Coordinating Modern Cross-Border Financial Services: No Global Policy, No Global Legal Framework, but Some Regional Opportunities

Antoine P. Martin

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ANTOINE P. MARTIN*

I. Introduction

The global economic crisis, which has hit the international community since 2008, has once again pointed at the limits of financial liberalization, often perceived and described as a model excessively fostering financial services and organizing financial instability by unbundling financial flows.[1] Meanwhile, the continuous improvement of computing technologies and the increased interconnectedness of regional and global financial markets have given a significant boost to a financial services industry increasingly operating as an autonomous economic sector on a worldwide and borderless basis.

In reality, financial services providers have become key economic actors on a worldwide scale. Whereas financial services and financiers merely used to play a trade support role when trade was about goods rather than services, they have vastly increased their influence and reach over time in dealing with, nowadays, traditional activities such as banking, financing, insurance,

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* Antoine P. Martin (Ph.D, LL.M) is a Research Associate at the Chinese University of Hong Kong, Faculty of Law, and a Fellow of the Faculty's Centre for Financial Regulation and Economic Development (CFRED), focusing on Investment and Trade law & policy with a particular interest for financial services & financial regulation. The author is grateful to Professor Bryan Mercurio and Professor Anatole Boute (CUHK) for their support and constructive comments. All mistakes remain his own.

1. Financial services are commonly defined as the financial, investment, and transactional functions performed by commercial, financial, banking, and insurance institutions to allow effective access and use by individuals and firms of modern, affordable, convenient, qualitative, and sustainable financial means, including banking and insurance-related services. *See Access to Financial Services as a Driver for the Post-2015 Development Agenda*, UNCTAD POL'Y BRIEF N° 35 (Sept. 2015), https://goo.gl/7CptBO. *See also TPP Financial Stability Threats Unveiled: It's Worse than We Thought*, PUB. CITIZEN (Nov. 2015), https://goo.gl/blcJQI (on international banks and state sovereignty). Please note that the regulation of capital account liberalization—i.e. the facilitation of financial flows across borders—is voluntarily excluded from the scope of this research paper as the author has analyzed it elsewhere, in relation to the changing role of the International Monetary Fund towards global financial stability and capital controls. *See* Antoine P. Martin & Bryan Mercurio, *The IMF Mandate on Capital Controls: Legal Analysis of the Article IV Broad and the Institutional View of 2012*, ARIZ. J. INT'L & COMP. L. (forthcoming 2017).

securities, and pensions. In recent times, they have also given the masses simple yet powerful tools to manage their transactions, investments, and diverse financial operations through innovative channels without the constraints once imposed by the traditional banking system and at a lesser cost.

This evolution in the financial industry is, however, raising various concerns at the global level because, as a result of their influential, algorithmic, electronic, reactive, and borderless nature, new generations of financial services tend to gain influence towards markets and/or disrupt the established order without necessarily being bound by the financial sector regulations.[2] Hence, to what extent is the international community capable of encouraging and coordinating the development of future, inevitable, and borderless financial services?

The main, current debates on financial regulation are rather pessimistic. Historically, financial services were hardly considered a regulatory concern. The Bretton Woods negotiations which led to the creation of the International Monetary Fund (IMF), the International Bank for Reconstruction and Development (IBRD), and the current World Bank, essentially insisted on reconstruction and recovery after WWII but placed no emphasis on the liberalization of trade exchange or on financial facilitation.[3] In time, nonetheless, the immense liberalization of international trade, which occurred primarily as a result of the GATT/WTO, has eventually led to a tremendous rise in the level of goods traded. This, in turn, has increased the need for cross-border transactions as well as the need to rely on more efficient financial services on a cross-border basis. Later on, the increasing opening of financial markets and the large increase in the commodities trade eventually transformed international finance into a self-standing activity and industry acting both autonomously and distinctively from palpable trade.[4]

Today, the large autonomy and influence enjoyed by financial services providers is generating important debates. For instance, OECD research highlights that the notion of "financial integration," i.e. the convergence of financial activities within important financial conglomerates, forces regulators to adapt to new forms of financing mechanisms and services.[5] Similarly, the FSB, which is responsible for coordinating national financial authorities and international standard-setting bodies whilst monitoring and making recommendations about the global financial system, has raised concerns about the so-called "Shadow-Banking" or "market-based

2. *Res. Rep. on Fin. Tech. (Fintech)*, IOSCO 74 (Feb. 2017), https://goo.gl/yqqUq1.

3. Reza Moghadam & Sean Hagan, *The Fund's Role Regarding Cross-Border Capital Flows*, INT'L MONETARY FUND 3 (Nov. 15, 2010), https://www.imf.org/external/np/pp/eng/2010/111510.pdf.

4. *See* Martin & Mercurio, *supra* note 1, § 2.3

5. *See* Harold D. Skipper, Jr., *Fin. Services Integration Worldwide: Promises and Pitfalls*, OECD 13 (2001), https://goo.gl/fa0p7O.

financing" industry,[6] and warned about the systemic risks created by credit intermediation practices involving entities, named as "other financial intermediaries" (OFIs), outside of the regular regulated banking system.[7] Very recently in January 2017, the FSB formulated additional concerns as to the potentially negative impacts of technology-based financial services, the so-called "FinTech" services, which have increasingly gained influence as a result of modern technological performances and developments[8], and recommended that the subject matter be integrated into the G20 Agenda for further surveillance.[9]

In pointing at such concerns, these international institutions clearly indicate that the international community is lagging behind technology and financial services providers, both in terms of knowledge, policymaking, and regulation.[10] This discourse characterized by a financial, instability-focused mind-set, however, reveals another important trend. To the OECD, financial services policymaking primarily is about ensuring the safety of the financial system.[11] To the FSB, financial services policymaking over the past years has achieved great success, particularly in terms of reforming the global financial system to mitigate vulnerabilities, to consolidate financial infrastructures, to reinforce bank solvability through higher capitalization, and to reduce the effects of interbank exposure.[12] At the European Union (EU) level, financial policymaking has consisted of setting up a framework

6. For a definition of shadow banking, *see* Laura E. Kodres, *What Is Shadow Banking?*, INT'L MONETARY FUND 42-43 (June 2013), http://www.imf.org/external/pubs/ft/fandd/2013/06/basics.htm ("Many financial institutions that act like banks are not supervised like banks. If it looks like a duck, quacks like a duck, and acts like a duck, then it is a duck—or so the saying goes. But what about an institution that looks like a bank and acts like a bank? Often it is not a bank—it is a shadow bank.").

7. *See Global Shadow Banking Monitoring Report 2015*, FIN. STABILITY BOARD (Nov. 12, 2015), http://www.fsb.org/wp-content/uploads/global-shadow-banking-monitoring-report-2015.pdf.

8. Douglas Arner et al., *The Evolution of Fintech: A New Post-Crisis Paradigm?*, UNSW Law (Oct. 1 2015), https://goo.gl/DM3sY9.

9. Adding Fintechs to the 2017 G20 Agenda, the FSB particularly considered how FinTech developments are affecting the global financial system in January 2017. *See* Mark Carney, *The Promise of FinTech – Something New Under the Sun?*, BANK OF ENGLAND (Jan. 25, 2017), https://goo.gl/dXG5K0. For comments, *see also* Caroline Binham & Claire Jones, *Fintechs Warned to Expect Tougher Regulation*, FIN. TIMES (Jan. 25, 2017), https://www.ft.com/content/6e2bd98c-e32a-11e6-8405-9e5580d6e5fb?mhq5j=E1.

10. *Res. Rep. on Fin. Tech. (Fintech)*, *supra* note 2, at 75 ("It is clear . . . that, taken together, the changes already underway as a result of Fintech are substantial, in certain cases leading to disintermediation and reintermediation, and in other cases testing the boundaries of full disintermediation through the use of technology.").

11. Stephen Lumpkin, *Supervision of Fin. Services in the OECD Area*, OECD (2002), https://goo.gl/CnDSeM ("A central goal in the design of regulatory and supervisory regimes for financial services is to create a framework that ensures the safety of the financial system as a whole and allows other objectives of supervision (e.g. investor and consumer protection) to be attained efficiently and effectively.").

12. Letter from Mark Carney, FSB Chair, to G20 Leaders, Building a Resilient and Open Global Fin. System to Support Sustainable Cross-Border Investment (Aug. 30, 2016) (on file with Fin. Stability Board).

guaranteeing "a resilient and stable" system through Basel I, II, III capital and liquidity standards (2013), a Capital Requirements Directive IV (CRD IV) to be implemented by 2019, reforms to the securities and derivatives market including the European Market Infrastructure Regulation (EMIR 2012), the Markets in Financial Instruments Directive II (MiFID II), and Markets in Financial Instruments Regulation (MiFIR) of 2014.[13]

In other words, the international community and its supervisory institutions have over time considered the financial services industry as a risk and have accordingly approached financial services policymaking in terms of risk-mitigation.[14] Yet, despite stability preservation policies being absolutely necessary, one could argue that such orientations have had a major flaw. In focusing attention exclusively on ways to regulate so as to control and restrict, policymakers might have missed opportunities to look forward, anticipate, and provide common directions ensuring the development, promotion, and coordination of financial services evolving faster than regulatory constraints.

Interestingly, various forward-looking initiatives have lately been promoted on a domestic basis. In September 2016, the Hong Kong Monetary Authority (HKMA) released a Fintech Supervisory Sandbox (FSS) aimed "to facilitate the pilot trials of Fintech and other technology initiatives of authorized institutions (AIs) before they are launched on a fuller scale," as well as a "Fintech Facilitation Office (FFO) to facilitate the healthy development of the fintech ecosystem in Hong Kong and to promote Hong Kong as a fintech hub in Asia."[15] Later, the Hong Kong Financial Services Development Council released a genuine business plan aimed at making

13. *Financial Services Liberalization and TiSA: Implications for EU Free Trade Agreements*, EUR. PARLIAMENT (July 26, 2016), http://www.europarl.europa.eu/RegData/etudes/STUD/2016/578019/EXPO_STU(2016)578019_EN.pdf.

14. This has particularly been noted by IMF and WTO experts. *See* Stijn Claessens & Juan A. Marchetti, *Global Banking Regroups*, FIN. & DEV. 14, 16 (Dec. 16 2013), https://goo.gl/rM2JUQ ("The general regulatory reaction following the global financial crisis has been a mix of nationally and internationally coordinated policies aimed at reducing the risk of cross-border transmission of shocks and at dampening the effects of those shocks. These efforts include improving the way regulators deal with troubled global institutions—whether restoring them to health or guiding their unwinding process. New international standards for banks, such as those requiring higher levels of capital and better liquidity management . . . [s]ome improvements have been made with regard to information sharing across jurisdictions and disclosure of financial exposures, possibly helping supervisory agencies detect risks earlier and allowing for more market discipline. Assessments of systemically important financial systems are conducted more frequently, and financial surveillance has been enhanced . . .").

15. *See* Letter from Arthur Yuen, Deputy Chief Executive, Hong Kong Monetary Authority, to the Chief Executive, All Authorized Institutions (Sept. 6, 2016), https://goo.gl/TPxj9e. *See also Fintech Facilitation Office (FFO)*, HONG KONG MONETARY AUTHORITY, https://goo.gl/QDJidQ; *See also* Michelle Chen & Michelle Price, *Hong Kong to Launch Banking Fintech 'Sandbox' as Rivals Pull Ahead*, REUTERS (Sept. 6, 2016), http://uk.reuters.com/article/us-hongkong-banks-regulator-idUKKCN11C0EV (Hong Kong's top banking regulator announcing that "The sandbox allows banks to conduct tastings and trials of newly developed technology on a pilot basis. Within the sandbox, banks can try out their new fintech products

Hong Kong a leading FinTch place.[16] In line with the initiative, the Monetary Authority of Singapore launched a "FinTech Regulatory Sandbox" aimed to "encourag[e] more FinTech experimentation so that promising innovations can be tested in the market and have a chance for wider adoption,"[17] while the Central Bank of Malaysia also set up a '"Financial Technology Regulatory Sandbox Framework" for similar purposes.[18] Finally, in December 2016, the Australian Securities and Investments Commission (ASIC) launched a FinTech regulatory sandbox also for similar purposes.[19]

Despite such unilateral efforts, however, no large-scale framework capable of foreseeing, facilitating, and coordinating the inevitable future developments of the financial services sector was ever put into place. Some rule-making attempts have been made but overall, the various pro-liberalization efforts aimed at opening and fostering cross-border financial services markets have yielded little results. Instead, the economic skepticism mentioned previously has had an echo in the trade community where, as explained below, financial services facilitation has not been a general priority.

