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GATS Financial Services Liberalization: How do OECD Members Schedules Impact Commercial Banking FDI?

Laura Páez[*]

The World Trade Organization (WTO) has come to play an important role for a significant number of countries (currently 150) negotiating financial services liberalization under the General Agreement on Trade in Services (GATS). Nonetheless, despite these significant advances, the GATS is far from being complete. Substantial liberalization is still pending in a considerable group of member countries. This leads to regulatory deficiencies that contribute to a suboptimal provision of financial services. Among the many aspects needing improvement, is a strengthening of GATS provisions to guarantee greater market access and NT to foreign service providers. The analysis of the scheduled commitments and MFN exemptions undertaken by the 30 Organization for Economic Cooperation and Development (OECD) members points to a great variability in the depth of commitments affecting financial services foreign direct investment (FDI). In particular, entry, establishment and competition of foreign banks is determined through market access and NT limitations under the GATS framework. Given the current stalemate in the negotiation process of the GATS, improvements in the current liberalization framework will come from the combination of several processes such as unilateral opening; regionalism; pressures from the International Monetary Fund (IMF) and the World Bank (through their lending mechanisms) and the OECD, rather than under the aegis of the WTO.

1. Introduction

Recent efforts to lay out an international regulatory framework relevant for financial services liberalization, consolidated under the aegis of the World Trade Organization (WTO) and followed by the implementation of the General Agreement on Trade in Services (GATS), have provided market access to commercial banks seeking establishment in an important group of countries. This undoubtedly has contributed to an improved provision of globalized financial services (FS). However, though the GATS may target market failures that affect the global provision of FS, it is far from offering optimal results. Part of the reason rests on the complex architecture of the agreement that allows for a considerable degree of variability in the level and progress of liberalization on a country-by-country basis, via the country schedules of commitments.

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The focus of this article is set on the financial services sector of a subgroup of WTO Members, which at the same time are members of the Organization for Economic Cooperation and Development (OECD), for three reasons. First, the OECD was the first international body from which an agreement on financial services liberalization emanated. Second, the organization also geared considerable efforts to create multilateral rules on FDI, a task that was later pursued in the WTO through a negotiation mandate for a multilateral framework on investment. Third, and more importantly, the 30 OECD countries concentrate an important share of financial services in international markets. They not only attract considerable capital from different world region in the form of FDI, they also actively invest in the financial sectors of member and non-member countries.

Despite the need for an assessment on the degree of financial services liberalization in WTO member countries, the literature on the topic is scant. This resides in the difficulty of identifying comparable parameters of liberalization, and in trying to observe the de facto level of liberalization, which may divert considerably from the guaranteed level of market access and national treatment (NT) inscribed in the GATS country schedules of commitments.

This article seeks to contribute to the literature on financial services liberalization, with an analysis of the scheduled commitments and most-favoured nation (MFN) exemptions undertaken by the 30 OECD members. This qualitative evaluation hopes to offer insights of the liberalization effect on commercial banking FDI, by highlighting how entry, establishment and competition of foreign banks is determined through market access and NT limitations under the GATS framework.

2. Overview of the GATS Schedules of Commitments

The 30 OECD member countries[1] are represented in 19 schedules of commitments, annexed to the GATS. Although the GATS envisages one schedule per Member State, there are fewer schedules than countries, because the 12 member countries of the European Communities (EC) count as one member in the WTO. Further, given that Austria, Finland and Sweden joined the EC in 1995, these initial schedules of these three countries were separate from those of the EC. Nevertheless, their specific horizontal and sectoral provisions have also been incorporated to the EC schedules, and hold consistency with their country schedules.[2]

Table 1 gives an overview of the commitments and exemptions affecting financial services in the OECD region. Several observations can be made from this overview.

[1] These are: Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxemburg, Mexico, The Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States.

[2] The 12 EC members are: Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, The Netherlands, Portugal, Spain, and the United Kingdom. Later updates of the EC Schedules incorporate individual commitments of Austria, Finland and Sweden.

Table 1. Overview of Commitments Concerning Financial Services FDI in OECD Countries

SCHEDULES	AU	AT	CN	CZ	EC[1]/EU 15	FN	HU	IC	JP	KR	MX	NR	NZ	PL	SR	SV	SW	TR	US
HORIZONTAL COMMITMENTS (ALL SECTORS) AFFECTING FINANCIAL SERVICES FDI																			
MODE 3	✓	✓		✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
MODE 4	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
FINANCIAL SERVICES SECTORAL COMMITMENTS																			
Banking and other FS excluding insurance	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Insurance and insurance related	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓

Source: Developed by the author on the basis of country schedules of commitments. Schedules can be retrieved from the *WTO Services Database Online*, available at: <http://tsdb.wto.org/wto/WTOHomepublic.htm>.

[1] European Communities (EC) states: Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, The Netherlands, Portugal, Spain, and the United Kingdom. The European Union (EU 15) includes: the 12 EC members and Austria, Finland and Sweden, which joined the EU in 1995. Though ten new members also joined the EU on May 1, 2004, namely Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovak Republic and Slovenia, these are not included in the present schedules.

