



**Regional Training of Trainers  
on how to design, negotiate, and implement FTAs**

**GATS and Trade in Services**

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Delivering Progress

# Objectives of the session

## **PART 1**

### **What is GATS?**

- Scope and definitions
- General obligations and disciplines (including exceptions)

## **PART 2**

### **How does it work?**

- Understanding GATS Schedules of commitments

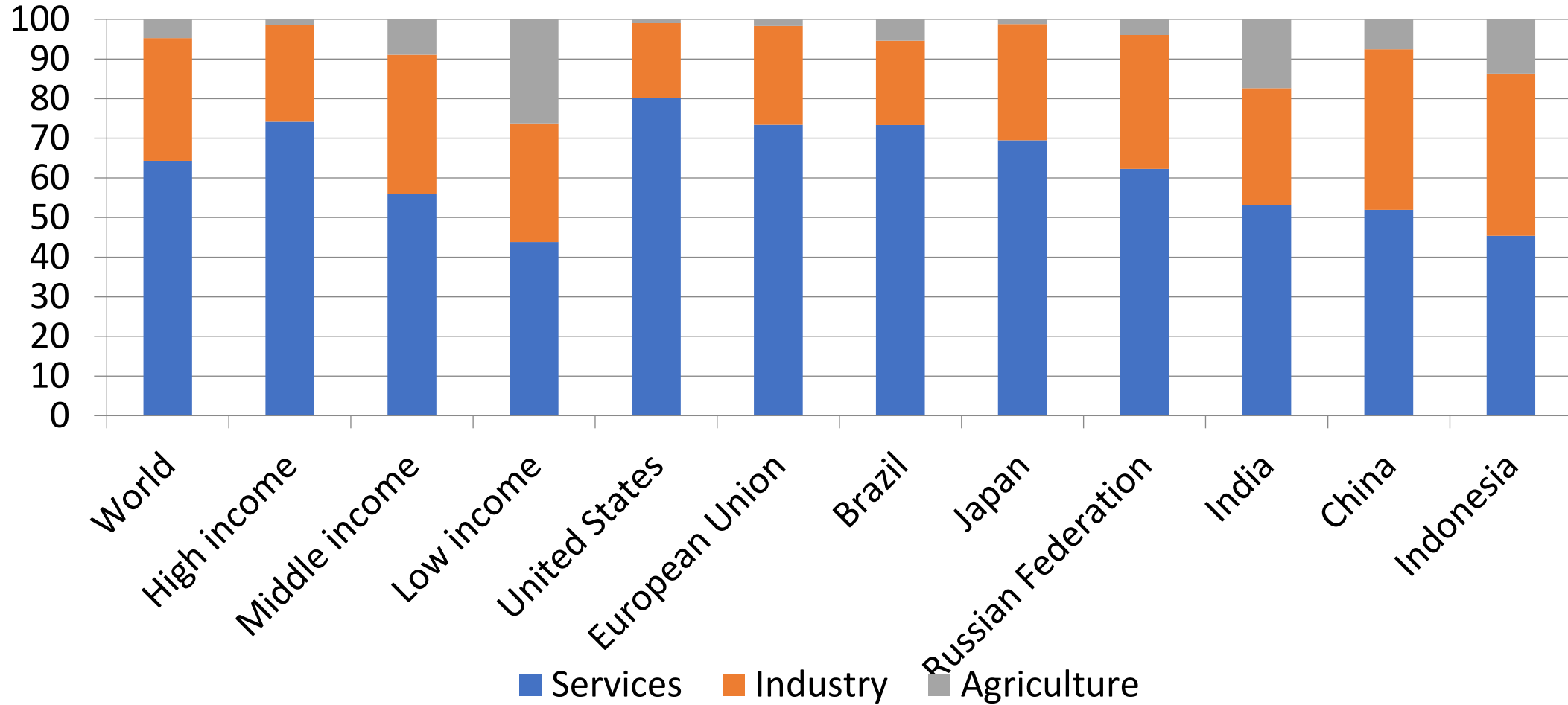
## **Part 3**

### **How does GATS relate to FTAs?**

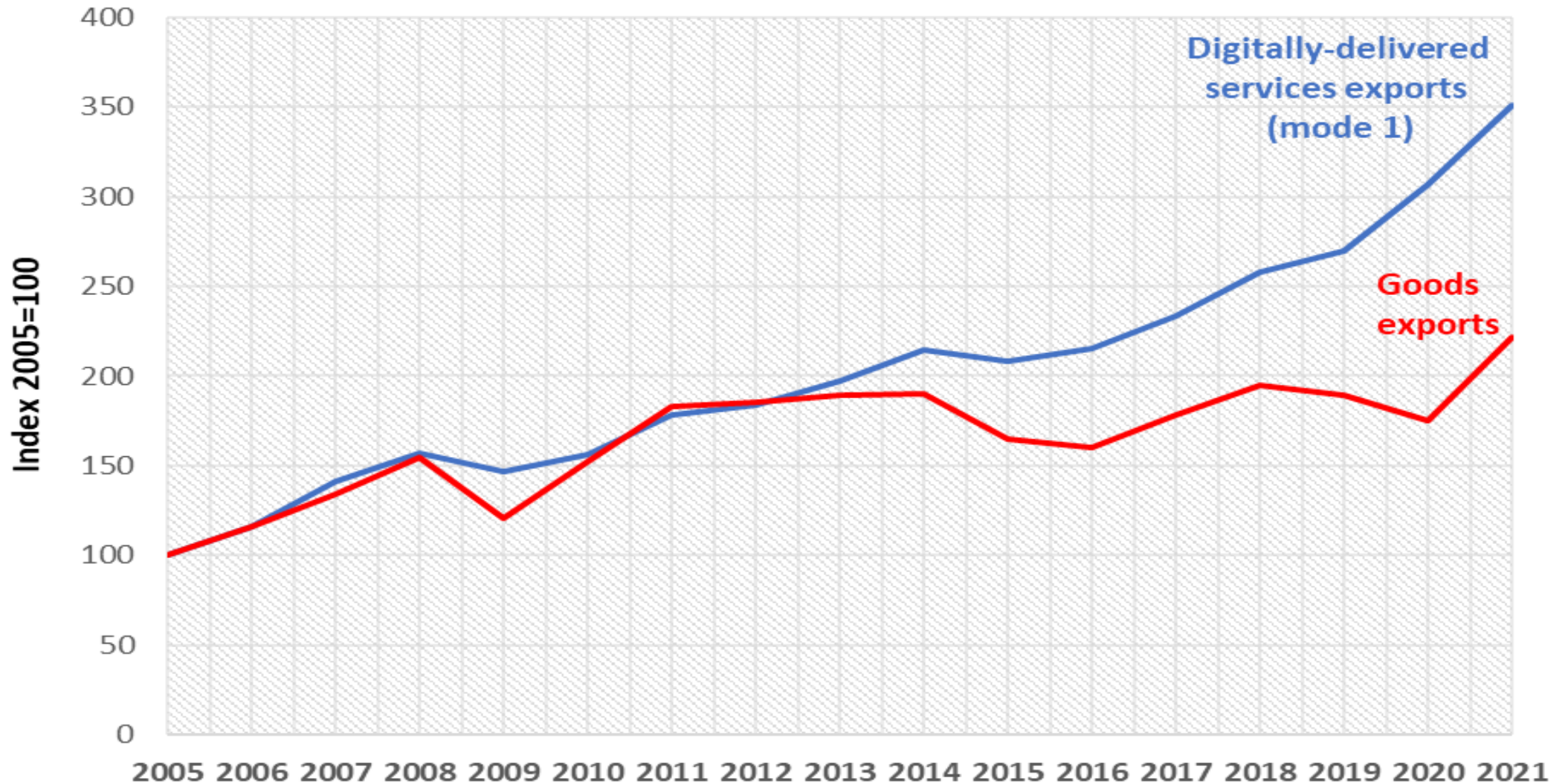
- Rules on "economic integration agreements" (i.e. FTAs)
- Architecture differences
- Scheduling differences – positive vs. negative list approach

