Trade in Services – Rules issues to consider

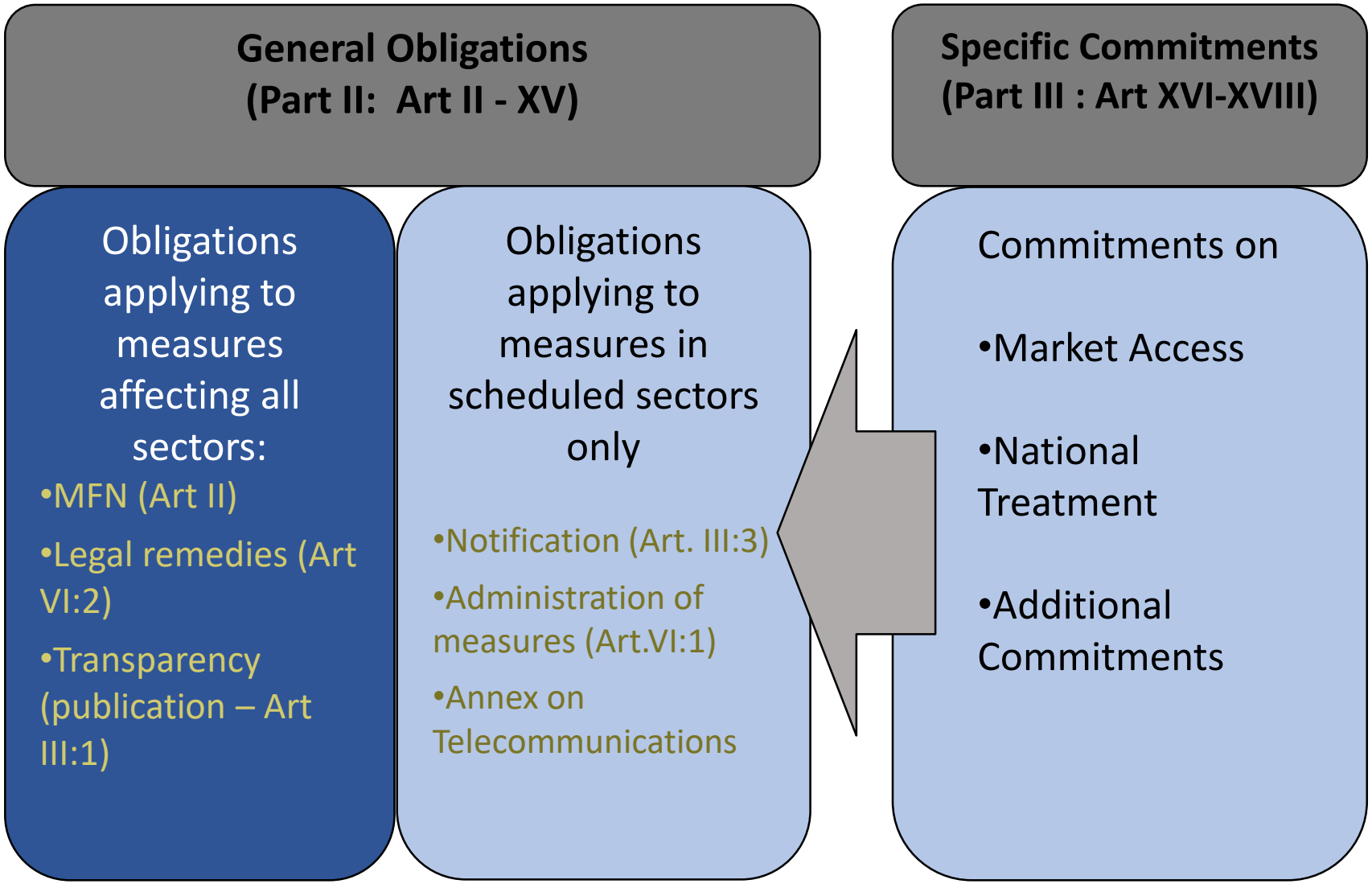
WTO Seminar on Accession Rules

Geneva, 4 – 15 February 2019

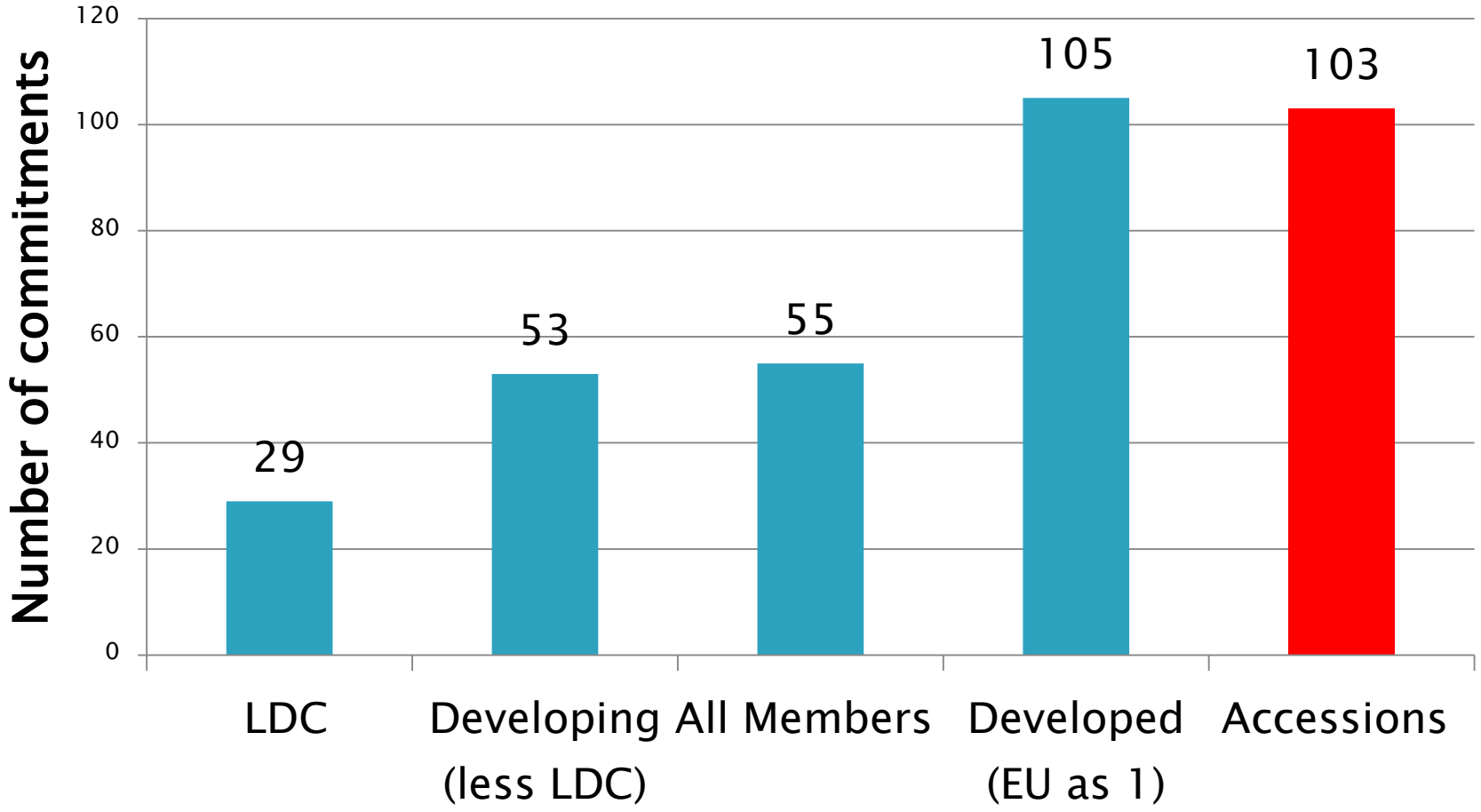
Overview

- Beyond schedules of commitments – key obligations contained in the GATS
- GATS-plus obligations in the Working Party Reports of recently acceded Members (and relationship with ongoing work in the WTO)

GATS logic of obligations and commitments



Sector commitments across various Member groups (average number)

