BRIEFING PAPER

trade and investment series

C C P A
CANADIAN CENTRE
for POLICY ALTERNATIVES
CENTRE CANADIEN
de POLITIQUES ALTERNATIVES

Volume 9, Number 4 • July 2008

Financial Instability and the GATS Negotiations

By Ellen Gould

Summary

The subprime mortgage crisis has exposed fundamental problems with the regulation of financial corporations in industrialized countries. Three assumptions are now being questioned: that all innovative products financial corporations devise are necessarily beneficial; that sophisticated financial engineering can turn risky products into safe investments; and that the world's dominant financial corporations will act prudently in a deregulated environment. Commenting on the extraordinary initiatives governments are having to take to restore stability, former US Federal Reserve Chair Paul Volcker said: "Simply stated, the bright new financial system—for all its talented participants, for all its rich rewards—has failed the test of the market place."

Former advocates of deregulation are conceding that given the severity of the subprime crisis, new regulations will have to be imposed on the financial industry. But even as these regulations are being drafted, a deregulation agenda is being advanced at the World Trade Organization (WTO). Both the US and the EU trade negotiators are insisting that to conclude the current Doha Round of WTO negotiations there will have to be more concessions made on services in general and financial services in particular. Governments are under pressure to remove conditions on foreign entry into their financial markets and to impose "disciplines" on their regulations.

From the very beginning, the world's largest banks, insurance companies, and brokerage houses have dominated trade negotiations on services. Without the well-funded lobby mounted by these financial corporations, the WTO services agreement—the General Agreement on Trade in Services—would never have been created. The powerful influence financial industry lobbyists have over trade policy has meant financial services are given a special status at the WTO. Unlike other service sectors, financial services have been under negotiation almost continuously, with governments being pressured to place ever stronger constraints on their capacity to regulate financial corporations.

When countries fully commit any service sector to GATS rules, among other things this means they have to allow total foreign ownership in the sector and cannot give any preferences to local companies. However, in the current round of negotiations the bargaining requests specifically related to financial services go further. Countries are being asked to impose a "standstill" on their financial services policies, so no new conditions could be imposed on established firms. They are also being asked to allow established firms to supply any new products they want, regardless of whether these products might have negative effects on the overall economy.

Because the world's dominant financial corporations are based in industrialized countries, the financial services lobby has had to persuade developing countries they stand to gain from the GATS. The US

services lobby, the US Coalition of Service Industries, argued in a 2006 paper that developing countries could benefit from the superior risk management expertise and innovative products that western banks have to offer. The Coalition presented the shift by the western banking industry from traditional lending to dealing in new mortgage and investment products as the kind of innovation that could improve the economies of developing countries.

But the innovative subprime mortgage products developed by financial institutions and sold primarily to minorities in the US have been a social disaster, with foreclosures filed on 1.3 million American homes in 2007 alone. And the new financial products created to sell these mortgages to international investors failed in spectacular fashion to achieve what they were supposed to do — minimize the risks associated with subprime lending. The world's major financial conglomerates are now declaring huge losses related to their subprime investments. Lack of confidence in even the largest of these conglomerates has dried up inter-bank lending.

The role of hedge funds, which are largely unregulated, has come under increased scrutiny. It was the failure of hedge funds invested in subprime securities that triggered the present crisis. Another unregulated activity, private trading in derivatives, was also a major contributing factor to the subprime debacle. Derivatives trading has been criticized for being a form of "high-octane speculation more akin to gambling than to sensible hedging of financial risk." Despite the instability these financial services can create, countries are being asked to make full GATS commitments for both hedge funds and trading in derivatives.

GATS commitments severely constrain governments' policy options. WTO dispute panels have ruled that if governments completely commit a service, they cannot prohibit the supply of any part of the service. India, for example, has banned futures trading in key food products due to concerns over speculation. But if India makes commitments for this financial service, as it is being asked to do, it could be challenged for violating its GATS commitments.

One reason that to this point there have not been WTO challenges to financial regulations may be the inclusion of a "prudential carveout" in the GATS. This clause was intended to protect the ability of governments to regulate for prudential reasons. However, WTO members disagree about what is prudential and what is protectionist. The minutes of their meetings reveal a number of sharp disagreements on this point, disagreements that could become full fledged WTO disputes.

One component of the current round of GATS negotiations could make a challenge to financial regulations significantly more likely. Financial and other services corporations have not been satisfied with gaining "non-discriminatory" treatment through the GATS. Industry lobbyists have complained that even if regulations apply to foreign and local companies alike, they can still be an obstacle to trade.

In response to this complaint, negotiators have drafted an amendment to the GATS that would impose "disciplines" on non-discriminatory domestic regulation. Some of the financial regulations affected would be the licensing requirements and standards for financial institutions. Regulations could be challenged on the grounds that they were not "objective", not "relevant", or that they were a "disguised restriction on trade." Licensing procedures for banks, brokerage firms, and insurance agencies could be challenged if they were not "as simple as possible." The GATS amendment including these new restrictions on regulations will be part of the overall deal signed at the conclusion of the Doha Round.

WTO negotiators seem out of step with the times in their efforts to impose more restrictions on governments' capacity to regulate. It is as though with their extensive commitment of resources to trade negotiations, governments have created a Sorcerer's Apprentice. Given how grave the current financial crisis is, governments need to intervene to break the spell of automatic extension of trade rules that constrain what they can do.

Introduction

Over the last three decades, some of the world's largest financial corporations have made promotion of trade agreements a strategic priority. It has been said that without their involvement, there might not have been a General Agreement on Trade in Services (GATS) established as part of the WTO and perhaps not even a WTO[1].

Key WTO delegations are pressing to complete the current round of negotiations to expand the WTO, the Doha Round, before the end of the Bush presidency. This means the final agreement could be signed during what the IMF has called "the largest financial shock since the Great Depression"[2].

With repeated announcements about massive write-downs in the assets of the world's dominant financial corporations, one financial columnist has suggested the US might have "passed the high water mark of financial deregulation"[3]. Four US banks have failed this year and one official has warned that there is a "possibility that future failures could include institutions of greater size than we have seen in the recent past."[4] However, at the same time as financial experts debate what reforms are needed to fix the financial system, the potential to do this is being narrowed at the GATS negotiations.

Both the US and the EU are insisting that to conclude the Doha Round there have to be more concessions made on services in general and financial services in particular. Governments are under pressure to permanently limit their policy options by removing conditions on foreign entry into their financial markets and limiting regulations according to new GATS "disciplines".

The rethinking on whether domestic deregulation of the financial sector is beneficial provides an opportunity to re-evaluate whether deregulation should be locked in through international trade rules. This paper will survey the various ways the GATS restricts public policy in the financial sector, and the implications of these restrictions.

The Stake of Financial Corporations in the GATS

Knowing the history of the GATS helps to make sense of what is a very complicated package of rules that apply to financial services. These rules can be understood in light of the goals financial corporations have been trying to achieve in lobbying to create the GATS in the first place and to set the agenda for subsequent negotiations. The goals pursued at the international level find parallels in efforts to achieve deregulation domestically.

From the very beginning, the world's largest banks, insurance companies, and brokerage houses have dominated international trade negotiations on services. David Hartridge, former WTO Director of Services, has commented: "Without the enormous pressure generated by the American financial services sector, particularly companies like American Express and CitiCorp, there would have been no services agreement and therefore perhaps no Uruguay Round and no WTO."[5]

This view of the origins of the GATS is confirmed by Harry Freeman, a former executive with American Express who has given an insider's account[6] of how the agreement came about. Freeman says that the idea for a trade agreement covering services got its start in 1979 with concerns American Express had over not being able to gain access to foreign markets. Existing trade treaties were not helpful because these agreements only covered trade in goods. Freeman writes "we decided that we would have to change that, which meant starting a new round of trade negotiations including services."

A significant benefit of the GATS from the perspective of US companies was that it was drafted to have foreign investment defined as one of the "modes" of trade. Sales by US service companies established abroad are more significant than their cross-border trade.[7]

When countries fully commit financial services to the rules of the GATS, they are promising to allow banks, insurance companies and other key financial institutions established within their borders to be foreign owned.

Officials will sometimes say to foreign bank representatives that obtaining a license to do business is a privilege, not a right.[8] However, once governments have fully committed banking services under the GATS, foreign banks do have a WTO-backed right to be granted a license as long as they meet the same requirements applied to domestic banks.

In the 1980's, American Express provided an unlimited budget and a large staff to create a lobby for the GATS.[9] The CEO's of Citicorp and American International Group—the largest US bank and its largest insurance corporation—joined with American Express's CEO to take personal leadership of this project. The US Coalition of Services Industries they founded established close relations with influential media and US government trade negotiators, who they met with as often as once a week.[10] The Coalition has described its relationship with US trade negotiators as an "extraordinary example of government/industry cooperation."[11]

The goals of the Coalition in this round of GATS bargaining include: "facilitating direct foreign investment, by giving companies the right to establish (mode 3) in whatever corporate form best suits their operations in a given market, to own at least a majority share in their investment, and to be treated the same as local businesses."[12]

The US coalition has its counterparts in other countries, with the UK LOTIS (Liberalization of Trade in Services) committee focusing specifically on financial services. LOTIS meetings are attended by British government trade negotiators, officials from Treasury and the Bank of England, and representatives of the dominant corporations in the British financial sector—including Goldman Sachs International, Barclay, Lloyds, and HSBC. Their work has involved developing strategies to push the GATS financial services negotiations forward, create ways "to educate and partner the EC negotiators"[13], and implement "counter-measures" to ngo campaigns critical of the GATS[14]. One such counter-measure was to produce data showing liberalization had benefits for developing countries[15]. The committee describes itself as having played "a key role in influencing the successful conclusion of the WTO Agreement on Financial Services in December 1997."[16]

Another significant organization determining the direction of the GATS negotiations is the Financial Leaders Group (FLG), with representation from Citigroup, Goldman Sachs, the Royal Bank of Canada, Lloyds, Barclay's and UBS among others. This lobby was established in 1996 and has met regularly with EU and US negotiators to present a common transatlantic agenda. The FLG commissioned studies to demonstrate that liberalization would improve the economies of developing countries, studies which apparently influenced these countries' willingness to liberalize under the GATS.[17]

During negotiations for the 1997 GATS Financial Services Agreement, the FLG developed a list of specific regulatory changes EC and US negotiators should seek from the twenty fastest-growing developing countries.[18] The FLG's involvement in Financial Services Agreement negotiations stand out because it was the first time a transnational industry group representing the world's top multinational companies organized to press for services liberalization.