First, all OECD countries have inscribed horizontal commitments which affect the 12 services sectors regulated by the GATS, according to the Services Sectoral Classification List. Unless otherwise specified in the horizontal commitments section, this also includes financial services.[3]

Second, all countries have also made horizontal commitments for modes of delivery 3 and 4. In other words, all countries address FDI via "commercial presence" and "movement of natural persons". In all cases, the measures described in these two modes are presumed to affect all services, including financial services. Canada is the only country with horizontal commitments for mode 3 which do not affect the commercial presence of FS, as is expressly stated in its horizontal schedule.[4]

Third, all OECD members have made sectoral commitments in financial services. Concretely, all have distinct commitments for "banking or other" types of financial services, separate from the insurance and insurance related services. As will be discussed in the following section, some members also distinguish banking subsector service activities following the Central Product Classification (CPC), as specified in the Services Sectoral Classification List.

In general, judging from this preliminary overview, the coverage of liberalization in FS for OECD countries seem to be very high, given that all countries hold commitments on a horizontal and sectoral level. However, there is a considerable degree of variability in the level of liberalization achieved, given the relative freedom WTO countries enjoy when inscribing commitments in their schedules. This is especially the case with regards to the horizontal and sectoral commitments, and is the focus of the next subsection.

2.1. Horizontal commitments affecting commercial banking FDI

In the GATS, horizontal commitments apply to all services sectors inscribed in a country schedule. Thus, unless otherwise specified in the schedules, horizontal commitments also affect financial services. As identified in the general overview, all OECD countries have inscribed horizontal commitments in their schedules. Twenty-nine countries members have inscriptions for both mode 3 and 4, while one member (Canada) only considers horizontal commitments in mode 4 for FS. Even though Canada has horizontal commitments for commercial presence, the horizontal section expressly says that they do not apply to banks, these being dealt with in the section for specific commitments.[5]

The level of commitments varies substantially. Nonetheless, members phrase their inconsistent measures in a similar manner. Table 2 summarizes the different commitments in the market access and NT columns in OECD countries. First, with regards to mode 3, most members address three types of measures in their market access column, namely: particular admission, authorization or notification requirements for investors and/or their

[3] See WTO (1991) for the CPC services list for details on the CPC for financial services.

[4] See II.A below for further details.

[5] The complete horizontal commitments schedules can be retrieved from the *WTO Services Database Online*, available at: <http://tsdb.wto.org/wto/WTOHomepublic.htm>.

investments; limitations on form, amount or control of FDI, and limitations to participating in mergers and acquisitions (M&As) and/or privatization. The first type of measures is present in Australia, Austria, France, Spain, Portugal, Finland, Iceland, Korea, New Zealand, Poland, and Turkey. These measures range from a simple notification of the investment, to an actual examination based on economic interests by a country's investment authority, before being admitted to the country. The second types of limitations in some cases are specified as monetary thresholds, or percentage of shares or voting rights that may be acquired, as formulated by Finland, France, Italy, Korea, New Zealand, Spain, Portugal and Turkey. Above these thresholds, investments are subject to the granting of an authorization or concession, or are completely prohibited. Other commitments limit FDI to certain forms of establishment, prohibiting branches, only allowing the creation of a limited liability or joint stock company (e.g., Hungary and Poland), or the acquisition of equity stakes, shares or stocks (Korea and Mexico for reserved sectors). Further, typical limitations on foreign control apply when the majority of the board of directors and chairman (or voting shares) must be in the hand of nationals, as specified in the schedules of Finland, Norway, Switzerland.[6] These last two types of measures suggest that (greenfield) investments with 100 percent foreign control are not desired. Finally, countries like Italy, France and Portugal also limit or rule out foreign participation in the privatization of state owned firms, leaving further specification to the competent authority.

These types of limitations generally affect FDI at a pre-establishment level. For example, without authorization, the entry of capital is prohibited and will not benefit from investment protection in a given country. More importantly, some limitations may actually collide with the decision of how much to invest, or what form of establish is required for an investment to pay off. Depending on how burdensome some of these requirements may be, they may actually have a deterring effect on investment.

Second, members mostly address limitations on the rent or purchase of real estate; limitations on subsidies, tax write-offs or preferential treatment, and establishment or residence requirements in the NT column. In an important group of OECD countries, reigning conditions for the rent or purchase of real estate are limited to national capital and investors (i.e., both mode 3 and mode 4). They are not to be enjoyed by foreign capital or investors, unless otherwise specified. For example, in countries such as Austria, Czech Republic, Denmark, Germany, Finland, Iceland, Korea, Norway, Poland, Slovak Republic, Sweden and Switzerland, real estate purchases must be previously authorized, and can only be used for business-related purposes (Iceland, Korea, Switzerland and Turkey). With respect to subsidies and tax write-offs, these generally are only to be enjoyed by nationals, RTA members, or minorities (Australia, Austria, EC, Finland, Iceland, Norway, Sweden, the United States), be limited to juridical persons established within the territory (Finland, EC, Korea, Iceland, Norway, Sweden), or reflect differences at a subregional level, as is the case for Switzerland and the US tax write-offs. Finally, preferential

[6] Such limitations are tied to the establishment and residence requirements, typically inscribed in the NT column for both mode 3 and mode 4, as is discussed below in this section.

