



# Services Regulation and Finance

Marc Maes, 11.11.11  
@ CSO Strategy Meeting on  
Advocacy Around Africa's  
Trade and Development Challenges  
Accra, 2-3 March 2016

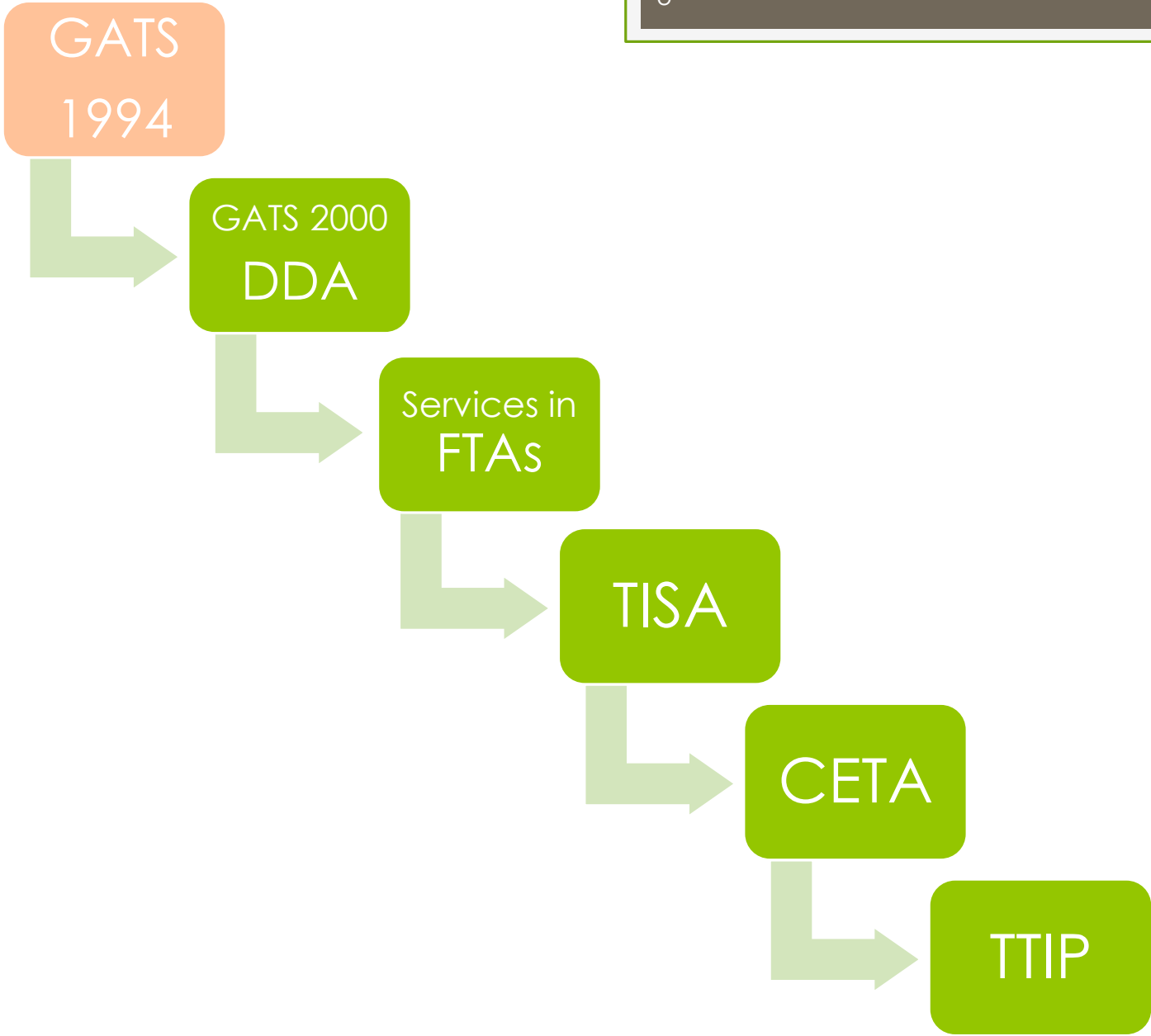
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# Financial services (de-)regulation in trade agreements

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# Part 1: GATS 1994

- First services trade agreement
- Four modes of services trade
- Most important: mode 3, investment
- Market access and national treatment commitments via bottom-up approach
- Commitments can not be changed without compensation

# GATS 1994

- Unfinished business:
  - Domestic regulation: disciplines qualifications, procedures, technical standards, licensing requirements
  - Rules: subsidies, gvt procurement, safeguards
  - LDC modalities
  - **Financial services** negotiations continued until 1997 with 104 countries taking commitments (into force in 1999)
- Built-in agenda of negotiations: GATS 2000

