Regulatory Cooperation in Securities Market Regulation: Perspectives from Australia

Law Working Paper N° 503/2020
March 2020

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Monash University and ECGI

ECGI Working Paper Series in Law

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I am grateful to Pierre-Henri Conac, Tony D'Aloisio and Eric Pan for helpful comments and to Mitheran Selvendran for excellent research assistance.

Abstract

The global financial crisis highlighted the interconnectedness of international financial markets and the risk of contagion it posed. The crisis also emphasized the importance of supranational regulation and regulatory cooperation to address that risk.

Yet, although capital flows are global, securities regulation is not. As a 2019 report by IOSCO notes, the regulatory challenges revealed during the global financial crisis have by no means dissipated over the last decade. Lack of international standards, or differences in the way jurisdictions implement such standards, can often result in regulatory-driven market fragmentation.

This article considers a range of cooperative techniques designed to achieve international regulatory harmonization and effective cross-border financial market supervision. It discusses three major techniques: (i) transgovernmental networks of financial regulators; (ii) complex multilateral arrangements; and (iii) mutual recognition agreements, and considers the benefits and downsides of each of these regulatory mechanisms.

The article focuses particularly on developments in Australia. It examines, for example, a high profile cross-border supervisory experiment, the US-Australian Mutual Recognition Agreement, which the SEC and Australia's business conduct regulator, ASIC, signed in 2008. This was the first agreement of its kind for the SEC. The article also considers some key regulatory developments in Australia and Asia since the time of the US-Australian Mutual Recognition Agreement.

Keywords: Financial market regulation; transnational regulatory networks; transgovernmental regulatory networks; multilateral regulation; mutual recognition agreements; global governance.

JEL Classifications: F02, F55, G18, G28, G30, G38, K22, K33, O16.

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Forthcoming, 2020, *European Company and Financial Law Review (ECFR)*, pp. 12-35

1. Introduction

In an influential article published in the *Harvard International Law Journal* in 2007, Ethiopis Tafara and Robert J. Peterson asserted that "[b]orders that have blurred for most market participants are proving as sharp as ever where market regulation is concerned".[1] The onset of the global financial crisis the same year revealed the interconnectedness of international financial markets and the risk of contagion it posed.[2] The crisis also highlighted the importance of supranational regulation and regulatory cooperation to address that risk.

Yet, as a 2019 report of the International Organization of Securities Commissions (IOSCO)[3] notes, these difficulties have by no means dissipated over the last decade. According to IOSCO, lack of international standards, or differences in the way jurisdictions implement such standards, can lead to regulatory-driven market fragmentation.[4] These matters lay at the heart

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1 *Ethiopis Tafara/Robert J. Peterson*, "A Blueprint for Cross-Border Access to U.S. Investors: A New International Framework", Harvard International Law Journal 48 (2007), 31, 32.

2 See *World Economic Forum*, "The Financial Development Report 2009", xi; *IOSCO*, Remarks by David Wright, Secretary General of IOSCO, The Atlantic Council, Washington D.C., 10 December 2012, https://www.iosco.org/library/speeches/pdf/20121210-Wright-David.pdf (last accessed 1 December 2019), 5.

3 See *IOSCO*, "Market Fragmentation & Cross-border Regulation", June 2019.

4 See *IOSCO*, MR 14/2019: "IOSCO examines regulatory-driven market fragmentation and considers how to enhance cross-border cooperation", 4 June 2019**;** *IOSCO* (fn. 3), 8. The definition of market fragmentation adopted by IOSCO is the same as that used by the Financial Stability Board (FSB), namely "global markets that break into segments, either geographically or by type of products or participants". *IOSCO* (fn. 3), 7.

of the conference that took place in Luxembourg in late 2018 on possible roles that IOSCO could play in enhancing cross-border regulatory cooperation.[5]

This article discusses a number of issues relating to international regulatory harmonization and financial market supervision, with particular emphasis on developments in Australia. The article is structured as follows. Part 2 discusses three major cooperative techniques for achieving regulatory harmonization, namely (i) transgovernmental networks of financial regulators; (ii) complex multilateral arrangements; and (iii) mutual recognition agreements, and considers the benefits and downsides of each of these regulatory mechanisms. Part 3 examines a high profile cross-border supervisory experiment - the 2008 US-Australian Mutual Recognition Agreement.[6] Part 4 reviews some Australian regulatory developments since the time of the US-Australian Mutual Recognition Agreement. Part 5 explores the recent attempt to increase regulatory cooperation at a regional level through the Asia Region Funds Passport, and Part 6 concludes.

2. Techniques for Establishing Regulatory Harmonization[7]

2.1 Transgovernmental Networks of Financial Regulators

Transgovernmental networks of financial regulators ("transgovernmental networks") constitute an important regulatory harmonization technique. Although academic interest in

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5 IOSCO and the New Financial Architecture: What Role for IOSCO in the Development and Implementation of Cross-Border Regulation and Equivalence, Joint conference, University of Luxembourg & Max Planck Institute for Procedural Law, Luxembourg, 5 October 2018.

6 See *United States Securities and Exchange Commission/Australian Securities and Investments Commission/Australian Minister for Superannuation and Corporate Law*, "Mutual Recognition Arrangement Between the United States Securities and Exchange Commission and the Australian Securities and Investments Commission, Together with the Australian Minister for Superannuation and Corporate Law", 25 August 2008, https://download.asic.gov.au/media/1346672/SEC_framework_arrangement_aug_08.pdf (last accessed 1 December 2019), 1.

7 This section of the article builds on my earlier research in *Jennifer G. Hill,* Why Did Australia Fare So Well in the Global Financial Crisis?, in: Eilís Ferran/Niamh Moloney/Jennifer G. Hill/John C. Coffee, The Regulatory Aftermath of the Global Financial Crisis, 2012, 203, 225-231.

transgovernmental networks dates back to at least the 1990s,[8] these networks became highly visible during the global financial crisis, as a result of their regulatory responses to the crisis.[9]

Transgovernmental networks represent a form of supra-state regulation. These cooperative networks of financial regulators include, for example, the Financial Stability Board (FSB), the Basel Committee on Banking Supervision, the Organisation for Economic Cooperation and Development (OECD), and IOSCO.[10] The transgovernmental networks themselves receive the backing of multi-state contact groups, such as the Group of Twenty (G20) and the Group of Eight (G8).

In contrast to the influential "law matters" paradigm of horizontal regulatory imitation,[11] transgovernmental networks operate vertically, on the basis of global promulgation, combined with national implementation, of legal rules. Although the standards adopted by transgovernmental networks are themselves generally informal and non-binding,[12] their subsequent downstream replication will ultimately result in "hard law" at a national level.

Transgovernmental networks offer several clear regulatory advantages, which have led some scholars to view them optimistically as a "transformational" development in global

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8 See *Pierre-Hugues Verdier*, "Transnational Regulatory Networks and Their Limits", Yale Law Journal of International Law 34 (2009), 113, 117 (noting, however, that the "intellectual roots" of this academic interest date back to the work of Robert Keohane and Joseph Nye in the 1970s).

9 Some commentators have, however, criticized these transgovernmental networks for their failure to prevent the global financial crisis. See, for example, *Pierre-Hugues Verdier*, "Mutual Recognition in International Finance", Harvard International Law Journal 52 (2011), 55, 56.

10 Several other treaty-based organizations, such as the International Monetary Fund (IMF), World Bank and World Trade Organization (WTO), provide a backdrop to this complex international financial regulatory framework, but play only a limited role in relation to the supervision of financial markets.

