



# Institutional and Legal Structure of the WTO System for Services

Almaty, 14 May 2012



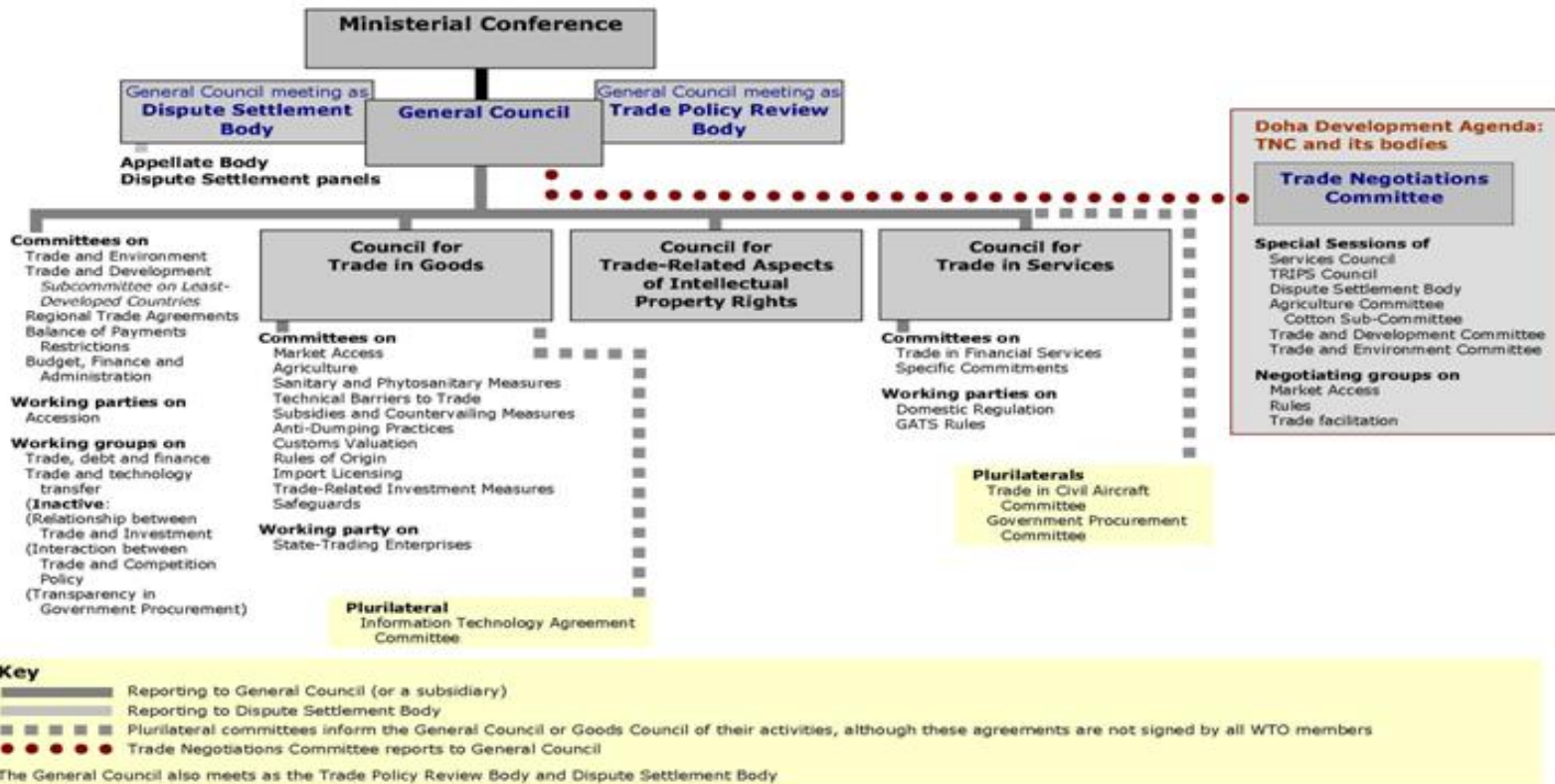
## Overview

- § What institutional arrangements at the WTO govern trade in services?
- § What institutional arrangements at the WTO govern WTO accession?
- § What WTO legal texts at the WTO govern trade in services?
- § What WTO legal provision(s) at the WTO govern(s) accession?
- § Other Relevant Legal Sources
- § What do governments negotiating accession to the WTO trade in services regime need to be mindful of in terms of legal obligations?

