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The International Organisation of Securities Commissions (IOSCO), Europe, Brexit, and Rethinking Cross-border Regulation: A Call for a World Finance Organisation

by

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The need to promote cross-border regulation and cooperation between supervisors of financial markets has become acute ten years after the 2008 global financial crisis. This is due to a rise in extra-territorial legislation and cross-border access to foreign markets conditioned on “equivalence” and “deference” among jurisdictions. Brexit has made the issue more critical in Europe because the United Kingdom will rely on “equivalence” decisions on many aspects of its future cross-border financial relationships with the European Union. Equivalence decisions by the European Commission are based on a technical assessment but also include a political dimension which can punish or reward the other party. It is not just a European issue since the financial world will be more connected in the next twenty years and will need to rely even more on cross-border cooperation and equivalence. In addition, the amount of bilateral equivalence assessments and decisions could very quickly become unmanageable with dozens of jurisdictions dealing with hundreds of various regimes. The global financial architecture needs to be adapted, market fragmentation to be pre-empted, and international standards to become more granular. The International Organisation of Securities Commission (IOSCO), made up of all securities supervisors in the world, should play a leading role in cross-border regulation and deference. It is the interest of many European countries, and not just the European Union, to be the driving force to strengthen IOSCO so that a more rule-based and cooperative system can prevail and prevent future market fragmentation. For this goal to be achieved, IOSCO should become a new treaty-based World Finance Organisation.

* Professor of Financial Markets Law at the University of Luxembourg and ECGI Research Member. This article originates from a conference on “The International Organization of Securities Commissions (IOSCO) and the new international financial architecture: what role for IOSCO in the development and implementation of cross-border regulation and equivalence?” which was held in Luxembourg on the 5th of October 2018. The conference was co-organised by Professor Pierre-Henri Conac (University of Luxembourg) and Professor H  l  ne Ruiz-Fabri (Director of the Max Planck Institute, Luxembourg) with the support of the Luxembourg Fonds National de la Recherche and the Chamber of Commerce. Speakers and panelists came from academia, industry, supervisory authorities and IOSCO. According to its General Secretary, Paul Andrews, it was the first international academic conference to discuss the role and future of IOSCO.

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1. Introduction

Europe, and soon not just the European Union (EU), is home to some of the largest financial markets in the world, such as London and to a lesser extent Frankfurt and Paris. This favourable situation is well reflected in the strong representation of Europe in the governing body (Board) of the International Organisation of Securities Commissions (IOSCO). IOSCO was established in 1983 and is the international association of securities commissions. It succeeded a previous Pan-American organisation established in 1974 with the support of the United States (US) *Securities and Exchange Commission* (SEC). IOSCO now combines more than 95% of the world’s capital markets’ supervisors in more than 115 jurisdictions. IOSCO is a forum for securities supervisors where they can meet and discuss issues of common interest. It is the international standard setter for securities regulation. In addition, IOSCO is also a forum for co-operation on enforcement and technical support for emerging markets.

The importance of IOSCO has grown dramatically since the 2008 great financial crisis. Before 2008, there was only a very loose international coordination of regulatory activities regarding financial markets. There was also strong opposition by the US to granular standards. In 1992, the chair of the SEC successfully opposed an effort by IOSCO, led by the United Kingdom (UK) and France, to develop capital standards for securities firms because they would have been too low compared to the US.¹ He declared that IOSCO should be nothing more than a “clearing house of ideas and techniques”. Nevertheless, IOSCO achieved considerable results in developing international principles and standards, such as *Objectives and Principles of Securities Regulation* which are used by the International Monetary Fund (IMF) in its Financial Sector As-

1 Benn Steil, *International Securities Markets Regulation*, Wiley, 1994, p. 204.

assessment Programs (FSAPs). IOSCO also succeeded in fostering enforcement cooperation with the signing in 2002 of a Memorandum of Understanding (MMoU) “concerning consultation and cooperation and the exchange of information”. It immediately proved to be a huge success.

The 2008 global financial crisis was a game changer for the international financial architecture. It revealed how deep economies and markets had become interconnected since the fall of the Berlin wall in 1989. This realisation led to the most comprehensive changes to the global financial architecture since the Bretton Woods agreement of 1944 led to the establishment of the IMF and the World Bank. The seriousness of the crisis led global leaders, with the strong involvement of Germany and France, to extend the G7 and establish the G20 to deal with the crisis. Unsurprisingly, the first G20 meetings focused on banking and financial regulation. This issue sprang to the top of the political agenda.

The G20 meeting in Washington² in November 2008 and the G20 meeting in Pittsburgh³ in September 2009 broke new ground on international financial regulation. The G20 Leaders agreed on general policies and financial markets’ standards to be implemented by all jurisdictions, committed themselves to regulatory convergence, and, in the context of Over The Counter Derivatives (OTC), supported regulatory deference for cross-border clearing obligations. This support for deference in international regulation of financial markets was confirmed at the Saint Petersburg meeting in September 2013. The G-20 Leaders agreed that regarding OTC derivatives “*jurisdictions and regulators should be able to defer to each other when it is justified by the quality of their respective regulatory and enforcement regimes, based on similar outcomes, in a non-discriminatory way, paying due respect to home country regulation regimes.*” The G20 Leaders did not foresee a binding enforcement mechanism. In case of divergence, problems would have to be solved at the G20 Level, either by the Leaders or, more likely, by their Finance Ministers.

In this evolving context, IOSCO was given a much more significant role than before and was implicitly recognised as the international standard setter for securities markets. Policy work by IOSCO has been requested by the G20 and the Financial Stability Board (FSB)⁴ to develop and monitor global regulatory standards. As part of this reshuffling of the global financial regulatory archi-

2 G20 leaders, Declaration of the Summit on Financial Markets and the World Economy, November 2008; <http://www.g20.utoronto.ca/summits/2008washington.html> (last accessed 27 January 2020).

3 G20, Leaders’ statement, The Pittsburgh Summit, 24–25 September 2009; <http://www.g20.utoronto.ca/2009/2009communique0925.html> (last accessed 27 January 2020).

4 The FSB was established in April 2009 as the successor to the Financial Stability Forum (FSF).

ture, IOSCO engaged spontaneously in a reflection on how to enhance cross-border regulatory cooperation. This led in 2013 to the establishment of an IOSCO Task Force Report on “Cross-Border Regulation”, chaired by Ashley Alder, Chief Executive Officer of the Hong Kong Securities and Futures Commission (SFC), and vice-chaired by Professor Anne Héritier Lachat, Chair of the board of directors of the Swiss FINMA. After extensive consultation, the Task Force published its report in 2015. Although a step in the right direction, the report was underwhelming. It was difficult to adopt and did not lead to meaningful recommendations, especially due to the reluctance of the US SEC and the *Commodity Futures Trading Commission* (CFTC) to see a bigger role for IOSCO. It ended up as a mapping exercise describing various regulatory approaches : national treatment,⁵ recognition (unilateral and mutual)⁶ and passporting.⁷ The report included recommendations limited to better information and a plea for IOSCO to “consider” being more explicit in incorporating cross-border issues into its policy work. It was only a small step forward but the report had the merit of placing the issue in the public debate.

