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Financial Crisis and Trade Agreements[1]
Draft Preliminary Note

INTRODUCTION

THIS paper briefly reviews in a preliminary way some of the causes and effects of the current crisis and the way in which the provisions in multilateral and regional trade and investment agreements can make it more difficult to effectively deal with the crisis and prevent future similar crises.

This note finds that a variety of provisions in these agreements can make it difficult to effectively carry out the measures recommended to deal with this crisis. Whilst most barriers are likely to come from the services and investment provisions, the competition, goods, intellectual property and government procurement chapters in North-South FTAs can also have an effect.

Severity of the crisis

Whilst developing countries did not create the current financial and economic crisis, they are suffering the effects. As Tanzanian President Kikwete warned: "This is a very unprecedented problem. Africa is a victim. We are not responsible for its genesis but all of us are suffering."[2]

'A financial crisis, originating in the most advanced countries and on a scale not seen since the 1930s, is currently unfolding... The crisis has become global. Even emerging markets and less developed countries that have managed their economy well, resisted bad lending practices, did not purchase toxic mortgages, and did not allow their banks to engage in excessive risk taking through derivatives, have become embroiled. Any global solution – short term measures to stabilize the current situation and long term measures to make another recurrence less likely – must pay due attention to impacts on all countries. Without doing so, global economic stability cannot be restored.'[3]

Trade and investment agreements

North-South[4] free trade agreements (FTAs), bilateral investment treaties (BITs) and World Trade Organization (WTO) commitments often contain a number of provisions that can increase the likelihood of a financial crisis and make it more difficult to take the necessary measures to deal with one once it occurs. This note briefly highlights the main provisions in these agreements that can hamper the effective implementation of recommendations to deal with the current crisis. However, more detailed examination of this interaction is required.

There are thousands of BITs[5] and as of October 2003, all 146 WTO Members, with the exception of Mongolia, were participating in or actively negotiating FTAs[6] (although not all of these are North-South FTAs).

Of course these provisions are particularly onerous for the more than 30 countries, including least developed countries (LDCs), who are not yet members of the WTO. As they are not subject to WTO disciplines yet,[7] these countries can still impose local content requirements on investors, not have to pay royalties for intellectual property use and impose restrictions on international transfers and payments for current transactions relating to services etc.

Furthermore, given the variation in wording between each treaty and that these are the legal documents, the exact restrictions on each country cannot be known without careful study of the relevant treaty by lawyers, economists and finance experts.

The provisions listed below are not always absolute prohibitions, (for example exceptions may be allowed on a negative list basis, i.e. all exceptions for all time must be listed at the time of negotiating the treaty), however for the sake of brevity and simplicity, they have been listed in summary form below. Furthermore, while there are often some slight prudential or other safeguards, these are generally not strong enough or long enough to be sufficient in a financial crisis and often require the situation to be severe before they can be used (and even then compensation may be required).

Lessons from history

According to publicly available information, 46 cases have been filed by foreign investors against Argentina as a result of its 2001 economic crisis.[8] An estimate by the Argentine Justice Ministry puts the potential liability at more than $17bn.[9] This does not include a potential claim by a sizeable minority of bondholders who, after declining a recent settlement offer by the Argentine government, are now seriously considering international arbitration.[10]

'Argentina sought to convince the tribunal that any breaches of the treaty had been a necessary response to a chaotic economic and social situation. However, the tribunal rejected this argument, noting that the country failed to meet the stringent international law test for "necessity".'[11] 'A lawyer at the Argentine attorney general's office, who spoke on the condition of anonymity, stresses that Argentina seeks to treat foreign companies equitably, but without putting them above others.

"This crisis affected everybody – foreign investors, local investors. Poverty and unemployment grew at an incredible pace," the lawyer says. "We believe that in those kinds of situations a government has the right under international law to take the necessary measures to assure its survival, the survival of the state, and of the society. As long as [those] measures do not discriminate and as long they affect everybody in an equal way, we believe that nobody can say [to a government] that 'you are not entitled to do that'." The lawyer adds that investment treaties are being interpreted to provide foreign investors with a softer landing than that experienced by the rest of the Argentine economy.[12]

There are predictions that the current economic crisis could give rise to more investor-to-state cases.[13] This is not so farfetched. Failure to bail out banks equally has already resulted in host governments being liable.[14]

THE FINANCIAL AND SUBSEQUENT ECONOMIC CRISIS IS ALREADY CAUSING DIFFICULTIES FOR DEVELOPING COUNTRY ECONOMIES

For example, as the Chair of the UN Commission on reforms of the International Financial System noted, 'these consequences pale in comparison to what will be happening in the developing world. If history is our guide, educations will be interrupted, those who lose their jobs will have no safety net to fall back upon, malnutrition will increase, governments faced with tighter budgetary constraints will be forced to cut back on health expenditures. There will be lifelong scars. It is too late to prevent this downturn. But it is not too late to try to mitigate some of these adverse effects.'[15] The UN Commission notes that if the crisis is not dealt with effectively 'There will be an increase in poverty and malnutrition and the education of many young people will be interrupted, with life-long effects.'[16]

Ninety-four out of 116 developing countries have experienced a slowdown in economic growth.[17] The average GDP growth rate of developing countries is now projected to fall in 2009 to less than half the pre-crisis rate.[18] The World Bank notes that: given the unprecedented severity of the crisis, few countries will be able to avoid heavy pressures on their fiscal and external positions.[19]

'World trade is on track to register its largest decline in 80 years, with the sharpest losses in East Asia, reflecting a combination of falling volumes, price declines, and currency depreciation.'[20] 'Developing countries such as Indonesia, Philippines and Turkey registered a drop in exports of 20 percent or more. In October, India registered its first ever year-over-year decline in exports (of 15 percent), following growth of 35 percent in the previous five months. In December... Brazil's exports plunged 29 percent.'[21]

In addition to decreased exports, the current account balance is also likely to worsen in sub-Saharan Africa due to declining export receipts from tourism and transportation services which tend to be pro cyclical as well as falling remittances[22]

There will be decreased flows of finance to developing countries including credit,[23] there will also likely be a decrease in concessional financing[24] and aid[25].

Developing countries are also experiencing decreased government revenue due to: commodity-related tax revenue falling,[26] 'sovereign debt issuance by high-income countries is set to increase dramatically, crowding out many developing country issuers (private and public)'[27] and aid being pro cyclical.[28] This is occurring at a time when increased government revenue is required for stimulus packages and social safety nets[29] such as those that industrialised countries have implemented.

