

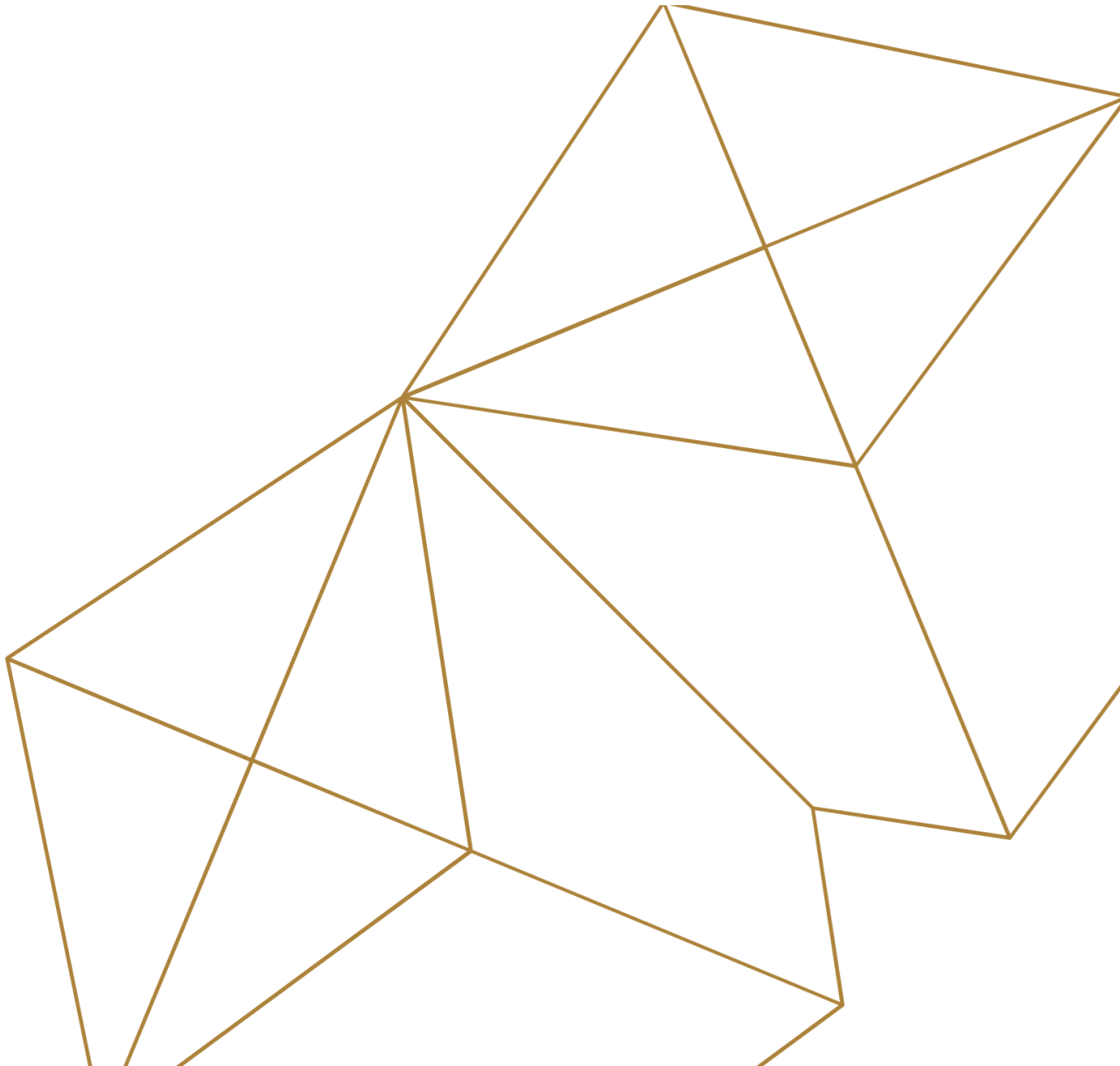
Determining the Scope and Coverage of the Free Trade Agreement

03 January 2024

Learning Objectives

- Identify crucial sectors and industries for FTA inclusion
 - Explore tariffs, quotas, and non-tariff barriers within the FTA framework
- An overview of WTO rules and examination of FTA compliance with these regulations
- Understand legal requirements of cross-border trade activities including customs procedures
 - Customs
 - Intellectual Property Rights
 - Dispute Resolution Mechanisms
- Aligning FTAs with national economic and development goals
- Strengthening government agencies and stakeholders on FTA rules and procedure training

Identifying Crucial Sectors and Industries for Inclusion in the FTA



Setting the Context

When undertaking an FTA negotiations, it is important to assess some key factors, which for example include an insight into:

- Is the FTA with an important partner
- Strategic and geopolitical interests
- Economic diversification
- New market access opportunities for businesses
- Gains for consumers
- Employment generation

The factors provide a strong foundation to identify sectors and industries that are critical to achieve the above-mentioned goals

Note: The scope and coverage of FTAs varies across countries.

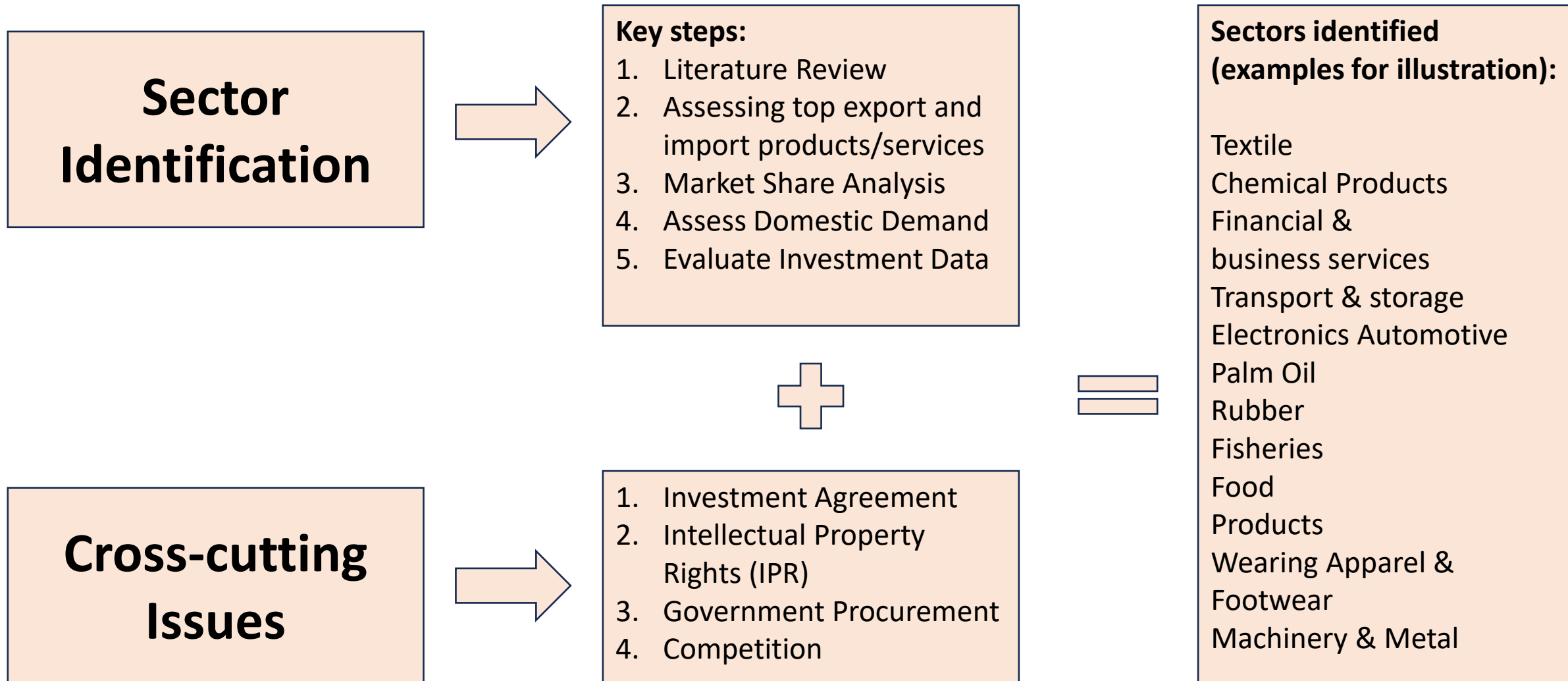
Key Priorities to Address

- Trade in Goods:
 - Secure comprehensive access for industrial and agricultural goods into the partner countries
 - Reduction or elimination of tariffs and non-tariff barriers
- Trade in Services:
 - Foster transparency and addressing unnecessary bureaucracy and regulation
 - Seek sector specific rules
 - Improve access for services firms and businesspeople to operate in the partner countries
- Investments:
 - Create new opportunities for investors
 - Address existing barriers that investors currently face
 - Maintain the right to regulate investments made in areas of national interest

Analysis

- These priorities can be addressed by undertaking an empirical assessment of trade between partners which would include:
 - Quantitative Analysis
 - To assess the [existing trade](#) between FTA partner countries
 - Understand trade and [tariff](#) structure
 - Regulatory and Policy Review
 - [Non-tariff measures](#)

Approach – Sector and Issue Identification



Trade Indicators

- [Country Growth \(%\)](#)
 - [Export \(US\\$ Thousand\)](#)
 - [Export Partner Share \(%\)](#)
 - [Export Product Share \(%\)](#)
 - [Export Share In Total Products \(%\)](#)
 - [Import \(US\\$ Thousand\)](#)
 - [Import Partner Share \(%\)](#)
 - [Import Product Share \(%\)](#)
 - [Import Share In Total Products \(%\)](#)
 - [No. Of Exported HS6 Digit Products](#)
 - [No. Of Imported HS6 Digit Products](#)
-
- Other indicators are covered in subsequent slides

Trade Indicators

- **Trade Openness:**

- Is measured through the trade-to-GDP ratio
- Is a fundamental measure of openness to foreign trade and economic integration
- Shows the level of dependence of domestic producers on foreign demand, as well as the reliance of domestic consumers and producers on foreign supply
- The trade-to-GDP ratio is calculated as $(X-M)/GDP$, where X represents exports, M is imports, and GDP stands for gross domestic product

- **Trade Complementarity Index**

- The Trade Complementarity Index (TCI) measures to what extent the export profile of one country (i.e., supply) matches the import profile of another country (i.e., demand)

$$TCI_{ij} = 100 * \left[1 - \sum_k |m_k^i - x_k^j| / 2 \right]$$

- The TCI between countries i and j is defined as:

- where m_k^i is sector k's share in country i's total imports from the world
- x_k^j is its share in j's total exports to the world

- A trade agreement among countries with high TCI is likely to create more trade and welfare gains than countries with low TCI

Trade Indicators

- **Revealed Comparative Advantage Index**

- The revealed comparative advantage (RCA) index identifies products in which a country has a comparative advantage

- The RCA index of a country is expressed as: $RCA_{ij} = (X_{ij}/X_{it})/(X_{wj}/X_{wt})$

Where RCA_{ij} is the Revealed Comparative Advantage of country i in product j ,

X_{ij} is the export value of country i in product j ,

X_{it} is the total export value of country i ,

X_{wj} is the export value of the world in product j ,

X_{wt} is the total export value of the world

- If $RCA > 1$, then the country produces a particular good or services at a lower opportunity cost than its trading partners
- A trade deal among countries that have revealed comparative advantage in different sets of products is likely to create more trade than similar countries

Trade Indicators

- **Trade Intensity Index**

- The Trade Intensity Index (TII) indicates whether a country exports its products more intensively, as a percentage, to a partner than the world does on average
- TII is expressed as $TII_{ij} = \left[\frac{X_{ij}/X_{wj}}{X_i/X_w} \right]$ where X_{ij} is the value of country i exports to destination j , X_i is total exports of country i ; subscript w indicates the world as an exporter
- When $TII > 1$, it indicates that there is a significant and high bilateral trade flow given the partner country's importance in world trade
- Granting preferential access to particular countries under trade agreements promotes trade intensity between members

Trade Indicators.....contd.

- **Market Access and Share:**

- To identify existing market access in a potential trade partner, [ITC Market Access Map](#) is a great tool
- It is a free analytical portal that allows users to access, compare, analyze and download customs tariffs, tariff-rate quotas, trade remedies and non-tariff measures applicable to a specific good in any market in the world.
- It does so by:
 - Identifying customs tariffs, tariff rate quotas, trade remedies, regulatory requirements and preferential regimes applicable to your product
 - Calculating market share
 - Comparing tariffs and other market access indicators across different destination markets
 - Analyzing trade agreements, forward-looking preferential tariffs and other market access conditions

Trade Indicators

- **Export Market Concentration Index**

- This index measures, for each product, the degree of export market concentration by country of origin
- It tells us if a large share of commodity exports are accounted for by a small number of countries or, on the contrary, if exports are well distributed among many countries

- **Import Concentration Index**

- This index measures, for each product, the degree of import market concentration by country of destination
- It tells us if a large share of commodity imports is bought by a small number of countries or, on the contrary, if the imports are well distributed among many countries

These indices help in determining the product composition of trade between the FTA partners

Hirschman-Herfindahl (HH) concentration indices

The HH concentration indices measure the concentration, or diversification, of a country's trade in terms of either products or markets. The HH export (import) product concentration index is calculated as the sum of squared product shares in a country's exports (import) and then normalized to lie between zero and one. HH market concentration indices are calculated analogously. HH export and import product concentration indices with scores close to zero indicate a diversified, i.e. equally distributed, product portfolio and scores close to one indicate high concentration on a few products. Analogously, in the case of HH indices of export and import market concentration scores close to zero indicate that trade is diversified, i.e. equally distributed, across markets and scores close to one indicate high concentration on a few markets. The WITS Portal provides analysis of [HH Market concentration index By Country in 1988 - 2021](#)

Trade Indicators

- **Competitiveness Position**

- This provides an insight into the relative performance of a country in the products that it exports, as compared to other countries
- Competition can be classified into:
 - Static Competition
 - Standard economic theory sees competition as a static equilibrium, a balanced state with no short-term deviation rather than as the process that evolves towards a certain equilibrium in the long-term
 - Dynamic Competition
 - Competition is seen as an ongoing dynamic process, where firms continuously vie for market dominance
 - Less efficient firms are replaced by more efficient ones over time, illustrating the dynamic nature of competition
- The structural gravity model provides a theoretical framework to evaluate a country's competitiveness position offering a clear and comprehensive picture

Overview on Tariffs

- **Tariff Rates**

- Every good exporter/ imported has a product code under the global classification system called the Harmonized System (HS) of tariff classification
- Tariffs are applied by HS codes
- Once the relevant tariff code is identified, its corresponding tariff rate can be checked
- Countries generally base their tariff schedules on the World Customs Organization's Harmonized System (HS) nomenclature
 - The HS specifies products using six digits

HS Code	TLL Codes	TLL Code Description
950611		
	95061120	Skis, cross-country snow-skis
	95061140	Skis, snow-skis (o/than cross-country)
	95061160	Parts and accessories (o/than poles) for snow-skis

Overview on Tariffs

- **Tariff Quotas**

- Under tariff quotas, specified quantities of goods can be imported at reduced or zero duty rate
- Preferential tariff quotas are commonly found in trade agreements and preferential arrangements

Example - A government sets a specified quantity of sugar that can be imported at a lower tariff rate. It sets a quota of 100,000 metric tons. Imports of sugar up to the specified quota quantity (e.g., 100,000 metric tons) are subject to a zero or lower tariff rate. On the contrary, the imports of sugar that exceed the specified quota quantity are subject to a higher tariff rate (mostly to protect domestic producers from increased foreign supply)

Overview on Tariffs

- **Anti-dumping Duties**

- Apart from regular import duties, a product can also be subject to anti-dumping or other trade defense instruments
- All WTO Members are required to bring their anti-dumping legislation into conformity with the Anti-Dumping Agreement, and to notify that legislation to the Committee on Anti-Dumping Practices
- Antidumping and countervailing orders (AVD/CVD) orders must be reviewed to determine whether the merchandise falls under the scope of an order
 - Orders are published by official trade websites of countries

Example:

[DS617](#) United States — Anti-dumping measure on Oil Country Tubular Goods from Argentina

Overview on Tariffs

- **Anti-subsidy or countervailing measures**

- These measures are intended to offset the effects from an unfair subsidy by a trade partner
- They consist of different types of tools:
 - Applied in the form of increased duties
 - An additional ad valorem or specific duty
 - A minimum import price
 - A 'price undertaking,' where the exporter commits to sell the product above a minimum price

Example:

[DS618](#) European Union (formerly EC) — Countervailing duties on imports of biodiesel from Indonesia

Overview on Tariffs

- **Safeguard Duties**

- These measures can be applied when a country's industry is impacted by an unforeseen, sharp, and sudden increase of imports
- Such measures are used very rarely, and only in very specific circumstances
- They consist of quantitative import restrictions (trade quotas), or of duty increases
- The measures may apply to all imports of the product in question from all trade partners, or from goods of specific origins

Example:

[DS595](#) European Union (formerly EC) — Safeguard Measures on Certain Steel Products

Tariff Indicators

- To undertake successful FTA negotiations, it is important to understand the tariff structure at - product, sectoral and economy level of the FTA Parties
- Following tariff indicators can provide a good understanding of the prevailing tariff structure:
 - [MFN Max Rate \(%\)](#)
 - [MFN Min Rate \(%\)](#)
 - [MFN Simple Average \(%\)](#)
 - [MFN Specific Tariff Lines Share \(%\)](#)
 - [MFN Specific Duty Imports \(US\\$ Thousand\)](#)
 - [MFN Total Tariff Lines](#)
 - [MFN Weighted Average \(%\)](#)
- For more tariff indicators refer to [WITS Tariff Indicators](#)

Regulatory and Policy Review – NTMs in Goods

Preliminary analysis of NTMs is important to develop a country position for FTA negotiations

- **Frequency index:** this provides the share of products affected by one or more NTMs.

Frequency index of NTMs imposed by country j is: $FI_j^s = \frac{\sum_{n \in S} D_j^n}{N_s}$

- The data on presence/absence of any type of NTM for product n in sector s in country j is D_j^n , where D takes the value of 1 if at least one type of NTM is applied to the product and zero otherwise. The total number of product lines in sector s that are impacted is denoted as N_s .
- **Coverage ratio** (or weighted frequency measure): this reports the share of imports affected by one or more NTMs in total imports. Formally, the Coverage ratio of NTMs applied in country j can be written as:

$$CR_j^s = \frac{\sum_{n \in S} m_{ij}^n D_j^n}{\sum_{n \in S} m_{ij}^n}$$

- This ratio measures the share of imports subject to NTMs, with a higher value indicating greater coverage of the sector by NTMs. The index captures the structure of trade and places more weight on Goods that have higher trade values.

Regulatory and Policy Review – NTMs in Goods

- **Prevalence ratio:** this captures the average number of NTMs affecting an imported product.
 - It gives information on the average number of NTMs applied per product line given that each product may be subject to several different types of NTMs.
 - It accounts for the fact that a large number of products have more than one regulatory measure applied to them
 - Formally, the Prevalence ratio for NTMs applied to any product within a sector is computed as:

$$PM_j^s = \frac{\sum_{n \in s} p_j^n}{N_s}$$

- Thus, the prevalence measure partially captures the fact that sectors with a higher number of different NTMs applied per product line have a high Prevalence ratio.