11 See *Rafael La Porta/Florencio Lopez-de-Silanes/Andrei Shleifer/Robert W. Vishny,* "Law and Finance", Journal of Political Economy 106 (1998), 1113; *Rafael La Porta/Florencio Lopez-de-Silanes/Andrei Shleifer*, "Corporate Ownership Around the World", Journal of Finance 54 (1999), 471. According to the "law matters" hypothesis, there is a direct link between the structure of capital markets and a jurisdiction's corporate governance regime. Specifically, the hypothesis argued that jurisdictions with a high level of minority investor protection would develop dispersed ownership structures, such as those existing in the United States and the United Kingdom. The "law matters" hypothesis provided strong support for convergence theory. It was predicted that civil law jurisdictions would adopt the legal rules of common law jurisdictions, on the basis that the latter offered superior legal protection to investors than the former. See *David A. Skeel Jr*, "Corporate Anatomy Lessons", Yale Law Journal 113 (2004), 1519, 1544-1545.

12 *Verdier* (fn. 8), 116.

governance.[13] This technique can, for example, improve cross-border regulatory harmonization, thereby reducing the risk of regulatory arbitrage.[14] It can also enable regulators to tackle global problems, which could not be addressed effectively by individual governments.[15] The notable success of many initiatives of transgovernmental networks like the Basel Committee[16] and IOSCO[17] have given lustre to this form of cooperative regulation.

Yet, transgovernmental networks are not necessarily a global regulatory panacea - they face numerous legal, political and logistical challenges.[18] One challenge to effective globally coordinated regulation is the risk of regulatory overlap or inconsistency across agencies with different focal points, goals and philosophies.[19] This kind of regulatory disjunction, which is a familiar feature of some national legal systems, can be magnified at an international level, where the presence of too many global bodies can result in regulatory inefficiency.[20]

A second challenge relates to the collaborative process of standard setting at an international level. It has been argued, for example, that transgovernmental networks fail to create a truly

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13 *Verdier* (fn. 8), 116.

14 See, for example, *G20*, "Enhancing Sound Regulation and Strengthening Transparency – Final Report", 2009,vi; Joint Forum of the Basel Committee on Banking Supervision, International Organization of Securities Commissions and the International Association of Insurance Supervisors, "Review of the Differentiated Nature and Scope of Financial Regulation: Key Issues and Recommendations", 2010, 4.

15 *Verdier* (fn. 8), 115.

16 See, for example, *Michael S. Barr/Geoffrey P. Miller,* "Global Administrative Law: The View from Basel", European Journal of International Law 17 (2006), 15, 17 (describing Basel I as "one of the most successful regulatory initiatives ever attempted").

17 See, for example, *Verdier* (fn. 8), 143, 146 (describing IOSCO as "largely successful").

18 See, for example, *Chris Brummer*, "How International Financial Law Works (and How it Doesn't)", Georgetown Law Journal 99 (2011), 257, 290-295; *Eric J. Pan*, "Challenge of International Cooperation and Institutional Design in Financial Supervision: Beyond Transgovernmental Networks", Chicago Journal of International Law 11 (2010), 243; *Verdier* (fn. 8), 122-129.

19 It was suggested during the global financial crisis, for example, that, in relation to issues like executive compensation and securitization, the FSB's main focus on stability could result in different regulatory outcomes to those promulgated by another agency, such as IOSCO. See *Tony D'Aloisio*, "Regulatory Response to the Financial Crisis", 12 October 2009, https://download.asic.gov.au/media/2103234/speechchairman-151009.pdf, 8, 10 (last accessed 1 December 2019); *IOSCO*, Remarks by David Wright (fn. 2), 3. See also *David A. Singer*, "Capital Rules: The Domestic Politics of International Regulatory Harmonization", International Organization 58 (2004), 531, 548-549 (discussing difficulties experienced by the IOSCO Technical Committee and the Basel Committee on Banking Supervision in arriving at a consensus view on a global standard for securities firm capital adequacy).

20 *IOSCO*, Remarks by David Wright (fn. 2), 3.

global regulatory system because the regulators setting the relevant standards are not detached from domestic politics and remain beholden to their local constituencies and legislatures. [21] States may therefore have divergent regulatory preferences, which can fluctuate according to timing and circumstance.

Indeed, it has been suggested that the quest for international regulatory harmonization is itself something of a red flag, in that regulators are more likely to seek such harmonization in times of financial instability or increasing competitive pressures from foreign firms subject to less stringent regulation.[22] The increased importance of transgovernmental regulatory networks following the global financial crisis is consistent with this hypothesis. Tensions regarding regulatory preferences are often particularly acute between developed and developing nations,[23] but may also exist between developed nations, as was the case with IOSCO's attempt to introduce a global standard for securities firm capital adequacy. This initiative failed due to a clear divergence between UK and US interests and regulatory preferences.[24]

Although transgovernmental networks are generally presented as exemplars of cooperative rule-making, powerful states may exercise disproportionate influence or act coercively to determine[25] - or, at times, derail[26] - supra-national rules. The United States, for example, was one of the chief opponents of IOSCO's attempt to introduce capital adequacy for securities firms. At the time of the proposal's ultimate demise in 1993, then-SEC Chairman, Richard Breeden, cast doubt on the scope of IOSCO's powers, suggesting that the organization should operate as a mere "clearing house of ideas", rather than as a "rule maker".[27]

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21 See *Verdier* (fn. 8), 115, 120, 162; *Singer* (fn. 19), 536.

22 See generally *Singer* (fn. 19).

23 See *Verdier* (fn. 8), 116-117, 124-125. See also *IOSCO*, Remarks by David Wright (fn.2), 3 (arguing that emerging nations may be under-represented in reform design).

24 IOSCO abandoned its initiative for a global securities firm capital adequacy standard in 1993. See generally *Singer* (fn. 19), 547-549, 551, 557-560.

25 *Verdier* (fn. 8), 125, 150, 163.

26 *Singer* (fn. 19), 560 (noting that, in relation to IOSCO's unsuccessful attempt to introduce global capital adequacy standards for securities firms, the SEC "made its preferences known by unceremoniously pulling out of the IOSCO negotiations").

27 See *Robert Peston/Tracy Corrigan*, "International Capital Markets: Hopes Dwindle for New Agreement on Capital Requirements – IOSCO Conference", Financial Times, 28 October 1992, 30.

It can, therefore, be difficult to craft rules that are acceptable to all parties. Yet, failure to accommodate divergent regulatory preferences risks may provide incentives for some parties to break rank and defect.[28] This affects the content of rules, because, in seeking to achieve consensus, transgovernmental networks may promulgate rules that are overly general and weak.[29]

A third set of problems for the efficacy of transgovernmental networks relates to the translation and enforcement of rules at a national level. Divergence in regulatory outcomes can occur in a number of ways. Different interpretations of international standards can, for example, create legal variations across nations or regions.[30] Even where similar reforms are introduced, they may operate differently across jurisdictions, due to variations in compliance levels.[31] Also, the strategic responses of regulated parties, or commercial pushback, will differ from jurisdiction to jurisdiction and may potentially subvert the efficacy of particular legal rules.[32] Furthermore, there can be variations in enforcement intensity, and oversight by national financial regulators may also wane as populist pressure eases.[33]

The lesson from an overall assessment of the operation of transgovernmental networks is that, although they are a valuable technique for coordinating regulatory policy at an international level, their success is necessarily uneven. Transgovernmental networks have proven very effective in coordinating responses to some areas of major international concern, such as

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28 See *Verdier* (fn. 8), 115 (noting that many of these standards and procedures "do not lend themselves to uncontroversial technical solutions").

29 *Verdier* (fn. 8), 150, 168; *IOSCO*, Remarks by David Wright (fn. 2), 3.

30 See, for example, *Guido Ferrarini/Maria C. Ungureanu,* "Lost in Implementation: The Rise and Value of the FSB Principles for Sound Compensation Practices at Financial Institutions", Revue Trimestrielle de Droit Financier No 1-2 (2011), 60.

