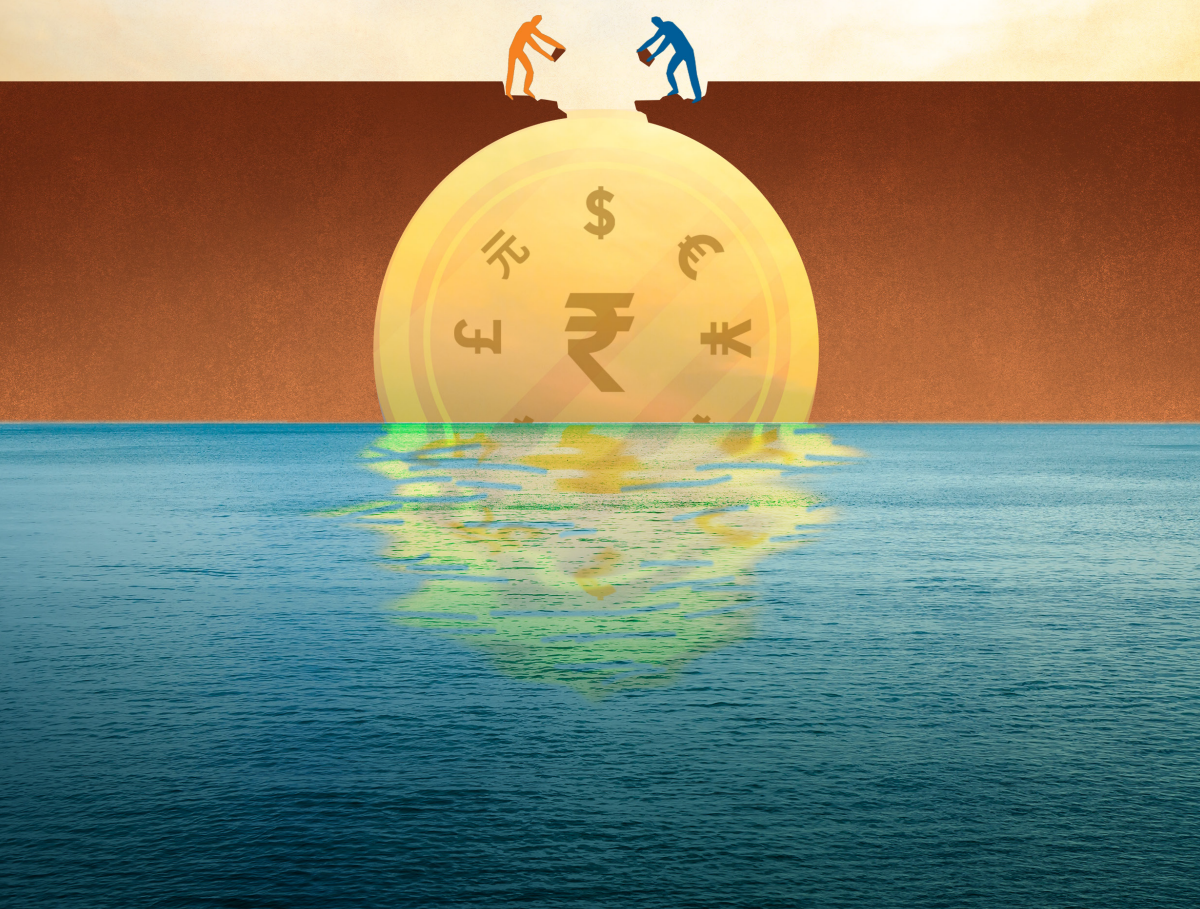




# **Unlocking Opportunities: A Guide to Negotiating Financial Services in Free Trade Agreements**





# **Unlocking Opportunities: A Guide to Negotiating Financial Services in Free Trade Agreements**

*This Book is an attempt by India Exim Bank to bring forth a compilation of articles from various stakeholders involved in Financial Services Negotiations in India's Free Trade Agreements. The endeavour has been to provide valuable insights into the intricacies of FTA negotiations, offering practical guidance and best practices for utilizing financial services to strengthen trade relations. The perspectives shared through the articles would interest policy makers, academia, development agencies, as well as researchers. The views and opinions expressed in the articles are those of the authors and do not necessarily reflect those of India Exim Bank. India Exim Bank accepts no responsibility for authenticity, accuracy or completeness of the information and data.*



## Message from Ms. Harsha Bangari

### Managing Director, India Exim Bank



It gives me immense pleasure to introduce this comprehensive publication, *“Unlocking Opportunities: A Guide to Negotiating Financial Services in Free Trade Agreements”*, a collaborative effort involving experts from Department of Financial Services, Ministry of Finance, Government of India, Centre for WTO Studies, Centre for Trade and Investment Law and researchers from India Exim Bank.

In today’s interconnected world, the role of financial services in facilitating international trade and investment cannot be overstated. As Managing Director of India Exim Bank, I have witnessed firsthand, the transformative potential of strategic trade agreements in shaping the landscape of financial services, opening new avenues for collaboration and growth.

This publication arrives at a crucial juncture when countries are increasingly turning to Free Trade Agreements (FTAs) to strengthen their economic ties. It offers valuable insights into the complexities of FTA negotiations, providing practical guidance and best practices for leveraging financial services to enhance trade relations. The inclusion of perspectives from various stakeholders involved in FTA negotiations enriches the content, providing a holistic view of the subject. Their expertise and insights have been instrumental in ensuring that this publication serves as a practical and reliable guide for policymakers, negotiators and practitioners involved in FTA negotiations.

I commend the authors for their dedication and commitment in producing a valuable resource. I am confident that this publication will be a valuable tool for all stakeholders involved in FTA negotiations, guiding them towards crafting mutually beneficial agreements that promote sustainable economic development and financial inclusion.





**Message from Dr. Vivek Joshi**  
Secretary, Department of Financial Services  
Ministry of Finance, Government of India



India has set an ambitious target of US\$ 2 trillion for exports by 2030. Achievement of this target will hinge upon the growth of exports in services sector. Within services sector, financial services occupy a position of critical importance, underpinning economic growth, investment flows, and overall prosperity. As one of the world's leading economies with a large service sector base, India is expected to play an increasingly prominent role in the global financial trade.

In G20 New Delhi Leaders' Declaration, leaders recognised that Digital Public Infrastructure (DPI) can enable delivery of services at societal-scale. India has built considerable capacities in this area and is in a position to partner with other countries in delivering essential financial services such as secure banking services, MSME finance, remittance transfers, direct benefit transfers, etc., at societal-scale. This can also help in diversifying India's services exports basket.

Today, Free Trade Agreements (FTAs) are being used to promote international trade and economic partnerships. Mutually beneficial negotiations in financial services will be an important component in future Free Trade Agreements (FTAs). I am happy to note that EXIM Bank has come out with this publication as a guide to negotiators handling financial services in FTAs negotiations. This book provides to reader a good grounding in the history of services trade negotiations, technical intricacies of financial services in FTAs and other details a negotiator should be aware of.

I hope this timely publication will prepare our negotiators with the fundamental understanding of core and emerging dimensions of financial services in FTAs and assist them to navigate complexities in negotiating financial services within FTAs.






## Preface

India has set an ambitious target of US\$ 2 trillion for exports by 2030 and India's Export Vision outlines a strategic approach to reach this target. Free Trade Agreements (FTAs) in its various forms are a part of this strategic approach for reaching the target. This is substantiated from the fact that share of global trade conducted through preferential lines has risen from 31% in 2000 to 41% in 2020, highlighting the increasing importance of Free Trade Agreements (FTAs).

The rise of service-based economies and increasing importance of financial services have led to a transformation of FTAs. This evolution reflects the growing recognition that a robust financial sector is crucial for economic development. FTAs have become more comprehensive, encompassing not just goods but also services like banking, insurance, and investment. By incorporating provisions on financial services, these agreements aim to facilitate cross-border financial transactions, promote competition within the financial sector, and ultimately, foster economic integration between trading partners.




This shift towards comprehensive economic partnerships presents both opportunities and challenges. On the one hand, it opens doors for financial institutions to expand their reach into new markets, potentially leading to increased investment and economic growth. However, on the other hand navigating the complexities of financial regulations across different countries and ensuring a fair and equitable environment for all participants requires careful negotiation.

This book covers basics of a FTA deal with a focus on negotiations under financial services text. The aim is to shed light on the journey from the General Agreement on Trade in Services (GATS) to the nuanced dynamics of modern FTA, which are reshaping the landscape of liberalisation and globalisation.

Chapter 1 provides an introduction to trade in financial services and traces the evolution of GATS and its consequential impact on the international trade framework. Chapter also analyses the effectiveness of GATS provisions in fostering transparency, facilitating market access and ensuring national treatment across service sectors.

Chapter 2 delves into the practicalities of negotiating and implementing financial services provisions within FTAs and explores India's commitments in financial services under various FTAs. It also provides a perspective of the critical aspects of financial services negotiations, addressing the variances between WTO and FTA commitments, the categorization of financial services, the scheduling of commitments, and the structural composition of financial services text within these agreements.

Understanding the intricate tapestry of financial services regulation in India is crucial for navigating the opportunities and challenges presented by FTAs. Chapter 3 explore the financial services regulatory landscape in India, providing a granular analysis of India's regulatory architecture and highlighting the policies that govern the nation's financial services sector. This includes an examination of regulatory framework in India with respect to insurance and insurance related services and banking and other financial services.



Moreover, the chapter also infers the key points that must be kept in mind when negotiating a Financial Services Chapter under FTAs.

Having covered the essentials for Free Trade Agreements, Chapter 4 looks ahead and ventures into the frontier territories of financial services trade, spotlighting the new and emerging issues that are gaining traction in contemporary FTAs. It offers foresight into the future trajectories of trade in financial services and the challenges and opportunities that FTAs present in promoting inclusive development and securing the overall national interest.

As the global paradigm continues to evolve, this book aspires to serve as a fundamental block of knowledge in financial services negotiations under FTAs and a navigational tool for those charting the complex waters of financial services trade negotiations. We warmly invite our readers to delve into the insights contained within this book, which we trust will be an invaluable resource in the ever-expanding universe of financial services trade.



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# Introduction to Trade in Financial Services

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*This chapter delves into the evolution of the General Agreement on Trade in Services (GATS) and evaluate its impact on international trade, particularly within the realm of financial services. It assesses the effectiveness of GATS provisions in fostering transparency, facilitating market access and ensuring national treatment across service sectors. The chapter also analyses pertinent provisions concerning the financial sector under the GATS, along with associated policy tools for trade. Considering the rising trend of economic integration agreements among nations, it also explores how such agreements will bolster the principles espoused by the GATS, promoting cooperation and trade facilitation among participating countries.*

## Background

Trade and financial systems are not separate in an interdependent world. The WTO's creation on January 1, 1995 marked the biggest reform of international trade






since the end of the Second World War. The WTO treaty covered 60 areas, including trade in goods (GATT 1994), trade in services (GATS), trade-related intellectual property rights (TRIPS), a trade policy review mechanism and a limited set of trade related investment measures (TRIMS), in addition to trade and development. The WTO Agreement also included a unique Dispute Settlement Understanding (DSU), which provided it with powers to regulate and enforce the rules of international trade that had been negotiated and agreed between WTO members.