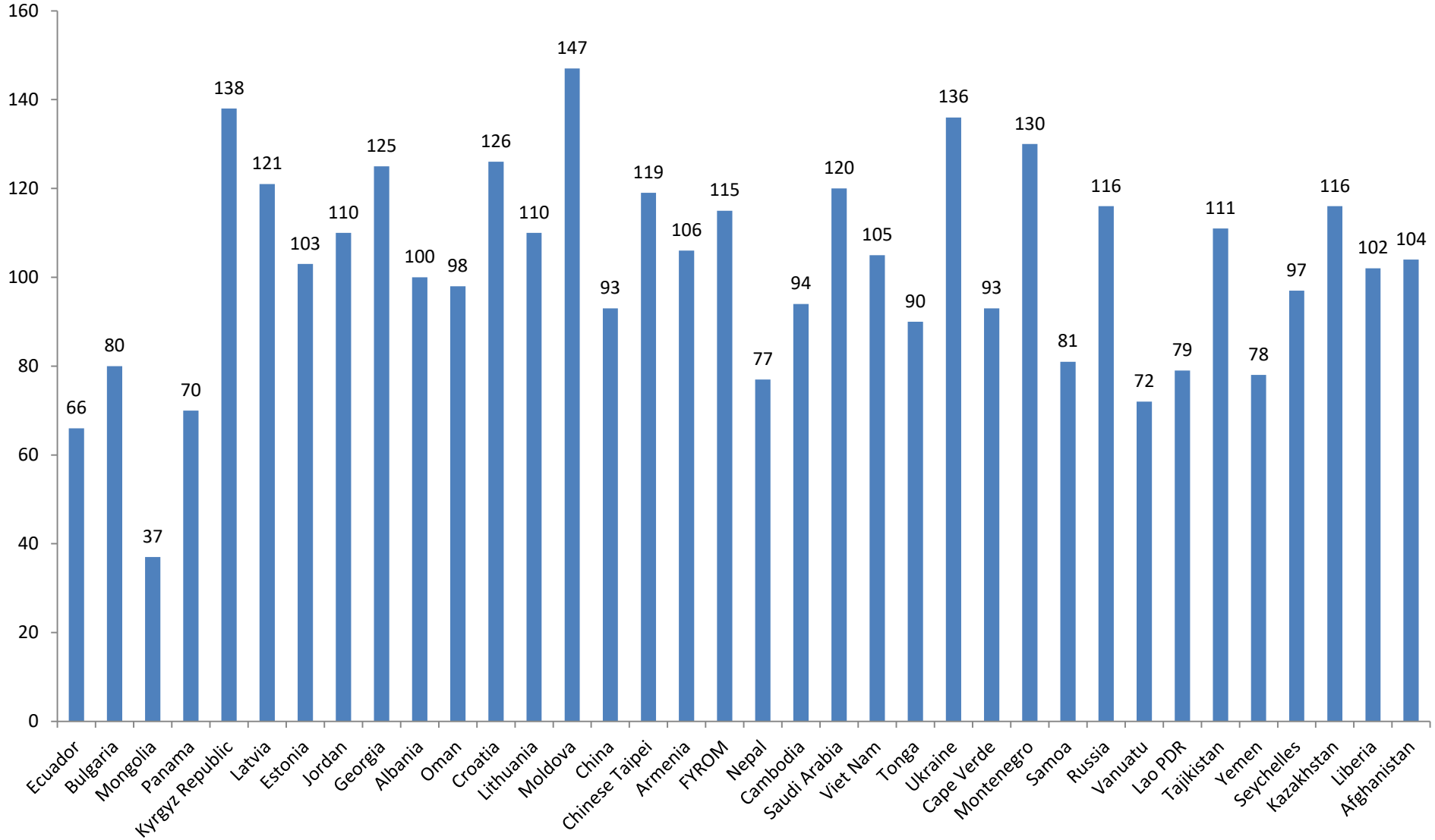


Results Achieved

Article XII LDC Members: Market Access Commitments in Goods and Services

Article XII LDC Member	Membership date	Goods commitments					Services commitments: Number of service sub-sectors
		Average final bound rate (%)			Binding coverage (%)		
		TOTAL	AG	NAMA	TOTAL	NAMA	
Nepal	2004	26.0	41.5	23.7	99.4	99.3	77
Cambodia	2004	19.1	28.1	17.7	100	100	94
Cabo Verde	2008	15.8	19.3	15.2	100	100	103
Samoa	2012	21.1	25.8	20.4	100	100	80
Vanuatu	2012	39.7	43.7	39.1	100	100	69
Lao PDR	2013	18.8	19.3	18.7	100	100	79
Yemen	2014	21.1	24.9	20.5	100	100	78
Liberia	2016	26.7	23.8	27.2	100	100	102
Afghanistan	2016	13.5	33.6	10.3	100	100	104
Article XII LDCs: Average	***2004-2016***	***22.4***	***28.9***	***21.4***	***99.9***	***99.9***	***87.3***
All Article XII: Average	*1996-2016*	*13.9*	*20.3*	*12.9*	*100*	*100*	***102.5***
Original LDCs: Average	***1995***	***65.2***	***79.9***	***45.4***	***53.8***	***46.7***	***20***

Number of Sub-sectors Committed by Article XII Members



The MFN principle in the GATS

- Any advantage granted to services and service providers of a country must be extended to all WTO Members
  - →regardless of the size or level of development
  - →Only WTO Members benefit from MFN
- MFN (unconditional obligation) ≠ NT

