

**SPECIAL ISSUE:
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Thematic Studies

The WTO Committee on Trade in Financial Services: The Exercise of Public Authority within an Informational Forum

*By Joseph Windsor**

A. Introduction

The Committee on Trade in Financial Services (hereinafter, Committee or CTFS¹) is a committee subsidiary to the Council for Trade in Services (CTS), which itself reports to the General Council of the WTO. Shortly after the WTO Agreement entered into force, the CTS established the Committee in its Decision on Institutional Arrangements for the General Agreement on Trade in Services (Institutional Decision).² The Committee acts primarily as a forum for dissemination of regulatory information specific to the often opaque financial services sector. This permits a meeting of national finance ministers and experts, as opposed to (mere) trade negotiators and representatives, who may not be in a position to understand the unique nature of national financial regulation. Fundamentally, a state's finance sector underlies all other sectors of international trade, since any transaction for goods or services requires compensation, usually monetary, thereby making the financial sector function as a sort of central nervous system for global trade.³ The financial services sector, therefore, is peculiar among

* Joseph Windsor, LL.M. (Heidelberg), is an Attorney Editor for THE GOVERNMENT CONTRACTOR at Thomson Reuters/West, Washington, D.C. The author is grateful to Armin von Bogdandy for collaboration on related articles, the staff at the Max Planck Institute for Comparative Public Law and International Law and fellow project participants for insightful comments, the GLJ staff and Eva Richter for painstaking editing, and Salát Orsolya and Sandra Yue for stalwart friendship. Email: joseph.windsor@thomsonreuters.com.

¹ Sometimes referred to as the Financial Services Committee, it should not be confused with the Financial Services Committees of either NAFTA or the U.S. House of Representatives.

² S/L/1, 4 April 1995, para. 3.

³ See Juliane Hernekamp, *Ausgewählte Dienstleistungssektoren*, in WTO-RECHT 418 (Meinhard Hilf & Stefan Oeter eds., 2005); Peter Morrison, *The Liberalisation of Trade in Financial Services and the General Agreement on Trade in Services*, 5 SINGAPORE JOURNAL OF INTERNATIONAL & COMPARATIVE LAW 593, 593 (2001); J. Steven Jarreau, *Interpreting the General Agreement on Trade in Services and the WTO Instruments*

WTO trade sectors. Indeed, the regulatory constellation for financial services within WTO law is unique: it includes two annexes to the General Agreement on Trade in Services (GATS) and two Protocols to GATS, negotiations extended well beyond the Uruguay Round and the Marrakesh Agreement's entry into force, and there is a *sui generis* set of heightened commitments called the Understanding on Commitments in Financial Services.⁴ The Committee also acts as a monitoring body, overseeing both the implementation of legal commitments under the relevant Protocols and the specific progress of China under the Protocol on the Accession of the People's Republic of China.⁵

Following a brief introduction to the sector of financial services and the Committee as a body exercising public authority, part B analyzes the Committee in the context of international institutional law, considering its institutional setting, mandate, meeting procedure, decision-making, and review. Part C then surveys this legal landscape, giving attention to legal principles and questions of legitimacy.

I. Trade in Financial Services: The Legal Regime

The CTFS administers the application of GATS in the trade sector of financial services, a field that, by its interstate nature, is necessarily a concern of international law.⁶ Specifically, the institutional context of the WTO/GATS sets the framework for regulatory activity. Article I:2 GATS defines trade in services in four modes: (a) the cross-border supply of a service between WTO Members, (b) the consumption of a service abroad in another Member's territory, (c) the supply of a service through a commercial presence in another Member's territory, and (d) the supply of a service through the presence of natural persons in another Member's territory. GATS's Annex on Financial Services, in turn, more specifically regulates financial services, in particular defining "financial services" extensively in paragraph 5(a). Its three subsectors are insurance, banking, and securities services (although the GATS definition uses only two categories). By way of illustration, financial services include, *inter alia*, direct insurance, reinsurance, actuarial services, claim settlement services, acceptance of deposits, all types of lending, issuance of credit and

Relevant to the International Trade of Financial Services, 25 NORTH CAROLINA JOURNAL OF INTERNATIONAL LAW & COMMERCIAL REGULATION 1, 8 (1999).

⁴ LT/UR/U/1, 15 April 1994.

⁵ WT/L/432, 23 November 2001, Section 18.

⁶ For the author and a co-author's full analysis of financial services under GATS, see Armin von Bogdandy & Joseph Windsor, *Annex on Financial Services*, in VI MAX PLANCK COMMENTARIES ON WORLD TRADE LAW 640-666 (Rüdiger Wolfrum, Peter-Tobias Stoll & Clemens Feinäugle eds., 2008).

securities, asset and portfolio management, and transfer of financial information. Subject to certain exceptions, “services supplied in the exercise of governmental authority” and services supplied by a “public entity” are not covered by GATS disciplines.⁷ GATS itself contains general obligations of most-favored-nation (MFN) treatment and transparency (Articles II-III). Beyond this, Members can inscribe further-going obligations to trade liberalization in their so-called schedules of specific commitments, which are then legally an integral part of GATS (Articles XIX-XXI). Clarifying the regulatory implications of the somewhat complicated schedules of specific commitments is one of the activities undertaken by the Committee.⁸

The Committee therefore operates at the overlap of international trade law, international financial regulation, and national financial regulation. A perusal of the preambles to the WTO Agreement and GATS illustratively includes a broad range of interests and objectives, including social welfare, environmental protection, sustainable development, economic growth, and aid to developing countries. The implications for national policy can be significant not only for state legislative, executive, and administrative regulators, but also ultimately for private suppliers and consumers of financial services.

II. The Committee as a Forum for Monitoring and Discussion

The CTFS engages in various forms of regulation. In the years following the adoption of the Second Protocol⁹ to GATS, sometimes referred to as the Interim Agreement, the CTFS monitored its acceptance and ratification by Members who had undertaken commitments in accordance with it. Similarly, since the adoption of the Fifth Protocol,¹⁰ often called the Financial Services Agreement, the Chair of the Committee has at every meeting “invited” the Members that have yet to accept it to provide information on the statuses of their domestic processes. Since 2003, only Brazil, Jamaica, and the Philippines have continued to lag behind in their national legislative processes of acceptance.

⁷ Art. I:3(b) GATS in conjunction with paras. 1(b)-(d), 5(b)-(c) of the Annex on Financial Services.

⁸ A useful (albeit partially outdated) list of schedules is: FINANCIAL SERVICES COMMITMENTS AND MFN EXEMPTIONS, available at: http://www.wto.org/english/tratop_e/serv_e/finance_e/finance_commitments_e.htm. See also SCHEDULES OF COMMITMENTS AND LISTS OF ARTICLE II EXEMPTIONS, available at: http://www.wto.org/english/tratop_e/serv_e/serv_commitments_e.htm#commit_exempt.

⁹ S/L/11, 24 July 1995.

¹⁰ S/L/45, 3 December 1997.

The Committee also acts as a forum for discussion. In its meetings, Members are able to voice complaints, raise political defenses, give reasons and explanations, make proposals, and identify issues in need of clarification. In particular, the CTFS is mandated to provide technical assistance to developing and least-developed countries.¹¹ As a practical matter, the CTFS receives communications from various Members or groups of Members, assigns them a WTO document symbol, and circulates them among the other WTO Members in advance of Committee meetings.