This article explores this aspect of large-scale financial services regulation—i.e. the absence of moving-forward and anticipation-driven policymaking and rulemaking. It does so essentially by explaining decades of financial services negotiations, by clarifying the current status of global financial services efforts, and finally, by assessing to what extent the current trade system will be able to coordinate the future cross-border development needs of the financial services industry.

So far, however, the article finds that in the case of financial services markets, no "basic social rule" reflecting a global alignment in beliefs, norms, and institutions and capable of promoting cross-border financial services facilitation and coordination was ever agreed upon.[20] Despite modern regional mega trade agreements suggesting a fairly recent regional convergence on the matter, the international community does not have the premises of a reliable global legal framework for future financial services

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without the need to achieve full compliance with the HKMA's usual supervisory requirements").

16. Antoine P. Martin, "*HKDC's Report on 'The Future of Fintech in Hong Kong': A business plan for making Hong Kong a financial services hub!*", THE ASIA-PACIFIC CIRCLE (June 7, 2017), https://www.asiapacificcircle.org/single-post/2017/06/07/HKFSDC-Report-on-The-Future-of-Fintech-in-Hong-Kong-from-financial-services-policy-to-fintech-hub-business-plan.

17. *See* MAS FinTech Regulatory Sandbox, MONETARY AUTHORITY OF SING. (last modified Mar. 13, 2017), https://goo.gl/aqYkzi.

18. *See* Bank Negara Malaysia, *Financial Technology Regulatory Sandbox Framework*, Press Release No. 10/16/05 of 18 Oct. 2016, https://goo.gl/q1AY6e.

19. *Launch of an Innovative Regulatory Sandbox for Fintech*, THE TREASURY AUSTRALIAN GOV'T (Dec. 15, 2016), https://goo.gl/0du6Lf; *see also Australia's FinTech Priorities* THE TREASURY AUSTRALIAN GOV'T https://goo.gl/FDef9N (last visited June 21, 2017).

20. On the "basic social rule" argument, *see* Arnold S. Kling, *Specialization and Trade: a Re-Introduction to Economics*, 91-96 (Cato Institute 2016).

development, anticipation, and coordination. Hence, it thus seems unable to look forward and benefit from the progression of new technology-based financial services. In reality, although numerous negotiations on financial services market-opening have taken place since the 1990s under the World Trade Organization (WTO) through the General Agreement on Trade in Services (GATS) and its Annex on Financial Services[21] or more recently, on a bilateral and plurilateral basis, the rules for cross-border global financial services facilitation coordination are at a rudimental stage because global policy and rule-making have never been a drive. The reason for this is simple: trade in financial services facilitation has always been a highly contradictory process, which stands on unsteady legs from an economic perspective and has been largely driven by detrimental politics rather than by a financial liberalization policymaking and rule-making agenda.

In comparison with other areas of international economic law, such as investment or trade, legal publications on global financial services facilitation are rather uncommon. With limited large-scale liberalization efforts since the GATS financial services negotiations, research on financial liberalization commitments has mostly produced economic, domestic, GATS-focused, and unspecific multi-sector comments.[22] An article by Gkoutzinis, published in *The International Lawyer* in the mid-2000s, explored the impact of GATS negotiations in terms of legal commitments in the banking sector and drew interesting conclusions as to the difficulty of conciliating financial openness with national regulatory priorities.[23] Otherwise, the possibility of anticipating financial services developments has not attracted much attention, and the literature lacks a comprehensive discussion as to why no global policy or legal framework for cross-border trade in financial services facilitation and coordination was ever set up, until now. The issue is

21. General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994) [hereinafter GATS]; *see also Annex on Financial Services*, WORLD TRADE ORG., https:// goo.gl/v27weo (last visited June 25, 2017).

22. *See* Stephen L. Harris, *The Politics of Financial Services Liberalization: The Case of the Canadian Investment Dealer Industry*, 26 POLICY STUD. J. 526, 526 (1998); Jonathan E. Leightner & C.A. Knox Lovell, *The Impact of Financial Liberalization on the Performance of Thai Banks*, 50 J. ECON BUS. 115, 115-17, 124, 127 (1998); Adolfo Barajas et al., *The Impact of Liberalization and Foreign Investment in Colombia's Financial Sector*, ?63 J. DEV. ECON. 157, 157-58 (2000); Ali Ataullah et al., *Financial Liberalization and Bank Efficiency: A Comparative Analysis of India and Pakistan*, 36 APPL. ECON. 1915, 1915-16, 1922-24 (2004); Jonathan Williams & Nghia Nguyen, *Financial Liberalization, Crisis, and Restructuring: A Comparative Study of Bank Performance and Bank Governance in South East Asia*, 29 J. BANKING & FIN. 2119, 2119-22 (2005); Emilia Bonaccorsi di Patti, Daniel & C. Hardy, *Financial Sector Liberalization, Bank Privatization, and Efficiency: Evidence from Pakistan*, 29 J. BANKING & FIN. 2381, 2381-83 (2005); S.M. Thangavelu, & Mun-Heng Toh, *Bilateral 'WTO-Plus' Free Trade Agreements: The WTO Trade Policy Review of Singapore 2004*, 28 WORLD ECONOMY 1211, 1211 (2005).

23. Apostolos Gkoutzinis, *International Trade in Banking Services and the Role of the WTO: Discussing the Legal Framework and Policy Objectives of the General Agreement on Trade in Services and the Current State of Play in the Doha Round of Trade Negotiations*, ?39 INT'L LAWYER 877, 877-91 (2005).

important, nonetheless, because constructive orientations and forward-looking policy and rulemaking will be increasingly needed in order to coordinate inevitable cross-border financial services developments, beyond purely protective policymaking.

The argument formulated in this paper is chronological, interdisciplinary, and topical. Chronological, because the research process examines the various debates which have taken place since the early 1990s to identify the issues which appeared important over time and to draw a map of the understanding of the financial liberalization framework as of today. Interdisciplinary, because it derives from varied economic and scarcely legal literature on the topic, as well as from various reports and working papers published by international organizations. Finally, the argument is topical because the results of the research have been organized by distinguishing four main trends detailed below.

Section One reminds us that financial services liberalization never reached a consensus on the economic side of things. On the contrary, liberalization has historically been defended and attacked on economic grounds. If the opening of financial services markets was promoted during the 1990s for its competition, price, and growth benefits, experts would have also warned against the instability created by market-opening initiatives in times of crisis, particularly in countries with structurally weak financial sectors. Hence, while many comments have raised skepticism, coordination dynamics have progressively faded. Section Two shows that multilateral negotiations under the WTO's GATS have had limited law-making impacts because financial services negotiations have been dominated by political agendas and have become a leveraging tool to obtain concessions on other matters. They were not, however, motivated by global financial services coordination motivations. Hence, important ideological divides remain. Section Three considers the failure of preferential negotiations to yield results in terms of large-scale "global" coordination despite a praised EU model, and modern policy dynamics possibly offering some solutions. Section Four finishes with the idea that, as a result, the global regulatory and coordination framework now lags behind with little large-scale coordination perspectives, particularly in light of current policy shifts in the United States. While the financial services sector is rapidly expanding, as of 2017, preferential policymaking related to investment, competition, or financial services has become a political embarrassment worldwide. Financial liberalization and the very idea of facilitating cross-border financial services have become a sensible, worrisome, and politically incorrect topic and more than a coordination objective for the future.

II. No Consensus on the Economics of Financial Liberalization

The first element suggesting the unlikeliness of a global financial services facilitation and coordination framework is there was never a consensus on whether such efforts were valuable. Liberalization experts considered the idea extensively beginning in the 1990s because the banking sector's important development could then foster growth (A). In the 2000s, however, financial liberalization became a concern (B).

A. Market-Opening For Growth in the 1990s

Discussions on financial services liberalization started in the 1990s with the idea that facilitating global trade in goods also required facilitating financial flows and trade in financial services. While finance used to be about cash flows supporting trade in goods, financial services progressively became a global industry per se, deemed capable of contributing to global growth if regulatory barriers were reduced.[24] At the time, the idea particularly echoed with ongoing multilateral efforts to foster services liberalization under GATS, and experts began assessing the potential contribution of liberal, open, and competitive financial services markets to the global economy by discussing economic doctrines ranging from Adam Smith to modern OECD. Some described financial liberalization and market openness as enabling governments, companies, and households to find necessary funding through international markets.[25] Others labeled the global financial system as a "public good" in which government intervention had a role to play[26] and emphasized the system's limits (influence on domestic markets, taxation competition, or the surrendering of sovereignty, macroeconomic, and capital markets policymaking powers), thus leading to the idea of creating a framework "for a stable and sustainable growth of the international financial market."[27]

By the end of the decade, a financial crisis hit Asia and liberalization was associated with harmful deregulation. Stiglitz insisted that states had a supervisory role to play towards financial markets' failures.[28] Others noted that loosening the global financial landscape would create inconsistencies and a continuous necessity to consolidate global, regional, and domestic

24. International banking has grown twice as fast as world trade between the 1970s and the 1990s. *See* Jeffrey Simser, *GATS and Financial Services: Redefining Borders*, 3 BUFF. J. INT'L L. 33, 34 (1996). On the relationship between goods and financial services, *see* Joel P. Trachtman, *Trade in Financial Services under GATS, NAFTA and the EC: A Regulatory Jurisdiction Analysis* 34 COLUM. J. TRANSNAT'L L. 37, 41-2 (1996). On the role of financial intermediation towards the economy in general, *see* Kling, *supra* note 20, at 103-117.

25. *See* Dennis P. Quinn & Carla Inclan, *The Origins of Financial Openness: A Study of Current and Capital Account Liberalization*, 41 AM. J. POL. SCI. 771, 772-73 (1997). *See also* Masumi Kishi, *Regulation Issues in the Era of Financial Liberalisation: Japan, Korea and Taiwan*, 7 J. OF ASIAN ECON. 487, 499 (1996); *see also* Aaditya Mattoo, *Financial Services and the WTO: Liberalization Commitments of the Developing and Transition Economies*, WORLD BANK (Aug. 1998), https://goo.gl/85AkBU; *See also* Trachtman, *supra* note 24, at 40.

26. Kishi, *supra* note 25, at 488.

27. Jackline Wahba & Mahmoud Mohieldin, *Liberalizing Trade in Financial Services: The Uruguay Round and the Arab Countries* 26 WORLD DEV. 1331, 1343 (1998).

28. Joseph E. Stiglitz, *The Role of the State in Financial Markets*, in *Proceedings of the World Bank Annual Conference on Development Economics* 19, 27, 32, 50 (M. Bruno & B. Pleskovic ed., 1994).

financial systems.[29] Local actors in countries with weak financial services sectors would not be able to adapt to market-opening measures, external financial liberalization, while the premature opening of domestic capital markets would generate risky bubbles–i.e. uncontrollable volatile financial flows, excessive, and unforeseen appreciations and depreciations in exchange rates on a short-term basis.[30]

In other words, discourses on the benefits of financial liberalization shifted to concerns on future financial instability while financial liberalization reforms were criticized for assimilating countries into a global pattern.[31] A "sequencing" doctrine eventually took over by the end of the 1990s. To avoid the damaging impacts of "unrestrained" liberalization, financial markets liberalization were operated in phases: internal market preparation to increased competition, external trade liberalization policymaking, financial liberalization, and ultimately, the opening of the capital account which corresponds to the decision of the host authorities to allow the free circulation of capital inside and outside domestic economies.[32]

B. Deregulation Questioned in the 2000s

Such questioning accelerated in the 2000s.[33] Certainly, some insisted that financial liberalization and the rejection of state interventionism were essential to fostering foreign investment in services and global growth.[34] In a definite political approach, the former Canadian Deputy Minister of Finance Dobson, for instance, insisted that scheduled financial services liberalization under multilateral negotiations would "promote a country's growth and welfare in two main ways:" by guaranteeing a legal framework favorable to "foreign institutions investing for the long term," and by encouraging transparency and reform through external pressure.[35] The argument, also,

29. Kishi, *supra* note 25, at 488-92.

30. *See* Wahba & Mohieldin, *supra* note 27, at 1341-43. *See also* Apisith J. Sutham, *The Asian Financial Crisis and the Deregulation and Liberalization of Thailand's Financial Services Sector: Barbarians at the Gate*, 2 FORDHAM INT'L L. J. 1890, 1890-92 (1997).

31. Sutham, *supra* note 30, at 1893.

32. Wahba & Mohieldin, *supra* note 27, at 1339-40; *see also* The *IMF's Approach to Capital Account Liberalization*, 9 (Int'l Monetary Fund 2005). On calls for prudential regulation, *see also* Stiglitz, *supra* note 28, at 19; *see also* Kishi, *supra* note 25, at 499; *see also* Simser, *supra* note 24, at 57.

