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MEMO

From: Todd Tucker, Public Citizen[1]
Date: March 15, 2010
Re: "That's All They've Got?": What Latest WTO Secretariat Paper on Financial Crisis Does and Does Not Say About GATS Disciplines on Financial Regulation

On February 3, the WTO issued a document that many in Geneva call the "non-response" to over a year of growing questions from WTO member countries and others about the connection between the rules of the General Agreement on Trade in Services (GATS) on financial services and the global economic crisis.[1] Indeed, this was the Secretariat's first major study[2] in nearly 12 years about the WTO's financial service rules.[3] The new paper is a disappointment to anyone hoping for a convincing rebuttal to charges that the WTO's General Agreement on Trade in Services (GATS) promotes financial services deregulation. The 76-page document includes a lengthy discursion on the GATS treatment of corporate branches versus subsidiaries, as well as a very defensive discussion of the causes of the crisis (bottomline, in their estimation: WTO rules are in no way implicated). The paper avoids altogether the question of WTO compatibility of the types of measures that member countries have implemented in response to the crisis. This is despite the formal demand via a paper tabled September 17, 2009 in the WTO's Committee on Trade in Financial Services,[4] and via subsequent requests at the General Council in December.[5]

And, with respect to the question of how GATS rules promoted past financial deregulation and could conflict with reregulation, several points are especially worth highlighting:

1. The Secretariat does not rebut any of the main concerns about the GATS rules' deregulatory requirements raised in recent years.
2. In fact, the Secretariat confirms many of these concerns.
3. When dealing with a controversial issue where there is no record of official interpretation at the WTO, the Secretariat cites only unofficial sources making "don't worry, be happy" arguments rather than reviewing all of the international law review and other analyses, or offering an official interpretation.

This memo addresses each of these in turn below. I would just note that it is now all the more surprising that – after the release of the Secretariat's paper in February that confirms the concerns that GATS clashes with re-regulation – the USTR would *still* be calling for deeper financial services commitments in its March "2010 Trade Agenda"[6]… at the same time as the president's domestic policy team is pushing domestic re-regulation. (Secretary Geithner's recent opposition to European

[1] Tucker is research director with Public Citizen's Global Trade Watch division. He thanks Kevin Gallagher, Mike Kirkpatrick, Riaz Tayob and Lori Wallach for helpful comments.

hedge fund regulations is also illustrative of this fundamental lack of coherence between the administration's domestic and international initiatives on financial regulation.)[7]

I. The Secretariat does not rebut the main concerns about GATS and financial services deregulation.

Those who defend the WTO but are also sensitive (either for political or substantive reasons) to charges that the agreement promotes financial deregulation might have wished that the Secretariat had made several points to shut down specific concerns that have been raised.

Here's a Top 13 list of claims the WTO's defenders would have liked the Secretariat to make, but which it did not, because it cannot:

1. That GATS rules only require that foreign firms be treated like domestic firms, and that a WTO panel would never rule against a non-discriminatory domestic regulation.
2. That WTO panels have already established that countries are free to adopt non-discriminatory financial services regulations without risking GATS challenges.
3. That any policy that is ruled kosher by the so-called "international financial regulatory bodies" (like the Basel Committee for Banking Supervision, the International Monetary Fund (IMF), etc.) is automatically allowable under the GATS, and that the WTO just imports the definitions and disciplines of these more knowledgeable bodies.
4. That countries that fear that past governments overcommitted domestic financial service sectors to GATS rules at the height of the deregulation craze can withdraw those sectors without having to pay out compensation to other WTO members.
5. That anytime a country adopts a financial services policy for prudential reasons, then there is no way that this policy can be challenged at / ruled against by a WTO panel.
6. That the GATS has been determined by a WTO panel to not restrict countries from adopting firewalls between commercial and investment banks (as the United States did under the Glass-Steagall Act and later amendments).
7. That the GATS has been determined by a WTO panel to not apply to policies limiting the size of individual firms.
8. That countries can ban financial services they fear are toxic, even if past governments signed up these sectors (perhaps inadvertently) to the GATS.
9. That GATS contains no disciplines for capital controls that many developing countries are now seeking to use, and that countries now desiring to restrict capital flows (through financial transaction taxes or other means) can simply add these as limitations to their schedule in the Doha Round negotiations.
10. That the Doha Round does not entail deeper financial services commitments.
11. That the bank bailouts of the last two years present no GATS conflicts.
12. That the Standstill provision in the Understanding on Commitments on Financial Services does not amount to a lock in of the regulatory status quo in place in the 1990s.
13. That policies of the Treasury Department or Federal Reserve are not subject to GATS disciplines.

Indeed, the Secretariat would not have been able to support the above points, even had it wished to.

