

India's negotiating experience in Financial Services Current State of Play

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THE GATS AND FINANCIAL SERVICES

- The multilateral rules and disciplines applicable to trade in financial services are contained in three legal instruments: the GATS, the GATS Annex on Financial Services; and the Understanding on Commitments in Financial Services.
- The GATS contains the rules and disciplines applicable to all service sectors, including financial services. The Annex and the Understanding complement and/or modify certain provisions of the GATS, reflecting the need for specific rules and disciplines to cater for the particular features of financial services

THE ANNEX ON FINANCIAL SERVICES

- Like all other Annexes, this Annex is an integral part of the GATS and therefore binding on all Members.
- It applies to "measures affecting the supply of financial services", and is divided in five sections, dealing with the scope of the GATS with regard to financial services, domestic regulation, recognition, dispute settlement, and definitions.
- The Annex provides for a specific exception for measures taken for prudential reasons. The scope of this exception has not yet been interpreted in WTO jurisprudence. A measure falling within the ambit of the carve-out, although inconsistent with other provisions of the GATS, would still be legally permitted.
- The "prudential reasons" are the protection of investors, depositors, policyholders or persons to whom a fiduciary duty is owed by a financial service supplier, and the preservation of the integrity and stability of the financial system. List of "prudential reasons" is only indicative. However, it is not an unqualified exception.

THE UNDERSTANDING ON COMMITMENTS IN FINANCIAL SERVICES

- The Understanding is a unique legal instrument in the WTO, that was included in the Final Act although it is not an integral part of the GATS.
- It is not binding on every Member, but only on those that voluntarily adhered to it.
- The Understanding is not a plurilateral agreement with benefits accruing only to those Members that have adhered to it. Rather, according to an introductory paragraph, "resulting specific commitments shall apply on a most-favoured-nation basis."
- The Understanding starts by imposing a standstill obligation, according to which any conditions, limitations and qualifications to the commitments made must be limited to existing non-conforming measures at the time of making those commitments.
- Apart from the standstill, the Understanding's obligations are organized under two headings: Market Access and National Treatment. The obligations on market access are further broken down into the following categories: monopoly rights; financial services purchased by public entities; cross-border trade; commercial presence; new financial services; transfers of information and processing of information; temporary entry of personnel; and non-discriminatory measures. A final section on definitions closes the document.

THE PLURILATERAL REQUEST ON FINANCIAL SERVICES

- Definitions: Use the agreed definitions in the GATS Annex on Financial Services for scheduling commitments (see attachment).
- Mode 1: undertake commitments for marine, aviation and transport insurance; reinsurance; insurance intermediation, insurance auxiliary services; financial advisory services and financial information and data processing services.
- Mode 2: undertake commitments for marine, aviation and transport insurance; reinsurance; insurance intermediation, insurance auxiliary services; and all non-insurance financial services (subsectors v-xvi).
- Modes 1 and 2: there can be advantages of additional liberalization, especially where the consuming agent is sophisticated, for example, an institutional consumer of securities services.
- Mode 3: for all financial services sectors, undertake commitments encompassing rights to establish new and acquire existing companies, in the form of wholly-owned subsidiaries, joint ventures and branches.
- Modes 1, 2 and 3: remove discrimination between domestic and foreign suppliers regarding application of laws and regulations ("national treatment").
- Modes 1, 2 and 3: remove limitations such as monopolies, numerical quotas or economic needs tests and mandatory cessions.
- Transparency in development and application of laws and regulations, transparent and speedy licensing procedures, and other regulatory issues should be addressed in the negotiations

INDIA'S FINANCIAL SERVICES COMMITMENTS

Header statement of India's GATS commitment

- The commitments in financial services are made in accordance with the General Agreement on Trade in Services and the Annex on Financial Services
- All the commitments are subject to entry requirements, domestic laws, rules and regulations and the terms and conditions of the Reserve Bank of India, Securities and Exchange Board of India and any other competent authority in India
- For banking and other financial services (excluding insurance), no commitment under Mode 1 and 2. As we don't have full capital account convertibility in India and residents under FEMA regulations do not have a general permission for opening foreign currency accounts in India or abroad. Permission is given under FEMA for specific purposes to Residents. Commitments in banking and financial services (excluding insurance) are only under Mode 3

INDIA'S GATS COMMITMENT (1997)

