

**OAS TRADE UNIT STUDIES**  
**Analyses on trade and integration in the Americas**

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**Multilateral and Regional  
Services Liberalization by  
Latin America and the Caribbean**

Sherry M. Stephenson

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**Organization of American States**  
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## OAS TRADE UNIT STUDIES

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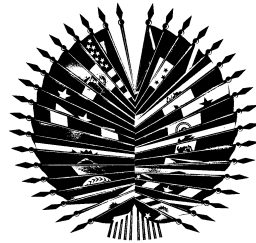
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**INTRODUCTION**

There has been a growing interest on the part of countries in the Western Hemisphere to liberalize trade in services that has manifested itself over the past decade as the result of three factors. The first is the increase in the importance of the service sector to national economies around the world and the realization of the vital role the service sector plays in stimulating both economic growth and trade, including for agricultural and manufacturing products. The second is the influence of services trade being brought under multilateral rules and disciplines for the first time with the completion of the Uruguay Round and the entry into force of the WTO General Agreement on Trade in Services (GATS) in January 1995. This process has served to familiarize negotiators with the concepts involved in services trade and with the way in which to negotiate binding service commitments. The third is the activism of sub-regional arrangements within the hemisphere whose members have shown the desire and willingness to go beyond services liberalization at the multilateral level and negotiate more far-reaching integration agreements.

This study captures the latter two phenomena, with a focus in Part I on the growing participation of Latin American and Caribbean countries in multilateral services liberalization, particularly since the WTO GATS has been in effect, and how these countries have positively contributed to the preparations for, and ongoing discussions, within the current GATS 2000 negotiations. Part II focuses on the mirror side of this situation, namely the activism of countries in the Western Hemisphere at the sub-regional level to liberalize services trade. Together, the two parts of the study paint a very complete picture of how interest and activism in the services area has increased over time for countries in the region.

## I. THE GROWING PARTICIPATION IN MULTILATERAL SERVICES LIBERALIZATION<sup>2</sup>

The General Agreement on Trade in Services (GATS) under the World Trade Organization (WTO) marked its fifth year of operation in January 2000. This important millennium date provides a nice benchmark from which to evaluate what has been accomplished by Latin America and the Caribbean with respect to the liberalization of trade in services at the multilateral level, both during and since the Uruguay Round of Multilateral Trade Negotiations (1986-1994), and in particular to examine what role countries of the region have played in the services area. After a controversial launch and difficult negotiations during the Uruguay Round, since the coming into effect of the GATS in January 1995, discussions and negotiations on trade in services have progressed in a relatively smooth manner. Witness to this are the successful conclusions of the Agreement on Basic Telecommunications in February 1997 and the Financial Services Agreement in December 1997. From an initial attitude of skepticism and mistrust, countries in Latin America and the Caribbean have on the whole been actively participating in these discussions and have undertaken additional commitments, some of them market-opening in nature, at the multilateral level.

As mandated in Article XIX.1 of the GATS, a new round of services negotiations was officially launched in February 2000, with the objective of furthering the progressive liberalization of trade in services. This launch met with almost complete concordance among WTO members, developed and developing alike, on the negotiating agenda. Latin America and the Caribbean were very much present in this general consensus on negotiating principles and objectives. Thus trade in services has evolved from being one of the most controversial areas of trade policy-making in the 1980s to enjoy widespread consensus by WTO Members under the GATS in the late 1990s and beyond.

This chapter sheds light on the progress towards services liberalization achieved by Latin America and the Caribbean during the Uruguay Round negotiations and in the first five years of the operation of the GATS. It also examines their participation in the current multilateral services negotiations (GATS 2000), and reviews their submissions to these negotiations.

### The Uruguay Round Services Negotiations

In the Western Hemisphere, as in the rest of the world, trade in services comprises twenty five percent of total exports and over sixty per cent of total GDP on average. Trade in services is a major foreign exchange earner for smaller economies in the hemisphere. Many Caribbean and Central American countries rely heavily on trade in services, and services exports are larger than merchandise exports for two-thirds of these small nations where for some they can be double the value of goods exports.<sup>1</sup> In terms of economic activity, 54 per cent of the total labour force in the Western Hemisphere is engaged in some form of service activity: 39 per cent of male labour force and 69 per cent of female labour force, respectively.<sup>2</sup>

Despite the significance of trade in services, these negotiations during the Uruguay Round were quite contentious. Under the Punta del Este Declaration, services negotiations were separated from those of goods, and the two were even launched separately in September 1986. Given the fact that the major exporters of services in the world economy have traditionally been developed countries, such as European Union member countries and the United States, developing countries perceived that only developed countries would benefit from services liberalization. This perception led to their strong opposition to the launch of services negotiations, only brokered by the fact that both agriculture and textiles were also included as negotiating agenda items. Such resistance was transformed into reluctance and hesitation, once negotiations were initiated. Rather passive participation on the part of

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<sup>2</sup> Part I was prepared for the volume *The Future of Latin America in the Global Economy*, edited by Patricia Rich, UK: Macmillan Press, 2001. The author would like to acknowledge a large debt of gratitude to Soonhwa Yi for her valuable research assistance and input into this paper and to thank Maryse Robert for helpful comments.

<sup>1</sup> See Prieto and Stephenson (1999).

<sup>2</sup> WTO Background Data: Employment by Economic Activity, Press Release 167.6.2000.

developing countries during the Uruguay Round resulted in a very low number of specific commitments and a small degree of openness for services trade.<sup>3</sup>

One of the main reasons that the negotiations were so divisive was because of the lack of knowledge over what was being discussed. Services trade represented a large unknown and uncharted area in the realm of multilateral diplomacy. Thus most participants simply muddled through with little knowledge of services. Two factors contributed to undermine most countries' active involvement in the services negotiations. Those were notably: the paucity of statistics on trade in services, and the lack of economic studies estimating the economic impact of services liberalization. These two factors deserve further comment.

