



# **THE SCHEDULING OF SPECIFIC COMMITMENTS UNDER THE GATS**

# Market Access and National Treatment: Main elements



- MARKET ACCESS (Article XVI)
  - Absence of quota-type and similar restrictions
  
- NATIONAL TREATMENT (Article XVII)
  - Non-discrimination with regard to **all** measures affecting the supply of a service
  - Any **limitations** must be inscribed in Schedules under the relevant mode(s).

# How Schedules of Commitments are structured:



Modes of supply: 1) Cross-border supply 2) Consumption abroad 3) Commercial presence 4) Presence of natural persons

Sector or subsector	Limitations on market access	Limitations on national treatment	Additional commitments
<u>Hotels and restaurants</u> (CPC 641- 643)	1) Unbound* 2) None 3) The admission of new hotels in individual provinces may be made contingent on past tourist arrivals over a representative period 4) Unbound except as indicated in the horizontal section	1) Unbound* 2) None 3) Foreign-owned hotels and restaurants are subject to training requirements (one trainee per two regular staff) 4) Unbound	

\*Unbound due to lack of technical feasibility

**NOTE: “Unbound” = no commitment (full policy discretion)**

**“None” = no limitation (full commitment)**

**“The admission of ... “ and “Foreign-owned .... “ = partial commitments**

# The Obligation to have a schedule



- Article XX:1 - Each Member shall set out in a schedule the specific commitments it undertakes under Article XVI (market access), Article XVII (national treatment) and Article XVIII (additional commitments)
- Article XX:3 – Schedules of specific commitments shall be annexed to the Agreement and shall form an integral part thereof.

# The Obligations on Listing Specific Commitments (II)



- Article XX:1 – With respect to sectors where such commitments are undertaken, each Schedule shall specify:
  - Terms, limitations and conditions on market access;
  - Conditions and qualifications on national treatment;
  - Undertakings relating to additional commitments;
  - Where appropriate the time-frame for implementation of such commitments; and
  - The date of entry into force of such commitments.

# Commitments in a schedule are organized by sector and by mode of supply



Modes of supply: 1) Cross-border supply 2) Consumption abroad 3) Commercial presence 4) Presence of natural persons

Sector or subsector	Limitations on market access	Limitations on national treatment	Additional commitments
8. HEALTH RELATED AND SOCIAL SERVICES  A. <u>Hospital Services</u> (CPC 9311)	1) ...  2) ...  3) ...  4) ...	1) ...  2) ...  3) ...  4) ...	

# Description of the Sectors



- While there is no compulsory system, MTN. GNS/W/120 of July 1991 is a general guidance, which divides sectors into 12 groups
- Altogether ~ 160 sub-sectors identified in W/120
- To refine sectoral classification where necessary, reference may be made to corresponding number of the UN Central Product Classification (CPC)
- CPC is a tool, Members may describe sectors by using other definitions (e.g. Financial Services Annex).

# Characteristics of CPC



- The AB in US – Gambling confirmed that: – The CPC is exhaustive (all goods and services are covered) and its categories are mutually exclusive (a given good or service may only be classified in one CPC category).
- The CPC is a decimal system: a reference to an aggregate category must be understood as a reference to all of the constituent parts of that category. (US-Gambling)



# Case (I)

Modes of supply: 1) Cross-border supply 2) Consumption abroad 3) Commercial presence 4) Presence of natural persons

Sector or subsector	Limitations on market access	Limitations on national treatment	Additional commitments
<b>A. <u>Primary Education Services</u> (CPC 921, excluding national compulsory education in CPC 92190))</b>	1) Unbound 2) None 3) Joint schools will be established, with foreign majority ownership permitted 4) Unbound, except as indicated in Horizontal Commitments ... .	1) Unbound 2) None 3) Unbound  4) ....	