treatment reflects the special carve-out conditions to MFN treatment enjoyed by RTAs members in European Economic Area (EEA) countries, namely, EC and EFTA countries (i.e., Iceland, Norway, and Liechtenstein, except Switzerland). The limitations prohibit the enjoyment of the reigning MFN conditions to firms of third countries that have established themselves in an EEA member. The rationale behind this measure is to avoid a de facto MFN violation, at the expense of (firms from) EEA partner countries.[7] The same type of limitation also applies to EC member countries. In both cases, if an "effective and continuous link" between the country of establishment and the third country enterprise can be shown, the enterprise may receive the same MFN treatment accorded to member country enterprises. Extending this MFN treatment however, is left to the discretion of the RTA member country. Finally, establishment or residence requirements are mostly inscribed as mode 3 commitments, though they target the natural persons in control of the foreign investment. As such, founders, directors, entrepreneurs and/or managers of established firms in Iceland, Finland, Slovak Republic, Norway, Sweden and Switzerland have to be resident.[8]

Third, the most frequent type of limitations and requirements apply to mode 4. As shown in Table 2, these refer to qualification, skills or employment requirements, limitations on the category or function of employees, and limitations on the duration of stay, addressed in the MA column. In general, these seem to be more restrictive than mode 3 commitments. In all the schedules, the movement of natural persons is "UNBOUND", meaning the scheduling country opposes to submit this mode to the progressive liberalization of the GATS. The only exception to this general rule is the entry and temporary stay of natural persons categorized as "intra-corporate transferees". Further, in all the schedules, with the exception of Poland, Turkey and the United States, these limitations are extended to the NT column, which expressly states the same rules apply for the categories of natural persons specified in the MA column. Categories of transferees are narrowly defined and accompanied by numerous qualification and/or employment requirements and limitations on the duration of stay. Although each schedule categorizes transferees slightly differently, three main categories can be outlined, namely: (i) senior executives and managers, (ii) specialists, and (iii) service sellers or business visitors. In most schedules, the first category refers to those who actually direct the enterprise, have supervisory functions and are authorized to make decisions concerning the conduct of business and personnel. These are generally allowed to stay for periods ranging between one and five years (subject to renewal, as stated in some schedules), provided that they have been already employed for at least a year by prior their transfer, are responsible for the company's operations and are resident in the country of establishment. The second category refers to employees who posses proprietary knowledge, or skill necessary for

[7] Companies from third countries may be attracted by the MFN conditions within EEA members, and wishing to circumvent the higher level of restrictions imposed on third countries (such as tariffs) will seek establishment in any of the EEA members. This type of response is known as "tariff jumping" FDI, and has been the cause for trade diversion.

[8] Similar limitations in the NT column have also been inscribed for mode 4 in the case of Australia and Austria, as is discussed below.

Table 2. Measures Inscribed in the Horizontal Commitments Affecting Commercial Banking FDI

Country	Admission/ authorization or notification requirements	Limitations on form/ amount or control of FDI	Limitations to participating in M&As/ privatization	Limitations on the rent/ purchase of real estate	Limitations on subsidies/tax write-offs/ preferential treatment	Establishment or residency requirements	Qualification/ skills or employment requirements	Limitations on the category/ function of employees	Limitations on the duration of stay[2]	Economic needs/social benefit or labour market tests
AU	MA 3)				NT 3)	NT 4)	MA* 4)	MA* 4)	MA* 4)	MA* 4)
AT	NT 3)			NT 3)	NT 3), 4)	NT 4)	MA* 4), NT 4)	MA* 4)		NT 3)
CN							MA *4)	MA 4*)	MA 4*)	
CZ				NT 3)			MA* 4)	MA* 4)		
EC[1]					NT 3), 4)		MA* 4), NT 4)	MA* 4)	MA* 4)	
BL										
DN				MA 3)						
FR	MA 3)	MA 3)	MA 3)		NT 3)					
GE				NT 3)						
GR										
IR										
IT		MA 3)	MA 3)	NT 3)						
LX										
NL									MA* 4)	
PR	MA 3)		MA 3)							MA 3)
SP	MA 3)									MA 3)
UK									MA* 4)	
FN	MA 3)	MA 3)	MA 3)		NT 3), 4)	NT 3)	MA* 4)	MA* 4)	MA* 4)	MA* 4)
HU		MA 3)		MA 3), NT 3)			MA* 4)	MA* 4)	MA* 4)	
IC	MA 3)			MA 3)	NT 3), 4)	NT 3)		MA* 4)		
JP							MA* 4)	MA* 4)	MA* 4)	
KR	MA 3)	NT 3)			NT 4)		MA* 4)	MA* 4)	MA* 4)	
MX								MA* 4)	MA* 4)	
NZ	NT 3)	NT 3)					MA* 4)	MA* 4)	MA* 4)	MA* 4)
NR		NT 3), 4)	NT 3), 4)	NT 3)	NT 3), 4)	NT 3)	MA* 4)	MA* 4)	MA* 4)	
PL	MA 3)	MA 3)	MA 3)	NT 3), 4)			MA 4)	MA 4)	MA 4)	MA 4)
SR				NT 3), 4)		NT 3)	MA* 4)	MA* 4)		
SV		MA 3)		NT 3)	NT 3), 4)	NT 3)	MA* 4)	MA* 4)	MA* 4)	
SW				NT 3)	NT 4)	NT 3)	MA* 4), NT 4)	MA* 4)	MA* 4)	
TR	MA 3)	MA 3)	MA 3)				MA 4)	MA 4)	MA 4)	MA 3)
US					NT 3)		MA 4)	MA 4)	MA 4)	

Source: Developed by the author on the basis of country schedules of commitments. Schedules can be retrieved from the *WTO Services Database Online*, available at: <http://tsdb.wto.org/wto/WTOHomepublic.htm>.

