ICTSD EPAs and Regionalism Series



Revisiting Regional Trade Agreements and Their Impact on Services Trade

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ICTSD
International Centre for Trade and Sustainable Development

Issue Paper No. 4

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Published by

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Acknowledgments

This paper was commissioned under the ICTSD Programme on EPAs and Regionalism. An initiative supported by SIDA (Sweden); the Department for International Development (U.K.); and the Ministry of Foreign Affairs of Netherlands (DGIS). ICTSD is grateful for their support.

The author would like to thank Ambassador Sergio Marchi (ICTSD), Mr Christophe Bellmann (ICTSD), Mr David Vivas-Eugui (ICTSD), Mr Johannes Berbabe (ICTSD) Mr El-Hadji Diouf (ICTSD), Mr Maximiliano Chab (ICTSD) and Ms Marie Wilke (ICTSD) for their comments.

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Citation: Marconini Mario, (2009). *Revisiting Regional Trade Agreements and Their Impact on Services Trade*. International Centre for Trade and Sustainable Development, Geneva, Switzerland. International Centre for Trade and Sustainable Development, Geneva, Switzerland.

The views expressed in this publication are those of the author and do not necessarily reflect the views of ICTSD or the funding institutions.

ISSN 2071-5952

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FOREWORD

Regional trade agreements (RTA) have become a distinctive feature of the international trading landscape. Their number has increased significantly in recent years, as World Trade Organization (WTO) member countries continue to pursue these agreements. Some two hundred odd agreements have been notified to the WTO but their number may be actually higher, as some agreements are never notified to the multilateral bodies and many more are under negotiation. As a result, more and more trade is now covered by such preferential deals, prompting many analysts to suggest that RTAs are becoming the norm rather than the exception.

Many regional pacts contain obligations that go beyond existing multilateral commitments, and others deal with areas not yet included in the WTO, such as investment and competition policies, as well as labour and environment issues. Regional and bilateral agreements between countries at different stages of development have become commonplace, as have attempts to form region-wide economic areas by dismantling existing trade and investment barriers, an objective that figures prominently in East Asian countries' trade strategies.

Yet the effects of RTAs on the multilateral trading system are still unclear, as is their impact on trade and sustainable development. They represent a departure from the basic Non-discrimination principle of the WTO, and decrease the transparency of global trade rules, as traders are subject to multiple, sometime conflicting requirements. This is particularly the case in relation to rules of origin, which can be extremely complex and often vary in agreements concluded by the same countries. Also, the case that WTO-plus commitments enhance sustainable development is far from proven, and it is not readily apparent whether RTAs enhance trade rather than divert it.

However, developed and developing countries alike continue to engage in RTA negotiations, and this tendency seems to have been intensified recently due to the slow pace of progress in the multilateral trade negotiations of the Doha Round. Countries feel the pressure of competitive regional liberalization and accelerate their searches for new markets. Thus, while most countries continue to formally declare their commitment to the multilateral trading system and to the successful conclusion of the Doha negotiations, for many bilateral deals are taking precedence. Some countries have concluded so many RTAs that their engagement at the multilateral levels is becoming little more than a theoretical proposition.

Thus, gaining a better understanding of the workings of RTAs and their impact on the multilateral trading system is a key concern of trade analysts and practitioners. Current WTO rules on regional agreements, mainly written in the late 1940s, do not seem well equipped to deal with today's web of RTAs. Economists dispute whether RTAs create or divert trade, and political scientists try to explain the resurgence of RTAs by a mix of economic, political and security considerations. In some cases, the fear of losing existing unilateral non-reciprocal trade preferences provides the rationale for launching RTA negotiations, as is the case of the Economic Partnership Agreement (EPA) negotiations between the European Union (EU) and its former colonies in Africa, the Caribbean, and the Pacific (ACP). Many worry about the systemic impact of RTAs and dispute whether they should be considered "building blocks" to a stronger and freer international trading system or rather "stumbling blocks" that erode multilateral rules and disciplines.

There are many interpretations of the dynamic relationship between RTAs and the WTO. The fact remains, however, that RTAs are here to stay. If anything, they will continue to increase in number in the coming years. They are already an integral part of the international trade framework, and influence the behavior of governments and traders. They co-exist with the multilateral trading system and impact it in manners that have yet to be fully understood. Regional rules often replicate multilateral disciplines, but sometimes go beyond them by going deeper into some commitments, with implications for sustainable development that need to be highlighted.

And it may well be that some regional disciplines might be able to find their way into the multilateral framework.

It is for these reasons that ICTSD has decided to initiate a research, dialogue and information programme whose main purpose is to contribute to filling in these knowledge gaps and gaining a better understanding of the evolving reality of RTAs and their interaction with the multilateral trading system.

This issue paper, titled *"Revisiting Regional Trade Agreements and Their Impact on Services Trade"* written by Mr. Mario Marconini, is a contribution to that process. The paper exhaustively reviews services disciplines included in several Federal Trade Agreements (FTA). The aim of the paper is to enable stakeholders to understand how rules and commitments regarding trade in services have been introduced in FTAs, and how those policies might impact sustainable development in developing countries.

The paper starts by examining the main models used for agreements on services disciplines, namely the approaches deployed by the North American Free Trade Agreements (NAFTA), the WTO General Agreement on Trade in Services (GATS) and the EU in form of the Economic Partnership Agreements (EPAs). Unlike already existing research, this analysis goes beyond a discussion of the different mechanisms for liberalization (i.e. the negative and positive approach) thus introducing new groundbreaking research on services provisions in FTAs.

With reference to the 3 models for services disciplines, the paper continues with an in depth analysis of different provisions contained in the services chapters. Among others, the analysis addresses scope and coverage, Non-discrimination, market access, domestic regulation, mutual recognition and cooperation.

In the light of the great importance of services trade for developing countries, concluding chapters complement the technical analysis with a discussion on the interaction of services disciplines and development objectives including the crucial aspects of free movement of capital and labour.

The main conclusion of the paper is that the incorporation of services disciplines in FTAs has thus far delivered little either in terms of liberalization or in terms of development. Rather services agreements tend to bind the status quo. Regional agreements have also fallen in short of achieving progress in matters that were supposedly better tailored for preferential agreements and have not been included in the multilateral trading regime – such as mutual recognition. Coequally, the co-habitation of FTAs covering services and the GATS seems to have been accepted by the international trade community. In any case, the difficulty for developing countries is less the choice of forum than the identification of their specific interest in services negotiations. The fact that some agreements may include development provisions is no guarantee that the individual country interests are adequately contemplated.

We hope that this paper, together with the others in this series on preferential trade agreements, will facilitate the task of identifying domestic interests and suitable legal framework for achieving those, while helping to promote a better understanding of the workings of RTAs and how the deals interact with the multilateral trading system and development objectives.

Ricardo Meléndez-Ortiz
Chief Executive

1. INTRODUCTION

14 years after the entry into force of the World Trade Organization (WTO), the suspicion that we continue to know uncomfortably little about the service sector lingers on. This is not to say that service industries around the world do not know their own plight and outlook. As is widely known, services were the object of a host of reforms in the last 20 years, particularly in the developing world, ranging from privatization to full-fledged regulatory overhauls. In the developed world, services had been at the forefront of the regulatory debate even before the financial debacle of 2008, the roots of which were at the very heart of financial regulation in mature markets. Now, the world is poised to welcome creativity and innovation in regulating markets and the spillover from the financial to the overall services universe is all but a certainty. Liberalization, to the extent that it frees service suppliers from the constraints of regulation, is now back on the priority watch list of policy-makers and regulators around the world; so are trade in services negotiations.

As if a global financial and economic crisis were not enough, services trade - as all trade - has taken a major blow in the recurring failures of the Doha Development Agenda (DDA). Driven by a core of issues unrelated to services (domestic agricultural subsidies, agricultural tariffs and industrial tariffs), the DDA impasse has gone from disease to symptom: it does much now to reveal the overall malaise plaguing the world trading system and trade relations in general. Once again, the system already gave indications of weakness and hesitation way before the collapse of the financial markets in the developed world. While leaders herald the multilateral trading system as one of the major ingredients of a consistent recovery, economic constituencies around the world claim for protection, - particularly in the hardest-hit countries, which, this time, happen to be first and foremost, the developed. 2009 opens as a highly schizophrenic moment in trade: what is recognizably good policy for the world (keeping markets open) is precisely that which every country is bent on resisting.

Services admittedly constitute just a part of that gloomy picture but a very important part at that. It is not as if matters were nice and clear for services before the "storm" but now they certainly have become yet more complex. The external implications of internal processes, the core concern in services trade liberalization, are now even more important than before. Although the U.S. has lagged behind in its traditional leadership role in trade, whether multilateral or (more recently) regional, agreements contemplating services trade continue to be in the making. Trade negotiations abound of the sort that forces countries to think and act fast - or else lose their strategies, their policies and, unfortunately, their markets. Countries, even when already some distances down the learning path, continue to be unsure about how best to translate their domestic priorities at the negotiating table. The trade in services regime had just been born with the Uruguay Round and already in the first round to follow faces tough choices imposed by the rise of a strong and dynamic regionalism.

To be sure, services liberalization across countries did not start with the Uruguay Round. Western Europe had already been at it for 40 years, since the advent of the Treaty of Rome which laid down the free movement of persons, services and capital alongside that of goods as the crucial element in the conformation of an "Internal Market of the European Economic Community". Even the recourse to regional *free trade agreements*, as opposed to the much broader, supranational economy-wide European approach to services liberalization, predated the multilateral compact, as attested by the Canadian-U.S. Free Trade Agreement (CUSFTA) - entered into force on 1st of January 1989. What is new in 2005, effectively, is that 2 universes now apply to services trade, the regional and the

multilateral, when only 15 years ago services, with the exception of the European Economic Communities, were fully free from any binding trade obligations *at virtually any level*.

Since CUSFTA, close to 6ty services agreements have been notified to the WTO - whether as chapters or specific services-related provisions in free trade agreements (FTAs) or economic integration agreements (EIAs). Since then, therefore, the regional and multilateral universes have expanded, albeit in a somewhat uncoordinated fashion, clearly guided by the precepts laid down in the services free trade agreements of the nineties. Even though the negotiation of "new generation" trade agreements that included trade in services coincided in large measure with the reform push of the nineties in many developing countries, it would be highly fallacious to correlate the 2 phenomena. The agreements did not promote any of the market openings that took place but merely, in some cases and to a very limited extent, reflected that opening in schedules of commitments. The typical practice so far has been for countries to bind less than their existing regulatory situation *even when that situation corresponds to an open market*.

As liberalization has been recent in many developing countries, many of them seek time and "policy space" to revisit, re-evaluate and, perhaps, re-regulate. Ironically, developed countries may go through some of that feeling as they revamp and overhaul their own regulatory regimes in the mother of the all service sectors: the financial. The translation of that for negotiating purposes is fairly clear for those that want to see it: caution in negotiating new commitments, which includes, if necessary, a staunch reluctance to enter into new agreements.

2. A TALE OF 3 MODELS?

By the time the WTO came into force on 1st January 1995, the world was primed for trying its own hand at services free trade agreements. With the European experience as a useful but rather distant reference[1], there were 2 approaches to such agreements that carried the day. In the General Agreement on Trade in Services (GATS), the world could see a broad-based agreement, inclusive of all services sectors and forms of commercialization, with varying degrees of flexibility in the application of its principles and the mechanics of liberalization. In the North American Free Trade Agreement (NAFTA), it could see an equally broad based agreement, with a somewhat more complex structure for services activities, not inclusive of all services sectors but fairly ambitious from a market opening perspective, though also equipped with flexible rules and liberalization instruments. The choices were there and countries did indeed begin to pick and choose in the presence of their burgeoning regional drive.

Nowadays a cursory look at the complex web of regional and bilateral agreements indicates that the 2 initial models have been widely followed and, in some cases, somewhat "improved" - depending on the criterion adopted. In fact, changes, additions and improvements have been so many that in one particular case a new model can actually be discerned. In much the same way as the mechanics of liberalization were not so long ago the main distinguishing feature between services trade agreements, another level of distinction has now become important – particularly in the wake of a failed round of multilateral trade negotiations aimed, in principle, at dealing with trade *and* development issues. That third model does just that, making distinctions between GATS and NAFTA remain important but adding a whole new level of issues to the services negotiating table. That model is the one pursued since 2002 by the EU in what has become known as the "Economic Partnership Agreements" (EPAs).

In what follows below, a brief introduction to the 3 models will be provided alongside an also introductory review of agreements that either borrowed or departed from them. A closer examination of the details of each model as they have been applied across the world will then be attempted in the section to follow.

2.1 GATS

The GATS, as the name reveals, is a general agreement like the General Agreement on Tariffs and Trade (GATT). It came into force with the rest of the Uruguay Round Agreements on 1st January 1995 - when the WTO itself came into force. It has 29 articles, divided into 6 parts, and 6 annexes of which 4 are of a sectoral nature (financial services, telecoms, air transport and maritime transport). The first *general* characteristic of the GATS is its universal coverage of sectors and modes of commercialization (or "modes of supply" as stated in the agreement itself). It is a binding arrangement among governments and not a mere best-endeavors compact. Most of its general features resemble those of the GATT, such as: each member has a vote and can exit the agreement with a previous notice; there is a dispute settlement system applicable to all members; rules can only be altered subject to an overall consensus; all members accept as a package the results of the multilateral, plurilateral and bilateral negotiations.

Clearly, the GATS included some important adaptations to general GATT law and practice. Thus, Non-discrimination, in both of its manifestations – most-favored-nation and national treatment – applies to services *and* service suppliers (firms or people). Unlike the GATT, a principle of market access was necessary to set parameters within which the concept could exist in relation to services. Even principles such as transparency had its own particularities vis-à-vis services: as the regulation is so vast for all service sectors

combined, the agreement established the obligation for members to set up contact points where relevant information should be made available upon request. As with the GATT, the notion of free trade agreements and economic integration is a matter of disciplines and Article V of the GATS, as its GATT counterpart, Article XXIV, permits regional agreements but only under certain conditions: a substantial sectoral and modal coverage alongside a substantial absence or elimination of discriminatory measures.

Where GATS went fully beyond GATT was in some key regulatory matters. An article on domestic regulation, for example, recognizes that countries have a threshold of regulation that will not be considered restrictive subject to certain conditions. Another article, on recognition, permits countries to recognize education, experience and certificates obtained in other countries for the supply of services, permitting also that such recognition take place unilaterally or *via* a bilateral agreement. GATS also delves into monopolies and exclusive service suppliers, business practices and security exceptions – all of which are more relevant for trade in services than in goods.

Finally, perhaps the feature that is most associated with the GATS is its "positive-listing" of sectors under its liberalization mechanism. According to the GATS, countries make liberalization commitments only in sectors they *positively* include, after their negotiations with trading partners, in their schedules. Sectors that are not included in the schedules are free of any commitment to liberalization. According to the literature, this feature makes the GATS a "flexible" agreement – or at least a *more* flexible agreement than some of the agreements that would follow it in the future.