II. The Secretariat confirms many concerns about GATS and financial services deregulation.

Capital Controls

In the wake of the financial crisis, even the IMF is revising old opinions, and suggesting that capital controls could be beneficial for addressing destabilizing financial flows.[8]

On pages 3-6, the Secretariat discusses capital controls, and notes:

> "Although its main focus is on the *liberalization of trade in financial services*, the GATS could require individual Members to allow *capital movements* associated with a broad range of – primarily – financial services, depending on the level of specific commitments undertaken…
>
> "Cross-border trade in some other services, for example, acceptance of deposits, lending, or trading in securities, is inseparable from capital movements. Hence, liberalizing such services transactions requires the liberalization of the related capital flows to make the transactions effective…
>
> "restrictions on transfers and payments for current transactions must not be maintained where a Member has made a commitment on financial services…
>
> "Members undertake not to impose restrictions on any capital transactions inconsistently with its specific commitments regarding those transactions."

Here, the Secretariat confirms a very serious concern: that the GATS creates obligations to simply eliminate whole categories of non-discriminatory regulations. The Secretariat states that, "The GATS does not define terms such as 'payments and transfers for current transactions,' 'current transactions,' 'capital transactions,' 'movement of capital,' or indeed 'restrictions,'" even though definitions exist through the International Monetary Fund and other bodies. The lack of definition of the term "restriction" is especially troublesome, since it could encompass reregulatory measures that are being widely discussed at the moment, such as financial transaction taxes (FTT).[9] An FTT, by contrast, would explicitly not be considered a prohibited "restriction" under the IMF Articles of Agreement, since the IMF defines "restriction" as "a direct governmental limitation on the availability or use of exchange as such."[10]

To restate, GATS commitments thus implicitly require capital account liberalization – which has been shown NOT to be associated with economic growth in developing countries, and leaves them prone to financial instability. Resulting crises can spread to the United States, undermine U.S. export markets, and even hurt Wall Street when our trading partners' firms default.[11]

Regulatory Bans

The recent crisis has resurrected the notion that some types of financial services or products are so dangerous and so lacking in social utility that they should simply be banned. This is what the U.S. Securities and Exchange Commission is doing in regards to naked short selling and flash trading.[12]

One of the major concerns in regards to the GATS conflict with reregulation is the recent WTO Appellate Body ruling in the Antigua gambling case that non-discriminatory regulatory bans constitute a "quota of zero," and that enacting them can put countries in violation of their GATS Article XVI Market Access commitments. Unlike some areas of concern with the GATS, this one actually had jurisprudence associated with it[13] that confirms many concerns raised by GATS critics, and also by pro-WTO academics and practitioners such as Panagiotis Delimatsis, Federico Ortino, and Joost Pauwelyn.[14]

Far from dispelling concerns that the GATS rules could be used to challenge a financial regulatory ban, the Secretariat says: "an outright prohibition to provide a certain financial service would be a trade measure subject to scheduling under the GATS" (page 5). In other words, if a country's deregulation-prone government did not think to schedule a ban during the 1990s (as the U.S. did with respect to securities and derivatives, but *only* for onions futures), imposing a ban now in a committed sector would put the country in violation of its GATS commitments.

Firewalls and Too-Big-To-Fail Measures

In the wake of the crisis, everyone from Paul Volcker to Simon Johnson to John McCain agrees that banks got "too big to fail," and that firewalls and other size limitations need to be reinstituted.

But the GATS Article XVI(2) Market Access rules could limit countries' ability to impose firewalls between distinct service sectors, such as between banking and securities, or between banking and insurance. Such a firewall could be seen as a prohibited limitation on the total value of service transactions or assets (covered by Article XVI(2)(b)), or on the total number of service operations or on the total quantity of service output (covered by Article XVI(2)(c)), or a prohibited measure which restricts or requires specific types of legal entity or joint venture through which a service supplier may supply a service (covered by Article XVI(2)(e)). Indeed, a WTO panel has never ruled to the contrary.

This and related points have been made by scholars such as Markus Krajewski and Petros Mavroidis (formerly a lawyer at the WTO Secretariat) who are notably not cited in the paper, despite reference to numerous opinions from outside the WTO jurisprudence, official documents and the Secretariat.[15] Moreover, there are provisions in the Understanding on Commitments in Financial Services (which the U.S. and most other OECD countries adopted) which could restrict firewalls, and the United States also explicitly committed to "reform" the Glass-Steagall Act in its GATS financial service Schedule of Specific Commitments.

The Secretariat paper mentions these various provisions in passing, but does not explore their GATS compatibility. In fact, the Secretariat appears to suggest that new firewalls could indeed violate GATS commitments: after discussing the possible interest by member countries in such

policy tools, the Secretariat worryingly notes on page 37 that "even if any specific measure could be considered as inconsistent with an obligation or commitment in the GATS," a country facing a WTO challenge could invoke in its defense before a WTO tribunal an alleged exception related to prudential measures (see next section for more on that so-called exception).

Moreover, the Secretariat also appears to dismiss firewalls as a useful regulatory device. The Secretariat oddly excludes the removal of New Deal-era firewalls as a contributing root cause to the crisis, but then adds patronizingly that such "regulatory initiatives seem genuinely motivated by the need to avoid systemic risk" (page 37).