III. An Outlier in the Law of International Institutions

One question should be addressed at the threshold of the present analysis: does the Committee really belong in a discussion of the emerging law of international institutions? To put it another way, how much public authority is actually being exercised here? The CTFS has been selected for various reasons. Firstly, the WTO is one of the most influential international organizations, having even been called an “embryo world government.”¹² In administering its trade agreements, the WTO exerts a tremendous influence on national public policy-making and national administrative agencies. Instead of generalizing and surveying the entirety of the organization—a feat which would fail simply for reasons of space—the present contribution undertakes a microcosmic view of one of the almost forty councils, committees, and working groups operating under the auspices of the WTO’s general assembly, whether it is meeting as the General Council, the Ministerial Conference, the Dispute Settlement Body, or the Trade Policy Review Body.¹³ While the activities of these bodies vary greatly, the CTFS has been selected not only for the underlying importance of the financial sector for international trade, but also because its diplomatic, soft-law mode of operation may, to a large extent, characterize the orientation of the WTO as a whole (even the compulsory jurisdiction of the dispute settlement system foresees consultations and good offices, conciliation, and mediation before the establishment of a Panel¹⁴). In this sense, a closer analysis of one of the WTO bodies may provide insights which might be cautiously extrapolated onto the organization generally.

¹¹ See S/FIN/W/29/Rev.1, 17 September 2003.

¹² Trade: At Daggers Drawn, THE ECONOMIST 17, 22, 8-14 May 1999.

¹³ For an overview of WTO structure and subsidiary bodies, see WTO ORGANIZATION CHART, available at: http://www.wto.org/english/thewto_e/whatis_e/tif_e/org2_e.htm.

¹⁴ Arts. 4-5 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).

Secondly, the network of international financial regulators and standard-setting bodies represents one of the most highly regulated sectors in global governance.¹⁵ The organizational mandates vary widely in terms of purpose, geography, addressees, *etc.*, so the necessity for horizontal cooperation, coordination, and deference in this sector is all the more acute. When the Organization for Economic Cooperation and Development (OECD), for example, makes a presentation at a CTFS meeting, this makes a subtle contribution to the setting of financial industry standards, because a common frame of reference is promoted among the more than 150 WTO Members. The Committee is, of course, not among the most prominent of the international financial regulatory institutions, but the present analysis is meant to shed light on the significance of a single inconspicuous component in the vast governance network.¹⁶

Finally, the CTFS has been chosen intentionally as a borderline case study—as a sort of outlier among international institutions. One of the defining characteristics of the law of international institutions is its departure from the traditional sources of public international law enshrined in Article 38 of the ICJ Statute. Informal, soft-law instruments and nonbinding governance methods become objects worthy of legal analysis.¹⁷ Thus, the Committee's informality, collegiality, and political consensus-building should not be considered insurmountable obstacles to its analysis from the perspective of international institutional law. The Committee engages in varied activities that can be considered exercises of public authority: the administration of regulatory information, including naming-and-shaming and giving international notice of non-compliance and regulatory peculiarities; oversight and review of acceptance and implementation of international obligations in national financial systems; constructive rulemaking in the form of clarification and negotiation of Members' schedules of specific commitments, thereby contributing to the setting of state regulatory practice; a sort of notice-and-comment forum for proposed amendments to GATS and the Annex on Financial Services;

¹⁵ See generally Sydney J. Key, *Trade liberalization and prudential regulation*, 75 *INTERNATIONAL AFFAIRS* 61, 69-70 (1999); David Zaring, *Informal Procedure, Hard and Soft*, in *International Administration*, 5 *CHICAGO JOURNAL OF INTERNATIONAL LAW* 547, 585-592 (2004-2005).

¹⁶ Important international financial regulatory organizations include the OECD, the Bank for International Settlement (BIS) and the Basel Committee on Banking Supervision, the International Accounting Standards Committee (IASC), the International Organization of Securities Commissioners (IOSCO), the International Association of Insurance Supervisors (IAIS), the Financial Stability Forum (FSF), as well as the World Bank and the International Monetary Fund (IMF).

¹⁷ See Zaring (note 15), at 594-595 ("the regulatory cooperation studied here transcends the concept [of 'soft law' in international relations] ... Even if it is nonbinding, how does that matter if it is obeyed? ... In this sense, regulatory cooperation, both hard and soft, amounts to administration by agreement in a way just as substantial as agreement by treaty").

and a forum for formal communications which trigger open discussion and thereby act as an informal complaint procedure between Members. The Committee's exercise of public authority may be more political bark than legal bite, but its watchdog role over the financial services sector under GATS gives teeth to its influence on national financial regulation. In this sense at least, it certainly exercises public authority.

B. Legal Analysis

I. The WTO as Institutional Framework

As stated above, the Committee operates as one of numerous subsidiary bodies in the WTO. While an institutional analysis of the WTO is, of course, beyond the scope of the present chapter, some contextualization should be of assistance. Established on 1 January 1995 by the WTO Agreement,¹⁸ the WTO meets, with representation of all Members, either at a Ministerial Conference or as the General Council, which in turn can also convene as the Dispute Settlement Body or the Trade Policy Review Body, depending on which function is to be performed.¹⁹ The General Council is the WTO's highest decision-making body and meets regularly in Geneva. Three Councils operate under the General Council's general guidance: the Council for Trade in Goods, the Council for Trade-Related Aspects of Intellectual Property Rights, and the CTS.²⁰ The CTS, in turn, has established four of its own subsidiary bodies, namely, the Committees on Trade in Financial Services and Specific Commitments and the Working Parties on Domestic Regulation and GATS Rules. By way of comparison, the WTO's structure includes around two dozen committees and working parties on this lowest organizational level, each reporting to one of the three main Councils or to the General Council itself.²¹

According to Article XXIV:2 GATS, delegates from all WTO Members may participate in all of the CTS's subsidiary bodies and, thus, also in the Committee. The CTS established the CTFs in 1995 in paragraph 3 of the Institutional Decision, on the basis of its power, under Article XXIV:1 GATS and Article IV:6 WTO

¹⁸ 33 ILM 1144 (1994).

¹⁹ Art. IV WTO Agreement.

²⁰ Art. IV:5 WTO Agreement.

²¹ See WHOSE WTO IS IT ANYWAY?, available at: http://www.wto.org/english/thewto_e/whatis_e/tif_e/org1_e.htm. This excludes other sub-committees, negotiating groups, and working parties on the accession of specific candidates. See WTO BODIES & OTHER ENTITIES, CHAIRPERSONS AND ASSOCIATED DOCUMENT SERIES, available at: <http://www.members.wto.org/bodiesandseries/Public/main.asp>.

Agreement, to establish such bodies. According to paragraph 2 of this decision, the Committee is subordinate to the CTS and is to “carry out responsibilities as assigned to it by the Council”; however, paragraph 1 empowers the Committee to “establish its own rules of procedure.” The Committee regularly submits to the CTS an Annual Report of the Committee on Trade in Financial Services.²²

The CTFS elects its own Chair under the procedures outlined in the Guidelines for Appointment of Officers to WTO Bodies.²³ The various committees, councils, and working groups in the WTO, however, have developed a practice of informal consultations to ensure a proper distribution of the heads of these bodies.²⁴ Such consultations work out consensus on a slate of chairpersons for the four bodies reporting to the CTS, which then takes note thereof, before the CTFS elects its Chair by consensus. Those elected generally chair the Committee for one year. The composition of the CTFS blends two levels in the multilevel international legal order. That is, its meetings bring together national representatives of WTO Member governments without specific requirements as to whom a government may send. The Committee may thus comprise a mixture of trade officials, financial regulators, diplomats, and ministers of finance or their aides, and this mixture of national representatives meets, at the international level, as one subsidiary body within a larger international organization. The Committee’s immediate legal foundation is a decision internal to the international organization, but of course this ultimately derives its validity from the international treaty on which the organization itself is based. The Committee enjoys legal autonomy only as far as its procedure is concerned; its substantive mandate is limited by both the decision on which it is founded and any assignments from the superior body to which it reports.