The need for promoting cross-border regulatory cooperation and avoid market fragmentation has become more acute after the 2008 financial crisis due to a rise in extra-territorial legislation. Before 2008, the US was essentially the only jurisdiction to apply extraterritorially some parts of its financial legislation. This was usual but led to an international outcry and negotiations after the passing of the Sarbanes-Oxley Act in 2002 as it included several extra-territorial provisions in corporate governance and audit.

The European Union was essentially immune from this behaviour, having been a “victim” of US extra territoriality, but suddenly asserted itself quite forcefully after the 2008 financial crisis. On the one hand, some EU legislation was given extra-territorial reach. The rationale was either to protect the EU from outside financial systemic risks. On the other hand, the EU also opened some of its markets to third country firms, provided that there was a recognition of the “equivalence” of the third country regulatory regime. According to the definition provided by the EU Commission, “Equivalence” refers to a pro-

5 National treatment implies that a foreign firm is subject to the same treatment as a domestic firm. It ensures a level playing field.

6 Recognition implies that the foreign regime is considered to be equivalent to the national regime. It allows some access but is usually limited to certain activities.

7 Passporting is the most favorable approach. The firm only needs to be approved in its jurisdiction to provide financial services in a foreign jurisdiction. This system exists within the Member States of the EU and members of the European Economic Area (EEA) (and sometimes with third countries such as with the Alternative Investments Funds Managers Directive) and in some limited cases in the Americas (“Pacific Alliance Initiative”, 2011) and Asia (“Asia Regional Fund Passport”, 2019).

cess whereby the European Commission assesses and determines that a third country's regulatory, supervisory and enforcement regime is equivalent to the corresponding EU framework. That recognition makes it possible for the competent authorities in the EU to rely on third country entities' compliance with the third country framework which has been deemed "equivalent" by the Commission. The use of the concept of equivalence is also a clever way to "export" EU regulation to other jurisdictions and to promote the G20 agenda of a regulatory level playing field.

Despite looking restrictive, the concept of equivalence is sometimes a way to grant some access to a market. It is a liberalisation tool designed to facilitate cross-border activity. Therefore, the possibility to grant "equivalence" to a third country regime to allow access to the EU market is not always possible. As to securities markets, equivalence provisions are scattered in directives and regulations without a clear policy rationale. They are clearly exceptions. In banking regulation, they are quite rare.

Although the basis for recognition should be predictable and a mere consequence of a technical analysis of relevant regulations, the process, which had always been very informal and flexible, has suddenly become more political with the decision in June 2016 of the United Kingdom to leave the EU ("Brexit"). In order to keep access to the single market, the UK argued in its 2018 White Paper on its future relationship with the EU that its financial services regulation should benefit from an equivalence status and should even be extended to more areas, just shy of a passporting system: "As part of this, the existing autonomous frameworks for equivalence would need to be expanded, to reflect the fact that equivalence as it exists today is not sufficient in scope for the breadth of the interconnectedness of UK-EU financial services provision. A new arrangement would need to encompass a broader range of cross-border activities that reflect global financial business models and the high degree of economic integration. The UK recognises, however, that this arrangement cannot replicate the EU's passporting regime".⁸ As to future determinations of equivalence, the UK hoped that the EU would accept the inclusion of common principles for the governance of the relationship, extensive supervisory cooperation and regulatory dialogue and predictable, transparent and robust processes. Clearly, the EU was reluctant to provide such a bespoke mutual recognition and guarantee. The reason was a fear that the UK would keep most of the benefit of being a member for financial services while being outside. This was not acceptable politically especially since several Member States were ac-

8 HM Government, *The future relationship between the United Kingdom and the European Union*, Presented to Parliament by the Prime Minister by Command of Her Majesty, July 2018, p. 30.

tively trying to lure UK financial institutions. Any easy cross-border access would have defeated these efforts and weakened the benefits of remaining a member of the EU.

The Political Declaration of 17 October 2019 of the EU and the UK states that “The Parties agree that close and structured cooperation on regulatory and supervisory matters is in their mutual interest. This cooperation (...) should include transparency and appropriate consultation in the process of adoption, suspension and withdrawal of equivalence decisions, information exchange and consultation on regulatory initiatives and other issues of mutual interest, at both political and technical levels.”⁹ Essentially, the UK was told that granting of equivalence would involve consultation but nothing more. There was no reference to IOSCO global standards to be the basis to govern market access, at least for global financial firms, and the process could remain political.

The politization of the process has affected the UK but also other jurisdictions such as Switzerland which relied heavily on equivalence. The Swiss stock exchange lost its access to the EU markets for equity trading in summer 2019 as a penalty for not agreeing with the EU to a framework agreement.

In addition to the rigidification and the “politization” of the EU equivalence process due to Brexit, it appears that, 12 years after the crisis, there is a risk of increased market fragmentation. The Financial Stability Board (FSB) recently described market fragmentation as “global markets that break into segments, either geographically or by type of products or participants”.¹⁰ This is an unwelcome development.

The 2019 Japanese presidency of the G20 took official notice of the issue and IOSCO prepared a report on “Market Fragmentation & Cross-border Regulation” (2019).¹¹ The report noticed market fragmentation in the trading and clearing of derivatives, trade reporting, and data privacy and location requirements. The report also included a discussion on the concept of “deference” as an “overarching concept to describe the reliance that authorities place on one another when carrying out regulation or supervision of participants operating cross-border”. The report, which was prepared after the 2018 Luxembourg

9 Point 39 of the Political Declaration Setting Out The Framework For the Future Relationship Between the European Union and the United Kingdom, October 2019, available at https://ec.europa.eu/commission/publications/political-declaration-setting-out-framework-future-relationship-between-european-union-and-united-kingdom_en (last accessed 27 January 2020).

10 FSB’s Standing Committee on Supervisory and Regulatory Cooperation, SRC/2019/03.

11 IOSCO, Market Fragmentation & Cross-border Regulation, Report, June 2019, available at <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD629.pdf> (last accessed 27 January 2020).

conference, accurately reflects some ideas and proposals which were discussed there. It certainly constitutes a significant step in the right direction.

The EU and Europe should embrace this “deference” approach and rely more on IOSCO as a natural forum for discussing cross-border issues, equivalence and even dispute resolution. The soon to be 27 EU Member States and the United Kingdom still benefit from large domestic and international financial markets. However, taking a medium to long term view for all parties, this situation is deteriorating fast due to the rise of emerging markets.¹² Countries in Asia such as China but also India, Indonesia or Vietnam have experienced massive economic and population growth. This growth is expected to continue even if at a slower pace. Therefore, their financial markets have already, for many, or will match and overtake national markets in Europe within 20 years, as Europe is experiencing slow economic growth and population stagnation or decline. In the Americas, Brazil has experienced remarkable growth and is already a giant. Among those countries, one has special importance because of its size. China will not be an average country. It is challenging the United States to become the first economic power in the next two decades. China might succeed or not but has become in a very short period of time a key player in international finance.