# Alternative or supplementary classification systems under the GATS

- Telecom Model Schedule and the Chairman's Note
- Annex on Financial Services
- Maritime Model Schedule
- Annex on Air Transport

# The Sectors in W/120



## Sectors

*Precise definition is critical as it defines the scope of a commitment*

- Business and professional
- Communications, all types
- Construction
- Distribution
- Education
- Environment
- Financial
- Health and social
- Tourism
- Recreation & cultural
- Transport, all types
- Other

# Listing Approaches Used



- Positive listing approach is used for inscribing sectors: *only sectors listed in the schedule are committed*
- Negative listing approach for scheduling MA and NT commitments: *only limitations listed for a given sector and mode of supply may continue to be maintained.*

# Scope and coverage of specific commitments



## **Article XVI (Market Access)**

All measures, whether discriminatory or not, falling under one of six categories

## **Article XVII (National Treatment)**

All (other) measures discriminating against services or service suppliers of any other Member.

## **Article XVIII (Additional Commitments)**

Non-discriminatory measures not falling under Article XVI or XVII.

# Article XVI: Market Access



- All measures falling under any of the categories listed in Article XVI **must be scheduled**, whether or not they represent a national treatment violation.
- Quantitative restrictions can be expressed **numerically**, or through **economic needs tests**.
- Under the GATS, “full market access” is granted when *in a given sector and mode of supply, a Member does not maintain any of the six types of measures listed in Article XVI*

# Six Types of Market Access Limitations (Article XVI:2): an exhaustive list



- (a) Number of service suppliers\* (e.g. number of licenses for cosmetology schools is limited to 48 total licenses)
- (b) Value of transactions or assets\* (e.g. assets of foreign banks limited to 25 percent of total bank assets)
- (c) Total number of operations or quantity of output\* (e.g. restrictions on broadcasting time for foreign films)

# Six Types of Market Access Limitations (*bis*)



- (d) Total number of natural persons\* (e.g. no more than x foreigners per outlet)
- (e) Type of legal entity or joint venture (e.g. foreign presence only via subsidiaries)
- (f) Foreign capital participation (e.g. foreign equity limited to 49 per cent)

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\* Or requirement of economic needs test.



# National Treatment (Article XVII):

## An “open-ended definition”



- (1) Treatment shall be “no less favourable than accorded to own like services and services suppliers”.
- (2) ... “either formally identical or formally different treatment” ...
- (3) Includes both *de jure* and *de facto* discrimination: the essential is that there is no modification of “the conditions of competition” in favour of own like services or service suppliers.

# Discrimination *de jure*



- Domestic suppliers of audiovisual services are given preference in the allocation of frequencies within the national territory
  - This is an explicit discrimination on the basis of the origin of the service supplier

# Discrimination *de facto*



- A three-year period of prior residency is required in order to obtain a license to supply veterinary services
  - There is no formal distinction based on the origin of the supplier, but foreign suppliers are less likely to meet the requirement
  - Case-by-case evaluation
  - Relation with Art. VI measures

# Typical National Treatment Limitations



- Discriminatory subsidies and other fiscal measures
- Nationality and residency requirements (→ mode 3)
- Discriminatory licensing/registration/qualification/training requirements
- Technology transfer requirements
- Prohibitions on land/property ownership
- Limitations on insurance portability, education grants

# Overlap between Market Access and National Treatment



## Article XX:2:

Relevant measures (e.g. discriminatory quotas or equity ceilings) shall be inscribed in the column relating to Article XVI (MA). This provides a condition and qualification to Article XVII (NT) as well.

See also S/L/92, para. 18

# Levels of Commitments and Terminology



- Since terms used in the schedule create legally binding commitments, they should be uniform and precise:
  - Full commitments: **NONE**
  - Commitments with limitations indicating elements inconsistent with Articles XVI or XVII
  - No commitments: **UNBOUND**
  - No commitments technically feasible: **UNBOUND\*** with footnote “Unbound due to lack of technical feasibility”

# How to record commitments:



Modes of supply: 1) Cross-border supply 2) Consumption abroad 3) Commercial presence 4) Presence of natural persons