# GATS 1994 on financial services

- Market Access and National Treatment commitments on financial services in schedules
- Annex on Financial Services
- Understanding on Financial Services appended to Final Act of Uruguay Round

# GATS 1994 on financial services

Market Access and National Treatment  
**commitments** on financial services **in schedules**

- No limitations on the number of services providers and quantity or value of services provided
  - No limits on foreign ownership
  - No restrictions on specific types of legal entity
- Unless specified otherwise in schedules

No restrictions on payments and capital movements related to committed (financial) services (except in case of balance of payment problems)

# GATS 1994 on financial services

**Annex on Financial Services**, contains:

- Scope and definitions
- Definitions of “services in exercise of government authority”: central banks, monetary authorities, statutory social security are excluded
- Prudential carve out: “a self-cancelling loophole”



# GATS 1994 on financial services

## **Prudential carve out “self-cancelling loophole”:**

members can take measures for prudential reasons to ensure protect investors, depositors etc or to protect the integrity and stability of the financial system

*“ Where such measures do not conform with the provisions of the Agreement, they shall not be used as a means of avoiding the Member's commitments or obligations under the Agreement”*

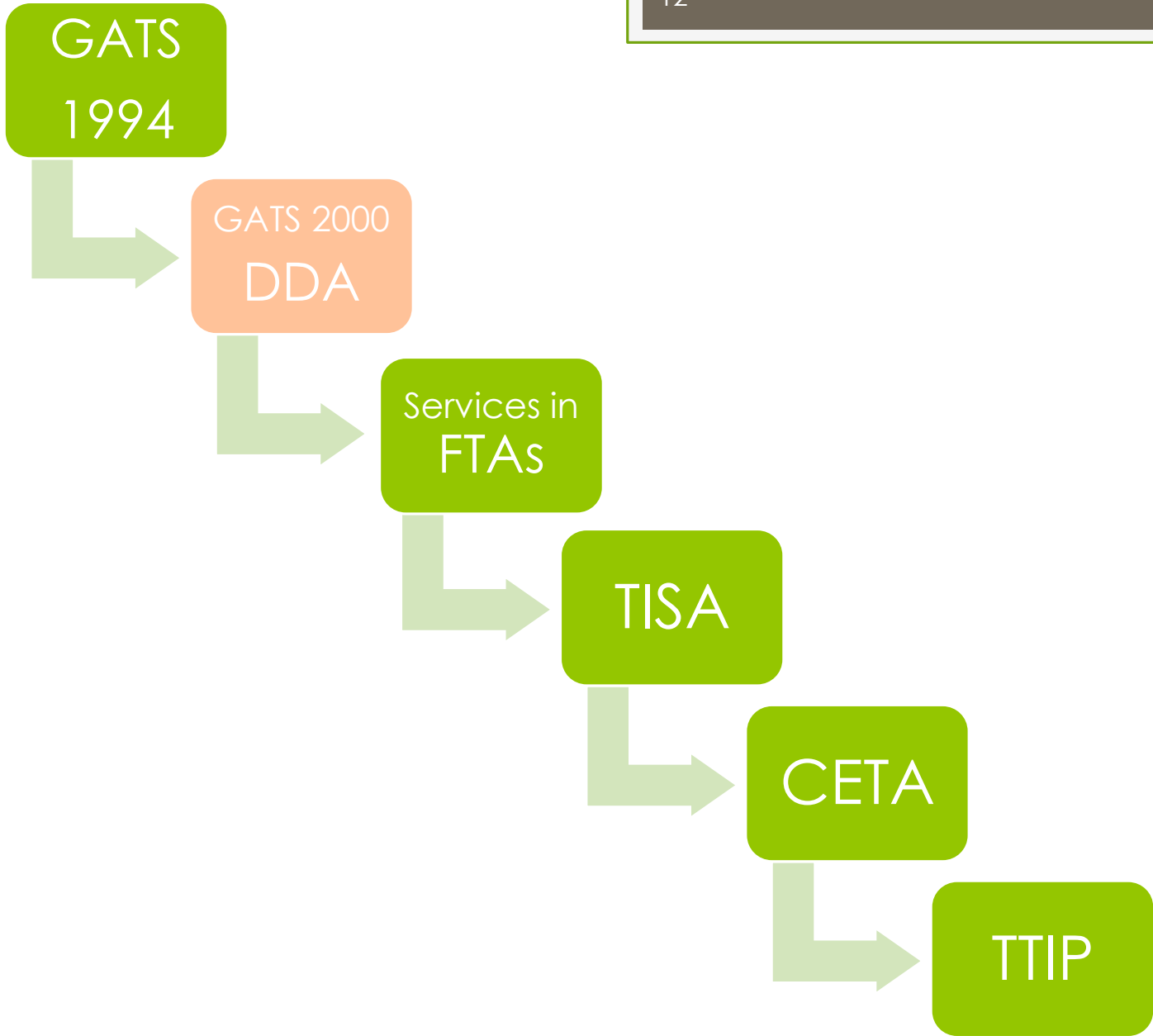
# GATS 1994 on financial services

## Understanding on Financial Services:

- Between 33 mostly OECD countries (plus Nigeria and Sri Lanka)
- Contains enhanced commitments, including:
  - Stand-still (only existing conditions allowed)
  - New services shall be permitted
  - Existing monopolies listed and endeavour to reduce
  - Remove “non-discriminatory” measures that would hinder foreign financial services
  - Mode IV senior staff connected with investment permitted
- Actually constitutes a negative lists

# GATS 1994 on financial services

- Geared towards swift liberalisation, increased competition and concentration