Regulatory & Policy Review – NTMs in Goods

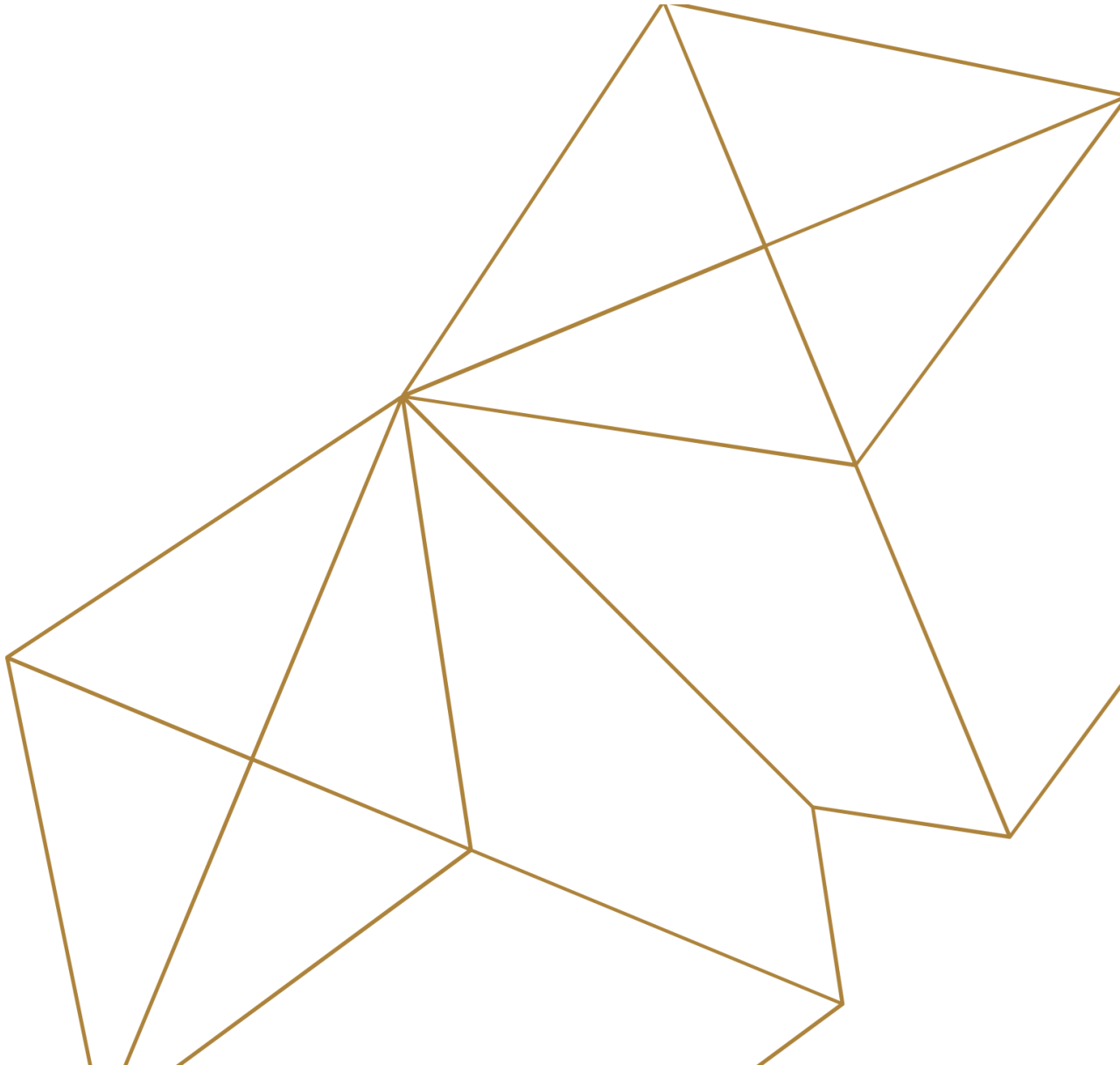
Estimating Ad Valorem Equivalents:

- The AVE of an NTM corresponds to the tariff equivalent that has the same impact on trade
- It helps to detect which products, sectors, or exporting countries are the most affected by NTMs
 - AVEs provide information on the importing countries that impose NTMs that have a trade-reducing effect
- The primary approach developed by Kee, et al. (2009) is increasingly used in empirical literature, and involves the following steps
 - To determine the quantity impact of NTMs, the trade equation with the gravity approach is estimated to provides values of the predicted flows
 - The deviations between the predicted (without an NTM) and actual flows (with an NTM) provide the quantity impact of the NTM
 - The impact of an NTM is then converted into an AVE using the value of import demand elasticities
- WITS provides estimates of ad valorem
 - [MFN AVE Tariff Lines Share \(%\)](#)
 - [AHS AVE Tariff Lines Share \(%\)](#)
- UNCTAD established the Multi-Agency Support Team (MAST) to work on the taxonomy of NTMs and create a database for NTMs
 - For a comprehensive overview on the type of NTMs please refer to [UNCTAD MAST](#), these have been covered in previous module

Regulatory and Policy Review – NTMs in Services

- Services are not subjected to tariff measures; they are regulated using non-tariff measures
- Econometric modelling is used to quantify NTMs in the services sector and assess their impact
- The [OECD - Services Trade Restrictiveness Index](#) is a policy tool available to assess NTMs
 - Service Trade Restrictions Index (STRI) helps identify which policy measures restrict trade
- The STRI Simulator enables policy makers and experts to explore the impact of a change at a detailed level for each measure, and to compare a specific country with a range of other selected countries in a particular sector
- STRI provides information and measurement tools to:
 - Improve domestic policy environment
 - Negotiate international agreements
 - Open up international trade in services
 - Identify best practices and then focus domestic reforms on priority sectors and measures
- The STRI database is based on regulations currently in force
- STRI indices take the value from 0 to 1, where 0 is completely open and 1 is completely closed

An Overview on WTO Rules and FTA Compliance



WTO and FTAs

- Non-discrimination is a core principle of the WTO
- Members have committed, in general, not to favor one trading partner over another
- FTAs are discriminatory as preferential market-access conditions are provided only to the Parties and not other third countries
- However, WTO members recognize the legitimate role of RTAs/FTAs which aim at facilitating trade between Parties but which do not raise trade barriers vis-à-vis third-parties
 - By June 2016, all WTO members had an FTA in force
- WTO members are permitted to enter into RTAs under specific conditions which are spelled out in three sets of rules

Existing WTO Rules

- **Article XXIV (Paragraphs 4 to 10) of GATT 1994**
 - Provides for the formation and operation of customs unions and free-trade areas covering trade in goods, and interim agreements leading to one or the other
- **Paragraph 2(c) of the Enabling Clause**
 - Refers to preferential trade arrangements in trade in goods amongst developing country Members under the 1979 Decision on Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries
- **Article V of GATS**
 - Governs RTAs/FTAs in the area of trade in services, for both developed and developing country Members
- **Transparency Mechanism**
 - The Transparency Mechanism was negotiated in the Negotiating Group on Rules, established under the Doha Development Agenda
 - Provides for the early announcement of any RTA
 - Details procedures to enhance transparency

Compliance with WTO's Consideration of RTAs: Process - I

The consideration of RTAs is carried out by the WTO Committee on Regional Trade Agreements (CRTA). RTAs that are notified under the Enabling Clause and considered by the WTO Committee on Trade and Development (CTD).

WTO's consideration process includes:

- **Early Announcement:**

- Under the Transparency Mechanism, Members participating in new negotiations aimed at the conclusion of an RTA shall endeavor to inform the WTO Secretariat of such negotiations.
- Members which are parties to a newly signed RTA shall convey to the Secretariat information on the RTA
- Information to be included - official name, scope, date of signature, any foreseen timetable for its entry into force or provisional application, relevant contact points and/or website addresses, copy of a relevant press release or official website address

Compliance with WTO's Consideration of RTAs:

Process - II

- **Notification:**

- WTO Members entering into RTAs are required to notify such RTA to the WTO, either under Article XXIV of the GATT 1994 or the Enabling Clause (for RTAs covering trade in goods), or under Article V of the GATS (for RTAs covering trade in services)
- In a case of an RTA covering both goods and services, two notifications are required
- The notification should be made following ratification of the RTA and before the application of preferential treatment between the parties
- Information to be included - full text and any related schedules, annexes and protocols, in one of the WTO's official languages, references to related official internet links

- **Notification of Changes:**

- Any changes affecting the implementation of an FTA, or the operation of an already implemented FTA, should be notified to the WTO as soon as possible after the changes occur

- **Subsequent reporting:**

- At the end of the RTA's implementation period, the parties shall submit to the WTO a short report on the realization of the liberalization commitments contained in the RTA

Compliance with WTO's Consideration of RTAs: Process - III

- **Factual Presentation (FP):**

- The Factual Presentation is a document prepared on the responsibility of the WTO Secretariat in conformity with Article 7 (b) of the Transparency Mechanism in full consultation with the parties
- It serves as the basis for the consideration of an RTA by the WTO Membership
- It describes:
 - the trade environment
 - the main characteristics of the agreement
 - its impact on market access in the parties to the FTA.
- The parties are required to submit trade and tariff line information as specified in Annex I of the Transparency Mechanism, within a specified period after notification

Compliance with WTO's Consideration of RTAs: Process - IV

- **Factual Abstract (FA):**

- It is a short summary of the main features of the agreement, prepared by the WTO Secretariat in conformity with Article 22(b) of the Transparency Mechanism
- It is prepared for older agreements for which an examination has already been completed by the CRTA

- **Questions and Replies:**

- Before an agreement is considered by WTO Members, they may submit questions in writing to the parties to the agreement
- The Parties are expected to provide written answers in advance of the meeting to consider that FTA
- A document containing the questions and replies submitted by Members and the parties is issued three working days in advance of the CRTA or the CTD meeting where the FTA is to be considered