<b>Sector or subsector</b>	<b>Limitations on market access</b>	<b>Limitations on national treatment</b>	<b>Additional commitments</b>
<p>8. HEALTH RELATED AND SOCIAL SERVICES</p> <p>A. <u>Hospital Services</u> (CPC 9311)</p>	<p>1) Unbound</p> <p>2) Unbound</p> <p>3) Only through incorporation with a foreign equity ceiling of 51 per cent</p> <p>4) Unbound except as indicated in the horizontal section</p>	<p>1) Unbound</p> <p>2) Unbound</p> <p>3) None</p> <p>4) Unbound except as indicated in the horizontal section</p>	

# How to record commitments:



Modes of supply: 1) Cross-border supply 2) Consumption abroad 3) Commercial presence 4) Presence of natural persons

Sector or subsector	Limitations on market access	Limitations on national treatment	Additional commitments
9. TOURISM AND TRAVEL RELATED SERVICES A. Hotel and restaurants services (CPC 641-643)	1) Unbound*  2) None  3) Joint ventures required with foreign majority ownership permitted  4) <b>Unbound except as indicated in the horizontal section</b>	1) Unbound*  2) None  3) The majority of employees of joint venture hotels and restaurants shall be nationals  4) <b>Unbound except as indicated in the horizontal section</b>	



# Role of Horizontal Commitments



- Horizontal commitments are scheduled at the beginning of a schedule in order to avoid repetition.
- Horizontal commitments condition all other entries in the schedule unless otherwise specified, either specific to only one mode of supply, or affecting more than one mode of supply

# An Example of Horizontal Commitments



Modes of supply: 1) Cross-border supply 2) Consumption abroad 3) Commercial presence 4) Presence of natural persons

Sector or subsector	Limitations on market access	Limitations on national treatment	Additional commitments
<b>I. Horizontal Commitments</b>			
ALL SECTORS INCLUDED IN THIS SCHEDULE	<p>4) Unbound, except for the temporary presence for up to three years of the following categories of persons:</p> <p>A. <u>Services Salespersons</u></p> <p>...</p> <p>B. <u>Intra-corporate Transferees</u> ...            Executives ...            Managers ...            Specialists ...            Professionals ...</p> <p>C. <u>Personnel Engaged in Establishment</u> ...</p>	<p>3) Unbound for subsidies. Acquisition of land subject to government approval.</p> <p>4) Unbound , except for measures concerning the categories of natural persons referred to in the Market Access column.</p>	



# Need for consistency between horizontal and sectoral entries

Horizontal limitations (e.g. “unbound for subsidiaries”) apply across all scheduled sectors and must be read in conjunction with the sector-specific entries, whether “none”, “unbound” or any additional limitation (e.g. “majority of directors must be nationals”).

# Role of Additional Commitments (Article XVIII)



- Scheduling of measures **not** falling under Articles XVI or XVII.
- Such measures may relate to qualifications, standards, licenses, competition disciplines, etc.
- Additional commitments are expressed in the form of undertakings, not limitations.

See also S/CSC/W/34

# How policy intentions translate into specific commitments



**Current situation: foreign equity ceiling of 49%**

Policy intention	Entry for mode 3, Market Access
Full discretion (no commitment)	"Unbound"
Guarantee of status quo	"Foreign capital participation limited to 49% "
Full liberalization	"None"
Future liberalization (pre-commitment)	"Foreign capital participation limited to 49%, none from [date]"
Partial liberalization (status quo plus)	"Foreign capital participation limited to [49 + X]%"
Minimum liberalization (status quo minus)	"Foreign capital participation limited to [49 - X]%"

# Policy Considerations in Preparing a Schedule...



## □ **Select sectors and sub-sectors for inclusion**

*Relevant considerations [underlying objectives]:*

Create more stable and predictable trading conditions that help to: attract foreign investment [employment], foster competition [efficiency], broaden product choice and improve quality [consumer welfare], etc.

## □ **Consider need for modal exclusions or limitations**

*Relevant considerations [type of limitation]:*

Promote know how transfer [joint venture requirements (mode 3)], protect domestic employment [quantitative limitations (modes 1,2,4), subsidies], prevent market disruption [phase-in commitments], etc.

