

Financial Sector Regulation and Financial Services Liberalization at the Crossroads: The Relevance of International Financial Standards in WTO Law

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This article provides an assessment of the relevance in World Trade Organization (WTO) law of the international financial standards set by the Basel Committee on Banking Supervision (Basel Committee), the International Organization of Securities Commissions (IOSCO), and the International Association of Insurance Supervisors (IAIS), international cooperation fora bringing together domestic financial regulators. This analysis gauges the potential use of these international financial standards in a potential future dispute settlement involving the domestic regulation of financial services. It demonstrates their relevance in WTO law as well as their both considerable and contested role in the institutional practice of the organization, thereby highlighting the incentives for regulatory harmonization that are embedded in the General Agreement on Trade in Services (GATS). The difficulties are mainly centred on the Basel Committee due to its limited membership, therefore not meeting the conditions of validity for the recognition of external standards laid down in the GATS, and also leading to the reluctance of some developing countries unwilling to endorse standards to which they have not previously agreed. More broadly, this study reflects on the potential tensions between plurilateral regulatory strategies and the multilateral context of the WTO and highlights the insufficient coordination between the international legal frameworks for the regulation and for the liberalization of financial services.

1. INTRODUCTION

The recent financial turmoil has brought into sharp relief the utmost importance of an effective financial regulation. While a lack of supervision and insufficient coordination at the international level have been the focus of the G20 discussions, these latest developments should not overshadow the long-standing harmonization accomplishments in the area of financial services undertaken by some international standard-setting institutions. Indeed, the Basel Committee on Banking Supervision (Basel Committee), the International Organization of Securities Commissions (IOSCO), and the

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International Association of Insurance Supervisors (IAIS),¹ institutions mainly comprised of domestic financial regulators, have developed standards to be implemented in national laws, therefore ensuring the convergence of their approach on issues of common interest and promoting the equivalence and the mutual recognition of domestic regulations.

Emanating from bodies operating behind the customary diplomatic channels and lacking public international law-making authority, these international financial standards are not classified among the traditional sources of international law enshrined in Article 38 of the Statute of the International Court of Justice. However, it seems excessive to confine them to mere political guidelines and to soft law status.² Their legal significance keeps on growing as they have served as an assessment device for several international institutions such as the Financial Stability Forum³ and its successor the Financial Stability Board,⁴ the International Monetary Fund (IMF) and the World Bank for the financial sector,⁵ and the UN for combating the financing of terrorism.⁶ These standards have even been disseminated, although yet timidly, through preferential trade agreements.⁷

Considered as influential rules promoting regulatory harmonization, these international standards are called upon to play an increasing role in the liberalization of financial services, insofar as such standards usually significantly lower 'the likelihood of disguised

¹ For a general presentation of these institutions, see D. Zaring, 'International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations', *Texas Journal of International Law* 33, no. 2 (1998): 281–330. On the Basel Committee, see S. Emmenegger, 'The Basle Committee on Banking Supervision – A Secretive Club of Giants?', in *The Regulation of International Financial Markets. Perspectives for Reform*, ed. R. Grote & T. Marauhn (Cambridge: Cambridge University Press, 2006), 224–236; M.S. Barr & G.P. Miller, 'Global Administrative Law: The View from Basel', *European Journal of International Law* 17, no. 1 (2006): 15–46; K. Alexander, 'Global Financial Standard Setting, the G10 Committees, and International Economic Law', *Brooklyn Journal of International Law* 34, no. 3 (2009): 861–881.

² Discussing the legal value of these standards, three authors note that '[a]s a general matter...the sources of public international law are increasingly viewed as unsatisfactory for explaining the variety of international obligations and commitments undertaken by states in many areas of international relations'. See K. Alexander, R. Dhumale & J. Eatwell, *Global Governance of Financial Systems. The International Regulation of Systemic Risk* (New York: Oxford University Press, 2006), 137.

³ On this institution, see G.A. Walker, 'International Financial Crisis and the Financial Stability Forum', in *International Financial Sector Reform. Standard Setting and Infrastructure Development*, ed. S. Goo, D.W. Arner & Z. Zhou (London: Kluwer Law International, 2002), 173–232, 204; R. Bismuth, 'Le Système International de Prévention des Crises Financières. Réflexions Autour de la Structure en Réseau du Forum de Stabilité Financière', *Journal du Droit International* 134, no. 1 (2007): 57–83, 66.

⁴ G20, Working Group on Reinforcing International Cooperation and Promoting Integrity in Financial Markets, 'Final Report', <www.g20.org/Documents/g20_wg2_010409.pdf>, 27 Mar. 2009. See also M. Giovanoli, 'The Reform of the International Financial Architecture after the Global Crisis', *New York University Journal of International Law and Politics* 42 (2010, forthcoming).

⁵ R.P. Delonis, 'International Financial Standards and Codes: Mandatory Regulation without Representation', *New York University Journal of International Law and Politics* 36, no. 2–3 (2004): 563–634, 575.

⁶ Mainly through the activity of the Counter-Terrorism Committee (CTC) instituted in 2001 by the Security Council Resolution (S/RES/1373). At the request of the UN Security Council in 2003 (S/RES/1456), the CTC further established a 'Directory of International Best Practices, Codes and Standards' that are relevant to the combating of terrorism. These rules include several international financial standards adopted by the Basel Committee, IOSCO, and IAIS (CTC, 'Directory of International Best Practices, Codes and Standards', <www.un.org/sc/ctc/bestpractices/best_prac.html>).

⁷ See, e.g., the EFTA-Mexico Free Trade Agreement providing that '[e]ach Party shall make its best endeavours to ensure that the Basle Committee's Core Principles for Effective Banking Supervision, the standards and principles of the International Association of Insurance Supervisors and the International Organization of Securities Commissions' Objectives and Principles of Securities Regulation are implemented and applied in its territory' (Art. 37(4) of the Free Trade Agreement between the EFTA States and the United Mexican States, <www.efta.int/content/legal-texts/third-country-relations/mexico/MX-FTA.pdf>, 27 Nov. 2000).

or needlessly restrictive impediment to trade and investment'.⁸ In this respect, the World Trade Organization (WTO) offers a normative framework acting like a magnet attracting external rules and by which certain international norms (even non-legally binding ones) are used to assess domestic regulations and, more broadly, state measures.⁹ Given the existence of a dispute settlement mechanism, the assessment of the relevance of international financial standards in WTO law is of theoretical as well as practical importance.¹⁰ It requires first highlighting the relationship between the two distinct processes of regulation and liberalization of financial services.

The international frameworks for the trade in financial services and for the regulation and supervision of the financial have two distinct purposes. The former is driven by a liberalization process and aims to prevent regulatory abuse whereas the latter pursues an objective of stability and aims to lessen the risk of regulatory 'race to the bottom'.¹¹ These two perspectives, sometimes incompatible, have met within the WTO. They could not have been ignored since financial services play a key role in supporting economic development and trade liberalization and also because prudential regulation of the financial sector prevents international systemic crises from producing negative externalities on the economy.¹²

National regulations, whatever their noble objectives, are likely to constitute restrictions on trade and domestic regulatory autonomy is sometimes 'abused as concealed protectionism or...not sufficiently motivated to provide efficient regulation'.¹³ The differences of approaches in national regulations may also lead a Member State to perceive a prudential measure as unjustified where it could be viewed as fundamental by the enacting state. The WTO Secretariat gives the example of the segregation of banking, securities, and insurance businesses in the USA whereas this kind of limitation does not exist in Europe for financial conglomerates.¹⁴ In this specific context, financial standards of

⁸ A. Mattoo & P. Sauvé, 'Domestic Regulation and Trade in Services: Looking Ahead', in *Domestic Regulation and Service Trade Liberalization*, ed. A. Mattoo & P. Sauvé (Washington, DC: World Bank/Oxford University Press, 2003), 221–230, 222.

⁹ See, e.g., R. Howse, 'A New Device for Creating International Legal Normativity: The WTO Technical Barriers to Trade Agreements and International Standards', in *Constitutionalism, Multilevel Trade Governance and Social Regulation*, ed. C. Joerges & E.-U. Petersmann (Portland: Hart, 2006), 383–395.

¹⁰ We do not intend to analyse the substantive rules set by these international fora but rather to assess their relevance in the WTO framework. For a brilliant discussion on these standards, see M. Giovanoli, 'A New Architecture for the Global Financial Market: Legal Aspects of International Financial Standard Setting', in *International Monetary Law. Issues for the New Millennium*, ed. M. Giovanoli (Oxford: Oxford University Press, 2000), 3–59.

¹¹ G. Huftbauer & E. Wada, 'Can Financiers Learn from Traders?', *Journal of International Economic Law* 2, no. 4 (1999): 567–701; J.P. Trachtman, 'Regulatory Competition and Regulatory Jurisdiction', *Journal of International Economic Law* 3, no. 2 (2000): 331–348.

¹² M. Kono et al., *Opening Markets in Financial Services and the Role of the GATS* (Geneva: World Trade Organization, 1997), 27–33.

¹³ J.P. Trachtman, 'Lessons for the GATS from Existing WTO Rules on Domestic Regulation', in *Domestic Regulation and Service Trade Liberalization*, ed. A. Mattoo & P. Sauvé (Washington, DC: World Bank/Oxford University Press, 2003), 57–81, 57. See also J.A. Marchetti & P.C. Mavroidis, 'What Are the Main Challenges for the GATS Framework? Don't Talk about Revolution', *World Trade Review* 5, no. 3 (2004): 511–562, 546–553.

¹⁴ A study carried out by the WTO gives the illustration of the sectoral segregation between the banking sector and the financial markets for prudential reasons whereas the European approach does not consider such a distinction as prudential (WTO, Council for Trade in Services, Financial Services. Background Note by the Secretariat, S/C/W/72 (2 Dec. 1998), para. 35, n. 44).

the Basel Committee, IOSCO, and IAIS could constitute a relevant basis for the judicial review of domestic regulations under the WTO Agreements and the question is whether a WTO court would have the authority to use them for that purpose. Interestingly, the potential utility of such standards goes beyond establishing circumstantial evidence of discrimination. Indeed, it also includes a mechanism through which the necessity, appropriateness, and proportionality of domestic regulation could be assessed regardless of its discriminatory impact as well as comprises incentives for regulatory harmonization, yet weaker than those existing under the Agreement on Technical Barriers to Trade (hereinafter TBT Agreement) and Agreement on the Application of Sanitary and Phytosanitary Measures (hereinafter SPS Agreement).¹⁵

Since, to date, no dispute has arisen between Member States in the area of financial services, neither a panel nor the Appellate Body has the occasion to rule on this issue.¹⁶ Therefore, we need to assess to what extent a proper interpretation of the WTO Agreements would show the relevance of international financial standards.

