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The New Financial Service Clause: A Window for Financial Innovation or a Pandora's Box for Financial Regulation in China?

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The positive-list and negative-list modes of financial regulation differ in terms of which sectors are open to foreign services and suppliers. In the positive-list mode, only the listed sectors are accessible to foreign entities, whereas in the negative-list mode, all sectors are open except for those explicitly prohibited by law. Recent trade agreements such as RCEP, CPTPP, and USMCA have moved away from positive-list mode, especially in financial services regulation. While they do not adopt the negative-list mode either, they introduce new financial service clauses that facilitate market access for innovative financial products. These agreements also serve as a benchmark for opening up other sectors. They will continue to offer financial products, but their product types and transfer forms will differ from current financial services. China iscreating significant challenges in establishing a correct understanding of the new financial services clause, developing a robust regulatory system, and mitigating risks associated with opening the financial services market.

Keywords: New Financial Service, Financial Innovation, RCEP, CPTPP, USMCA, Trade in Services

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I. Introduction: The New Financial Service Clause and the Evolutionary Change of Regulation Mode for Trade in Services

The term "new financial service" originates from an understanding of commitment to financial services (hereinafter, Understanding). Article 7 of Part B (Market Access) of the Understanding provides that a member shall permit the financial service suppliers of any other member established in its territory to offer any new financial services. Article 3 of Part D (Definition) defines the new financial service as "a service of a financial nature, including services related to existing and new products or the manner in which a product is delivered, that is not supplied by any financial service supplier in the territory of a particular Member, but which is supplied in the territory of another Member."

The Understanding is listed at the end of the Uruguay Round package of agreements, which is different from the six understandings attached to the GATT 1994.[1] As part of the Uruguay Round Negotiation achievements, these six understandings are components of Annex 1A under the WTO Agreement binding on all members. The Understanding Commitments in Financial Services was one of the documents adopted by the Ministerial Conference held in Marrakesh on April 14, 1994. Interested Members may include it in their schedules of specific commitments conforming to the approach set out in the Understanding section.[2] However, it does not exhibit a binding effect. China has not yet officially accepted this policy.

The RCEP, which came into effect on January 1, 2022, has 15 signatories, including China. To date, it is the largest regional trade agreement in terms of economic capacity and population.[3] Article 1(c) of Annex 8A (Financial Services) of the RCEP defines the new financial service as "any financial service which is not supplied in the territory of a Party but is supplied and regulated in the territory of any other Party. This may include services related to current and new products or the manner in which a product is delivered." Article 3 sets the obligation of the host party for market access to new financial services. A Party should endeavor to permit financial institutions of another party established in the territory of the host party to supply a new financial service. In this case, the party would permit its own financial institutions, in similar circumstances, to supply without adopting a law or modifying an existing law.[4] When a host party approves an application, the supply

of new financial services is subject to licensing, institutional or juridical forms, or other requirements.

China submitted an application to join the CPTPP on September 16, 2021. Article 11.1 (Definitions) of the CPTPP defines the new financial service as "a financial service not supplied in the Party's territory that is supplied within the territory of another Party, and includes any new form of delivery of a financial service or the sale of a financial product that is not sold in the Party's territory." Article 11.7 (New Financial Services) requires each Party to implement the following obligation: "to permit a financial institution of another Party to supply a new financial service that the Party would permit its own financial institutions, in like circumstances, to supply without adopting a law or modifying an existing law."[5] Despite the stipulations in Article 11.5(b),[6] a party may determine its own institutional and juridical form through which the new financial service may be supplied. It may also require authorization to supply services in its territory. In this case, after it receives the application for authorization, the party shall decide without delay whether to issue the authorization and may refuse it only for prudential reasons.

The USMCA is a new version of NAFTA. Although it is a closed free-trade agreement open only to the US, Mexico, and Canada, all three signatories are the original Parties to the TPP (the US withdrew from it on January 20, 2017), the predecessor of the CPTPP. Therefore, it is natural for the USMCA to have a deep imprint on the CPTPP.[7] As some articles on the USMCA have a potential influence on China,[8] it is also relevant to this study from the perspective of China.[9] Article 17.1 of the USMCA defines a new financial service as "a financial service not supplied in the Party's territory that is supplied within the territory of another party, and includes any new form of delivery of a financial service or the sale of a financial product that is not sold in the Party's territory."

Article 17.7 of the USMCA further provides that each party shall permit a financial institution of another party to supply a new financial service that the party would permit its own financial institutions, in such circumstances, to supply without adopting a law or modifying an existing law.[10] Despite the stipulations of Article 17.5.1 (Market Access) (a) and (e),[11] a party may determine the institutional and juridical form through which the new financial service may be supplied and may require authorization for the supply of the service. When a Party receives an application for authorization, it shall decide without delay whether to permit this

authorization and may refuse the application only for prudential reasons.[12]

From the Understanding to RCEP, CPTPP, and USMCA, the new generation of trade agreements has transformed the regulation of new financial services from a declaratory clause to an obligatory one, which has continued to promote free trade since the WTO launched and conforms to the trend of further liberalization in international trade. They also provided an open structure to construct a future regulation system for the trade in services. While enjoying the benefits of free trade after joining these trade agreements, the parties need to complete their own supervision mechanisms, as these FTAs operate like a double-edged sword. Risks may arise with the market opening. What matters is how to guide market activities during the course of development and avoid risks through domestic regulations and international cooperation. This is what we will clarify in this research.