It is widely acknowledged that services negotiators face a deficiency of available GATS-relevant statistics on trade in services. The statistical paucity derives from the divergence between the GATS legal framework and the classification that has been adopted for services activities, and the traditional statistical framework within which tradable data are collected and reported. Importantly, the GATS legal framework does not match the concepts and categories used by statisticians. Currently, the only available source of data on services trade (cross-border transactions) on a global basis is the Balance of Payments (BOP) statistics collected by the International Monetary Fund (IMF) and found in the IMF Balance of Payments Manual. These data, as all BOP data, are based on the concept of transactions between residents and non-residents. However, the concept of services trade under the GATS goes beyond this. The GATS defines services transactions as one of four possible modes: mode 1 being cross-border trade; mode 2, consumption abroad; mode 3, commercial presence; and mode 4, movement of natural persons. Thus the GATS covers not only transactions between service producers and consumers in two different countries (residents and non-residents) but also those transactions taking place between service producers and consumers of different nationalities located within the same territory or country. It also covers the movement of natural persons to provide a service abroad. The source of service transactions can thus be not only differences in location, but also in ownership, control and nationality. The few number of categories for which data are collected and reported within the Fifth Edition of the IMF BOP Manual are therefore limited to cross-border transactions under modes 1 and 2.

Data on mode 3 are taken to be those sales by foreign affiliates or foreign affiliate trade (FAT) within a host country. However, the FAT definition of foreign ownership does not coincide with the GATS which is broader; similarly, the services classification used by FAT does not concord with the classification of the GATS. With a view to solving these problems, a set of guidelines for collecting data on foreign affiliates trade in services (FATS) has been developed.<sup>4</sup> However, at the present time only a few developed countries have begun to collect data on sales by foreign affiliates under these guidelines, and very little is as yet comparable. Data on mode 4 are partially available under the category of worker compensation in the balance of payments accounts. However these data do not include self-employed workers, and they group together workers in both the goods and service sectors, thus including transactions that are not related to service supply.<sup>5</sup>

Second, there is a divergence between the GATS framework and that of traditional statistics with respect to classification. The current classification scheme used by statisticians for the collection of data is far less disaggregated than that for services products set out in the classification list adopted by the WTO for the purpose of services negotiations (found in GSN/W/120). This difference is most flagrant with respect to telecommunications and financial services, where practically no detail in breakdown exists for the collection of trade statistics. Third, a divergence exists with respect to the actual service categories included in the various classification systems. There is a lack of concordance between some of the services categories used by the IMF and/or in the framework of the FAT, and those listed in the GSN/W/120.<sup>6</sup>

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<sup>3</sup> Only one-third of WTO members committed on between 81 and 145 sectors out of 155 sectors. See WTO S/C/W/94 for further information.

<sup>4</sup> See Chang and others (1999).

<sup>5</sup> See Karsenty (2000).

<sup>6</sup> See UN (2000).

Due to the paucity of available statistics on services trade, services negotiators were not able to determine which of their service sectors was important for trade (export-oriented) or relatively less competitive (import-competing) for the purpose of requesting and offering GATS commitments. This contributed to their lack of preparation for the negotiations and ultimately undermined the ability of these countries to play an active role in the services negotiations during the Uruguay Round.<sup>7</sup>

In terms of economic studies of the impact of services trade liberalization, these have been extremely difficult to carry out due to lack of data and the difficulties involved in trying to estimate price equivalents for the non-tariff type of barriers that restrict service providers. Barriers to services trade have been broadly placed into two categories for the purpose of the services negotiations: restrictions on market access (GATS Article XVI); and derogations on national treatment (GATS Article XVII).<sup>8</sup> These non-tariff barriers are hard to measure, which also means that the impact of liberalization is not easily captured. This difficulty in measuring economic impact of services liberalization deterred services negotiators for quite some time. Over the recent past, some pioneering studies have been undertaken to measure and quantify non-tariff barriers in selected service sectors.<sup>9</sup>

### *Commitments by Latin America and the Caribbean*

The skeptical attitude towards the opening of services markets described above was initially manifested by Latin America and the Caribbean and resulted in very little participation in the Uruguay Round and in small numbers of specific commitments undertaken on trade in services.<sup>10</sup> Half of these countries made commitments on less than 40 of the 155 service sub-sectors defined for the purpose of the negotiations. The large majority of commitments were made in five of the eleven principal service sectors, namely: tourism (32 countries), financial services (30), communications (28), business services (26), and transport (25), while the other six sectors were practically ignored.<sup>11</sup> *Table 1* sets out the number of service commitments undertaken by countries of the Western Hemisphere (Latin America and the Caribbean plus the United States and Canada) at the conclusion of the Uruguay Round. However, this numerical listing does not take into account the degree of actual liberalization or market opening contained in the GATS schedules. The number of commitments listed in the table is a reflection of the count of the total number of entries made in an individual schedule and groups together measures with varying degrees of openness, from those with no restrictions to those with very restrictive limitations. The list even includes entries in national schedules that were not bound, or listing as “unbound”.

A more in-depth analysis in this area needs to rely upon a measurement tool that can provide a better evaluation of the actual significance of GATS commitments, particularly from the perspective of trade liberalization, or openness, achieved. The numerous ways in which the data can be presented makes deciphering the value of the commitments tricky. The most objective measurement of openness that can be applied to the services area comes from examining the number of sub-sectors/modes of supply in which a country has bound itself to

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<sup>7</sup> In order to improve availability on services statistics, an Inter-Agency Task Force of Statistics on International Trade in Services was created and drafted the Manual on Statistics of International Trade in Services (MSITS) in early 2000. The task force consists of EUROSTAT, OECD, UN, UNCTAD, IMF, and WTO. It explicitly takes into account the needs of services trade negotiators for the first time in designing an expanded framework for the collection of statistics on services trade. With a view to addressing the needs of the users, the task force held a meeting in July 2000 of senior statisticians (providers) and senior trade negotiators (users) to discuss the draft Manual that is now in the process of revision.

<sup>8</sup> See Warren and Findlay (2000),

<sup>9</sup> Ibid. Also Findlay (2000).

