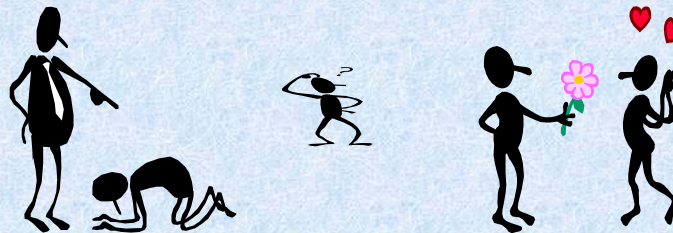


## Scope and Limits of the MFN-obligation under GATS

(Economic Integration, Recognition Measures, MFN Exemptions, etc.)



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## The benefits of multilateralism: An old-fashioned view (?)

'The great political virtue of multilateralism, far exceeding in importance its economic virtues, is that it makes it economically possible for most countries, even if small, poor and weak, to live in freedom and with chances of prosperity without having to come to special terms with some Great Power.'

Jacob Viner

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**STARTING POINT (I)**

**“This Agreement applies to measures by Members affecting trade in services.”  
(Art. I:1 of GATS)**

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## STARTING POINT (II)

### Most-Favoured-Nation Treatment

“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 suppliers of any other country.” (Art. II:1)

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### Therefore:

Whenever a bilateral agreement *affects trade in services*, the relevant provisions are ‘multilateralized’ via Art. II:1 of GATS.

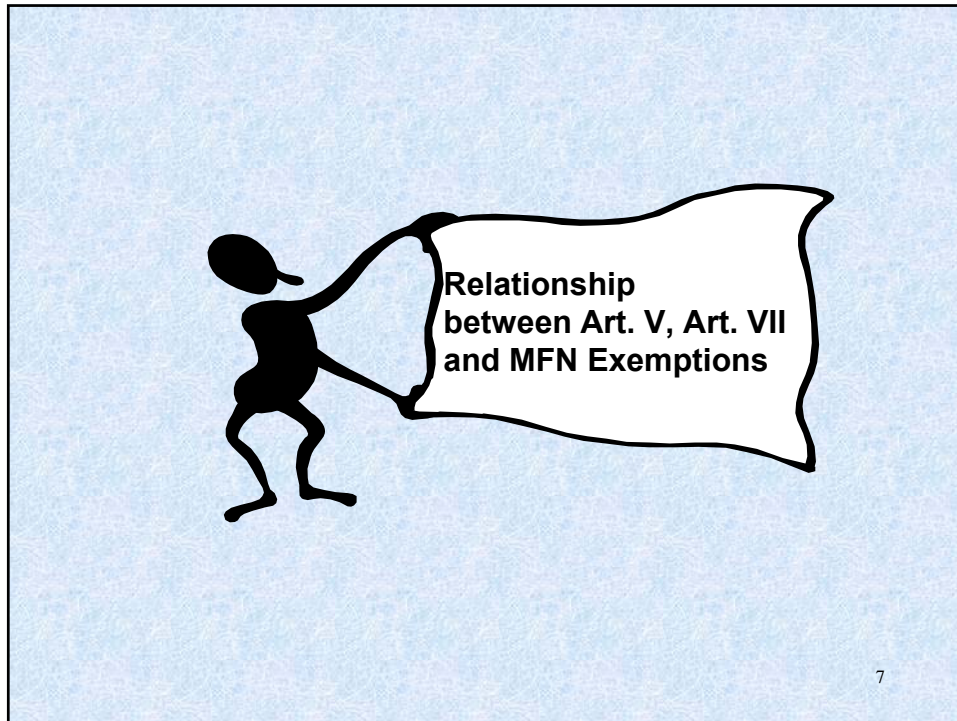
#### Main exceptions:

- Preferential trade agreements
- Recognition measures
- MFN Exemptions
- Others (Art. XIV etc.)