Even if a country's public debt is low, it may find it difficult to finance a large fiscal stimulus package. 'According to World Bank analysis, only one quarter of vulnerable developing countries are in a position to expand their fiscal deficit to undertake significant countercyclical spending. Moreover, one-third of these countries is aid dependent and will require additional external support to finance increased spending. At the same time, there is a clear need for countercyclical fiscal stimulus in response to the contraction in global demand. However, many countries, particularly LICs, lack the resources to undertake the types of measures that could make a real difference in the lives of those impacted by the crisis. Many governments, particularly in LICs and countries negatively impacted by the earlier food and fuel crisis, have found it increasingly difficult – if not impossible – to cushion the effects of the crisis on their populations, as weak revenue performance puts budgets under additional pressure, placing the delivery of basic services at risk and precluding the adoption of a stimulus packages without external assistance.' [30]

For Africa, the downturn in global growth, the decline in most commodity prices, and tighter credit combines to significantly worsen the economic outlook for sub-Saharan Africa.[31] The Prime Minister of Ethiopia, Meles Zenawi, recently noted that countries like his own that have come out of conflict in the recent past could find their stability threatened by the downturn. If recent progress was threatened then some countries "could go under and that would mean total chaos and violence."[32] he added. President Ellen Johnson-Sirleaf similarly stated that stability in Liberia is also threatened.[33]

MEASURES TAKEN BY INDUSTRIALISED COUNTRIES TO DEAL WITH THE CRISIS CAN WORSEN THE EFFECTS ON DEVELOPING COUNTRIES

There has already been increasing protectionism by developed countries, including:

- the 'Buy American' provision in the U.S. law
- Other examples in the January 2009 report to the TPRB from the World Trade Organization (WTO) Director General[34] include the EU re-introducing export subsidies for butter, cheese, and whole and skim milk powder.
- The effects of this can be exacerbated by the competition provisions in North-South FTA, see below.
- Professor Stiglitz, Chair of the Commission of Experts of the President of the UN General Assembly on Reforms of the International Monetary and Financial System noted that:[35]
- The subsidization by the U.S. and EU of their banks and auto sectors are in the 'order of magnitude never seen before and unmatched in history.' This is unmatchable by developing countries and so there is no level playing field.
- Furthermore, the level playing field cannot be easily restored because companies in industrialized countries know that they can and will be bailed out. This makes them more likely to engage in risk taking activities knowing that they will be rescued.
- (In addition, banks that are known that they will be bailed out, can borrow at cheaper rates which gives them another competitive advantage. According to the U.S. Government, this is already occurring: 'creditors are granting big institutions more favorable treatment because they know the government is backing them, FDIC officials said. Large banks with more than $100 billion in assets are borrowing at interest rates 0.34 percentage points lower than the rest of the industry. Back in 2007, that advantage was only 0.08 percentage points, according to the FDIC.'[36])

CURRENT AND FUTURE TRADE LIBERALISATION CAN INCREASE THE RISK OF EXPERIENCING A FINANCIAL CRISIS

Professor Stiglitz also noted that existing trade liberalisation has increased the speed of the contagion of this crisis from the USA.[37] The UN Commission noted that 'Many bilateral and multilateral trade agreements contain commitments that... may have exposed them unnecessarily to the contagion from the failures elsewhere in the global economic system.'[38]

The impact of financial innovation

In particular, the causes of the crisis according to the International Monetary Fund (IMF) include the emergence of new types of financial instruments and the inability of regulators to keep up; rapid expansion of securitization; increasingly complex balance sheets; highly leveraged financial market players; intensified cross-border spillovers after the crisis broke because financial institutions and markets across borders were closely linked and risks highly correlated.[39] The G20 agrees that one of the drivers of the current turmoil was that financial innovation outpaced the ability of regulators to effectively monitor it and that there therefore is a need to better regulate it.[40]

This has been the experience in the past for a number of developing countries. For example, Thailand found that prior to its financial crisis in 1997, despite efforts to regulate the financial sector, 'New financial and debt instruments were created that made surveillance and devising appropriate regulation almost impossible.'[41]

Given this, the drive for further financial services liberalisation at the WTO and in FTAs/ economic partnership agreements (EPAs), particularly for new financial services as the CARIFORUM-EC EPA requires is especially worrying, see below.[42]

Need for regulation of capital flows

The IMF goes on to point out that 'emerging markets with well-developed financial systems were initially mostly affected by cross-border financial linkages through capital flows, stock market investors, and exchange rates.'[43] This indicates the need for regulation of capital flows, however this is made difficult by North-South FTAs and BITs, see below.

Furthermore, according to the IMF, [44] 'Unlike in developed economies, there has been no systemic banking crisis in sub-Saharan Africa... However, as the crisis continues, risks could grow because parent banks could withdraw funds from subsidiaries and local banks. Risks of contagion from distressed foreign parent banks to local subsidiaries within sub-Saharan Africa could be associated with parent banks (i) withdrawing capital from African subsidiaries; (ii) calling in loans to their African subsidiaries; (iii) no longer investing local profits in local subsidiaries; or (iv) a combination of these... considering that many financial institutions in Africa are foreign-owned.' This indicates the risk of allowing binding market access for foreign banks into Africa in an FTA/EPA or at the WTO and the problems which can arise from liberalising capital flows in an FTA/ EPA.

Given this, the UN Commission recommends that 'In the absence of better systems of risk mitigation, it is especially important for developing countries to be wary of measures that expose them to greater risk and volatility, such as capital market liberalization. Developing countries should use all the tools at their disposal, price interventions, quantitative restrictions, and prudential regulations, in order to help manage international capital flows. Market-driven international capital flows are of a magnitude and volatility that they can offset any formal mechanism to provide additional finance for development. Thus, an active management of foreign capital inflows will be required to ensure that they are supportive of government counter-cyclical policies.'[45]

However, the ability to impose capital controls is severely limited in BITs and North-South FTAs such as the CARIFORUM-EC EPA which appears to be a model for future EU FTAs, see below.

CURRENT AND FUTURE TRADE LIBERALISATION MAKES IT DIFFICULT TO EFFECTIVELY RESPOND TO THE CRISIS AND MAKES FUTURE CRISES MORE LIKELY

The UN Commission noted that 'Many bilateral and multilateral trade agreements contain commitments that circumscribe the ability of countries to respond to the current crisis with appropriate regulatory, structural, and macro-economic reforms and rescue packages.'[46]

Goods

As a result of this crisis, developing countries are experiencing decreased government revenue (see above) at a time when increased government revenue is required for stimulus packages and social safety nets such as those that industrialised countries have implemented.

Tariffs are an important source of revenue during development because they are generally easier to collect than other types of tax. For example, customs duties accounted for more than 50% of U.S. government revenue when it was developing in the 1870s.[47] In other countries, the share of tariffs in government revenue may even be higher, for example, Kiribati and Vanuatu raise over 80% of their revenue from tariffs.[48] South Asia depends on tariffs for 37% of its government revenue.[49]

Therefore reduction of tariffs in an FTA or WTO negotiations[50] can have a significant impact on government revenue in developing countries. If the FTA involves a WTO member, in order for it to be an allowed exception to the most-favoured-nation treatment requirement of the WTO, substantially all trade in goods must be liberalised in the FTA.[51] There is no agreement at the WTO as to what constitutes 'substantially all trade'. However, the European Union has interpreted it as requiring 80% of tariffs to be removed. USFTAs often require the developing country to remove all of its tariffs on U.S. products. Given such broad liberalisation interpretations under the current WTO provision, this can mean substantial loss of tariff revenue for developing country governments. It is also not practical to remove agricultural subsidies via an FTA, so while the developing country may have to remove its tariffs on incoming agricultural products, developed countries can continue to subsidise the same agricultural products leaving the developing country farmers unable to compete.

For example, according to the Minister of Commerce of Senegal in the context of EU EPA negotiations, 'the removal of tariffs would lead to a drop by 7-10% of governmental revenue and those losses can rise even higher, for as far as 15-20% in the case of some African countries.'[52]

Furthermore, International Monetary Fund economists note that middle income countries are only likely to recover 45-60% of lost tariff revenue from other taxation sources and low-income countries are at best likely to recover 30% or less of lost tariff revenue from other taxation sources.[53] They note that a value-added tax is not proven to make up for the lost revenue from lowering tariffs.

