

The GATS and financial services: the role of regulatory transparency

Kern Alexander¹
University of Warwick

Abstract *The World Trade Organization (WTO) General Agreement on Trade in Services (GATS) and its Annex on Financial Services provide the international legal framework for the regulation of cross-border trade in financial services. This paper analyses the main provisions of the GATS that relate to regulatory transparency of trade in financial services. The GATS generally provides a flexible framework for states to negotiate liberalisation commitments while providing WTO members with autonomy to promote their regulatory objectives. The extent to which states, however, must adhere to GATS disciplines regarding transparent regulatory practices has become a source of policy debate. Although the WTO has played no role in setting financial regulatory standards, the transparency obligations of the GATS have important implications for how financial regulators can achieve their objectives. Moreover, GATS transparency obligations can potentially create disproportionate administrative costs for developing countries and thus undermine their financial sector development. The paper argues that the principles of regulatory transparency in the GATS should be interpreted in a way that favours regulatory discretion to achieve financial stability and other prudential objectives. In the post-Doha era, WTO members should attempt to clarify GATS transparency obligations in a way that promotes financial development and regulatory autonomy.*

Introduction

The rapid changes in global financial markets and the ability of regulators to respond to those changes by applying good regulatory practices is a crucial area of financial regulation. This article examines the role of regulatory transparency in the General Agreement on Trade in Services (GATS) and how it can impact the regulation of cross-border trade in financial services.² Transparency has been recognised as one of the important norms and principles of a regulatory system and is particularly

¹ I would like to thank my colleagues at the University of Zurich, Rechtswissenschaftliches Institut for their collaboration and special thanks to Professor Christine Kaufmann for her most helpful comments and insights and to the Swiss National Science Foundation and the Cambridge Endowment for Research in Finance for their support. Thanks also to the editors of the *Cambridge Review of International Affairs* and, in particular, to Lynn Kuok and Christopher J Piranio for their thoughtful and careful editorial comments, and to the three anonymous referees for their helpful comments. All errors remain solely mine.

² The text of the GATS can be found on the WTO website (< www.wto.org >). See also the *Legal texts: the results of Uruguay Round of multilateral trade negotiations* (Cambridge UK: Cambridge University Press).

important in financial regulation. It is also an essential principle of the multilateral trading system, as the transparent adoption and implementation of laws and regulations can facilitate international trade and improve market access (Keiya and Nielson 2002). Transparency is a fundamental principle because it ensures that other important principles of regulation are achieved, such as independence and accountability of regulators and providing market participants with sufficient information to make informed decisions (Amentbrink 2006, 5–6).

Transparency has become increasingly important in many areas of public policy. Indeed, the application of the transparency principle in international trade relations has been recognised in the Doha trade round, where paragraph 22 of the Doha Ministerial expressly states that ‘transparency’ is an essential requirement for making the rules and procedures of international trade agreements clear and predictable (World Trade Organization [WTO] 2001c).³ Transparency is an essential norm of international trade because it allows market participants, state authorities and members of the public to determine what the rules are and how they should be applied.

The meaning of transparency, however, has not always been well defined. The principle of transparency can be interpreted in a number of ways, and even manipulated, to provide a rationale for various forms of governmental and private sector action. In international trade regulation, there is a danger that transparency can be used to justify certain regulatory practices that might place some countries at a competitive disadvantage *vis-à-vis* other countries and thereby serve a protectionist agenda. Moreover, too much transparency in financial regulatory practices can in certain circumstances undermine the ability of the regulator to achieve its prudential objectives if the regulator is required to release information to the market or to enforce regulations that has the effect of causing or exacerbating a financial crisis. Nevertheless, transparent regulations are important because they allow market participants to be aware of their rights and obligations (Dobson and Jacquet 1998, 28).

The article analyses the concept of regulatory transparency in the GATS and the relevant principles and provisions that influence the domestic regulation of financial markets. The article suggests that the transparency disciplines of the GATS should be applied carefully to take account of the traditional objectives of financial regulation, which are generally to promote financial stability and protect depositors and investors. Previous work (Wolfe 2003) examined some of the key issues of regulatory transparency in the GATS and its impact on developing countries. Transparency of WTO decision-making has already been addressed in recent academic literature (Esty 2002, 7–22; Hoekman 2002, 24–46; Van den Bossche 2005, 148–162) and transparency in the WTO dispute settlement mechanism has been addressed (Van den Bossche 2005, 212–217; Hoekman and Kostecki 2001, 70).

It should be emphasised at the outset that, except for telecommunication services,⁴ the GATS does not deal with transparency and reporting requirements

³The WTO Doha trade round negotiations, which included negotiations on services, ended unsuccessfully in 2006. Efforts to revive the negotiations at Davos, Switzerland in January 2007 resulted in a resumption of informal bilateral discussions involving Brazil, India, the European Communities, and the US, which have produced constructive engagement but no agreement over the difficult issues involving agricultural tariffs, sensitive agricultural product exemptions and safeguard measures.

⁴See Marco Bronckers and Pierre Larouche (2007).

for companies and firms.⁵ The GATS addresses the different issue of transparency in regulatory practices and the level of information that domestic regulators of WTO member states should make available to foreign services suppliers of other WTO members.⁶ This article extends the academic analysis of GATS to include how the GATS governs—and should govern—transparency in regulatory practices for financial service firms.

The article proceeds as follows. The second section examines the legal and regulatory dimension of transparency and the various forms it can take in a regulatory system. The third section analyses how the principle of transparency has been applied in the WTO agreements with particular focus on the GATS. The final section examines the role of transparency in financial regulation and how transparency might be defined in prudential regulatory practice. The article argues that transparency is a crucial element of any financial regulatory regime, but that the efficient regulation of financial markets requires a balance between the needs of financial services firms to have access to information on regulatory procedures and requirements and the need for regulators to exercise discretion in how they apply the transparency principle to achieve prudential regulatory objectives.

The legal and regulatory dimension of transparency

Transparency

Transparency involves openness in government and in the exercise of state power and is crucial for maintaining the accountability of those who exercise public functions. The regulation of the economy involves the exercise of a public function and transparency is necessary to ensure that those who exercise regulatory functions are accountable to those who are subject to the regulation. In this regard, transparency means that the regulated person must be able to ascertain if the exercise of state regulatory practices follows a consistent approach and is predictable with respect to its decisions and actions. Although openness or transparency in government is viewed as fundamental to the 'health of the modern state' (United Kingdom [UK] Government 1997), a balance should be struck between the need for public access to official information and preserving the state's ability to exercise its regulatory function and achieving its legally mandated objectives.

In modern legal jurisprudence, transparency is an important principle for determining the validity of legal rules. Positivist legal theory holds that the validity of legal rules depends in part on whether those obliged by the rules can

⁵ Other transnational legal regimes cover these market reporting requirements, such as the European Union's financial services legislation governing the implementation of the EU Financial Services Action Plan (Andenas and Avgerinos 2003).