2.2 NAFTA

Negotiations on a "North-American Free Trade Agreement (NAFTA)" started later than the Uruguay Round but the resulting agreement actually went into force a full year before the WTO or the GATS (1st of January 2004). It was in August 1992 that the governments of Canada, Mexico and the United States would announce the conclusion of the negotiations for an agreement that, like its predecessor between Canada and the U.S., included provisions on trade in services in several of its chapters. Thus, Chapter XI dealt with Investment, Chapter XII with Cross-Border Trade in Services, Chapter XIII with Telecommunications, Chapter XIV with Financial Services and Chapter XVI with Temporary Entry of Business Persons. Other chapters, particularly the ones dealing with standards, government procurement, intellectual property and competition policy, monopolies and state enterprises, also incorporated references to services-related matters.

As the GATS, the NAFTA is a binding arrangement among governments and not a mere best-endeavors compact. It also resembles the GATS in many aspects, including the general approach to the principles of the Non-discrimination (national treatment and most-favored-nation) and transparency (in the absence of a principle on market access, however). On regulatory matters, NAFTA has fallen short of adopting all GATS provisions on the matter but has gone beyond GATS in certain aspects, including provisions on good government. It also has provisions on monopolies and state enterprises, but goes beyond GATS in having a chapter on competition policy – applicable to both goods and services.

Not all chapters of NAFTA, contrary to the belief of many, represent an inducement to free trade in services. In fact, whole service sectors have been excluded from the purview of the agreement, such as the air transport services, basic telecommunications and maritime transport services sectors. In some cases, provisions limit the scope of liberalization applied to a theme or issue, the best example of that being the movement of natural persons which is circumscribed to "business persons". Conversely, in other

cases, the agreement went beyond its predecessor and included liberalization commitments for the land transport services sector (excluded in CUSFTA) alongside a number of annexes on the professions.

In stark contrast to the GATS, the feature that is most associated with the NAFTA is its "negative-listing" of sectors under its liberalization mechanism. Under NAFTA, countries list the sectors they will not liberalize (thus, "negative" listing) in their schedules. Sectors that are not included in the schedules are therefore fully liberalized – which is precisely the opposite plight of non-included sectors under GATS. Clearly, negative listing is more ambitious or pro-liberalization than its positive counterpart to the extent that it "forces" parties to be fully transparent and commits all sectors to liberalization in some measure – as opposed to freeing some sectors from liberalization in full measure.

2.3 EPAs

The EU has perhaps been the most active protagonist in devising agreements that include "cooperation" and "development" - a phenomenon which is intrinsically highly positive since it involves the richest grouping of countries in the world. It should not come as a surprise that the most cooperation or development-minded compacts deal with the ACP – Europe's former colonies in Africa, the Caribbean and the Pacific. The ACP-EU Partnership Agreement, or Cotonou Agreement, signed in June 2000, replaced the Lomé Conventions – its precursor for the foregoing 25 years. Even though the Cotonou Agreement is a far cry from a "conventional" services agreement, it contains a chapter on trade in services under a part devoted to cooperation strategies. The language of the text recognizes from the outset that ACP countries may not be prepared for wholesale liberalization and that they need first and foremost "some experience in applying the Most Favored Nation treatment under GATS".[2]

Dealing with trade *and* development in bilateral agreements has therefore not been a novelty for the EU. Even the so-called European Union Agreements, also known as the EU FTA's, for example, despite an overall predilection for GATS rules and principles, differ from GATS by going beyond trade to deal with concepts such as "cooperation" and "development". In the case of the EU FTA's with the "MED" countries (12 Mediterranean countries which since the Euro-Mediterranean Conference of November 1995, have been involved in talks on 'Association Agreements'), for example, provisions on the liberalization of trade in services figure next to rules and principles regarding economic cooperation on a number of service sectors. The "Trade, Development and Cooperation Agreement" with South Africa, in force since January 2000, does the same, with a particular focus on sectors as ICT, transport, tourism and financial services.[3]

What does constitute a novelty for the EU in the last few years has been the depth with which both trade and development have been treated in the new agreements. In previous FTA's, the EU put a lot more emphasis on development and cooperation than on trade itself. In MED Agreements, provisions on liberalization were shallow but there was a strong emphasis on economic cooperation. In the case of the South African agreement, an immediate recourse to economic cooperation contrasted with the absence of any commitment on services liberalization. By contrast, with the so-called "Economic Partnership Agreements (EPAs), the EU has ushered in a new era of agreements straddling the trade and development divide. The main focus of the EU's new approach has been the ACP countries, in a movement that aims to replace the Cotonou framework with a new approach for trade and development. The EU has started overall ACP negotiations in September 2002, having moved to specific regions in subsequent years: October 2003 with West Africa and Central Africa, February 2004 with Eastern and Southern Africa and April 2004 with the Caribbean. The first such agreement to be signed was that between the EU and CARIFORUM – on 15 October 2008.

The EU-CARIFORUM EPA (henceforth, the "EUCARI") included trade in services in a single title, which also dealt with investment and e-commerce. The title is divided into 6 main chapters, including one on commercial presence, one on cross-border supply of services, one on temporary presence of natural persons for business purpose and one on regulatory framework. The chapter on commercial presence applies to both goods and services – in an approach that tracks broadly along with the investment chapters of NAFTA and certain subsequent agreements. The same occurs with the chapter on cross-border supply of services and the chapter on temporary presence of natural persons for business purpose. All these chapters ultimately cover the so-called 4 modes of supply, establishing obligations for each of them separately - but generally along the lines of the GATS. The chapter on regulatory framework addresses specific key sectors of particular development interest to CARIFORUM and the EU.

The EU-CARIFORUM EPA also broke new ground on a number of aspects. For starters, the EU-CARIFORUM EPA recognized both generally (Article 1(f)), as well as with regards to services trade (Article 60.1), that the liberalization of investment and trade in services needed to be "progressive, reciprocal and asymmetric" – something which is certainly not set forth in NAFTA-type agreements, for example. Additionally, development-related provisions took both a financial and non-financial character, recognizing the importance of technical assistance for the building of human, legal and institutional capacity in the CARIFORUM countries alongside the promotion of private sector and enterprise development, the diversification of CARIFORUM exports, the enhancing of technological and research capabilities and the development of innovation systems and trade infrastructure (Article 8). These priorities were echoed for specific service sectors in various parts of the Agreement, including through financial support.

EPAs and ACP Preferences

Contrary to what some analysts suggest[4], the EU-ACP EPAs do not constitute the end of the ACP preferences[5] in the EU. To begin with, Least Developed Countries (LDC), with or without the EPAs, should continue to benefit from the EU-sponsored "Everything But Arms" (EBA) initiative – or at least there is no reason to believe otherwise at the time of writing of the present piece. With the EPAs, however, the LDCs would be assured to keep their preferences *even in the absence of EBA, which is a unilateral measure by the EU that could ultimately (although highly unlikely) be taken away at any time*. Most importantly, for the 22 out of 79 ACP countries that are not LCDs (and therefore do not benefit from the EBA), the EPAs constitute the actual opposite of the end of the ACP preferences in the EU: they are effectively *the only way through which these preferences can be maintained in the presence of the WTO waiver that allowed for such preferences to expire in 31 December 2007*.[6] Without the EPAs, non-LDC ACP countries would no longer keep their preferences in the EU (such as the duty-free quota free (DFQF) access, for example).

It is true, however, that what has been essentially a non-reciprocal trade relation - whereby EU concessions were made in the absence of any reciprocity on the part of the ACP countries - will now become reciprocal. In exchange for preferences, aid and assistance in the EU market, the Europeans seek more access to goods, services and investment in the ACP countries and expect these countries to implement appropriate policies to strengthen their supply capacity and to reduce transaction costs.

The so-called Interim Economic Partnership Agreements (IEPAs) constitute the first stage of the EPA negotiations. The second stage aims to go deeper into liberalization efforts to include services, investment, competition and government procurement. Since CARIFORUM is the first ACP region to sign a full-fledged EPA with the European Commission, it is also the first ACP region to accept commitments on all those themes.

The ACP EPAs may therefore have set the bar on an innovative approach for concomitant trade and development provisions in a single binding undertaking. The EUCARI, a first, may be the reference in that context for some time to come, including for other much less prepared ACP regions than the Caribbean and the Dominican Republic.

2.4 Hybrids

As the 2 almost-concomitant original models, the GATS and NAFTA were influential from their outset. No agreement could afford to disregard them as either a model or a reference. In the case of the GATS, additionally, countries do have to be more than mindful of its Article V obligations, particularly the commitment to a substantial sectoral coverage (both in terms of sectors and modes of supply) and to the absence or elimination of substantially all discrimination. There have been hybrids, however, which for the purposes of the present analysis refer to agreements that have combined elements of both NAFTA and GATS in some aspects.

Perhaps the most prominent hybrid Regional Trade Agreement (RTA) in services is the "General Framework of Principles and Rules and for Liberalizing the Trade in Services in the Andean Community" (henceforth, "the Andean Framework"), as set out in Decision 439 of 11 July 1998. As a first, the Andean Framework aims at the creation of an "Andean Common Market in Services", admittedly a much more ambitious objective than most existing agreements dealing with services which involves, in addition to the elimination of intra-zone barriers, the "harmonization of national policies in the sector".[7] Unlike NAFTA, the Andean Framework does not exclude any sectors or modes of supply. Unlike the GATS, it incorporates the obligation of *status quo* or standstill whereby member countries commit not to establish new, or raise the level of non-conformity of existing, measures. Unlike the NAFTA, this obligation, as all others, applies to all levels of government (central, provincial/state and local). There is no possibility of Most Favored Nation (MFN) exemptions and a later Decision 510, entitled "Adoption of the Inventory of Measures Restricting the Trade in Services" of 31 October 2001, committed countries to draw up inventories of non-conforming measures – a clear negative listing instrument - and eliminate them by 2005. Even special and differential treatment is foreseen, under Decision 439, for Bolivia and Ecuador.[8] Although the deadline for the inventories had to be changed twice since then and a new Decision, the 659 of 14 December 2006, would recognize that the mere elimination of all restrictive measures was not the best policy for the block, the CAN services liberalization process stands as one of the most comprehensive, ambitious and pragmatic in the world. Proof of that is the treatment granted to Bolivia in the presence of its new political order: a suspension of all services liberalization was permitted for La Paz until 31 March 2009 when Bolivia was to propose sectors for which it required preferential treatment.

Finally, the Association of Southeast Asian Nations (Asean) Framework Agreement on Services (AFAS) signed in December 1995, 3 years after the establishment of the Asean Free Trade Area (AFTA), also constitutes a rather original compact on services trade. Alongside the expansion and deepening of commitments ("GATS-*plus*"), the framework calls for the enhancement of cooperation amongst member countries[9] singling out 4 items in that context: infrastructural facilities, joint production, marketing and purchasing arrangements, R&D and exchange of information.[10] The work on services is conducted by the Coordinating Committee on Services (CCS), one of 29 existing committees of senior officials. It should be noted, however, that services figure prominently, over and beyond the AFAS, in broader integration projects such as the development of Trans-Asean transportation ne2rk consisting of major inter-state highway and railway ne2rks, principal ports and sea lanes, the interoperability and interconnectivity of the national telecommunications equipment and services and the Trans-Asean energy ne2rks, which consist of the Asean Power Grid and the Trans-Asean Gas Pipeline Projects are also being developed.[11]

3. COMPARING THE COMPARABLE

In what follows, a detailed comparison will be attempted of the 3 main models of RTAs on services, in relation to a number of key aspects of the emerging regional regulatory regime. As will gradually become apparent, agreements tend to differ both in terms of the overall models followed (GATS, NAFTA or EPAs) as well as in terms of specific provisions or concepts modified from those models. Thus, if one takes the GATS as the initial reference, one can refer to agreements or parts of agreements as GATS-plus or GATS-minus, depending on the criterion adopted. For ease of reference, henceforth NAFTA-based and GATS-based agreements will be referred to, respectively, as "NBAs" and "GBAs". Since EPAs are the newest "kids" in the block, they have not had much of a following yet but should serve as a useful reference for plus and minus aspects of both other types of agreements.

3.1 Definitions

Every RTA has a section on "definitions" where relevant terms are defined for the purposes of the agreement. As may be expected, these definitions tend to differ across agreements which in turn result in distinct approaches amongst them to matters as relevant as the scope, the structure and the mechanics of their provisions. In large measure, agreements "can afford" to take liberties with different definitions – for example, some variance in defining sectors, whenever applicable. There is a key aspect, however, where the text matters particularly a great deal: the rule of origin for services and services suppliers which defines those that can be granted or denied the benefits accruing from the liberalization process implicit in any agreement. In fact, a number of definitions comprise the rule or rules of origin of a particular agreement.

NBAs do not define "trade in services", as do the GATS and GBAs. NBAs define "cross-border trade in services" to be something that corresponds to GATS' 3 out of 4 modes of supply: cross-border supply proper, consumption abroad and the movement of natural persons.[12] In NBAs, commercial presence is included under a broad investment chapter that covers more than presence and more than services: it is a chapter on both goods and services investment (and not just commercial presence). The broad definition of cross-border that includes the supply of services by "nationals" from one party in the territory of another party is then limited to the "temporary movement of business persons" which in NBAs has usually been the object of a specific chapter.

It is in that context, of modal definitions, that one can extract the relevant rules of origin. In the case of NBAs, the central definition that determines origin both for cross-border services trade as well as for investment in services is the one relating to "person". "Person" in NBAs usually refers to both natural persons and enterprises, and "person of one Party" refers to "a national or enterprise of a Party".[13] "National" is usually defined as a "natural person who is a citizen or permanent resident of a Party".

As to enterprises, NBAs define them according to the place of constitution and organization and not by reference to the nationality of ownership and control as does the GATS. This implies that any enterprise established in any of the member or parties of the agreement, whatever the origin of its ownership and control, is considered of a regional origin and entitled to the benefits from the agreement. An enterprise that has third country ownership or control can, however, be denied benefits but only it has "no substantial business activities" in the territory of any Party.[14] A representative office of a Japanese bank in Montreal could be denied benefits in the U.S. but not a subsidiary of the same bank.

GATS defines juridical persons of another member as persons that are owned or controlled by natural or juridical persons of that member.

In the case of juridical persons, control means having "the power to name a majority of directors or legally direct its actions" while ownership refers to having over 50% of the equity interest.[15] In other words, in GATS and GBAs the tendency has been to be restrictive in defining beneficiary juridical persons or enterprises: it is not applicable to all those established in a member but only to those that have the right ownership and control situation (over 50% and majority of directors, etc.).