Such an assessment requires, at the first stage, an analysis of the relevant substantive provisions of the WTO Agreements in order to determine if an interpretation of these rules (mainly the General Agreement on Trade in Services (GATS) and its Annex on Financial Services) naturally leads to these international financial standards (section 2).

However, the WTO is not only a juxtaposition of agreements, it is also an institutional structure made up of organs and mechanisms whose role is to administrate the conventional regimes. While the dispute settlement mechanism has not ruled so far on this issue, several features of the organization (notably the WTO Committee of Trade in Financial Services, the Trade Policy Review Mechanism (TPRM), and the accession process for new members) have signalled both the relevance of and concerns about these standards, thereby corroborating the mainly speculative analysis carried out on the normative *corpus* of the organization (section 3).

2. THE RELEVANCE OF INTERNATIONAL FINANCIAL STANDARDS IN WTO AGREEMENTS

At the very beginning of the process of liberalization of financial services, the WTO Secretariat considered that the work led by institutions like the Basel Committee, IOSCO, and IAIS was 'particularly relevant for this sector'.¹⁷ However, it seems necessary to assess precisely to what extent and under what conditions the WTO Agreements are likely to echo them. Such a demonstration requires an understanding of the Marrakech

¹⁵ Mattoo & Sauvé, *supra* n. 8, 228; Trachtman, *supra* n. 13, 70 (pointing out that the GATS 'provides a facility for harmonization but does not require it' and noting that 'there are fewer incentives for harmonization under the GATS than under the SPS or TBT agreements').

¹⁶ The only dispute related to financial services concerned the Chinese measures on foreign financial information services suppliers. It was initiated in March 2008 at the request of the European Communities, the United States, and Canada (DS372, DS373, DS378) but was settled at the consultation stage in December 2008.

¹⁷ WTO, S/C/W/72, *supra* n. 14, para. 3.

Agreements and its articulation of the relationship between the liberalization objectives and the possibility for states to regulate the economy.

WTO is commonly described as a negative integration process since no overall harmonization of national regulations occurs concurrently to the liberalization of markets.¹⁸ Indeed, beyond incentives for regulatory harmonization,¹⁹ WTO law generally permits Member States to choose their level of regulation, in goods as well as in services, with the general limit that regulation is justified in relation to the objectives it pursues and has not been construed so as to involve discrimination between Member States or disguised restrictions to trade.²⁰ Given this absence of an exhaustive list of prohibited or authorized measures, the WTO Agreements are considered as an 'incomplete contract'.²¹ Benchmark instruments were therefore needed to ensure that national regulations are not a means to circumvent the obligations undertaken in the WTO. For this reason, international standards were introduced in WTO law as assessment devices.

Within this framework, provisions relevant to trade in financial services in the WTO Agreements make possible, and sometimes necessary, the recourse to international standards (section 2.1.1). Although the standards set by the Basel Committee, IOSCO, and IAIS appear to be the most relevant ones, it does not necessarily mean that the WTO could recognize them outright. It is thus necessary to determine whether these financial standards meet the conditions set out in the WTO Agreements (section 2.1.2).

2.1. THE NEED FOR STANDARDS FOR THE LIBERALIZATION OF FINANCIAL SERVICES

2.1.1. *The Legal Framework for the Liberalization of Financial Services*

WTO rules governing trade in financial services are included within three distinct instruments: the GATS, the Annex on Financial Services attached to the GATS, and the Understanding on Commitments in Financial Services, which is optional. The GATS constitutes the *lex generalis* and applies to all kind of services,²² the Annex and the Memorandum complete or modify the GATS in trade in financial services and constitute therefore the *lex specialis*. The objective is not to provide an exhaustive presentation

¹⁸ Except for intellectual property given the adoption of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

¹⁹ See *supra* n. 15 and accompanying text.

²⁰ It is possible to mention Art. XX GATT concerning the measures that can be taken by Member States in order to protect health and environment '[s]ubject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade'. See also TBT Agreement, Preamble, para. 6; SPS Agreement, Art. 2(3).

²¹ P.C. Mavroidis, *The General Agreement on Tariffs and Trade. A Commentary* (New York: Oxford University Press, 2005), 22. The author underlines that 'the founding fathers of the GATT opted for an incomplete contract...: they imposed on members the obligation to respect non-discrimination any time they intervene in their market through regulatory means and, as a result, trade is affected'.

²² D. Luff, *Le Droit de l'Organisation Mondiale du Commerce. Analyse Critique* (Bruxelles/Paris: Bruylant/LGDJ, 2004), 579.

of this legal framework, already extremely well documented,²³ but to determine to what extent and under what conditions these provisions are likely to make relevant the recourse to international standards in order to assess the legality of domestic regulations.

While the GATS and the General Agreement on Tariffs and Trade (GATT) share the same underlying philosophy, the terms of liberalization of trade in services differ from those applicable to trade in goods. The GATS applies indeed to all kind of services, but the opening of markets also depends on specific commitments of Member States in which limitations to market access and national treatment are made.²⁴ Besides, failing an undertaking by the end of the Uruguay Round negotiations, it was only several months after the GATS entered into force on 1 January 1995 that some WTO members started to establish their lists of specific commitments in financial services.²⁵ Once restrictions have been inserted, states are not able to grant less favourable market access than provided in their lists²⁶ and less favourable treatment than granted to their national suppliers, except for the restrictions to the national treatment provided in their lists.²⁷

The GATS also imposes a common discipline on all service suppliers, notably comprised of the most-favoured-nation treatment prohibiting discriminations among foreign suppliers²⁸ and a transparency obligation requiring Member States to publish 'all relevant measures of general application which pertain to or affect the operation' of the Agreement.²⁹

²³ See S.J. Key, *The Doha Round and Financial Services Negotiations* (Washington, DC: AEI Press, 2003); É.H. Leroux, 'Trade in Financial Services under the World Trade Organization', *Journal of World Trade* 36, no. 3 (2002): 413–442; M.J. Hahn, 'W.T.O. Rules on Trade in Financial Services: A Victory of Greed over Reason?', in *The Regulation of International Financial Markets. Perspectives for Reform*, ed. R. Grote & T. Marauhn (Cambridge: Cambridge University Press, 2006), 176–205; J.S. Jarreaut, 'Interpreting the General Agreement on Trade in Services and the WTO Instruments Relevant to the International Trade of Financial Services: The Lawyer's Perspective', *North Carolina Journal of International Law and Commercial Regulation* 25, no. 1 (1999): 1–74; D. Servais & J. Dutry, 'GATS 2000: Quels Enjeux pour les Services Financiers?', *Revue de Droit des Affaires Internationales* (1999): 653–675; Mamiko Yokoi-Arai, 'GATS's Prudential Carve Out in Financial Services and Its Relation with Prudential Regulation', *International and Comparative Law Quarterly* 57, no. 3 (2008): 613–648. For a comparative study of the legal frameworks for the liberalization of financial services in the WTO, the NAFTA, and the EU, see J.P. Trachtman, 'Trade in Financial Services under GATS, NAFTA and the EC: A Regulatory Jurisdiction Analysis', in *The International Economic Law Revolution and the Right to Regulate*, ed. J.P. Trachtman (London: Cameron May, 2006), 323–402.

²⁴ Articles XVI, XVII, and XX GATS. On the functioning of these lists, see Luff, *supra* n. 22, 605. For a glimpse of these limitations in specific commitments, see A. Gkoutzinis, 'International Trade in Banking Services and the Role of the WTO: Discussing the Legal Framework and Policy Objectives of the General Agreement on Trade in Services and the Current State of Play in the Doha Round of Trade Negotiations', *International Lawyer* 39, no. 4 (2005): 877–914, 904; L. Páez, 'GATS Financial Services Liberalization: How Do OECD Members Schedules Impact Commercial Banking FDI?', *Journal of World Trade* 42, no. 6 (2008): 1065–1083.

²⁵ A first temporary agreement, to which the United States was not a party, was reached in July 1995 (WTO, Second Protocol to the General Agreement on Trade in Services, S/L/11 (24 Jul. 1995)) then replaced in December 1997 by a second agreement adopted on a permanent basis to which have been attached the specific commitments made by seventy members (WTO, Fifth Protocol to the General Agreement on Trade in Services, S/L/45 (8 Dec. 1997)). See Leroux, *supra* n. 23, 427.

²⁶ Article XVI:1 GATS. See Luff, *supra* n. 22, 612.

²⁷ Article XVII:1 GATS. See Luff, *supra* n. 22, 615.

²⁸ Article II GATS.

²⁹ Article III:1 GATS.

2.1.2. *Domestic Regulation and Financial Services Liberalization*

Other GATS provisions directly concern domestic regulations. Article VI:1 GATS provides that national regulations ‘are administered in a reasonable, objective and impartial manner’,³⁰ and in the absence of common disciplines established within the Council for Trade in Services,³¹ Member States ‘shall not apply licensing and qualification requirements and technical standards that nullify or impair such specific commitments’.³²

The Annex on Financial Services completes these general provisions and allows Member States to adopt domestic regulations pursuing prudential objectives. The Annex indeed provides that:

[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 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.³³

The formulation of this exception contrasts with other exceptions included in the WTO Agreements that require, like those in Article XX GATT, a necessity criterion or at least a sufficient relationship between the measure and the objective it pursues. Indeed, the Annex refers to ‘measures [taken] for prudential reasons’ and not to measures ‘relating to’³⁴ or ‘necessary to’³⁵ prudential considerations. Some authors have suggested the need for a nexus between the measure and its objective has disappeared here, and that the legality test is located in the potential discriminatory effect of the measure.³⁶ Professor Joel Trachtman favours an interpretation implying the existence of the nexus. Recognizing that it would be ‘difficult to predict how a WTO panel or the Appellate Body would approach this requirement’, this author underlines, however, that ‘in order for a measure to benefit from the prudential carve out of Article 2(a) of the GATS Annex on financial services, [the measure] [...] would be required to be “reasonably related” to the regulatory goal’.³⁷ This interpretation is also shared by the WTO Secretariat – whose opinion is binding only for itself – having underlined that ‘[a]lthough technically, Article VI:4 and 5 may not be applicable to prudential measures, questions may remain as to whether they are based on objective and transparent criteria, or are not more burdensome than necessary’.³⁸

³⁰ Article VI:1 GATS.