## **General Agreement on Trade in Services**

The General Agreement on Trade in Services (GATS), a framework agreement for international trade in services (with some sectoral annexes, including on financial services), is an integral part of the 1994 Marrakesh Agreement for the establishment of the WTO. India played a significant role during the closing phase of the negotiations of the Uruguay Round, when the framework of the General Agreement on Trade in Services (GATS) was conceptualized and negotiated. The significance for India of the GATS can be gauged by the fact that 44% of the negotiating proposals (42 out of 95) on trade in services during the Uruguay Round had been made by just four delegations – the US, European Communities, Brazil and India. India's contributions in the final text of the GATS on increased participation of developing countries (Article IV) and progressive liberalization (Article XIX) served the interests of developing countries in becoming active participants in the growing global trade in services after 1995.

The GATS, in force since 1995, was the first trade agreement to cover services on a multilateral basis. It is designed to ensure that the laws and regulations that WTO member countries apply to services trade are transparent and fair. Its key market-opening element is the Schedule of Specific Commitments that each signatory annexed to the GATS as an integral part of the Agreement. In these schedules, signatories identified the extent to which they would accord full market access and national treatment in specific service sectors.




The GATS adopts what is called a positive list or bottom-up approach to members making commitments in sectors and sub-sectors that they specify in a schedule. This means that members agree to accept commitments to liberalize and provide market access for trade in services in specified sectors and sub-sectors.

For each service sector or sub-sector that is listed, the schedule indicates, with respect to each of the four modes of supply, any limitations on market access or national treatment which are to be maintained. A commitment therefore indicates the presence or absence of market access or national treatment limitations with respect to each mode of supply.

The first column in the standard format of schedule contains the sector or sub-sector which is the subject of the commitment; the second column contains limitations on market access and the third column contains limitations on national treatment. In the fourth column, governments may enter any additional commitments which are not subject to scheduling under market access or national treatment. Commitments are generally classified into two categories: (1) “none,” implying that no restrictions are applied on either market access or national treatment for a given mode of supply or sector, and (2) “unbound”, the country wished to make no commitments to accord market access or national treatment.

For example, under the limitations on national treatment for all sectors included in the schedule, India has committed that in case of collaboration with public sector enterprises or government undertakings as joint venture partners, preference in access will be given to foreign service suppliers/entities which offer the best terms for transfer of technology.

The schedules, however, were only a first step in the complex process of liberalizing services trade, and many countries continue to impose limitations and conditions on both market access and national treatment. These restrictions are specified in each country’s schedule. Continuing services negotiations that are taking place under the GATS are aimed at removing these limitations and conditions.



The recent 13<sup>th</sup> WTO Ministerial Conference (MC13) held in Abu Dhabi saw the entry into force of new disciplines on services domestic regulation, which is expected to lower trade costs by over US\$ 125 billion worldwide. The disciplines seek to mitigate unintended trade-restrictive effects of measures relating to licensing requirements and procedures, qualification requirements and procedures and technical standards. It seeks to make the regulatory environment more conducive to business and can help particularly micro, small and medium-sized enterprises as well as women entrepreneurs. It includes the first-ever commitment in a WTO agreement to ensuring non-discrimination between men and women when they seek permits to supply services.

## **GATS - Scope and Coverage**

All services are covered by the GATS, except those that are supplied by governments on a non-commercial basis (such as central banking or social security). The GATS applies not just to the provision of services across borders to consumers in other countries, but also to the provision of services within countries by foreign suppliers.

In the GATS, the supply of services is defined based on the location of the supplier and consumer at the time when the transaction takes place. The GATS defines trade in services as the supply of a service through four modes of supply: cross-border trade, consumption abroad, commercial presence, and presence of natural persons.

**Mode 1:** Cross-border supply from the territory of one WTO member country into the territory of another (for example, an architect in India sending plans to a client in the US). The definition implies that both the supplier and the consumer remain in their respective territories when the service is consumed;

**Mode 2:** Consumption abroad, service is supplied 'in the territory of one member to the service consumer of any other member (for example, an Australian tourist taking a vacation in India, or a Bangladeshi citizen coming to India for health care);

**Mode 3:** Commercial presence - takes place through the supply of a service 'by a service supplier of one member, through a commercial presence in the territory of any other member' (for example, the branch of an Indian bank in South Africa extending loans to local entrepreneurs); and

**Mode 4:** The presence of "natural persons" for a limited period of time in another country (for example, the representative of an Indian software company spending a month in the US installing the firm's products on American company's computers).


This extended dimension of international supply of services, matters greatly from a trade policy perspective, as market access conditions vary among the four ways of supplying services internationally. Since GATS, most other regional (bilateral or plurilateral) trade agreements follow similar principles in setting out their commitments according to the four modes of supply.

## Obligations under GATS

Obligations contained in the GATS may be categorized into two broad groups: general obligations that apply to all members and services sectors, as well as obligations that apply only to the sectors inscribed in a member's schedule of commitments.

### ***(a) General obligations***

**Most Favoured Nation Treatment (Article II):** Under Article II of the GATS, members are held to provide most favoured nation (MFN) treatment commitments, which is used to ensure that firms legally established and authorised in a foreign market should be subject to 'most favoured nation treatment', meaning *"treatment no less favourable than that accorded to like services and services suppliers of any other country"*. Unlike national treatment and market access commitments, which apply only when a country has formally adopted them, the MFN commitment is a general obligation in the GATS. For example, if a WTO member country has not made any specific commitments on accounting services, the country may maintain or introduce in this sub-sector any restrictions it considers necessary. However, if the



country removes a restriction with regard to the provision of accounting services from another country, it has to remove it for all members, by virtue of Article II.


Furthermore, the GATS allows groups of members to enter into economic integration agreements or to mutually recognize regulatory standards, certificates and the like if certain conditions are met. For example, Article V of the GATS titled “*Economic Integration*” imposes the conditions on WTO members pursuing preferential trade arrangements. Similarly, Article VII of the GATS allows WTO members to enter into mutual recognition agreements with regard to education or experience obtained, requirements met, or licenses or certificates granted.

**Transparency (Article III):** GATS members are required, among other things, to publish all measures of general application and establish national enquiry points mandated to respond to other members' information requests.

### ***(b) Specific commitments***

**Market Access (Article XVI):** Market access commitments can be used to restrict the use of quotas or caps with respect to local contracting, employment or output, economic needs tests or local ownership requirements attached to the right to establish authorised entities for the provision of services in a market. The list of restricted measures should be based on the terms of GATS Article XVI, but customised and refined as required to ensure that tests, caps or quotas of any kind and measures do not act as de facto checks on foreign firms participating in local markets.

**National Treatment (Article XVII):** National treatment commitments can be used to ensure that foreign firms are treated no different from local firms of the same type and profile in the conduct of supervision or any other regulatory treatment. The key requirement is not to modify, in law or in fact, the conditions of competition in favour of the member's own service industry. For example, if domestic suppliers of audiovisual services are given preference in the allocation of frequencies for transmission within the national territory,



such a measure discriminates explicitly on the basis of origin of the service supplier and thus constitutes formal or *de jure denial* of national treatment.

However, the extension of national treatment in any particular sector may be made subject to conditions and qualifications (for example, by placing additional conditions or requirements on foreign computer professionals). In banking sector, India's commitment states that foreign banks are required to constitute Local Advisory Boards consisting inter-alia of professionals and persons having expertise in areas such as small-scale industry and exports. The appointment of Chairman and members of the Board requires Reserve Bank of India approval. Deviations from national treatment are to be listed and included in a country's schedule of commitments.

In case of financial services, national treatment could cover all aspects of their regulation: prudential and conduct supervision, rights to establish local branch or sales networks, access to payments systems and market infrastructure and the requirements imposed on their corporate governance, data handling or any other aspect of business. National treatment could also be extended to new financial services, with foreign firms automatically eligible to provide new financial services approved for the market on the same terms extended to domestic firms. For example, if a country introduces a new type of banking service (such as mobile banking), foreign banks operating in that country would automatically be eligible to offer this service under the same conditions as domestic banks. However, prudential measures could still be imposed.

Members are free to tailor the sector coverage and substantive content of such commitments as they deem fit. The commitments thus tend to reflect national policy objectives and constraints, overall and in individual sectors. While some members have scheduled less than a handful of services, others have assumed market access and national treatment disciplines in over 120 out of a total of 160-odd services.

The existence of specific commitments triggers further obligations concerning, among other things, the notification of new measures that have a significant impact on trade and the avoidance of restrictions on international payments and transfers.

## Salient Features of Trade in Financial Services

Trade in financial services support the basic financial infrastructure of markets around the world, sustain deep and dynamic capital markets, finance trade and fund investments. Financial services play an important facilitative role in the wider economy, and foreign firms can bring new capital and sophisticated skills that benefit the importing economy.

The WTO GATS classifies financial services in 16 categories, including lending, guarantees and commitments, asset or funds management, trading, insurance and insurance related services, among others. Principles of trade in financial services are contained, as for all services, in the GATS. Further, an Annex to the GATS contains specific provisions applicable to trade in financial services. This deals with issues such as sectoral definitions, services supplied in the exercise of governmental authority and prudential measures.

Additionally, a number of WTO members have made commitments in accordance with the Understanding on Commitments in Financial Services. The 'Understanding' is an optional and alternative approach to making specific commitments on financial services. It is not part of the GATS, but it was appended to the Final Act of the Uruguay Round.

Financial services are one of the sectors where the number of WTO members with specific commitments is the highest, second only to tourism services. As of end-2020, 111 WTO members (counting the EU-25 as one) had undertaken specific commitments in at least one type of financial service and 43 members had made commitments on the whole range of insurance, banking and other financial services.