In the case of the EPAs, the trend shall be towards the NAFTA solution when it comes to "persons". A natural person of the EC Party or of the Signatory CARIFORUM State is simply defined as being a national of that Party or that State.[16] A juridical person of a Party is defined according to whether it is set up in accordance with the laws of a Member State of the EU or of a Signatory CARIFORUM State – without any references to majority ownership or control – in a similar fashion, therefore, as NAFTA and NBAs.[17] This is also the general approach adopted by another agreement otherwise largely based on the GATS: the Mercosur's Montevideo Protocol. The Mercosur instrument also refers to "persons" but, in contrast to NAFTA, opts for "juridical person" as opposed to "enterprises". All the same as NAFTA, however,, the juridical persons do not have ownership or control limitations, sufficing for them to be established in one of the member States of Mercosur to be able to benefit from the benefits accruing from the agreement – in much the same way as in NAFTA.

3.2 Scope and Coverage

All existing agreements tend to have a very broad definition of what is meant by "measures", normally extending at least to any "law, regulation, procedure, requirement or practice"[18] as in NAFTA and NBAs. The GATS and GBAs normally add also the catch-all phrase "or any other form" to the definition which ensures that *a priori* absolutely no measure is outside the general purview of the agreement. Both types of agreements also include under "measures adopted or maintained" by a Party the notions of supply, purchase, payment, use or a service, the access to and use of publicly offered services and the presence of persons supplying services from the territory of one member in the territory of another member.[19]

As to the scope of "measures by members", the GBAs tend to be broader since NBAs exclude measures taken by local governments (municipal level) from the application of national treatment, most-favored-nation and local presence.[20] Furthermore, NBAs do not even include a best endeavors clause such as Article I:3 of the GATS whereby members commit themselves to taking "such reasonable measures…to ensure their observance by regional and local governments". NBAs have a similar provision in the general objectives of the agreement but it only refers to "state and provincial governments" – and not "local" ones.[21] The EPAs shall follow the GATS approach as attested by the EUCARI.[22]

All agreements have some reference to the exclusion of services supplied in the exercise of governmental functions as in Article I of the GATS. NBAs normally spell out the principal activities that would be excluded in that context as does NAFTA itself.[23] In the special case of prudential measures taken by Central Banks and monetary authorities for systemic reasons, all agreements establish a carve-out, always by means of sectoral provisions relating to the financial services sector. No agreement has yet defined what these measures should be in their specific context.

There are also important sectoral exclusions at the regional level, usually of the same sort as the ones agreed at the Uruguay Round. Thus, the air transport services sector stands out also regionally as a sector that does "best" outside the realm of free trade agreements. Experiments such as Open Skies or other attempts at liberalization of the sector never find a corresponding place in the provisions of RTAs on services with one major exception: Mercosur's Montevideo Protocol on Trade in Services which includes in an annex provisions on the liberalization of sub-regional air services.[24] Another sector that has been excluded in some

agreements is the cultural services sector. NAFTA inherited the exclusion agreed in the Canada-U.S. FTA and made it applicable only to the 2 countries – and not Mexico. The bilateral Canada-Chile also excluded cultural services industries from the purview of the agreement.

The EPAs shall once again set new standards on sectoral coverage in service trade agreements. The EUCARI was very straightforward in excluding audiovisual services, national maritime cabotage, national and international air transport services (with the exception of aircraft repair and maintenance, the selling and marketing of air transport services, computer reservation systems and other ancillary services such as ground handling, etc.). It did so also for both cross-border supply (modes 1 and 2) and commercial presence (mode 3). The novelty for EPAs, even in the context of previous EU FTAs, is the emphasis given to cultural matters through the inclusion of a full-fledged "Protocol on Cultural Cooperation" (Protocol III). The EU has been known to shun away from commitments, particularly in a trade setting, regarding so-called "cultural industries". With the Protocol, Brussels breaks new ground in the sector through a best endeavors clause intended to facilitate the entry and temporary stay of artists and other cultural professionals and practitioners from other parties to EPAs. This is a significant development in terms of sectoral coverage, particularly coming from the EU towards developing countries, in cultural sectors *and* regarding mode 4 amongst other things.

It should be noted that a number of recent RTAs on services, particularly the ones negotiated bilaterally by the U.S. such as with Chile, Central America-Dominican Republic (US-CAFTA-DR), Peru, Colombia and Panama[25], have incorporated an important sectoral "inclusion": that of electronic commerce. These agreements have a specific article devoted to the matter that ensures that any measure relating to it is subject to the chapters on cross-border and financial services and the corresponding annexes of non-conforming measures. The EPAs shall possibly include an article on e-commerce in the image of Article 119 of the EUCARI, which prohibits the imposition of customs duties on all electronic transmissions. Although EUCARI's Article 119 sets out a stronger obligation than related provisions in previous EU FTA's such as the one with Chile, it still falls short of the level of commitment exhibited in certain NBAs – such as the one between the U.S. and, once again, Chile.[26]

Table 1: Scoreboard: Definition & Coverage

ITEM	NBAS	GBAS	EPAS
Definition of Trade in Services	GATS-minus Modes 1, 2 and 4 under Cross-Border Chapter; mode 3 in different chapter applying to both goods and services.	GATS-neutral 4 modes as in the GATS	GATS-neutral 4 modes as in the GATS
"Person"	GATS-plus In terms of "nationals" and enterprises	GATS-plus In terms of natural and juridical but without the national ownership and control majority rules.	GATS-plus In terms of "persons" but also without national ownership and control majority rules.

Table 1. Continued

ITEM	NBAS	GBAS	EPAS
Denial of Benefits	GATS-plus Denial possible for non-Party firms owned or controlled by non-Party persons. Also, party firms that have no substantial business operations.	GATS-plus There is no denial of benefits provisions but definition is liberal. Firms in origin countries have to have substantial operations (no matter if they are non-Party)	GATS-plus Same as GBAs.
Definition of "Measure"	GATS-plus All types, including “practice”.	GATS-plus All types, including “any other form.	GATS-plus Same as GBAs.
“Measures adopted or maintained by a [Party] [Member]”	GATS-minus Exclude measures adopted or maintained at the local level of government from the application of the core liberalization principles; does not include best endeavors clause on compliance at all levels of government.	GATS-neutral Specify that all levels of government are included and includes best endeavor clause on compliance.	GATS-neutral Same as GBAs.
Prudential Measures	GATS-neutral Excluded by virtue of an exceptions article in a chapter on Financial Services.	GATS-neutral Excluded by virtue of a specific article in a chapter on Financial Services.	GATS-neutral Excluded by virtue of an article in a section on Financial Services.
Governmental Functions	GATS-neutral Related activities are excluded.	GATS-neutral Related activities are excluded.	GATS-neutral Related activities are excluded.
Sectoral Exclusions	GATS-minus Exclude all air transport services, except repair and maintenance and specialized air services.	GATS-minus Exclude air transport services but includes selling and marketing and CRS. Excludes explicitly audiovisual and national maritime cabotage services.	GATS-minus Exclude air transport services but includes aircraft repair and maintenance, selling and marketing, CRS and other ancillary services. Excludes explicitly audio-visual and national maritime cabotage services.
Natural Persons	GATS-minus Limited to temporary entry of business persons.	GATS-neutral Cover full range of mode 4.	GATS-neutral Same as GBAs.

3.3 Non–discrimination

All agreements cover both traditional notions of Non-discrimination – same treatment as accorded to national services and service suppliers (national treatment) and same treatment as that accorded to the most-favored nation (MFN).

NBAs tend to adopt more limited definitions of national treatment – possibly due to the fact that GATS Article XVII already represented an improvement on the earlier NAFTA version. GBAs, therefore, tend to include both the notion of treatment no less favorable than that accorded to national services and service suppliers but also the notions of treatment formally identical or formally different and the criterion that goes along with it: that whatever treatment is bestowed, it infringes the national treatment principle if it "modifies the conditions of competition" in favor of national services or suppliers.[27]

For cross-border purposes, Chapter XII, NAFTA only deals with service "providers", not making any reference to services themselves. The more complete sort of treatment is reserved for the investment chapter where the no-less-favorable criterion is applied to both investors and investments. In any case, both the cross-border trade in services chapter as well as the investment chapter clarify the treatment among states or provinces. It is also interesting to note that the GATS criterion of modifying conditions of competition only finds a parallel in the national treatment provision of the financial services chapters of NBAs - even though it is coined there in terms of affording "equal competitive opportunities".

It should be noted that the apparent "shortcomings" of NAFTA regarding the definition of cross-border national treatment, the criterion for its application and other aspects are still evident in all the NBAs that followed it. In the U.S.-Australia FTA, for example, the article on cross-border national treatment does not make any reference to services either (only to service suppliers) nor to the applicable treatment to states and/or provinces. As to the "equal competitive opportunities" criterion, it also remained applicable only to financial services – and not to cross-border trade in services or investments in both goods and services.

The EPAs shall emulate EUCARI and have a national treatment principle appearing in the mode-related chapters, on the basis of GATS Article XVII. In EUCARI, the provision is in effect GATS-minus by virtue of Article 60.3 that states that the Title relating to investment, trade in services and e-commerce does not apply to subsidies. In other words, contrary to the GATS, the EUCARI is fully clear on how subsidies are permitted and do not apply in the absence of specific provisions on the subject. Another important difference with the GATS, which makes EUCARI more ambitious, refers to the obligation for signatory countries to bind applicable measures at the *status quo* level – and not below it, as is possible under the GATS. This appears in CARIFORUM's Annex 4.VI, applying to both commercial presence and cross-border services.

The other facet of Non-discrimination, the most-favored-nation treatment, also constitutes a central aspect of all agreements. All agreements refer to MFN as a treatment that applies even when the best treatment available is the one granted to a non-Party or member of a particular agreement. The main difference relates to the discipline applied to the principle. Thus, GBAs have adopted GATS' approach to having MFN as a general principle applicable to all service sectors – even if in the presence of *initial* exemptions as was the case with the GATS itself.[28] By contrast, NAFTA and NBAs allow for the indefinite non-application of MFN non-conforming measures, which can be set out in member country schedules and do not have any timeframe within which to be eliminated.

The EUCARI also innovates with respect to the application of the MFN principle. Although it also sets out the obligation that both Parties should grant the most-favored-nation treatment accorded to a third party to the other EUCARI Party, in the case of the

CARIFORUM countries this obligation applies to agreements concluded with "any major trading economy". The objective of such a clarification is to impose the obligation on third countries only when they are more developed in their trade with the world. In its paragraph 4, Article 70 states that a major trading economy means an economy that has more than 1% of world merchandise exports or, in the case of a group of countries, a group that has more than 1.5% of those exports, in the year before the entry into force of the relevant agreement with CARIFORUM countries. This would include, for example, Brazil and/or Mercosur, were CARIFORUM to conclude a trade in services agreement with either one of them.[29] The same article also goes on to provide for consultations in cases where CARIFORUM countries enter into future agreements with third parties that result in better treatment than that accorded to the EC Party under EUCARI.

Finally, it should be noted that NAFTA has an important provision regarding "standard of treatment" that does not find a parallel in the GATS or GBAs. It primarily sets out that the better treatment available between national treatment and MFN treatment should be the one granted to service suppliers of any other party. In other words, if China gets a better treatment in a particular State of the United States than national service or service suppliers do in that same State, Mexican or Canadian suppliers should be entitled to get "Chinese" and not national treatment in that state – in other words, Mexican and Canadian suppliers should get MFN, and not national, treatment granted in that State. In any case, such a provision may have seemed necessary because under NAFTA countries could lodge reservations vis-à-vis the MFN principle whereas in GATS that was only possible once, as an exception, and subject to elimination within a defined period of time.

Table 2: Scoreboard: Non-Discrimination

ITEM	NBAS	GBAS	EPAS
National Treatment	GATS-minus Clarify that "regionally" (other than central or federal) treatment has to be the same as accorded to national suppliers but there is a carve-out from liberalization principles for local governments anyway.	GATS-neutral No clarification needed because all levels of government covered anyway.	GATS-neutral No clarification needed because all levels of government covered anyway.
	GATS-minus No reference to according national treatment via treatment formally identical or different depending on whether conditions of competition are modified. Same in investment chapter.	GATS-neutral Follow the GATS on formally identical or different and on conditions of competition.	GATS-neutral Follow the GATS on formally identical or different and on conditions of competition.

Table 2. Continued

ITEM	NBAS	GBAS	EPAS
Most-favored-nation	GATS-neutral Traditional definition extending best treatment granted to non-Parties (see part below regarding mechanics of liberalization).	GATS-neutral Same as NBAs	GATS-minus. There is provision for ACPs applying it only to third countries that are "major trading economies"
Standard of Treatment	GATS-neutral Did not include NAFTA provision that foresaw the better treatment between national treatment and MFN	GATS-neutral Silent on the matter	GATS-neutral Silent on the matter

3.4 Market Access

The notion of "market access" does not appear as such in the NAFTA. Article XVI of the GATS is the genesis of this practice and all GBAs include an article by that name. Article XVI and its followers do not define what market access is, however, limiting itself to a listing of measures that are considered market access barriers. These comprise an exhaustive list of 5 quantitative and one qualitative type of measure making Article XVI the provision that deals with all quantitative measures – whether discriminatory or non-discriminatory. Under GATS and GBAs, the measures listed under the market access article are prohibited and have to be eliminated at some point in the future.

On quantitative measures, NAFTA did not include a prohibition but only a best endeavors clause regarding the "liberalization or removal" through periodic negotiations at least every 2 years. The same cannot be said about a number of NBAs that tended to "innovate" on the basis of the original NAFTA approach and added a market access article very much similar to the one appearing in the GATS. The U.S. FTAs since the one with Jordan that entered into force in December 2001, for example, have a market access article in the chapter on cross-border trade in services that prohibits 4 of the 5 measures listed under Article XVI of the GATS. The fifth measure is prohibited also but in the Investment Chapter, since it deals with the participation of foreign capital in national firms.[30]

NAFTA and NBAs attempted to go beyond the GATS in a couple of important market access aspects. First, under the chapter on cross-border trade in services, a prohibition is included regarding the "duty of establishment" – i.e., the obligation upon cross-border suppliers to establish in the local market.[31] Second, under the chapter on investment, NAFTA introduced a prohibition on so-called "performance requirements" – i.e., requirements that governments at times impose for the establishment, acquisition, expansion, management, conduct or operation of an investment made by a foreign investor. Even though it is true that GATS and GBAs do not spell out either of these prohibitions, it is also true that just like NAFTA, GATS requires the scheduling of such measures when they are applied to scheduled sectors or sub-sectors. In addition, the prohibition in NAFTA is neither of immediate or time-bound application and parties can schedule them in annexes without any commitment to their

eventual elimination. NAFTA and NBAs have been therefore clearer on what is meant by both prohibitions but not necessarily more forceful in actually putting them into effect.

The EPA market access provisions are like the NBAs in one aspect: they appear in various chapters of the agreement, in this case in Title II of the EUCARI, under the chapter on commercial presence, the chapter on cross-border supply and, via the chapter on cross-border supply, the chapter on the temporary presence of natural persons for business purpose. The items listed under the respective provisions on market access track with the items listed in Article XVI of the GATS.