33. *See* Robert M. Townsend & Kenichi Ueda, *Welfare Gains from Financial Liberalisation*, 51(3) INT. ECON. REV, pp.553-597 (Aug. 2010); *see also* Christopher F. Thornberg and Frances L. Edwards, *Failure of Trade Liberalisation: A Study of the GATS Negotiations*, 10 J. INT'L BUS. & L., pp.325-348 (2011); *see also* Páez, Laura. *GATS Financial Services Liberalisation: How do OECD Members Schedules Impact Commercial Banking FDI?*, 42(6) J. WORLD TRADE, pp.1065-1083 (2008).

34. Ayesha Malik, *Why 'Trade' in Financial Services, An Assessment of the Agreement on Trade in Financial Services Under the GATS*. 1 J. WORLD INV. 35, 362 (2000); *see also World Investment Report*, UNCTAD (2015), http://unctad.org/en/PublicationsLibrary/wir2015_en.pdf.

35. *See* Wendy Dobson, *Further Financial Services Liberalization in the Doha Round?* INT'L ECON. POL'Y BRIEFS (Aug. 2002), https://goo.gl/4u3UYr. *See also* Aaditya Mattoo et al.,

was that increasing trade in financial services would reinforce the financial sector and benefit consumers.[36]

Skepticism nonetheless prevailed. Following the Asian Crisis of 1997, Stiglitz reiterated that "financial and capital market liberalization, done hurriedly, without first putting into place an effective regulatory framework, was at the core of the problem."[37] Furthermore, the idea emerged that financial liberalization was not a model needed and demanded by all. Taking the example of India and China, where the crisis was said to have little impact because strong capital controls had actually been put into place, economists argued that many countries ill-equipped to adapt abrupt market-opening policies had never asked for such policies in the first place.[38] Arestis, alternatively, furthered the economic inadequacy argument by questioning the "problematic nature of the theoretical framework of financial liberalization" and dissected the assumptions on which financial liberalization was always based—for instance, the ideas that free banking leads to stability of the financial system, financial liberalization enhances economic growth, or stock markets and speculation cannot influence international financial stability.

All in all, while market-opening was desirable in the early 1990s, it was widely admitted in the 2000s that markets were perhaps more instable than the risks of governmental interference itself, and a new claim was formulated that better regulation was more important than facilitation coordination.[39]

Measuring Services Trade Liberalization and Its Impact on Economic Growth: An Illustration, 21 J. OF ECON. INTEGRATION 64, 66 (2006).

36. *See* James Gillespie, *Financial Services Liberalization in the World Trade Organization* 1-4 (Harvard Law School, Working Paper, 2000) (Describing financial services as "facilitators of transactions" and noting that "efficient financial services are vital to the functioning of modern industrial economies. They provide intermediation between lenders and borrowers, allow firms to diversify and manage risk, ration capital across the economy, and provide many of the technical services necessary for both domestic and international commerce to operate. In countries with weak economies, the development of a strong financial sector is now recognized as one of the key ingredients to sustainable development."). *See also* Philip Arestis, *Washington Consensus and Financial Liberalization*, 27 J. POST KEYNESIAN ECON. 251, 256 (2004).

37. Joseph E. Stiglitz, *Capital Market Liberalization, Economic Growth, and Instability*, 28 WORLD DEV. 1075, 1075 (2000). It was added that cross-border trade commitments would particularly increase capital flow risks and currency valuation bubbles while interventionism would provide a safeguard against financial liberalization spillovers. *See* Nico Valckx, *WTO Financial Services Liberalization: Measurement, Choice and Impact on Financial Stability*, 1 (De Nederlandsche Bank, Research Memorandum No, 705, 2002). *See also* Dobson, *supra* note 35, at 3-4. (admitting that the Asian financial crisis of 1997-98 provided the proof that "mobile capital by itself can be dangerous" if free flows are left uncontrolled).

38. Stiglitz, *supra* note 37, at 1076-79.

39. Arestis, *supra* note 36, at 256-58; *see also* Malik, *supra* note 34, at 370; On "prudential concerns," *see* Chantal Thomas, *Globalization in Financial Services - What Role for GATS?* 21 ANN. REV. BANKING L. 323, 331 (2002); Mattoo, *supra* note 25, at 4.

III. GATS: Vastly Political Negotiations, No Rule-Making Agenda

In addition to a lack of consensus on the economic side of things, the financial services liberalization negotiations, under the premises of the WTO's GATS, hardly succeeded in creating a global market-opening facilitation coordination framework. The negotiations of various multilateral liberalization instruments proved to be extremely difficult because self-interest and lack of commitment constantly prevailed over global policymaking opportunities and rule-making agendas (A). As a result, the draft framework for the coordination of financial services market-opening efforts became legally complex, weak, and structurally contradictory (B), while important political divides barred policy and regulatory results (C).

A. GATS: Complex and Detached Negotiations

The General Agreement on Trade in Services (GATS), which created the existing framework applicable to trade in services, was inspired from the multilateral rules applicable to trade in goods under the General Agreement on Tariffs and Trade (GATT).[40] In addition, the GATS Annex on Financial Services, which has since then remained the only multilateral reference, was timidly negotiated at the end of the WTO Uruguay Round (1993).[41] A Decision on Financial Services gave the Members additional time to "improve, modify, or withdraw all or part of their commitments in this sector without offering compensation"[42] while OECD Members undertook a complementary but optional initiative known as "The Understanding on Commitments in Financial Services."[43] A Second Annex on Financial

40. Including transparency obligations, Most-Favoured Nations (MFN) rules and market access. *See* R. Brian Woodrow, *The 1997 World Trade Organization Accord on Financial Services: Its Impact on and Implications for the World Insurance Industry*, 25 The Geneva Papers on Risk & Ins. 78, 89 (2000). *See also* Gkoutzinis, *supra* note 23, at 890; Trachtman, *supra* note 24, at 41.

41. The Annex also recognized the necessity of leaving the activities of central banks unbound (Paragraph 1) and gave host governments an opportunity to conduct domestic policies for prudential reasons, i.e. for the protection of the stability of domestic financial systems (Paragraph 2). *Annex on Financial Services*, World Trade Org., https://www.wto.org/english/tratop_e/serv_e/10-anfin_e.htm (last visited June 25, 2017).

42. *Decision on Financial Services*, World Trade Org., https://goo.gl/2NAu3q (last visited June 25, 2017).

43. *See Understanding on Commitments in Financial Services*, World Trade Org., https://goo.gl/PcpH8E (last visited June 25, 2017). OECD documentation suggests that while the legal status of this Understanding is "unclear," its goal at the minimum was to offer an optional 'alternative approach' to scheduling commitments and to set certain explicit standards for liberalization of financial services, particularly in relation to monopolies, government procurement, new financial services, rights of establishment, the temporary entry of personnel, cross-border trade, non-discrimination and national treatment. *See The General Agreement on Trade in Services (GATS): An Analysis*, OECD (1994), https://goo.gl/qUJkMP. *See also* Gkoutzinis, *supra* note 23, at 901.

Services eventually gave Members extra negotiation time,[44] but remained on the side. A First Protocol to the GATS, also known as "The Interim Agreement," and a Second Protocol were furthermore discussed in 1995 with twenty-nine countries, the EU negotiating as one, and in 1996 to acknowledge the need for even more negotiations.[45] Three additional protocols later, the final Financial Services Agreement (FSA) concluded in December 1997 to ensure that a new set of fifty-six schedules of commitments and a list of exemptions representing the position of seventy WTO Members would update and replace the existing framework.[46]

At best, however, the length of the negotiations, the large amount of instruments produced, and their limited legal contribution, mainly time extensions, suggest that the Members were inefficient. In reality, the Members were unwilling to achieve results in terms of coordination, framework creation, or global rule making, and rather focused on self-interested, irreconcilable, and impassionate, detached talks. For instance, the First Protocol negotiations were dominated by the US and EU agenda, which aimed at obtaining strong market access commitments from other Members—i.e. developing economies. However, while the EU was willing to accept weak commitments, the US feared the emergence of "MFN free riders"—i.e. countries committing to weak obligations but requesting the benefit of strong commitments granted to other members under the MFN rules—and requested strong binding commitments.[47] Because of the emerging economies' reluctance to play the reciprocity card, the US withdrew MFN standards from its financial services commitments[48] and, together with India and Thailand, blocked or delayed negotiations until the

44. *The General Agreement on Trade in Services (GATS): An Analysis*, *supra* note 43, at 25-26.

45. Negotiations would not conflict with GATS or prevent new commitments applicable on a MFN basis as part of GATS. Members considered the right to establish and provide new financial services abroad, commitments towards adverse measures, the granting of access to payment and clearing systems to foreign entities on a National Treatment basis, but apart from monopolies left the extent to which they were willing to liberalize financial services undefined. On the negotiations roadmap, *see* Simser, *supra* note 24, at 58-59; Gkoutzinis, *supra* note 23, at 891. *See also Second Protocol to the General Agreement on Trade in Services*, WORLD TRADE ORG. (July 24, 1995), https://goo.gl/r504b0.

46. *Fifth Protocol to the General Agreement on Trade in Services*, WORLD TRADE ORG. (Dec. 3, 1997), https://goo.gl/SnwZpK. On the negotiations, *see Overview of the 1995 and 1997 Negotiations on Financial Services*, WORLD TRADE ORG., https://goo.gl/oMzkd2 (last visited June 25, 2017). *See also* Ying Qian, *Financial Services Liberalization and GATS - Analysis of the Commitments Under the General Agreement on Trade in Services (GATS) at the World Trade Organization (WTO)*, (Asian Development Bank, Background Paper 4, 2003); *see also* Gkoutzinis, *supra* note 23, at 890.

47. *The World Trade Organization: Legal, Economic and Political Analysis Vol. I* 959 (Patrick F. J. Macrory et al. eds., 2007); *see also* Thornberg & Edwards, *supra* note 33, at 338-40 (On "Strategic Free Riding").

48. *See* Dobson, *supra* note 35, at 1.

Fifth Protocol,[49] assuming that better results would be achieved through bilateral negotiations.

Beyond regulatory control and framework-building considerations, furthermore, financial negotiations were essentially about influence building. For instance, commentators largely emphasized that liberalization efforts occurring prior to the Asian financial crisis had been made by developing economies with weak financial systems which clearly had "little to gain from reciprocal access to the OECD economies, [ ] [but] were anxious to signal their commitment to reform as a way to restore tattered credibility."[50] In fact, economic research on the motivational determinants of financial liberalization suggested that in a trade context characterized by deadlocked agricultural negotiations under the Doha Round,[51] financial sector negotiations had essentially represented a "valuable bargaining chip" to developing economies with agricultural or textile agendas involved in multi-sector negotiations.[52] Simply put, Members, who had no financial services export goals, either made financial liberalization efforts to obtain concessions from others regarding what mattered to them, or promised that they would do so in the future to obtain immediate or future concessions.[53] In other words, liberalization talks were hardly grounded on optimistically liberal beliefs, but resulted from a mix of political trading by developing economies and political pressure applied by developed economies seeking to expand the reach of their financial services providers abroad.

B. GATS Did Little on Financial Services Rule-Making

Due to political un-commitment, many structural barriers were never addressed, and the GATS framework was criticized as "far from offering optimal results" and for "do[ing] little to advance international trade in banking services despite the broad participation and resources available to it."[54] The framework was overall deemed insufficient for three reasons. Two were legal, the other was political.

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49. *See* Simser, *supra* note 24, at 60; Trachtman, *supra* note 24, at 8-9; Thomas, *supra* note 39, at 327; Gkoutzinis, *supra* note 23, at 891.

50. Dobson, *supra* note 35, at 6.

51. Antoine Martin & Bryan Mercurio, *"Doha dead and buried in Nairobi: lessons for the WTO"*, Journal of Int'l Trade Law and Policy, Vol. 16 Issue: 1, pp.49-66 (2017), https://doi.org/10.1108/JITLP-01-2017-0001.

52. *See* Philipp Harms et al., *Explaining Liberalization Commitments in Financial Services Trade*, 139 Rev. World Econ. 82, 102-03 (2003). *See also* Edward D. Mansfield & Eric Reinhardt, *Multilateral Determinants of Regionalism: The Effects of GATT/WTO on the Formation of Preferential Trading Arrangements*, 57 Int'l Org. Foundation 829, 829-30 (2003) (On PTAs bargaining leverage to some states having no reasons to negotiate preferential agreements during multilateral rounds). On the peer group effect, *see also* Valckx, *supra* note 37, at 9.