- Without prove that this will improve access to services in developing countries
- Increased risk for instability (free movement of capital, payments and providers)
- No regulation of financial services but reduction of policy space (“regulations are barriers to trade”)



## Part 2:

# Services negotiations in the DDA

- GATS 1994 : broad built-in agenda, including market access negotiations within 6 years  
= GATS 2000
- GATS 2000 integrated into DDA.
- In DDA: most developing countries not keen on engaging without progress on development issues, NAMA and Agriculture
- DDA stalled

# Services negotiations in the DDA

- Market access and national treatment
- Domestic regulation
- Rules
- LDC modalities

# Services negotiations in the DDA

## **Market access and national treatment**

- Request – Offer process, did not pick up
- Attempts to break the bottom-up approach
  - Annex B in Hong Kong: “all to commit in 80% of sectors”; failed, but collective requests allowed
  - Chair’s text May 2008: “bind existing openness”, “no prior exclusion of sector or mode”

# Services negotiations in the DDA

EU tabled 107 requests! (all leaked out)

- Financial services, one of 5 key sectors: 94 requests on financial services, including 20 LDCs and 30 LICs
- Some requests in financial services:
  - Increase foreign ownership
  - Remove licences for branches
  - Remove state monopoly on reinsurance



# Services negotiations in the DDA

Some EU requests:

- Allow foreign companies to provide financial services to state agencies
- Allow foreign banks to have offshore banking licences
- Remove requirement that money reserve must be held in branch
- Allow trade in derivative products
- Remove requirement of mandatory lending to SMEs

# Services negotiations in the DDA

Collective or plurilateral request on financial services by 10 countries :

- Bind all existing liberalisations
- Market opening in Mode 3 in all financial services
- Remove all foreign ownership restrictions
- ...

# Services negotiations in the DDA

## **Domestic regulation**

= rules for the administration of licenses, qualifications and technical standards = all financial services regulation

