

No Meaningful Safeguards for Prudential Measures in World Trade Organization's Financial Service Deregulation Agreements



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Executive Summary

This report's first section examines the existing financial services deregulation requirements of the World Trade Organization (WTO), and the proposed expansion of these through the "Doha Round" of trade talks. Just some of the WTO limitations many governments have placed on their financial regulatory policies are:

- A "standstill" on financial regulation of sectors already committed to WTO jurisdiction, so countries risk WTO challenges if they reregulate elements of the financial industry.
- A ban on policies that limit the size of financial institutions (aimed at dealing with the too big to fail problem), regardless of whether such rules apply equally to domestic and foreign firms.
- Foreign firms must be allowed to offer any new financial product or services – no matter how risky – limiting the ability of countries to keep out harmful products, such as the credit default swaps and collateralized debt obligations that fueled the current financial crisis.
- Government aid to the financial industry cannot favor domestic over foreign companies – even inadvertently.

When the WTO's financial services provisions were negotiated and implemented in the 1990s, there was a prevailing consensus that the shift towards expansive deregulation would be permanent. This consensus has been all but swept away after the 2007-09 financial meltdown, but the binding WTO obligations remain. Many members of Congress and legislators in other nations now grappling with how to best reregulate the financial sector remain largely unaware that these WTO rules require countries to maintain the very financial sector policies that led to the crisis and could pose impediments to effective reregulation.

As this significant problem has begun to bubble to the surface – in the Stiglitz Commission report, in a G-24 paper, and in various analysis from consumer and development organizations – WTO defenders have tried to shut down the needed review and renegotiation of these WTO provisions. First, they claimed that the WTO does not require deregulation, only "liberalization." Then, faced with the plain deregulatory language of the actual WTO provisions, they switched their defensive argument to focus on a provision on "domestic regulation" of financial services, sometimes (disingenuously) called the "prudential exception" or "prudential carve-out." However, as this paper shows, this provision offers no safe harbor for financial safety measures – in that it contains a self-cancelling loophole. Unfortunately, similar restrictions on countries' financial service prudential regulation were placed by the Bush administration in nine current and three pending trade and investment agreements – most of which additionally provide private foreign investors with standing to challenge governments' financial stability measures before foreign tribunals to claim cash compensation.

We conclude with some suggested changes to the current WTO provisions, so that financial stability proposals could be truly protected from challenge under trade and investment pacts.

Financial Deregulation Required by Existing WTO Rules and “Doha Round” Proposals

Foreclosed homes. Lost jobs. Collapsing banks. The greatest government involvement in the economy in generations. While these headlines dominate the news, one of the root causes of this crisis has largely been ignored: over the last several decades, the U.S. government and corporations have pushed extreme financial deregulation worldwide using “trade” agreements and international agencies.

The WTO oversees 17 commercial agreements and has locked in domestically and exported internationally a model of extreme financial service deregulation. While many people still assume our trade pacts are about traditional matters, such as tariff cuts, in fact, the WTO requires signatory countries – including the United States – to conform their domestic policies to an expansive *non-trade* deregulatory agenda.

And, contrary to claims by defenders of the WTO, there is no WTO exception that provides a safe harbor for provisions related to “prudential” measures, i.e. those aimed at safeguarding the stability of the financial system. The recent ruling in the “Fireman’s Fund” case under the North American Free Trade Agreement (NAFTA) (explored in more detail below) unfortunately demonstrated how a tribunal interpreting even NAFTA’s more meaningful financial regulatory safeguards can impose its own interpretation of what is considered a prudential matter over a government’s judgment.

The WTO’s General Agreement on Trade in Services (GATS) and several related texts house particularly expansive financial services deregulation requirements. The related texts include the GATS Annexes on Financial Services, the Second and Fifth Protocols to the GATS, the Understanding on Commitments in Financial Services, and countries’ GATS schedules of financial services commitments.¹ Although the specific negotiations around most of these financial services provisions occurred after Congress’ 1994 vote on the Uruguay Round negotiations that established the WTO, the later WTO financial services package was never brought to Congress for a vote.

The *binding* terms of these WTO pacts are the exact opposite of the *non-binding* terms of various international accords between banking, securities and insurance supervisors, which attempt (however imperfectly) to create a global regulatory floor. Rather, **the WTO financial service rules constitute a global regulatory ceiling**. The WTO includes a dispute settlement system with foreign trade tribunals empowered to instruct the United States and other nations to eliminate WTO-forbidden financial service regulations, with trade sanctions authorized for failure to comply. To date, WTO tribunals have ruled against the domestic policy in question in nearly 90 percent of the cases brought before them.² Not surprisingly, the WTO financial services agenda – an unusually potent system of international rules – was pushed by the top financial institutions that stood to make short-term gains from deregulation, including AIG and Citigroup.³

Despite the little-known history of the WTO financial services negotiations, some analysts and groups are starting to take note of its requirements. The United Nations Commission of Experts on Reforms of the International Monetary and Financial System, chaired by Nobel Prize winner Joseph Stiglitz, has said: “The framework of financial market liberalization under the Financial

Services Agreement of the WTO may serve to restrict the ability of governments to change the regulatory structure in ways which support financial stability, economic growth, and the welfare of vulnerable consumers and investors.”⁴ Americans for Financial Reform – the umbrella organization for consumer and labor groups advocating U.S. reregulation – has said “existing and prospective pacts that contain deregulatory obligations and constraints on oversight must be renegotiated so that policymakers can implement the consensus call to address the crisis in the manner they see fit without the threat of trade suits.”⁵

This growing public awareness – about trade agreement constraints on reregulation generally and the WTO’s financial service deregulation terms specifically – has worried some who pushed that system in the first instance and support its expansion. First, they understand the political liability of more people understanding that the already beleaguered WTO expansion negotiations, called the WTO “Doha Round,” includes *further* financial deregulation as a key agenda item. Second, to date, the WTO financial service deregulation dictates, which went into effect for over 100 nations in 1999 (following implementation of the final financial services terms), have largely escaped attention, and thus calls for reform have not yet included changes to WTO rules.

As a result, those on the defensive have now begun to make misleading arguments that the WTO rules do not require financial service deregulation. First they claimed that WTO rules do not require deregulation, but only “liberalization” or “market access.” However, even a superficial review of the actual texts in question shows that is patently false. Thus, the latest line of argument is that a provision entitled “Domestic Regulation” in the GATS Annex on Financial Services “carves out” all financial service prudential regulations from coverage by the WTO’s deregulatory requirements. WTO defenders claim that this provision, which they sometimes (disingenuously) call a “prudential exception” or “prudential carve-out,”⁶ allows WTO countries to maintain – or implement new – policies to regulate financial services. Yet, a closer look at the actual language in the GATS Annex’s Article 2(a) shows that the provision – which applies to all 153 WTO signatory governments – provides no safe harbor from WTO challenge of financial stability measures:

*“2. Domestic Regulation: (a) Notwithstanding any other provisions of the Agreement, a Member shall not be prevented from taking measures for prudential reasons, including for the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by a financial service supplier, or to ensure the integrity and stability of the financial system. **Where such measures do not conform with the provisions of the Agreement, they shall not be used as a means of avoiding the Member’s commitments or obligations under the Agreement**”* [emphasis added].

As the second sentence makes clear, the provision may only be used to defend regulatory policies *if* such policies do not undermine the commitments and obligations established through the other WTO rules. This effectively eviscerates the use of the provision to protect domestic regulatory policies that a country may have in place or may newly implement from WTO challenge. That is to say, country A’s policy would only be challenged by country B if B thought that it was losing out commercially – because A’s policy was undermining A’s obligations and commitments. (Indeed, a true “carve-out” would have excluded prudential measures from WTO coverage altogether.)