There is a risk that the EU, looking forward 20 years, having abused its equivalence tool to gain political advantage, faces a difficult situation where it could be subject to equivalence conditions imposed by China or some other major jurisdictions which will also use equivalence or deference as a political tool. In addition, assessing equivalence among dozens of jurisdictions, as multilateral financial relations increase considerably, will prove a huge loss of resources. Finally, in order to ensure a better level playing field in a multipolar world, a forum on cross-border regulation will be more and more necessary. Therefore, some centralisation is preferable and IOSCO is the obvious forum to fulfil this role.

There is currently a window of opportunity while Europe is well represented on the board of IOSCO to promote and support this agenda at the political level. European non-EU jurisdictions such as Switzerland, Russia and soon the UK should be supportive. Other jurisdictions should also be supportive. Jurisdictions in Africa, in Asia, such as Japan, Singapore, Hong Kong, or in South America, such as Brazil, face the same challenges as Europe. Even, the US might realise that it is in its long term interest as it is now dealing with a systemic competitor. Even without taking China into account, the share of the US in global financial markets is set to decline significantly on a relative basis in the

12 The Dutch supervisory authority lost in 2019 its permanent member status in the IOSCO board due to the relative loss of size of its financial markets.

years ahead. Multilateralism will have its virtue even for the US. China might also be supportive of a stronger role for IOSCO because it would increase multilateralism which it supports. Since none of these jurisdictions is likely to move first, Europe should take the lead and strengthen IOSCO in order to increase its role in promoting neutral cross-border regulation, including equivalence (I). The way forward is complex so that incremental and bold steps should be combined (II).

2. Europe Should Strengthen the Role of IOSCO in Cross-border Regulation

IOSCO, provided it is given sufficient means, is the natural forum for playing a role in trying to ensure an international level playing field in financial regulation and assessing equivalence (A). Europe, not just the EU, is the international player which should push forward this agenda (B).

2.1. IOSCO is the Natural Forum for Cross-Border Cooperation

IOSCO is the natural forum to deal with cross-border regulation and equivalence issues at the international level because of its large membership and its expertise (1°). There is significant support outside and within IOSCO to enhance its role in this field (2°).

2.1.1. Capacity and Expertise of IOSCO in Cross-Border Cooperation

IOSCO, which is based in Madrid, has a worldwide membership of 129 ordinary members which covers 95% of the world's securities markets. Therefore, it is called the "United Nations of securities regulation".¹³ Because of its composition, it is a technical and relatively politically neutral forum. IOSCO has been the global standard setter for securities markets regulation and has strong expertise in developing global regulatory standards. It has received implicit political endorsement by the G20 in 2009 and is part of the new international financial architecture.¹⁴ For instance, the G20 instructed IOSCO to work on

13 See *Jean-Paul Servais*, "The International Organization of Securities Commissions (IOSCO) and the new international financial architecture: what role for IOSCO in the development and implementation of cross-border regulation and equivalence?", *European Company and Financial Law Review*, 2020, 3.

14 IOSCO Welcomes G20 communiqué, Madrid, 3 April 2009, IOSCO/MR/08/2009: "The International Organization of Securities Commissions (IOSCO) has welcomed the statement of the Leaders of the Group of 20 as an endorsement of IOSCO's recent work to close

OTC derivatives¹⁵ as well as on Credit Default Swaps markets as part of regulatory pressure on shadow banking¹⁶. As part of this work on shadow banking¹⁷, IOSCO, at the request of the FSB¹⁸, published policy recommendations on Money Market Funds following the September 2008 run on some money market funds that alerted regulators to the systemic relevance of MMFs'.¹⁹ The recent 2019 IOSCO report on "Market Fragmentation & Cross-border Regulation" reflects a very legitimate concern of the Japanese Presidency of the G-20 which the FSB is following up actively.²⁰

IOSCO has extensive experience with peer review because of its 2002 MMoU and Enhanced MMoU of 2017. The 2002 MMoU provided for the establishment of a screening group charged with verifying the ability of an applicant to comply with each provision²¹. A "monitoring group" was established in order

the regulatory gaps in financial securities markets"; see also G20, Declaration on Strengthening the Financial System, London, 2 April 2009, p. 6. Available at <http://www.g20.utoronto.ca/summits/2009london.html> (last accessed 27 January 2020).

- 15 Cannes Summit Final Declaration, "Building our Common Future: Renewed Collective Action for the Benefit of All", November 2011, Point 24. IOSCO was specifically asked to work with the CPSS, the FSB and other relevant organisations, on trade repositories and on standards on margining for non-centrally cleared OTC derivatives. Available at <http://www.g20.utoronto.ca/2011/2011-cannes-declaration-111104-en.html> (last accessed 27 January 2020).
- 16 Cannes G20 Leaders Summit Final Communiqué, Point 14: 'We have decided to develop the regulation and oversight of shadow banking. We will develop further our regulation on market integrity and efficiency, including addressing the risks posed by high frequency trading and dark liquidity. We have tasked IOSCO to assess the functioning of Credit Default Swaps markets'; <http://www.g20.utoronto.ca/2011/2011-cannes-com-munique-111104-en.html> (last accessed 27 January 2020).
- 17 Cannes Summit Final Declaration, "Building our Common Future: Renewed Collective Action for the Benefit of All", November 2011 Point 30. See (fn. 17).
- 18 'In this regard, the Financial Stability Board (FSB) asked the International Organization of Securities Commissions (IOSCO) to undertake a review of potential regulatory reforms of MMFs that would mitigate their susceptibility to runs and other systemic risks and to develop policy recommendations. This work is part of the efforts undertaken by the FSB to strengthen the oversight and regulation of the shadow banking system', IOSCO, Policy Recommendations for Money Market Funds, October 2012, p. 3; www.iosco.org/library/pubdocs/pdf/IOSCOPD392.pdf (last accessed 28 January 2020).
- 19 IOSCO published Policy Recommendations for Money Market Funds, Madrid, 9 October 2012, IOSCO/MR/27/2012; www.iosco.org/library/pubdocs/pdf/IOSCOPD392.pdf (last accessed 27 January 2020).
- 20 FSB, Updates on the Work on Market Fragmentation, 14 October 2019, available at <http://www.fsb.org/2019/10/updates-on-the-work-on-market-fragmentation/> (last accessed 27 January 2020).
- 21 OICV-IOSCO, Multilateral memorandum of understanding concerning consultation and cooperation and the exchange of information, 24 May 2002, Appendix B, p. 12.

to monitor possible changes “in the willingness or ability of a signatory to meet the provisions of the MoU”²². In 2012, IOSCO established an Assessment Committee which prepares Country and Thematic Reviews. Therefore, IOSCO has strong expertise in monitoring international standards and national legislation. This experience could be useful for equivalence assessments.

Since IOSCO has expertise in comparing regulatory regimes, it could, provided with sufficient staff in order to rely not too much on national supervisors, advise on cross-border regulation and decide on equivalence. Involving IOSCO in equivalence assessment would provide a considerable benefit in so far as it would reduce the duplication of equivalence assessments by individual jurisdictions, especially in a multilateral context and where purely bilateral assessment is less important.

2.1.2. Financial Industry and Supervisory Support for a Stronger Role for IOSCO

Unsurprisingly, the global financial industry favours an increased role for IOSCO in cross-border regulation in order to reduce the risks of market fragmentation. There is also support in some parts of the financial industry for an increased role in equivalence.