Given the increased unemployment as a result of this crisis,[54] developing countries may need to create jobs for example in value added and processing industries. However, the EU's desire to ensure its access to raw materials (as epitomised in its 'Raw Materials Initiative'[55]) means that it is seeking to reduce the ability of developing countries to restrict exports of raw materials to ensure that inputs for value added and processing industries remain cheap via proposals including:

a) Binding non-agricultural export taxes in WTO negotiations (except for LDCs)[56]

b) Prohibiting/severely restrict the ability to impose export taxes or restrictions in its FTAs.[57]

Failure to comply with the tariff reductions required by the FTA/WTO can lead to the retaliation outlined under 'enforcement' below.

Intellectual property chapter

Developing countries may need to ensure that medicines are as affordable as possible, especially if unemployment has risen as a result of the recession. However, if developing countries agree to intellectual property provisions similar to those in the CARIFORUM- EU EPA, this is likely to increase the price of medicines they face.[58]

Furthermore, if developing countries agree to the stronger and broader intellectual property protection provisions in the CARIFORUM-EU EPA, this is also likely to increase the outflow of royalties and exacerbate any balance of payments problems. For example, in 2005, Malaysia had a net outflow of royalties of US$1.7billion.[59]

Services and investment provisions

Market access generally

According to the IMF as noted above, sub-Saharan Africa could be exposed to the crisis because distressed foreign parent banks may withdraw capital from African subsidiaries, call in loans to their African subsidiaries, stop investing local profits in local subsidiaries or a combination of these.[60] This highlights the way in which developing countries can be more exposed to crises originating in other countries if their financial sector is liberalized. A 2010 IMF staff paper finds that allowing foreign direct investment in the financial sector can be particularly destabilising.[61]

BITs, the WTO's General Agreement on Trade in Services (GATS) and the services/financial services/investment chapter of an FTA facilitates the entry of foreign financial institutions and instruments to differing degrees.

The strongest degree is providing market access (via modes one, two or three) without exceptions.

The next most drastic is providing market access on a negative list basis. This has been common in U.S. FTAs. This means that everything is liberalized unless the countries list the exceptions to market access at the time of signing the FTA. This list of exceptions usually cannot be added to without agreement of the other country and perhaps compensation. This has two particular problems in the context of the current crisis:

1. At the time of listing exceptions, the government may not know that these financial instruments exist and can be dangerous.

2. Even if the government is aware of all current financial instruments, because the list of exceptions is decided once and for all at the time of signing the FTA, the government cannot list as an exception financial instruments that come into existence in the future.

3. There are also difficulties with safe services liberalisation even in non-crisis times because for example:

a. There are multiple, conflicting, complicated services classification systems which was one of the causes for the U.S. mistake in the Antigua gambling case, see below.

b. Services are notoriously difficult to measure. Even developed countries and the United Nations Conference on Trade and Development have had difficulty in measuring them. Without accurate data, it is difficult for developing countries to know what they can safely liberalise, even when it is not a time of financial crisis.

The third level is providing market access on a positive list basis. This means that market access is only provided to financial institutions and their instruments if it is listed for liberalisation. This is the way that it is done at the WTO, for example there are developing countries which have made financial services liberalisation commitments in the Uruguay Round, post Uruguay Round, provisional offers in the Doha Round and in the process of joining the WTO. However, even this has proved problematic to do accurately, even for developed countries, as the United States-Antigua case at the WTO showed.[62] So even this method has a number of problems:

1. As under the negative list system above, the positive list liberalisation is done at the time of signing the treaty and amendments usually require the consent of the other party and/or compensation. For many of the trade agreements that were signed prior to the current crisis, positive list liberalisation commitments in financial services that may have seemed safe at the time, may no longer be seen the same way. See below for recommendations.

2. There are multiple, conflicting, complicated services classification systems which was one of the causes for the U.S. mistake in the Antigua gambling case.

3. Services are notoriously difficult to measure. Even developed countries and the United Nations Conference on Trade and Development have had difficulty in measuring them. Without accurate data, it is difficult for developing countries to know what they can safely liberalise, even when it is not a time of financial crisis.

Furthermore, 'To lay the ground for recovery, it will also be important that small and medium-sized enterprises are able to obtain the financing necessary to create and develop opportunities for growth and employment. SMEs play a critical role in economic recovery, often acting as the "best safety net". This highlights the importance of protecting access to financing for this particular vulnerable segment of the private sector.'[63] Unfortunately, the opposite may occur if foreign banks are given market access through Doha Round GATS negotiations /FTAs because experience shows that foreign banks decrease lending to SMEs. For example, "Around the world, countries that have opened up their banking sectors to large international banks have found that those banks prefer to deal with other multinationals like Coca-Cola, IBM and Microsoft. While in the competition between large international banks and local banks the local banks appeared to be the losers, the real losers were the local small businesses that depended on them." [64]

FTAs and BITs

At the heart of most North-South FTAs and BITs are strong chapters or provisions leading to liberalisation of financial services and deregulating the entry and operations of financial institutions and instruments. This facilitates the flows of speculative money and instruments via various mechanisms.

Including services in an EPA beyond cooperation is likely to trigger Article V of the WTO's General Agreement on Trade in Services (GATS) which countries such as the EU may then interpret as requiring liberalisation of 80% of services sectors. If 80% of services have to be liberalised, this may not allow developing countries to exclude essential services and all financial services. The dangers of liberalising financial services were outlined above.

Furthermore, the situation of likely current account deficits in developing countries as a result of the crisis as outlined above is liable to be exacerbated by such extensive services liberalisation, because services generally do not generate export revenue yet repatriate their profits.[65]

The CARIFORUM-EC EPA Title on services and investment appears to be a template for the EC so is the example focused on for this analysis.

With respect to financial services in particular, there are a number of provisions in the CARIFORUM-EC EPA which may make it difficult to prevent future crises and to effectively deal with the current crisis.

Firstly, if market access commitments are made in financial services, parties to the EPA cannot set limits on the size or form of financial institutions, unless exceptions are listed.[66] This is problematic for a number of reasons including:

a) the former chief economist of the International Monetary Fund has said that 'too big to fail is too big to exist'.[67] This means that when financial institutions that are very large collapse, they must be bailed out in order to avoid causing systematic problems for the whole economy. However, Articles 67 and 76 of the CARIFORUM EPA make it difficult to limit the size of financial institutions if they are liberalised under the EPA, so is likely to cause these 'too big to fail' institutions.

• Furthermore, once these "too big to fail" institutions exist and only the locally owned ones are bailed out, this can violate investment provisions in BITs and FTAs which give foreign investors the right to fair and equitable treatment and a minimum standard of treatment.[68] This can be seen when a Dutch subsidiary of a Japanese bank recently successfully claimed that the Czech Republic had violated its right to fair and equitable treatment by extending its bailout program only to "too big to fail" Czech banks, therefore excluding a bank of similar strategic importance in which the Dutch subsidiary had invested.[69]

b) It prevents firewalls that separate deposits from risky investment banking. For example, the Glass-Steagall Act in the USA that was set up in response to be financial crisis of the 1930s used to do this, however the requirement to set up a bank holding company to supply consumer banking services that was strictly regulated, had high deposit ratios and could only invest in very secure assets, violated the provisions in GATS (the equivalent provisions in the CARIFORUM EPA are Article 67.2 (c), (e) and Article 76.2 (c)) which states that you cannot specify the type of entity. The repeal of this Act allowed the combined banking services in the USA whose collapse has been responsible for a significant part of the current crisis.

c) Given the recent evidence of lack of solvency of banks, countries may wish to require them to establish as subsidiaries (which must have their own capital reserves) rather than mere branches.[70] However, the CARIFORUM-EC EPA does not appear to allow this unless it is listed as an exception.[71]

d) When this is combined with the requirement to allow new financial services, it would appear to allow a mere branch to supply these risky new financial products, unless the EC and CARIFORUM agree on the form these financial institutions should take (or unless it is listed as an exception).