<sup>10</sup> As of April 15, 1994, twenty-eight countries of the thirty-four WTO members in the Western Hemisphere submitted schedules of GATS commitments. Ecuador, Haiti, St. Kitts and Nevis, and Panama submitted their schedules in 1996 and 1997. The Bahamas is not yet a WTO member. The number of commitments refers to a count of the entries a country has placed in its GATS schedule for a given service sub-sector in the areas of market access and national treatment. The total universe of possible commitments is a count of 620 with respect to each, or 1,240 in total.

<sup>11</sup> Those sectors are construction and engineering, distribution, education, entertainment, health, and recreation, cultural and sports services.

**Table 1**  
**Number of GATS Commitments made by Western Hemisphere Countries, 1994**

<b>Countries</b>	<b>Number of Commitments</b>	<b>Countries</b>	<b>Number of Commitments</b>
Antigua & Barbuda	68	Haiti	64
Argentina	208	Honduras	64
Barbados	24	Jamaica	128
Belize	8	Mexico	252
Bolivia	24	Nicaragua	196
Brazil	156	Paraguay	36
Canada	352	Panama	208
Chile	140	Peru	96
Colombia	164	St. Kitts & Nevis	24
Costa Rica	52	St. Lucia	32
Dominica	20	St. Vincent & the Grenadines	32
Dominican Republic	264	Suriname	16
Ecuador	140	Trinidad & Tobago	68
El Salvador	92	United States	384
Grenada	20	Uruguay	96
Guatemala	40	Venezuela	156
Guyana	72		

**Source:** *WTO. National Schedules of GATS Commitments.*

apply no restrictions and has therefore listed “none” for both market access and national treatment.<sup>12</sup> This measurement is the most significant one in evaluating GATS commitments because it takes into account in an objective manner the real degree of openness of the scheduled measures through capturing the number of bound commitments that a country has made that reflect fully liberalized access, with no limitations on either national treatment or market access attached. It is obtained by taking the number of commitments for a given sub-sector and mode of supply without any limitations attached as a share of total possible GATS commitments. Such a measurement allows a more significant interpretation to be made of the liberalizing extent of the commitments since it is devoid of weighting as well as of subjective judgments.<sup>13</sup> The method takes into account only those bound measures in both categories of

<sup>12</sup> Schedules of specific commitments consist of two sections, of which the first section is horizontal commitments (applying to a committed sector overall) and the second is commitments listed by sub-sector. Both sections have three categories of market access, national treatment and others. WTO members schedule commitments by mode of supply with respect to the two conditions of market access and national treatment. The types of commitments that may be undertaken by modes, sectors and sub-sectors are three: “none”, meaning that the measure in question is bound without restrictions on market access or national treatment for the service sub-sector listed; a partial commitment containing some form of reservation with respect to either market access or national treatment for the given sector or sub-sector; and “unbound”, meaning that no commitment is effectively undertaken.

<sup>13</sup> This method, pioneered by Hoekman, gives a value of “1” for an entry of “none” for the same sub-sector and mode of supply scheduled for both market access and national treatment. These matched 1s provide a measure of the openness of the service sectors in a country because this measure takes into account only those commitments of full liberalization that indicate the binding of liberalized market access (or the absence of any restrictions) for *both* market access *and* national treatment. This measure therefore involves no value judgment about the degree of openness in a particular subsector and/or mode of supply. The percentage of matched 1s out of the total GATS count (1,240) has been calculated for each country in the Western Hemisphere and the result set out in Table 2.

MFN and national treatment that represent full liberalization of market access and non-discriminatory treatment for all service providers for a given service sub-sector/mode of supply.

Applying this measurement to the GATS schedules of countries in the Western Hemisphere allows an evaluation to be made of the degree of liberalization that actually resulted from the Uruguay Round in the services area. Results from this method are shown in Table 2.

**Table 2**  
**Degree of Services Liberalization in the GATS 1994 Schedules**  
**of Western Hemisphere Countries**

Very High (100%-60%)	Moderately High (<60%-40%)	Moderate (<40%-20%)	Moderately Low (<20%-10%)	Low (<10%-5%)	Very Low (<5%)	
		Argentina Canada United States	Colombia Dominican Republic Ecuador Jamaica Mexico Nicaragua Panama Uruguay	Antigua & Barbuda Chile Guyana Haiti Trinidad & Tobago Venezuela	Barbados Bolivia Costa Rica El Salvador Guatemala Paraguay St. Kitts & Nevis St. Lucia	Belize Brazil Dominica Grenada Honduras Peru Suriname St. Vincent & Grenadine

**Note:** The degree of liberalization is calculated as a percentage of the number of commitments where no restrictions have been attached to both market access and national treatment for a specific services sub-sector and mode of supply out of total possible commitments. Countries are grouped into categories in the table without being ranked within those categories. Calculations have been done by the OAS Trade Unit based on the methodology developed by Hoekman (1995).

#### *Assessing the Liberalizing Content of Services Commitments*

During the Uruguay Round, countries of the Western Hemisphere committed to either open or maintain open services market for between 1.0 and 35.2 percent of their total service sectors. Significantly, no country in the hemisphere committed to full openness for more than 35 percent of its total possible service sub-sectors/modes of supply. Only one Latin American country (Argentina) falls in the category of "moderately open" with respect to the liberalizing content of its GATS commitments. Significantly, more than two-thirds of Latin American and Caribbean countries have committed to full market openness for less than 10 percent of total possible service sub-sectors/modes of supply, and one-half of these for less than 5 percent. Thus, according to this measure, it can be concluded that the extent of liberalization in the services area achieved at the conclusion of the Uruguay Round in April 1994 by Latin America and the Caribbean was quite limited.

Part of this modest result with respect to both a low number of specific commitments and a low degree of effective liberalization derives from the way the GATS itself was structured. GATS does not oblige WTO members to schedule a specified number of commitments, either in numerical terms or in terms of sectors covered. A country needed to make only one commitment in one sector to legitimize its acceptance of the Uruguay Round Final Act, a fact that explains the great deal of variance in the GATS schedules both in terms of number of commitments and coverage of commitments. Moreover, the GATS

was structured as an agreement that emphasizes progressive liberalization; few countries (and no developing countries) during the Uruguay Round were asked to make commitments of any significant degree of actual market opening.