When consulting on its 2015 report on “Cross-Border Regulation”, the IOSCO Task Force received around 30 answers. The pool of answers was diversified, coming for instance from the City of London, the International Swaps and Derivatives Association (ISDA), LCH Clearnet, Brazil, France, the Chicago Mercantile Exchange and individual banks. A private body composed of major financial institutions, the Cross-border regulation forum (CBRF), was even especially established to answer the consultation. Among other proposals, the CBRF advocated an increased role for IOSCO in setting more granular international standards, pre-empting the impact of national rules on other jurisdictions, performing comparability assessments and developing standards on equivalence.

There was support for IOSCO to play a role to avoid regulatory arbitrage, promote mutual recognition and assess “equivalence”. The Swiss Finance Council suggested that “When detailed global standards are appropriate, IOSCO should be mandated – perhaps with high-level political support (...) – to develop standards that countries then commit to implement, alongside IOSCO having a strong monitoring role ...”. This statement was before Brexit made the issue even

more critical for Switzerland. The time saving advantage of centralisation was also underlined by one of the respondents which suggested IOSCO could be “conducting peer reviews to assess whether national legislation is consistent with international standards, thereby reducing the need to individual regulators to undertake separate recognition assessments”.²³ Deutsche Bank noted that “IOSCO’s role can be strengthened while still recognising the legal responsibilities of national level policy-makers (encompassing law-makers and regulatory authorities) and domestic political pressures.”²⁴ It added that “In the medium-to-long term, there is a need for political and legal changes to ensure that IOSCO can play a greater role in overcoming divergence caused by conflicting national requirements, ...”.²⁵ The International Banking Federation suggested that “IOSCO could offer its services as a mediator, on an informal and non-binding basis, for disputes between national authorities on the application of law where Recognition is implicated. The UK Financial Markets Law Committee suggested that “one proposal to minimise conflicts on the interpretation of the provisions of these (MMoUs) has been the establishment of a standing dispute settlement forum or mechanism.” ISDA noted that IOSCO was “Uniquely placed to facilitate resolution of disputes between jurisdictions”.

More recent reports confirm that support for a stronger role for IOSCO in cross-border regulation is now engrained in the global financial industry, especially in the face of increased risks of market fragmentation. A 2018 report by the Global Financial Markets Association on “Principles for Achieving Consistent Regulatory Regimes and Supervisory Practices” argues for « Developing and adopting principles for achieving consistency of regulatory regimes and supervisory practices with the objective of designing a new cooperation arrangement to address divergences is a necessary next step in the regulatory reform agenda. The lack of effective regulatory cooperation arrangement(s) based on globally agreed upon principles and clearly defined fact-based policy objectives to achieve consistent regulatory regimes and supervisory practices across all sectors is very much a financial stability issue. ».²⁶ The World Federation of Exchanges promoted this approach in a 2017 Position Paper which lambasted “regulatory dissonance”.²⁷

23 International Regulatory Strategy Group. TheCityUK. February 2015.

24 Deutsche Bank response to IOSCO Task Force on Cross-Border Regulation’s consultative report, 23rd February 2015.

25 See (fn. 25).

26 Global Financial Markets Association (GFMA) Principles for Achieving Consistent Regulatory Regimes and Supervisory Practices, April 2018, available at <https://www.gfma.org/wp-content/uploads/0/83/197/231/64665979-572d-4887-9edf-5ebbbe6dd27.pdf> (last accessed 27 January 2020).

27 WFE, Financial Markets and International Regulatory Dissonance. WFE Position Paper, Nov. 2017.

Some national supervisors are also supportive and Brexit is providing political tailwinds for IOSCO to become more involved with “recognition”, “deference” and “equivalence. Unsurprisingly, the most vocal calls come from the UK and jurisdictions which depend heavily on global open markets, such as for instance Switzerland and Hong Kong. In a 2017 speech, Mark Carney, chair of the Bank of England, said “The combination of robust international standards and trust built through transparent implementation and intensive supervisory cooperation can create a system of enhanced equivalence and mutual deference.”²⁸ Speaking at the European Securities and Markets Authority (ESMA) Conference in Paris in 2017,²⁹ Ashley Alder, the chairman of IOSCO and CEO of the Hong Kong SFC, indicated the interest of IOSCO “to co-ordinate equivalence post-Brexit.”³⁰ He mentioned IOSCO had been “seen as a standard setter” but that, in the future, “its as much about an organisation that facilitates how regulators and jurisdictions interact cross-border”. This would be a very positive development.

Thanks to the strong impulse of the G20 Japanese presidency, IOSCO is moving in that direction. For instance, the FSB disclosed in October 2019 that IOSCO is developing a repository for deference assessments, which will include the deference assessments that have been conducted by member jurisdictions as well as their final outcome.³¹ This is a very positive first step.

European countries are the natural actors to support this evolution of IOSCO.

2.2. Europe is the Natural Jurisdiction to Strengthen the Role of IOSCO

Among all “regional” jurisdictions which compose IOSCO, Europe, the EU and the Member States of the European Union enjoy a shared agenda on multilateralism (1°). In addition, the EU has allowed access to third countries more liberally than other jurisdictions’ markets and has gained significant expertise in assessing equivalence (2°).

28 <https://www.bankofengland.co.uk/speech/2017/the-high-road-to-a-responsible-open-financial-system> (last accessed 27 January 2020).

29 ESMA Conference, 17 October 2017, Paris.

30 *Baptiste Aboulian and Siobhan Riding*, IOSCO offers to co-ordinate equivalence post-Brexit, *Ignites Europe*, 19 October 2017.

31 FSB, (fn. 22).

2.2.1. Europe as a Promoter of Multilateralism

The EU has been a traditional promoter of multilateralism on the global stage and has enjoyed significant success in some areas. The EU, established by treaty, is itself multilateral and cooperative by nature. It is often considered as a model outside Europe. The EU has led the way and has been very successful in its multilateral approach in being the biggest promoter of the International Financial Reporting Standards (IFRS). They have been a huge success and as of 2020, they have been adopted by 144 jurisdictions.³² The EU has also been a promoter of IOSCO through references to principles and standards in directives and regulations such as, references to international standards for an assessment of third country prospectuses.³³

However, it is not only the EU but more generally Europe which has been a promoter of a multilateral approach in international finance and relations. Switzerland embodies neutrality, multilateralism, and the benefits of cross-border financial flows. Being an open jurisdiction, it is a strong supporter of equivalence as stated by Anne Héritier Lachat in her 2018 Luxembourg conference speech. Russia, which is home to a financial centre, is also a supporter of multilateralism in international financial relations.

2.2.2. EU as a Promoter of Equivalence for Third Country Access

Since the 2008 global financial crisis, the EU has considerably developed the use of equivalence. Historically, few fields were subject to equivalence and this remains so in important financial areas. For instance, there is no equivalence regime for most core banking activities with retail clients (ie deposit taking). However, the equivalence regime is incorporated in many directives and regulations. EU financial services law includes around 40 areas for equivalence decisions and the European Commission has adopted more than 280 equivalence decisions in the area of banking and finance for more than 30 countries.³⁴

32 See IFRS Foundation: <https://www.ifrs.org/use-around-the-world/use-of-ifrs-standards-by-jurisdiction> (last accessed 27 January 2020).