No Space for Deviations on Some Domestic Regulations

At several points (paragraphs 17 and 20), the Secretariat notes that many kinds of domestic financial service regulation (specifically mentioning capital controls) cannot be scheduled as limitations on GATS obligations. Indeed, according to the GATS Scheduling Guidelines, any non-Market Access or non-National Treatment measure falls under GATS Article VI which covers "Domestic Regulation." The constraints on domestic regulation set forth in Article VI automatically apply to any service sector that has been committed under the GATS Market Access or National Treatment provisions. **Translated out of GATSese, the Secretariat's point is that certain forms of domestic regulation cannot be listed as exceptions in countries' schedules. In other words, if capital control, interest rate, minimum capital or any other financial rules violate GATS terms, they must simply be eliminated or brought into conformity with the GATS. This is another way that the GATS promotes deregulation.**

Prudential Measures

The paper mentions on page 9 that "If a measure that allegedly services 'prudential reasons' is considered by affected Member(s) to violate a Member's obligations or specific commitments under the GATS, it may be challenged under the WTO dispute settlement system." This is very significant concession, but as we show in the next section, it is crowded out in the paper by a lot of allegations that seek to minimize this danger.

The primary defense invoked by the WTO's defenders when the GATS-deregulation link is raised is the claim that the Annex on Financial Services Article 2(a) "allows countries to take measures for prudential reasons." As we have shown elsewhere, the reverse is true: this article indicates that prudential measures can indeed run afoul of other GATS obligations, and thus can be challenged in WTO tribunals.[16] In other words, the Annex Article 2(a) provision only can be used as defense *after* a prudential regulation has already been challenged.

The claim that the Article 2(a) language allows for policy space for prudential measures often rests on the article's first sentence, which give that impression. However, the second sentence reads that, where prudential "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."[17] Beginning on page 8 of the study, the Secretariat makes a number of unwarranted assertions about this Article 2(a) prudential measures language:

- That it is an "exception" or "carve-out." In fact, it is not termed such in the GATS, nor does it operate in such a manner. A "carve-out" is when a *country* excludes a specific policy or sector from coverage of the rules in its schedule of commitments. When a country has "carved out" a sector or policy, none of the WTO rules apply to it. An "exception" is when a WTO text states that certain government measures or activities are outside the scope of the relevant agreement. For instance, an actual GATS exception is the very narrow language in Article I(3)(b-c) that states that GATS rules do not apply to a service supplied in the exercise of governmental authority if that service is supplied neither on a commercial basis, nor in competition with one or more service suppliers.
- That a measure falling within the provision "would be legally permitted," while it is in fact WTO panels and the Appellate Body that would get to determine that in the course of the provision being raised as a defense in the event of a challenge.
- In trying to dismiss concerns about the second sentence of Article 2(a), mentions that "This provision is clearly intended to avoid abuse in the use of the exception." The Secretariat is freelancing here: there is no textual basis for thinking that the second sentence of the prudential measures provision is intended only to "avoid abuse.".Indeed, reference to other WTO exception provisions proves the opposite. Textually, the provision states clearly that it is to discipline measures taken for allegedly prudential reasons that "do not conform to the provisions of the Agreement." In contrast, the WTO has a boilerplate clause that is included in its various exception provisions as a means to avoid abuse of the exception. This turn of phrase is as old as the General Agreement on Tariffs and Trade (GATT) and appears in various WTO agreements. Its source is the *chapeau* of GATT Article XX (General Exceptions): "**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 the same conditions prevail, or a disguised restriction on international trade,** nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures…" (emphasis added). This exact anti-abuse language appears in Article XIV General Exception provisions of GATS itself.[18] The Agreement on Sanitary and Phytosanitary Measures Article II(3) contains a similar clause employing the "shall not be applied in a manner which would constitute a disguised restriction on international trade…" phrase.
- Later in the paper, the Secretariat states: "even if any specific measure could be considered as inconsistent with an obligation or commitment in the GATS, Members could still have recourse to the prudential carve-out, which, as explained in previous sections, recognizes the right of Members to take any measure for prudential reasons notwithstanding any other provisions of the Agreement." For the reasons noted above, this is a specious claim.