### **Post-Uruguay Round Participation in WTO Services Negotiations**

Since the Uruguay Round, a notable change has taken place in the attitude of countries in Latin America and the Caribbean towards services liberalization as they have moved to become pro-active in this regard, and particularly so at the sub-regional level. Following the opening of goods markets through significant programs of reduction of tariffs and non-tariff barriers over the period 1985-1995, the developing countries of the hemisphere began to turn their priority to the reform and liberalization of the service sector. This new emphasis has likewise been reflected in their heightened participation in the GATS, post-Uruguay Round. The section below highlights the commitments that Latin America and the Caribbean have undertaken in the WTO extended negotiations on basic telecommunications and financial services concluded in 1997. The significant success of both of these negotiations is largely a reflection of the fact that most of the governments involved, like those in Latin America and the Caribbean, are convinced of the need to pursue reforms in these sectors, including liberalization and elimination of entry barriers, accompanied by the development of regulatory principles.

### *Basic Telecommunications*

The vast bulk of the world's telecommunications market has been made subject to some form of competition with the entry into force of the Fourth Protocol of the GATS or the Agreement on Basic Telecommunication (ABT) in February 1998.<sup>14</sup> In these negotiations, finalized in February 1997, twenty (20) Latin American and Caribbean countries made specific commitments, and all of these but Brazil also committed to adopt in whole or in part the Reference Paper on Pro-Competitive Regulatory Principles.<sup>15</sup>

According to Low and Mattoo, specific commitments made by a government may be categorized into four types: i) less than 'status quo'; ii) the 'status quo' level; iii) further actual liberalization in the context of negotiations; and iv) undertakings for future liberalization.<sup>16</sup> These categories are not mutually exclusive, but this distinction is useful in thinking about the relationship between WTO negotiations and the domestic liberalization process. In the Western Hemisphere most of the twenty-two participating governments scheduled commitments at the level of the 'status quo'. More commitments were undertaken for value-added services than for basic telecommunications. Many Latin American and Caribbean countries undertook some form of commitment for allowing competition in long distance services.<sup>17</sup>

Several developing countries in the hemisphere participated in a new form of scheduling in these negotiations in the form of pre-commitments for future liberalization. For example, Argentina, Jamaica, and Venezuela scheduled to liberalize international services in 2000, 2013, and 2000 respectively. By means of such pre-commitments, countries can "take advantage of the GATS to strike a balance between their reluctance to unleash competition immediately on protected national suppliers and their desire not to be held hostage in perpetuity either to the weakness of domestic industry or to pressure from vested interests".<sup>18</sup>

Commonly listed limitations in the schedules are those on the number of suppliers, restrictions on type of legal entity and limitations on the participation of foreign capital.<sup>19</sup> For example, Argentina, Bolivia, Grenada, Jamaica, Peru (up to 1999) and Venezuela (up to 2000) either do not allow foreign entry or have postponed it, as these countries are allowing newly privatized telecom companies to exploit

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<sup>14</sup> See WTO S/C/W/74. Governments representing about 82 per cent of world revenue committed to ensure some form of telecom competition as of February 1998 and another 6 percent have committed to introduce competition on or before 2005. As of November 1998, 89 WTO members have included telecommunications services in their schedules of commitments. Out of 19 members, one-fourth committed 14 or more telecom sub-sectors (the total number of telecom sub-sectors is 15 of them); another 40 per cent between 10 and 13; over one-fourth between 6 and 9; and the rest 9 per cent five or less. 83 members committed on basic telecommunications and 70 on value-added telecoms. Sixty-eight (68) members committed on some or all aspects of the Reference Paper.

<sup>15</sup> These countries are Antigua & Barbuda, Argentina, Barbados, Belize, Bolivia, Chile, Colombia, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Jamaica, Mexico, Peru, Suriname, Trinidad & Tobago, and Venezuela. Canada and the United States also scheduled commitments. St. Vincent & the Grenadines submitted only a draft offer for the specific commitments. As of October 2000, fourteen of these countries had accepted the Fourth Protocol, namely Antigua & Barbuda, Belize, Canada, Colombia, Dominica, Ecuador, El Salvador, Grenada, Jamaica, Mexico, Peru, Trinidad & Tobago, USA, and Venezuela. The Agreement is subject to ratification in both Brazil and the Dominican Republic.

<sup>16</sup> Such treatments are subject to governments' specific commitments. See also Low and Mattoo (1999) and Warner (2000).

<sup>17</sup> Fourteen countries undertook commitments for long distance services. These include: Argentina (as of November 2000), Bolivia (as of November 2001), Canada, Chile, Dominican Republic, El Salvador, Grenada (as of 2006), Guatemala, Jamaica (as of 2013), Mexico, Peru, Trinidad and Tobago, the United States, and Venezuela (as of November 2000). Antigua and Barbuda will allow competition for international long distance services as of 2012. Mexico only allows for international long distance providers to use the national infrastructure and satellites to make the calls until 2002.

<sup>18</sup> See Mattoo (2000).

<sup>19</sup> Six types of market access listed in GATS Article XVI are (a) limitations on the number of suppliers; (b) limitations on the total value of service transactions or assets; (c) limitations on the total number of service operations or on the total quantity of service output; (d) limitations on the total number of natural persons that may be employed; (e) measures which restrict or require specific types of legal entity or joint venture; and (f) limitations on the participation of foreign capital.

fixed monopoly or duopoly concession terms for between six to ten years. The benefit of this type of conditional liberalization has been questioned by policy analysts.<sup>20</sup>

The Reference Paper, negotiated as a voluntary accompaniment to the GATS Agreement on Basic Telecommunication, fosters competition in the telecom sector by providing pro-regulatory principles to curb the anti-competitive behavior of telecom providers with monopolistic characteristics. These pro-competitive regulatory principles apply to a major supplier who has the ability to materially affect the terms in which others may participate in the market for basic telecommunications services (with respect to price or supply or both), or to abuse a dominant position as a result of control over essential facilities (that is, the public telecommunications transport network).<sup>21</sup>