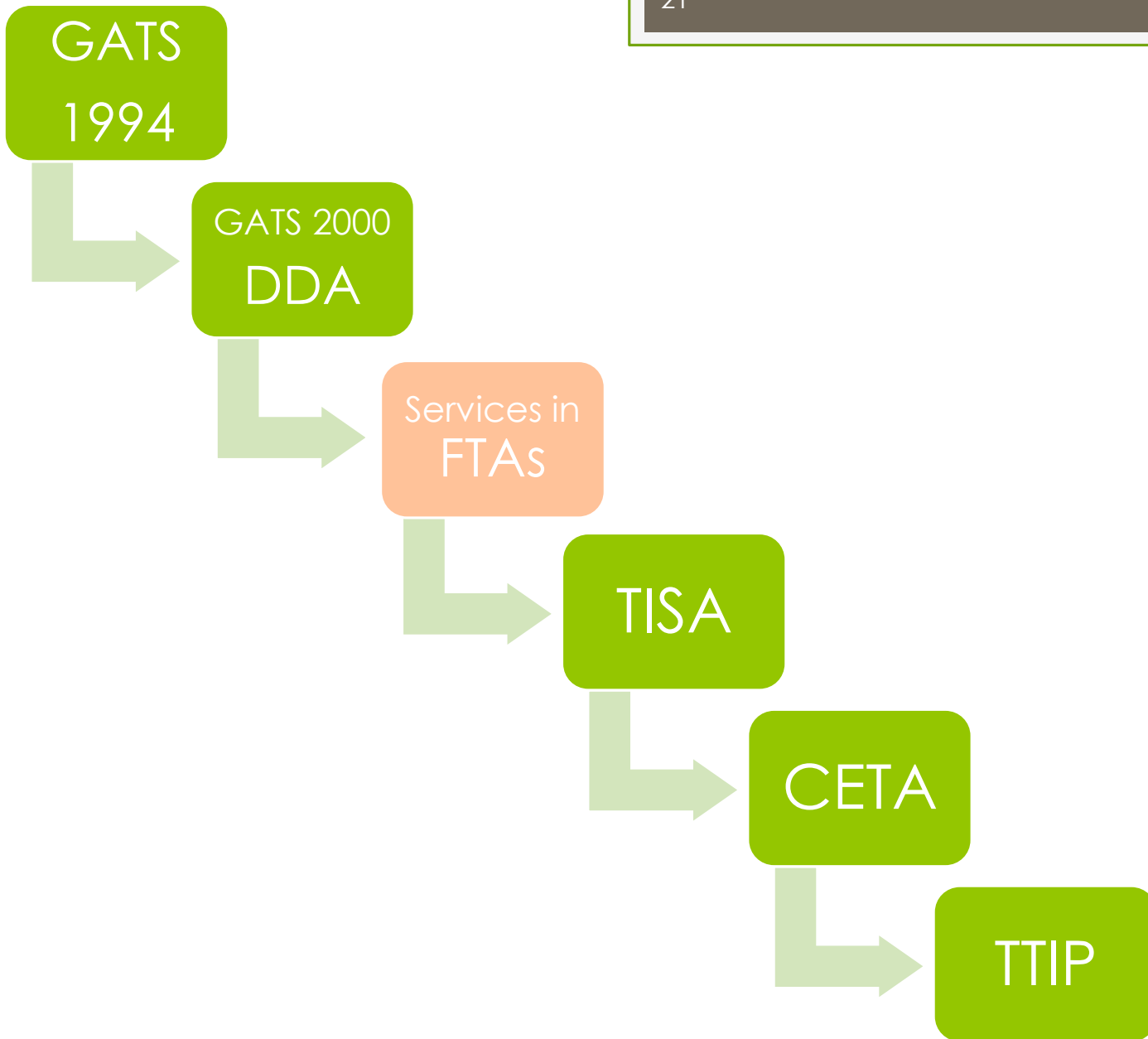
- To make sure they:
  - do not constitute “unnecessary barriers” to trade in services
  - “are not more burdensome than necessary”
  - are based on “objective and transparent criteria”
- = “necessity test”: authorities must prove that regulation do not interfere with free trade “more than necessary”

# Services negotiations in the DDA

## **Domestic Regulation**

Is also about “transparency”:

- Governments must publish proposals for new measures in advance
- And allow opportunity for interested persons to comment => allow for lobby



## Part 3: “going with the willing”, financial services in FTA’s

- The DDA stalling, US and EU step up FTA negotiations
- Financial services in EU FTA’s, so far in:
  - Cariforum EPA
  - EU-Korea
  - EU-Central America
  - EU-Colombia/Peru/Ecuador
  - EU-Singapore
  - EU-Canada