Proposed Timeline for Factual Presentations in the CRTA/CTD

Notification of the RTA

Submission of trade and tariff line information

(as specified in Annex I of the Transparency Mechanism) +10 weeks / 20 weeks*

Draft of the Factual Presentation sent to the Parties +6 weeks

Jointly agreed comments received from Parties +4 weeks

Comments integrated into Factual Presentation +2 weeks

Factual Presentation circulated in all three languages +3 weeks

Written questions received from Members +4 weeks

Written responses received from Parties +4 weeks

Q&R circulated to the Members +2 weeks

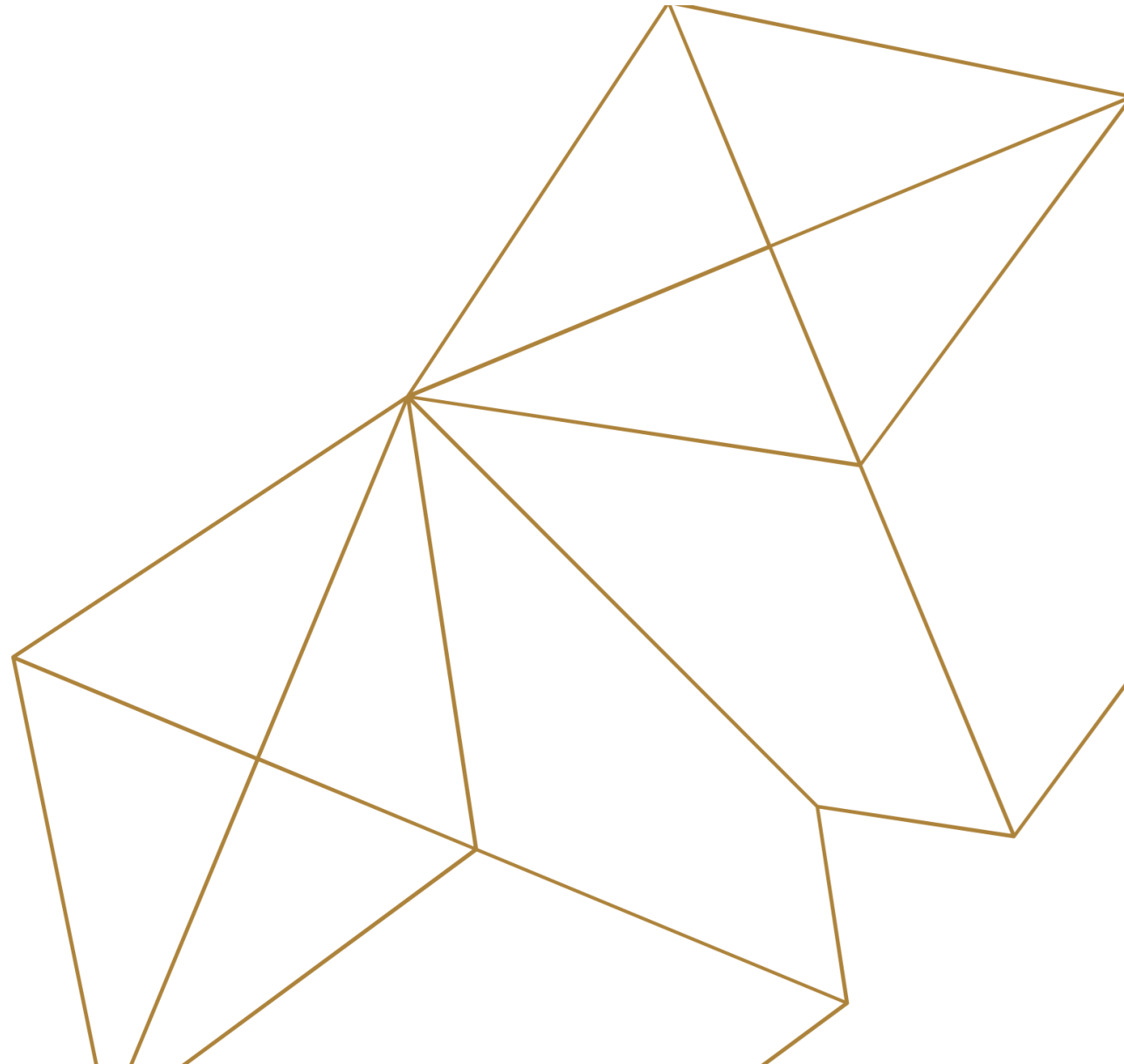
(at the latest 3 days before the meeting)

Total time lapsed since notification

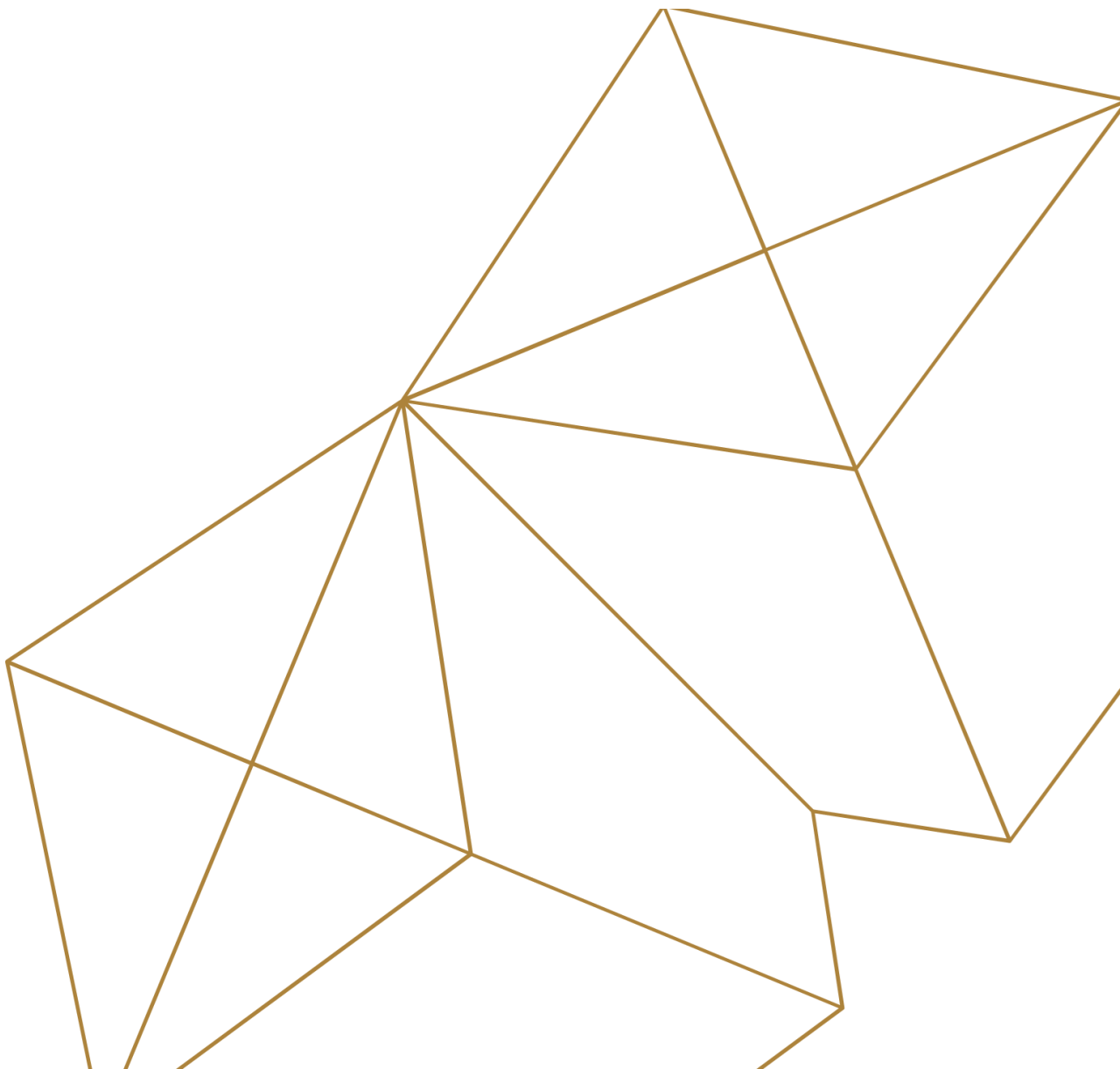
35 weeks / 45 weeks*

* In the case of RTAs involving *only* developing countries.

Understand Legal Requirements of Cross-Border Trade Activities



Customs (Part 1)



Overview

- What are customs?
 - Customs refers to the government agency or authority tasked with regulating trade in goods and collecting any duties levied on imports and exports
 - Offices and staff working for customs are located at places where goods transit across borders, such as ports, airports or other frontiers
 - Customs manage a set of procedures and operations to control goods and people that enter or exit the country
 - An exporter/importer will have to comply with a series of customs and border procedures that will verify that the products meet market access requirements
- What are customs laws and regulations?
 - These are statutory and regulatory provisions relating to the importation, exportation, movement, or storage of goods, the administration and enforcement of which are specifically charged to a customs authority, and any regulations made by a customs authority, under its statutory powers

Overview

- What are customs "standards"?
 - Customs "Standards" (HS, Origin and Valuation) are essential components of the trading system and are used by Customs around the world.
 - The WCO brings together national Customs administrations, plays a major role in setting these customs standards and in ensuring common interpretation thereof
- Who are the WCO Customs rules meant for?
 - Goods manufacturers and industrial producers
 - Wholesalers, importers and exporters;
 - Customs brokers, experts in Customs formalities;
 - specialist legal advisers;
 - international carriers and logisticians;
 - Intergovernmental and international organizations, on the basis of trade agreements and arrangements;
 - States and their administrations responsible for supervising trade in goods, compliance with the rules, Customs formalities and recovery of Customs duties;
 - Training bodies in this sector

Cross-Border Trade Documents

- International trade procedures are interactions of 4 areas relating trade documents and data

Commercial Transactions	Trade Financing and Settlement	Transportation and Related Services	Official Control Measures
<ul style="list-style-type: none">• Offer, Counter-Offer, Proforma Invoice• Framework contract, contract• Invoice, Packing List• Test Certificate, Manufacturing Certificate• Cargo Insurance (Insurance Policy), etc	<ul style="list-style-type: none">• Letter of Credit, Bill of Exchange and etc	<ul style="list-style-type: none">• Cargo/Vessel Status information• In-Transit report• Bill of Lading, Sea Way-Bill, Air Way-Bill and so on	<ul style="list-style-type: none">• Country/Certificate of Origin• Conformity Certificates such as Fumigation Certificate, Safety/Health Certificate and National/International Standard Certificate• Import/Export License/Permit and Quota• Customs clearance information, Advance Manifest

Key Legal Provisions

Common legal aspects related to cross-border customs procedures under FTAs include:

- **Rules of Origin (RoO)** - FTAs typically include rules of origin to determine the eligibility of products for preferential treatment. Compliance with these rules is crucial for accessing tariff preferences and is verified at the customs check point.
 - ITC's [Rules of Origin Facilitator](#) is a database for RoO provisions of FTAs
- **Customs Valuation** - FTAs may address customs valuation methods to ensure consistency in determining the value of goods for customs purposes. This helps prevent disputes and promotes transparency in trade transactions.
- **Customs Procedures and Documentation** - FTAs may establish streamlined customs procedures and documentation requirements to expedite the movement of goods between participating countries. This can include simplified documentation and electronic submission processes
- **Coordination and Cooperation** - The FTA may encourage or mandate cooperation and coordination between customs authorities of the participating countries. This collaboration can include information exchange, mutual assistance, and joint efforts to combat customs fraud and other illegal activities.

