FINANCIAL INCLUSION AS A PUBLIC POLICY ISSUE IN THE GLOBAL DIGITAL ECONOMY

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ABSTRACT

Financial inclusion is a policy objective indirectly based on the UN Sustainable Development Goals (UN SDG). The legal framework of the General Agreement on Trade in Services (GATS) is suitable to contribute to the efforts of implementing financial inclusion around the globe. Complemented by the recent trade liberalization movements in the digital market sectors (bilateral and regional Free Trade Agreements (FTA)) FinTech services and sustainable finance can be extended; in addition, the carve-out provision and the public policy exception justify the enactment of domestic public policy rules that strengthen the access of civil society to financial services of whatever kind. The article outlines how the existing regulations should be interpreted and to what extent new rules appear to be desirable.

KEYWORDS: *digital trade, financial inclusion, FinTech, public policy, sustainable finance*

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I. INTRODUCTION

Being subject to continuous change, financial institutions and services are dynamically evolving at a high pace with financial markets becoming increasingly international in scale and impact. The General Agreement on Trade in Services (hereinafter "GATS") is the only multilateral agreement to regulate and liberalize trade in financial services on an international level. However, since the establishment of the GATS during the Uruguay Round, the financial landscape has substantially changed, not at least due to digitization (for example in the form of digital financial services). Even if regulatory frameworks across all financial sectors are tightened[1] and new policy objectives such as financial inclusion are gaining importance, regional trade agreements, particularly in East Asia, have introduced new "modern" provisions liberalizing digital trade and digital payments.

So far, the GATS Members have made more commitments in financial services than in any other sector except tourism.[2] But on the national level, the regulatory environment is in constant adaption. In particular, during the last few years, the "traditional" regulatory framework was complemented by

[1] Kern Alexander, *The GATS and Financial Services*, *in* THE WORLD TRADE ORGANIZATION AND TRADE IN SERVICES 561, 569 (Kern Alexander & Mads Andenas eds., 2008).
[2] Rolf H. Weber & Rika Koch, *Relevance of WTO Law for Financial Services – Lessons from "Argentina-Financial Services"*, 2 SCHWEIZERISCHE ZEITSCHRIFT FUR WIRTSCHAFTS- UND FINANZMARKTRECHT [S.W.Z.] 163, 164 (2017) (Ger.).

completely new rules governing digital financial services and cryptoassets. Since these sectors do have a global reach by their very nature, multinational regulations become increasingly important.[3]

The financial sector does not only encompass FinTech services but also new areas such as sustainable finance and financial inclusion. Financial services need to contribute to sustainable development in accordance with international policy objectives and to support civil society in extending financial inclusion; both elements cannot anymore be neglected if societal well-being should be strengthened beyond the scope of liberalized trade.

As shown hereinafter, public policy considerations such as sustainable development and financial inclusion have an important impact on several segments of financial markets, for example, payment systems, lending activities and asset management protection mechanisms. Therefore, trade liberalization must reach an adequate equilibrium with public policy objectives that can be enforced by Nation States based on carve-out options and exception clauses.

II. FINANCIAL SERVICES IN THE GATS

A. General Principles of GATS

The GATS is the first and so far, only multilateral trade agreement to cover trade in services. As outlined in its Preamble, it aims to establish "a multilateral framework of principles and rules for trade in services". The key pillars of the GATS also apply to financial services, defined in a broad way as "any service of a financial nature".[4] The GATS does not only consist of the main text of the Agreement but also of various Annexes and the individual "Schedules of Specific Commitment" of the Member States that form an integral part to the GATS.

The Most-Favoured-Nation (hereinafter "MFN") obligation is the key fundamental principle of the GATS. It obliges its Member States to extend preferential treatment for financial services granted to a specific country to all other Member States. The most critical issue is the likeness test: an analysis must show whether two services or services suppliers are "like" in order to justify the application of the equal treatment principle;[5] the Panel in "China — Electronic Services" stated that a determination of likeness should

[3] Rolf H. Weber & Rainer Baisch, *Cryptoassets: Taxonomy and Regulatory Approaches*, 39 BANKING & FIN. L. REV. 467, 476 (2023).

[4] General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183 [hereinafter GATS], Annex on Financial Services, ¶ 5.

[5] Weber & Koch, *supra* note 2, at 165; for a general overview see also Rolf H. Weber, *WTO law and cross-border data flows for digital trade*, *in* RESEARCH HANDBOOK ON DIGITAL TRADE 73, 76 (David Collins & Michael Geist eds., 2023).

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be made on a case-by-case basis considering the particular circumstances of each case.[6] The less favorable treatment criterion implies an "effective equality of opportunities" treatment.[7]

The GATS also encompasses "Specific Commitments", namely market access, national treatment and additional commitments.[8] Art. VI of the GATS requires Member States to ensure that measures affecting trade in services are administrated in a reasonable, objective and impartial manner; this task requires the development and implementation of services' technical standards having partly been done but not yet in a sufficiently detailed way. Art. XVI of the GATS encompasses specific rules regulating market access to the covered services sectors for foreign services suppliers; according to the World Trade Organization (hereinafter "WTO") Appellate Body, this provision merits a wide interpretation.[9] Art. XVII of the GATS enshrines the national treatment obligation requiring Member States to avoid discrimination between domestic and foreign service suppliers.