II. Substantive Mandate

1. General Mandate

The CTS adopted the Institutional Decision pursuant to Article XXIV GATS. Paragraphs 1 and 2 are formulated generally, setting up a framework for “[a]ny subsidiary bodies that the Council may establish.” Paragraph 3 goes on to create the

²² The most recent is S/FIN/18, 13 November 2007. The minutes of the meeting on 12 November 2007 are contained in S/FIN/M/55, 16 November 2007. As of May 2008, this was the most recent meeting, with a meeting scheduled for 3 June 2008.

²³ WT/L/31, 7 February 1995.

²⁴ See CURRENT WTO CHAIRPERSONS, available at: http://www.192.91.247.23/english/thewto_e/secre_e/current_chairs_e.htm.

CTFS, stating that it has the mandate laid down in paragraph 2, which contains a catalogue of responsibilities in addition to any other tasks that the CTS may assign.

Thus, the six subparagraphs of paragraph 2 make up part of the Committee's mandate; in the context of financial services, they include:

- a) To review and survey continually the application of GATS and the Annex on Financial Services to the financial services sector;
- b) To formulate proposals or recommendations on any matter relevant to financial services;
- c) To consider proposals for amendment of the Annex on Financial Services and to make recommendations, where appropriate, to the CTS in this respect;
- d) To provide a forum for technical discussions and to conduct studies and examinations of national measures and of the financial services sections of Members' schedules of specific commitments and lists of MFN exemptions;
- e) To provide technical assistance to developing countries, whether already Members or seeking membership, regarding GATS obligations in the financial services sector; and
- f) To cooperate with other subsidiary bodies under GATS or any international organizations active in the financial services sector.

Because paragraph 2 of the Institutional Decision was drafted as a general template for any sectoral committee, it is necessarily abstract and general. The Institutional Decision explicitly leaves the Committee's mandate open for any future "responsibilities assigned to it by the Council [for Trade in Services]." Three main tasks have indeed been subsequently assigned to the CTFS: it has been instructed to monitor Members' acceptance of, respectively, the Second and Fifth Protocols to GATS on financial services and, notably, to carry out transitional review of the financial services sector under Section 18 of Chinese Accession Protocol.

2. Monitoring of GATS Protocols

Since GATS entered into force along with the WTO Agreement, negotiations have continued with respect to Members' schedules of specific commitments. An individual Member can unilaterally improve the commitments in its schedule, or, occasionally, certain groups of Members have negotiated a set of commitments, all of which enter into force simultaneously, effectively as a new agreement. Several

such agreements have been reached in the form of Protocols to GATS, and the Second and Fifth Protocols deal with schedules of commitments in the financial services sector. Although the Second Protocol no longer has legal relevance, the commitments annexed to the Fifth Protocol account for much of the current state of the law in the international financial services sector.

The CTFS has had the task of monitoring the status of acceptance of each Protocol by those Members that annexed new financial services commitments.²⁵ Since its entry into force, all Members concerned have accepted the commitments they annexed to the Fifth Protocol except Brazil, Jamaica, and the Philippines, so that the Committee's monitoring task continues with respect to this Protocol.²⁶

3. Transitional Review Mechanism

The Chinese Accession Protocol²⁷ was drafted and adopted in 2001 in response to many Members' concerns about the Chinese legal order's compatibility with WTO law, given China's "socialist market economy," the relatively high number of state-owned enterprises, and the one-party system.²⁸ Section 18 of the Accession Protocol tasks the CTFS, alongside fifteen other subsidiary bodies, with the Transitional Review Mechanism. Section 18, paragraph 1, requires the Committee to "review, as appropriate to [its] mandate, the implementation by China of the WTO Agreement"; for its part, China is required to "provide relevant information" to the Committee ahead of meetings. The regulatory, administrative, and legal content covered by this mandate is not only quite technical, but also very broad; however, it should be kept in mind that the review mechanism has a merely monitoring function and is not equipped to enforce the law.²⁹ Paragraph 1 does, however, require (and empower) the Committee to issue reports to the CTS, which then is to report to the General Council.

²⁵ Regarding the Second Protocol, see S/L/13, 24 July 1995, para. 3; regarding the Fifth Protocol, see S/L/44, 3 December 1997, para. 3.

²⁶ See STATUS OF ACCEPTANCES OF THE FIFTH PROTOCOL TO THE GENERAL AGREEMENT ON TRADE IN SERVICES, available at: http://www.wto.org/english/tratop_e/serv_e/finance_e/finance_status_5prot_e.htm; S/FIN/M/53, 30 November 2006, paras. 3-7.

²⁷ WT/L/432, 23 November 2001. See also Xin Zhang, *Implementation of the WTO Agreements*, 23 NORTHWESTERN JOURNAL OF INTERNATIONAL LAW & BUSINESS 383, 408-410 (2003).

²⁸ See Julia Ya Qin, *WTO Regulation of Subsidies to State-owned Enterprises (SOEs) – A Critical Appraisal of the China Accession Protocol*, 7 JOURNAL OF INTERNATIONAL ECONOMIC LAW 863 (2004); Zhang (note 27), at 409-410.

²⁹ See William Steinberg, *Monitor with No Teeth*, 6 UNIVERSITY OF CALIFORNIA DAVIS BUSINESS LAW JOURNAL 2, section IV (2005).

4. *Forum for Discussion*

Much of the CTFS's mandate revolves around the dissemination of information and the clarification of GATS rules for and in the sector. The importance of this informational function in the exercise of public authority should not be understated.³⁰ The Institutional Decision's listing of responsibilities leaves the Committee's area of competence wide open. The Committee, then, is programmed as a forum for technical discussion, particularly for the benefit of developing country Members, as a forum for clarification of GATS disciplines as applied to financial services and Members' schedules of specific commitments, and, to some degree, as a forum for standard-setting and notice-and-comment rulemaking.³¹ Regarding the latter, the CTFS does not engage in standard-setting or rulemaking per se; nonetheless, it is not inaccurate to say that the forum provided by the Committee serves as one (possible) phase in such informal rulemaking in the highly regulated financial sector.

III. *Flexible Practice Instead of Fixed Rules of Procedure*

1. *General Practice and Decision-making*

Paragraph 1 of the Institutional Decision states that the Committee "shall establish its own rules of procedure, and may set up its own subsidiary bodies as appropriate." Thus far, the Committee appears to have avoided laying down any definite rules of procedure, instead relying on an adaptable, diplomatic approach to its meetings; it has not established any subsidiary bodies. As far as can be determined from publicly accessible documentation, the procedure involves the distribution by airgram of an agenda before each meeting. This pre-distributed agenda is listed at the beginning of the minutes of each meeting (with the document symbol WTO/AIR/...), but the airgrams are not available on the WTO's website. Typical agenda items include the acceptance status of the Fifth Protocol, technical issues (for example, e-commerce or sectoral classifications), recent developments, and presentations by other bodies active in the field (for example,

³⁰ See Schmidt-Aßmann, in this issue ("Here, even more than in national administrative law, it holds true: administrative law is first and foremost law on the administration of information!"); Daniel C. Esty, *Good Governance at the Supranational Scale*, 115 YALE LAW JOURNAL 1490, 1533 (2006).