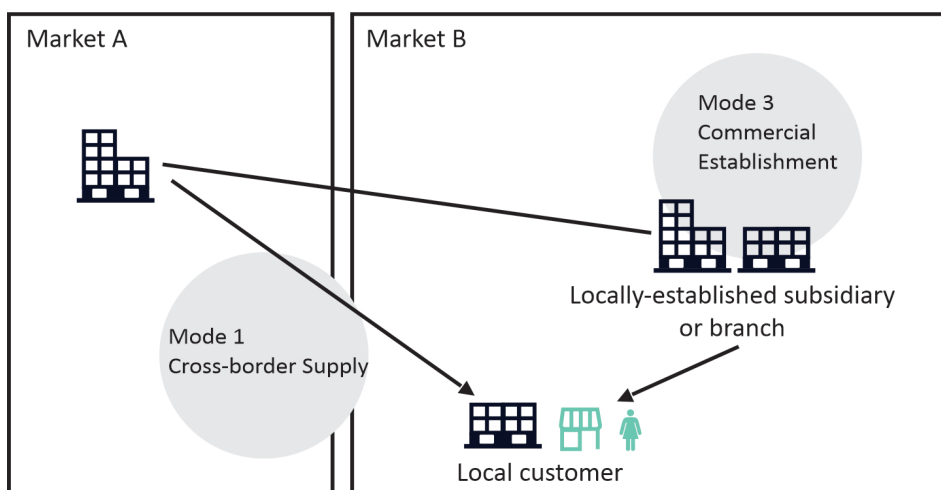
### *Modes of Supply*

Although exports of financial services can be undertaken through any of the four modes of supply of services, there are two prominent models of international trade in financial services (**Figure 1**):



1. Cross-border trade (Mode 1): In this mode, firms and individuals get regulated financial services directly from firms in the exporting jurisdictions.
2. Trade through a local commercial presence (Mode 3): In this mode, services are sold through a local establishment, such as a subsidiary or branch, established in the importing country by the financial services firm of the exporting country. It gives domestic regulators comfort that foreign firms are operating within their direct supervision.

**Figure 1: Key Modes of Financial Services Exports**



Source: UK Finance and India Exim Bank Research

Though cross-border trade in financial services remains substantial, it remains much smaller than the volume of services traded through commercial establishment. However, there has been a notable shift in the pattern in recent times especially in developed economies, with the impact of digitisation becoming more visible. Although technology is rapidly changing the geographical scope for providing services cross-border, the ability to co-locate alongside customers inside their regulatory jurisdiction (by establishing a local branch or subsidiary, for example) is always likely to remain important for most financial services exports, especially in the market for retail financial services.

## Policy Tools for Trade in Financial Services

The WTO's framework, notably the GATS, acts as a guidepost for India's domestic economic reforms. There are two basic categories of policy tool for trade in financial services. The first include regular diplomacy tools such as strategies for encouraging openness, convergence and best practice in regulation in the country's key trading partners. These include the country's own approach as an importer, a wide range of bilateral cooperation and recognition frameworks and the process of setting financial services standards at the multilateral level.

The second are mechanisms for 'locking in' this practice in formal international agreements such as Free Trade Agreements (FTAs) and the WTO framework. FTAs are a unique opportunity to 'lock in' national treatment and market access frameworks and regulatory best practice from trading partners. This creates certainty for exporters and can establish 'gold standards' in areas such as transparency and proportionality in regulation. FTAs can also be used to establish frameworks for regulatory cooperation and collaboration.

### *Provision in GATS for FTAs*

Article V of the GATS allows WTO members to deviate from their treaty obligations as a consequence of having entered into a preferential trade agreement, provided the FTA establishes a significant degree of economic integration. It establishes the rules and pertinent requirements that preferential trade agreements must meet in order to be legally compatible with the multilateral trading system.

As of April 30, 2024, 208 FTAs have been notified under Article V (Economic Integration) of the GATS, accounting for over half of all notified regional trade agreements in the WTO. Article V of the GATS permits WTO member countries to conclude FTAs provided that such an agreement:

- has substantial sectoral coverage in terms of number of sectors covered, volume of trade and modes of supply affected;

- provides for the absence or the elimination of substantially all discrimination in the sense of national treatment; and
- will not be raising barriers against non-members as result of the agreement.

All three conditions are cumulative and have to be satisfied concurrently. FTAs help partner countries to obtain more favourable treatment than the one granted under the WTO's GATS. The FTAs, in principle, take over the provisions of the GATS and the related schedules of commitments as a basis for improvements.

From the perspective of financial services, the use of FTAs for making commitments with respect to trade in financial services has a number of potential benefits:

- To lock in the existing access provided by one FTA party to the firms of another by bringing their guaranteed access closer to what they actually provide in practice, thereby providing greater certainty for investing and trading firms;
- Commitments in an FTA are binding on a trading partner and can only be amended if new concessions are provided in other areas to balance the market access rights being withdrawn or by withdrawing from the FTA, making them relatively robust and reliable;
- Provide preferential treatment for the two parties not extended, in principle or practice, to any other WTO member, provided they meet the terms set out in GATS Article V;
- Such commitments in an FTA can be made subject to the dispute resolution arrangements embedded in an FTA, providing a formal mechanism to resolve disputes in an open and transparent way; and
- To lock in forms of best practice in regulation and regulatory, supervisory and legislative transparency and responsiveness, putting a floor under good practice and signalling it to others.

To conclude, FTAs can provide deeper and more comprehensive market access commitments and can go beyond the GATS requirements by reducing or eliminating trade barriers. They allow countries to negotiate specific commitments tailored to their needs, which may not be feasible in a multilateral context where consensus among all members is necessary. FTAs offer flexibility in choosing sectors to liberalize and to what extent, based on development priorities and domestic regulations. They often include provisions for regulatory cooperation and harmonization and enhance regulatory compatibility between countries. They can promote best practices in areas like intellectual property, labour and environment, which may not be fully covered by the GATS. Overall, FTAs give countries greater control over their trade relations, enabling them to pursue deeper integration with specific partners.

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# Financial Services in Free Trade Agreements of India

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*Financial services are increasingly becoming important in trade negotiations. This chapter presents a brief outlook of financial services in the context of India's free trade agreements. It elaborates upon key issues pertaining to financial services negotiations, such as difference between WTO and FTA commitments, financial services classifications, scheduling of commitments, structure of financial services text, etc. It also provides a snapshot of financial services commitments made by India in its existing FTAs. The chapter concludes by highlighting some emerging issues pertaining to financial services negotiations in new-age FTAs.*

## 1. Introduction

Financial services trade is a rapidly growing area in the global trade. It is well known that as a nation progresses, the share of its financial services sector increases in total output as the consumption of services such as banking and insurance



increases with rising incomes. Increased production and consumption of financial services in turn gives rise to the possibility of trading these services not only within a nation but also among nations.

Though international trade in services is as old as trade in goods, the literature on services trade is relatively new. Economists started analyzing international trade in services in the 1970s and 1980s. The Uruguay Round and signing of the WTO General Agreement on Trade in Services (GATS) led to much of the initial research on services trade. More recently, the growing number of regional and bilateral agreements encompassing services has also led to further studies on services trade.

In this context, this chapter provides a brief overview of financial services in the context of India's free trade agreements (FTAs).

## **2. WTO vs FTA Commitments**

The World Trade Organization (WTO) has a dedicated agreement dealing with trade in services. This is called General Agreement on Trade in Services (GATS), which came into existence in 1995. The GATS has an Annex on Financial Services which specifies the specific provisions pertaining to financial services, such as definition of financial services, prudential measures, recognition, etc. The GATS is a multilateral agreement among more than 160 Members. On the other hand, free trade agreements are signed between either two countries (Example: India-Singapore FTA) or selected set of countries (Example: India-ASEAN FTA). The FTAs generally have text provisions which are either GATS based or GATS plus. Similarly, the liberalization commitments in services are also mostly either GATS based or GATS plus. The FTA provides a country the flexibility to have higher liberalization commitments only for its FTA partners as against for all WTO members in the case of GATS commitments.

### ***2.1 Financial Services and FTAs: Annex vs Chapter Structure***

As in the case of the GATS, which has an Annex on Financial Services, India's FTAs also follow an Annex structure for financial services. The Annex on

Financial Services in these FTAs is annexed to the Trade in Services Chapter that has all the provisions pertaining to trade in services, such as market access, national treatment, etc. However, many new age FTAs have started having a separate chapter on financial services instead of an annex. The key difference between a chapter and an annex is that in the case of a separate chapter, financial services are completely delinked from trade in services chapter. Therefore, the provisions of trade in services chapter do not apply to financial services, unless specifically provided for in either of the two chapters. On the contrary, in an annex structure, financial services remains an integral part of trade in services and hence trade in services provisions apply to financial services also, unless specified otherwise.

## ***2.2 Financial Services Classification***

For purposes of structuring commitments, countries generally use a classification system for which is provided in the GATS Annex on Financial Services, according to which, financial services are divided into the following sub-sectors-

### ***I. Insurance and insurance-related services***

- (i) Direct insurance (including co-insurance) :
  - (A) life
  - (B) non-life
- (ii) Reinsurance and retrocession;
- (iii) Insurance intermediation, such as brokerage and agency;
- (iv) Services auxiliary to insurance, such as consultancy, actuarial, risk assessment and claim settlement services.

### ***II. Banking and other financial services (excluding insurance)***

- (v) Acceptance of deposits and other repayable funds from the public;
- (vi) Lending of all types, including consumer credit, mortgage credit, factoring and financing of commercial transaction;



- (vii) Financial leasing;
- (viii) All payment and money transmission services, including credit, charge and debit cards, travellers cheques and bankers drafts;
- (ix) Guarantees and commitments;
- (x) Trading for own account or for account of customers, whether on an exchange, in an over-the-counter market or otherwise, the following:
  - (A) money market instruments (including cheques, bills, certificates of deposits);
  - (B) foreign exchange;
  - (C) derivative products including, but not limited to, futures and options;
  - (D) exchange rate and interest rate instruments, including products such as swaps, forward rate agreements;
  - (E) transferable securities;
  - (F) other negotiable instruments and financial assets, including bullion.
- (xi) Participation in issues of all kinds of securities, including underwriting and placement as agent (whether publicly or privately) and provision of services related to such issues;
- (xii) Money broking;
- (xiii) Asset management, such as cash or portfolio management, all forms of collective investment management, pension fund management, custodial, depository and trust services;
- (xiv) Settlement and clearing services for financial assets, including securities, derivative products, and other negotiable instruments;
- (xv) Provision and transfer of financial information, and financial data processing and related software by suppliers of other financial services;
- (xvi) Advisory, intermediation and other auxiliary financial services on all the activities listed in subparagraphs (v) through (xv), including credit reference and analysis, investment and portfolio research

and advice, advice on acquisitions and on corporate restructuring and strategy.

### ***III. Others***

## **3. Scheduling Commitments in FTAs**

India's existing FTAs follow a GATS based positive list approach for undertaking liberalisation commitments in financial services. In a positive list schedule of commitments (SoC), a country lists the sectors in which it assumes liberalisation commitments pertaining to market access and national treatment. Limitations may be attached to these commitments in order to reserve the right to operate measures inconsistent with full market access and/or national treatment. Thus, all non-listed sectors remain uncommitted for that country in a positive list FTA. On the other hand, in a negative list FTA, all sectors are considered as committed (fully liberalised) unless reservations (limitations) are inscribed by a country for specific sectors in its Schedule of Non-Conforming Measures (NCMs). Thus, all non-inscribed sectors are considered as fully committed by that country.

