



TPSA | CANADA-INDONESIA TRADE AND
PRIVATE SECTOR ASSISTANCE PROJECT

HOW TO DRAFT FREE TRADE AGREEMENTS

Jakarta, 5-7 September 2017

Alexandre Larouche-Maltais
Senior Trade & Investment Expert
Conference Board of Canada

Canada

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The Conference Board
of Canada

Partner:



Outline: How to Draft Free Trade Agreements



PART 1

NATURE OF INTERNATIONAL AGREEMENTS

What is a treaty?
**Structure of international
treaties**



Canada

What is a treaty?

The 1969 Vienna Convention on the law of treaties:
"an international agreement concluded between States in written form and governed by international law."



A binding instrument, which means that the contracting parties intended to create legal rights and duties;



Concluded by states or international organizations with treaty-making power;



Governed by international law;



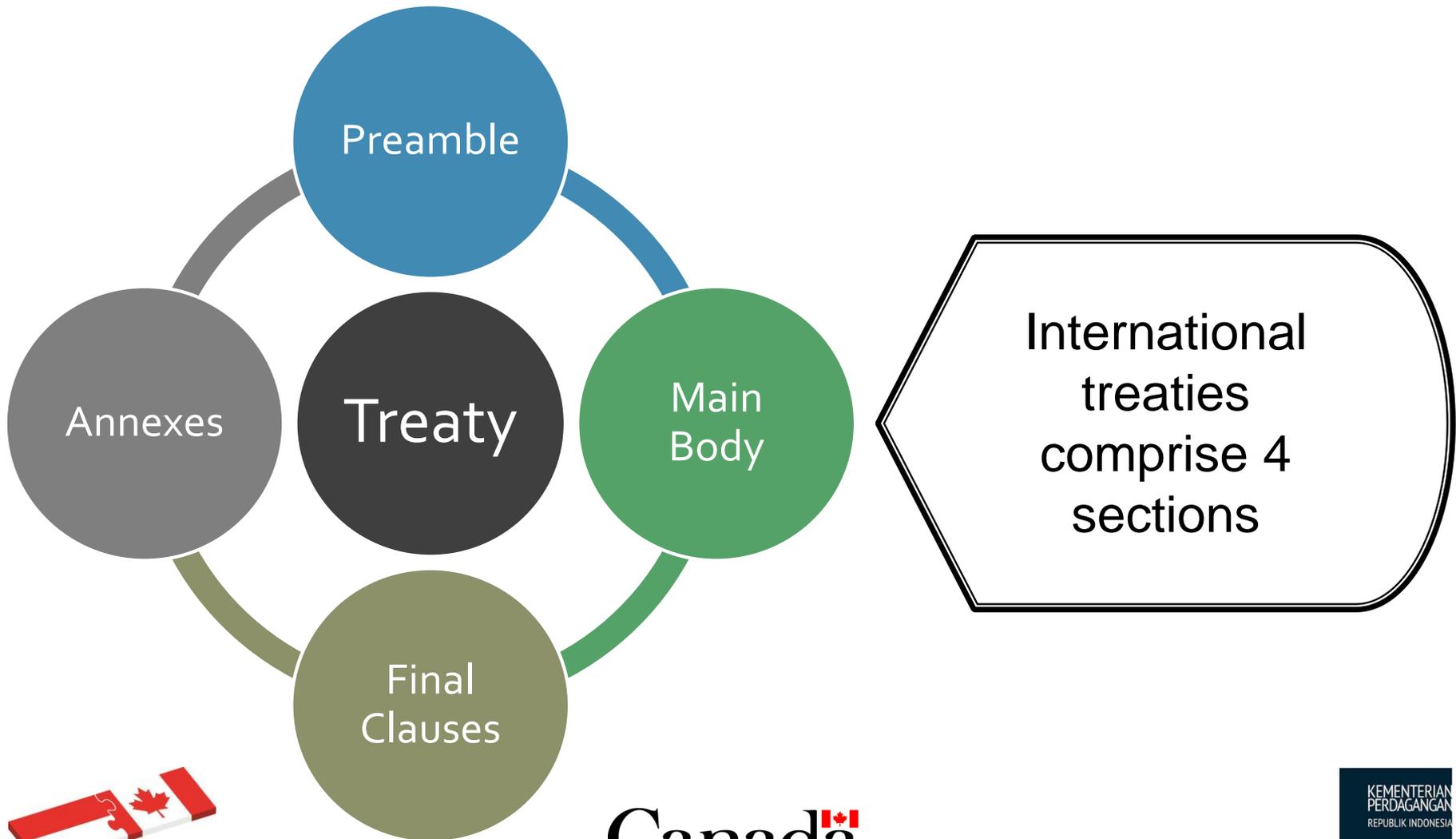
In writing.