And, the constraints on WTO signatory countries' financial service sector regulations are expansive and onerous:⁷

- **No limits on size:** The GATS Market Access rules (contained in Article XVI(2) of the GATS text) prohibit government policies that limit the size or total number of financial service suppliers in covered sectors.⁸ This ban applies absolutely. If a country has signed up its financial services to meet these rules – and the United States did for a broad swath of them – then that country simply may not maintain or enact such size-limiting policies, even if they apply equally to domestic and foreign firms. This is one of the clearest examples of how the WTO rules implement a broad domestic deregulation agenda rather than applying only to how *trade* in services may be regulated. These WTO rules ban limits on the value of service transactions, number of service operations, or number of employees – and requirements that services be provided by specific types of legal entity, like a branch or non-profit agency. This GATS obligation – which binds most WTO member countries with respect to financial services – could make it difficult to solve the “too big to fail” problem identified by such economists as former IMF chief economist Simon Johnson.⁹
- **No bans on risky activities:** Under the above-cited market access rules, a country *may not ban a highly risky financial service* in a sector (i.e. banking, insurance, or other financial services) once it has been committed to meet GATS rules. A WTO tribunal has already established the precedent of this rule’s strict application: the U.S. Internet gambling ban – which prohibited both U.S. *and* foreign gambling companies from offering online gambling to U.S. consumers – was found to be a “zero quota” and thus violate GATS market access requirements.¹⁰
- **Top-down coverage of certain financial services:** The dictate to deregulate and the limits on reregulation are even more extreme for the 33 countries that agreed to additionally adopt the WTO Understanding on Commitments in Financial Services.¹¹ This text established further deregulation obligations. While most WTO countries are only responsible for complying with GATS constraints with respect to the financial service sectors they have explicitly listed in their schedule of specific commitments, countries adopting the Understanding additionally agree to so-called “top-down” commitments in certain sectors. (Top-down means service sectors are default fully covered by all of the agreement’s obligations and constraints *unless* a country specifically schedules limits to them. This is the opposite of the “bottom-up” approach that WTO signatory countries otherwise used for binding other service sectors to coverage of the GATS market access and national treatment rules, where only the sectors that countries affirmatively list are bound to comply with those rules.) For the nations that adopted the Understanding – which also include Nigeria, Sri Lanka, Turkey and most of the developed countries – there is an absolute requirement to allow financial service providers to establish a commercial presence (i.e. set up operations in your country) in all financial service sectors under the privileged terms of the market access rules (for instance, the host country may apply no limits on size unless it scheduled such an exception, which the United States did not). These countries additionally agreed on a top-down basis to allow a significant

list of financial services to be traded across borders – even when such cross-border service flows pose additional regulatory concerns.¹²

- **Standstill on new regulation:** For countries that signed on to the Understanding, there is also a freeze on new regulations in covered financial service sectors that conflict with the various regulatory constraints otherwise established in the WTO texts. This so-called “standstill” provision is contained in the Understanding’s Article (A), and reads: “*Any conditions, limitations and qualifications to the commitments noted below shall be limited to existing non-conforming measures.*” The effect of this provision is to lock countries into the level of deregulation they agreed to in the 1990s. There is a vast array of reregulation proposals that might run afoul of this provision, which was drafted when most rich countries were rapidly deregulating their financial sectors. The current crisis proves that this deregulatory push was severely misguided, as was its lock-in through binding trade pacts like the WTO.
- **No bans on new financial service products:** The Understanding’s Article B(7) also obliges the United States and the other 32 countries that adopted it to ensure that foreign financial service suppliers are permitted “to offer in its territory any new financial service.” This is a direct conflict with the various proposals to limit various risky investment instruments, such as certain types of derivatives.
- **Competitive deregulation of even policies that apply to domestic and foreign firms alike:** There is also an obligation in the Understanding to “*endeavour to remove or to limit any significant adverse effects on financial service suppliers of any other Member of: non-discriminatory measures that prevent financial service suppliers from offering in the Member’s territory, in the form determined by the Member, all the financial services permitted by the Member; non-discriminatory measures that limit the expansion of the activities of financial service suppliers into the entire territory of the Member; measures of a Member, when such a Member applies the same measures to the supply of both banking and securities services, and a financial service supplier of any other Member concentrates its activities in the provision of securities services; and other measures that, although respecting the provisions of the Agreement, affect adversely the ability of financial service suppliers of any other Member to operate, compete or enter the Member’s market...*¹³ Meanwhile, all WTO members may be required to show that (among other limits) their service sector regulations are “not more burdensome than necessary to ensure the quality of the service,” and are “objective,” “reasonable,” and “relevant.” The obligations are contained in the Understanding’s Articles 10 and 11 and in GATS Article VI.¹⁴ That is to say that a WTO signatory country may challenge another’s service sector regulations as failing to meet these criteria, and then a WTO tribunal would make the subjective decisions about the reasonableness and relevance of the challenged countries’ laws. One aspect of the Doha Round service sector negotiations is to adopt a new agreement on “Disciplines on Domestic Regulation” that would amplify the existing Article VI(4) text with more specific constraints on service sector regulation. These rules affect even those regulations that apply equally to domestic and foreign firms. Such provisions could pose severe problems for attempts to restore financial stability.

To make matters worse, while the November 2008 and April 2009 G-20 Summit declarations have called for financial reregulation on the one hand, on the other, they have simultaneously called for completion of the WTO Doha Round¹⁵ – one plank of which is *further* deregulation.¹⁶ Among the specific Doha Round proposals that would further financial services deregulation:

- **WTO countries are under pressure to submit additional financial sectors to the GATS market access rules.**¹⁷
- **“[I]ncreased use of the Understanding by Members as a minimum standard for liberalization.”**¹⁸ This would mean more countries would be required to allow in all new risky financial products and services of foreign firms, and also to allow establishment of foreign firms operations within their countries, unconstrained by size-limiting regulations, along with all of the Understanding’s other deregulatory terms noted above.
- **New global limits on regulations of the accountancy sector.** If the Doha Round were concluded, one of the texts that would be *automatically* implemented as part of it is new “disciplines” to restrict non-discriminatory regulations in the accounting sector. These disciplines, which the infamous Arthur Andersen firm helped formulate,¹⁹ will restrict accounting regulations to what WTO tribunals judge “necessary,” putting pressure on governments to deregulate as much as possible.
- **“Standstill on certain non-discriminatory measures.”**²⁰
- **“Improved ability to sell products to locals or provide services from offshore; greater flexibility in the number and types of products which can be offered,”**²¹ which could undermine policies aimed at keeping toxic financial products offered elsewhere out of domestic markets. It could also undermine measures aimed at countering financial transfers with tax haven countries.
- **Elimination of differences in regulatory structure between state, local and federal governments.**²² In countries where subfederal regulations are stronger than federal regulation, such downward harmonization can reduce financial stability.