³¹ In BLACK'S LAW DICTIONARY 1358 (Bryan A. Garner, Editor in Chief, 8th ed., 2004) *informal rulemaking* is defined as: Agency rulemaking in which the agency publishes a proposed regulation and receives public comments on the regulation, after which the regulation can take effect without the necessity of a formal hearing on the record. Informal rulemaking is the most common procedure followed by an agency in issuing its substantive rules. -- Also termed *notice-and-comment rulemaking*.

the World Bank or the OECD). More recently, the agenda has included the abovementioned transitional review under the Chinese Accession Protocol. At meetings, the Chair presides, and representatives, as desired or as necessary, make statements, put questions, and respond to communications.

The Committee apparently makes decisions by consensus, as no annual report has yet recorded formal dissent to the decisions made. This has the effect that—at least from an external point of view—disagreement in the CTFS is minimized, appearing only occasionally in the minutes as disagreement expressed during meetings but not as formal nays. Indeed, nothing like voting is apparent from the Committee's documents. Members are thus able to record objections and express concerns in the Committee's documents—even apparently anonymously. One example can be seen in the minutes of an early meeting in 1995. Negotiations in the financial services sector had been extended beyond GATS's entry into force. The months leading up to the Second Protocol on financial services were contentious.³² This may have led certain Members to wish to remain anonymous: although the minutes ordinarily do name the countries taking action or making statements, the minutes of this meeting record several instances of simply "one delegation" or "another delegation" making statements, criticizing developments, or responding.³³

2. *Monitoring of the Fifth Protocol*

During meetings, the Chair regularly "invites" delegates from certain Members to provide information on the continuing processes of domestic implementation of the Fifth Protocol. This involuntary, if not necessarily particularly invasive, means of disseminating information is usually the first agenda item at Committee meetings. Members that have yet to accept the Fifth Protocol (currently, only Brazil, Jamaica, and the Philippines) are called on to provide information on the status of acceptance in their national legislatures and the reasons why it remains outstanding. The inquiry, by now, is not particularly rigorous, and delegations sometimes simply respond that no new developments have occurred since the last report.³⁴ Considering that the negotiated Agreement entered into force for many Members a decade ago, the value of this information may now lie more in naming-and-shaming than in updating foreign regulators, despite occasional expressions of

³² For an account of financial services negotiations, see von Bogdandy & Windsor (note 6), at margin nos. 4-12.

³³ S/FIN/M/3, 29 May 1995, paras. 6-7; S/FIN/M/7, 26 July 1995, paras. 19-20.

³⁴ See S/FIN/M/52, 4 May 2006, para. 4; S/FIN/M/53, 30 November 2006, paras. 4-5.

concern by other Members.³⁵ This also has the effect of providing other Members with notice that the given Member's schedule of specific commitments, as annexed to the Fifth Protocol, has not yet been implemented in the national regime.

3. *Transitional Review Mechanism*

Transitional review under Section 18 of the Chinese Accession Protocol similarly displays the Committee's high level of informality. Usually a handful of other Members submit communications in advance of the review, and these are circulated among all Members. During meetings, then, the Chinese representative responds at length to the submissions, after which the delegations engage in an extended question-and-answer session.³⁶ Thematically, transitional review covers the full range of banking, securities, and insurance services in the Chinese system, for example, minimum capital requirements for foreign direct investment, the operation of grandfather clauses in insurance law, or regulations on priority of debt repayment for domestic and overseas depositors. The sixth review took place on 12 November 2007, and Section 18, paragraph 4, of the Chinese Accession Protocol calls for eight annual reviews with a final review in the tenth year after accession. The CTFS delivers a formal, succinct report to the CTS, listing the date of review, the communications received in advance of review, and a reference to the minutes of the meeting.³⁷

Committee documents are adopted by consensus, and the informality of the review mechanism allows for some level of evasiveness. Thus, transitional review has not only been praised for its contribution to transparency and dialogue, but also sharply criticized for its lack of effectiveness and sanctions.³⁸ The merits of Section 18 review depend on the criteria used to evaluate it. As a forum for clarifying

³⁵ The United States, Japan, Switzerland, and the European Communities have recently expressed concern over the delays. S/FIN/M/52, 4 May 2006, para. 5; S/FIN/16, 28 November 2006, para. 2.

³⁶ Transitional review sessions have apparently been extensive, judging from the number of paragraphs covered in the minutes of meetings: S/FIN/M/37, 24 October 2002, paras. 11-71; S/FIN/M/43, 4 December 2003, paras. 21-74; S/FIN/M/47, 26 November 2004, paras. 14-77; S/FIN/M/50, 23 September 2005, paras. 6-55; S/FIN/M/53, 30 November 2006, paras. 12-73; S/FIN/19, 14 November 2007, paras. 30-106.

³⁷ The six reports thus far have been formulaic: S/FIN/7, 25 October 2002, S/FIN/11, 4 December 2003; S/FIN/13, 26 November 2004; S/FIN/15, 23 September 2005; S/FIN/17, 30 November 2006; S/FIN/19, 14 November 2007.

³⁸ For positive comments, see S/FIN/M/47, 26 November 2004, paras. 37, 51; S/FIN/M/50, 23 September 2005, paras. 39, 46; Zhang (note 27), 408-410. For negative remarks, see S/FIN/M/50, 23 September 2005, para. 47; S/FIN/M/53, 30 November 2006, paras. 48, 71; Steinberg (note 29), sections IV-V.

uncertainty regarding opaque regulations and as a means of creating political pressure via on-the-record criticism, the mechanism has been quite successful. As an effective means of securing speedy compliance and implementation, it has been rather poor.

4. Poorly Defined Powers: The Adoption of the Second Protocol

One open question regards the legal basis of the Committee's decision-making powers and whether it could, without consensus, make binding or even nonbinding decisions. This has not become an issue because, even in critical, quarrelsome periods, the Committee has maintained its modest profile and not attempted to appropriate greater significance, neither within the WTO nor in the international financial sector. Yet its decision-making powers remain poorly defined. While nothing currently suggests that the issue will become a problem in the foreseeable future, at least the potential exists that a dispute could arise. Two meetings on 26 July 1995 illustrate the lack of clarity. Dissatisfied with the counteroffers of certain Members and concerned about a "free rider" threat, the United States withdrew its broad MFN offer from Committee negotiations, leaving the EC scrambling to salvage some part of the progress made theretofore. The EC led the way to the conclusion of the stopgap Second Protocol³⁹ – a negotiated set of financial services commitment that entered into force together on an MFN basis, although not all WTO Members (notably, the United States) attached commitments. At the meetings, the Committee discussed, *inter alia*, the "procedural issues" involved in adopting the Second Protocol and three related implementing decisions. The description of the Secretariat's explanation is worth quoting at length:

On the question of the legal basis for the [adoption of the Second Protocol and related decisions], the Secretariat explained that there was no doubt that these Decisions could be taken by the Committee and the Council for Trade in Services by consensus, and that the Council for Trade in Services rather than the General Council was empowered to take the Decisions being discussed; there were many precedents to such decisions being taken by consensus which had had more far-reaching consequences ... Their legal validity had never been challenged, and they had been

³⁹ S/L/1, 24 July 1995.

accepted by Panels as “relevant GATT provisions” ... It was also clear that the Second Decision being considered did not introduce any fundamental changes in the rights and obligations of Members ... Therefore, a Decision to extend the term of the rights and obligations that the Annex provided seemed to be absolutely within the capacity of the Services Council to establish necessary procedures ... Delegations expressed satisfaction with this explanation.⁴⁰