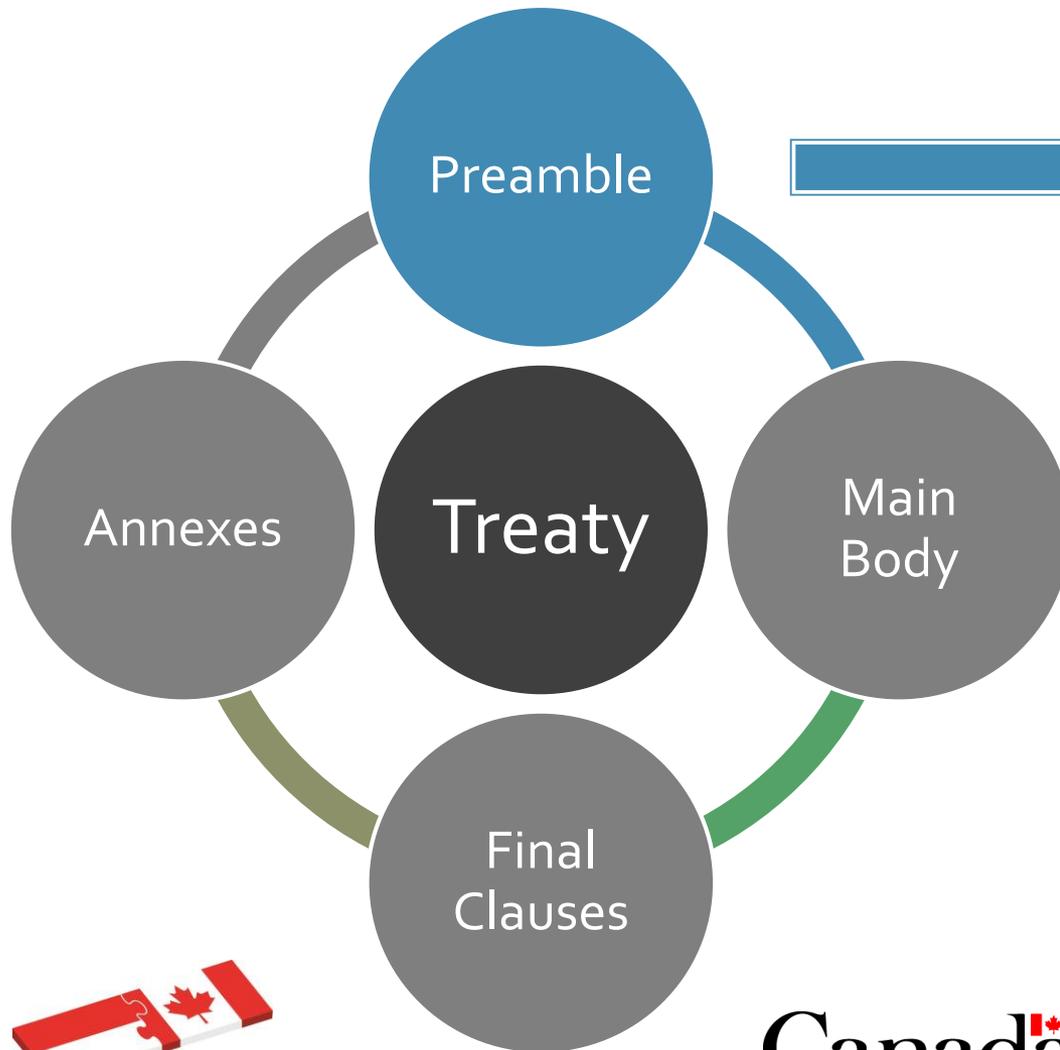
Source: United Nations Treaty collection



Structure of international agreements



Structure of international agreements



- Name of the parties
- Elements of context
- Reasons & Objectives of the treaty



Canada

Agreement on the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area (1992)

Preamble

The Governments of Brunei Darussalam, the Republic of Indonesia, Malaysia, the Republic of the Philippines, the Republic of Singapore and the Kingdom of Thailand, Member States of the Association of South, East Asian Nations (ASEAN):

MINDFUL of the Declaration of ASEAN Concord signed in Bali, Indonesia on 24 February 1976 which provides that Member States shall cooperate in the field of trade in order to promote development and growth of new production and trade;

RECALLING that the ASEAN Heads of Government, at their Third Summit Meeting held in Manila on 13-15 December 1987, declared that Member States shall strengthen intra-ASEAN economic cooperation to maximise the realisation of the region's potential in trade and development;

NOTING that the Agreement on ASEAN Preferential Trading Arrangements (PTA) signed in Manila on 24 February 1977 provides for the adoption of various instruments on trade liberalisation on a preferential basis;

ADHERING to the principles, concepts and ideals of the Framework Agreement on Enhancing ASEAN Economic Cooperation signed in Singapore on 28 January 1992;

CONVINCED that preferential trading arrangements among ASEAN Member States will act as a stimulus to the strengthening of national and ASEAN Economic resilience, and the development of the national economies of Member States by expanding investment and production opportunities, trade, and foreign exchange earnings;

DETERMINED to further cooperate in the economic growth of the region by accelerating the liberalization of intra-ASEAN trade and investment with the objective of creating the ASEAN Free Trade Area using the Common Effective Preferential Tariff (CEPT) Scheme;

DESIRING to effect improvements on the ASEAN PTA in consonance with ASEAN's international commitments;

HAVE AGREED AS FOLLOWS:



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Agreement on the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area (1992)

Name of the parties

The Governments of Brunei Darussalam, the Republic of Indonesia, Malaysia, the Republic of the Philippines, the Republic of Singapore and the Kingdom of Thailand, Member States of the Association of South, East Asian Nations (ASEAN):

Context

MINDFUL of the Declaration of ASEAN Concord signed in Bali, Indonesia on 24 February 1976 which provides that Member States shall cooperate in the field of trade in order to promote development and growth of new production and trade;

RECALLING that the ASEAN Heads of Government, at their Third Summit Meeting held in Manila on 13-15 December 1987, declared that Member States shall strengthen intra-ASEAN economic cooperation to maximise the realisation of the region's potential in trade and development;

NOTING that the Agreement on ASEAN Preferential Trading Arrangements (PTA) signed in Manila on 24 February 1977 provides for the adoption of various instruments on trade liberalisation on a preferential basis;

Objectives

ADHERING to the principles, concepts and ideals of the Framework Agreement on Enhancing ASEAN Economic Cooperation signed in Singapore on 28 January 1992;

CONVINCED that preferential trading arrangements among ASEAN Member States will act as a stimulus to the strengthening of national and ASEAN Economic resilience, and the development of the national economies of Member States by expanding investment and production opportunities, trade, and foreign exchange earnings;

DETERMINED to further cooperate in the economic growth of the region by accelerating the liberalization of intra-ASEAN trade and investment with the objective of creating the ASEAN Free Trade Area using the Common Effective Preferential Tariff (CEPT) Scheme;