Notes: MA: Market access column; NT: National treatment column, MA*: limitations inscribed in MA also apply for NT; 3): "commercial presence"; 4): "movement of natural persons".

[1] In addition to the specific commitments of each EC member, measures listed in the EC line apply to all.

[2] Refers to expressly stated limitations on the number of years, months or days.

the conduct of business in the established enterprise. These typically face employment requirements such as having worked for their employee for no less than one year and who posses the necessary qualifications, sometimes subject to economic or labor market tests. As with the former category, their periods of stay may range from one to four years and may also be renewed.[9] Finally, service suppliers and/or business visitors are those who enter the country for the sole purpose of negotiating sales contracts or agreements, or to establish commercial presence. In most cases, these can stay for a period of up to 90 days, have to be remunerated with funds from outside the scheduling country, and may not engage in secondary jobs or provide services locally.[10]

To a lesser extent, economic needs, social benefit or labour market tests are also present in some schedules. These are mostly contained in limitations for mode 4 addressing the temporary stay of specialists in Australia, Finland, New Zealand and Poland. General economic and social considerations underlying such tests are the avoidance of foreign personnel recruitment that might cause unemployment and/or undesired immigration in a particular services sector. Economic interest or social benefits tests are also present in Austria, Spain, Portugal and Turkey for mode 3, and are part of the authorization process of FDI.

Finally, also affecting intra-corporate transferees are establishment or residence requirements. Although these are mostly inscribed as mode 3 limitations the NT column, Australia and Austria have scheduled these as mode 4 commitments.

2.2. Sectoral financial services commitments affecting commercial banking FDI

Scheduled sectoral commitments specify limitations and requirements apply to a particular sector or subsector in each WTO Member. The present subsection analyzes the sectoral commitments which pertain to "banking services and other financial services" of the 30 OECD countries under review. These do not include "insurance or insurance related services.[11]

Several commonalities become apparent across the 19 sectoral schedules of the OECD sample.[12] First, are comments in the form of a preamble or footnotes in the schedule before the actual commitments, where members stress their schedules have been designed in accordance with the Understanding on Commitments in Financial Services

[9] In some cases, legal, tax and accountancy consultants may be face additional professional limitations, such as requirements on the years of professional experience, certification and professional license tests or registry in professional association, among others. Turkey, EC and Austria hold such requirements.

[10] Although some schedules do not specify the number of years, months or days of temporary stay, the conditions described in the schedules are for temporary stay, as defined by the countries' relevant authorities and regulation.

[11] Only commitments affecting commercial banking are considered here. Measures with regards to investment banking, securities trade, thrift industry that are also part of the banking and other financial services sector are not considered, even if banks are also allowed to participate.

[12] The 12 EC countries are represented in one schedule. As is the case with the Horizontal section, the sectoral section of the EC schedule has been amended to include commitments of new members, given that Austria, Finland and Sweden joined the EC in 1995. Nonetheless, these countries still keep their individual country schedules.

(16 members) and/or the Annex on Financial Services (11 members).[13] Most of the statements refer to specific obligations and objectives contained in these two instruments. For example, prudential concerns are directly referred to in the schedules of Austria, Czech Republic, the EC, Hungary, Japan, Korea, New Zealand, Poland, Slovak Republic and Turkey, which enunciate Article 2(a) of the Annex, the so-called "prudential carve-out"[14] (see Table 3).

Countries making explicit reference to both the obligations in the Understanding and the Annex are Austria, Czech Republic, the EC, Hungary, Japan, New Zealand, Slovak Republic, Sweden, and Turkey. In particular, explicit reference to the Understanding implies the application of an alternative methodology to that of the GATS, in order to achieve a higher level of liberalization, as previously described.[15] This methodology also foresees conceding foreign service suppliers the right to establish or expand within a member's territory via commercial presence, for instance through acquisitions.[16] As will be noted, limitations to participating in M&A and privatization are fewer than in the horizontal section (Czech Republic, Finland, Mexico, Slovak Republic and the United States), and relate to an authorization requirement for the acquisition of shares (see Table 3). This contrasts with the horizontal limitations which range from an outright prohibition to conditioned authorization for participating in M&A and privatization, as shown in Table 2.

Second, despite the practicality of directly referring to CPC classification, only seven countries (Canada, Czech Republic, Korea, Mexico, New Zealand, Poland, and Slovak Republic) make use of it, in combination with the services categories of the Annex.[17] As previously discussed, the Annex provides a classificatory list of financial services. Article 5 clearly distinguishes between "Banking services and other financial services excluding insurance" on the one hand, and "insurance and insurance related services" on the other hand. Under the "banking and other financial services excluding insurance" category, the following services are listed: (i) acceptance of deposits; (ii) lending of all types; (iii) financial leasing; (iv) payment and money transmission services; (v) guarantees and commitments, and (vi) trading for own account or for account of customers.[18] Countries that do not use the CPC classification just refer to the services categories (i)

[13] The 12 EC countries are counted as one member. Countries that do not expressly mention the Understanding are Korea, Mexico and Poland, and the Annex are Australia, Canada, Finland, Iceland, Mexico, Norway, Switzerland, and the United States.