53. Harms et al., *supra* note 52, at 85; Mattoo, *supra* note 25, at 19.

54. Gkoutzinis, *supra* note 23, at 908; *see also* Páez, *supra* note 33, at 1065; Piritta Sorsa, *The GATS Agreement on Financial Services – A Modest Start to Multilateral Liberalization*, (International Monetary Fund, Working Paper 7, 1997) (discussing the GATS failing "to meet many of the . . . tests for a 'good' agreement"); *see also* Bernard Hoekman, *Tentative First Steps -*

First, the GATS and its Annex were unable to create genuine legal commitments and rules on financial services because the objective of liberalizing services progressively only created ambiguity. The GATS' drafters provided the Members with four channels for liberalizing the cross-border supply of services (Mode 1),[55] facilitating services consumption abroad (Mode 2),[56] increasing internal liberalization through commercial presence (Mode 3)[57]—i.e. facilitating foreign investment—and facilitating the movements of foreign persons inside domestic markets (Mode 4).[58]

Whilst these provided a method for planning and organizing general market opening,[59] the Modes created a hybrid and dysfunctional system. In the main, the Agreement liberalized specifically listed markets—the so-called "positive list" approach—and guaranteed MFN treatment (no discrimination amongst foreign providers), and transparency requirements on these listed sectors.[60] However, the negotiating parties would retain the possibility to establish a list of reservations to these commitments and to limit National Treatment (no discrimination between domestic and foreign providers) and Market Access standards.[61] Hence, by tempering with its own partial "positive list approach" to ensure progressivity, the general GATS framework created total or partial exemptions to its parties' commitments and generated its own loopholes. Legally speaking, the multi-sector Agreement was described as a very conditional or limited,[62] discretional, complex, and fragmented[63] set of instruments characterized by a major legal "structural weakness,"[64] a "juxtaposition of texts," and a disruptive "lack of

An Assessment of the Uruguay Round Agreement on Services 14 (The World Bank, Policy Research Working Paper 1455, 1995) ("liberalization in the sense of reducing discrimination and enhancing market access did not occur"); Drusilla K. Brown et al., *The Liberalization of Services Trade: Potential Impacts in the Aftermath of the Uruguay Round*, in *The Uruguay Round and the Developing Countries* 292 (Will Martin & Alan Winters eds., 1996).

55. *GATS*, *supra* note 21, at 285-86 (discussing cross-border supply).

56. *Id.*

57. *Id.*

58. *Id.*; on liberalization modes, *see* Sorsa, *supra* note 54, at 7; Simser, *supra* note 24, at 48; Mattoo, *supra* note 25, at 2-3.

59. On Modes, *see* Simon Lester et al., *World Trade Law, Text, Materials and Commentary* 638-39 (2012).

60. *GATS*, *supra* note 21, at 286-87.

61. *Id.*, at 297-98; *see* Dominique Servais & Julie Dutry, *GATS 2000: High Stakes for the Financial Sector* 6 INT'L BUS. L. J. 653, 655-56 (1999); *see also* Bernard Hoekman, *Assessing the General Agreement on Trade in Services*, in *The Uruguay Round and the Developing Countries* 98 (Will Martin & Alan Winters ed., 1996). *See also* Thomas, *supra* note 39, at 329; Qian, *supra* note 46, at 5, 10.

62. Sorsa, *supra* note 54, at 7.

63. Simser, *supra* note 24, at 56.

64. Pierre Sauvé, *Assessing the General Agreement in Trade in Services: Half-Full or Half-Empty?*, 29 J. WORLD TRADE 125, 132 (1995) ("Such structural weakness is nowhere more visible than in the GATS' approach to liberalization commitments."); Simser, *supra* note 24, at 50; Hoekman, *supra* note 61, at 98; Servais, *supra* note 61, at 657; Gillespie, *supra* note 36, at 14; *see also* Martin Roy, et al., *Services Liberalization in the New Generation of Preferential Trade Agreements (PTAs): How Much Further than the GATS?* 6 WORLD TRADE REV. 155, 165 (2007);

coherence," thus, making it impossible to understand precisely the Members' commitments and obligations.[65] Even more bluntly, the GATS ensured the preservation of the *status quo*[66] and was deemed largely counterproductive because its progressive nature overall created partially liberalized markets while leaving non-scheduled sectors out of reach.[67]

This major weakness particularly impacted financial services facilitation and coordination efforts, and a major ideological gap appeared. In retrospect, negotiations on financial services were not obvious to many countries which traditionally relied on trade in goods and faced regional financial instabilities at the time of the negotiations. To these, trade in services—including financial services—was unreachable while market-opening requests were interpreted as the 'foreign domination of the banking or general financial system . . .'[68] Thus, the MFN commitments—a right to non-discrimination amongst foreign providers—deemed applicable to all

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Sherry M. Stephenson, *Regional Versus Multilateral Liberalization of Services*, 1 WORLD TRADE REV. 187, 189–91 (2002); Thomas, *supra* note 39, at 323–25.

65. One commentator wrote: "[e]ach Member first decides (negotiates) which service sectors will be subject to these disciplines. It then decides, for each such sector, what measures will be kept in place that violate market access or national treatment . . . With four modes of supply, there are eight opportunities for GATS Members to avoid full application of market access or national treatment," *see* Hoekman, *supra* note 61, at 98, 116; *see also* Thomas, *supra* note 39, at 330; Servais, *supra* note 61, at 660–63 (for a similar reading of the GATS functioning). *See also* Régis Bismuth, *Financial Sector Regulation and Financial Services Liberalization at the Crossroads: The Relevance of International Financial Standards in WTO Law*, 44 J. WORLD TRADE 490, 498 (2010) ("on the obscure and vague provisions of the legal framework for the liberalization of financial services.").

66. Stephenson, *supra* note 64, at 192 ("Viewed primarily as an exercise in binding the 'status quo' . . . in national schedules, the GATS has not so far been able to advance the trading community towards real market opening in services."); *see also* Hoekman, *supra* note 61, at 101.

67. Rudolf Adlung & Hamid Mamdouh, *How to Design Trade Agreements in Services: Top Down or Bottom Up?* 2–3 (World Trade Organization, Working Paper, 2013), https://goo.gl/9xP3Sq ("As a result, access to any particular service sector, if subjected to specific commitments, is defined by eight parameters, specifying the levels of market access and national treatment for each of the four modes of supply. These structural innovations absorbed a lot of negotiating energy. Little time and resources were thus left in the Uruguay Round to achieve actual liberalization within the newly created framework and, given the novelty of the terms and concepts involved, there might also have been limited appetite to do so in many cases. The levels of openness ultimately bound in the resulting schedules thus remained quite shallow overall."); *see also* Bryan Mercurio, *ASEAN Services Liberalization Beyond 2015, Assessment and Recommendations* USAID (Mar. 2016), https://goo.gl/y035lF ("Not only have issues such as subsidies, procurement and emergency safeguards been left for future negotiations, but the agreement itself always envisaged initial market access and national treatment commitments to be progressively liberalized. Understandably, the GATS differs from the General Agreement on Tariffs and Trade (GATT) in a number of respects, most notably in architecture and the variable geometry of commitments between and among Members . . . the GATS is the result of pragmatic negotiations which resulted in a rich set of rules but a lighter approach in regards to commitments. There is much more work to be done.").

68. On financial services using economic development instead of contributing to it, *see* Wahba, *supra* note 32, at 1333. On the role and impact of foreign commercial and investment banks over domestic financial systems and monetary policies, *see* Simser, *supra* note 24, at 44–45;

were considered excessive by developing economies which had no particular interest in treating all foreigners equally[69] while the National Treatment standard—an obligation to treat foreigners as locals—became a leveraging asset as it was only applicable to the extent that specific sectoral commitments were taken. Thus, more than creating a global legal framework for financial services liberalization, the GATS outputs produced a quantity of exceptions and a large dose of optionality but failed to provide a dynamic towards financial services facilitation coordination.[70]

Second, the reach of the Financial Services Annex was also described as very limited. To Gillespie, including a large range of activities within the description of 'financial services'[71] was tactical: the greater the scope of the agreement, the less chances that the negotiation would be captured by one of the industries at risk to foreign competition.[72] To others, the move diluted the agreement and compromised transparency,[73] while leading to the conclusion that while providing liberalization opportunities, difficult multilateral negotiations had created a 'vastly complicated' trading environment for the further development of cross-border financial services.[74] While OECD Members went 'beyond the general requirements of the GATS' by adopting the optional 'Understanding on Financial Services,'[75] elsewhere the results were less convincing. If developed economies planned 'more comprehensive commitments,' developing ones rather focused on licensing requirements and firms' legal structure constraints, thus, making domestic preservation prevail over market opening.[76] In addition, although most signatories had committed towards the core sectors (insurance, banking, and securities) in line with their existing domestic frameworks, about eighty percent of exceptions were made in relation to further development of banking and non-insurance sectors.[77]

Trachtman, *supra* note 24, at 48; Mattoo *supra* note 25, at 16, 19; Dobson, *supra* note 35, at 3–4; Thomas, *supra* note 39, at 332; on self-interest in negotiations, *see* Simser, *supra* note 24, at 40.

69. The model was questioned after the US requested a broad exemption allowing it to deny MFN status to countries taking insufficient liberalisation commitments. *See* Thomas, *supra* note 39, at 329.

70. *See* Trachtman, *supra* note 24, at 44; *supra* note 24, at 359; Sorsa, *supra* note 54, at 5.

71. The definition of Financial Services is provided in Paragraph 5 of the Annex.

72. Gillespie, *supra* note 36, at 9.

73. *See, e.g.*, Hoekman, *supra* note 61, at 110.

74. Wahba, *supra* note 32, at 1342.

75. Gillespie, *supra* note 36, at 11-12; Malik, *supra* note 34, at 365; Research conducted by the Asian Development Bank, however, found that the 'economic intuition' had more advanced economies that tended to take greater liberalization commitments that were not always verified; *see* Qian, *supra* note 46, at 43, 49.

76. Gillespie, *supra* note 36, at 15-16; Qian, *supra* note 46, at 44.

77. It was also added that, all sectors considered, the majority of commitments were scheduled in Mode 3— *i.e.* foreign commercial presence—while Mode 4 (free movement of personal) remained 'insignificant,' *see* Gillespie, *supra* note 36, at 15-16. To others, however, the ability of the GATS liberalization process to increase competition through Mode 3 was rather limited, *see* Qian, *supra* note 46, at 44.

Third, the commitments taken by the Members have been found disappointing because they were more political than legal. In theory, about two thirds of the WTO Members that participated in the Uruguay Round made market access commitments on financial services, thus, ensuring that ninety percent of global banking assets and stock market capitalization (as of 1994) would be involved in financial liberalization.[78] An International Monetary Fund working paper, however, added that the Agreement had 'only resulted in limited consolidation of [industrialized] existing policies' because the Members which liberalized their markets did so for 'mercantilistic bargaining' reasons—i.e. to convince others of their liberal state of mind—more than to earn economic benefits.[79] Others went so far as to ask whether the GATS efforts ever aimed at operating a legal structure or were a mere political undertaking 'grounded in the politics of policy' and characterized by important legal discretion.[80] At best, the value of the GATS instruments was, thus, to be found in the political message that had been sent to the world: more than building a legal framework for facilitation coordination, the negotiations brought financial services into the scope of global talks and, thus, represented a 'somewhat tentative and imperfect'[81] 'modest start' in paving the way for future sector developments.[82]

C. Important Political Disagreements Remained

Low policy and law-making motivations overall reflected important, unsolved political disagreements. Of course, the argument was made that given the technological progresses lowering the cost of financial services—especially electronic payment and banking systems—it had become increasingly important to focus on the competition policy in the financial sector at the global level.[83] Still, in reality the GATS instruments became a multifaceted political problem.

First, the negotiation process created a major uncertainty feeling, both in legal and political terms. Experts deplored 'notably inconclusive' efforts and

78. Sorsa, *supra* note 54, at 5, 12.

79. *Id.*, at 6, 13; Mattoo (1998) *supra* note 25, at 2.