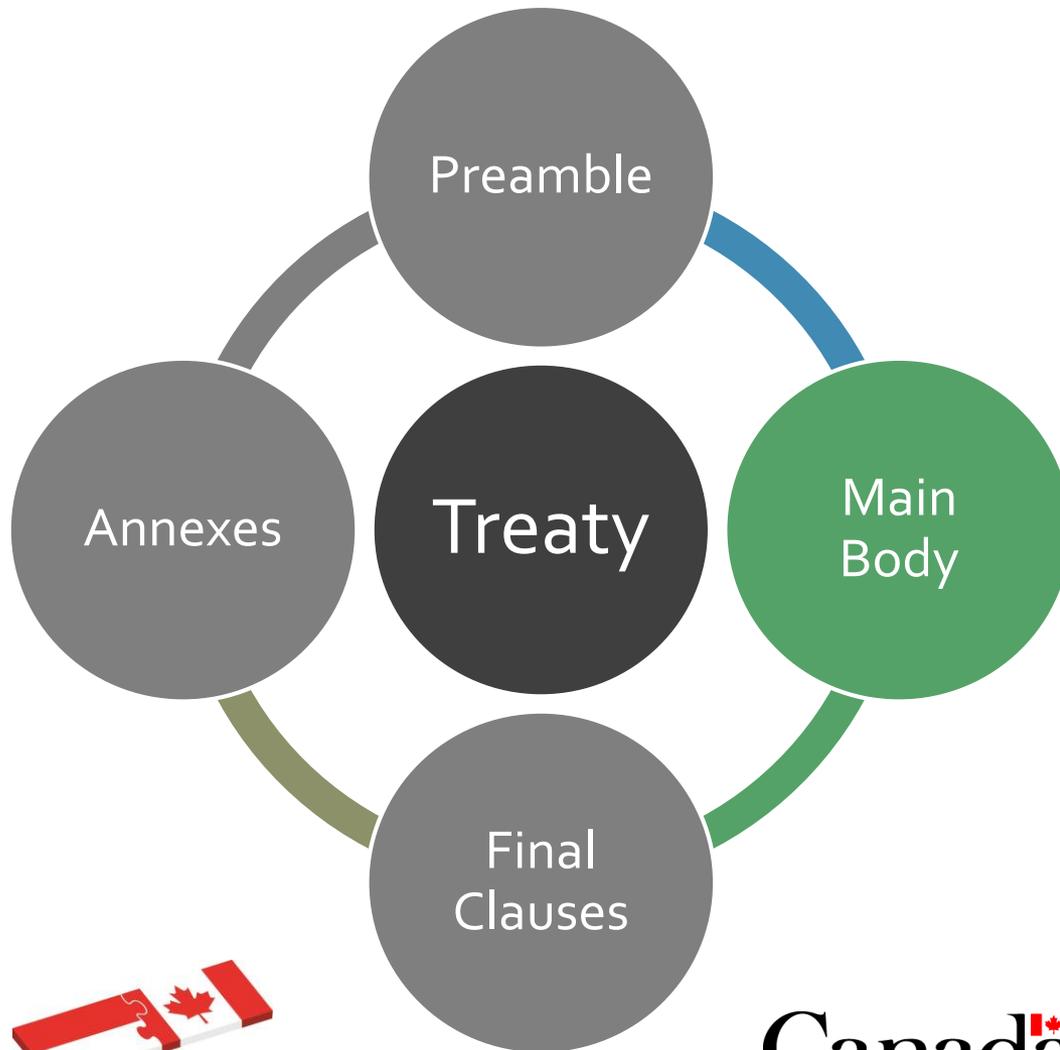
DESIRING to effect improvements on the ASEAN PTA in consonance with ASEAN's international commitments;

HAVE AGREED AS FOLLOWS:



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Structure of international agreements



- Substantive clauses agreed by the parties



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North American Free Trade Agreement (1992)