As a sign-on letter to President Obama in advance of the G-20 Pittsburgh Summit noted: “rather than calling for completion of the current Doha Round agenda (as they did in November and April), the leaders of the G-20 countries must agree to review and repair the existing WTO limits on financial service regulation and devise a future WTO negotiating agenda that takes into consideration the harsh lessons of the crisis.” The letter was signed by Americans for Financial Reform and 50 other groups representing over eight million Americans.²³

The trade-pact threat to financial reregulation is not merely a hypothetical problem. The *Wall Street Journal* reports that the U.S. and UK governments may be lobbying against other European countries’ proposed non-discriminatory leverage restrictions for hedge funds, with UK officials

calling the proposal a “form of protectionism.”²⁴ Such lobbying, and the Obama administration’s instruction to U.S. regulators that they “should also consider the implications of [certain regulatory] determinations for international agreements negotiated by the executive branch,” may well be referencing the onerous WTO requirements.²⁵

The mere existence of such an expansive, binding, radical deregulation regime is exactly contrary to the intentions and needs of countries seeking to reregulate. Moreover, the recent wave of controversies with respect to the WTO compatibility of U.S. climate, tobacco, food safety and stimulus bills – where Congress was pressured to back off of public-interest reforms – shows the harmful chilling effect that can occur when mere threats of WTO litigation are made.²⁶ In these cases, Wall Street and other corporate interests have been able to equate additional legislative checks on their behavior (which may run afoul of certain *non-trade* provisions of the WTO) with sparking a “trade war.” Various newspaper editorial boards have eagerly echoed this theme. Foreign governments have jumped on the bandwagon of using impending “trade war” warnings to attack domestic regulatory policies when this furthers their commercial interests. Clearly, the cause of restoring economic stability and prosperity would be better served by more adequately segregating trade and non-trade regulatory concerns, which corporate interests tend to conflate – both out of self-interest, and unfortunately also because our current global architecture gives them an intellectual foundation for doing so.

The GATS Annex “Domestic Regulation” Provision Provides No Meaningful Safeguard for Prudential Measures

The George H.W. Bush administration – in partnership with other developed country governments – constructed the first drafts of the WTO’s GATS, including the early versions of controversial provisions such as the “Domestic Regulation” restriction in the Annex on Financial Services.²⁷ These texts served as the basis for the so-called 1991 “Dunkel Draft” of the 1986-94 Uruguay Round General Agreement on Tariffs and Trade (GATT) negotiations, which ultimately led to establishment of the WTO. (The 1991 draft was named for its author, GATT Director-General and Swiss diplomat Arthur Dunkel.)²⁸

The Reagan and Clinton administrations also played important roles in establishing the current WTO financial service deregulation rules. In a sense, if the Reagan administration was the land prospector and clear-cutter for the GATS and its financial services deregulation focus, then the Bush I administration was its architect, and the Clinton administration was its builder, buyer, seller, real estate agent and interior decorator. (And the Bush II administration picked up where Clinton left off.) Thus, the Bush I administration and its contemporaries can be blamed for conceiving of such controversial WTO financial services provisions as the deregulation requirements applying to non-discriminatory measures included in the “market access” provisions, the self-cancelling provisions that fail to safeguard domestic prudential measures, and the extreme deregulation required under the Understanding on Commitments in Financial Services. However, the United States would not have been bound to these constraints without the work of Clinton administration officials such as Timothy Geithner, Larry Summers and Robert Rubin.²⁹

(The GATS part of these rules were finalized in 1993-95 and adopted after a major Clinton administration-led campaign to secure congressional passage of the Uruguay Round. Most of the specific financial services obligations were negotiated thereafter through the Fifth Protocol to the GATS. This text is sometimes called the Financial Services Agreement (FSA). It was finalized only in 1997 and went into effect in 1999, after the Clinton administration pressured other countries to sign on. Stunningly, the Clinton administration signed the United States to comply with the whole 1997 package without seeking congressional approval – thus binding Congress to an array of WTO financial service deregulation requirements not contemplated when the Uruguay Round was approved in 1994.)

Because pre-crisis, the global trend has been towards continual financial service deregulation, to date there has been no WTO dispute settlement case involving the GATS financial services terms. Thus, there is a high degree of uncertainty about the meaning and effectiveness of the Annex on Financial Services provision on domestic regulation, where the last sentence appears to cancel out the first. The most recent scholarly explication of this “self-cancelling” problem can be found in a paper prepared for the G-24.³⁰ Ultimately, the decision about if and when a country would be

permitted to defend a challenged prudential measure through use of this provision would be left to a specific WTO tribunal applying the measure in a specific case. However, the provision's negotiating history, comparative law analysis, and pronouncements by academics and financial service professionals about the provision provide some illumination. A review of these materials reveals several conclusions:

1. **There were several alternative proposals for a WTO financial services prudential exception that would have more fully protected financial stability policies, but these were rejected in favor of the actual WTO language.** In June 1990, Felipe Jaramillo, the Colombian diplomat in charge of the Uruguay Round services negotiations, proposed five options for a carve-out provision that could protect countries' financial stability measures. Each of these options would have entailed more policy space than what the United States and other developed country governments desired and eventually obtained in the WTO text. The options "ranged from narrow to broad in scope. The first option provided for a prudential carve-out limited to a qualified national treatment provision. The second option was broader, permitting all 'reasonable' prudential and fiduciary measures. Option three was a variation of option two, enumerating examples of permissible measures. Option four provided for an unqualified right to take such measures. Option five aimed at defining as precisely as possible the prudential actions that would be permitted, so as to reduce legal uncertainties."³¹ Moreover, Malaysia and other Asian nations made a proposal at the time that "measures taken for prudential reasons should not be subject to any dispute settlement procedure."³² Instead, the text that was ultimately included in the GATS only covers those prudential measures that do not impair any GATS obligations, including market access. Again, given the expansiveness of the WTO financial service obligations, it is hard to imagine a prudential policy that would be clearly safeguarded by the provision.
2. **While analysts disagree about how the GATS Annex provision on domestic regulation would operate if triggered, they all agree that the provision is confusing and that a WTO tribunal would have the final say.** An extensive literature review of articles written by academics and practitioners over more than a decade yielded almost complete unanimity across many different political perspectives that WTO tribunals will ultimately determine what the WTO provisions limiting financial service regulation mean and how and when the provision specifically covering prudential measure can be used – or not.³³ As noted, because WTO tribunals issue binding rulings against U.S. and other countries' challenged policies (including public interest measures) in nearly 90 percent of the cases, it is a truly worrying proposition that such tribunals will have the final say in deciding when and if countries may maintain financial stability measures (when such policies conflict with the expansive limits on regulation contained in the WTO texts).

3. **Many policies that countries apply for prudential reasons may not be considered prudential by other countries or by WTO panels.** The types of financial service regulations that have been considered “prudential” range from minimum capital requirements for depository institutions, to leverage restrictions, to various consumer protection policies, and beyond. In the Uruguay Round debates, Mexico, India and many other developing countries’ representatives stated that infant industry protection applied to promote the development of domestic financial sectors should be considered prudential in nature.³⁴ Many countries’ governments consider restrictions on capital inflows and outflows – both in crisis and non-crisis times – to be prudential in nature.³⁵ In the current re-regulation debate, there are far-ranging proposals for enhanced consumer protection measures, including the notion of adopting a precautionary principle approach for new financial instruments (i.e. the burden of proof is on the creator of a new financial product to show it is safe and useful to society and thus should be approved by government regulators). The UK’s top financial regulator advocated a variation on this theme, for instance.³⁶ Indeed, economists across the political spectrum – from the Keynesian Hyman Minsky to the former Federal Reserve economist John Boyd, a self described “laissez faire” economist – have advocated a variety of regulatory interventions to keep banks small and oriented towards community lending.³⁷

How a WTO panel would rule on a challenge to such measures is unclear, but many governments and corporations have let it be known that they favor sharp limitations on which policies should be considered prudential.³⁸ Indeed, some pro-GATS scholars suggest that WTO panels should limit the definition of prudential measures to Basel II-type requirements.³⁹ (Basel II refers to an agreement reached by central bankers from developed nations – under substantial industry influence – in 2004, which includes highly flawed notions of bank capital adequacy based on banks’ own “internal risk models.”⁴⁰) The opening for such a low road approach provided by the mere presence of WTO-GATS-style “disciplines” on domestic regulation can encourage a race to the bottom and lowest common denominator regulation.