# Preparing a schedule: Complementary Work (II)



- Consider impact of ‘conditional’ (i.e. commitment-related) obligations

Art. VI:1 (administration of measures)

Art. VI:5 (regulatory disciplines)

Art. VIII (compliance of monopolies)

Art. XI:1 (current transactions)

Art. XI:2 and fn 8 to Art. XVI (capital transfers)

Annex on Telecommunications



# Commitments are legally binding access guarantees

Nevertheless, the GATS allows for

- **departures** in specified circumstances
  - protection of life & health, public morals, etc.
  - security concerns
  - prudential concerns (financial services)
  - Balance of Payments problemsand
- **renegotiation** of commitments against compensation (Article XXI)



# Relationship between MFN exemptions and Commitments



- Inadmissible: Reciprocity conditions and other discriminatory provisions which would reduce the scope of a commitment
- Possible: More generous treatment of specified trading partners than provided for under scheduled limitations
- Precondition: Properly defined MFN exemption

# MFN Exemptions vs Schedules

## How an exemption works



Type of Exemption	Scheduled Commitment	Result
Preferences on foreign equity participation in retail distribution services	<i>Foreign equity limited to 49%</i>	<i>All suppliers are entitled to 49%. The exemption only permits granting some countries a higher level</i>
Bilateral agreements covering road transport	<i>No commitments scheduled on road transport</i>	<i>Any preferences or discrimination are permissible</i>
Commercial presence of foreign accounting firms is based on reciprocity	<i>Accountancy commitments show no limitations on commercial presence</i>	<i>The exemption is inoperable since all Members must be granted scheduled access</i>

*Example:*



## **Domestic Regulation not listed in Schedules**

### *Requirements for obtaining a license*

**The applicant must demonstrate an adequate financial base & technical capability to supply the services...**

#### **Criteria relating to financial base**

- **minimum capital requirement of £50,000**
- **presentation of a business plan**

#### **Criteria relating to technical capacity**

**At least 2 staff must be certified engineers with 5 or more years of experience**

**Implication: A license can be denied if the applicant does not satisfy the criteria, even if commitments with no limitations are scheduled on that service**

# Measures/policies not affected by Specific Commitments



- Non-discriminatory domestic regulation (standards, licensing requirements, etc.)
- Government procurement
- Non-discriminatory subsidies
- Export-related measures (subsidies, restrictions, etc.)
- Private commercial actions

# Relationship between Specific Commitments and actual market conditions:



- Commitments guarantee **minimum levels** of Market Access and National Treatment
- Members remain free to offer **better conditions** (subject to MFN principle)
- Commitments **may be upgraded** at any time to reflect the improved conditions