While emerging markets have been their main target in negotiations, GATS corporate lobby groups have also sought changes in the financial legislation of industrialized countries. Strong EC bargaining demands of the US risked weakening the US-EC alliance on financial services[19], but some LOTIS members have expressed the view that the US got off lightly in previous negotiations and should be pressed harder. A UK government negotiator said at one LOTIS meeting: "This time the EC could not allow the US to avoid negotiating on the various US restrictions which existed."[20] In particular, European companies are targeting the financial policies that are under state government jurisdiction.[21]

In addition to market access, the GATS financial lobby has set its sights on domestic regulation. The Chair of the LOTIS committee has complained that even if foreign corporations gain entry to a market they can still be frustrated by regulations, such as those prohibiting new financial products.[22] According to the US Coalition of Service Industries, "Regulation that unnecessarily limits innovation and market based pricing only helps the incumbents. It's now time for the WTO to address services regulatory issues in addition to market access and national treatment."[23]

Some lobbyists have argued for new GATS obligations to make financial regulations "pro-competitive"[24], which could involve among other things that regulations would be limited to what was the least restrictive or burdensome to industry. However, there has been some hesitancy about pushing an overly aggressive position on domestic regulation. According to a UK negotiator, "there was a real danger of upsetting some important players, for example the regulators in different countries."[25] Despite this danger, disciplines on domestic regulation—discussed below—have already been drafted and would be adopted as part of an overall Doha Round agreement.

Into the Shadows

The financial deregulation that has taken hold in industrialized countries is being advocated as the ideal model to be adopted globally and made permanent through GATS commitments. In 2006, the US Coalition of Service Industries published a research paper[26] making the case for expansion of the GATS. It argued that liberalization through the GATS would make a greater range of financial products available to consumers and improve the ability of financial institutions to measure and manage risk. The innovations of western banks were held up as examples of what could be gained by opening markets to foreign corporations. The Coalition's paper states:

> "In the 1990s the western banking industry shifted its primary focus from traditional lending and borrowing activities to multi-financial projects and development of new financial products. As former Deputy Treasury Secretary Kenneth Dams said, 'access to new mortgage products kept U.S. consumers spending and sophisticated debt instruments kept business investing' after the 2001 U.S. economic slowdown."

This shift GATS lobbyists were promoting has been called "shadow banking." It involves financial institutions moving out of regulated areas—such as holding mortgages—to lightly or unregulated areas—such as private derivatives trading and hedge fund investment. Financial innovation is often driven by efforts to escape regulation. The complex investment products developed in the US to package and sell off subprime mortgages are part of this trend.

However, less than two years after the Coalition made its argument about the advantages of expanding the GATS the full costs of "new mortgage products" and "sophisticated debt instruments" are emerging. Unaffordable mortgages sold disproportionately to minorities[27] in the US played a major factor in the foreclosures filed on 1,285,873 homes in 2007.[28] Subprime loans, rather than making homeownership affordable for the poor, actually stripped many of the equity they already had in their homes. Most subprime loans were made to people who already owned a home, but were convinced by mortgage brokers they could benefit from a refinancing with products like adjustable rate mortgages. Although sub-prime adjustable rate mortgages start off with low interest rates, the rates escalate steeply after the first years so that the ultimate cost of the loan to borrowers is extremely high.

The world's largest banks, insurance companies, and hedge funds so badly miscalculated the risk of investments related to sub-prime mortgages that they are now scrambling to shore up their balance sheets. Lack of confidence in even the largest institutions has dried up inter-bank lending.

The sharp increases in subprime lending over recent years would not have been possible without finding new sources of financing. Rather than holding mortgages, financial institutions are selling mortgages they originate to investors. By moving these loans off their balance sheets, financial institutions avoid the regulatory requirements for capital reserves that put a restraint on lending. London-based HSBC found this business in the US so attractive that it had plans to start subprime lending operations in other countries where it was established, such as Brazil and Mexico.[29]

Through a process called securitization[30], subprime mortgages were bundled into a dizzying array of innovative financial products sold internationally. Forty percent of sub-prime backed bonds were held outside the US.[31] By late 2007, Deutsche Bank Trust was the largest property owner in the City of Cleveland.[32] The reported losses at a Canadian bank, the Royal Bank of Canada, give a glimpse into the complexity of international subprime finance:

- "$90 million related to retained positions in U.S. subprime collateralized debt obligations of asset-

backed securities and other structured credit trading positions."

- "$200 million for credit default spreads on exposures to a subsidiary of U.S. monoline insurer MBIA Inc. [an insurer of subprime loans]"
- "$65 million on 'available-for-sale' holdings related to the deterioration in the U.S. subprime market."[33]

The shift towards securitization of a variety of loans — home equity loans, student loans, auto loans, credit card debt, as well as mortgages — means that the risk of borrowers defaulting becomes distanced from those who originate the loans. Being able to offload risk[34] in this way encourages banks to get involved in riskier lending, which can have destabilizing effects on the financial sector and for the economy as a whole.

While US firms accounted for 76% of the securitization business in 2007, companies elsewhere have been rapidly getting involved in the securitization of loans. The value of mortgage backed securities issued in Canada jumped from $1 billion in 2001 to $39 billion in 2007.[35]

Investment products related to sub-prime mortgages were sold to both institutional and individual investors on the basis that they were safe.[36] Claims about the safety of subprime mortgage products were based on assumptions that risk assessments were reliable and that any risks had been successfully hedged, assumptions which proved to be wrong.

The vaunted sophistication of the western banking system and its ability to handle risk have come into question. Some developing countries are asking why IMF is not intervening, as it does when there is financial instability in their countries.[37] The current crisis suggests that governments should retain the ability to decide what kinds of financial products should be sold and whether critical funds, such as pension plans, should be constrained from investing in unregulated areas.

Robert Kuttner has suggested that the subprime crisis casts doubt on one of the central tenets of financial deregulation, that any innovation financial institutions come up with is inherently beneficial. He argues that critical questions have to be asked:

> "First, which kinds of innovations in financial engineering actually enhance economic efficiency, and which ones mainly enrich middlemen, strip assets, appropriate wealth, and increase systemic risk? It no longer works to assert that all innovations, by definition, are good for markets or markets wouldn't invent them. We just tested that proposition in the sub-prime crisis, and it failed. But which forms of credit derivatives, for example, truly make markets more liquid and better able to withstand shocks, and which add to the system's vulnerability? We can't just settle that question by the all purpose assumption that market forces invariably enhance efficiency."[38]

The capacity for governments to approve certain financial innovations and not others however can conflict with GATS commitments. In addition, efforts to expand GATS rules about non-discriminatory regulations — regulations that treat foreign and domestic companies alike — will further restrict this capacity. Canada, for example, has said countries are distorting trade when they do not allow specific activities or specific products to be offered. Canada is suggesting this problem could be dealt with through new GATS rules restricting non-discriminatory regulation.[39]

Special Status of Financial Services in the GATS Negotiations

Financial services are covered by most of the GATS general rules, such as the requirement to provide most favoured nation treatment to all WTO members and to provide market access and national treatment for services where commitments are made. An example of a market access commitment is to agree not to place constraints on the number of foreign banks allowed to establish a presence. An example of a national treatment commitment is to remove requirements that foreign institutions have local residents on their boards.

But in addition to these general GATS rules, financial services also have their own special annex in the GATS. The Financial Services Annex[40] is one example of the special status accorded to this industry at the WTO. The Annex reflects the tension between trade negotiators who wanted to see the maximum liberalization of the sector as opposed to the concerns of financial service regulators, who cautioned that trade

rules could constrain the ability of governments to regulate for prudential reasons.

On the one hand, the Annex contains a very broad definition of financial services and a long illustrative list of services that is more extensive than the classification system governments use to make their GATS commitments in other sectors. On the other hand, the Annex provides what is called a "prudential carveout", a clause to protect the ability of governments to regulate for prudential reasons. The limitations of this prudential carveout and the ways it is under challenge are described below.

Financial services have been given their own negotiating forum within the WTO. In general, the current round of GATS talks that started in 2000 involves expansion of the commitments governments made when they originally joined the WTO. However, in the case of financial services, the latest negotiations follow fast on the heels of the Financial Services Agreement that was signed in 1997 and implemented — with some exceptions — in 1999. This means in effect that countries have been continuously under pressure to expand their financial services commitments at the WTO. Besides tourism, financial services are now the most heavily committed sector in the GATS.

US financial corporations are credited with achieving this favourable treatment for their sector. At the end of the Uruguay Round in 1994 the US insisted that the financial services commitments were inadequate and that negotiations had to be extended to get more liberalization in this particular sector. According to Pierre Sauve: "The December 1997 outcome [the Financial Services Agreement] can be seen as vindicating the hard line taken by the U.S. government and the country's financial industry…"[41]

The establishment of a specific permanent GATS committee — the Committee on Trade in Financial Services — is also evidence of the special status financial services has been accorded at the WTO. This committee has mostly focused on pressuring the few countries who did not expand their commitments in 1999 to do so and challenging China to meet the very extensive financial services obligations it had to take on as a condition of joining the WTO in 2001.