⁶ Essentially, the GATS addresses transparency of regulatory practices, while the European Union Financial Services Action Plan addresses transparency in market practices for firms (UK FSA 2006, 2–10). The EU Prospectus Directive, however, contains minimum requirements for regulatory practice that include response periods for applications for regulatory approval and licenses. See Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003. Article 13 (2) requires the competent authority to notify the 'issuer' of its decision 'regarding the approval of the prospectus within 10 working days of the admission of the draft prospectus.

ascertain in advance what behaviour or forbearance is required (Hart 1961, 10). Similarly, natural-law theorists have recognised the importance of *clarity of laws* to the internal morality of law. Indeed, Fuller (1964, 63) observed that ‘obscure and incoherent legislation’ can undermine the legality or internal morality of the law. This view holds that even in a legal system where the legislature provides the official source of law, it cannot be exempt from the responsibility of legislative clarity in adopting statutes (Fuller 1964, 64). In this context, the principle of transparency would hold that no court should uphold a statute that substantially lacks in clarity. The constitutional law of major legal systems has reinforced this notion of transparency. For instance, United States (US) constitutional law has recognised the importance of ascertainable and transparent legal rules. Under US law, the constitutional principle of due process of law holds that a statute is impermissibly vague, and thus void on its face, if the law in question ‘fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits’ or if it ‘authorises or even encourages arbitrary and discriminatory enforcement’.⁷ A law that fails to define clearly the conduct it proscribes ‘may trap the innocent by not providing fair warning’ and may have the practical effect of impermissibly delegating ‘basic policy matters to policemen, judges and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application’.⁸ A law or regulation may be void for vagueness if it lacks clarity and transparency of meaning and purpose.

In economic regulation, however, US courts have recognised that these transparency standards should not be mechanically applied, and that the degree of vagueness tolerated by the constitution can vary depending in part on policy objectives and the subject and persons regulated.⁹ In policymaking, transparency can mean different things to different people depending on what they want to achieve.¹⁰ According to this view, transparency is defined by its purpose. Essentially, transparency has three main components: its political dimension (decision-making), procedure and substantive rules. Transparent decision-making allows members of the public a certain level of access to political decision-making through either active participation or observation. This form of public scrutiny strengthens the institutional credibility and legitimacy of a government and is essential for democratic decision-making.¹¹ Second,

⁷ See *Hill v Wood*, 530 US 703, 719 (2000), citing *Chicago v Morales*, 527 US 41, 56–57 (1999). In other words, the law or regulation is void if it is so vague that persons ‘of common intelligence must necessarily guess at its meaning and differ as to its application’ (*Connolly v General Construction Co*, 269 US 385, 391 [1926]).

⁸ *Grayned v Rockford*, 408 US 104, 108–109 (1972).

⁹ See *Hoffman Estates v Flipside, Hoffman Estates*, 455 US 489, 498 (1982), observing that economic regulation can be subject to a less strict vagueness test because its subject matter is often more narrow and because business can be expected to consult the relevant laws in advance and to plan for contingencies.

¹⁰ For instance, some economists have emphasised the importance of transparency of official state records in documenting property ownership as a necessary element in attracting investment and promoting economic growth (De Soto 2000, 5–7).

¹¹ A related issue on the subject of decision-making concerns the dispute settlement process in the WTO, which can be criticised for its non-transparent process and confidential proceedings. See discussion in Van den Bossche (2005, 212–217).

procedural transparency or transparency in process means rules and procedures in the operation of organisations, which are clearly defined, publicly disclosed and written into law. This involves the constitutional principle of due process of law that suggests a guarantee that, 'whatever the substance of the rules of conduct government promulgates', those rules may not be brought to bear on any person so as to deprive them of 'life, liberty, or property' without fair procedures, such as a hearing before a fair and impartial tribunal (Tribe 2000, 1332).¹² Similarly, in the regulatory sphere, transparency requires more openness about the way in which regulators act and the basis upon which decisions are made (UK Financial Services Authority [FSA] 2005, 13–14; 2006, 2–4). This transparency of process is vital in establishing accountability of governmental institutions.

The third element is transparency with respect to substantive rules, meaning availability of information on the requirements of regulations, standards and rules. Lack of transparency on substantive rules can lead to judicial or administrative decisions that are arbitrary and capricious and that discriminate in the application of different criteria and requirements to comparable circumstances. Moreover, substantive rules or principles of transparency can necessarily require that, to qualify as 'law', a statute or regulation will have to meet substantive requirements of rationality, non-oppressiveness and fairness. Legislative clarity, however, does not preclude the use of standards that have general meaning, such as for example 'good faith', 'due care' and 'fairness' (Fuller 1964, 65). These standards can derive their meaning from ordinary activity in day-to-day life, such as those found in the customary practices of commercial traders. Although precision of meaning for legislative and regulatory provisions is often most desirable for regulating economic and social conduct, some provisions may contain inherently ambiguous terms that reflect the complexity of the subject matter regulated or represent a political compromise by the legislator, which was unable to agree more precise terms (Hudec 2002, 213).

These elements of transparency have become important aspects of good regulatory governance. Transparency allows the exercise of public authority to be publicly accessible and enables the use of political power to be subject to legal and constitutional constraints. Transparency often entails procedural rules regarding the state's obligation to publish, notify and administer fairly and reasonably its policymaking decisions. This allows public stakeholders to monitor and oversee state decision-making so that they can monitor and hold state officials accountable.¹³ Transparency is the key principle that allows members of the public to hold governmental authorities accountable for their

¹² See also European Convention on Human Rights Article 6 (requiring a hearing before a fair and impartial tribunal). The requirement of a fair and impartial tribunal has been recognised by UK courts in *R (on the application of Fleurose) v Securities and Futures Authority Ltd* [2001] EWHC Admin 292, [2001] 2 All ER (Comm) 481. Moreover, the European Court of Human Rights has interpreted Article 7(1) of the European Convention as requiring regulatory and criminal offences to be clearly defined in law so that an individual may foresee the legal consequences of its actions (*Kokkinakis v Greece* (1993) 17 EHRR 397).

¹³ Similarly, in the private sector, transparency provides more information for shareholders regarding how their agents or officers are managing their wealth (Jensen and Meckling 1976; UK FSA 2006).

actions. It requires a legal and regulatory framework that involves information-sharing and monitoring that enables the public as principals to assess and direct the activities of their governmental agents.

The scope and definition of transparency directly implicate governmental decision-making in two main ways. First, process-oriented safeguards containing procedures and rules provide channels through which the exercise of authority can be reviewed and held to account. As mentioned above, this involves procedural requirements to publish, notify and establish regular procedures for the exercise of state authority. The second involves substantive standards of transparency that involve an assessment of whether the exercise of authority conforms with principles of equity and fairness. For instance, do the procedural rules that disclose information to the public enable the public to monitor effectively state action, to understand the content and nature of their obligations, to make informed decisions and, if necessary, to control state action or hold it accountable.

Transparency and financial regulation

Regulatory transparency has become an important issue for financial regulators as they seek to manage the growing liberalisation of financial services trade and the related cross-border capital flows that have impacted the provision of banking and financial services (IMF 2004). Since the late 1970s, there have been a growing number of banking and financial crises and several major sovereign debt crises that have raised the issue of the need for more transparency in domestic financial regulation (Eichengreen 1999). In response, the International Monetary Fund (IMF) and the World Bank published in 2000 a code of good practices on transparency in monetary and financial policies (IMF 2000). The IMF observes that the 'attitude with respect to transparency by central banks and financial agencies is evolving, reflecting changes in the international environment' (IMF 2000). Several factors have influenced central banks and financial regulators to adopt greater transparency in their practices. First, a growing number of high-profile bank failures and financial scandals in the 1980s and 1990s created political pressure on central banks and regulators to provide greater openness in their activities and policies. Second, the forces of financial globalisation that have been fostered by liberalisation in financial services trade, growing capital flows, and substantial consolidation, conglomeration and convergence in the financial industry have led central banks and regulators to operate with a greater degree of transparency in their monetary and financial policies.

Third, the IMF has recognised the growing importance of the GATS and its domestic regulatory disciplines that create both general and specific transparency obligations in regulatory practices (IMF 2000). Fourth, the growing political independence of central banks in the instruments they use to achieve inflation targets has led to more public disclosure of how they are meeting those targets and their corresponding credibility with market participants. Finally, advances in communication technology, and growing public access to websites and electronic databases, have made it easier for central banks and regulators to communicate their regulatory requirements, policy objectives and other actions to the public.