³¹ Article VI:4 GATS.

³² Article VI:5(a) GATS. On Art. VI GATS, see P. Delimatsis, ‘Due Process and “Good” Regulation Embedded in the GATS. Disciplining Regulatory Behaviour in Services through Article VI of the GATS’, *Journal of International Economic Law* 10, no. 1 (2006): 13–50.

³³ Annex on Financial Services, Art. 2(a). See also K. Alexander, ‘The GATS and Financial Services: The Role of Regulatory Transparency’, *Cambridge Review of International Affairs* 20, no. 1 (2007): 111–132, 126.

³⁴ Article XX(g) GATT.

³⁵ Article XX(b) GATT.

³⁶ Key, *supra* n. 23, 25; Luff, *supra* n. 22, 653; Yokoi-Arai, *supra* n. 23, 640.

³⁷ J.P. Trachtman, ‘Addressing Regulatory Divergence through International Standards: Financial Services’, in *Domestic Regulation and Service Trade Liberalization*, ed. A. Mattoo & P. Sauv  (Washington, DC: World Bank/Oxford University Press, 2003), 27–41, 30.

³⁸ WTO, S/C/W/72, *supra* n. 14, para. 41, n. 50.

If we concur with this view, the interpretation of the term 'prudential' in the Annex seems crucial. However, it is not defined in the WTO Agreements, and given the use of the word 'including', the list of Article 2(a) of the Annex is only illustrative.³⁹ Moreover, Member States have not succeeded in adopting a common understanding on the definition of this notion.⁴⁰ WTO law does not provide a satisfying interpretation of what may constitute 'prudential measures' and, *a fortiori*, lacks completeness to determine if a domestic regulation pursues prudential objectives.⁴¹ Having recourse to relevant international standards would therefore be profitable to the interpretation of these aspects of WTO law.

This conclusion could also be extended to Article VI GATS, which remains applicable to financial services. International standards would help to determine to what extent regulations are 'administered in a reasonable, objective and impartial manner'⁴² or if 'qualification requirements and technical standards... nullify or impair... specific commitments'.⁴³ International standards would also be useful to interpret several provisions relating to domestic regulation included in the Understanding on Commitments in Financial Services, an optional agreement applying only to a limited number of states wishing to establish a more detailed framework compared to those of the GATS and the Annex.⁴⁴

³⁹ Leroux, *supra* n. 23, 430; L.E. Panourgias, *Banking Regulation and World Trade Law. GATS, EU and Prudential Institution-Building* (Oxford: Hart, 2006), 9. The latter author notes the convergence of WTO and NAFTA provisions, both containing a non-exhaustive list not defining the term 'prudential'.

⁴⁰ The WTO Committee on Trade in Financial Services pointed out in a report that:

'A number of delegations failed to see the need for clarification of the definition [of "Prudential Regulation"] contained in the Annex on Financial Services and voiced that the prudential exception constituted a fine compromise to preserve regulatory flexibility in this sensitive sector which warranted caution. ... Concerns have been expressed as to the objectives of this proposal as some delegations... felt that such an exercise could develop into a discussion on the legitimacy of Members' prudential regulations' (WTO, 'Report of the Committee on Trade in Financial Services to the Council for Trade in Services, S/FIN/5' (24 Nov. 2000), para. 4).

⁴¹ Servais & Dutry, *supra* n. 23, 664. See also Trachtman, *supra* n. 13, 78; S. Claessens, 'Regulatory Reform and Trade Liberalization in Financial Services', in *Domestic Regulation and Service Trade Liberalization*, ed. A. Mattoo & P. Sauvé (Washington, DC: World Bank/Oxford University Press, 2003), 129–146, 143.

⁴² Article VI:1 GATS.

⁴³ Article VI:5(a) GATS.

⁴⁴ The Memorandum mainly concerns Organization for Economic Cooperation and Development (OECD) Member States. On this agreement, see Leroux, *supra* n. 23, 432. The Understanding imposes a strict discipline and provides (Art. 10):

Each Member shall endeavour to remove or to limit any significant adverse effects on financial service suppliers of any other Member of:

- (a) non-discriminatory measures that prevent financial service suppliers from offering in the Member's territory, in the form determined by the Member, all the financial services permitted by the Member;
- (b) non-discriminatory measures that limit the expansion of the activities of financial service suppliers into the entire territory of the Member;
- (c) measures of a Member, when such a Member applies the same measures to the supply of both banking and securities services, and a financial service supplier of any other Member concentrates its activities in the provision of securities services; and
- (d) other measures that, although respecting the provisions of the Agreement, affect adversely the ability of financial service suppliers of any other Member to operate, compete or enter the Member's market; provided that any action taken under this paragraph would not unfairly discriminate against financial service suppliers of the Member taking such action.

This article of the Understanding imposes a soft obligation (Leroux, *supra* n. 23, 438) since it provides that Member States 'shall endeavour to remove or to limit ...', intimating that WTO courts would hardly consider it binding. However, it suggests that states should not adopt measures that, although non-discriminatory, affect the competitive capacity of foreign providers (Luff, *supra* n. 22, 674). It seems therefore that an in-depth analysis of the reality of the prudential objective could be undertaken by the yardstick of this provision of the Understanding.

The GATS recognizes the right of every state to choose its level of regulation but at the same time imposes the requirement to apply its domestic regulation in a non-discriminatory way between foreign suppliers. However, derogating from the most-favoured-nation treatment is possible through Article VII GATS enabling, but not requiring,⁴⁵ any Member State to adopt mutual recognition measures on the basis of which it considers for a specific service the domestic regulation of another state as equivalent to its own.⁴⁶ In the field of prudential regulation, this option is laid down in the Annex:

A Member may recognize prudential measures of any other country in determining how the Member's measures relating to financial services shall be applied. Such recognition, which may be achieved through harmonization or otherwise, may be based upon an agreement or arrangement with the country concerned or may be accorded autonomously.⁴⁷

Mutual recognition measures exempt the beneficiary foreign supplier from the limitations to market access and national treatment included in the specific commitments. The mutual recognition process may therefore have potential discriminatory effects when it is granted to some states and refused to others despite having both an equivalent level of regulation. In order to prevent abuses likely to constitute disguised restrictions to trade, the GATS contains a 'best-endeavour' provision inducing Member States to extend the benefit of mutual recognition measures at the request of excluded members when domestic regulations are deemed to be equivalent.⁴⁸ The Annex provides indeed:

A Member that is a party to such an agreement or arrangement referred to in subparagraph (a), whether future or existing, shall afford adequate opportunity for other interested Members to negotiate their accession to such agreements or arrangements, or to negotiate comparable ones with it, under circumstances in which there would be equivalent regulation, oversight, implementation of such regulation, and, if appropriate, procedures concerning the sharing of information between the parties to the agreement or arrangement. Where a Member accords recognition autonomously, it shall afford adequate opportunity for any other Member to demonstrate that such circumstances exist.⁴⁹

Despite being a provision highly difficult to put into practice, the recourse to international standards would facilitate the comparison between two sets of domestic regulations when they are based on a common denominator,⁵⁰ the expression 'equivalent regulation' used in the Annex and 'harmonization' used in Article VII:1 GATS playing the same role. Again, international standards are useful assessment tools for a state claiming the benefit of mutual recognition measures.

Therefore, the usefulness of an international yardstick in the field of financial services liberalization is obvious. Despite a natural penchant for standards set by the Basel Committee, IOSCO, and IAIS, it is necessary to determine to what extent WTO law

⁴⁵ Trachtman, *supra* n. 13, 69.

⁴⁶ Article VII(1) GATS.

⁴⁷ Annex on Financial Services, Art. 3(a).

⁴⁸ Articles VII(2) and VII (3) GATS. See Luff, *supra* n. 22, 598.

⁴⁹ Annex on Financial Services, Art. 3(b).

⁵⁰ Yokoi-Arai, *supra* n. 23, 644 (pointing out that '[t]he activities of the Basel Committee provide guidance on how mutual recognition might be achieved effectively').

allows recourse to external norms in order to interpret its own provisions and assess the compliance of domestic regulations with the GATS.

2.2. THE LIMITED RESORT TO INTERNATIONAL FINANCIAL STANDARDS

2.2.1. *The Relationship between WTO Law and International Standards*

Determining to what extent international financial standards are likely to throw light on the obscure and vague provisions of the legal framework for the liberalization of financial services presupposes an analysis of the relationship between WTO law and other international rules.

WTO founding fathers refused the building of a sealed off organization. The Dispute Settlement Understanding (DSU) indeed provides that the clarification of provisions of the WTO Agreements has to be done 'in accordance with customary rules of interpretation of public international law'.⁵¹ It is on this ground that the Appellate Body underlined in its first report that it implies 'a measure of recognition that the General Agreement is not to be read in clinical isolation from public international law'.⁵² If public international law is relevant to interpret the WTO Agreements, demonstrating that the organization is far from being a self-contained regime,⁵³ several provisions of the agreements go beyond this general relationship by referring directly to other international conventions.⁵⁴ For instance, provisions of the UN Charter for the maintenance of international peace and security,⁵⁵ Articles of Agreement of the IMF,⁵⁶ the Paris Convention, the Berne Convention, the Rome Convention, and the Treaty on Intellectual Property in Respect of Integrated Circuits⁵⁷ are among the rules of public international law incorporated by reference in the WTO Agreements.⁵⁸

Beyond these references to existing international obligations, to which the international financial standards do not belong,⁵⁹ the WTO Agreements also refer to non-binding international rules and standards – adopted outside the WTO – that are relevant to assess the compliance of domestic regulations with the WTO Agreements and avoid

⁵¹ Understanding on Rules and Procedures Governing the Settlement of Disputes, Art. 3(2).

⁵² Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (adopted 29 Apr. 1996).

⁵³ J. Pauwelyn, 'The Role of Public International Law in the WTO: How Far Can We Go?', *American Journal of International Law* 95, no. 3 (2001): 535–578. For an in-depth analysis of sources and interpretative tools of WTO law, see P.C. Mavroidis, 'No Outsourcing of Law? WTO Law as Practiced by WTO Courts', *American Journal of International Law* 102, no. 3 (2008): 421–474.

⁵⁴ J. Cazala, 'Les Renvois Opérés par le Droit de l'Organisation Mondiale du Commerce à des Instruments Extérieurs à l'Organisation', *Revue Belge de Droit International* 38, no. 1–2 (2005): 527–558.

⁵⁵ Article XXI:c GATT.

⁵⁶ Article XV:2 GATT.