Table 3: Scoreboard: Market Access

ITEM	NBAS	GBAS	EPAS
Market Access	GATS-minus Article limited to cross-border.	GATS-neutral Have specific article applied to all modes.	GATS-neutral Have specific article applied to all modes.
Local Presence	GATS-plus Have article that prohibits requirement to establishment for the supply of cross-border services; reservations in schedules are possible.	GATS-neutral Silent on the matter	GATS-neutral Silent on the matter
Performance Requirements	GATS-plus Have article under investment chapter that lists and prohibits a number of TRIMs for both goods and services; reservations in schedules are possible.	GATS-neutral Silent on the matter	GATS-neutral Silent on the matter
Senior Management and Boards of Directors	GATS-plus Have article under investment chapter providing for prohibition on national preference for senior management but allows national majority on board of directors; reservations in schedules are possible.	GATS-neutral Silent on the matter	GATS-neutral Silent on the matter

3.5 Domestic Regulation

NAFTA does not have a specific article devoted to domestic regulation as does the GATS in its Article VI. GATS also has language in the preamble recognizing the right of members to regulate their economies according to national policy objectives – something that is absent from NAFTA. NAFTA does go beyond the GATS, however, with respect to "good government" disciplines where the commitment is to ensure a reasonable, objective and impartial administration: this commitment in NAFTA is not limited only to sectors where specific commitments are undertaken, applying therefore to the full universe of service sectors

covered by the agreement. In fact, by virtue of an article on administrative proceedings, NAFTA actually extends good government to all goods and service sectors covered by the agreement.[32]

Once again, NBAs negotiated as from the U.S.-Jordan FTA in 2001[33], have differed from NAFTA also in respect to domestic regulation. These agreements now have an article on domestic regulation that reproduces the same language as Article VI of the GATS and make a reference to the negotiations foreseen in paragraph 4 of that article on qualification requirements and procedures, technical standards and licensing requirements. Conversely, other agreements, such as Mexico-EU, that are based on GATS provisions and mechanisms to a large extent, have not included an article on domestic regulation.

The main effect that the inclusion of a domestic regulation article *à la* GATS has had in both NBAs and GBAs is to ensure that the criteria mentioned in Article VI of the GATS apply not only to the licensing and certification of "nationals" as does the NAFTA but also to qualification requirements other than licenses and certificates, as well as procedures, technical standards and licensing requirements as applied to all services (and not only professional services) and services suppliers (and not only natural persons).

NAFTA does not have a specific article on transparency but picks up on all the aspects covered by GATS Article III in a number of different places in the agreement – many of which under Chapter 18 on publication, notification and administration of laws. Perhaps the most "ambitious" provision of NAFTA in this context, which has also been incorporated in later NBAs, is the recourse "to the extent possible"[34] to prior comment on proposed changes in relevant laws and regulations. GBAs do not provide for such recourse and a host of countries tend to oppose it when negotiating FTAs that include services trade or investment.

EPAs may not have a regular regulatory situation provision as the GATS but instead, following EUCARI, a full chapter (5) devoted to the "regulatory framework". The EUCARI chapter starts with a full article (85) addressing mutual recognition, followed by articles on transparency and disclosure of confidential information (86) and procedures (87). These latter articles correspond to almost identical provisions in the GATS under the transparency (III and III *bis*) and domestic regulation (VI) Articles – with additions regarding investors, in addition to service suppliers.[35]

The conspicuous aspect about EUCARI is that, with the exception of 2 good governance paragraphs, GATS Article VI is absent from the EUCARI in its most important aspect: the commitment to negotiating in the future "necessary disciplines" regarding qualification requirements and procedures, technical standards and licensing requirements and, most importantly, the interim disciplines that should apply to them until definitive disciplines were negotiated.[36] Since in the GATS these "interim disciplines" only apply to sectors where commitments have been made, EUCARI members run the risk of having no discipline amongst themselves with respect to qualification requirements and procedures, technical standards and licensing requirements in sectors not committed under the GATS.

For some professional sectors absent from the EU schedule at the WTO, for example, EUCARI members may feel short of disciplines to frame the behaviour of European professional authorities – something that is not good for CARIFORUM suppliers. Conversely, European suppliers may feel short of disciplines to frame the behaviour of CARIFORUM authorities insofar as licensing procedures are concerned – once again, in sectors not included under CARIFORUM schedules of specific commitments at the WTO . Ultimately, both sides lose in predictability while retaining more "policy space" to regulate those important elements of trade in services.

Table 4: Scoreboard: Domestic Regulation

ITEM	NBAS	GBAS	EPAS
Good governance – measures of general application, tribunals, procedures	GATS-plus Paragraphs 1 and 2 of GATS VI are under transparency article with more complete language (that applies to the overall agreement and not only to services).	GATS-neutral Same as the GATS	GATS-minus Same 2 paragraphs under transparency as paragraphs 2 and 3 of GATS Article VI. Nothing on measures of general application being administered in a "reasonable, objective and impartial manner"
Good governance – reviews and appeals	GATS-plus GATS VI:2 is under transparency article with more complete language	GATS-minus Same as the GATS	GATS-neutral Same as the GATS
Good governance - authorizations	GATS-neutral Paragraph 3 of GATS Article VI is reproduced in domestic regulation article	GATS-neutral Same as the GATS	GATS-neutral Same as the GATS
Requirements	GATS-neutral Same as GATS VI:4	GATS-neutral Same as GATS VI:4	GATS-minus Languages as in GATS VI:4 does not appear

3.6 Mutual Recognition

All agreements have some form of mutual recognition discipline, all of them at least committing members and parties to the possibility of recognizing each others' education or experience obtained, requirements met, or licenses or certifications granted. NAFTA and NBAs that followed until the U.S. Jordan FTA did not have an article similar to article VII of the GATS and focused on professional services when they dealt with mutual recognition. The "second-generation" NBAs – i.e., those concluded after the U.S. Jordan FTA - incorporated an article with the same title as Article VII and broadened the application of its provisions to all service suppliers – and not just professionals as in the NAFTA.[37]

It is in that context also that the NAFTA sets out the obligation that members or parties eliminate "any citizenship or permanent residency requirement … for the licensing or certification of professional service providers" within 2 years of the date of entry into force of the agreement. That commitment has not been implemented still today in spite of its reappearance in a number of NBAs such as Chile-Mexico (which in fact stipulated an immediate elimination of those requirements and not in 2 years) and Chile-Canada.[38] The effect has been that parties to these agreements had then the right to keep these measures themselves – a possibility which was foreseen in cases where parties did not comply with the 2-year deadline.

The EPAs may follow the EUCARI approach whereby a full article (85) of a section (I) of a chapter (5) addresses mutual recognition with respect to both investors and service suppliers. In the EUCARI, Article 85:6 stipulates that mutual recognition agreements will have to be in conformity with the relevant provisions of the "WTO Agreement and, in particular, Article VII of the GATS – which obviates the need to replicate the same provisions as in that article. EUCARI Article 85 then goes beyond its

counterpart in the GATS in 3 important aspects: (1) it identifies accounting, architecture, engineering and tourism as priority sectors for the conclusion of mutual recognition agreements; (2) it encourages relevant professional bodies to start negotiations no later than 3 years after entry into force of the agreement to "jointly develop and provide recommendations on mutual recognition" in the priority sectors; (3) it sets out a review of progress made by the Joint Committee every 2 years.

Table 5: Scoreboard: Mutual Recognition

ITEM	NBAS	GBAS	EPAS
Recognition	GATS-Neutral Article based on GATS VII	GATS-neutral Same as in the GATS	GATS-plus Direct linkage to compliance with GATS Article VII alongside a listing of priority sectors for agreements and clear deadlines for concluding such agreements and reviewing overall progress.

3.7 Mechanics of Liberalization

There are many commonalities between GATS, NAFTA and the EPAs in terms of the mechanics of liberalization. All 3 types of agreements allow for the scheduling of reservations or limitations vis-à-vis the key liberalization principles of the agreement. All foresee the possibility of binding existing measures or regulatory situations and both deal with quantitative and qualitative measures of both discriminatory and non-discriminatory nature.

Reservations or Limitations

The terminology varies a bit but the central idea is the same: that member countries or parties to an agreement have the right to "reserve" a particular measure or limitation in relation to certain liberalization principles. One of the main differences is that NBAs, unlike the GBAs or EPAs, allow for reservations to be lodged in relation to the MFN principle - something that was a one-shot possibility in the context of the GATS. EU FTAs and now EPAs tend to have a straightforward application of MFN as does the GBAs. Mercosur's Montevideo Protocol or the EUCARI, for example, did not make provision for any exemption from MFN and all member countries have had to apply it fully as from the entry into force of the instrument. Another aggravating factor in NAFTA is the fact that the lodging of reservations with respect to MFN is very generic in nature, encompassing full sectors, and not focused on specific measures within sectors. In all 3 NAFTA countries, these reservations were made generically for the aviation, fisheries, telecommunications transport ne2rks and telecommunications transport services.

NAFTA also allowed for reservations being lodged in relation to activities reserved for the State, a recourse that was only resorted to by Mexico in order for petroleum, other hydrocarbons and basic petrochemicals alongside a number of other service sectors (electricity, communications via satellite, telegraph, postal services, radiotelegraph services, rail transport services, control, inspection and surveillance of maritime and inland ports, airports and heliports) to be kept outside the scope of the agreement.[39]

Future Measures

NAFTA has an important particularity, which was adopted also by the NBAs: it allows for reservations being lodged with respect to future measures. The GATS does not allow for this, limiting the scope of limitations to existing measures and prohibiting the introduction of new restrictive measures in sector where commitments have been made. NAFTA, by contrast, permits Parties to indicate sectors, sub-sectors or activities where it may maintain

existing, or adopt new or more restrictive, measures that do not conform with obligations imposed by national treatment, most-favored-nation and local presence in the cross-border trade in services chapter and national treatment, most-favored-nation, performance requirements and senior management and board of directors in the investment chapter. Needless to say, this is a very significant "loophole" in the otherwise free trade bias of the NAFTA agreement.

Binding

Both types of agreements rely significantly on the "binding" of measures – existing or even future (as in NAFTA). Binding is a concept borrowed from tariff negotiations in the GATT where members or parties fixed "for posterity", or at least until the next round of negotiations, a particular tariff level in relation to which they committed not to become more restrictive in the future; if they did so, in addition, they would have to compensate trading partners for the adverse effects of that action. In services, the concept is the same, albeit it is applied to measures and not tariffs.

The main difference amongst existing agreements relates to whether the possibility of leaving a sector, measure, and mode of supply or regulatory situation unbound. NAFTA and NBAs do not allow for any "unbinding". Every annex, with all its scheduled measures, whether existing or future, is fully bound, so that there is nothing in NAFTA or their related agreement that remains unbound after the negotiations. The GATS and GBAs are, of course, quite different in that respect since they do allow full sectors or sub-sectors to remain unbound (not included in the schedule), and even for each individual sector or sub-sector that is included in a schedule the possibility remains for leaving specific measures unbound in terms of modes of supply and/or the market access and national treatment principles.

As we have seen, NAFTA allows for sectoral exclusions, future measures and other provisions that dilute its otherwise free trade bias. However, the NAFTA, by requiring bindings on all that is included in the negotiations is clearly a more transparent agreement than its GATS counterparts. It should be noted that a significant pro-liberalization instrument in NAFTA and NBAs is the so-called "ratchet" mechanism whereby a member country has to apply immediately to all other members any liberalization that takes place in its regulatory regime – even if the member country in question has reserved its position by binding the previous restriction in its corresponding annex. In other words, whenever NAFTA and NBA countries liberalize unilaterally they have to extend the benefits of that to all member countries automatically – in the absence of any negotiation. That is the equivalent of requiring an "instant" binding of any pro-market move occurring in the free trade area.[40]

Sectoral Listing

Perhaps the most salient difference between NAFTA and GATS, and the agreements based on them, has to do with the listing of sectors, sub-sectors or activities. This difference, which in principle is resolved at the WTO[41], has been the source of great divergence in some negotiating forums. Perhaps the most prominent example of this was the now "extinct" negotiations on a Free Trade Area of the Americas (FTAA), which pitted NAFTA against Mercosur countries over whether the listing should or not be based on GATS as Mercosur would like it to be. It should be noted that the EPA negotiations, including those that have been concluded between the EU and CARIFORUM, are not the object of such divergence, as the EU favours the GATS approach to sectoral listing – something, which is welcome by ACP countries. Thus, the EPAs do not constitute a third alternative here, merely siding with the GATS in the matter.

The GATS modality is known as a "positive list approach" because members, once they have negotiated and determined the nature and content of their schedule, can indicate the sectors, sub-sectors or activities for which they will "positively" make commitments, and leave out those where there is no intention whatsoever to commit in terms of market access and national treatment. The NAFTA

approach in large measure the opposite: countries have to list only sectors, sub-sectors and activities where commitments *cannot* be equivalent to full liberalization, leaving out the ones that are already fully liberalized. Under NAFTA, therefore, the list is "negative" in the sense that included sectors, sub-sectors and activities are *not* fully committed – unlike the excluded ones.

The difference in the type of listing is therefore most significant not only for what it means *to list* but, more importantly, for what it means *not to list*. Under the GATS, sectors, sub-sectors and activities not listed are therefore *fully free* from any commitment on market access or national treatment under GATS. Conversely, under NAFTA, sectors, sub-sectors and activities not listed are *fully committed* to those principles. This difference does, however, have another important consequence that tends to favor the NAFTA approach as a *liberalizing* instrument. With the negative list approach, NAFTA essentially obliges Parties to reveal fully what the regulatory situation is for all sectors, sub-sectors and activities included in the agreement. Whether included in the lists or not, the regulatory situation for all of them is clear because being left off the list has itself a very clear meaning: full liberalization. With GATS, by the time the negotiations are over and the schedules agreed, all the excluded sectors, sub-sectors and activities remain "a mystery" since there is nothing in the agreement that foresees the revealing of their regulatory situation.

Clearly, negative lists are favored by countries that feel confident that their regulatory regime, by and large as it is, is adequate and should not undergo major changes in the foreseeable future. Positive lists tend to be favored by countries that either do not feel that confident or that simply want to retain the control over a big portion of services trade and investment policy for its own national reasons. Clearly, positive lists can preserve greater "policy spaces" and have the preference of countries that may, for example, be undergoing transitions or adaptations in their services regime and need some time to see that process through. It should not come as a surprise that for the most part developing countries tend to prefer the positive list approach – certainly the case of the ACP countries as well. After all, their regulatory system is often much less sophisticated or much more recent than their developed counterparts. Sophistication in this context denotes know-how to regulate and achieve public policy objectives. As to being recent, regulatory regimes in developing countries have been undergoing major changes in the last decade to 15 years, a relatively short period in many cases for policy-makers to base their assessments of market, environmental or social effects of those changes. Very often, developing countries may still need some time before committing to an existing regulatory situation "for posterity" – thus, the predilection for positive listing.