These structural and institutional changes in financial markets are causing central banks and regulators to become more transparent in their practices (WTO 1998a).

Transparency in regulatory practices are necessary to give domestic and foreign service providers adequate information regarding the regulatory requirements and obstacles they may encounter when entering foreign markets (Hindley 2000, 33). As both developed and developing countries reduce national barriers to trade in financial services and liberalise regulatory restrictions on the provision of financial services, transparency in financial regulation becomes an important regulatory instrument that enables financial firms to ascertain differences in prudential regulatory practices across jurisdictions. It is the role of transparency in regulatory practice to assist firms in understanding what these regulatory barriers are and how they can be complied with.

Transparency and the WTO agreements

Scope and definition of transparency in the WTO agreements

The WTO agreements mandate four levels of transparency: (1) publication of laws and regulations, (2) notification of new measures to trading partners, (3) enquiry points for trading partners and (4) independent administration and adjudication. These requirements are based on a notion of transparency that implies openness, communication and accountability. The concept of transparency is very broad and, although it appears throughout the WTO agreements, it is not specifically defined. The various WTO committees and working groups have published numerous documents and reviews addressing the issue of transparency and have settled on a general notion of transparency that involves greater clarity and predictability in regulatory rules and enhanced disclosure of information about trade policies and regulations (WTO 1999c, 2; 2002a; 2002b).¹⁴

Most international trade agreements contain the principle of transparency as a core principle (Feketekuty 2000, 229). Indeed, the principle of transparency is addressed in all the WTO agreements. For instance, Article X of the GATT addresses transparency in the context of publication and administration of trade regulations, stating that laws, regulations, judicial decisions and administrative rulings of general application, as well as 'agreements affecting international trade policy' shall be published promptly and accessible to governments and traders.¹⁵ The Technical Barriers to Trade (TBT) Agreement contains the same obligation and, in addition, an obligation to inform other member states when a relevant international standard or recommendation does not exist, or when the technical regulation has a significant effect on the trade of other member states.¹⁶ Similarly,

¹⁴ The Committee on Sanitary and Phytosanitary Measures stated that '[t]ransparency in the context of the World Trade Organization is used to signify one of the fundamental principles of its agreements: the aim is to achieve a greater degree of clarity, predictability and information about trade policies, rules, and regulations of Members' (WTO 2002b, 1).

¹⁵ GATT, Article X:1.

¹⁶ TBT, Articles 2.9–2.11 and Article 5.6 (1)–(4). For instance, when a relevant international standard does not exist, Article 2.9.1 states that the member 'shall publish a notice in a publication at an early appropriate stage, in such a manner as to enable interested parties in other Members to become acquainted with it' (WTO 1999b, 123).

the notification requirements in the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) are used to keep member authorities informed of new or changed regulations in other member states. The SPS Agreement has also been interpreted as requiring member authorities to answer reasonable questions and to publish regulations promptly (WTO 1999c, 2).¹⁷ These obligations to inform and to notify require WTO members to act proactively in providing each other with the necessary information about trade policies, rules and regulations.¹⁸

Further, to complement the notification requirement, the TBT Agreement requires members to establish a national enquiry point for other WTO members to request and obtain information and documentation on technical standards, regulations and test procedures, as well as on participation in bilateral and regional standard-setting bodies.¹⁹ WTO members can monitor compliance with the TBT Agreement through the operation of a TBT Committee, which gives WTO members the opportunity to consult, to exchange information and to monitor compliance. Similarly, the Trade in Intellectual Property Agreement (TRIPS) addresses the issue of transparency by requiring publication of laws, regulations, final judicial decisions and administrative rulings of general application.²⁰

The transparency obligation is one of the central elements of the WTO Agreements and is based on the belief that democratic governance and efficient markets are enhanced if the participants are well informed. Specifically, this means that members must publish all relevant regulations and laws, establish national enquiry points and notification procedures when regulations are amended or appealed, and for regulatory agencies to have a degree of autonomy. These transparency requirements are aimed at providing both clarity within a country and transparency between member countries (Wolfe 2003, 158). The ideas of regulatory autonomy and transparency are central to the politics and legal

¹⁷ The SPS Agreement contains provisions expressly addressing transparency in Article 7 (Transparency) and in Annex B (Transparency of sanitary and phytosanitary regulations). Article 7 states that '[m]embers shall notify changes in their sanitary and phytosanitary measures and shall provide information on their sanitary and phytosanitary measures' according to the provisions of Annex B, which require the prompt publication of regulations so 'as to enable interested members to become acquainted with them' (WTO 1999b, 68). Annex B(3) and (5) also requires members to establish national enquiry points and notification procedures, respectively, to answer the requests of 'interested members as well as for the provision of relevant documents'. When there are no applicable international standards or when proposed regulations might deviate from international standards, Annex B5(c) requires members to 'provide upon request to other Members copies of the proposed regulation'. See also discussion in Donna Roberts and Laurian Unnevehr (2005, 480–481).

¹⁸ The *Sanitary and Phytosanitary Agreement Handbook* (WTO 2002a, 2) discusses how the use of notifications in the Agreement on Agriculture allows members to monitor the implementation of commitments in the areas of subsidies and market access.

¹⁹ Article 10.1 TBT requires that '[e]ach Member shall ensure that an enquiry point exists which is able to answer all reasonable enquiries from other Members and interested parties in other Members as well as to provide the relevant documents' that are set forth in Article 10.1.1–10.1.6.

²⁰ Article 63(1)–(4) TRIPS entitled 'Transparency' requires, among other things, that members must notify the TRIPS Council of all regulatory changes and administrative arrangements. The Council monitors compliance. Article 63(1) TRIPS (WTO 1999a).

framework of the WTO, and are recognised as important aspects of national administrative law (Wolfe 2005).

The GATS and regulatory transparency

The GATS explicitly recognises a government's right to regulate and introduce new regulations to meet national policy objectives. It also addresses the particular needs of developing countries to exercise this right. The GATS Preamble supports this view by stating that the WTO agreements shall promote the 'interests of all participants on a mutually advantageous basis and at securing an overall balance of rights and obligations, while giving due respect to national policy objectives'. In analysing the GATS provisions requiring regulatory transparency, it must be borne in mind that the GATS Preamble provides clear language to 'establish a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade under conditions of transparency and progressive liberalisation and as a means of promoting the economic growth of all trading partners and the development of developing countries'.²¹ The general obligation of transparency is found in Article III and covers all members' services sectors regardless of whether they are subject to specific commitments, unless a GATS exception applies.²² Article III requires that members publish all relevant laws and regulations, and set forth clear standards so that foreign traders can discern exactly what conditions must be fulfilled in order to conduct trade in the host jurisdiction.²³ Moreover, national authorities must notify the Council for Trade in Services of any changes in regulations that apply to services that are subject to specific commitments.²⁴

To improve compliance with the transparency obligation, Article III requires member countries to establish enquiry points for dissemination of trade-related laws and regulations to other WTO members on request.²⁵ Governments were required to establish these enquiry or contact points in their bureaucracies within two years of the WTO agreements becoming effective (1995) so that they can respond promptly to trade-related questions posed by suppliers of services from other member countries. Several countries have proposed to increase the role played by these contact points by requiring, for instance, that national authorities of WTO members respond to the questions of all 'interested persons' that are

²¹ GATS, Preamble.

²² The transparency obligation in Article III is a general obligation of the GATS as is the Most Favoured Nation (MFN) obligation that is subject to full implementation by WTO members unless an express exception in the GATS applies. See discussion in Arup (1999, 110–115).