⁵⁷ Articles 1(3) and 35 TRIPS.

⁵⁸ Luff, *supra* n. 22, 29.

⁵⁹ In our view, the legal relevance of financial standards rests only on a possible recognition of external standards by the GATS. Given that such standards are non-binding international norms, this relevance cannot be established through the integration of existing international obligations permitted under Art. 3(2) DSU, as it has been suggested by an author. See B. De Meester, 'Testing European Prudential Conditions for Banking Mergers in the Light of the Most Favoured Nation in the GATS', *Journal of International Economic Law* 11, no. 3 (2008): 609–647, 644.

disguised restriction on trade. It is reflected in trade in goods in the SPS Agreement and TBT Agreement.

Indeed, The SPS Agreement induces Member States to harmonize their SPS measures on the basis of 'international standards, guidelines or recommendations'.⁶⁰ Moreover, when domestic measures comply with these standards, they 'shall be deemed to be necessary to protect human, animal or plant life or health, and presumed to be consistent with the relevant provisions of this Agreement and of GATT 1994'.⁶¹ This agreement relates directly to the standards, guidelines, and recommendations established by the Codex Alimentarius Commission, by the International Office of Epizootics, and by the Secretariat of the International Plant Protection Convention.⁶² For matters outside the scope of competence of these organizations, the SPS Agreement refers to standards 'promulgated by other relevant international organizations open for membership to all Members, as identified by the Committee'.⁶³ This provision thus reflects the possibility to rely on standards adopted by institutions that are not listed in the Agreement.

The TBT Agreement shares a similar philosophy, providing that members should use 'relevant international standards' as a basis of their technical regulations,⁶⁴ which shall be deemed 'not to create an unnecessary obstacle to international trade'.⁶⁵

If this agreement mentions rules adopted by the International Organization for Standardization (ISO) and the International Electrotechnical Commission (IEC), it provides a generic definition of the term 'standard' as a '[d]ocument approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory'.⁶⁶ It also mentions that the term 'body' means a '[b]ody or system whose membership is open to the relevant bodies of at least all Members'⁶⁷ and even specifies that the adoption of these norms should be based on consensus.⁶⁸ The latter two conditions aim to prevent regulatory capture by a small number of states that would lead to circumvent the multilateral and consensus-based functioning of the WTO.

SPS and TBT agreements are therefore very informative on the scale of external norms that could potentially be absorbed by WTO law. If the international standards explicitly mentioned in the SPS Agreement stem from intergovernmental organizations or public international law instruments, those included in the TBT Agreement originate

⁶⁰ SPS Agreement, Art. 3(1).

⁶¹ SPS Agreement, Art. 3(2).

⁶² SPS Agreement, Annex A, Arts 3(a), 3(b), and 3(c).

⁶³ SPS Agreement, Annex A, Art. 3(d). This article refers to the Committee on Sanitary and Phytosanitary Measures in charge of the administration of the agreement; SPS Agreement, Art. 12.

⁶⁴ TBT Agreement, Art. 2(4). On this aspect, see Howse, *supra* n. 9, 383.; L. Tamiotti, 'Article 2 TBT', in *WTO – Technical Barriers and SPS Measures*, ed. R. Wolfrum, P.T. Stoll & A. Seibert-Fohr (Leiden: Martinus Nijhoff, 2007), 210–234, 221.

⁶⁵ TBT Agreement, Art. 2(5). The presumption is rebuttable.

⁶⁶ TBT Agreement, Annex 1, Art. 2.

⁶⁷ TBT Agreement, Annex 1, Art. 4.

⁶⁸ 'Standards prepared by the international standardization community are based on consensus. This Agreement covers also documents that are not based on consensus'; TBT Agreement, Annex 1, Art. 2, Explanatory Note.

from private institutions such as the ISO or the IEC comprised of, and governed by, professional associations.

Therefore, the provisions of the TBT and SPS agreements make highly relevant public as well as private international soft law norms adopted by these 'quasi-legislators'.⁶⁹ Beyond the blurring of this public/private law-making distinction, the legal status of these international standards is almost identical to rules of public international law, which is highlighted by David Luff:

[T]he status of these rules and international standards is in fact similar to the one of international treaties specifically mentioned in the WTO agreements. The legal nuance lies in the fact that the latter are themselves binding between parties whereas the former can only be used for interpreting a provision of the WTO agreements and establish a presumption of the compatibility of a national measure to them.⁷⁰

By the yardstick of the SPS and TBT agreements, it is now possible to assess the possibility of using the standards of the Basel Committee, IOSCO, and IAIS to interpret some of the GATS provisions. Although several authors have already underlined the relevance of these financial standards for this purpose,⁷¹ it appears that such recourse cannot be systematically realized and an analysis of what is permitted by the GATS possibly is necessary.

2.2.2. *The Recourse to International Financial Standards in WTO Law*

The Annex on Financial Services remains silent on the characteristics of the potential standards and standard-setting institutions for the assessment of domestic measures. In the absence of indications in the *lex specialis*, the relevant provisions are to be found in the GATS, the *lex generalis*. It provides that, in order to determine whether the domestic

⁶⁹ Trachtman, *supra* n. 13, 70.

⁷⁰ Luff, *supra* n. 22, 38. ['le statut de ces règles et standards internationaux est donc en pratique semblable à celui des traités internationaux qui sont désignés de manière plus spécifique dans les accords de l'OMC La nuance juridique est que ces derniers comportent de par eux-mêmes des effets juridiques obligatoires pour les parties tandis que les premiers ne peuvent servir qu'à interpréter une disposition des accords de l'OMC et à faire présumer la compatibilité d'une mesure nationale avec eux.'](translation by the author).

⁷¹ Alexander, *supra* n. 33, 127 (arguing the relevance of the Core Principles for Banking Supervision established by the Basel Committee); Gkoutzinis, *supra* n. 24, 908 (proposing the integration of the standards of the Basel Committee, IOSCO, and IAIS); Hahn, *supra* n. 23, 202 (referring to the standards of the Basel Committee, IOSCO, and IAIS); Key, *supra* n. 23, 21 (underlining the relevance of Basel Committee and IOSCO standards); Panourgias, *supra* n. 39, 107 (proposing to incorporate Basel Committee standards); P. Sauvé & K. Steinfatt, 'Financial Services and the WTO: What Next?', in *Open Doors: Foreign Participation in Financial Systems in Developing Countries*, ed. R. E. Litan, P. Masson & M. Pomerleano (Washington, DC: Brookings Institution Press, 2001), 351–386, 366 (underlining the relevance of the standards set by the Basel Committee, IOSCO, and IAIS); Trachtman, *supra* n. 37, 27 (referring to the standards of the Basel Committee, IOSCO, and IAIS); Servais & Dutry, *supra* n. 23, 667 (citing the standards of the Basel Committee and IOSCO to determine the scope of application of the prudential carve out); Yokoi-Arai, *supra* n. 23, 644 (mentioning the relevance of the Basel standards); A. Piquemal, 'La Libéralisation des Services Financiers dans le Cadre du GATT et de l'OMC', in *La Réorganisation Mondiale des Echanges*, ed. Société Française pour le Droit International (Paris: Pedone, 1996), 163–189, 175 (citing Basel Committee standards and underlining that prudential measures should not be considered as prejudicial to the competition they are when undertaken and coordinated at the international level); Delimatis, *supra* n. 32, 47 (mentioning IOSCO within the framework of Art.VI); D. Snyder, 'Free Trade in Insurance and Domestic Insurance Regulation: In Harmony or in Conflict?', *Journal of Insurance Regulation* 26, no. 1 (2007): 115–122, 120 (mentioning IAIS standards in the matter of insurance services).

regulations are 'based on objective and transparent criteria',⁷² 'account shall be taken of international standards of relevant international organizations'.⁷³ Similarly, the GATS provides in matter of mutual recognition procedures that:

In appropriate cases, Members shall work in cooperation with relevant intergovernmental and non-governmental organizations towards the establishment and adoption of common international standards and criteria for recognition and common international standards for the practice of relevant services trades and professions.⁷⁴

Contrary to the SPS and TBT agreements, the GATS does not refer to any international institution likely to fulfil this purpose, and with good reason, this agreement applies to all kinds of services. The expression 'relevant international organizations' is defined as 'international bodies whose membership is open to the relevant bodies of at least all Members of the WTO'.⁷⁵ The opening up of the membership of these institutions is thereby the only condition for the recognition of the relevant international standards. However, the GATS imposes no procedural conditions pertaining to the adoption of standards by consensus, such as in the TBT Agreement, thereby allowing the recognition of standards adopted by a majority vote outside the WTO and, consequently, the circumvention of the consensus-based functioning of the organization.

The application of this provision clearly shows that IOSCO and IAIS could be considered as relevant standard-setting bodies for the GATS since the membership of these institutions is open to financial regulatory authorities of all states.⁷⁶ However, given the limited and restricted membership of the Basel Committee, which was originally comprised of the G10 countries⁷⁷ and, following the discussions on the reform of the international financial architecture,⁷⁸ was extended in March 2009 to reflect the composition of the G20,⁷⁹ its standards could not receive the *imprimatur* of the GATS.⁸⁰ Therefore,

⁷² Article VI:4(a) GATS.

⁷³ Article VI:5(b) GATS.

⁷⁴ Article VII:5 GATS.

⁷⁵ Article VI:5(b) GATS, n. 3.

⁷⁶ This finding could be different if a WTO court used the consensus criterion of the TBT Agreement. Indeed, IOSCO and IAIS standards are adopted by consensus in working groups and the Technical Committee of both institutions, but IAIS standards are adopted by the General Meeting of Members by a two-thirds majority of members casting a vote (Art. 12(1)(c) of IAIS By-Laws; <www.iaisweb.org/_temp/By-laws_2008_edition.pdf>). IOSCO standards are not necessarily submitted for the approval of the Presidents Committee, which is the plenary organ of the institution. Therefore, in both cases, it would be delicate to argue that all standards of these two institutions are adopted by a consensus of all members. The TBT Agreement instils flexibility on this matter as it provides that it 'covers also documents that are not based on consensus' (TBT Agreement, Annex 1, Art. 2, Explanatory Note). This flexibility was confirmed by the Appellate Body in the *Sardines* case; Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R (adopted 26 Sep. 2002), paras 219 et seq. See also Luff, *supra* n. 22, 297, n. 1328.

⁷⁷ Emmenegger, *supra* n. 1, 225.

⁷⁸ The G20 stated that 'major standard setting bodies should promptly review their membership' (G20, 'Declaration, Summit on Financial Markets and the World Economy', <www.g20.org/Documents/g20_summit_declaration.pdf>, 15 Nov. 2008, para. 9).