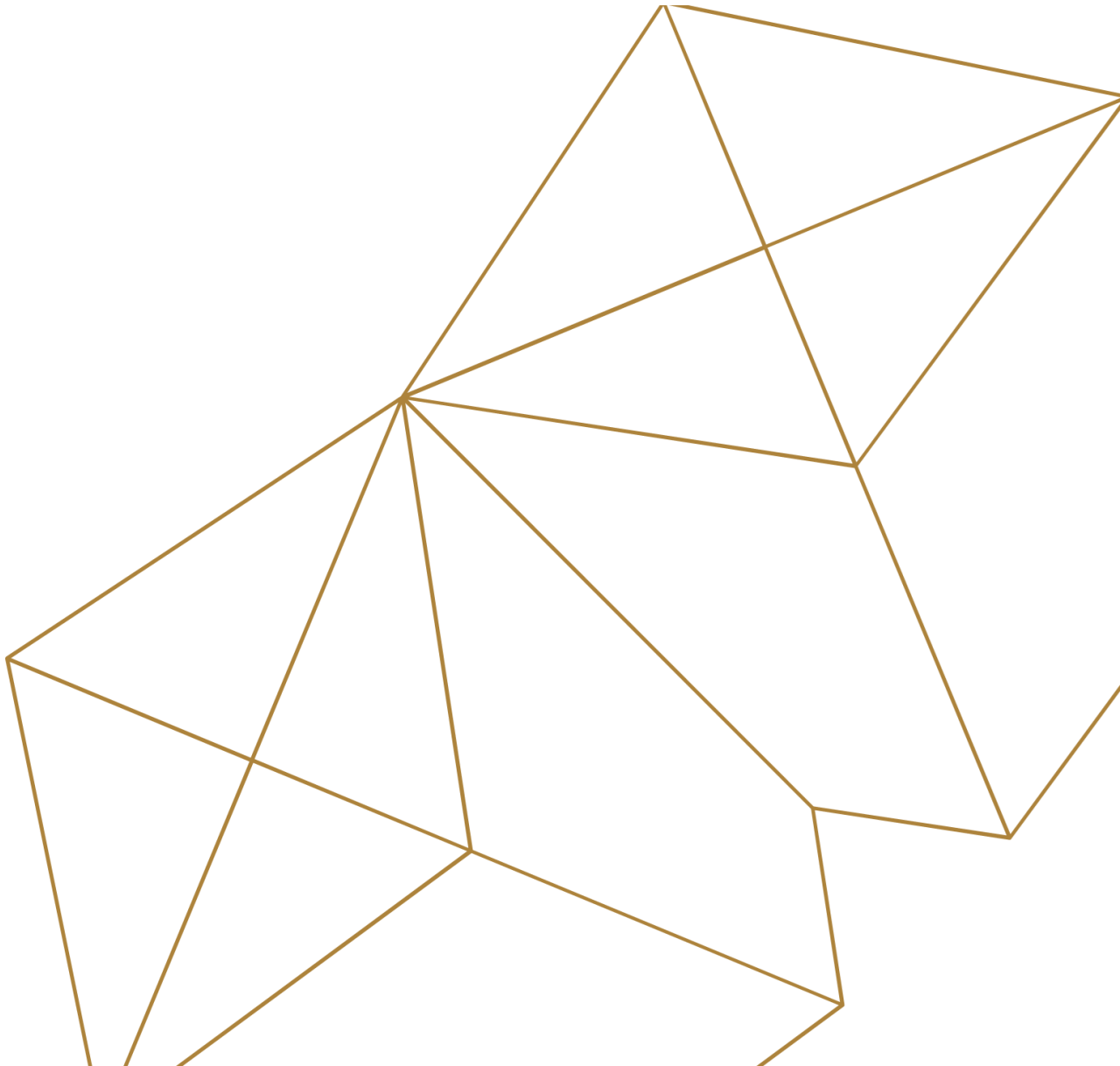
Key Legal Provisions

- **Technical Assistance and Capacity Building** - Some FTAs include provisions for technical assistance and capacity building to help countries implement and comply with the agreement. This may involve training customs officials, upgrading infrastructure, and enhancing regulatory frameworks.
- **Transparency and Publication** - FTAs often emphasize transparency by requiring the publication of relevant laws, regulations, and procedures. This helps businesses understand and comply with the customs requirements of the FTA partners.
 - Example: Fees and Charges
 - Information on fees and charges imposed by a customs administration of that Party, including through electronic means is needed
 - This information includes the applicable fees and charges, the specific reason for the fee or charge, the responsible authority, and when and how payment is to be made
 - A Party shall not impose new or amended fees and charges until it publishes or otherwise makes available this information
- **Risk management**
 - Adopt and apply FTA import, export and transit requirements and procedures for goods on the basis of risk management principles and focus compliance measures on transactions that merit attention

Trade Facilitation

- FTA trade facilitation provisions are aimed at improving and simplifying custom procedures by incorporating provisions that to reduce associated cost burdens and maximize efficiency while safeguarding legitimate regulatory objectives
- Customs provisions broadly extend to:
 - Allowing electronic submission and processing of information required by customs
 - E.g. Use of block chains
 - Launching electronic single windows
 - Using risk-based inspections
 - Deepening regional cooperation
 - Sparking competition by making private participation easier
 - Upgrading trade logistics infrastructure
 - Promoting efficiency in product-specific inspections
 - Training and communication with trade stakeholders

Intellectual Property Rights (Part 2)

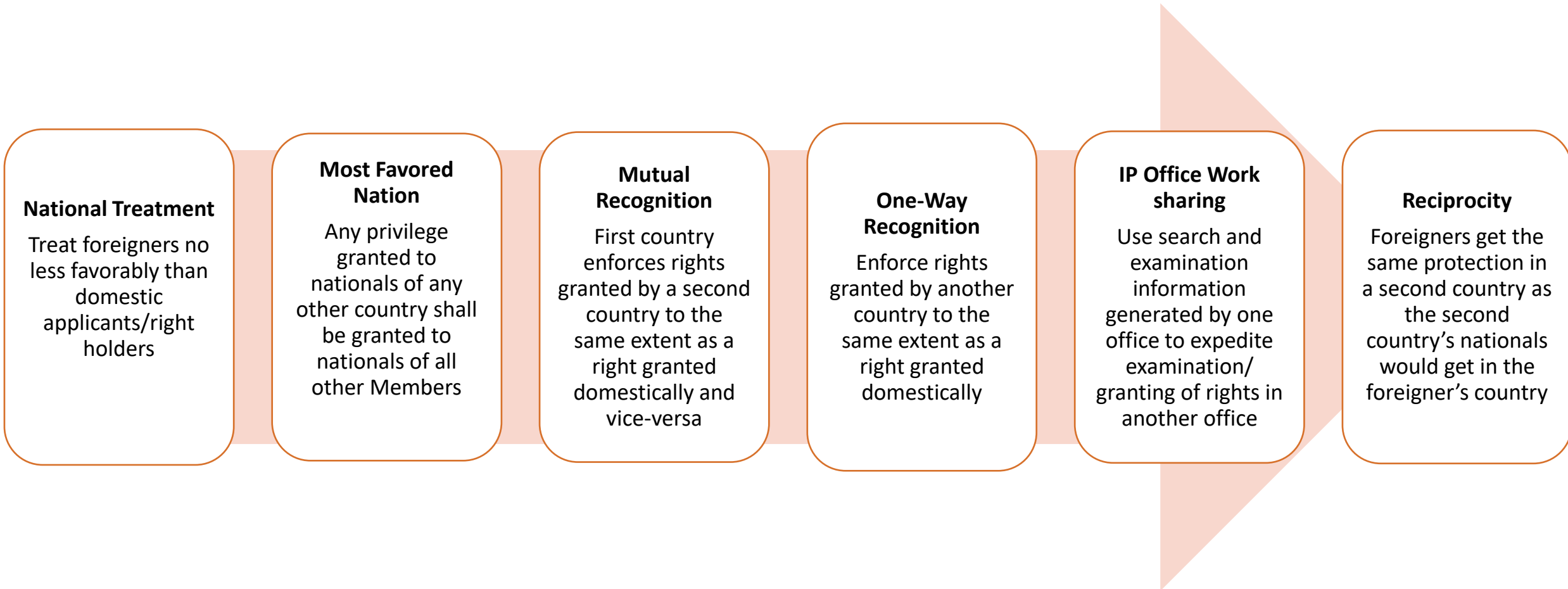


Types of Intellectual Property Rights

Intellectual Property Rights (IPRs) can take the following forms:

- **Patents:** Legal protection for inventions, granting exclusive rights to make, use, and sell the patented innovation for a specified period
- **Trademarks:** Distinctive symbols, words, or designs used to identify and distinguish goods or services in the marketplace
- **Copyright:** Exclusive rights granted to the creators of original works, protecting the expression of ideas in literary, artistic, and other creative forms
- **Trade secrets:** Confidential business information, such as formulas or processes, kept secret to maintain a competitive advantage
- **Design protection:** Safeguarding the unique visual appearance of a product through design registration or similar means
- **Website domains:** Exclusive rights to a specific web address, providing a unique online identity for businesses or individuals
- **Geographical indications:** Indicators used on products to signify a specific geographical origin and associated qualities or reputation

Principles to Guide Cross-Border IP



Overview

Who grants protection?

- Grant of intellectual protection is usually under the Government's authority
- Typically a patent is granted by the Patent Office

What is the duration of the protection?

- IPR is a legal monopoly
- The period of patent protection differs with the country and type of patent

Who are the stakeholders involved?