²³ Article III:1 requires each member to publish promptly 'all relevant measures of general application' that affect operation of the agreement. Mina Mashayekhi and Elisabeth Tuerk (2007) refer to the general transparency requirements of prior publication and prior comment in Article III:1 as an *a priori* obligation.

²⁴ Article III:3 GATS. Specifically, members must notify the Council at least once a year whether there have been any changes to their laws, regulations or non-binding administrative guidelines which significantly affect trade in services sectors subject to specific commitments. However, there is no requirement to disclose confidential information (Article IIIbis).

²⁵ Article III:4.

submitted through these contact points. Other proposals recommend that countries establish sector-specific enquiry points.²⁶

In addition, the principle of transparency found in Article III and in the GATS Preamble provides that members should undertake scheduling in a precise and clear manner so that all members can understand the scheduling commitments of all WTO members. Article XX:3 of the GATS reinforces this by providing that members' schedules are 'an integral part' of the GATS and thus constitute important legal obligations under the WTO agreements.²⁷ Precision and clarity in scheduling commitments are an important aspect of the GATS framework and constitute an important part of the transparency obligation as set forth in the Preamble and in Articles III and VI (WTO 2001a).²⁸

Article VI Transparency. The GATS recognises that domestic regulation can take the form of licensing requirements and technical standards that do not constitute unlawful trade barriers, but which nevertheless pose obstacles to market access and result in excessively burdensome compliance costs that nullify the benefits deriving from a member's liberalisation commitments (Marchetti 2003). In the financial services sector, these regulatory barriers can be substantial, as the regulation of banking, insurance and capital markets depends heavily on technical standards such as capital adequacy and financial disclosure rules, and on qualification and licensing requirements for brokers, agents and dealers.²⁹ To address these barriers, Article VI:1 requires that in sectors where members have undertaken 'specific commitments' they 'shall ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner'. Moreover, Article VI:5 prohibits members that have

²⁶ The GATS notification obligations are not as far-reaching or intrusive on state regulatory practice as the SPS and TBT agreements' requirements to provide ongoing notification and information about regulatory changes and to inform members when there are no regulatory rules to address the issue in question. Moreover, business groups have lobbied for increased transparency of dispute resolution between foreign service providers and host-country authorities and any related court proceedings and rulings (Forum on Trade and Democracy; WTO 2005a).

²⁷ The WTO Appellate Body (2005b) reaffirmed the centrality and legally binding nature of a member's schedule of market access commitments in *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services (US—Gambling)* by holding that market access commitments shall be interpreted strictly and that any applicable exceptions justifying a member's avoidance of its commitment must be applied in a manner that is not arbitrary or discriminatory. Article XXI, however, permits members to reverse binding liberalisation commitments after they have been in force for three years without regard to the rationale for such change so long as the member undertaking the modification in commitments provides compensation to other WTO members whose interests are impaired. For an interpretation of the GATS scheduling guidelines, see WTO (2001a).

²⁸ Also, Article XIX GATS (entitled 'Negotiation of Specific Commitments') requires members to engage in ongoing negotiations with a view to taking further commitments to open markets on a national treatment and market access basis.

²⁹ Pursuant to Article VI:4 (a)–(c), GATS disciplines have already been agreed for the accountancy sector (WTO 1997). The accountancy disciplines mandate that licensing, qualification and technical standards governing accounting and auditing may not be 'more trade restrictive than necessary' to accomplish the legitimate purpose of a regulation (WTO 1998b).

undertaken specific liberalisation commitments³⁰ from maintaining technical standards and licensing requirements that form unnecessary trade barriers or that nullify or impair the commitments that have been undertaken.³¹ In addition, Article VI:4(a)–(c) provides a mandate for members to negotiate and approve rules to ensure that domestic licensing, qualification and technical standards are ‘not more burdensome than necessary to ensure the quality of the service’.³²

In contrast, Article VI:2 applies to all services sectors, regardless of whether commitments have been made, by requiring that members establish the means for prompt reviews of administrative decisions relating to applications by foreign suppliers for the supply of services for all sectors, regardless of whether specific liberalisation commitments have been made for those sectors. This means that member states are required to establish the legal and regulatory institutions (‘judicial, arbitral or administrative tribunals or procedures’) that allow all service suppliers of WTO members to seek legal appeals and other forms of administrative redress for unsuccessful applications and conditional approvals of applications (Van den Bossche 2005, 497). At the request of an affected supplier, these mechanisms should provide for the ‘prompt review of, and where justified, appropriate remedies for, administrative decisions affecting trade in services’.³³

To ensure regulatory promptness, Article VI:3 requires that where a service provider has applied for authorisation from a domestic authority to provide services, the competent authorities shall respond to the application in a reasonable period of time after the submission of the completed application. Although this provision only applies to services on which specific commitments have been made, the obligation would reduce the ability of regulators to use delay and

³⁰ Applies to specific commitments taken under Article XVI (market access), Article XVII (national treatment) and Article XVIII (any other commitments).

³¹ Article VI:5 (a)–(b) states in relevant part,

- (a) In sectors in which a Member has undertaken specific commitments ... the Member shall not apply licensing and qualification requirements and technical standards that nullify or impair such specific commitments in a manner which:
 - (i) does not comply with the criteria outlined in subparagraphs 4(a), (b) or (c); and
 - (ii) could not reasonably have been expected of that Member at the time the specific commitments in those sectors were made.
- (b) In determining whether a Member is in conformity with the obligation under paragraph 5(a), account shall be taken of international standards of relevant international organizations³ applied by that Member.

The term ‘relevant international organizations’ refers to international bodies whose membership is open to the relevant bodies of at least all members of the WTO.

³² Article VI:4 states in relevant part,

With a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services, the Council for Trade in Services shall, through appropriate bodies it may establish, develop any necessary disciplines:

- (a) based on objective and transparent criteria, such as competence and the ability to supply the service;
- (b) not more burdensome than necessary to ensure the quality of the service;
- (c) in the case of licensing procedures, not in themselves a restriction on the supply of the service.

³³ Article VI: 2(a).

dilatory tactics in reviewing applications as protectionist instruments to keep out foreign services suppliers.

Potentially, the most far-reaching of these Article VI provisions is Article VI:4(b) that sets forth a broad and ambitious mandate for WTO members to engage in negotiations to develop disciplines to ensure that regulatory measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services. These disciplines should be based on objective and transparent criteria and on the principle that regulatory requirements should not be more burdensome than necessary to ensure the quality of the service. Article VI:4 disciplines can potentially apply to all of a member's services sectors, regardless of whether the member has scheduled specific commitments under Part III for market access or national treatment. However, for these disciplines to become effective, they must acquire content, which members can only provide through negotiations. To this end, the GATS Committee on Domestic Regulation has achieved little progress in its negotiations over domestic regulation disciplines.³⁴ However, despite the lack of progress, where a member has made specific liberalisation commitments Article VI:5 prohibits the member from adopting any regulatory measures (licensing and qualification requirements, and technical standards) that nullify or impair commitments already undertaken and requires that the measure in question be based on objective and transparent criteria.