⁷⁹ The Basel Committee is now comprised of representatives of banking regulators of the following countries: Australia, Belgium, Brazil, Canada, China, France, Germany, India, Italy, Japan, Korea, Luxembourg, Mexico, The Netherlands, Russia, Spain, Sweden, Switzerland, the United Kingdom, and the United States. See Basel Committee, 'Expansion of Membership Announced by the Basel Committee, Press Release, 13 Mar. 2009', <www.bis.org/press/p090313.htm>, 6 Apr. 2009.

⁸⁰ R. Grynberg, S. Silva & J.Y. Remy, 'Plurilateral Financial Standards and Their Regulation at the WTO, the Experience of Small Developing States', *Journal of World Investment and Trade* 5, no. 3 (2004): 509–549, 542.

whereas the standards of the Basel Committee are in favour with a majority of authors to serve as relevant rules within the framework of the liberalization of financial services,⁸¹ Articles VI and VII GATS seem to prevent such a connection.

Therefore, from a dispute settlement perspective, Member States could favourably invoke the standards of IOSCO and IAIS in the field of domestic regulation, including prudential regulation and mutual recognition measures. It is also worth noting that the Annex provides that '[p]anel[s] for disputes on prudential issues and other financial matters shall have the necessary expertise relevant to the specific financial service under dispute'⁸² and, therefore, seems to favour the participation of members of these institutions in the first stage of the dispute settlement process.

Our conclusion needs, however, to be clarified. By no means, domestic regulations based on Basel standards should be regarded as illegal or deemed to pursue non-prudential objectives. While national measures based on IOSCO or IAIS standards should be irrebuttably presumed consistent with the GATS, the non-recognition of the Basel Committee only means that domestic regulations based on its standards do not enjoy the same *ipso jure* presumption of validity. Pushing the analysis one step further, this issue raises the delicate question of whether a WTO court owes any deference to the Basel Committee standards. Plurilateral regulatory strategies have been regarded in a more favourable light by the Appellate Body than strictly unilateral ones.⁸³ In our view, there should be a rebuttable presumption that domestic regulations based on international norms devised in a plurilateral context involving the major economies and establishing the conditions of a level playing field in the banking sector are deemed adopted for prudential reasons and, consequently, consistent with the GATS.⁸⁴ The outcome would be different if the contentious standards, even if adopted in a plurilateral forum, were not financial sector-related, such as those concerning the combating of tax evasion or the facilitation of tax information exchange.⁸⁵

⁸¹ See *supra* n. 71.

⁸² Annex on Financial Services, Art. 4. See Leroux, *supra* n. 23, 432. On the specificity of the WTO dispute settlement mechanism in the matter of services, see W. Zdouc, 'WTO Dispute Settlement Practice Relating to the GATS', *Journal of International Economic Law* 2, no. 2 (1999): 295–346.

⁸³ This stance is reflected in the Shrimp/Turtle case where the Appellate Body put the emphasis on the unilateralism and selective bilateralism of the processes of certifications established and administered by the United States. See Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimps Products*, WT/DS58/AB/R (12 Oct. 1998), paras 170–176. See also Trachtman, *supra* n. 13, 69 (noting that the Appellate Body suggested 'that for a national measure to be eligible for exemption under the *chapeau* of Article XX, a state might be required first to attempt to achieve its regulatory goals through multilateral (or other non-unilateral) means').

⁸⁴ Mattoo & Sauvé, *supra* n. 8, 228 (noting that 'efforts should be directed to ensure that the GATS creates a stronger presumption in favor of genuinely international standards in services trade' and recognizing further that '[t]he relevant institutions for promoting international standards for service are to be found in various specialized regulatory institutions, such as the Bank for International Settlements ...').

⁸⁵ This would for instance be the case of a domestic mutual recognition regulation of the host state requiring the home state to comply with the OECD standard on transparency and exchange of information in tax matters in order to allow the establishment in the host state of a branch or a subsidiary of a financial institution chartered and regulated in the home state. The OECD model agreement on exchange of information in tax matters is available at <www.oecd.org/dataoecd/15/43/2082215.pdf>.

3. THE RELEVANCE OF INTERNATIONAL FINANCIAL STANDARDS IN THE WTO INSTITUTIONAL PRACTICE

While the Basel Committee norms are not considered as ‘international standards of relevant international organizations’ under the GATS, this has not prevented the development of an institutional practice within the WTO more inclined to accept all international financial standards and therefore bypassing the limitations included in the GATS. This extension manifests itself within the WTO Committee on Trade in Financial Services (CTFS) whose role is to administrate the relevant agreements and commitments of Member States in the matter of financial services (section 3.2.1). Moreover, since no dispute has yet precisely defined the relevance of international financial standards, other institutional mechanisms within the WTO through which the legality of Member States’ measures is assessed reveal a tendency for the integration of all international financial standards, notably those of the Basel Committee, in the practice of the organization (section 3.2.2).

3.1. THE RELEVANCE IN THE PRACTICE OF THE CTFS

3.1.1. *The Institutional Framework for the Liberalization of Financial Services*

The CTFS⁸⁶ was established in March 1995 by the Council for Trade in Services as one of its subsidiary organs⁸⁷ and took the succession of the Interim Group on Financial Services, which administered the negotiations during the Uruguay Round.⁸⁸ Although its role was to serve as an institutional support for the negotiations of the two protocols of 1995 and 1997, it has also been a forum for the discussion of domestic regulation and mutual recognition procedures. Within this framework, Member States have been brought to tackle the question of the relevance of international financial standards.

Besides, this question was not new and was discussed at the very beginning of the Uruguay Round. In 1989, the Group of Negotiations on Services mentioned the relevance of the main standards adopted by the Basel Committee (in particular the Concordat of the Basel I Accord), which it considered constituted ‘disciplines relating to the provision of financial services’.⁸⁹ Without standing for an official recognition of the Basel Committee standards, all the more as it intervened at the negotiation stage, such

⁸⁶ For a recent study on the CFTS, see J. Windsor, ‘The WTO Committee on Trade in Financial Services: The Exercise of a Public Authority within an International Forum’, *German Law Journal* 9, no. 11 (2008): 1805–1831.

⁸⁷ This competence is laid down in Art. XXIV GATS.

⁸⁸ WTO, Council for Trade in Services, Report of the Meeting Held on 1 Mar. 1995, Note by the Secretariat, S/C/M/1 (22 Mar. 1995), para. 8.

⁸⁹ Uruguay Round, Group of Negotiations on Services, Trade in Financial Services, Note by the Secretariat, MTN.GNS/W/68 (4 Sep. 1989), 1. A summary of the Basel Committee standards is attached to this document (Annex III). See also Uruguay Round, Group of Negotiations on Services, Existing International Arrangements and Disciplines Relevant to Trade in Services: Summary of Material made available to the GNS, Note by the Secretariat, MTN.GNS/W/93 (14 Feb. 1990), 3 (mentioning the standards of the Basel Committee); Uruguay Round, Group of Negotiations on Services, Working Group on Financial Services including Insurance, Note on the Meeting of 11–13 Jun. 1990, MTN.GNS/FIN/1 (5 Jul. 1990), para. 7 (proposal of the Working Group’s President to invite Basel Committee’s experts to the discussions).

a reference showed, however, the practical relevance of these standards in the context of the liberalization of financial services.⁹⁰ However, the question of international financial standards disappeared from the debates of this negotiating group and was also absent from the first works of the CTFS.⁹¹

It only came back on the agenda a few months after the conclusion of negotiations and the adoption of the Fifth Protocol on financial services. Two views conflicted: a form of proselytizing by the developed countries to establish the relevance of the international financial standards within the CTFS and a resistance by the developing countries unwilling to be subject to rules drafted and adopted without their participation. Naturally, the standards of the Basel Committee were at the centre of the debate. The legal impact of discussions led within the CTFS needs to be underlined as they represent more than the potential emergence of an *opinion juris* for the international financial standards. Indeed, Article VI.4 GATS provides:

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. Such disciplines shall aim to ensure that such requirements are, inter alia:

- (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.⁹²

What is at stake is thus the potential recognition of international financial standards as devices for the assessment of domestic measures of Member States. Such recognition would not modify the result reached by a WTO court for IOSCO and IAIS standards, but it could potentially lead to the legitimization of Basel Committee standards, which, as underlined above, could not pass the test of Article VI:5 GATS.

3.1.2. *The Dispute about International Financial Standards in the CTFS Practice*

While the Council for Trade in Services had early signalled its interest for financial standards, inducing states to look into the work of 'other international organizations,

⁹⁰ H. Ascensio, 'Les Activités Internationales des Banques: Liberté ou Contrôle?', *Journal du Droit International* 120, no. 2 (1993): 255–297, 266.

⁹¹ We have found only a reference in a note of the Secretariat of the CTFS in 1996 raising a question in relation with the terms of cross-border supply of financial services and the necessity to maintain an adequate supervision over the foreign supplier. The Committee underlined that '[s]ome countries may have considered that, if and when the principles of consolidated home-country supervision and regulatory harmonization coupled with enhanced international cooperation as laid down in the regulatory principles agreed by the Basle Committee on Banking Supervision are applied universally, such concern may be alleviated substantially' (WTO, Committee on Trade in Financial Services, Technical Issues Concerning Financial Services Schedules, Note by the Secretariat, S/FIN/W/9 (29 Jul. 1996), para. 12). On another level, the Ministerial Declaration of Singapore encouraged in the matter of services 'the successful completion of international standards in the accountancy sector by IFAC, IASC, and IOSCO' (WTO, Ministerial Conference, Singapore Ministerial Declaration, WT/MIN(96)/DEC (adopted 13 Dec. 1996), para. 17).

⁹² Emphasis added.

most notably the...BIS, IOSCO, IAIS...among others, are also particularly relevant for this sector',⁹³ it was mainly developed states, in particular those belonging to the G10, that have gone up to the front to actively campaign within the CTFS for the recognition of international financial standards.