- Government, Patent Office, IPR attorneys/agents, IPR lawyers, technology development personnel, IPR owner, IPR applicant, inventor, assignee, licensee, members of the public

Some common protection-granting criteria

- Generally the criteria are: Novelty, Non-obviousness, Industrial application

IP Strategy Checklist

- While negotiating any FTA, a country should ensure that the IPR negotiating outcomes:
 - Facilitate businesses to have processes and/or procedures to identify the likelihood of obtaining IP protection
 - Design provisions where that facilitates business to collaborate with potential partners on the development and commercialization of the idea/concept
 - Provide a competitive edge vis-à-vis competitors
 - Minimize the likelihood of infringing third party rights by applying the idea/concept
 - Maximize the ways of commercialization (manufacture, sale, license, etc) for businesses
 - Ensure Freedom to Operate within the jurisdiction of other FTA parties
 - Foster IP innovation and review
 - Maintain transparency with regular audit regulations
 - Undertake IP-related capacity building and training

Considerations for negotiating cross-border transactions focusing on IP

- **Intellectual property rights**

- IRPs and concepts vary among countries
- Understand the protectable and enforceable rights specific to each relevant jurisdiction
 - For instance, the work-for-hire doctrine, a copyright principle in US law, lacks recognition in numerous countries outside the US. In instances where these laws are not acknowledged by foreign jurisdictions, it is crucial to expressly clarify the parties' intentions regarding the transfer of intellectual property rights.
- Moreover, legal concepts may be applied differently across countries
 - The notion of "moral rights" in copyright law, acknowledged in both European Union countries and the US, diverges in its application
 - The EU extends broader protection, covering all copyrightable works, as opposed to the US, which limits it to visual works
- To prevent ambiguity, parties should explicitly outline the rights encompassed by the contract, as relying solely on specific terminology may not adequately capture the parties' intentions

Considerations for negotiating cross-border transactions focusing on IP

• **Formalities**

- Comprehend the necessary legal formalities mandated by relevant jurisdictions
 - Compliance with international treaties and agreements, such as the Berne Convention for copyright, the Paris Convention for industrial property (including patents and trademarks), and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) administered by the World Trade Organization.
- Determine the governing law applicable to the intellectual property agreement, specifying which country's laws will be used to interpret and enforce the contract
- Complying with local laws, regulations, and administrative procedures that may affect the acquisition, maintenance, and enforcement of intellectual property rights
 - Different regions may stipulate that intellectual property agreements must be documented in writing, and specific prescribed language may be essential for licenses or transfers to be valid

Considerations for negotiating cross-border transactions focusing on IP

- In certain instances, registration of intellectual property agreements with a governmental body may be obligatory to enable the involved parties to access specific advantages
- Additionally, some jurisdictions may mandate the translation of contracts into the native language of foreign entities or individuals
- Understanding and addressing any tax implications associated with cross-border intellectual property transactions, including transfer pricing and tax treatment of royalties.

Considerations for negotiating cross-border transactions focusing on IP

- **Warranties and limitations of liability**

- Comprehend the diverse ways in which different laws permit the exclusion of express and implied warranties or the limitation of liability in contractual agreements
- Not only do various statutes imply different warranties or restrict the exclusion of certain warranties or liability through legal mandates, but the approach to warranties and liability may also differ based on whether the contracting party is a consumer or another business
- In some cases, the exclusion of specific warranties may be prohibited under contracts, and the associated risks may be addressed through alternative means outlined in the contract

- **Privacy and Data Protection:**

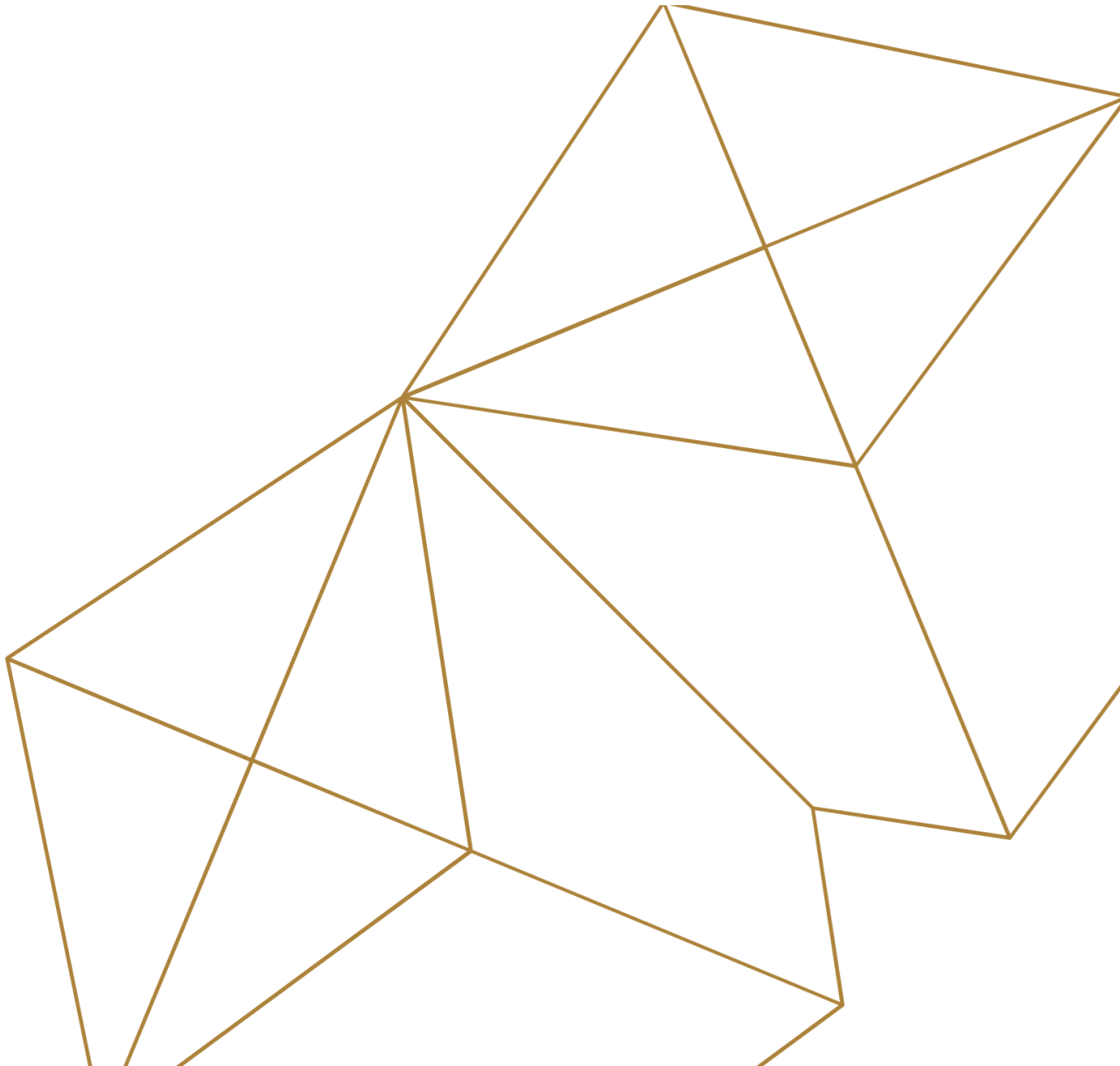
- Complying with local privacy and data protection laws, especially in cases where the transfer of personal or sensitive information is involved.

Considerations for negotiating cross-border transactions focusing on IP

- **Dispute resolution**

- Understand the mechanisms available for enforcing intellectual property rights in each relevant jurisdiction, such as civil litigation, administrative actions, customs enforcement, or alternative dispute resolution methods like arbitration
- Recognize the impact of different legal frameworks and dispute resolution mechanisms on your rights and liabilities within an IP Agreement
- The selected dispute resolution process can influence the interpretation of contract provisions and applicable laws
- Courts in different jurisdictions may apply laws, rules, or regulations in varying ways
- Arbitrators, not bound by court rules, generally have more flexibility in interpreting statutes and issuing judgments
- Additionally, costs associated with the chosen dispute resolution process, such as travel expenses, arbitrator fees, and filing costs, must be taken into account

Dispute Settlement (Part 3)



Overview

- Free Trade Agreements (FTAs) include substantive rights and obligations like those set out in the WTO Agreement
- Most FTAs also contain provisions establishing mechanisms for third-party adjudication of disputes that may arise between the parties.
- This leads to an overlap of jurisdiction (Kwak and Marceau 2006), whereby WTO Members could challenge their FTA partners' measures in the WTO and under the respective FTA dispute settlement mechanism (DSM).
- State-State Dispute Settlement is provided for disputes related to:
 - Goods trade
 - Services trade
 - IP issues
 - Investment issues (also known as Investor-State Dispute Settlement)

State-State Dispute Settlement

- FTAs provide for state-to-state dispute settlement to ensure that the rights and obligations provided for in the FTA are respected
- The dispute settlement provisions FTAs are similar to the Understanding on Rules and Procedures Governing the Settlement of Disputes (the “DSU”) in the WTO Agreement. They share the following four common elements:
 - if a dispute arises between the parties to a relevant agreement, they shall first conduct a **consultation** in respect of such dispute
 - if such consultation fails to settle such dispute, the complainant may then **refer the matter to the dispute settlement body** to be established pursuant to the relevant agreement
 - the dispute settlement body examines the relevant matter and **renders a binding decision** (judgment) or makes a recommendation
 - the respondent **rectifies violations of the agreement or provides for compensation** to the complainant in line with the relevant judgment, or, many cases, a mechanism is adopted whereby discussions are resumed based on the recommendation

Investor-State Dispute Settlement I

- Investor-State Dispute Settlement (ISDS) is a legal mechanism allowing an investor from one contracting state to an international investment agreement to bring a claim against another contracting state in which it has made an investment (also known as the host state)
- ISDS was created to reduce the political risks related to rapidly increasing foreign investment, and make the commitments made by host states in investment treaties more easily enforceable
- It aims to protect investors from arbitrary expropriation and ensure non-discriminatory treatment for foreign investments, in countries considered risky
 - In countries where the judiciary is not fully independent from government, arbitration was considered a more neutral framework to ensure enforcement of the host state's obligations towards investors

Investor-State Dispute Settlement II

- The scope of disputes covers four broad categories:
 - Discriminations – Under 'national treatment' (NT) and 'most favored nation treatment' (MFN) clauses, a host government must treat foreign investors equally to national investors and the best-treated investors from abroad
 - Expropriation - 'indirect expropriation', which is interpreted as host government actions, often through regulations that have similar effect to expropriation
 - Fair and equitable treatment - protecting investments from abusive acts of the host state, application of regulatory fairness and transparency as well as safeguarding investors' legitimate expectations
 - Capital Transfers – restricting capital flows