[14] Annex Article 2:(a) allows the members to take "measures for prudential reasons, including for the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by a financial service supplier, or to endure the integrity and stability of the financial system". Also known as the "prudential carve-out", this provision is conditioned by subparagraph (b), limiting the application of prudential measures so as to circumvent obligations and commitments under the GATS.

[15] The Understanding offers an alternative approach for negotiating commitments to the approach specified in Part III of the GATS.

[16] Understanding on Commitments in Financial Services, Section B, para. 5.

[17] Typical services considered by these are: (a) acceptance of deposits (CPC 81115-9), (b) Lending of all types (CPC 8113), (c) Financial leasing (CPC 8112), (d) Payment and money transmission services (CPC 81339), (e) Guarantees and commitments (CPC 81199), (f) all payment and money transmission services (CPC 81339).

[18] See Annex, Article 5:(a), items (v) to (x).

Table 3. Measures Inscribed in the Sectoral Commitments Affecting Commercial Banking FDI

Country	Authorization or licensing requirements	Limitations on form, amount or control of FDI	Limitations to participating in M&As/ Privatization	Favoured legal form of establishment	Minimum capital and prudential requirements	Limitations on specific banking services	Types of service facing restrictions	Nationality or residence requirements	Mode 4 Commitments	Economic benefits or needs tests
AU	MA 3)	MA 3)		S, B	MA 3)	MA 3)	FX, D		Horizontal	MA 3)
AT	MA 3)	MA 3)		JS, LL, B, S	✓	MA 3)	FX	NT 4)	Horizontal	MA 3)
CN	MA 3)	MA 3), NT 3)		S, B				NT 3)	Horizontal	
CZ	MA 3)	MA 3)	MA 3)	JS, B	✓				Horizontal	
EC[1]				S, B	✓				Horizontal	
BL										
DN										
FR										
GE										
GR		MA 3)			MA 3)			MA 4)		
IR		MA 3)		Except RO						
IT										
LX										
NL										
PR	MA 3)									MA 3)
SP								NT 3)		
UK										
FL	MA 3)	MA 3)	MA 3)					MA 3)	Horizontal	
HU				B	✓			✓	Horizontal	

IC	MA 3)	MA 3)		LL, B, RO		MA 3)		NT 3)	Horizontal
JP					✓				Horizontal
KR	MA 3)	MA 3)			✓	MA 3)	FX, D, L		Horizontal
MX	MA 3)	MA 3)	MA 3)	RO		MA 3)		MA 3)	Unbound
NZ					✓				Horizontal
NR		MA 3)		JS, S		MA 3)	BO	NT 3)	Horizontal
PL	MA 3)	MA 3)		JS, B	✓			MA 3), NT 4)	Horizontal
SR	MA 3)	MA 3)	MA 3)	JS, B	✓	MA 3)	FX		Horizontal
SV		MA 3)		B, RO				NT 3)	None
SW		MA 3)		Except RO					Horizontal
TR	MA 3)	MA 3)		JS, B	MA 3)	MA 3)	D, BO		None
US	MA 3)	MA 3)	MA 3)	B, S		MA 3)	D	MA 3)	Horizontal

Source: Developed by the author on the basis of country schedules of commitments. Schedules can be retrieved from the *WTO Services Database Online*, available at: <http://tsdb.wto.org/wto/WTOHomepublic.htm>.

Notes: MA: Market access column; NT: National treatment column; 3): "commercial presence"; 4): "movement of natural persons". Horizontal: horizontal commitments apply (see Table IV.II).

[1] In addition to or unless otherwise stated in the specific commitments of each EC member, measures listed in the EC line apply to all.

✓ Applies when a requirement or limitation is formulated in the introductory text, headnote or footnote in a schedule and not as MA or NT commitments for mode 3).

LL: limited liability, JS: Joint-stock company, B: Branch, S: Subsidiary; RO: Representative office; FX: foreign exchange operations: D: deposit, L: lending: BO: Banking operations

to (vi) (i.e., Australia, Austria, Japan and Sweden).[19] Finally, even though some countries may use a different classification (e.g., Finland), all schedules at least distinguish between "banking and other financial services excluding insurance" from "insurance and insurance related services", making comparisons between the different schedules possible.

Third, almost all of the schedules also make explicit reference to their mode 4 horizontal commitments. Exceptions are Mexico, Sweden and Turkey, as shown in Table 3. The former registers UNBOUND for mode 4 commitments in general, while the latter two have inscribed NONE in the respective columns for MA and NT. UNBOUND implies that Mexico has not undertaken any sectoral commitments in mode 4 for its banking sector. Nonetheless, horizontal commitments for mode 4 also apply to financial services, as summarized in Table IV.2, according to the *Guidelines for the Scheduling of Specific Commitments under the General Agreement on Trade in Services (GATS)*.[20] In turn, NONE means there are no sectoral limitations. Once again, the horizontal section needs to be studied to assess the level of restrictions on mode 4. In all cases, as shown in Table 2, limitations on movement of natural persons refer to qualification, skills or employment requirements, limitations on the category and/or function of employees and limitations on the duration of stay.

A fourth commonality is the absence of certain types of limitations that are typical of the horizontal sections. For example, there is absence of limitations on the rent and purchase of real estate and limitations on subsidies, tax write-offs or preferential treatment. A plausible explanation for this general pattern in the design of the schedules is that since these aspects have already been covered in the horizontal section for all sectors including FS, there is no need to replicate the same provisions in the sectoral schedule.