Main
Body

PART ONE: GENERAL PART

Chapter One: Objectives

Chapter Two: General Definitions

PART TWO: TRADE IN GOODS

Chapter Three: National Treatment and Market Access for Goods

Chapter Four: Rules of Origin

Chapter Five: Customs Procedures

Chapter Six: Energy and Basic Petrochemicals

Chapter Seven: Agriculture and Sanitary and Phytosanitary Measures

Chapter Eight: Emergency Action

PART THREE: TECHNICAL BARRIERS TO TRADE

Chapter Nine: Standards-Related Measures

PART FOUR: GOVERNMENT PROCUREMENT

Chapter Ten: Government Procurement

PART FIVE: INVESTMENT, SERVICES AND RELATED MATTERS

Chapter Eleven: Investment

Chapter Twelve: Cross-Border Trade in Services

Chapter Thirteen: Telecommunications

Chapter Fourteen: Financial Services

Chapter Fifteen: Competition Policy, Monopolies and State Enterprises

Chapter Sixteen: Temporary Entry for Business Persons

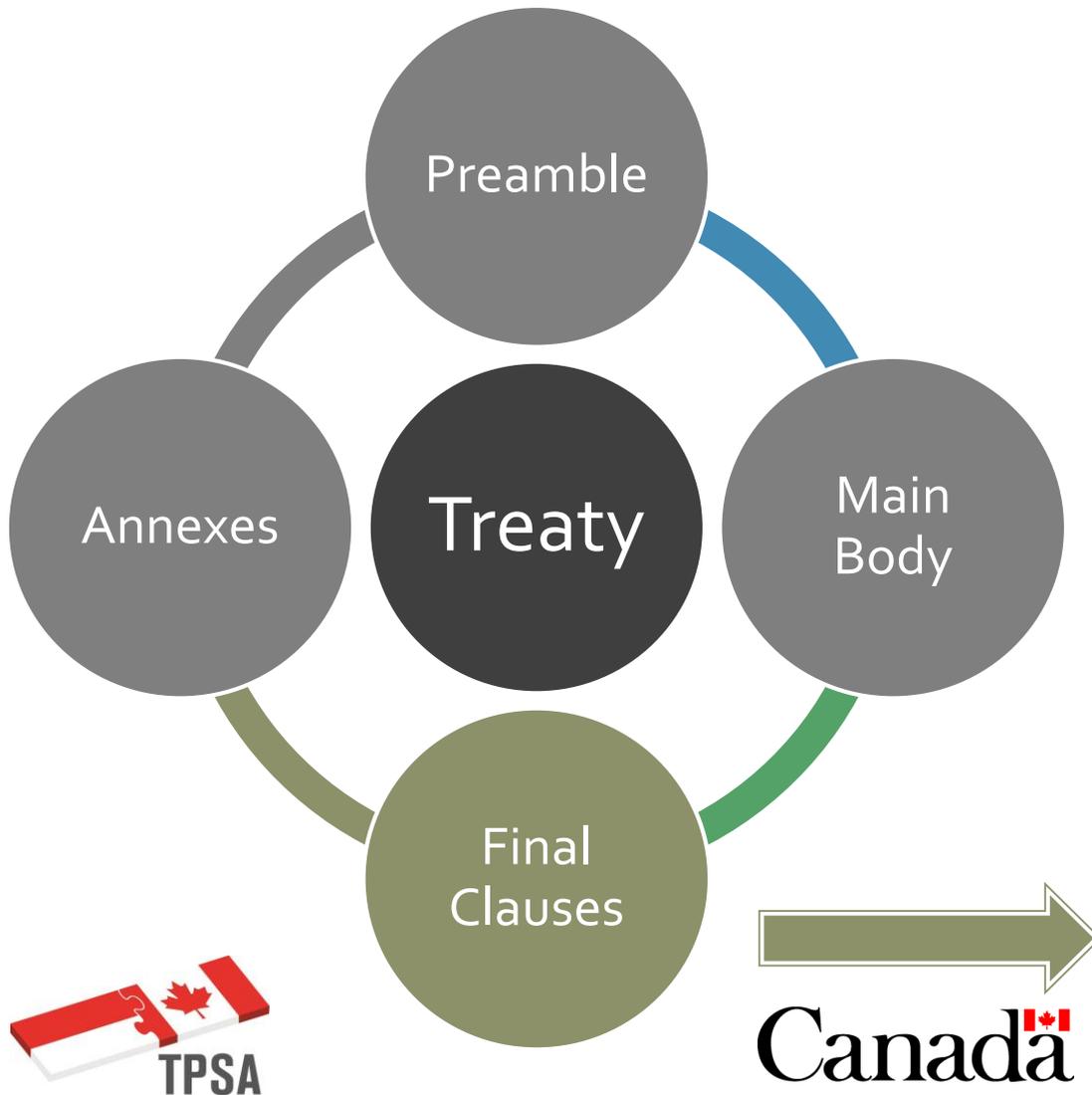
PART SIX: INTELLECTUAL PROPERTY

Chapter Seventeen: Intellectual Property



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Structure of international agreements



- Dispute settlement
- Entry into force
- Withdrawal and termination
- Other



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ASEAN-Japan Comprehensive Economic Partnership Agreement (2008)

Final
Clauses

Chapter 9 Settlement of Disputes

Article 59 Definitions

Article 60 Scope of Application

Article 61 Contact Points

Article 62 Consultations

Article 63 Good Offices, Conciliation and Mediation

Article 64 Establishment of Arbitral Tribunals

Article 65 Composition of Arbitral Tribunals

Article 66 Third Parties

Article 67 Functions of Arbitral Tribunals

Article 68 Proceedings of Arbitral Tribunals

Article 69 Draft Award and Award

Article 70 Suspension and Termination of Proceedings

Article 71 Implementation of Award

Article 72 Compensation and the Suspension of Concessions

Article 73 Expenses

Chapter 10 Final Provisions

Article 74 Table of Contents, Headings and Subheadings

Article 75 Review

Article 76 Annexes and Notes

Article 77 Amendments

Article 78 Depositary

Article 79 Entry into Force

Article 80 Withdrawal and Termination



Canada

ASEAN-Japan Comprehensive Economic Partnership Agreement (2008)

Final
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Dispute
settlement

Entry into
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Withdrawal
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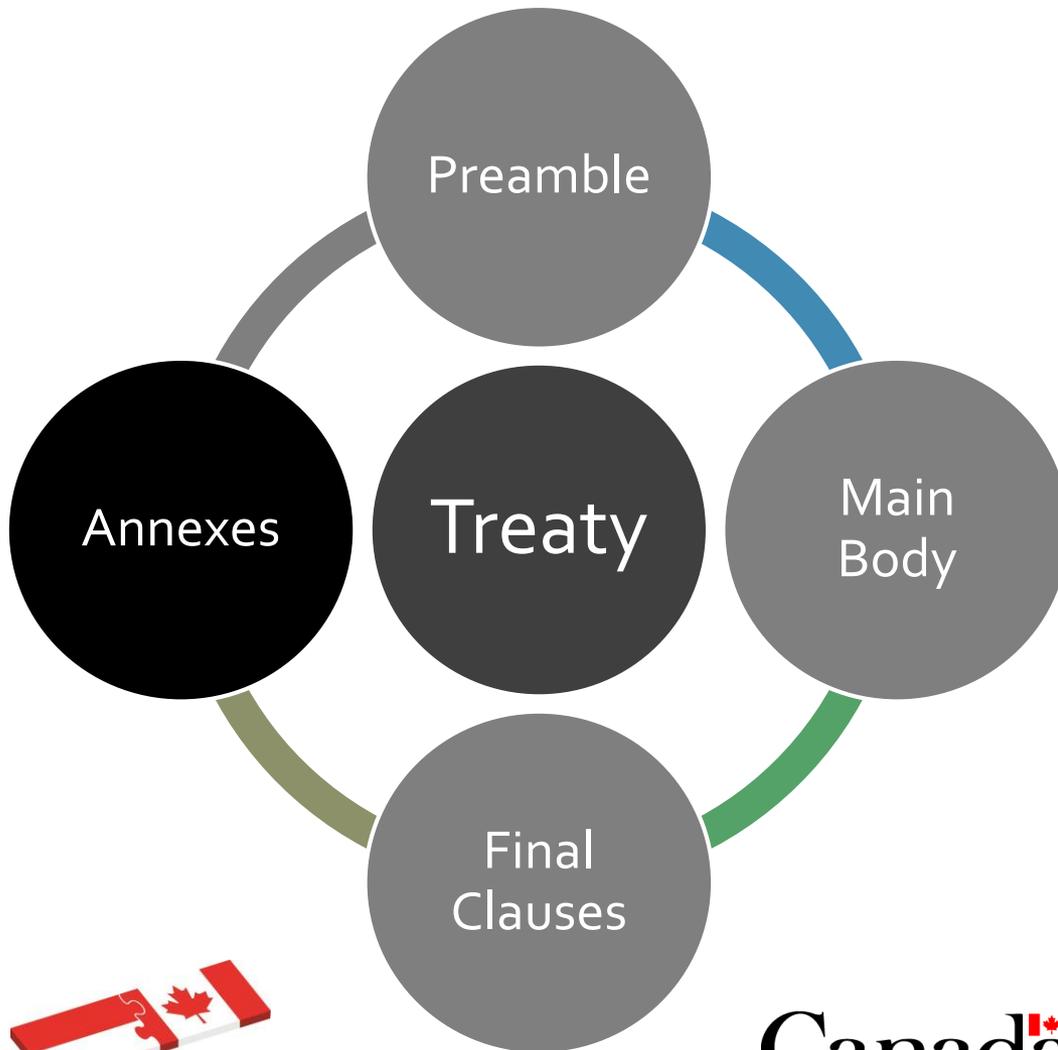
Article 79 Entry into Force