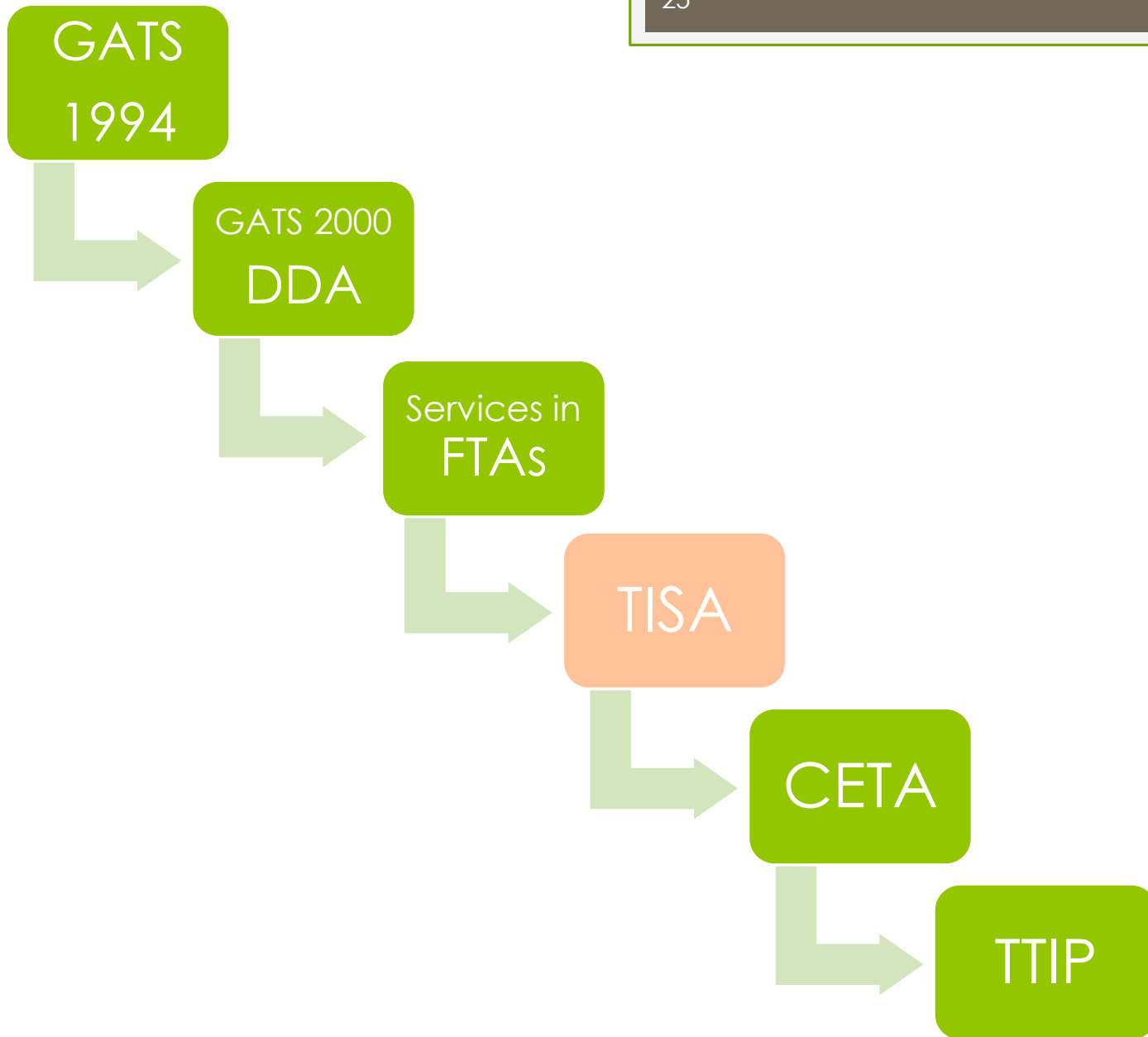
## Part 3: financial services in EU FTAs

- Main priority: access in Mode 3
- Covering virtually all financial sectors; locking in existing liberalisations + additional
- Uses Gats Understanding as minimum (stand still, any new services, monopolies, non-discriminatory measures)

## Part 3: financial services in EU FTAs

- Adds advance notice, comment and response
- Encouraging application of international standards
- “nothing requires privatisation”
- Prudential carve-out without loophole
- But with “no arbitrary discrimination” and “not more burdensome than necessary” (necessity test)





## Part 4: TISA

# Now enter the Really Good Friends

- Australia, Canada, Chile, Chinese Taipei , Colombia , Costa Rica, European Union, Hong Kong, Iceland, Israel, Japan, Korea, Liechtenstein, Mauritius, Mexico, New Zealand, Norway, Pakistan, Panama, Peru, Switzerland, Turkey, United States
- RFG = 23 including EU (or 49 countries)

# Enter the Really Good Friends

- RGF discussing possibility of a plurilateral or international “Trade In Services Agreement” (TISA) since beginning of 2012
- Agreement on principles governing the TISA reached at the end of 2012
- Negotiations have been launched without much publicity in March 2013 (or even earlier)
- EU Commission obtained mandate on 18 March (only five weeks after proposing it on 15 February)

# TISA = a radical services FTA

- Based on GATS, art.V = same base as for services in FTAs
- Positive list for market access, negative for national treatment
- Standstill and ratchet
- Enhanced disciplines on domestic regulation and rules (subsidies, government procurement)
- TISA may include investor-state-dispute settlement! (USA seems to be interested in that, EU is not)