II. The Closed Rule System of the WTO and the Open Rule System of the New Generation of Regional Trade Agreements

The General Agreement on Trade in Services (GATS) has adopted a positive list in its regulation of market access. Each Member listed in detail how many sectors were open to foreign services and service suppliers, to what degree, and under what conditions. For those not listed in the commitments, whether they are open and how they are open will be decided by the members on their own.

Article XVII of GATS is a national treatment clause. Paragraph one provides that in the sectors inscribed in its schedule and subject to any conditions and qualifications set out therein, each member shall accord to the services and service suppliers of any other member, in respect of all measures affecting the supply of services, treatment no less favorable than that it accords to its own like services and service suppliers. Therefore, the binding effect of the national treatment requirements is limited to the sectors and items listed in the commitments. The new financial service clause was created for new financial products and transfer methods that have never occurred before. Whether they have access to the host member market is debatable.

The commitments made by the RCEP Parties to market access for trade in services differ. Although these eight party of China, New Zealand, Cambodia, Lao PDR,

Myanmar, the Philippines, Thailand, and Vietnam still maintain a positive list, are required to change it into a negative list six years after entering into this agreement,[13] combining Annex II and Annex III into one.[14] Korea, Indonesia, and Malaysia have also adopted the negative list in general, but they maintain the positive list for market access for the financial sectors in a separate appendix in Annex III.[15] Australia, Japan, Brunei, and Singapore, however, adopted a completely negative list for market access. These four parties put financial entities together with others under Annex III under the same regulation. It is not clear whether China and the other seven parties, similar to the current practices of Korea, Indonesia, and Malaysia, are allowed to maintain the regulation of financial services with a positive list in a separate appendix after they finish the six-year transitional period and adopt the negative list in general.

Although the CPTPP also adopts the positive-list mode for financial regulation, it does not make it a separate annex but lists it in the annexes at the end of Chapter 11 (Financial Services).[16] This displays further clarification of service sectors open to foreign services and service suppliers, as the CPTPP draws the definition and scope of financial services from the Annex on Financial Services in the GATS.[17] As for the current financial services, the Parties of CPTPP have opened almost all sectors in their domestic markets, and there is little difference between them. Meanwhile, the CPTPP provided the possibility of future market access to new financial services. It not only distinguished the definition of new financial services from the current ones, but also delimited the obligations of the parties.

Despite the different rule-making styles of the RCEP, CPTPP, and USMCA, all these trade agreements take the new financial service as an important part. Their objectives are similar, as is the degree of opening of the service market. The RCEP adopts general provisions together with annexes. Chapter 8 provides specific regulations for the trade in services. Commitments to market access made by each party are listed in Annexes II and III, respectively. In comparing the commitments made by China under the WTO with those to the RCEP, under the heading of national treatment, there are more restrictions in the former and more permissions in the latter, although market access for the insurance sector and related services is similar to each other. Within its WTO commitments, China requires foreign insurance entities to pass economic tests before obtaining a license for business. The RCEP does not have this requirement. Offering a license neither requires an

economic test, nor quantitative limits on licenses.[18]

The banking and other related service sectors opened by China under the commitments of the WTO and the RCEP are similar, but the degree of opening between them is different. Under the RCEP, China does not limit banking services except for the transfer of financial information, financial data processing, and the provision of related software by suppliers of other financial services.[19] This is the same as under the WTO.[20] In the securities sector of the RCEP, for the first time, China permits foreign services and service suppliers that meet the requirements of China's relevant laws and regulations to provide the following services to qualified Chinese institutional domestic investors (QDII): (1) trading for accounts of QDII; (2) providing securities trading advice or portfolio management; and (3) providing custody for overseas assets of QDII.[21]

Financial services, telecommunications, and professional services are the three major areas of trade in services, which comprise the three annexes attached to Chapter 8 of the RCEP. Annex 8A defines financial services and their categories. It also defines new financial services in a separate paragraph. Regarding the law-making style of Annex 8A, current and new financial services are arranged in the same order, although they are defined in different paragraphs. The provisions in Chapter 8 apply to both groups. The current financial service is referred to as the existing format, whereas the new financial service is referred to as the future.

Compared with the RCEP, the CPTPP has been liberalized much more and has fewer restrictions. On the one hand, it carried on the practice of the GATS and surpassed it in some respects. While it is consistent with the GATS in its definitions, scope of application, conditions on market access, national treatment, and philosophy of regulation on international trade, it pursues a higher standard for new financial services, dispute settlement, and so on. The CPTPP has also focused on financial globalization, trade liberalization, and the balance of interests in high-standard trade rule negotiations, which, to a certain degree, will help carry out the global regulation process of financial services against the fragmentation of trade regulation.[22] The rules on trade in CPTPP services are presented in Chapters 10 (cross-border trade in services), 11 (financial services), 12 (temporary entry for business persons), and 13 (telecommunications). Regarding content and structure, rules on trade in services have played an important role in the CPTPP.