# Institutional Arrangements - Overview

## WTO structure

All WTO members may participate in all councils, committees, etc, except Appellate Body, Dispute Settlement panels, and plurilateral committees.





## **Institutional Arrangements - Services**

### **§ Ministerial Conference**

- When?
- Who?
- What?
- Legal basis?

### **§ General Council**

- When?
- Who?
- What?
- Legal basis?

### **§ Council for Trade in Services**

- When?
- Who?
- What?
- Legal basis?

### **§ Committees**

- When?
- Who?
- What?
- Legal basis?



## **Institutional Arrangements - Accession**

### **§ Ministerial Conference**

- Role in accession?

### **§ General Council**

- Role in accession

### **§ Accession Working Parties**

- Role in accession?
- Who may join the WP?
- Who does join the WP?

### **§ WTO Secretariat**

- Role in accession



## WTO Legal Texts





## **WTO Legal Texts and Trade in Services**

General Agreement on Trade in Services - **GATS** (Annex 1B to the Marrakesh Agreement)

### **§ Scope:**

- Very broad - all measures affecting trade in services and thus it covers laws, regulations, rules, procedures, decision, administrative action, or any other form of measure
- GATS commitments are binding on all levels of government including sub-national levels, requiring Members to take all reasonable measures available to ensure observance by regional and local governments and authorities and non-governmental bodies

### **§ Exclusions :**

- Services supplied in the exercise of governmental authority (neither on commercial basis, nor in competition one or more suppliers)
- Air traffic rights or directly related rights

## The Services Regime

- Measures (not tariffs)
  - Regulation
  - Liberalization *vs. Status quo*
  - Sensitive Sectors
  - Heterogeneous Sectors
  - National Policy Objectives
- 1974 – *Trade Act* in the U.S.  
1982 - *Coalition of Service Industries* (CSI)  
1986 – Launching of the Uruguay Round  
1988 – Canada-U.S. FTA  
1994 – NAFTA  
1995 – WTO comes into force  
1997 – Post-Uruguay Round financial services  
1998 – Post-Uruguay Round telecom services  
2001 – Launching of the DDA  
2005 – Missed deadlines  
2008– DDA final serious attempt  
2012 - ???

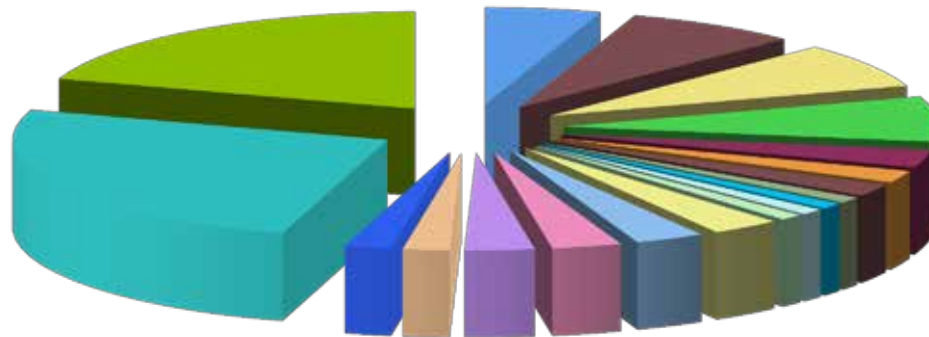


## The Services Regime

- Universal Coverage
  - Measures, sectors, modes
- Application to all sectors
  - Unconditional disciplines:
    - MFN, Transparency, Good Governance
- Application to some sectors
  - Market Access, National Treatment
  - Conditional disciplines:
    - Transparency, (VI) Administration and regulation, (VIII) Monopolies, Increasing Participation of Developing Countries (IV), Telecoms Annex.
- Application to no sector:
  - Government Services
  - Air Traffic Rights