In other words, on a completely untested GATS provision (whose plain text presents clear worries of WTO conflict with prudential measures), the Secretariat's number of optimistic allegations outnumber diligent textual reading by over a 4-to-1 margin. To paraphrase Chief Justice John Roberts, this is not legal analysis: it's a degeneration into a political pep rally.[19]

III. The Secretariat employs questionable and misleading sourcing strategies.

There are several quotes by non-official sources – those outside WTO jurisprudence and WTO official documents and not sourced as the interpretation of the Secretariat – alleging that Article 2(a):

- "affords Members considerable autonomy to enact financial regulatory measures." (Source: J. Steven Jarreau)
- is "essentially an 'anti-avoidance' provision, the purpose of which is to prevent the abuse of the exception for prudential measures. Although paragraph 2(a) has yet to be interpreted by a panel or the Appellate Body, it is clear that, at a minimum, it imposes an obligation of good faith with respect to the adoption and application of prudential measures." (Source: Eric Leroux)
- sets, at the very least, "a good faith standard as to the avoidance of GATS commitments and obligations… it seems reasonable to interpret the prudential carve-out as affording the Members a high level of discretion regarding measures for prudential reasons including, but not limited to, the ones listed, but at the same time not permitting measures that are purely or primarily protectionist in effect." (Source: Max Planck Commentaries on World Trade Law, 6)
- "the prudential carve-out overrides the requirements for domestic regulations in Article VI of the GATS." (Source: Sydney J. Key)

If any of these arguments were legally valid, wouldn't it be in the Secretariat's interest to disarm the GATS critics by offering these conclusions in its own voice? The fact that the Secretariat refuses to settle the score once and for all suggests that it is not at all certain that a WTO panel would back up these assertions made by non-official sources.

Moreover, there are other non-official sources – other scholars and commentators – who explicitly disagree with the statements cited above. For instance, legal scholars Christine Kaufmann and Rolf H. Weber have written that:

> "The right of a member to issue or maintain such prudential regulation seems to find its limits in Article XI GATS. Indeed, paragraph 2 of the Annex on Financial Services underlines that the prudential carve-out should not be used to avoid commitments or obligations under the GATS Agreement. This sheds uncertainty on the relationship between the Annex on Financial Services and the GATS, in particular Article XI GATS. The issue is well illustrated by the current request from the EC to Chile to lift its requirement that a prior authorization by the Central Bank is necessary before profit repatriation to be allowed. Such restrictions are indeed considered by the EC to be in breach of Article XI… If this provision is interpreted as prevailing over the prudential carve-out, it seems to prevent countries from taking prudential measures with respect to payment in transfers, in fact measures, which could be 'nevertheless very effective for dealing with financial stability.'"[20]

(A similar point is made by the Max Planck Commentaries, excepted below.)

Further problems with sourcing: skewed sourcing

It's worth noting that there are not more than a handful of scholars that have done work on the WTO financial services provisions. Virtually all of the players in this limited circle either had a role in writing the rules, defending them to national legislators and regulators, or worked in or with the WTO Secretariat on overseeing them. These scholars rarely – if ever – consider the views of public-interest advocates or critical scholars in their writing. In sum, there are very few scholars who have looked at these issues without having some sort of institutional or professional interest to defend.[21]

There are several glaring examples of this practice. The cited source for two contentious points (related to capital controls and the prudential measures language) is Sydney J. Key. Key is a pro-GATS former Federal Reserve official (1994-2006, and prior to 1992) and House Banking Committee staffer (1993-1994) who has long alleged that the Annex's Article 2(a) language allows countries' substantial policy space.[22] Key was twice in a capacity where she could have been raising alarm bells about a potential GATS conflict with prudential regulation – but either chose not to or was unsuccessful in altering the negotiating course to one that protected prudential measures from possible GATS challenges.

Key's book, quoted by the Secretariat, was published in 2003 by the American Enterprise Institute (AEI) and financed by the American International Group (AIG), American Express and other major services corporations. AEI describes itself as "a hotbed of innovative ideas – on deregulation" that found favor in the deregulation-oriented Reagan administration.[23] AEI's partnership with American Express goes back to the 1980s, when they were among the foremost advocates for GATS provisions on financial services, having financed a string of pro-GATS publications.[24] In other words, the author, publisher and financier all have a deep interest in preserving the GATS or shielding it from criticism.

Eric Leroux, another quoted source, is a Canadian trade official, working for one of the most pro-GATS delegations in the world. Having sources like Leroux and the AIG-financed work by Key shows a very skewed sourcing. This allows the Secretariat to not deal with more probing and unbiased work put out by a wide range of academics and practitioners (some of whom are pro-GATS but have raised critical questions about its key provisions) like Joseph Stiglitz, Patricia Arnold, Andrew Cornford, Panagiotis Delimatsis, Bart de Meester, Jayati Ghosh, Ellen Gould, Markus Krajewski, Petros Mavroidis, Federico Ortino, Chakravarthi Raghavan, Robert Stumberg, Myriam Vander Stichele, Erich Vranes, Nicola Yeates… not to mention Public Citizen.[25] In fact, none of this work is cited in the "References" section of the paper.