# TRENDS: Share of Services Value Added in GDP

2017, selected countries

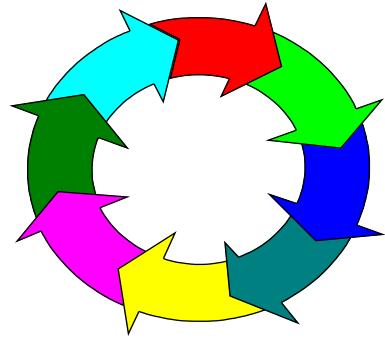


# Strong growth in digital services trade



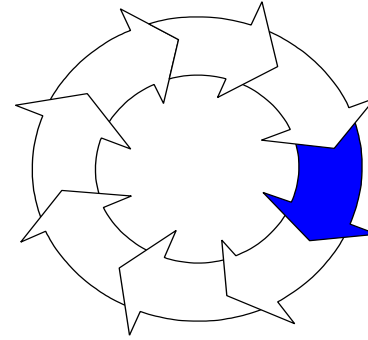
# PART 1: What is GATS?

## Common to all



- Short text of Articles - the “Framework”
- Annexes

## Individual



- Schedules of Commitments
- MFN Exemptions (*only at outset & if needed*)

# Framework (Articles I – XXIX)

- I. Scope and Definition
- II. General Obligations and Disciplines
  - Transparency
  - Most-Favoured-Nation
  - Domestic regulation
  - Others
- III. Specific Commitments
  - Market Access
  - National Treatment
  - Additional Commitments
- IV. Progressive Liberalization
- V. Institutional Provisions

# Eight Annexes

- On provisions
  - Annex on Art. II Exemptions
  - Annex on Movement of Natural Persons
- On sectors
  - Annex on Air Transport Services
  - Annex on Telecommunications
  - Annex on Financial Services
- On extended negotiations (*Italics – completed*)
  - *Annex on negotiations on Basic Telecommunications*
  - *Second Annex on Financial Services*
  - Annex on negotiations on Maritime Transport Services

# Vast coverage of the economy

## Sectors

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

”Clusters” have also evolved,  
e.g. for energy services and for logistics  
services

## Covers *all services*

### *except:*

- Services supplied in the exercise of government authority.
- But only if these are not supplied on a commercial basis or in competition with other service suppliers

## Covers *all measures*

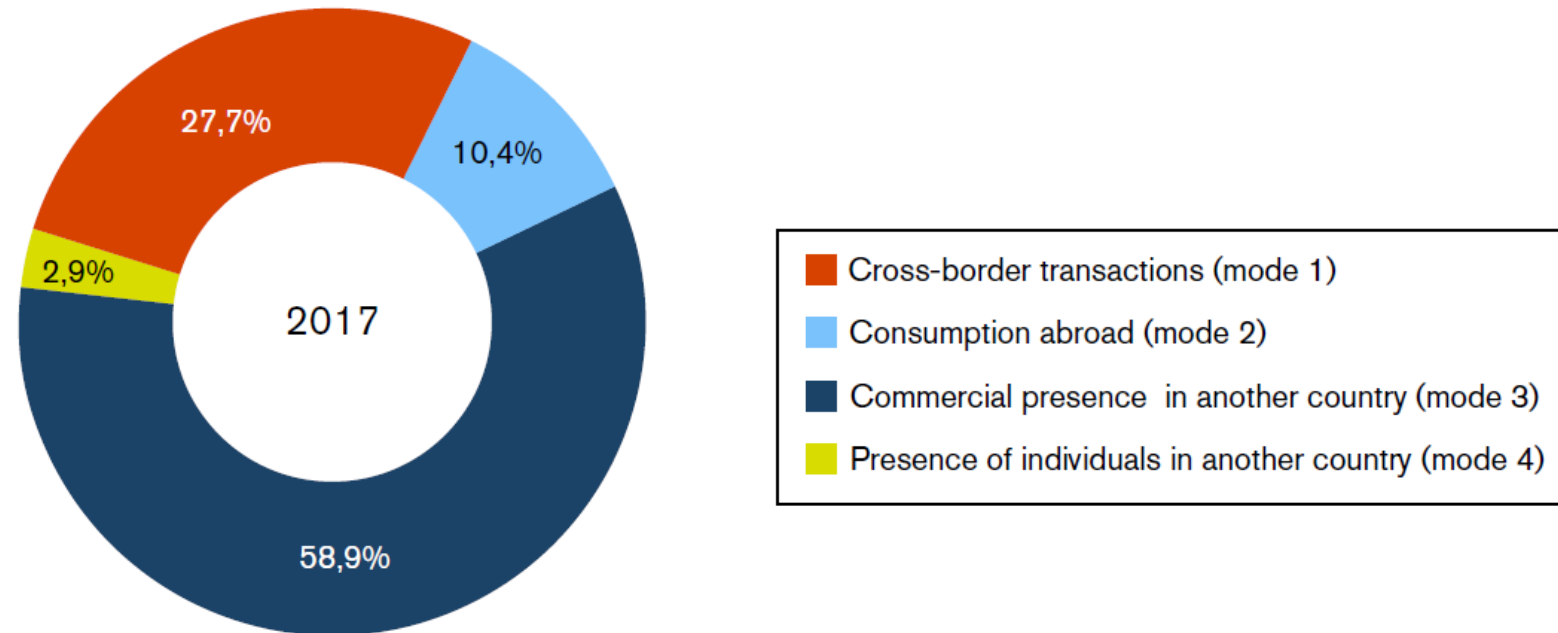
- including those of **local and regional governments** and **non-governmental bodies** exercising delegated authority