Admittedly, the nature of the Second Protocol played a significant role here: it was essentially a plurilateral agreement, binding only for the “Members concerned” and not for each and every WTO Member, although it applied on an MFN basis. The text proper did not include any new commitments to financial services liberalization. Instead, the set of negotiated schedules of commitments were annexed to the Protocol, and they would only enter into force if all annexing Members accepted it in their national processes by the date specified or if otherwise decided despite any lagging Members. In terms of legal substance, then, the decision to adopt the Second Protocol was based on an already negotiated, reciprocal compromise. Who, then, was going to object? Nonetheless, legally speaking, the maneuver appears to have been, at least, the rubber-stamping of a *questionable*, albeit *unquestioned*, legal basis for action or, at most, a procedural assertion of uncertain institutional powers in the protective shadow of current consensus. Again, neither the actual nor the theoretical significance of the Committee’s decision in this case should be overstated; the Japanese delegation even made a point of stressing that, in its understanding, the decisions were “purely procedural” and “did not prejudice in any way [its] final position.”⁴¹

Other formulations in the Secretariat’s statement appear similarly presumptuous. Lack of previous challenge to legal validity is not necessarily tantamount to legal validity, and lesser significance does not ipso facto heal any lack of empowerment that might exist. That the “[d]elegations expressed satisfaction with this explanation,” of course, also would not sanction any procedural or substantive overstepping of institutional bounds. The benignity of the decision-making thus far

⁴⁰ S/FIN/M/7, 26 July 1995, para. 17.

⁴¹ S/FIN/M/8, 26 July 1995, para. 4.

belies the fact that delegated decision-making can raise serious issues of legitimacy.⁴²

Perhaps more problematic is the legal basis for the Committee's decisions adopting the Second and Fifth Protocols. Assuming that the legal power to adopt such texts actually does reside with the CTS, and not with the General Council,⁴³ it remains unclear from public documents whether the CTS can and did delegate the relevant decision-making power to the CTFS. The respective decisions adopting the Protocols were made by the Committee itself; the parallel third paragraphs read, "The Committee on Trade in Financial Services shall monitor the acceptance of the Protocol by Members concerned and shall, at the request of a Member, examine any concerns raised regarding the application of paragraph 2 above."⁴⁴ Here, too, expedience and a lack of any dissent apparently sufficed to sidestep formal procedural delegation: it is not entirely clear under what powers deriving from the Institutional Decision (absent any subsequent empowerment by the CTS) the CTFS either could adopt the two Protocols or could assign itself(!) the compulsory task of monitoring their acceptance by Members. While the content of the Protocols is well within the Committee's sectoral mandate, it is not clear why the agreements, which are akin to the four plurilateral trade agreements in Annex 4 to the WTO Agreement, needed to be separately adopted by a WTO-wide body at all (as opposed to simply the subset of Members concerned); thus, there is at least the appearance that the Committee decided to adopt the Protocols as a means of appropriating not only the task of monitoring but even the decision-making power regarding the task. Here, again, the lack of objection by WTO Members and the CTS does not supply a proper legal basis.

5. Participation of Other International Organizations

While the WTO has a primarily intergovernmental nature and is Member-driven, consultation and cooperation with other international organizations is foreseen in several relevant provisions.⁴⁵ As the meetings bring together high-level finance officials and their aides, widening the circle of participants and attendees would

⁴² Esty (note 30), at 1503-1504. However, unchallenged institutional practice can itself clarify powers. See JOSÉ E. ALVAREZ, *INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS* 87 *et seq.* (2005).

⁴³ In the Secretariat's explanation quoted above, this is indeed assumed. It seems indisputable that the CTS's mandate to "oversee the functioning of [GATS]" (Art. IV:5 WTO Agreement) includes adoption of agreements such as the Second and Fifth Protocols.

⁴⁴ S/L/13, 24 July 1995, para. 3; S/L/44, 3 December 1997, para. 3 (omits "on Trade in Financial Services").

⁴⁵ Institutional Decision, para. 2(f); Arts. VII:5, XXVI GATS; Art. V WTO Agreement.

complicate the proceedings of the Committee and disrupt the heretofore collegial atmosphere and practice. Although the meetings are not open to the public, six international organizations currently enjoy observer status: the African, Caribbean and Pacific Group of States (ACP), the IMF, the OECD, the UN, the United Nations Conference on Trade and Development (UNCTAD), and the World Bank.⁴⁶ The CTFS, for its own meetings, has the power to grant or revoke observer status and ad hoc observer status.⁴⁷

Beyond such observer status, several briefing sessions held for CTFS delegations display the thoroughly networked nature of the sector. On 10 October 2001, the Basel Committee on Banking Supervision, the IAIS, and the IOSCO held a joint briefing session in Geneva for delegations ahead of a Committee meeting the next day. During the session, the standard-setting financial organizations reported on their respective areas of competence, and the session was mostly well-received.⁴⁸ On the morning of 22 July 2002, ahead of a Committee meeting that afternoon, the IMF and the World Bank jointly held a similar briefing session on their Financial Sector Assessment Programme and its relation to financial services trade.⁴⁹ On 26 February 2003, the World Bank also held a briefing session entitled "Finance for Growth: Policy Choices in a Volatile World" on the morning of a Committee meeting.⁵⁰ Additionally, during the afternoon meeting the IMF representative commented extensively on an IMF paper entitled "Financial Sector Stability, Reform Sequencing and Capital Flows" discussing the relationship between specific commitments in financial services and capital movements.⁵¹ On 23 March 2004 the OECD held a briefing and information session during a meeting, presenting a document entitled "Managing Request-offer Negotiations under the GATS: The Case of Insurance Services" as part of a joint OECD/UNCTAD project; the presentation was followed by an extensive question-and-answer period.⁵² And on 12 November 2007 UNCTAD reviewed its recent Expert Meeting on Trade and

⁴⁶ See INTERNATIONAL INTERGOVERNMENTAL ORGANIZATIONS GRANTED OBSERVER STATUS TO WTO BODIES, available at: http://www.wto.org/english/thewto_e/igo_obs_e.htm.

⁴⁷ WT/L/161, 25 July 1996, Annex 3; S/FIN/M/13, 29 April 1997, para. 5; S/FIN/M/26, 29 June 2000, para. 44; S/FIN/M/28, 20 November 2000, para. 31.

⁴⁸ S/FIN/M/31, 1 June 2001, para. 16; S/FIN/M/32, 9 November 2001, paras. 43-44.

⁴⁹ S/FIN/M/34, 26 April 2002, paras. 27-32; S/FIN/M/35, 8 July 2002, paras. 36-37.

⁵⁰ S/FIN/M/39, 7 April 2003, paras. 56-57.

⁵¹ S/FIN/M/39, 7 April 2003, paras. 12-18.

⁵² S/FIN/M/44, 21 April 2004, paras. 25-62.

Development Implications of Financial Services at a CTFS meeting.⁵³ Such cooperation is regulated by the Rules of Procedure set up by the WTO's General Council, such that the Committee has broad discretion over the form and degree of interaction.⁵⁴ However, concern has been expressed over the level of discontinuity resulting from such inter-institutional exchange and policy-overlap.⁵⁵ Fragmentation, in part, may even have induced the negotiators of GATS to include the so-called prudential carve-out in paragraph 2(a) of the Annex on Financial Services⁵⁶ – a catchall exception which permits a WTO Member to take measures for prudential reasons (such as to protect investors or policy holders or to ensure the integrity or stability of the financial system), any provision in GATS notwithstanding.