The current round of negotiations involves countries getting "requests" to expand their market access and national treatment commitments, to which they are supposed to respond with "offers" of the commitments they are willing to make. Some of the key requests countries have received in the financial services sector are:

- To make their commitments rise to the levels of liberalization they have brought about autonomously.[42] Such a commitment would permanently lock in extensive liberalization, since countries have significantly deregulated and opened their markets to foreign corporations in recent years.
- To commit to allowing any new financial product supplied by financial institutions already established.[43]
- To allow financial institutions to establish themselves in any corporate form they want, eg. as either a branch or a subsidiary of a bank.[44] Being able to choose among corporate forms allows companies to pick the one that is most advantageous to them from a regulatory and tax perspective. Because subsidiaries have to separately incorporate and have their own capital reserves, they may be a more secure form of foreign investment with the solvency of some of the world's largest financial firms now coming into question. But getting countries to allow foreign banks to establish as branches is a key thrust of the current negotiations.
- To allow 100% foreign ownership of financial institutions.[45]
- To eliminate monopolies of financial services, which could mean government programs like social security in the US and health insurance in Canada would need to be opened to private competition.[46]

Disagreeing over the Prudential Carveout

Despite the fact that industry lobbyists complain the GATS prudential carveout is being used to maintain regulations that are protectionist[47], so far no country has launched a dispute over this. Countries may have seen pursuing a complaint as too risky because of the broad wording of the carveout, which states:

> "Notwithstanding any other provisions of the Agreement, a Member shall not be prevented from taking measures for prudential reasons, including for the protection of investors,

depositors, policy holders 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."

The carveout has the following qualification attached to it: "Where such measures do not conform with the provisions of the Agreement, they shall not be used as a means of avoiding the Member's commitments or obligations under the Agreement." The more commitments and obligations countries undertake, the more likely they will be challenged as using prudential measures to get around them.

If countries believe a financial regulation fits under the prudential carveout, they do not have to safeguard it by putting a limitation on their commitments. However, regulations that are not listed as limitations on commitments are open to challenge through the WTO dispute system. In the event of a challenge, to avoid trade sanction governments would have to convince a dispute panel that their regulations really were "prudential".

There clearly is significant potential for WTO disputes over what is protectionist versus what is prudential financial regulation. For example, in a discussion of American state laws requiring that foreign insurance companies establish trust funds, a British insurance executive commented: "These state laws are discriminatory and counter to the national treatment principle embodied in the GATS. It seemed, however, that, since the US had not scheduled the measures as a restriction under GATS, they would probably defend them as compatible with the prudential carve-out."[48] In the current round of GATS bargaining, the EC has asked the US to remove these state laws.

Other examples of disagreements among WTO members over the meaning of prudential include:

- The EC has told China its restriction on how soon a foreign bank can open up new branches is obviously a limit on the entry of foreign banks. But China responded that it was not "in line with the prudential principle" for a bank to apply to open another branch when one that had just been approved was still being established.[49]
- Belgium is being asked by the US and Switzerland to allow investment advice to be provided across borders, but Belgium is maintaining a limitation on its commitments because consumer protection requires clients to be able to meet in person with their financial advisors.[50]
- The EC is being asked to relax the criteria European Central Banks use to calculate banks' minimum reserve requirements.[51]
- Chile is being asked by the EC to eliminate the Chilean Central Bank's authority to restrict the movement of foreign capital in and out of the country,[52] something Chile says is necessary for the stability of its currency.

A "Top-Down" Model for Financial Commitments

The special status of financial services at the WTO is also made apparent by the "Understanding on Commitments in Financial Services"[53] that was signed by a group of thirty, largely developed, countries.[54] The Understanding breaks with the fundamental design of the GATS that is supposed to allow countries to liberalize according to their specific interests and in a measured way. Rather than having a "bottom up" structure, where market access and national treatment commitments are only made in areas that are explicitly listed, the Understanding is "top down", meaning all financial services are covered except those listed as exempt. This structure fosters the most extensive commitments possible.

One of the articles of the Understanding requires that "Each Member shall grant financial service suppliers of any other Member the right to establish or expand within its territory, including through the acquisition of existing enterprises, a commercial presence." As a consequence, unless countries are very thorough in the limitations they place on their commitments under the Understanding, they may end up inadvertently committing financial services they did not intend to.

But the Understanding goes beyond a means to encourage the maximum number of market access and national treatment commitments for financial services. Some of the far-reaching additional obligations it imposes on governments are:

To implement a "Standstill".

Part A of the Understanding is unambiguously named "Standstill" and states that: "Any conditions, limitations

and qualifications to the commitments noted below shall be limited to existing non-conforming measures." So while governments are allowed to list and maintain non-conforming measures they already have, they are not permitted to list a limitation to preserve the possibility of introducing non-conforming measures in the future. The standstill is a powerful way of making deregulation become a one-way street.

Since one of the commitments included in the Understanding is the right of establishment for financial institutions, countries cannot place any new "condition, limitation or qualification" on the operations of these institutions. This is an obvious threat to financial reform. For example, in the wake of the sub-prime crisis the Financial Stability Forum[55] has recommended new regulations.[56] But unless all new regulations can be justified as falling under the prudential carveout, industrialized countries could be challenged if they attempted to re-regulate in a manner that is inconsistent with the GATS.

To endeavour to reduce or eliminate monopolies.

Part B, Article 1 states: "Each Member shall list in its schedule pertaining to financial services existing monopoly rights and shall endeavour to eliminate them or reduce their scope." For example, by signing the Understanding Canada has committed to work to reduce or eliminate provincial monopolies in auto insurance.

To automatically allow new services to be supplied by established firms.

Part B, Article 2.7 requires countries to "to permit financial service suppliers of any other Member established in its territory to offer in its territory any new financial service." This appears to require any new financial product to be approved, even if it increases price volatility, exploits the disadvantaged, cannot be reliably valued, or causes other kinds of problems not covered by the prudential carveout.

Article 2.7 is such a radical constraint on the right to regulate that some countries have tried to limit it. For example, at the beginning of its financial commitments where Japan states that its commitments are made in accordance with the Understanding it declares: "Japan shall not be prevented from applying non-discriminatory limitations concerning admission to the market of new financial services which shall be consistent with regulatory framework aimed at achieving such prudential objectives."[57] The EC commitments say much the same thing.[58]

The US has placed only a slight qualification on its commitment to allow any new financial service[59] and Canada has placed none.[60] This may reflect a deliberate policy choice. US Treasury Secretary Henry Paulson acknowledged in October 2007 that financial innovation had got ahead of regulation, but said "I don't think we'd want it the other way around."[61] New financial products are to be allowed, and government may respond after the fact to any negative effects.

Developing countries, including Thailand, are being asked in this round of GATS negotiations to sign on to the Understanding.[62] But a Thai official explained at one GATS meeting[63] that new financial products had helped precipitate its financial crisis in the late 1990's. He said Thailand's failure to adequately regulate to avoid the crisis was not for lack of trying, and observed that "New financial and debt instruments were created that made surveillance and devising appropriate regulation almost impossible." Being obligated to automatically grant approval to new financial products makes it difficult to proactively avoid crises.

To endeavour to limit their financial service regulations even when they are "non-discriminatory".

A country might have revised all its regulations to remove ones that were stricter for foreign companies. But Article B (10) of the Understanding requires countries to go further, and endeavour to eliminate regulations if they "affect adversely the ability of financial service suppliers of any other Member to operate, compete or enter the Member's market."

The GATS Ban on Bans

One of the early successes of the lobbyists for the GATS was to get the broadest possible definition of "financial services" so that a wide range of allies could be enlisted to press for financial services liberalization.[64] The Annex on Financial Services defines financial services in a circular fashion: "A financial service is any service of a financial nature offered by a financial service supplier of a Member" and a "financial service supplier" is any individual or corporation in the private sector "wishing to supply or supplying financial services." The Annex gives an open-ended list of classes of financial services

covered by the GATS. This list includes not only familiar services like mortgage lending, insurance, and securities trading but also more obscure activities like dealing in derivatives.

But what if a government considers that particular financial services should be prohibited and not opened to supply by either foreign or local financial companies? The 2005 WTO ruling in the US-Gambling case[65] means that when market access commitments are made for a classification of services, these commitments are violated by bans on any service within the classification. The same is true for any form of service delivery. For example, if governments commit to allowing services to be supplied across borders, then all the ways this can be done have to be allowed. In the US-Gambling case, the WTO Appellate Body upheld a dispute panel's decision that the US had violated its market access commitment for recreational services by prohibiting gambling via the Internet.

This WTO decision surprised many trade experts because GATS market access rules were understood to prohibit quantitative restrictions, such as limits on the number of foreign banks, but not qualitative regulations such as regulatory bans.[66] The ruling that a ban was a quantitative restriction (in effect, a limit of zero) prohibited under GATS market access rules has significant implications. The US warned that interpreting market access commitments in this way "greatly constrains the right of Members to regulate services…"[67]

Governments need to fully comprehend the implications of the US-Gambling ruling when they make new GATS commitments. The social harm caused by sub-prime mortgage innovation suggests an argument could be made for prohibiting certain types of these mortgages.[68] Other innovative financial products spectacularly failed to do what they were supposed to do—manage the risk associated with sub-prime mortgages—and instead created financial havoc. However, OECD governments could be challenged if they tried to prohibit the most problematic of these products, as they have already made market access commitments for the relevant classes of services involved.

A number of American states could have had their regulations to stem predatory lending challenged under the GATS, if the federal government had not first stepped in to pre-empt state legislation. When financial institutions started in a major way to sell off subprime loans to outside investors, some state governments became alarmed at the sharp increases they saw in fraudulent practices associated with these loans. They enacted legislation to "impose assignee liability on purchasers of illegal loans", meaning that investors who were several steps removed from the original loan transaction could still be held responsible for any fraud involved.[69] Because these laws effectively eliminated the market for sub-prime securities, they could be characterized as a ban.