... plus FOG in schedules



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## I. Economic Integration (Article V)

- Article V provides cover for preferences among members of an Economic Integration Agreement
- No MFN exemption required if conditions are met
- In practice, a number of MFN exemptions were filed in the Uruguay Round to cover existing PTAs
- PTAs may apply to merchandise and services trade: Article V is relevant for the services parts or for services-only Agreements

## Article V: Conditions

- **Substantial sectoral coverage (volume of trade, number of sectors, and modes)**
- No a priori exclusion of modes, etc.
- **Absence or elimination of substantially all discrimination in the sense of Article XVII (national treatment)**
- Should facilitate trade among parties and not raise overall barriers vis-à-vis other Members
- If GATS specific commitments are affected, renegotiation according to Article XXI is required

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## Article V: Examination

- Notification to the Council for Trade in Services (CTS): existence, enlargement or significant modification of the agreement
- CTS transmits agreement to Committee on Regional Trade Agreements for examination
- On conclusion of the examination, the Committee makes recommendations to the CTS
- Since the creation of the GATT (1947), the Committee never made recommendations on compatibility / incompatibility of a PTA ...
- ... **but Article V may nevertheless be adjudicated in Dispute Settlement**

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## Frequently overlooked: Article *V bis* Labour Markets Integration Agreements

Members are free to participate in agreements providing for the “full integration” of their labour markets. Necessary conditions:

- Citizens of the parties must be exempt from residency and work permit requirements;
- notification to the Council for Trade in Services

**Relevant in practice?**

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## II. Article VII: Recognition Measures

- A Member may accord “recognition” of education, experience, requirements, licenses or certifications obtained in a “particular country” either autonomously or based upon an agreement (MRA)
- Result: more favorable treatment of services and/or suppliers of the beneficiary country

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## Article VII: Conditions

- A Member granting recognition (on the basis of an MRA or autonomously) must afford adequate opportunity to other interested Members to negotiate accession or to demonstrate that their measures should be recognized as well (note: no obligation concerning result ...)
- Recognition must not constitute a means of discrimination or a disguised restriction on trade in services

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## Article VII:4: Transparency

Members are required to notify existing recognition measures, the opening of negotiations on relevant agreements (as far in advance as possible), and the autonomous adoption of new measures or significant modification of existing measures.

Notifications received since January 2005:

6 (six)

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## Relationship between Articles V & VII

- Many recognition measures (in the form of MRAs or otherwise) are adopted in the context of Economic Integration Agreements
- Article V does not explicitly provide GATS coverage for recognition measures
- Question whether
  - the substantive requirements of Article V and VII are cumulative
  - notification obligation applies separately (i.e. does notification under Article V exempt parties from notifying reciprocal recognition measures?)

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## III. MFN Exemptions:

**“A Member may maintain a measure inconsistent with para. 1 provided that such a measure is listed in, and meets the conditions of, the Annex on Article II exemptions” (Art. II:1)**

**Note: The possibility of listing exemptions existed only at the end of the Uruguay Round or, for acceding countries, the date of accession.**

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## Scope and coverage of MFN Exemptions:

- ca. 95 Members (EC12 = 1)
- ca. 500 measures / cases
  - Sector Focus: Audiovisual (48 Members), Road transport (36), Maritime transport (30), Financial services (27), Air transport (25)
  - 14 for Bilateral Investment Treaties (BITs)
  - None specifically for Temporary Migration Agreements (TMAs)