Two important obligations in a positive list FTA are market access and national treatment. The market access provisions cover six types of restrictions that must not be maintained in the absence of limitations inscribed in the schedule of commitments. The restrictions relate to-

- The number of service suppliers
- The value of service transactions or assets
- The number of operations or quantity of output
- The number of natural persons supplying a service
- The type of legal entity or joint venture
- The participation of foreign capital

These measures, except for (e) and (f), are not necessarily discriminatory, i.e. they may affect national as well as foreign services or service suppliers. **Box 1** provides some examples of these six types of market access limitations.

### BOX 1: EXAMPLES OF MARKET ACCESS LIMITATIONS

Market Access Limitations	Examples
a) Number of service suppliers (i.e. numerical quotas, monopolies, exclusive service suppliers or an economics needs test)	<ul style="list-style-type: none"> <li>• Annually established quotas for foreign banks.</li> <li>• Licence for a new bank branch based on an economic needs test.</li> <li>• Nationality requirements for suppliers of insurance services (equivalent to zero quota for foreigners).</li> </ul>
b) Value of service transactions or assets (i.e. numerical quotas or economics needs test)	<ul style="list-style-type: none"> <li>• Foreign bank subsidiaries limited to x percent of total domestic assets of all banks.</li> </ul>
c) Number of service operations or quantity of service output (i.e. designated numerical units in the form of quotas or economics needs test)	<ul style="list-style-type: none"> <li>• Restrictions on total output of banking services available for foreign banks.</li> </ul>
d) Number of natural persons employed (i.e. numerical quotas or economic needs test)	<ul style="list-style-type: none"> <li>• Foreign labour should not exceed x per cent and/or wages y per cent of total.</li> </ul>
e) Type of legal entity or joint venture	<ul style="list-style-type: none"> <li>• Foreign banks required to establish subsidiaries.</li> <li>• In sector x, commercial presence must take the form of a joint venture.</li> </ul>
f) Participation of foreign capital (i.e. maximum percentage limit on foreign share-holding or the total value of individual or aggregate foreign investment)	<ul style="list-style-type: none"> <li>• Foreign equity ceiling of x per cent for a particular form of commercial presence.</li> </ul>

Source: Author's construction based on WTO document S/L/92

National treatment implies the absence of all discriminatory measures that may modify the conditions of competition to the detriment of foreign services or service suppliers. Again, limitations may be listed to provide cover for inconsistent measures, such as discriminatory subsidies and tax measures, residency requirements, etc. It is for the individual country to ensure that all

potentially relevant measures are listed; The national treatment obligation applies regardless of whether or not foreign services and suppliers are treated in a formally identical way to their national counterpart. What matters is that they are granted equal opportunities to compete.

It is also useful to keep in mind that, unlike market access article, national treatment article does not contain an exhaustive listing of the types of measure which would constitute limitations on national treatment.

**Box 2** presents the template for scheduling services commitments under the GATS. This template is also followed for undertaking financial services commitments in positive list FTAs.

<b>BOX 2: TEMPLATE FOR SCHEDULING SERVICES COMMITMENTS UNDER GATS</b>			
Modes of supply: 1) Crossborder supply 2) Consumption abroad 3) Commercial presence 4) Presence of natural persons			
<b>Sector or subsector</b>	<b>Limitations on market access</b>	<b>Limitations on national treatment</b>	<b>Additional commitments</b>
<i>I. HORIZONTAL COMMITMENTS</i>			
sectors included in this schedule			
<b>II. SECTOR-SPECIFIC COMMITMENTS</b> [Insert specific commitments in the relevant service sector(s)/sub-sector(s) as appropriate]			
Sector 1	1) Unbound 2) Unbound 3) None 4) Unbound except as indicated in horizontal commitments	1) 2) 3) 4)	
Sector 2	1) 2) 3) 4)	1) 2) 3) 4)	

Source: WTO

A horizontal commitment applies to trade in services in all scheduled services sectors unless otherwise specified. On the other hand, a sector specific commitment applies to trade in services in a particular sector.

The first column lists the sector or subsector in which a country wishes to assume liberalisation commitments. The sector/subsector are listed as per the classification described in section 2.2. Any subsector with \*\* implies that only a part of that subsector and not the entire subsector is committed for liberalisation.

If a Member does not seek in any way to limit market access or national treatment in a given sector and mode of supply through measures inconsistent with market access and national Treatment, it should mark in the appropriate column: **NONE**. However, any relevant limitations listed in the horizontal section of the schedule will still apply.

If the Member wants to remain free in a given sector and mode of supply to introduce or maintain measures inconsistent with market access or national treatment, it must record in the appropriate column the word: **UNBOUND**. In some situations, a particular mode of supply may not be technically feasible. In these cases, the term **UNBOUND\*** should be used.

The fourth column in this template relates to 'Additional Commitments'. Additional commitments are expressed in the form of positive undertakings, not limitations, for example, undertakings with respect to qualifications, technical standards, licensing requirements or procedures.

## 4. India's Financial Services Commitments in FTAs

Till date, India has signed nine free trade agreements in services. Out of these seven are with individual countries, namely Singapore (2005), Korea (2010), Malaysia (2011), Japan (2011), Mauritius (2021), UAE (2022), and Australia (2022), and two with regional blocs of countries, namely, ASEAN (2015) and EFTA (2024).

## 4.1 Textual Obligations

All these FTAs have financial services text as an annex attached to the Trade in Services chapter. The textual provisions are based on GATS provisions. However, some of these FTAs also contain GATS plus provisions. For example, the India-Australia FTA has provisions on 'New Financial Services', 'Self-regulatory Organisations', 'Payment and Clearing Systems', 'Performance of Back-Office Functions', 'Credit Rating of Financial Services Suppliers', etc.

## 4.2 Schedule of Commitments

**Box 3** presents a snapshot of financial services subsectors in which India has made commitments in its various FTAs.

BOX 3: INDIA'S FINANCIAL SERVICES COMMITMENTS IN FTAs									
FS Subsector/FTA		India-Singapore	India-Korea	India-Japan	India-Mauritius	India-ASEAN	India-EFTA	India-Australia	India-UAE
<b>A.</b>	<b>All insurance and insurance-related services</b>								
	a.	Life, accident and health insurance services	✓	✓	✓	✓	X	✓	✓
	b.	Non-life insurance services	✓	✓	✓	✓	X	✓	✓
	c.	Reinsurance and retrocession	✓	✓	✓	✓	✓	✓	✓
	d.	Services auxiliary to insurance (including broking and agency services)	✓	✓	✓	✓	X	✓	✓
<b>B.</b>	<b>Banking and other financial services (excl. insurance)</b>								
	a.	Acceptance of deposits and other repayable funds from the public	✓	✓	✓	✓	✓	✓	✓
	b.	Lending of all types, incl., inter alia, consumer credit, mortgage credit, factoring and financing of commercial transaction	✓	✓	✓	✓	✓	✓	✓

FS Subsector/FTA			India-Singapore	India-Korea	India-Japan	India-Mauritius	India-ASEAN	India-EFTA	India-Australia	India-UAE
	c.	Financial leasing	✓	✓	✓	✓	✓	X	✓	X
	d.	All payment and money transmission services	✓	✓	✓	✓	✓	✓	✓	✓
	e.	Guarantees and commitments	✓	✓	✓	✓	✓	✓	✓	✓
	f.	Trading for own account or for account of customers, whether on an exchange, in an over-the-counter market or otherwise, the following:	✓	✓	✓	✓	✓	✓	✓	✓
	g.	Participation in issues of all kinds of securities, incl. under-writing and placement as agent (whether publicly or privately) and provision of service related to such issues	✓	✓	✓	✓	✓	✓	✓	✓
	h.	Money broking	X	X	X	✓	✓	X	X	X
	i.	Asset management, such as cash or portfolio management, all forms of collective investment management, pension fund management, custodial depository and trust services	✓	✓	✓	✓	X	✓	✓	✓
	j.	Settlement and clearing services for financial assets, incl. securities, derivative products, and other negotiable instruments	✓	✓	✓	✓	X	X	✓	X



FS Subsector/FTA			India-Singapore	India-Korea	India-Japan	India-Mauritius	India-ASEAN	India-EFTA	India-Australia	India-UAE
	k.	Advisory and other auxiliary financial services on all the activities listed in Article 1B of MTN. TNC/W/50, incl. credit reference and analysis, investment and portfolio research and advice, advice on acquisitions and on corporate restructuring and strategy	✓	✓	✓	✓	✓	✓	✓	✓
	l.	Provision and transfer of financial information, and financial data processing and related software by providers of other financial services	✓	✓	✓	✓	X	✓	✓	✓
C.	Other		X	X	X	X	X	X	X	X

Source: Author's compilation

## 5. Emerging Issues in Financial Services Negotiations

Financial services are part of all new age, modern, comprehensive free trade agreements. Based on the analysis of the recent FTAs of various countries, some of the emerging issues pertaining to financial services negotiations in the context of FTAs can be listed as below-

- **Positive list (GATS based) vs negative list approach for scheduling of commitments:** Many new age FTAs follow a negative list approach for financial services liberalisation commitments. As mentioned earlier, a negative list implies that all sectors are completely liberalised unless reservations are undertaken. Thus, preparing a negative list schedule of commitments requires a lot of background work in terms of knowing all

the regulatory measures affecting the concerned service sector so as to take appropriate reservations for such regulatory measures.

- **Annex vs Chapter structure for Financial Services text:** Some countries in FTA negotiations insist on having a separate chapter on financial services delinked from trade in services chapter so as to give prominence to financial services negotiations. Delinking of financial services from overall trade in services chapter requires careful evaluation of applicability of trade in services provisions for financial services so that the same could be incorporated in the financial services chapter.
- **Most Favoured Nation (MFN) treatment:** MFN treatment means giving the same treatment to an FTA partner as provided to some other country. Since, each FTA is negotiated on its own merit, MFN treatment to the existing FTA partner may result into providing extra benefits to the existing FTA partner if the future FTAs have greater liberalisation as compared to the existing FTA.
- **New financial services:** Most of the new-age FTAs have provisions on new financial services (NFS). Though, there is no universal definition of NFS, they are generally understood as those financial services that do not exist/recognised in a particular country.
- **Financial data processing and data localisation:** Given increasing role of data processing and use of big data analytics, the new-age FTAs also have provisions on free flow of financial data for further processing. However, since financial data is sensitive, any commitment on cross-border flow of financial data needs a careful evaluation with respect to the national policy objectives and the existing laws and regulations.

## 6. Conclusion

Financial services have attained greater importance in trade negotiations over the years. Since financial services are linked with all economic activities in an economy, countries have both defensive and offensive interests in financial services trade liberalisation. Given the emergence of new issues, as highlighted in Section 5, financial services negotiations are becoming complex in new FTAs. Therefore, it is of utmost importance to have a robust

understanding of financial services and related issues in the context of free trade agreement negotiations.