# Definition of services

	Defined	Examples
<b>Cross border (Mode 1) (GATT equivalent)</b>	Service supplier not present in the territory where services are delivered	Delivery of any services via telephone, fax, Internet, or the post
<b>Consumption abroad (Mode 2)</b>	Consumers purchase services outside their country of residence	Tourism, Repair of a ship in another country, Going to a hospital abroad for surgery
<b>Commercial presence (Mode 3)</b>	Service supplying entities present in the territory to deliver services	Establishing a bank branch or subsidiary Any foreign direct investment
<b>Presence of natural persons (Mode 4)</b>	Entry and temporary stay of individual persons to supply services	<b>1.</b> Consultant services, Professional or business travel <b>2. Also,</b> foreign employees of a firm supplying services

# World Supply of Services by Modes



Source: WTO estimates (2019).

Note: World trade is calculated as the average of world exports and world imports.

# General Obligations & Disciplines

## Obligations

Some apply generally, “across the board” to all services, *whether or not scheduled* (i.e. they apply “across the board”)

Some apply *only to services listed* in schedules

In most cases, this is determined provision by provision, rather than by Article

## Exceptions

- Contain relevant *disciplines* to ensure that they are not abused

# General Obligations & Disciplines

## Across-the-board obligations

- **Most Favoured Nation Treatment** (no discrimination among Members or preferences to non Members)
- **Transparency** (publication of measures)
- **Domestic Regulation** (mechanisms for appeal of administrative decisions)
- **Recognition** (of licenses and certifications and licensing and qualification criteria)
- **Monopolies & exclusive providers** (prevent actions affecting MFN obligation)
- **Business Practices** (consultations on anti-competitive practices of companies)

# General Obligations & Disciplines

## Applied to scheduled services/sectors

- **Transparency** (notification of new or revised measures to WTO)
- **Domestic Regulation** (requirements, criteria & standards to be objective, not unnecessarily burdensome, procedures not restrictive, impartial implementation, inform applicants for licenses or other authorizations)
- **Monopolies & exclusive providers** (prevent actions adversely affecting commitments)
- **Payments & Transfers** (no restrictions affecting commitments)

# General Obligations & Disciplines

## Most-Favoured-Nation Treatment

Applies to all services, *whether or not listed in schedules*

“... each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of *any other country*” (Article II:1)

# General Obligations & Disciplines

## Transparency

Applies to all services, *whether or not listed in schedules*

**Make publicly available all measures** affecting trade in services

- Includes all relevant laws, regulations, licensing procedures & criteria, technical requirements, etc.

# General Obligations & Disciplines

## Domestic Regulation:

Reasonable, objective and impartial *implementation* of all measures related to **committed services**

Licensing procedures and criteria, technical standards and qualification requirements should be objective, transparent and not more burdensome than necessary \*

*Negotiations recently completed to develop specific disciplines*



# General Obligations & Disciplines

## Exceptions

### In GATS

- General exceptions
- Security exceptions
- **Economic integration agreements**
- Financial services: prudential measures (Annex)
- Restrictions on the balance of payments in a crisis situation

**In WTO** - waiver provisions, to be used in extraordinary conditions, are temporary, and reviewed annually

**Offers Flexibility to address certain broad policy objectives**

# Details of General Exceptions

GATS permits measures to achieve policy objectives such as

- protection of public morals and the maintenance of public order
- to protect privacy of personal data, confidentiality of individual records, and to prevent fraud

***Disciplines on the exceptions:*** The measures must not be more restrictive than necessary, applied in an arbitrary way, discriminate unjustifiably or be used as a disguised restriction

## Part 2

How does it work.