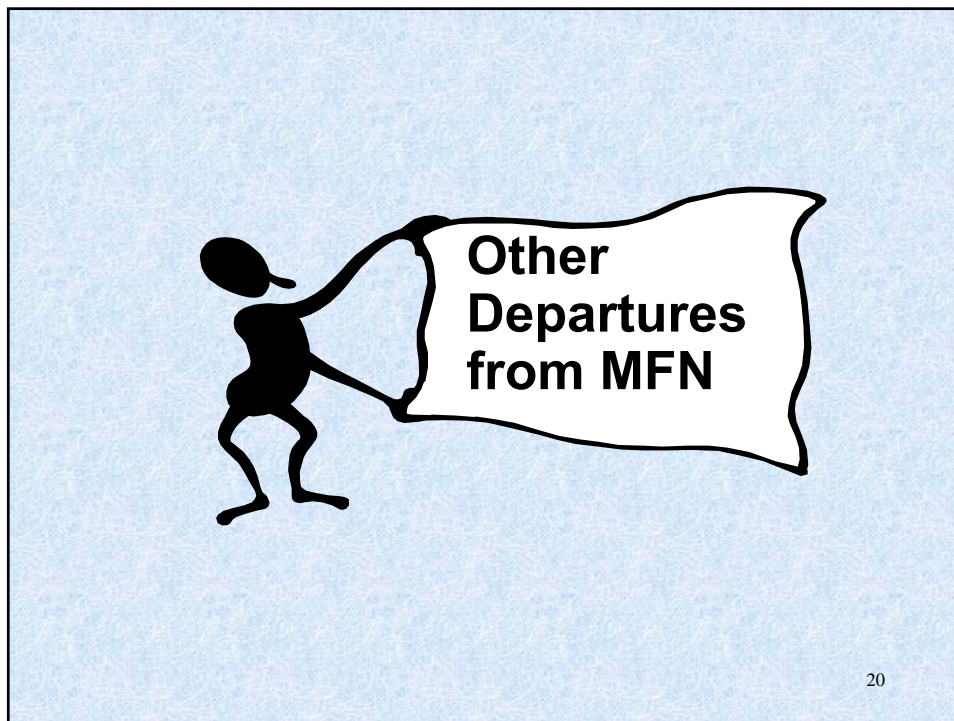
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MFN Exemptions: Chinese Taipei				
Sector or sub-sector	Description of measure indicating its inconsistency with Article II	Countries to which the measure applies	Intended duration	Conditions creating the need for the exemption
ALL SECTORS	<u>Acquiring the Rights and Interests in Lands</u> Non-Chinese Taipei natural and juridical persons are permitted to lease or purchase land for offices, residences, shops and factories, churches, schools of the expatriates, chancellery, facilities of non-profit organisations and graveyard on a reciprocal basis	All countries.	Indefinite.	Reciprocity.
Supporting and Auxiliary Air Transport Services 1)ramping services provided in airports (741**) 2)other supporting services for air transport (7469**)	Foreign air carriers granted under bilateral air services agreement may self-handle their own cargo-handling services. Foreign air carriers granted under bilateral air services agreement may self-handle their aircraft cleaning, disinfecting and towing services.	All countries.  All countries.	Indefinite.  Indefinite.	Bilateral air services agreement.  Bilateral air services agreement.

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**Economic Integration vs. Recognition vs. MFN Ex.**

	Duration	Coverage <ul style="list-style-type: none"> <li>• Sector</li> <li>• Mode</li> <li>• Measures</li> </ul>	Openness for more Members
<b>Integration Agreements (Article V)</b>	Unlimited	<ul style="list-style-type: none"> <li>• Substantial coverage</li> <li>• No a priori exclusion</li> <li>• Discrimination in the sense of Article XVII (substantial removal)</li> </ul>	No
<b>Recognition Measures (Article VII)</b>	Unlimited	<ul style="list-style-type: none"> <li>• Undefined</li> <li>• Undefined</li> <li>• Authorization, licenses, certificates, etc.</li> </ul>	Yes (opportunity to negotiate accession, etc.)
<b>MFN Exemptions</b>	10 years (in principle)	Undefined	No



## Exceptions:

### Article XIV (XIVbis) and Annex on Financial Services

**Subject to certain conditions, nothing in the GATS prevents Members from taking measures necessary:**

**to protect public morals or maintain public order; protect life or health, etc.; protect essential security interests** (Art. XIV & XIVbis)

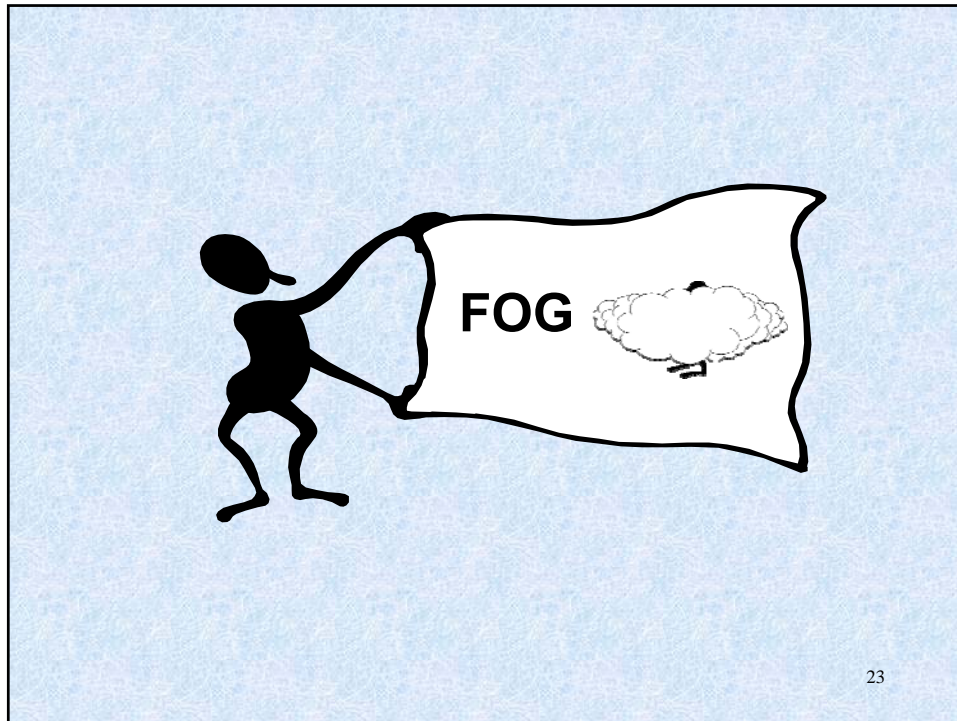
**to ensure the integrity and stability of the financial system** (Annex on Financial Services)