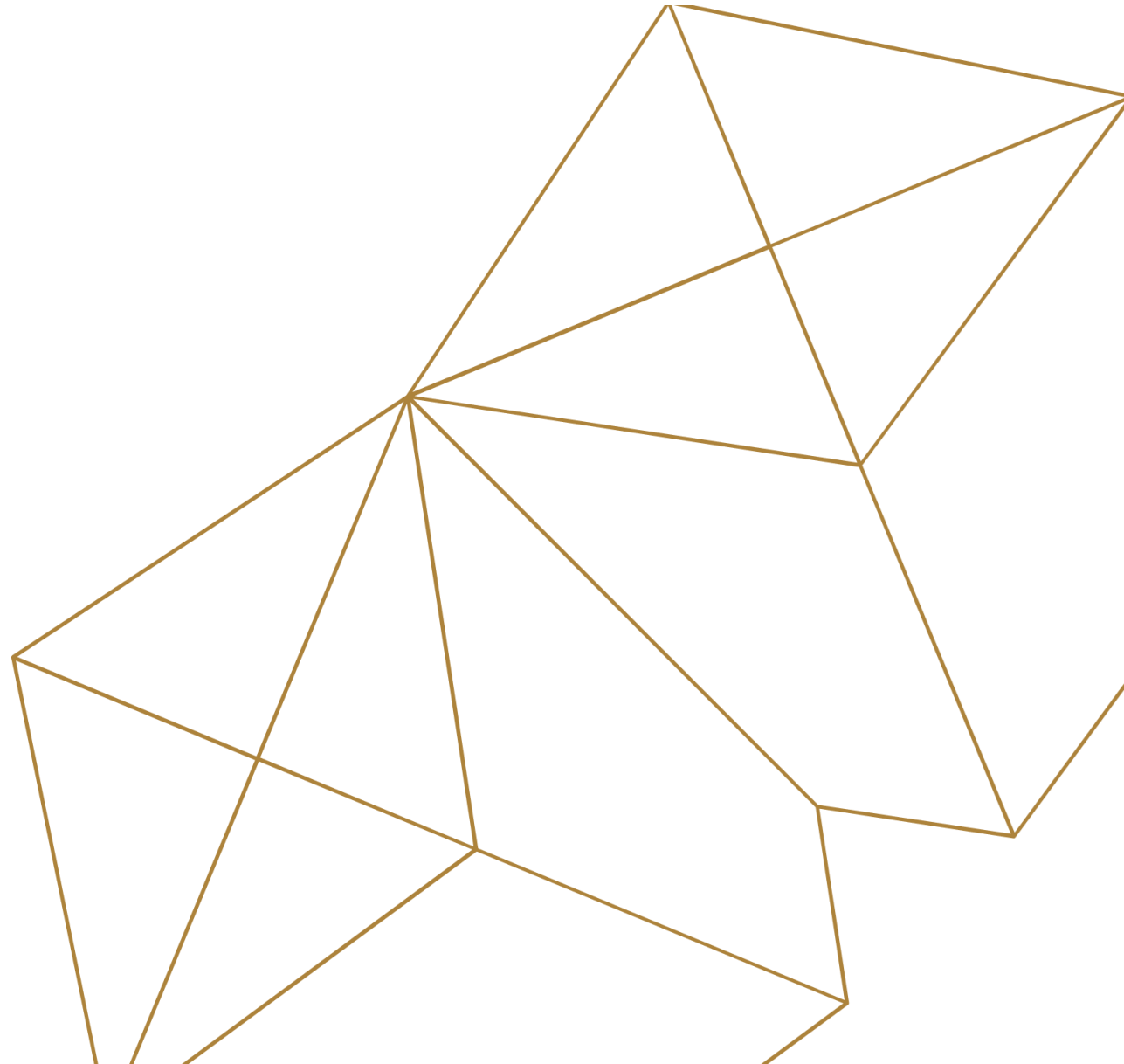
Investor-State Dispute Settlement III

- A foreign investor can use ISDS to seek compensation for certain breaches of a country's investment obligations like:
 - obligations setting parameters on expropriation of a foreign investor's property
 - non-discrimination and minimum standards of treatment (such as protection against denial of justice)
 - a commitment to ensure foreign investors will be able to move capital relating to their investments freely, subject to appropriate safeguards
- ISDS does not give foreign investors the right to enforce other provisions of the FTA, including, for example, the intellectual property chapter
 - Examples- [Comprehensive and Progressive Agreement for Trans-Pacific Partnership \(CPTPP\)](#), [China–Australia Free Trade Agreement](#)
- As of [31 December 2022](#), known treaty-based ISDS cases include:
 - Total: 1257; Pending: 343; Concluded: 890; Unknown: 24

Investor-State Dispute Settlement IV

- The common stages of an ISDS procedure include:
 - Notice of arbitration is usually sent by an investor to the host state
 - Both parties choose the arbitration tribunal and proceed to selection of arbitrators
 - Usually each party chooses one, with the third appointed jointly to chair the tribunal
 - Proceedings, in which both parties are represented by teams of lawyers, may last several years
 - The award determines the amount of compensation, if so decided, and allocates legal costs
 - It is final and binding on the parties, but does not create a binding precedent applicable in other cases
 - Although in practice tribunals often refer to earlier arbitration decisions

**How can FTAs be
Aligned with
National Economic
and Developmental
Goals?**



TSD Provisions in FTAs

- There is a need for enhanced policy coherence at the national and international levels to harness the potential for a positive contribution of international trade to the promotion of sustainable development
- Trade agreements are thus an important driver for sustainable growth
 - They help apply and actively promote high standards for sustainable development and inclusiveness
- Modern FTAs contain rules on trade and sustainable development
- The enforceability of these trade agreements has evolved over “generations” or “models” of TSD provisions
 - Different countries often have different approaches depending on the period and partner with whom they signed a trade agreement.
- TSD provisions are either included as integral chapters within the body of the agreement (e.g., US-Colombia FTA), dedicated TSD chapters (e.g., EU-Korea FTA) or contained in a side agreement (e.g., Canada-Honduras FTA)
- The diversity of implementation and enforcement approaches included in trade agreements ranges from no dispute settlement for these provisions to state-to-state dispute settlement

Features of TSD Provisions

- TSD provisions:
 - Recognize that economic development, social development and environmental protection are interdependent and mutually supportive components of sustainable development
 - Address trade- or investment-related aspects of labor and environmental standards
 - Include a human rights dimension or may relate to the fulfilment of such rights.
- Approach:
 - Best-endeavor measures
 - Sanctions-based enforcement

Typology of TSD Provisions

Preamble

- Setting broad TSD goals for the entire agreement

Exception

- Incorporating general exceptions for the TSD provisions

TSD Cooperation

- Enhancing TSD cooperation between Parties

Specific TSD Issues

- Promoting specific TSD issues, e.g. bonded labour, biodiversity, water quality

Uphold TSD-related Laws

- Maintaining or improving TSD standards and creating a level playing field for trade between Parties

Typology of TSD Provisions

Implementation Mechanism

- Establishing a specific body to monitor and the application of TSD provisions

International Agreements/ Conventions

- Reaffirming international commitments

Public Participation

- Promoting access to TSD-related information, decision-making, and public submissions

Dispute Settlement

- Establishing mechanisms for consultation and arbitration procedures on TSD commitments between Parties

Impact Assessment

- Estimating the potential TSD-related effects of a trade agreement

Scope of Environmental Provisions

- The inclusion of environmental provisions in FTAs has developed considerably and become increasingly widespread over recent decades.
- The range of specific environmental issues has increased over time
 - climate change
 - genetic resources
 - renewable energy
 - biodiversity
 - illegal trade in endangered species
 - fisheries
- Most provisions allow FTA partners to determine the level of environmental protection and to encourage high levels of protection, to modify their domestic environmental laws and policies provided they do not
 - lower their environmental standards to encourage trade or investment
 - their laws and policies are consistent with each Parties' international commitments
- Provisions also include exceptions for the protection of natural resources and animal and plant life
 - Such exceptions can apply to trade, service, or investment-related measures

Scope of Labour Provisions

- Steady strengthening of labor provisions seen in separate labor chapters or TSD chapters of FTAs
- FTAs generally use the 1998 Declaration on Fundamental Principles and Rights at Work of the International Labor Organization (ILO) as a baseline reference for labour standards
- However, there is no uniform approach
 - Some countries do not refer to ILO standards
 - partly attributed to the fact that not all the states have ratified the fundamental ILO conventions Thus, levels of commitment in labor provisions vary
 - Some countries go beyond core labor standards
 - include commitments to occupational safety and health, right to strike, wages, labor inspections, the protection of migrant workers, and/or access to justice, remedies and social guarantees
- A notable policy development has been the broadening of social provisions beyond traditional TSD provisions under an “inclusive trade agenda” that includes, among others, gender and indigenous rights, as witnessed in Canada, Chile and New Zealand

Scope of Other Social Provisions

- Provisions on other social factors include:
 - Promotion of transparency, due process, and anti-corruption in trade agreements
 - Capacity building for compliance, monitoring, and enforcement
 - Public participation in policymaking
 - Human rights objectives
- An overall lack of focus on social commitments other than labour, prioritizing cooperation and aspirational language

Implementation Mechanisms of TSD Provisions - I

1. Joint Committees/ National Focal Points

- Most common institutional mechanism to deploy FTAs consists of joint committees and/or national contact points
- Typically comprised of government officials at the cabinet or ministerial level
- They deal with labor and environmental issues jointly
 - Often specific subcommittees in charge of overseeing labour or environmental issues also exist

2. Intergovernmental Governmental Committees

- Cooperation remains the watchword for the implementation of TSD provisions,
- Such committee's work focuses on broad areas of:
 - Regulatory cooperation
 - Harmonization and/or approximation of domestic measures
 - Technical assistance and capacity building
 - Joint scientific research and cooperation

Implementation Mechanisms of TSD Provisions - II

3. International Treaties

- References to international treaties are common for labor, social and environmental standards
- Agreements contain provisions allowing for consultations with the ILO, whether for assistance with ILO conventions at the pre-ratification stage, or more marginally during labour disputes
- ILO assistance has been particularly effective to drive developing countries to ratify ILO conventions at the pre-ratification stage.
- The pre-eminence of the ILO for the implementation of labor standards contrasts with the environmental field, where no international organization fulfils a comparable advisory function

Implementation Mechanisms of TSD Provisions - III

4. Civil Society Participation

- Participation varies in their scope and their procedures across FTAs
- The provisions range from having no institutionalized public submission process at all, to having quite robust ones
 - Example - Public submissions in the US and Canada can give rise to detailed reports that establish a factual record if the US or Canada receives a complaint from a national about another Party
- Although many countries openly support the participation of non-state actors in trade policymaking, they tend to resort to ad hoc consultations on the implementation of trade agreements instead of formal civil society committees like EU domestic advisory groups
- It is rarely institutionalized and harmonized across several FTAs

Enforcement Provisions in FTAs - I

- Environmental and labor enforcement provisions in the FTAs generally include or choose from several broad categories of elements, which are examined hereafter:
 - Obligations to implement international standards based on international commitments
 - International standards invariably rely on the 1998 ILO Declaration on Fundamental Principles and Rights at Work, and multilateral environmental agreements (MEAs)
 - Requirements to effectively enforce one's labor and environmental laws
 - The obligation to enforce one's labor and environmental laws are also often included in TSD provisions.
 - The level of enforceability of those standards varies across third country FTAs, ranging from aspirational language (e.g. "strive to ensure") in early US FTAs to much more stringent and specific enforcement provisions ("shall promote compliance with and effectively enforce") as found in Canadian agreements.