Understanding Commitments

# Schedules of Specific Commitments

## Undertakings listed in Schedules

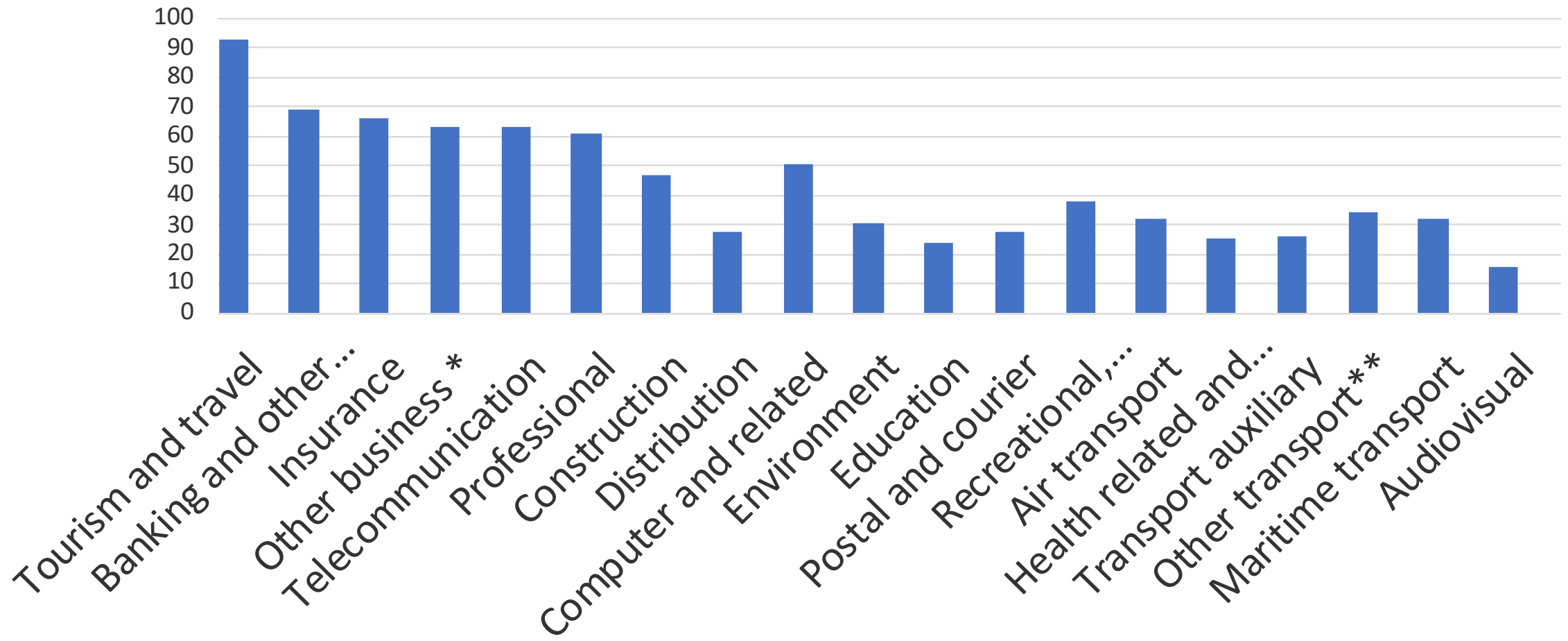
### Market Access

### National Treatment

### Additional Commitments

- Listed by service and modes of supply
- Indicates each Member's legally bound guarantee of specified **minimum** levels of access or national treatment
- Schedules **do not bind laws or regulations** as such

# Multilateral bindings: Sectoral coverage of commitments



# The Schedules

## “Horizontal” Measures

- To avoid repetition, limitations applied to a number of sectors are listed at the front of the schedule. Like sector-specific entries, they are legally binding. Listed by column & mode
- Some may relate to only one mode of supply:  
Example: Overall limitations on foreign investment, formation of corporate entity or land acquisition (market access/commercial presence)
- Others affect more than one mode of supply:  
Example: Tax measures contrary to national treatment

# Using Modes of Supply in Schedules

	Relevant measures to list
Cross border	Measures affecting the treatment of the service -- supplier not physically present
Consumption abroad	Measures relating the the consumer's ability to secure the service abroad
Commercial presence	Measures relating to the supplier's ability to provide the service by means of a corporate presence, e.g. investment laws, company laws
Presence of natural persons	Measures related to the ability of individuals (rather than corporate persons) to do business within the country, e.g. rules on business travellers, work permits

# Market Access Column

## Definition: Article XVI

Measures a Member **MAY NOT** maintain or adopt ***unless specified in its Schedule*** are:

- a. limits on number of suppliers\*
- b. limits on value of transactions or assets\*
- c. limits on number of operations or the quantity of output\*
- d. limits on number of persons that may be employed in a sector or by a supplier\*
- e. measures that restrict or require specific types of legal entity or joint venture
- f. limits on the participation of foreign capital

\* *or an economic needs test having the same effect*

***Is considered a complete or “closed end” definition***



# National Treatment Column

## Definition: Article XVII

Unless relevant limitations are specified in the schedule:

Each Member shall accord to services and services suppliers of any other Member *treatment no less favorable* than that it accords to its own like services and service suppliers

No discrimination in favour of national suppliers on a ***de jure or de facto*** basis

Applies to all discriminatory laws and regulations

*This is considered an “open ended” definition*

# Format of Schedules

Schedules are organized into four columns that specify the extent of liberalization in listed sectors for each type of obligation and 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. SECTOR  A. <u>Subsector</u> (CPC Number or other defining characteristics)	1)  2)  3)  4)	1)  2)  3)  4)	

# Market Access & National Treatment

## Terminology used in entries

Term	Definition of Entry
“None”	Binding to apply no limitations (within the meaning of Articles XVI and XVII). Also means “none other than those listed in the horizontal section”, if any, so need to specify if horizontal limits not applicable
“Unbound” “ <i>Unbound</i> ”*	No commitment, no binding (usually entered for a particular mode of supply wherein other modes <i>DO</i> contain commitments) * <i>Not technically feasible</i>
Limitation(s) specified	Binding where the relevant limitation(s) is specified. Is understood to mean “none, except” i.e. that <i>ONLY</i> said limitation(s) will be applied (in addition to relevant horizontal limits, if any)
“Unbound except ....”	Limits the scope of binding within a mode. Differs from limiting the type of services covered (which is noted in sector/sub-sector column) Limitations applied to the “bound” segment must also be listed

# Structure of Schedules

## A Sample Commitment

Schedules are organized into four columns that specify the extent of liberalization in listed sectors for each type of obligation and 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) Unbound  2) Unbound  3) Only through incorporation with a foreign equity ceiling of 51 per cent  4) Unbound except as indicated in the horizontal section	1) Unbound  2) Unbound  3) None  4) Unbound except as indicated in the horizontal section	

# Additional Commitments Column

## What can be listed?

The definition of possible undertakings is open-ended

They can be unique to a particular Member or Members  
can agree to a common set of additional commitments

The Telecom Reference Paper is the first example of plurilateral negotiation of a common set of such undertakings. Others were under consideration in the Doha talks

# General Obligations vs. Specific commitments

## Measures NOT listed in schedules

### MFN Treatment

Measures inconsistent with MFN **cannot** be listed as limitations in schedules

*(Derogations, if any, had to be noted in list of MFN exemptions submitted in 1994 or at accession. Otherwise, can only be obtained through WTO waiver procedures)*

### Domestic Regulations

Such measures are not “presumed” to be trade barriers, so **are not committed in schedules** -- **unless discriminatory** (*national treatment*) or *subjected to “additional” commitments*”

### Exceptions

Measures covered by GATS exceptions are not listed in schedules, they are covered by the own disciplines found in the provisions concerned

## ***GATS scheduling approach***

Often referred to as a “positive list” approach, the GATS schedules were actually negotiated as a “hybrid” approach.