# The Services Regime



- |                              |                   |                        |
|------------------------------|-------------------|------------------------|
| ■ Qualification Requirements | ■ Technical Norms | ■ Licensing            |
| ■ Governmental               | ■ Moral/Order     | ■ Life/Health          |
| ■ Fraud Prevention           | ■ Privacy         | ■ Security             |
| ■ Tax Collection             | ■ Double Taxation | ■ Labor Market         |
| ■ Nationality                | ■ Residence       | ■ Permanent Employment |
| ■ Air Traffic Rights         | ■ Prudential      | ■ Market Access        |
| ■ National Treatment         |                   |                        |



## What does GATS cover?

§ Four (4) modes of supply:

- Mode 1 - cross-border (Mexican architect faxes plan to Saudi Arabia)
- Mode 2 - consumption abroad (tourism)
- Mode 3 - commercial presence (Mexican architecture firm opens branch in Saudi Arabia)
- Mode 4 - movement of natural persons (Mexican architect travels to Saudi Arabia)



## **WTO Legal Texts and Trade in Services**

GATS Obligations can essentially be broken down into two main types:

§ **General Obligations and Disciplines** (including)

- MFN
- Transparency
- Economic Integration
- Domestic Regulation
- General Exceptions

§ **Specific Commitments** (namely on the following)

- Market Access
- National Treatment
- Additional Commitments



## Basic Obligations under GATS

### MFN - Article II

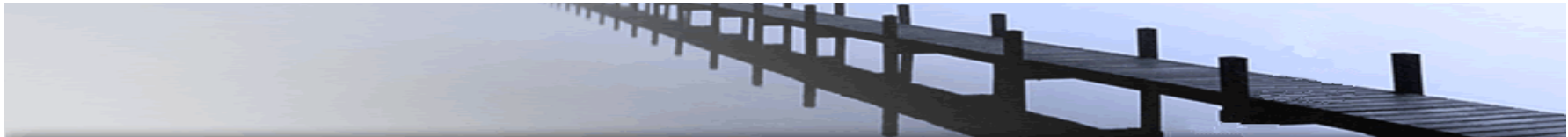
- § Treatment no less favourable than that accorded to like services and service suppliers of any other country
- § Like GATT, basic obligation applies regardless of commitments
- § BUT - one-off opportunity to claim exemptions
  - Exemptions mostly in transport (maritime, air, road) and audiovisual services. About one third are in the financial services sector
  - How have accession countries fared in scheduling exemptions?



## Basic Obligations under GATS

### Transparency - Article III

- § Publication all measures of general application affecting operation of GATS.
- § Establish enquiry points
- § *Where specific commitments*, annual notification to Services Council of new or changed measures significantly affecting trade in services.



## Basic Obligations under GATS

### Domestic regulation - Article VI

#### § General:

- Members must have a system for review of administrative decisions affecting trade in services
- But not if it would be inconsistent with constitutional structure or nature of legal system.

#### § Where specific commitments have been made

- regulations applied in a reasonable, impartial and objective manner
- not apply licensing and qualification requirements and technical standards that nullify or impair specific commitments in a manner which:
  - Does not meet certain criteria
  - Could not reasonably have been expected at the time the specific commitments were made.



## Basic Obligations under GATS

### General Exceptions

- § Article XIV - same chapeau as GATT Article XX, i.e. not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination, or a disguised restriction on trade
- Necessary to protect public morals or maintain public order
  - Necessary to protect human, animal or plant life and health
  - Necessary to secure compliance with laws not consistent with the agreement including, e.g., fraud, privacy and safety.





