particular note is a study by the Centre for Economic Policy Research (CEPR), a leading independent pan-European economic research organization.[189] The CEPR study falls very near the middle of all studies in terms of projected economic gains.[190] The CEPR predicts that TTIP will increase the size of the EU economy by €120 billion (0.5% of GDP) and the U.S. economy by €95 billion (0.4% of GDP).[191] These increases would be a permanent increase that would occur every year.[192] These increases are across all sectors that are currently included in the TTIP negotiations.[193]

The study goes in depth in all of the sectors identified. Specifically, for the financial services sector, the study points out that Non-Tariff Barriers (NTBs) (which include regulatory divergence) are the major cause for increased costs between the EU and the U.S.[194] The study found that the cost increases attributed to NTBs result in an effective tax rate of 11.3% in EU barriers to U.S. exports and 31.7% in U.S. barriers to EU exports.[195] The study goes on to

[189] EUROPEAN COMM'N, *Transatlantic Trade and Investment Partnership: The Economic Analysis Explained* 2 (Sept. 2013), http://trade.ec.europa.eu/doclib/docs/2013/september/tradoc_151787.pdf [hereinafter *Economic Summary*].

[190] *Id.* at 3.

[191] *Id.* at 2.

[192] *Id.*

[193] *See* CTR. FOR ECON. RESEARCH, *Reducing Transatlantic Barriers to Trade and Investment: An Economic Assessment* 56 (Mar. 2013), http://trade.ec.europa.eu/doclib/docs/2013/march/tradoc_150737.pdf [hereinafter *Economic Assessment*].

[194] *See id.* at 16.

[195] *Id.* at 19.

assume that if TTIP would be able to eliminate approximately 25% of these NTBs through harmonization and convergence of regulations, then financial services alone could add €3.8 billion to Europe's economy and €7 billion to the U.S. economy.[196] Again this study prefers to err on the side of caution, so these numbers could easily be significantly higher.[197]

B. Economic Gains for Individuals

Harmonization through TTIP will also have a significant impact on individuals. The overall impact will provide €545 to the average family in Europe and €655 per family in the United States.[198] Additionally, increased market access and lower costs to firms will increase competition and lower prices to everyone.[199] Harmonization will also increase wages and create jobs for both skilled and unskilled workers through an overall increase in demand for products, increased productivity, and growth of the economy.[200] It will provide smaller companies currently situated in solely the U.S. or EU to expand into the other's markets previously unattainable due to the high costs associated with divergent regulatory regimes.[201] Last, harmonization will provide investors more direct access to foreign markets as well as better information to make decisions. Because the U.S. and the EU are already each other's largest Foreign Direct Investment (FDI) nation, any potential increase in access to the other's market will have the potential to have a significant impact on FDI.[202]

C. Global Political Implications

TTIP can deepen the already substantial ties that bind the U.S. and the EU in the world's largest economic and strategic alliance.[203] TTIP, if successful, will serve to strengthen the U.S. commitment to the EU as a key ally in a world that is experiencing significant power shifts toward developing countries such

[196] *Id.* at 43–44 (multiplying the baseline shares in value added times the overall value added of €120 billion for EU and €95 billion for the US).

[197] *See* GABRIEL FELBERMAYR, ET AL., TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP (TTIP): WHO BENEFITS FROM A FREE TRADE DEAL? 24, 29 (2013) (predicting 4.95% and 3.27% increases in GDP in the EU and U.S. respectively), *available at* http://www.ged-shorts.org/wp-content/uploads/2013/06/Study-TTIP_final_ENG.pdf.

[198] Economic Assessment, *supra* note 193, at vii.

[199] *Id.* at 21–22 .

[200] *Id.* at 71.

[201] *See supra* Part III.

[202] Economic Assessment, *supra* note 193, at 90.

[203] CRS BRIEF, *supra* note 4, at 3, 5.

as China, Korea, and India.[204] This is particularly important as the Obama Administration has undergone some "rebalancing" toward the Asia-Pacific region and could be seen as declining significance for the EU in U.S. economic policy.[205] For example, the Trans-Pacific Partnership is another large FTA currently being negotiated between the U.S. and several countries in Southeast Asia and North America.[206]

TTIP could have a major impact on multilateral trade liberalization, allowing the two sides to define the rules in trade liberalization in the absence of progress in other global fora such as BASEL III, the IASB, and the G-20.[207] Because the U.S. and EU make up more than half of the world's GDP,[208] other countries will be forced to move toward convergence in regulations with these two super powers or risk being left out of two of largest markets in the world.[209] TTIP alone is projected to increase GDP in trading partners with the U.S. and EU by almost €100 billion.[210] In this specific instance, if other countries participate in the harmonization due to the downward economic pressure created by TTIP, then the overall global gains could far exceed these numbers.[211]

D. Critiques of TTIP

However, skeptics believe that TTIP will not provide the advertised economic and strategic gains claimed by its proponents. Trade skeptics believe that TTIP and other trade liberalization efforts such as NAFTA and TPP lead to an inequitable distribution of costs and benefits.[212] Specifically, they suggest the protectionist stance that free trade means adverse import competition for certain economic sectors which causes negative employment in these sectors.[213] While this argument may hold true for certain industries, the argument is actually about the distribution of wealth in an economy and not about the harmful effects of trade liberalization. As almost any free-market

[204] *Id.* at 5.