Developing countries in the current round of negotiations are under pressure to significantly extend their market access commitments, opening themselves up to a WTO challenge for any prohibitions they may impose. For example, over the past year India has banned futures trading in key agricultural commodities over concerns that speculative trading is linked to sharp increases in the price of food staples like lentils, wheat, and rice.[70]

The Indian government retains the option of imposing a ban on aspects of futures trading because it has not yet committed this service under the GATS. But it is being asked to eliminate this policy option in the current round of GATS negotiations. In 2006 Canada, the US and other countries made a joint request to India and twenty other emerging markets for new commitments of financial services. Some of the commitments sought in this request are for "derivative products including, but not limited to, futures and options."[71]

Following the reasoning of the US-Gambling dispute panel, any ban on futures trading of food staples would constitute a violation of GATS market access commitments. India could still commit futures trading to GATS market access rules and list particular commodities as limitations on this commitment. The US has done this for futures trading, listing trading in onions as a limitation on its commitment.[72] But the Indian government would have to anticipate all areas where it might potentially want to restrict futures trading and list these as limitations at the time it makes its commitment. Otherwise, the ability to impose such restrictions would be permanently lost.[73]

The Understanding on Commitments in Financial Services, which India is also being asked to sign on to[74],

would provide further grounds for a WTO challenge to its legislation. If India's prohibitions affected foreign companies and were considered "new" services, its ban would violate the obligation "to permit financial service suppliers of any other Member established in its territory to offer in its territory any new financial service" (Article B(7) of the Understanding on Commitments in Financial Services).

Locking in Financial Deregulation

Patricia Arnold, a professor of business administration, observed in her paper on the GATS and its impacts on US financial regulation that:

> "In the final analysis, GATS has more to do with governance than with trade. Over the past century, financial regulation in the US has oscillated from periods of strict financial controls over banking and capital markets following the Great Depression to periods of deregulation in the 1980s and 1990s. GATS locks in the status quo at a time of unprecedented financial liberalization…"[75]

Arnold warned that the GATS could make it very difficult to reverse dangerous levels of financial services deregulation in the US. For OECD countries generally, the various GATS instruments governing financial services deregulatory trends that have been pursued domestically. One significant aspect of deregulation is the breaking down of barriers between different financial services, so that companies can expand into any financial area they want.

Before it was repealed by the US in 1999 after intensive lobbying by Citibank, the Glass-Steagall Act had been a target of EU trade negotiators who defined it as a barrier to European companies.[76] Glass-Steagall was originally passed during the Depression to separate commercial banking (deposit taking and lending) from investment banking to ensure that depositors' savings were not put at risk in speculative investments and to avoid conflicts of interest.

In the years immediately following repeal of the Act, large companies like Citibank and Merrill Lynch "aggressively amassed a wide variety of services under one roof."[77] Some have been sued over conflicts of interest. In 2002, an investigation into Merrill "was prompted by allegations that the firm's analysts issued glowing reports on firms that they privately disparaged so as to keep open the possibility of gaining lucrative investment banking business from them."[78] Shortly after the repeal of Glass-Steagall, the collapse of Enron and WorldCom exposed how supposedly objective investment advisors had promoted the stock of companies their institutions were financing.[79] Financial analysts have also identified ways that the elimination of Glass-Steagall contributed to the sub-prime crisis.[80]

The US included a promise to change Glass-Steagall in its 1998 GATS commitments for financial services.[81] In the current round of negotiations requests are being made for countries to allow financial institutions to provide whatever mix of financial services they want. For example, the EC is asking Japan to allow branches of foreign banks to combine banking and securities services "as is appropriate for universal banks".[82] Japan for its part is requesting the "the U.S. to relax business scope limitations, which are imposed on securities subsidiaries of foreign banks."[83]

Deregulation and Derivatives

During the 1990's, OECD not only eliminated many existing regulations, but also took hands off approach to new financial products, such as complex derivatives. The ability to supply new financial products without restrictions is an industry demand that has found its way into the GATS negotiations. Because of the Understanding on Commitments in Financial Services, OECD countries are already committed to allow foreign companies established within their borders to supply new products. Developing countries are frequently told by promoters of the GATS to make commitments so that they could benefit from the sophisticated new risk-management products western banks can provide.

However, critics argue that some financial innovations that are supposed to minimize risk end up magnifying it.[84] An April 2008 analysis in the New York Times identified "opaque trading and hard-to-value derivatives tied to mortgage loans" as factors contributing to the current financial crisis.[85] The Times' analysis provides a plain language explanation of derivatives and why they are controversial:

> "Derivatives are privately negotiated and often complex financial contracts theoretically designed to limit risk. Their value is derived from an underlying basket of assets, like stocks, bonds

> or loans. Advocates say that derivatives, used wisely, foster economic activity. Critics contend that as derivatives trading has boomed over the last decade, it has led to high-octane speculation more akin to gambling than to sensible hedging of financial risk."

AIG, the world's largest insurer with a presence in 130 countries, has lost almost half of its share value over the past year due to its losses on derivatives tied to sub-prime mortgages. It is currently under investigation by the US Securities and Exchange Commission and the Justice Department over how it valued these derivatives in its books.[86]

A proposal to regulate privately traded derivatives was successfully blocked in 1998 by Alan Greenspan, chair of the Federal Reserve, and Robert Rubin, a former partner of Goldman Sachs who became Treasury Secretary and went on to be an executive at Citibank.[87] In a 1997 speech[88] on derivatives, Greenspan gave the core arguments for financial services deregulation, arguments that are a common thread through the policies of industrialized countries. Greenspan rejected government regulation of derivatives as "wholly unnecessary" because in his view the market could achieve public policy objectives without government interference. He believed that problems that might emerge in derivative markets would not affect the economy as a whole. He also claimed that because the institutions trading in these markets had high credit ratings, they were not at risk of bankruptcy.

The sub-prime crisis has undercut these arguments. Private derivative deals related to sub-prime mortgages have had extensive impacts, requiring extraordinary interventions from central banks in Europe as well as the US. Bear Stearns, a corporation that had been around for 85 years, failed as a result of these deals. But because of the extraordinary size of Bear Stearns obligations to other financial institutions—estimated at $10 trillion—the Federal Reserve had to engineer a rescue. It provided a loan of $29 billion to JPMorgan Chase & Co. to buy Bear Stearns and took over the least credit-worthy of the firm's assets.[89]

The US Federal Reserve's interventions over the past year have gone far beyond the Bear Stearns bailout—creating a number of new ways for financial institutions to borrow from the central bank. Former Fed Reserve Chairperson Paul Volcker summed up the situation by saying: "Simply stated, the bright new financial system—for all its talented participants, for all its rich rewards—has failed the test of the market place."[90] But by opening their markets without reservations to foreign companies and guaranteeing that established companies can provide new financial services, WTO members can strip away their capacity to deal with the problems that have become evident in this "bright new financial system".

Deregulation and Hedge Funds

The sub-prime crisis has renewed concerns not only about derivatives, but also about hedge funds. Sub-prime losses at two Bear Stearns' hedge funds[91] ultimately brought the company down. UBS, the largest European bank, has been rocked by huge sub-prime related losses at one of its hedge funds.

Hedge funds are private companies that generally invest in high risk areas for a limited pool of wealthy investors. The fees hedge managers can charge are unregulated, and they do not have the same disclosure requirements or restrictions on what they can invest in that apply to mutual funds. As a result, governments set restrictions on who can invest. Brazil, for example, limits the amount pension funds can invest in hedge funds although it has recently upped these limits.[92]

In 2006, U.S. Securities & Exchange Commission Chair Christopher Cox testified to Congress that the collapse of one hedge fund "had left in its wake not only ruined investors, but also serious questions about the threat to our capital markets as a whole from such significant funds pursuing high risk strategies with excessive leverage."[93] Leverage involves borrowing to make an investment and paying for only part of the investment's cost with your own money. Hedge funds allow investors to leverage at very high ratios. This worked well in the subprime market as long as prices continued to increase, but magnified losses when they went down.

But despite the systemic risk posed by hedge funds, they have continued to multiply with little government oversight in most jurisdictions. UNCTAD's paper on trade in financial services reports how significant these largely unregulated institutions have become:

> "Many hedge funds operate in derivative markets, which are estimated at $17 trillion. This

raises fears about shocks. Following five years of 20 per cent average annual growth, an estimated 7,000 global hedge funds hold assets of $1.3 trillion. The sector remains lightly regulated and concerns of developing (mainly Asian) countries resulting from the late 1990s crises remain unaddressed. Recent collapses raise concerns and interest in better regulation for hedge funds, e.g. by the 2007 G8 meeting."[94]

Hedge funds are not identified explicitly in the list of services GATS Annex on Financial Services, but the services they supply are still covered by the GATS because it governs all services "of a financial nature." Of the services listed in the Annex, the class that best fits hedge funds is "Asset management, such as cash or portfolio management, all forms of collective investment management…"

If GATS commitments are made for this class of services, attempts to introduce new regulations on hedge funds could be vulnerable to a challenge. For countries that have signed the Understanding on Commitments in Financial Services, the standstill requires that they not impose any new "conditions, limitations and qualifications" on their Understanding commitments. This includes allowing all financial service suppliers, including hedge funds, to establish themselves and expand their operations. Imposition of higher capital requirements, which have been called for in the wake of the sub-prime crisis[95], would violate the Understanding's requirement that no new conditions be placed on the establishment or expansion of financial service suppliers. Governments could try to defend their regulations with the prudential carveout, but they could be challenged as just trying to get around the obligations they have undertaken.