33 See Article 20 Issuers incorporated in third countries of the (now repealed) Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC, OJ L 345/64, 31.12.2003.

34 Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, Equivalence in the area of financial services, Brussels 29.7.2019, COM(2019) 349 final, p. 2.

Thanks to this openness, the EU equivalence framework appears to be one of the most sophisticated and encompassing existing regime in the world. The scope of equivalence has also been steadily growing in EU legislation such as in the Credit Rating Agencies Regulation (2009)³⁵, the Alternative Investment Funds Managers Directive (2011)³⁶, the European Markets Infrastructure Regulation (EMIR, 2012)³⁷, the Central Securities Depositories Regulation (2014)³⁸, the 2014 Markets in Financial Instruments Directive (MiFID II)³⁹ and the 2014 Markets in Financial Instruments Regulation (MiFIR)⁴⁰ or the Financial Benchmark Regulation (2016).⁴¹ The MiFIR has been recently amended, as part of the Investment Firm Review, to deal with Brexit and access to the single market.⁴²

The EU equivalence framework is complex, as the regimes differ according to the directives and regulations. It cannot be described in detail in this article.⁴³ However, it is sufficient to note that the EU has developed several models for granting equivalence but which all imply an equivalence decision by the Commission and an assessment and sometimes a decision by ESMA as well as co-operation arrangements being in place between the third country and ESMA

35 Regulation (EC) No 060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies, as Amended.

36 Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 060/2009 and (EU) No 095/2010, OJ L 174/1, 1.7.2011.

37 Regulation (EU) No 48/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and European trade repositories, OJ L 201/1, 27.7.2012.

38 Regulation (EU) No 09/2014 of the EU Parliament and of the Council of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories and amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) No 36/2012, OJ L 257/1, 28.8.2014.

39 Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, OJ L 173/349, 12.6.2014.

40 Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 48/2012, OJ L 173/84, 12.6.2014.

41 Regulation (EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds and amending Directives 2008/48/EC and 2014/17/EU and Regulation (EU) No 96/2014, OJ L 171/1, 29.6.2016.

42 Regulation (EU) 2019/2033 of the European Parliament and of the Council of 27 November 2019 on the prudential requirements of investment firms ..., OJ L 3/4/I, 5. 12. 2019

43 See in more detail the other articles in this issue.

or the Member State of reference. ESMA plays a key role in the framework and has devoted considerable resources to providing technical assessment of equivalence. Thankfully, decisions have been overwhelmingly outcome-based rather than a line-by-line comparison.⁴⁴

Also, although some equivalence decisions have arguably been politicized, the assessment of the EU framework and track record should not lead to confuse the forest for the trees. In general, the EU has been open and pragmatic in its equivalence decisions. For instance, in 2017, the Commission determined that the United States rules on obligations on the exchange of collateral (margins requirement) between counterparties for non-centrally cleared over-the-counter (OTC) swaps were equivalent to the European Market Infrastructure Regulation (EMIR) rules.⁴⁵ However, there was a difference since the margin requirement is calculated every day gross in the EU whereas it is calculated every two days net in the US.⁴⁶ This favors considerably trading in the US, putting the EU markets at a disadvantage. There are other cases where the EU took a pragmatic approach benefiting other jurisdictions, such as with IFRS and prospectuses, given either their importance or proximity to the EU. Therefore the EU is also clearly mindful of the need to compromise to avoid market fragmentations.

Several changes to the EU equivalence framework have recently taken place. The first one is that the role of ESMA in the field of equivalence has been strengthened with the adoption in 2019 of the European Supervisory Agency review.⁴⁷ The amended ESMA 1095/2010 Regulation moves third country re-

44 See Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions. Equivalence in the area of financial services, Brussels, 29.7.2019 COM(2019) 349 final and, EU equivalence decisions in financial services policy: an assessment, Brussels, 27.2.2017 COM(2017) 102.

45 Commission Implementing Decision (EU) 2017/1857 of 13 October 2017 on the recognition of the legal, supervisory and enforcement arrangements of the United States of America for derivatives transactions supervised by the Commodity Futures Trading Commission as equivalent to certain requirements of Article 11 of Regulation (EU) No 48/2012 of the European Parliament and Council on OTC derivatives, central counterparties and trade repositories, OJ L 265/23 14.10.2017.

46 Commission Delegated Regulation (EU) 2016/2251 of 4 October 2016 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories with regard to regulatory technical standards for risk mitigation techniques for OTC derivatives contracts not cleared by a central counterparty, OJ L 940/9, 15.12.2016.

47 Regulation (EU) 2019/2175 of the European Parliament and of the Council of 18 December 2019 amending Regulation (EU) No 093/2010 establishing a European Supervisory Authority (European Banking Authority), Regulation (EU) No1094/2010 estab-

cognition powers for certain market actors from Member States' supervisors to ESMA. In addition, ESMA's role is extended to monitoring which is now becoming a key element of equivalence. It will not be enough to be equivalent on day one. This is a key development as "equivalence" is shifting from regulatory comparison (law on the books) to enforcement of the rules (law in action). This dimension was always implicitly present in the concept of "deference" and was the reason why, for instance, the SEC chose Australia for its first agreement. It knew that there was a tradition of enforcement similar to the US.

Secondly, the Commission has improved its equivalence process by addressing the issue of the importance of the market to the granting of equivalence. EMIR 2.2, adopted in 2019, divides central counterparties (CCPs) into systemically important CCPs (Tier 2) and non-systemically important CCPs (Tier 1).⁴⁸ For systemically important third country CCPs, for which ESMA deems that the Tier 2 regime does not sufficiently ensure the EU's financial stability, there is a possibility to require relocation to the EU. However, although a Tier 2 CCP is under the supervision of ESMA, it can request a finding that the rules to which it is subject in its home country are comparable to EU law. If there is "comparable compliance", there is deference to the third country supervision.⁴⁹ The EMIR 2.2 process for clearing houses goes in the right direction with the use of deference and this tiering approach depending on the magnitude of possible financial stability and investors risks. Targeting "high-impact" third countries, for which an equivalence decision is likely to be used intensively by market participants, should allow easier access to equivalence for others. Only "high-impact" countries would be subject to a very granular analysis. The Investment Firm Review takes a similar approach based on the systemic importance of the third country.

Despite those recent improvements, the EU regime is not without some remaining problems. As stated by the Commission, it is discretionary in content, in timing as some countries come first, and even existence since there is no

lishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), Regulation (EU) No 095/2010 establishing a European Supervisory Authority (European Securities and Markets Authority), Regulation (EU) No 00/2014 on markets in financial instruments, Regulation (EU) 2016/1011 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds, and Regulation (EU) 2015/847 on information accompanying transfers of funds, OJ L 334/1, 27.12.2019.

48 Regulation (EU) 2019/2099 of the European Parliament and of the Council of 23 October 2019 amending Regulation (EU) No 48/2012 as regards the procedures and authorities involved for the authorisation of CCPs and requirements for the recognition of third-country CCPs, OJ L 322/1, 12.12.2019.

