GATS and Financial Crises: Between Protection & Protectionism

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Types of Financial Crises

- Banking Crisis
- Speculative Bubbles and Crashes
- Currency Crisis
- Recession
- Depression

Causes of Financial Crises

- Overleveraging
- Asset-liability risk mismatch
- Herd Behavior
- Fraud
- Regulatory Failures
- Systemic Risk Contagion

1997 Asian & 2007 "Western" Crises

- Overleveraging by some economies
- Property Bubbles
- Currency Speculation
- Regulatory Failures
- Fraud
- Systemic Risk Contagion

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Responses to Financial Crises

- Capital Controls (Malaysia 1997)
- Government Support of Financial Institutions
- Governmental Purchasing of Debt (US 2007)
- Stimulus Packages (to prevent Recession)
- Increased Regulation

GATS Obligations

- MFN (for all)
- Scheduled Commitments:
  - MA
  - NT
  - Reasonable and Objective Regulation (Art VI)
  - Allow Capital Transfer (Art XI:2 and fn 8)

* Note: RTAs & Investment Treaties

GATS Exceptions

- General Exceptions “public order” (Art XIV)
- IMF Fund Request (Art XI:2)
- Safeguard Balance of Payment (Art XII) (NT and MFN still applies)
- For Financial Services in Financial Services Annex:
  - “measures for prudential reasons... to ensure the integrity and stability of the financial system”
  - recognition of prudential measures of any other country

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Public Order (Art XIV)

Subject to the requirement that such measures are *not* applied in a manner which would constitute a means of **arbitrary or unjustifiable discrimination** between countries where like conditions prevail, or ***a disguised restriction*** on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:

(a) **necessary** to protect public morals or to maintain **public order**; [fn 5] ...

Fn 5: The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.

- ***US Gambling Case***

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IMF Fund Request (Art XI)

2. Nothing in this Agreement shall **affect the rights and obligations** of the members of the International Monetary Fund under the Articles of Agreement of the Fund, including the use of exchange actions which are in conformity with the Articles of Agreement, provided that a Member shall not impose restrictions on any capital transactions inconsistently with its specific commitments regarding such transactions, except under Article XII **or at the request of the Fund**.

Safeguard BoP(Art XII)

1. **In the event of serious balance-of-payments and external financial difficulties or threat thereof**, a Member may adopt or maintain restrictions on trade in services on which it has undertaken specific commitments, **including on payments or transfers for transactions related to such commitments**...

2. The restrictions referred to in paragraph 1:

(a) **shall not discriminate** among Members;

(b) **shall be consistent with the Articles of Agreement of the International Monetary Fund**;

(c) shall avoid unnecessary damage to the commercial, economic and financial interests of any other Member;

(d) shall not exceed those **necessary** to deal with the circumstances described in paragraph 1;

(e) **shall be temporary and be phased out progressively** as the situation specified in paragraph 1 improves.

Prudential Measures (FS Annex)

2. Domestic Regulation

(a) Notwithstanding any other provisions of the Agreement, a Member shall not be prevented from taking **measures for prudential reasons**, including for the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by a financial service supplier, or to ensure the integrity and stability of the financial system. Where such measures do not conform 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**.

- Note the absence of a **"necessary"** requirement like that found in GATS Art XIV.

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Exercise

Would it be a GATS violation if:

1. Singapore provided deposit insurance only for banks incorporated in Singapore;
2. Singapore imposed a general currency control such that all foreign exchange could only be done through the banks incorporated in Singapore at fixed non-market rates;
3. Singapore bought bonds from banks incorporated in Singapore at premium (above market) rates to enable them to meet their liquidity thresholds requirements?