

# Banking and Other Financial Services: Latest Developments in International Economic Law

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# Structure

## **Umbrella of on-going tectonic shifts in International Economic Law**

1. Multilateral rules in trade in banking and other financial services
2. Patterns in the liberalisation of trade in banking and other financial services
3. TiSA and Joint Initiative on Services Domestic Regulation
4. Current Pain Points and Policy Options

# Trade in Banking and Other Financial Services

- Entered the global stage with the conclusion of the General Agreement on Trade in Services (GATS) as part of WTO framework
  - Earlier: cross-border supply of banking and other financial services depending on respective domestic standards, no market access rights
- GATS entails non-discrimination rules, transparency obligations, and relevant definitions
  - Liberalisation commitments in Market Access & National Treatment organised along 4 modes of supply, 12 services sectors, and almost 600 types of services in individual schedules of commitments

# Definition

Covered under «Banking and Other Financial Services» in GATS:  
deposit-taking; lending of all types; financial leasing; payment and money transmission services; securities trading and underwriting; money broking; asset management incl. pension fund management; custodial, depository and trust services; settlement and clearing services for financial assets and negotiable instruments; provision and transfer of financial information; financial data processing and related software; advisory, intermediation and other auxiliary financial services, aso.

Sector or Sub-sector	Limitations on Market Access	Limitations on National Treatment	Additional Commitments
<p><u>Banking and Other Financial Services</u> (excluding insurance)</p>	<p>Monopoly rights as indicated in paragraph B.1 of the "Understanding": two mortgage bonds issuance institutes have been granted an exclusive right for the issuance of specific mortgage bonds (Pfandbrief, lettre de gage); with regard to the first institute only Swiss cantonal banks are accepted as members; in the case of the second institute banks with head office in Switzerland whose national mortgage loan business amounts to at least 60 per cent of the balance sheet can be members; the issue of other mortgage-backed bonds is not affected by this regulation.</p> <p>1)<sup>3</sup> Foreign investment funds can only be marketed or distributed through a licensed representative agent resident in Switzerland; Swiss franc denominated issues can be lead-managed only by a bank or a securities dealer having a commercial presence (except representative office) in Switzerland.</p> <p>2) Swiss franc denominated issues can be lead-managed only by a bank or a securities dealer having a commercial presence (except representative office) in Switzerland.</p>	<p>1) Acquisition of real estate by foreigners is limited as indicated in Part I; however, foreign or foreign-controlled banks are granted authorization to acquire property that serves as a security for mortgage loans in case of bankruptcy or liquidation; the issue of foreign collective investment funds is subject to stamp duty.</p> <p>2) None</p>	
	<p>3) Commercial presence of foreign financial service suppliers is subject to specific requirements relating to the name of the firm and the regulations on financial institutions in the country of origin; commercial presence may be denied to financial service suppliers whose ultimate shareholders and/or beneficial owners are persons of a non-GATS Member; representative offices can neither conclude or deal business nor act as an agent.</p> <p>4) Unbound except as indicated in Part I</p>	<p>3) Acquisition of real estate by foreigners is limited as indicated in Part I; however, foreign or foreign-controlled banks are granted authorization to acquire property that serves as a security for mortgage loans in case of bankruptcy or liquidation.</p> <p>4) Unbound except as indicated in Part I</p>	