Different from the specific commitments to services and non-conforming measures

for investment of the 15 parties annexed to the RCEP, the annexes of the CPTPP are not listed separately, but are placed at the end of each chapter. This indicates that fewer reservations were made by the CPTPP Parties. The annexes in Chapter 11 include A (cross-border trade), B (specific commitments), and C (nonconforming measures ratchet mechanisms). Annex A lists the differences between CPTPP Parties in providing cross-border trade in services, including insurance and related services, banking, and other financial services. The open sectors of the CPTPP Parties are the same. Annex B clarifies the obligations of parties regarding portfolio management, information transfer, insurance supply by postal insurance entities, electronic payment card services, and transparency considerations. Annex C lists the exceptions for Vietnam, which has been available for three years. This differs from Annex II of the RCEP, which lists each party's specific commitments to market access for services. In fact, the annexes of Chapter 11 are not the schedules of CPTPP Parties' commitments to financial services but the clarification of their obligations.

The lawmaking style of the USMCA on trade in services differs from that of the RCEP and the CPTPP. This is partly due to the fact that the market for trade in services within these three Parties has almost been fully opened to each other. Together with the annexes, the provisions of the USMCA on financial services consist of three parts: the first is Chapter 17 (financial services), which has 21 articles; the second is the four annexes of Chapter 17, which are concerned with the specific commitments of each party to cross-border trade, authorities responsible for financial services, Mexico-United States investment disputes in financial services, and the location of computing facilities; and Annex III, which lists the schedule of non-conforming measures of each party.[23] In terms of market access, the financial service sectors of the USMCA are more open than those of the CPTPP and RCEP.

Thus, the new generation of trade agreements has defined market access to new financial services as a general obligation for parties. Unless its law has clearly prohibited, no party may refuse to provide market access to a new financial service because either it has never provided this service before in its domestic market, or this service has never been supplied in other countries. In other words, the absence of a legal prohibition implies freedom. This requires the host country to regulate its financial market. Lenity errors may pose risks to the financial market, while severity errors may hinder financial innovation. Although these agreements permit market

access to new financial services approved by the host party, this is only necessary for market regulation.

The new financial services clause displays a further opening feature for the new generation of trade agreements. The keyword of this clause is "new," which means the innovation of products and the uncertainty of risks. Finance is an important component of national economies. This process requires innovation and supervision. Only after balancing the relationship between them can financing help the economy develop in a healthy manner.

III. The Possibility of Financial Innovation and the Uncertainty of Supervision

Under the WTO rules, members regulate financial services within a pre-committed scope and in a predictable manner. What sectors are open? With what conditions? These are listed in the schedule of specific commitments for each member. Disputes arising among members mainly focused on whether they had fulfilled their commitments and observed their obligations.

In the *UnionPay* Case,[24] China firstly encountered the question on trade in services after acceding to the WTO. The debate in this case is not whether China's commitments to financial services have been fulfilled, but whether the regulation by Chinese authorities on the issuing of banking cards by foreign banks is the same as that of China's national banks. The core issue in this case is that the banking cards issued by China's national banks can pay in Chinese currency, while the banking cards issued by foreign banks can only pay in foreign currency.[25] The question is whether this violates national treatment. Since the facts in dispute were clear to all, the panel concluded that China's measures were inconsistent with the WTO rules and commitments. China accepted this rule without appealing.[26]

Unlike similar market access among the WTO members in the trade of goods, the degree of opening up in their trade in services varies. Article XVII of the GATS requires each member to observe obligations within its commitments. From the perspective of the WTO rules, the binding effect of the GATS is the same, but the sphere regulated by each member is different. In the new generation of trade agreements, the market access of the CPTPP and the USMCA is close to each other,

while the RCEP contains different commitments of its parties to trade in services in the annexes. All three agreements have a new financial service clause that provides the possibility of future financial innovation and leaves financial supervision uncertain.

In terms of the lawmaking style, both the new financial service clause and the prudential supervision clause in the new generation of trade agreements are open provisions without a defined scope of regulation, except for some guiding directions. Each Party must comply with its domestic law based on its own understanding of the agreements. Article 4 of Annex 8A of the RCEP provides that a party shall not be prevented from adopting or maintaining measures for prudential reasons,[27] including those for the protection of investors, depositors, policyholders, or persons to whom a fiduciary duty is owed by a financial service supplier, or to ensure the integrity and stability of the financial system. Where such measures do not conform to the provisions of this agreement, they shall not be used to avoid the Party's commitments or obligations.[28]

Article 4 of Annex 8A of the RCEP involves several aspects with a large protected scope. There may be different understandings of the basic concepts of investors, depositors, policyholders, and financial service suppliers. This is an area in which domestic law needs to be further clarified. Article 8 states that nothing in this Annex shall be construed to prevent a party from adopting or enforcing measures necessary to secure compliance with laws or regulations that are not inconsistent with this Annex, including those relating to the prevention of deceptive and fraudulent practices or dealing with the effects of a default on financial services contracts.[29]

Article 11.11, Paragraphs 1 and 4 of the CPTPP and Article 17.7, Paragraphs 1 and 4 of the USMCA have similar provisions to Article 8 of Annex 8A of the RCEP. The new financial services clause is not a funnel clause, as it has an inherent relationship with other articles. The point is how parties can improve their supervision measures through these provisions. The new generation of trade agreements has made it clear that parties have the right to ensure compliance with their domestic laws and regulations that are not inconsistent with these agreements. Therefore, while parties are obliged to open their financial service markets, they also have the right to ensure market stability.