A national measure can be justified, even if it is incompatible with the rules and obligations of the GATS law if prevailing public interests call for the protection of political, social or cultural objectives.[10] The justification reasons are anchored in Art. XIV of the GATS; however, the exception reasons must be interpreted strictly to prevent an unnecessary restriction of cross-border trade in services.[11]

B. Annex on Financial Services

The Annex on Financial Services is one of a total of eight Annexes to the GATS and forms an integral part of the GATS. It contains five paragraphs providing for specified rules on measures relating to financial services.[12] Para. 2 states that "a Member shall not be prevented from taking measures for prudential reasons . . . or to ensure the integrity and stability of the financial system". This so-called "prudential carve-out" extends to Member States the sovereignty to adopt prudential measures,

[6] Panel Report, *China — Certain Measures affecting Electronic Payment Services*, ¶ 7.701, WTO Doc. WT/DS413/R and Add.1 (adopted Aug. 31, 2012).
[7] Appellate Body Report, *European Communities — Regime for the Importation, Sale and Distribution of Bananas*, ¶ 234, WTO Doc. WT/DS27/AB/R (adopted Sept. 25, 1997).
[8] Weber & Koch, *supra* note 2, at 165-66.
[9] Appellate Body Report, *United States — Measure Affecting the Cross-border Supply of Gambling and Betting Services*, ¶ 232, WTO Doc. WT/DS285/AB/R (adopted Apr. 20, 2005).
[10] *See infra* part IV.B.
[11] ROLF H. WEBER & MIRA BURRI, CLASSIFICATION OF SERVICES IN THE DIGITAL ECONOMY 129 (2013).
[12] Weber & Koch, *supra* note 2, at 166.

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notwithstanding their potential incompatibility with the GATS.[13]

Nevertheless, academic discussions and the practicability of the application of the "prudential carve-out" have shown some challenges: On the one hand, the prudential carve-out clause grants Member States the flexibility necessary to adapt their regulations to the particular domestic economic circumstances through maintaining adequate regulatory controls or potential reasons. On the other hand, however, the GATS does not provide for a clear definition of the scope and limits of the vague term "prudential". Therefore, the prudential carve-out clause has been criticized that it was too broad and does cause the risk of granting too wide discretion to Member States.[14]

But the prudential carve-out has been carefully analyzed in the "Argentina Financial Services" decision of the WTO Appellate Body.[15] The main learnings from this decision are the following:[16]

1. The likeness test under the GATS — Must be interpreted similarly to the likeness test under the General Agreement on Tariffs and Trade (hereinafter "GATT").

2. Leveling the "playing-field" — Should not be the prevailing criterion.

3. The word "prudential" in the carve-out clause — May not be defined too narrowly, but a strong nexus between the measure at issue and the underlying prudential reason is required.

4. Since the process of globalization and integration of financial markets is evolving dynamically — It must lead to altered perceptions and notions of sovereignty.[17] Nevertheless, the concretization of the "prudential carve-out" remains partly uncertain and, therefore, open to interpretation in the context of new innovative services.

C. Extension Through FinTech and Sustainable Finance

FinTech services and sustainable finance objectives are increasingly important in the present global environment. Both policy segments concern cross-border trade. Furthermore, they are able to improve the financial inclusion situation of civil society, particularly in less developed countries. Financial inclusion can be defined as the delivery of financial services at an

[13] Wei Wang, *The Prudential Carve-Out*, *in* THE WORLD TRADE ORGANIZATION AND TRADE IN SERVICES, *supra* note 1, at 601, 601-14 (Kern Alexander & Mads Andenas eds., 2008) (for a general analysis of the prudential carve-out).

[14] Christine Kaufmann & Rolf H. Weber, *Reconciling Liberalized Trade in Financial Services and Domestic Regulation*, *in* THE WORLD TRADE ORGANIZATION AND TRADE IN SERVICES, *supra* note 1, at 411, 415-18 (Kern Alexander & Mads Andenas eds., 2008).

[15] Panel Report, *Argentina — Measures Relating to Trade in Goods and Services*, ¶ 7, WTO Doc. WT/DS453/R (adopted May 9, 2016).

[16] Weber & Koch, *supra* note 2, at 172-73.

[17] *See also* Rolf H. Weber, *The Legitimacy of the G20 as Global Financial Regulator*, 43 BANKING & FIN. L. REV. 389, 390 (2013).

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affordable cost to all parts of society; it constitutes a contribution supporting the efforts to enable people to manage their financial obligations efficiently, to reduce poverty and to support wider economic growth.[18]

Financial inclusion as an objective is not explicitly mentioned in the United Nations Sustainable Development Goals (hereinafter "UN SDG") that otherwise provide a framework of detailed purposes and criteria allowing to pursue sustainable development.[19] Nevertheless, financial inclusion and in particular financial access is an important element to reduce the burden of life's challenges. To the extent that risks could be avoided, hedged, or socialized through the financial system, prosperity is promoted and sustainability strengthened.[20]

Increasing financial inclusion is being seen not as an end in itself but as one fundamental aspect for achieving broader sustainable development objectives. An important driver of this development is the availability of FinTech service providers acting in the public policy interest. Therefore, it is relevant to embed financial inclusion into the digital services framework of the GATS. As shown hereinafter,[21] the previously discussed concept of digital inclusion can also contribute to an improved understanding of public policy considerations.