The Secretariat does not even deign to address the findings of an official United Nations body that raised serious concerns about the WTO financial services terms. The Commission of Experts on Reforms of the International Monetary and Financial System was convened by the United Nations General Assembly president in the fall of 2008, in the early days of the financial crisis. It was chaired by Nobel Prize winner Joseph Stiglitz, with the participation of a host of distinguished academics from around the world. In September 2009, the Commission released a comprehensive report calling for changes to the global regulatory ceiling imposed by trade pacts like the World Trade Organization. Among the report's findings:

> "Many developing countries have entered into (North-South) free trade agreements (FTAs), bilateral investment treaties (BITs), and World Trade Organization (WTO) commitments *that prevent them from regulating the operations of financial institutions and instruments or capital flows*. For example, *if a developing country decides to nationalize some services such as banking, this can require compensation if the sector has been liberalized under the WTO GATS Financial Services Agreements* (FSA) or under an FTA or BIT. When these agreements and commitments are enforced, *developing countries have to pay compensation or suffer the imposition of tariffs on their exports to the complainant if they do not or cannot comply*."[26]

> "Agreements that restrict a country's ability to revise its regulatory regime—including not only domestic prudential but, crucially, capital account regulations—*obviously have to be altered, in light of what has been learned about deficiencies in this crisis. In particular, there is concern that existing agreements under the WTO's Financial Services Agreement might, were they enforced, impede countries from revising their regulatory structures in ways that would promote growth, equity, and stability*."[27] [italics added]

Given the high degree of uncertainty surrounding the WTO's financial services disciplines, the Secretariat should have either intensively scrutinized the sources it did quote to make sure they were able to pass reliability and conflict –of-interest tests, or alternatively, quoted and examined the arguments of a much wider range of experts. Drawing an analogy to domestic court practice is instructive. According to the U.S. Federal Rules of Evidence and the Advisory Committee Notes, trial court judges – in their assessment of the reliability of expert testimony – should consider "whether the expert's technique or theory can be or has been tested" and "whether the expert has adequately accounted for obvious alternative explanations." The guidelines also raise red flags when the expert's "discipline itself lacks reliability." While U.S. legal practice offers these guidelines for possibly excluding expert witness testimony, it also defaults in favor of calling expert witnesses with a variety of opinions and background to assist judges and juries with coming to a fully informed conclusion. Quoting the court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (509 U.S. 579 (1993)), the Notes state: "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."[28]

Yet the theories and allegations of Key and others about the scope of the WTO's financial services disciplines have not been tested. Moreover, the highly insular community of practitioners and scholars is on the record as being supportive of the GATS disciplines, and rarely tests (or even accounts) for alternative theories or arguments from GATS critics. As a consequence, the entire "discipline" lacks sufficient reliability and rigor. These factors should have raised a red flag at the Secretariat before citing these sources. Alternatively, the Secretariat could have simply presented the arguments of both GATS critics and proponents, but failed to do that as well.

Further problems with sourcing: selective quotation

Additionally, the Secretariat makes highly selective quotes of the few sources it does reference. WTO members might have been just as interested in the following (however muted) warnings about the GATS rules:

- Key writes that "countries may be reluctant, however, to make commitments to national treatment and market access for cross-border services that have the potential to overburden the prudential carve-out. Moreover, the scope of the carve-out, particularly its antiabuse provision, is still untested in WTO jurisprudence."[29] (Page 39)
- Key, when discussing the GATS Article VI Domestic Regulation necessity language, notes that "its subsequent application to individual non-quantitative and nondiscriminatory structural measures through the WTO dispute settlement mechanism could open a Pandora's box of legal claims and counterclaims." (Page 50)
- In discussing whether other countries would commit to such wide-ranging reforms as the United States did in the GATS by agreeing to lock in the repeal of Glass-Steagall, Key notes: "countries would not want to make binding international commitments subject to WTO dispute settlement that might constrain their ability to modify their overall domestic financial structure." (Page 50)
- Key writes in her introduction: "A GATS commitment is permanent in that it cannot be withdrawn without compensation of trading partners. Failure to honor a commitment could open up a country to a dispute settlement proceeding and, ultimately, WTO-sanctioned retaliatory measures by its trading partners. Thus, backsliding… could be extremely costly." She adds: "Governments that participate in the negotiations are forced to account to their trading partners for the barriers they impose and to explore the possibility of overcoming domestic political constraints to reduce or eliminate those barriers." (Pages 2-3)
- Leroux notes the key role of lobbying by financial services firms in getting the WTO financial services rules.[30] (Page 427)
- Leroux also argues that "the most important aspect" of the GATS rules is that they "resulted in the financial services sector being 'permanently' subjected to a comprehensive set of rules and disciplines that limit" members' ability to adopt and maintain discriminatory or nondiscriminatory measures. (Page 428)
- Jarreau notes that lawyers "should understand that for every reasonable interpretation one Member may have of a particular aspect of the [GATS] instruments, another Member may urge an equally reasonable but contrary interpretation."[31] (Page 70)
- The Max Planck Commentaries on World Trade Law states that "a more precise definition of the broadly formulated prudential carve-out… may be desirable."[32] (Page 629)
- The Max Planck Commentaries question whether "any measure with the effect of permitting a Member to circumvent a legal obligation flowing from GATS is *ipso facto* no prudential for purposes of para. 2 lit. a.." (Page 635)
- The Planck Commentaries cite GATS critics Isabel Lipke and Myriam Vander Stichele's concern about a "loss of, or chilling effect on, sovereign economic power to regulate and stabilize the financial sector: if the prudence of measures is subject to WTO dispute settlement, they argue, a central bank or supervisory agency may be hesitant to take the measures it deems most efficient." (page 636)
- The Planck Commentaries state that members may not use prudential measures to "actually avoid any obligations under the GATS (including the obligation to liberalize international transfers and payments relating to services for which specific commitments have been made." (Page 254)
- The Planck Commentaries also state that, in the GATS section on Payments and Transfers, "the term 'restriction' should be construed broadly… as a basic rule, any measure that could impede international transfers and payments in connection with GATS services is prohibited.