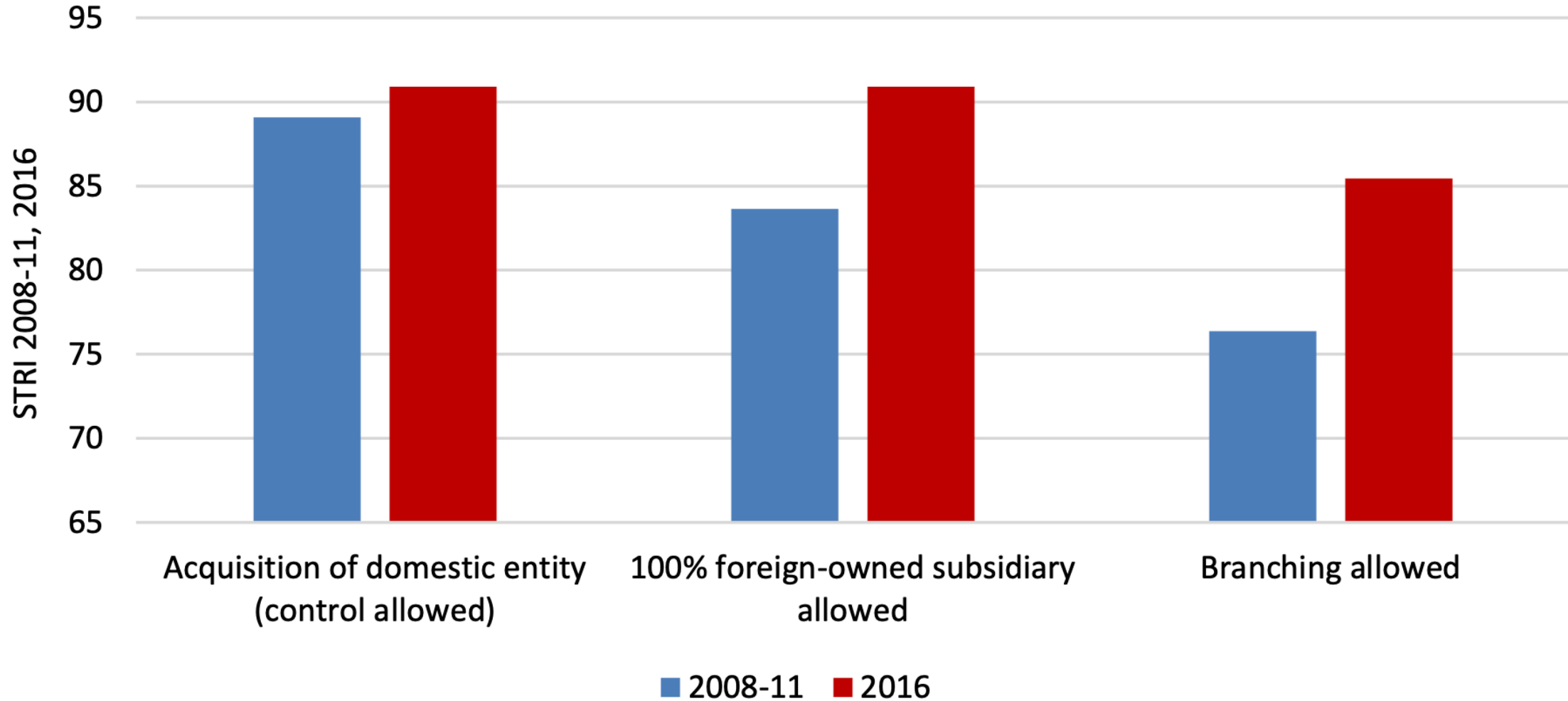
# Patterns in MFN-Market Access I

- Services sector with particularly high number of specific commitments of WTO members (second to tourism)
- Applicable rules:
  - General Agreement on Trade in Services (schedule of commitments)
  - Annex to the GATS: sectoral definitions, services supplied in the exercise of governmental authority, prudential measures
  - Optional Understanding on Financial Services: specific list of commitments incl. the permission to supply any new financial service, applies on MFN-basis
  - Outside MFN: *Preferential* market access in international trade agreements