The literature has often been deceiving when characterizing NAFTA and NBAs as necessarily more liberalization-prone just on the basis of its negative listing of sectors, sub-sectors and activities. The truth is that a host of other aspects have necessarily come into the analysis before one can feel confident about such a view. The fact that NAFTA and NBAs require clarity regarding the regulatory situation of all measures affecting trade and investment in services does make them very transparent agreements. However, many other of their provisions pose significant limits on sectoral coverage and overall scope – notably: the possibility of reservations vis-à-vis the MFN principle, the possibility of reservations in regard to future measures, the exclusion of certain sectors, and the absence of liberalization obligations on local governments. A reliable assessment of the contribution of different approaches to liberalization and/or sustainable development must necessarily take all relevant aspects into account - and not just the more visible ones.

Deadlines

Both NAFTA and GATS have handed down to regional agreements a relatively strong set of rules and disciplines on market access, national treatment and MFN. All the same,

the rhetorical strength of all these rules and disciplines is mitigated by the way they are actually applied – via schedules of reservations or limitations often in the absence of time-frames, phasing-outs, or deadlines. Methods and modalities of liberalization are indeed important features of an agreement. Positive-list agreements such as the GBAs, for example, do tend to be more lenient on liberalization to the extent that they do not even commit countries to schedule their full regulatory situation. On the other hand, the commitment to set a final date for free trade to occur is clearly a much stronger commitment than any of the principles, mechanisms or other aspects of trade agreements. In the absence of deadlines and time-limited schedules, what agreements on services trade may accomplish is nothing more than the legitimizing of existing or even future[42] restrictions – something that may in fact freeze, and not facilitate, the liberalization process.

A time-limited commitment can be general as to the application of an entire agreement, as is the case, for example, with Mercosur's Montevideo Protocol that sets a 10-year limit to full intra-zone liberalization.[43] Annual rounds of negotiations are foreseen until on the tenth year, all exceptions, limitations, restrictions, whether by sector or mode of supply have been eliminated wholesale. In addition, as from the entry into force of the agreement, there are no sectoral exclusions (with the exception of some aspects of air transport services), and MFN is applied unconditionally to all sectors. Another agreement that is very clear on deadlines is the "General Framework of Principles and Norms for the Liberalization of Trade in Services in the Andean Community" (the "Andean Framework") – object of a specific Andean Community Decision (439) – which set 2005 as the time-limit for the conclusion of an Andean "Common Market in Services" – effectively a much more ambitious undertaking than just an FTA in services.[44]

In NAFTA, the only deadlines relating to all sectors and sub-sectors refer to quantitative restrictions – the type of measures for which, unlike GATS and GBAs, there is no prohibition. NAFTA here sets out that Parties will have to periodically, at least every 2 years, *endeavor* to negotiate the liberalization or removal of the quantitative restrictions.[45] For other types of measures affecting trade in services, NAFTA does not specify any temporal obligations, thus leaving qualitative, discriminatory measures, future measures, activities reserved for the State and exceptions to MFN and non-discriminatory measures, without any time horizon whatsoever regarding further liberalization or market opening.

It should be noted that NBAs did not start to include any general reference to time-frames until August 1999 when Mexico and Chile concluded their FTA and included a provision on "future liberalization" – a practice that Mexico pursued in all its ensuing agreements. Even then, however, mention was simply made of future rounds of negotiations being launched with a view to deepening liberalization – that, in the absence of a clear time frame.[46] Mexico and Chile have pursued that general approach in agreements concluded with the EU as well. In the EU-Chile FTA, for example, there is provision for a review within 3 years from the entry into force with a view to "further deepening of liberalization". The Mexico-EU FTA is very ambitious in setting a 10 year period as a deadline to achieve full elimination of substantially all discrimination, although it also set a 3-year deadline to agree on the decision that should set in motion that elimination, but never complied with it so far.[47]

EPAs, if they follow the EUCARI, are likely to have an article devoted to future liberalization (62) as well, which sets out the obligation on the parties to entering into further negotiations "on investment and trade in services" no later than 5 years from the date of entry into force of the agreement – once again a general commitment to entering into negotiations but in the absence of an equally general commitment for achieving full liberalization within a prescribed time frame.

Table 6: Scoreboard: Mechanics of Liberalization

ITEM	NBAS	GBAS	EPAS
Principles	GATS-plus Added market access principle to NAFTA-type agreement and kept local presence obligation. Through investment chapter, included obligations on performance requirements and senior management and board of directors.	GATS-neutral 3 core liberalization principles just as in GATS. GATS-minus for the Mexico agreement since it has a carve-out for non-discriminatory measures and treatment granted under agreements notified under Article V. Also GATS-minus for the Chile-EU, which has no MFN principle for services.	GATS-plus Same as the GATS but without MFN exceptions.
Reservations/ Limitations	GATS-neutral Can be lodged, in addition to market access and national treatment, in relation to MFN and local presence. Under investment chapter, can also be lodged in relation to performance requirements, senior management and board of directors.	GATS-neutral Can be lodged in relation to market access and national treatment. MFN is virtually free from any obligation – not even reservations are necessary in Mexico and Chile-EU FTAs. Mercosur Protocol does not allow for reservations for MFN, which has to apply fully from the outset.	GATS-neutral Same as the GATS
Future Measures	GATS-minus Parties can reserve their rights to maintain existing or adopt new and more restrictive measures in relation to all core liberalization principles.	GATS-neutral There is no such provision.	GATS-neutral There is no such provision.
Binding	GATS-plus The full regulatory situation of a party is to be bound; there is no possibility of leaving unbound. Transparency effect is full-fledged.	GATS-neutral Most agreements as the GATS.	GATS-neutral Same as in the GATS.
Standstill	GATS-neutral There is no such provision.	GATS-plus Mexico-EU agreement provides for a standstill on discriminatory measures	GATS-neutral There is no such provision.

Table 6. Continued

ITEM	NBAS	GBAS	EPAS
Regulatory Carve-out	GATS-neutral There is no such provision.	GATS-minus Mexico-EU agreement provides for carve-out for non-discriminatory measures.	GATS-neutral There is no such provision.
Lists of Sectors	GATS-plus Negative list approach: whatever is not listed is fully liberalized.	GATS-neutral Positive list approach: whatever is not listed is virtually fully obligation-free. MFN still applies unless object of a specific time-limited exception in the GATS. Some agreements do not allow for MFN exceptions (Mercosur Protocol, for example).	GATS-neutral Same as the GATS.
Reviews, Deadlines	GATS-minus Implementation articles set out obligation to consult annually, or as otherwise agreed, to "review the implementation and consider other matters of mutual interest". Language is therefore not forcefully calling for more liberalization. GATS Article XIX:1 is more forceful on that aspect. US-Chile provides for consulting on the "feasibility of removing… citizenship and residency requirements".	GATS-plus The Latin-American Agreements with the EU weigh in: Chile-EU provides for review within 3 years with a view to "further deepening liberalization". Mexico-EU provides for 3-year deadline to agree on a decision to eliminate substantially all discrimination (not complied with) and on an overall 10 year deadline for achieving it.	GATS-minus Article on future liberalization based on the GATS (not later than 5 years) but no reference to "successive" rounds or "periodically thereafter".

In NAFTA and NBAs, deadlines that apply to effective liberalization relate to specific sectors – in particular to professional and financial services. Perhaps the most forceful and liberalizing provision in that context is the one relating to cross-border professional services where it is established that within 2 years of the date of entry into force of this Agreement Parties would eliminate any citizenship or permanent residency requirement applicable to the licensing or certification of professional service suppliers.[48] Still in professional services, the agreement established a commitment to setting up a working program for common procedures for the authorization of foreign legal consultants and a review of this commitment within a year from the entry

into force of the agreement. For temporary licenses for engineers, a working program was also called for.[49] NBAs also followed these general approaches to time frames in professional sectors.[50]

For financial services, NAFTA did better than some of its follower agreements. In addition to a chapter on the sector, the agreement stipulates that Parties will "no later than 1 January 2000, consult on further liberalization of cross-border trade in financial services".[51] The Chile-Canada and Chile-Mexico FTAs excluded financial services from the scope of the agreement, even though in the case of Chile-Mexico it was foreseen that by 30 June 1999 at the latest negotiations on a financial services chapter should start – something that has not prospered as committed.[52] In NAFTA, the land transport sector also had a decisive deadline in terms of "seven years after the date of entry into force….to consider further liberalization commitments" – which did not result in any effective "further liberalization commitments" at all.[53]

3.8 Sectors

Effectively, one of the main differences between NBAs and GBAs refers to the treatment of sectors. EPAs seem to be embarking on sectoral provisions as well, following in that context the GATS approach. Essentially, the main distinction lies in whether sectoral provisions set out liberalization obligations, recognize specificities of the sectors, set out regulatory obligations or a combination of some of these 3 elements. An additional distinction is whether sectoral provisions apply to all parties to an agreement or only to those that subscribe to them.

Table 7: Sectoral Disciplines Under the EU–Cariforum EPA

Sectors	Provisions
Computer services	Various definitions
Courier services	Prevention of anti-competitive practices in the courier sector, universal service (right to define), individual licenses (only for universal service), separation of regulatory bodies from suppliers
Telecommunications services	Regulator legally distinct and functionally independent from suppliers, sufficiently empowered to regulate, authorization subject to mere notification, competitive safeguards on major suppliers, right to negotiate interconnection, scarce recourses allocated in objective, timely, transparent and non-disc, right to define universal services, confidentiality, disputes between suppliers under regulatory authority
Financial services	Prudential carve-out, effective and transparent regulation, new financial services, data processing, public retirement plan or statutory system of social security
International maritime transport services	Including multi-modal, no more cargo-sharing or unilateral measures or administrative, technical or other obstacles
Tourism services	Prevention of anti-competitive practices, access to technology, small and medium sized enterprises, mutual recognition, increasing the impact of tourism on sustainable development, environmental and quality standards, development cooperation and technical assistance (list of possibilities), exchange of information and consultation

As seen in the previous section on deadlines, NAFTA and NBAs do provide for sectoral annexes that set out liberalization obligations via procedures, deadlines, standstill commitments and other instruments. While the GATS sectoral annexes were clearly not intended to provide for liberalization but instead to clarify or complement provisions from the framework agreement, one cannot say that GBAs followed the GATS in that respect. Once again, the EU FTAs with Chile and Mexico strayed away from the GATS in that they adopted various sectoral liberalization provisions. EPAs, however, would seem bent on following GATS cue: the EUCARI has sectoral sections that fall short of liberalization but add much on regulatory matters. In fact, all sectors are addressed through sections of a chapter (5) entitled "Regulatory Framework".

Table 8: Scoreboard: Sectors

ITEM	NBAS	GBAS	EPAS
Financial Services			
Instrument	GATS-plus Agreements have specific chapter that is a "stand-alone" agreement; all the same, some aspects are linked to other chapters.	GATS-plus Both EU-Mexico and EU-Chile have separate chapters that detail liberalization obligations.	GATS-plus The agreement has a separate section for the sector that reproduces definitions, domestic regulation (as prudential carve-out) and other provisions of the corresponding Annex in the GATS. However, it goes into new financial services and data processing, which must be applied to all Parties (unlike the GATS Understanding)
Principles	GATS-plus Adds new principles based on NAFTA such as the "right of establishment of financial institutions" and "new financial services". National treament in NAFTA was more ambitious than in US bilaterals (no longer best treatment amongst that accorded across many states of the Union).	GATS-minus EU-Chile has a market access article and a more ambitious national treatment clause (base on GATS) than EU-Mexican counterpart agreement.	GATS-minus No articles on core liberalization principles.
Dispute Settlement	GATS-plus Specific provisions	GATS-plus Specific provisions	GATS-minus No dispute settlement provisions.
General Deadlines	GATS-neutral No deadlines	GATS-plus Chile-EU: Special committee to "facilitating and expanding trade in financial services" within 3 years. Mexico-EU: annual meeting but no reference to further liberalization.	GATS-neutral No deadlines

Table 8. Continued

ITEM	NBAS	GBAS	EPAS
Specific Deadlines	GATS-plus Chile committed to the opening of voluntary savings pension plans by 1 March 2005.	GATS-neutral None	GATS-neutral None
Mechanism of Liberalization	GATS-plus Reservations possible for all core liberalization principles.	GATS-neutral While Chile-EU is a positive list, Mexico-EU is a negative list.	GATS-neutral None
Prudential carve-out	GATS-neutral All agreements have it.	GATS-neutral All agreements have it	GATS-neutral All agreements have it
Telecommunications			
Overall Outlook	GATS-plus Provisions combine some access to and use of public telecommunication ne2rk provisions from GATS Annex with the reference paper of the post-Uruguay Round negotiations.	GATS-plus Provisions tend to correspond, roughly, to the WTO-negotiated and optional reference paper – only applicable to all Parties of the agreements.	GATS-plus Same as GBAs.
Transport Services			
General Treatment	GATS-neutral No specific chapter.	GATS-neutral No specific chapter.	GATS-neutral No specific chapter.
Air Transport	GATS-minus No chapter or annex – merely an exclusionary provision under the article on scope and coverage. Do not Include selling and marketing or CRS services.	GATS-neutral No chapter or annex – merely an exclusionary provision under the article on scope. Include selling and marketing or CRS services.	GATS-plus No chapter or annex – merely an exclusionary provision under the article on scope. Include aircraft repair and maintenance, selling and marketing, CRS and ancillary services.
Maritime Transport	GATS-neutral Nothing on the sector	GATS-plus Section specially devoted to the sector, ensuring that unrestricted access continues to be the norm. Exclusion of cabotage in scope.	GATS-plus Same as GBAs.
Other Transport	GATS-neutral Nothing on the sector	GATS-neutral Nothing on the sector	GATS-neutral Nothing on the sector

Table 8. Continued

ITEM	NBAS	GBAS	EPAS
Tourism Services			
	GATS-neutral Nothing on the sector	GATS-neutral Nothing on the sector	GATS-plus Full-fledged section on the sector, including provisions on prevention of anticompetitive practices, access to technology, impact on sustainable development and development cooperation and technical assistance – inter alia.
Professional Services			
General Outlook	GATS-plus Vary as to professions covered but "plus" elements regarding regulatory approaches, international standards (Chile), working groups (Peru), temporary licensing of engineers (Chile, Peru), future liberalization of foreign legal consultants (Chile)	GATS-neutral Virtually nothing specific on professional services with the exception of brief mention under mutual recognition.	GATS-neutral Virtually nothing specific on professional services with the exception of mention of accounting, architecture and engineering as priority sectors for mutual recognition agreements.
Express Delivery			
General Outlook	GATS-plus All US bilaterals have it while NAFTA had no such provisions; an annex in Chile agreement, as specific commitments in Cafta and Peru agreements	GATS-neutral Nothing on the sector	GATS-neutral Nothing on the sector
Existing Access	GATS-plus All express desire to maintain existing level of access, CAFTA and Chile commit to a standstill, Peru commits only to consultations in case access level is questioned.	GATS-neutral Nothing on the sector	GATS-neutral Nothing on the sector

Table 8. Continued

ITEM	NBAS	GBAS	EPAS
Monopoly	GATS-plus CAFTA and Peru commit to avoid abuse of monopoly position. Chile and CAFTA commit not to direct revenues from postal monopoly to benefit express delivery firms.	GATS-neutral Nothing on the sector	GATS-neutral Nothing on the sector
Courier Services			
General Outlook	GATS-neutral Nothing specifically on the sector	GATS-neutral Nothing specifically on the sector	GATS-plus Full-fledged section on the sector, including provisions on scope and definition, prevention of anticompetitive practices, universal service, individual licenses and independence of regulatory bodies.
Computer Services			
	GATS-neutral Nothing on the sector	GATS-neutral Nothing on the sector	GATS-plus Full-fledged section devoted to the sector, including mostly provisions on definitional issues (for example, clarifying that CPC 84 does not cover the content or core service but only the enabling service).