4. **Arguments that “diplomatic restraint” will prevail are overstated.** Another of the arguments behind the claim that the WTO financial service provisions do not eliminate countries’ prudential policy space is that, as a former U.S. regulator noted, only governments can bring WTO cases.⁴¹ That is to say, governments would operate under some sort of diplomatic screening process that would result in certain fights not being picked because a government would take into consideration that an attack on another country’s prudential regulation could later boomerang into an attack on that country’s own policies. This is a highly debatable notion, as most recently demonstrated with Panama’s announcement that a major plank in its effort to be removed from tax haven watch lists is to launch WTO cases against countries that put them on such lists.⁴² (Panama has previously commented in WTO sessions

that countries that place limits on the financial service transactions of countries deemed tax havens are violating WTO rules.)⁴³ Some countries' whose economies are highly dependent on tax havens have taken deep commitments under the Understanding (such as Aruba, Liechtenstein, the Netherland Antilles and Switzerland). Such countries may be open to arguments that they have little to lose and lots to gain from launching a WTO challenge (as apparently Antigua was in regards to the Internet gambling case cited above).

5. **The self-cancelling provision on domestic regulation was incorporated into nine recent bilateral trade and investment pacts (and three pending pacts). In most of these, private corporations can directly sue governments for prudential measures.** The GATS' Annex on Financial Services provision on domestic regulation provided the basis for the 2004 Model U.S. Bilateral Investment Treaty's (BIT) provision on prudential regulation,⁴⁴ which was contained in BITs with Rwanda and Uruguay.⁴⁵ Similar language was also contained in U.S. "Free Trade Agreements" (FTAs) with Australia,⁴⁶ Bahrain,⁴⁷ Central America,⁴⁸ Chile,⁴⁹ Morocco,⁵⁰ Oman,⁵¹ Singapore,⁵² and agreements signed by President George W. Bush but not approved by Congress with Colombia,⁵³ Korea,⁵⁴ and Panama.⁵⁵ Many of these deals allow not only governments, but also private investors, to bring cases against prudential measures. Under these FTA "investor-state" enforcement provisions, foreign investors can directly demand cash compensation from governments in foreign tribunals – in addition to the pacts being enforceable by government-to-government dispute settlement tribunals.

Several scholars have argued that such provisions are "in the short term, more likely than any other area of international economic law to give rise to complaint and initiation of legal action" against financial rescue measures.⁵⁶ The record shows that private enforcement of these pacts by foreign investors can have a harmful chilling effect on countries' public interest policies.⁵⁷ The GATS Annex on Financial Services provision on domestic regulation has not been tested under the above listed pacts. But Argentina invoked a broadly comparable provision known as the "essential security exception" when corporations such as Enron brought cases against its financial rescue measures under the U.S.-Argentina BIT. Yet, in 100 percent of these cases, tribunalists ruled that *they*, not Argentina, must be the judges of whether the exception constituted a defense against investors' challenges of financial stability measures.⁵⁸ Not only do these cases make clear that it is foreign tribunals, not domestic governments, that are empowered to decide when a particular financial stability measure is indeed prudential, but in these cases the tribunals fully or partially rejected the government's defense, and required the government to pay compensation nearing half a billion dollars.⁵⁹

6. **Even NAFTA's broader prudential exception was deemed subject to challenge: Fireman's Fund case.** The North American Free Trade Agreement (NAFTA) – which was negotiated by the Bush I administration and signed by the Clinton administration – contains

language on financial service prudential measures that is more expansive than that contained in the WTO. In particular, the NAFTA provision does not include the self-canceling language.⁶⁰ In 1993 congressional hearings on the NAFTA financial services chapter, the NAFTA prudential exception received the unanimous support of the federal and state financial regulators called to testify. (That NAFTA financial service hearing was much more substantive than any hearing that was conducted on the GATS with respect to protection of U.S. prudential measures.) As a representative from the Texas Board of Insurance testified at the NAFTA hearing: “I believe that government regulation of financial services is a complex and difficult process... Improvements in our regulatory systems must continue to be made. Consequently, the ability to simply reserve existing consumer protection, financial soundness, and solvency measures is not in my view sufficient to protect the public. I believe that State and Federal authority to adopt new, reasonable measures must be preserved. I further believe that the NAFTA prudential exception for financial services does this.”⁶¹

Yet in the NAFTA “Fireman’s Fund” challenge of a financial stability measure, a tribunal ruled that even this more robust exception would not necessarily be sufficient to protect a NAFTA signatory country’s prudential measure. The target of the challenge was a series of measures related to Mexico’s bailout of its financial sector: Mexico deemed these “prudential” in nature, while Fireman’s Fund claimed they constituted an indirect expropriation (among other violations) requiring compensation under NAFTA. The tribunal cited writings by the U.S. Treasury Department official who negotiated the NAFTA financial services chapter as support for the conclusion that investors can challenge prudential measures as expropriations, and that tribunals in investor-state cases can decide *whether* challenged measures qualify for the prudential exception. That is to say that even under the more expansive NAFTA language the tribunals, not the governments, get to determine whether a measure is deemed prudential.⁶²

Notably, the “U.S. investor” in this case (Fireman’s Fund Insurance Company) was in fact a subsidiary of a German company (Allianz) who also had a Mexican subsidiary (Allianz Mexico). Of course, a German or Mexican investor would not have been able to bring a NAFTA investor-state case against the Mexican government because of complications arising from prudential measures applied to their Mexican investment. But the U.S. subsidiary *did* have such standing. Thus, this case also illustrates how – under current trade agreements – global corporate structures can be used to launch challenges against prudential measures that would not otherwise be possible.⁶³

7. **Congress has not had meaningful input on the WTO financial services provisions.** Few in Congress are even aware that these WTO provisions limiting U.S. financial stability measures exist, nor that over 100 countries around the world remain bound to WTO rules that require them to maintain the policies that contributed to the current crisis and limit their ability

to reregulate.⁶⁴ And, there has been virtually no meaningful scrutiny of how and if the WTO's GATS Annex on Financial Services provision on domestic regulation would function. Congress did not have a vote to approve or otherwise formally adopt the 1997 outcome of the later round of WTO financial services negotiations. The 1994 vote on the core WTO agreement, which was conducted under the Nixon-era Fast Track rules, provided Congress a limited role in the formation of the agreement's terms. At the time of the WTO vote, even when directly challenged, few members of Congress would even admit to having read the thousands of pages of the pact and its implementing legislation.⁶⁵ In fact, there have been more references in congressional testimony to the Annex on Financial Services provisions in post-meltdown 2009 (when re-regulation is finally on the table) than in the entire previous history of congressional "oversight" on the matter from 1986 to 2008.⁶⁶

Instead, the prevailing Beltway conventional wisdom for over two decades (among the very few who even knew of such matters) was that the financial services provisions of trade pacts impacted only U.S. financial firms' *offensive* interests in foreign markets, rather than the *defensive* interest of sound domestic regulation. For instance, consider the inquiries of current Financial Services Committee Chairman Barney Frank (D-Mass.), who is among the most informed people in the entire country on financial regulation issues. In his subcommittee's 1993 oversight hearings on the topic, the focus was on whether the financial services talks provided sufficient overseas opportunities for U.S. firms. Whether the WTO rules could expose U.S. financial service regulation to attack was not raised. In 2005, after the various financial crises of the late 1990s had spotlighted certain problems, Frank raised a slightly broader range of concerns, saying, "without the insistence on a total abolition of capital controls, I think we have a broad consensus" on financial service provisions in trade pacts. However, the broader question of how WTO financial services rules could undermine U.S. domestic regulation remained off the table. Frank is not only exceptionally well-informed, but also interested in ensuring the financial system is properly regulated. That these issues were not in his sights suggests a broad lack of awareness of this problem, which will now need to be addressed in the context of reregulation.⁶⁷

8. **The WTO limits on financial regulatory policy undermine governments' ability to adapt to changing circumstances through the normal democratic process.** Former Treasury official Barry Newman, who went on to work at Bear Stearns, was unusually candid in his assessment of the benefits of NAFTA-style trade pacts. He told a 1993 congressional hearing on NAFTA financial services provisions that: "future Mexican governments may change, and they may not have the same attitudes of the current government. The benefit of NAFTA is that it will lock into an internationally legally binding and enforceable agreement the kinds of changes that the present government is seeking and that we are strongly encouraging so that it will be very much more difficult for future governments to pull back

from what is now being developed in the context of the NAFTA.”⁶⁸ It would be difficult to find a clearer exposition of the real dangers associated with including legally binding limits on domestic financial service regulation in trade pacts. When the WTO financial services provisions were negotiated and implemented, there was a prevailing consensus that the shift to deregulation would be permanent. This consensus has been all but swept away after the 2007-09 financial meltdown, but the binding trade obligations remain.