The intergovernmental WTO affords limited opportunity for private actors to participate directly, whether as individuals or collectively as NGOs, lobbies, or multinational corporations, and the same holds true for the Committee's proceedings. In theory, such actors can instead lobby national governments, including especially, but not only, their own government.⁵⁷ Because the governmental delegations to the Committee call for a high level of expertise, meetings evince a high level of technocracy, especially by and among the representatives from developed countries, which not only have greater resources and know-how, but also have more capital invested in the financial services sector. The exclusion of NGOs and the public may be seen as an affirmation of the Committee's collegial practice, its technical regulatory area, and its tendency toward technocracy: beyond the necessary financial delegations from Member governments and a few select international financial organizations, opening the participant circle to the uninitiated might compromise the definite, albeit limited, functional niche that the Committee has carved out for itself.

6. *Multilevel Aspects*

As the CTFS is a forum for the dissemination of information, financial information regularly flows from the national level to the international level. This takes place

⁵³ S/FIN/M/55, 16 November 2007, paras. 12-29.

⁵⁴ WT/L/161, 25 July 1996, Annex 3; Institutional Decision, para. 2(f).

⁵⁵ S/FIN/M/32, 9 November 2001, para. 44; S/FIN/M/54, 2 July 2007, paras. 15-22.

⁵⁶ Apostolos Gkoutzimis, *International Trade in Banking Services and the Role of the WTO*, 39 INTERNATIONAL LAWYER 877, 902 (2005).

⁵⁷ Steve Charnovitz, *Opening the WTO to Nongovernmental Interests*, 24 FORDHAM INTERNATIONAL LAW JOURNAL 173, 199-200 (2000).

both voluntarily and on demand with varying levels of legal and political pressure. Information is frequently supplied voluntarily at meetings as recent developments in financial services, allowing Members to discuss the functioning of their specific commitments under GATS and the regulatory peculiarities of their financial services markets. The Committee's monitoring of the acceptance of the Fifth Protocol also represents the flow of information from the national to the international level. More pressure, if not quite compulsion, to provide information is exerted on China under Section 18 of the Chinese Accession Protocol. As discussed above, Section 18 requires China to provide information to the CTFS, although the vague parameters of the duty leave enough slack for China *legally* to avoid providing any information it desires to withhold, whatever the *political* consequences of such evasiveness might be.⁵⁸

The Committee's annual reports, decisions, and the minutes of meetings represent information transferred in the opposite direction, that is, from the international to the national level. (This transfer is not identical with a transfer of the information to the public at large, because CTFS documents, in particular the minutes of meetings, are initially circulated as "restricted" among Members before eventually being derestricted and made generally accessible.⁵⁹) Again, the CTFS apparently adopts decisions and reports by consensus, meaning that dissent is handled during drafting, so that the Committee speaks in its documents with a relatively singular voice with disharmonious voices usually "noted" by the Chair in the minutes of meetings. As stated above, the consensus procedure effectively affords each delegation a veto, which in the CTFS has occasionally led to the compromise of dissent voiced under anonymity (with respect to the general public, though probably not within the Committee).

Some horizontal cooperation between the Committee and other international organizations has taken place, although it may be more properly characterized as consultation at the Committee's discretion. Several international organizations have held briefing and information sessions at or in conjunction with meetings.

IV. Reporting and Decisional Activity

1. Central Regulatory Instruments

The combination of the Committee's informality with the recommendatory, soft-law nature of its decision-making means that it exercises a diffuse kind of public

⁵⁸ Steinberg (note 29), at sections III-IV; Zhang (note 27), at 408-409.

⁵⁹ WT/L/452, 16 May 2002.

authority, spread across its decisions, reports of minutes, and annual reports to the CTS. Since its inception in 1995, two significant tasks have been added to the Committee's governance activities. Firstly, its consecutive tasks to monitor Members' acceptance of the Protocols is a standard agenda item reported in the minutes of meetings and annual reports. Secondly, since 2001, the CTFS has carried out annual transitional review of China's implementation of WTO law in the financial services sector. Formulated generally: within a dense network of domestic and international financial institutions, the Committee engages in soft-law, multilateral decision-making and the dissemination of sectoral information as a means of regulating national legal regimes for trade in financial services.

In adopting the Institutional Decision as the legal basis and framework for the CTFS's regulatory activity, the CTS availed itself of Article XXIV GATS. Paragraphs 1 and 3 of the Institutional Decision mandate and empower the Committee to report at least annually to the CTS. As discussed above, the legal basis for Committee decisions is somewhat equivocal; however, the Committee's modest powers, consensus procedure, and prudent self-restraint have thus far meant that its decisions and their bases have been uncontested. Questions as to the scope of its decision-making power thus remain purely theoretical—for the time being. At any rate, the nonbinding legal nature of Committee decisions may deflate any disputes that do arise.

The Institutional Decision generally formulates the CTFS's mandate in the financial services sector. From this basis and including subsequent tasks assigned by the CTS, the Committee has developed, in its decisional and reporting practice, a small set of agenda items that circumscribe the range of subject matter typically covered. These include monitoring the acceptance of the Fifth Protocol, recent developments in financial services trade, and the clarification of technical issues in the sector. Instead of legally obligating the given addressees, the CTFS usually phrases its reports and decisions in admonitory or recommendatory language. Because the Committee's purpose is largely to disseminate information *among its own participants*, which constitute "a discrete regulatory community,"⁶⁰ the legal and political intensity of the language chosen tends to be indirectly proportional to the prominence of the legal act. In other words, the mildest language appears in the prominent annual reports to the CTS; whereas the reports of the minutes of meetings use somewhat stronger language to identify culprits, call on Members to undertake specified activity or reform, and make decisions by consensus. Presumably, the most disputatious (and, thus, most productive) work among CTFS

⁶⁰ S/FIN/M/35, 8 July 2002, para. 19; S/FIN/M/37, 24 October 2002, para. 83.

delegations is carried out off the record in “informal consultations in small group configurations.”⁶¹

The addressees of the Committee’s legal instruments are WTO Members generally, via the CTS as overseeing body. Here, it is worth reiterating that these addressees reflexively include the Members’ delegations to the Committee itself; indeed, they might even be seen as the *primary* addressees, since the flow of information regarding the functioning of WTO law and financial services law in other jurisdictions pertains particularly to the financial regulators typically sent as delegates to Geneva. Indirectly, then, the Committee’s work also implicates national lawmakers, who have the dual task of implementing GATS schedules of commitments and structuring the national trade regime in compliance with GATS disciplines. Furthermore, the Committee’s regulatory and administrative activity affect national financial service suppliers⁶² whose commercial activity is the ultimate regulatory object of GATS in the sector. Committee documents are available initially to Members and later made accessible to the public at large, depending on restriction status, most easily accessible on the WTO’s website.

2. *Multilevel Aspects*

At first glance, the decisional and reporting activity at the CTFS appears to be directed top-down, in terms of multilevel governance: an international organization acts through a subsidiary body to disseminate technical information to member states and to monitor their compliance with public international law in a highly regulated sector. On closer inspection, the levels become less clearly distinct. Expertise from the national level flows directly into the Committee via the national delegations. And the international level’s superiority in the hierarchy is mitigated by the CTFS’s consensus procedure, although significant political pressure can be exerted on national regulators both by the naming-and-shaming of non-complying Members and by the red-flagging of national regulatory peculiarities. In this sense, even without requiring compulsory action, the Committee is one administrative actor in the larger network of standard-setting bodies and international administrative agencies active in the financial sector.

A state’s financial sector underlies every other trade sector, and compliance with international financial standards, such as the banking and capital adequacy

⁶¹ See S/FIN/M/54, 2 July 2007, para. 20.