# Patterns in MFN-Market Access II

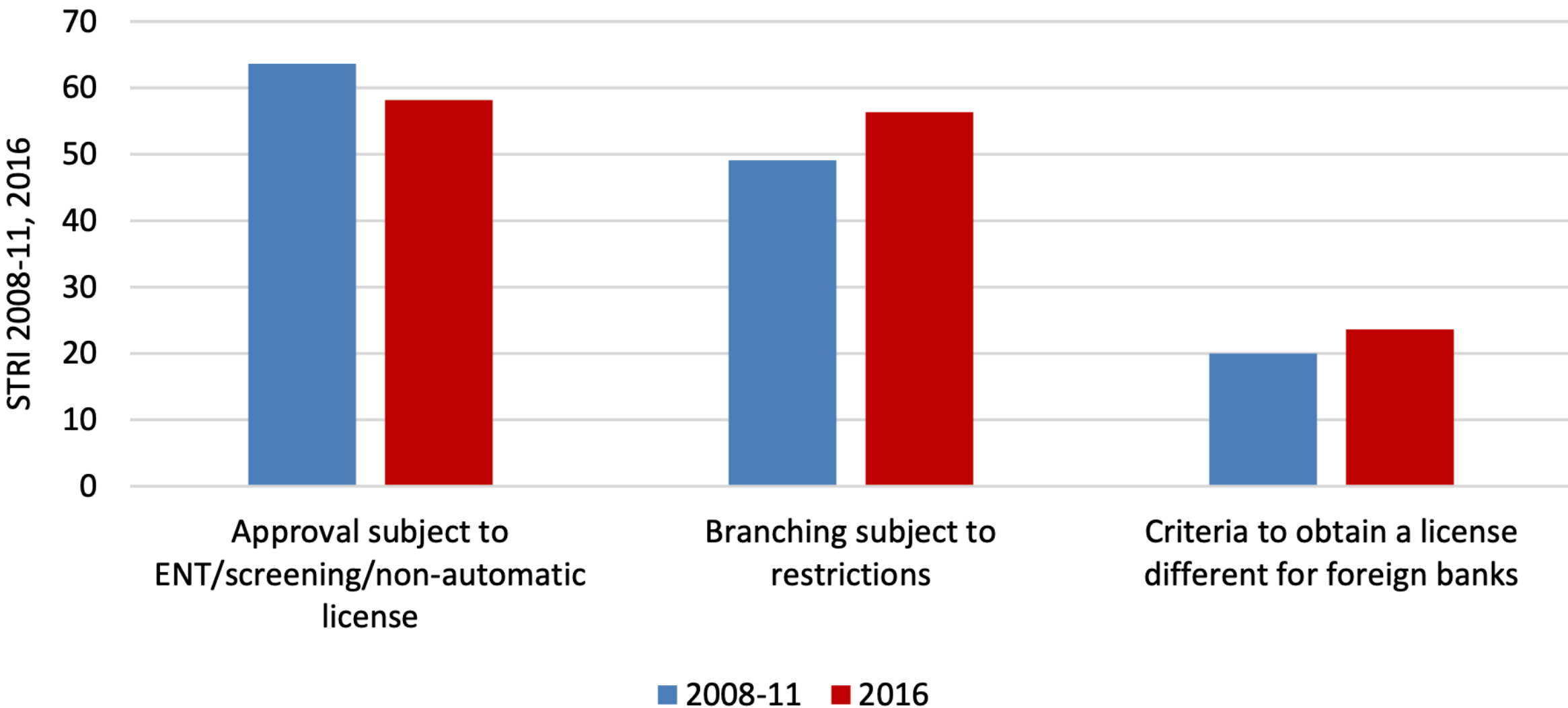
- Financial markets have become more open since 2008
- In Business-to-Consumer (B2C) financial services higher restrictions are placed on cross-border supply (mode 1) than on commercial presence (mode 3)
  - Consumer protection, supervisory concerns
- Banking services:
  - Mode 3 access through acquisition and control of domestic entities; establishment of wholly-owned subsidiaries; direct branching
  - Preference for acquisition of already licensed institutions

**Figure 11 Share of economies allowing different modalities of foreign bank establishment**





**Figure 12 Share of economies with different types of restrictions on foreign banking (mode 3)**



See Borchert et al. (2020) The Evolution of Services Trade Policy Since the Great Recession, Staff Working-Paper ERSD-2020-02, WTO, Geneva.