III. MORE FLEXIBILITY THROUGH NEW REGULATORY INITIATIVES

In principle, it is widely acknowledged that newly developed, particularly digital services require the adoption of amended GATS rules. The efforts undertaken in the e-commerce context have so far not led to a specific agreement.[22] The success of the Joint Statement Initiative on E-Commerce (JSI)[23] addressing digital trade appears to be at least uncertain. Therefore, new regulatory initiatives attempting a liberalization of cross-border trade have mainly been executed and implemented at a bilateral or trilateral level. Positive negotiation results can more easily be achieved between a small number of countries. The processes are more difficult in case of regional or even over-regional efforts. Therefore, the bilateral Free Trade Agreements (hereinafter "FTA") are discussed ahead of the Regional Agreements.

[18] Douglas W. Arner et al., *Sustainability, FinTech and Financial Inclusion*, 21 EUR. BUS. ORG. L. REV. 7, 12 (2020).
[19] *The 17 Goals*, U.N., https://sdgs.un.org/goals (last visited Feb. 19, 2024).
[20] Arner et al., *supra* note 18, at 12.
[21] *See infra* part IV.
[22] *See* Weber, *supra* note 5, at 77.
[23] *Joint Initiative on E-Commerce*, WORLD TRADE ORG., https://www.wto.org/English/tratop_e/ecom_e/joint_statement _e.htm (last visited Feb. 19, 2024).

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A. Bi- and Trilateral Free Trade Agreements in East Asia

Due to the limited progress at the WTO/GATS level in the e-commerce and digital trade context, efforts have been undertaken to move towards liberalization on the level of a more limited number of countries. This attempt has resulted in negotiations of FTA, particularly in East Asia, during the last ten years.[24] The chosen approaches are not standardized; the provisions promote, among others, cooperation on financial technology and/or FinTech. Since its establishment as a British trading post, Singapore developed as a mercantile hub; therefore, it comes with no surprise that Singapore is the "frontrunner" of FTA, but also other (more developed) countries in East Asia have entered into "Digital Economy Agreements" or "Digital Partnership Agreements". Therefore, it is worthwhile to analyze those FTAs that encompass FinTech business models.

For example, the following FTA contain provisions liberalizing the cross-border offering of financial services among the signatories:

1. *Australia–Singapore Digital Economy Agreement (SADEA)*[25] — This FTA goes beyond the arrangements in the digital trade arrangements between Australia and Singapore under the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (hereinafter "CPTPP") and the quite general Singapore-Australia FTA. More robust rules ensure businesses, not limited to the financial sector, the transfer of data across borders without the restriction to build or use data storage centers in either jurisdiction.[26] In the context of FinTech and RegTech, it is expected that enterprises and industry bodies will develop standards for open banking; details are included in a separate Memorandum of Understanding (hereinafter "MoU"); however, this MoU is not legally binding and does not create any enforceable rights under domestic or international law.[27]
2. *Digital Economy Agreement between the United Kingdom of Great*

[24] *See generally* Rolf H. Weber, *Digital Trade and E-Commerce: Challenges and Opportunities of the Asian-Pacific Regionalism*, 10 ASIAN J. WTO & INT' L HEALTH L. & POL'Y 321, 323, 334-41 (2015); for a global overview, see generally Mira Burri, *Digital Trade Rulemaking in Free Trade Agreements*, *in* RESEARCH HANDBOOK ON DIGITAL TRADE 9, 12-16, 24-26 (David Collins & Michael Geist eds., 2023).

[25] THE SINGAPORE-AUSTRALIA DIGITAL ECONOMY AGREEMENT [hereinafter SADEA], MINISTRY OF TRADE & INDUS., https://www.mti.gov.sg/Trade/Digital-Economy-Agreements/The-Singapore-Australia-Digital-Economy-Agreement (last visited Feb. 6, 2024).

[26] Additionally, the SADEA improves protections for source code, and establishes new commitments on compatible e-invoicing and e-payment frameworks with the ambition to deliver new benchmarks for improving safety and consumer experiences online. New trade rules foster the development of the digital economy also in the area of artificial intelligence and trade facilitation (e.g., e-certification for agricultural exports and imports).

[27] *Memorandum of Understanding on FinTech Cooperation Between the Australian Treasury and the Monetary Authority of Singapore,* DEPT. OF FOREIGN AFF. & TRADE AUS. (Apr. 11, 2022), https://www.dfat.gov.au/sites/default/files/australia-singapore-mou-on-fintech-bridge.pdf.

Britain and Northern Ireland and the Republic of Singapore (hereinafter "UKSDEA") [28] — This FTA might be the most innovative trade agreement covering all aspects of the modern digital economy and addressing digitized trade in services and goods across the whole economy (paperless trading, digital invoicing etc.). The UKSDEA establishes not only open digital markets including guaranteed tariff-free flows of digital content but also takes care of the protection of personal data, intellectual property, and consumer rights. In the financial services markets, the transfer of financial information is promoted by stating the prohibition of unjust data localization including safeguards to ensure access to the data by financial regulators. New financial services including FinTech and RegTech are directly addressed with enhanced commitments to guarantee non-discriminatory treatment. Alongside the conclusion of the core UKSDEA, one of the five additional cooperation arrangements addresses the UK-Singapore Fintech Bridge.

