TOWARDS AN INTERNATIONAL SECRET AGREEMENT (TISA) ON FINANCIAL SERVICES?

Financial crises in Asia (1997-98), the US and the EU (2007-2008) and elsewhere have shown the major impact the financial sector can have. Tax payers' money, governmental budgets and public services were depleted by billions of dollars of funds to bail out the banks. Even worse, the financial crisis severely damaged the real economy and caused a massive global recession with lost output in the trillions and the loss of millions of jobs, especially for the young all over the world. For years, the financial services sector had argued that they did not need regulation because they were "efficient" and GATS negotiators used this argument to make liberalization and deregulation of financial services permanent under the WTO. But this deregulation failed massively, including in developing countries which had opened up their markets to Western financial services. The fierce competition among the financial industry that followed the financial services and capital liberalisation through GATS and other measures resulted in enormous risk taking, innovation into risky opaque financial products and enormous pressure by the financial lobby to deregulate, or at least not introduce strict regulation. In many countries, liberalization and competition with foreign financial services operators has failed to improve the provision of financial services, instead resulting in less financial services for poor clients, small companies and farmers, and rural areas, as these were considered not profitable enough.

Six years after the financial crisis fully erupted from the US and the EU in 2008 and spread around the world, global efforts to reform the financial sector are far from finalized and implemented. The financial reforms in the US and the EU – at the centre of the financial markets – and in other countries are far from adequate to prevent another financial crisis. Clearly, not less and not more interconnectedness is needed, while more and not less oversight and public supervision of the financial sector is urgently needed to ensure global financial stability.

Listening to the financial lobby, not learning the lessons of the financial crisis

Nevertheless, the lobby strategies of this failed financial industry together with other services sectors were able to convince the EU, the US and 21 other countries to negotiate in secret a services agreement that would go far beyond the GATS: a Trade in Services Agreement (TiSA). The negotiators did not intend to integrate the lessons learned from the financial crisis that new and strict regulation was needed. On the contrary, rather than disciplining the financial sector, a leaked negotiation text of 14 April 2014 of the Financial Annex shows how the financial sector managed to use the TiSA negotiations to do the opposite of what the public demands: if allowed to come into existence, TiSA would restrict what parliaments, governments, regulators, and the general public can do to regulate and supervise the financial sector.

Pre-crisis rules

There is global agreement on the need to break up or shrink banks that are "Too Big to Fail" (TBTF), and to limit socially useless speculative derivatives markets so that financial markets serve the needs of the real economy, rather than vice versa. Yet the core of the proposed TISA is still the deregulatory pre-crisis so-called **market access rules** that prohibit these solutions, by forbidding to limit the value of transactions, the number of financial services operations or financial service suppliers. The EU as a whole has for instance greatly endangered its future financial regulatory capacity by proposing so far almost no exemptions to those TiSA market access rules. For example, the EU made an exemption to protect a current EU legal proposal that would require a bank to take on a particular legal form in order to avoid TBTF banks but this is insufficient given that breaking up or shrinking the banks would be a much better solution. Likewise, food security advocates and regulators around the world are working to rein in price speculation in food commodities. But many of the current legislative proposals, such as the EU's Markets in Financial Instruments Directive (MiFID II) on numerical limits (quotas) on financial food price speculation and other future regulations would likely be contrary to these TiSA rules.

A number of the provisions in the leaked text are identical to the pre-crisis GATS special agreement on financial services deregulation the voluntary so-called "Understanding on Commitments in Financial Services", which includes sweeping liberalization commitments without instruments to deal with the consequences. Most developing countries have not subscribed to the GATS Understanding including those participating in the TiSA negotiations (Colombia, Costa Rica, Pakistan, Panama and Peru).

The overall aim of the TiSA, based on the demands from the lobby and the financial sector, is to open up as many (financial) services markets for trade and investment, and to freeze current liberalization and regulation – to ensure that any future regulation is not more restrictive that the current regulatory and liberalization regime. This is illustrated below, with indications of what the dangers are in the financial sector.