Article 80 Withdrawal and Termination



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Structure of international agreements



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PART 2

UNDERSTANDING LEGAL JARGON

Interpretation of international treaties

Nature and scope of obligations



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Vienna Convention on the Law of Treaties

Article 31 General Rules of
Interpretation

Article 32 Supplementary
Means of Interpretation

No. 18232

MULTILATERAL

**Vienna Convention on the law of treaties (with annex).
Concluded at Vienna on 23 May 1969**

*Authentic texts: English, French, Chinese, Russian and Spanish.
Registered ex officio on 27 January 1980.*



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Interpreting international treaties

Article 31. General Rules 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 connexion with the conclusion of the treaty;
 - b) Any instrument which was made by one or more parties in connexion with the treaty and accepted by the other parties as an instrument related to the treaty.



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Interpreting international treaties

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.



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Interpreting international treaties

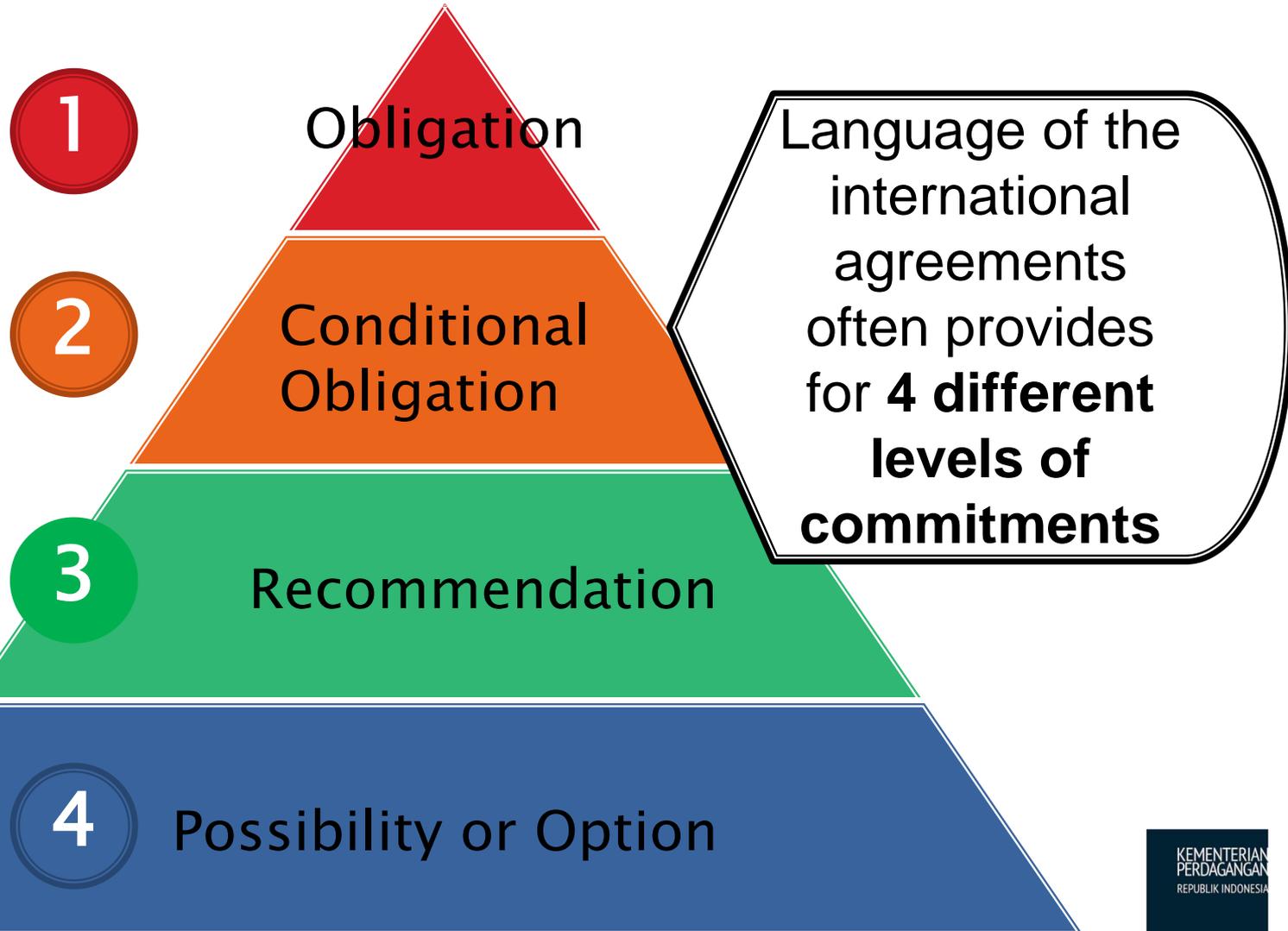
Article 32 Supplementary Means of Interpretation

1. Recourse may be had to supplementary means of interpretation, including the **preliminary 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