Sectors are positive listed, so have no MA/NT commitments if not included. Once listed, however, a sector is presumed to be liberalized except with respect to the limitations inscribed (negative listing).

## ***Other GATS scheduling techniques***

- Telecom “technology neutral” approach
- Understanding on Financial Services
- Maritime transport
- Air transport
- Other: Check-list approach... Tourism? Energy?

## Part 3

# How do GATS provisions on Economic Integration agreements (IEAs) relate to FTAs



# GATS Article V: Requirements for EIAs

## Conditions regarding trade among parties to the EIA

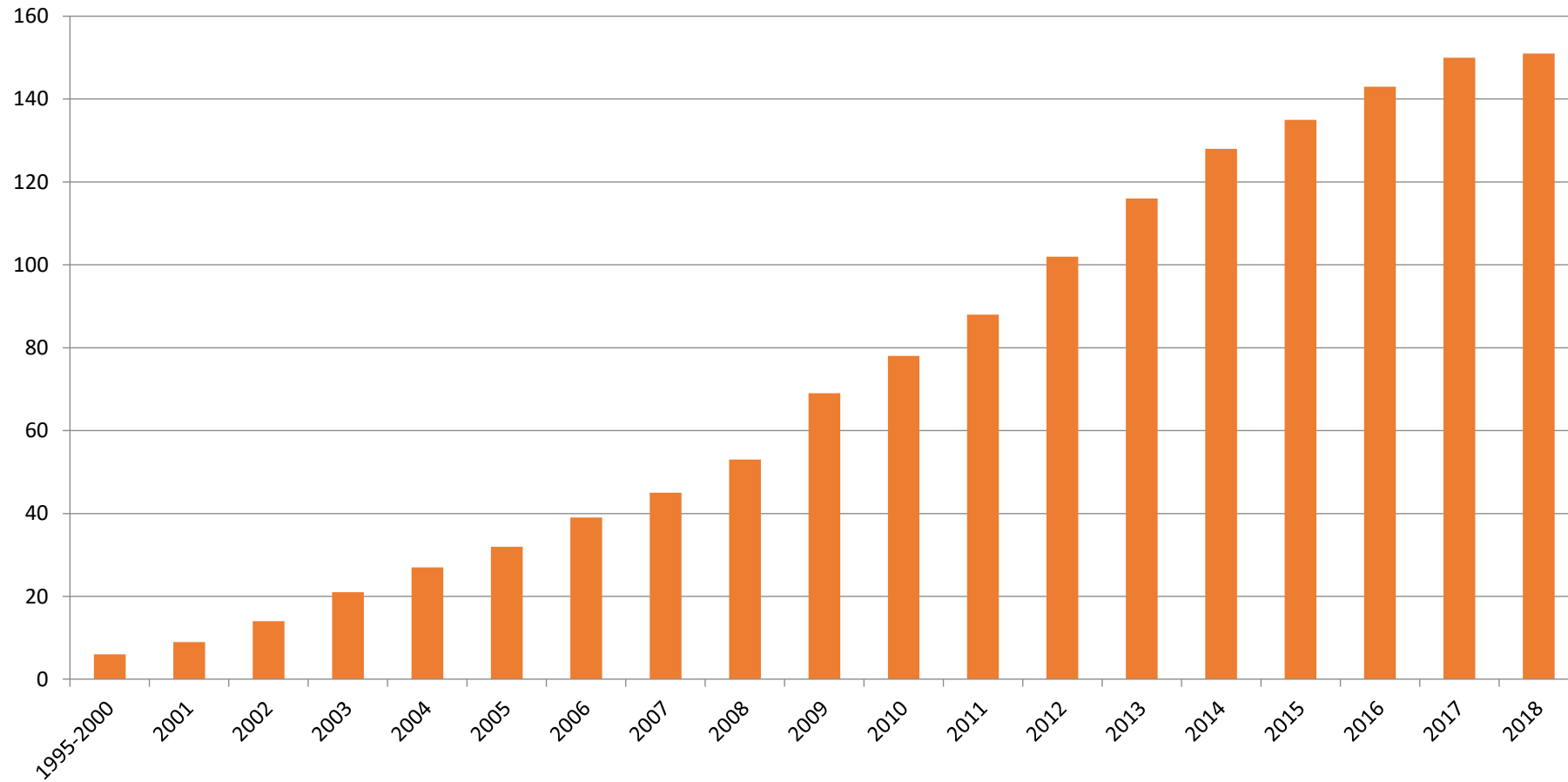
- **Substantial sectoral coverage** (Article V:1(a))
  - ...understood in terms of the number of sectors, volume of trade affected, and modes of supply.
  - No *a priori* exclusion of any mode of supply.
- **Absence or elimination of substantially all discrimination** (V:1(b)), in the sense of Article XVII GATS (NT), in the sectors covered by the agreement
  - Through the elimination of existing discriminatory measures and/or the prohibition of new or more discriminatory measures,
  - **Either at the entry into force of the agreement or on the basis of a reasonable time-frame** (Article V:1(b)) (except for measures permitted under Articles XI, XII, XIV and XIV *bis*).