The Uruguay Round negotiations only achieved the GATS, which works as a core text, more areas around it need to be further explored. Some WTO Members have

been working towards liberalizing the financial market. Their initial achievement is the Trade in Services Agreement (TiSA). The TiSA negotiators intended to take the trade in services as a breakthrough in the face of the deadlock of the Doha Negotiations and to set up a complete set of rules on the market access of services that were first applied by a certain number of members. When all WTO Members accept these rules, they become part of multilateral trade agreements and bind all members. Currently, the TiSA is a plurilateral agreement in financial services that is accepted only by some WTO Members.[30] The breakthrough made by the TiSA is reflected in various aspects.[31]

The TiSA functions as a bridge between the GATS and the new generation of trade agreements. Both the TiSA and the GATS have adopted commitments with a combined schedule, but there are some differences between them. The GATS has listed all the commitments of the WTO Members in their schedules using the positive-list approach. The TiSA maintains the positive list in market access, while adopting the negative-list approach in the application of national treatment; that is, all services and service suppliers should be offered national treatment, except those listed. These restrictions were released within a certain period.[32]

Although the CPTPP has made some changes to the TPP rules, suspending the application of the minimum treatment standard in financial services, it is no less the highest standard of trade rules in services at present, especially in financial services, where it retains the preciseness of the TPP. The exploration of the CPTPP's new rules for the cross-border financial service market represents the advanced nature and high standards of the financial trade rules of the post-WTO era. In contrast to the positive-list mode under the GATS, the CPTPP adopts a negative-list mode to regulate trade in services. Only if a category of new financial services has not been put on the negative list, a party should open its market to foreign services and service suppliers, in the case that it does not prohibit it by law. If a Party wishes to rule out the application of some articles, including Article 11.3 (National Treatment), Article 11.4 (Most-Favored-Nation Treatment), and Article 11.5 (Market Access for Financial Institutions), it should do so through a special provision of the annex.[33]

The negative-list mode has increased the transparency of service categories, helping parties adjust their foreign trade policies, enhancing supervision efficiency, and benefiting financial service suppliers. Nevertheless, negative list mode may have unpredictable consequences. The Parties may either set more irrelevant

restrictive measures on market access, or neglect sectors that need to be supervised and displayed on the negative list. All these may lead to risks that undermine the market stability and the financial service system of a party. This is more relevant to an undeveloped economy, as regulations with a negative list may have a significant impact on an economy guided by government policies.[34]

In view of the relevant provisions of the RCEP, CPTPP and USMCA, a party is entitled to establish its domestic law and regulations. Nevertheless, how to ensure that they are not regarded as “arbitrary” or “unjustifiable discrimination and disguised restrictions on international trade” will test the legislative capability of the Party. A Party must regulate its market in a justifiable, objective, and fair manner. Article 11.13 of CPTPP (Transparency and Administration of Certain Measures) is such an example, which stipulates the obligations of parties for transparency in regulating financial institutions and the activities of cross-border financial service suppliers, including the time and format to publish laws and regulations, the time limit to make an administrative decision, and the manner of dealing with objections to the administrative decision.[35]

The continuous advancement of trade liberalization is often accompanied by an increase in the reinforcement of financial supervision. Cross-border financial services have made the governments of relevant countries pay more attention to maintaining the safety of the national economy. The Annex on Financial Services of the GATS includes provisions to balance the supervision of members’ financial services with the promotion of free trade.[36] The prudential exception clause in the new generation of trade agreements provides parties with the right to take remedies in unusual situations and permits them to authorize their regulatory departments to take necessary measures to safeguard the stability of the financial service market. With this authority, parties can make supervision rules in accordance with the realities of their domestic markets and national economies. If a Party makes full use of this clause and completes its domestic rules, the new finance service clause will open a window to financial innovation. However, if the Party does not have complete rules or comparable regulatory measures, the new finance service clause may become a Pandora’s box for it.

IV. The Necessity of Supervision on the New Financial Service

The stability of the financial system guarantees the development of the national economy. As Professor Jean Triole, a Nobel laureate in economics, pointed out, the essence of banking regulation is to find an optimal balance between improving service quality, inspiring competence, and maintaining clearing capability and market stability.[37] A more open financial market requires more efficient regulation. New financial services include financing data, information, and intelligence. While it produces opportunities for current finance with the virtualization of transactions, individualization of services, mixed business operations, and internationalization of regulation, it will also bring challenges to the financial systems of relevant countries. If the capital flow is not well managed, it will break away from the real economy, which may lead to market speculation and economic bubbles.