# □ Trade under which modes is affected by the following measures?



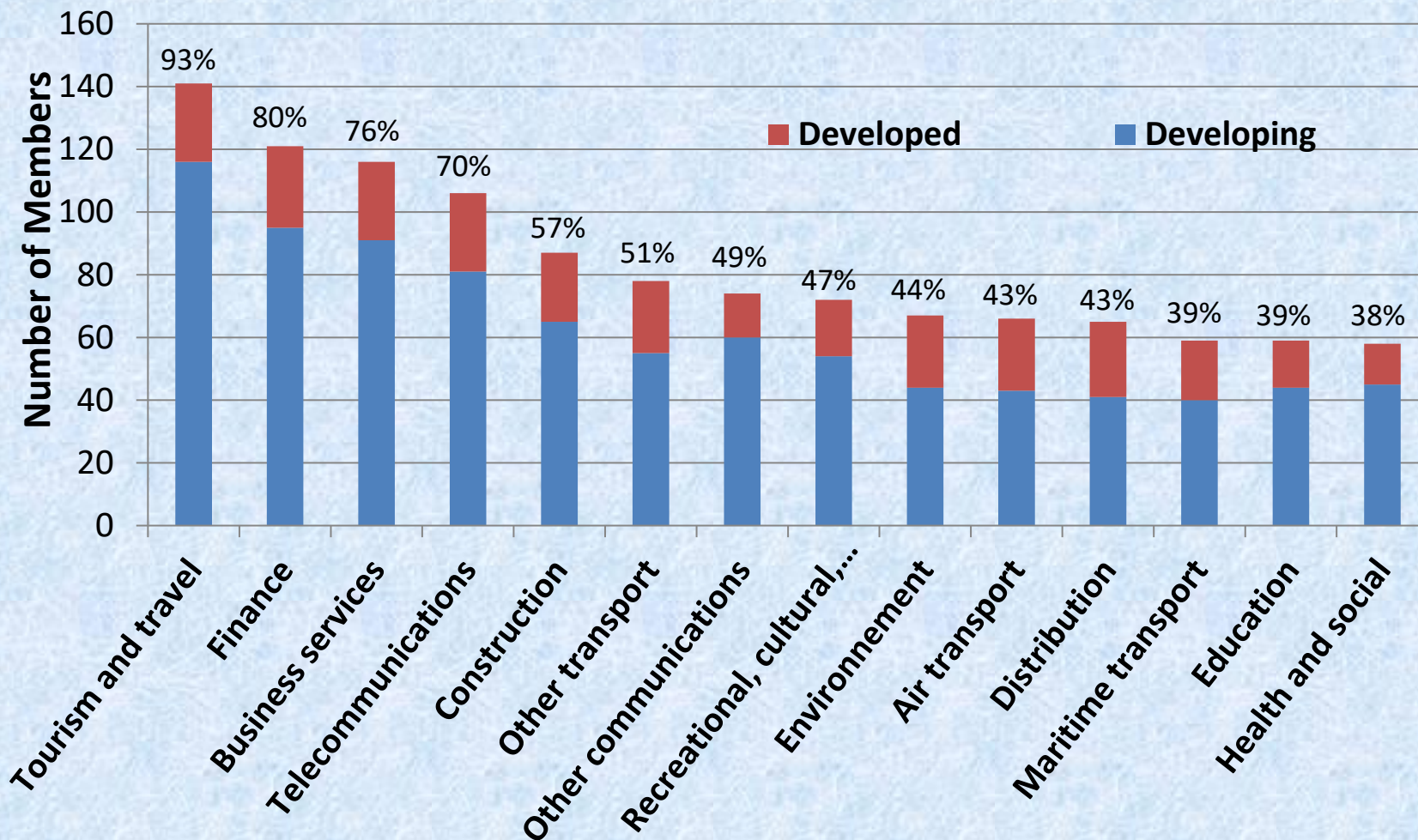
- (i) The number of voice telephone providers is limited to five.
- (ii) Hotels are prohibited from employing foreign nationals, except senior managers.
- (iii) Only language courses offered by domestically-owned schools are funded under a country's educational programme.
- (iv) Companies that have their ship repairs done abroad do not get a tax exemption.



□ Which of the following measures are governments allowed to take in non-scheduled sectors:

- > Prohibiting foreign suppliers from incorporating subsidiaries.
- > Imposing a complete ban on any private establishment.
- > Limiting access to investors from countries with an equally open investment regime.
- > Excluding from public tenders construction companies from countries with closed procurement markets.
- > Liberalizing air links with selected countries under ‘open skies’ agreements.
- > Denying access to foreign medical practitioners without even verifying their professional competence.