9. **Even WTO defenders argue that renegotiation of the GATS rules on domestic prudential regulation of financial services would be useful.** They acknowledge that leaving the definition of acceptable prudential measures up to a WTO panel risks the legitimacy of the entire system. Two such proponents have called for some “clarification of the boundaries of the ‘prudential carve-out,’” and note that “it would be far better (in terms of regulatory legitimacy) for such a clarification to arise from a negotiated understanding among regulators than from a panel ruling (regardless of the degree of financial expertise panelists might have).”⁶⁹ Thus, both WTO critics and defenders share an interest in renegotiating this aspect of U.S. international obligations.

Conclusion and Policy Recommendations

This report had examined the WTO’s existing financial services deregulation requirements, and their proposed expansion through the “Doha Round” of trade talks. We also examined the history and arguments surrounding the GATS Annex on Financial Services Article 2(a), which fails to provide a safeguard for countries’ financial stability measures that may conflict with the WTO’s general deregulatory requirements. We noted that very few individuals in the U.S. or globally are aware of these WTO financial service deregulation requirements and the obstacles they could pose to reregulation globally and at home.

We noted that language similar to this restriction has been inserted into nine current and three pending trade and investment agreements – most of which allow private financial services investors with standing to challenge governments’ financial stability measures for cash compensation. Under NAFTA, a tribunal ruled that its arbitrators – rather than Mexico’s elected government – could decide whether a domestic bailout could be deemed prudential in nature and thus permissible. We also noted that Argentina was denied full use of a somewhat similar “essential security” exception in cases brought by Enron and other corporations under the U.S.-Argentina investment pact, and that the country’s taxpayers have been ordered to pay nearly half a billion dollars to compensate investors for measures enacted in response to a financial meltdown.

At issue is a political question of whether countries now calling for financial reregulation intend to actually reverse the extreme deregulation paradigm implemented by the WTO. The financial interests closely involved in establishing the WTO deregulation regime are keen to avoid real reform at either the national and international levels.

The question of whether governments will commit to the real reforms needed will again come to the forefront at the September G-20 summit in Pittsburgh. The summit Communiqué is expected to once again simultaneously call for reregulation and the completion of the WTO Doha Round (with its further deregulation). It is not possible to have it both ways.

Moreover, failure to remedy the existing WTO financial service deregulation requirements and eliminate further Doha Round financial service deregulation will fuel general public ire against the current terms of globalization generally and the WTO specifically.

As a legal matter, these problems are easy to remedy. For instance, the current WTO provisions that fail to safeguard prudential measures must be revised to ensure that financial stability measures are truly safeguarded from attack at the WTO. The current Article 2(a) of the GATS Annex on Financial Services must be replaced with the following language to ensure that prudential measures are not subject to WTO challenge:

“Domestic Regulation: Notwithstanding any other provisions of the Agreement, a Member shall not be prevented from adopting or maintaining measures relating to financial services it employs for prudential reasons, including for the protection of consumers, investors, depositors, policy holders, or persons to whom a fiduciary duty is owed by a financial services supplier, or to ensure the integrity and stability of the financial system. For greater certainty, if a Party invokes this provision in the context of consultations or an arbitral proceeding initiated under the Dispute Settlement Understanding, the exception shall apply unless the Party initiating a dispute can demonstrate that the measure is not intended to protect consumers, investors, depositors, policy holders, or persons to whom a fiduciary duty is owed by a financial services supplier, or is not intended to ensure the integrity and stability of the financial system.”

Such a measure would allow countries to define for themselves what prudential regulations are required to ensure financial stability, and provide a default in favor of such measures’ sanctity, while also providing a means for countering attempts to abuse such a designation. A similar approach was used to amend the Essential Security exceptions of four FTAs negotiated by the Bush administration.⁷⁰ Similar revisions should be made to other U.S. trade and investment pacts.⁷¹

There are additional steps that must be taken to ensure that financial stability measures are not threatened by WTO rules. First, is “do no further harm”: there should not be further financial service deregulation in any international agreement coming after the hard-learned lessons of the crisis. Practically, this means that the demands and offers on financial services should be taken off the Doha Round negotiating table. There should be a moratorium on financial service commitments for countries now negotiating terms of accession to the WTO, given that the crisis has proven the perils of the extreme deregulation model. Further, the financial service provisions of the pending FTAs with Korea, Panama and Colombia must be renegotiated.

Second, the existing WTO and FTA terms that limit financial reregulation should be renegotiated. This includes elimination of the Understanding on Commitments in Financial Services. Revoking this text would eliminate the most extreme financial deregulation rules that apply to countries like the United States, Nigeria and most developed nations. As well, the deregulatory elements of the GATS market access rules – namely GATS Article XVI(2) – should also be eliminated. Getting rid of this text restores the policy space to address the “too big to fail” problem. Effectively, this change would separate out commitments to provide market access from requirements to simultaneously deregulate such offered sectors.

Third, the new constraints on all service sector domestic regulations now under negotiation in the Doha Round must be jettisoned. Given the brutal lessons the current crisis has provided with respect to the perils of extreme financial service sector deregulation – and the Enron scandal provided with respect to energy service deregulation – the WTO GATS Working Party on Domestic Regulation should simply be shut down and its draft agreement scrapped. There is no excuse for having such a negotiating group, whose remit is to limit domestic regulation at the very time WTO countries are committed to reregulating.

Also, if the Doha Round were concluded, one of the texts that would be automatically implemented is new “disciplines” to restrict non-discriminatory regulations in the accounting sector. These disciplines, which the infamous Arthur Andersen firm helped formulate, will restrict accounting regulations to what WTO tribunals judge “necessary,” putting pressure on governments to deregulate as much as possible. This text should be scrapped.

Finally, unless the changes noted above to the WTO financial service terms are implemented, WTO signatory countries should agree to a period during which existing WTO financial services commitments may be withdrawn without being required to negotiate terms of compensation, according to normal WTO rules. Either the deregulatory aspects of the WTO financial service terms must be remedied through multilateral negotiations as part of the global reregulation effort, or countries must be allowed to safeguard their domestic reregulation efforts by withdrawing from WTO commitments that undermine such efforts.

For More Information on WTO Service-Sector Regulatory Constraints and Which U.S. Service Sectors Are Implicated: Please contact Public Citizen’s Global Trade Watch at 202-546-4996. You can also visit our website TradeWatch.Org, where you will find a database detailing the U.S. WTO service-sector commitments, along with background materials describing the GATS rules and how to read the WTO schedules, fact sheets detailing how these rules affect regulation of an array of service sectors and more.