The severe competition among enterprises, the cross-border flow of capital, frequent fluctuations in the currency rate, and constant changes in economic policies may aggravate and amplify financial risks, which lead to the collapse of the regional financial system. With economic globalization and the internationalization of financial transactions with high-tech features among enterprises, a country can hardly make efficient regulation of all financial activities with its own efforts. Leaving a management vacuum is almost unavoidable.[38] New financing is a type of development service, and its uncertainty may have a profound impact on a country's financial system.[39]

Modern finance has changed the categories of financial products and service supply modes by using new technologies such as big data, cloud computing, blockchain, artificial intelligence, biological identification, quantitative models, and movable and distributed computing, which have reshaped the traditional way of supplying financial products and reformed traditional financial service modes.[40] It is difficult for a country to efficiently regulate financial services using existing regulatory modes.

The GATS divides trade in services into four categories: cross-border services, foreign consumption, commercial presence, and movement of natural persons. The new financial service belongs to one of them but differs from those in the category of products and supply modes. From the perspective of regulation, the degree of

openness to cross-border financial services is comparatively low because it is more difficult for a country to regulate overseas institutions that supply services.

As the consumption of financial services abroad benefits the local economy, local governments are unlikely to restrict these activities. Commercial presence refers to the establishment of an enterprise. Is the establishment of a financial institution permitted as a sector of foreign investment, and in what specific sector then? These were clearly listed in the host country's commitments when it accessed the WTO. As for the movement of natural persons, the host country may regulate it with a license, according to the Annex on the Movement of Natural Persons Supplying Services under the GATS.[41]

In the above four categories, it is difficult to supervise only cross-border financial services because of their mobility. The impact of the Internet, big data, and other advanced technologies on finance is mainly displayed in the cross-border supply of services.

On the Internet, one of the consequences of cross-border financial services is the mobility of data that not only contains commercial secrecy but also involves the information security of a country. Each country has established relevant rules to regulate the mobility of cross-border data, with restrictions on maintaining the spatial sovereignty of the network and the security of the country. Transmission technology has made it easier for financial data to move from one country to another, which may lead to the loss of controlling power and jurisdiction in the host country. Risks such as misconduct of the data, disclosure of secrecy, or even attacks on the network due to the above factors pose a major threat to national security.

As for the economic and social aspects, restrictions on the cross-border mobility of financial data are due to the conductibility of financial risks, asymmetry of information, and strategic importance of the finance industry. The conductibility of financial risks means that the risk of an individual institution may extend to the entire industry and that the risk of the financial industry may spread to every aspect of society. Asymmetry in financial information may also lead to an imbalance between financial institutions and consumers regarding the right to enjoy the benefits of financial data.[42]

Out of the necessity of preventing financial risk, China, upon accession to the WTO, only committed to opening certain sectors of insurance, banks, securities, and financial information, such as those listed in the Schedule of Specific Commitments

on Services. China must observe its obligations, including MFN and national treatment.[43] In view of the development level of financial services and the regulation capability back to twenty years ago, China made a bold step in its commitment to market access for trade in services, as it had practiced a planned economy for decades before, and finance was the most protected sector. China's accession to the WTO indicates that its financial markets are open to others. Since then, the opening steps have not stopped. Compared to the commitments under the WTO, the commitments to China made under the RCEP took another big step ahead.

The time has now come for a new generation of trade agreements with high-standard international trade rules. New financial services require innovation in management philosophy and supervision. Innovation will not only promote the further liberalization of finance, but also push for legislation of regulations on finance. Financial innovation has led to changes in the financial market, financial instruments, financial service modes, and even financial structures, connecting the financial activities of all countries and accelerating global financial liberalization. Economic development has motivated corresponding changes in the legal field, which have emerged with the constant release of each country on the regulation of financial services, the allocation of financial resources within the global market, and the realization of financial regulation from a power-oriented to a rule-oriented mode.[44]

In the face of new financial services, regulatory innovation should begin by sorting out current regulatory instruments. If it is proven that there is still no way to effectively regulate new financial services after exhausting the current instruments, then innovation will be necessary. Based on the principle of technological neutrality, the WTO Members are obliged to permit new financial services to enter the sectors that they have agreed to open in their commitments.[45] However, there are no relevant provisions in multilateral trade agreements regarding this obligation. This should be decided based on the specific situation in practice. The first case that introduced the principle of technological neutrality is the *Gambling Case,* while the case that attracted public attention is the *Publication and Audiovisual Entertainment Products* case. In the first case, the Panel ruled in favor of the complainants, Antigua and Barbuda.[46] In the second case, although the Panel did not refer to this principle in its rulings, they said that they would, if necessary, support the principles of technological neutrality.[47]

The new financial service does not change the nature of the financial service and contains only some innovative aspects. Therefore, while the regulation of the new financial service should, in principle, be the same as that of the current financial service, regulatory instruments should be improved over time. The CPTPP has almost abandoned the positive-list mode, such as the schedule of commitments. In the financial services sector listed in Annex II of the RCEP, there are no limitations on market access or national treatment, except in a few subsectors. Furthermore, this positive list should be changed to a negative list six years after its entry into effect.[48] Therefore, it is impossible to limit market access to new financial services based on future commitments. While the new generation of trade agreements introduce the concept of a new financial service, they also impose corresponding obligations on the parties. This implies that market access to new financial services is almost automatic and unlimited.