31 See, for example, *John C. Coffee, Jr.,* "Law and the Market: The Impact of Enforcement", University of Pennsylvania Law Review 156 (2007), 229; *Howell E. Jackson*, "Variation in the Intensity of Financial Regulation: Preliminary Evidence and Potential Implications", Yale Journal on Regulation 24 (2007), 253.

32 *David A. Skeel*, "Governance in the Ruin", Harvard Law Review, 122 (2008), 696, 697. See generally *Curtis C. Milhaupt/Katharina Pistor,* Law and Capitalism: What Corporate Crises Reveal about Legal Systems and Economic Development Around the World, 2008.

33 Professor John Coffee describes this phenomenon as the "regulatory sine curve". See *John C. Coffee Jr.,* "The Political Economy of Dodd-Frank: Why Financial Reform Tends to be Frustrated and Systemic Risk is Perpetuated", Cornell Law Review 97 (2012), 1019 (reprinted with permission in *Eilis Ferran/Niamh Moloney/Jennifer G. Hill/John C. Coffee* (fn. 7).

securities fraud and money laundering, but have been less effective in situations where individual states have fewer incentives to pursue international harmonization, or have completely divergent rule preferences.[34]

2.2 Complex Multilateral Arrangements

Complex multilateral arrangements constitute another species of regulatory cooperation. The most prominent example of this model is the European framework, which Professor Niamh Moloney has described as a “regulatory juggernaut”.[35] Although in the the late 1980s, regulatory harmonization in Europe was still aspirational at best,[36] the multilateral arrangements applying there today represents a “maximum harmonization” regime, which is regarded as the most advanced form of financial market integration in the world.[37] It is also inextricably linked with the broader goal of political integration in Europe.[38]

The European multilateral regulatory framework is characterized by strong supranational institutions, which have unique powers to make, monitor and enforce common rules.[39] However, experiences during the global financial crisis, such as those relating to the failure of Icelandic banks in 2008 and the Greek sovereign debt crisis in 2010, raised issues about the ability of EU institutions to monitor risk and compliance effectively. Europe’s multilateral framework necessarily involves high levels of intervention into member states’ regulatory regimes,[40] resulting in considerably reduced autonomy at a national level.

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34 See *Verdier* (fn. 8), 167; *Singer* (fn. 19), 532-533.

35 *Niamh Moloney,* “Financial Market Regulation in the Post-Financial Services Action Plan Era”, International and Comparative Law Quarterly 55 (2006), 982, 992.

36 See *Frank H. Easterbrook,* Introduction: Federalism and European Business Law, in: Richard M. Buxbaum/Gérard Hertig/Alain Hirsch/Klaus J. Hopt (eds.), European Economic and Business Law: Legal and Economic Analyses on Integration and Harmonization, 1.

37 *Verdier* (fn. 9), 75.

38 See *Liana Giorgi/Ronald J. Pohoryles*, “Challenges to EU Political Integration and the Role of Democratization”, Innovation 18 (2007), 407.

39 See *Verdier* (fn. 9); *Niamh Moloney*, “The European Securities and Markets Authority and Institutional Design for the EU Financial Market – A Tale of Two Competences: Part (2) Rules in Action”, European Business Organization Law Review 12 (2011), 177.

40 *Moloney* (fn. 35), 985.

If the European model is perceived as a "regulatory juggernaut", then it was, until recently at least, seen as a relatively stable juggernaut. The ongoing saga of Brexit has, however, altered that perception, potentially affecting both financial market and political integration. The strong supranational institutions, which were the hallmark of the regime and were integral to delivering "maximum regulatory harmonization" in the EU context, appear to have contributed to the populist backlash and the UK Brexit agenda, which has the potential to contribute to longterm instability.[41]

2.3 Mutual Recognition Agreements

Mutual recognition agreements constitute a third possible technique for addressing regulatory challenges posed by contemporary developments, such as globalization, technological advances, increased cross-border securities trading and M&A activity, and greater interdependence of capital markets.[42] Although transgovernmental networks of financial regulators attracted most attention during the global financial crisis, bilateral (and regional) mutual recognition agreements have subsequently become an important, and growing, trend.[43]

Mutual recognition has been described as "an understanding among two or more states under which each recognizes the adequacy of the other's regulation or supervision of an activity or institution as a substitute for its own".[44] Mutual recognition relies on concepts of reciprocity, regulatory equivalence, substituted compliance and regulatory deference.[45] It also involves high levels of information sharing and coordination between regulators.[46]

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41 See *Tony Barber*, "Look Back in Sorrow", Financial Times, 19 October 2019 (arguing that given "the political fragmentation of European democracies, the shortcomings of the EU, the weaknesses of the eurozone and Brexit,…it is not difficult to see why Europe, so far from being the beacon of promise that it imagined itself in 1989, may once again generate much instability in years to come").

42 See *Carlo R W de Meijer/Michelle H W Saaf*, "Mutual Recognition and the Transatlantic Dialogue: The Concept and its Progress", Journal of Securities Law, Regulation and Compliance 3 (2010), 124, 125-126.

43 See *Verdier* (fn. 9); *de Meijer/Saaf* (fn. 42), 125 (describing mutual recognition as "[a] model that is gaining increased interest", particularly due to its ability to address global regulatory challenges, while preserving national and regional regulators).

44 *Verdier* (fn. 9), 63.

45 See *IOSCO* (fn. 3), 1. See also *de Meijer/Saaf* (fn. 42), 125, 128.

46 *De Meijer/Saaf* (fn. 42), 125, 130.

The primary goal of mutual recognition is to provide increased cross-border access to investors in the participating jurisdictions while, at the same time, shielding them from financial risk and upholding suitable principles of investor protection.[47] Some of the potential benefits of mutual recognition are increased cross-border market efficiency; reduced compliance costs and regulatory duplication;[48] fewer opportunities for regulatory arbitrage;[49] and control of international externalities and the risk of contagion in financial markets.[50] Bilateral mutual recognition agreements are generally underpinned by Memoranda of Understanding (MoUs), which provide the framework for extensive continuing supervisory and enforcement cooperation between the relevant securities regulators.[51]

In the absence of any likelihood of the creation of a formal supranational regulator in the near future,[52] mutual recognition agreements fulfil an increasingly important role. They contribute to a pluralist model of cross-border financial market regulation, operating in tandem with transgovernmental networks, and performing a gap filling function with respect to deficiencies in transgovernmental networks.

Mutual recognition agreements provide interesting contrasts with both transgovernmental networks and complex multilateral arrangements. Perhaps the most significant contrast is that, because mutual recognition agreements are voluntary and selective,[53] they preserve national regulatory autonomy to a far greater degree than the other two harmonization techniques. This aspect of mutual recognition agreements may become even more significant in an era of

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47 See *United States Securities and Exchange Commission/Australian Securities and Investments Commission/Australian Minister for Superannuation and Corporate Law* (fn. 6).

48 *United States Securities and Exchange Commission/Australian Securities and Investments Commission/Australian Minister for Superannuation and Corporate Law* (fn. 6).

49 *US Securities and Exchange Commission*, “Unofficial Transcript of Roundtable Discussion on Mutual Recognition Agreements”, 12 June 2007, 4-5.

50 *Verdier* (fn. 9), 64.

51 See *US Securities and Exchange Commission* (fn. 49), 5.

52 *Verdier* (fn. 9), 57. See also *IOSCO*, Remarks by David Wright (fn. 2), 8, 10 (arguing strongly in favour of the need for an institutional framework with enforcement authority at a global level, along the lines of EU regulatory structure).