## References

*WTO I-TIP Database, <http://i-tip.wto.org/services/>*

*WTO document S/L/92, Guidelines for the Scheduling of Specific Commitments under the General Agreement on Trade in Services (GATS), March 28, 2001.*

*WTO website [https://www.wto.org/english/tratop\\_e/serv\\_e/cbt\\_course\\_e/intro1\\_e.htm](https://www.wto.org/english/tratop_e/serv_e/cbt_course_e/intro1_e.htm)*

*Various FTAs of India.*

# India's Financial Services Regulatory Landscape

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*The General Agreement on Trade in Services (GATS) and relevant chapters under Free Trade Agreements (FTAs) require India to undertake binding liberalisation commitments with respect to financial services. The scope of financial services is broad and includes insurance, banking as well as other financial services. The key provisions that are relevant for binding commitments that are reflected in a Schedule of Specific Commitments are Market Access (MA) and National Treatment (NT). Considering the financial services sector is heavily regulated, this chapter provides a quick overview of India's financial services regulatory landscape. Specifically, the chapter seeks to identify key MA and NT limitations with respect to cross border supply of financial services and foreign investment in the financial services sector. The chapter reminds negotiators that in the context of binding liberalisation commitments what needs to be reflected in India's Schedule of Specific Commitments are MA and NT limitations.*

## 1. Introduction

Under the General Agreement on Trade in Services (GATS) and under Free Trade Agreements (FTAs), countries take treaty obligations and liberalisation commitments with respect to the financial services sector. This chapter will discuss India's financial services regulatory landscape in the context of the GATS and India's FTAs. The scope of financial services is quite vast under the GATS. The definition of financial services refers to any service of a financial nature offered by a country. It includes insurance and related services, banking and other financial services as well as financial services that go beyond banking and insurance.

This chapter will identify the scope of financial services under the GATS and FTAs in section 2. The core obligations that India undertakes with respect to financial services under the GATS and FTAs will be briefly discussed in section 3. Section 4 will examine the financial services regulatory framework in India with respect to (i) insurance and insurance related services and (ii) banking and other financial services. Lastly, the chapter will conclude summarising the key points that must be kept in mind when scheduling commitments on financial services.

## 2. Scope of Financial Services under the GATS and FTAs

Financial services are divided into two broad categories viz. (i) Insurance and insurance related services and (ii) Banking and other financial services (excluding insurance). These two broad sectors are further sub-divided into the following sub-sectors:

**Table 1: Categories of Financial Services**

Insurance and insurance-related services	Banking and other financial services (excluding insurance)
<p>(i) Direct insurance (including co-insurance), which is further divided into:</p> <p>(A) Life insurance;</p> <p>(B) Non-life insurance</p> <p>(ii) Reinsurance and retrocession;</p> <p>(iii) Insurance intermediation, such as brokerage and agency</p> <p>(iv) Services auxiliary to insurance, such as consultancy, actuarial, risk assessment and claim settlement services.</p>	<p>i. Acceptance of deposits and other repayable funds from the public;</p> <p>ii. Lending of all types, including consumer credit, mortgage credit, factoring and financing of commercial transaction;</p> <p>iii. Financial leasing;</p> <p>iv. All payment and money transmission services, including credit, charge and debit cards, travellers' cheques and bankers' drafts;</p> <p>v. Guarantees and commitments;</p> <p>vi. Trading for own account or for account of customers, whether on an exchange, in an over-the-counter market or otherwise, the following:</p> <p>A. money market instruments (including cheques, bills, certificates of deposits);</p> <p>B. foreign exchange;</p> <p>C. derivative products including, but not limited to, futures and options;</p> <p>D. exchange rate and interest rate instruments, including products such as swaps, forward rate agreements;</p> <p>E. transferable securities;</p> <p>F. other negotiable instruments and financial assets, including bullion.</p>

Insurance and insurance-related services	Banking and other financial services (excluding insurance)
	<ul style="list-style-type: none"> <li>vii. Participation in issues of all kinds of securities, including underwriting and placement as agent (whether publicly or privately) and provision of services related to such issues;</li> <li>viii. Money broking;</li> <li>ix. Asset management, such as cash or portfolio management, all forms of collective investment management, pension fund management, custodial, depository and trust services;</li> <li>x. Settlement and clearing services for financial assets, including securities, derivative products, and other negotiable instruments;</li> <li>xi. Provision and transfer of financial information, and financial data processing and related software by suppliers of other financial services;</li> <li>xii. Advisory, intermediation and other auxiliary financial services on all the activities listed in subparagraphs (v) through (xv), including credit reference and analysis, investment and portfolio research and advice, advice on acquisitions and on corporate restructuring and strategy</li> </ul>

Source: GATS Annex on Financial Services, 5(a)

### 3. Key Obligations under the GATS and FTA Services Chapters

While this may have been covered in the previous chapters, this section will recap the core obligations that are covered under the GATS and FTAs. At

the outset, it is important to recall the definition of “trade in services” is the supply of services through the following modes:

- **Mode 1:** Cross Border Supply of Services  
*(Illustration: Bank from country X is supplying online banking services to a person in country Y.)*
- **Mode 2:** Consumption Abroad  
*(Illustration: Person from country X is consuming insurance services in country Y.)*
- **Mode 3:** Commercial Presence  
*(Illustration: Bank from country X has set up a commercial presence in the form of a branch, representative office or a subsidiary in country Y.)*
- **Mode 4:** Movement of Natural Persons.  
*(Illustration: Person from country X is working in a bank or insurance company in country Y.)*

Another aspect that is relevant to note is that no commitments or obligations are taken with respect to services supplied in exercise of governmental authority, which in the case of financial services means the following:

- (i) activities conducted by a central bank or monetary authority or by any other public entity in pursuit of monetary or exchange rate policies;
- (ii) activities forming part of a statutory system of social security or public retirement plans; and
- (iii) other activities conducted by a public entity for the account or with the guarantee or using the financial resources of the Government.

In other words, activities conducted by a public entity, i.e., a government entity, a central bank or monetary authority or a private entity performing functions normally performed by a central bank or monetary authority, is excluded from the scope of the GATS.<sup>1</sup> This is also usually the case with respect to FTAs.

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<sup>1</sup> GATS Annex on Financial Services, 1(b) and 5(c).




The two key core obligations are Market Access (MA) and National Treatment (NT). A country is not allowed to maintain MA and NT limitations for a sector in which commitments are taken, unless it is expressly listed in its Schedule of Specific Commitments (Schedule).

Article XVI of the GATS specifies the MA obligation, which requires countries to not maintain six (6) types of limitations, these include four types of quantitative limitations as well as limitations on forms of legal entity and on foreign equity participation. If a country maintains any of such limitations in a committed sector, it must describe it in its Schedule. These six MA limitations, simplified, are as follows:

- Limitations on the number of service suppliers;
- Limitations on the total value of service transactions or assets;
- Limitations on the total number of service operations or on the total quantity of service output;
- Limitations on the total number of natural persons that may be employed in a particular service sector;
- Restrictions on type of legal entity or joint venture;
- Limitations on percentage of foreign shareholding or the total value of individual or aggregate foreign investment.

On the other hand, Article XVII of the GATS specifies the NT obligation, which requires a country to treat foreign financial service suppliers in the same manner as domestic financial service suppliers, unless it is listed in the Schedule. In trade parlance, this is referred to as “no less favourable treatment”. In other words, a country is not allowed to discriminate between foreign and domestic financial service suppliers unless it is expressly provided for in its Schedule.

There may be some limitations that is considered both a MA and a NT limitation. For instance, foreign insurers are not allowed to provide cross border insurance services in India. This is a discriminatory requirement, which also serves as a Mode 1 MA restriction on the number of service suppliers.



Such a requirement would be scheduled in the MA column but would apply with respect to both MA and NT in accordance with Article XX:2 of the GATS.

In addition to MA and NT, another core obligation is known as the Most Favoured Nation (MFN) treatment, this obligation requires that a country does not discriminate between other countries. For example, if India liberalises the insurance sector to country A and allows FDI up to 45%, it must grant the same treatment to country B as well. The MFN obligation under the GATS applies unconditionally, in other words, it applies to all sectors irrespective of the commitments undertaken a Member's Schedule of Specific Commitments, unless a limitation is expressly specified in a country's MFN Exemption List.<sup>2</sup> On the other hand, in FTAs India usually grants only a limited form of MFN obligation, wherein the FTA partner country can enter into consultations to request for MFN treatment in particular sector. However, India's MFN approach in its recent FTA, such as the India – Australia Economic Cooperation and Trade Agreement (IAECTA) is slightly different. In IAECTA, the MFN obligation requires India to provide non-discriminatory treatment between the FTA partner and other countries only in a specific list of sectors identified in the MFN Schedule. In other words, India extends the same treatment to the FTA partner that it does to any other country (including a future FTA partner) for the specific sectors it has identified in the MFN Schedule.

However, the principle of non-discrimination, whether NT or MFN may also come up in the context of other provisions such as new financial services or financial data and information. For instance, an FTA partner may require that with respect to permitting new financial services India must treat the financial service suppliers of the FTA partner in the same manner as domestic financial service suppliers. In the context of MFN, an FTA partner may require that with respect to locating financial data and information, India must treat the FTA partner in the same manner as it treats other countries.

Lastly, the obligation that is also of relevance is Domestic Regulation (DR), which is prescribed under Article VI of the GATS. This obligation extends

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<sup>2</sup> GATS, Article II

to qualification requirements and procedures, licensing requirements and procedures and technical standards. It essentially deals with aspects that are not covered under MA or NT. In FTAs, disciplines on DR deal with transparency, predictability and efficiency of procedures for authorisation of service suppliers. Often Financial Services Chapters in FTAs do not have a dedicated DR article, disciplines with respect to transparency and efficiency of authorisation of foreign financial service suppliers may be covered under provisions on Transparency.

Thus, the key obligations in the context of services in FTAs are MA, NT, MFN and DR. Specifically, negotiators are required to describe any existing law, regulation, policy (referred to as 'measures' in trade parlance) that are inconsistent with MA and NT in a sector/sub-sector where there is a liberalisation commitment in the Schedule. Overall, negotiators must be mindful that any obligation that it includes in the FTA must be consistent with its domestic legal framework.

## **4. Indian Legal Framework**

Financial regulation in India is based on regulating different financial products.<sup>3</sup> For instance, fixed deposits and other banking products are regulated by the Reserve Bank of India (RBI), mutual funds and equity markets by the Securities and Exchange Board of India (SEBI), and insurance by the Insurance Regulatory Development Authority of India (IRDAI). As indicated in the table above, the GATS divides financial services into two broad categories viz. (i) Insurance and insurance related services and (ii) Banking and other financial services (excluding insurance). However, these two broad categories are divided into sub-sectors, which are regulated by relevant statutory bodies, which will be discussed below. This section discusses the Indian legal framework under the two broad sub-sectors identified under the GATS, which are also the way in which it is reflected in FTAs.

