The International Regulatory Regime on Capital Flows and Trade in Services

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How Conceptualize Capital Flows??

- Economists still do not agree on what capital flows entail
- Lawyers did not come up with an uniform definition of "capital movements"
- From a regulatory perspective, there are three kinds of measures:
  - Measures that operate on capital account transactions
  - Exchange Restrictions on capital account transactions
  - Exchange restrictions on payments and transfers for current account transactions

How Capital Flows are Regulated??

	Capital Account Transactions	Payments& Transfers for Current Acc Transactions
IMF Articles of Agreement	No (only limited supervision)	Yes
GATS and GATT	Yes (GATS)	Yes – (GATT & GATS)
OECD Codes	Yes	Yes
Investment Agreements	Yes	Yes
FTAs and RIAs (EU)	Yes	Yes

IMF

- Stringent rules for payments and transfers for current account transactions - (Article VIII) covers Multicurrency Arrangements and Exchange restrictions etc
- Only possibility to deviate is the BoP provision
- The definition of payment and transfers cover also (i) payments of moderate amount for amortization of loans or for depreciation of direct investments, (ii) moderate remittances for family living expenses, and (iii) normal short-term banking and credit facilities
- Capital Movements are not covered. The IMF has some role only to impede that Members use Found resources “to meet a large or sustained outflow of capital”
- The Fund can request a Member either to impose capital controls or eliminate capital controls as a condition for the use Fund’s resources

Movement of Capital in the WTO

- Movement of capital and trade in services are two distinct issues that might overlap
- The GATT covers only payments and transfers for current account transactions, while the GATS covers both movement of capital and payment and transfers for both current and capital account transactions
- Movement of Capital is regulated by the footnote to Article XVI
- The main issue in the GATS is to grant some policy space on for capital controls.

	Mode 1	**Mode 2**	**Mode 3**	**Mode 4**
Inflow	yes	no	yes	no
Outflow	yes	no	no	no

The GATS

Possible Situations	Capital Mov.	Services Trade
Lending transaction in domestic currency between a domestic financial service provider located in its own country or abroad and a domestic customer	No	
Lending transaction (mode 1) in foreign currency between a domestic financial service provider (located abroad) and a domestic customer	yes	
Lending transaction in foreign currency between a foreign financial service provider established in the host country (mode 3) and a domestic customer.	yes	yes
Lending transaction in domestic currency between a foreign financial service provider established in the host country (mode 3) and a domestic customer		yes
Lending transaction (mode 1) operated by a foreign bank (located in its own country) and a domestic customer	yes	yes

Policy Space for Controls on Capital Flows in the GATS

	CAPITAL MOVEMENT (and Capital Payments & Transfers)	CURRENT PAYMENTS AND TRANSFERS
COVERAGE	Only Mode 1 and 3 and only services scheduled in those modes	All modes and Services
EXCHANGE RESTRICTIONS	Only for mode 1-3 and services scheduled	Prohibited
BALANCE OF PAYMENT	Yes	Yes
PRUDENTIAL CARVE-OUT	Yes	Yes
REQUEST BY THE IMF	Yes	No
SCHEDULING UNDER ARTICLE XVIII	Restrictions on the outflow of capital Prudential restrictions, such as restrictions on derivatives contracts, borrowing of local currency from offshore banks, or maturity mismatched between long and short-term capital flows.	

At the Preferential Level

- OECD Code on Liberalization of Capital Movements and Code on Invisible Operations
- In EU the MoC is one of the four freedoms of the "single market"
- Free Trade Agreements
  - US FTAs and BITs are the strictest on liberalization of capital movements – no BoP derogation and no safeguards (only exception is NAFTA and the "cooling off" provision in FTAs with Chile/Colombia/Peru/Singapore)
  - EU and Others FTAs invariably contain BoP derogation, host country legislation carve-outs and other safeguards
- BITs are the strictest on capital flows (cases with Argentina)
  - Capital flows as portfolio investment, transfer of funds provisions, currency manipulations, fair and equitable treatment etc.
  - Only few BITs contain BoP exceptions or state of necessity clauses

Conclusions I

	CAPITAL MOVEMENTS			CURRENT PAYMENTS	
	Coverage	**Measures**	**Safeguards**	**Measures**	**Safeguards**
GATS	Inflow (mode 1-3) and Outflow (mode 1)	Capital Controls and Exchange Restrictions	Yes	Exchange Restrictions, Multicurrency Arrangements	Yes
OECD	Inflow and Outflow	List of Various Operations on the Capital Account, covering both FDI and Portfolio flows	Yes	Exchange Restrictions, Multicurrency Arrangements	Yes
IIAs	Mainly Outflow	Capital Controls and Exchange Restrictions	Partial	Exchange Restrictions, Multicurrency Arrangements	Partial
US FTAs	Inflow (mode 1-3) and Outflow (mode 1)	Capital Controls and Exchange Restrictions	No	Exchange Restrictions, Multicurrency Arrangements	Yes
Others FTAs	Inflow (mode 1-3) and Outflow (mode 1)	Capital Controls and Exchange Restrictions	Yes	Exchange Restrictions, Multicurrency Arrangements	Yes
IMF	Not Covered			Exchange Restrictions, Multicurrency Arrangements	Yes

Conclusions II

- The major problem is to achieve regulatory coherence on capital flows between IMF/WTO/BITs /FTAs
- This implies reaching a consensus on what capital flows entail, how are they structured, and what kind of measures will affect them.
- Adopting a uniform definition of capital movements!
- The footnote to Article XVI, while making reference to movement of capital, does not define in what it consists
  - If we adopt the definition of the IMF, then some capital account transactions would be considered as current transactions
  - Does Capital movement extends to all FDIs??? In this case countries could use the BoP to deviate on mode 3 commitments
- Is possible to use Article XVIII of the GATS to grant some policy space for controls???

Thank you for your attention!!

For any questions

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