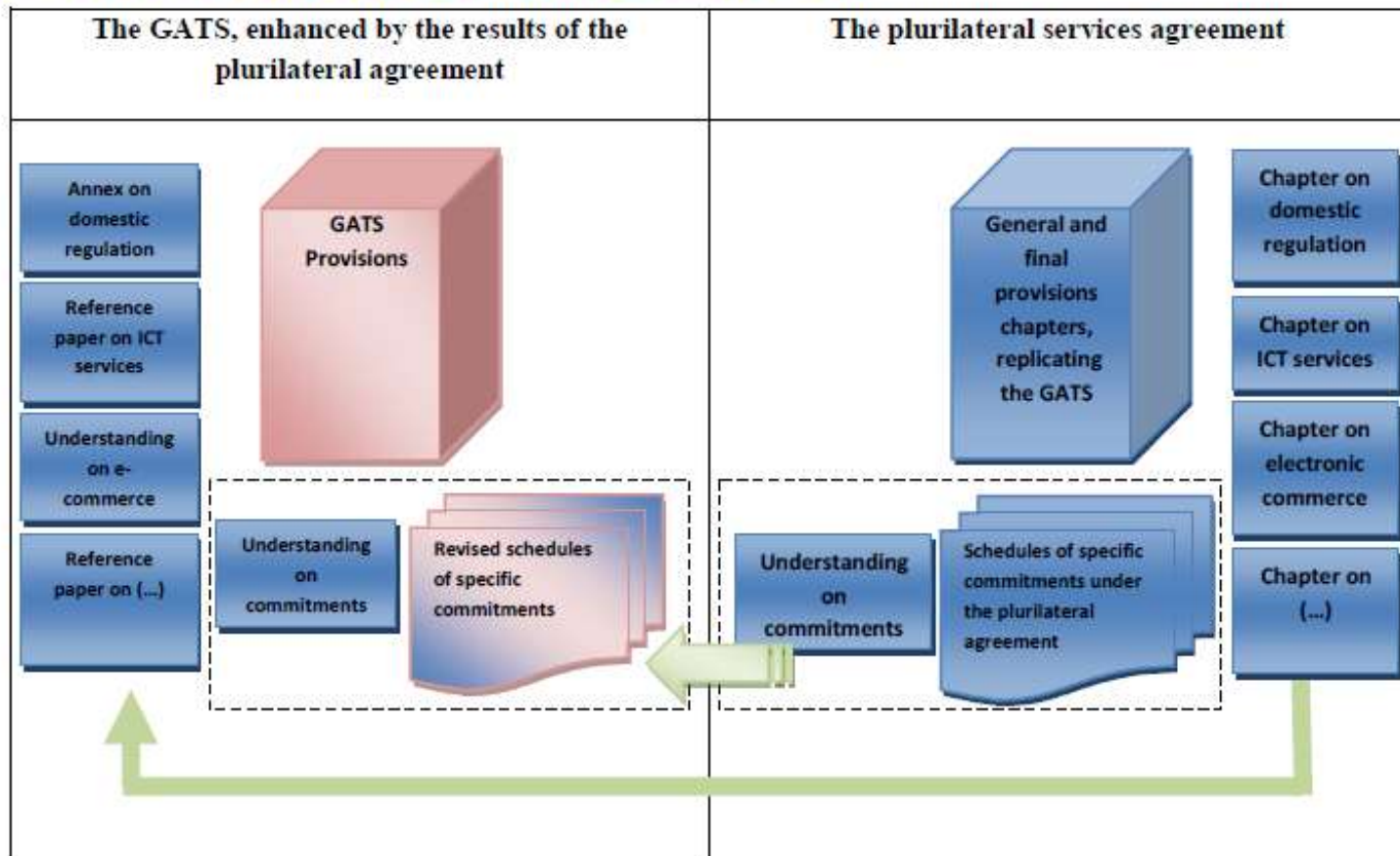
# TISA expansion

- Objective remains to get global services liberalisation and disciplines =
  - 1) get countries on board of TISA and/or
  - 2) radicalise GATS negotiations
- => 1) RGF will push other countries to come on board
  - Countries that have or are negotiating FTAs with RFG
  - WTO accession countries

# TISA expansion

- => 2) RGF want to bring TISA back into WTO
  - Or by getting it recognised as a WTO plurilateral (unlikely)
  - Or by bringing TISA result into GATS negotiations = “docking” (problem : RGF will need to offer MFN to all WTO members)

# The "modular" approach: a pathway to multilateralisation



# Financial services in TISA

## Enhanced Markets Access

- List of financial services sub-sectors where commitments **have to** be made
- **List and end** monopoly rights
- **Accept** any new service