# Article V: S&D

## Flexibility for Developing Countries

- regarding the **conditions imposed in Article V:1**, particularly V:1 b), where developing countries are parties to the EIA and in accordance with the level of development, both overall and individual sectors (Article V:3a))
- In agreements involving only developing countries, more favourable treatment may be granted to juridical persons owned or controlled by natural persons of the parties to such agreement

# Notifications: FTAs covering trade in services



# General Trends

- Main *demandeurs* in WTO negotiations all involved. e.g., China (14), Japan (14), USA (13), EU (17), Australia (10), Korea (14), Mexico (11)

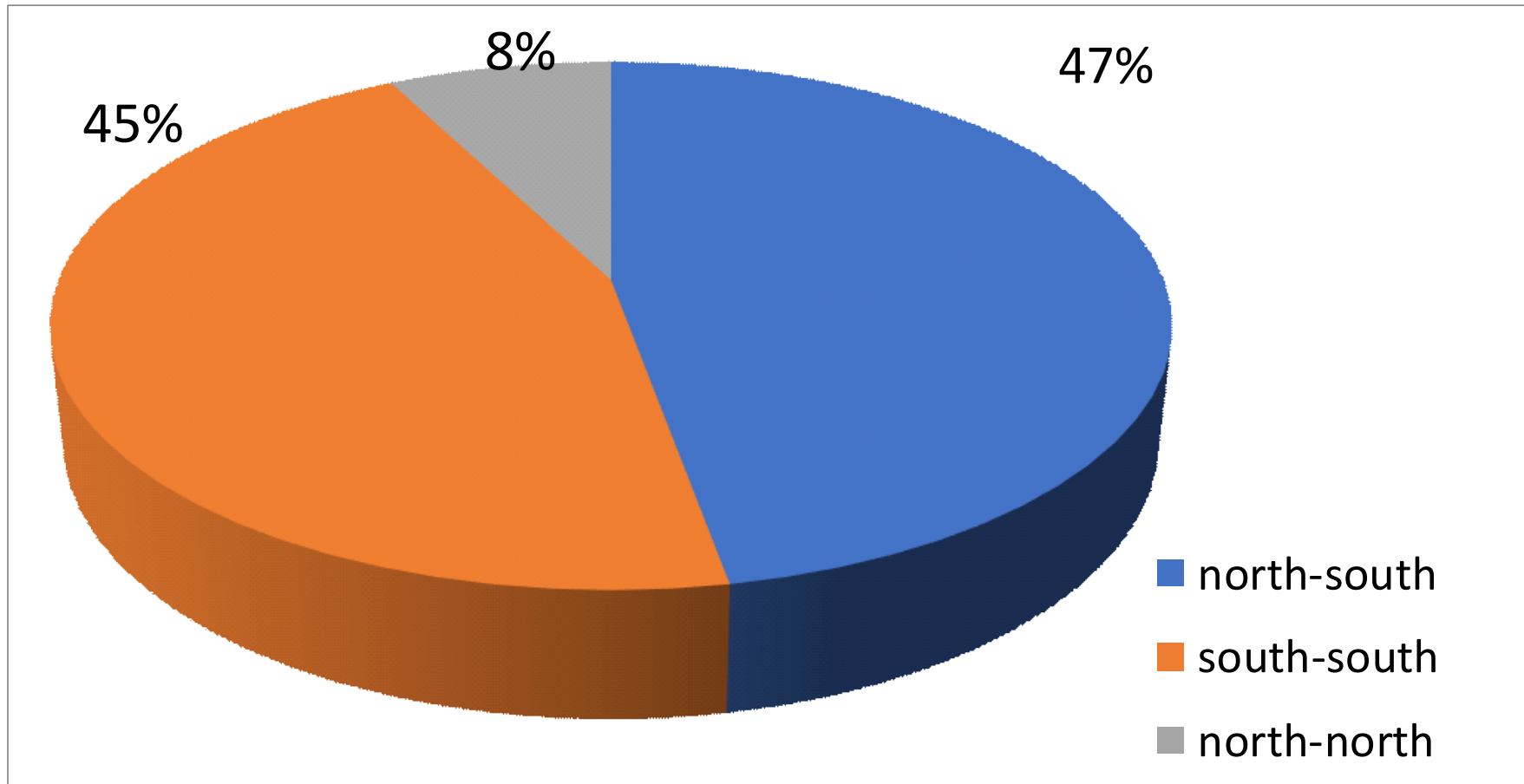
- Larger Agreements

CPTPP, ASEAN-India, AANZFTA, RCEP\* (16 countries), TISA\*, EU-MERCOSUR\*

- Linking important economies

Canada-EU, EU-MERCOSUR\*, India-Japan, India-Korea, Australia-China, EU-LA, China-Korea, China-Switzerland, Japan-EU\*, CPTPP

# Level of Development of Parties to Services FTAs



# Motivations for Services FTAs

- Politics; Negotiating Economy
- To reflect new ways of doing business; advancing new rules
- Security of access for services exporters; GATS+ commitments/Reciprocity
- Different liberalization modalities
- Regional integration
- Encourage and consolidate reforms
- Investment signalling; improving business climate
- Part of trade-offs for preferential access in goods or other issues (e.g., development assistance; labour mobility)
- Bandwagon

# Services in FTAs

## Main approaches/models

- **GATS-type FTAs = Positive list approach**

- Sectoral coverage: Bottom up
- Limitations for MA and NT must be listed per sector/subsector and mode

E.g. EFTA-Korea, EC-Chile, MERCOSUR, ASEAN, US-Jordan, CARICOM,  
most EU agreements, EFTA agreements

- **NAFTA-type FTAs = Negative list approach**

- Sectoral coverage: Top down
- Reservations for MA, NT, MFN, local presence, PRs, SMBD (existing and future non-conforming measures)

E.g. NAFTA, US FTAs (except US-Jordan), Korea-Singapore, Japan-Mexico, Korea-Chile, Canada-EU (CETA), Trans-Pacific Partnership Agreement – TPP\*

- **Hybrid approach = combines positive and negative elements**

- E.g. KORUS (positive and negative for financial services), India – Korea (positive for services, negative for investment), Japan-Indonesia (positive for CB services, negative for investment)