Secondly, as noted above, there is an explicit provision that requires the CARIFORUM country to allow EU financial services suppliers to supply a new financial service if the CARIFORUM country allows its own financial institutions to do so and it has committed to liberalise that particular financial service in the EPA.[72] This is in a situation where, according to the IMF, the emergence of new types of financial instruments and the inability of regulators to keep up was one of the causes of the current crisis.[73] (This EPA provision is based on the optional Understanding on Commitments in Financial Services at the WTO that most developing countries have not adopted and which has already been forecast to conflict with proposals to limit risky financial instruments[74]).[75] Thus, if a CARIFORUM country allowed a hedge fund activity domestically, it would have to allow hedge funds from EU countries to enter and introduce similar services. Since the European institutions are much larger than the domestic hedge fund, the risks to the economy by this liberalisation would increase manifold. Since 'financial services' are defined broadly,[76] the same applies to derivatives and other risky new financial instruments. There is a prudential carve out,[77] however it is narrower in some respects than the WTO equivalent[78] and even use of the WTO one has been challenged, especially by the EC.[79]

Thirdly, a number of countries including Spain,[80] Germany,[81] have banned naked short selling[82] because of the pressure it has put on banks in Spain and the way it has exacerbated the recent European government debt crisis by betting that the price of insuring Greek, Spanish or Portuguese debt would rise and so 'often pushes up the cost that countries need to pay to lure investors into its debt. In the case of Greece, such increase led to unbearably high borrowing costs, pushing the country into a bailout by the EU and the International Monetary Fund.'[83] The German Chancellor Angela Merkel and French President Nicolas Sarkozy, leaders of the two largest European economies, have therefore called in a joint letter to the European Commission President for a total European ban on naked short-selling of government bonds.[84] However, if countries have made commitments to liberalise these sectors in FTAs or at the WTO and it then bans this kind of financial activity, it would be violating its commitments (because a ban is the same as a zero quota according to the WTO) and it is not clear that any prudential exception could be used (see above).

Fourthly, if a government wants to be able to bailout or provide stimulus packages to its companies that are in trouble due to the current crisis, provisions commonly found in FTAs or BITs (such as the Ecuador-Netherlands BIT[85]) would require that it also help foreign companies in their country. This is because of national treatment provisions which require investors from the other party to be treated the same as domestic investors. For developing countries with limited budgets, having to bail out large foreign companies will restrict the amount they have left to assist local companies. Failure to comply with such a national treatment requirement in a treaty can be enforced by the methods described in 'enforcement' below.

Expropriation[86]

'Investment' is usually broadly defined in free trade agreements or bilateral investment treaties. It often includes any property whether it is tangible or intangible (eg a patent) and any related property rights (eg a mortgage) as long as it has the characteristics of an investment (eg commitment of capital, expectation of gain/profit or assumption of risk). It often explicitly includes shares, bonds, debentures, loans, contract rights, debt, concessions, licences, profits, capital gains, royalties, interest, fees, dividends, market share, profits etc.

There is often also an expropriation provision which provides to differing degrees that the government must provide compensation if it does anything which reduces the value of the investment (such as increasing capital adequacy requirements or prohibitions on predatory lending)[87], broadly defined. It could be interpreted therefore that many types of government regulation which reduce the profit of an investment by a company of the other country would amount to expropriation and so require the host government to pay compensation to the investor.

This compensation is usually the fair market value before the expropriation took place or was known about, is fully realizable and freely transferable and includes interest at a commercially reasonable rate.

Failure to comply with expropriation requirements in a treaty can be enforced by the methods described in 'enforcement' below.

WTO

Existing commitments

The WTO's limits on domestic financial service regulation are contained not only in the original GATS and its schedules, but in the subsequent additional financial services liberalization commitments,[88] which went into effect in 1999, in the WTO accession process and the Understanding on Commitments in Financial Services ('Understanding') which the OECD countries also signed.

The almost identical structure of GATS means that the problems with services liberalisation outlined in a)-c) of the FTA section also apply to financial services liberalisation done without listing appropriate exceptions under GATS.[89]

According to a legal opinion, some WTO Members such as the USA, UK, Singapore and Hong Kong could already be in violation of their existing WTO commitments due to their regulations of financial services.[90]

Understanding

Countries which signed on to extra WTO obligations in the Understanding are also bound by a "standstill" commitment – meaning they are forbidden from rolling back deregulation (or liberalization) for the expansive financial services they commit.[91] This means that these countries have bound themselves **not** to do what regulators and experts deem necessary – create new financial service regulations.

Countries which are Parties to the Understanding are also required to ensure that foreign financial service suppliers which are established in its country are permitted "to offer in its territory any new financial service,"[92] a direct conflict with the various proposals to limit various risky investment instruments, such as certain types of derivatives. So this means new financial service products from these foreign suppliers cannot be banned in countries which are Parties to the Understanding.

Prudential safeguard

GATS contains a "carve-out" provision that supposedly ensures that the agreement will not undermine domestic laws or regulations – such as those designed to protect investors, depositors, and policyholders, or to ensure the safety and integrity of the financial system.[93] However, this ostensible guarantee is largely eviscerated by several significant loopholes. First, the putative carve-out contains a classic WTO circumvention clause that negates the ability of countries to actually safeguard a domestic policy that conflicts with WTO obligations. The clause starts by noting that countries shall not be prevented from establishing financial service regulatory policies for "prudential reasons," but then continues by stating: "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." That is to say that even if regulatory measures are taken for prudential reasons, they are subject to challenge if they in effect undermine the regulatory constraints otherwise established in the agreement. Moreover, the definition of "prudential" is left undefined in the GATS. Thus the question of what constitutes a "prudential" regulation is subject to interpretation by WTO dispute resolution panels were a domestic law challenged. Moreover, the financial service industry has been lobbying in the context of ongoing GATS negotiations for a narrow interpretation that would limit "prudential" measures to regulations concerning only solvency and financial disclosure.

Financial services negotiations in the Doha Round

The current Doha Round includes plurilateral-type services sectoral negotiations which includes financial services. In the financial services group, developed countries and their financial institutions are pressing a group of developing countries to open up their financial services markets, i.e. by allowing the establishment of foreign financial institutions (Mode 3), and by allowing freedom of cross-border financial flows, instruments and services (Modes 1 and 2).

If the negotiations conclude along the proposed lines, the developing countries would be subjected to the type of financial liberalisation that makes them more susceptible to financial vulnerability and less able to ensure their SMEs receive adequate access to credit.

Another a key aspect of the Doha Round, if it were completed, would be the imposition of new restrictions on non-discriminatory regulation over services, including the financial sector. The 20 March 2009 draft of these provisions, unambiguously titled "Disciplines on Domestic Regulation," requires measures relating to licensing requirements and procedures to be pre-established, based on objective and transparent criteria and relevant to the supply of the services to which they apply. This could mean that it is not possible to increase or strengthen (as has been widely recommended to prevent future similar crises) the regulation of foreign financial institutions which are already established in the developing country.