The acceptance of the regulatory principles contained in the Reference Paper was on a voluntary basis. Among the 20 Latin American and Caribbean countries that made telecom commitments in February 1997, all but Brazil accepted part or all of the Reference Paper. Bolivia committed only to the policy on interconnection. In terms of actual regulatory practice, however, several countries in the hemisphere have established independent regulatory bodies for telecom services during the recent period. This is the case of Brazil (with Anatel being established in 1998 to supervise anticompetitive practices), as well as Argentina, Chile and Mexico who have established independent regulatory bodies in the form of CNC, Subtel and Cofetel, respectively.<sup>22</sup> Many countries in the hemisphere have thus moved a considerable distance down the path of liberalization and regulatory reform during the latter half of the 1990s, and many have bound these steps in their multilateral commitments. Much of the development in regulatory reform may be largely explained through the backdrop of the principles contained in the GATS Telecom Reference Paper.<sup>23</sup>

### *Financial Services*

During the extended post-Uruguay Round negotiations on financial services, 102 WTO members concluded the Financial Services Agreements (FSA) in December 1997.<sup>24</sup> Seventy (70) among them, accounting for 97 per cent of the world's financial services trade, submitted their improved schedules, bringing financial services under the GATS MFN principle.<sup>25</sup> These commitments entered into force through the acceptance of the Fifth Protocol in January 1999.<sup>26</sup> Fifteen (15) Latin American and Caribbean countries submitted newly improved schedules on financial services.<sup>27</sup> However, none of these

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<sup>20</sup> See Mattoo (2000) who asserts that granting time-protected monopoly rights does not improve the market and entry restrictions are thus less justified in the face of growing evidence of the benefits of competition. In Latin America, countries that granted monopoly privileges to newly privatized telecom operators (formerly state enterprises) saw connections grow at 1.5 times the rate achieved under purely state monopolies but at only half the rate of telecom connections in Chile, where the government retained the right to issue competing licenses at any time. Another area of lesser benefit is that of employment: an increase in telecom employment of over 20 per cent has occurred in markets allowing for varying degrees of competition as compared to some 3 per cent in monopoly market in Latin America. See WTO No. 2748/Rev.1

<sup>21</sup> The principles are notably: i) competitive safeguards with the objective of preventing anticompetitive practices, including cross-subsidization and misuse of information as a means of impeding competition; ii) ensure the right to interconnection – provision of interconnection by a major supply on a non-discriminatory basis and a timely manner; iii) the right to define and carry out a universal service obligation; iv) transparency of licensing criteria; v) the creation of an independent regulatory body, separate from the supplier of basic telecom services; and vi) fair and non-discriminatory allocation and use of scarce resources, such as frequencies and rights of way, on a timely, objective, and transparent manner.

<sup>22</sup> See Bastos Tigre (2000).

<sup>23</sup> See Low and Mattoo (1999).

<sup>24</sup> The FSA also incorporates Understanding on Commitments in Financial Services.

<sup>25</sup> See WTO (1998), "The Results of the Financial Services Negotiations under the GATS", [http://www.wto.org/english/tradtop\\_e/servfi\\_e/fiback\\_e.htm](http://www.wto.org/english/tradtop_e/servfi_e/fiback_e.htm)

<sup>26</sup> The Fifth Protocol replaced the existing schedules and MFN exemption lists in the financial services sector with the newly submitted national schedules and lists.

<sup>27</sup> Those are Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica Republic, Ecuador, El Salvador, Honduras, Jamaica, Mexico, Nicaragua, Peru, Uruguay, and Venezuela. Canada and the United States also scheduled commitments. Twelve of these countries have already accepted the Fifth Protocol, namely: Canada, Chile, Colombia, Costa, Rica, Ecuador, El Salvador, Honduras, Mexico, Nicaragua, Peru, USA, and Venezuela. Bolivia and Costa Rica made commitments on financial services for the first time in February 1997. Both Brazil and Uruguay are in the process of ratifying the Fifth Protocol.

countries accepted the Memorandum of Understanding on Financial Services that also resulted from the negotiations (although both the United States and Canada did so).

Numerous improvements were made in the expanded commitments on financial services. Many developing countries in the hemisphere moved to a more open stance with respect to the entry through foreign direct investment of foreign-owned banks and insurance companies.<sup>28</sup> Improved commitments highlight expanded coverage of commitments and the allowance of new entry in the form of subsidiaries for insurance and banking.

With respect to mode of supply, it is notable that most Latin American countries did not make commitments on mode 1, 2, or 4 in either the insurance or the banking sector.<sup>29</sup> This posture, similar to that of other WTO developing members, was most likely promoted by a desire for retention of control over cross-border flows of capital, combined with regulatory caution. Commercial presence, or mode 3, has been liberalized by several Latin American countries with respect to their 1994 GATS commitments, but investment is still made subject to ceiling levels. Brazil, Chile, Peru and Uruguay allow new entry of foreign subsidiaries in both insurance and banking (Brazil allowing up to 100 per cent ownership, upon approval) but this is made subject to decrees or authorizations.<sup>30</sup> Canada dropped ministerial approval requirements for allowing in foreign bank subsidiaries, subject to their establishment of more than one branch. Mexico increased the possibility of foreign participation or investment in the financial sector up to an overall 40 per cent, with a 10 per cent ceiling per individual foreign company in insurance and securities, and a 5 per cent ceiling for individual foreign companies in banking.

These patterns of varying degrees of commitments by mode may be interpreted as indications of considerable continued regulatory caution by countries of the hemisphere with respect to the financial sector and a marked reluctance to bind liberalization of cross-border trade in financial services. As a result, liberalization in the financial sector is concentrated primarily on mode 3, or commercial presence. However, most Latin American and Caribbean countries scheduled commitments at a *status quo* level. Others followed what is known as 'grandfathering', or the adoption of more stringent or restrictive conditions on market access or national treatment for new service suppliers than those that are applied to foreign companies already established in the market. This is the case of Brazil who adopted a grandfathering measure for the banking sector.<sup>31</sup>

Regulatory reform is an important issue in the area of financial services, in order to allow for the implementation of liberalizing commitments. With respect to the acceptance of the Fifth Protocol, both Brazil and the Dominican Republic reported that their financial systems were in need of regulatory reform, and that this would be a prerequisite for the ratification and acceptance of the Fifth Protocol. However, regulatory issues in the form of prudential and solvency requirements and financial safeguards continue to remain outside of the scope of the GATS, making it problematic to discuss either the content or the appropriateness of such measures in the WTO context.<sup>32</sup>

The Understanding on Financial Services that accompanied the specific commitments under the Fifth Protocol is a scheduling convention to promote market access in financial services markets. It states that each member "shall list in its schedule pertaining to financial services existing monopoly rights and

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<sup>28</sup> However, Peru and Venezuela continue to maintain broad MFN exemptions corresponding to reciprocity requirements in banking and insurance sub-sectors. The United States withdrew the list of MFN exemptions that it had put in place earlier, except for a limited and targeted MFN exemption applying to countries that force companies to gradually divest their foreign activities.