## Specific Commitments under GATS

§ Market access - Article XVI - Members can impose limits, either by numerical quota or economic needs test on:

- Number service suppliers
- Total value of service transactions
- Total number of services operations (I.e. quantity of output)
- Total number of natural persons

**As well as**

- Requirement of a certain type of legal entity or joint venture
- Limitations on participation of foreign capital (e.g., maximum limit on foreign shareholding)

**Can do all these but must be scheduled**



## Specific Commitments under GATS

### National Treatment - Article XVII

- § Treatment no less favourable than that granted to like domestic services and service providers
- § Treatment does not have to be identical - key idea is conditions of competition
- § Unlike GATT, can place limits on national treatment - but must schedule them.



## Specific Commitments under GATS

### Additional Commitments - Art. XVIII

- § Can negotiate additional commitments on measures not falling under Articles XVI and XVII
- § Including relating to qualifications, standards and licensing.
- § But other types also
  - Reference paper on basic telecoms



## Specific Commitments

Modos de prestação: 1) Prestação Trans-fronteiriça 2) Consumo no Exterior 3) Presença Comercial 4) Presença de Pessoas Físicas			
SECTOR OR SUB-SECTOR	LIMITATIONS ON MARKET ACCESS	LIMITATIONS ON NATIONAL TREATMENT	ADDITIONAL COMMITMENTS
Architectural Services (CPC 867)	<p>Unbound</p> <p>2. Unbound</p> <p>3. Foreign service suppliers can only supply services in the national market if affiliated with national service suppliers by means of a consortium. The national partner must keep the main executive function. The objective of the consortium must be clearly defined in the relevant contract.</p> <p>4. Unbound, except for the horizontal commitments inscribed in the horizontal section of the present schedule.</p>	<p>1. Unbound</p> <p>2. Unbound</p> <p>3. None</p> <p>1. Unbound, except for the horizontal commitments inscribed in the horizontal section of the present schedule.</p>	



## Depth of Commitments

	<b>Commitment with restrictions</b>	<b>Commitment without restrictions</b>
<b>Bound</b>	Describe the measure	Enter "None"
<b>Unbound</b>	Enter "Unbound"	Enter "Unbound"

## Pending Rules

- Domestic Regulation
- Safeguards
- Subsidies
- Government Procurement
- Anti-dumping?



## **GATS Annexes - Overview**

### **Integral part of the Agreement**

- § MFN exemptions
- § Movement of Natural Persons
- § Air Transport
- § Financial services
- § Maritime
- § Telecommunications



## **Legal Provision(s) on WTO Accession**

### **Article XII of the Marrakesh Agreement - Accession**

1. Any State or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements may accede to this Agreement, on terms to be agreed between it and the WTO. Such accession shall apply to this Agreement and the Multilateral Trade Agreements annexed thereto.
2. Decisions on accession shall be taken by the Ministerial Conference. The Ministerial Conference shall approve the agreement on the terms of accession by a two-thirds majority of the Members of the WTO.
3. Accession to a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement.





## **Legal Provision(s) on WTO Accession**

### **Article XIII of the Marrakesh Agreement - Non-Application**

1. This Agreement and the Multilateral Trade Agreements in Annexes 1 and 2 shall not apply as between any Member and any other Member if either of the Members, at the time either becomes a Member, does not consent to such application.
2. Paragraph 1 may be invoked between original Members of the WTO which were contracting parties to GATT 1947 only where Article XXXV of that Agreement had been invoked earlier and was effective as between those contracting parties at the time of entry into force for them of this Agreement.
3. Paragraph 1 shall apply between a Member and another Member which has acceded under Article XII only if the Member not consenting to the application has so notified the Ministerial Conference before the approval of the agreement on the terms of accession by the Ministerial Conference.



## **Legal Provision(s) on WTO Accession**

### **Article XVI of the Marrakesh Agreement - Miscellaneous Provisions**

1. Except as otherwise provided under this Agreement or the Multilateral Trade Agreements, the WTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947.