Furthermore , if the Doha Round is concluded, one of the texts that would be formally adopted is the new "disciplines" to restrict non-discriminatory regulations in the accounting sector. These disciplines will restrict accounting regulations to what is "necessary,"[94] which has a specific meaning in WTO jurisprudence that requires a country employing regulations to prove the negative: that their system is the least trade restrictive. The financial crisis has also lead to proposals to revise accounting standards to prevent future similar crises and these proposals may not meet the necessity test.

Overall, if agreed to, these new commitments would mean that countries that may wish to abide by proposed policies (eg by the UN Commission) to regulate financial flows and institutions and instruments may be violating their new WTO commitments.

Movement of capital provisions

As noted above, according to the IMF, capital flows are one of the ways that the crisis spread to developing countries.[95] Even developed countries have needed to impose capital controls to deal with the current crisis and the IMF has allowed this.[96] The UN Commission emphasized that 'In the absence of better systems of risk mitigation, it is especially important for developing countries to be wary of measures that expose them to greater risk and volatility, such as capital market liberalization' and that developing countries should use all the tools at their disposal in order to help manage international capital flows.[97]

A 2010 IMF staff paper focusing on capital inflows as a source of financial fragility notes concerns that foreign investors may be subject to herd behaviour rather than making rational decisions and even where inflows are fundamentally sound, the paper finds that they can still cause problems which may require capital controls to solve them.[98] Such problems include large capital inflows causing 'excessive foreign borrowing and foreign currency exposure, possibly fueling domestic credit booms (especially foreign-exchange denominated lending)[99] and asset bubbles (with significant adverse effects in the case of a sudden reversal).'[100] Analysis of the experience of countries which have imposed capital controls on inflows finds that it successfully shifts significant portions of inflows towards less vulnerable structures. The authors point out that even if investors devise strategies to bypass the capital controls, as long as the strategies cost more than the expected return from the transaction, the costs of this circumvention acts as sand in the wheels.

A 2004 journal article by the IMF's Senior Counsel about capital controls in FTAs also stated that 'in cases of severe balance of payments crisis, it may be necessary for the country to impose exchange restrictions on a temporary basis to safeguard its balance of payments.'[101] She notes that 'despite improvements in crisis prevention analysis, a risk remains that economic and financial crises may emerge in countries where they are not anticipated.'[102]

Unfortunately, North-South FTAs and BITs often have provisions requiring all transfers relating to the investment from the other party[103] to be allowed without delay into and out of its territory. These transfers include: contributions to capital, profits, dividends, capital gains, interest, loan repayments etc. This would prevent regulation of capital flows and the imposition of capital controls unless there are safeguards that are strong enough, broad enough and long enough. For example, the CARIFORUM-EC EPA limits the ability to impose capital controls even more than GATS[104] and the balance of payments safeguards[105] may not be sufficient.

The Senior Counsel in the Legal Department of the IMF has expressed concern about the ability of parties to several USFTAs to manage macroeconomic imbalances and consistency with the work of the IMF given the USFTAs' blanket prohibitions on capital restrictions, even in the context of an economic and financial crisis.[106] She goes on to point out that when the IMF provides resources to a country, it may 'request' the imposition of capital controls to prevent a large or sustained outflow of capital. Since this 'request' is a condition for financing by the IMF, failure to impose the capital controls (for example because doing so is prohibited by an FTA or BIT and therefore doing so would expose the government to liability to investors for monetary compensation and possible tariffs on its exports) can render the country ineligible to access the IMF's resources.[107] The importance of accessing international resources such as those from the IMF in times of financial crisis can be seen by the developed[108] and developing countries that have needed IMF assistance in this current crisis. Ability to access to IMF resources can be particularly important as they normally play a catalytic role for financing from the rest of the international community.[109]

If a country tries to deal with its conflicting obligations under an FTA/BIT (prohibiting capital controls) and the IMF (requiring capital controls) by only imposing capital restrictions on countries not party to its FTAs/BITs, the IMF's Senior Counsel concludes that this would be illegal under the IMF's Articles which require non-discrimination amongst IMF members.[110]

She also warns against reliance on the 'cooling-off' period in the Chile and Singapore USFTAs as being a sufficient safeguard. [111] This is because according to the IMF Senior Counsel, even with these provisions, Chile and Singapore could still be held liable to investors for even temporary restrictions that were imposed in connection with the resolution of an economic and financial crisis.[112] 'The "cooling off" period delays when a claim may be initiated, but the treaty continues to hold the signatory liable if a panel determines that any restrictions imposed "substantially impede transfers" and the liability applies retroactively even if the restrictions have subsequently been removed.'[113]

The Senior Counsel also finds that a side letter between the Singapore and US Governments on this matter is also an insufficient safeguard because: a) it does not settle the issue, b) it does not bind dispute settlement panels; c) it is likely to be ignored by investors bringing claims under the investor-state arbitration and d) does not fully address the problem that restrictions may indeed need to have substantial effects in order to serve their purpose.[114]

She concludes by highlighting the importance of consideration of the capital control issues in a broader context than bilateral market access negotiations.[115]

Competition and government procurement provisions

North-South FTAs often have competition and government procurement provisions even though these have been dropped from the Doha Round of WTO negotiations.

At a time when developed countries are increasing their protectionist measures, see above, the competition provisions in the CARIFORUM-EC EPA[116] For example could prohibit activities such as:

- joint marketing within a developing country of a commodity such as chicken
- A developing country's farmers or value added companies carrying out joint marketing campaigns to 'buy local chicken' (rather than European milk for example)
- A developing country's chicken distributors agreeing to only sell domestic chicken

Bailouts of struggling companies are also needed in developing countries. However, competition provisions such as those in the CARIFORUM- EU EPA restrict the ability to provide aid to state enterprises.[117] It specifies that: with respect to public enterprises and enterprises to which special or exclusive rights have been granted, the Parties must ensure that there is no measure distorting trade in goods or services between the Parties to an extent contrary to the Parties interest.

(This may also be a problem for European Union countries especially since a bailed out private sector company, such as some of the banks that have been nationalised, may then be considered to be a state enterprise and therefore cannot receive further aid). This would mean that bailouts have to be once and for all if they involve turning it into a state enterprise as defined in the FTA. It appears to be difficult for even industrialized countries to know how much and how often they will need to bail out a given enterprise, given the swiftly changing and unpredictable nature of the current crisis. So this is likely to be even more difficult for developing countries to predict.

There is a widely recognized need for stimulus packages in developing countries as well.[118] Yet a number of North-South FTAs require national treatment in government procurement.[119] This can mean that procurement of goods or services by national or regional/state governments or state enterprises must also be opened to companies from the other party to the FTA. Opening government procurement by developing country governments to European companies (as the CARIFORUM-EC EPA did)[120] will decrease the effectiveness of assistance for local companies as some of the stimulus spending would go to foreign companies.

Companies from industrialised countries generally have more supply capacity than those from developing countries. This is one reason why developing countries have traditionally resisted the inclusion of government procurement at the WTO and very few developing countries have joined the optional government procurement agreement at the WTO. Nevertheless, government procurement in services are still being negotiated at the WTO. In 2006, the European Union proposed national treatment for government procurement (i.e. market access) of services in these negotiations.[121]

It may be argued that a North-South FTA gives developing country companies access to the government procurement of the industrialized country, but in reality there appears to be little or no effective market access for developing country companies due to other barriers. For example, according to U.S. government statistics:[122]

- 94% of U.S. procurement goes to companies based in the U.S.
- Chile and Australia did not see increases to significant levels of their access to the U.S. government procurement market after signing USFTAs which opened the government procurement of all Parties.[123]

As allowing foreign companies to tender for government procurement increases leakage and makes stimulus packages less effective domestically, this is particularly problematic for developing countries which have more limited budgets.