⁶² Para. 5(b) of the Annex on Financial Services defines “financial service supplier” as “any natural or juridical person of a Member wishing to supply or supplying financial services but the term ‘financial service supplier’ does not include a public entity.” See von Bogdandy & Windsor (note 6), margin nos. 20-21.

standards referred to as Basel II, remains voluntary but extremely beneficial.⁶³ Therefore, within the “discrete regulatory community” of this network, the myriad bodies necessarily rely heavily on horizontal, informal cooperation. Perhaps expectedly, this (over)abundance of standard-setters and international institutions has raised issues of overlap and fragmentation in public international law in the sector.⁶⁴ However, the principle of consensus has, here more than elsewhere, remained relatively strong because the economically strongest states form an exclusive club that other states are all too eager to join. Regulation in the financial services sector is thus *de jure* largely voluntary, diminishing misgivings about fragmentation. But the *de facto* inequality between major players and developing countries raises issues of legitimacy.

V. Review by the CTS

The Institutional Decision requires the Committee to report no less than annually to the CTS. An assessment of the CTS’s opportunity to review the activity of the CTFS can only be called unremarkable. Since 1998, the CTS’s annual reports to the WTO General Council have simply included under “Work of the Subsidiary Bodies” a reference, without further comment, to the annexed copy of the Committee’s annual report.⁶⁵ Prior to this, CTS reports included brief descriptions of the Committee’s negotiations toward the Fifth Protocol and a recommendation that Ministers abide by the prescribed timeframe.⁶⁶ Recently, CTS reports have also incorporated, by reference, the Committee’s Section 18 review of Chinese implementation into its own Section 18 review.⁶⁷ Thus far the CTS has simply rubber-stamped the Committee’s activity.

⁶³ See BIS, Basel II: Revised international capital framework, available at: <http://www.bis.org/publ/bcbsca.htm>; Michael S. Barr & Geoffrey P. Miller, *Global Administrative Law*, 17 EUROPEAN JOURNAL OF INTERNATIONAL LAW 15 (2006).

⁶⁴ This abundance of “multilateral international institutions and standard-setting bodies with a mandate to discuss the international financial regulatory and supervisory framework” contributed to the adoption of the prudential carve-out in para. 2(a) of the GATS Annex on Financial Services as a means of limiting WTO law’s (and thus, by extension, the Committee’s) impact on domestic regulatory autonomy. Gkoutzinis (note 56), 902-904. Due to the potential fragmentation, “soft regulatory convergence on the basis of international standards and codes” has been suggested in place of attempts to harden regulations. *Id.*, 913-914.

⁶⁵ See, e.g., S/C/26, 1 December 2006, para. 8, Annex I.

⁶⁶ S/C/3, 6 November 1996, paras. XXXIV-XL, XLIII.

⁶⁷ See S/C/26, 1 December 2006, para. 2; S/C/M/85, 12 December 2006, paras. 20-21.

Institutionally, this (potential) review is external to the Committee but internal to the WTO. Were the Committee ever to test the limits of its mandate or undertake controversial action, the standard of review would presumably be the Institutional Decision, which, however, not only leaves the Committee's mandate open to further assignments by the CTS, but also fails to provide much power independent of the CTS.⁶⁸ It is difficult to imagine the Committee's attempting to make any formal decision without the consent, tacit or explicit, of the CTS. The Committee's modest practice has avoided the necessity of testing the limits of its accountability. It seems reasonable to assume that the CTS and the General Council – but *only* these two superior WTO bodies – have the power to initiate review of Committee action and would have broad discretion to craft sanctions, as necessary. Again, unless practice changes drastically, such a situation is highly unlikely.

This lack of significant review also stems, in large part, from the nature of the financial services sector. Because it is highly complex and highly regulated, the trade representatives throughout the rest of the WTO may, as a general rule, defer to the financial technocrats in the CTFS. As long as the Committee remains collegial in practice and uncontroversial in content, this sectoral deference and absence of demand for clear lines of accountability will likely remain common practice at the CTFS.⁶⁹

C. Assessment

I. Principles

As a subsidiary committee within the GATS institutional framework, the CTFS is immediately involved in promoting the general obligations of MFN treatment and transparency (Articles II-III GATS) as well as specific commitments in market access and national treatment (Articles XVI-XVII).⁷⁰ At least theoretically, these disciplines are in line with the economic principle of non-discrimination. Furthermore, GATS and the WTO itself are based largely on the economic principle of comparative advantage.⁷¹ The WTO also places significant emphasis on

⁶⁸ See the chapeau and para. 2(b)-(c).

⁶⁹ But see Lori M. Wallach, *Accountable Governance in the Era of Globalization*, 50 UNIVERSITY OF KANSAS LAW REVIEW 823, 826-841, 862-864 (2002).

⁷⁰ For the WTO's own assertion of principles, see PRINCIPLES OF THE TRADING SYSTEM, available at: http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm.

⁷¹ See THE CASE FOR OPEN TRADE, available at: http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact3_e.htm; Alan O. Sykes, *Comparative Advantage and the Normative Economics of International Trade Policy*, 1 JOURNAL OF INTERNATIONAL ECONOMIC LAW 49 (1998).

promoting equality among its Members, specifically for developing and least developed countries.⁷² Of course, whether developing countries have sufficient resources to take meaningful advantage of this normative equality, and whether the WTO's trade system would even benefit them, if they *could* take advantage of it, are open questions.⁷³ More specifically to GATS and financial services, the Committee's work toward defining the contours of the prudential carve-out—the catchall exception for “prudential reasons” in financial services⁷⁴—promotes what has been called the principle of derogation in global administrative law.⁷⁵ The law governing international institutions, by its multilevel nature, requires “flexibility mechanisms to accommodate intense national political pressures ... [and] promote good governance by transferring politically sensitive decisions to national officials with greater accountability.”⁷⁶

Beyond international trade law, the Committee's role in the international regulatory network also has implications for general principles of public international law. Its openness to all Members, collegial practice, and consensus decision-making reflect the principle of the sovereign equality of states and the related principle of consensus as basis for international legal obligation. While both of these principles may be diminishing in international law, the continued, cooperative regulatory work of bodies like the CTFS flows from traditional notions of sovereignty. Perhaps most directly, however, the Committee's activity promotes the principle of transparency. In particular, its regular discussion of recent developments in financial services trade fosters regulatory transparency. As the U.S. trade representative put it, Members' presentations “emphasiz[e] transparency in their regulatory frameworks for financial services ... [T]ransparency regarding consultations with the public was beneficial and helped avoid unintended

⁷² See preambular paras. 2, 4-6, Arts. III:4, IV, V:3, XV:1, XIX:2, XXV:2 GATS. The Institutional Decision, para. 2(e), also mandates the CTFS “to provide technical assistance to developing country Members and developing countries negotiating accession to the [WTO].”

⁷³ See Victor Murinde & Cillian Ryan, *Globalization, the WTO and GATS*, in HANDBOOK OF INTERNATIONAL BANKING 751-763 (Andrew W. Mullineux & Victor Murinde eds., 2003); ISABEL LIPKE & MYRIAM VANDER STICHELE, FINANZDIENSTLEISTUNGEN IN DER WTO: LIZENZ ZUM KASSIEREN? 37-38 (World Economy, Ecology & Development ed., 2003).

⁷⁴ Para. 2(a) Annex on Financial Services. See von Bogdandy & Windsor (note 6), at margin nos. 22-24. The Committee debated on the prudential carve-out during seven meetings in 2000-2001 (S/FIN/M/25-31).

⁷⁵ Esty (note 30), at 1536-1537. The principle can be seen as a specific instance of the principle of subsidiarity, applicable in politically charged situations to maintain or increase accountability, and divorced from geographical considerations.