<sup>29</sup> Uruguay is the only country that has bound modes 1 and 2 in the banking sector.

<sup>30</sup> See Holz (2000).

<sup>31</sup> The measure specifies that banks established before 5 October 1988 are allowed to maintain the aggregate number of branches that existed at that date. For foreign banks authorized to operate in the country after that date, however, the number of branches is subject to the conditions set out at the time the authorization is granted.

<sup>32</sup> It is worth mentioning that in terms of the coverage of financial services commitments, the Annex on Financial Services to the GATS excludes "services supplied in the exercise of governmental authority", such as monetary or exchange rate policies, from the GATS coverage. It sets out another key provision as well, which is the so-called the "prudential carve-out" whose purpose is to ensure that governments can protect the financial system and its users. WTO members can enforce their own prudential measures to protect investors or depositors, or to ensure the integrity and stability of the financial system and these remain outside the scope of the negotiating process. See GATS Annex on Financial Services.

shall endeavor to eliminate or reduce them". WTO Members that adopted the understanding (only Canada and the U.S. in the Western Hemisphere) agreed that the Understanding should be placed on record as part of their commitments. However, the coverage of relevant obligations they adopted is limited primarily to insurance activities and auxiliary/advisory services (and covers mostly modes 2 and 3).<sup>33</sup>

### **Post-Uruguay Round Work on Services and Latin America**

Three articles of the GATS remained unfinished at the conclusion of the Uruguay Round, namely those related to safeguards (Article X), government procurement (Article XIII), and subsidies (Article XV). Since 1995, the Working Party on GATS Rules has been continuing discussions on these issues and attempting to develop rules in these areas, all of which are mandated by the GATS. On each issue, developed and developing WTO members tend to display at times considerable differences in their positions. Latin American countries have been active in the discussions, and in certain cases have submitted proposals to advance understanding of the issues.<sup>34</sup>

In the case of the discussion on development of safeguard disciplines, the deadline for conclusion of the negotiations ongoing within the Working Party on GATS Rules has been extended from 15 December 2000 to 15 March 2002. While developed countries are reluctant to formalize disciplines on safeguards and tend to support a limited scope of action with respect to mode 1 only (cross-border trade), developing countries on the other hand continue to push strongly for the inclusion of language that is as broad as possible in this area, and have tended to make their willingness to further open their services markets contingent upon a functioning safeguard clause. Discussion has centered on whether safeguards should be general or only for specific commitments, if they should benefit all providers of services or only those companies controlled by nationals, on the type of emergency situations that would justify a safeguard, on the viability to define the criteria for injury and causality, and on what type of measure should be taken to carry out a safeguard action.<sup>35</sup>

Most Latin American and all Caribbean countries share the position that a functioning safeguard clause would be useful in the services area at the multilateral level, similar to what exists for goods in the GATT 1994. However, the questions of how to define these disciplines and over what modes they would apply and how, are still outstanding. Interestingly, the position held by Latin America on safeguards at the multilateral level is quite the opposite to that which the majority of these countries have manifested at the sub-regional level in the Western Hemisphere, where none of the integration agreements at present (with the exception of one) contain either a general safeguard provision or an operational safeguard clause for services trade.<sup>36</sup> This can be taken as an indication of the willingness of countries in the hemisphere to proceed to deeper integration, as the possibility of carrying out safeguard action with respect to services trade from members to the agreement is not contemplated.

In the case of the discussion to develop disciplines on subsidies, GATS Article XV recognizes that subsidies may distort trade, but also that they may play an important role in development. It calls for negotiations to establish subsidy disciplines and to examine the case for countervailing remedies.<sup>37</sup> Current

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<sup>33</sup> See Warner (2000).

<sup>34</sup> The possibility of disciplines in these three areas is also being discussed in the context of the services chapter within the Free Trade Area of the Americas (FTAA) negotiations, launched at the Second Summit of the Americas in Santiago de Chile, in April 1998, and scheduled to conclude no later than 2005.

<sup>35</sup> These issues were summarized in the Secretariat document S/WPGR/27/Rev.1 of May 1999.

<sup>36</sup> Only the CARICOM Protocol II agreement in the Western Hemisphere for countries of the Caribbean includes an operational safeguard article at the time of this writing. Most of the sub-regional agreements do not contain a general safeguard article for services trade. This is the case of NAFTA, the Andean Community's service agreement contained in Decision 439, the Mercosur Protocol of Montevideo, the Group of Three and four of the NAFTA-type agreements. Other agreements specify that general safeguards may be applied once future disciplines are developed in this respect. This concerns the agreements signed by Mexico with Bolivia, Costa Rica, Nicaragua and the three northern countries of Central America, as well as the agreement between the Dominican Republic and Central America.