49 See new Article 25a(1) of EMIR.

obligation to adopt an equivalence decision. The process largely eludes democratic accountability and transparency so that the European Parliament wants to become more involved.⁵⁰ The process has recently become more transparent with the Commission publishing draft decisions for comments (with a 30 days feedback period). However, decisions can be revoked at any time, or with short notice, to address emerging divergences or for lack of cooperation. The framework requires reassessment each time the foreign or EU law changes. The process is also very resource intensive for ESMA as the number of countries and foreign regulations to assess is significant.

Therefore, while the current system can still work with a small number of jurisdictions, it is probably not workable in a more multilateral environment which will be growing with time. At the recent September 2019 Eurofi conference in Helsinki, this concern already came into the regulatory debate. “A regulator highlighted the problems stemming from the design of equivalence processes, when considering them in a global perspective. If a country is a third country to every other financial market in the world and vice versa this will lead to a very “baroque” architecture, which will become increasingly complicated as the financial market becomes more multipolar. Expanding networks of bilateral equivalence designations will also be extremely time-consuming to put in place and manage. It is uncertain whether the complicated bilateral matrix this will result in is really operable and whether all these bilateral agreements are generating added value for their constituencies. A different type of design should be thought of, leveraging the global standards and assessment processes that exist in many areas of finance”.⁵¹ These are wise words.

This is the way forward as there are serious limitations to the bilateral approach. The EU 27, the UK, and other European countries which rely on equivalence, should take the lead and push the agenda of strengthening the role of IOSCO in cross-border regulation.

3. The Way to Strengthen the Role of IOSCO in Cross-Border Regulation

There are different ways for Europe to promote within IOSCO a more active role in cross-border regulation (A). Europe could even support the transfor-

50 European Parliament, Resolution of 11 September 2019 on Relationships between the EU and Third Countries concerning Financial Services Regulation and Supervision (P8_TA(2018)0326), available at https://www.europarl.europa.eu/doceo/document/T-A-8-2018-0326_EN.html (last accessed 27 January 2020).

51 Eurofi, Summary, The Eurofi Financial Forum 2019, Helsinki, 11,12 & 13 September 2019, organised in association with the Finnish EU Council Presidency, p. 32.

mation of IOSCO into a World Financial Organisation inspired by the World Trade Organisation (B). Although the former approach is essentially technical, the latter would require political consensus.

3.1. The Role of Europe within IOSCO

The strengthening of IOSCO could be promoted by the European Union (1°) and, even better, by the European Regional Committee of IOSCO since it represents all Europe (2°).

3.1.1. The Role of the European Union

The strengthening of IOSCO could become a goal of the European Council and of the Commission as part of a much needed defence and promotion of multilateralism. Contrary to appearances, the situation is not as dire as it looks if one is to rely only on “Tweets” for information. Although the Trump administration has challenged multilateralism and especially the World Trade Organisation (WTO), the approach adopted by the US Treasury and financial agencies has been much more pragmatic.

In 2007, in a ground breaking article, two top SEC representatives proposed a new approach to cross-border access based on substituted compliance.⁵² This led directly to the adoption of the US-Australian Mutual Recognition Agreement between the SEC and the Australian Securities and Investments Commission (ASIC) in 2008.⁵³ It allowed for cross-border access to exchanges and broker-dealers without separate registration. Australia was chosen as a “testing ground” as it was culturally close enough to the US, had a strong enforcement culture and was sufficiently far away so that retail cross-border activity would remain limited and likewise possible investors and political damage. As stated by Jennifer Hill, the agreement was a “blue print” for other agree-

52 *Ethiopia 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.

53 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, 1 (last accessed 1 December 2019).

ments.⁵⁴ This initiative showed that, contrary to traditional thinking, the US is not closed to deference, provided there is a strong enforcement culture and limited risk. Unfortunately, the global financial crisis brought this development to an abrupt halt as other priorities took centre stage for the SEC and other supervisors.

The CFTC developed in the 1990s the concept of “substituted compliance” but it implied micro-examination line by line of legal compliance, with regulators only granting waivers if the laws were *de facto* the same. This was the traditional US approach of national treatment. However, the issue of “substituted compliance” returned to the US agenda with the introduction of extra-territorial provisions in the EU financial legislation especially in EMIR. The derivatives markets in the US became affected. This led to intense negotiations on cross-border issue and equivalence between the CFTC, the SEC on the one side and the European Commission and ESMA on the other side. Those negotiations took place in the OTC Derivatives Regulatory Group (ODRG), established in 2011.⁵⁵ They were very difficult and challenging although ultimately successful. Then, in 2018, a few days before the IOSCO conference in Luxembourg to which Eric J. Pan, Director of the Office of International Affairs took part, the CFTC published a White Paper which adopted a ground breaking approach to equivalence with the EU.⁵⁶ Reinterpreting the concept of “substituted compliance”, the CFTC endorsed an outcome based approach. It advocated a distinction to be drawn between the swaps reforms agreed to by the G20 and enacted in the 2010 Dodd-Frank Act that are designed to mitigate systemic risk, and those intended to address market and trading practices which should be subject to a more flexible comparability assessment. Therefore, the US, led by the CFTC, is moving towards a more cooperative approach to equivalence. which should reduce market fragmentation.

The European Parliament has also supported, in the context of Brexit, an increased presence of the EU within IOSCO. In the context of Brexit, a 2017 report on relationships between the EU and third countries concerning financial services regulation and supervision prepared by the Committee on Eco-

54 See *Jennifer G. Hill*, “Regulatory Cooperation in Securities Market Regulation: Perspectives from Australia”, *European Company and Financial Law Review* 2020, 12, 27.

55 See Report of the OTC Derivatives Regulators Group (ODRG) to G20 Leaders on Cross-Border Implementation Issues, November 2014; www.cftc.gov/ucm/groups/public/@internationalaffairs/documents/file/oia_odrgreportg20_1114.pdf (last accessed 12 January 2020).

56 CFTC chairman J. *Christopher Giancarlo*, “Cross-border swaps regulation version 2.0: a risk-based approach with deference to comparable non-u.s. regulation” (oct. 1, 2018), available at: <https://www.cftc.gov/PressRoom/PressReleases/7817-18> (last accessed 27.01.2020).

nomics and Monetary Affairs (ECON) called “for active involvement of the Union and the Member States participating in global standard-setting bodies in financial services”.⁵⁷ Speaking with a united voice and with a stronger involvement could help Europe strengthen IOSCO and lead to more granular standards in some markets areas. This does not mean that ESMA should be the single voice for the EU in IOSCO. This would not enhance the position of the EU in IOSCO. Quite to the contrary, this option has to be discarded as it would significantly reduce the influence of Europe in the Board since IOSCO is based on a large membership, including in the Board which is a large body of 31 Members. There would be no interest to move from eight to just one vote in the board of IOSCO. In addition, securities supervisors of Member States have the expertise and also exclusive responsibility over the supervision of their Member States’ securities markets, so that they should not be replaced by ESMA or the Commission. A mixed approach is necessary. One way forward would be to have more coordination within the board of ESMA ahead of IOSCO meetings.