53 See, for example, *US Securities and Exchange Commission* (fn. 49), 5, 129 (which consistently uses the terminology, “selective mutual recognition”).

growing nationalism, isolationism and protectionism.[54] Mutual recognition agreements are also a simpler and cheaper technique for facilitating cross-border market access than complex multilateral arrangements, which depend on powerful, and expensive, supranational institutions.[55]

3. The 2008 US-Australian Mutual Recognition Agreement

The US attitude to mutual recognition agreements has undergone some major shifts in recent years. The concept of substituted compliance, which underpins mutual recognition, was developed during the 1990s by Andrea Corcoran of the US Commodity Futures Trading Commission (CFTC),[56] and the CFTC was an early supporter of this form of cross-border regulatory cooperation.[57] The traditional approach of the SEC, on the other hand, was to emphasize "universal regulatory convergence" under a transgovernmental networks paradigm.[58] In 2003, for example, SEC Commissioner, Roel C. Campos, discussed mutual recognition agreements in a speech, entitled “Embracing International Business in the Post-Enron Era”.[59] Resisting European pressure for the SEC to issue exemptions permitting non-US firms and issuers to operate in US markets, Commissioner Campos stated simply that the SEC was “more inclined to a single set of rules for all participants in the US market… the SEC does not practice mutual recognition”.[60]

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54 See, for example, *Ismail Lagardien*, “Global Capitalism – Ready for the Next Financial Crisis?”, Business Day, 13 November 2019, 6.

55 See *de Meijer*/*Saaf* (fn. 42), 128.

56 Andrea Corcoran served as the first Director of the Office of International Affairs at the CFTC. See https://aligninternational.com/andreacorcoran_more.htm (last accessed 1 December 2019).

57 See Public Documents of the XXVIIth Annual Conference of the International Organization of Securities Commissions, Speech by Ms. Andrea M. Corcoran, “Misconduct Across Jurisdictions – The Enforcement Challenge”, 23 May 2002, Istanbul, Turkey, 5.

58 See *Tafara/Peterson* (fn. 1), 55.

59 *Commissioner Roel C. Campos*, “Embracing International Business in the Post-Enron Era”, Centre for European Policy Studies, 11 June 2003, Brussels, Belgium.

60 According to Commissioner Campos, this approach was consistent with the SEC’s fundamental mission of investor protection and its underlying philosophy of equal treatment of market participants. See *Campos* (fn. 59) (citing SEC Chairman, William O. Douglas’ famous statement on the role of the SEC that “we are the investor’s advocate”).

By 2007, however, the SEC had done a U-turn on this issue. Rather than focusing on the potential risks posed to US investors by deference to non-US securities law, a 2007 SEC roundtable discussion on mutual recognition highlighted the potential benefits that mutual recognition agreements could provide US investors, in terms of greater access to foreign investment opportunities and increased portfolio diversification.[61] It has also been said that US interest in mutual recognition agreements may have been influenced by corporate scandals, such as the 2001 collapse of Enron.[62] It has been suggested that the Enron scandal tarnished the SEC's reputation and demonstrated that its regulatory powers, which had historically operated within the narrow confines of US capital markets, were less effective in an era of globalized markets.[63]

A clear reflection of this attitudinal change was the United States' entry into a pilot mutual recognition agreement with Australia.[64] The US-Australian mutual recognition agreement,[65] which was executed by the US Securities and Exchange Commission ("SEC")[66] and the Australian Securities and Exchange Commission ("ASIC") in August 2008,[67] was the first of its kind for the SEC.[68] It represented a clear departure from the US regulator's earlier

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61 See *US Securities and Exchange Commission* (fn. 49), 5 (noting that use of mutual recognition agreements could provide US investors with more extensive information and choice concerning foreign investment opportunities). See also *Australian Securities and Investments Commission*, "MR 08-193 Australian Authorities Sign Mutual Recognition Agreement", 25 August 2008, https://asic.gov.au/about-asic/news-centre/find-a-media-release/2008-releases/08-193-sec-australian-authorities-sign-mutual-recognition-agreement/ (last accessed 1 December 2019) (quoting Ethiopis Tafara as saying that "[o]ver the past several years and continuing to this day, there has been increased interest by US investors in foreign securities" .

62 *Tafara/Peterson* (fn. 1), 33.

63 See *James D. Cox*, "Coping in a Global Marketplace: Survival Strategies for a 75-year-old SEC", Virginia Law Review 95 (2009), 941, 943-946; *Chris Brummer*, "Post-American Securities Regulation", California Law Review 98 (2010), 327, 328.

64 See *United States Securities and Exchange Commission/Australian Securities and Investments Commission/Australian Minister for Superannuation and Corporate Law*, "Mutual Recognition Arrangement" (fn. 6); *Australian Securities and Investments Commission*, (fn. 61).

65 *United States Securities and Exchange Commission/Australian Securities and Investments Commission/Australian Minister for Superannuation and Corporate Law*, "Mutual Recognition Arrangement" (fn. 6).

66 See https://www.sec.gov/ (last accessed 1 December 2019).

67 See https://asic.gov.au/ (last accessed 1 December 2019).

68 *De Meijer/Saaf* (fn. 42), 125, 130.

preference for "universal regulatory convergence".[69] Instead, the agreement embodied the concepts of substituted compliance and regulatory deference, by authorizing US and eligible Australian exchanges and broker-dealers to operate across jurisdictional borders without the need for separate registration.[70]

The choice of Australia as the other party to this mutual recognition agreement came as something of a surprise to the international financial community. This was because the SEC had already held preliminary talks with regulators in Canada[71] and the EU regarding entry into a mutual recognition agreement. In February 2008, for example, the SEC and the European Commission released a public Joint Statement,[72] acknowledging that a mutual recognition agreement could benefit EU and US investors in numerous ways.[73] The Joint Statement acknowledged that the United States and the EU, which had been engaged in cross-border regulatory dialogue since 2002,[74] had a "a common interest" [75] in undertaking a cooperative approach to securities market regulation, given the combined dominance of their financial markets.[76]

Ultimately, however, the United States concluded a mutual recognition agreement exclusively with Australia. A factor that seemed to favour Australia vis-à-vis Canada was that Australia

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69 *Tafara/Peterson* (fn. 1), 55. See also *Campos* (fn. 59).

70 *De Meijer/Saaf* (fn. 42), 125, 130-131.

71 See, for example, *US Securities and Exchange Commission,* "Schedule announced for completion of US-Canadian Mutual Recognition process agreement", Press Release 2008-98, 29 May 2008.

72 See *Statement of the European Commission and the US Securities and Exchange Commission on Mutual Recognition in Securities Markets*, 1 February 2008, https://www.sec.gov/news/press/2008/2008-9.htm, (last accessed 1 December 2019).

73 Benefits included:- increased transatlantic investment opportunities, and lower trading and transaction costs, coupled with strong investor protection. See *Statement of the European Commission and the US Securities and Exchange Commission* (fn. 72).

74 See *Testimony of Alexander Schaub*, Director–General, DG Internal Market of the European Commission before the Committee on Financial Services, US House of Representatives, 13 May 2004, 10-11; *Hans-Jürgen Hellwig*, The Transatlantic Financial Markets Regulatory Dialogue, in: Klaus J Hopt/Eddy Wymeersch/Hideki Kanda/Harald Baum (eds.), Corporate Governance in Context: Corporations, States and Markets in Europe, Japan, and the US, 2005, 363; *de Meijer/Saaf* (fn. 42), 125, 131*ff.*

75 *Statement of the European Commission and the US Securities and Exchange Commission* (fn.72).