Source: Prepared by the author.

3.9 Cooperation

As mentioned previously in this study, some RTAs on services have been original in their treatment of important notions such as "cooperation" and "development". It has also been said that the EU has been a driving force in that process, having led the way in the so-called ACP-EU Partnership Agreement, or Cotonou Agreement, signed in June 2000, as well as the precursor Lomé Conventions.

Until the Cotonou Agreement and the EUCARI – the first agreement of its kind to be concluded pursuant to the Cotonou Agreement - the cooperation envisaged under EU services agreements had hardly focused specifically on trade in services but rather on the workings of prominent services sectors. The Agreement with Morocco, for example, in force since 1st March 2000, has an article on right of establishment and services which leaves to an "Association Council" the task of making recommendations as to when services liberalization should be pursued by both parties[54], but singles out, in addition to broad-based issues that also relate to services such as education and training, a number of service sectors where cooperation should occur – namely: financial, transport, telecommunications and information technology, energy, tourism. That pattern is pursued in most of the MED Agreements as well as

for the Mexico and Chile agreements, both of which are much more substantive on effective trade in services liberalization as well. The Agreement with South Africa had also a great emphasis on cooperation in the absence of much commitment on services liberalization.

The EUCARI would therefore change things considerably with respect to the approach to cooperation. As their formal basis, EUCARI and other EPAs to come rely on Cotonou's article 41:5 - which actually mandates EU assistance to ACP countries in certain sectors. If based on the EUCARI, EPAs should henceforth have their development cooperation approach embodied in a full-fledged part of the agreement, possibly entitled "Trade Partnership for Sustainable Development". Part I of the EUCARI recognizes a number of important elements relating to development cooperation and identifies general development priorities (Article 7). Sector-specific priorities are given throughout the agreement, including for services where tourism stands out in Title II of Part II of the Agreement – "Investment, Trade in Services and E-Commerce". Development cooperation in the EUCARI and possibly in future EPAs is envisaged both as financial and non-financial, with the latter including a variety of technical assistance, training and capacity building programs (see box below).

EPAs and Development Cooperation

Part I of the EUCARI starts by recognizing as one of its objectives the promotion of "the gradual integration of the CARIFORUM States into the world economy, in conformity with their political and development priorities" (Article I). It also recognizes that liberalization has to be progressive and asymmetrical between the 2 regions (Article I) and that cooperation can take both financial and non-financial forms (Article 7:1). In its Article 8, Part I of the EUCARI identifies the following development priorities:

- Technical assistance to build, human, legal and institutional capacity in the CARIFORUM states with a view to facilitating compliance with the commitments of the EPA;
- Assistance for capacity building and institution building for fiscal reform;
- Provision of support measures aimed at promoting private sector and enterprise development;
- The diversification of CARIFORUM exports of goods and services through new investment and the development of new sectors;
- Enhancing the technological and research capabilities of the CARIFORUM states so as to facilitate development of, and compliance with, internationally recognized sanitary and phytosanitary measures and technical standards and internationally recognized labour and environmental standards;
- The development of CARIFORUM innovation systems, including the development of technological capacity;
- Support for the development of infrastructure in CARIFORUM states necessary for the conduct of trade.

Title II of Part II of the Agreement is where services-related priorities are identified. Each of the sectoral sections of Title II contain development cooperation priorities – in particular the section on tourism (7) that details priority support areas such as capacity building for environmental management or the development of internet marketing strategies. Article

Continued

121 of Chapter 7 of the same Title, in turn, is fully devoted to cooperation in general and identifies the following areas as priority:

- Improving the ability of service suppliers of the Signatory CARIFORUM States to gather information on and to meet regulations and standards of the EC Party at European Community, national and sub-national levels;
- Improving the export capacity of service suppliers of the Signatory CARIFORUM States, with particular attention to the marketing of tourism and cultural services,
- the needs of small and medium-sized enterprises (SMEs), franchising and the negotiation of mutual recognition agreements;
- Facilitating interaction and dialogue between service suppliers of the EC Party and of the Signatory CARIFORUM States;
- Addressing quality and standards needs in those sectors where the Signatory CARIFORUM States have undertaken commitments under this Agreement and with respect to their domestic and regional markets as well as trade between the Parties, and in order to ensure participation in the development and adoption of sustainable tourism standards;
- Developing and implementing regulatory regimes for specific service sectors at CARIFORUM regional level and in Signatory CARIFORUM States in those sectors where they have undertaken commitments under this Agreement.
- Establishing mechanisms for promoting investment and joint ventures between service suppliers of the EC Party and of the Signatory CARIFORUM States, and enhancing the capacities of investment promotion agencies in Signatory CARIFORUM States.

Cooperation has also been an important innovation for a number of agreements negotiated by Asian countries – particularly in South-East Asia. Thus, as previously mentioned, the Asean Framework on Services (AFAS), already in its Article II, pinpoints specific areas of cooperation: infrastructural facilities, joint production marketing and purchasing arrangements, research and development and exchange of information, making a reference to another "Framework Agreement on Enhancing Asean Economic Cooperation".[55] It is interesting to note that both the Thailand-Australia and the Singapore-Australia Agreements also have specific provisions on cooperation. While the former lists specific areas such as R&D, human resource and professional development, data management and small and medium enterprises capacity enhancement[56], the latter has a full chapter on education cooperation, including even an article on student mobility and scholarship arrangements.[57] Even though these types of provisions may be perceived as *soft* by trade aficionados because they do not involve market openings, their value as guiding principles should not be underestimated, particularly when the language is mandatory ("shall" as opposed to "may", and so forth).

4. REGIONAL SCOREBOARD: LIBERALIZATION VS. DEVELOPMENT

Of course, the relationship between liberalization and development is not necessarily adversarial from an economic standpoint as the present sub-title suggests. In trade negotiations, however, the 2 focuses have become important political adversaries, with countries on both sides of the trade-and-development spectrum vying for methods and modalities that best accommodate their social and economic profile. Assessing what has been happening at the regional and bilateral levels in services can point to different realities depending on whether one is looking at the agreements as instruments of liberalization *per se* or as instruments that should contribute to sustainable development – and not just to the liberalization process itself. What may be GATS-*plus* in terms of liberalization may be GATS-*minus* in terms of development, depending on the perspective of each particular country.[58]

The difference in views here reveals the traditional divide that exists between those that consider liberalization as either equivalent or virtually equivalent to the best development policy available for countries, and those that believe that liberalization is just a part of a much broader policy package that can only lead to development if accompanied by a host of other policies. Both sides can possibly agree that a RTA or any trade agreement is not supposed to provide for development by itself. In negotiations, however, differences remain as to how much development-related provisions should be mixed in with trade liberalization-related provisions for an agreement to be considered a sufficient contribution to a country's development. Once again, the new EPA approach to trade in services has broken new ground in this context by providing a practicable and respectable new synthesis between free trade and economic development.

4.1 Liberalization

As far as liberalization is concerned, RTAs in services have not fared as well as they could. The analysis of the previous sections of this paper pointed to a significant number of flexibilities, loopholes, exclusions, mandate violations, lack of time frames and no provisions for future negotiations. For the most part, countries negotiated one-shot deals that effectively legitimated restrictions and froze them that way for applicable sectors, modes of supply and levels of government. Also, in virtually every case, countries at most bound the regulatory situations that they had in place at the time of the negotiation instead of "going any extra mile" for trading partners. Any differences in terms of GATS commitments possibly have more to do with timing than with content as such. If regional offers were better than those committed at the Uruguay Round, that often reflected the fact that countries liberalized further after the Round or simply felt more confident about offering commitments in additional sectors or modes of supply.

Given the lack of assessments, and the usual difficulties associated with analyzing services, it would be very difficult to be categorical on whether RTAs produced effective liberalization of markets or whether that liberalization was bullish in creating market opportunities for participating countries. What is ascertainable, however, is that all the differences in methods and modalities between the 2 main "schools" of agreements – NAFTA and GATS – did not prove to be sufficiently significant to cause notoriously different outcomes, since many of those differences tended to cancel each other as good or bad liberalization tools. If one factors in the fact that countries normally

only committed at best to maintaining their regulatory *status quo* in their schedules (and not to open new markets or eliminate new restrictions), one can also imagine that the real "market" effect of RTAs in services was often minimal in most cases. Most of the "free-trade" benefit should then reside in the higher predictability that comes from the transparency and irreversibility of commitments made – and not in effective market openings.

Another pro-liberalization aspect of trade agreements that did not seem to evolve much at the regional and bilateral levels was that of domestic regulation and regulatory harmonization or mutual recognition. GATS provides for both aspects, respectively by means of Articles VI and VII. Mattoo & Sauvé (2002) pointed to how with few exceptions[59], RTAs in services did not advance a great deal in clarifying what could be a necessity test that would ensure "proportionality" between regulatory means and objectives. The truth is that a number of agreements, especially pre-U.S.-Jordan NBAs, did not even include an article on domestic regulation that applied to the full universe of services. The domestic regulation focus of many of these agreements has been exclusively on licensing and certification of professionals and only for cross-border purposes at that, since there is no corresponding provision in their investment chapters. As to harmonization and mutual recognition agreements, there has been very little progress even in agreements, such as NAFTA, that adopted timetables for common procedures, future work and other commitments.

GATS were to have a new chance to break liberalization ground at the DDA. At the time of writing of this report (mid-2009), the round is paralyzed, caught between inaction and plain apathy on the part of the world's main trading partners. There seems to be a high risk of the DDA slipping into irrelevance for at least a few years given the new trade priorities of the new Administration in Washington. If one factors in the fact that services was not a high priority in the present round anyway, having remained outside "Lamy's Triangle"[60] of industrial tariffs, agricultural tariffs and agricultural subsidies, a strong impact of the DDA on services liberalization can hardly be expected. A cursory look at the offers made during the round before the latest impasses corroborates that conclusion. For example, while during the Uruguay Round all participating countries made specific commitments on 32% of sub-sectors, in the DDA new offers accounted for only around 2% more sub-sectors to be added to countries' schedules. In the case of developed countries, the corresponding numbers were 65,4% of all sub-sectors to an additional mere 5% of sub-sectors through new offers. For developing countries, the numbers were 28.28% and 1,92%, respectively.[61] Doha's mark on services would and will definitely not be on the liberalization of trade in services.

4.2 Development

The issue of sustainable development, particularly that of developing countries, has figured prominently in the international trade agenda since the Uruguay Round. It makes sense, since services are omnipresent in the larger economy, providing the ne2rks, the infrastructure and the crucial inputs that make it function smoothly - whether in agriculture, mining or industry, including social and environmental services and regulations that correct and potentialize markets for real sustainable development. A trade agenda without services, in that sense, could be a lost opportunity. A trade agenda without sustainable development as a guiding principle, however, could be an additional cost to economies that are not yet sufficiently mature to sift through and pick across regulatory alternatives and policy choices in services. The complexity of the service sector and of its linkages to good economic, environmental and social policy and regulation makes it much more sensitive than any other segment of the economy,

particularly for countries that have not had the time or circumstance to achieve the necessary equilibrium in it, for the pursuit of sustainable development. Trade negotiations, as a principle, should not run roughshod over these concerns or economic prosperity and well-being gets lost along the way.

The DDA, as the name suggests, has attempted to place sustainable development straight in the center of its concerns – clearly, among other things, a reflection of the high level of disgruntlement by developing countries with regard to the implementation of the WTO Agreements.[62] The effort is in principle laudable but very difficult to put into practice. Since the Uruguay Round that seems to have been the plight of many a regional and bilateral trade in services agreement as well. In large measure, the difficulty is common to both RTAs and the multilateral system: in addition to evident political complexities, both systems have had a difficult time defining what is meant by development, sustainable or not, and what are the instruments to match it. At the multilateral level, the overriding objective of preventing the system from crumbling, and with it its much-appreciated disciplining effect, may have forced a reduction of the sustainable development agenda in favor of the attainment of market access objectives that can more easily point to a successful end of the Doha Round. At the regional level, sustainable development may have faltered because countries either failed to see the value of having it as a guiding principle or lacked the negotiating power to influence matters in that direction.

To the extent that most regional arrangements dealing with services trade have been based on NAFTA or GATS, it is to be expected that their focus be more on free trade than on development-related matters – as they are themselves that way. All the same, NAFTA was actually the first agreement to have environmental provisions and clear references to sustainable development while the WTO has a committee on trade and environment. For the most part, however, one could affirm that the "universes" of trade and sustainable development remained fairly distant in the regions – in services, as it had "traditionally" been in goods. In Asia, for example, whether "new-age" (Japan-Singapore, Australia-Singapore, New Zealand-Singapore) or more traditional, RTAs have moved very slowly on issues of sustainability, retaining however a clear focus on trade liberalization. In the broader cooperation arrangement characterized by Asean, environmental and social matters appear as elements of functional cooperation and not within the realm of trade provisions.[63]

Until the Cotonou Agreement and the EUCARI, trade agreements that combined market openings with economic cooperation had been more common in Asia than in other parts of the world, having been negotiated both among developing countries as well as between developed and developing countries. Both the Asean Framework as well as the agreements negotiated by Australia with both Singapore and Thailand attest to that fact (see "Cooperation" above). Cotonou would of course make this combination easier by having objectives that were explicitly developmental in nature – such as the pursuit of sustainability in the development of ACP countries.

As we have seen in the section "Cooperation" above, the EPAs are slated to have full-fledged chapters on sustainable development that aim at cooperation both of a financial as well as non-financial nature. In addition, EPAs should spell out some of the development priorities achievable by an agreement of its sort, including both in general as well as for investment and services (including, in turn, sector-specific priorities in each case). The EPAs therefore constitute a legitimately new approach to development, one that may tip the balance in favor of a new paradigm for trade and development. In times of crisis, the EPA approach may be particularly attractive as a means for developing countries to secure a considerable level of aid-for-trade

alongside a greater measure of integration of their economies with the rest of the world.