IOSCO could also benefit from the expertise of ESMA on assessment of equivalence and use the results from the assessments of ESMA in its own process. ESMA has been actually very active in IOSCO since its creation. It gained observer status in 2014. This means that, although it cannot vote, it can attend the IOSCO Board, get access to all documents, and speak. Since the IOSCO decision-making process is based on consensus rather than voting, the ESMA participation can be more than that of a simple observer. Nevertheless, the chair of ESMA is limited as it needs to present the collective position of the board of supervisors of ESMA, if any, and national competent authorities tend to act very autonomously. ESMA also participates in Consultative Committees of IOSCO. The real policy work and standard setting activity of IOSCO is conducted in those Consultative Committees. There are currently eight Committees : Issuer Accounting, Auditing and Disclosure (Committee 1), Regulation of Secondary Markets (Committee 2), Regulation of Market Intermediaries (Committee 3), Enforcement and the Exchange of Information and the Multilateral Memorandum of Understanding Screening Group (Committee 4), Investment Management (Committee 5), Credit Rating Agencies (Committee 6), Commodities Derivatives Markets (Committee 7) and Retail Investors (Committee 8). ESMA is a Member of Committee 6 (Credit Rating Agencies) and an *Observer* in Committees 2 (Regulation of Secondary Markets), 3 (Regulation of Market Intermediaries) and 8 (Retail Investors). Therefore, there is a working relationship between ESMA and IOSCO.

57 Report on relationships between the EU and third countries concerning financial services regulation and supervision, (2017/2253(INI)), Committee on Economic and Monetary Affairs, Rapporteur: *Brian Hayes*, A8-0263/2018, 18.7.2018, Point 25.

The EU could promote IOSCO to become a more active international forum for cross-border regulation and equivalence. However, this effort should also be supported by all European countries.

3.1.2. The Role of the European Regional Committee

The European Regional Committee (ERC) is the largest regional committee (50 members) of IOSCO. Some members of the ERC which are not member of the EU, are home to very important financial markets such as the UK or Russia. They could be affected by market fragmentation and complex equivalence procedures.

Because of the expertise of many of its members in equivalence issues, the role of the European Regional Committee, in which ESMA is a member, should be key to raise the attention of the IOSCO board on cross-border issues. Several actions could be taken. The ERC could suggest to the IOSCO Board the creation of a full standing Committee on “Cross-border Regulation and Supervision”. This would send a very strong signal. The ERC could also suggest to the IOSCO Board the development of a MMoU or a model MMoU for supervisory purposes, including procedure for assessment of “equivalence”. This would not be such a far-fetched proposal when compared with the existing enhanced MMoU. IOSCO could also benefit from the existence of supervisory MoUs, such as the that between the US SEC and the Australian ASIC⁵⁸.

As a consequence of Brexit, the UK should be a supporter of more IOSCO involvement since it will lose almost all influence on the development of EU financial legislation and will probably not even be an observer within ESMA. It is in its interest to regain its lost influence at the international level. Therefore, it is not surprising that the UK has been pushing in the direction of more involvement of IOSCO in developing and monitoring international standards. However, one of the issues is the lack of general granularity of IOSCO principles and standards. Eilis Ferran raised this crucial point when she stated that “...in principle the case can be made for the use of international standards as the benchmark for regulatory parity but there is major impediment because of the limited supply of suitable standards.”⁵⁹ The Swiss Finance Council also encouraged the EU to step-up its engagement in international

58 See *Hill*, (fn. 54) 22–28.

59 See *E. Ferran*, “Recognition of third country equivalence in EU financial law – an obstacle or a way forward for future EU-UK bilateral arrangements?”, in ECB Legal Conference 2017, *Shaping a new legal order for Europe: a tale of crises and opportunities*, 4–5 September 2017, p. 213. The article is available at: <https://www.ecb.europa.eu/pub/pub/legal/html/index.en.html> (last accessed 27 January 2020).

fora in order to globally promote consistent standards on which equivalence decisions should be based.⁶⁰ However, the road to achieving more granular standards is long although more could be developed in certain areas, especially emerging issues. In addition, there is a positive view of the WTO's dispute settlement system by Elizabeth Howell to deal with UK access rights to the single market in case there the final future agreement would not deal satisfactorily with this aspect.⁶¹ It would make much more sense to locate this mechanism within IOSCO rather than in a more "generalist" institution such as the WTO.

The IOSCO 2019 Report on Market Fragmentation & Cross-border Regulation suggested a greater use of the IOSCO Regional Committees where members can discuss cross-border regulatory issues on a regular basis. It also noted that a precedent had already been established by the meeting of the IOSCO Asia-Pacific Regional Committee (APRC) and the European Commission and ESMA during which members have met annually for the past three years to consider regulatory developments in the two regions, including emerging trends, cross-border implications of domestic and regional legislation and efforts in both regions to promote greater integration and connectivity. The report considers that this type of engagement could be transformed into a regular fixture of the agenda of IOSCO Regional Committees which would allow members to develop knowledge of one another's markets and legislative frameworks. These proposals are excellent as cross-border issues are more intense within and between regional blocs. They would contribute to raise awareness of cross-border issues and avoid ex-ante market fragmentation.

With the multiplication of important financial markets, some other originally bilateral negotiations groups now combine some of the most important supervisors and could also be brought within IOSCO. For instance, the ODRG includes in addition to the CFTC, the SEC, the EU Commission and ESMA, it includes the Australian Securities and Investments Commission (ASIC), the Brazilian *Comissao de Valores Mobiliarios*, the Hong Kong Securities and Futures Commission, the Japanese Financial Services Agency, the Ontario Securities Commission (OSC), the *Autorité des marchés financiers du Québec* (AMF), the Monetary Authority of Singapore (MAS) and the Swiss FINMA. It looks now like a Consultative Committee of IOSCO. The ODRG has sent its reports directly to the G20, like IOSCO sends its own reports to the FSB. Why such duplication of groups and structures?

60 Lukas Gähwiler, Regulatory cooperation in the area of financial services: in need of closer cooperation, more convergence and more legal certainty, February 2019.

61 Elizabeth Howell, "Post-'Brexit' Financial Governance: Which Dispute Settlement Framework should be Utilised", *Modern Law Review* 2020, 128–162.

Linking those fora with IOSCO regional or thematic committees would not be a great change and would significantly improve coordination and coherence at international level.

IOSCO has been successful in developing international granular standards in new areas and when it had political support, especially through the FSB. Moving in this direction and strengthening IOSCO cannot be achieved by national supervisors alone. It is ultimately a political decision. Political support will be needed.