# Multilateral bindings: Sectoral coverage of commitments



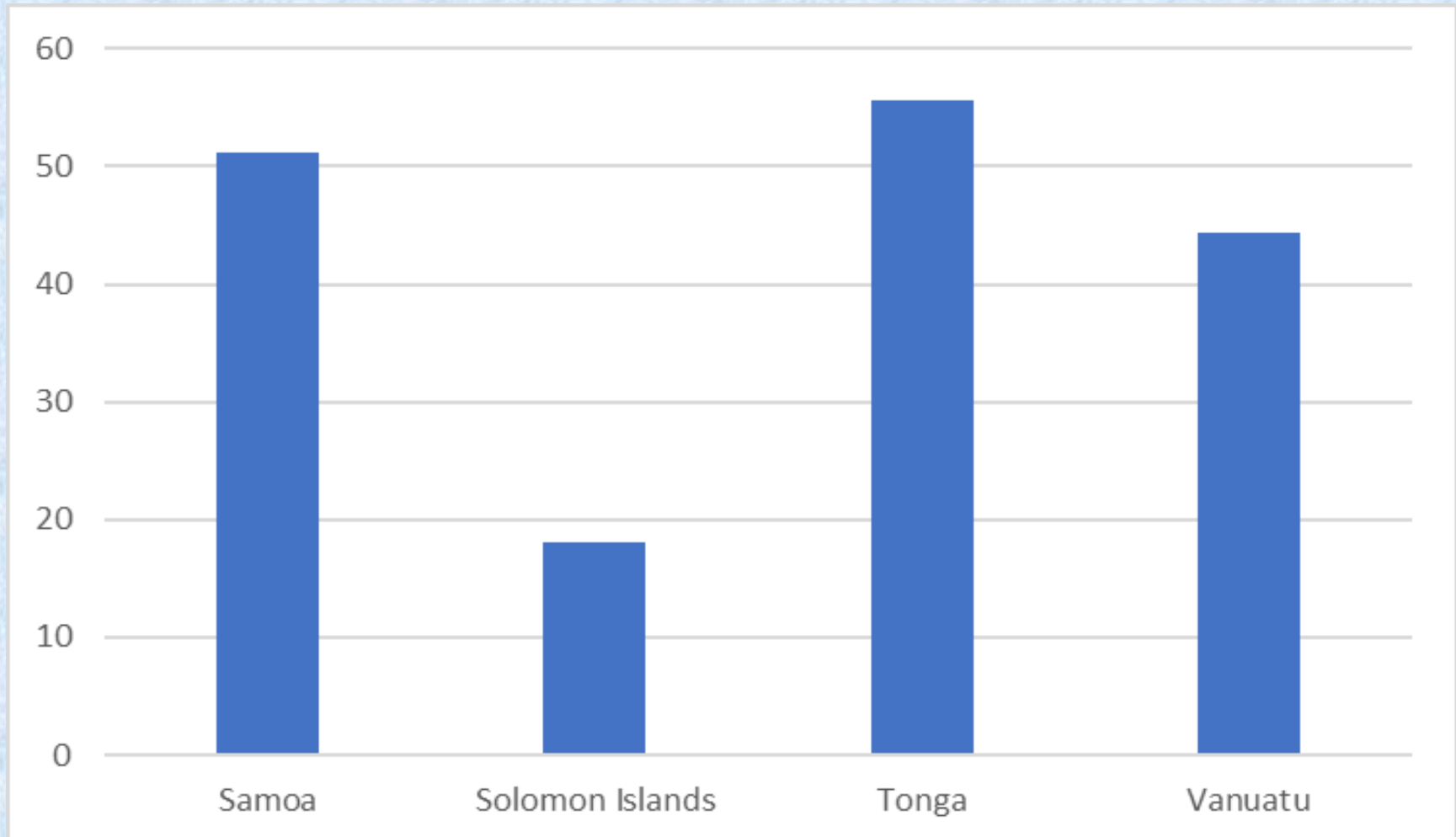


# Average Proportion of Services Subsectors Subject to Specific Commitments under the GATS

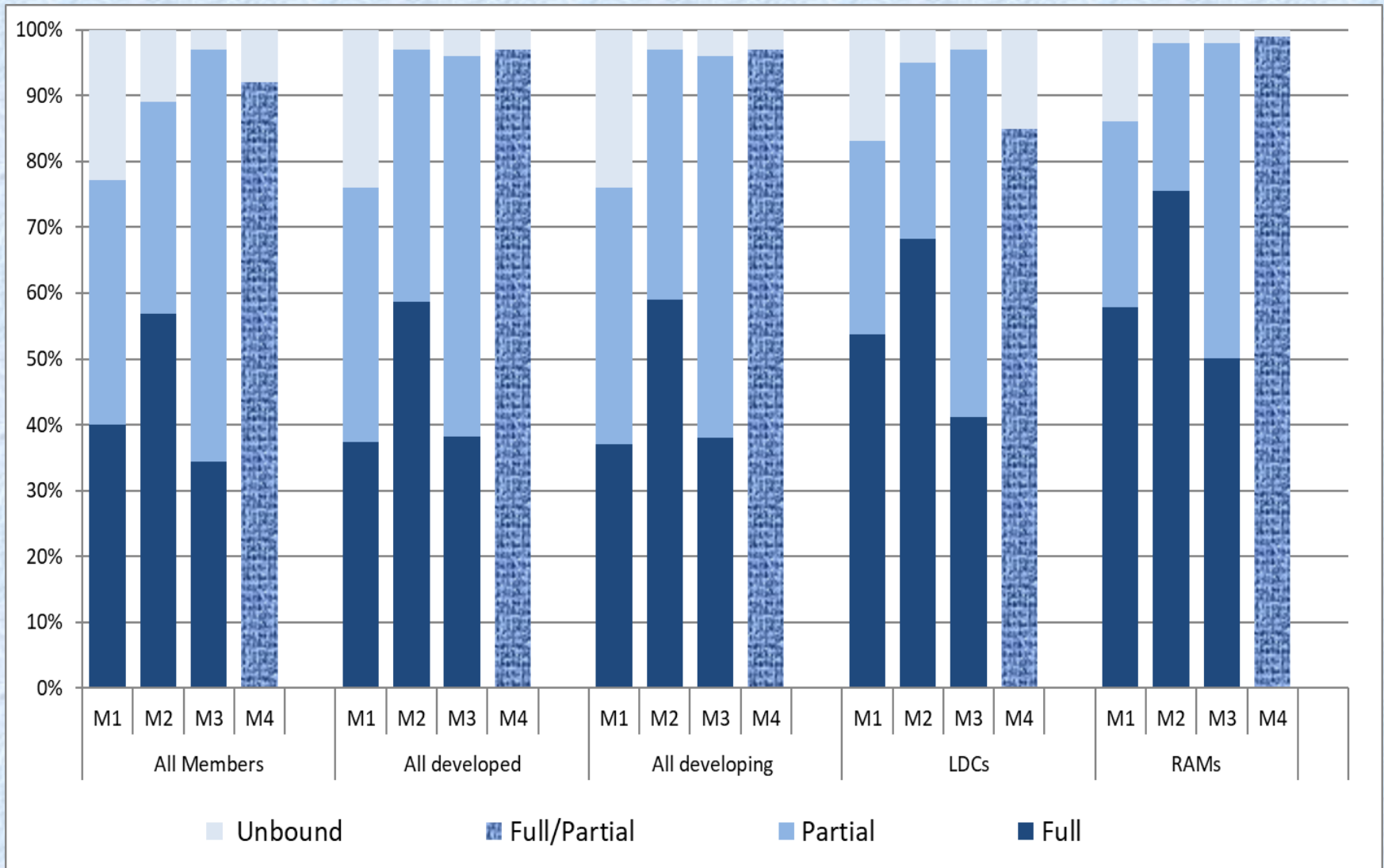


	<b>Average percentage of subsectors committed</b>
<b>All Members</b>	<b>36%</b>
<b>Developed Country Members</b>	<b>69%</b>
<b>Developing Country (DCs) Members</b>	<b>28%</b>
<b>Least developed countries (LDCs)</b>	<b>22%</b>
<b>DCs less Accessions and LDCs</b>	<b>24%</b>
<b>DCs less LDCs</b>	<b>31%</b>
<b>Accessions</b>	<b>65%</b>
<b>All original Members</b>	<b>26%</b>