Restrictions can be direct or indirect. Direct restrictions affect the transactions themselves, for instance prohibiting certain transactions, setting quotas, providing for approval procedures, etc. Indirect restrictions, conversely, do not restrict international transfers and payments as such, but discourage them without directly limiting them by means of restrictive regulation, such as excessive taxation, measures requiring undue paperwork or those creating extensive delays, etc." (Page 251-252).

- A paper by Deborah Siegel, an IMF attorney, is quoted on the section on capital controls, but no reference is made to her conclusion: "Leaving issues of the Fund / WTO relationship to the WTO's dispute settlement panels effectively amounts to allocating the conduct of international relations to judges; experience shows that the juridical process alone cannot properly ensure coordination between international organizations."[33] (599)

Further problems with sourcing: contradictory conclusions between cited sources

Leroux argued "It should be noted that to the extent that there is no conflict between the prudential carve-out and Article VI of the GATS, which also relates to domestic regulation, the provisions of the latter apply." But, as noted above, Key wrote that "the prudential carve-out overrides the requirements for domestic regulations in Article VI of the GATS." The Secretariat did not even pronounce on key disputes raised by the few sources that it quoted.

CONCLUSION

Deprived of evidence or good arguments, WTO defenders are now left to cling to various unsatisfactory arguments, such as hopes that a WTO challenge to financial regulation is never lodged. This hope may be misplaced, given the number of countries with offshore financial centers that are experiencing crackdowns by both developed and developing nations. Panama is top on this list, as the country has already threatened multiple countries with WTO dispute settlement over various financial service regulations.[34] Not only is such a "wait-and-see" approach poor governance, it runs directly counter to the wisdom that the financial crisis has taught us: we cannot wait until the next crisis to clean house.

Ironically, one take-away from the Secretariat paper's endless efforts to minimize various concerns could be that the GATS financial service rules require little of signatories. Notably, the Secretariat does not directly state in writing what some officials have said privately in their attempts to quell criticism: that the GATS financial services rules actually just aren't that meaningful. Besides being substantively inaccurate, there is also the political problem: you cannot tell governments and NGOs that the policies mean nothing while simultaneously telling corporations that they're very meaningful and worth spending decades lobbying for. Likewise, corporate lawyers may be many things, but they're not stupid. Why would corporations push for a WTO financial services deal for decades[35] if in the end it had not teeth or substantive import?

In sum, **the latest Secretariat report confirms, rather than dispels, the majority of the GATS critics' arguments about the pact's promotion of financial deregulation and its conflicts with reregulation.**

ENDNOTES

[1] See, for instance, "Discussion Document by Argentina, India and South Africa on the Financial Crisis and Related Matters," WTO Document, Sept. 17, 2009; and Commission of Experts of the President of the UN General Assembly on Reforms of the International Monetary and Financial System, September 2009 Report, at 38-39. Available at: http://www.un.org/ga/econcrisissummit/docs/FinalReport_CoE.pdf. See also: Americans for Financial Reform, "Global Issues Paper, June 2009. Available at: http://ourfinancialsecurity.org/issues/working-in-the-international-system/

[2] WTO, "Financial Services," Background Note by the Secretariat, S/C/W/312 and S/FIN/W/73, Feb 3, 2010.

[3] Previous major studies included a 1989 Note by the GATT Secretariat entitled "Trade in Financial Services" (GATT Document MTN.GNS/W/68, dated Sept. 4, 1989), and a 1998 Background Note by the WTO Secretariat entitled "Financial Services" (WTO Document S/C/W/72, dated Dec. 2, 1998). Smaller studies include a 1996 Note by the WTO Secretariat entitled "Technical Issues Concerning Financial Services Schedules" (WTO Document S/FIN/W/9, July 29, 1996) and an Informal Note by the Secretariat attached to the 2001 GATS Scheduling Guidelines (WTO Document S/L/92, March 28, 2001).

[4] WTO, "Discussion Document by Argentina, India and South Africa on the Financial Crisis and Related Matters," WTO Document, Sept. 17, 2009.

[5] WTO, "General Council - 17 - 18 December 2009 - The Financial and Economic Crisis and the Role of the WTO - Communication from Argentina, Ecuador and India," WTO Document WT/GC/W/617/Add.1, Dec. 15, 2009.