## Rules

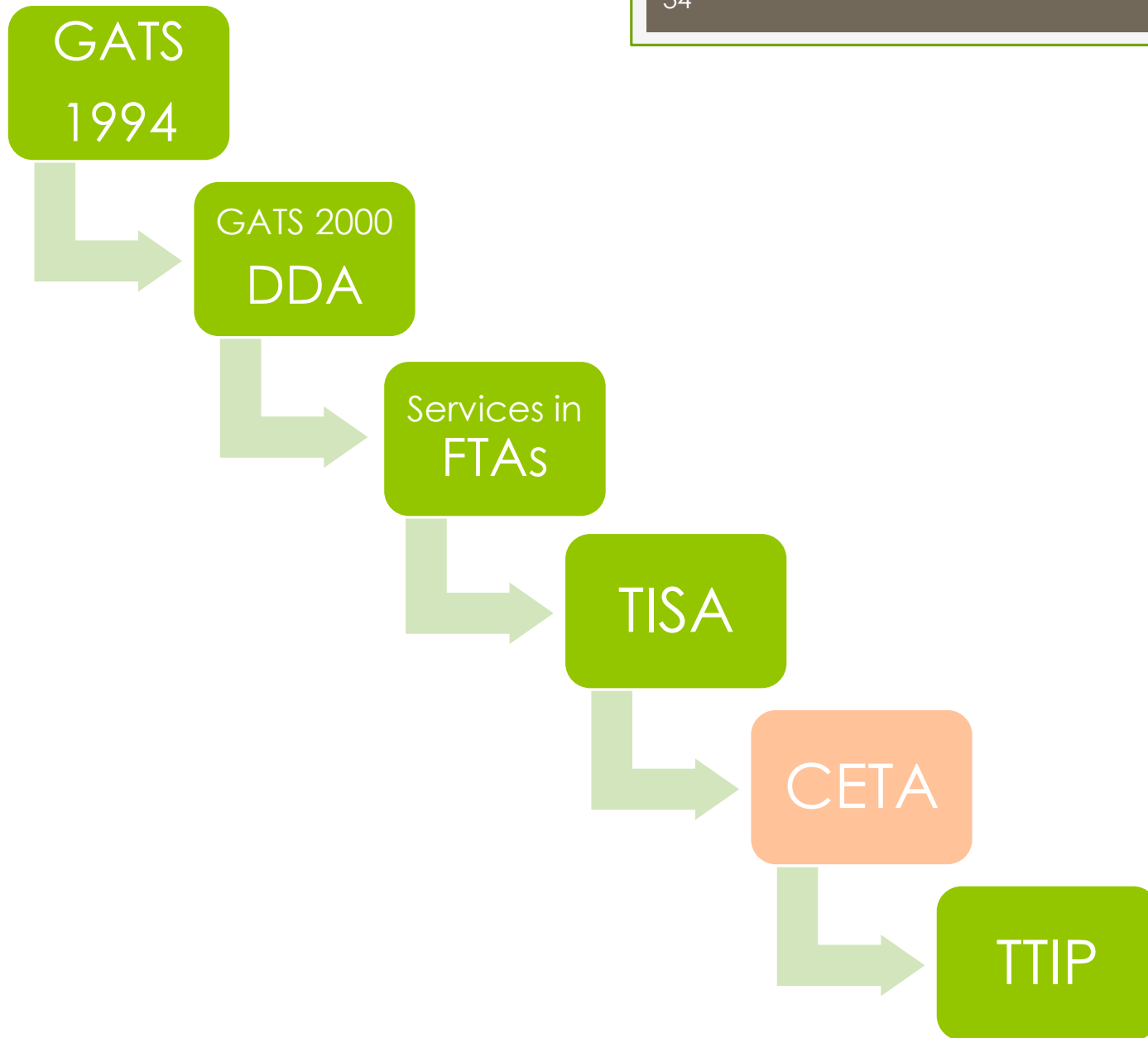
- Government procurement : MFN +NT (with schedules)
- Subsidies: NT (with schedules)



# Financial services in TISA

## **Domestic Regulations**

- Non-discriminatory measures may not hinder financial services trade
- All measures must be administered in a reasonable, objective, impartial way
- Inform, comment, respond
- Disciplines for insurance by Postal Insurance Entities
- Disciplines on sectorial cooperatives selling insurances (US proposal)



## Part 5: CETA (EU-Canada FTA)

- ◉ Negotiations concluded in 2014
- ◉ This Monday (29 Feb 2016) legal scrubbing finished
- ◉ CETA uses completely negative list (for both MA and NT); risk of errors is high

## Part 5: CETA

- **Contains Investment-state dispute settlement (ISDS)**
- Financial services investors can use ISDS is not treated “fair and equitable” = *can enforce disciplines themselves*
- **EU forced Canada** to give up exclusion of financial services from ISDS