80. Malik, *supra* note 34, at 367-68; *see also* Dobson, *supra* note 35, at 4.

81. Sauvé, *supra* note 64, at 127.

82. *See* Mattoo (1998) *supra* note 25, at 12-16 (WTO commitments always were a way of signaling the Members' strategic seriousness towards trade and investment but hardly prevented status quo consolidation.). *See also* Simser, *supra* note 24, at 57, 65; Sorsa, *supra* note 54, at 4-5, 17. *See also* Wahba, *supra* note 32, at 1342; *see also* Woodrow, *supra* note 40, at 87 (On the idea that negotiations were about bringing the idea of progressive financial liberalization more than about creating a trade regulatory 'Big Bang'). *See also* Mercurio, *supra* note 67, at 4. ("To date, there have not been any meaningful advances to the GATS . . . leaving services 'with yesterday's rulebook' of "weak, incomplete, rules and the limited, regulatory precaution-laden, pre-Internet, commitments of 1994."). (citing Pierre Sauvé, *Towards a Plurilateral Trade in Services Agreement (TISA): Challenges and Prospects* 5 J. OF INT'L COM., ECON. & POL'Y 1, 3 (2014).

83. Stijn Claessens, *Regulatory reform and trade Liberalization in Financial Services*, *in* DOMESTIC REGULATION AND SERVICE TRADE LIBERALIZATION, 206 (Aaditya Mattoo & Pierre Sauvé eds., 2003).

emphasized 'a certain lack of clarity about the significance of the GATS to globalization in financial services',[84] others criticized a 'loosely phrased, multilateral agreement . . . acceded to by many countries without much commitment' which had largely encouraged political games without providing for actual financial sector and market opening improvements.[85] Second, the fear of foreign banks influencing domestic markets created a reluctance issue and maintained ideological divides as to whether market-opening was about sound harmonizing policymaking or regulatory sovereignty and stability threats.[86] To some, developed economies had to make more efforts to refrain from protectionism.[87] To others—such as former Deputy Minister Dobson—resonate but nonetheless ambitious liberalization would remain the key.[88] Overall, high expectations were therefore placed in the ability of the Doha Rounds to foster the financial services liberalization political demarche, but conclusive agreements as to the possibility to facilitate and coordinate cross-border financial services were never reached. This was particularly well summarized by Gkoutzinis, who at the time noted that as far as financial services were concerned, 'the main objectives of the current Doha agenda [would] draw heavily on the limitations and shortcomings of the 1997 Agreement' with expectations focusing on developing countries broadening their commitments or on the definition of prudential exceptions aimed at preserving financial stability.[89]

IV. From Multilateral to Preferential Negotiations

Doha, however, failed to produce results[90] and financial services discussions shifted with the idea that 'preferential' arrangements and regionalism would represent a political alternative to deadlocked WTO negotiations incapable of solving agricultural disagreements. In practice, however, (A) early preferential agreements had a defiance dimension rather than a policy and rule-making role, and their impact on financial services facilitation and coordination remained somehow limited (B) and despite a European model (C) and modern agreements suggesting an apparent

84. Thomas, *supra* note 39, at 325.

85. Malik, *supra* note 34, at 375-77.

86. Gkoutzinis, *supra* note 23, at 911 ('The most obvious conclusion is that developed countries are encouraging more market access and national treatment commitments, while developing countries are still refusing to open their cards before other more pressing trade disputes were settled.'); *see also* Malik, *supra* note 34, at 357-358, 369 and Gillespie, *supra* note 36, at 19; *see also* Dobson, *supra* note 35, at 4 ('The fundamental issue remains how to persuade reluctant developing countries that opening their financial markets to foreign service providers is in their long-term interest.').

87. *See* Harms et al., *supra* note 52, at 103.

88. Dobson, *supra* note 35, at 6-7, 8-10.

89. Gkoutzinis, *supra* note 23, at 911.

90. Antoine P. Martin & Bryan Mercurio, *Doha Dead and Buried in Nairobi: Lessons for the WTO*. J. of Int'l Trade Law and Policy (Forthcoming 2017); Gkoutzinis, *supra* note 23, at 911.

willingness to build policies and rules (D) preferentialism—because of its very selective nature—has so far failed to generate consensus on financial services facilitation and coordination.

A. Early Preferential Arrangements: Politics Rather Than Policy

The 2000s witnessed a significant proliferation in the number of Preferential Trade Agreements (PTAs)—also known as Free Trade Agreements (FTAs) or as Regional Trade Agreements (RTAs)—aimed at allowing more efficient negotiations amongst states sharing common liberalization goals. In reality, these agreements were negotiated before and in parallel to the creation of the WTO in 1995, but they never attracted much attention since all eyes then focused on multilateral talks.[91] Nonetheless, when the WTO called for increased multilateral negotiations through the Hong Kong Declaration of 2005,[92] preferential arrangements had already become a serious alternative to the Doha Round deadlocks.[93]

In retrospect, the early preferential negotiations, however, brought little to the financial services framework. Instead, they were criticized for producing 'virtually no liberalisation'[94] because most discussions focused on embodying mid-1990s market access standards matching the GATS. Preferential discussions rather had a largely political nature, far from the idea of creating *global* policies and rules for coordinating financial services cross-border developments.

First, preferential liberalization was an opportunity for developed economies to take a stand against multilateral negotiations where trade in goods (important to developing countries) dominated trade in services (important to advanced economies). Under the WTO's Single Undertaking (all or nothing) model, the Uruguay Round had difficulties to deliver in terms of services and, later, the Doha Round became an even bigger complication as negotiations focused on agricultural subsidy issues while occulting services negotiations.[95] Furthermore, the limits of the GATS'

91. On the various waves of FTA negotiations in the late 1950s and 1990s, *see* Edward D. Mansfield & Eric Reinhardt, *Multilateral Determinants of Regionalism: The Effects of GATT/WTO on the Formation of Preferential Trading Arrangements*, 57 Int'l Org. 829, 831 (2003); *see also* Olivier Cadota et al., *Can bilateralism Ease the Pains of Multilateral Trade Liberalization?*, 45 Eur. Econ. Rev. 27, 27–28 (2001); on early FTAs, *see generally* Shujiro Urata, *Globalization and the Growth in Free Trade Agreements*, 9 Asia-Pacific Review 20, 20-21 (2002).

92. World Trade Organization, Ministerial Declaration of 18 December 2005, WTO Doc. WT/MIN(05)/DEC (2005), https://goo.gl/s8NrN9.

93. *See* Gkoutzinis, *supra* note 23, at 878. (Referring in the early 2000's to 'four main tracks of institutional reform, not mutually exclusive, available to those countries that elected to open their financial systems to international competition . . . the unilateral track . . . the bilateral track . . . the multilateral regional track . . . and the multilateral non-regional track of reform.').

94. Rudolf Adlung, *Services Liberalization from a WTO/GATS Perspective: In Search of Volunteers* (World Trade Org., Econ. Research and Statistics Div., Working Paper 2009).

95. *See also* Antoine P. Martin & Bryan Mercurio, *supra* note 90. *See also* Roy, Marchetti, & Lim, *supra* note 64, at 157. *See also* Gkoutzinis, *supra* note 23, at 911.

positive list framework had given negotiators additional reasons to shift strategies.[96] Therefore, advanced economies interested in services liberalization left multilateral talks and uncooperative countries to discuss multisector liberalization arrangements, seen as 'an insurance against failing multilateral one-sided negotiations'.[97] In other words, committing to bilateral and regional negotiations was about developing domestic services on a self-interest basis by opening new markets—the 'Singapore Issues', *i.e.* foreign investment, government procurement, competition or financial services which were excluded from WTO talks during the Cancun Ministerial Conference of 2004.[98] The process was also about creating a 'defensive' and 'competitive' liberalization cycle: more than limiting competition arising from non-negotiating countries, preferential deals would defend domestic infant industries from free-riders aiming to enjoy greater market access without committing to open their own markets, protect domestic investments abroad, and lock-in the investments originating from selected partners.[99] The countries which refused to negotiate on services, however, were given no access to other markets.

Second, preferential liberalization took a strategic, regional, political, and security perspective.[100] Following the creation of the NAFTA Agreement in 1994, for instance, a 'new regionalism' doctrine described an 'ongoing phenomenon of proliferation of bilateral and regional trading agreements in

96. As a reminder, the US had in the past interrupted negotiations because other countries refused to make concessions on MFN matters. *See* Section 1.

97. Jo-Ann Crawford & Roberto V. Fiorentino, *The Changing Landscape of Regional Trade Agreements*, WTO Discussion Paper No. 8, 6–9 (2005); Rahul Sen, *"New Regionalism" in Asia: A Comparative Analysis of Emerging Regional and Bilateral Trading Arrangements Involving ASEAN, China and India*, 40 J. WORLD TRADE 553, 565 (2006) (". . . it is believed that such economic partnership agreements, that involve deeper liberalization beyond tariff reduction in goods, can provide as a catalyst for enhancing the pace of multilateral trade liberalization.").

98. *See* Juan A. Marchetti & Martin Roy, *Services Liberalization in the WTO and in PTAs*, *in* OPENING MARKETS FOR TRADE IN SERVICES: COUNTRIES AND SECTORS IN BILATERAL AND WTO NEGOTIATIONS, 74 (Juan A. Marchetti & Martin Roy eds., 2008) ("The multifaceted nature of trade in services has resulted in the inclusion of distinct but complementary sets of disciplines to cater for the existence of, inter alia, several modes of supplying services as well as complex sectoral issues (e.g. financial services and telecoms). Thus, in addition to a main chapter on trade in services, PTAs also often include additional chapters on investment, the movement of natural persons, financial services, and telecommunications, which either contain specific obligations for those sectors or policy areas, or simply clarify the application of certain disciplines to those sectors or policy areas.").

99. Marie-France Houde et al., *The Interaction Between Investment and Services Chapters in Selected Regional Trade Agreements*, (OECD Trade Policy Papers, No. 55, 2007), http://dx.doi.org/10.1787/054761108710; *see also* Crawford, *supra* note 97, at 16; Mohamed R. Hassanien, *Bilateral WTO-Plus Free Trade Agreements In The Middle East: A Case Study Of OFTA In The Post-Trips Era*, 8 WAKE FOREST INTELL. PROP. L. J. 161, 161 (2007-2008) ("Free trade agreements (FTAs) are no longer about trade."); Thangavelu & Toh, *supra* note 22, at 1218; Sen, *supra* note 97, at 554; Aaditya Mattoo & Carsten Fink, *Regional Agreements and Trade in Services: Policy Issues*, 16-19 (World Bank Policy Research Working Paper No. 2852, 2002).

100. Sen, *supra* note 97, at 555; Crawford, *supra* note 97, at 1.

the Asia-Pacific'—the ASEAN.[101] Free-trade areas and customs unions also appeared in Sub-Saharan Africa whilst consolidation initiatives were being developed by numerous countries with the US or as regional policies in South America and Eastern European countries where alignment policies with the EU were set up to compensate the former Soviet Union's fragmentation.[102] In all cases, these 'additive regionalism' trends were clearly generated by what commentators called a 'domino effect' generating economic and political incentives to join a club and acting as a political catalyst amongst like-minded countries whilst helping with the building of diplomatic and security relations with foreign partners.[103]

Overall, early preferentialism as promoted by the US, the EU, and their most liberal partners had limited impact in terms of financial services policy and rule-making. Despite calls for financial services policymaking as part of the Hong Kong Declaration,[104] and even though the goals of negotiating parties representing more than eighty percent of world trade in services was to bypass uncooperative developing economies at the multilateral level, to promote the interests of the largest economies, and to create a club centered around liberal values at large,[105] the process was certainly not about negotiating a global framework for cross-border financial services development and coordination deemed acceptable to all.

B. The EU Model as a Suitable Model?

The European model should be mentioned here as, in fact, it has been described in the literature as a regional model potentially suitable for larger future financial services facilitation coordination. The model is twofold.

First, the EU model has a major community dimension. At the EU level, the financial liberalization process has been described as a slow and steady process spread over three decades and observing the sequencing rules generally prescribed by economists on the matter, i.e. trade liberalization followed by domestic reforms aimed at preparing domestic financial systems to market opening, before actually opening the country's capital account.[106] This included banking regulation coordination based on a consensually

101. Sen, *supra* note 97, at 553.

102. On the WAEMU, CEMAC, COMESA, SADC38 or COMECON initiatives, *see* Crawford, *supra* note 97, at 6–9, 13.

103. Crawford, *supra* note 97, at 6 (taking the example of Chile, Mexico and Singapore); *see also* Sen, *supra* note 97, at 554, 565.

104. *See* Thomas F Morante et al., *Global Liberalization of Financial Services Through the Evolution of Trade Agreements*, 123 Banking L. J. 605, 626 (2006).

105. Such as Japan, India, China, Australia, New Zealand, Chile, Mexico, India, Hong Kong, Switzerland, Norway, Thailand, Malaysia, Korea, and Singapore. *See* Roy, Marchetti & Lim, *supra* note 64, at 157, 184-85; *see also* Stephenson, *supra* note 64, at 187.