Failure to comply with these provisions in a treaty can be enforced by the methods described in 'enforcement' below.

ENFORCEMENT

Failure to comply with the provision of an FTA, BIT or WTO commitment can result in serious economic consequences. This is because if the government does not comply with its obligations above, there are usually a number of ways it can be sued.

WTO

WTO commitments are enforced via state-to-state dispute settlement at an international tribunal. If the losing party fails to comply with the tribunal's decision, the complaining party can ultimately impose tariffs on the losing party's exports until it complies.

FTAs and BITs

Firstly, the host government can often be sued by the investor directly at an international tribunal (known as 'investor-to-state dispute settlement') for monetary compensation. (This has not been included in EU FTAs prior to the Lisbon Treaty, but is likely to be included in those concluded with major economies (developed or developing) post-Lisbon Treaty). If the host government loses and does not comply with the tribunal's award,

- in an FTA it can usually be enforced by a state-to-state dispute settlement at an international tribunal which ultimately allows the imposition of tariffs on the host government's exports.
- In a BIT it can often be enforced by seizing the host government's assets in the home government's country.[124]

This requirement to pay investors monetary compensation for ordinary measures the host government may take in the public interest has alarmed even the IMF's Senior Counsel.[125] In the context of having to compensate investors for measures taken to deal with a financial/economic crisis (as Argentina has been sued for, see above), she noted that 'recent experience has highlighted the unexpected nature of economic and financial crises. Thus, even for relatively stable countries like Singapore and Chile, the potential liability associated with the prohibitions on any exchange controls, even temporary controls in the context of a crisis, is worrisome. To the extent that these provisions serve as models for future agreements with higher risk countries, this concern is more pronounced'.[126]

Secondly, (this can be an alternative to or in addition to investor-to-state dispute settlement), the home government can sue the host government at an international tribunal for failure to comply with the obligations of the treaty. If this is part of an FTA, the tribunal's decision can usually be enforced by raising tariffs on the losing party's exports.

Thirdly, some treaties such as the European Union-Uzbekistan Partnership and Cooperation Agreement[127] allow for immediate retaliation by raising tariffs on exports for perceived failure to comply with the treaty (which includes requirements for free movement of capital) without needing to resort to dispute settlement first.

AMENDING/WITHDRAWING COMMITMENTS

Amendments to an FTA or BIT usually require the consent of both parties.

Unilateral withdrawal from an FTA or BIT is usually possible with some notice in writing (often six months). However, the protection available under the BIT often continues for an additional period (often 10 years) even after withdrawal from the treaty.

RETHINKING OF TRADE RULES IS NEEDED

There have been a number of calls to rethink the trade rules in the light of the current crisis. For example: the African Union notes: 'rising food prices, the global financial crisis, the impact of climate change and until recently the increasing energy prices, among others. These have consequently compelled nations around the globe to undertake reviews of their national trade and overall economic policies, in order to take appropriate intervention measures to avert the collapse of their economies... Similarly, the ability of the crisis to influence and reshape of positions on the Economic Partnerships Agreement (EPA) negotiations cannot be underestimated.'[128]

Similarly, the UN Commission noted that 'Many bilateral and multilateral trade agreements contain commitments that circumscribe the ability of countries to respond to the current crisis with appropriate regulatory, structural, and macro-economic reforms and rescue packages, and may have exposed them unnecessarily to the contagion from the failures elsewhere in the global economic system.'[129] The Chair of this Commission therefore concluded that as existing trade rules have not been designed adequately to deal with the current situation, these trade liberalisation rules need to be rethought.[130]

CONCLUSION

The G20 (which includes the European Union)[131] Working Group points out that 'there remains considerable uncertainty about how best to mitigate systemic risks, how to assess these risks as they arise, and how to respond.'[132] The G20 Working Group documents show that there is still on going learning about the causes of the crisis and how best to regulate them. Thus the G20 finance ministers and leaders have made it clear that they will still be developing prudential and other regulations even in 2010.[133] Given this, it is premature to agree to legally binding provisions in trade negotiations that may prevent the implementation of measures to deal with the current crisis and prevent future crises including the G20's own recommended regulations.

Furthermore, President Jagdeo of Guyana has called for a moratorium on implementation of the EPAs[134] as developing country governments need the tariff revenue for stimulus packages, bailouts and social safety nets. Given that Article XXIV of GATT has not yet been amended, realistically, free trade agreements negotiated now are still likely to require extreme liberalisation of goods with consequent loss of government revenue.

Given the number of problematic provisions outlined even in the preliminary analysis above, a more detailed and careful study is needed of the implications of such trade and investment agreements on the ability to deal with the current and future crises.

There should be a blanket review of relevant **existing** FTAs, BITs and WTO provisions to see which provisions of these rules are now inappropriate given the new understanding we now have on financial liberalisation. In such a review, recommendations should be made to adjust these existing agreements to make them in line with the new understanding and realities.

During this review process, the implementation of the parts of the **existing** FTAs that are linked to the new understanding about the downside of financial liberalisation should be suspended until the review and possible revisions are completed.

All current FTA **negotiations** including economic partnership agreements (EPAs) should be frozen until a review is completed about their appropriateness in light of the current crisis conditions.

With respect to the WTO, our suggestion is that the financial services plurilateral **negotiations** at the WTO be discontinued for the duration of the Doha Round.

Furthermore, reviews should be made as to the appropriateness of **existing** financial services commitments and offers by developing countries at the WTO, since they were made when the knowledge and awareness of the nature of financial markets was inadequate, and with the new understanding of these markets, they should be allowed to revise their commitments and offers without compensation. Developed countries wishing to revise their commitments should have to provide compensation.

Given the constraints imposed by Article XXIV of the WTO's General Agreement on Tariffs and Trade (GATT) dealing with regional trade agreements, this may also need to be reviewed in order to ensure developing country governments have sufficient tariff revenue to pay for stimulus and bail-out packages and social safety nets. Similarly, Article V of GATS may need to be reviewed to ensure that developing countries can limit the amount of sectors liberalised so that they need not liberalise essential services or financial services.

FURTHER INFORMATION

- Further general explanation of the EU-CARIFORUM EPA provisions, can be found at: www.twnside.org.sg/title2/par/CARIFORUM.Feb09.doc
- Further information on the likely impact of current WTO commitments and those being negotiated in the Doha Round on the ability to effectively implement measures to deal with the current crisis can be found at http://www.policyalternatives.ca/documents/National_Office_Pubs/2008/Financial_Instability_and_GATS.pdf.

Annex 1: How North-South FTAs/BITs can contribute to causing financial crises in developing countries

The provisions in the table below are only examples of those that are likely to have a directly relevant effect. Of course there may be indirect effects from a number of FTA provisions.

Many of the investor protections can also apply to existing investments in the country.

Furthermore, if the definition of 'investor' is loose, in practice, investors from almost any country can obtain the protection of the treaty.