3. *Digital Partnership Agreement between the Government of the Republic of Korea and the Government of the Republic of Singapore (KSDPA)* [29] — This FTA deepens the bilateral cooperation in the digital economy by establishing modern digital trade rules and norms to promote interoperability between digital systems; in principle, the content of the agreement is more or less identical to the UKSDEA.
4. *Summarizing* — the contents of the above-described FTA, it can be said that FinTech services gained importance during the last few years. Equally, a positive impact on financial sustainability cannot be overlooked.

B. Regional and Over-regional Free Trade Frameworks

Due to the (almost) standstill of the WTO activities on digital trade and to the limited geographical scope of bilateral trade agreements, several initiatives of groups of countries in agreeing on cross-border rules have been successful:

1. Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) — The CPTPP[30] was agreed upon in 2017 between eleven countries in the Pacific Rim and entered into force on 30 December 2018; it removes more than 95% of tariffs for a bloc consisting of Canada, Mexico, New Zealand, Malaysia, Vietnam, Singapore, Brunei and Peru and

[28] Digital Economy Agreement, Sing.-U.K, Feb. 25, 2022, https://www. mti.gov.sg/Trade/Digital-Economy-Agreements/UKSDEA.
[29] Digital Partnership Agreement, S. Kor.-Sing., Nov. 11, 2022, https://www.mti.gov.sg/Trade /Digital-Economy-Agreements/KSDPA.
[30] Comprehensive and Progressive Agreement for Trans-Pacific Partnership [hereinafter CPTPP], Mar. 8, 2018, 57 I.L.M. 545, https://www.mti.gov.sg/Trade/Free-Trade-Agreements/CPTPP.

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in the meantime the United Kingdom. Further current applicants are China, Taiwan, Ecuador, Costa Rica, Uruguay, and Ukraine.

The CPTPP contains a chapter on financial services (11) and e-commerce (14). The CPTPP also enshrines modern rules for trade in services removing market access barriers like labor market tests or establishment requirements; all traders must be treated like domestic or other CPTPP suppliers. As far as digital financial services are concerned, the respective provisions do include Fintech services. In addition, access principles have been incorporated into the CPTPP's e-commerce chapter, namely in the form of "Principles on Access to and Use of the Internet for Electronic Commerce/Digital Trade".[31]

2. Digital Economy Partnership Agreement (hereinafter "DEPA")[32] was originally concluded between Singapore, Chile and New Zealand having been interested in harnessing the potential of the digital economy by establishing basic rules to promote these countries as platforms for such services.[33] The respective frameworks support companies offering digital services and products (e-commerce). In principle, the DEPA did not add anything of significance which is not already agreed under the CPTPP, however, it represents an innovative and collaborative approach to digital trade issues.

The DEPA matters mainly when other governments agree to use DEPA modules or align domestic policy with the DEPA framework. Indeed, the DEPA is the only trade agreement that directly addresses the issue of digital inclusion: Module 11 on digital inclusion establishes new collaborations pertaining to digital trade issues, including reduced disparities between developed and developing countries, and among haves and have-nots within a given country.[34] In 2023, Korea joined DEPA as the first non-founding member. Already since 2022, Canada and China have been in negotiations to join the DEPA; the inclusion of these two countries would substantially change the original perception.

3. United States – Mexico – Canada Agreement (hereinafter "USMCA") — The USMCA[35] entered into force on July 1, 2020 and substituted the North America Free Trade Agreement (NAFTA); it includes now a comprehensive digital trade chapter (19), (i) prohibiting the application of customs duties and other discriminatory measures to digital products

[31] *See* CPTPP art. 14.10.

[32] DIGITAL ECONOMY PARTNERSHIP AGREEMENT [hereinafter DEPA], June 12, 2020, https://www.mti.gov.sg/Trade/Digital-Economy-Agreements/The-Digital-Economy-Partnership-Agreement.

[33] DEPA, http://www.sice.oas.org/trade/DEPA/DEPA_index_e.asp (last visited Feb. 6, 2024).

[34] SHIN-YI PENG, INTERNATIONAL ECONOMIC LAW IN THE ERA OF DATAFICATION 35-36 (forthcoming Apr. 2024).

[35] Agreement between the United States of America, the United Mexican States, and Canada [hereinafter USMCA], Nov. 30, 2018, https://ustr.gov/usmca.

distributed electronically and (ii) ensuring that data can be transferred across borders without data localization measures restricting the places where data can be stored and processed. Similarly to the CPTPP, it also contains access principles in the digital trade context (Art. 19.10). The digital financial services are dealt with in a separate chapter (17) including a modern financial services definition; any new form of delivery of a financial service or the sale of a financial product is addressed. However, when a financial institution is required to obtain authorization to supply an innovative financial service, the rejection of a license is possible based on prudential reasons.