76 According to the Joint Statement, the US and EU markets together comprised 70% of the world's capital markets at that time. *Statement of the European Commission and the US Securities and Exchange Commission* (fn.72).

had a single national securities regulator, ASIC, whereas Canada had multiple provincial regulators under its state-based system.[77] A potential problem with the EU's bid for mutual recognition lay with the inclusion of numerous additional member states from Eastern Europe in 2004 and 2007.[78]

The parties to the mutual recognition agreement were the SEC, ASIC and the Australian government.[79] The agreement[80] comprised comprised three documents:- (i) the mutual recognition arrangement document;[81] (ii) the supervisory MoU;[82] and (iii) the enhanced enforcement MoU.[83] The mutual recognition agreement provided a framework under which ASIC and the SEC agreed to consider exemptions[84] permitting US and Australian stock

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77 Attempts since at least the 1970s to create a national regulator in Canada were fraught with constitutional difficulties. See, for example, Reference Re Securities Act, 2011 SCC 66. Following the Canadian Supreme Court's 2011 decision that a proposed *Securities Act*, which would have created a national securities regulator, was unconstitutional, the federal government launched another initiative in 2014, via a Memorandum of Agreement (MOA) regarding the Cooperative Capital Markets System, in its efforts to establish a pan-Canadian securities regulator. This initiative was also challenged in the courts. In May 2017, a majority of the Court of Appeal of Québec held that the MOA was unconstitutional, but this was reversed on appeal to the Supreme Court of Canada. In November 2018, the Canadian Supreme Court delivered a unanimous judgment in Reference re Pan-Canadian Securities Regulation, 2018 SCC 48, [2018] 3 S.C.R. 189, which finally upheld the constitutionality of the proposed national cooperative securities market regulatory scheme. See *Elizabeth Raymer,* "SCC Rules that a National Securities Regulator is Constitutional", Canadian Lawyer, 9 November 2018.

78 See *European Commission*, European Neighbourhood Policy and Enlargement Negotiations: From 6 to 28 Members, https://ec.europa.eu/neighbourhood-enlargement/policy/from-6-to-28-members_en (last accessed 1 December 2019); *Ulrich Sedelmeier,* "Europe After the Eastern Enlargement of the European Union: 2004-2014", Heinrich Böll Stiftung European Union, 10 June 2014.

79 The agreement was signed on behalf of the United States of America by Christopher Cox, Chairman of the SEC, and, on behalf of Australia, by Senator Nick Sherry, Minister for Superannuation and Corporate Law and Tony D'Aloisio, Chairman of ASIC. See *Australian Securities and Investments Commission*, (fn. 61).

80 *Australian Securities and Investments Commission*, (fn. 61); *US Securities and Exchange Commission*, "MR 2008-182 SEC, Australian Authorities Sign Mutual Recognition Agreement", 25 August 2008.

81 *United States Securities and Exchange Commission/Australian Securities and Investments Commission/Australian Minister for Superannuation and Corporate Law*, "Mutual Recognition Arrangement" (fn. 6).

82 *United States Securities and Exchange Commission/Australian Securities and Investments Commission/Australian Minister for Superannuation and Corporate Law*, "Memorandum of Understanding Concerning Consultation, Cooperation and The Exchange of Information Related to Market Oversight and the Supervision of Financial Services Firms", 25 August 2008.

83 *United States Securities and Exchange Commission/Australian Securities and Investments Commission/Australian Minister for Superannuation and Corporate Law*, "Memorandum of Understanding Concerning Consultation, Cooperation and The Exchange of Information Related to the Enforcement of Securities Laws", 25 August 2008.

84 The mutual recognition agreement stated that "the Authorities will consider applications for exemption made by certain Market Participants, as defined and limited in this Arrangement and subject to such

exchanges and broker-dealers to operate in both jurisdictions without dual regulation,[85] thereby reducing barriers and promoting a "freer flow of capital", with increased investment opportunities.[86]

The US-Australia mutual recognition agreement was based upon a detailed comparability assessment of the US and Australian financial market regulatory systems to ensure their "equivalence".[87] The agreement acknowledged that staff at the SEC and ASIC had already assessed aspects of each other's regulatory regimes. It also acknowledged that securities regulation may have adapted to the particular market conditions and reflect "different regulatory philosophies" of each country, justifying differences in the underlying securities laws themselves.[88]

The US-Australian mutual recognition agreement envisaged intense supervisory cooperation between the SEC and ASIC, emphasizing the need for high levels of trust between the relevant regulators. The agreement stated, for example, that "[t]he Authorities recognize the importance of close communication and intend to consult regularly regarding developments and issues related to the operation of this Arrangement".[89] This theme was amplified in the supervisory

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terms and conditions as each Authority may find appropriate" (para. [12]). "Authorities" was defined to include the SEC, ASIC and the Australian Minister for Superannuation (para. [1]) and "Market Participant" was defined as "supplier of capital markets-related services, which include trading in securities, asset management, advisory, and settlement and clearing services for financial assets" (para. [10]). See *United States Securities and Exchange Commission/Australian Securities and Investments Commission/Australian Minister for Superannuation and Corporate Law*, "Mutual Recognition Arrangement" (fn. 6), *ibid*.

85 *Australian Securities and Investments Commission*, (fn. 61).

86 *Australian Securities and Investments Commission*, (fn. 61) (quoting Tony D'Aloisio, Chairman of ASIC).

87 *US Securities and Exchange Commission,* MR 2008-52, "Chairman Cox, Prime Minister Rudd Meet Amid U.S.-Australia Mutual Recognition Talks", 29 March 2008.

88 *United States Securities and Exchange Commission/Australian Securities and Investments Commission/Australian Minister for Superannuation and Corporate Law*, "Mutual Recognition Arrangement" (fn. 6), para. [19].

89 See *United States Securities and Exchange Commission/Australian Securities and Investments Commission/Australian Minister for Superannuation and Corporate Law*, "Mutual Recognition Arrangement" (fn. 6), para. [21].

MoU,[90] which contained several references to the "fullest possible cooperation" [91] in providing oversight of exempted entities under the agreement, and "maximum assistance"[92] in interpreting regulatory information. According to the supervisory MoU, regulatory collaboration under the US-Australian mutual recognition agreement would primarily be achieved through "ongoing, informal, oral consultations, supplemented by more in-depth, ad hoc cooperation".[93]

The enhanced enforcement MoU accentuated the need for high levels of cooperation and trust between the relevant regulators. This MoU referred to the importance of investor protection and the need to "pursue violators of securities law across borders".[94] It also explicitly noted the need for enforcement assistance above and beyond that provided under IOSCO's Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information (MMoU),[95] which establishes an international benchmark for regulatory cooperation in relation to cross-border enforcement of securities laws.[96]

The US-Australian mutual recognition agreement was never intended to be a regulatory end in itself. Rather, it was designed as a trial program, which would provide the United States with a blueprint for a much more extensive roll-out of international mutual recognition agreements. Yet, in spite of its promising start, the agreement stalled. Possible reasons for this included the deepening global financial crisis soon after its execution; personnel changes and political issues

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90 *United States Securities and Exchange Commission/Australian Securities and Investments Commission/Australian Minister for Superannuation and Corporate Law* (fn. 82).

91 See *United States Securities and Exchange Commission/Australian Securities and Investments Commission/Australian Minister for Superannuation and Corporate Law* (fn. 82), paras. [23], [26].

92 *United States Securities and Exchange Commission/Australian Securities and Investments Commission/Australian Minister for Superannuation and Corporate Law* (fn. 82), paras. [23], [26a].

93 *United States Securities and Exchange Commission/Australian Securities and Investments Commission/Australian Minister for Superannuation and Corporate Law* (fn. 82), para. [14].

94 *United States Securities and Exchange Commission/Australian Securities and Investments Commission/Australian Minister for Superannuation and Corporate Law* (fn. 83), 1.

95 See *IOSCO*, "Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information", May 2002 (revised May 2012), https://www.iosco.org/library/pubdocs/pdf/IOSCOPD386.pdf (last accessed 1 December 2019). See generally *Verdier* (fn. 9), 83-84.

96 See *IOSCO* (fn. 95).

within the SEC; calls for stronger financial market regulation in the US; and declining trust in the regulatory regimes of other jurisdictions.