Michael Ewing-Chow, a professor of law at the National University of Singapore, has examined the hedge fund regulations of Singapore, Hong Kong, the UK and the US in light of their GATS commitments.[96] He suggests that all four countries could be violating these commitments by restricting the kind of investors hedge funds are allowed to attract. The US, for example, sets criteria for the minimum net worth hedge fund investors must have. Ewing-Chow argues such restrictions might conflict with the market access requirement not to limit the total value of service operations or on the total quantity of service output.

Should India agree in this round of negotiations to requests to make market access commitments for asset management, its efforts to regulate hedge funds could be subject to challenge at the WTO. The Securities and Exchange Board of India is only allowing entry of hedge funds if they can prove to the satisfaction of the Board that they have a good track record.[97] This restriction is potentially a GATS market access violation, as it limits the total value of service operations. It could also conflict with the proposed GATS disciplines on domestic regulation (described below), which require approvals be made "within a reasonable time frame."

Marketing Financial Liberalization to Developing Countries

Because of the overwhelming dominance of western financial institutions in international trade, accounting for ninety percent of all exports[98], proponents of the GATS have had a challenge to convince developing countries that financial services liberalization is in their interests. The imbalance in corporate strength means developing countries cannot realistically expect their home-grown financial companies to profit from the opening of western markets while the survival of these companies is put at risk by competition from the world's financial conglomerates. Harry Freeman has explained the strategy the services lobby adopted to address this problem:

"We have yet to convince most of the countries of the world, particularly developing countries… that services are part of the necessary infrastructure for development. That is the essential theme… Our argument is that this is good for developing countries. They do not always agree. They are not so happy sometimes with the American Express offices, or Bank of America, or Chase in their countries. They do not know why they need these foreign banks and foreign financial experts. To us, free competition helps development.… We will win this battle, but it will take many, many years of discussion, scholarly writing, and all kinds of communication."[99]

The arguments in favour of developing countries liberalizing financial services through the GATS generally focus on the value of locking in domestic deregulation for the positive signals this will send to foreign companies, the efficiency to be gained by having these companies allocate capital, and the sophisticated products western banks have to

offer. Developing country delegations at the WTO have countered that they can endanger not only their domestic financial institutions but their entire economies by removing restrictions on foreign financial institutions. Some point to how much better Malaysia—with its strict controls on these institutions—fared during the 1990's Asian financial crisis than its liberalized neighbours.

In its August 2007 paper[100] on trade in financial services and its impacts on developing countries, UNCTAD reviewed the arguments in favour of this trade and reported on the potential disadvantages. These included:

- Negative impacts on domestic banks, which studies indicate lose profitability with the establishment of foreign firms. Foreign firms can take over the most lucrative business, or "cherry pick" a financial market. When a few foreign banks end up dominating a country's financial system, concentration of power, both economic and political, becomes a concern.
- Decreases in service to the poor and to rural areas as foreign banks concentrate on the most profitable clients and increased competition makes all banks try to cut costs.
- Macroeconomic problems, as foreign providers "are more likely to invest domestic savings abroad rather than in the local economy" and "might also increase the probability of capital flight and volatility…" Foreign companies can have destabilizing impacts when engage in cross-border trade in financial services. Increased capital flows between countries have coincided with increases in banking and exchange rate crises.
- Lack of developing country capacity to regulate complex foreign financial institutions.

Another concern that has been raised is that the increased competition created from liberalization is not an unqualified good. Myriam Vander Stichele, in her presentation[101] to the September 2007 UNCTAD expert meeting on the implications of financial services for economic development, identified the potential for firms to become involved in riskier areas when there is increased competition.

An illustration of the risks of excessive competition is provided the entry of London-based HSBC's into the US subprime market in 2002. In explaining why HSBC was buying subprime lender Household International despite the risks that had already become evident in this type of lending, HSBC Chair Sir John Bond said the bank was trying gain ground on its rival—Citigroup. Bond stated: "You have 9,000 commercial banks competing in the prime space and four or five finance companies competing in the subprime space.... You need to push into this area because there will be no respite at the top end of the market."[102] The bank, which had up to that point enjoyed a reputation for being conservative, took over a financial institution that otherwise might not have survived due to the problems with its business. HSBC became the second largest subprime lender in the US, and thus far has had to write off $15.6 billion in losses related to its US operations.[103]

"Disciplines" on Financial Regulation and the Prudential Carveout

One component of the current round of GATS negotiations could make a challenge to financial regulations significantly more likely. GATS negotiators are drafting an amendment that would impose "disciplines" on non-discriminatory domestic regulation. Describing this aspect of the negotiations, a British insurance executive said: "For real liberalisation to take place in the next round a further easing of regulatory practices was needed."[104]

The proposed GATS disciplines would limit according to set criteria all measures relating to licensing requirements and procedures, qualification requirements and procedures, and standards for services. The disciplines would apply in areas where governments have made market access and national treatment commitments. Given the extensive commitments for financial services countries have already made, this would mean a wide range of their financial regulations would become vulnerable to challenge as not conforming with the disciplines. Morever, regulations that do not conform could not be safeguarded by limiting the application of the disciplines to commitments.

One consequence of adopting these disciplines would be that the prudential carveout in the GATS would be a less reliable protection from challenges to financial regulation. The carveout says that countries cannot use prudential regulations as a means of avoiding their

obligations under the GATS. The disciplines would add to the obligations countries have under the GATS, thereby increasing the possibilities that prudential regulations would be challenged as efforts to get around the agreement.

The disciplines may succeed in effectively narrowing the prudential carveout where past efforts have failed. Australia proposed in 2000 that "prudential regulation" should be defined so that countries would know what was excluded and could not use the carveout for protectionist reasons.[105] Their representative suggested using the principles developed by certain standard setting bodies as the basis for defining what prudential means. The EC said regulatory issues should be discussed so that commitments were not undermined by "inappropriate" prudential regulation.[106] Australia and Switzerland both suggested using the principles developed by certain standard setting bodies as the basis for defining what prudential means.

The representative from the Philippines argued that the prudential carveout was as broad as it was because that's what negotiators had intended, and this should not be changed. [107] Malaysia's representative in particular vigorously opposed defining the prudential carveout, and stated that his country's experience financial crisis had demonstrated that regulators needed to have flexibility in managing financial crises. In terms of using international standards to define prudential measures, he rejected this saying that "measures that for other countries could have worked might not have worked for Malaysia."[108]

During the negotiations on the disciplines, a group of developing countries proposed that a clarification should be included so that the prudential carveout would not be affected. But their proposal does not appear in the latest draft.[109]

Financial Regulations Affected by the Disciplines

The disciplines include very broad definitions of the regulations they cover. Qualification requirements are defined as "substantive requirements relating to the competence of a natural person to supply a service, and which are required to be demonstrated for the purpose of obtaining authorization to supply a service." In relation to the financial sector, this would cover regulations like the qualification requirements for mortgage brokers.

"Licensing requirements" are defined in the disciplines[110] as everything a company or individual needs to do to "obtain, amend or renew authorization to supply a service." In his paper[111] on the GATS and financial regulation, Kern Alexander gives as an example for a licensing requirement the "fit and proper" standards a bank's senior management and directors have to meet in order for the bank to be licensed. Regulators have to agree that the people appointed to top positions in banks are competent and have integrity.

"Technical standards" are defined in the draft disciplines as "measures that lay down the characteristics of a service or the manner in which it is supplied." Alexander says the standards for the minimum capital a bank must have are examples of technical standards. Kern explains that applying higher capital requirements to foreign banks than local ones can be a national treatment violation, but "even if the minimum capital standards are not discriminatory as applied between foreign and domestic banks, they must still comply with the disciplines…."[112]

This is a critical point to note about the disciplines—that they place restrictions on completely non-discriminatory regulations. If a country's regulations were challenged for not conforming with the disciplines, it could not defend itself by demonstrating that the same regulations were applied to foreign and local companies. Licensing procedures are defined as "administrative or procedural rules" that applicants must follow to show they have complied with the requirements of a license.

Some delegations view the current draft of the disciplines as a compromise, particularly because they do not include "necessity tests"—requirements that regulations not be more burdensome or trade restrictive than necessary. New Zealand has said that the disciplines should not be "diluted" any more[113]. However, the disciplines as currently drafted provide many potential grounds for WTO challenges. Especially when the disciplines are considered in light of the extensive restrictions on regulation in the rest of the agreement, it is clear the right to regulate is being significantly curtailed.

Potential Challenges Over the "Objectivity" of Financial Regulations

The disciplines on domestic regulation as drafted require that countries ensure their regulations are based on "objective" criteria. However some banking regulations like "fit and proper" requirements for bank officials do not seem to conform with the common understanding of the term "objective". For example, Swiss banking law requires that "the persons charged with the administration and management of the bank enjoy a good reputation",[114] which would seem to require the exercise of subjective judgement on the part of bank regulators.

Concepts like "the public interest" are unlikely to qualify as "objective". Dubai, for example, provides for discretionary authority on the part of its regulators for licensing of investment brokers:

> "The issue of a license by the Market is a privilege not a right, and the Market retains the right to reject an applicant or suspend or cancel a license if this is deemed by the Board to be in the public interest."[115]

The draft disciplines encourage the adoption of international standards, although they do not make this mandatory.[116] However, there are no truly international standards for banking. Core principles and standards for capital adequacy have been developed by the Basel Committee on Banking Supervisions. This committee's members are drawn from only thirteen countries, although many countries have adopted its standards for international banks operating within their borders. For countries like Brazil that maintain higher capital requirements[117] than laid out in Basel II (11% for banks as opposed to 8% under Basel II) the question would be whether these stricter standards could be justified as objective or if they might be ruled a disguised restriction on trade.