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## Waiver of WTO Obligations

- Scenario: a departure from MFN is necessary and none of the GATS exceptions apply
- Article IX:3 of the WTO Agreement:
  - WTO obligations can be waived in exceptional circumstances by the Ministerial Conference
  - requires approval by  $\frac{3}{4}$  of WTO Membership
  - annual review of all waivers granted for a period of more than one year
- One such case to date (Albania/telecom)

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## The benefits of FOG:

**“It is not the clear-sighted who lead the world. Great achievements are accomplished in blessed warm mental FOG... “**

Joseph Conrad (1915), 'Victory: An Island Tale'

However ...

**... is this true for GATS commitments as well?**

## Panel Report *Mexico - Telecom*

Reference to the 'requirement of a permit' (MA, Mode 3) "does not indicate that Mexico maintains a quantitative limitation 'on the number of suppliers'. On the contrary, it suggests that any supplier who is set up in accordance with Mexican law is eligible for a permit".

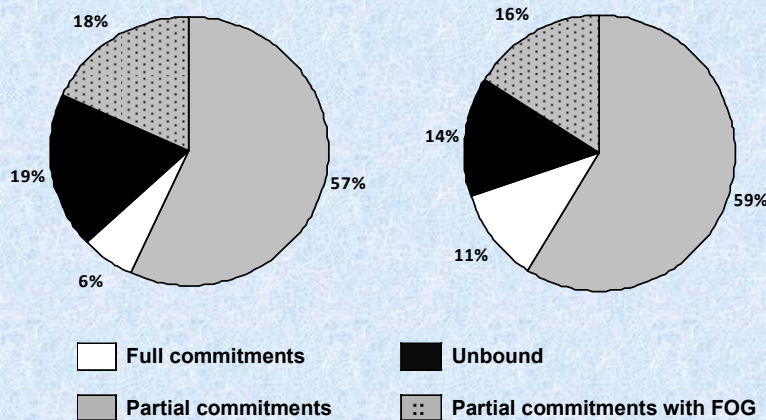
In other words: Such entries do not constitute limitations in the sense of Article XVI.