As for most of the other existing agreements, there is very little on development itself. In fact, even South-South agreements tend to leave out some of the *pièces de résistance* in the trade establishment's developmental lingo. For example, Mercosur never had a clearly stated special and differential treatment provision[64] anywhere in its vast collection of protocols, decisions and resolutions, including its Montevideo Protocol on Trade in Services.[65] Another development *pièce* that also finds a hard time in regional South-South RTAs on services is the emergency safeguard mechanism (ESM), which for many developing countries is a *sine-qua-non* issue at the WTO. Asean, the main sponsor of the idea at the WTO, never contemplated having it for its own intra-zone services trade. The same applies to Mercosur, the Andean Community and a host of NBAs. In NAFTA, there was a safeguard mechanism but it appeared only in the Mexican schedule on financial services, thus referring only to the opening of Mexico's financial sector – something that found no parallel in later NBAs.[66] Some agreements, such as Caricom and the Andean Framework (Decision 439), have safeguards but only insofar as balance of payments difficulties are concerned.[67]

5. FACTORING FACTORS: CAPITAL AND LABOUR

Economic theory has repeatedly demonstrated the value of capital and labour moving together internationally so that adjustments in one factor can be compensated by changes in the other factor. As it turns out still in 2005, the mobility of capital has become the rule while the mobility of labour continues to be the exception. Agreements like NAFTA have moved some distance by having chapters on each of the factors of production, both of which apply not only to goods or to services but to both – as in "normal" life. Still, NAFTA itself is very limited on labour mobility, albeit very ambitious on capital mobility. There is no indication that this predicament might change in that context or any other in the world.

5.1 Capital

The movement of capital in trade agreements has found an important anchor in the theme of investment. With NAFTA, investment has become effectively a trade issue by virtue of its inclusion as a chapter governing both goods and services transactions. NAFTA in that sense went beyond the results of the Uruguay Round where investment-related matters were treated only partially: in the TRIMs agreement which dealt solely with aspects of investments specifically related to trade in goods and, of course, in the GATS Agreement which focused on investment via one of its modes of supply – the number 3, commercial presence.

As many agreements attempted to emulate NAFTA provisions since its inception, many of them have included investment provisions in their purview. The ones that have opted for not doing so clearly had problems convincing their constituencies of the value of surrendering that much "policy space". Among the countries with that sort of "spatial" concerns in relation to investment, numbering the richest in the world, gathered at the Organization for Economic Co-Operation and Development (OECD) to negotiate and draft a so-called Multilateral Agreement on Investment (MAI). The fiasco in 1998, when these countries decided to put an end to the negotiations and not even come back to the negotiating table, should have put a damper on similar initiatives at other levels – particularly given that countries like Canada and the United States found strong opposition at home to anything approaching a plurilateral or multilateral agreement on the matter. Nothing could be farther from the truth, however: those countries, as well as many others in the Americas, continue to push for an ambitious outcome on investment in the FTAA negotiations.

As it turns out, therefore, developed countries seem to prefer ambitious investment pacts with developing countries - whether bilaterally, plurilaterally or multilaterally, or yet, via a bilateral investment treaty or a trade agreement – to modest ones with developed countries, and that for 2 principal reasons:

- Investment arrangements with developing countries have a greater incentive to lock in place favorable liberalization and protection regimes alongside reliable dispute settlement provisions - of the sort that is significant enough for any opposition at home to be either virtually inexistent or easily rebuffed;

- Clearly, bargaining power between unequal partners goes a long way in explaining why the strong resistance to the issue when negotiating with like-minded and "like-fitted" countries and the steadfast push to the issue when negotiating with countries at lower levels of development. Investment has therefore become an askew theme, having a better chance to prosper internationally the greater is the bargaining differential of the countries involved.

That in the real world trade and investment are part and parcel of the same economic realm is irrefutable. That in the world of trade agreements the 2 issues need to be together, however, is a totally new matter that depends on the ultimate policy objective being pursued.

To evaluate such a question, the impact of one or the other choice must be clear in terms of 2 potentially conflicting aims: the aim of attracting foreign long-term capital vs. the aim of having the prerogative to intervene and influence the investment profile and function in one's market. This second aim has come back to the policy debate in many countries, after a relative absence in the nineties, in the context of what has been referred to as the preservation of "policy space". The dilemma, however, is bound to remain: investors shy away from too much *dirigisme* and that will continue to be the measure of the harsh reality surrounding foreign direct investment – in goods or in services.

5.2 Labour

The sensitivities that are normally associated with the movement of people across borders were not absent from regional agreements – no matter how close neighboring countries felt when they sat down to craft a trade in services agreement. The GATS limits (temporary stay, not seeking employment, not related to citizenship or residency) have worked as useful parameters for a number of agreements. Where movement has been present, it has had a lot to do with the movement of professionals or business visitors. NAFTA and many NBAs have included those categories in addition to traders and investors and intra-company transferees and in some cases have provided for special visas for professionals[68] subject to specific requirements.[69] GATS and GBAs apply to all categories of services providers but the extent of any particular liberalization commitment will depend on what countries effectively commit in their schedules of commitments. The EPAs may go farther than both the permitted scope and the practical commitments countries make if the EU continues to include contract service suppliers (CSS) alongside independent professionals (IP) in its schedules – as it has done in the EUCARI. Unlike NAFTA and NBAs, GBAs and EPAs only relate to the movement of natural persons as suppliers (or consumers) *of services* - and not of goods.

Regional agreements have remained a great distance from providing for "innovations" on the movement of people. Even when they did include labour mobility with a deeper level of liberalization commitment, the scope of categories included remained limited and not very attractive for countries that exhibit great competitiveness in their professional, technical or manpower services. For agreements that have opted for separate provisions for investment, whether in goods or services, the inclusion of only a few categories of natural persons comes highly short of providing a balance between factors of production. The norm has been for countries to shy away from broad-based principles or commitments on labour mobility liberalization – whether in the presence of investment provisions or not.

It is worth noting that whenever the opportunity presented itself regionally for a bargain to take place between labour mobility and other negotiating themes, countries have often preferred a conservative, as opposed to a demanding, stance. At the FTAA negotiations, for example, labour mobility did not come to integrate Mercosur's palette of demands even when in the presence of strong pressure from NAFTA countries in favor of an investment chapter. In other words, Mercosur seems to have preferred to avoid *both* ambitious investment and labour provisions as opposed to charging a "labour" price for the inclusion of investment – a clear indication of how regionally the issue does not seem to be as important as some might suspect. It should be noted, however, that Mercosur has been keen on avoiding limiting is "policy space" at all costs – a position which should be common to many developing countries who would rather live without greater labour mobility and not "sacrifice" its autonomy by conceding too much on capital mobility (investment) - than the opposite.

6. POLICY SPACE: WORSE OFF?

As the liberalization and privatization waves of the nineties did not produce all that was promised by the Washington Consensus, societies became concerned, organized and vocal, governments reacted and changed, and a new concept emerged in trade negotiations which was fully consistent with the notion that if things were wrong in the last decade they should be corrected in the present one. That concept was that of "policy space" and it readily revealed the underlying concern of many in the world with being able to change things past and avoid stringent commitments on things future.

In services, where liberalization commitments do lock-in domestic, sensitive and strategic regulatory situations for posterity, the search for the preservation of policy space had become a guiding principle for many countries around the world. In so many ways, regional experiments had aggravated the suspicion of some that the big trading partners were indeed out to limit the supposedly scarce policy space of the poorer nations. Once again, there were some *pièces de résistance* that emerged in RTAs and did much to illustrate the debate. 2 of them were especially revealing.

The first *pièce* was the provision for prior comment on proposed changes in relevant laws and regulations that appeared in NAFTA and in many NBAs that followed it. Many countries in the Americas, for example, voiced a strong opposition to the notion in the FTAA negotiations, as it was perceived as a clear encroachment upon a country's otherwise sovereign right to regulate. The second *pièce* related to the inclusion of investment provisions in free trade agreements – something which has been so far fully rejected at the multilateral level but which has moved a long way regionally – once again - with the advent of NAFTA and its kin agreements. Within that context, there has been an even more specific concern that is at the center of the controversy: the prohibition of performance requirements.

These requirements were precisely what many developing countries were seeking to keep or restore. As many of the mistakes of the past tended to be somehow linked to the wave of liberal policies on investment, including, first and foremost, privatization, policy-makers in many countries were keen to keep their "policy space" and be able to have recourse to some of those measures (trade balancing, local content, etc.) if necessary in the future. Those measures were also often seen as important bargaining chips in luring quality foreign direct investment to one's market. Policy-makers of this particular persuasion rather saw the value of such measures to "force" multinationals to negotiate their entry as opposed to the value in having a system free of restrictions as a potent attractor of FDI. Without going into the merits of one position or another, the fact is that many developing countries have been weary of this new potential curtailment of their policy space. And then the international financial crisis struck in September 2008 and the world slowly, but all the same strikingly, changed priorities. Countries, both developed and developing alike, have grown weary of trade liberalization for the time being and have tried to act on the other end of the trade spectrum: protectionism. In other words, the main objective is no longer to open up markets but rather prevent them from closing any further. The fact is that all countries are now seeking "policy space" to try and weather the storm the best way they can. When countries bail out banks or subsidize auto manufacturers, they are going against at least the spirit of the WTO Agreements – if not the latter in many cases. The debate on the matter had not reached a satisfactory balance before the crisis and has now taken a heavy blow with the debacle, which has grown out of the lack of adequate domestic regulation in the most prominent of all services sectors: the financial.

The resistance of some countries to giving up their policy space has accounted for the demise of agreements around the world –

the Free Trade Agreement for the Americas (FTAA) to cite just one. The DDA was clearly not held hostage by the services dossier but matters relating to domestic regulation remained at the root of all discussions in those negotiations. All that was already taking place in the absence of a global crisis of the 2008 proportions. Reaching a balance on the issue of policy space may now be all the harder for the foreseeable future.

7. DILEMMA OR INERTIA – STRADDLING THE REGIONAL DIVIDE

As with trade in goods, there is an apparent dilemma between multilateralism and regionalism in trade in services as well. As with goods, the important underlying question from a national *economic* perspective in services is, as Fink and Mattoo (2002) put it, whether larger welfare gains can be produced through a regional (preferential) or multilateral (non-preferential) approach to liberalization. As with goods, the important underlying question from a national *political* perspective in services is whether a country can best advance its own national priorities, developmental and otherwise, *via* regionalism, multilateralism, both at the same time, or neither at the same time (unilateralism *per se*).

From a *systemic* standpoint, the dilemma is also quite forceful both economically as well as politically in services: is the world economy better off if countries "band" together in "small" groups and discriminate in favor of the group in their international services transactions? Is the world's governance better off if trade and investment in services is increasingly a matter of choice and negotiation among blocks, and not countries? This is where Jagdish Bhagwati's "spaghetti bowls"[70] meet Peter Sutherland's "stumbling blocks".[71] The choices are indeed not easy but the fact is that the world has not exactly "stopped" to reflect on these issues: it continues to move forward on both fronts – apparently somewhat indiscriminately.

The advent of regional trade in services arrangements seems to reflect much more inertia than dilemma. If countries were really torn between regional and multilateral approaches, there might be less of either. The fact is that the world seems to be comfortable with the *co-habitation* of both systems in services and RTAs covering services trade are proliferating very quickly. It would be a far shot to uphold, however, that this movement, as 2-fold as it may be, is inspired by a clear, one-dimensional view on the benefits of regionalism either as a *mover* of economic growth and development or as a *shaker* of a possibly ailing multilateral system. Countries seem to be racing to conclude services agreements because "everybody is doing it". The movement seems to be more an expression of the [positive] inertia of a stampede[72] than of the [dampening] dilemma of competing universes.

Perhaps the strongest demonstration of inertia as opposed to dilemma is the record of RTAs covering services itself. If countries were really keen on the value of regional arrangements in services their approach to these agreements might be more straightforward and consistent. NAFTA never went back to the negotiating table and failed to comply with significant commitments such as the liberalization of land transport. The Montevideo Protocol only went into force 11years after being signed. Many other agreements, including bilaterals such as Chile-Canada, excluded full important sectors from their disciplines (financial services, cultural "industries", etc.). Others do not apply any discipline to local measures. Most agreements have no final deadline for achieving full liberalization. Some of them allow for the scheduling of future restrictive measures. The record on development, as both a concept and an instrument, has been vacuous - at best. So far, only one agreement has been negotiated pursuant to a new vision on trade, development and cooperation – the EUCARI pursuant to the Cotonou Agreement.

Is there light at the end of the tunnel? Doha certainly has not done much to bring the services world out of its doldrums. It has failed to liberalize services and certainly is a far shot from providing a development perspective on services beyond the predictable additional flexibility for developing countries in liberalizing fewer sectors in longer timeframes - which, admittedly, is at times elusive and hard to ensure at the negotiating table. Regional agreements have also disappointed in that

context, having fallen short of achieving progress in matters that were supposedly better tailored for partial agreements – such as mutual recognition. To make things even more complicated, the world has fallen apart with the financial debacle in the United States and its worldwide consequences.

And yet, RTAs in services continue to be negotiated. There seems to be a feeling that unless the "services regional bicycle" is pedaled, the "services region" will fall. In many cases, "banding together" on services trade and investment is also seen as a form of deterring the ambitions of more powerful trading powers. In other cases, conceding on services trade and investment is seen as an important signal to the world – a signal that may make the difference between more or less, good or bad-quality investment, growth and development. It may come as a surprise to some that the main protagonists of the services drama moving forward might be some of the most developed countries in the world – the EU – and some of their poorest counterparts – the ACP countries. Yet, the new model put forth by the EPAs may just strike the right balance between trade and development for deals to become feasible *even in times of crisis*.

The jury is still out on RTAs on services.

8. CONCLUSIONS AND RECOMMENDATIONS

A possible finding from the present analysis could "safely" be that the future is somehow bleak for agreements covering trade in services – whether in terms of liberalization or development – since they have so far delivered little on either front. That assumes, of course, that countries, when negotiating trade in services agreements, are effectively seeking one, the other, or both liberalization and development. The truth, however, seems to lie elsewhere: countries, for the most part, are using trade in services agreements as an instrument amongst many for the furtherance of their national policy objectives, including a greater and more consistent integration into the world economy. For the most part, countries are seeking to lock in place whatever predictability they can in their regulatory regimes by making commitments that, while not opening their economies any further than the *status quo*, do bind existing levels of openness for posterity – at most.