→ applies to all Members **in all services** covered by the GATS, irrespective whether commitments have been undertaken

- Wide scope "measures affecting trade in services"
- Applies to both "**de jure**" and "**de facto**" discrimination

Main departures from MFN

Type	Scope	Availability	Main conditions	Duration	GATS provision
Exemptions Article II.2	Measures inconsistent with MFN obligation	**One-off** : date of entry into force of GATS (or date of accession)	No substantive conditions **BUT** the levels of access provided under specific commitments (MA + NT) must be respected	*In principle*, should not exceed 10 years	Annex on Article II Exemptions
Economic Integration Agreements (EIAs)	Agreements for further liberalizing trade in services	At any time	- Substantial sectoral coverage and absence or elimination of substantially all discrimination. - Not increase overall level of barriers vis-à-vis other Members.	No time constraints	Art. V
Recognition	Recognition of foreign standards, licences, certificates, degrees	At any time	- Afford other Members adequate opportunity to negotiate accession or to demonstrate it should be recognized as well. - Not to constitute a means of discrimination or a disguised restriction on trade.	No time constraints	Art. VII

Overview MFN exemptions

- There are a **total of 566 exemptions**
- They have been listed by **104 Members** (counting EC as 1), i.e. on average, 5 exemptions per Member
- Developed Members have listed 203 exemptions, i.e. around 8 each on average
- Only about one-third of all **LDCs** has an MFN exemption list

For Acceded Members:

→ **All but three** (Oman, Kyrgyz Republic, Mongolia) of the Members who acceded to the WTO after January 1995 have listed MFN exemptions
→ In total, they have listed **192 exemptions**
→ All LDC (acceded Members) have listed MFN exemptions

GATS & Transparency: Articles III and IV:2

“unconditional” obligations applicable to all sectors:

- Publish “all relevant measures of general application which pertain to or affect to operation of this agreement” (Art III:1)
- Response to request for information & establishment of Enquiry Points (for governments)(Art III:4)
- Developed countries: establishment of Contact Points (for suppliers) (Article IV:2)

“Conditional” obligations in scheduled sectors:

- Notification: annual information requirement of new measures which significantly affect trade in services covered by specific commitments

Article VI: Existing regulatory disciplines in the GATS

(1) Administration of all measures of general application affecting trade in services in a reasonable, objective and impartial manner*

(3) Rules on authorizations: information on decisions regarding applications for authorization & information on status upon request *

(6) Adequate procedures to verify the competence of foreign professionals*

(2)Mechanisms for the objective and impartial review of administrative decisions affecting trade in services, and appropriate remedies

* **Rules applicable only in sectors where specific commitments have been undertaken**

Competition disciplines

- Monopolies to observe MFN and specific commitments (Article VIII:2)

- Monopolies (and exclusive service suppliers) must not abuse their monopoly position when supplying services in a sector outside the scope of their monopoly rights (Article VIII:2)

+ telecom Reference paper

- Competitive safeguard - avoid abuse of dominance
- Interconnection - guarantee fairness
- Regulator - independent of operators
- Universal service - competition friendly
- Finite resources - administer fairly
  (e.g. spectrum, numbering, rights of way)
- Licensing - added transparency

Payments and Transfers (Article XI)

- No restrictions on transfers and payments for current transactions relating to commitments (except under BoP difficulties)

- No restrictions on capital transactions inconsistently with commitments (except under BoP difficulties or at the request of the IMF)

Transparency – Publication of measures

1. The representative of [X] confirmed that [X] would publish all laws, regulations and other measures of general application pertaining to or affecting trade in services. [Article III:1]
2. Publication of such laws, regulations and other measures would include the effective date of these measures and the general scope of services or activities affected. [Article III:1 -clarification]
3. He further confirmed that [X] would publish a list of all organizations that were responsible for authorizing, approving or regulating service activities for each service sector. [DR draft texts]
4. In addition, [X] would publish in the official journal all of its licensing procedures and conditions upon accession. [DR draft texts]

Afghanistan, para 281; Kazakhstan, para 1131; Seychelles, para 395; Tajikistan, para 336; Russian Federation, para 1404; Montenegro, para 266; Ukraine, para 490; Viet Nam, para 506; China, para 307.

Transparency – Publication of Draft Regulation

"The representative of [X] also confirmed that [X] would:

(i) publish in advance any regulations or other implementing measures of general application that it proposed to adopt and the purpose of the regulation or other implementing measure; [DR draft texts]

(ii) provide interested persons, including Members, a reasonable opportunity to comment on such proposed regulation or other implementing measure; and, [DR draft texts]

(iii) allow reasonable time between publication of the final regulation or other implementing measure and its effective date. [DR draft texts]

Afghanistan, para 2812; Kazakhstan, para 1133; Seychelles, para 396; Tajikistan, para 337; Russian Federation, para 1406; Montenegro, para 265; Ukraine, para 491; Viet Nam, para. 508.