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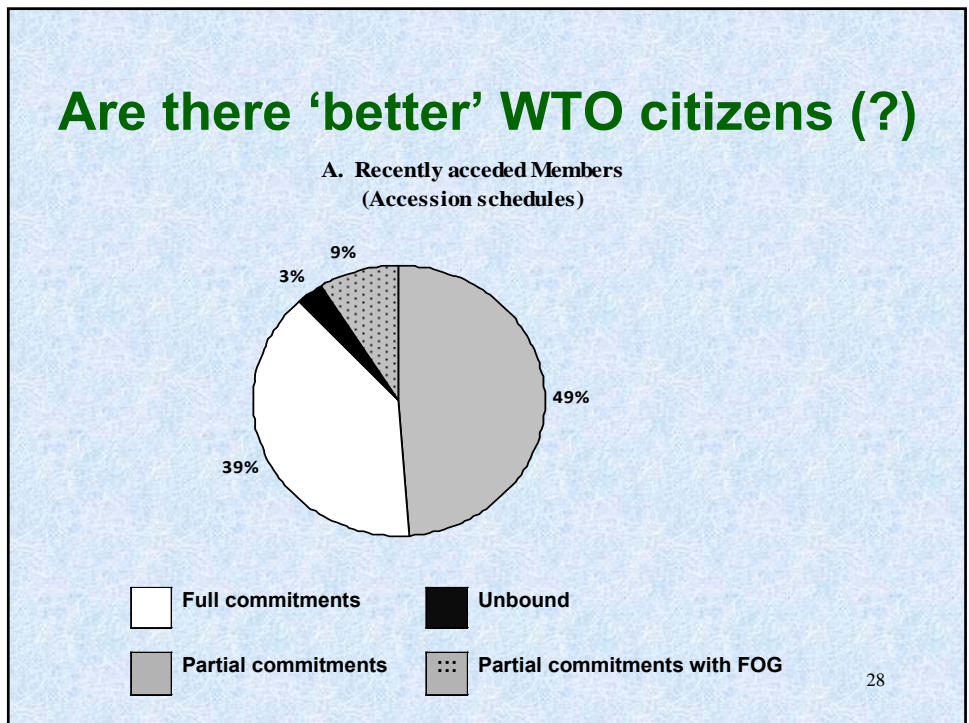
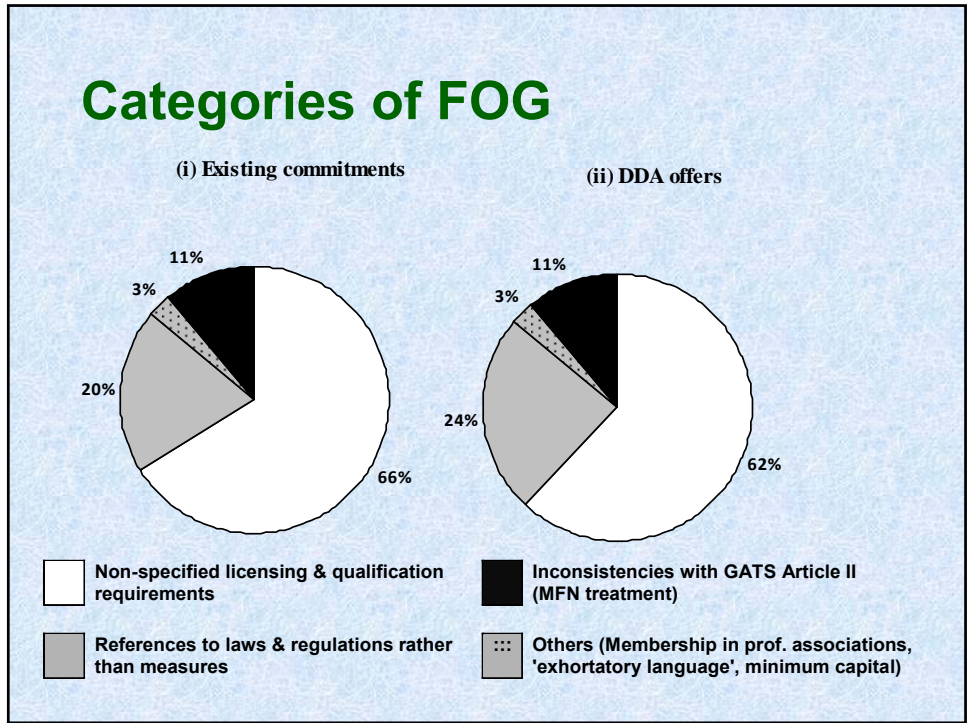
## Patterns of Commitments (Commitments on Market Access, Mode 3, 85 Members with DDA offers)