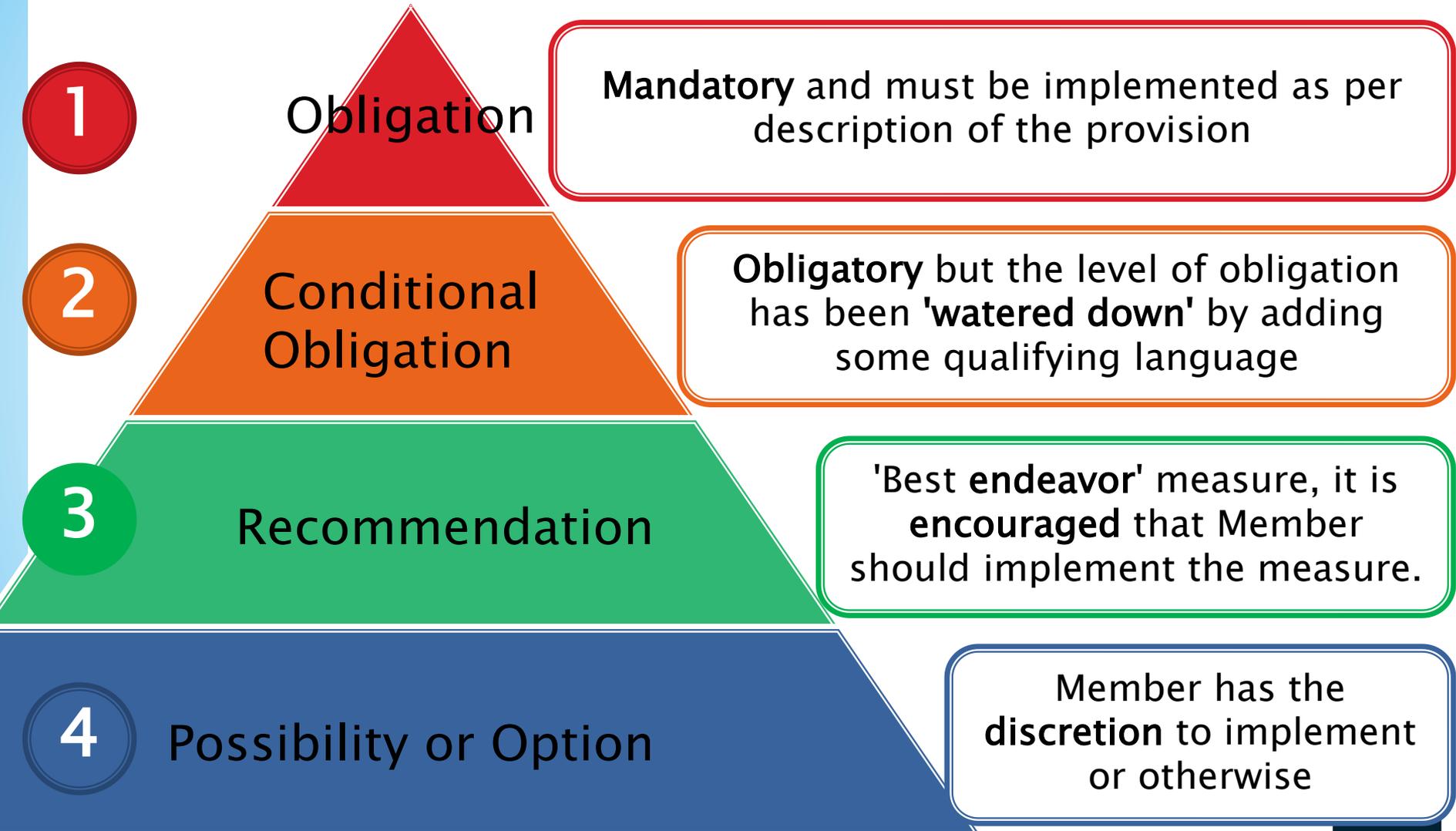


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Nature and scope of obligations



Nature and scope of obligations



Nature and scope of obligations

GATT Article I: General Most-Favoured-Nation Treatment

1. *With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III,* any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country **shall be accorded** immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.*



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Nature and scope of obligations

GATT Article I: General Most-Favoured-Nation Treatment

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Nature and scope of obligations

GATT Article III*: National Treatment on Internal Taxation and Regulation

1. *The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, **should not be applied** to imported or domestic products so as to afford protection to domestic production.**



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Nature and scope of obligations

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3



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Nature and scope of obligations

SPS Agreement Article 3: Harmonization

3. Members **may introduce or maintain** sanitary or phytosanitary measures which result in a higher level of sanitary or phytosanitary protection than would be achieved by measures based on the relevant international standards, guidelines or recommendations, if there is a scientific justification, or as a consequence of the level of sanitary or phytosanitary protection a Member determines to be appropriate in accordance with the relevant provisions of paragraphs 1 through 8 of Article 5 (2).



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Nature and scope of obligations

SPS Agreement Article 3: Harmonization

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Nature and scope of obligations

Marrakesh Agreement Article XVI Miscellaneous Provisions

2. To the extent practicable, the Secretariat of GATT 1947 shall become the Secretariat of the WTO, and the Director-General to the CONTRACTING PARTIES to GATT 1947, until such time as the Ministerial Conference has appointed a Director-General in accordance with paragraph 2 of Article VI of this Agreement, shall serve as Director-General of the WTO.



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Nature and scope of obligations

Marrakesh Agreement Article XVI Miscellaneous Provisions

2. *To the extent practicable, the Secretariat of GATT 1947 shall become the Secretariat of the WTO, and the Director-General to the CONTRACTING PARTIES to GATT 1947, until such time as the Ministerial Conference has appointed a Director-General in accordance with paragraph 2 of Article VI of this Agreement, shall serve as Director-General of the WTO.*



Nature and scope of obligations

Revised GPA Article VII — Notice of Intended Procurement

*For each covered procurement, a procuring entity **shall publish** a notice of intended procurement in the appropriate paper or electronic medium listed in Appendix III, except in the circumstances described in Article XIII. Such medium **shall be widely disseminated** and such notices **shall remain readily accessible** to the public, at least until expiration of the time-period indicated in the notice.*

(...)