ENDNOTES

¹ Texts of these instruments can be found at: http://www.wto.org/english/docs_e/legal_e/legal_e.htm.

² See Public Citizen's dispute settlement tally at: <http://www.citizen.org/documents/WTODisputesSummaryOnePagerwtables.pdf>.

³ 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).

⁴ Preliminary Draft of the Full Report of the Commission of Experts of the President of the UN General Assembly on Reforms of the International Monetary and Financial System, May 21, 2009, available at <http://www.un.org/ga/president/63/interactive/financialcrisis/PreliminaryReport210509.pdf>, at 55.

⁵ See Americans for Financial Reform, "Global Issues Paper, June 2009. Available at: <http://ourfinancialsecurity.org/issues/working-in-the-international-system/>

⁶ For instance, in March 2009 testimony to the House Foreign Affairs Committee, Phil Levy of the American Enterprise Institute said: "If I may beg your indulgence for one point, and this is on the repeated attacks on the financial services agreement. Let me just note that the WTO financial services agreement has an unusually strong carve-out for prudential regulation. Now this can be done for all manner of excuses, including to ensure the integrity and stability of the financial system, regardless of any other provisions of the GATS, and that is the General Agreement on Trade and Services, and I am citing paragraph two there. And so I know that time is short, and I won't beg further, but I wanted to put that on the record." (<http://www.internationalrelations.house.gov/111/48001.pdf>) Also, WTO Director-General Pascal Lamy, in an April 29, 2009 letter, said, "Opening trade does not equate deregulation. The WTO Doha Round does not include further financial services deregulation. Opening markets merely means that you would allow foreign providers of financial services to operate in your country playing by the same rules as your domestic providers... Nothing in the WTO Financial Services agreement prevents governments from taking any action to protect the sanctity of its financial system. Article 2 of the Financial Services Annex to the GATS is clear on this: '2. Domestic Regulation: (a) Notwithstanding any other provisions of the Agreement, a Member shall not be prevented from taking measures for prudential reasons, including for the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by a financial service supplier, or to ensure the integrity and stability of the financial system.' It is therefore up to each WTO member to decide the level of domestic regulation that it wants the operators in its market to respect, whether they are national or foreign operators. Nothing in the WTO rules prevent a member from doing so."

⁷ Note: The following relate to the general and specific obligations of the GATS and associated texts. A given country's obligations can only be determined by looking at their specific commitments, and any relevant reservations that they took.

⁸ GATS Article XVI(2) reads: "In sectors where market-access commitments are undertaken, the measures which a Member shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule, are defined as: (a) limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test; (b) limitations on the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test; (c) limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test; (d) limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test; (e) measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service; and (f) limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment." As legal studies have argued, policies that restrict individual firms are not clearly excluded from coverage by several of the XVI(2) disciplines. See Markus Krajewski, *National Regulation and Trade Liberalization in Services*, (The Hague: Klewer Law International, 2003), at 90-91

⁹ Johnson says, "too big to fail is too big to exist." See <http://baselinescenario.com/2009/04/09/what-next-for-banks/>

¹⁰ "United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services - AB-2005-1 - Report of the Appellate Body," WTO Document WT/DS285/AB/R, July 4, 2005, at 88.

¹¹ Strictly speaking, countries become bound to the Understanding's terms by inscribing some variation on the phrase "Commitments in this subsector are undertaken in accordance with the Understanding on Commitments in Financial Services" into a headnote in their schedule of GATS financial services specific commitments. Countries can adopt the Understanding for "insurance" or "banking and, other financial services" or both.

¹² The Understanding's Article B(5) reads: "Each Member shall grant financial service suppliers of any other Member the right to establish or expand within its territory, including through the acquisition of existing enterprises, a commercial presence." Note that Sri Lanka's commitments under the Understanding are restricted to non-insurance financial services.

¹³ See text at http://www.wto.org/english/docs_e/legal_e/54-ufins_e.htm (This provision is written as an "endeavor to" clause, meaning the obligation is to try to achieve the goal. This stands in sharp contrast to the other obligatory provisions in the Understanding, in which a country is *required* to deregulate or to permit foreign forms to establish a presence. However, this clause is worth noting because it so perfectly embodies the philosophy underlying the entire WTO approach to financial services.)

¹⁴ GATS Article VI(4) instructed the WTO Council for Trade in Services to develop and establish disciplines on non-discriminatory domestic regulations, procedures and requirements. This article specified that these "disciplines shall aim to ensure that such requirements are... not more burdensome than necessary to ensure the quality of the service." The Council's Working Party on Domestic Regulation, in its March 20, 2009 proposed "Disciplines on Domestic Regulation Pursuant to GATS Article VI:4", says that "Measures relating to licensing requirements and procedures, qualification requirements and procedures, and technical standards shall be pre-established, based on objective and transparent criteria and relevant to the supply of the services to which they apply." This text says that members "shall ensure" that licensing

and qualifications procedures “are as simple as possible and do not in themselves constitute a restriction on the supply of services.” The requirements that such measure be “objective,” “relevant” and “reasonable” are repeated throughout.

¹⁵ The November G-20 Summit Communiqué said: “We underscore the critical importance of rejecting protectionism and not turning inward in times of financial uncertainty. In this regard, within the next 12 months, we will refrain from raising new barriers to investment or to trade in goods and services, imposing new export restrictions, or implementing World Trade Organization (WTO) inconsistent measures to stimulate exports. Further, we shall strive to reach agreement this year on modalities that leads to a successful conclusion to the WTO’s Doha Development Agenda with an ambitious and balanced outcome. We instruct our Trade Ministers to achieve this objective and stand ready to assist directly, as necessary.” (See <http://www.nytimes.com/2008/11/16/washington/summit-text.html>). The April G-20 Summit said: “We remain committed to reaching an ambitious and balanced conclusion to the Doha Development Round, which is urgently needed. This could boost the global economy by at least \$150 billion per annum. To achieve this we are committed to building on the progress already made, including with regard to modalities.” (See <http://www.forbes.com/2009/04/02/communique-g20-text-markets-equity-economy.html>)

¹⁶ The other two planks are agricultural and manufacturing liberalization.

¹⁷ But these rules ban countries for maintaining or establishing prohibitions on the total value of services transactions or total number of service operations or assets. This is an absolute ban, which is to say such policies simply are forbidden to exist in a country that has made commitments under these rules. This type of request involves the deregulation of policies designed to limit the size of financial firms (and thus deal with the too big to fail problem), their legal forms, or firewalls between different financial service businesses to limit risk contagion across sectors.

¹⁸ “Communication from Switzerland – GATS 2000: Financial Services,” WTO document S/CSS/W/71, May 4, 2001.

¹⁹ Patricia J. Arnold, “Disciplining domestic regulation: the World Trade Organization and the market for professional services,” *Accounting, Organizations and Society*, 30: 4, May 2005.

²⁰ “Communication from the European Communities and their Member States: GATS 2000: Financial Services,” WTO document S/CSS/W/39, Dec. 22, 2000.

²¹ “Communication from Australia – Negotiating Proposal for Financial Services,” WTO document S/CSS/W/66, March 26, 2001.

²² Different regulations applied by sub-central and local governments on types of operation, ceiling on equities sharing, or other limitations on trade in financial services act as critical barriers to establishing or expanding operations of services suppliers. Therefore, the financial services negotiations should aim at harmonizing different regulations maintained by sub-central and local governments.” See “Communication from the Republic of Korea: Negotiating Proposal for Financial Services,” WTO document S/CSS/W/86, May 11, 2001.

²³ “Groups Urge World Leaders to Change Course on Global Financial Deregulation,” Americans for Financial Reform, Sept. 15, 2009.