The Committee's most recent capital adequacy standards—called Basel II—illustrate the problems with trying to meet the standard of being "objective". Even though Basel II creates numerical formulae for the amount of capital banks are required to have, formulae that might appear "objective", the risk weights these formulae assign have been criticized as arbitrary.[118]

In addition, Basel II gives private credit rating agencies a critical role in assessing the riskiness of a bank's portfolio. The higher the risk, the more capital a bank is required to have, so the ratings of the agencies have a direct impact on the profitability of companies.

Credit rating agencies are now being severely criticized for the role they played in the subprime crisis—providing subprime investments with high ratings that gave an impression of safety. Because credit rating agencies are paid by the firms they rate, financial regulators are questioning whether they do not have conflicts of interest.[119] Yet reliance on the ratings of credit agencies was actually considered a less biased way of assessing risk than the earlier system, which gave an automatic low risk rating to the bonds of OECD countries.

Achieving unquestioned objectivity in financial services' regulations is proving to be an elusive goal, even for the Basel Committee. This suggests a GATS discipline requiring regulations to be objective could provide wide scope for future disputes.

Other Potential Challenges Based on the Disciplines

The disciplines as drafted suggest many other potential grounds for challenges to financial services regulation, including:

Regulations would have to be "relevant to the supply of the services to which they apply".

This discipline threatens requirements that might be considered external considerations to the supply of a service. For example, Brazil requires banks to lend at preferential rates to farmers. In the US, the Gramm-Leach-Bliley Act requires financial institutions interested in expanding their operations to demonstrate that they been making loans in the communities where they are based to low and middle income groups.[120] These Brazilian and American regulations could be defined as either licensing requirements or technical standards according to the broad definitions provided for the disciplines. South Africa's Black Empowerment Act makes the empowerment of black people and social investment" by corporations as requirements for the issuing of business licenses. All of these requirements could be considered not "relevant" to the supply of

banking services from the perspective of efficiency or customer satisfaction.

Different kinds of restrictions on where and how much fund managers are allowed to invest could also be challenged as "not relevant". Jennifer Choi, Assistant Counsel of the Investment Company Institute, stated at a U.S. Department of Commerce Conference on the GATS in 2002 that the mutual fund industry encouraged the removal of regulatory requirements that while seeming neutral could deny market access. Choi said that imposition of strict asset allocation requirements and restrictions on investment in foreign securities were trade barriers and her industry could provide better returns to their clients without these restrictions.[121]

Licensing procedures would have to be "as simple as possible".

This discipline will create extensive grounds for challenge as any procedure can be made more simple if goals other than simplicity are sacrificed. Having to comply with the heavy documentation requirements of Basel II is arguably not the simplest process possible to qualify as a bank.

Authority for license approvals would rest with a single authority.

A discipline on licensing procedures stipulates that applicants could only be required "in principle" to approach "one competent authority". This discipline would create pressures on federal systems to centralize financial regulation and eliminate shared authority with state and provincial governments. The phrase "in principle" is unlikely to moderate the requirement to eliminate multi-level approvals, as no other qualifying words have been included. Best endeavour language and the phrase "taking into account their regulatory structure" were deleted from previous drafts.

Patricia Arnold has explained what the potential impacts of the GATS threat to subfederal regulatory authority:

> "State regulation of insurance and banking can be a powerful tool to achieve public policy objectives such as caps on exorbitant interest rates, prohibitions on red-lining in insurance, discriminatory lending practices, and so forth. National and international regulators are less likely to be responsive to local concerns. Social policy objectives may be sidelined as GATS creates pressure for state laws to be harmonized and modeled after national and international standards."[122]

Applications would have to be processed "within a reasonable timeframe."

The disciplines on licensing procedures also would require governments to process applications "within a reasonable timeframe" and to allow supply of a service to being "without undue delay." In relation to financial services, the time countries take to approve foreign bank and insurance branches and the complexity of the approval process is a major source of complaint raised at GATS meetings, so a WTO challenge based on the slowness of licensing approvals is a real possibility.

Licensing fees could not be more than the administrative costs involved in approving licenses.

Banks are interested in seeing the costs of establishing themselves overseas reduced, and this discipline on licensing fees would suit that purpose. In its requests to the US, for example, Korea is asking that fee charged by State Supervisory institutions be reduced.[123]

Regulations cannot be "a disguised restriction on trade."

Governments may misunderstand this discipline to mean that they simply need to ensure their regulations are publicly available. However, in relation to "disguised restriction" language in other WTO agreements, the Appellate Body has stated that a "concealed or unannounced restriction or discrimination in international trade does not exhaust the meaning of 'disguised restriction'."[124] The panel in the Brazil-Tyres case took this Appellate Body statement to mean "that a restriction need not be formally 'hidden' or 'dissimulated' in order to constitute a disguised restriction on international trade…"[125] These rulings suggest that even a measure that is completely transparent can still be a "disguised restriction on trade." For example, if the cost of complying with regulations was high, this could be a violation of the disciplines as a restriction on trade, even though the regulations were publicly available and not concealed in any way.

Socializing Risk

The Financial Stability Forum has described the current state of affairs in stark terms as a system "burdened by market uncertainties about the health of key financial institutions…"[126] Although the FSF notes that impacts among countries may vary, they say that "financial system weaknesses have contributed to deteriorating prospects for the real economy."[127]

The financial crisis and problems with the way financial firms are managed are not restricted to the US. In response to a request from the Financial Stability Forum, senior financial regulators from five countries undertook a review of how the world's top eleven financial institutions had handled risk related to their sub-prime investments[128]. The regulators reported that some firms had taken on exposure to sub-prime securities that "far exceeded the firms' understanding of the risks inherent in such instruments, and failed to take appropriate steps to control or mitigate those risks." They found that the senior management of nearly all firms had encouraged increased risk-taking, and questioned whether executive compensation is designed to "achieve an appropriate balance between risk appetite and risk controls."

While governments have generally taken a hands-off approach to regulating financial institutions in recent decades, this does not mean these institutions will be left to sort themselves out in the event of a crisis. The past year has seen the US and European governments having to massively intervene to salvage failed financial markets. The bailout of Bear Stearns in the US and nationalization of Northern Rock in the UK are just two examples of the extraordinary measures that have been taken.

A breakdown in the confidence banks have in each other's credit worthiness has created a liquidity crisis, with banks reluctant to lend to each other. The European Central Bank and the US Federal Reserve have had to step in to fill the gap with massive injections of funds. In the US and the UK, central bank interventions have begun accepting mortgage and other kinds of risky debt in exchange for safe government treasuries[129].

Investment analyst David Einhorn has stated: "The owners, employees and creditors of these institutions are rewarded when they succeed, but it is all of us, the taxpayers, who are left on the hook if they fail."[130] Given the critical importance of the financial sector, governments are compelled to come to its rescue when a crisis develops. Yet the GATS and its multiple constraints on financial service policies mean governments are severely constrained in their ability to anticipate and prevent crises.

Conclusion

Many WTO members, through their GATS commitments and by signing the Understanding on Commitments in Financial Services, have already agreed to significantly limit their ability to regulate financial services. They are now pushing the limits of liberalization with far reaching bargaining requests in the current round of negotiations. Furthermore, the proposed disciplines on domestic regulation would make challenges to financial regulation a far more likely prospect.

In reference to the position developing countries should adopt in the GATS financial services negotiations, UNCTAD has suggested that "binding obligations need to be conditional upon the existence of effective regulatory frameworks." The same could now be said of industrialized countries, given the regulatory problems exposed through the subprime crisis.

As the current financial instability drives home, governments need to reject GATS commitments that risk locking them in to deregulation. World Bank economist Aaditya Mattoo has said: "It is well known that the freedom to change one's mind can be a nuisance. The GATS offers a valuable mechanism to make credible commitments to policy."[131] While changing one's mind may be a nuisance, it is much more than a nuisance for governments to have to bail out failed financial systems.

Notes

1 David Hartridge. What The General Agreement On Trade In Services (GATS) Can Do". Speech to a conference "Open Markets for Banking Worldwide" sponsored by Clifford Chance, London, UK. 8 January 1997.

2 IMF. "World Economic Outlook: Housing and the Business Cycle". April 2008. p. 4.

3 Martin Wolf. “The Rescue of Bear Stearns Marks Liberalisation’s Limit”, Financial Times. 25 March 2008.

4 Sheila C. Bair, Chair of the Federal Deposit Insurance Corporation. “The State of the Banking Industry: PART II”. Testimony to the Committee on Banking, Housing and Urban Affairs, U.S. Senate. 5 June 2008.

5 Op cit.

6 Harry Freeman. “Comments and Discussion on Financial Services and the GATS 2000 Round”, in Brookings-Wharton Papers on Financial Services 2000 (2000). pps. 455–461

7 Robert Vastine, President, US Coalition of Service Industries. “The Role of Private Sector Organizations in Promoting the Use of Negotiations to Increase Services Export Opportunities: The US CSI Experience”, Speech to conference held in Bogota, Colombia. 26 January 2004.

8 For example, Acting Superintendent of the New York State Banking Department Elizabeth McCaul “We emphasize to prospective foreign bank applicants that a license (or a charter, in the case of a subsidiary), is a privilege, not a right.” See http://www.claims.state.ny.us/pr980324.htm. Accessed 15 June 2008.

9 Harry Freeman. Op. cit.

10 Ibid

11 Dean R. O’Hare, Chairman & CEO, The Chubb Corporation and Chairman, Coalition of Service Industries. Introductory Remarks to the Services 2002 Conference, U.S. Department of Commerce, Washington, D.C. 5 February 2002

12 Robert Vastine, President, Coalition of Service Industries. “Services Negotiations in the Doha Round: Promise and Reality”. Speech to Conference “Perspectives on the Doha Development Agenda”, Gerald R. Ford School of Public Policy, University of Michigan, 21 October 2005.