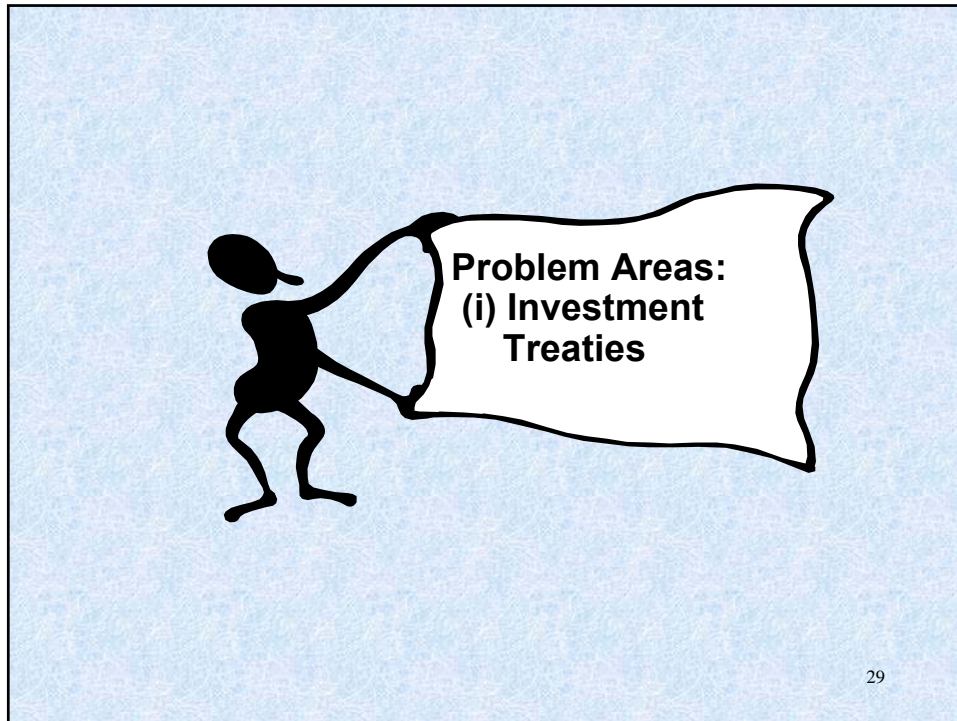
(i) Existing commitments

(ii) DDA offer



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## **BITs – A common feature of international economic relations**

- Over 2'700 BITs signed to date, some 2'000 ratified
- Most frequent signatories: Germany (> 130), China (> 110 ), Switzerland (> 110) and UK (> 100)

## BITs – Main Elements (I)

### Comparative standards of treatment

#### MFN treatment

#### National treatment

- Post-establishment: 'Protection Treaties'
- Pre- and post-establishment:  
'Liberalization Treaties' (< 4% of all BITs)

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## BITs – Main Elements (II)

### Other treaty obligations (with/without equivalents in GATS?)

- Fair and equitable treatment
- Guarantees against expropriation, including 'regulatory expropriation'
- Dispute Settlement (incl. Investor-to-State)
- Retroactive monetary compensation for damages
- Others (Transfers of funds, performance requirements, etc.)

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## 'Liberalization BITs' involving the US: Sector coverage

Country group	Number of Investment Treaties (All / Signed after '95)	Sector coverage of Investment Treaties		Sectors scheduled under GATS (BIT partner)	
		Average (approx.)	Range (approx.)	Average	Range
Least-developed countries	4 / 1	130	86-157	17	9-29
Developing countries	17 / 4	131	93-157	40	3-110
Transition economies	15 / 5	131	94-157	120	37-147
<b>Total</b>	<b>36 / 10</b>	<b>131</b>	<b>86-157</b>	<b>63</b>	<b>3-147</b>

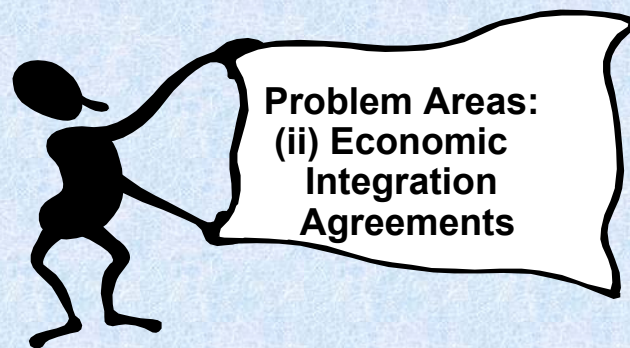
## BITs vs. GATS

- **Less than 10% of WTO Members have filed Exemptions from Article II**
- **In other words: The vast majority of Members needs to extend any GATS-related benefits on an MFN basis**
- **Follow up issue: Feasibility of a 'safeguards clause' under Mode 3**

## How to avoid tensions with GATS obligations?

- Carve-out for services in new BITs  
However: Potential imbalance among the parties
- Integration into PTAs  
However: There are 2'500 BITs at present ...
- MFN exemption (acceding countries)  
However: Uncertain status of future BITs
- Autonomous extension of BIT obligations to all WTO Members  
However: What about dispute settlement, etc.?
- "Gentleman's Agreement"  
However: ...