Ultimately, the US-Australian mutual recognition agreement failed to fulfil its promise. Although the agreement remained on the books for several years, it was never functional in practice and no exemptions were granted under the arrangement. Any hope that it might become operational ended in August 2013, when the agreement's five year term elapsed.[97] Although the mutual recognition agreement provided for possible renewal by the SEC and ASIC,[98] no renewal ever occurred under its terms, and any revival of the agreement in the near future seems unlikely.

4. Regulatory Cooperation by ASIC After the US-Australian Mutual Recognition Agreement

The US-Australian mutual recognition agreement faltered in providing a blueprint for SEC regulatory engagement with the world. Nonetheless, the signing of the agreement in 2008 was hailed as a major development in Australia,[99] which appeared to contribute to increased cooperation by ASIC with other international regulators.[100] Shortly before signing the US-Australian mutual recognition agreement, for example, ASIC announced that it intended to "continue to pursue recognition opportunities with key jurisdictions across a range of areas".[101]

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97 *United States Securities and Exchange Commission/Australian Securities and Investments Commission/Australian Minister for Superannuation and Corporate Law*, "Mutual Recognition Arrangement" (fn. 6), para. [25]. Also, both the SEC and ASIC were entitled to terminate the mutual recognition agreement by giving sixty days written notification (*id*, para. [26]).

98 See *United States Securities and Exchange Commission/Australian Securities and Investments Commission/Australian Minister for Superannuation and Corporate Law*, "Mutual Recognition Arrangement" (fn. 6), para. [25] (permitting the SEC and ASIC, after completing a periodic review pursuant to para. [23] of the agreement, to "mutually decide to modify and/or renew" the regulatory arrangement).

99 For example, Mr Richard Murphy, general manager, equity markets at the Australian Securites Exchange (ASX) stated "We are very happy with the SEC, ASIC and our government for doing this. Our attempts at sales and marketing in the US over the past decade have been quite hampered. This frees things up". See *Peter Chapman*, "Aussie Mart Chants 'USA' with Pact", Traders Magazine, 1 October 2008.

100 Australia had already entered into a a mutual recognition agreement with New Zealand regarding securities offerings in December 2007. See *Allens Arthur Robinson*, "Trans-Tasman Mutual Recognition of Securities Offerings", Focus, March 2008.

101 See *Australian Securities and Investments Commission*, "Report 134: Enhancing capital flows into and out of Australia", July 2008, https://download.asic.gov.au/media/1344926/REP_134.pdf (last accessed 1 December 2019), 17.

As ASIC's current list of international regulatory agreements shows, the Australian regulator has pursued that course with determination.[102] Since 2008, ASIC has entered into cooperative arrangements and MoUs with regulators in more than 50 jurisdictions. These international regulators include the Ontario Securities Commission,[103] the Hong Kong Securities and Futures Commission,[104] the China Securities Regulatory Commission,[105] the UK Financial Conduct Authority,[106] the New Zealand Financial Markets Authority,[107] and the Commission de Surveillance du Secteur Financier in Luxembourg.[108] A growing number of these

102 See *Australian Securities and Investments Commission*, "Memoranda of Understandings and Other International Agreements", 9 September 2019, https://asic.gov.au/about-asic/what-we-do/international-activities/international-regulatory-and-enforcement-cooperation/memoranda-of-understanding-and-other-international-agreements/ (last accessed 1 December 2019).

103 See *Australian Securities and Investments Commission/Ontario Securities Commission*, "Co-operation Agreement", 1 November 2016, https://download.asic.gov.au/media/4307866/asic-osc-cooperation-agr-executed-nov-1-2016.pdf (last accessed 1 December 2019); *Australian Securities and Investments Commission*, "MR 16-371: ASIC and Ontario Securities Commission sign agreement to support innovative businesses", 3 November 2016.

104 *Australian Securities and Investments Commission/Hong Kong Securities and Futures Commission*, "Co-operation Agreement", 13 June 2017, https://download.asic.gov.au/media/4288984/asic-hksfc-agreement-20170613.pdf (last accessed 1 December 2019).

105 See *Australian Securities and Investments Commission/China Securities Regulatory Commission,* "Information-Sharing Co-operation Agreement", 3 November 2017, https://download.asic.gov.au/media/4536062/asic-csrc-fintech-cooperation-agreement-2017.pdf (last accessed 1 December 2019); Australian Securities and Investments Commission, MR 17-371: "China and Australia to Cooperate on Fintech", 6 November 2017.

106 See, for example, *Australian Securities and Investments Commission/Financial Conduct Authority,* "MoU concerning consultation, cooperation and the exchange of information related to the supervision of covered entities in the alternative investment fund industry between the Australian Securities and Investments Commission (ASIC) and the Financial Conduct Authority (FCA) in the United Kingdom", April 2019, https://download.asic.gov.au/media/5067305/fca-asic-agreement-aifs-april-2019.pdf (last accessed 1 December 2019); *Financial Conduct Authority/ Australian Securities and Investments Commission*, "Memorandum of Understanding on Cooperation Arrangements to access information on derivatives contracts held in United Kingdom trade repositories", April 2019, https://download.asic.gov.au/media/5067299/fca-asic-agreement-trade-repositories-april-2019.pdf (last accessed 1 December 2019); *Australian Securities and Investments Commission/Financial Conduct Authority,* "MoU concerning consultation, cooperation and the exchange of information related to the supervision of AIFMD entities", 22 July 2013, https://download.asic.gov.au/media/1348040/UK-MOU-published-July-2013.pdf (last accessed 1 December 2019).

107 *New Zealand Financial Markets Authority/Australian Securities and Investments Commission*, "Memorandum of Understanding between Australian Securities and Investments Commission and New Zealand Financial Markets Authority in Relation to Assistance and Mutual Cooperation", 28 August 2012, https://download.asic.gov.au/media/1340882/MoU-asic-nz-financial-markets-authority-published-3-September-2012.pdf (last accessed 1 December 2019).

108 *Commission de Surveillance du Secteur Financier/Australian Securities and Investments Commission*, "Memorandum of Understanding between The Australian Securities and Investments Commission and The Commission de Surveillance du Secteur Financier Concerning Consultation, Cooperation and the Exchange of Information Related to the Supervision of Regulated Entities", Septemberr 2013,

international cooperation agreements are in the fintech or innovation area.[109] ASIC has also entered into agreements with some US regulators, such as the Financial Industry Regulatory Authority (FINRA)[110] and the CFTC.[111]

ASIC's pursuit of cooperative arrangements with other regulators reflects an important global trend. According to IOSCO, use of supervisory MoUs in such cross-border regulatory arrangements has increased significantly since 2015, prompting IOSCO to build a central repository of the agreements to promote greater transparency for industry participants and regulators.[112]

5. Regulatory Cooperation in Asia – Asia Region Funds Passport

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https://download.asic.gov.au/media/1340354/Luxembourg-CSSF-supervisory-MOU.pdf (last accessed 1 December 2019).

109 See, for example, *Australian Securities and Investments Commission/Monetary Authority of Singapore,* "Innovation Functions Co-operation Agreement between Australian Securities and Investments Commission ('ASIC') and Monetary Authority of Singapore (MAS)", 16 June 2016, https://download.asic.gov.au/media/4307872/mas-mou-june-2016.pdf (last accessed 1 December 2019); *Australian Securities and Investments Commission/Capital Markets Authority*, "Co-operation Agreement between Australian Securities and Investments Commission (ASIC) and Capital Markets Authority of Kenya", 21 October 2016, https://download.asic.gov.au/media/4307860/asic-cma-fintech_cooperation_agreement-1.pdf (last accessed 1 December 2019); *Australian Securities and Investments Commission/Dubai Financial Services Authority*, "Innovation Functions Co-operation Agreement*",* 23 November 2017, https://download.asic.gov.au/media/4555006/asic-dfsa-dubai-fintech-cooperation-agreement-nov-2017.pdf (last accessed 1 December 2019).