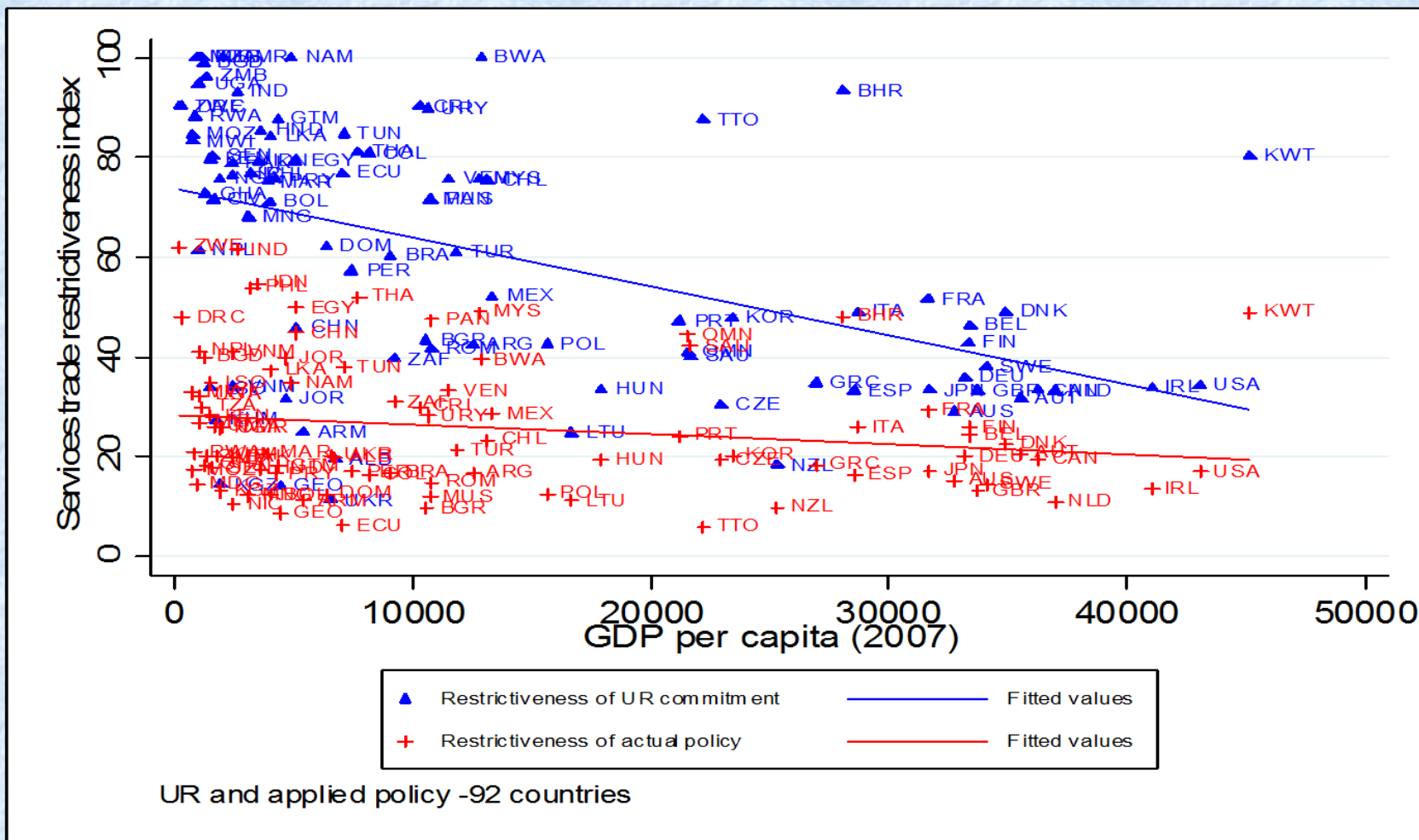
# Proportion of Services Subsectors Committed under the GATS



# Average Levels of Commitment by Mode of Supply for Subsectors Scheduled (%), by Groups of Members



# GATS commitments vs. applied regimes





**Thank you**