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## **A closer look at GATS Article V:1(a) and (b)**

### **Conditions for EIAs:**

- ▶ **“substantial sectoral coverage”** and
- ▶ **“absence or elimination of substantially all discrimination in the sense of Article XVII”**
  - through (i) elimination of existing discriminatory measures, and/or
  - (ii) prohibition of new or more discriminatory measures, ...

## **‘Softeners’**

- ▶ **Consideration of wider process of economic integration or trade liberalization among the countries concerned (Article V:2)**
- ▶ **Flexibility for developing countries concerning in particular the ‘absence or elimination of substantially all discrimination’ (Article V:3(a))**

## **A strict interpretation of Article V:1:**

'**Substantial**' requires an agreement to be **comprehensive in coverage**, without sector exclusions, and to **remove nearly all discrimination** between the parties. Possible consequence:

**“An FTA that reproduces commitments in the GATS with only a limited number of improvements would, on the face of it, not qualify.”** (Asian Development Bank, 2008)

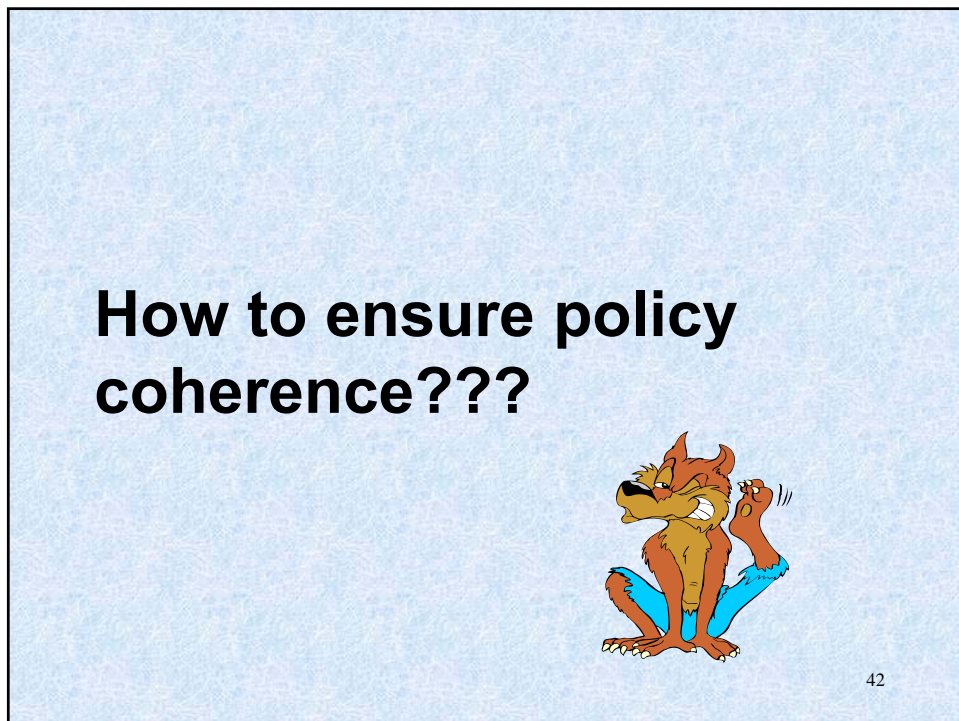
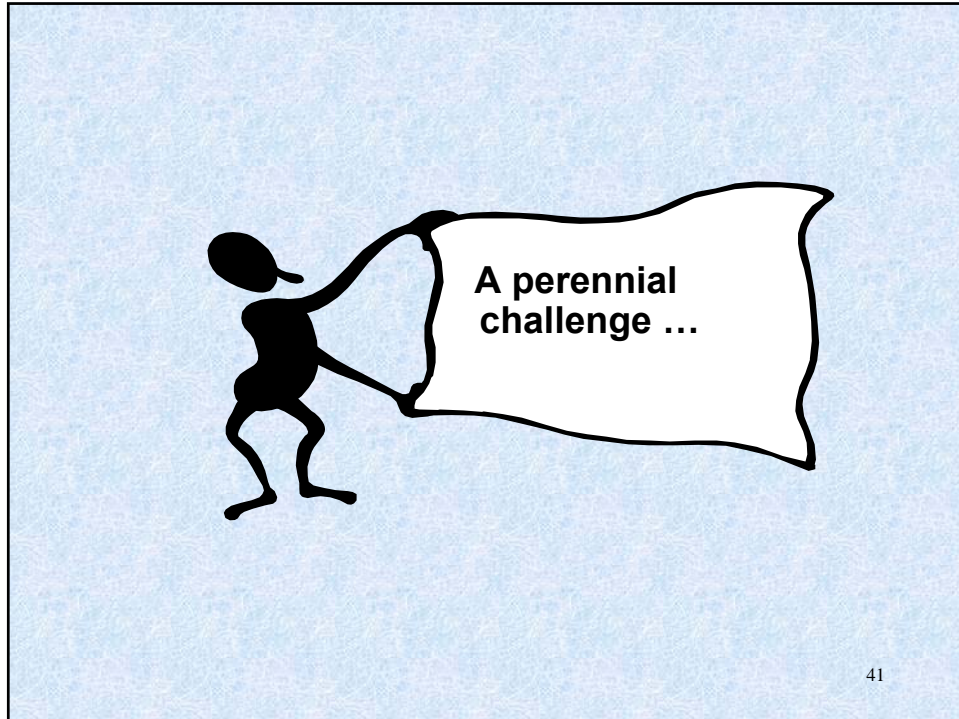
**However ...**