[205] *See id.*

[206] The White House Office of the U.S. Trade Representative, *The U.S. in the Trans-Pacific Partnership* (Nov. 2011), http://www.ustr.gov/about-us/press-office/fact-sheets/2011/november/united-states-trans-pacific-partnership.

[207] CRS BRIEF, *supra* note 4, at 3.

[208] *Id.* at 3.

[209] *Id.* at 5.

[210] Economic Summary, *supra* note 189, at 10.

[211] *Id.* at 10–11.

[212] *Id.* at 9.

[213] *See id.*

economist will argue, if the overall pie is larger, then everyone can have a larger piece.[214]

Global foreign relations could be seriously strained by TTIP. While the impact on the transatlantic relationship is generally seen as a positive step toward stronger relations, if the negotiations stall or produce results not seen as sufficiently ambitious, further questions could be raised about the strength of the U.S./EU relationship.[215] Additionally, TTIP could solicit backlash from those nations not included, especially if seen as a strategic move to weaken the economic positions of China and Russia. The partnership could help in further polarizing the political climate between these countries and the West. While this is a fair and valid argument, the global economy is so interconnected today that any backlash could cause severe and lasting damage to both China's and Russia's economies through decreased access to the world's major financial markets and decreased foreign direct investment from these countries.

TTIP, as an overarching free trade agreement, has the potential to create significant amounts of global wealth and prosperity.[216] It could provide the world with the needed stimulus to spur a new wave of economic growth and could finally put an end to this period of slow growth caused by the financial crisis of 2008. TTIP also has the potential to create a new standard in global cooperation and the harmonization of regulations. More specifically, the harmonization of financial services regulations within TTIP could provide the framework that will be the gold standard for regulating the financial industries worldwide. In harmonizing the U.S. system with the European system, TTIP might just be able to create a sustainable financial industry that manages risk and consumer protection in the correct balance, which will hopefully serve to prevent major financial crises in the future.

CONCLUSION

Because TTIP is still in its infancy, many aspects of the agreement have yet to be decided. This indecision includes whether to even include financial services as part of the negotiations. Even after the seventh round of talks

[214] The Coase Theorem explains that the winners can compensate the losers so that in the end everyone is better off. This Comment will not delve into the details of the redistribution of wealth other than to say arguments like this will not be considered as adequate arguments against trade liberalization for the purposes of this paper.

[215] CRS BRIEF, *supra* note 4, at 5.

[216] *See supra* Part VI.A.

concluded, the U.S. still opposed including financial services regulations. The EU continues to push for inclusion.[217] Overall, whether financial services are included, TTIP is poised to have a significant impact on the European, American, and Global economies. That being said, financial services could ultimately be important inclusion adding significant value to the agreement.

As noted in Part II, diverging policies and regulations in the financial services industry can have catastrophic consequences on the global scale. Ignoring the risk of global financial instability, there are still significant costs associated with differing regulatory regimes. These costs, outlined in Part III, range from duplicative costs to firms, to increased costs to the consumer, to lost opportunities that can only be alleviated through the harmonization of financial regulations. Additionally, as shown by the waning support for reforms in other global forums, it will be far easier for the U.S. and the EU to come to an agreeable arrangement in bilateral talks. This is why TTIP should and must include financial services into the final agreement. If financial services regulations are included, several major areas need to be addressed. As noted in Part IV, these include but are not limited to: a single accounting standard, closing loopholes in existing regulations, and minimizing unnecessary risk taking by financial institutions. Even if only these three areas are harmonized, TTIP will have gone further than any other cooperative effort in financial regulation.

Part V presented a six point plan to achieve harmonization through TTIP. TTIP should strive to synchronize existing regulations, provide guidelines for initiating and developing new regulations, have a framework to implement new regulations, have effective cross-border supervision, and enforce the regulations fairly and effectively in both jurisdictions. Last, Part VI outlined the impacts of including financial services in TTIP. Doing so could provide a much needed $200 billion injection into the economies of America and Europe. Additionally, with nearly half of the world's GDP following the same financial framework, the rest of the world will fall in line or risk being left behind. The U.S. and EU will be the de facto standard setters in the financial industry and will be able to steer in any direction they deem fit.

[217] *TTIP Round 7 Advanced Technical Groundwork—Most Contentious Issues Not on Table*, BORDERLEX (Oct. 5, 2014), http://www.borderlex.eu/ttip-round-7-advanced-technical-groundwork-contentious-issues-table/.

In the age of globalization, economies have become so intertwined that a few major bank failures triggered a worldwide recession,[218] the likes of which had not been seen since World War II.[219] While there are many ongoing efforts that are addressing global financial reform, they have not been effective in gaining a consensus.[220] As such, TTIP provides a unique opportunity for two of the world's superpowers to come together and bilaterally determine the future of the global financial landscape. Financial services be included in the TTIP negotiations to exclude them would be an error that could most likely not be remedied in the foreseeable future. This paper has outlined the who, why, what, where, and how, all that is left is the when, that is the $10 billion question.

BRETT BICKEL[*]

[218] CRS BRIEF, *supra* note 4, at 9.

[219] NATI'L BUREAU OF ECON. RESEARCH, *supra* note 2.

[220] *See supra* Part II.C.

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