<sup>3</sup> 'Financial Sector in India: Regulations and Reforms', Lok Sabha Secretariat, Members' Reference Service, Reference Note No. 15 /RN/Ref./August /2013, Accessed <[https://loksabhadocs.nic.in/Refinput/New\\_Reference\\_Notes/English/financialsectorinindia.pdf](https://loksabhadocs.nic.in/Refinput/New_Reference_Notes/English/financialsectorinindia.pdf)>, Last accessed: 3 May 2024.

In terms of modes of supply, the primary modes with respect to financial services is Mode 1 (cross border supply) and Mode 3 (supply of service through commercial presence). Mode 2 is largely not regulated by a country as it deals with consumption of a service by an Indian citizen in a WTO Member country or FTA partner country. On the other hand, Mode 4 deals with supply of a financial service by a citizen of the FTA partner country, which is usually governed by visa requirements set by the Ministry of Home Affairs, where there is no financial services specific requirement. Mode 4 is also often dealt with in a separate schedule, which specifies the requirements that foreign services suppliers are required to comply when supplying services through natural persons.

Considering the financial services sector is heavily regulated in India and it is difficult to identify all the relevant laws, regulations and policies that could potentially constitute as MA and NT limitations, India has sought to list a horizontal limitation for financial services in its Schedule of Specific Commitments, which states that “All the commitments are subject to entry requirements, domestic laws, rules, regulations, guidelines and the terms and conditions of the RBI, SEBI, IRDAI and any other competent authority in India”. Such a horizontal limitation is often pushed back on by FTA partners during negotiations as it fails to provide the partner country with the security and predictability it seeks from a Schedule of Specific Commitments. However, this limitation is critical in India’s ever-evolving financial sector regulatory regime.

This section will discuss India’s regulatory framework with respect to the core area of financial services as identified in the GATS and FTAs.

#### ***4.1 Insurance and Insurance Related Services***

India’s insurance sector is regulated by the Insurance Regulatory and Development Authority of India (IRDAI). IRDAI is a statutory body formed under the Insurance Regulatory and Development Authority Act, 1999 (IRDA Act). IRDAI is responsible to regulate, promote and ensure orderly growth of the insurance and re-insurance business in India.<sup>4</sup> In addition to the IRDA Act,

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<sup>4</sup> Section 14 (1), IRDA Act.

the Insurance Act, 1938 (as amended from time to time) is the relevant law relating to the business of insurance in India. These two laws and relevant rules and regulations therein govern the insurance sector in India.

a) Supply of insurance services through commercial presence (Mode 3)

Section 2 (7A) of the Insurance Act, 1938 defines the term “Indian insurance company”, which is a company formed under the Companies Act, 2013. In 2021, the definition of “Indian insurance company” was amended to include a company in which the aggregate holdings of equity shares by foreign investors including portfolio investors, does not exceed seventy-four per cent (74%). of the paid-up equity capital of such Indian insurance company.

India gradually liberalised the insurance sector by successive revisions in FDI limits, with the cap raised from 26% in 2014 to 49% in 2015 and subsequently to 74% in 2021. The FDI limitation is also reflected in the Consolidated FDI Policy 2020 through Press Note 2 of 2021, which specifies up to 74% of foreign investment is allowed through the automatic route and prescribes certain other conditions.

There are additional requirements prescribed by the Indian Insurance Companies (Foreign Investment) Rules, 2015 and the IRDA (Registration of Indian Insurance Companies) Regulations, 2022 as well any other relevant rules or regulations therein. Specifically, there are nationality requirements that an Indian insurance company that has foreign investment must have a majority of the directors and key management persons, as well as at least one among the Chairperson of its Board, its Managing Director and its Chief Executive Officer be Resident Indian Citizens.<sup>5</sup> There are also certain requirements specified for Indian Insurance Company having foreign investment exceeding forty-nine per cent (49%).<sup>6</sup>

<sup>5</sup> Rule 4, Indian Insurance Companies (Foreign Investment) Rules, 2015 and Rule 8, IRDA (Registration of Indian Insurance Companies) Regulations, 2022.

<sup>6</sup> Rule 9, IRDA (Registration of Indian Insurance Companies) Regulations, 2022.

In addition to the aforementioned requirements for foreign investment in the insurance sector, there may be additional sub-sector specific restrictions such as in case of insurance intermediation services or other sub-sectors identified in the table.

b) Cross – border supply of insurance services (Mode 1)

Section 2 (9) of the Insurance Act, 1938 defines the term “insurer”, which only allows foreign companies that have invested in an Indian insurance company (as discussed above) or is engaged in reinsurance through a branch established in India to supply insurance services in India.<sup>7</sup> A foreign reinsurer providing re-insurance services through a branch established in India are also required to comply with the IRDAI (Registration and Operations of Foreign Reinsurers Branches and Lloyd’s India) Regulations, 2024. Overall, the cross-border supply of insurance services is restricted in India except in case of placing reinsurance / retrocession services with cross-border re-insurer (CBR) as discussed below and is subject to the regulatory framework put in place by IRDAI.

Additionally, the prior permission of the IRDAI is required to take or renew any insurance policy with a foreign insurer with respect to any property in India.<sup>8</sup> This requirement extends to any property in India including any ship, aircraft or other vessel registered in India. This requirement is relevant in the context of non-life insurance sub-sector.

In case of reinsurance and retrocession, Indian insurers are allowed to place their reinsurance business with any CBR<sup>9</sup> in accordance with requirements prescribed in the IRDA (Re-insurance), Regulations, 2018 as amended from time to time.<sup>10</sup> These also include requirements with respect to the order of preference that needs to be followed in case of non-life insurance.

<sup>7</sup> Section 2 (7A) and Section 2 (9), Insurance Act, 1938.

<sup>8</sup> Section 2CB, Insurance Act, 1938

<sup>9</sup> ‘Cross Border Re-insurer’, hereinafter called by acronym ‘CBR’, means a foreign reinsurer including Lloyd’s Syndicates, whose place of business is established outside India, and which is supervised by its home country regulator. Cross Border Re-insurer includes: A. Parent or Group companies of the Foreign Reinsurers’ Branches (FRBs); B. Parent or Group companies of the International Financial Service Centre Insurance Offices (IIOs);

<sup>10</sup> Regulation 4, IRDA (Re-insurance) Regulations, 2018.

With respect to insurance intermediation, the relevant requirements are laid down in the IRDAI, (Insurance Brokers) Regulations, 2018. In particular, the reinsurance of domestic risks can be placed abroad with foreign reinsurers through a reinsurance broker registered with IRDAI, provided that not more than 50% of the remuneration can be shared with the foreign insurance broker for the services obtained.<sup>11</sup>

Moreover, there are also certain requirements for storing data that have been prescribed in a few IRDAI regulations. For instance, Regulation 3 (9) of the IRDAI (Maintenance of Insurance Records) Regulation, 2015 requires insurers to store data in India with respect to all records pertaining to insurance policies issued and claims made in India. Similarly, the IRDAI (Minimum Information Required for Investigation and Inspection) Regulations, 2020 requires every insurer, intermediary or insurance intermediary to maintain all information and data at their place of business in India.

Overall, the insurance sector is heavily regulated with a number of rules and regulations. It is important for negotiators to keep in mind which relevant regulations may constitute a MA or NT limitation and carefully include the same in India's Schedule of Specific Commitments.

## ***4.2 Banking and Other Financial Services***

The Reserve Bank of India (RBI) is the relevant body in charge of regulating the banking sector in India. The RBI is also a statutory body established under the Reserve Bank of India Act, 1934 (RBI Act). The RBI Act along with the Banking Regulation Act, 1949 (BR Act) are the primary pieces of legislation governing the banking and non-banking sector in India. The RBI Act and the BR Act empower the RBI to issue rules, regulations, directions and guidelines on a wide range of issues relating to the banking and non-banking financial sector. Additionally, the RBI also has the powers to regulate transactions related to foreign exchange, current and capital account transactions under the FEMA.

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<sup>11</sup> Rule 38, IRDAI, (Insurance Brokers) Regulations, 2018

The scope of the banking and other financial services sector under the GATS and FTAs is quite expansive and extends to participation in issuance of securities and asset management. Some of these sub-sectors may be regulated by the Securities and Exchange Board of India (SEBI), which is the statutory body established under the SEBI Act, 1992 responsible for regulating the securities market in India.

This section will briefly cover the relevant legal framework governing foreign investment in banking and other financial services and the cross-border supply of such services.

a) Supply of banking and other financial services through commercial presence (Mode 3)

According to Section 22 of the BR Act, only companies issued a license by the RBI are allowed to carry out banking business in India. A company under the BR Act, is not just limited to an Indian company registered under the Companies Act, 2013 but also extends to foreign company.<sup>12</sup> Section 11 of the BR Act prescribes minimum paid up capital requirements that must be maintained.

Similarly, Section 45IA of the RBI Act requires all non-banking financial companies (NBFCs), including foreign companies to obtain requisite registrations and comply with net owned fund requirements.

The requirements for a foreign entity to establish a Branch Office (BO)/ Liaison Office (LO)/ Project Office (PO) or any other place of business in India is prescribed in the RBI Master Direction, as updated from time to time. Any application for a foreign entity to have a BO/LO/PO in India for the supply of banking services will require prior approval by the RBI.<sup>13</sup> Foreign banks are also required to comply with the requirements prescribed under the RBI Master Circular on Branch Authorisation.<sup>14</sup>

<sup>12</sup> Section 5 (d), Banking Regulation Act, 1949

<sup>13</sup> Master Direction - Establishment of Branch Office (BO) / Liaison Office (LO) / Project Office (PO) in India by foreign entities, para. 1 (ii).

<sup>14</sup> Master Circular



In addition to bank branches, the RBI has also developed a Scheme for Setting up of Wholly Owned Subsidiaries (WOS) by foreign banks in India (WOS Scheme). Only a foreign bank with home country regulator approval may set up a WOS in India, subject to compliance with requirements prescribed in the WOS Scheme.

With respect to foreign investment in banking services, the Consolidated FDI Policy 2020 permits foreign investment of up to 74% in private sector banks, where 49% is allowed via the automatic route, and up to 74% is allowed with approval of the RBI, provided that 26% of the paid-up capital will have to be held by residents, except in case of WOS of a foreign bank.<sup>15</sup> Additional requirements are listed in Annexure 8 of the Consolidated FDI Policy 2020. All banks, including foreign banks, may also be required to comply with RBI Master Direction on Financial Services provided by Banks, 2016 when supplying services other than banking services.