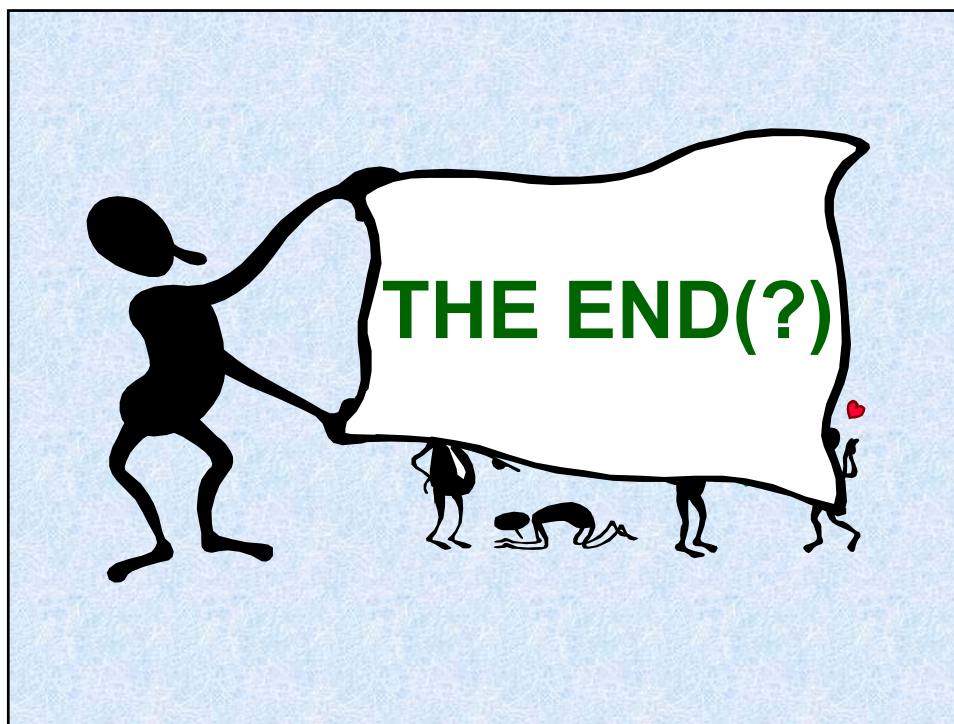
**... most PTAs include commitments even at levels below the parties' GATS schedules**

**Of the 56 PTAs involving OECD countries (2010), 80 per cent contain GATS-minus features**

Examples: Japan with Brunei Darussalam, Indonesia, Malaysia, Philippines, Singapore and Thailand; Singapore with Australia, India, EFTA, Korea, New Zealand and United States (Miroudot et al, 2010)

**Covered by Article V:3(a) → flexibility for developing countries (?)**





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