4. Regional Comprehensive Economic Partnership (hereinafter "RCEP") — The RCEP[36] is an FTA, concluded between the ten Member States of the *Association of Southeast Asian Nations* (ASEAN: Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, Vietnam) and its five FTA partners China, South Korea, Japan, Australia and New Zealand. Compared to the CPTPP, there are fewer binding commitments to trade liberalization and the approach regarding the reduction of tariffs is less aggressive. Annex 8A covers financial services similarly to the USMCA; however, the supply of the new financial services is subject to relevant licensing or other requirements of the host country. Additionally, it is allowed to adopt or maintain measures for prudential reasons, including customer protection, and to ensure the integrity and stability of the financial system.

5. Indo-Pacific Economic Framework (hereinafter "IPEF") — The newly launched IPEF with its four pillars (I. trade, II. supply chains, III. clean economy, and IV. fair economy) with fourteen participating founding members and an open invitation for other countries to join is still under negotiation; in substance, it lacks tangible policy actions such as market access or lowering tariffs. Pillar I addresses the digital economy and the facilitation of digital trade as an acknowledgement of "the rapidly evolving nature of digital technology" and does not mention financial services in particular.[37] Pillar II enshrines sustainable finance and mentions the need for facilitating investment in clean technologies and environmental goods and services, as well as the enhancement of renewable energy, energy efficiency, and zero and low carbon sourcing; in addition, green investment and finance as well as circular economy approaches are mentioned.

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[36] The Regional Comprehensive Economic Partnership [RCEP], Nov. 15, 2020, https://asean.org/our-communities/economic-community/integration-with-global-economy/the-regional-comprehensive-economic-partnership-rcep/.

[37] *See Ministerial Text for Trade Pillar of the Indo-Pacific Economic Framework for Prosperity*, INDO-PAC. ECON. FRAMEWORK PROSPERITY 1-2 (2022), https://ustr.gov/sites/default/files/2022-09/IPEF%20Pillar%201%20Ministerial%20Text%20(Trade%20Pillar)_FOR%20PUBLIC%20RELEASE%20(1).pdf.

IV. PUBLIC POLICY ELEMENTS IN THE FINANCIAL LAW FRAMEWORK

The undertaken analysis of the bi- and trilateral as well as the regional and over-regional FTA has shown some progress in liberalizing digital trade, but sustainable finance and financial inclusion continue to play a marginal role. Therefore, the question must be addressed whether other avenues can contribute to an increased consideration of these objectives. In particular, global developments outside of the GATS merit are considered more deeply. Nevertheless, it should not be underestimated that digital inclusion, having similarities to financial inclusion, already played a role in a GATT case (not a GATS case), namely in the *Brazil — Taxation* dispute addressing the issue of bridging digital divide and promoting social inclusion.[38]

A. Sustainable Finance and Financial Inclusion

The realization of sustainable development based on the UN SDG requires a redesign of the financial system. Financial inclusion brings finance to all parts of society, thereby maximizing general welfare. Financial inclusion focuses on sustainable and balanced developments by extending the benefits to people. Sustainable finance and financial inclusion are policy objectives in the interest of the public.[39]

Digital financial transformation in support of financial inclusion can nowadays mainly be based on FinTech business models. This assessment is reflected in the fact that international bodies have incorporated expert groups and organizational units dealing with financial inclusion and FinTech offerings. Amongst others, already more than ten years ago the G20 Financial Inclusion Experts Group (FIEG)[40] has been established, equally as a Global Partnership for Financial Inclusion (GPFI);[41] in addition, a Financial Inclusion Action Plan (FIAP),[42] adopted by the G20 leaders, is

[38] Panel Report, *Brazil — Certain Measures Concerning Taxation and Charges*, ¶¶ 7.552-.568, WTO Doc. WT/DS472/R (adopted Jan. 11, 2019) [hereinafter *Brazil — Taxation* Panel Report]. The *Brazil — Taxation* dispute was initiated by the European Union in 2013 with respect to certain measures concerning taxation and charges in the automotive sector, the electronics and technology industry, goods produced in Free Trade Zones, and tax advantages for exporters. Brazil defended (partly unsuccessfully) its measures with several arguments; for the R&D investment requirements Brazil justified the implemented regulations with the reference to social inclusion and bridging the digital divide. Insofar the Panel agreed with Brazil qualifying these principles as public morals objectives. For further details, see *infra* part IV.B.

[39] Arner et al., *supra* note 18, at 15-16.

[40] *Subgroups and Co-Chairs*, GPFI, https://www.gpfi.org/subgroups-and-co-chairs (last visited Feb. 6, 2024).

[41] PRINCIPLES AND REPORT ON INNOVATIVE FINANCIAL INCLUSION, http://www.gpfi.org/publications/principles-and-report-innovative-financial-inclusion (last visited Feb. 6, 2024).

[42] *2023 Financial Inclusion Action Plan*, GLOB. PARTNERSHIP FOR FIN. INCLUSION (2023), https://www.g20.org/content/dam/gtwenty/gtwenty_new/document/G20_GPFI_FIAP_2023. pdf.

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frequently reviewed and amended (the last time in 2023). Major development organizations such as the International Monetary Fund (IMF), the Organisation for Economic Cooperation and Development (OECD) and others, as well as Non-governmental Organizations (NGOs) are equally issuing principles on financial inclusion and sustainable finance.

