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## **SESSION 4:**

**FINANCIAL SERVICES AND REGIONAL INTEGRATION**

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# **New trends in financial services negotiations in EU FTAs**

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## Focus of this contribution

- financial services in FTAs and financial stability:
  - Issues to discuss
  - Difficulties of third country supervision and cooperation
  
- News trends in EU FTAs:
  - ISDS: adaptations
  - Regulatory cooperation

## Issues to discuss: financial services liberalisation vs financial stability

- Increasing interconnectedness, including through restrictions on capital flows in FTAs
  
- Increased competition leads to :
  - more risk taking
  - less diversity in financial services
  - larger financial service providers some of which become too big to fail and too big to be useful for the economy (while FTA/GATS prohibit restrictions on value of transactions and imposing legal forms e.g. to split /separate banks)

# Financial services in FTAs vs public interest

- 'Protecting financial stability' (prudential carve out in FTAs: 'not more burdensome than necessary'),
- not integration the public interest and consumers' interests = flexibility for regulating for non-financial (i.e. not 'prudential') policy objectives

e.g. universal access to finance,  
cheap finance for housing

- Undermining regulatory flexibility that is based on regional needs and diversity
- No integration of how the financial sector should contribute to sustainability



# The aftermath: problems of the supervision of third country financial services

Third country financial service providers, operators (e.g. exchanges, trade repositories) and trading entities (e.g. hedge fund managers) :

- Authorisation: at national or EU level : complex web
- Supervision: equivalence acts, agreements for information exchange and cooperation in supervision (e.g. for agricultural commodity derivatives markets: national and EU financial and agricultural authorities cooperation)
- Regulatory differences: pressure from financial industry for temporary relief vs. reform progress respect for rules agreed by parliaments

# New trends in EU FTAs & financial services: ISDS



- EU-Canada FTA: adaptations for financial services?
- TTIP: investor to state dispute settlement system among developed countries
  - Proposal: support by business and protests by citizens
  - Consultation by EC :  
<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1052>
  - What adaptations?
    - Protect right to regulate preventing the risk of abuse of the system (e.g. frivolous cases and attacks on legitimate regulations')
    - Making the arbitration system more transparent
    - Preventing conflicts of interest or bias in arbitrators
    - Ensuring better consistency and control
    - ISDS will only apply to breaches of investment protection provisions and to not other parts of TTIP

NB: US financial sector sued US financial regulatory authorities before courts to oppose new regulations (position limits)

# EU proposals for changes in ISDS

- Has a clear definition of 'Fair and Equitable Treatment' based on a closed list of elements;
- Includes a clarification that 'Fair and Equitable Treatment' does not imply that the Parties would not be able to modify or introduce new legislation;
- Clarifies that measures taken for public welfare objectives such as health, consumer protection or the protection of environment cannot be considered equivalent to indirect expropriation;
- Envisages an Appellate Mechanism for investor-to-state dispute settlement;
- Includes the principle of 'costs follow the law', whereby the losing party pays all costs relating to the dispute, as a disincentive against frivolous or tactical claims;
- Includes provisions against treaty-shopping, by clarifying that investors who tactically restructure their investments to be able to bring themselves within the scope of the TTIP (for example, by setting up a shell company in the US) will not be able to bring an ISDS claim;
- Includes a binding code of conduct for arbitrators setting out in detail the level of independence expected of them. The aim is to avoid as far as possible conflicts of interest.



# Newest trend: Regulatory cooperation



- TTIP: most benefits will from ‘disciplines’ on regulation/NTBs (vs. disciplining the financial sector?)
- EU proposal in TTIP vs US:
  - include financial services in regulatory cooperation framework (cf. Canada, TISA, ...)
  - US refuses financial regulatory cooperation in trade agreement, favours multilateral fora, more go-it-alone regulation if others are weak, limiting interconnectedness (‘balkanisation’ of financial sector)
  - More far-reaching than in currently seem to be included in EU-Canada RTA
  - Pushed by financial sector

## **Important elements of regulatory cooperation as proposed by EC:**

- cooperate to make joint proposals in, and dominate, international standard setting bodies, and apply international standards
- Strive towards equivalence /substituted compliance / mutual reliance / regulatory consistency : rely on each others rules vs. all under domestic supervision
- Consult before (parliamentary) decisions on new regulations or measures (that seriously affect the other party)
- Cooperate to remove barriers to trade in financial services

# Regulatory cooperation: critical points



- Priority to supervisory cooperation overlooked
- Objective is only financial stability: overlooking overall economic and public interest of financial services
- Basically deciding how to regulate and legislate : without involvement of the regulators, parliamentarians, citizens (including at international standards setting bodies)
- Institutionalising input of financial lobby in early stages
- Reliance on each other rules and supervision: how effective and democratic? What access to remedies for consumers in case of problems?
- Cooperation would be legally binding among states → potential for regulatory chill, race to the bottom

# Literature & websites



- M. Vander Stichele, R. van Os, Business as Usual - How Free Trade Agreements Jeopardise Financial Sector Reform, December 2010, [http://somo.nl/publications-en/Publication\\_3611](http://somo.nl/publications-en/Publication_3611)
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THANK YOU !

SORRY TO LEAVE EARLY BUT CONTACT ME AT:

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