The reluctance of developing countries to this initiative first manifested itself through institutional rapprochement between the CTFS and the Basel Committee, IOSCO, and IAIS. The discussions among the CTFS about the IAIS's request for a membership in this committee are revealing about this divide, despite the IAIS being an open institution comprised of domestic regulators from developing countries. The European Communities, Japan, the United States, and Canada approved this request almost without any reservation. Japan declared for instance that 'if cross-border transactions were to be liberalized Members had to bear in mind that proper supervision needed to be in place [and therefore] the inputs in that regard that IAIS could provide would benefit the work of the Committee as a whole'.⁹⁴ However, several developing countries expressed some reluctance,⁹⁵ and no consensus was reached on this request, which was eventually turned down.⁹⁶ This reluctance turned into mistrust when a meeting between the Member States' representatives and these institutions was proposed. The CTFS underlined all the safeguards that were put in place around this meeting, which are symptomatic of these tensions:

[T]he Committee agreed to organize an informal briefing session to be given by the most relevant international standard-setting organizations, namely the Basel Committee on Banking Supervision, the International Organization of Securities Commissions, and the International Association of Insurance Supervisors. The purpose of the informal briefing session would be to provide an opportunity for those organizations to inform and update delegations about their activities in this field. It was worth highlighting that consensus was reached on the basis of the following conditions: that the session would be a one-off, stand-alone event; that there would be no reporting to the Committee or to the Council on the session's proceedings; that the briefing session would not touch upon the scope of paragraph 2(a) of the Annex on Financial Services [*related to prudential*

⁹³ WTO, S/C/W/72, *supra* n. 14, 1. See also n. 41 (quoting several Basel Committee, IAIS, and IOSCO standards).

⁹⁴ WTO, Committee on Trade in Financial Services, Report of the Meeting Held on 13 Apr. 2000, Note by the Secretariat, S/FIN/M/25 (8 May 2000), para. 28. In the same way, the representative of the EC underlined that 'granting that observership would be very useful in bringing the Committee closer to an International Organization dealing with regulatory matters in the sector'. Canada indicated as for him that 'it would be puzzling if the trade policy community did not have more than a passing interest in what regulator were doing' and that '[t]he request by the IAIS should be welcomed'. The United States 'supported granting observership on "Ad hoc" basis but not limited to insurance' (WTO, Committee on Trade in Financial Services, Report of the Meeting Held on 25 May 2000, Note by the Secretariat, S/FIN/M/26 (29 Jun. 2000), paras 43–46).

⁹⁵ See the statements of Malaysia and Pakistan (S/FIN/M/26) and of Mauritius and Egypt (S/FIN/M/27) mainly dealing with procedural aspects. The question of the relationship between the IAIS (whose legal status remains unclear) and the Bank for International Settlements was raised by China. The representative of Japan answered that 'those two organizations were independent as they only shared a building and certain parts of their Secretariats, for historical reasons' and that '[t]he IAIS had an independent membership and its decisions were made independently' (WTO, Committee on Trade in Financial Services, Report of the Meeting Held on 13 Jul. 2000, Note by the Secretariat, S/FIN/M/27 (23 Aug. 2000), para. 54).

⁹⁶ WTO, Committee on Trade in Financial Services, Report of the Meeting Held on 9 Oct. 2000, Note by the Secretariat, S/FIN/M/27 (20 Nov. 2000), paras 30–39.

measures]; and that, if necessary, national experiences would be referred to only in general terms and would not identify country-specific situations.⁹⁷

The stance of developing countries needs to be set back in the broader context of multiple attempts of developed countries, notably those also members of the Basel Committee, to submit the matter of domestic regulation to these institutions and to refer to their standards. Switzerland recommended for instance ‘the increased use of the standards developed in the relevant international forums (the Basel Committee, the IAIS, the IOSCO, and the Joint Forum on Financial Conglomerates)’.⁹⁸ The position of the European Communities reflects the search of a better connection between the competences of the WTO and those of these institutions:

It is our view that one pre-requisite for a successful and orderly opening of financial markets is the existence of an appropriate regulatory structure, as well as the ability of local supervisory authorities to monitor a more complex market. The EC emphasise its support for regulation that is transparent, proportionate and necessary. WTO work on regulatory issues will be useful in supporting domestic regulatory reform efforts, and should reflect upon the consideration of international standards as developed by the competent international organisations (IOSCO, IAIS, the Basle Committee, IMF, World Bank, etc.). The WTO shall in no way seek to replace or take up the role of these competent international organisations; rather, the work of the WTO and of these other international organisations should be mutually supportive.⁹⁹

The question became more sensitive when some states proposed to rely on international financial standards, notably those of the Basel Committee, in order to clarify the notion of ‘prudential measures’ of the Annex on Financial Services. Australia was the first to propose using the Core Principles for Banking Supervision of the Basel Committee, underlying that ‘[t]he objective would be to have a common understanding of what was excluded so that coverage by the carve out would not be used to introduce regulatory behaviour that could become protectionist’.¹⁰⁰ The Australian proposal found favour with several delegations, notably Japan, the European Communities, the United States, Canada, and Norway but provoked the reluctance, not to say the opposition, of Malaysia, China, Brazil, The Philippines, and Korea,¹⁰¹ which feared that such an initiative would restrict the right of every state to adopt the desired level of protection in their domestic regulation.¹⁰²

⁹⁷ WTO, Council for Trade in Services, Special Session, Report of the Meeting Held on 14 to 17 May 2001, Note by the Secretariat, S/CSS/M/9 (22 Jun. 2001), para. 56.

⁹⁸ WTO, Council for Trade in Services, Special Session, Communication from Switzerland, GATS 2000: Financial Services, S/CSS/W/71 (4 May 2001), para. 19.

⁹⁹ WTO, Council for Trade in Services, GATS 2000: Financial Services, Communication from the European Communities and Their Member States, S/CSS/W/39 (22 Dec. 2000), para. 20.

¹⁰⁰ WTO, S/FIN/M/25, *supra* n. 94, para. 20.

¹⁰¹ See the minutes of the following meetings: S/FIN/M/26; S/FIN/M/27; S/FIN/M/28; S/FIN/M/29; S/FIN/M/30. The position of Brazil, however, relaxed in favour of such a rapprochement, see S/FIN/M/49; S/FIN/M/50; S/FIN/M/55.

¹⁰² Which is reminded in the GATS Preamble recognizing ‘the right of Members to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives and, given asymmetries existing with respect to the degree of development of services regulations in different countries, the particular need of developing countries to exercise this right’ (GATS Preamble, para. 4). See also Grynberg et al., *supra* n. 80, 536.

These attempts gave rise to fierce opposition from small developing countries, mainly those being the place of off-shore financial activities. Antigua and Barbuda, on behalf of Belize, the Fiji Islands, Guyana, Papua New Guinea, The Maldives, the Solomon Islands, and St Kitts and Nevis proposed an amendment to several GATS provisions so as to prevent the recourse to financial standards. They consider themselves as:

[S]mall developing economies with limited administrative, financial and human resource capacity to participate in the formulation and implementation of the international standards relating to financing of activities that result in acts of terror, money laundering, capital adequacy requirements and harmful tax competition that are emerging from plurilateral fora such as the Financial Action Task Force (FATF), the Basel Committee and the OECD.¹⁰³

This debate within the CTFS took an unexpected political turn as the arguments of these countries, although expressed in a vehement manner, raised systemic issues about these new types of international norms.¹⁰⁴ The following excerpt best encapsulates the key elements of their criticisms of some financial standards:

[A] number of larger and more powerful states had abrogated to themselves the task of making rules and imposing them on others.... The sovereign right of states to regulate and manage their crucial financial services sector was being challenged continually by some countries who appeared to have usurped the role of international organizations such as the WTO in global governance. The best rules, codes and practices – and the ones that were most effectively implemented and policed – were those in which all states, large and small, had a real role in elaborating. There was no better method of securing enthusiasm and support than the full involvement of all concerned parties. Flying in the face of that common sense approach, some larger and more powerful countries adopted unfair and coercive practices in plurilateral organizations...to compel many other countries to implement measures which they alone had devised.... Membership in these organizations was effectively closed-off to many developing countries, especially small vulnerable ones like his own.

Over the past few years, the financial community had seen an unprecedented growth in the number of codes, standards and guidelines that were fashioned entirely by these plurilateral groups and with which they expected conformity from others....

The inclusiveness and international legitimacy of financial standards, universally negotiated and universally applied, could be accomplished best through the provisions related to Domestic Regulation under Article VI of the GATS. The recommendations contained in the proposal could therefore be categorized as follows:

that small states acquire some measure of flexibility in designating bodies responsible for the administration of their standard setting and compliance obligations under GATS, and that in particular, they be given technical assistance in formulating and implementing standards with which they are being expected to comply;

that a more explicit definition be given for what constitutes a “relevant international organization” in footnote 3 of the GATS, to ensure that all WTO Members, regardless of their developmental status and through technical assistance, have access to international processes aimed at setting these standards; and

¹⁰³ WTO, CTFS, Communication from Antigua and Barbuda, Belize, Fiji Islands, Guyana, Papua New Guinea, The Maldives, Solomon Islands, and St Kitts and Nevis, the GATS and the Annex on Financial Services, International Regulations and Financial Services, S/FIN/W/29 (4 Aug. 2003), 1.

¹⁰⁴ See also R. Grynberg & S. Silva, “Harmonization without Representation: Small States, the Basel Committee, and the WTO”, *World Development* 34, no. 7 (2006): 1223–1236, 1233.

that small states that may be expected to comply with these financial standards and codes be notified and subsequently accorded the opportunity to engage in consultations with these standard-setting members, bodies and institutions.

The proposal derived from a long experience of exclusion of small developing states in standard setting...[T]hese countries could not accept that a handful of states, however powerful, usurped the right to dictate standards to the rest of the world...The time was overdue for the international community as a whole to assume responsibility for this matter in a genuinely international organization such as the WTO.¹⁰⁵

From another perspective, these arguments raise another issue related to the integration of international financial standards into the GATS. The first proposals of the Basel Committee members within the CTFS principally aimed to prevent large emerging economies such as China or Brazil from adopting prudential regulations with protectionist purposes and complicating the establishment of foreign financial institutions in these countries. On the contrary, the underlying idea of Antigua's proposal was to consider that the Basel standards, among others, were likely to constitute discriminatory and unjustified measures since, when transposed into domestic regulations, they would complicate the capacity of the financial institutions of these small developing countries to supply financial services abroad.