Available at: <http://ourfinancialsecurity.org/2009/09/groups-urge-world-leaders-to-change-course-on-global-financial-deregulation/>.

²⁴ Alistair MacDonald, “U.S. Enters Europe’s Fund Debate,” *Wall Street Journal*, July 27, 2009. Available at:

<http://online.wsj.com/article/SB124864567973282125.html>

²⁵ See “Financial Regulatory Reform: A New Foundation,” U.S. Government, July 2009, at 85. Available at:
http://www.financialstability.gov/docs/regs/FinalReport_web.pdf.

²⁶ “Waxman Climate Change Bill Could Violate WTO Rules, Experts Say,” *Inside U.S. Trade*, April 3, 2009; “Indonesia Says U.S. Tobacco Bill Violates WTO Rules, Holds Off On Legal Challenge,” *Inside U.S. Trade*, Aug. 25, 2009; “EU Questions Dingell FDA Draft, Seeks Regulatory Harmonization,” *Inside U.S. Trade*, May 9, 2008; “Industries Clash Over ‘Buy American’ Provisions In Stimulus Package,” *Inside U.S. Trade*, Jan. 20, 2009.

²⁷ For instance, an October 1989 Bush administration document contained the provision “The Parties recognize the right of each Party to regulate within its territories the provision of covered services, including the right of Parties to introduce new measures consistent with this Agreement. Parties shall ensure that such measures are not prepared, adopted or applied, the intent or effect of which is to nullify or impair the obligations of this Agreement. See United States, “Agreement on Trade in Services,” MTN.GNS/W/75, Oct. 17, 1989. A Bush proposal from July 1990 got even closer to the final language (see “Note on the Meeting of 12-13 July 1990,” GATT Document MTN.GNS/FIN/2, Aug. 10, 1990, at 13.)

²⁸ “Dunkel Draft,” GATT Document MTN.TNC/W/FA, Dec. 20, 1991.

²⁹ 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); William Drake and Kalypso Nicolaidis, “Ideas, Interests, and Institutionalization: ‘Trade in Services’ and the Uruguay Round,” *International Organization*, 46: 1, Winter 1992; Chakravarthi Raghavan, “Financial Services, the WTO and Initiatives for Global Financial Reform,” forthcoming; “Statement by Secretary Rubin and Ambassador Barshefsky Regarding the Successful Conclusion of the WTO Financial Services Negotiations,” U.S. Treasury Department Press Release, Dec. 13, 1997.

³⁰ 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>

³¹ Working Group on Financial Services Including Insurance, “Note on the Meeting of 11-13 June 1990,” GATT Document MTN.GNS/FIN/1, July 5, 1990, at 23.

³² “Communication from the Delegation of Malaysia,” GATT Document MTN.GNS/FIN/W/3, Sept. 12, 1990.

³³ See Wendy Dobson and Pierre Jacquet, *Financial Services Liberalization and the WTO*, (Washington, D.C.: Institute for International Economics, 1998), at 77; Sydney J. Key, “Trade Liberalization and Prudential Regulation: The International Framework for Financial Services,” *International Affairs*, 75: 1, January 1999; Pierre Sauvé and James Gillespie “Financial Services and the GATS 2000 Round,” *Brookings-Wharton Papers on Financial Services*, 2000; Kalypso Nicolaidis & Joel P. Trachtman, *From Policed Regulation to Managed Recognition: Mapping the Boundary in GATS*, in GATS 2000: New Directions In Services Trade Liberalization, (Pierre Sauvé & Robert M. Stern, eds., 2000); Eric H. Leroux, “Trade in Financial Services under the World Trade Organization,” *Journal of World Trade*, 36:3, 2002; Joel Trachtman, “Lessons for

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- ³⁴ “Communication from Mexico: Test of the Applicability Of Concepts, Principles And Rules To The Financial Services Sector,” GATT Document MTN.GNS/W/71, Sept. 15, 1989; “Communication from Cameroon, China, Egypt, India, Kenya, Nigeria and Tanzania,” GATT Document MTN.GNS/W/101, May 4, 1990.
- ³⁵ “Communication from Colombia,” GATT Document MTN.TNC/W/67, Feb. 11, 1991, and “Communication from Colombia,” GATT Document MTN.TNC/W/68, Feb. 20, 1991.
- ³⁶ George Packer, “Call to curb London from UK watchdog,” *Financial Times*, Aug. 27, 2009.
- ³⁷ For Minsky’s recommendations, see Hyman P. Minsky, *Stabilizing an Unstable Economy*, (New York: McGraw Hill, 2008), at 355 and 367-368. For Boyd’s remarks, see video of a forum at the Economic Policy Institute from Sept. 9, 2009. Available at: <http://www.epi.org/publications/entry/event20090909/>.
- ³⁸ Aaditya Mattoo, “Financial Services and the World Trade Organization,” World Bank Research Working Paper 2184, September 1999. Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=629174
- ³⁹ 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). See also Bart de Meester, “Testing the European Prudential Conditions for Banking Mergers in the Light of Most Favored Nation in the GATS,” Leuven Centre for Global Governance Studies, Working Paper 10, January 2008; Mamiko Yokoi-Arai, “GATS’ Prudential Carve Out in Financial Services and its Relation with Prudential Regulation,” *International and Comparative Law Quarterly*, 2009. For more on Basel II’s flaws, see Tarullo, 2008.
- ⁴⁰ Daniel Tarullo, *Banking on Basel: The Future of International Financial Regulation*, (Washington, D.C.: Peterson Institute for International Economics, 2008).
- ⁴¹ “Disagreement over whether a particular measure falls within the prudential carve-out is subject to WTO dispute settlement procedures and thus potentially to determination by a dispute settlement panel. Most regulators, however, do not appear to be particularly concerned about this possibility. For one thing, prudential issues are dealt with intensively in other fora, as discussed in the following section, so there is some basis for assuming that certain types of rules will always be considered prudential. Moreover, if a country was concerned that a particular measure might not be generally accepted as prudential in the future, it listed that measure as an exception in its schedule of commitments. Another very important reason for the apparent lack of concern is that only governments—not private parties—may bring claims to dispute settlement in the WTO; and, in the absence of a truly egregious action, governments may prefer to respect each other’s ability to determine which rules may be prudential.” See Sydney J. Key, “Trade Liberalization and Prudential Regulation: The International Framework for Financial Services,” *International Affairs*, 75: 1, January 1999, at 67-68.
- ⁴² “Panamá protegerá sus servicios internacionales y financieros,” *Xinhua Spanish*, Aug. 6, 2009. Available at: <http://spanish.peopledaily.com.cn/31617/6720014.html>.
- ⁴³ Council for Trade in Services, “Report of the Meeting Held on 9 July 2001,” WTO S/C/M/54, Released Aug. 27, 2001. In this meeting, the Panamanian delegation’s intervention focused on how GATS exceptions would not apply to OECD measures on harmful tax havens, because Panama does not have any double taxation treaties (which is one of the GATS exceptions). In regards to the other exception, on the “the imposition or collection of direct taxes in respect to services or service supplier of other members,” the Panamanian delegation said: “It was difficult to imagine how the Panamanian tax regime could have an impact on the ability of other jurisdictions to impose and collect taxes on Panamanian services or suppliers that required the application of discriminatory measures, measures distinct to those used in the cases of other suppliers other than nationality.”
- ⁴⁴ Available at: <http://www.state.gov/documents/organization/38710.pdf>.
- ⁴⁵ See texts at <http://www.ustr.gov/trade-agreements/bilateral-investment-treaties/bit-documents>.
- ⁴⁶ Available at: http://www.ustr.gov/sites/default/files/uploads/agreements/fta/australia/asset_upload_file610_5158.pdf, at 4.
- ⁴⁷ Available at: http://www.ustr.gov/sites/default/files/uploads/agreements/fta/bahrain/asset_upload_file782_6285.pdf, at 4.
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- ⁵⁴ Available at: http://www.ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset_upload_file35_12712.pdf, at 5.
- ⁵⁵ Available at: http://www.ustr.gov/sites/default/files/uploads/agreements/fta/panama/asset_upload_file494_10346.pdf, at 5-6. (The Jordan FTA incorporates both countries’ GATS commitments. Available at: http://www.ustr.gov/webfm_send/1041, at 3.)
- ⁵⁶ Anne van Aaken and Jurgen Kurtz, “The Global Economic Crisis and International Economic Law,” University of St. Gallen Working Paper No. 2009-04, June 2009, at 1. See also Abba Kolo and Thomas Wälde, “Economic crises, capital transfer restrictions and investor protection under modern investment treaties,” *Capital Markets Law Journal* 3:2, March 2008.
- ⁵⁷ Mary Bottari and Lori Wallach, “NAFTA Chapter 11 Investor-State Cases: Lessons for the Central America Free Trade Agreement,” Public Citizen Report, February 2005. Available at: <http://www.citizen.org/documents/Chapter%2011%20Report%20Final.pdf>