106. On sequencing and capital account opening, *see The IMF's Approach to Capital Account Liberalization*, *supra* note 32, at 49, 75. For a definition of capital account opening, *see* M. Ayhan Kose & Eswar Prasad, *Capital Accounts: Liberalize or Not?*, Int'l Monetary Fund, https://goo.gl/S20hkN ("The capital account in a country's balance of payments covers a variety of financial flows—mainly foreign direct investment (FDI), portfolio flows (including investment

agreed minimum harmonization playing field under a 'lowest common denominator' criterion, the mutual recognition of the applicable rules, and the idea that domestic authorities would be responsible for supervising their domestic financial institutions.[107] The EU members also coordinated the opening of the financial sector to internal, single market competition (through the limitation of administrative barriers restricting market access to financial actors originating from the EU[108]) and the facilitation of capital account transactions (including capital movements and foreign exchange transactions).[109] Hence, as of today, the free movement of people, goods, services, and capital constitute the core 'four freedoms' at the basis of the European Union's single market. It is said that 'the path adopted by the EU represents the best case of successful extensive liberalization in the financial services industry'.[110]

Second, and as suggested previously, the EU model significantly influenced the elaboration of financial services talks at various levels because the Single Market—as a concrete ongoing reality—gave negotiators both an example of existing developments and some influence as rule-makers.[111] The GATS commitments by the EU reflected a *status quo* matching existing Single Market rules;[112] however, the Union's influence towards financial services coordination has derived mostly from recent free trade agreement negotiations.

Clearly, research conducted in 2003 suggested that attempts to increase trade with the MENA region (the Euro-Mediterranean partnership) generated limited results and, in fact, left financial services out of the negotiations due to a lack of strong financial supervision in these countries.[113] Since then, nonetheless, additional negotiations have been conducted, particularly with strategic partners and mainly in Asia.

The EU reports that in the negotiations conducted after 2006, in particular, concessions exceeding GATS commitments have been achieved in

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in equities), and bank borrowing—which have in common the acquisition of assets in one country by residents of another.").

107. *See also* Paola Bongini, *The EU Experience in Financial Services Liberalization: A Model for GATS Negotiations?* Vienna: SUERF (SUERF Studies: 2003/2), 14-16.

108. This was achieved through the First and Second Banking Coordination Directives (77/780/EEC) and (89/646/EEC), which created a Single Passport allowing EU banks to establish and supply financial services in EU member countries. In practice, however, the mapping of banking markets showed a lack of homogeneity, with the UK and Luxembourg becoming far more advanced financial hubs in the Union. *See id.* at 21–22.

109. *Id.* at 17.

110. *Id.* at 8.

111. *Id.* at 32-6 ('Third, the Single Market has represented a building bloc promoting multilateral liberalization. In fact, those EU member states which had domestic pieces of legislation less favorable to foreign non-EC intermediaries and initially bound their status quo, were later prone to lift such burdens and relax some of the restriction introduced in the schedules.').

112. *Id.* at 36.

113. *Id.* at 41.

regards to market access and establishment rights (Mode 3 Commercial Presence under GATS).[114] In modern FTAs, in fact, important investment provisions normally provided through bilateral investment treaties have even been included, far ahead from GATS standards.[115] The EU-Korea FTA, which entered into force in July 2011, gave hope to EU financial services providers regarding a very restricted Korean financial sector and has been described by the EU as a 'new generation' agreement and as 'the most significant new agreement since the WTO Uruguay Round,' possibly exceeding the US-Korea (KORUS) FTA.[116] Similarly, in November 2014, the EU completed negotiations on a FTA with Singapore by representing about one-third of EU-ASEAN trade in goods and services and about two-thirds of EU-ASEAN investments,[117] and by providing a framework on modern issues such as sanitary and phytosanitary measures (Chapter 5), e-commerce (Chapter 8), investment (Chapter 9), government procurement (Chapter 10), or intellectual property (Chapter 11).[118] In a very similar fashion, FTA negotiations with Vietnam concluded in 2016.[119] In both cases, the text of the agreements is yet to be formally approved by the Commission and ratified by the European Parliament, and the Financial Services provisions are drafted as a subsection of the e-commerce chapter[120]—thus not picturing financial services as an investment playground per se.[121] In both cases nonetheless, and in line with the mega-agreements in which the EU is currently involved,[122] the negotiations suggest that the EU is playing an active role in pushing large-scale financial services facilitation and coordination.

C. Modern Agreements: A Political Will to Liberalize Selectively

In contrast with fairly inconclusive multilateral negotiations, the modern trend towards mega-regional negotiations suggests increasing determination

114. Policy Department A for the Economic and MonetaryAffairs Committee, *Financial Services in EU Trade Agreements*, POLICY DEPARTMENT, EUROPEAN PARLIAMENT, 7, 10, IP/A/ECON/2014-08 (Nov. 2014). To the exception of the EU-Chile Association Agreement of 2002.
115. *Id.* at 10-11.
116. The point is not explored further in this article. For an analysis, *see id.* at 10; *see also Financial Services Liberalization and TiSA: Implications for EU Free Trade Agreements*, *supra* note 13, at 11.
117. *See Countries and Regions: Singapore*, EUROPEAN COMM'N, https://goo.gl/ftAABn (last visited June 27, 2017).
118. *See EU-Singapore Free Trade Agreement*, EUROPEAN COMM'N, https://goo.gl/uiCG8e (last visited June 11, 2017).
119. *See EU-Vietnam Free Trade Agreement*, EUROPEAN COMM'N, https://goo.gl/nEmr8M (last visited June 11, 2017).
120. In contrast, the EU-East African Countries (EAC) FTA, which negotiations ended in 2014, contains no provisions on financial services, except those related to agricultural developments, *available at* https://goo.gl/nGqc0v.
121. In contrast with TPP for instance. *See id.*
122. *See infra.*

to building either domestic or selective frameworks for financial services facilitation and coordination.

As mentioned in the introduction, various jurisdictions have taken pro-services stands, particularly recently, in contrast with the general risk-averse approach to financial services followed by financial stability-focused regulators on a global scale. In the Asia-Pacific region, in particular, various governments have set up pro-banking initiatives aimed at facilitating the development of new Fintech services, with the aim of assessing potential opportunities outside of the applicable domestic legal frameworks prior to generalizing them.[123] Since the beginning of the global economic crisis of 2008, furthermore, research suggests that, particularly in emerging market economies, financial markets have been increasingly opened, with restrictions on market access and discriminatory measures favoring domestic financial services declining notably in relation to banking, securities, and insurance activities.[124]

In addition, to a certain extent, recent preferential arrangements have been found capable of increasing financial services' facilitation. In contrast with GATS-type agreements, which merely provides lists of positive commitments without creating a general liberalization scheme, recent preferential arrangements with the US—or other developed economies following a more liberal NAFTA-type negative approach to commitments—have given signatories incentives to provide restriction-free liberalization frameworks, which are narrowed down through a list of the sectors, or measures that will not be liberalized immediately (these are "the non-conforming measures").[125] Therefore, in doing so, PTAs are endorsed for having potentially achieved relatively "greater liberalization,"[126] and for contributing to the increasing transparency and foreign investment diversification in the financial services sector.[127]

Interestingly, however, liberalization is not merely about unbundling and authorizing unrestricted openness to cross-border financial services. To the contrary, preferential agreements tend to provide significant market-access safeguards. For instance, the "new financial services" provisions allow foreign providers, originating from other signatories, to provide new services. These are about preventing discrimination "in like circumstances" but leave hosts some regulatory room. Furthermore, "new services" in all

123. *See* sources cited *supra* notes 15-18, for examples in Hong Kong, Singapore, Malaysia, and Australia.

124. Claessens, *supra* note 14, at 15.

125. *See for instance* Stephenson, *supra* note 64, at 189, 193-195; *see also* Marchetti & Roy, *supra* note 98, 74-5.

126. Roy et al., *supra* note 64, at 173-75, 179.

127. Morante et al., *supra* note 104, at 626; Stephenson, *supra* note 64, at 189; Adlung, *supra* note 94, at 12; *see also* Houde et al., *supra* note 99, at 244.

agreements can be subjected to authorization requirements, which guarantees regulatory freedom in "prudential" situations.[128]

Hence, regional preferential arrangements, perceived as "WTO-plus" instruments to complement WTO negotiations, have been described as a part of a "competitive liberalization" process as well as a "building block for multilateral liberalization."[129] In fact, various large scale negotiations—described as "mega-FTAs" because of their magnitude and geographic reach[130]—point towards a political willingness to liberalize services, such as financial services, on a large scale. This will occur throughout various regions, mainly under US and EU leadership. In particular, examples of "mega-FTAs" include the TPP agreement between the US and eleven countries of the Asia-Pacific region, the TTIP between the US and the EU, the CETA between the EU and Canada, and the TISA negotiations amongst fifty countries, including the US and the EU.

1. *TPP*

Even though it is highly unlikely to enter into force following recent shifts in US trade policy,[131] the Trans-Pacific Partnership (TPP) is the most obvious example of modern preferential agreements negotiated with a genuine policy ambition shared amongst twelve countries.[132]

In line with most FTAs negotiated by the Office of the United States Trade Representative (USTR),[133] Chapter 11 of the TPP clearly aims to facilitate market access to foreign financial service providers, to allow the introduction of "new financial services" by these providers,[134] and more generally, to promote foreign investments in financial institutions and cross-

128. *See, e.g.*, Trans-Pacific Partnership art. 11.7, Nov. 5, 2015, https://ustr.gov/sites/default/files/TPP-Final-Text-Financial-Services.pdf; *see also* US-Australia Free Trade Agreement, art. 13.6, Mar. 2004, http://www.sice.oas.org/TPD/USA_AUS/Studies/AUSFTAguide_e.pdf; *see also* US-Singapore Free Trade Agreement art. 10.6, Jan. 15, 2003, https://ustr.gov/sites/default/files/uploads/agreements/fta/singapore/asset_upload_file708_4036.pdf. On the issue of stability safeguards in FTAs, *see also* Martin & Mercurio, *supra* note 90, at forthcoming.

129. Thangavelu & Toh, *supra* note 22, at 1217; *see also* Sen, *supra* note 97, at 566; Roy et al., *supra* note 64, at 174-75; On PTAs approach to investment; *see* Houde et al., *supra* note 99, at 245-46.

130. For further information about mega-agreements, *see, e.g.*, Vinod K. Aggarwal & Simon J. Evenett, *A Fragmenting Global Economy: A Weakened WTO, Mega FTAs, and Murky Protectionism*, 19 SWISS POL. SCI. REV. 550, 550-55 (2013).

131. Letter from Maria L. Pagan, Acting Representative, Office of the United States Trade Representative, to TPP Depositary, Ministry of Foreign Affairs and Trade (Jan. 30, 2017), available at https://goo.gl/xVhC0j.

132. The twelve partner countries involved in the TPP include Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Vietnam. *Text of the Trans-Pacific Partnership*, N.Z. MINISTRY OF FOREIGN AFF. & TRADE, https://goo.gl/QZ73X3.

133. *Free Trade Agreements*, OFFICE OF THE U.S. TRADE REP., https://ustr.gov/trade-agreements/free-trade-agreements.

134. Trans-Pacific Partnership, *supra* note 128, at art. 11.7.

border trade in financial services.[135] It does so by granting service providers the basic standards of international economic laws, such as national treatment (the parties must treat national and foreign financial service providers equally) and the most-favored-nation clause (the parties must treat investors from all other partner countries equally).[136] In addition, it creates regulatory transparency obligations, and strong "[m]arket [a]ccess for financial institutions" commitments. This implies that the parties cannot limit the number of foreign financial institutions, and cannot impose quotas on the total value of financial service transactions, or on the number of operations and outputs realized by foreign TPP entities.[137] Lastly, Chapter 11 ensures that foreign financial services providers are to be covered by the rules applicable under foreign investment law as provided within the investment chapter of the TPP,[138] including—but not limited to—the minimum standard of treatment requirement (which includes fair and equitable treatment and full protection and security under customary international law), the expropriation and compensation requirement, the freedom of transfers requirement (aimed at guaranteeing the right of investors to repatriate profits), and a specific investor-state dispute settlement (ISDS) mechanism, which allows recourse to investor-state arbitration as provided under Chapter 9.[139]

2. *TTIP*

Although rather confidential, the large scale Transatlantic Trade and Investment Partnership (TTIP), currently negotiated by the US and the EU, contains provisions aimed at increasing policy and regulatory cooperation in financial services.[140]

First, in Chapter III, the proposed agreement provides for a large "cross-border supply of services," which guarantees market access to cross-border service providers (preventing host states from imposing restrictions on the number of providers allowed into the country, or from imposing quotas and limitations on the quantity and value of operations and on the entry of personnel), together with the customary national treatment and MFN provisions.[141] Second, it contains an Annex in the form of two sub-sections—"Liberalization of Financial Services," and "Regulatory

135. On the contribution of TPP to financial services, *see* Martin & Mercurio, *supra* note 90, at forthcoming.

136. Trans-Pacific Partnership, *supra* note 128, at arts. 11.3-11.4.

137. *Id.* at arts. 11.5, 11.13.