Instead, new limitations, which are more banking specific, have been included. For example, minimum capital and prudential requirements and limitations on specific banking services are found in an important number of schedules. As previously noted, 10 members (with the EC counting as one) have expressed prudential concerns by referring to Article 2:(a) of the Annex in their schedules.[21] Other members – Australia, Greece and Turkey – have specified minimum capital base requirements in their MA columns (see Table 3). Limitations on specific banking services are held by nine members, namely Australia, Austria, Iceland, Korea, Mexico, Norway, Slovak Republic, Turkey and the United States. In all cases, these have been inscribed in the MA column (see Table 3). Limitations are not formulated as an outward prohibition, rather, specific services require a license or some form of authorization, are limited by (deposit) thresholds, or are exclusive to a certain form of establishment (e.g., a commercial bank, subsidiary or branch), in order to be offered by foreign banks. The type of services facing restrictions are foreign exchange transactions, deposit and lending, and general banking operations (see Table 3). In the case of foreign exchange, systemic stability concerns, such as maintaining a certain

[19] Members can also refer to other internationally recognized classifications, than that provided by the CPC, such as those of the Annex on Financial Services Annex.
[20] See WTO (2001c).
[21] See note 15 above.

level of reserves or capital controls, may be argued. In turn, restrictions on the operation of accounts may underlie insolvency risk concerns, to ensure legal redress according to the local jurisprudence in the event of bankruptcy.

Fifth, some measures are formulated similar to those defined in the horizontal section, such as authorization or licensing requirements, and requirements on the form, amount or control of FDI. The slight variations reflect sector specific needs, for instance, a stronger focus on authorizations and licensing – rather than general registry and admission requirements for FDI, as was the case in the horizontal section – or greater emphasis on the form of establishment and control of FDI – rather than actual FDI thresholds. In both cases, a majority of countries hold MA commitments for both. In the case of authorization or licensing requirements, 13 countries have made commitments, namely: Australia, Austria, Canada Czech Republic, Portugal, Finland, Iceland, Korea, Mexico, Poland, Slovak Republic, Turkey and the United States.[22]

Countries show preference for certain legal forms of establishment, consistent with the Understanding.[23] Particularly, commercial presence of limited liability and joint-stock companies, subsidiaries, branches, and representative offices is preferred, as shown in Table IV.3. Though some schedules do not expressly mention which form of establishment is favoured, they may rule out a form. For example, representative offices are not allowed in Greece and Sweden. Finally, some countries confer different treatment, or specify restrictions according to their preferred legal form of establishment. For instance, subsidiaries (as opposed to branches) receive a less restrictive treatment in Australia, Austria, Canada, EC, Norway, Slovak Republic and the United States. For instance, subsidiaries of non-EC countries receive harmonized treatment, as opposed to branches in which face local non-discriminatory legislation and prudential measures. Similarly, in Austria offers harmonized EEA prudential regulation for third country subsidiaries seeking commercial presence. In contrast, local prudential, capitalization, solvency and reporting requirements apply to non-EEA branches located in EEA Member States. Other frequent measures for branches prohibit the supply of certain services or deny access to certain financial activities; require special authorization, or set geographic limitations to service operations in Australia, Canada, Slovak Republic, Norway and the United States.[24]

Furthermore, requirements on the control of FDI are held by Canada, Hungary, Korea, Mexico, and Norway. As seen in the horizontal section, requirements specify limits on the control and voting rights of shareholders, and establish percentage thresholds on the ownership of stocks and shares (see Table 2 for comparisons).

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[22] In the particular case of the EC, additional commitments have been made concerning licenses. A "best endeavor principle" applies to the examination of license applications for banking subsidiaries of non-EC banks. A consideration period of 12 months in accordance with the laws of the Member State is foreseen.

[23] Section D, para. 2 of the Understanding defines "commercial presence" as "… an enterprise within a Member's territory for the supply of financial services and includes wholly- or partly-owned subsidiaries, joint ventures, partnerships, sole proprietorships, franchising operations, branches, agencies, representative offices or other organizations".

[24] General geographic limitations and national treatment limitations are subject to the "home state" conditions in the case of the United States. Canada has similar limitations across its provinces.

Sixth, nationality and/or residence requirements are also found in the sectoral schedules. However, as opposed to the horizontal commitments, they have been inscribed in both the MA and NT columns, mostly for mode 3 (see Table 2 for comparisons). Austria, Greece, Portugal, Finland, Iceland, Hungary,[25] Norway, Poland, Sweden, and the United States hold requirements for the founders, board of directors, bank executives and/or managers. Exceptions are made in the case of EEA partners in the schedules of Norway and Iceland.

Finally, economic needs tests are also present, though these are less frequent than in the horizontal section. Portugal requires an economic needs test prior authorizing the establishment of non-EC banks, while Australia requires a proof of potential contribution to competition to the sector, and Austria only confers licenses to institutions satisfying national economic interest tests (see Table 3).

3. Types of MFN Exemption that Affect Commercial Banking FDI

Most-favoured-nation (MFN) exemptions allow members to confer different treatment across foreign service providers of WTO members, and thus circumvent the general MFN obligation contained in GATS Article II. Correspondingly, Annex II of the GATS lists all the MFN exemptions held by the WTO membership. These are presented in tables, following a similar format to the country schedules of commitments. The tables distinguish exemptions on the basis of the sectors concerned, a description of the measure inconsistent with Article II, a list of countries favoured by the measure, the duration of the measure, and an explanation on the conditions justifying the exemption.