To some extent, developed countries have been hoisted with their own petard. Norway's retort was telltale of this uneasiness. Norway 'disagreed with any notion that these measures were in place to protect the financial industry' and underlined that they 'were prudential and reflected the need to protect policy holders'.¹⁰⁶ Some developed states were therefore put in the situation of defending recourse to international financial standards and, paradoxically, justifying that domestic regulations based on the prudential standards of the Basel Committee should be regarded as 'prudential measures' under the Annex on Financial Services. This debate has therefore raised the risk that countries may use 'the "prudential carve out" as a pretext for unilateral introduction and imposition of their own domestic and international financial standards'.¹⁰⁷ It seems, however, that the discriminatory and unjustified nature of the Basel Committee standards cannot be established. While this question is of the same nature as the level of protection that states may choose under the SPS Agreement,¹⁰⁸ it would be far-fetched to claim that Basel standards do not pursue prudential objectives and are construed so as to exclude some developing states lacking in the administrative structures to implement them.¹⁰⁹

¹⁰⁵ WTO, CTFS, Report of the Meeting Held on 6 October 2003, Note by the Secretariat, S/FIN/M/42 (12 Nov. 2003), paras 50–54.

¹⁰⁶ WTO, CTFS, Report of the Meeting Held on 25 June 2004, Note by the Secretariat, S/FIN/M/45 (19 Jul. 2004), para. 30. Moreover, the statement added that 'Norway could not support any proposal that could undermine these initiatives through the WTO system. Norway would, however, continue working to ensure transparency and the widest possible participation in standard setting'.

¹⁰⁷ Grynberg & Silva, *supra* n. 104, 1233.

¹⁰⁸ Luff, *supra* n. 22, 282.

¹⁰⁹ As discussed above (s. 2.2.2), standards adopted in a plurilateral forum involving the major economies and establishing the conditions of a level playing field in the banking sector shall be presumed in compliance with the GATS. This stance, however, does not shrug off the issue of the acceptable level of protection since some developing states argue that the small size of their economies structurally prevent them from absorbing the cost of the implementation of financial standards, thereby de facto excluding them from markets the access of which is subject to a compliance of foreign services suppliers' domestic regulation with these standards.

This dispute has not weakened the relevance of Basel standards for the GATS. The issue has disappeared from the CTFS agenda a little more than a year after its introduction, and the debates it raised were the occasion for a range of states, including some of the largest developing economies, to emphasize the importance of the international financial standards for the liberalization of financial services. It is also not surprising that this turnaround has coincided with an enlargement of states involved in the work of the Basel Committee and the opening of the capital of the Bank for International Settlements to the central banks of these countries, the latter institution hosting most of the international financial cooperation fora.¹¹⁰

Decision-making within the WTO being guided by consensus,¹¹¹ which is also mandatory among subsidiary organs of the institution,¹¹² the CTFS could not in principle impose the international financial standards in the case of opposition from one Member State, such as Antigua. However, the possibility of a forced integration of the Basel Committee standards within the CTFS exists despite this persistent minority. The analysis remains highly speculative, but these discussions could possibly be used as a basis for a panel or the Appellate Body to ascertain this integration, WTO courts having already relied on recommendations adopted among its organs as an auxiliary means of interpretation of the agreements.¹¹³

3.2. THE RELEVANCE IN THE GENERAL INSTITUTIONAL PRACTICE OF THE WTO

While no common discipline has been adopted so far by consensus within the WTO in the field of financial services, and given the probable, but still hypothetical, recognition of the Basel Committee standards by WTO courts, these standards remain highly relevant within the framework of the general institutional practice of the organization. Indeed, the WTO has established non-jurisdictional mechanisms assessing the compliance of trade policies and domestic regulations with the agreements. Two kinds of mechanisms put into perspective the relevance of international financial standards and notably those of the Basel Committee: the WTO accession process (section 3.2.1) and the TPRM (section 3.2.2).¹¹⁴

¹¹⁰ See Bank for International Settlements, '77th Annual Report' (2007), 157.

¹¹¹ Agreement Establishing the World Trade Organization, Art. IX:1.

¹¹² G. Marceau, 'Pratique et Pratiques dans le Droit de l'Organisation Mondiale du Commerce (OMC)', in *La Pratique et le Droit International*, ed. Société Française pour le Droit International (Paris: Pedone, 2004), 159–208, 200.

¹¹³ See the examples cited by Mavroidis, *supra* n. 53, 430.

¹¹⁴ It is noteworthy to mention that the relevance of international financial standards has also been addressed by the Working Group on Trade, Debt and Finance (WGTDF) established in 2001 by the Doha ministerial declaration. Its mandate includes, among others, the issuing of recommendations on how 'to strengthen the coherence of international trade and financial policies, with a view to safeguarding the multilateral trading system from the effects of financial and monetary instability' (WTO, Ministerial Conference, Ministerial Declaration, WT/MIN(01)/DEC/1 (adopted 14 Nov. 2001), para. 36). Following a Brazilian proposal to that effect (WTO, WGTDF, Communication from Brazil, WT/WGTDF/W/39 (6 Oct. 2008), paras 4–6, 8), the WGTDF hosted a presentation on the Basel II Agreement and its implication for trade financing made by a representative of the Secretariat of the Basel Committee to the attention of WTO members (WTO, WGTDF, Presentation by the Secretariat of the Basel Committee on Banking Supervision, WT/WGTDF/W/42 (2 Dec. 2008)). More recently, the WGTDF discussed the appropriateness and the necessary reform of the Basel II prudential framework with respect to the implementation of the G20 package (WTO, WGTDF, Expert Meeting Group on Trade Finance, Informal Report by the WTO Secretariat, WT/WGTDF/W/46 (17 Sep. 2009)).

3.2.1. *As Part of the WTO Accession Process*

Each member of the WTO 'shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the...Agreements'.¹¹⁵ It is therefore not surprising that one of the most fundamental aspects of the accession process to the WTO is to ensure that future Member States modify their legal system and trade policies so as to make them consistent with WTO rules.¹¹⁶ The accession is handled on an ad hoc basis since no specific procedure has been established by the agreements.¹¹⁷ In practice, the accession process is administered by Working Party groups established under the auspices of the General Council. It comprises four main stages¹¹⁸: (1) the *investigation* by which the applicant provides information about its domestic regulations and trade policy to the Working Party, which, through a questions/responses process, asks for clarifications on aspects likely to present inconsistencies with the WTO Agreements; (2) the *multilateral negotiations* during which the applicant proposes a schedule for the review of its inconsistent domestic regulation and for the commitments it has planned to undertake; (3) the *bilateral negotiations* during which the tariff reductions and the scope of services liberalization under the GATS with the main trading partners are specified; (4) the *accession* during which the Working Party submits to the General Council its final report, including the Protocol of Accession,¹¹⁹ the final decision being the province of the Ministerial Conference.

It has been possible to witness during the first stage of this process that the Working Party as much as the applicant states have included the transposition of the Basel Committee standards into their doctrine of compliance with the WTO Agreements. This approach is all the more surprising given that these standards do not seem relevant for the GATS.

At the beginning of the procedure launched with the application for membership, the Working Party in charge of the examination draws up a 'Memorandum' on the foreign trade regime on the basis of the information provided by the applicant. From this first stage, documents of the working parties may contain explicit references to the Basel Committee standards.¹²⁰ These references are more common when, on the basis of this Memorandum passed on to the Member States, the latter address questions to the applicant in order to clarify some aspects of its domestic regulation or trade policy. For instance, within the framework of its accession to the WTO, Jordan was asked to provide

¹¹⁵ Agreement Establishing the World Trade Organization, Art. XVI:4.

¹¹⁶ G. Marceau, 'Les Procédures d'Accession à l'Organisation Mondiale du Commerce (OMC)', *Canadian Yearbook of International Law* 35 (1997): 233–262, 235.

¹¹⁷ See Agreement Establishing the World Trade Organization, Art. XII. Guidelines on accession procedures were adopted by the WTO Secretariat; WTO, Accession to the World Trade Organization, Procedures for Negotiations under Art. XII, Note by the Secretariat, WT/ACC/1 (24 Mar. 2005). See also WT/ACC/10/Rev.1 and WT/ACC/11.

¹¹⁸ Identified by Luff, *supra* n. 22, 1039. See also Marceau, *supra* n. 116, 238.

¹¹⁹ The protocols of accession are in practice an important source of WTO law since these instruments may lessen or increase some provisions of the WTO Agreements for Member States; Luff, *supra* n. 22, 23.

¹²⁰ See, e.g., WTO, Accession of the Kyrgyz Republic, Memorandum on the Foreign Trade Regime, WT/ACC/KGZ/3 (23 Aug. 1996), 58 (referring to the agreement undertaken between the Member States of the Regional Group on Banking Supervision for Transcaucas and Central Asian States providing for the creation of a Council on bank supervision to coordinate the bank supervisory policies and requiring that the Council adopts its 'resolutions and other acts in accordance with the standards of the Basel Committee').

details about the supervision of foreign banks and minimum capital requirements. Jordan replied that domestic regulation provided for a home-state supervision of foreign banks 'in accordance with Basel requirements' and a non-discriminatory application of the Basel capital adequacy ratios to domestic and foreign banks.¹²¹ Similarly, Kazakhstan justified the non-discriminatory nature of its prudential ratios, arguing that they 'are consistent with the Basel Agreement'.¹²² Similar elements are found in the answers given by Ukraine and Moldova, which both refer to the Basel Committee standards as the basis of their domestic regulation.¹²³

The questions/replies process set during the first stage may lead Member States to raise the question of compliance of domestic regulations with the Basel Committee standards, suggesting that the latter belong to a body of norms every WTO member has to observe. The case of the accession process of Vanuatu is illustrative in this respect.¹²⁴ A Member State questioned Vanuatu on its prudential regulation and underlined at the same time that it 'strongly urge[d] Vanuatu to base the capital adequacy ratios on Basel risk-weighted asset methodology and to ensure that these ratios are implemented on a national treatment basis'.¹²⁵ In its reply, Vanuatu provided information on ongoing legislative reform and indicated that 'the new ratios will definitely be based on Basel risk-weighted asset methodology' and that '[a]s far as the implementation of the ratios on a national treatment basis are concerned, the proposed Bill does not make such distinctions between national and foreign-owned banks'.¹²⁶ Therefore, Basel Committee standards play a predominant role in accession procedures¹²⁷ and constitute at the same time a justification for applicant states as well as a device for Member States to assess the compliance of domestic regulations with the WTO Agreements.

3.2.2. *As Part of the TPRM*

A similar trend exists as part of the TPRM,¹²⁸ whose objective is to ensure the transparency of trade policies and practices of Member States by subjecting them to a monitoring

¹²¹ WTO, Accession of Jordan, Questions and Replies on the Memorandum on the Foreign Trade Regime (Documents L/7533, WT/ACC/JOR/2 and 3), WT/ACC/JOR/9 (4 Jun. 1997), questions 131 and 132.