110 See *Financial Industry Regulatory Authority*, *Inc./Australian Securities and Investments Commission,* "Memorandum of Understanding Between Financial Industry Regulatory Authority, Inc. and Australian Securities and Investments Commission", 17 June 2010, https://download.asic.gov.au/media/1340906/MoU-finra-2010.pdf (last accessed 1 December 2019).

111 See *US Commodity Futures Trading Commission/Reserve Bank of Australia/Australian Securities and Investments Commission*, "Memorandum of Understanding Concerning Cooperation and the Exchange of Information Related to the Supervision of Cross-Border Clearing Organizations", 5 June 2014, https://download.asic.gov.au/media/1322929/cftc-rba-asic-clearingMoU06051.pdf (last accessed 1 December 2019); *US Commodity Futures Trading Commission/Reserve Bank of Australia/Australian Securities and Investments Commission*, "Memorandum of Understanding Concerning Cooperation and the Exchange of Information Related to the Supervision of Cross-Border Covered Entities", 29 September 2014, https://download.asic.gov.au/media/2067637/cftc-MoU-published-1-october-2014.pdf (last accessed 1 December 2019); *United States Commodity Futures Trading Commission/Australian Securities and Investments Commission*, "Cooperation on Financial Technology Innovation", 4 October 2018, https://download.asic.gov.au/media/4894449/cftc-asic-fintech-arrangement-4-october.pdf (last accessed 1 December 2019).

112 *IOSCO* (fn.3), 2.

Another technique for promoting open markets on a regional basis is passporting. IOSCO has described passporting as "a tool that is based on a common set of rules that are applicable in the authorities covered by the passporting arrangement".[113] Passporting is a central feature of the EU system promoting free trade between countries in the European Economic Area (EEA).[114] Many hope that a new multilateral cooperation agreement, the Asia Region Funds Passport,[115] will provide similar trade benefits in the Asia-Pacific area.

Australia has, for some time, advocated in favour of a regional passporting framework as a means of expanding cross-border engagement and investment opportunities in Asia. Australia has one of the most substantial pools of assets under management in the world. In 2017, its fund pool under management was ranked sixth globally,[116] and was the largest in Asia.[117] A key factor in the strength of Australia's managed fund sector is the country's distinctive mandatory pension (or "superannuation") system.[118] Australia now has the fourth largest pension fund asset pool in the world[119] as a result of this superannuation scheme.[120] As of September 2019, superannuation assets totaled approximately A$2.9 trillion.[121] The

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113 *IOSCO* (fn.3), 15.

114 *IOSCO* (fn.3), 15. The EU has also commenced developing a passporting system for non-EU firms. *Ibid.* See also *Kwon Yong-won*, "Learning from Luxembourg", Korea JoongAng Daily, 18 October 2019 (noting the parallels between the Asia Region Funds Passport and the means by which Luxembourg became a major financial hub through removal of financial barriers to cross-border fund flows).

115 See *Asia-Pacific Economic Cooperation (APEC)*, "Asia Region Funds Passport: About ARFP", https://fundspassport.apec.org/about-us/about/ (last accessed 1 December 2019).

116 After the USA, Luxembourg, Ireland, Germany and France. See *Australian Trade and Investment Commission*, "Australia's Managed Funds 2017 Update: Trade and Investment Note", April 2017, 2. Australia's total funds under management in 2017 were A$2.8 trillion (or US$2.1 trillion). *Ibid.*

117 *Australian Trade and Investment Commission* (fn. 116), 2.

118 *Australian Trade and Investment Commission* (fn. 116), 3.

119 See *Australian Trade and Investment Commission*, "Australia has the Fourth Largest Pension Fund Assets in the World", https://www.austrade.gov.au/news/economic-analysis/australia-has-the-fourth-largest-pension-fund-assets-in-the-world (last accessed 1 December 2019) (citing *Willis Tower Watson*, "Global Pensions Asset Study – 2019). The largest pension markets by asset value are:- the United States (61.5% of the world total); Japan (7.7%), the United Kingdom (7.1%), and Australia (4.6%). *Ibid.*

120 Mandatory superannuation was introduced in Australia in 1992. For background on the history of the superannuation scheme, see *Jennifer Hill*, Institutional Investors and Corporate Governance in Australia, in: *Theodor Baums/Richard M. Buxbaum/Klaus J. Hopt* (eds.), Institutional Investors and Corporate Governance , 1994, 583, 588-589. As a result of this superannuation system, The Economist has stated that "Aussies are now a nation of capitalists". See "Super-duper supers: In Australia's superannuation scheme, everyone's a winner", The Economist, 28 May 2011, 6.

121 This figure represented a 7.1% increase over the previous twelve month period. See *Australian Prudential Regulatory Authority,* Media Release: "APRA releases superannuation statistics for

superannuation system also helped Australia perform well during the global financial crisis compared to a number of other developed countries.[122]

In spite of this economic strength, however, Australia's engagement in cross-border activity in the Asia-Pacific region has historically been relatively weak and undeveloped.[123] Over the last decade, increased attention has been given to remedying this situation and providing Australia's funds management industry with greater ability to compete within the global financial services market. This was spear-headed by the 2009 Johnson Report.[124] This report noted that, in spite of the strength and sophistication of Australia's funds management industry, the industry tended to be predominantly local, managing only a small percentage of off-shore funds.[125]

The Johnson Report recommended the introduction of a multilateral Asia Region Funds Passport to facilitate cross-border marketing of managed funds in participating Asian jurisdictions[126] and to enable Australia to become a major exporter of financial services to the Asia-Pacific region.[127] It has also been envisaged that in the long-term, it might be possible to

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September 2019", 26 November 2019, https://www.apra.gov.au/news-and-publications/apra-releases-superannuation-statistics-for-september-2019 (last accessed 1 December 2019).

122 See *Hill* (fn. 7), 295-299. For some other possible reasons why Australia weathered the crisis so well, see *Hill* (fn. 7), 276*ff*. No bail-ot of major financial institutions was required in Australia, in contrast to the United Kingdom and the EU. See *The Hon. Wayne Swan*, Deputy Prime Minister and Treasurer, Australia, "Emerging from the Crisis: The G20 and the Asia-Pacific", Address to Canada 2020 and the Canadian Australian Chamber of Commerce, Toronto, Canada, 27 June 2010. The Walker Review noted that under the UK bailout arrangement, the taxpayer provided UK banks with nearly £1.3 trillion in funding. See *Sir David Walker*, Walker Review: A Review of Corporate Governance in UK Banks and Other Financial Industry Entities (July, 2009), 7.1. Also, by 2012, the EU had spent €1.7 trillion (or 13% of GDP) supporting the banking system. See *IOSCO*, Remarks by David Wright, (fn. 2), 5.

123 See letter from members of the Australian Financial Centre Forum to The Hon. Chris Bowen MP, Minister for Financial Services, Superannuation and Corporate Law, 17 November 2009.

124 See *Commonwealth of Australia*, "Australia as a Financial Centre: Building on Our Strengths", November 2009. The Report is often referred to as the "Johnson Report", after its Chair, Mark Johnson.

125 *Commonwealth of Australia* (fn. 124), 1. See also *Financial Services Council*, "Australia as a Financial Centre – Seven Years On", 29 June 2016, 1 (noting that, although financial services represent Australia's largest industry as a proportion of GDP, their export value was less than 5%).

126 See *Asia-Pacific Economic Cooperation*, "Asia Region Funds Passport - History", http://fundspassport.apec.org/background/ (last accessed 1 December 2019).

