BOOK REVIEW:

BART DE MEESTER
LIBERALIZATION OF TRADE IN BANKING SERVICES – AN INTERNATIONAL AND EUROPEAN PERSPECTIVE.

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VI. INTRODUCTION

Financial markets have not yet fully recovered from the 2007 and 2008 financial crisis. Whilst it is impossible to point to one isolated cause for the turmoil that spread across all of the major economies of the world, liberalisation of trade in banking services has been often accused of being one of the forces that pulled the trigger. By forcing governments to ease their regulation as regards access to their markets for foreign suppliers - so this recurring argument goes - trade liberalisation has tilted the balance of sovereignty in the domain of financial services towards international organisations and led to forced and unnecessary deregulation.[1]

Traditionally, financial services were considered a small niche in the field of international trade law. Since the entry into force of the General Agreement on Trade in Services (GATS), only one case on financial services has been adjudicated by a WTO Panel,[2] and the issue at stake pertained to questions of interoperability of payment services, not financial regulation as such. Moreover, it is often complicated to bridge a gap between internationally agreed trade rules and domestic policies and regulations on financial services. This is even more the case in the context of the European Union. The EU, in fact, adheres to the WTO as one Member and has exclusive competence in the domain of trade. However, the EU is a union of 28 different Member states, hence measures on financial services adopted in Brussels have then to be implemented at the domestic level in 28 different jurisdictions, thus making the picture even

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[1] See, for instance, para 51 of the Report of the Commission of Experts of the President of the United Nations General Assembly, 'Reforms of the International Monetary and Financial System' (commonly known as the 'Stiglitz Commission's Report'), 21.09.2009.

[2] DS413 *China — Certain Measures Affecting Electronic Payment Services* (Panel Report, Adopted on 31.08.2012).

more complicated.

Bart De Meester, the author of the book under review, is a scholar and a member of the Trade Team of the Legal Service of the European Commission (ie, the team of lawyers that defends the European Union before the courts of the World Trade Organization (WTO)). The book has two ambitious aims. The first is to provide a fair overview of the state of the art of the interplay between financial regulation and trade obligations and commitments undertaken by the EU in the context of the WTO. The second is to challenge the myth that trade liberalization was one of the main causes of the crisis. It is fair to say that both goals were successfully achieved and that the author has set a very high standard for future contributions in this field.

I. OVERVIEW OF THE BOOK

The volume, which originates from the PhD thesis that De Meester defended at the Katholieke Universiteit Leuven in Belgium is divided into three parts. Part I (*'Policy concerns underlying the regulation and liberalization of banking'*) analyses the implications of the opening up of financial markets to foreign suppliers. Based on an overview of the literature on the issue, the author explains the pros and cons of liberalisation of trade in banking services. Essentially, grounded in the explanations provided by economists, De Meester shows that there is a trade-off that must be taken into account when analyzing this subject. On the one hand, liberalisation of cross-border trade in financial services increases opportunities for competition, increases efficiency and facilitates easier access to credit and other financial instruments. On the other hand, it enhances the degree of interconnectedness between different domestic financial systems. This, in turn, may lead negative externalities due to the possibility of bank runs or financial crises spreading more easily across the borders and affecting a higher number of actors than they would have otherwise.

Part II (*'The international approach to liberalization of trade in banking services'*) explains in greater detail the sources of the obligations provided by the GATS in the framework of the WTO. The analysis is accurate in distinguishing the different instruments specifically dealing with the disciplines on financial services (the Annex on Article II Exemptions, the First Annex and the Second Annex on Financial Services, the Understanding on Commitments in Financial Services). The volume also gives an account of the attempts to reduce regulatory asymmetries and to coordinate supervisory standards at the international level, which mainly take place in the context of informal institutions whose recommendations and standards are not legally binding. The book then examines the

limitations to the right for WTO Members to regulate the market for financial services and the situations in which governments may deviate from their obligations. Besides the general exceptions specified in the GATS, Members enjoy more leeway when they enact pieces of legislation for the pursuit of macroeconomic policy management and prudential objectives. Part II concludes with an overview of the limitations on the right of WTO Members to supervise the banking sector.

Part III (*The European approach to international trade in banking services and its interaction with the GATS*) gives an account of the evolution of the EU legislation with regard to third-country banks seeking access to the European market. Starting from the First Banking Directive of 1977, De Meester provides an extensive analysis of the different pieces of legislation, including the very last instruments enacted as a means to respond to the 2007-2008 crisis.

II. THE CONTRIBUTION OF THE BOOK

The book is extremely well written. The analysis is conducted with scientific rigor and the structure makes the volume easy to read. It is not excessive to say that it represents an important contribution in the field. It certainly belongs to the category of those rare books that make the reader more curious about the topic after reading them. Moreover, it contributes to providing long-awaited answers to relevant questions for our times.