¹²² WTO, Accession of Kazakhstan, Additional Questions and Replies to the Memorandum on the Foreign Trade Regime (Document WT/ACC/KAZ/3), WT/ACC/KAZ/6 (3 Feb. 1997), question 154.

¹²³ For Ukraine, see WTO, Accession of Ukraine, Questions and Replies, WT/ACC/UKR/6 (10 Oct. 1995), question 5n; WTO, Accession of Ukraine, Services, Discussion Document for the Second Meeting of the Working Party, WT/ACC/UKR/19 (28 Nov. 1995), question 5n; WTO, Accession of Ukraine, Additional Questions and Replies, Addendum, WT/ACC/UKR/24/Add.1 (21 Mar. 1997), question 53. Concerning the home-state supervision of foreign banks, Moldova underlined within the framework of its accession that '[a]s for the requirement to be adequately supervised on a consolidated basis, the National Bank requires that the foreign financial institution meets the criteria of the Basel Convention at least to the same degree as Moldova'; WTO, Accession of the Republic of Moldova, Additional Questions and Replies, WT/ACC/MOL/8 (27 Oct. 1997), question 86.

¹²⁴ Vanuatu is not yet a member of WTO.

¹²⁵ WTO, Working Party of the Accession of Vanuatu, Accession of Vanuatu, Additional Questions and Replies, Addendum, WT/ACC/VUT/7/Add.2 (13 May 1998), question 72.

¹²⁶ *Ibid.* On the accession process of Vanuatu and the standards of the Basel Committee, see also WT/ACC/SPEC/VUT/7, para. 98; WT/ACC/VUT/12, para. 126; WT/ACC/VUT/13, para. 112.

¹²⁷ Barr & Miller, *supra* n. 1, 42–43.

¹²⁸ Embodied in the Annex 3 of the Marrakech Agreements.

administered by the Trade Policy Review Body (TPRB), the approach being pedagogic and regulating.¹²⁹ This review is mainly comprised of three types of documents: a policy statement report submitted by the Member State under review, an independent report from the WTO secretariat, and the reports of the TPRB proceedings.¹³⁰

Policy statement reports show the relevance of international financial standards and notably those of the Basel Committee. Member States underline that their financial regulatory authorities are members of the standard-setting institutions¹³¹ or have been invited to take part in their deliberations,¹³² that their domestic regulations comply with these standards,¹³³ or that current reforms are being undertaken in this respect.¹³⁴ The reports of the TPRB proceedings and those of the WTO Secretariat also contain recurrent references to the Basel Committee standards,¹³⁵ suggesting their – maybe unconscious – integration in the body of rules that Member States have to follow.

This institutional practice referring to the Basel Committee standards raises several uncertainties. It would be a delicate exercise to assess the influence and the potential impact of this institutional practice on a WTO court having to interpret the GATS and its Annex on Financial Services. While the discussions within the CTFS or the clarifications of Member States during the accession process could possibly serve as a basis for a panel or the Appellate Body, reports published within the framework of the TPRM

¹²⁹ Luff, *supra* n. 22, 1030–1032.

¹³⁰ *Ibid.*, 1031.

¹³¹ See WTO, Trade Policy Review, Report by Brunei Darussalam, WT/TPR/G/196 (21 Jan. 2008), para. 56 (underlining the fact that the financial regulatory authority is a member of IOSCO and the IAIS).

¹³² WTO, Trade Policy Review, Macau, China, Report by the Government, WT/TPR/G/82 (19 Feb. 2001), para. 60, (financial regulatory authorities invited to attend the Basel Committee meetings and seminars).

¹³³ WTO, Trade Policy Review, Report by Israel, WT/TPR/G/157 (22 Dec. 2005), para. 30 (compliance ‘with international standards prescribed by the Basel Committee for Banking Supervision’).

¹³⁴ WTO, Trade Policy Review Mechanism, Chile, Report by the Government, WT/TPR/G/28 (12 Aug. 1997), para. 4 (underlining that the reform aims at ‘bringing capital adequacy regulations into line with the suggestions of the Basle Committee’); WTO, Trade Policy Review, Report by Brazil, WT/TPR/G/212 (2 Feb. 2009), para. 27 (pointing out that the ‘capital structure according to Basel II is expected to be fully implemented’ and that Basel Committee recommendations will be incorporated).

¹³⁵ See, e.g., the following minutes of the Trade Policy Review Body meetings: WTO, Trade Policy Review, Switzerland and Liechtenstein, Minutes of the Meeting, Addendum, WT/TPR/M/141/Add.1 (16 Feb. 2005), para. 206 (compliance with the standards of the Basel Committee and IOSCO); WTO, Trade Policy Review, Republic of Guinea, Minutes of Meeting, Addendum, WT/TPR/M/153/Add.1 (1 Dec. 2005), 13 (preparation of a ‘draft new banking law to comply with the 25 basic principles of the Basel Committee’). For the reports of the Secretariat mentioning the standards of the Basel Committee, see, e.g., WTO, Trade Policy Review, Barbados, Report by the Secretariat, Part V, WT/TPR/S/101 (10 Jun. 2002), para. 124 (assessment conducted by the central bank of the implementation of the Basle Committee Core Principles for Effective Banking Supervision); WTO, Trade Policy Review, Hong Kong, China, Report by the Secretariat, Part V, WT/TPR/S/109 (18 Nov. 2002), para. 22 (compliance with the Core Principles of the Basel Committee); WTO, Trade Policy Review, Burundi, Report by the Secretariat, Part V, WT/TPR/S/113 (5 Mar. 2003), para. 80 (underlining that the prudential regulation of Burundi ‘relies on the international standards of the Basel Committee’); WTO, Trade Policy Review, Kingdom of Morocco, Report by the Secretariat, Part V, WT/TPR/S/116 (19 May 2003), para. 147 (compliance of the prudential regulation with ‘the international standards established by the Basel Committee’); WTO, Trade Policy Review, Rwanda, Report by the Secretariat, Part V, WT/TPR/S/129 (13 Apr. 2004), para. 86 (prudential framework of the Rwandan regulation ‘similar to the international standards of the Basel Committee’); WTO, Trade Policy Review, Suriname, Report by the Secretariat, Part V, WT/TPR/S/135 (14 Jun. 2004), para. 116 (capital adequacy ratios of domestic banks, ‘which have systematically exceeded Basle minimum guidelines’); WTO, Trade Policy Review, Republic of Guinea, Report by the Secretariat, Part V, WT/TPR/S/153 (14 Dec. 2005), para. 109 (programme launched ‘to harmonize Guinea’s banking regulations with the 25 basic principles of the Basel Committee in order to ensure effective monitoring’); WTO, Trade Policy Review, Bolivia, Report by the Secretariat, Part V, WT/TPR/S/1154 (4 Oct. 2005), 131 (compliance of the Bolivian banking regulation with the Basel Committee’s recommendations); WTO, Trade Policy Review, Japan, Report by the Secretariat, Part IV, WT/TPR/S/211/Rev.1 (12 May 2009), para. 38 (implementation of the Basel II requirements).

cannot 'serve as a basis for the enforcement of specific obligations under the Agreements or for dispute settlement procedures'.¹³⁶

However, this whole institutional practice shows that the Basel Committee standards, and those of IOSCO and IAIS, are both considered by a large majority of Member States and the WTO Secretariat as an obvious yardstick for the regulation of the financial sector.

If such integration is to be realized, it would raise the sensitive question of the level of deference exercised by WTO courts. Should the financial standards serve as a basis for the assessment of the discriminatory nature of a domestic measure or should they also be used to call into question the prudential nature of the domestic regulation, just like the scientific justification required within the SPS Agreement? The latter possibility can be illustrated with the potential challenge to the American regulation preventing a financial institution from supplying, banking, insurance of financial market-related services at the same time. Any Member State could argue that such a measure pursues no proven prudential objective and makes more difficult the entry of new actors in the market by obstructing the grouping of these activities in a single institution, thereby decreasing the potential economies of scale.¹³⁷ This issue is all the more important given that Member States specific commitments only include restrictions on market access and national treatment and do not allow, in principle, the protection of the 'philosophy' of the prudential system, which may have historical underpinnings not necessarily relevant in the current regulatory context. In the absence of a dispute in the field of financial services, these potential tracks remain highly speculative and it is likely that Member States would not venture into this line of argument, which, if it was accepted, could backfire on their own regulatory model.

4. CONCLUSION

In the end, the study of the relevance of the international financial standards in WTO law has raised as many questions as it has answered. On the whole, these standards – and the way they have been used in practice – have highlighted the potential for regulatory harmonization stemming from the GATS. Domestic regulations based on both IOSCO and IAIS standards should be irrebuttably presumed consistent with the GATS given the large membership of these institutions. However, while the Basel Committee standards are likely to be favourably considered by WTO courts, their status fluctuate between a hypothetical *de jure* recognition through the WTO Agreements and a *de facto* relevance in the institutional practice.

¹³⁶ Trade Policy Review Mechanism, Art. A(i). See also WTO Panel Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/R (adopted 14 Apr. 1999), para. 9.274.

¹³⁷ For another example of domestic regulation consisting in the imposition of a commercial presence on foreign financial services suppliers, see A.O. Sykes, 'The (Limited) Role of Regulatory Harmonization in International Goods and Services Markets', *Journal of International Economic Law* 2, no. 1 (1999): 49–70, 60.

In the light of the recent financial unrest, this vague legal status shows the inability of the WTO legal framework to rectify the shortcomings of the Basel Committee standards and, more generally, the gaps in the international financial architecture. The fact that these international financial standards are non-binding rules of public international law that could be easily incorporated in the WTO legal framework is just the tip of the iceberg. The processes of regulation and liberalization of financial services are accomplished by different national entities. Domestic financial regulators, such as central banks or securities commissions, are in charge of the regulation of financial services in their jurisdiction and have developed their own international framework¹³⁸ but have not been actively included in the liberalization negotiations.¹³⁹ Discussions led at the highest level for the reshaping of the international financial system should, without any doubt, take into account these asymmetries between regulation and liberalization and better interconnect these two layers of global economic governance.

¹³⁸ On this issue, see R. Bismuth, 'The Independence of Domestic Financial Regulators: An Underestimated Structural Issue in International Financial Governance', *Göttingen Journal of International Law* 2, no. 1 (2010, forthcoming).

¹³⁹ Trachtman, *supra* n. 37, 35 (noting that '[t]he WTO is relatively ignorant of the subject matter and concerns of the SSBs [*the standard-setting bodies*] and, as shown in the trade and environment sphere, lacks the formal equipment to provide an integrated policy response').