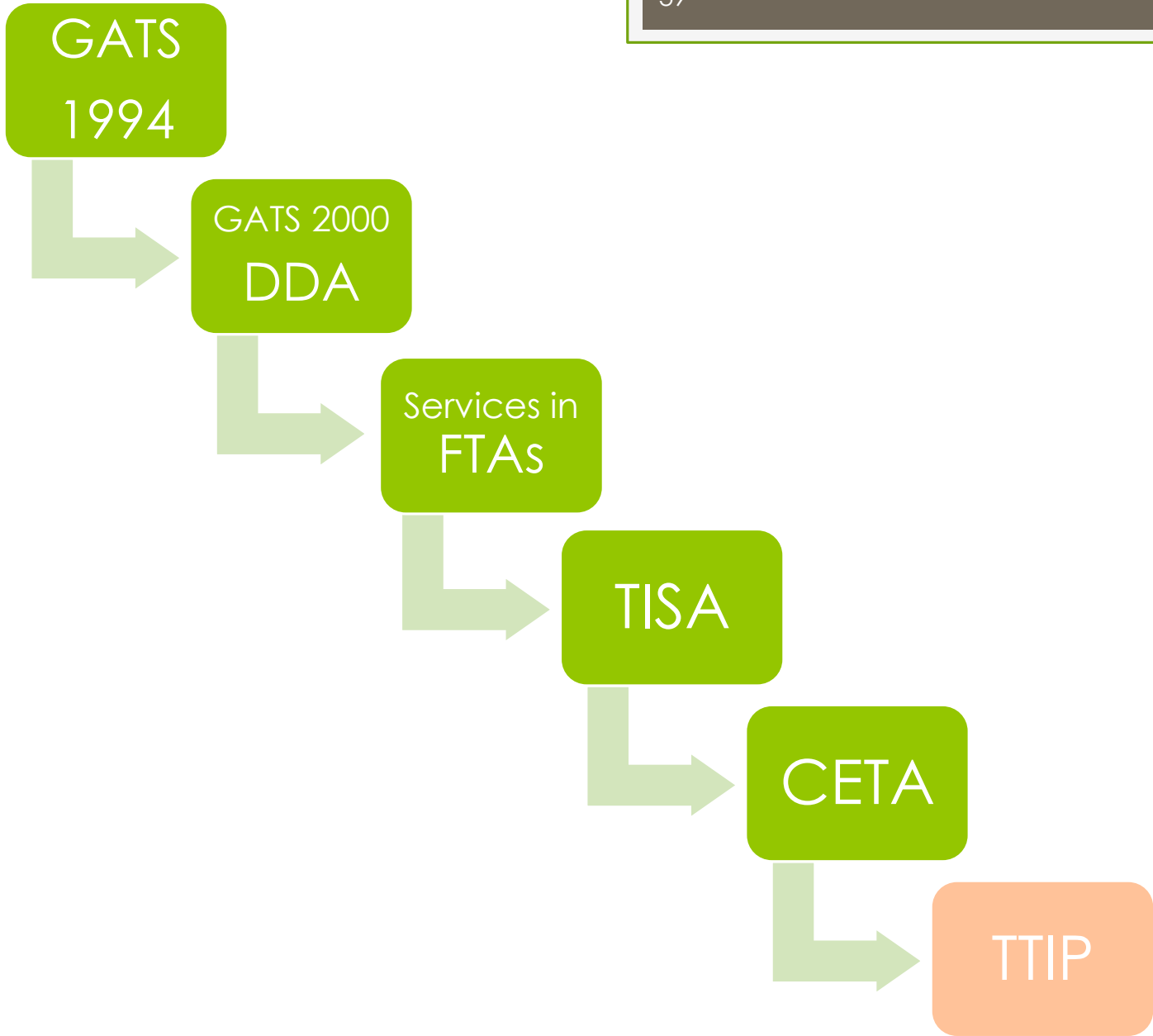
# Part 5: CETA

However

- Prudential carve out without loophole or “not more burdensome than necessary”
- But with new wording in an annex (“Guidance”):
  - No disguised restriction
  - No arbitrary discrimination
  - “not so severe in light of its purpose that is manifestly disproportionate to attain purpose”

# Part 5: CETA

- Party may require registration, may prohibit particular service or activity
- Party may determine its own appropriate level of prudential regulation
- In case of ISDS, Parties can agree that a contested measure was prudential and this is binding on the Tribunal (= filter)



## Part 6: TTIP (a “MRTA”)

- Will also contain ISDS
- Will go for regulatory cooperation to
  - resolve divergent services rules
  - and jointly work out new harmonised rules
- EU also want branches to be monitored by home not host state (US rules are more strict)



## Part 6: TTIP (a “MRTA”)

- US wanted to subject dealings of foreign banks with US banks outside the US to US rules
- EU and US banks and EU against that
- (Compulsary) “Regulatory cooperation” should forestall such measures (and there are many more examples)