The United Nations also established the Task Force on Digital Financing (hereinafter "TFDF") in November 2018;[43] the TFDF has the task to develop strategies that promote financial technology to advance the UN SDG. The TFDF supports the view that FinTech is an important, possibly the most important, single accelerator for the attainment of the UN SDG.

From an overall perspective, digital finance and FinTech are in a position to play three core roles in relation to achieving the UN SDG[44]:

- Digital Finance and FinTech can enhance the allocation of existing financial resources by supporting sustainable development.
- Digital finance and FinTech are suitable to involve the expansion of resources in the financial system generally.
- Digital Finance and FinTech do directly contribute to financial inclusion and the achievement of the UN SDG.

In a nutshell, if financial markets are sufficiently major, providing payment services, long-term financing, insurance services and savings/investment products, financial inclusion through FinTech will be strengthened and the implementation of FinTech business models can contribute to all seventeen UN SDG.[45] But to the extent that international regulations do not sufficiently support sustainable finance and financial inclusion, the question arises whether domestic law is suitable to play a substituting role based on the public policy concept.

B. Public Policy in the GATS

In the GATS, the term "public policy" is not used in the sense of an objective for trade liberalization or of a basic regulatory instrument (such as MFN or National Treatment), but as an intervention means.[46] According to Art. XIV GATS, Nation States are entitled to invoke policy considerations for implementing trade barriers if narrowly defined conditions are met. Equally, the "prudential carve-out" of the GATS Annex[47] does not refer to

[43] *Taskforce on Digital Financing of Sustainable Development Goals*, U.N. (Nov. 29, 2018), https://press.un.org/en/2018/sga1842.doc.htm.
[44] Arner et al., *supra* note 18, at 16.
[45] *See* Ross P. Buckley et al., *FinTech, Financial Inclusion and the UN Sustainable Development Goals*, *in* ROUTLEDGE HANDBOOK OF FINANCIAL TECHNOLOGY AND LAW 249, 254, 258 (Iris Chiu & Gudula Deipenbrock eds., 2021).
[46] Rolf H. Weber & Rainer Baisch, *Revisiting the Public Moral/Order and the Security Exceptions under the GATS*, 13(2) ASIAN J. WTO & INT'L HEALTH L. & POL'Y 375, 380 (2018).
[47] *See supra* part II.B.

public policy. Therefore, the vague use of the term public policy makes a comparative analysis more difficult.

Notwithstanding the general goal of the GATS to remove services' trade barriers, Member States have been put into the position (as already previously in the GATT to adopt restrictive measures for non-trade purposes. The respective general exceptions aim at achieving certain policy objectives (GATS Art. XIV, partly based on GATT Art. XX). [48] In particular, Art. XIV GATS allows the adoption of measures considering the protection of public morals and the maintenance of public order.[49] Since the most important services' issues in the globalized world concern cross-border data flows, public order is highly relevant in this context.

In contrast to the GATS, the corresponding Art. XX of the GATT does only contain the term of public morals, not the term of public order. Nevertheless, the Panel in the *Brazil — Taxation* case has dealt with the question of to what extent the concept of digital inclusion would fall within the scope of the public morals. According to the Panel, it is important to bridge the digital divide and to promote social inclusion by reaching a balance between trade efficiency and digital inclusion. [50] The Brazilian government pointed out, that such efforts could "improve literacy, democracy, social mobility, economic quality, and growth".[51]

The right to adopt exceptions' measures is subject to certain conditions specified in the introduction to Art. XIV GATS, in the so-called "chapeau". As a principle, the chapeau stipulates that any measure based on an objective listed in the sub-paragraphs shall not be "applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the like conditions prevail, or a disguised restriction on international trade". In order to reach an appropriate interpretation of the term "public policy" a good and comprehensive appreciation of the GATS's history and objective appears to be necessary,[52] even if it is difficult for a WTO Panel to address socially driven concepts such as digital or financial inclusion.[53]

In addition, the generally accepted "ordre public" principle under international law can provide useful assistance; the "ordre public" concept and public policy, the common law counterpart, are deeply rooted in Western democracies and broadly acknowledged in private international law. Due to

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[48] *See generally* Nicolas F. Diebold, *The Morals and Order Exemptions in WTO Law: Balancing the Toothless Tiger and the Undermining Mole*, 11(1) J. INT'L ECON. L. 43 (2008).
[49] Weber & Baisch, *supra* note 46, at 380-81.
[50] *Brazil — Taxation* Panel Report, *supra* note 38, ¶ 7.622; *see supra* note 38 for the summarized case.
[51] *Brazil — Taxation* Panel Report, *supra* note 38, ¶ 7.545.
[52] Weber & Baisch, *supra* note 46, at 381.
[53] To the bridging of digital divide and digital inclusion in general, see Peng, *supra* note 34, at 20-24.