# Services in FTAs

## Scheduling approaches

	Positive list	Negative list
<b>Sectoral coverage</b>	<b>Bottom-up:</b> Commitments apply only to sectors/sub-sectors in Schedule	<b>Top-down:</b> All sectors/sub-sectors liberalized unless otherwise specified
<b>MA &amp; NT</b> (for negative list, may also include MFN, local presence in lists of non-conforming measures)	All limitations must be listed	Annexes on <b>non-conforming measures:</b> <ul style="list-style-type: none"> <li>- Existing measures (stand-still or <i>status quo</i>) – Annex I</li> <li>- Future measures (sectors, sub-sectors excluded) – Annex II</li> </ul>
<b>Other elements</b>		“Ratchet” mechanism



# Example -negative list: Existing non-conforming measure (KORUS FTA, Annex I - Korea)

<b>Sector:</b>	Transportation Services - International Maritime Cargo Transportation and Maritime Auxiliary Services
<b>Obligations Concerned:</b>	National Treatment (Article 12.2) Market Access (Article 12.4) Local Presence (Article 12.5)
<b>Measures:</b>	<i>Maritime Transportation Act</i> (Law No. 8381, April 11, 2007), Articles 24 and 33  <i>Enforcement Regulations of the Maritime Transportation Act</i> (Ordinance of the Ministry of Maritime Affairs and Fisheries No. 340, June 26, 2006), Articles 17, 19, 29, and 30  <i>Pilotage Act</i> (Law No. 8379, April 11, 2007), Article 6  <i>Ship Investment Company Act</i> (Law No. 8223, January 3, 2007), Articles 3 and 31
<b>Description:</b>	<u>Cross-Border Trade in Services</u>  A person that supplies international maritime cargo transportation and shipping brokerage services must be organized as a <i>Chusik Hoesa</i> (stock company) in Korea. A ship investment company must also be organized as a <i>Chusik Hoesa</i> (stock company) in Korea.  Only a Korean national may supply maritime pilotage services.

# Services in FTAs

## General structure & scope of application

### **GATS model ( mainly “positive” approach)**

- Chapter on services - covers 4 modes of supply
- Sometimes additional sections covering specific sectors or topics (e.g. financial)
- Sometimes a separate chapter on establishment or investment (also covers mode 3)
- Many EU FTAs have separate schedules on ‘establishment’, modes 1 and 2 and on mode 4

# Services in FTAs

## General structure & scope of application

- **NAFTA model ( “negative” approach)**
  - Chapter on cross-border TiS (modes 1, 2, 4)
  - Chapter on investment (covers mode 3)
  - Chapters on financial services (often self-contained), telecom (no liberalization obligations)
  - Chapter/annex on temporary entry of business persons (mode 4)
  - Other chapters relevant to services:  
Electronic commerce/digital trade, government procurement, transparency, exceptions, definitions.

# Key Provisions in FTAs

## MFN

- Good number of agreements have no MFN obligation, or weak ones.
- Various other agreements have an MFN clause with limited exceptions
  - Past agreements
  - Selected future agreements
  - Other measure-specific reservations