Since the schedule of specific commitments annexed to the RCEP cannot prevent the risks brought about by the new financial service, then, can Annex 11-C of the CPTPP (the Non-Conforming Measures Ratchet Mechanism) do so? This warrants further studies on the characteristics and functions of the ratchet mechanism. The ratchet mechanism is similar to the grandfather clause of the Provisional Application Protocol of GATT 1947 as both permit parties to reserve some non-conforming measures when they accept the agreement.[49] The ratchet mechanism of the CPTPP applies only to Vietnam and has been available for three years,[50] unlike the grandfather clause. According to the provisions of the grandfather clause,[51] a GATT contracting party might continue its non-conforming measures, provided that it does not amend its existing law. This accounts for the fact that some sectors, such as agriculture, were not well regulated during the GATT era, as the agricultural subsidies conferred by some contracting parties did not change for decades.

Although the Uruguay Round negotiations did not solve the issue of agricultural subsidies, they concluded an Agreement on Agriculture, which provides a preliminary structure to regulate the trade of agricultural products.[52] The ratchet mechanism cannot be used to prevent the risks brought by the new financial service because it is based on current measures, while preventive measures will be taken in the future. It is impossible to effectively supervise the risks brought about by new financial services using current regulatory instruments.

Professor Triole and his colleagues analyzed the lessons of past financial

crises for the banking system from an international perspective. They considered it necessary to relieve the impact of political means and considered that the key to solving this issue was to innovate the financial supervision system.[53] As China is preparing for accession to the CPTPP and other regional trade agreements, as a precondition, it should first improve its financial supervision system.

V. Conclusion: Roadmap of Supervision on the New Financial Service

Under the guidance of Triole's New Regulation Theory, China should innovate government regulation and coordinate the interests of all sides on the premise of financial stability and national security while pursuing the optimal allocation of social resources and the maximization of public welfare. Regarding market regulation, China must solve the puzzle of market failure and avoid government failure.[54] China can take the following three steps.

A. Complete the Market Access System for the Financial Institutions

The financial sector is not a lawless area, but businesses should be operated with a license. Most countries require that cross-border financial services not be permitted without licenses.[55] Otherwise, it is an intrusion into a country's financial territory and a violation of its financial sovereignty. The emergence of the Internet has made the regional character of financial transactions and the boundaries of supervision increasingly invisible. Digital finance is displayed in the form of data but fulfills financial transactions. It is difficult to effectively regulate digital finance using the current regulatory means.

Article 10 of the Draft of Financial Stability Law of the People's Republic of China (hereinafter the Draft) promulgated by the People's Bank of China provides that any institution or individual cannot establish a financial institution or deal with or operate in disguise any financial business without approval. This indicates that China's financial authorities realized the importance of regulation from the source. Supervising the qualifications of market operators and their businesses is an effective way to supervise financial markets.

While the RCEP, CPTPP, and USMCA require their parties to open financial

service markets, they all have a clause of recognition as the legal basis for the parties to authorize the provision of financial services. Article 6, Paragraph 1 of the RCEP Annex 8A provides that a party may recognize the prudential measures of any international standard-setting body, another party, or a non-party in determining how its measures relating to financial services shall be applied.[56] Such recognition may be based on an agreement or arrangement with the international standard-setting body, another party, or non-party concerned, or may be accorded autonomously. Article 11.12, Paragraph 1 of the CPTPP has similar provisions that list the possible means of recognition as: (a) accorded autonomously; (b) achieved through harmonization or other means; or (c) based on an agreement or arrangement with another party or a non-party. Thus, a party has the right to decide what regulatory measures it may take. Article 6, Paragraph 2 of RCEP Annex 8A further provides that a party shall afford adequate opportunities for other interested parties to negotiate their accession to such an agreement or arrangement or to negotiate comparable ones with it. Therefore, it is necessary for a host country to create laws, regulations, and normative documents to implement commitments to market access to new financial services. This is an international practice.

Finance is a highly sensitive external industry. The new generation of trade agreements has made it clear that parties may authorize market access to new financial services. A Party may require a supplier of cross-border financial services from another party to register for the establishment of a financial service institution or obtain authorization. The host party may refuse this authorization for prudential reasons, provided that it does not influence other prudential supervision methods for cross-border financial services.[57] China must establish a registration system for financial services. A financial institution should obtain a license before supplying financial services, regardless of whether they come locally or abroad. After registering and receiving authorization, the financial institution may open its business under Chinese law.[58]

Article 11.7 of the CPTPP provides that a party may require suppliers of cross-border financial services or financial instruments to register or receive authorization to supply financial services. With its large scope and increasing openness, China's financial market is attracting an increasing number of foreign services and suppliers. As these services and suppliers bring new financial products to Chinese consumers, they may also destabilize China's market order because of unlicensed business

activities under the auspices of the Internet and other platforms. Just a few years ago, the disordered growth in online loans supplied by Peer-to-Peer lending institutions significantly impacted China's financial regulation system.[59] China has to supervise its financial market through strict authorization of market access, with an emphasis on licensing the business of the new financial service. For businesses with a low risk level, China may not need such a requirement; however, the right to do so should remain in the hands of the Chinese government.