138. *Id.* at art. 11.2(2) ("Section B of Chapter 9 (Investment) is hereby incorporated into and made a part of this Chapter.").

139. As protected under Articles 9.6, 9.8, 9.9, and 11.22 of the Investment Chapter, *id.* at art. 11.

140. *See generally* Proposal of the EU on the "Transatlantic Trade and Investment Partnership: Trade in Services, Investment and E-Commerce," (July 31, 2015), https://goo.gl/IZKLH4.

141. *Id.* at arts. 3.2-3.4.

Cooperation in Financial Services,"[142] which shows a common willingness to conduct financial services market liberalization. But this Annex provides little provisions directly applicable to financial services, and mainly serves to extend the scope of the agreement of such services, whilst listing the relevant chapter of the agreement deemed applicable to the sector. Hence, it ensures that foreign financial service providers are treated according to the rules of trade in cross-border services (Chapter III) and are recognized as investors under the rules of foreign investment law (done so by referring to the investment chapter, Chapter II)—which unlike the vast majority of investment agreements, also includes a "market access" commitment, which provides pre-establishment rights.[143] But in all, financial services has been a difficult aspect of the TTIP negotiations because the US was reticent in cooperating on financial regulations "for fear of weakening various regulatory initiatives which have been implemented since the financial crisis, and/or interfering with regulatory initiatives underway in other international for a," a point deemed essential to the EU.[144]

3. *CETA*

The Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada is the most palpable mega-agreement to date. Although it still has to be ratified by Canada, and incorporated in each of the EU members' domestic legal systems, it was ratified by the EU Parliament on February 15th 2017,[145] and thus is the most practical agreement available.

Like the proposed TTIP text, CETA contains an investment chapter (Article 8) which includes a market access clause that prevents the hosts from imposing various restrictions on foreign providers,[146] as well as a section on cross-border trade of services (Article 9). In contrast with the TTIP Annex, which merely refers to the services and investment chapters to establish a framework, CETA, however, makes these chapters inapplicable to financial services.[147]

142. *Id.* at art. 5.

143. *Id.* at art. 3.2; *see also* UN CONF. ON TRADE AND DEV., BILATERAL INVESTMENT TREATIES 1995-2006: TRENDS IN INVESTMENT RULEMAKING, at 26, U.N. Sales No. E.06.II.D.16 (2007) (explaining that "an increasing number of BITs provide national treatment and MFN treatment in the pre-establishment phase," while also noting that, "[s]ummarizing the recent trends in BITs, the prevailing approach is to make the question of entry and establishment subject to national laws").

144. *See Financial Services Liberalization and TiSA: Implications for EU Free Trade Agreements*, *supra* note 13, at 11.

145. The full text of the Comprehensive Economic and Trade Agreement between Canada (CETA) is available from the page of the Council of the European Union, *see* 'EU-Canada trade agreement: Council adopts decision to sign CETA' (28/10/2016), https://goo.gl/vM2lqc.

146. *Id.*

147. *Id.* at art. 8.3 ("This Chapter does not apply . . . to the extent that the measures apply to investors or to their investments covered by Chapter Thirteen (Financial Services)."); *see also id.* at art. 9.2(2)(d).

Instead, these are dealt with under a specific article (Financial Services, Article 13), which like TPP, CETA views financial services as an "investment playground" and provides the entire regime applicable to the sector by incorporating selected provisions of Chapter 8. This Chapter includes the market access provision,[148] which together with national treatment and MFN clauses, both refer to and incorporate the clauses drafted in Chapter 8 for this purpose in the investment chapter.[149] Also, provision aimed at fostering the development of new financial services is provided alongside regulatory efficiency and transparency obligation.[150] Finally, the financial services chapter incorporates selected standards of international investment law borrowed to Article 8[151]—specifically treatment of investors and of covered investments (Article 8.10), compensation for losses (8.11), expropriation (8.12), transfers (8.13), and denial of benefits (8.16). In addition, the article provides foreign providers with an investor-state dispute resolution system, adapted to ensure financial stability to the host.[152]

4. *TiSA*

Finally, it is important to mention the Trade in Services Agreement (TiSA) which has been in negotiations since 2012 between the EU and twenty-three countries, known as the "Really Good Friends of Services," mainly due to a lack of optimism on Doha Round's ability to deliver on services.[153]

TiSA is significant because it will be the first modern FTA to reunite the EU, the US, and a significant number of WTO members. Hence, it might provide a convergence opportunity between EU and US approaches to financial services,[154] but in the future, the goal is to allow expending TiSA at the multilateral level amongst all WTO members.[155] But major countries

148. *Id.* at art. 13.6-7.

149. *Id.* at art. 13.4-7.

150. *Id.* at arts. 13.14, 13.11.

151. *Id.* at art. 13.2(3).

152. *Id.* at arts. 13.20-21; *see also* Martin & Mercurio, *supra* note 90, at forthcoming.

153. *The Plurilateral Agreement on Services*, EUROPEAN PARLIAMENT (July 1, 2013), https://goo.gl/ChbucZ.

154. *Financial Services Liberalization and TiSA: Implications for EU Free Trade Agreements*, *supra* note 13, at 11.

155. *The Plurilateral Agreement on Services*, *supra* note 153, at 14-15 (Explaining, "[t]he objective of the plurilateral trade in services agreement should be to negotiate an ambitious agreement that is compatible with the General Agreement on Trade in Services, (GATS), which would attract broad participation and which could be multilateralised at a later stage. Indeed, by staying close to the GATS, it could be easier to convince some of the leading emerging countries that were active in the DDA negotiations to join the initiative, either during the negotiations or later on.").

such as China, Russia, or India are not part of the negotiations thus far, despite these countries having applied.[156]

The text of the agreement is currently under confidential negotiations,[157] but some information is already available. In line with the free-riding fears, formulated by the US as part of the GATS negotiations, the negotiating parties—led by the EU[158]—are pushing the idea that MFN commitments ought to be excluded from the agreement until the so-called "critical mass" of ninety percent of global trade services are represented.[159] Therefore, until then, the parties retain the liberty to negotiate more ambitious agreements without extending those arrangements to other TiSA parties.[160] In addition, as reported by the EU, "unlike most other services agreements, the TiSA has adopted a hybrid approach to listing: positive listing for market access, and negative listing for national treatment," which implies that no discrimination between domestic and foreign services providers would become the norm, unless expressly excluded.[161]

The financial services part of the agreement would seem to take the form of an annex, which includes the main national treatment and regulatory transparency provisions. It is emphasized, however, that "the EU's proposals for the TiSA core text and the Annex on Financial Services simply replicate existing WTO provisions in the GATS, the GATS Annex on Financial Services, and the GATS Understanding on Commitments in Financial

156. Stephanie Henry, *China Expresses Interest in Joining Services Negotiations, Creating New Opportunities & Risks*, U.S.-CHINA BUS. COUNS. (last visited June 26, 2017), https://goo.gl/l2VSPW.

157. *Trade in Services Agreement (TiSA) Financial Services Annex*, WIKILEAKS (June 3, 2015), https://goo.gl/fxvLF3.

158. *Financial Services Liberalization and TiSA: Implications for EU Free Trade Agreements*, *supra* note 13, at 31 (Stating that "this would constitute a significant, and probably unacceptable, limitation on the EU's FTA strategy going forward.").

159. As of 2012, TiSA members represented 68.2% of global trade in services, *see The Plurilateral Agreement on Services*, *supra* note 153, at 18-19 (Stating: "[i]n order to avoid free-riding, the automatic multilateralization of the agreement based on the Most Favored Nation (MFN) principle should be temporarily suspended as long as there is no critical mass of WTO members joining the agreement."); *see also Financial Services Liberalization and TiSA: Implications for EU Free Trade Agreements*, *supra* note 13, at 31 ("It is still unsettled whether the TiSA text will include an MFN provision.").

160. The issue of non-MFN negotiations raises concerns. *See, e.g.*, Malcolm Bosworth, *The Proposed Non-MFN Trade in Services Agreement: Bad for Unilateralism, the WTO and the Multilateral Trading System*, 3 (NCCR Trade Reg., Working Paper No. 2014/05), https://goo.gl/9691ge. *See also* Michitaka Nakatomi, *Sectoral and Plurilateral Approaches in Services Negotiations: Before and After TISA*, 5 (ECIPE, Policy Brief 02/2015), https://goo.gl/ZzMAO2 (finding that "there is no rationality in introducing a discriminatory system.").

161. *See Financial services liberalization and TiSA: Implications for EU Free Trade Agreements*, supra note 13, at 15.

Services."[162] Hence, TiSA would "simply reflect a continuation of the *status quo* as far as financial services are concerned."[163]

A "new financial services" clause seems to be discussed, yet no reference is made to a potential market access clause, which might appear within a larger "trade-in-services" chapter. Similarly, while the nature of the applicable dispute settlement process remains vague, the available draft does not indicate whether arbitration might be the chosen path. In fact, according to the EU, "one obvious but significant point of difference between the TiSA and most new generation FTAs is that . . . TiSA will not contain investment protections, and related investor-state dispute settlement, in respect of investments and investors in the financial sector."[164]

Hence, despite very little information being available, two conclusions may be formulated. One is that TiSA shows the willingness of the US, the EU, and of the twenty-three other countries to move forward with services market liberalization on a wide and futuristic global scale. The other is that liberalization on financial services might be limited in that there are expectations that financial services market access commitments will essentially be compatible with those of GATS. But in the absence of investment provisions applicable to financial services, the agreement might have less impact than CETA, or the late TPP which, as mentioned previously, both included investment chapters capable of picturing financial services as major investment playgrounds.

D. But Preferentialism is not About Creating a Global Framework

True to its name, preferentialism has never—and is still not—about building a *global* framework for financial services facilitation coordination. Despite many (overlapping) instruments suggesting a converging willingness to coordinate cross-border financial services facilitation on a largely selective basis, identifying comparable liberalization benchmarks has always been problematic.[165] It is difficult to argue that the premise for a generally applicable legal framework for cross-border financial services coordination was ever agreed upon.

First, early preferential agreements have not covered financial services equally. Efforts for preferential agreements particularly occur in relation to

162. *Id.* at 25. *See also* Elina Viilup, *The Trade in Services Agreement (TISA): An End to Negotiations in Sight?*, European Parliament, https://goo.gl/IxQREU.

163. EU reports suggest that while the EU's initial financial services package matched that of the EU-Korea FTA (which as mentioned previously is described as superseding the commitments taken in the significant Korea-U.S. FTA), improvements reaching CETA-like levels of ambition have been discussed while "few if any TPP parties have gone beyond the TPP package in the TiSA negotiations." *See Financial services liberalization and TiSA: Implications for EU Free Trade Agreements*, *supra* note 13, at 7, 25.

164. *See id.* at 7.

165. Sen, *supra* note 97, at 556, 562; Páez, *supra* note 33, at 1066; Roy et al., *supra* note 64, at 155.

the opening of insurance markets; however, no study affirms that a general and globally applicable framework for banking and non-insurance services liberalization has been developed. In fact, research focusing on PTAs between developing countries suggests that preferential arrangements have aimed at developing reciprocity and at fostering regional integration (Mercosur, ASEAN) more than at creating a set of legal rules for the development of cross-border financial services.[166] A similar argument could reasonably hold as far as the modern mega-negotiations are concerned.

Second, large disagreements have suggested that existing preferential standards could not supersede the authority of (nonexistent) multilateral rules, once described as "the superior option for carrying out trade liberalization."[167] In addition, it has been noted that RTAs might even "pose a threat to a balanced development of world trade," by creating parallel and/or overlapping discriminatory standards (the so-called "noodle bowl") to the detriment of regulatory transparency while diverting trade and investment flows from countries not involved—or not capable of getting involved—in preferential arrangements.[168] In the context of the ASEAN, for instance, the WTO had concerns that Singapore's pro-market opening of preferential trade policies could be detrimental to other economies—such as Malaysia—while suggesting "that the WTO [was] a weak forum for an open multilateral trading system."[169] Thus, some suggestions were made that preferential regional commitments ought to be treated as entry level pledges prior to committing at the global level, or that a 'consultative system' could be built to map, monitor, and redefine preferential rules as to preserve multilateral talks and interests.[170] Again, in sum, a politicized debate prevails on the possibility to generate a wide framework for the facilitation and coordination of cross-border trade in financial services.