Moreover, with respect to foreign investment in other financial services, including those financial services that are regulated by any financial sector regulator viz. RBI, SEBI, IRDAI, or any other financial sector regulator, foreign investment is allowed up to 100% under the automatic route.<sup>16</sup> Such foreign investment is subject to any additional requirements prescribed by the regulators, including minimum capitalisation requirements. Whereas for financial services that are not regulated by any financial sector regulator or where there is a lack of clarity regarding regulatory oversight, foreign investment will be allowed up to 100% under the Government approval route.<sup>17</sup>

With respect to other financial services, such as venture capital and participation in issues of all kinds of securities are regulated by the SEBI and relevant regulations therein. For instance, all foreign venture capital investors are required to comply with the SEBI (Foreign Venture Capital Investors)

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<sup>15</sup> Consolidated FDI Policy Circular of 2020, para 5.2.26

<sup>16</sup> Consolidated FDI Policy Circular of 2020, para 5.2.26; RBI Circular on Foreign investment in Other Financial Services, A.P. (DIR Series) Circular No. 8, October 20, 2016.

<sup>17</sup> Ibid.

Regulations, 2000 , venture capital funds are required to comply with SEBI (Alternative Investment Funds) Regulations, 2012 or with respect to asset management, foreign portfolio investors are required to comply with SEBI (Foreign Portfolio Investors), 2019.

There are certain additional financial services that are prescribed in the Consolidated FDI Policy 2020 related to pension fund and provision or transfer of financial information. For instance, foreign investment in Credit Information Companies (CIC) is allowed up to 100% through the automatic route, subject to any requirements prescribed in the Credit Information Companies (Regulation) Act, 2005. Additionally, in case of the pension sector, which is regulated by the Pension Fund Regulatory and Development Authority (PFRDA), foreign investment is allowed up to 74% through the automatic route and in accordance with the requirements laid down in the Pension Fund Regulatory and Development Authority (PFRDA) Act, 2013.<sup>18</sup>

**b) Cross border supply of banking and other financial services (Mode 1)**

Largely, the cross-border supply of banking and other financial services is not allowed in India as most such services are supplied through commercial presence as explained above. Moreover, in the sectors where cross-border supply of financial services may be allowed, Indian regulators like the RBI and SEBI often maintain data localisation policies, which restrict the cross-border supply of such services.

For instance, RBI Circular on Storage of Payment System Data issued under the Sections 10 (2) and 18 of the Payment and Settlement Systems Act 2007 (PSS Act) requires that the entire data relating to payment systems operated by them are stored in a system in India. Additional data localisation requirements are maintained with respect to digital lending data,<sup>19</sup> data of NBFC account

<sup>18</sup> Section 24, PFRDA Act, 2013.

<sup>19</sup> RBI Guidelines on Digital Lending, para. 11.4.

aggregators,<sup>20</sup> data of NBFCs that provide Peer to Peer Lending Platform,<sup>21</sup> and credit information data<sup>22</sup>. The RBI's Payments Vision 2025 also envisages local storage of data when setting out the road map of cross border process of data.<sup>23</sup> Similarly, SEBI has issued Framework for Adoption of Cloud Services by SEBI Regulated Entities (REs) which requires SEBI REs to maintain/process all data within the legal boundaries of India. By virtue of Section 16 (2) of the Digital Personal Data Protection Act, 2023, the RBI Circular and any other existing law that provides for a higher degree of protection for or restriction on transfer of personal data outside India continues to be applicable.

The above discussion does not provide a comprehensive assessment of the financial services regulations in India. However, it identifies the relevant regulations in the context of foreign investment and cross border supply of financial services. While not all the laws and regulations discussed will be considered as MA or NT limitations, the specific requirements that may be considered as such limitations would need to be listed in India's Schedule. Moreover, it is also critical for a negotiator to be mindful when developing new rules that such rules are not inconsistent with India's Schedule in the GATS and in FTAs.

## 5. Conclusion


This document is not a detailed overview of India's financial services regulations, but it seeks to provide some insights into the relevant financial services' regulatory framework in the context of India's financial services commitments under the GATS and FTAs.

<sup>20</sup> The T&C attached to Certificate of Registration issued to NBFC-AA mandates to process data on hardware located within India.

<sup>21</sup> Master Directions - Non-Banking Financial Company – Peer to Peer Lending Platform (Reserve Bank) Directions, 2017

<sup>22</sup> The operational guidelines for CICs requires that entities categorised as Specified Users (SUs) shall process and store credit information in India. Further, one of the conditions prescribed to CICs, while sharing credit information with other entities (based on consent), is that the entity shall process and store credit information received in India and not transfer it outside India.

<sup>23</sup> RBI Payments Vision



While several of the regulations discussed are non-discriminatory or apply equally to domestic and foreign financial services suppliers, many prescribe special conditions with respect to foreign financial service suppliers. On the other hand, MA limitations are largely in the nature of legal form requirements or foreign equity caps. The quantitative limitations are largely in the nature of not granting market access at all. However, there are a number of minimum capitalisation requirements, which are common in case of financial services, but these do not specifically fall within the six (6) MA limitations that are required to be listed. Nevertheless, India's approach is to include these requirements in its Schedule of Specific Commitments as an MA limitation to provide greater transparency to its FTA partners.

Overall, a negotiator must keep in mind the relevant regulatory framework to identify particular measures that would need to be reflected in India's Schedule of Specific Commitments. Moreover, negotiators must also be mindful of the legal regime and ensure none of the obligations that are negotiated are inconsistent with India's existing legal regime and keep in mind any necessary future policy space that may be required.

# Emerging Issues in Modern Free Trade Agreements

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*Modern Free Trade Agreements (FTAs) are moving beyond trade liberalisation and towards larger economic cooperation. Through a comprehensive economic agreement they seek to address multifaceted challenges, promote sustainability, and lay the groundwork for a more interconnected and forward-looking global economy. FTAs increasingly address non-tariff measures (NTMs) such as technical regulations, sanitary and phytosanitary standards, and customs procedures. FTAs are incorporating sustainability impact assessments to evaluate potential economic, environmental, social, and human rights effects of trade agreements. Further, FTAs recognize the importance of the digital economy. They include provisions on data flows, privacy, cybersecurity, and e-commerce. More comprehensive FTAs incorporate labour provisions that seek to uphold fundamental rights, fair wages, and safe working conditions. This chapter presents a brief outlook on some key emerging issues in modern FTAs with particular focus on trade in financial services.*

## Introduction

The preceding chapters have covered the evolution of the General Agreement on Trade in Services (GATS) and its impact on international trade, the structure of FTAs, discussed key issues pertaining to financial services negotiations, as well as the financial sector regulatory landscape. However, as new-age FTAs become the conduit for larger economic cooperation, there are new dimensions in FTAs having unique characteristics and challenges. This chapter will deep dive into the new emerging dimensions in Financial Services commitments such as the use of the Most Favoured Nation concept, commitments in New Financial Services and transfer of Financial data and information, Gender, Labour and Sustainability dimensions, Dispute Settlement mechanism and interlinkages between trade and investment.

## Most Favoured Nation

As explained in the previous chapters, the Most Favoured Nation (MFN) treatment obligation requires that a country does not discriminate between other countries. The meaning of MFN clauses in international law can be further illustrated with the help of this simple example. Let us assume three states: A (the granting state), B (the beneficiary state) and C (the third state). Further assume that States A and B have entered into an agreement containing the MFN clause. Now, If State A extends certain benefits to State C, State B can invoke the MFN clause in the agreement to ensure that State A extends the same benefits to her, provided the granted benefits to State C falls within the scope of application of the MFN clause of the agreement between A and B. MFN principle is embedded within modern Free Trade Agreements (FTAs), embodying the commitment of non-discrimination and equal treatment among trading partners.

In the GATS text, MFN has been granted to all signatory countries. Article II of GATS reads as follows, “1. With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country. 2. A Member may maintain a measure inconsistent

with paragraph 1 provided that such a measure is listed in, and meets the conditions of, the Annex on Article II Exemptions”. In most cases the commitment is for giving consideration to a request by the other Party for grant of treatment no less favourable than that provided to the non-Party. The implication of such a commitment would be that in case a country in any of its future FTAs provides a liberal concession, say allowing 100% FDI limit in a sector, to a country, the same concession can be requested for by all partner countries with whom that country has granted MFN in its past agreements.

In recent FTA negotiations, MFN provision is being applied in new and emerging areas or in areas where it is being felt that a country is not ready to commit or give concessions at present. In such cases an MFN clause stating that each Party shall accord to financial service suppliers of the other Party “treatment no less favourable than the treatment it accords to like financial service suppliers of a non-party” is being used. Such language could imply that there is no immediate requirement for performance of the commitment and that it requires only non-discrimination against a third party. However, commitments involving such language require to be carefully negotiated bearing in mind that gains from bilateral agreements like FTAs may differ across countries.

MFN provision has been particularly used in Bilateral Investment Treaties. Some use cases of MFN provision in BITs are as under<sup>24</sup>:

1. **MFN can be used to Borrow Substantive Provisions from other BITs:**  
India has already experienced a foreign investor relying on the MFN provision to borrow a substantive provision, missing in the primary treaty, from a third-State Indian BIT. In *White Industries v India* case, the Australian investor, relying on the MFN provision of India-Australia BIT, argued for the importation of a favourable substantive provision related

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<sup>24</sup> Prabhash Ranjan, Indian Journal of International Law 55(1), May 2015  
[https://www.researchgate.net/publication/277966893\\_Most\\_favoured\\_nation\\_provision\\_in\\_Indian\\_bilateral\\_investment\\_treaties\\_A\\_case\\_for\\_reform](https://www.researchgate.net/publication/277966893_Most_favoured_nation_provision_in_Indian_bilateral_investment_treaties_A_case_for_reform)

to 'effective means of asserting claims and enforcing rights' given in India-Kuwait BIT into the India-Australia BIT.

2. **MFN and dispute settlement:** If the MFN provision clearly states that MFN provisions do not extend to dispute settlement, then the foreign investor cannot use the MFN provision to borrow a beneficial dispute resolution provision from another BIT signed by the host state. However, in absence of such explicit provisions, there is ambiguity if one investor can import beneficial procedural clauses from any other treaty and it solely depends on arbitral discretion. If an arbitral tribunal were to follow the reasoning given by tribunals like *Maffezini v Spain*, then dispute resolution provision cannot be held to be outside the ambit of the MFN provision. However, if an arbitral tribunal adopts the reasoning given by arbitral tribunals like *Wintershall v Argentina*, which held that word like 'treatment' in MFN does not extend to dispute settlement, then MFN provision cannot be relied upon by a foreign investor to borrow a beneficial dispute resolution clause.


Due attention may be given while drafting of MFN provisions so that the 'carefully negotiated balance' that has been struck in the hard-negotiated agreement is not undermined.

## **New Financial Services**

A financial service means any service of a financial nature offered by a financial service supplier, including all insurance and insurance related services, all banking and other financial services. A "new financial service" generally refers to financial service that is not supplied in one country but which is supplied and regulated in the territory of any other country. This may include services related to existing and new financial products, or the manner in which the financial product is delivered. The commitment requires that a Party shall permit financial service suppliers of the other Party established in its territory to offer in its territory any new financial service.