Licensing Procedures – commitments for sectors with commitments

General obligations

- licensing procedures and conditions would not act as barriers to market access and would not be more trade restrictive than necessary. (mandate Art VI:4 China , para 308)
- The representative of [X] confirmed that [X] would ensure that its licensing procedures and conditions would not act as independent barriers to market access." (Montenegro, para 264)
- It would ensure that its licensing procedures were not in themselves a restriction on the supply of the service, and that its licensing requirements directly related to eligibility to supply a service were not in themselves an unjustified barrier to the supply of the service. (mandate Art VI:4 - Russian Federation, para 1405)

Afghanistan, para 280; Kazakhstan, para 1132; Seychelles, para 394; Tajikistan, para 335; Russian Federation, para 1405; Montenegro, para 264; Ukraine, para 489; Viet Nam, para 507; China, para 308.

Licensing Procedures

- Licensing fees charged, which were not deemed to include fees determined through auction or a tendering process, would be [commensurate with the administrative cost of processing an application – e.g. China, Montenegro][not in themselves be a restriction on the supply of the service –e.g. Russia, Kazakhstan]; [DR draft texts]
- After receipt of an application, the applicant would be informed whether the application was considered complete under X's domestic laws and regulations and in the case of incomplete applications, X would identify the additional information required to complete the application and provide an opportunity to rectify deficiencies; [Art VI:3 – plus; DR draft texts]
- decisions would be taken promptly on all applications; [Art VIII:3 – *within a reasonable period of time*.]
- if an application was denied, the applicant would be informed in writing and without delay of the reasons for such action; [DR draft texts]
- The applicant would have the possibility to resubmit, at his/her discretion, a new application addressing the reasons for termination or denial; [DR draft texts]
- in case examinations were held for the licensing of professionals, such examinations would be scheduled at reasonable intervals; [DR draft texts] Russia no in FS and self-regulatory bodies

Independence of regulators

The representative of [X] further confirmed that in those sectors, where [X] had undertaken specific commitments, relevant regulatory authorities would not be accountable to any service suppliers they regulated. [WTO Telecom Reference paper +; Draft DR disciplines requiring independence of decision making and impartiality]

Afghanistan, para 283; Kazakhstan, para 1133; Tajikistan, para 338; Russian Federation, para 1406; Viet Nam, para 508; China, para 309

Regulatory GATS + obligations undertaken by several acceded Members -overview

Regulatory Commitments in Working Party Reports	Acceded Members with commitments
Necessity test – licensing procedures and requirements not more trade restrictive than necessary	China; Montenegro; Tajikistan; Russian Federation; Ukraine; Viet Nam; Kazakhstan; Afghanistan
Publication of lists of regulatory authorities	China; Montenegro; Tajikistan; Russian Federation; Ukraine; Viet Nam; Kazakhstan; Afghanistan
Publication of licensing requirements and procedures	Tajikistan; Russian Federation; Ukraine; Viet Nam; Kazakhstan; Afghanistan
Responses to enquiries by service suppliers	China; Montenegro; Tajikistan; Russian Federation; Ukraine; Viet Nam; Kazakhstan;
Publication of and prior comment on draft regulation	China; Montenegro; Tajikistan; Russian Federation; Ukraine; Viet Nam; Kazakhstan; Afghanistan
Independence of regulatory authorities	Afghanistan, China; Tajikistan; Viet Nam; Kazakhstan; Russian Federation
Submission of applications at any time	China; Montenegro; Tajikistan; Ukraine; Afghanistan
Permission to complete of incomplete applications	China; Montenegro; Tajikistan; Ukraine; Viet Nam; Kazakhstan; Afghanistan
Time-frame for processing applications/ no undue delay	China; Montenegro; Russian Federation; Kazakhstan; Afghanistan
Fees commensurate with administrative costs/not in themselves restriction on supply of service	China; Montenegro; Tajikistan; Ukraine; Viet Nam; Kazakhstan
Licensing examinations for professionals at reasonable intervals	China; Montenegro; Tajikistan; Ukraine; Viet Nam; Kazakhstan; Afghanistan
Information on status of applications/decision –reason for rejection	China; Montenegro; Tajikistan; Ukraine; Viet Nam; Kazakhstan; Afghanistan