166. Countries involved in negotiations on the cross-border supply of financial services with the U.S. have gone beyond the multilateral requirements by adding commitments to the cross-border supply of insurance intermediation (broking and agency) and to portfolio management services, by switching from asset management firms to mutual funds. Roy et al., *supra* note 64, at 173-75; In this additional research, the authors emphasized that Guatemala's commitments went from 9 under GATs, to 90 under PTAs; Chile's commitments increased from 10 to 74; Australia's increased from 47 to 83; Japan went from 45 to 70, etc. However, India and the European Communities of the ASEAN countries, made limited commitments under PTAs, *see* Marchetti & Roy, *supra* note 97, at 85, 89.

167. Stephenson, *supra* note 64, at 188, 196, 204; Mattoo and Fink, *supra* note 99, at 16-19.

168. Adlung, *supra* note 94, at 8, 19; Crawford, *supra* note 97, at 1, 16-17; On the gap between early birds and late movers, *see also* Roy, Marchetti and Lim, *supra* note 64, at 185-87; Mattoo and Fink, *supra* note 99, at 4, 20-22; Sen, *supra* note 97, at 555, 564-65.

169. Thangavelu, *supra* note 22, at 1214.

170. *See, e.g.*, Crawford & Fiorentino, *supra* note 97, at 18.

V. Future Perspectives

Despite the rapidly growing influences and reach of financial services fostered by modern technology, the perspectives of cross-border facilitation coordination overall seem limited.

A. Limited Global Perspectives

First, the global economy has been hit by several impacting and long lasting financial crises—the Asian crisis of 1997, the Argentinian crisis of 2001, and the worldwide crisis of 2008—and today financial institutions are under increased scrutiny.[171] Hence, the trends suggest that financial services in the future will be increasingly regulated through international norms such as Basel I, II, and III[172] because of their potential impact, rather than facilitated and coordinated.

Second, chances of multilateral—for example global and consensual—policy and rule-making are slim because no organization—especially not the WTO—is capable of playing a facilitator role in the matter. On the other hand, WTO staffers have emphasized that the multilateral system is unable to cope with the multiplicity of domestic institutional framework, and concluded that the "centralized" negotiation structures in Geneva failed to cooperate with the uncoordinated domestic policymaking bodies.[173] The number and intensity of technical meetings at the WTO level declined, notifications to the WTO have become irregular, while members are increasingly reticent to discuss specific commitments with WTO committees, thus, indicating a general "negotiating fatigue," as well as a "widespread disregard of long-existing transparency Obligations."[174] The staffers even suggested that the WTO ought to follow a "more modest approach," whereby it would not act as a promoter but "predominantly as a sort of a notary or 'clearing house' to certify and oversee liberalization moves decided and implemented in whatever other contexts."[175] Meanwhile, the never ending Doha Round, which was long under intensive care, was "buried" in Nairobi in December 2015, with the adoption of "The Nairobi Package," and the implicit admission that the international community

171. On the heavy regulation of financial services, *see, e.g.*, Claessens, *supra* note 83, at 2, 6-7, 16.

172. The idea that financial liberalization would be structured through additional mechanisms, such as IOSCO or the Basel rules, was also part of the debate near the end of the decade. But this topic is outside the scope of this paper. For more information on IOSCO or the Basel rules, *see generally* Press Release, Basel Committee on Banking Supervision, Group of Governors and Heads of Supervision Announces Higher Global Minimum Capital Standards (Sept. 12, 2010) (on file with author); *see also* Patrick Slovik, *Systemically Important Banks and Capital Regulation Challenges*, 9-10 (OECD Economics Department, Working Paper No. 916, 2012).

173. Adlung, *supra* note 94, at 9.

174. *Id.* at 20-2.

175. *Id.* at 8, 11, 20-2.

would now close negotiations.[176] But the WTO has no agenda on financial liberalization and is incapable of acting as a forum for the development of a global legal framework for cross-border financial services.

Third, preferential arrangements have become problematic, politically incorrect, and incorrectly political. Whilst the late 2000s, the idea was that "self-generated" preferential financial liberalization remained a valuable option.[177] Today, an important shift is taking place. The most visible trade arrangement since the development of NAFTA—for example the TPP, the TTIP, the CETA, and the TiSA—are being questioned by all political sides, if not put to a halt. On the US side, the presidential debate has pushed all candidates to question the TPP deal,[178] while in the EU, national leaders seem ready to block a treaty deemed excessively beneficial to the US. The EU often expressed concerns as to the consequences of the Canadian deal,[179] thus, sending the message that soon after Brexit, the EU's ability to sign preferential trade will remain fragile. Hence, the most recent preferential arrangements, which were once described as the "bilateral renaissance"[180] of trade facilitation, have become incorrectly political to the people and politically incorrect to the decision-makers.

B. The US: From Leadership to Uncertainty

Finally, while the above shows that the EU and the US have historically played an important leadership role in developing trade in financial services at plurilateral and regional levels, two important questions emerge as a result of the arrival of power to President Trump.

The decision to unravel the Dodd-Franck legislation to facilitate financing in the US is likely to challenge the currently applied international financial regulations, which have in large part been set up with similar objectives in mind, for example, increasing the stability of the global financial system by ensuring that banks do not stand on shallow legs following the 2008

176. *See* Martin & Mercurio, *supra* note 90, at 50-55; On the death of the Doha Round, *see also* Bryan Mercurio, *Reflections on the World Trade Organization and the Prospects for Its Future*, ?10 MELB. J. INT'L L. 49, 49-57 (2009).

177. At the time, WTO staffers wrote that "Geneva is distinctly different from Brussels," and admitted that the WTO would not create a multilateral trading framework like those designed and implemented at the EU or NAFTA levels. Adlung, *supra* note 94, at 8, 20-22.

178. *See, e.g.*, Jake Tapper, *45 Times Secretary Clinton Pushed the Trade Bill She Now Opposes*, CNN (June 15, 2015), https://goo.gl/K4Q5mP. *See also* Sam Thielman, *Hillary Clinton's U-turn on TPP Deal has Team Working Overtime Ahead of Debate*, GUARDIAN (Oct. 13, 2015), https://goo.gl/V6FniH.

179. Jennifer Rankin, *Doubts Rise over TTIP as France Threatens to Block EU-US Deal*, GUARDIAN (May 3, 2016), https://goo.gl/Ne5u3W. *See also* Daniela Vincenti, *EU Leaders on Collision Course with Commission over CETA*, EURACTIV (June 30, 2016), https://goo.gl/IEzhbM. *See also Belgium Walloons Block Key EU CETA Trade Deal with Canada*, BBC NEWS (Oct. 24, 2016), https://goo.gl/pyjWzP.

180. Lucian Cernat, *TPP, TTIP and Multilateralism: Stepping Stones or Oceans Apart?* VOX (Nov. 8, 2013), https://goo.gl/V6JwU3.

economic crisis.[181] The decision, in addition, comes with the waiving of financial adviser's obligation to put their clients' best interests first,[182] which overall suggests that a financial services policy would likely be oriented towards deregulation, rather than coordination in the future. Hence, if conducted, policymaking might lead to major issues, such as shadow banking and financial instability, and the international regulatory bodies—which currently oversee the financial stability preservation processes—might attempt to counterbalance the US policy shifts. They are, more than ever, very unlikely to focus on promoting and coordinating modern cross-border financial services.

Concerning trade policy, dynamics will also change. The decision of President Trump to withdraw from TPP, and to favor bilateral deals, will have important consequences, particularly in terms of financial coordination in leadership.

By preferring bilateralism to regionalism, President Trump has probably lost a tremendous opportunity to ensure that US-led trade rules will be applied on a larger scope and has sent the message that Washington will abandon trade leadership at large.[183] Meanwhile, in the Asia-Pacific, the APEC organization—of which the US is a member—has insisted that protectionism was not imaginable, warned that liberalization would continue with or without Washington, and has since become the center of interests of various US trade partners wanting to commit to more trade facilitation.[184]

This political positioning by President Trump is likely to have a double impact on financial services liberalization. Although Washington has not communicated about TTIP and TiSA projects so far, Washington's TPP policy suggests that the same path may be followed. In fact, until the 2016 US elections, analysts believed that "the leadership of the United States and the European Union in the TiSA negotiations [would] continue[ ] to reinforce the position of these two players as rule-makers and push[ ] towards 'global' financial regulatory coordination with their leadership."[185] But the trend has become unlikely. As of February 2017, it would seem that, if Washington applies its new bilateral policy to TTIP and TiSA, financial services leadership would evolve without US influence. In fact, in relation to

181. *See, e.g.*, Ben Protess & Julie H. Davis, *Trump Moves to Roll Back Obama-Era Financial Regulations*, N.Y. TIMES (Feb. 3, 2017), https://goo.gl/SBuZNC.
182. Stephen Foley & Alistair Gray, *Trump Puts Brake on 'Client First' Fiduciary Rule Protecting Retirees*, FIN. TIMES (Feb. 3, 2017), https://goo.gl/s1nmai.
183. In March 2017, commentators suggested that Beijing may seek to replace Washington in future TPP negotiations. *See* Nyshka Chandran, *After US Drops TPP, China Joins Member States in Trade Talks*, CNBC (Mar. 13, 2017), https://goo.gl/aymzXl; Antoine P. Martin, *Trump's TPP & trade policy will make China politically great again*, THE ASIA PACIFIC CIRCLE (Dec. 2, 2016), https://www.asiapacificcircle.org/single-post/2016/12/02/Trumps-TPP-trade-policy-will-make-China-great-again-politically.
184. *See* Antoine Martin, *24th APEC Summit: Shaping the Future of Trade Policy-Making?*, TRADEPACTS (Nov. 29, 2016), https://goo.gl/cCNQOp.
185. Andrew D. Mitchell & Ana Maria Palacio, *Coordination in the Asian Financial Markets and the Case of TISA*, 13 MANCHESTER J. OF INT'L ECON. L. 206, 209, 247 (2016).

TiSA, considering the "critical mass" expectations mentioned previously, a shift in US influence would even threaten the agreement as a whole. In relation to TTIP, as mentioned in the previous section, negotiations have been blocked so far because of financial regulation at large. In contrast with the EU, the US proved reticent to cooperate by fear of reducing the impact of the regulations it put into place over the past few years in response to the financial crisis. Hence, with policies aimed at favoring American priorities over regional interests, the idea of large-scale financial regulation binding the US is shrinking and, with it, the likeliness of large-scale modern financial services facilitation and coordination.

VI. Conclusion

Although the financial services industry is evolving because of rapidly improving technologies, the global policies and legal framework applicable to cross-border financial services are currently largely unable to coordinate forthcoming developments. Even with international bodies largely committed to regulating and controlling international finance for the sake of stability, trade negotiations aimed at elaborating facilitation and coordination dynamics are achieving very limited results.

At the global level, discussions have historically been dominated by economists who focused on the merits of liberalization, or on the quantifying of financial service commitments taken by states over the years. But global and preferential financial service negotiations have historically been marked by detached, dispassionate, and self-interested politics, as well as by highly selective policymaking efforts. Hence, no global or large-scale consensus was ever reached on the "basic social rule" for coordinating cross-border financial services development and facilitation. Of course, the existing preferential agreements would tend to provide facilitation and coordination tools for future developments, but they remain largely bilateral and have little chance of building large-scale dynamics. Furthermore, major divides have prevailed between developed and developing countries, and the discourse on financial services liberalization has shifted from economics to politics, while simultaneously remaining poor in terms of policy-building and rulemaking. In retrospect, throughout the 1990s and 2000s, financial services negotiations were essentially a "shop window" political move, merely motivated by leveraging possibilities, without having many real legal ambitions or impacts.

In contrast, today large-scale regional instruments could represent significant tools for developing a forward moving financial service coordination framework. First, they have the potential for creating regional dynamics between countries sharing common interest and perspectives. Second, they also have the potential to start establishing applicable rules that, in the long-run, might be duplicated and improved as part of additional initiatives. Yet, because financial services and financial liberalization are seen as incorrectly political to the people, and politically incorrect to the leaders, tools will remain inefficient until policymakers are willing to push the rule-making further.

Hence, while coordination is needed more than ever, it remains unlikely. Still, cross-border financial service developments are inevitable and will sooner or later. Developments need to be planned for in a positive and forward-moving manner, and must be viewed beyond purely protective policymaking—particularly given the tendency of innovative financial service companies who lack familiarity with the financial sector and its regulations. Until then, modern financial services facilitation will remain in the realm of voluntarist and unilateral domestic policymaking.