*Parties, including their procuring entities covered under Annex 2 or 3, are **encouraged to publish** their notices by electronic means free of charge through a single point of access.*



Nature and scope of obligations

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Nature and scope of obligations

Safeguard Agreement Article 8: Level of Concessions and Other Obligations

1. *A Member proposing to apply a safeguard measure or seeking an extension of a safeguard measure **shall endeavour to maintain** a substantially equivalent level of concessions and other obligations to that existing under GATT 1994 between it and the exporting Members which would be affected by such a measure, in accordance with the provisions of paragraph 3 of Article 12.*



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Nature and scope of obligations

Safeguard Agreement Article 8: Level of Concessions and Other Obligations

1. *A Member proposing to apply a safeguard measure or seeking an extension of a safeguard measure **shall endeavour to maintain** a substantially equivalent level of concessions and other obligations to that existing under GATT 1994 between it and the exporting Members which would be affected by such a measure, in accordance with the provisions of paragraph 3 of Article 12.*

3



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Nature and scope of obligations

TFA Article 7.2 Electronic Payment

Each Member shall, to the extent practicable, adopt or maintain procedures allowing the option of electronic payment for duties, taxes, fees, and charges collected by customs incurred upon importation and exportation.



Nature and scope of obligations

TFA Article 7.2 Electronic Payment

Each Member shall, to the extent practicable, adopt or maintain procedures allowing the option of electronic payment for duties, taxes, fees, and charges collected by customs incurred upon importation and exportation.

3



PART 3

DRAFTING AND FINALIZING

**“Australian hints” on agreement
drafting**

Steps before entry into force



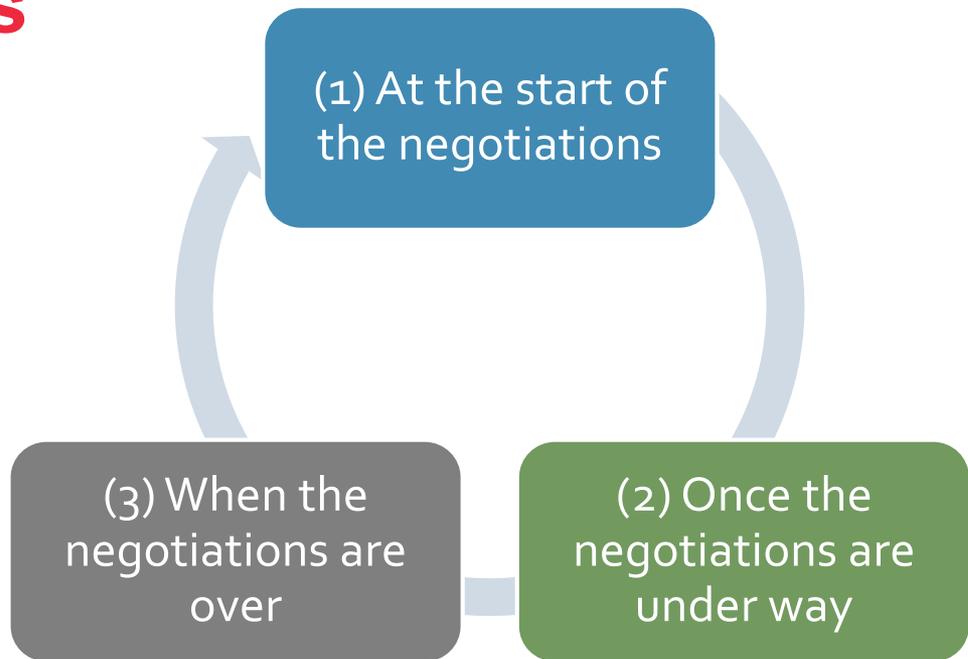
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“Australian hints” on agreement drafting

*The agreement has to stand
the test of time.*

*Clarity in the provisions will
make this easier.*

*The challenge is: how to
produce a reliable text
reflecting the outcome of the
latest stage of negotiations.*



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Source: Australian Government,
Department of Foreign Affairs and
Trade, “Negotiating free-trade
agreements: a guide” 2005



(1) At the start of the negotiations

Holding the pen

- appoint a single person in charge of the draft text
- do not assume that specialists in various issues are familiar with the requirements for drafting a treaty

Keeping it uniform

- agree on broad editorial guidelines and structures of chapters

Don't rush the deal

- don't be afraid to use square brackets liberally



Canada

Source: Australian Government, Department of Foreign Affairs and Trade, "Negotiating free-trade agreements: a guide" 2005

(2) Once the negotiations are under way

Thinking ahead

- early in the negotiations establish clearly how the treaty approvals system in your economy works

Getting advised

- consult your legal advisers frequently since drafting problems are easier to deal with than in the final stages

Avoiding a mess

- do not change the numbering of any article as other parts of the text will contain cross-references



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Source: Australian Government,
Department of Foreign Affairs and
Trade, "Negotiating free-trade
agreements: a guide" 2005



(3) When the negotiations are over

On the same page

- ensure that the text conforms to the negotiating team's understanding of what has been agreed, and the other side will do the same

Meeting ... again

- Some discrepancies may be harder to solve, and it may be necessary to have a meeting to work things out. Avoid CETA de facto renegotiation

Sharing good news

- May be asked to take part in lots of "briefing" meeting with high-level officials



Canada

Source: Australian Government, Department of Foreign Affairs and Trade, "Negotiating free-trade agreements: a guide" 2005

From adoption to entry into force

Adoption

Authentication

Expression of consent

Entry into force

Signature by
Parties

Legal
scrubbing

Ratification

As per
conditions
set in FTA



Canada

From adoption to entry into force

Adoption

Authentication

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*Adoption is the formal act by which negotiating parties **establish the form and content of a treaty.***

The treaty is adopted through a specific act expressing the will of the States and the international organizations participating in the negotiation of that treaty, for example, by voting on the text, initialling, signing, etc.



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Source: United Nations Treaty Handbook



From adoption to entry into force

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*Authentication is the procedure whereby the text of a treaty is **established as authentic and definitive**.*

Once a treaty has been authenticated, its provisions cannot be modified except by formal amendment.