There are two types of MFN exemptions which may affect commercial banking FDI, namely "all sector" and "financial Sector" exemptions, as observed in Table 1. In the OECD region, five countries have neither "all sector", nor "financial sector" exemptions, namely Australia, Czech Republic, Japan, Korea and Mexico. This denotes the maximum degree of adherence to GATS Article II, since there is no circumvention of the MFN principle for FS.[26]

In principle, "all sector" exemptions are more restrictive than no exemption at all, but may be less restrictive than "financial sector" exemptions. This is because some "all sector" exemptions are not relevant or applicable to financial services in practice. For example, Finland, Iceland, Norway and Sweden have Nordic cooperation programmes offering funds to promote investment and export projects, research and development (R&D), feasibility studies and environmental technology in the Nordic region. Though open to all sectors, such programmes do not affect banking activities.

[25] Hungary has formulated nationality and residence requirements in the introductory text of its sectoral schedule, as opposed to the rest of the members (see Table 3).

[26] However, it should be noted that these countries do hold MFN exemptions for other services sectors. Originally, Japan and Korea had financial sector exemptions, but eliminated these during negotiations in the Uruguay Round. See WTO (1993, 1994b).

Eight WTO Members have "all sector" exemptions affecting FS, namely Austria, Canada, EC, Poland, Sweden, Switzerland, Turkey and the United States, as shown in Table 4.[27] Of this group, six also hold "financial sector" exemptions, namely Austria Canada, Italy, Switzerland, Turkey and the United States. Only Poland and Sweden have no "financial sector" exemptions. Poland has two all sector exemptions which affect all WTO members. The first relates to notions of "commercial presence" (i.e., mode 3) present in treaties signed by Poland that go beyond limitations contained in its schedule of specific commitments. Thus, any more favourable MA or NT conferred to the treaty partners is not extended to third (WTO) countries. The second measure concerns dispute settlement mechanisms for investment disputes, often present in investment promotion and protection treaties. It consists of additional protection in the form of legal redress for investment related disputes, which is not available to third country investors. In turn, Sweden has an "all sector" exemption that confers full NT to the investors of three West African countries, based on existing BITs, and a second exemption concerning the movement of Swiss natural persons also based on existing RTA conditions.

With regard to the "financial sector" exemptions, a total of eight OECD members have these in place, namely Austria, Canada, Italy, Hungary, Slovak Republic, Switzerland, Turkey and the United States. Of these, Hungary and Slovak Republic do not have "all sector" exemptions. Both countries have measures affecting all WTO members concerning "commercial presence" (i.e., mode 3) on the basis of reciprocity. Correspondingly, the former offers access to foreign service providers of a WTO Member, if Hungarian service providers receive the same treatment in that Member; while the latter denies authorization to mode 3 to providers from Members that deny the same access and treatment to Slovak suppliers (see Table 4).

In most cases, exemptions are limitations based on reciprocity, meaning conditions in existing and future treaties, or actual treatment in the member countries is a parameter for the standard of treatment to be conferred. Countries such as Canada, France, Italy Portugal and the United States also consider preferences. These confer a more favourable treatment arguing historical, cultural and cooperation, or other ties existing between the countries. For example, France and Portugal give preferences to African countries with which they have cultural and historical ties, while the UK holds similar provisions for Commonwealth countries (some of which were former colonies and overseas territories). Other countries with preferences are Turkey, which argues cooperation and the interest in attracting greater investment for extending full NT, and the United States, which argues foreign policy reasons when offering residents of neighbor countries[28] a more favourable tax treatment and other benefits (see Table 4).

[27] In the counting, all EC members have been counted as one. However, it should be noted that France, Italy, Portugal and the UK have "all sector" commitments in addition to the EC, as explained in note 2 of Table 4. Further, it should be noted that countries with "all sector" commitments not applicable to FS, namely Finland, Iceland, New Zealand, Norway, as discussed in note 27 are not considered.

[28] These are NAFTA partner countries, namely Canada and Mexico.

Table 4. Type of MFN Exemptions Affecting Commercial Banking FDI

Country	All sector/ financial sector exemption	Countries favoured by the measure	Types of Measures Affecting MFN Treatment: Market access measures	National treatment measures	Differential tax treatment	Arbitration for investment disputes	Authorization or licenses	Economic needs/benefits tests
AT	✓/✓	SW/Partners	Reciprocity 4)					/Reciprocity 3)
CN	✓/✓	Partners/UK, IR				Reciprocity 3)	/Preference 3)	
EC[1]	✓	SW/Partners	Reciprocity 4)					
BL								
DN	✓[2]							
FR	✓	Francophone Africa, SW	Preference 4)					
GE								
GR								
IR								
IT	✓/✓	All/other			/Preference 3)		Reciprocity 4)	
LX								
NL								
PR	✓	Portuguese-speaking Africa		Preference 4)				
SP								
UK	✓	Commonwealth countries	Preference 4)					
FL	✓[2]							
HU	/ ✓	All	Reciprocity 3)	Reciprocity 3)				
IC	✓[2]							

NZ	✓[2]	Other						
NR	✓[2]							
PL	✓	All	Reciprocity 3)	Reciprocity 3)		Reciprocity 3)		
SR	/ ✓	All	Reciprocity 3)				Reciprocity 3)	
SV	✓[2], ✓	Partners, SW	Reciprocity 4)	Reciprocity 3)				
SW	✓/✓	EC, EFTA, LI	Reciprocity 4)	Reciprocity 4)				
TR	✓/✓	Other, All/ All	Reciprocity 3), 4)	Preference 3)				Reciprocity 4)
US	✓/✓	Partner, All/ CN, MX, EC	/Reciprocity 3)		Preference 3)		Preference 3)	

Source: Developed by the author on the basis of country MFN exemptions. MFN exemptions can be retrieved from the *WTO Services Database Online*, available at: <http://tsdb.wto.org/wto/WTOHomepublic.htm>.