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the legal perceptions of the GATS negotiating Parties, it can be assumed that the public policy exception clause is in line with the "ordre public" principle.[54]

In general, the broad context of "public order" can cover all kinds of legitimate objectives; for example, in the context of the Joint Statement Initiative,[55] the developing countries have been pressing for development-focused digital industrialization.[56] These political aspects must be considered, even if some constraints are expressed in footnote 5 to Article XIV GATS: "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." Therefore, a certain level of seriousness must be given. In particular, the necessity and proportionality of national measures need to be assessed with an objective standard; Member State interventions into the cross-border data flow should consequently not be easily justifiable and implementable.[57]

Similar considerations appear to be appropriate in the context of the "prudential carve-out" clause.[58] Originally, this exemption clause was intended to address issues of prudential behavior and risk management of financial intermediaries as well as measures trying to achieve financial stability and cybersecurity. Nevertheless, a teleological interpretation of the underlying purpose of the "carve-out" clause also allows us to consider modern objectives such as digital and financial inclusion.

The reconciliation between public policy objectives in the context of financial markets and public policy interventions against liberalized digital trade regimes is confronted with the challenge that, on the one hand, positive efforts are to be realized by implementing certain measures and, on the other hand, negative regulatory impediments are imposed on the business community. The final objectives can be similar; however, the procedural forms are different.[59]

V. PROMOTING FINANCIAL INCLUSION

A. Policy Objectives

Access to finance and financial inclusion has long been an important policy objective; financial inclusion encompasses the delivery of financial

[54] Diebold, *supra* note 48, at 56.
[55] *See* World Trade Organization, *supra* note 23.
[56] Peng, *supra* note 34, at 37; *see also* Shin-yi Peng, *The Uneasy Interplay Between Digital Inequality and International Economic Law*, 33(1) EUR. J. INT'L ECON. L., 205, 206 (2022).
[57] Weber & Baisch, *supra* note 46, at 381.
[58] *See supra* part II.B.
[59] *See infra* part V.B., V.C.

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services at an affordable cost to all segments of society.[60] Providing people with access to financial services, such as payments, savings, insurance and credit, helps them to manage their financial obligations and to build better futures. This aspect is of particular importance for developing countries.[61]

If due to the improvement of financial inclusion people are enabled to save funds to overcome, for example, weather shocks or to invest in their education, health and micro-businesses, the vulnerability will be reduced. Furthermore, financial inclusion can increase the efficiency of daily life since people are put into the position to pay bills electronically at no cost.[62] Finally, financial inclusion contributes to the socialization and diversification of financial risks of individuals through the financial system (shift of financial risks from the individuals to the society) and it also supports economic growth through increasing financial resources and diversification to strengthen real economic activity.[63]

Financial inclusion makes individuals less vulnerable by enabling them to save and increase their resilience. Such kind of developments can also strengthen the efforts for an inclusive green finance implementation.[64] Sustainable finance is an important pillar facilitating the realization of public policy objectives.[65]

FinTech and sustainable finance are real opportunities in the digitized world and contribute to the development of an entire digital financial ecosystem that meets the needs of both individuals and Small and Medium Enterprises (SMEs). Such kind of ecosystem can encompass four different pillars as analyzed and designed by academic voices and organizational statements[66]:

1. Pillar I — Experience shows that identification and digital identity in particular are central to financial inclusion and the transformation of digital finance; elements are the online "know your customer" (KYC, i.e., accountholder) compliance and the simplified account opening.

2. Pillar II — Digital payment infrastructures and open electronic payment systems provide the basic foundation for money to flow through any economy and are therefore vital to financial inclusion and economic development.

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[60] *See supra* part II.C.

[61] For further details, see *FinTech for Financial Inclusion: A Framework for Digital Financial Transformation*, Alliance for Financial Inclusion [hereinafter AFI] (2018), https://www.afi-global.org/wp-content/uploads/publications/2018-09/AFI_FinTech_Special%20Report_AW_digital.pdf.

[62] Buckley et al., *supra* note 45, at 252-53.

[63] Anita Gardeva, *Financial Inclusion 2020*, CTR. FOR FIN. INCLUSION (July 14, 2009), https://www.centerforfinancialinclusion.org/financial-inclusion-2020.

[64] *See generally Roadmap for Inclusive Green Finance Implementation*, AFI (2022), https://www.afi-global.org/wp-content/uploads/2022/11/Roadmap-for-Inclusive-Green-Finance-Implementation_isbn.pdf.

[65] Arner et al., *supra* note 18, at 18-26.

[66] AFI, *supra* note 61, at 9-18.

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3. Pillar III — The digitization of government payment and of the services' provision can scale the financial inclusion.

4. Pillar IV — An appropriate design of digital financial markets and systems also underpins the existing use cases including securities trading, clearing and settlement.

The full potential of FinTech for financial inclusion may be realized with a strategic framework of underlaying infrastructure and an enabling policy and regulatory environment to support digital financial transformation.[67]

B. Use Cases for Financial Inclusion

Drawing from experiences in a range of developing, emerging and developed countries, the main elements of financial inclusion can be identified.[68]

The development of mobile money, particularly in Kenya and East Africa,[69] has done the most to promote financial inclusion. This type of FinTech allows unbanked individuals to make payments, remit funds and save money using their mobile phones. For example, the M-Pesa services contributed to financial inclusion in Kenya for more than ten years.[70]

In China with its traditional and not overly efficient financial system, digitization of financial services has become a major policy issue. In the meantime, China is a frontrunner in respect of the digitized e-economy; having banned private cryptocurrencies, China is also advanced in the development of Central Bank Digital Currencies (hereinafter "CBDC").[71]