Article VI disciplines raise important issues regarding the nature and scope of domestic regulation and could potentially serve as a point of convergence for the development of international financial regulatory standards. Although Article VI:4(b) provides a broad mandate for members to negotiate both procedural and substantive standards of international regulation, negotiations over Article VI disciplines have been limited primarily to procedural issues. An agreement on procedural disciplines, however, could have a disproportionate impact on developing and poorer countries, which do not have the sophisticated regulatory apparatus, legal framework and economic system to provide the necessary level of administrative review, notice and regulatory transparency required under Article VI. This could put many developing countries at a disadvantage because of the disproportionate costs of complying with such standards. In contrast, developed countries with the experience and resources to administer complex regulatory regimes will have an advantage in complying with Article VI disciplines.³⁵

In summary, the GATS transparency obligation has evolved and become more concrete in two areas: (1) procedural requirements to ensure increased transparency and predictability of relevant rules and regulations and (2) progressive liberalisation through negotiations to obtain market access commit-

³⁴In 2004, the US government proposed minimum requirements for transparency in the publication and accessibility of domestic regulation standards. The US proposal suggests several areas where transparency can be enhanced, including an *a priori* comment process that would consist of an opportunity to comment on, and address in writing, the substance of regulatory standards before they are adopted (WTO 2004).

³⁵However, Article IV assists developing-country exporters by requiring developed countries to establish special points of contact for services suppliers of developing countries so that they can ascertain market entry information about regulatory standards and technical requirements.

ments in sectors that must be subject to reasonable, objective and impartial regulatory practices. Specifically, the issue of transparency is addressed in Article III requesting the publication of measures of general application, notification and enquiry points. Article VI:4 holds the most potential for regulatory reform by providing a mandate for WTO members to enter negotiations to establish domestic regulatory disciplines to ensure that qualification requirements, technical standards and licensing procedures are transparent and not more burdensome than necessary to achieve legitimate regulatory objectives.

Ongoing efforts in the GATS to define the transparency obligation

As mentioned above, an important objective of Article VI is to ensure that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services (WTO 2006a; Wouters and Coppens 2007). To this end, the Council for Trade in Services has a mandate to establish bodies to develop any necessary disciplines for such requirements. Since the GATS was adopted in 1995, however, the WTO has made little progress in negotiating standards for the domestic regulation of trade in services with the exception of the WTO Working Party on Professional Services (WPPS) that agreed to licensing and mutual recognition standards in the accountancy sector (WTO 1995; 1997; 1998b).³⁶ To build on its success, the WTO converted the WPPS into the 'Working Party on Domestic Regulation' (WPDR) to facilitate negotiations on domestic regulation in other services sectors (WTO 2001c). The Chair of the Working Party released a draft statement in 2006 that provided a framework for future negotiations that focuses on two main areas: (1) the development of Article VI:4 disciplines with specific focus on *transparency* and *necessity* and its relationship with other Article VI disciplines; and (2) the development of disciplines for other professional services sectors based on the accountancy disciplines (WTO 2006b).³⁷

Negotiations over transparency in financial services regulation essentially involve the following areas: deadlines for processing applications, procedures for licensing and authorisation, responding to inquiries on regulations by services

³⁶ The mutual recognition of home country standards for the accountancy sector took place under the Article VII GATS rules for the negotiation and recognition of home country regulatory measures. The Article VII rules contain transparency obligations that relate to any negotiations that take place between WTO members to recognise the home state regulatory standards of foreign services suppliers. Members are required to 'inform the Council for Trade in Services' within 12 months of the effective date of the WTO Agreement of 'existing recognition measures and state whether such measures are based on agreements or arrangements' (Art. VII (b)). If a member engages in such negotiations, it must 'promptly inform the Council for Trade in Services as far in advance as possible of the opening of negotiations'. The member must 'provide adequate opportunity to any other Member to indicate their interest in participating in the negotiations' before the negotiations enter 'a substantive phase'. Moreover, the Council for Trade in Services must be informed immediately by the member if it 'adopts new recognition measures or significantly modifies existing ones' and the member must 'state whether the measures are based on an agreement or arrangement' (Art VII (c)).

³⁷ For a detailed discussion of the WPDR proposals and deliberations, see Mashayekhi and Tuerk (2007).

suppliers, appeal and review mechanisms, opportunity for prior comment and inquiries, and national treatment in procedures (Mashayekhi and Tuerk 2007). Similarly, the Working Party recognises that transparency's relation to regulatory practices involves certain criteria that include: reasonable advance notice before implementation, public availability to service suppliers, specification of reasonable time periods for responding to applications, and providing information on why an application was declined and on procedures for review of administrative decisions (WTO 2006a).

The goal of these proposed disciplines on transparency in licensing standards is to enhance the clarity of the process. Some proposals require countries to establish sound and publicly available licensing procedures, mandating notification within a reasonable period of time, notifying applicants of the status of their applications and providing applicants with the reasons for denial (WTO 2004). Other proposed disciplines are designed to ensure that licensing requirements do not procedurally prevent market access by discriminating against foreign providers of services.

As discussed above, Article III requires the publication of newly adopted measures in a timely manner. Several countries have proposed disciplines that would also require the publication of the rationale behind new measures and of a regulatory impact assessment of the costs associated with new measures (WTO 2006b). A requirement to publish rationales could be the most controversial aspect of transparency disciplines. Some countries, for instance, the US, seek to expand the publication requirement by (1) making measures available to all interested parties; (2) publicising 'information about processing deadlines, rights of appeal, and notification with regard to violations of the terms of a license' and (3) publishing measures in plain language (WTO 2004). Although this type of transparency of process would facilitate monitoring of adherence to WTO obligations, it could potentially impose substantial and disproportionate costs for developing and emerging market economies that do not have the necessary level of expertise or resources to make such a system work effectively. If such proposals were adopted, it would be necessary to provide additional and more comprehensive technical assistance to advise countries on how to build these regulatory institutions.

Overall, the GATS regime provides a flexible framework for WTO members to negotiate liberalisation commitments while retaining national sovereignty to take regulatory measures that may have the effect of restricting cross-border trade in services. In the area of financial services, members have not undertaken negotiations to establish regulatory disciplines under Article VI:4 that could define the scope of the transparency obligation regarding technical standards and licensing requirements. This is mainly because the GATS has not been traditionally concerned with the content and scope of domestic regulation, but the growing pressures of financial globalisation are now raising important issues regarding the extent to which WTO members should be negotiating procedural and substantive regulatory disciplines that can provide a level playing field for cross-border trade in financial services. Although the WTO does not have the capacity or the mandate to set international standards of financial regulation, Article VI:4 allows members to enter negotiations over domestic regulatory disciplines that can potentially add more definition to the GATS transparency obligation and thereby impact on prudential regulatory standards.

Prudential regulation, the GATS and transparency

The balance between prudential regulation and transparency

Prudential rules help financial institutions to measure and manage their exposure to financial risk. Supervision of a highly regulated financial system is different from supervision of a system open to domestic and foreign competition. Opening financial markets to foreign financial firms can itself contribute to strengthening domestic financial systems through the creation of more competitive and efficient host-country markets (Kono et al 1997; Dobson and Jacquet 1998, 26–28; Claessens and Jansen 2000, 14–19). At the same time, adequate prudential regulation and supervision play an important role in achieving the maximum benefits of liberalisation while minimising the risks (Eichengreen 1999, 41–43). The measures to promote competitive markets must be complemented by measures ensuring the stability of the financial system and providing adequate protection for investors and consumers of financial services (Key 2000, 7).

Effective supervision requires reliable information on the financial condition of banking and financial service firms. Access to such information includes the availability of records and the regular publication of financial statements based on accepted accounting standards (Basel Committee 1997, Core Principle 21). The goal is to provide a true and fair view of a firm's financial position with some indication of the broader condition of a particular financial sector. The benefits of transparency, however, are not absolute. Although transparency can provide investors and depositors with more information that can enable them to offset risks, it can also result in increased volatility that can, in certain circumstances, undermine financial stability (Persaud 2003, 94).³⁸ Therefore, regulators should strike a balance between the application of strict prudential requirements (for example, capital adequacy, liquidity ratios and bank disclosure requirements) and the need in certain circumstances to forbear in their enforcement and in publicly disclosing violations thereof. The optimal level of transparency for financial markets should therefore be determined by the prudential objectives of the regulator that are established by law and regulation.