Has trade liberalization led to the watering down of financial regulation? The answer to this question cannot be a straight 'yes' or 'no'. It is difficult to say because commitments on financial services were rather the reflections of the conditions already applied to foreign suppliers – a snapshot of the existing situation – than real concessions made to the other Members of the WTO. Perhaps the situation is a bit different with regard to those trading nations that entered the WTO at a later stage and as such were asked to make more concessions in order to be allowed to join the club (but this was not the case of the European Union). However, as the author mentions, in the case of those countries that were already Members of the WTO before joining the EU, their original Schedules of Specific Commitments still apply and this may lead to a situation in which some concessions on National Treatment or Market Access are in place for some EU Members but not for all. In any event, if a deregulation of financial markets has occurred towards the end of the last century, that was mainly due to a precise political strategy pursued by national governments, rather than being a consequence of the adhesion to the multilateral organization governing the world trade.

Have WTO obligations prevented Members from modifying their legislations on financial services? In this case as well the answer should most probably be negative. Looking at the evolution of the legislation in the EU, it does not seem that the existence of a multilateral agreement on trade in financial services has severely shrunk the regulatory freedom of the EU authorities. De Meester points to situations in which the existence of multilateral obligations has most likely played a role, for example in the elimination of the reciprocity requirement with regard to National Treatment branches of foreign banking institution on the Capital Requirements Directive (p 279).

Are prudential considerations sufficiently protected at the WTO level? According to the author, the answer to this question is certainly positive. Prudential concerns, like the protection of financial institutions or the protection of the financial system as a whole override the principles on trade liberalization. Paragraph 2(a) of the Annex on Financial Services of the GATS allows Members to deviate from their obligations or commitments in pursuance of prudential regulatory objectives that are only vaguely described in an indicative and non-exhaustive list. De Meester classifies the provision as an exception and warns that arbitrarily discriminatory measures may be considered as not satisfying the requirements set out in the so-called prudential carve-out. However, he maintains that authentically prudential measures, if reasonably drafted and not arbitrary in their application, will certainly be covered by the prudential carve-out.

III. CRITICAL REMARKS

The book is extremely precise and complete. However, a eulogy of the book is of no interest for the readers of this book review and probably not even for the author himself. Therefore, it is probably time, at this stage, to make a critical remark and a suggestion.

The critical remark concerns the legal function of the prudential carve-out of the GATS. It must be acknowledged, to begin with, that there is no case law at the moment that can help the interpreter to better understand this provision, which is written in a rather tortuous and maybe even 'self-cancelling' way. However, the heading of the provision (*Domestic Regulation*) and its negotiating history may probably contribute to the interpretation of the provision in a different, more nuanced, way. In fact, the story of the negotiations of trade agreements on financial services is often the story of clashes and misunderstandings between financial regulators and central bank officials on the one side and trade officials on the other, with a more prominent role for the former. This, in itself, can help to explain why the language used in the prudential carve-out differs from traditional

exception-type provisions in trade agreements.

The provision, therefore, can be read in a different way, that is a strong restatement of the right to regulate of WTO Members according to prudential concerns, irrespective of any other obligation or commitment. Moreover, contrary to traditional WTO exceptions, the prudential carve-out does not contain a *chapeau* according to which measures are covered only if they are not arbitrary or do not amount to a disguised restriction to trade. Such requirements cannot be introduced through the backdoor if they do not appear in the wording of the provision. This different reading would mainly have implications with regard to the allocation of the burden of proof, which should therefore remain on the complainant and on the deferential attitude that judges should pay to the regulating Members. However, such a difference in point of view is likely to have higher consequences from a theoretical perspective than a practical one, therefore the disagreement should not be over-emphasised. In any event, a Panel report which will likely provide some more clarity is supposed to circulate in the summer of 2015, according to rumors which report that the provision has been invoked for the first time in a dispute between Panama and Argentina.[3]

Finally, it could be suggested – and this should not be seen as a critique of the volume at all – that there could have been a third dimension of the analysis in order to really complete the effort made in the book under review. The entire dimension of preferential trade agreements signed by the EU with its partners is not touched upon in the volume, and one may wonder whether there has been an evolution with regard to the rules on financial services at that level and to what extent this may represent a challenge for future reforms of the financial system at the EU level. Perhaps this is an area that the author may want to explore in his future work.

IV. CONCLUSIONS

The volume is a most welcome contribution to the existing literature. De Meester takes a position with regard to the most controversial topics in the field of trade in services, such as the discipline on Market Access or the scope of application and legal function of the prudential carve-out, only after having carefully examined the views already expressed in the

[3] See the blog post by Simon Lester: 'The Scope of the Prudential Exception' (International Economic Law and Policy Blog, posted 18.07.2014). <http://worldtradelaw.typepad.com/ielpblog/2014/07/the-scope-of-the-prudential-exception.html> accessed 08.12.2014.

epistemic community and in case law. He does so in a reasoned and balanced way, thus making his book even more enjoyable.

The volume is an important contribution and is likely to represent a milestone for future research in the topic. It is definitely a must-read book for researchers in the field.