FTA/ BIT provision:	Increased goods liberalisation	Pre-establishment investment rights*	Prevent regulation and control of capital flows*	Increased services liberalisation*	Increased financial services liberalisation*	Stronger intellectual property protection
Likely effect if agreed to:	Increased trade deficit	Increased inflow of hot money	Increased inflow and outflow of capital. In combination with increased inflows of investments, increased repatriation of profits	Increased current account deficit	If new financial services must be allowed, increased exposure to new financial instruments and the unpredictability and increased potential for large scale disruption they bring	Increased current account deficit as more royalties have to be paid overseas

* = also often explicitly present in BITs

Annex 2: Sample provisions

Some examples of the provisions discussed above are provided below.

National treatment
Central America-Dominican Republic-United States Free Trade Agreement:

'Article 10.3: National Treatment

1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.
2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
3. The treatment to be accorded by a Party under paragraphs 1 and 2 means, with respect to a regional level of government, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that regional level of government to investors, and to investments of investors, of the Party of which it forms a part.'

New financial services
CARIFORUM- European Union Economic Partnership Agreement

'Article 106: New financial services[135]

The EC Party and the Signatory CARIFORUM States shall permit a financial service supplier of the other Party to provide any new financial service of a type similar to those services that the EC Party and the Signatory CARIFORUM States permit their own financial service suppliers to provide under their domestic law in like circumstances. The EC Party and the Signatory CARIFORUM States may determine the juridical form through which the service may be provided and may require authorisation for the provision of the service. Where such authorisation is required, a decision shall be made within a reasonable time and the authorisation may only be refused for prudential reasons.'

Expropriation
Georgia-US BIT

'ARTICLE III

1. Neither Party shall expropriate or nationalize a covered investment either directly or indirectly through measures tantamount to expropriation or nationalization ("expropriation") except for a public purpose; in a non-discriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles of treatment provided for in Article II (3).
2. Compensation shall be paid without delay; be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken ("the date of expropriation"); and be fully realizable and freely transferable. The fair market value shall not reflect any change in value occurring because the expropriatory action had become known before the date of expropriation.
3. If the fair market value is denominated in a freely usable currency, the compensation paid shall be no less than the fair market value on the date of expropriation, plus, interest at a commercially reasonable rate for that currency, accrued from the date of expropriation until the date of payment.
4. If the fair market value is denominated in a currency that is not freely usable, the compensation paid – converted into the currency of payment at the market rate of exchange prevailing on the date of payment – shall be no less than:

(a) the fair market value on the date of expropriation, converted into a freely usable currency at the market rate of exchange prevailing on that date, plus
(b) interest, at a commercially reasonable rate for that freely usable currency, accrued from the date of expropriation until the date of payment.'

Free movement of capital
Japan-Malaysia Economic Partnership Agreement

'Article 83: Transfers

1. Each Country shall allow all transfers to be made into and out of that Country freely and without delay in any freely usable currency. Such transfers shall include:
   (a) the initial capital and additional amounts to maintain or increase investments;
   (b) profits, capital gains, dividends, royalties, interest, fees and other current incomes accruing from investments of the investors of the other Country;
   (c) proceeds from the total or partial sale or liquidation of investments of investors of the other Country;
   (d) payments made under a contract including loan payments in connection with investments;
   (e) earnings, remuneration and other compensation of personnel from the other Country who work in connection with investments in the former Country;
   (f) payments made in accordance with Articles 81 and 82; and
   (g) payments arising out of the settlement of a dispute under Article 85.
2. Each Country shall allow transfers referred to in paragraph 1 of this Article to be made in a freely usable currency at the market rate of exchange prevailing on the date of the transfer.
3. Subject to paragraphs 1 and 2 of this Article, each Country shall accord to the transfer referred to in paragraph 1 of this Article treatment no less favourable than that accorded to the transfer originating from investments made by investors of any third State.
4. Notwithstanding paragraphs 1 and 2 of this Article, a Country may delay or prevent a transfer referred to in paragraph 1 of this Article through the equitable, non-discriminatory and good-faith application of its laws relating to:
   (a) bankruptcy, insolvency or the protection of the rights of creditors;
   (b) issuing, trading or dealing in securities;
   (c) criminal or penal offences;
   (d) ensuring compliance with orders or judgments in adjudicatory proceedings; or
   (e) obligations of investors arising from social security and public retirement plans.'

Endnotes

1 By Third World Network, July 2010. For further information please contact sanya@twnetwork.org.
2 http://www.google.com/hostednews/afp/article/ALeqM5hQHLui0rWUEW0gA59bBycgnNTKQQ
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4 Those between developed and developing countries.
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[58] See for example, www.twnside.org.sg/title2/par/CARIFORUM.Feb09.doc.

[59] 9th Malaysia Plan, Page 264. For more information see for example, www.twnside.org.sg/title2/par/CARIFORUM.Feb09.doc.

[60] Impact of the Global Financial Crisis on Sub-Saharan Africa, IMF 2009, http://www.imf.org/external/pubs/ft/books/2009/afrglobfin/ssaglobalfin.pdf.

[61] http://www.imf.org/external/pubs/ft/spn/2010/spn1004.pdf

[62] The United States insisted that it did not make market access commitments for internet gambling. The WTO's Dispute Settlement Panel and Appellate Body rejected this and found that it had made commitments. The United States had to withdraw its gambling commitment from GATS and provide compensation.

[63] Swimming against the tide: how developing countries are coping with the global crisis, Background Paper prepared by World Bank Staff for the G20 Finance Ministers and Central Bank Governors Meeting, Horsham, United Kingdom on March 13-14, 2009, http://siteresources.worldbank.org/NEWS/Resources/swimmingagainstthetide-march2009.pdf.

[64] Joseph Stiglitz, former Chief Economist at the World Bank, (2006). Making globalization work. Penguin Books. London. See also: · Detragiache, E, Tressel, T & Gupta, P. (2006), Foreign Banks in Poor Countries: Theory and Evidence – an IMF Working Paper, IMF. Washington DC. 2006. · G.enesis Analytics. (2004). A survey of the SADC region: South African financial institutions, regional policies and issues of access. G.enesis Analytics. Johannesburg. June 2004. · Brownbridge. M, & Gayi. S. (1999). Progress, Constraints and limitations of financial sector reforms in least developed countries. IDPM. June 1999. · http://www.wdm.org.uk/resources/reports/trade/takingthecredit09032009.pdf

[65] Articles 122-123 CARIFORUM-EC EPA.

[66] Article 67 and 76.

[67] http://www.pbs.org/moyers/journal/02132009/transcript1.html

[68] http://www.ase.tufts.edu/gdae/Pubs/rp/BITsGallagherValeFeb10.pdf

[69] See Saluka Investments BV v. The Czech Republic, UNCITRAL, Award (Mar. 17, 2006), available at http://ita.law.uvic.ca/documents/Saluka-PartialawardFinal.pdf

[70] http://www.policyalternatives.ca/documents/National_Office_Pubs/2008/Financial_Instability_and_GATS.pdf

[71] Because although footnote 10 to Article 67.2(e) states that parties can require a specific legal form when being incorporated, this is only allowed without being listed as an exception, if it is applied in a non discriminatory manner. Since this would only apply to foreign banks, it appears to be discriminatory.

[72] Article 106.

[73] Impact of the Global Financial Crisis on Sub-Saharan Africa, IMF 2009, http://www.imf.org/external/pubs/ft/books/2009/afrglobfin/ssaglobalfin.pdf.