The efficient operation of financial markets will depend on the quality of prudential regulation and this will depend in part on the quality of information that the regulator releases to the public. Prudential supervision often involves a decision by the supervisor regarding how much information it needs to release to the public regarding a particular bank or financial firm. An effective liberalisation process should be governed by a legal and regulatory framework that authorises the regulator to make these decisions based on legally established prudential standards. To perform their function in an efficient way, supervisory authorities must: (1) have sufficient legal powers to share prudential information with each other; (2) actively exchange information, both nationally and internationally; and (3) be able to obtain and share with other supervisors prudential information to the extent that the information may be relevant for supervisory purposes (Amttenbrink 2006, 6).

³⁸ This has also been recognised in monetary policy, where Guido Ferrarini has noted that 'transparency of the foreign exchange markets coupled with the high volatility sometimes attributed to trading activity has been said to reduce the effectiveness of individual national governments' monetary policies' (Ferrarini 1994, 173).

Recent debates regarding regulatory governance highlight the importance of the regulator being open and accountable. In central banking, openness and accountability have been interpreted as the central bank providing information to the public in an accountable and legitimate way, but not disclosing information in a way that might undermine the statutory objectives of the central bank (for example, monetary policy and financial stability). Similarly, to achieve the tasks of the financial regulator, it is often necessary for regulatory practices to take place outside the public limelight in order to achieve the statutory objectives of financial stability and protecting investors.

The prudential carve-out and transparency

The prudential carve-out in paragraph 2(a) of the Annex on Financial Services expressly provides that the GATS shall not prevent a WTO member from taking a regulatory measure for a prudential reason so long as the measure in question is not used to avoid the member's commitments or obligations under the GATS (WTO 1998a; Sorsa 1997).³⁹ This controversial provision has been interpreted as authorising members to take 'measures that do not conform to the provisions of the Agreement', but adds that such measures 'shall not be used as a means of avoiding the member's commitments or obligations under the Agreement' (Nicolaidis and Trachtman 2000; Wang 2007). For example, a host regulator might argue that it is a prudential measure to adopt restrictions on short-term bank capital inflows to the host market in order to control volatility in the availability of credit to the banking sector or to impose a charge on flows of short-term capital out of the jurisdiction to improve the management of the exchange rate, even though such measures might directly conflict with a specific GATS market-access commitment.

The Uruguay Round negotiators were aware of the importance of prudential regulation to the efficient and stable operation of financial markets (Self 1996). However, WTO member states have taken a variety of views regarding what the prudential carve-out might mean.⁴⁰ One view holds that the carve-out should be interpreted broadly to permit a wide range of regulatory measures that address the

³⁹ The prudential carve-out in paragraph 2(a) of the Annex 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. Where such measures do not conform to the provisions of the Agreement, they shall not be used as a means of avoiding the Member's commitments or obligations under the Agreement.

⁴⁰ For instance, Colombia took the view during Uruguay Round negotiations that the prudential carve-out and Article VI of the GATS (domestic regulation) should allow members to take both prudential and non-prudential measures to ensure the stability and integrity of the financial system (WTO 2001b). An alternative view was expressed by Malaysia that the prudential carve-out be interpreted strictly according to its language (WTO 2002d, 60). Japan and the US asserted that prudential measures were to be left to the discretion of member states (WTO 2002d). However, the European Commission and its member states interpreted the carve-out as not permitting members to use prudential controls as a means to avoid GATS market access and national treatment commitments (WTO 2000).

different types of social costs posed by bank and financial risk-taking to different economies (WTO 1998a). Indeed, Dobson and Jacquet (1998, 76) recognise 'the special treatment' that a member's prudential measures are accorded in the Annex 'to take any [prudential] measures to protect investors and depositors and to ensure the stability of the financial system'. Moreover, in many jurisdictions, national regulatory authorities have typically enjoyed broad supervisory discretion in applying various regulatory instruments to oversee and control financial institutions and market participants. In contrast, some academic studies argue that the prudential carve-out should be defined with reference to international standards of prudential regulation (Kaufmann and Weber 2007).

The prudential carve-out and international transparency standards

The potentially broad scope of the prudential carve-out raises important issues regarding whether the transparency obligations under Articles III and VI of the GATS might directly conflict with a state's discretionary prudential authority to regulate its financial services markets. For example, can a WTO member that has made specific market access or national treatment commitments regarding a certain financial services sector depart from the related transparency obligations of Article VI that include, for instance, certain licensing requirements, technical and qualification standards, or the obligation to provide prompt review of licensing applications. As discussed above, the language of the prudential carve-out appears to allow a member to adopt prudential regulatory measures that may have the effect of departing from its GATS obligations and commitments if the regulatory measure in question is motivated by a prudential reason. For example, does a host country regulator have discretion to decide *not* to provide specific reasons why it delayed or rejected the application of a foreign bank to obtain a licence to operate in the host market if its action or inaction were motivated by a prudential reason?

One way to resolve an inconsistency between prudential regulation and GATS commitments to adhere to transparency disciplines might be to resort to the IMF Code of Good Practices on Transparency in Monetary and Financial Policies. The IMF Code provides legally non-binding international benchmark principles and guidelines for transparency in financial regulatory policies and practices. For instance, the Code's Article 6.2 provides that '[s]ignificant changes in financial policies should be publicly announced and explained in a timely manner'. Article 7.5 states that '[t]exts of regulations and any other generally applicable directives and guidelines issued by financial agencies should be readily available to the public'. Regulatory discretion, however, to limit disclosure in the conduct of regulatory policies and actions is provided for in Article 6.1, which states that the 'conduct of policies by financial agencies should be transparent, compatible with confidentiality considerations and the need to preserve the effectiveness of actions by regulatory and oversight agencies'. Article 6.1 suggests that, although national authorities have an obligation to publish the framework of decision-making for prudential regulation and related financial policies, they are not expected to disclose the basis of their decision-making if it might undermine the 'effectiveness of actions by regulatory and oversight agencies'. This supports a broad discretion for regulators to restrict disclosing to a foreign services supplier the factual basis of a decision to deny a licence or permit if to do so would inhibit or limit the effectiveness of the regulator to perform a prudential function.

In addition, the Core Principles on Banking Supervision adopted in 1997 by the Basel Committee on Banking Supervision might provide additional guidance to the transparency role of bank supervisors.⁴¹ The Core Principles provide that regulators and supervisors should have adequate investigative tools to confirm the accuracy of information submitted. Moreover, to protect fiduciary relationships, some sensitive information should be treated as confidential and exempt from disclosure. In this regard, banks need to have assurances that such sensitive information will be held strictly confidential and not disclosed to the public (including competitors) and to foreign regulators unless appropriate safeguards are in place. Regulators should also have adequate discretion to restrict the disclosure of information that might undermine financial stability or threaten depositors in specifically defined situations. Therefore, based on the Core Principles and the IMF Code, disclosure should be considered as an instrument of supervision to achieve broader regulatory objectives and should not be treated as a goal in itself. This means that regulators should have discretion to use transparency requirements and other supervisory tools to promote financial policy objectives, such as safety and soundness and efficient and effective development of the financial markets that includes investor and policyholder protection.

This would support the view that in certain circumstances prudential regulation can justify on financial policy grounds a departure from GATS market access and national treatment commitments that can potentially result in a foreign financial service provider being afforded treatment less favourable than local service providers because it has not received a complete or prompt response to its licence application. Similarly, a host regulator could be justified in requiring enhanced disclosure requirements of a foreign bank in violation of national treatment commitments, or not revealing the specific reason why it has refused a licence to a foreign bank in violation of market access commitments, if it has a prudential concern regarding the bank's ability to satisfy host-state regulatory objectives. Thus, regulatory measures that may not be specifically prescribed in the regulator's rulebook, and can potentially violate the transparency obligation, may nevertheless be necessary in exceptional circumstances to ensure the integrity and stability of the financial system or to serve some other prudential objective.