[6] See USTR, "2010 Trade Policy Agenda and 2009 Annual Report," March 2010. Available at: http://www.ustr.gov/2010-trade-policy-agenda. Accessed March 15, 2010. "The Doha negotiations, launched in 2001, had been stalled for years when President Obama took office in 2009… Since a review of the negotiations at the outset of this Administration, the United States clearly has indicated ways to advance the negotiations through a variety of mechanisms. These include pursuing negotiations focusing on tariff liberalization in selected industrial goods sectors (e.g., chemicals, electronics, health care products, industrial machinery) and *improved packages in services (providing new market access in key infrastructure services sectors such as financial services*, information and communications technology, distribution, energy and express delivery)." [Italics added]. At 4.

[7] See letter from Treasury Secretary Timothy Geithner to European Commissioner for Internal Market and Services Michel Barnier, dated March 1, 2010. Available at: http://www.efinancialnews.com/share/media/downloads/2010/03/4058529558.pdf. Accessed March 15, 2010. See also: Toby Lewis and James Mawson, "Geithner Warns Europe on Fund Legislation," *Wall Street Journal,* March 11, 2010. Available at: http://online.wsj.com/article/SB10001424052748703625304575115250708775486.html.

[8] Jonathan D. Ostry, et. al., 'Capital Inflows: The Role of Controls," IMF Staff Position Note SPN/10/04, Feb. 19, 2010. Available at: http://www.imf.org/external/pubs/ft/spn/2010/spn1004.pdf . Accessed Feb. 26, 2010.

[9] See comments by Gordon Brown, Nancy Pelosi, and others: http://www.cepr.net/documents/ftt-support.pdf

[10] Deborah Siegel, "Legal Aspects Of The IMF/WTO Relationship: The Fund's Articles of Agreement and the WTO Agreements," *American Journal of International Law*, July 2002, at 566.

[11] Kevin Gallagher, "Losing Control: Policy Space for Preventing and Mitigating Financial Crises in Global Trade and Investment Agreements," UNCTAD, 2010, forthcoming. See also: M. Ayhan Kose, Eswar S. Prasad, Ashley D. Taylor, "Thresholds in the Process of International Financial Integration," NBER Working Paper No. 14916, April 2009.

[12] "SEC's 'Naked' Short-Selling Rule Permanent," *Associated Press,* July 27, 2009; Jacob Bunge, "Direct Edge Wins Exchange Status From SEC," *Dow Jones Newswires,* March 12, 2010. The SEC will have a final vote on the ban on flash trading in the near future; it is expected to pass.

[13] WTO, "United States – Measures Affecting The Cross-Border Supply of Gambling and Betting Services," Report of the Panel, WTO Document WT/DS285/R, Nov. 10, 2004 at 232-233.

[14] Joost Pauwelyn, "Rien ne Va Plus? Distinguishing Domestic Regulation from Market Access in GATT and GATS," *World Trade Review*, 4, (2005), at 131-170. See also: Federico Ortino, "Treaty Interpretation and the WTO Appellate Body Report in US-Gambling: A Critique," *Journal of International Economic Law,* January 2006; Delimatsis, Panagiotis. "Don't gamble with GATS - The interaction between Articles VI, XVI, XVII, and XVIII GATS in the light of the US - 'Gambling' case," Journal of World Trade Law, December 2006.

[15] For instance, legal scholars have argued that the GATS Articles XVI(2)(b-c) could be seen as applying to individual firm limits. See Markus Krajewski, *National Regulation and Trade Liberalization in Services*, (The Hague: Klewer Law International, 2003), at 91. See also Petros Mavroidis, "Highway XVI re-visited: the road from non-discrimination to market access in GATS," *World Trade Review,* 6:1, 2007, at 17-18.

[16] Todd Tucker and Lori Wallach, "No Meaningful Safeguards for Prudential Measures in World Trade Organization's Financial Service Deregulation Agreements," Public Citizen Report, September 2009.

[17] The full Article 2(a) provision reads: "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."

[18] GATS *Article XIV (General Exceptions)* "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…"