These could encompass innovative fintech solutions, novel financial instruments, or specialized services catering to niche markets. The provision





aims to facilitate the integration of such new financial services into the regulatory framework of the FTA, promoting market access, transparency, and regulatory coherence in these novel services. Integrating new financial services necessitates regulatory alignment and harmonization among FTA parties. This entails mutual recognition of standards, streamlined approval processes, and cooperation in addressing regulatory divergences.

The challenge is to ensure that new financial services comply with prudential regulations, data privacy standards, and consumer rights safeguards to mitigate systemic risks and protect vulnerable stakeholders. To address these challenges, appropriate language can be negotiated to build in desirable safeguards into the commitment like ensuring that the new financial services being considered are regulated in the party which is proposing to supply it, the Financial Service Supplier supplying the new service is established in the party proposing to supply it and also that the new service itself is regulated in the host country and so on.

## **Transfer of Financial Data and Information**

Under this provision, parties to FTAs commit to allow free transfer of financial data and information, where such transfers are for the conduct of the ordinary business of the financial service supplier. There may be additional considerations on transfer, storage and processing of financial data and information.

New FTAs, particularly negotiated by developed economies, require free flow of financial data and information for transfer, storage, and processing. However, the flow of financial data and information is regulated by laws and regulations, which vary from one country to the other. In India, sectoral regulators such as RBI, SEBI and IRDAI have placed restrictions on transfer, storage, and processing of data.

In FTAs, transfer of data and information is subjected to the laws and regulations of the host country. In context of India, the India - Australia Economic Cooperation and Trade Agreement acknowledges that each country

“may have its own regulatory requirements, including requirements set out in legislation, concerning the transfer of financial information and the processing of financial information” and a country may, in pursuance of this requirement, take measure to prevent transfer and processing of Financial Information. Moreover, additional safeguards can be secured by incorporating provisions that empower regulatory authorities, for regulatory or prudential reasons, in requiring a financial service supplier in its territory to comply with its laws and regulations in relation to data management and storage and system maintenance.

As the digital economy continues to evolve, data transfer provisions in FTAs will play an increasingly pivotal role in shaping the future of international trade and investment. A balance between domestic laws and regulations and use of data for business and innovation is needed so as to protect personal data, personal privacy, and the confidentiality of individual records and accounts, and at all times the complete sovereignty over data is maintained with the appropriate authority. Therefore, while the commitment on permitting free transfer of financial data and information constitutes a key interest area for most countries embarking on FTAs, due care may be exercised while negotiating keeping in mind the above.

## **Gender and Labour dimensions**

Common types of gender-related provisions found in Financial Services commitments in FTAs are in the form of cooperation provisions on issues, including labour, health and social policy. While stronger commitments include upholding domestic gender-policies, implementing international gender-related agreements and instruments, and establishing institutional arrangements to oversee the implementation of the gender-related provisions and resolve issues through consultations. The language can range from:

- “recognising” the importance of building a diverse, including gender-balanced, financial services industry;
- “shall endeavour” to share best practices to promote diversity in financial services;

- “encourage” financial service suppliers to develop objectives and strategies that promote diversity and publish progress on gender diversity.

While such commitments are aligned with larger goals of promoting gender equality and only seek to reinforce and uphold domestic gender policies, taking such commitments in FTAs pose the challenge of being legally binding. Even if such commitments are taken, they may be taken across all sectors based on an overall policy decision.


Labour dimensions in FTAs, while not being specific to Financial Services commitments, are increasingly being used in FTAs and have the potential to affect all sectors. These include provisions on labour standards, especially for goods and services exported to other parties. The premise is built on the idea that low labour standards lead to lower costs of production, thereby providing unfair advantage over countries which provide for higher labour standards. United States-Mexico-Canada Agreement (USMCA), the successor of NAFTA, introduces novel rules of origin that require 40-45% of automobile content to be made by workers earning at least \$16 USD per hour to receive USMCA tariff relief.

Inclusion of labour standards in trade agreements may be perceived as a protectionist measure (a non-tariff barrier) in the guise of humanitarian concerns. Mandating unsustainably high labour standards may not improve average wages and working conditions in developing countries or even improve trade of developing countries. India, Brazil, Egypt and Malaysia have opposed the pressure from the developed nations to include labour standards within WTO as well as in their trade agreements<sup>25</sup>. With inclusion of gender and labour standards in legally binding trade agreements, the comparative advantage of countries, particularly low-wage developing countries, is put to test.

Gender dimensions and labour standards are widely discussed and negotiated in various multilateral international forums. However, the increasing trend

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<sup>25</sup> [pib.gov.in/PressReleaseIframePage.aspx?PRID=2009228](https://www.pib.gov.in/PressReleaseIframePage.aspx?PRID=2009228)



of their inclusion in trade negotiations indicates that there is a need to develop an overall trade negotiation stance after taking into account these dimensions. Commitments having such dimensions may not be limited to a few sectors (like Financial Services) but may be taken across all sectors based on an overall policy decision.

## **Sustainability Provisions**

In FTAs, sustainability dimensions aim to recognise the importance of international cooperation to facilitate the inclusion of Environmental, Social, and Governance (ESG) considerations in investment decision-making and other business activities so as to increase investment in sustainable activities. The inclusion of environmental considerations in investment decision-making and other business activities involves, inter alia, the assessment and pricing of climate-related risks and opportunities and the exploration of environmental and sustainable projects and infrastructure. The inclusion of sustainability provisions in FTAs was first conceptualised in the 1994 North American Free Trade Agreement (NAFTA), which included specific environmental provisions. It has also become standard in the new generation of the European Union's trade agreements with third parties, such as those with the Republic of Korea, Canada, Colombia, Peru and Vietnam, in the form of labour and environmental provisions. However, the inclusion of these clauses is not universal, as most FTAs either lack comprehensive commitments, or, in some cases, completely omit sustainability provisions.

The types of environmental provisions considered are:

- A reference in Preamble
- General and specific exceptions based on GATT Article XX or GATS Article XIV for protection of human, animal and plant life
- A commitment to uphold environmental law, and not weaken it to attract trade or investment

More substantive environmental provisions are:

- environmental co-operation
- coverage of specific environmental issues
- specific provisions on Multilateral Environmental Agreements (MEAs)
- implementation mechanism

The language can range from:

- Parties “acknowledging” the importance of encouraging financial service suppliers to develop approaches in managing climate-related financial risks;
- “Recognise” the importance of encouraging the uptake of climate-related financial disclosures for financial service suppliers, including forward-looking information;
- Recognise the work of initiatives such as the Task Force on Climate-Related Financial Disclosures (TCFD), The International Sustainability Standards Board (ISSB), etc;
- “Cooperate” and “promote” the development and adoption of internationally recognised standards for the inclusion of environmental, social, and governance considerations in investment decision-making and other business activities.

Though, trade, as any other area of economic activity, has an impact on use of environmental resources, however the aim of trade agreement is trade liberalization with focus on commercial issues such as tariffs & market access. Trade policy when used as an instrument for addressing Environmental issues can be leveraged to restrict and curtail imports of goods and services from developing countries. There are many instances of such non-tariff barriers impacting trade, the EU’s Carbon Border Adjustment mechanism (CBAM) is one of the most comprehensive and overarching programmes. Multilateral solutions to environmental problems are more effective and practical and should be addressed in separate stand-alone multilateral agreements such as UNFCCC’s Paris Agreement and should be based on principles of equity and justice such as Common But Differentiated Responsibilities (CBDR).

Major Developing Economies such as Brazil and India have not given any substantive obligations in their trade agreements while China in recent FTAs (for example with New Zealand) has included environmental provisions in its agreements. Going forward, the dimension of Sustainability, as also in the case of Gender and labour may be viewed as being intrinsically linked with trade and commitments in FTAs bearing such aspects may be negotiated and taken based on an overall considered policy decision.

## Dispute Settlement

Dispute settlement chapters in FTAs play a crucial role in ensuring smooth implementation and resolving disagreements that may arise between signatory countries. Some key provisions commonly found in these chapters are:

- Applicability in terms of:
  - **Scope:** The chapter usually outlines the types of disputes covered, often encompassing disagreements regarding the interpretation or application of the entire FTA or specific provisions within it.
  - **Exclusions:** Certain areas, like national security or environmental measures, may have separate dispute settlement mechanisms or be excluded altogether.
- Dispute Resolution Stages:
  - **Consultations:** The initial stage typically involves consultations between the disputing parties to seek a mutually agreeable solution through negotiation.
  - **Panels and Expert Groups:** If consultations fail, the chapter may establish procedures for forming panels or expert groups to independently assess the dispute and provide recommendations.
  - **Review and Appellate Mechanisms:** Some FTAs include provisions for reviewing or appealing panel findings, potentially through a standing appellate body.

- Outcomes and Enforcement:
  - **Recommendations and Rulings:** Panels or expert groups typically issue non-binding recommendations or rulings, which the parties are encouraged to follow.
  - **Retaliatory Measures:** In case of non-compliance, the chapter may authorize the complaining party to impose retaliatory measures, often in the form of tariffs or other trade restrictions.
  - **Compensation:** Certain FTAs allow for the possibility of compensation for economic losses incurred due to a violation of the agreement.

The mechanism to resolve disputes is governed by the dispute resolution text in the FTA. In general, financial services are also governed by the same mechanism. There is a recent trend amongst developed countries, particularly with offensive interest in financial services, to create a carveout or ring-fence financial services from cross retaliation in case dispute arises in a sector other than financial services.

## Trade and Investment

Trade and investment are deeply intertwined and mutually reinforcing. Investment Facilitates Trade as well as increase in trade promotes investments. Foreign financial institutions entering a new market through FDI can establish local branches or subsidiaries, this investment in the form of FDI starts trade in financial services (in form of mode 3). These institutions can further facilitate trade by providing trade finance, such as letters of credit and export credit guarantees, offering foreign exchange services and risk management tools and expanding the range of financial products and services available in the market. Moreover, growing trade volumes create a demand for various financial services such as trade finance to support import and export transactions, foreign exchange services to manage currency fluctuations and payment systems and infrastructure to facilitate cross-border transactions.

The primary objective of an investment chapter in an FTA is to establish a framework that provides investors with:

- **Predictability:** Investors need to know that their investments will be treated consistently over time.
- **Stability:** A stable investment climate encourages long-term commitments.
- **Transparency:** Clear rules and regulations enhance investor confidence.
- **Rules-Based Environment:** Investors seek a fair and predictable playing field.

## Conclusion

As FTAs continue to evolve towards broader economic partnerships, financial services are emerging as key interest areas for trading partners. The vision @ 2047 aims at achieving a USD 30 trillion economy with a per-capita income of USD 18,000-20,000 and a robust financial sector. As we pursue future FTAs, we need to strike a balance between liberalising the financial services sector and the larger public interest and harness the potential gains from liberalising trade in Financial Services to achieve our goal of Viksit Bharat.





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