## Other Relevant Legal Sources

- § Commitment Language in the Working Party Report
- § The 1993 Scheduling Guidelines
- § Articles 31 and 32 of the Vienna Convention of the Law on Treaties
- § WTO Dispute Settlement Reports



## Commitment Language in the WP Report

Example from para. 500 of Viet Nam's WP Report

"In response to a Member's request for clarification of the scope of Viet Nam's mode 1 distribution services commitment, the representative of Viet Nam confirmed that its commitment included the electronic distribution of legitimate computer software. This commitment was without prejudice to the ongoing discussion in the WTO, and Viet Nam's position, on the appropriate classification of computer software delivered electronically."

What has VN committed to specifically here?

What reservations has it made this "commitment" subject to?

*China - Publications and Audiovisual Products* is a very eye-opening case in this regard.



## The 1993 Scheduling Guidelines

- The basic reference document that WTO Members and governments under accession use to draft their commitments is the "Guidelines for the Scheduling of Specific Commitments under the General Agreement on Trade in Services (Document S/L/92 dated 28 March 2001)".
- In general the classification of sectors and sub-sectors should be based on the Secretariat's "Services Sectoral Classification List" (Document MTN.GNS/W/120, dated 10 July 1991).
- In addition, governments should consult the United Nations Provisional Central Product Classification, 1991 Version (UN CPC 1991).



# Customary Rules of Interpretation

## Vienna Convention on the Law of Treaties (1969)

### Article 31 General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the **ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.**
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
  - (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
  - (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
  - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
  - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
  - (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.



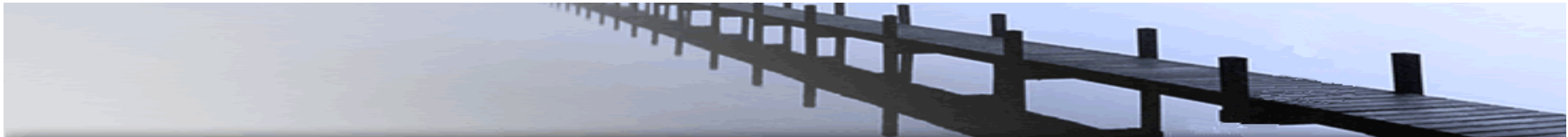
# Customary Rules of Interpretation

## Vienna Convention on the Law of Treaties (1969)

### Article 32 Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or ;
- (b) leads to a result which is manifestly absurd or unreasonable.



## WTO Dispute Settlement Reports

Panels and the Appellate Body have had occasion to clarify the meaning of the GATS and the specific commitments Members made in their schedules on a number of occasions. Arguably the most “landmark cases” in terms of trade in services have been:

- § *EC - Bananas* - clarifying *inter alia* the term “measures affecting trade in services”
- § *Mexico - Telecoms* - clarifying *inter alia* the nature of certain obligations under the Reference Paper and the Annex on Telecoms
- § *US - Gambling* - clarifying *inter alia* the nature of the term “Other Recreational Services (except sporting).” on the US’s Services Schedule, as well as clarifying the nature of market access commitments and the language in the chapeau of the General Exceptions clause
- § *China - Publications and Audiovisual Products* - clarifying *inter alia*, the nature of various national treatments commitments made by the PRC in its Services Schedule.





## What to be Mindful of in Terms of Legal Obligations?

- The package of obligations and commitments that a country enters into when joining the WTO comprises several thousand pages
- The WTO agreement is not a static document, meaning that it is constantly being “interpreted” by WTO dispute settlement panels and the Appellate Body
- What this means is that it’s probably impossible for a country’s lawyers to do a completely fool-proof job negotiating accession - unpleasant surprises can always arise subsequently to accession
- But the WTO regime on services is flexible enough to accommodate such surprises if and when they do arise.
- Your lawyers should think very carefully about the language they allow to be inserted into your WP report, and how commitments on MA and NT are formulated in Services Schedules; but policymakers also have to be prepared to expect the unexpected after accession - particularly if you’re a big market with lots of foreign services suppliers clamoring to enter and compete on your market.



**Questions?**



**Thank you**



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