INSURANCE SERVICES	COMMITMENT (MARKET ACCESS)
<p>•Non-life, limited to insurance of freight Ex. 5(a)(i)(B)</p> <p>•Reinsurance and retrocession 5(a)(ii)</p> <p>Insurance intermediation, limited to reinsurance Ex. 5(a)(iii)</p>	<ul style="list-style-type: none"> • Mode 1: MA-Unbound, except in the case of insurance of freight which shall be as per terms of sale contract. NT- Unbound. Mode 2,3 4 Unbound for MA and NT. • Mode 1: MA -Reinsurance can be taken with foreign reinsurers to the extent of the residual uncovered risk after obligatory or statutory placements domestically with Indian insurance companies. NT- Unbound. Mode 2,3 4 Unbound for MA and NT. • Mode 1, 2: MA -Insurance intermediation limited to reinsurance - Reinsurance of domestic risks can be placed with foreign reinsurers through overseas brokers, to the extent mentioned under reinsurance and retrocession. NT- Unbound.

INDIA'S GATS COMMITMENT (1997)

INSURANCE SERVICES	COMMITMENT (MARKET ACCESS)
<ul style="list-style-type: none">• Insurance intermediation, limited to reinsurance Ex. 5(a)(iii)	<ul style="list-style-type: none">• (i) Overseas brokers are allowed to have resident representatives and representative offices. They can also place reinsurance business from abroad with Indian insurance companies. (ii) Except for the business indicated above, the resident representatives and representative offices cannot undertake any other activity in India. (iii) All expenses of the resident representative offices have to be met by remittance from abroad and no income can be received in India from Indian residents.

INDIA'S GATS COMMITMENT (1997)

BANKING SERVICES	COMMITMENT (MARKET ACCESS)
<ul style="list-style-type: none">● Acceptance of deposits● Lending - consumer credit, mortgage credit and financing of commercial transactions but excluding factoring● payment & money transmission services including cards, travellers cheques and bankers' drafts● Guarantees and commitments● Trading for own account● Portfolio management, custodial services	<ul style="list-style-type: none">● Only through branch operations of a foreign bank● Licence as permissible under existing laws● Limit of twelve licences per year● Banks allowed to install ATMs● Licences issued for ATMs will not be included in the ceiling of twelve licences● Investments in other financial services companies by foreign banks not to exceed 10 per cent of owned funds or 30 per cent of the invested company's capital whichever is lower● Licences for new foreign banks may be denied when the maximum share of assets in India both on and off balance sheet of foreign banks to total assets of the banking system exceeds 15 per cent● Foreign banks are subject to non-discriminatory resource allocation requirements (NT clause)

INDIA'S GATS COMMITMENT (1997)

BANKING COMMITMENT (MARKET ACCESS)	RATIONALE
<ul style="list-style-type: none">• Only through branch operations of a foreign bank• Limit of twelve licences per year• Investments in other financial services companies by foreign banks not to exceed 10 per cent of owned funds or 30 per cent of the invested company's capital whichever is lower• Licences for new foreign banks may be denied when the maximum share of assets in India both on and off balance sheet of foreign banks to total assets of the banking system exceeds 15 per cent• Foreign banks are subject to non-discriminatory resource allocation requirements (NT clause)	<ul style="list-style-type: none">• Due to the prevailing regulatory framework• Regulatory comfort• Restriction imposed by Section 19(2) of the B.R.Act, 1949• To prevent foreign banks from dominating in the domestic financial system• To provide a level playing field between domestic & foreign banks

INDIA'S GATS COMMITMENT (1997)

OTHER FINANCIAL SERVICES	COMMITMENT (MARKET ACCESS)
<ul style="list-style-type: none">• Participation in issues of securities, underwriting & placement	<ul style="list-style-type: none">• Foreign banks branches• Foreign Financial Services Companies with foreign equity not exceeding 51%
<ul style="list-style-type: none">• Stock broking	<ul style="list-style-type: none">• Joint venture company with foreign equity not exceeding 49% by recognised foreign stock broking companies
<ul style="list-style-type: none">• Financial consultancy, advisory, investment, portfolio research, advice on acquisitions & corporate restructuring & strategy• Factoring, Financial leasing Venture capital	<ul style="list-style-type: none">• Foreign bank branches• Foreign financial services companies with foreign equity not exceeding 51%

INDIA'S REVISED OFFER (2005)