<sup>37</sup> The main service sectors receiving subsidies are those of air and maritime transport (in developed countries) and as telecommunications (in developing countries).

discussion on subsidies in the Working Party on GATS Rules is addressing nine basic themes: definition of domestic industry, the issue of acquired rights, the concept of "like services", compensation, indicators and criteria for defining a subsidy, applicable measures, modal application, and the issue of "unforeseen circumstances".<sup>38</sup>

Latin American countries have showed a certain enthusiasm and activism in developing multilateral disciplines on subsidies. Argentina jointly presented with Hong Kong China a communication on subsidy issues with a view to try and clarify some of the difficulties around definition of a subsidy in the services area, and what type of criteria are necessary in order to determine the harm resulting from the use of a subsidy.<sup>39</sup> Other Latin American countries, namely Chile, Colombia and Uruguay, have spoken in favor of developing multilateral subsidies disciplines. Chile also provided a submission with a view to analyzing the effect of subsidies on international services trade. However, in the context of the exchange of information process mandated by Article XV in order to deepen the knowledge of actual practices, Latin American and Caribbean countries have not yet provided a reply to the questionnaire agreed by the Working Party.<sup>40</sup>

Again, there is a wide gap between the positions taken by countries in the region at the multilateral level and the sub-regional agreements on services they have concluded. While there seems to be a general consensus by Latin America and the Caribbean that subsidy disciplines would be useful to develop under the GATS, only one agreement on services in the Western Hemisphere foresees the possibility of applying general subsidy disciplines to the service sector, while none of the other agreements contain provisions in this area.<sup>41</sup> Thus little interest has been displayed in the area of developing subsidy disciplines for services at the sub-regional level.

Lastly, much less interest and enthusiasm have been displayed in the ongoing discussions on government procurement than on safeguards and subsidy disciplines. Little progress has as yet been made to develop multilateral disciplines to fortify GATS Article XIII. For developing countries, including Latin America and the Caribbean, government procurement activities comprise well over half of GDP. Disciplines on market access, along with important obligations for transparency and non-discrimination, would subject the bulk of this procurement in the services area to scheduling commitments with a view to liberalization. Thus most countries in Latin America and the Caribbean are not very enthusiastic at this prospect, while developed WTO members (including the U.S. and Canada) would prefer to bring procurement seriously to the negotiating table and develop multilateral disciplines along the lines of those used by the World Bank in its lending programs. Discussions on government procurement have been limited to conceptual issues, in particular the relevance for services of the terms and definitions contained in the GATT and the distinction between government purchases and concessions. The positions and practices of a few Latin American countries with respect to government procurement can be found in their responses to the questionnaire on the subject prepared and circulated by the WTO Secretariat in 1996.<sup>42</sup>

Once again, the position of countries in the hemisphere at the multilateral level is in some cases quite at odds with what has been achieved at the sub-regional level where a few of the sub-regional agreements have indeed already incorporated procurement disciplines on both goods and services. In this area NAFTA broke new ground through including government procurement for services within the scope of

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<sup>38</sup> Particularly difficult is to assess what may be the effects of subsidies on the choice of modes of supply. For example, if investment in a service activity is subsidized in the host country, this could discourage cross-border transactions. But a complicating factor may be the wish by governments to control subsidization of establishments belonging to their own nationals but which are operating in another country.

<sup>39</sup> See GATS S/WPGR/W/31.

<sup>40</sup> To date, only four WTO Members have provided answers to the questionnaire designed to obtain information on subsidy practices that was agreed and circulated in 1997. See S/WPGR/W/10.

<sup>41</sup> This is the case of the NAFTA, the NAFTA-type agreements, the Andean Community Decision on services and the CARICOM Protocol II where none of the agreements contain provisions on subsidies with respect to services. These are, in fact, excluded from the coverage of these agreements. The Mercosur Protocol on Services is an exception to this, specifying that general subsidy disciplines, once elaborated, will apply to services.

<sup>42</sup> See S/WPGR/W/11. Those countries in the Western Hemisphere that have submitted replies to the questionnaire on government procurement practices are: Argentina, Brazil, Canada, Chile, Colombia, Costa Rica, Mexico, Peru, and the United States.

the procurement chapter, and many sub-regional agreements have followed this example. Similar provisions have already been included or are under development in all but one of the integration agreements in the Western Hemisphere.<sup>43</sup>

Thus in at least two of these three areas discussed above, several Latin American and Caribbean countries have been both willing and able to go beyond the incomplete multilateral GATS framework. This has either been on paper, as set out in the ambitious nature of the disciplines incorporated in their respective integration agreements, or through the actual implementation of these disciplines which has undertaken after several of these agreements have come into effect. Given this reality, it is interesting to note that the positions of these countries in the GATS discussions at the multilateral level do not reflect the deeper commitments and more far-reaching approach that they have adopted in a regional context which has led to deeper integration.

### **Contributing to Preparations for the Seattle Ministerial Meeting**

During the months preceding the WTO Ministerial Meeting held in Seattle in December 1999, several countries made proposals regarding the different issues for inclusion in what was thought would be the launch of a new round of multilateral trade negotiations. In the services area, many proposals were submitted, and several of these by Latin American and Caribbean countries. A submission by Brazil focuses on the issue of how to sequence the outstanding work of the GATS subsidiary bodies prior to beginning the market access component of the negotiations. Submissions by Bolivia, the Dominican Republic, El Salvador, and Honduras, CARICOM members, Colombia, Uruguay, and Venezuela support the inclusion of the concept of greater flexibility and special treatment in drawing up the guidelines and procedures for the services negotiations. Another submission by the Dominican Republic, El Salvador, and Honduras, along with nine other developing countries, centers on the full implementation of commitments undertaken by developed countries in mode 4. A submission by CARICOM members emphasizes the important of giving practical orientation to Article IV of the GATS and requests that special attention be given to the market access needs of small developing economies. A submission by Chile, jointly with Australia and New Zealand, focuses on the objectives of the GATS 2000 negotiations: improvement of market access for developed and developing countries through means of higher levels of liberalization to be achieved in all service sectors; simplification of schedules of specific commitments and greater transparency in commitments; limitation of the scope and number of MFN exemptions, and the development of binding rules on domestic regulation. A submission by Argentina also discusses possible negotiating modalities, preferring to leave the choice open for whichever modality might best suit the needs of participants.<sup>44</sup>

### **New Multilateral Services Negotiations: GATS 2000**

The Special Session of the GATS Services Council officially launched the new negotiations on services in February 2000, as part of the built-in agenda for progressive liberalization mandated in Article XIX of the GATS.<sup>45</sup> The negotiations and work on services is carried out in three subsidiary bodies: the

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<sup>43</sup> Similar provisions on procurement to those of NAFTA are included in the Group of Three agreement and in certain of the bilateral free trade agreements (those between Bolivia and Mexico, Costa Rica and Mexico, Mexico and Nicaragua, Central America and the Dominican Republic, and Central America and Chile). The Andean Community and Mercosur members are in the process of developing separate instruments on government procurement that will apply to both goods and services. CARICOM Protocol II is the only agreement that does not include procurement within its scope, in either actual or potential form.