[19] "Chief Justice John Roberts found State of the Union scene 'troubling'," *Associated Press,* March 10, 2010.
[20] Christine Kaufmann and Rolf Weber, "Reconciling Liberalized Trade in Financial Services and Domestic Regulation," in Kern Alexander and Mads Andenas (eds.), *The World Trade Organization and Trade in Services,* (Amsterdam: Martinus Nijhoff Publishers, 2008), at 424.
[21] This point was very effectively made in an early, almost anthropological, analysis of the community of GATS "scholars." These are mostly government and corporate officials who created a mutual citation society that covered up the lack of opposing views in the literature. See William Drake and Kalypso Nicolaidis, "Ideas, Interests and Institutionalization: 'Trade in Services' and the Uruguay Round," *International Organization,* 46:1, Winter 1992.
[22] See http://www.bu.edu/law/faculty/profiles/fullcvs/banking/key_s.html
[23] See http://www.aei.org/history.
[24] William Drake and Kalypso Nicolaidis, "Ideas, Interests and Institutionalization: 'Trade in Services' and the Uruguay Round," *International Organization,* 46:1, Winter 1992, at 75.
[25] See, for instance: Commission of Experts of the President of the UN General Assembly on Reforms of the International Monetary and Financial System, September 2009 Report, at 38-39. Available at: http://www.un.org/ga/econcrisissummit/docs/FinalReport_CoE.pdf; See also: Patricia Arnold, "Disciplining domestic regulation: the World Trade Organization and the market for professional services," *Accounting, Organizations and Society*, 30: 4, May 2005; Andrew Cornford, "The WTO Negotiations on Financial Services: Current Issues and Future Directions," UNCTAD Discussion Paper 172, June 2004; Panagiotis Delimatsis, "Don't gamble with GATS - The interaction between Articles VI, XVI, XVII, and XVIII GATS in the light of the US - 'Gambling' case," *Journal of World Trade Law*, December 2006; Bart de Meester, "The Global Financial Crisis and Government Support for Banks: What Role for GATS?" Leuven Center for Global Governance Studies, Working Paper 32, December 2009; Jayati Ghosh, "The WTO as Barrier to Financial Regulation," NETWORK Ideas, February 2010; Ellen Gould, "The Draft GATS Domestic Regulation Disciplines – Potential Conflicts with Developing Country Regulations," South Center Analytical Note SC/AN/TDP/SV/12, October 2009; Markus Krajewski, *National Regulation and Trade Liberalization in Services*, (The Hague: Klewer Law International, 2003); Petros Mavroidis, "Highway XVI re-visited: the road from non-discrimination to market access in GATS," *World Trade Review,* 6:1, 2007; Federico Ortino, "Treaty Interpretation and the WTO Appellate Body Report in US-Gambling: A Critique," *Journal of International Economic Law,* January 2006; Chakravarthi Raghavan, "Financial Services, the WTO and Initiatives for Global Reform," Intergovernmental Group of 24, August 2009, at 21.Available at: http://www.g24.org/cr0909.pdf; Robert Stumberg, Briefing Memo for Kay Wilkie on WPDR third draft on domestic regulation, May 28, 2007; Myriam Vander Stichele, "Trade, the WTO and Financial Crisis: Reinforcing Failures," Transnational Institute, November 2008; Erich Vranes, "The WTO and Regulatory Freedom," *Journal of International Economic Law,* 12:4, 2009; and Nicola Yeates, "The General Agreement on Trade in Services: What's in it for social security?," *International Social Security Review*, 58: 1: 3-22, 2005.
[26] Commission of Experts of the President of the UN General Assembly on Reforms of the International Monetary and Financial System, September 2009 Report, at 38-39. Available at: http://www.un.org/ga/econcrisissummit/docs/FinalReport_CoE.pdf.
[27] Ibid, at 104.
[28] Federal Rule of Evidence 702, and Advisory Committee Notes. Available at: http://federalevidence.com/advisory-committee-notes#Rule702
[29] Sydney Key. *The Doha Round and Financial Services Negotiations* (AEI Press, 2003).
[30] Eric Leroux, "Trade in Financial Services under the World Trade Organization," *Journal of World Trade,* 36:3, 2002.
[31] Steven Jarreau, "Interpreting the General Agreement on Trade in Services," *North Carolina Journal* of Law *& Technology*, 1999.
[32] "WTO - Trade in Services," Edited by Rüdiger Wolfrum, Peter-Tobias Stoll and Clemens Feinäugle, Max Planck Commentaries on World Trade Law, Volume 6, (Koninklijke Brill N.V., Leiden, 2008). This volume contains short entries by a variety of scholars, including Armin von Bogdandy and Joseph Windsor (who the Secretariat cite, and whom wrote the first three quotes), and by Marion Panizzon and Benedict F. Christ, who wrote the last two quotes.
[33] Deborah Siegel, "Legal Aspects Of The IMF/WTO Relationship: The Fund's Articles of Agreement and the WTO Agreements," *American Journal of International Law,* July 2002.
[34] "Panama to accuse Ecuador of discriminatory trade practices before WTO," BBC, Sept. 18, 2009; "Panamá protegerá sus servicios internacionales y financieros," *Xinhua Spanish,* Aug. 6, 2009. Available at: http://spanish.peopledaily.com.cn/31617/6720014.html; Council for Trade in Services, "Report of the Meeting Held on 9 July 2001," WTO S/C/M/54, Released Aug. 27, 2001.
[35] One of the top such lobbyists recounts the push going back to the 1970s. See Harry Freeman, "The Role of Constituents in U.S. Policy Development Towards Trade in Financial Services," in Alan Deardoff and Robert Stern, *Constituent Interests and U.S. Trade Policy*, (Ann Arbor: University of Michigan, 1999).