13 LOTIS Committee. Minutes of meeting, 12 April 1999, at Barclays Bank PLC, 54 Lombard Street, London, UK. The LOTIS Committee minutes for 1999–2001 are posted at: http://www.gatswatch.org/LOTIS/LOTISapp1.html. Accessed 15 June 2008.

14 LOTIS Committee. Minutes of meeting held on Thursday, 22 February 2001 at Lloyd’s, One Lime Street, London, England.

15 Ibid

16 LOTIS Committee, posted at http://www.ifsl.org.uk/output/LOTISCommitte.aspx, accessed 14 June 2008.

17 Robert Vastine. Op cit. 21 October 2005.

18 Robert Vastine, President, Coalition of Service Industries. Testimony before the Committee on Small Business, United States House of Representatives, 24 October 2001.

19 LOTIS Committee. Minutes of meeting, Friday, 8 December 2000 at The Institute of Chartered Accountants in England and Wales, Chartered Accountants’ Hall, Moorgate Place, London, UK.

20 LOTIS Committee. Minutes of meeting, Thursday, 23 September 1999 in the Corporation of London’s Marketing Suite, London, UK.

21 LOTIS Committee. Minutes of meeting, Monday 15 November 1999, at Barclays Bank PLC, 54 Lombard Street, London, UK. The Chairman said at this meething that “he had spoken to the President of the Chubb Corporation, Dean O’Hare, as to whether we could ally ourselves with the major US insurers who had their own problems with state regulations. O’Hare had advised against openly doing this.”

22 LOTIS Committee. Minutes of meeting, Thursday, 23 September 1999 in the Corporation of London’s Marketing Suite, London, UK.

23 Dean R. O’Hare, op cit.

24 The International Chamber of Commerce’s policy statement on the GATS negotiations and insurance says: “Local regulatory requirements often prevent foreign investors from competing on a level playing field with domestic firms. Market access does not necessarily guarantee liberalization. Consequently, regulatory regimes that are pro-competitive are required. This means that regulators should focus on solvency and prudential requirements to ensure a stable market while, in most cases, allowing competition to determine the most effective products and price.” Posted at http://www.iccwbo.org/collection4/folder165/id453/printpage.html?newsxsl=&articlexsl. Accessed 16 June 2008.

25 LOTIS Committee. Minutes of meeting, 23 September 1999 in the Corporation of London’s Marketing Suite, London, UK.

26 US Coalition of Service Industries Research and Education Foundation. “Making the Most of the Doha Opportunity: Benefits from Services Liberalization”. 2006.

27 In its report “Foreclosure Exposure: A study of racial and income disparities in home mortgage lending in 172 American cities”, ACORN Fair Housing documented that “racial disparities persist even among homeowners of the same income level. In comparative terms, upper-income3 African-Americans were 3.3 times more likely than upper-income whites to be issued a highcost loan when purchasing a home.” The report details how Posted at: http://www.acorn.org/fileadmin/HMDA/2007/HMDAreport2007.pdf. Accessed 16 June 2008.

28 RealtyTrac In. Press Release: “U.S. Foreclosure Activity Increases 75 Percent in 2007”. 29 January 2008.

29 Erik Portanger, Joseph T. Hallinan, and Patrick Barta. “HSBC Sets $16 Billion Deal For Household International; British Firm’s Purchase Kicks Off A Big Move Into North America”. Wall Street Journal, 15 November 2002.

30 Securitisation is a way for lending institutions to get cash in advance in exchange for handing over the rights to payments from loans. The future income from loan payments is transformed into tradable securities and sold to investors. Robert Kuttner explains mortgage-related securitization as follows: “Through securitization, a mortgage broker could originate a loan, sell it to a mortgage banker, who would then sell it to an investment bank like Salomon Brothers, who in turn would package the mortgages into securities. These were then evaluated and coded (for a fee) by private bond-rating agencies according to their supposed risk, and sold off to hedge funds or pension funds.” See “The Bubble Economy” at http://www.prospect.org/cs/articles?article=the_bubble_economy. Accessed on 13 June 2008.

31 European Shadow Financial Regulatory Committee. "Lessons from Recent Financial Turmoil", Statement No.2619,The Centre for European Policy Studies. 10 September 2007.

32 BBC News. 21 November 2007.

33 Royal Bank of Canada. "RBC provides information on writedowns", news release. 14 May 2008.

34 For a number of reasons, the risk of subprime loans often were never completely removed from banks that securitized these loans: to preserve their reputations, banks had to back investments they issued even when they had no legal requirement to do so; in the process of securitizing a package of loan, banks got caught holding some of these loans before they were securitized when the market evaporated for subprime loan investments; and sometimes some form of guarantee still tied banks to securitized subprime investments.

35 International Financial Services London Research. "Securitization 2008".March 2008.

36 Canadian Union of Public Employees. News release: "Finance gurus meet with CUPE on pensions". 12 May 2008.

37 India Times. "Developing nations want IMF to monitor advanced economies." 20 October 2007.

38 Kuttner, Robert. Testimony to the U.S. House of Representatives Financial Services Committee, op.cit.

39 Department of Finance, Canada. "Consultation Paper for the WTO Negotiations on Financial Services". May 2000.

40 The Annex on Financial Services is on p. 308 of the GATS, which is posted at: http://www.wto.org/english/docs_e/legal_e/26-gats.pdf

41 Pierre Sauve and James Gillespie. "Financial Services and the GATS 2000 Round" in Brookings-Wharton Papers on Financial Services: 2000(2000), p. 429.

42 Department of Finance, Canada. "Financial Services Collective Request". February 2006.

43 Emerging market are being asked to sign the Understanding on Commitments in Financial Services, which includes this obligation.

44 The EC, for example, is asking that investors and financial institutions be able be able "to establish in the legal form of their choice." WTO, Council for Trade in Services Special Session. "Communication from the European Communities and Their Member States—GATS 2000: Financial Services", WTO Document Symbol S/CSS/W/39. 22 December 2000.

45 For example, in its request to Indonesia, the EC is stating there are "Limits on foreign share holding in all financial institutions" and it wants Indonesia to "Remove these caps". The request is posted at: http://www.gatswatch.org/requests-offers.html#outgoing. Accessed on 16 June 2008.

46 Communication from Australia, Bahrain, Canada, the European Communities, Japan, Norway, Oman, Panama, Singapore, Switzerland, The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, and the US. "Joint Statement on Liberalization of Financial Services". WTO, Council for Trade in Services Special Session, WTO Document JOB(O5)/17. 18 February 2005. Among other things, this joint statement asks WTO Members to, "Remove nondiscriminatory limitations such as monopolies…"

47 LOTIS Committee. Minutes of meeting, in the Corporation of London's Marketing Suite, London, UK., 23 September 1999.

48 Ibid.

49 WTO, Committee on Trade in Financial Services. "Report of the Meeting Held on 21 October 2004", WTO Document Symbol S/FIN/M/37. 24 October 2004

50 Unpublished requests.

51 Department of Trade and Industry, UK. "Liberalising Trade in Services: A New Consultation on the World Trade Organisation GATS Negotiations", p. 40.

52 In its request to Chile, the EC is stating that "Paid-in capital can only be remitted abroad 2 years (current practice: 1 year) after being invested in Chile" and requesting Chile to: "Eliminate this restriction." The request is posted at: http://www.gatswatch.org/requests-offers.html#outgoing.

53 The Understanding is available on the WTO web site at: http://www.wto.org/english/docs_e/legal_e/54-ufins.pdf. Accessed 14 June 2008.

54 The WTO Secretariat describes the Understanding in the following way: "The Understanding on Commitments in Financial Services…is a unique legal instrument in the WTO, that was included in the Final Act but is not formally part of the General Agreement on Trade in Services (GATS)." WTO Document Symbol S/CSC/W/34, Committee on Specific Commitments, "Additional Commitments under Article XVIII of the GATS—Note by the Secretariat", 16 July 2002

55 According to its web site, the Financial Stability Forum (FSF) "brings together senior representatives of national financial authorities (e.g. central banks, supervisory authorities and treasury departments), international financial institutions, international regulatory and supervisory groupings, committees of central bank experts and the European Central Bank." See their description on their web site at: http://www.fsforum.org/about/who_we_are.html. Accessed 14 June 2008.

56 Financial Stability Forum. "Report of the Financial Stability Forum on Enhancing Market and Institutional Resilience", 7 April 2008.

57 WTO. "Japan: Schedule of Specific Commitments Supplement 3", WTO Document Symbol GATS/SC/46/Suppl.3. 26 February 1998.

58 WTO. "European Communities and Their Member States: Schedule of Specific Commitments Supplement 3", WTO Document Symbol GATS/SC/31/Suppl.3. 11 April 1997.

59 WTO. "United States of America: Schedule of Specific Commitments, Supplement 3", WTO Document Symbol GATS/SC/90/Suppl.3. The US qualification on the supply of new banking services is that "The offer of new financial services or products is subject, on a non-discriminatory basis, to relevant institutional and juridical form requirements." 26 February 1998.

60 WTO. “Canada: Schedule of Specific Commitments Supplement 4”, WTO document symbol GATS/SC/16/Suppl.4. 26 February 1998.

61 Adam Lashinsky. “Hank Paulson: Out of Time”, Fortune Magazine. 30 October 2007.

62 Freeman, Harry. Op cit., p. 457.

63 WTO, Council for Trade in Services Special Session. “Report of the Meeting Held on 23 July 2002”, WTO Document Symbol TN/S/M/3. 17 September 2002.

64 Harry Freeman, op. cit.

65 WTO. “United States—Measures Affecting the Cross-border Supply of Gambling and Betting Services—Report Of The Appellate Body”, WTO document symbol WT/D285/AB/R. 7 April 2005

66 See for example Joost Pauwelyn, “WTO Softens Earlier Condemnation of U.S. Ban on Internet Gambling, but Confirms Broad Reach into Sensitive Domestic Regulation”, The American Society of International Law—Insight. 12 April 2005.