Against that background, the principal conclusions of this study can be summarized as follows:

- Despite the vulnerabilities and insufficiencies of existing trade in services agreements, negotiations on such agreements are bound to continue – over and beyond crises and other disturbances. Developed countries will continue to press for further liberalization of a sector that accounts for over 70% of their GDP while developing countries will continue to use such agreements to lock in place regulatory situations that can help them in their efforts towards internationalization and integration into the world economy;

- Although the traditional leader of the world trading system, the U.S., has been facing difficulties in advancing a bullish trade agenda, the E.U. has established a vast work program with ACP countries that is slated to transform the trade in services landscape insofar as it manages to fuse liberalization and development into concrete provisions of interest to developing countries;

- In that sense, the E.U. has come up with a new "model" of agreement that may still unlock great potential for commitments on the part of developing countries, by establishing a new quid-pro-quo between the trade and development tracks within the same set of rules and principles guiding bilateral relations between any 2 parties (regional or not regional);

- The main issue for trade in services agreements moving forward is not whether to open or not to open one's services market but, instead, whether maintaining the *status quo* – with or without restrictions – is the best way to ensure social and economic development alongside a quality regulatory regime. Ultimately, trade in services agreements bind existing situations. The difficulty for countries, particularly for those in the developing world that do not have great tradition in regulating services, is to find the right balance between integrating their services economies into the most dynamic supply chains in the world while keeping the right to regulate and ensure world-class quality in services supply in their own markets;

- Existing models of agreements do reflect these concerns by exhibiting various levels of flexibility in their operative provisions. Generally, the E.U. favors much more flexibility than the U.S. when it comes to the mechanics of liberalization and promotes agreements that deal directly with aspects relating to development – something forcefully rejected by the U.S. in its approach to trade in services;

- The "emerging" EPAs can become a model for agreements between developed and developing countries but each case will be a separate case. Whether the E.U. would be willing to follow that model with the more advanced developing countries is not clear. Perhaps the model suits the E.U. for the most part with LDCs and ACP countries - exclusively;

- In any case, models of agreements can only be second to the overriding need for countries to know their regulation and define their specific interests in any negotiation. In other words, the fact that EPAs or other agreements may have development provisions is no guarantee that one's own interests are "adequately" contemplated in those agreements: that will hinge on each country's efforts towards defining its own interests and negotiating them successfully;

- Only if countries manage to focus, look inside, and define their own priorities, can they hope to lead - or be a leading influence - in negotiating agreements with other trading partners. In other words, only "armed with" clear national positions can a country aim to act - and not just react to proposals from negotiating partners. This is why, even in the context of an ever increasingly complex web of agreements on trade in services, countries need to turn to basics in crafting their approach to policy and negotiation – notably:

  - Economics It is important for countries to be clear on the economics of the services economy, its regulation and relationship to the world economy. Services, unlike goods, are intermediary activities that can do much to ensure the well-functioning of a national economy. In that sense, the economics of services need to be necessarily "economy-wide". Countries should not look to develop services just for their own sake, but because they can play a crucial function in the economy as a whole.

  - Policy Once a country has its own economics in place (i.e., it has opted for a particular economic pathway towards development), it has to think of specific policies that can effectively put it into practice. The policy-making process is most often "multi-disciplinary", involving a number of ministries, agencies, legislative authorities and, hopefully, stakeholders – amongst entrepreneurs and other representatives of society at large. With a view to negotiating successful agreements, countries have to come to some clarity on the underlying national policy objectives to be achieved for specific service sectors.

  - Regulation Regulation has to follow policy guidelines while ensuring a reasonable, objective, impartial and quality supply of services in a particular market. Regulation has to ensure that national policy objectives are met at the market, thus reflecting an optimal equilibrium between economic and non-economic elements of a country's policy fabric. Clarity on this balance will be crucial at the time of negotiating international commitments. Inventories of measures affecting services and trade in services should be a recurring activity, including evaluations of how such measures work and contribute to a country's economy.

  - Strategy Once countries have reached a certain level of clarity with respect to their own services sectors, they should be in a position to sketch a strategy regarding international negotiations. On the basis of defined interests, which themselves hinge on economic options, undertaken policies, and implemented regulations, countries should then actively decide on potential trading partners, integration possibilities, and negotiating modalities.

  - Negotiation International negotiations will be defined by the interplay between parties on both sides of the negotiating table. In that sense, in addition to knowing and defending one's own national interests, negotiating countries will have to resort to tactics that go beyond the services "universe", with a view to ensuring a so-called "balance of rights and obligations" in a particular pact. In broad-based negotiations such as the DDA or the emerging FTAs and EPAs, services constitute just one sector vis-à-vis agriculture and industry. This is not a trivial fact and has to be taken into account when the matter is the negotiation of an international binding agreement.

ENDNOTES

1. Even though the EC Treaty and the evolution of services liberalization within the EU have done much to influence both the GATS and NAFTA, its role as a *model* for the subsequent new generation of free trade agreements applying to services has been general at best. The most plausible reason for this is that no other region in the world approaches the social, economic, geographical, or historical features of the Old Continent and its integration process.

2. Cotonou Agreement, Article 41:4.

3. Trade, Development and Cooperation Agreement, EU-South Africa, Title IV.

4. Ibid., p. 5.

5. Non-reciprocal trade preferences have been offered by the EU to ACP countries since 1964 through various treaties: Jaunde I and II, Lome I-IV and through provisions of the Treaty of Cotonou itself (2000-2007).

6. The deadlines currently in place in the EU-ACP EPAs were a direct reaction, therefore, to another important deadline: that of the end of the waiver granted by the WTO for the EU and the ACP to maintain their preferential trade relationship – as opposed to granting whatever is negotiated between them to the rest of the world, as foreseen by the MFN principle.

7. Lome I-IV and through provisions of the Treaty of Cotonou itself (2000-2007). Trade in Services in the Andean Community", Article 1.

8. Andean Community, "General Framework....", Article 22.

9. Asean, Asean Framework Agreement on Services, Article I.

10. Asean, Asean Framework Agreement on Services, Article II.

11. In addition to trade and cooperation provisions in the Afas itself, services trade and investment are also part of an array of broader instruments such as the ASEAN Vision 2020 of 15 December 1997 and the ASEAN Concord II, also known as the Bali Concord II of 7 October 2003 which created an ASEAN Economic Community (Aec). The Aec calls for a single market and production base, with the free flow of goods, services, investment and labour; as to capital other than long-term investment, the Aec seeks a "freer" flow and not full freedom.

12. NAFTA, art. 1213:2.

13. NAFTA, art. 201.

14. NAFTA, arts. 1113 and 1211.

15. GATS, art. XXVIII(n)(i)-(ii).

16. EUCARI, art. 61(c).

17. EUCARI, art. 61(e).

18. NAFTA, art. 201.

19. NAFTA, art. 1201 and GATS, art. XXVIII:(c).

20. NAFTA, arts. 1206 and 1108.

21. NAFTA, art. 105.

22. EUCARI, art. 61(b).

23. NAFTA, art. 1201:3 provides that nothing would prevent a party from providing the following: "a service or performing a function such as law enforcement, correctional services, income security or insurance, social security or insurance, social welfare, public education, public

training, health, and child care".

24. Mercosur, since 1996, had an agreement on sub-regional air services that liberalized the intra-zone traffic between sub-regional airports. When it was signed, in 1997, the Protocol incorporated that agreement into an annex, thus ensuring compliance and consistency between the 2 instruments (the Protocol itself and the sub-regional air services agreement).

25. The U.S.-Jordan Agreement, in force since December 2001 already had a specific article devoted to electronic commerce, which, among other things, reaffirmed the principles that had already been announced in a previous Joint Statement on Electronic Commerce.

26. Chapter 15 of the U.S.-Chile FTA sets forth the right of parties to impose internal taxes on digital products and an obligation not to discriminate amongst digital products originating from the other party – something absent from the EUCARI.

27. GATS, Art. XVII.

28. In the case of the GATS, MFN exemptions were allowed as a one-shot possibility at the end of the Uruguay Round – initially for 5 years, renewable for an additional 5. In the case of GBAs that followed it, no possibility for exemptions was envisaged, as was the case with Mercosur's Montevideo Protocol on Trade in Services whose MFN principle was applicable without exception from the outsetGATS, Annex on Article II Exemptions.

29. Unsurprisingly, this has been the object of various mid-level developing countries such as, indeed, Brazil, who see in that provision a disincentive for South-South trade.

30. Earlier agreements that adopted the NAFTA content and structure wholesale were the ones negotiated by Chile, Mexico and Canada – namely, Chile-Canada and Chile-Mexico - which entered into force, respectively, on July 1997 and August 1999.

31. NAFTA, art. 1205. The concept is also known as the "right of non-establishment".

32. NAFTA, art. 1804.

33. All NBAs are included, including the more recent ones such as the U.S. agreements with CAFTA-DR, Peru, Colombia and Panama.

34. NAFTA, art. 1802:2.

35. Although EUCARI Article 86 only includes one paragraph like GATS Article III, namely the one relating to responding promptly to all requests by all Parties, the other aspects on transparency covered by the GATS Article III are picked up in Article 235. The other paragraphs under EUCARI Articles 86 and 235 correspond to GATS Article III *bis* on confidential information.

36. "...such requirements are, *inter alia*: (a) based on objective and transparent criteria, such as competence and the ability to supply the services: (b) not more burdensome than necessary to ensure the quality of the service: (c) in the case of licensing procedures, not in themselves a restriction on the supply of the service", GATS Article VI:4.

37. It should be noted that the coverage of professionals in NAFTA was limited anyway to highly skilled professionals. Neither here nor elsewhere in the agreement does NAFTA go beyond commitments it had assumed at the WTO.

38. Paragraph 3 of NAFTA Article 1210.

39. NAFTA, Annex III.

40. There has been no evidence of the usefulness of such provision in practice, but NBAs have consistently included it. Whether future NBAs, particularly those negotiated by the U.S., will continue to provide for such liberalization is, of course, a question that hinges on the future of trade policy under the Obama Administration, particularly in the presence of great resistance to free trade initiatives in the Congress.

41. This, in any case, does not mean that all members are fully satisfied with the prevailing approach in the GATS.

42. The reservation of future measures, as seen above, is possible via Annex II of the NAFTA.

43. However, the 10-year time limit applies as from the entry into force, which only took place on December 2005 - fully 7 years after having been signed.

44. Andean Community, Decision 439, art. I.

45. NAFTA, art. 1207.

46. The FTA between Chile and Canada that was negotiated and concluded 2 years previous to the México-Chile FTA, however, did not include any reference to future liberalization.

47. Negotiations between the EU and Central America and the Andean Community countries started in 2007 but have, at the time of writing of this report, gotten to a definitive stage regarding issues such as deadlines for liberalization.

48. NAFTA, art. 1210. The article also goes on to say that in case that obligation is not fulfilled by one Party, other Parties will have the right to maintain, for the same sector and for the same time as the Party is non-compliant, the same non-confirming requirement. Until today, not much has effectively been accomplished with respect to this commitment.

49. It is a generalized perception that there has been little effective movement in NAFTA regarding the mutual recognition of professional qualifications, the elimination of citizenship or permanent residency requirement or on some of the other matters the agreement was purported to do.

50. The México-Chile FTA, for example, called for the immediate, and not in 2 years, removal of citizenship and permanent residency requirements for professionals – art. 10-12:3.

51. NAFTA, Annex 1404.4.

52. México-Chile FTA, art. 20-08:(a).

53. NAFTA, Annex 1212:3.

54. EU Morocco Agreement, Title III, Article 31:2.

55. Asean, Asean Framework on Services, Article II:2.

56. Thailand-Australia Free Trade Agreement (TAFTA), Article 808.

57. Singapore-Australia Free Trade Agreement (SAFTA), Chapter 15.

58. Negative lists, for example, could be perceived as GATS-*plus* by countries that favor faster and indiscriminate liberalization agreements and GATS-*minus* by those that need more "policy-space" to put adequate regulations and policies in place. In the literature, the term GATS-*plus* normally only refers to elements that may have been introduced *in addition* to those set out in the GATS original construct, without the distinction hereby suggested with respect to the criterion used.

59. The EU itself, and pre-EU-accession agreements negotiated between the EU and Central and Eastern Europe.

60. These are items the solution of which would make a happy ending possible for the DDA.

61. WTO Secretariat PowerPoint, "GATS and the Current Services Round: An Overview". March 2005.

62. The Doha Declaration explicitly refers to sustainable development as an objective: "We strongly reaffirm our commitment to the objective of sustainable development, as stated in the Preamble to the Marrakesh Agreement. We are convinced that the aims of upholding and

safeguarding an open and non-discriminatory multilateral trading system, and acting for the protection of the environment and the promotion of sustainable development can and must be mutually supportive".

63. See Imai, Gueye (2003).

64. Some actual provisions in Mercosur's agreements provide for some differential treatment in practice such as a longer phasing out timetable for certain products for Uruguay and Paraguay. There is nowhere, however, an explicit formulation of the S&D principle.

65. Caricom and the Andean Community do have provisions on S&D, however.

66. NAFTA, Annex VII, Schedule of México, Section B.

67. Caricom, Protocol II, art. 37c and Chapter VII, Article 20 of Decision 439 of the Andean Community.

68. The U.S. has provided "Trade NAFTA (TN)" visas for professionals of other member countries of NAFTA. The U.S.-Chile agreement provided for a quota of 1,800 professionals (H-1B1 visa) while the U.S.-Singapore agreement provided for a quota of 5,400 (also, the H-1B1 visa). The U.S.-Australia FTA provided for a cap of 10,500 professionals (E-3 visa). However, more recent U.S. FTAs with CAFTA-DR, Peru, Colombia or Panama did not include provisions on labour mobility or quotas. In these agreements, as in NAFTA, only mechanisms for the discussion of the facilitation of the movement of professional workers were included.

69. Although the U.S. ultimately shied away from effective market access for mode 4 via quotas for certain professionals, the original and broader NAFTA format survived in later NBAs negotiated by Canada, Mexico and Chile such as: Canada-Chile, Canada-Peru, Chile-Mexico, Chile-Central America, México-Central America. In addition, in the Peru-Canada FTA, categories of "temporary entry" were broadened to include certain types of "technical workers".

70. Bhagwati, Jagdish. (1995), "U.S. Trade Policy: The Infatuation with Free Trade Areas", in *The Dangerous Drift to Preferential Trade Agreements*, eds. Jagdish Bhagwati and Anne O. Krueger. Washington: American Enterprise Institute.

71. On 16 September 1993, Peter Sutherland, then GATT's Director-General, delivered a speech in Montevideo entitled "The GATT and Regional Integration: Building Blocks, not Stumbling Blocks", arguing in favor of regionalism as long as it was of the open kind. The term had also been used in R. J. Lawrence, "Emerging Regional Arrangements : Building Blocks or Stumbling Blocks ?", in Richard O'Brien, *Finance and the International Economy,* vol. 5, London, Oxford University Press, 1991, pp. 22-35.

72. "A sudden frenzied rush of panic-stricken animals". Source: www.dictionary.com.

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