127 See generally *Commonwealth of Australia* (fn. 124), 1-2.

use the Asia Region Funds Passport as a foundation for an Asian-European mutual recognition agreement to facilitate the marketing of Asian-Pacific managed funds in Europe.[128]

The Asia Region Funds Passport concept had a long gestation period, with many fits and starts.[129] Although finance ministers from Australia, South Korea, New Zealand and Singapore signed a Statement of Intent in September 2013,[130] which recognized "the value of creating better connections between financial markets in the Asia region",[131] interest in the project later appeared to wane.[132] It was revived in Australia, however, in June 2016 with the release of a second Johnson Report.[133] The report's publication came only days after the Brexit referendum in the United Kingdom,[134] and many saw the Asia Region Funds Passport as an economic window of opportunity for Australian fund managers, given Brexit's potentially disruptive effects on the EU.[135]

The Asia Region Funds Passport was officially launched on 1 February 2019.[136] Goals listed in the Memorandum of Cooperation underpinning the passport include providing investors in participating jurisdictions with a greater range of investment opportunities and deepening

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128 See generally *PWC/Financial Services Council*, "Asia Region Funds Passport: The Future of the Funds Management Industry in Asia", November 2010, https://www.pwc.com.au/industry/asset-management/assets/asia-region-funds-passport-nov10.pdf (last accessed 1 December 2019).

129 See *Michael Smith*, "Political instability slows Johnson plan", Australian Financial Review, 29 June 2016, 30.

130 *Asia-Pacific Economic Cooperation*, "Statement of Intent on the establishment of the Asia Region Funds Passport", 20 September 2013.

131 *Asia-Pacific Economic Cooperation* (fn. 130), i.

132 The Statement of Intent had envisaged, for example, that eligible collective investment schemes would have access to the Asia Region Funds Passport by January 2016, which did not occur. See *Asia-Pacific Economic Cooperation* (fn. 130), iv.

133 See *Commonwealth of Australia* (fn. 124); *Financial Services Council* (fn. 125), 2 (setting out the original recommendations of the First Johnson Report and a list of new barriers to the export of Australian financial services identified in the Second Johnson Report).

134 The UK Brexit referendum was held on 23 June 2016. See *Anushka Asthana/Ben Quinn/Rowena Mason*, "UK Votes to Leave EU After Dramatic Night Divides Nation", The Guardian, 24 June 2016.

135 See *Smith* (fn. 129).

136 See *Asia-Pacific Economic Cooperation* (APEC), "Asia Region Funds Passport", https://fundspassport.apec.org/ (last accessed 1 December 2019); *Editors*, "Asia Region Funds Passport Goes Live", Regulation Asia, 3 February 2019.

capital markets in the region in order to attract finance to foster growth.[137] The signatories to the Memorandum of Cooperation are Australia, Japan, Korea, New Zealand and Thailand.[138] As IOSCO has noted, it is too soon to tell how successful the Asia Region Funds Passport will be in reducing market fragmentation and achieving its economic goals.[139] However, it is anticipated that other jurisdictions in Asia will keep a close watch on how the cooperative arrangement works with a view to joining the passport in the future.[140]

Conclusion

It is now over a decade since the onset of the global financial crisis. The crisis highlighted the need for greater cross-border regulatory cooperation in international financial markets. This article discusses three distinct mechanisms for achieving such cooperation, noting the benefits of these techniques, as well as their downsides. As the article notes, although transgovernmental networks of financial regulators received much attention during the global financial crisis, in more recent times, supervisory MoUs and regional passporting arrangements, such as the Asia Region Funds Passport, have become increasingly popular forms of cross-border regulatory cooperation.

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137 See Memorandum of Cooperation on the Establishment and Implementation of the Asia Region Funds Passport, April 2016, 1, https://fundspassport.apec.org/wp-content/uploads/2019/03/28-April-2016-Asia-Region-Funds-Passport-Memorandum-of-Cooperation-signed-by-Australia-Japan-Korea-NZ.pdf (last accessed 1 December 2019). See also Guidance on Host Economy Laws and Regulations relating to the Asia Region Funds Passport, https://fundspassport.apec.org/wp-content/uploads/2018/09/20180917-arfp-guidance.pdf (last accessed 1 December 2019).

138 Memorandum of Cooperation on the Establishment and Implementation of the Asia Region Funds Passport (fn. 137).

139 *IOSCO (*fn. 3), 16.

140 For example, the Asia Region Funds Passport Joint Committee held its seventh face to face meeting in Singapore in October 2019. In addition to representatives of the signatories to the Memorandum of Cooperation (ie Australia, Japan, New Zealand, Korea and Thailand), observers from the Monetary Authority of Singapore, the Securities Commission Malaysia, the Securities and Futures Bureau of Chinese Taipei, the Securities and Futures Commission of Hong Kong and the Securities and Exchange Commission of Philippines, also attended the meeting. See Asia Pacific Economic Cooperation (APEC), "Asia Region Funds Passport: Joint Committee Meeting 21-22 October 2019, Singapore", October 2019, https://fundspassport.apec.org/joint-committee-meeting-21-22-october-2019-singapore/ (last accessed 1 December 2019).

The article also considers regulatory cooperation from an Australian perspective, examining a high profile mutual recognition agreement entered into by the SEC and ASIC in 2008. This agreement between the United States and Australia was never actually used, yet it appears to have contributed to increased cooperation by ASIC with other international regulators, which reflects the growth in supervisory MoUs around the world.

Given the long-term repercussions of the global financial crisis, it is hardly surprising that, to date, regulatory cooperation has mainly tended to focus on financial risk. However, in 2012, David Wright, then-Secretary General of IOSCO, suggested that the global regulatory agenda should be broadened to focus on non-financial risk and "the crucial need to change behavior, ethics and incentives in firms".[141]

The danger posed by non-financial risk has come to the forefront in Australia in recent times, as a result of misconduct at some of the largest (and most profitable) financial institutions,[142] which culminated in the 2019 final report of the Australian Financial Services Royal Commission.[143] According to this report, the misconduct identified was directly tied to ethical failure and defective corporate cultures in the relevant financial institutions.[144]

The Chairman of ASIC, James Shipton has stated that "just as the global financial crisis was the watershed moment for banks to focus and mature financial risks — particularly credit and

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141 *IOSCO*, Remarks by David Wright (fn. 2), 4.

142 Misconduct included, for example, fees for no service. See Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report*, Vol. 1 (Commonwealth of Australia, 2019), 136*ff*.

143 See Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (fn. 142). The Australian Financial Services Royal Commission Final Report contained 76 Recommendations. See *id*, 20-42. Another important report in 2018 by the prudential regulator, the Australian Prudential Regulation Authority, criticized the governance, culture and accountability structures of the Commonwealth Bank of Australia, after several incidents at the bank, including breaches of anti-money laundering and counter-terrorism laws. See *Australian Prudential Regulation Authority*, Prudential Inquiry into the Commonwealth Bank of Australia, 30 April 2018, 15-16. See also *Ben Butler*, "Culture of Impunity: How Australia Dropped the Ball on Policing the Banks", The Guardian, 2 December 2019 (discussing a more recent scandal, involving alleged money laundering and child exploitation, at another major Australian bank, Westpac).

144 See generally Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (fn. 142), Chapter 3.5.

liquidity risk — we believe now is a watershed time for companies to significantly improve their focus on non-financial risks”.[145]

These remarks suggest that David Wright’s 2012 comments concerning “the crucial need to change behavior, ethics and incentives in firms”[146] at a supra-national level were prescient. They potentially flag an important future direction in cross-border cooperative regulation, by highlighting the need to address both financial and non-financial risks.

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145 *James Shipton*, Chair, Australian Securites and Investments Commission, “Launch of ASIC’s report of director and officer oversight of non-financial risk”, Keynote address, Australian Institute of Company Directors”, 2 October 2019. James Shipton also noted, however, that the understanding of non-financial risk management by company boards is often far less developed than their grasp of financial risk. *Ibid*.

146 *IOSCO*, Remarks by David Wright (fn. 2), 4.

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