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Source: United Nations Treaty Handbook



Legal scrubbing

Ensuring consistency, coherence and overall legal correctness

- References to other provisions
- Proper numbering of articles
- Check official titles of Agreements

Correct grammatical errors and inconsistent use of terms

- Coherent and consistent use of terms
- “Dictionary” review

Technical, rather than political process

- Process conducted by lawyers
- No change to the content
- Minor changes



Source: WTO, “TFA Facility: Operational Guidelines” 2016

Canada

Source: Marceau, “A History of Law and Lawyers in the GATT/WTO: The Development of the Rule of Law in the Multilateral Trading System” 2015



Legal scrubbing: e.g. TFA Preamble

11 December 2013

Members,

Having regard to the Doha Round of Multilateral Trade Negotiations;

Recalling and reaffirming the mandate and principles contained in paragraph 27 of the Doha Ministerial Declaration and Annex D of the Decision of the Doha Work Programme adopted by the General Council on 1 August 2004, as well as paragraph 33 and Annex E of the Hong Kong Ministerial Declaration;

Desiring to clarify and improve relevant aspects of Articles V, VIII and X of the GATT 1994 with a view to further expediting the movement, release and clearance of goods, including goods in transit;

15 July 2014

Members,

Having regard to the negotiations launched under the Doha Ministerial Declaration;

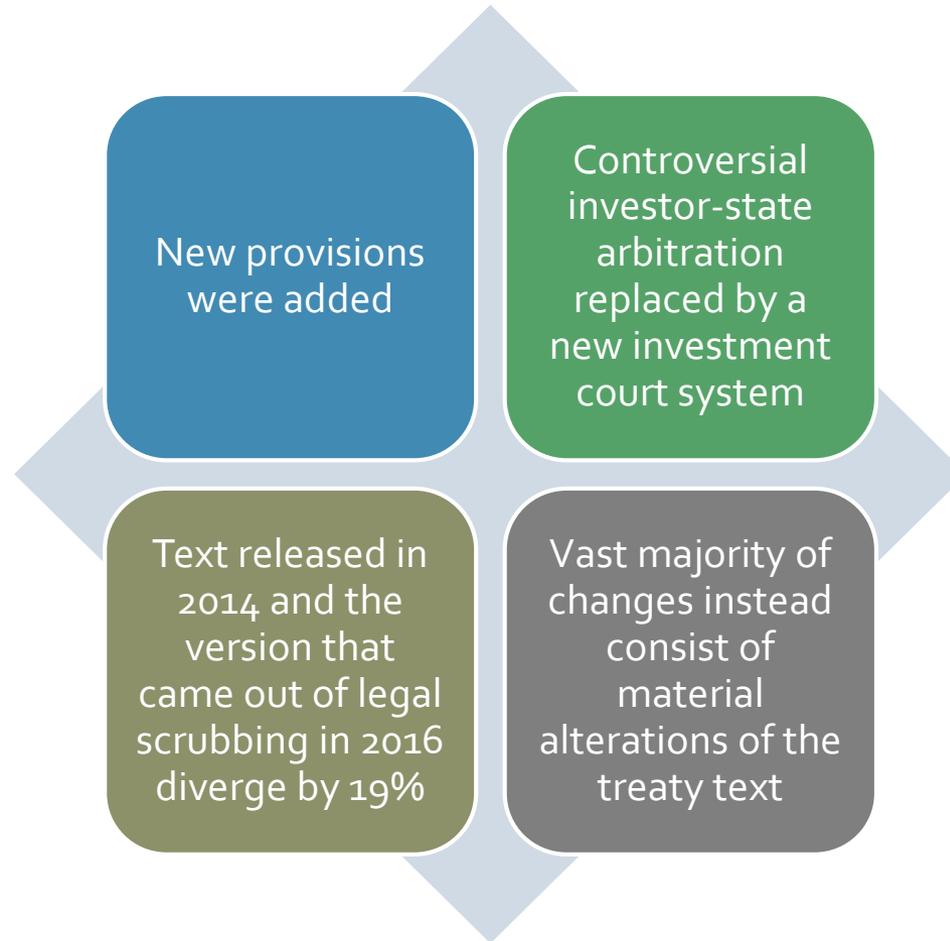
Recalling and reaffirming the mandate and principles contained in paragraph 27 of the Doha Ministerial Declaration (WT/MIN(01)/DEC/1) and in Annex D of the Decision of the Doha Work Programme adopted by the General Council on 1 August 2004 (WT/L/579), as well as in paragraph 33 of and Annex E to the Hong Kong Ministerial Declaration (WT/MIN(05)/DEC);

Desiring to clarify and improve relevant aspects of Articles V, VIII and X of the GATT 1994 with a view to further expediting the movement, release and clearance of goods, including goods in transit;



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Counterexample: CETA de facto renegotiation



Canada

Source: Alschner & Skougarevskiy, "Legal scrubbing or renegotiation?", *The Plot*, 24 March 2016

From adoption to entry into force

Adoption

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Expression of consent

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Signature by
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As per
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From adoption to entry into force

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*A State expresses its consent to be bound by a treaty under international law **by some formal act**, i.e., definitive signature, ratification, acceptance, approval or accession.*



Canada

Source: United Nations Treaty Handbook



From adoption to entry into force

Adoption

Authentication

Expression of consent

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Signature by
Parties

Legal
scrubbing

Ratification

As per
conditions
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Example: TPP entry into force

Article 30.5: Entry into Force

1. *This Agreement shall enter into force **60 days after** the date on which **all original signatories have notified the Depository** in writing of the completion of their applicable legal procedures.*

2. *In the event that **not all original signatories have notified** the Depository in writing of the completion of their applicable legal procedures **within a period of two years** of the date of signature of this Agreement, it shall enter into force **60 days after the expiry of this period** if **at least six of the original signatories, which together account for at least 85 per cent** of the combined gross domestic product of the original signatories in 2013 have notified the Depository in writing of the completion of their applicable legal procedures within this period.*



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Many thanks for your attention !



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