INSURANCE SERVICES	INDIA'S OFFER
<ul style="list-style-type: none"> •Life Insurance [5(a) (i) (A)] 	<ul style="list-style-type: none"> •New sector.Mode 1, 2 MA/NT unbound. Mode 3, MA, None, except establishment would be through incorporation with foreign equity not exceeding 26%. NT None.
<ul style="list-style-type: none"> •Non-life insurance [5(a) (i) (B)] 	<ul style="list-style-type: none"> •Improvement in Mode 3: NT None. MA None, except establishment would be through incorporation with foreign equity not exceeding 26%.
<ul style="list-style-type: none"> •Services auxiliary to insurance, such as consultancy, actuarial, risk assessment Ex.[5 (a) (iv)] 	<ul style="list-style-type: none"> • Mode 3: MA-None subject to the conditions that foreign companies can be established through incorporation with foreign equity not exceeding 51 per cent. In case of Actuarial and Advisory Services, formal certification by Actuarial Society of India would be required. NT – None. Mode 1, 2 MA/NT None.

INDIA'S REVISED OFFER (2005)

BANKING SERVICES	INDIA'S OFFER
<ul style="list-style-type: none">• Acceptance of deposits• Lending - consumer credit, mortgage credit and financing of commercial transactions but excluding factoring• payment & money transmission services including cards, travellers cheques and bankers' drafts• Guarantees and commitments• Trading for own account• Portfolio management, custodial services	<ul style="list-style-type: none">• subject to fulfilment of minimum capitalization norms• through branch operations and as a WOS of a foreign bank subject to regulations of RBI• limit of twenty licences per year both for new entrants & existing banks.• Licences for new foreign banks may be denied when the maximum share of assets in India both on and off balance sheet of foreign banks to total assets both on and off balance sheet of the banking system exceeds 15%• foreign banks are permitted to invest in private sector banks through the FDI route subject to foreign equity ceiling of 49%

INDIA'S REVISED OFFER (2005)

OTHER FINANCIAL SERVICES	INDIA'S OFFER
<ul style="list-style-type: none"> • Participation in issues of securities, underwriting & placement 	<ul style="list-style-type: none"> • Foreign financial services companies with foreign equity not exceeding 74%
<ul style="list-style-type: none"> • Financial consultancy, advisory, investment, portfolio research, advice on acquisitions & corporate restructuring & strategy • Factoring, Financial leasing Venture capital 	<ul style="list-style-type: none"> • No limit on foreign equity for the financial services companies • Allowed to foreign banks
<ul style="list-style-type: none"> • Asset Management, such as cash or portfolio management, all forms of collective investment management, pension fund management, custodial, depository & trust services 	<ul style="list-style-type: none"> • Foreign financial services companies with foreign equity not exceeding 26%

FINANCIAL SERVICES IN INDIA'S FTA's

- Key sector which is requested in all FTAs. Requests are in MAT insurance in insurance sector and in modes 1 and 2 in banking sector. In mode 3, requests for permitting greater number of bank branches, higher level of FDI in private banks and binding the autonomous regime in the sector. Some requests have also been for the removal of the head note.
- Existing FTAs of India with Singapore, Korea and Japan have a text as well as extensive commitments in financial services.
- In all FTAs commitments are GATS plus both in terms of text (with greater obligations than the Annex on Financial Services) and commitments (with commitments greater than GATS commitment and around the level of India's revised offers.)

Important Issues

- India's financial sector liberalization has been on autonomous basis.
- Essential to keep both regulatory and policy space in the sector.
- Foreign banks engage in 'cream-skimming' and 'cherry picking' practices, supplying services only to high-value customers, thus undermining the financial condition of domestic banks, which would end up serving low-value (and more risky) customers.
- This competition could be so destabilizing that some domestic banks would go out of business and the overall level of credit in the host country might decline.
- In India the foreign banks are present with only 5 rural branches and 6 semi-urban branches while there are 299 urban and metro branches with 238 branches in metropolitan cities.

Important Issues contd.

- In contrast to the global scenario, India has by and large been spared of the global financial contagion.
- Even in the midst of the crisis, India's financial sector remained safe and sound and financial markets continued to function normally.
- Financial stability in India has been achieved through perseverance of prudential policies which prevent institutions from excessive risk taking, and financial markets from becoming extremely volatile and turbulent.
- Pending reforms in the banking (WOS for foreign banks, policy for new private sector banks) and insurance (various issues including FDI in insurance).
- Essential to schedule commitments in a proper manner: DS-413 (CUP Case).

THANK YOU