As a general rule, however, to reduce the incentive of regulators to apply regulatory measures for ostensibly prudential reasons but which really have a protectionist purpose host regulators should strive to apply regulatory requirements in a non-discriminatory way that takes account of prevailing international principles of prudential supervision, as set forth by the various international standard-setting bodies. In this situation, regulators would only be justified in departing from GATS transparency obligations and disciplines if the regulatory practice in question conformed with international prudential standards. For example, a limit on the amount of capital invested by a foreign firm or a restriction on the number of local branches established by a foreign firm in violation of market access commitments might be justified on the grounds that the home country of the applicant firm does not comply with international anti-money-

⁴¹Core Principle 21 provides that bank supervisors must be satisfied that banks maintain adequate records produced from generally accepted accounting practices (Basel Committee on Banking Supervision 1997).

laundering regulatory standards. In a case where there was ambiguity regarding whether or not a prudential measure was permitted by international standards, a *necessity test* could be applied that relied on the criteria in Article XIV GATS for determining whether a measure is arbitrary or discriminatory. Alternatively, a looser proportionality test could be applied (Andenas and Zleptnig 2007).

Moreover, in deciding how to apply a GATS transparency obligation, it might be appropriate to consider how such an obligation should apply across countries and jurisdictions with different types of financial systems. For instance, should the obligation be implemented differently in developed as opposed to developing countries? In deciding this, some relevant criteria might be the member's level of economic and financial development and its technical capacity to generate adequate information for the market (Jara and del Carmen Domínguez 2006). Also, the regulator should have the capacity and ability to examine the relevant information provided by market participants and how to assess that information to achieve regulatory objectives. The role of international economic organisations in this regard, including the WTO, should be to provide technical assistance to countries so that the assessment of information can be based on best practices. This will involve a certain level of transparency in the exercise of regulatory authority and enhanced disclosure by regulators with international bodies about how they collect, manage and assess data and how this informs regulatory decision-making.

Transparency can present a particularly difficult challenge for developing countries because transparency often requires sound infrastructure and high levels of technical capacity (Wolfe 2003, 158). Developing countries suffer from constraints in these areas and thereby face a disadvantage in complying with regulatory norms of transparency. In the context of international investment agreements, the WTO Secretariat has raised the issue concerning the right balance between requiring minimum levels of transparency in a multilateral agreement and whether the imposition of such requirements is an unnecessary or disproportionate burden on developing countries (WTO 2002c). A related issue involves the extent to which these countries can benefit from technical and capacity assistance.

Conclusion

The objective of this article was to analyse the role of regulatory transparency in the GATS for cross-border trade in financial services. Indeed, the lack of transparency in regulatory practices and rules is a major obstacle to doing business in a foreign country. This problem has particular importance for trade in services because many of the relevant foreign trade restrictions take the form of domestic regulations. Sufficient information about potentially relevant rules and regulations is critical to the effective implementation of trade agreements. To address this, GATS sets forth a transparency principle in its Preamble and in Articles III and VI. Article III requires that members publish promptly all measures pertaining to or affecting the operation of the GATS. Article VI contains important disciplines on regulatory transparency including the mandate in Article VI:4 for WTO members to negotiate domestic regulatory disciplines to ensure transparent criteria for qualification requirements, technical standards and licensing procedures. Moreover, there is an obligation to notify the Council for Trade in Services at least annually of all legal and

regulatory changes that significantly affect trade in sectors where specific commitments have been made.

However, in considering the proper balance to be struck by the regulator in providing guidelines, rules and information to financial market participants, the article argues that the GATS provides domestic financial regulators with ample discretion to take decisions that may depart from market access or national treatment commitments and related transparency obligations if the regulator deems it necessary to accomplish a prudential regulatory objective. To address some of the uncertainties surrounding this issue, the Working Party on Domestic Regulation is examining a variety of issues that impact on the regulation of trade in services, but it is not directly addressing the regulation of financial services. Similarly, the Council for Trade in Services has provided a mandate to the Committee on Trade in Financial Services to examine issues involving the prudential carve-out. Although the Committee's terms of reference are broad, and include the possibility of making proposals to the Council regarding all issues related to trade in financial services, the Committee has been under-utilised in this respect, and it is unknown at this time whether any members will, in the near future, make any formal proposals to clarify what the transparency obligation should mean with respect to financial services. Nevertheless, the issue is assuming increasing importance, especially in today's turbulent global financial markets, because states are confronted with the contradictory pressures to keep domestic financial markets open to foreign capital and financial services as part of economic restructuring efforts, whilst also seeking to develop regulatory measures to promote economic and financial development. In the post-Doha environment, WTO members will have to carry this debate forward with a view to building a more efficient and equitable international trading system.

References

- Antenbrink, Fabian (2006) 'The three pillars of central bank governance: towards a model central bank law or a code of good governance?', 28 May, submitted to the European Conference on Financial Regulation and Supervision 'Designing financial supervision institutions: independence, accountability and governance', Centre for Monetary and Financial Economics, Bocconi University
- Andenas, Mads and Yannis Avgerinos (2003) *Financial markets in Europe* (London: Kluwer Law International)
- Andenas, Mads and Stefan Zleptnig (2007a) 'Proportionality and regulatory discretion', in Mads Andenas and Kern Alexander (eds) *The World Trade Organization and trade in services* (Leiden: Martinus Nijhof/Brill)
- Andenas, Mads and Stefan Zleptnig (2007b) 'Proportionality and balancing in WTO law: a comparative perspective', *Cambridge Review of International Affairs*, 20:1,
- Arup, Christopher (1999) *The World Trade Organization Agreements* (Cambridge, UK: Cambridge University Press)
- Basel Committee on Banking Supervision (1997) *Core principles for effective banking supervision* (Basel: Bank for International Settlements), <www.bis.org/publ/bcbs30a.htm>, accessed 20 December 2006
- Bronckers, Marco and Pierre Larouche (2007) 'A review of the WTO regime for telecommunications services', in Mads Andenas and Kern Alexander (eds) *The World Trade Organization and trade in services* (Leiden: Martinus Nijhof/Brill)
- Claessens, Stijn and Marion Jansen (eds) (2000) *The internationalisation of financial services: issues and lessons for developing countries* (London: Kluwer Law International)
- De Soto, Hernando (2001) *The mystery of capital* (London: Black Swan)