⁷⁶ *Id.* at 1536.

consequences of regulation. The Committee would benefit from other countries relating their practices in the future. She agreed ... that this issue was particularly relevant in the financial sector, which was highly regulated and where lack of transparency could therefore effectively mean lack of access to markets."⁷⁷

Other principles may also be developing in the law of international institutions. Highly technical regulatory areas—such as the international financial sector, but also space law or any number of international environmental and health law sectors—may require a principle of sectoral deference among international actors. The subject matter of international institutional law is too varied, too technically complex, for any single institution to be comprehensive. This can be seen, too, in the complex adjudication of WTO panels. Article 8(4) DSU contemplates the Secretariat's maintaining indicative lists of potential panelists, indicating their "specific areas of experience or expertise." Moreover, paragraph 4 of the Annex on Financial Services requires panelists in disputes over financial matters or prudential regulatory issues to have "the necessary expertise relevant to the specific financial service."⁷⁸ While the WTO Appellate Body, in contrast, *is* a standing court, its jurisdiction is limited to questions of law, so the potential lack of sector-specific expertise is far less significant.⁷⁹ The exclusivity of the club of financial representatives, whether in the CTFS or in any of the international financial regulatory organizations, exemplifies the administrative necessity for sector-specific expertise.

The other side of this sectoral deference *between* sectors is the cooperative networking *within* sectors. As one forum in a network of financial regulatory institutions, the Committee has some role in the setting of standards⁸⁰ such as Basel II or the Core Principles of the Joint Forum of the Basel Committee, the IOSCO, and the IAIS.⁸¹ Because such standards are "mere" soft law, toward which aspiring financial regulators can orient reforms, one author has called such standard-setting a case study of the "proselytization imperative."⁸² When the CTFS meets, and

⁷⁷ S/FIN/M/37, 24 October 2002, para. 83.

⁷⁸ See also von Bogdandy & Windsor (note 6), at margin nos. 29-30.

⁷⁹ Eric H. Leroux, *Trade in Financial Services under the World Trade Organization*, 36 JOURNAL OF WORLD TRADE 413, 432 (2002).

⁸⁰ For a Committee debate about what role the Committee and the WTO have in standard-setting, see S/FIN/M/42, 12 November 2003, paras. 49-69.

⁸¹ See, *supra*, note 63; The Joint Forum, *Core Principles: Cross-sectoral Comparison* (BIS ed., 2001), available at: <http://www.bis.org/publ/joint03.pdf>.

⁸² Zaring (note 15), at 580-585.

especially when it provides a forum for such direct standard-setters to present information, it engages in such “proselytization of minimum standards from developed countries to less developed countries.”⁸³ Soft-law proselytization, then, becomes an alternative to hard-law compulsion. Common standards in complicated regulatory areas such as the financial services sector provide an efficient form of rulemaking; they craft nonbinding standards that states nonetheless frequently seek to implement on the national level.⁸⁴ In the Committee’s case, it facilitates not simply the generalized setting of such standards, but also the implementation of its Members’ schedules of specific commitments. Within the WTO, the CTFS provides a forum for informational exchange, provides technical assistance to developing countries, and provides guidance on the implementation of GATS generally and by specific Members, thereby promoting legal certainty by coordinating the national execution of WTO law.

II. Legitimacy

The Committee’s exercise of public authority raises fewer questions than many international institutions, owing to its peripheral role in the international financial network, its collegiality and informality, its nonbinding decision-making and reporting, and especially its focus on consensus-building. Instead, questions shift toward the cleft between industrialized and developing countries; the availability of the resources, capacity, and expertise necessary to take meaningful part in meetings and negotiations; and the lack of both openness to the public and participation of NGOs. In terms of legitimacy, the Committee fares moderately, open to both criticism and praise.

Some scholars bifurcate legitimacy into process (or input) legitimacy and results (or output) legitimacy; the former can further be assessed *ex ante* or *ex post*.⁸⁵ In the CTFS, then, process legitimacy *ex ante* appears to be too opaque. The CTFS consists of delegations of ministers or other high-level trade representatives, but the compositions of delegations are neither set nor readily apparent from publicly accessible WTO documents. One might also object that, in the CTFS, all delegations

⁸³ *Id.* at 583.

⁸⁴ *Id.* at 592 (“Whatever standard is chosen has a good chance of developing an adoptive momentum by virtue of the advantages regulators see in being a part of the ‘network’ of regulators applying the same schema to their regulated industry”); Michael P. Malloy, *Emerging International Regime of Financial Services Regulation*, 18 *TRANSNATIONAL LAWYER* 329, 347-349 (2005) (“[Basel II] seems to represent the emergence of a new kind of source of law: an international administrative practice involving rule proposal for public comment, revision in light of public comments, and adoption, implementation, and enforcement at the national level”).

⁸⁵ See Venzke, in this issue.

are equal, but some are more equal than others: “from the perspective of smaller developing countries, global regulatory institutions including the WTO ... might already appear to be ‘administering’ them at the bidding of the industrialized countries.”⁸⁶ Moreover, only a handful of international organizations have observer status, excluding NGOs, watchdog groups, and the public at large. However, “while many reports and minutes of meetings are published online, actual participation in meetings at all levels [of the WTO] is crucial in order to understand the nature and depth of political negotiations and compromises which lie behind formal pronouncements.”⁸⁷ Process legitimacy *ex post* may be even more problematic due to the almost complete lack, in practice, of meaningful review by the CTS, combined with the exclusion of NGOs. While the low profile of Committee activity has arguably made such oversight superfluous, the increasing significance of the WTO and GATS and the continued debate over the lack of transparency may eventually demand openness at all levels.

The assessment of results legitimacy is more positive. The CTFS may not be in high demand as a topic for debate in legal journals or newspaper editorials, but it has certainly found its highly specific, highly complex niche of influence in the network of international financial regulators. No other forum has the expertise and institutional positioning to speak with the Committee’s level of credibility regarding the modest but significant area where international trade law, GATS schedules of specific commitments, and national banking, securities, and insurance regulation converge.

III. Conclusion

The foregoing discussion has been intended to help to illustrate the multifaceted nature of the law of international institutions. One actor among the myriad international financial regulators plays its seemingly minor role in the tremendously intricate choreography of one of most complex sectors of global governance. Other players certainly have more prominent roles and greater influence. The Basel Committee’s effects, for example, can hardly be understated, but at the same time it lacks the institutional framework and compulsory dispute-settlement jurisdiction that the CTFS enjoys in the WTO. The IMF and the World Bank enjoy an enormous budget but have a limited mandate related specifically to developmental aid. The OECD has a wide mandate but lacks the credibility that

⁸⁶ Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 LAW & CONTEMPORARY PROBLEMS 15, 27 (2004-2005).

⁸⁷ Ngaire Woods & Amrita Narlikar, *Governance and the limits of accountability*, 53 INTERNATIONAL SOCIAL SCIENCE JOURNAL 569, 577 (2001).

flows from a broad representation of the international community. Due in large part to this versatility and diversity, this network of international financial administrators exerts an ever-increasing influence on the world economy, public international law, and national administrative law.

International institutional law will only grow in significance in the foreseeable future. Already, the received sources of international law in Article 38 of the ICJ Statute no longer circumscribe the sphere of the law's influence on the international stage.⁸⁸ The Committee can be seen as an outlier, a borderline case, among international regulatory institutions—one that begins to show the definitional boundaries of the still uncertainly defined area. It may well be that the observer will scrutinize the motley gestalt of international institutions—each with a limited mandate, limited membership, and limited powers—and will come to the conclusion that the whole of international institutional law is greater than the sum of its parts.

⁸⁸ See Kingsbury, Krisch & Stewart (note 86), at 29-31.