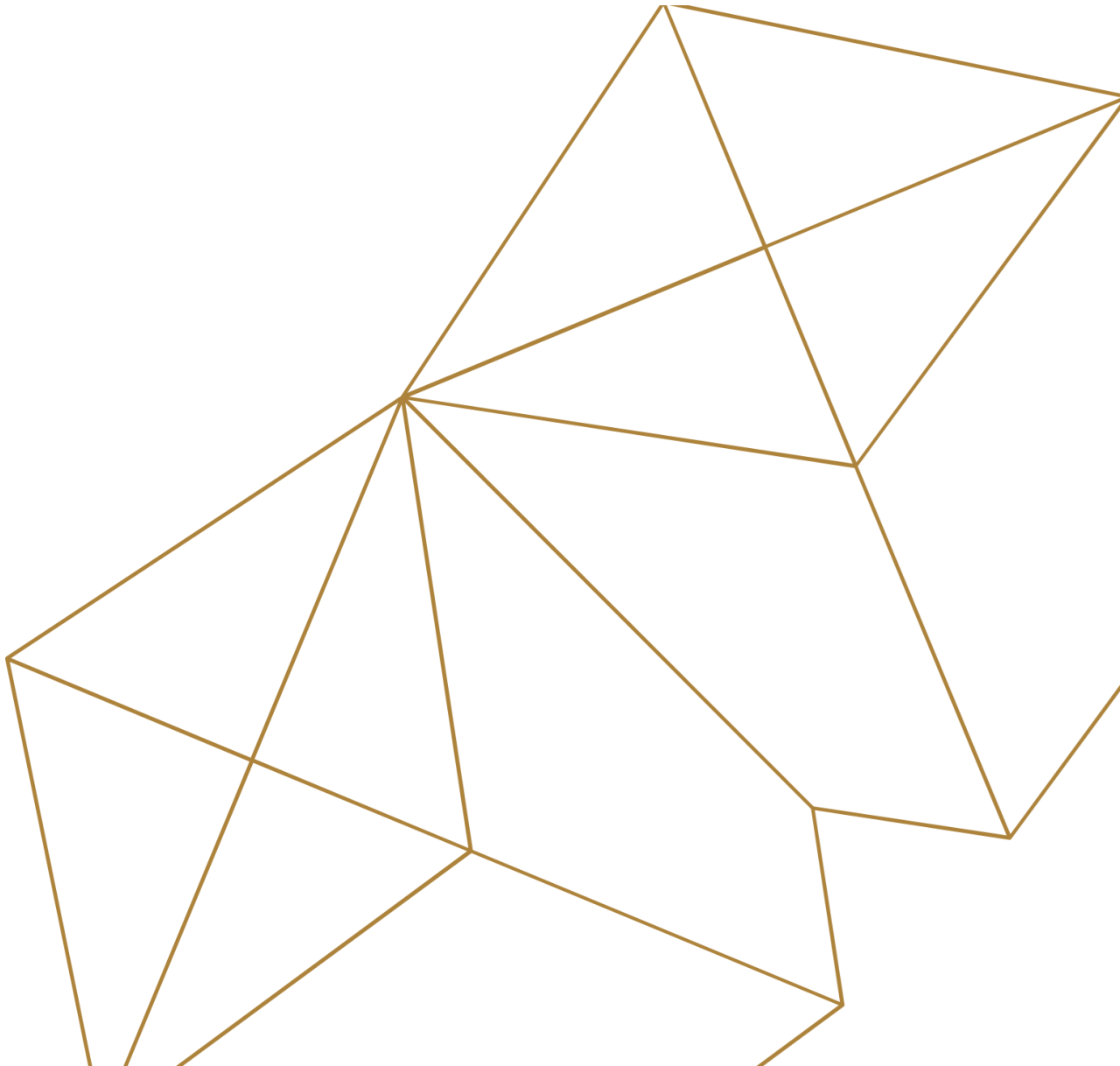
Enforcement Provisions in FTAs - II

- A non-derogation clause
 - Non-derogation clauses, which are very prevalent, specifically require that no Party shall weaken or derogate from their extant labour or environmental laws as a means of increasing trade or attracting investment
- A public complaint or submission mechanism
 - The ability of civil society actors to file complaints for a country's failure to enforce its labour and environmental obligations under an FTA
 - A good practice is that the process be transparent, consistent, and clear
- A consultation process between the Parties
 - Most agreements provide for a consultation process between the Parties
 - These consultations might form part of a dispute settlement process that lead to some form of arbitration or panel of experts or consultations might be the only recourse

Enforcement Provisions in FTAs - III

- A dispute settlement
 - Dispute settlement processes can include consultations, a panel of experts that produces a report and a plan of action, up to legal arbitration.
 - Arbitration processes can be specifically tailored to the labour and environmental chapters, or can be the same processes as the regular dispute settlement procedures, albeit with panellists that are experts in the field.
- A remedy
 - FTAs could include dispute settlement procedures with remedies
 - Such remedies generally include either monetary assessments, or full recourse to dispute settlement procedures that will provide the remedy of suspension of benefits in accordance with the dispute settlement rules.
- Some countries include all elements of enforcement provisions in their agreements or can draw upon them selectively

**Strengthening
Government Agencies
and Stakeholders on
FTA Rules and
Procedures Training**



FTA-related Capacity Building

- **Why is capacity building necessary?**

- To address knowledge and capacity deficits:
 - FTAs can be key drivers of stronger trade relationships among countries
 - However, the FTA-associated gains are not automatic
 - FTAs can deliver based on - breadth and depth of the agreement; implementation and enforcement of commitments
 - Countries must build greater analytical and institutional capacities to develop a solid understanding, strategies, and best practices necessary to ensure maximum benefits from FTAs
 - The knowledge and support technical assistance (TA) will strengthen capacities for designing, negotiating, implementing, and monitoring FTAs
- To reduce uneven participation and limited geographic reach
- To navigate the complexity of FTAs

- **Who undertakes capacity building activities?**

- FTA countries national government
- Regional and sub-regional countries
- International Organisations

FTA Provisions on Capacity Building I

- FTAs often have provisions within their legal texts often as a separate chapter and/or in each relevant chapter
- A chapter on Capacity Building and Technical Assistance in an FTA generally include provisions on:
 - Objectives
 - Facilitating ongoing economic and technical cooperation
 - Minimizing duplication of ongoing efforts and utilization of resources
 - Narrowing development gaps among the Parties
 - Maximizing mutual benefits from the implementation and utilization of this Agreement
 - Scope
 - Goods; services; investment; intellectual property; electronic commerce; competition; small and medium enterprises; and other matters, as agreed upon among the Parties
 - Resources
 - Resources for economic and technical cooperation are be provided voluntarily and in a manner that is agreed upon among the relevant Parties

FTA Provisions on Capacity Building II

- Work Program
 - Parties usually develop the work program to encourage effective implementation and utilization of this Agreement
 - The Work Program focus on activities that:
 - provide capacity building and technical assistance to developing country Parties and Least Developed Country Parties
 - increase public awareness
 - enhance access to information for businesses
 - other activities as may be agreed upon among the Parties
- Special and Differential Treatment
 - The Parties shall take into consideration specific constraints faced by Least Developed Country Parties
- Dispute Settlement
 - Dispute settlement mechanisms of an FTA often does not apply to any matter arising under capacity-building Chapter

Example: EU-MUTRAP I

- The Multilateral Trade Assistance Project III (MUTRAP III) was executed by the Ministry of Industry and Trade (MOIT) of the Socialist Republic of Vietnam in partnership with the European Union.
- The project supported the strengthening the capacity of the MOIT to deliver on its core responsibilities in the areas of trade policy:
 - Policymaking
 - Policy consultation
 - Negotiations
 - Implementation of commitments in trade agreements
- The objective of this assignment was to raise the awareness of Vietnam's decision-makers and industries on the adjustment measures they could take, as well as support their ability to identify better trade strategies

Example: EU-MUTRAP

- Activities under MUTRAP III mainly consisted of:
 - Capacity-building and training
 - Institutional strengthening (including IT and systems development);
 - Policy-oriented research
 - Workshops, conferences and other events to enhance public awareness and stakeholders' participation
 - Curricular development for trade- related teaching
- The activities involved stakeholders outside of MOIT, notably line ministries, trade and business associations, SMEs, universities and research institutes, the competition authorities and consumer protection associations, and the statistical office.

EU-MUTRAP – FTA Focus Activities

- Enhance the domestic institutional capacity to deal with regionalization issues through the provision of EU experiences
- Identify a mechanism to harmonize the process of regional integration and WTO accession
- Training on FTA negotiation skills
- Study the developments of different FTAs in the regions: their models, economic reasoning, trade creation effectiveness and welfare
- Study the FTAs between EU and other countries for possible lesson learnt by Vietnam
- Analyze the most important provisions of relevant bilateral and regional agreements, including different dispute settlement mechanisms
- Study, with other ASEAN countries together, the different stages of the EU integration process and draw the lessons for ASEAN integration
- Support MIT in its role as coordinator for EU-ASEAN FTA negotiations

Trade-related Capacity Building

- A number of mechanisms are in place to support middle and low-income countries through technical assistance and capacity-building related to trade:
 - The [International Trade Center \(ITC\)](#) works to build the capacity of private actors in developing countries and LDCs
 - The [Standards and Trade Development Facility \(STDF\)](#), a global partnership supporting developing countries to implement sanitary and phytosanitary (SPS) standards
 - The [Advisory Centre on WTO Law \(ACWL\)](#) provides legal advice on issues related to WTO, WTO dispute settlement support
 - The [Enhanced Integrated Framework \(EIF\)](#), an Aid for Trade mechanism dedicated specifically to LDCs and recent graduates
 - Under the WTO:
 - LDCs benefit from specific [courses](#) tailored to their needs; participate in mission [internship](#) programs
 - [“China’s LDCs and Accessions Programme”](#), facilitates participation of LDCs in WTO discussions and builds capacity for accession negotiations
 - [Trade Facilitation Agreement Facility \(TFAF\)](#) has been created to deliver support to LDCs and developing countries
 - The [ePing notification alert system](#) provides countries with timely access to SPS and TBT notifications
 - It facilitates dialogue among the public and private sector in addressing potential trade problems at an early stage