B. Establish the National Financial Security Exception Mechanism

Thanks to digital technology, new forms of financing, such as information transmission and financial transactions, can be operated with the help of big data. Financial settlements can also be realized using digital currency. Financial innovation also requires supervision. The security exception is a component of the international financial supervision system, as is the exception that the WTO Members are permitted to invoke.[60]

Financial security is part of national security. In addition to increasing the supervision of market access, cross-border financial services require a complete and delicate prudential regulation system as a compensatory measure after foreign services enter the market. Article 11.11, Paragraph 1 of the CPTPP provides that a party shall not be prevented from adopting or maintaining measures for prudential reasons, including those for the protection of investors, depositors, policyholders, or persons to whom a fiduciary duty is owed by a financial institution or cross-border financial service supplier, or to ensure the integrity and stability of the financial system.[61]

The term "prudential reasons" includes the maintenance of safety, soundness, integrity, or financial responsibility of individual financial institutions or cross-border financial service suppliers, as well as the safety, financial, and operational integrity of payment-clearing systems.[62] Article 11.11, Paragraph 4 of the CPTPP permits a Party to adopt or enforce necessary measures to secure compliance with its laws or regulations that are not inconsistent with this chapter, including those relating to the prevention of deceptive and fraudulent practices or to deal with the effects of a default on financial service contracts, provided that such measures are not applied in a manner of arbitrary or unjustifiable discrimination or a disguised restriction on investment in financial institutions or cross-border trade in financial

services.

All open and developed financial markets have strict supervision systems and a complete set of regulatory rules. They have better credibility and are more powerful deterrent forces in micro prudential supervision and market behavior regulation. China will be able to propose specific exceptional measures and their application spheres in negotiating trade agreements only after it completes its domestic laws and regulations. Article XX of China's National Security Law provides that the state should improve macro-prudential financial management and financial risk prevention and disposal mechanisms, enhance financial infrastructure and basic capabilities, prevent and resolve systemic and regional financial risks, and prevent and resist the impact of external financial risks. This was the direction for China to complete its financial supervision system.

Among the current CPTPP parties, Vietnam and Malaysia have made some reservations for each, but these reservations are achieved through their efforts in negotiations and are not conferred automatically for developing countries.[63] Even if a party has the right to make a reservation about its nonconforming measures, this right has a time limit, as the CPTPP represents the highest standard of openness in modern international trade rules. If one party makes too many reservations, it is unnecessary to agree to the agreement.

As for the potential risks brought about by the cross-border flow of capital with the opening of the market, China may follow international practices to take appropriate preventive measures, unless they are inconsistent with its commitments to the WTO. According to Article 9.9 of the CPTPP, each party shall permit all transfers relating to a covered investment to be made freely and without delay into and out of its territory. Such transfers include: (a) contributions to capital; (b) profits, dividends, interest, capital gains, royalty payments, management fees, technical assistance fees, and other fees; (c) proceeds from the sale of all or any part of the covered investment or from the partial or complete liquidation of the covered investment; and (d) payments made under a contract, including a loan agreement.

Article 10.12 of the CPTPP permits a Party to prevent or delay a transfer or payment through the equitable, non-discriminatory, and good faith application of its laws that relate to: (a) bankruptcy, insolvency, or the protection of the rights of creditors; (b) issuing, trading, or dealing in securities, futures, options, or derivatives; (c) financial reporting or record keeping of transfers when necessary to assist law

enforcement or financial regulatory authorities; (d) criminal or penal offenses; or (e) ensuring compliance with orders or judgments in judicial or administrative proceedings.

A distinguishing feature of new financial services is the uncertainty of service categories and transfer methods. In opening its financial market to foreign services and service suppliers, China needs to maintain the flexibility to regulate certain sectors and clarify some principles of risk prevention. As for sectors that are sensitive and unclear in the provisions of law and regulations, such as those relying on data platforms and future new financial services, China should consider the possibility of adjusting its policies before it can have a complete understanding of them. However, China must create an exceptional clause for prudential supervision in its law. When China considers that the services supplied by foreign suppliers have endangered its national security, it may limit them to the protection of public morality, maintenance of public order or financial security, and balance of international payments, even though China has committed to market access.[64]

C. Construct the International Coordinating Mechanism of Financial Supervision

The new generation of trade agreements includes e-commerce listed in a separate chapter.[65] These rules focus on such issues as electronic signatures, paperless customs clearance, and the protection of consumer information. They exclude financial services from e-commerce for the time being.[66] Nevertheless, digital currency is a financial payment instrument; it is not a financial business and should not be restricted. Digital currencies and paper money do not differ in nature. They differ only in form. Based on the technical neutrality principle, the new generation of trade agreements should not exclude the use of digital currency.

