

*Todd Tucker*

## The WTO's Financial Services Terms and Deregulation

The U.S. Trade Representative's "2010 Trade Policy Agenda" states that "improved packages in services (providing new market access in key infrastructure services sectors such as financial services ...)" is key to moving Doha forward.<sup>1</sup>

Yet, the U.S. Senate Finance Committee, the Stiglitz Commission, various developing country WTO delegations, and a recent G-24 paper have pointed out that the WTO's General Agreement on Trade in Services (GATS) equates "market access" with binding commitments to refrain from implementing new capital management techniques, bans on risky services and bank size limitations – even on a non-discriminatory basis.<sup>2</sup>

Moreover, further GATS disciplines on non-discriminatory, non-"market access" regulations are slated for adoption with the conclusion of the Doha Round. Accountancy sector rules have already been formulated, and will also be adopted. For over 100 developing and developed countries with GATS financial services commitments,<sup>3</sup> the agreement locks in their past "deregulation." And, because members found to violate the GATS can be subject to cross-retaliation on their agricultural or manufacturing sectors, the financial services rules are of widespread interest to countries of varying development strategies.

Recent official interventions have tended to confirm these concerns. For instance, the WTO Secretariat wrote in February 2010 that "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..."<sup>4</sup>

As for regulatory bans, the WTO Secretariat wrote that "an outright prohibition to provide a certain financial service would be a trade measure subject to scheduling under the GATS."<sup>5</sup> In other words, if a country's government in place in the 1990s did not think to schedule a ban (as was the case for the United States with respect to securities and derivatives, but *only* for onions futures), imposing a ban now in a committed sector would violate the GATS.

Of course, proposals for new bans have abounded in the last year. The U.S. Securities and Exchange Commission is proposing bans on naked short selling and flash trading.<sup>6</sup> Germany has implemented a ban on speculative short-selling, which a leading European trade think-tank has deemed a potential WTO violation – on the basis that (while non-discriminatory) it involves more regulation than implemented by other countries.<sup>7</sup>

And, in the wake of the crisis, commentators from Paul Volcker to Simon Johnson to John McCain agree

that banks got "too big to fail", and that firewalls and other size limitations need to be reinstated. But the GATS 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. Indeed, a WTO panel has never ruled to the contrary.<sup>8</sup>

In response to these concerns, some sources have cited the agreement's defence provision for prudential measures. However, this provision also reads that, "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."<sup>9</sup>

While Malaysia and other developing countries had fought, during the Uruguay Round negotiations, for a more robust prudential measures defence provision,<sup>10</sup> the final language states that prudential measures are only allowed under GATS rules if they do not violate any of the GATS rules. Prudential financial measures are subject to dispute settlement, and could be ruled against.<sup>11</sup> Indeed, while analysts disagree about how the GATS prudential measure defence clause would operate if triggered as a defence, it does not prohibit challenges of prudential measures, and a WTO tribunal would have the final say. A WTO panelist has written that "The right of a member to issue or maintain such prudential regulation seems to find its limits in Article XI GATS" – the capital controls disciplines.<sup>12</sup>

On September 15, 2010, Hamid Mamdouh of the WTO Secretariat urged members to regulate fully *before* they commit to such liberalization under GATS. Unfortunately, a number of factors make it difficult for members to heed his advice. Many members have already made extensive financial services commitments under GATS before the financial crisis, without strong regulatory structures in place. The combination of existing GATS rules and new disciplines on domestic regulation and accountancy being contemplated in the Doha Round make new regulation difficult.

Some WTO members have made strong interventions in the WTO General Council and the Committee on Trade in Financial Services (CTFS), and are currently withstanding the pressure to make further commitments. Members such as Argentina, South Africa, Ecuador and India urged the WTO Secretariat to examine the financial crisis and relevant GATS provisions.

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<sup>1</sup> USTR, “The President’s 2010 Trade Policy Agenda”, at 4.

<sup>2</sup> See 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, 104-105. Available at: [http://www.un.org/ga/econcrisissummit/docs/FinalReport\\_CoE.pdf](http://www.un.org/ga/econcrisissummit/docs/FinalReport_CoE.pdf). See also the discussion in Lori Wallach and Todd Tucker, “Answering critical questions about conflicts between financial reregulation and WTO rules hitherto unaddressed by the WTO Secretariat and other official sources”. Public Citizen Memorandum, June 22, 2010.

<sup>3</sup> 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#fntext2](http://www.wto.org/english/tratop_e/serv_e/finance_e/finance_fiback_e.htm#fntext2). Various intergovernmental sources have found that over 60 countries rank high on indices that measure GATS financial services commitments in Modes 1, 2 and/or 3. See Nico Valckx, “WTO Financial Services Commitments: Determinants and Impact on Financial Stability”. IMF Working Paper WP/02/214, December 2002; Nico Valckx, “WTO Financial Services Liberalization: Measurement, Choice and Impact on Financial Stability”. De Nederlandsche Bank Memorandum 705, October 2002; Aaditya Mattoo, “Financial Services and the World Trade Organization: Liberalization Commitments of the Developing and Transition Economies”. World Bank Policy Research Paper 2184, September 1999.

<sup>4</sup> WTO, “Financial Services”. Background Note by the Secretariat, S/C/W/312 and S/FIN/W/73, Feb 3, 2010. The paper is available at: <http://docsonline.wto.org/DDFDocuments/t/S/FIN/W73C.doc>

<sup>5</sup> *Ibid.* at 5.

<sup>6</sup> “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.

<sup>7</sup> See commentary at: <http://www.ecipe.org/blog/naked-misbegotten-germany/?searchterm=prudential>

<sup>8</sup> 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: Kluwer Law International, 2003), at 91. See also Petros Mavroidis, “Highway XVI revisited: the road from non-discrimination to market access in GATS”. *World Trade Review*, 6:1, 2007: pp 17-18.

<sup>9</sup> GATS Annex on Financial Services, Article 2(a).

<sup>10</sup> “Communication from the Delegation of Malaysia”. GATT Document MTN.GNS/FIN/W/3, Sept. 12, 1990; Group of Negotiations on Services, “Note on the Meeting of 12-13 July 1990”. Working Group on Financial Services Including Insurance, GATT Document MTN.GNS/FIN/2, Aug. 10, 1990. Available at: <http://sul-derivatives.stanford.edu/derivative?CSNID=92110082&mediaType=application/pdf>. Accessed March 1, 2010.

<sup>11</sup> 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. Available at: <http://www.citizen.org/documents/PrudentialMeasuresReportFINAL.pdf>.

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<sup>12</sup> 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. On Weber’s background, see: <http://www.nccr-trade.org/people/weber/>