⁵⁸ Article XI of the U.S.-Argentina BIT reads: “This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the Protection of its own essential security interests.” (Available at: http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_000897.asp) The investors that brought the cases were CMS, Continental, Enron, LG & E, and Sempra. On the rulings as to the non-self-judging nature of the BIT’s Article XI, see *Continental Casualty Company v. Argentina*, ICSID Case No. ARB/03/9 (US/Argentina BIT). Sept. 5, 2008, at 83. See also *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16 (US/Argentina BIT), at 114. (Available at: http://ita.law.uvic.ca/alphabetical_list_respondant.htm.)

⁵⁹ In the CMS, Enron and Sempra cases, the tribunals rejected Argentina’s necessity plea for all of the challenged measures. In the Continental and LG & E cases, the tribunals rejected the necessity plea for some of the challenged measures. In all cases, the tribunal ordered the payment of compensation. See *Continental Casualty Company v. Argentina*, ICSID Case No. ARB/03/9 (US/Argentina BIT). Sept. 5, 2008, at 134; and *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16 (US/Argentina BIT), at 104-105.

⁶⁰ Article 1410 of NAFTA reads: “Nothing in this Part shall be construed to prevent a Party from adopting or maintaining reasonable measures for prudential reasons, such as: (a) the protection of investors, depositors, financial market participants, policyholders, policy claimants, or persons to whom a fiduciary duty is owed by a financial institution or cross-border financial service provider; (b) the maintenance of the safety, soundness, integrity or financial responsibility of financial institutions or cross-border financial service providers; and (c) ensuring the integrity and stability of a Party’s financial system.” Available at: <http://www.nafta-sec-alena.org/en/view.aspx?x=343&mtpiID=145>.

⁶¹ Statement of Arlene Evans, Hearing before the House Committee on Banking, Finance and Urban Affairs, “Financial Services Chapter of NAFTA,” Serial Number 103-71, Sept. 28, 1993, at 13.

⁶² This was foreseen in an early article on NAFTA’s prudential exception. See Joel P. Trachtman, “Trade in Financial Services under GATS, NAFTA, and the EC: A Regulatory Jurisdiction Analysis,” *Columbia Journal of Transnational Law*, 1996, at 90.

⁶³ International Centre for Settlement of Investment Disputes, Additional Facility, Fireman’s Fund Insurance Company (Claimant) and The United Mexican States (Respondent), Award Before the Arbitral Tribunal constituted under Chapter Eleven of the North American Free Trade Agreement (NAFTA), ICSID Case No. ARB(AF)/02/01, July 17, 2006, at 59, 73-77, 95, and 103. Available at: http://www.naftaclaims.com/Disputes/Mexico/Fireman/FiremansFund-Mexico-Final_Award.pdf

⁶⁴ According to the WTO, over 100 countries have made commitments in financial services. See <http://tsdb.wto.org/matrixlist.aspx> and http://www.wto.org/english/tratop_e/serv_e/finance_e/finance_fiback_e.htm#fn1text2.

⁶⁵ For a history of this debate, see Todd Tucker and Lori Wallach, *The Rise and Fall of Fast Track Trade Authority*, (Washington, D.C.: Public Citizen, 2009). Available at: FastTrackHistory.Org.

⁶⁶ A review of congressional hearings and floor debates going back to 1985 found only two instances where the subject of the GATS prudential exception was meaningfully broached. In 1990, it was brought up voluntarily by Bush administration officials, but no members of Congress interrogated the issue. (See “Uruguay Round Negotiations on Financial Services,” House Banking, Finance and Urban Affairs Committee, Hearing Before The Subcommittee on Financial Institutions and Supervision, Regulation and Insurance, Task Force on International Competitiveness of U.S. Financial Institutions, Serial Number 101-152, July 17, 1990, with supplementary materials, at 9-11.) In 2005, it was brought up by former Federal Reserve official Sydney Key in a House Financial Services Committee oversight hearing. (See http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_house_hearings&docid=f.26757.pdf). In 1993 and 2003 hearings on NAFTA and the Chile/Singapore FTAs, the prudential exception of these FTAs was mentioned. In contrast, the GATS prudential exception was mentioned in two House International Relations hearings and one House Ways & Means hearing in post-crisis 2009.

⁶⁷ Coincidentally, Frank’s staff director when he was chair of the Subcommittee on International Development, Finance, Trade and Monetary Policy of the House Banking Committee, [which had oversight authority over the GATT financial services talks in the early 1990s when the deal was being negotiated] was Dr. Sydney Key. Key had a front row seat to the Dunkel Draft-era GATT deliberations as a Fed official both before and after her assignment to the committee. In all these capacities, and subsequently, Key is a leading proponent of the notion that the GATS is not problematic for domestic prudential regulation, despite conceding that, because the question is subject to WTO dispute settlement, ultimately WTO tribunals will have the final word. See *Deposit-Protection Schemes: Issues for an EC Directive* (Research Report 11, Centre for European Policy Studies, 1992); *Financial Services in the Uruguay Round and the WTO* (Occasional Paper 54, Group of Thirty, 1997); and http://www.bu.edu/law/faculty/profiles/fullcvs/banking/key_s.html.

⁶⁸ Comments of Barry Newman, Hearing before the House Committee on Banking, Finance and Urban Affairs, “Financial Services Chapter of NAFTA,” Serial Number 103-71, Sept. 28, 1993, at 45. See also: http://mitsloan.mit.edu/alumni/clubs/newyork/files/news_apr04.pdf

⁶⁹ See Pierre Sauvé and James Gillespie, “Financial Services and the GATS 2000 Round,” *Brookings-Wharton Papers on Financial Services*, 2000.

⁷⁰ See e.g. Peru FTA Article 22.2 footnote 2. (“Article 22.2: Essential Security: Nothing in this Agreement shall be construed: (a) to require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or (b) to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests... For greater certainty, if a Party invokes Article 22.2 in an arbitral proceeding initiated under Chapter Ten (Investment) or Chapter Twenty-One (Dispute Settlement), the tribunal or panel hearing the matter shall find that the exception applies”.)

⁷¹ For more information, see Testimony of Todd Tucker, Research Director, Public Citizen’s Global Trade Watch Division, For Public Meeting of the Administration Review of the U.S. Model Bilateral Investment Treaty Program, July 29, 2009, at U.S. State Department. Available at: http://www.citizen.org/hot_issues/issue.cfm?ID=2323.