Notes: [1] In addition to the specific exemptions of each EC member, measures listed in the EC line apply to all. [2] Measure concerning all sectors focuses on Nordic Cooperation between DN, FL, IC, NR and SW and does not affect FS in practice. Reciprocity: denotes the condition of reciprocal treatment either on the basis of an agreement existing with the favoured country, or on the effective treatment conferred by the favoured country. Preference: Denotes preferential treatment conferred on the basis of a historical, cultural or development assistance link with the favoured country. All: means all WTO countries to which the more favourable treatment may apply. Partners: means countries with which an RTA, BIT or other type of agreement offering more favourable treatment exists or will exist. Others: means list of countries that fulfill a specific requirement or condition to receive the more favourable treatment.

It should be noted that though the Annex specifies the exempted measures should in principle not exceed 10 years, many members used terms like "indefinite" or "indeterminate" when referring to the intended duration of the exemption. Nonetheless, the Annex also specifies that exemptions are subject to further negotiations in subsequent trading rounds, replicating the same GATS standard of liberalization.

4. Summary and Preliminary Conclusions

Given the increasingly global dimensions and growth of financial services, international financial law regulating these services is in the midst of being formed. In this regard, international organizations are playing a crucial role, through the design and implementation of multilateral rules in the field.

Because multilateral rules are intended to operate in a global context, they can only emanate from the joint effort of a significant group of countries that commit to a set of conditions. These conditions may focus on setting a level playing field in financial services markets, through the adoption of obligations that ensure greater market access and non-discriminatory treatment. A certain willingness to commit to these obligations is essential, and often implies that countries give up part of their sovereign right to regulate their financial markets as they please. In return, countries are able to benefit from the improved conditions under these rules, and also seek redress if others do not observe the rules. It is in this context that the WTO has come to play an important role, being the forum under which a significant number of countries (currently 150), has negotiated a set of multilateral rules which make the world trading system a more transparent, predictable and reliable setting. The importance of such a rule-setting body resides in it broad agenda, which includes the liberalization of financial services (and FDI).

Although there is a high variability in the content of the schedules, general patterns can be observed in terms of coverage, type of measures and degree of openness in the OECD region. The horizontal schedules are particularly important for mode 4 restrictions regulating the temporary movement of persons, and mode 3 restrictions on FDI mainly dealing with authorization; amount, form and control of FDI; participation in privatization and M&As, and the acquisition of real estate. In turn, the sectoral schedules particularly relevant for additional restrictions on commercial presence, such as licensing, limitations on the type of services to be provided, and additional prudential or sector specific legislation.

The MFN exemptions reflect reciprocity standards and preferences on the basis of existing agreements, cultural, historical and cooperation ties. Overall, there are considerably less MFN exemptions than actual limitations in the horizontal and sectoral schedules affecting FS. On the one hand, this is due to the fact that MFN only covers one standard of treatment applicable across foreign service providers. On the other, it reflects the interest of a majority of OECD countries to achieve a higher level of liberalization, by freezing the current level of restrictions through the "standstill clause" in the Understanding.

Thus, it may be argued that the GATS framework has a truly liberalizing effect because it eliminates reciprocity and foresees a phase-out of MFN restrictions through progressive liberalization. Nonetheless, despite these significant advances, the GATS is far from being complete. Substantial liberalization is still pending in a considerable group of member countries, and is left at the discretion of the members under the agreement. As pointed out, regulatory deficiencies contribute to a suboptimal provision of financial services. Among the many aspects needing improvement, is a strengthening of GATS provisions. Stronger rules would guarantee greater market access and NT to foreign service providers, raising efficiency and consumer welfare, and contribute to an optimal provision of financial services on an international level.

Finally, the WTO is a forum that brings together very diverse countries, with different degrees of development, priorities and interests. These differences are reflected in coalitions created during multilateral trade rounds, in the formal Member statements and proposals, and, as seen during the Cancun Ministerial, in the lack of consensus on several trade topics. Indeed, many (developing) countries may not consider financial services liberalization a priority, and may only be willing to liberalize this sector in return for other cross-sectoral concessions in their areas of interest.

Therefore, improved conditions for financial service providers may not initially come from multilateral negotiations. Rather, improvements in the current liberalization framework will come from the combination of several processes such as unilateral opening; regionalism; pressures from the IMF and the World Bank (through their lending mechanisms) and the OECD, among others.

Guide to Authors

The following is a brief guide concerning the provision of articles which may be of assistance to authors.

(1) Proposed contributions are invited and received on the understanding that they are final, and not preliminary drafts. They must not have been published or submitted for publication elsewhere and a statement to this effect should be included with the text submitted for publication. Only articles in English will be considered for publication.
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