Undermining the right to regulate

Standstill in the reforms: The TiSA negotiators wants to lock-in the current levels of liberalization as a minimum floor. This would mean that any exemptions of financial regulations that countries may have listed in the agreement would be the maximum that would ever be allowed. A country that has forgotten to make an exemption of an existing measure or wants to reverse the damage of a non-listed measure, would be prohibited from doing so under TiSA. This rule is dangerous in the light of the TiSA ambitions to significantly open up new financial markets, which has often had unexpected or unforeseen consequences. Note that many measures of the bank reform (Basel III) will not be decided until after 2015 or 2016 (such as, for example, the leverage ratio in the EU). Overall, many national, regional and international supervisory mechanisms are still not able to handle a cross-border financial crisis (e.g. when systemic important financial conglomerates fail ('SIFI resolution')) and are in dire need of significant new regulations. TiSA is likely to commit governments to maintain the current failed system of financial regulation. In other words, the minimal reforms they have adopted after the financial crisis would become the maximum permitted regulation under the proposed TiSA. A TiSA member could be sued if it sought to tighten financial rules that were put in place by reckless or ill-considered liberalisation or deregulation in the past.

The TiSA would allow measures for **prudential regulations** but only if they are not seen as a means to avoid observing the rules and commitments under the agreement. But prudential regulation would only free from the TiSA rules if it could deviate from TiSA rules. This contradictory language is related to the huge grey area of what is 'prudential' or what is protectionist, as the current huge conflicts between the EU and the US on, for instance, derivatives trading and clearing demonstrate. As a result, if the financial services corporations in one country didn't like the prudential rules in another, its government could file a dispute. Then a dispute settlement panel of private arbiters would have the power to decide whether the prudential financial regulations conformed to the deregulatory rules of TiSA. This is far cry from democratic control of financial regulations and reforms.

An important problem with the provision of 'prudential regulation' is that it only defines such regulation for the aim of financial stability and protection of financial clients/savers or investors. However, this means that TiSA rules could restrict measures aiming for better and more accessible financial services for consumers, small businesses, farmers, and the economy in general, especially in developing countries. For instance**, new financial services** by another member's financial supplier could only be refused on prudential grounds. However, this could prove problematic, as pre-crisis experience has shown that regulators have often only discovered the dangers of a financial product when it is too late, and also because it would preclude a country from using developmental economic or social goals as reasons for a financial regulation.

The current financial sector regulatory framework fails to not ban or preventing financing socially and environmentally damaging companies, projects or products, many of which are contested all over the world. Obvious examples include the financing and marketing of land that has been illegally obtained (landgrab), or exotic speculative Over the Counter (OTC) derivatives. TiSA rules might however prevent the public from being able to successfully pressure the government to transform the financial sector to be at the service of the public interest. Due to the very narrow TiSA definition, replicating GATS, many **public financial entities** will be subject to the TiSA restrictions and disciplines.

Interestingly, two TiSA negotiators are well aware of some dangerous restrictions and language in GATS taken over by TiSA. In the draft text made public on 26 September 2014 of the Canada-EU Comprehensive Economic Trade Agreement (CETA), several provisions identical to those in TiSA are formulated and defined in the CETA draft text more carefully in an attempt to avoid abusive interpretations that could overly restrict regulation (e.g prudential regulation). So, why do the EU and Canada not admit the dangers in the TiSA text, and how will they handle these **inconsistencies** in the treaties?

Transparency for business and secrecy for developing countries

The TiSA text will contain a **transparency clause** so that when a new domestic regulation is proposed, 'all interested persons' would have an opportunity to provide comments 'to the extent practicable'. In addition, the US wants that the substantive comments from interested persons on the proposed regulations would be addressed in writing. In practice, the financial regulatory processes in many countries have shown that the domestic and foreign financial industry completely dominates any consultation and that their arguments to weaken regulation are mostly conceded. This **regulatory capture** also happened before the 2007-2008 financial crisis and is considered, for instance by Prof. Stiglitz, to be a cause of the deregulation and weak ('light touch') regulation that caused the crisis.

The TiSA negotiations are in contrast very secret for the many citizens and parliamentarians who will be affected by it. However, they are also very secret towards the other WTO members currently not negotiating in TiSA but who might be soon confronted by the results of TiSA without having had an opportunity to provide substantive comments, let alone to enjoy a written reply. The EU has the intention to "**multilateralise**" the TiSA, but not so much by allowing other countries to join the TiSA negotiations or the agreement. The EU has explained that it wants to present the TiSA extended regulatory disciplines and commitments **within the WTO/GATS** for negotiations so that many other developing countries would negotiate and agree on far reaching TiSA provisions. Since the TiSA provisions and principles deviate substantially from the GATS framework, developing countries will be challenged to be able to negotiate modifications that would accommodate to their development needs, such as inclusive domestic finance, and that would give them legal possibilities to strictly regulate or reverse liberalization and privatisation of certain financial services (e.g. health insurance, pension funds) when against the public or economic interest.

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