67 WTO. “United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services (AB-2005-1)—Appellant Submission of the United States”, p. 54. 14 January 2005.

68 In 2007, the US-government sponsored lender Freddie Mac won support from consumer groups when it announced it would not buy certain types of subprime mortgages. See “Freddie Mac Bans Unaffordable Subprime Home Loans”, Center for Responsible Lending, 27 February 2007, posted at http://www.responsiblelending.org/press/releases/page.jsp?itemID=31767669, accessed 13 June 1008.

69 Nicholas Bagley. “The Unwarranted Regulatory Pre-emption of Predatory Lending Laws”. New York University Law Review, Vol. 79. 6 December 2004.

70 Asia Time Online—Daily News. “India’s inflation fans futures anger”. 29 April 2008.

71 Department of Finance, Government of Canada. “Financial Services Collective Request”, February 2006.

72 WTO. “United States of America: Schedule of Specific Commitments, Supplement 3”, WTO Document Symbol GATS/SC/90. 15 April 1994.

73 Since many economists dispute there is a causal relationship between futures trading and price rises, the Indian government would probably fail if it tried to defend its ban as necessary as required using the exceptions clauses in GATS Article XIV.

74 This request from the EC to India is posted at: http://www.gatswatch.org/requests-offers.html#outgoing.

75 Dr. Patricia Arnold. “The GATS: Implications for regulation of financial services in the United States”, presentation to the Transatlantic Consumer Dialogue, 5th Annual Meeting, Washington, D.C. October 28-30, 2002.

76 European Commission. “Report on United States Barriers to Trade and Investment”, p. 57. August 1999.

77 BBC News. “Merrill sued over internet stock tip.” 17 July 2002

78 Gretchen Morgenson. “Caution: This Hybrid Can Sting”, New York Times. 9 March 2003.

79 Vinod, Hrishikesh D., “Divest Investment Banking from Financial Institutions”. IEEP, Fordham U., Economics Working Paper No. 02-01.12 August 2002.

80 In his 2 October 2007 testimony to the U.S. House of Representatives Financial Services Committee, Robert Kuttner stated:“Since repeal of Glass Steagall in 1999, after more than a decade of de facto inroads, super-banks have been able to re-enact the same kinds of structural conflicts of interest that were endemic in the 1920s—lending to speculators, packaging and securitizing credits and then selling them off, wholesale or retail, and extracting fees at every step along the way.” Kuttner’s testimony is posted at: http://www.house.gov/apps/list/hearing/financialsvcs_dem/testimony_-_kuttner.pdf, accessed 13 June 2008.

81 WTO. “United States of America: Schedule of Specific Commitments”, WTO Document Symbol GATS/SC/90. 15 April 1994.

82 The EC request to Japan is available at: http://www.gatswatch.org/requests-offers.html#outgoing.

83 The Japanese request to the US is included in the document: “GATS Requests By State”, USTR. 31 March 2003. Posted at http://www.tradeobservatory.org/library.cfm?RefID=25870. Accessed 16 June 2008.

84 Norvald Instefjord. “Risk and Hedging: Do Credit Derivatives Increase Bank Risk?”, paper presented to conference “Bubbles, Recessions and Golden Ages: A Long Term Look at Technology and Finance”, Centre for Financial Analysis and Policy, Cambridge, England, 24 October 2003.

85 Nelson Schwartz and Eric Dash. “Where Was the Wise Man?”, New York Times. 27 April 2008.

86 Financial Week. “AIG CEO Sullivan ousted: Citi veteran Robert Willumstad takes helm Subprime losses force shakeup at world’s largest insurer”. 16 June 2008.

87 Michael Greenberger. “Our Confusing Economy, Explained”, interview on NPR. 3 April 2008.

88 Alan Greenspan. “Government regulation and derivative contracts”, speech to the Financial Markets Conference of the Federal Reserve Bank of Atlanta, Coral Gables, Florida. 21 February 1997.

89 Scott Lanman. “Bernanke Urged to Do More to Ease Bank Funding Costs” in Bloomberg News. 30 April 2008.

90 Paul A. Volcker. Speech to the Economic Club of New York. 8 April 2008.

91 These Bear Stearns hedge funds invested in subprime derivatives had the ironic names “High-Grade Structured Credit Strategies Enhanced Leverage Fund” and “High Grade Structured Credit Strategies Fund”.

92 Hedgeweek Newsletter. “Brazil builds reputation as hedge fund centre”. 16 February 2008

93 Christopher Cox, Chair of the US Securities and Exchange Commission. “Testimony Concerning the Regulation of Hedge

Funds." To the U.S. Senate Committee on Banking, Housing and Urban Affairs, Washington, D.C. 25 July 2006

94 UNCTAD Secretariat. "Trade and Development Implications of Financial Services", document symbol TD/B/COM.1/EM, p. 9. 3 August 2007.

95 Financial Stability Forum. Op. cit. p. 3.

96 Michael Ewing-Chow. "Securing the Borders:Hedge Funds, Domestic Regulations, WTO and RTAs". Presentation to the 10th SCIBL Conference on The Regulation of Wealth Management. 23 August 2007.

97 Ruth David. "India To Open Door To Hedge Funds", Forbes Magazine. 29 March 2007.

98 UNCTAD Secretariat. Op. cit. p. 5.

99 Harry Freeman. Op cit.

100 UNCTAD Secretariat. Op cit.

101 Myriam Vander Stichele. "Role of Financial Services in Economic Development". Presentation to the UNCTAD Meeting on Trade and Development:Implications of Financial Services, Geneva, Switzerland. 20–21 September 2007.

102 Erik Portanger, Joseph T. Hallinan, and Patrick Barta. "HSBC Sets $16 Billion Deal For Household International; British Firm's Purchase Kicks Off A Big Move Into North America", Wall Street Journal. 15 November 2002.

103 BBC News. 12 May 2008.

104 Minutes of meeting, High Level LOTIS Group, 20 July 2000. The minutes are posted at: http://www.gatswatch.org/LOTIS/2263.html. Accessed 14 June 2008.

105 WTO Committee on Trade in Financial Services. "Report of the Meeting Held on 25 May 2000", WTO Document Symbol S/FIN/M/26. 29 June 2000.

106 Ibid.

107 WTO Committee on Trade in Financial Services. "Report of the Meeting Held on 13 July May 2000", WTO Document Symbol S/FIN/M/27. 23 August 2000.

108 GATS Committee on Trade in Financial Services. "Report of the Meeting Held on 25 May 2000", WTO Document Symbol S/FIN/M/26. 29 June 2000.

109 GATS Working Party on Domestic Regulation. "Revised Draft—Disciplines on Domestic Regulation Pursuant to GATS Article VI:4—Informal Note by the Chairman". 23 January 2008.

110 WTO, Working Party on Domestic Regulation "Revised Draft—Disciplines on Domestic Regulation Pursuant to GATS Article VI:4, Information Note by the Chairman" 23 January 2008. Posted at: http://www.tradeobservatory.org/library.cfm?refID=101417. Accessed 14 June 2008.

111 Kern Alexander. "The World Trade Organization and Financial Stability: The Balance between Liberalisation and Regulation in the GATS", Cambridge Endowment for Research in Finance, p. 8. 2003.

112 Ibid.

113 WTO, Council for Trade in Services Special Session. "Report of the Meeting Held on 28 September 2007", WTO document symbol TN/S/M/27. 14 November 2007.

114 Government of Switzerland. Section II, Article 3.2.c of "Federal Law on Banks and Savings Banks".

115 "Licensing Requirements with Dubai Financial Market", posted at http://www2.dfm.ae/pages/default.aspx?c=605. Accessed on 14 June 2008.

116 The latest draft of the disciplines state "Where technical standards are required and relevant international standards exist or their completion is imminent, Members should take them or the relevant parts of them into account in formulating their technical standards except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of national policy objectives."

117 WTO. "Trade Policy Review—Brazil", WTO document symbol WT/TPR/S/140, Part 5, para. 199, p. 153. 1 November 2004.

118 Shadow Financial Regulatory Committee (Washington). "The Latest Revisions to Basel II and Implementation Plans in the United States", American Enterprise Institute for Public Policy Research, 5 May 2003.

119 Joint Statement of Shadow Financial Regulatory Committees of Asia, Australia-New Zealand, Europe, Japan, Latin America, and the United States, "Lessons from Recent Financial Turmoil", 10 September 2007.

120 "Community Reinvestment Act Information", US Comptroller of the Currency, posted at: http://www.occ.treas.gov/crainfo.htm. Access on 13 June 2008.

121 White & Case LLP. "World Trade Organization & Regional Trade Agreements", p. 27. September 2002.

122 Arnold, op. cit.

123 USTR. "GATS Requests by State". Op. cit.

124 WTO. "United States—Standards for Reformulated and Conventional Gasoline—Report of the Appellate Body", WTO document symbol WT/DS2/AB/R. p. 25. 29 April 1996.

125 WTO. "Brazil—Measures Affecting Imports of Retreaded Tyres—Report of the Panel", WTO document symbol WT/DS332/R. 12 June 2007.

126 Financial Stability Forum. Op. cit. p. 6.

127 Ibid.

128 Senior Supervisors Group. "Observations on Risk Management Practices during the Recent Market Turbulence", 6 March 2008.

129 On 11 March 2008 the US Federal Reserve offered to lend $200 billion in Treasury bonds in exchange for mortgage backed securities.

130 David Einhorn. Speech given at the Grant's Spring Investment Conference, 8 April 2008.

131 Aaditya Mattoo. "Shaping Future GATS Rules for Trade in Services", World Bank. 20 April 2001.

CAW 567 OTTAWA