[74] See for example http://www.citizen.org/documents/FinancialCrisisPrimer121508.pdf

[75] See http://www.lawstaff.auckland.ac.nz/~ekel001/Pacific_Trade_files/CARICOM_cf%20Pacific_EPA.pdf and www.twnside.org.sg/title2/par/CARIFORUM.Feb09.doc for more detail.

[76] Article 103.2.

[77] Article 104.

[78] http://www.lawstaff.auckland.ac.nz/~ekel001/Pacific_Trade_files/CARICOM_cf%20Pacific_EPA.pdf

[79] http://www.policyalternatives.ca/documents/National_Office_Pubs/2008/Financial_Instability_and_GATS.pdf

[80] http://www.ft.com/cms/s/0/3d464a7e-6a54-11df-b268-00144feab49a.html

[81] http://www.ft.com/cms/s/0/84bbacde-67ff-11df-af6c-00144feab49a,dwp_uuid=1f4e12ca-53ec-11dd-aa78-000077b07658.html

[82] Ie selling shares and bonds etc that are not owned or borrowed.

[83] http://www.guardian.co.uk/business/2010/jun/09/naked-short-selling-merkel-sarkozy

[84] http://www.guardian.co.uk/business/2010/jun/09/naked-short-selling-merkel-sarkozy

[85] Article 3.2 requires foreign investors to be treated at least as well as domestic investors (national treatment) and does not appear to have exceptions to this for subsidies, grants or government-supported loans, guarantees or insurance. This BIT is enforceable via investor-to-state dispute settlement, see enforcement below.

[86] This is not usually present in EU FTAs.

[87] These are among the measures recommended to deal with the crisis according to the Nobel Prize winning former Chief Economist of the World Bank, Joseph Stiglitz, http://www.guardian.co.uk/commentisfree/cifamerica/2008/oct/22/economy-financial-crisis-regulation.

[88] S/L/45

[89] The equivalent GATS provision to a) above is Article XVI, the equivalent GATS provision to b) above is Article XVI(c),(e) and equivalent GATS provision to c) above is Article XVI(e).

[90] Michael Ewing-Chow. "Securing the Borders:Hedge Funds, Domestic Regulations, WTO and RTAs". Presentation to the 10th SCIBL Conference on The Regulation of Wealth Management. 23 August 2007 cited in http://www.policyalternatives.ca/documents/National_Office_Pubs/2008/Financial_Instability_and_GATS.pdf.

[91] WTO, Understanding on Commitments in Financial Services, A.

[92] WTO, Understanding on Commitments in Financial Services, B.7.

[93] Annex on Financial Services, paragraph 2(a) states that " 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 owned 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."

94 WTO Council for Trade in Services, "Disciplines on Domestic Regulation in the Accountancy Sector", Adopted by the Council for Trade in Services on 14 December 1998, S/L/64, December 17, 1998.

95 Impact of the Global Financial Crisis on Sub-Saharan Africa, IMF 2009, http://www.imf.org/external/pubs/ft/books/2009/afrglobfin/ssaglobalfin.pdf.

96 For example Iceland, http://www.imf.org/external/pubs/ft/scr/2008/cr08362.pdf

97 Paragraph 76-77, Recommendations by the Commission of Experts of the President of the General Assembly on Reforms of the International Monetary and Financial System, March 2009, http://www.un.org/ga/president/63/letters/recommendationExperts200309.pdf.

98 http://www.imf.org/external/pubs/ft/spn/2010/spn1004.pdf.

99 The paper notes that this is especially dangerous if it is by borrowers (such as households) who do not have natural hedges. (Exporters have natural hedges).

100 http://www.imf.org/external/pubs/ft/spn/2010/spn1004.pdf.

101 Deborah E Siegel, ILSA Journal of International & Comparative Law [Vol 10:297].

102 Deborah E Siegel, ILSA Journal of International & Comparative Law [Vol 10:297].

103 This can also include investments from other countries if 'investor' is not defined carefully, see above.

104 Articles 122-123, see http://www.lawstaff.auckland.ac.nz/~ekel001/Pacific_Trade_files/CARICOM_cf%20Pacific_EPA.pdf for analysis.

105 Article 124 (which only allows capital controls for six months and cannot be used for current payments) and 240 (which has other limitations), http://www.lawstaff.auckland.ac.nz/~ekel001/Pacific_Trade_files/CARICOM_cf%20Pacific_EPA.pdf

106 Deborah E Siegel, ILSA Journal of International & Comparative Law [Vol 10:297].

107 Deborah E Siegel, ILSA Journal of International & Comparative Law [Vol 10:297].

108 Including Greece, see for example: http://ec.europa.eu/economy_finance/articles/eu_economic_situation/2010-05-03-statement-commissioner-rehn-imf-on-greece_en.htm.

109 Deborah E Siegel, ILSA Journal of International & Comparative Law [Vol 10:297].

110 Deborah E Siegel, ILSA Journal of International & Comparative Law [Vol 10:297].

111 Deborah E Siegel, ILSA Journal of International & Comparative Law [Vol 10:297].

112 Deborah E Siegel, ILSA Journal of International & Comparative Law [Vol 10:297].

113 Deborah E Siegel, ILSA Journal of International & Comparative Law [Vol 10:297].

114 Deborah E Siegel, ILSA Journal of International & Comparative Law [Vol 10:297].

115 Deborah E Siegel, ILSA Journal of International & Comparative Law [Vol 10:297].

116 Article 127.1 in conjunction with Article 126 which states that the Parties agree that these practices restrict competition.

117 Article 129.2.

118 See for example the UN Commission recommendations: http://www.un.org/ga/president/63/letters/recommendationExperts200309.pdf

119 For example U.S. and EU FTAs. This is usually in the government procurement chapter, but in the CARIFORUM-EU EPA it was also in the competition chapter.

120 Article 129.4 and Article 167.1.2(b)(ii), www.twnside.org.sg/title2/par/CARIFORUM.Feb09.doc.

121 WTO document: S/WPGR/W/54

122 https://www.fpds.gov/.

123 Chile had access to US$32,090 worth of U.S. government contracts in the year before its USFTA began. Two years after its USFTA started, it accessed US$233,570 worth of U.S. government contracts. In the year before Australia's USFTA began, it accessed US$10,311,944 worth of U.S. government contracts. In the first year of its USFTA, it won U.S. government contracts of US$34,095,229.

124 http://www.unctad.org/en/docs/iteiit4v6n3_en.pdf.

125 Deborah E Siegel, ILSA Journal of International & Comparative Law [Vol 10:297].

126 Deborah E Siegel, ILSA Journal of International & Comparative Law [Vol 10:297]. She later comments that higher risk countries can be those with limited capacity to absorb balances of payments or financial system shocks.

127 Article 95.2.

128 AU's Briefing Note from http://www.africa-union.org/.

129 Paragraph 37, Recommendations by the Commission of Experts of the President of the General Assembly on Reforms of the International Monetary and Financial System, March 2009, http://www.un.org/ga/president/63/letters/recommendationExperts200309.pdf.

130 Presentation at the Palais des Nations, Geneva, 12 March, 2009.

131 http://www.g20.org/about_what_is_g20.aspx

132 http://www.g20.org/Documents/g20_wg1_010409.pdf

133 See for example: http://www.g20.org/Documents/Fin_Deps_Fin_Reg_Annex_020409_-_1615_final.pdf and http://www.g20.org/Documents/g20_wg2_010409.pdf

134 In March 2009, http://www.caribbeannetnews.com/news-14560—13-13—.html.

135 This Article applies only to financial services activities covered by Article 103 and liberalised according to this Title.