A further important example is India having implemented a major strategy to build an ecosystem for a new digital economy and financial system (so-called "India Stack" or the "Aadhaar System", respectively); relevant elements are an optimal underlying infrastructure and an enabling policy environment leading to the result that 90% of adults in India execute financial transactions.[72]

East Asia is generally advanced in the implementation of digital financial services; not by coincidence, the mentioned use cases stem from this region. In light of the far-reaching technological advances, also in the

[67] *See generally* Dirk A. Zetzsche et al., *Sustainability, Financial Inclusion and Efficiency: A Trilemma or Trifecta for the Regulation of Digital Finance?*, 39(3) BANKING & FIN. L. REV. 445 (2023).
[68] For a general assessment, see Buckley et al., *supra* note 45, at 260.
[69] AFI, *supra* note 61, at 12; Arner et al., *supra* note 18, at 21.
[70] For a general overview of the contribution of mobile payments to financial inclusion, see generally Jane K. Winn, *Mobile Payments and Financial Inclusion: Kenya, Brazil, and India as Case Studies*, *in* RESEARCH HANDBOOK ON ELECTRONIC COMMERCE LAW 92 (John A. Rothchild ed., 2016).
[71] *See* AFI, *supra* note 61, at 13; Arner et al., *supra* note 18, at 22.
[72] AFI, *supra* note 61, at 8-10.

context of CBDC,[73] it can be expected that the number of digital applications supporting financial inclusion will increase over the next years.

C. Financial Inclusion as Public Policy

Financial inclusion is an increasingly important policy issue, not only a new aspect of financial markets such as FinTech and (partly) sustainable finance. Many international declarations at least indirectly express the necessity to strengthen financial inclusion, beginning with the UN SDG and including manifold efforts of economic and financial organizations with a global reach. The existing documents have a piecemeal character and need to be harmonized. A mutually agreed strategic approach reinforcing the respective objectives must be implemented.

Technology is a driver of new developments; thereby technology should not exclusively be designed by the developers' intentions, but, moreover, equally by the users of the technology.[74] This assessment is not at least due to the fact that the accelerating technology facilitates the market entry of new competitors increasing the scope and number of different business models. Thereby, individual choices of civil society members will be increased and the possibilities for financial inclusion substantially widened; at the same time, such an approach is improving digital access.

As a consequence, policymakers and regulators need to develop methods that are capable of understanding new technologies as well as the related risks and opportunities. In parallel, technologies should better contribute to a potential redesign of the regulatory framework governing FinTech and sustainable finance, thereby building an appropriate innovation ecosystem.[75] Nevertheless, from a business perspective, it should not be overlooked that innovation hubs can require substantial resources if an important impact on financial systems should be caused and also secured over time.

The respective measures should be considered when negotiating a new e-commerce or digital trade understanding within the WTO as well as when ongoing FTA improvements are elaborated. As long as these attempts are not successful, Member States of the WTO are in a position to introduce provisions on financial inclusion based on the carve-out clause and/or the exception clause of the GATS since FinTech and sustainable finance are relevant elements of a future financial inclusion concept and fulfill the requirements of the public policy objective.

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[73] *See generally* Heng Wang, *Addressing Governance Challenges of Digitalisation and Sustainability: A Perspective of Central Bank Digital Currency*, RESEARCHGATE (Oct., 2023), https://www.researchgate.net/publication/374545305_Addressing_Governance_Challenges_of_Digitalisation_and_Sustainability_A_Perspective_of_Central_Bank_Digital_Currency.

[74] *See* Buckley et al., *supra* note 45, at 264.

[75] *Id.* at 265.

An inclusive and balanced sustainable growth allowing all members of civil society around the globe to take advantage of the new digital services requires a digital financial transformation. The achievement of the UN SDG can probably only be achieved if the respective innovations are financed and "translated" into a proper understanding for the beneficiaries of financial inclusion.

VI. OUTLOOK

International trade law is no longer confined to removing tariffs and quotas at the border, or to prohibit discrimination between suppliers. Moreover, services, particularly digital services, gained importance,[76] at the same pace as policy issues such as sustainable development, data protection/privacy, consumer interests, etc.[77] Consequently, the respective public policy principles are worth to be introduced into the WTO framework.

Financial inclusion is culturally oriented; globally harmonized standards are not able to cope with the specific national needs around the globe (as it has been also seen in the privacy/data protection context). A certain harmonization might be feasible in bilateral or regional FTA if the same geographical area is concerned.

Otherwise, Nation States must be allowed to invoke the "carve-out" clause contained in the Annex on Financial Services and/or the exception clause of GATS Art. XIV. If financial inclusion is realized on the basis of internationally accepted policy objectives such as the UN SDG or similar legal instruments, the public policy reservation appears to be fulfilled and the respective national measures should be accepted.

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[76] *See generally* Yik-Chan Chin & Jingwu Zhao, *Governing Cross-Border Data Flows: International Trade Agreements and Their Limits*, 11(4) Ls. 1 (2022).
[77] *See* Gregory Shaffer, *Trade Law in a Data-Driven Economy*, *in* ARTIFICIAL INTELLIGENCE AND INTERNATIONAL ECONOMIC LAW 29, 30-33 (Shin-yi Peng et al. eds., 2021).

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