Capital Account Regulations and Global Economic Governance

UNCTAD – GEGI
3-4 October 2013
Geneva

Capital Account Regulations and the Trading System

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“It is widely held out that control of capital movements, both inward and outward, should be a permanent feature of the post-war system”.

John Maynard Keynes
(Draft Plan, 11 February 1942)

“A good case could be made for the thesis that a government should have the power to control the influx and efflux of capital”.

Harry Dexter White
(White Plan, April 1942)
### IMF v. GATT/WTO Legal Framework

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Capital account liberalization as a by-product of the GATS principal goal

Art. XI:1 (Payments and Transfers):

after undertaking market access and NT commitments for specific service sectors, a State has to liberalize the connected current and capital movements

Footnote 8 to Art. XVI (Market Access):

capital controls on both inflows and outflows are prohibited for financial services provided under Mode 1, and for all services provided under Mode 3
Footnote 8 to Art. XVI (Market Access)

- if a Member undertakes a market-access commitment in relation to Mode 1 and if the cross-border movement of capital is *an essential part* of the service itself, that Member is thereby committed to allow such movement of capital

- if a Member undertakes a market-access commitment in relation to Mode 3, it is thereby committed to allow related transfers of capital *into its territory*
CARs may constitute a breach of:

• Market access (Art. XVI + Footnote 8), when the measure amounts to a ban or to a quantitative limitation

• National treatment (Art. XVII), when the measure accords less favorable treatment to foreign service suppliers

• Domestic regulation (Art. VI)
GATS safeguard clauses

• **Art. XI:2**: capital controls can be introduced *at the request of the IMF*

• **Art. XII:1**: in the event of a *BoP crisis* and once a list of requirements is met, Members are allowed to introduce *controls on capital outflows* (unclear whether applicable also on inflows)

• **FSA Art.2(a)**: Members are allowed to introduce *prudential measures* irrespective of their specific commitments
The GATS *ex ante* coordination clause with the IMF legal framework

GATS Art. XI:2

“Nothing in this Agreement shall affect the rights and obligations of the IMF members […], *including* the use of exchange actions which are in conformity with the IMF Articles, provided that a Member shall not impose restrictions on any capital transactions inconsistently with its specific commitments regarding such transactions, *except* under Art. XII [the BoP clause] or *at the request of the IMF.*”
The GATS BoP clause (1)

Art. XII:1

“in the event of a serious BoPs and external financial difficulties or threat thereof, a Member may adopt or maintain restrictions on trade in services on which it has undertaken specific commitments, including on payments or transfers for transactions related to such commitments.”
Art. XII:2

The restrictions shall:

• *not discriminate* among Members,
• *be consistent with the IMF Articles*,
• *avoid unnecessary damage*,
• *not exceed those necessary to deal with the circumstances*,
• *be temporary and phased out progressively*.
The GATS Prudential Carve-Out

FSA Art.2(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.”