# TiSA Negotiations 2013-2016

- Plurilateral negotiations outside of WTO-framework, involving 22 countries plus EU and 70% of global trade in services
  - Focus primarily on trade liberalisation, and to a lesser extent on modernising applicable rules (e.g. privacy, internet, ...)
  - Halted at advanced stage: no agreement on cross-border flows of data and new services
- Shift in trade policy: from trade as an instrument to generate social welfare to trade as instrument to ensure social justice

# Services Domestic Regulation 2017-2021

- Joint initiative within WTO framework, applies on MFN basis, adopted by 43 WTO members plus EU on 2 December 2021 (covering over 87% of global services trade)
- Objective: mitigation of unintended trade-restrictive effects of measures relating to licensing requirements and procedures, qualification requirements and procedures, and technical standards
  - Trade facilitation through e.g. acceptance of electronic applications, creation of a single dedicated online portal, transparency in criteria and application processes, reasonable periods of time for submission, option to resubmit

## Development of Measures

22. If a Member adopts or maintains measures relating to the authorization for the supply of a service, the Member shall ensure that:
- (a) such measures are based on objective and transparent criteria;<sup>17</sup>
  - (b) the procedures are impartial, and that the procedures are adequate for applicants to demonstrate whether they meet the requirements, if such requirements exist;
  - (c) the procedures do not in themselves unjustifiably prevent the fulfilment of requirements; and
  - (d) such measures do not discriminate between men and women.<sup>18</sup>

# Current Pain Points

- Negotiations at multilateral level stalled
  - Mode 3 regulatory barriers persist; Mode 1 access remains limited
- New pressing regulatory issues are cross-border in nature
  - e.g. AI, Blockchain or crypto currencies
- Critical role in broader global policy objectives
  - e.g. combatting tax evasion or greening the global economy
- «Weaponizing Interdependence» – overlap with security interests
  - e.g. exclusion from SWIFT («chokepoints» of highly asymmetric networks)

# Policy Options

- Unilateral reform abroad (e.g. through bilateral dialogue)
- Multilateral alignment of standards (e.g. Financial Stability Board)
- Formal bilateral cooperation frameworks (e.g. UK-CH Global Financial Partnership)
- Mutual recognition agreements (... in theory?)
- Preferential trade agreements
- Multilateral (WTO) bindings (e.g. TiSA, E-Commerce, aso.)
- Unilateral regulation

# Pain Point «Trade Liberalisation»

- Joint initiative in services domestic regulation – if banking and other financial services are covered – can help
  - Potential challenge: application on MFN-basis, free-riding problem
- Preferential trade agreements are already used to implement elements of TiSA template on banking and other financial services
- Untapped potential? MRAs in banking and other financial services

# Pain Point «New Services»

- No or uncertain MFN-rules applicable (legal uncertainty)
- Relevant aspects of modern rules in privacy, cross-border data flows, e-commerce, net neutrality currently developed in PTAs (e.g. CPTPP, USMCA, EU-Chile)
- Unilateral regulation related to disruptive technologies
  - Problem of compliance with GATS (e.g. prohibition of crypto currencies)
  - Problem of cross-border nature of «new services» and their supply
  - ... potential spill-over to PTAs and/or plurilateral initiatives?



# Pain Point «Broader Policy Objectives»

- Banking and other financial services affected by general shift in global trade policy (from social welfare to social justice)
- Current:
  - Corporate due diligence, OECD global minimum tax, rules on «sustainable investment», ...
  - Relevant in this context: *Argentina – Financial Services*
- Potential:
  - Preferential market access for sustainable banking and other financial services; prohibitions/bans affecting trade in banking and other fin. services

# Pain Point «Economic Coercion»

- Legal uncertainty: Security Exceptions in GATS
    - Increasing and expanding use of security exceptions
    - WTO DSB currently unable to ensure WTO compliance
  - PTAs become more important
    - Binding common rules and fair treatment in times of crisis
- But: economic coercion likely to remain a foreign policy tool of big economies for another while

# In Sum

- Trade in banking and other financial services not at the centre of recent developments in international economic law
- Potential for improvement of market access through joint initiative in services domestic regulation/PTAs
- Considerable legal uncertainty with respect to multilateral rules on new services/disruptive technologies and security exceptions
- Shift in global trade policy (social welfare to social justice) likely to reach banking and other fin. services also on the international level

# Thank you!

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