As part of the internationalization of its currency (RMB), China should take the opportunity to join a new generation of regional trade agreements to establish cooperation with other parties to promote the use of digital currency.[67] Unlike the WTO Agreement, the new generation of trade agreements does not have a regulatory institution, except for a coordinating mechanism. Chapter 18 of the RCEP provides the three-level working structure of the ministerial meeting, joint committee, and subsidiary body. As a subsidiary body, the Committee on Services and Investment established by the Joint Committee is in charge of work on trade

in services, including financial services, telecommunications services, professional services, and the temporary movement of natural persons.[68]

The functions of the RCEP's Joint Committee include: (1) considering any matter relating to the implementation and operation of this Agreement; (2) considering any proposal to amend this Agreement; (3) discussing the differences that may arise regarding the interpretation or application of this Agreement; and (4) issuing interpretations of the provisions of this Agreement as deemed appropriate and necessary.[69] This working structure provides a dialogue and coordination platform for parties to solve issues arising from new financial services. According to Article 27.2, the Trans-Pacific Partnership Commission has the authority to consider any matter related to the implementation or operation of this Agreement.

Article 27 of the Draft states that the financial regulatory department of the State Council will cooperate with the regulatory bodies of other countries on the exchange of information and cooperation in supervision based on the principles of reciprocity and mutual benefit for the timely and effective management of cross-border financial risks and the prevention of cross-border risk transmission. International cooperation can proceed as follows.[70]

First, China should explore the appropriate global supervision methods to prevent regulatory speculation. Both the RCEP and the CPTPP require their parties to abide by the principle of transparency and study the laws, regulations, and policies of others. The Parties may learn from each other's supervision systems, which lays the foundation for them to adjust their policies and complete their own regulations.[71] If a Party considers that a certain measure may impact the implementation of an agreement or the interests of other parties, it should inform the others of it.

Second, China should unite with other countries to crack down on illegal activities and negotiate for coordination with them. The CPTPP was the first international agreement to include a specific chapter on anti-corruption issues. Chapter 26 lists in its Annex the specific provisions on transparency and procedural fairness for pharmaceutical products and medical devices, which indicates that these two categories of products deserve more attention from parties. These provisions will help parties build an efficient and law-abiding government with a streamlined administration.

Third, China should expand its international supervision cooperation while balancing its domestic laws and international obligations. International agreements

have only indirect applicability in most countries, which means they must be incorporated into domestic laws and regulations. Joining the CPTPP is a major challenge for China, which is comparable to accessing the WTO for the second time.[72] While China is becoming acquainted with the provisions of the CPTPP, it should take time to correct its nonconforming measures and compensate for the necessary ones. Only in this way can China promote regional cooperation while enhancing its capabilities.

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3. The current population of the fifteen signatories is 2.2 billion, and their total volume of GDP is 25.6 trillion US dollars. *See* China's Ministry of Commerce, What Does It Mean for RCEP To Come into Force? [RCEP生效意味着什么？] (2021), http://www.mofcom.gov.cn/article/tj/tjzc/202111/20211103215485.shtml.
4. In this case, a party may issue a new regulation or other subordinate measure to permit the supply of the new financial service. *See* RCEP ch. 8, annex I, note 2.
5. As shown in Article 3 of annex 8A of RCEP, this article does not prevent a Party from issuing a new regulation or other subordinate measure to permit the supply of the new financial service.
6. Market Access for Financial Institutions.
7. *See, e.g.*, USMCA chs. 21, 24 &27. They are similar to CPTPP chs. 16, 20 & 26.
8. USMCA art. 32.10.
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10. In this case, a Party may issue a new regulation or other subordinate measure to permit the supply of the new financial service.
11. USMCA art. 17.5.1.
12. The USMCA Parties agree that nothing in Article 17.7 prevents a financial institution of a Party from applying to another Party to request that it authorize the supply of a financial service that is not supplied in the territory of any Party. That application will be subject to the law of the Party to which the application is made and is not subject to this Article.
13. The time for Cambodia, Lao PDR, and Myanmar may be extended to fifteen years. *See* RCEP art. 8.12.7.
14. The four annexes of RCEP are: Annex I (Schedules of Tariff Commitments); Annex II (Schedule of Specific Commitments for Service); Annex III (Schedule of Reservations and Non-Conforming Measures for Investment); and Annex IV (Schedules of Specific Commitments on Temporary Movement of Natural Persons).
15. *See* Schedule of Specific Commitments for Financial Services (Korea), Specific Commitments for Financial Services (Indonesia), and Specific Commitments for Financial Services (Malaysia), http://fta.mofcom.gov.cn/rcep/rcep_new.shtml.
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25. *Id.* at 121-9.
26. *Id.* at 191.

27. According to the note under this Article, “prudential reasons” may include the maintenance of the safety, soundness, integrity, or financial responsibility of individual financial institutions or financial service suppliers, as well as the safety and financial and operational integrity of payment and clearing systems.
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29. *Id*.
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