- Dobson, Wendy and Pierre Jacquet (1998) *Financial services liberalization in the WTO* (Washington: Institute of International Economics)
- Eichengreen, Barry (1999) *Toward a new international financial architecture* (Washington: Institute for International Economics)
- Esty, Daniel C (2002) 'The World Trade Organization's legitimacy crisis', *World Trade Review*, 1:1, 7–22
- Feketekuty, Geza (2000) 'Regulatory reform and trade liberalization in services', in Pierre Sauve and Robert Stern (eds) *GATS 2000* (Washington: Brookings Institute), 225–240
- Ferrarini, Guido (ed) (1994) *Prudential regulation of banks and securities firms* (Amsterdam: Martinus/Nijhof)
- Forum on Democracy and Trade (2005) 'Transparency in Domestic Regulation', 18 November, <www.forumdemocracy.net/trade_negotiations/transparency_domestic_regulation>, accessed 5 January 2007
- Fuller, Lon (1964) *The morality of law*, rev edn (New Haven: Yale University Press)
- Hart, Henry LA (1961) *The concept of law* (Oxford: Oxford University Press)
- Hindley, Brian (2000) 'A trade-policy perspective', in *The internationalization of financial services: issues and lessons for developing countries* (London: Kluwer Law International)
- Hoekman, Bernard (2002) 'Strengthening the global trade architecture for development: the post-Doha agenda', *World Trade Review*, 1:1, 23–45
- Hoekman, Bernard and Michel Kostecki (2001) *The political economy of the world trading system*, 2nd edn (Oxford: Oxford University Press)
- Hudec, Robert (2002) 'Free trade, sovereignty, democracy: the future of the World Trade Organization', *World Trade Review*, 1:2, 211–222
- IMF (2000) 'Code of good practices on transparency in monetary and financial policies', IMF Executive Board, approved 24 July, <www.imf.org/external/np/mae/mft/sup/part1.htm>, accessed 25 December 2006
- Jara, Alejandro and M del Carmen Domínguez (2006) 'Liberalization of trade in services and trade negotiations', *Journal of World Trade*, 40:1, 113–127
- Jensen, Michael and William Meckling (1976) 'Theory of the firm: managerial behavior, agency costs, and ownership structure', *Journal of Finance*, 3:4, 305–360
- Kaufmann, Christine and Rolf Weber (2007) 'Resolving conflicts between prudential regulation and liberalisation in financial services', in Mads Andenas and Kern Alexander (eds) *The World Trade Organisation and trade in services* (Leiden: Martinus Nijhof/Brill)
- Keiwa, Iida and Julia Nielson (2002) *Transparency in domestic regulation: practices and possibilities* (Paris: OECD)
- Key, Sydney (2000) *GATS 2000: issues for the financial services negotiations* (Washington: Brookings Institution Press)
- Kono Masamichi, Patrick Low, Mukela Luanga, Aaditya Mattoo, Maika Oshikawa and Ludger Schuknecht (1997) *Opening markets in financial services and the role of the GATS* (Geneva: WTO)
- Marchetti, Juan (2003) 'What should financial regulators know about the GATS?', WTO, Geneva, unpublished paper
- Mashayekhi, Mina and Elisabeth Tuerk (2007) 'GATS negotiations on domestic regulation: a developing country perspective', in Mads Andenas and Kern Alexander (eds) *The World Trade Organization and trade in services* (Leiden, The Netherlands: Martinus/Nijhof/Brill)
- Nicolaidis, Kalypso and Joel Trachtman (2000) 'From policed regulation to managed recognition: mapping the boundary in GATS', in Pierre Sauve and Robert Stern (eds) *GATS 2000* (Washington: Brookings Institute Press), 241–282
- Persaud, A (2003) 'Liquidity black holes', in A Persaud (ed) *Liquidity black holes* (London: Risk Books), 85–104
- Roberts, Donna and Laurian Unnevehr (2005) 'Resolving trade disputes arising from trends in food safety regulation: the role of the multilateral governance framework', *World Trade Review*, 4:3, 449–468
- Sorsa, Piritta (1997) 'The GATS Agreement on Financial Services: a modest start to multilateral liberalization', IMF Working Paper WP/97/55, Washington
- Tribe, Laurence (2000) *American constitutional law* (Boston: Foundation Press)
- UK Government (1997) White Paper, 'Your right to know', Cm 3818, December 1997

- UK FSA (2005) *Planning for MIFID* (London: Financial Services Authority), < www.fsa.gov.uk > , accessed 15 December 2006
- UK FSA 'Transparency Directive', Issue 14, 1–40, < www.fsa.gov.uk > , accessed 15 December 2006
- Van den Bossche, Peter (2005) *The law and policy of the World Trade Organization* (Cambridge, UK: Cambridge University Press)
- Wang, Wei (2007) 'The prudential carve-out under the WTO', in Mads Andenas and Kern Alexander (eds) *The World Trade Organization and trade in services* (Leiden, The Netherlands: Martinus/Nijhof/Brill)
- Wolfe, Robert (2003) 'Regulatory transparency, developing countries, and the WTO', *World Trade Review*, 2:2, 157–182
- Wolfe, Robert (2005) 'Decision-making and transparency in the "medieval WTO": does the Sutherland Report have the right prescription?', *Journal of International Economic Law*, 8:3, 631–645
- WTO (1995) 'Decision on professional services', Council for Trade in Services, S/L/3, 1 March
- WTO (1997) 'Guidelines for recognition of qualifications in the accountancy sector', S/L/38, 28 May
- WTO (1998a) Council for Trade in Services, 'Financial services', background note by the Secretariat, S/C/W/72, 2 December
- WTO (1998b) 'Disciplines on domestic regulation in the accountancy sector', WTO document PRESS/118, adopted by the Council for Trade in Services, S/L/64, 14 December
- WTO (1999a) *Guide to the Uruguay Round Agreements* (Boston: Kluwer Law International)
- WTO (1999b) *The legal texts: the results of the Uruguay Round of multilateral trade negotiations* (Cambridge, UK: Cambridge University Press)
- WTO (1999c) 'Review of the operation and implementation of the Agreement on the Application of Sanitary and Phytosanitary Measures', report of the Committee on Sanitary and Phytosanitary Measures, G/SPS/12, 11 March
- WTO (2000) Communication from the European Communities, 'GATS 2000: financial services', S/CSS/W/39, 22 November
- WTO (2001a) 'GATS 2001 scheduling guidelines', S/L/92, 28 March
- WTO (2001b) Communication from Colombia, S/CSS/W/96, 9 July
- WTO (2001c) 'Doha Ministerial declaration', WT/MIN(01)/Dec/1, 20 November
- WTO (2002a) *The Sanitary and Phytosanitary Agreement Handbook*, 'How to apply the transparency provisions', September, < www.wto.org/English/tratop_e/sps_e/spshand_e.doc > , accessed 5 January 2006
- WTO (2002b) (Revision) Committee on Sanitary and Phytosanitary Measures, 'Recommended procedures for implementing the transparency obligations of the SPS Agreement (Article 7)', G/SPS/7/Rev2, 2 April
- WTO (2002c) Secretariat, 'Transparency of the Working Group on the Relationship Between Trade and Investment', 27 March, working paper
- WTO (2002d) 'Report of the Meeting Held on 3–6 December 2001', note by the Secretariat, S/CSS/M/13, 26 February, 60
- WTO (2004) Communication from the US, 'US proposal for transparency disciplines in domestic regulation: building on existing international disciplines and proposals', JOB(04)/128, 15 September
- WTO (2005a) 'Report of the WPDR Chair to the Special Session of the Council for Trade in Services', Job (05)/280, 15 November
- WTO (2005b) Appellate Body, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services (US—Gambling)*, WT/DS285/R, circulated on 7 April 2005, Panel Report, WT/DS285/R, circulated 10 November 2004
- WTO (2006a) 'The General Agreement of Trade in Services: an introduction', 29 March, WTO Papers, < www.wto.org/english/tratop_e/serv_e/gsintr_e.doc > , accessed 5 January 2007
- WTO (2006b) 'Disciplines on domestic regulation pursuant to GATS Article VI:4', working paper, note by the Chairman, WPDR, Job (06)/225, 12 July
- Wouters, Jan and Dominic Coppens (2007) 'GATS and domestic regulations: balancing the right to regulate and trade liberalization', in Mads Andenas and Kern Alexander (eds) *The World Trade Organization and trade in services* (Leiden: Martinus/Nijhof/Brill)

Copyright of *Cambridge Review of International Affairs* is the property of Routledge and its content may not be copied or emailed to multiple sites or posted to a listserv without the copyright holder's express written permission. However, users may print, download, or email articles for individual use.