3.2. The Transformation of IOSCO into a Treaty-Based International Organization

In a 2012 ground-breaking speech at the Atlantic Council, David Wright, the then Secretary General of IOSCO, speaking in a personal capacity, advocated reform of the global financial architecture in order to promote regulatory convergence among G20 members and beyond. He asked the crucial question in the post 2008 financial crisis world: “Will the agreed global policies and standards that are emerging be properly implemented by all jurisdictions? Evenly? Equivalently? Without distortion of competition or capital flows? Without regulatory arbitrage?”. His proposal was to develop ‘A global institutional framework, probably established by International Treaty that has some enforcement authority, binding disputes settlement and sanctioning possibilities. [...] This global Institutional framework should encompass at least the FSB and the main global sectorial standard setters. Its role would not be to try to enforce a one-size-fits-all harmonized set of rules – but rather to ensure and, if necessary, legally require that the basic globally agreed policy principles are properly implemented by all jurisdictions who are signatories to the Treaty arrangements’.⁶²

Currently, IOSCO is not an international organisation according to international public law. This is not surprising as it originated from a bottom-up approach. It is a private non-profit organisation incorporated under a private act in Canada. Antonio Marcacci provides an excellent definition of its legal nature: “IOSCO can be classified as multilateral regulatory network of (usually public) regulators with the formal structure of a private-law based non-profit entity incorporated by a statutory act”.⁶³

There is some political support in Europe for increasing the role of IOSCO, maybe to the point of establishing a treaty-based international organization

62 Remarks by *David Wright* Secretary General of IOSCO at The Atlantic Council, Washington D.C., 10 December 2012.

63 *Antonio Marcacci*, “The EU and IOSCO: An Ever Closer Cooperation?”, EUI Working Paper LAW 2013/02, p. 6.

(1°). This organisation could be inspired by the WTO but with several differences (2°).

3.2.1. *The Necessity of Political Support*

There is some political support in the European Parliament for transforming IOSCO. Following a key recommendation included in a report to the European Parliament by the author of this article, it passed a resolution in 2016 calling for, among other proposals, “the EU institutions and the Member States to promote the establishment of a road map towards the creation of a global treaty-based financial organisation, following the lines suggested by the de Larosière report, with wide-ranging powers of recommendation, negotiation of minimum binding standards, multilateral dispute settlement mechanisms and, where appropriate, sanctions; believes that the experience gained, notably in the trade sector through the WTO, could be used to set up the above-mentioned multilateral dispute settlement mechanisms ...”.⁶⁴ Although, it was just a resolution, which included many other goals, the WTO reference was adopted within this recommendation. However, the idea would first need to be tested with major European jurisdictions, whether members of the EU or not.

The benefits of increasing the role of IOSCO in cross-border regulation and equivalence, thanks to political support, would be manifold. A stronger political support could facilitate the adoption of more granular international principles and standards, in selected areas where such granularity would be helpful. This development would make the adoption of binding dispute resolution mechanisms easier in areas where a multilateral approach would be preferable to a bilateral one. In addition, it should reduce the amount of bilateral equivalence assessments and decisions could very quickly become unmanageable with dozens of jurisdictions dealing with hundreds of various regimes. Another benefit from this approach would be to reduce the political approach sometimes taken in equivalence decisions. This would lead to a more stable and predictable regulatory environment.

IOSCO would benefit from a stronger legal status compared to other international financial bodies, especially banking supervisors. In the area of international finance, as is also the case in many national jurisdictions, banking institutions and fora exert a stronger influence than securities supervisors. The Fi-

64 European Parliament resolution of 12 April 2016 on the EU role in the framework of international financial, monetary and regulatory institutions and bodies (2015/2060 (INI)), Reporter *Sylvie Goulard*. The report is available at: <http://www.europarl.europa.eu/committees/en/supporting-analyses-search.html> (last accessed 27 January 2020).

nancial Stability Board (FSB), which is mostly made up of banking supervisors, and where the CFTC is not a member which is a complete puzzle, has requested several reports from IOSCO. This relationship should be rebalanced as it creates some risks.

For instance, the FSB wanted to apply prudential regulations to asset managers. This, for various reasons, was completely unjustified and IOSCO successfully opposed this move. However, it was a big struggle. IOSCO could have failed and this success is rather unique. Failure by IOSCO would have had severe consequences for the asset management industry. David Wright noted in 2012 that “There is a domination of Central Banks and bank regulators in the key global policy committees (e.g., in the FSB), leading to the predominance of a policy culture of risk minimization, rather than risk optimization, that some feel may not be always appropriate for securities markets.”⁶⁵ This is also an issue in national jurisdictions.

3.2.2. *The Model of the World Trade Organisation*

The adoption of a WTO type of model would imply a limited reorganisation of IOSCO governance, as to participation and voting. The securities supervisors should remain the members of IOSCO, and not the States, since they have the technical expertise.

The governance would not need to be changed considerably since the composition of the board of IOSCO already reflects the relative importance of financial markets. The financing should come from the industry and from the States rather than from the securities supervisors since the signatories would be the former and not the latter. In addition, securities supervisors are often under-financed so this would be a drain on their limited resources. Currently, the IOSCO budget is very small, at around 4 million euros. Contributions are currently based on the size of the jurisdictions. It should remain so. Such transformation would imply a significant increase in IOSCO staff, and therefore budget, as its mission would expand significantly if it is to deal with assessments of equivalence. The current number of staff is very low at around 30 people, with some of them being experts on secondment from national authorities.

One main difference would be that IOSCO would establish panels to deal with equivalence assessments and possibly dispute resolution. Such panels could issue binding decisions. However, they could also be non-binding, even if IOSCO receives an public international law status. It is often the case in fi-

65 Remarks by *David Wright* Secretary General of IOSCO at The Atlantic Council, Washington D.C., 10 December 2012.

nance that soft-law is as, or even more, effective than hard law. In the case of IOSCO, the MMoU is not legally binding but because of the natural and strong incentives for members to cooperate, it is very effective. Therefore, opinions on equivalence could be non-binding. In addition, this would be justified for democratic accountability reasons.

4. Conclusion

IOSCO has succeeded as an institution for the adoption of international financial principles and standards, as well as a forum for exchange of information for enforcement and supervisory purposes. However, in a post 2008 financial crisis and Brexit world, characterised by increased financial integration as well as market fragmentation, extra-territoriality and access to markets conditioned on equivalence assessment, the role of IOSCO should radically evolve.

A technical and political approach is necessary. On the one hand, an incremental approach within IOSCO would bring many benefits. This is the path on which IOSCO has embarked more clearly since 2019 with the support of the FSB and G20. The ERC should take the lead within IOSCO. IOSCO could develop criteria for assessment and provide a forum to share experiences in order to reduce ex ante the risk of regulatory divergence and market fragmentation. Making IOSCO a forum for assessment of equivalence would need strong political support. Whether IOSCO would be turned into a treaty-based organisation or not is ultimately not key at this stage. IOSCO panels would not need to have binding powers since, in a multilateral system, the incentive to apply the decisions will be strong. This is actually why WTO panels decisions are enforced.

The EU and in Europe, a coalition of the willing, should take the lead within and outside IOSCO on those issues. Following Brexit, the UK could become the strongest supporter of this approach as it would reduce its dependency on EU politics. It could easily be joined by Switzerland and may be also by Russia. Those countries enjoy strong influence and stand to benefit the most from a more multilateral approach in the face of emerging markets which could become dominant in a 20 years' time frame. Many non-European jurisdictions, such as Hong Kong, China, Japan, India or Brazil to cite a few, should also be interested to participate to this effort since it is everyone's interest to have a more rule-based approach to international financial relations.

The global financial crisis of 2008 has led to the complete reshuffling of the international financial architecture and made it more necessary to rely on deference. This process is not over and, with Brexit making the issue more critical, as it could become a blueprint for equivalence by the EU, the time has

come to reconsider the role of IOSCO. May be Brexit, like the Butterfly effect, might prove to be the spark for a pressing reform of the global financial architecture?