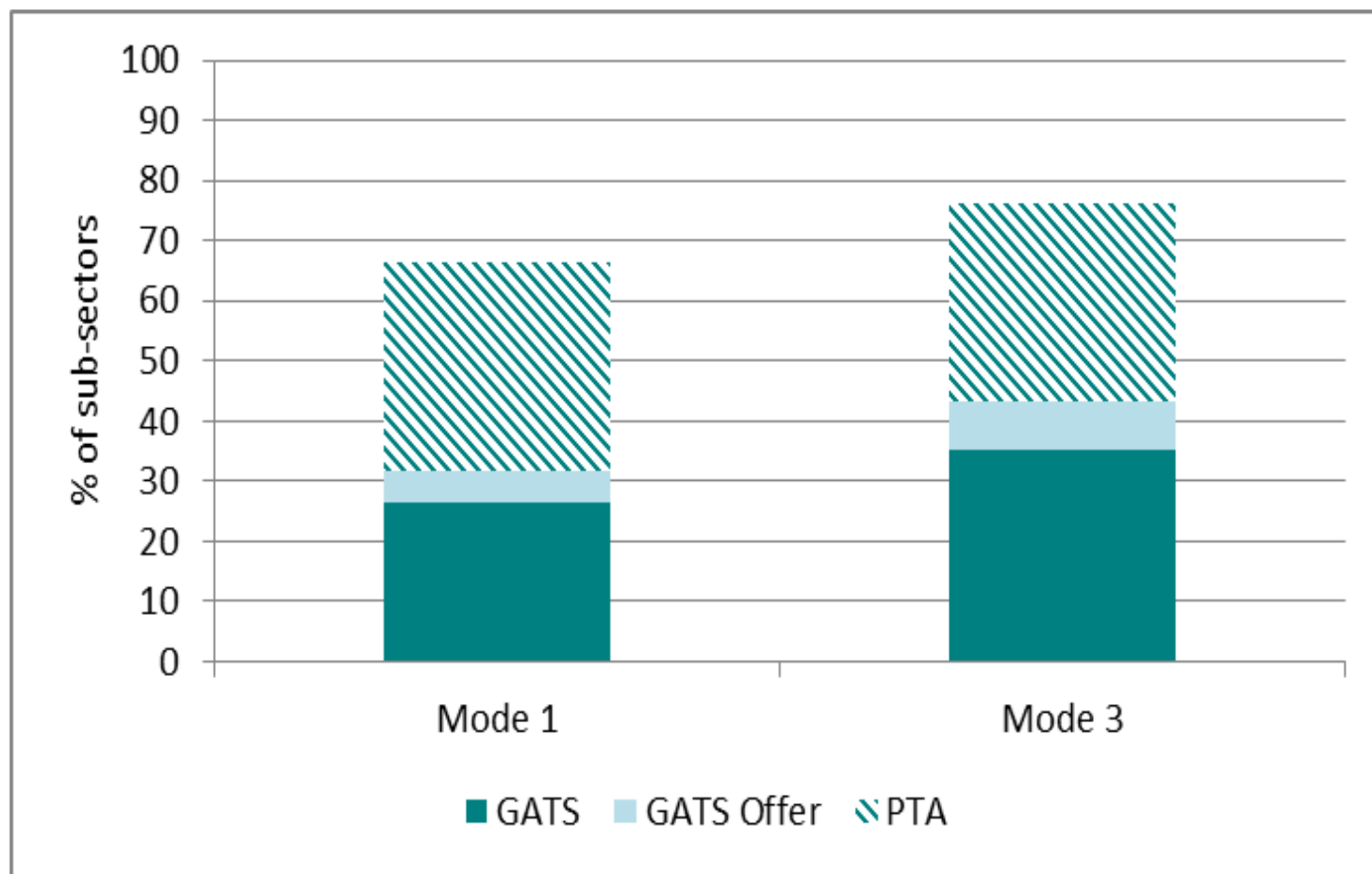
# Sectoral disciplines

- Common in many FTAs (either separate chapters or annexes)
- Very common for financial services and telecommunications
  - Difference: FS sometimes include MA, NT and other disciplines (e.g. US FTAs), while telecom chapters focus on regulatory disciplines
- Sometimes also individual chapters/annexes on transport, professional services, express delivery

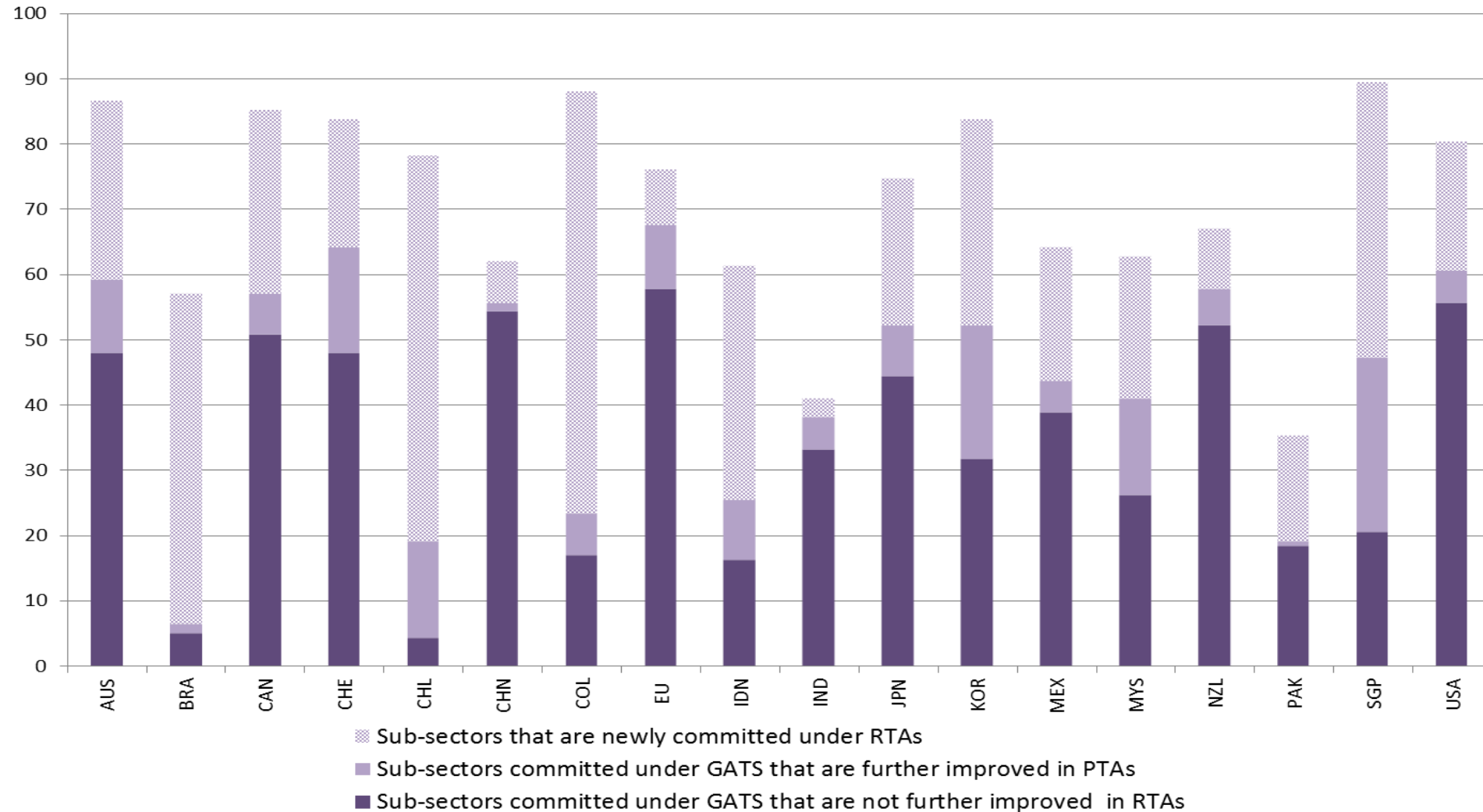
# FTAs: How Much Further than the GATS?

- Overall FTA commitments tend to go significantly beyond GATS offers
  - For either M1 or M3, average score achieved by FTAs is more than twice that of existing GATS commitments
- Unequal results across Members (and agreements)
  - A few Members exhibit spectacular improvements in FTAs
- GATS is far less liberal than “applied” regimes, however, FTAs, while more liberal than GATS, also for the most part do not match applied regimes

# Key Trends: Sectoral Coverage



# Mode 1: New and Improved Sub-sectors





# Implications of market access in Services FTAs

- No loss of revenue as in the case of tariff reductions
- Limited 'new' liberalization resulting from FTAs because key objective has been to bind *status quo* and incorporate future liberalization (via ratchet or negative list)
- Single regulatory regimes for services may imply *de facto* extensions of provisions to third countries

# Challenges for Services Negotiators

- Surveying one's own existing measures and identifying the 'applied regime' for all modes, sectors, and key obligations.
- Translating the applied (or status quo) regime into scheduling language
- If negative list is used, translating GATS schedules into the new format as a starting point
- Defining positions on MA e.g., status quo, unbound, status quo (+), or status quo (-)
- Defining positions on sectoral and topical chapters, e.g. SOEs, digital trade, etc.
- Coordination/consultations with all ministries, regulators, and sub-central entities
- Assess the other side's commitments

Thank you!