<sup>44</sup> See the following submissions: Argentina (WT/GC/W/231); Bolivia (WT/GC/W/); Brazil (WT/GC/W/333); CARICOM (WT/GC/W/361); Chile, Australia, and New Zealand (WT/GC/W/204) Colombia (WT/GC/W/312); Uruguay (WT/GC/W/234); and Venezuela (WT/GC/W/281). All of these proposals were submitted as part of the preparations for the 1999 Ministerial Conference.

<sup>45</sup> GATS Article XIX:1 mandates that "in pursuance of the objectives of this Agreement, Members shall enter into successive rounds of negotiations, beginning not later than five years from the date of entry into force of the WTO Agreement and periodically thereafter, with a view to achieving a progressively higher level of liberalization ..."

Article XIX:2 specifies that "the process of liberalization shall take place with due respect for national policy objectives and the level of development of individual Members, both overall and in individual sectors. There shall be appropriate flexibility for individual developing country members for opening fewer sectors, liberalizing fewer types of transactions, progressively extending market access in line with their development situation ..."

Committee on Specific Commitments, the Working Party on Domestic Regulation, and the Working Party on GATS Rules, as well as in the meetings of the Special Session of the GATS Council on Services.

WTO Members agreed to a road-map for the services negotiations in May 2000. The GATS 2000 negotiations were seen as comprising two phases: the “rule-making” part during which WTO members are to complete the negotiation of disciplines in the areas discussed above as well as those for domestic regulation under GATS Article VI.4; and the “market access negotiations” phase, where WTO members are to negotiate further specific commitments and/or further sectoral disciplines. However, the road-map does not provide for any direction with regards to sequencing and timing of the different issues that are being considered by the Special Session. It only states that current work in the Working Party on GATS Rules should be completed prior to the conclusion of the negotiations, and sets 15 December 2000 as the date to complete work on safeguards.<sup>46</sup> A best endeavor deadline of March 2001 was introduced by WTO Members to complete the work currently under way in the Committee on Specific Commitments. To date the Committee on Specific Commitments has discussed sectoral classification issues (such as those for environmental and energy services) and scheduling guidelines.

In order to facilitate negotiations on market access during phase two, WTO Members were expected to present proposals on negotiating guidelines and procedures until the end of December 2000. Proposals should address the following issues: (a) modalities of negotiations, (b) increasing participation of developing countries, (c) modalities for the treatment of autonomous liberalization, and (d) issues arising from the work carried out in the Council for Trade in Services and its subsidiary bodies. Negotiators in the coming GATS round, especially those from developed countries, will be very keen to see that the degree of trade liberalization for services through greater market access is deepened and expanded. The first priority in this respect by developed countries would be to lock in the current degree of openness for services providers by binding existing market access positions on the part of all WTO Members (i.e. a formally committed standstill). Developing countries may be reluctant to go along with this, as they have had the possibility up to the present of scheduling commitments at a more restrictive level than that of current access. However, were this to be accepted, it would certainly advance the degree of liberalization. A more far-reaching version of this proposal would be to provide for an overall standstill, also for unbound or unscheduled measures.

### **Issues in the GATS 2000 Negotiations and Latin America**

Since the launch of the GATS 2000 negotiations, the Special Session has been discussing four major issues: i) assessment of trade in services; ii) elements of a proposed first phase of negotiations<sup>47</sup>; iii) negotiating guidelines and procedures; and iv) treatment of autonomous liberalization. These issues are reviewed in this section, with a focus on the contribution of Latin America to these discussions.

#### *Assessment of Trade in Services*

GATS Article XIX:3 mandates an assessment of trade in services in overall terms and on a sectoral basis, with reference to the objectives of the GATS, including those set out in Article IV:1 (facilitation of the increasing participation of developing countries), in order to provide the necessary elements for the elaboration of the guidelines and procedures for each round of services negotiations. This requirement could be viewed in two ways: either that the assessment is a prerequisite to establishment of the guidelines, or that the assessment is the on-going parallel process to the negotiations, by which a government can identify its negotiating position and priorities. Most developing

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<sup>46</sup> The submission by Brazil prior to the Seattle Ministerial Meeting addresses the sequencing for the different issues in the negotiating agenda and recommends two distinct phases for this process: the phase of negotiations for additional specific commitments should only begin once the rule making phase has been completed. See WT/GC/W/333. As mentioned above, the deadline for completing the development of disciplines on safeguards was extended to 15 March 2002.

<sup>47</sup> See WTO S/CSS/3. The WTO Secretariat prepared a text for the “other matters relating to negotiations under Article XIX”, drawing upon proposals by Australia and Singapore, and Mercosur members (Argentina, Brazil, Paraguay and Uruguay). The text is contained in WTO document S/CSS/M/3, which is not publicly available at the time of this writing.

WTO members adhere to the first position, while developed members prefer the latter. However, as the negotiations proceed, this will likely be viewed as an on-going process.

Since 1999, the Council for Trade in Services has carried out an information exchange program endorsed by the Ministers at the Singapore Ministerial Conference. The program aims to facilitate the access of all WTO members, in particular developing country members, to information regarding laws, regulations and administrative guidelines and policies affecting trade in services.<sup>48</sup> The Council has discussed as well an assessment of trade in services where the serious lack of statistical information on services trade that could allow for a quantitative assessment to be made was emphasized. In the absence of such data it is difficult to envisage the undertaking of a comprehensive evaluation. In light of the very slow progress on the improvement of services trade statistics, this means that effectively WTO members must again enter into market access negotiations without the possibility of having this information on services trade flows available, including for determining the potential economic impact of services liberalization.

While some developed WTO members have made a great deal of effort in assessing their own situation with respect to services trade, most developing countries are still in need of serious statistical and analytical analysis in this area, as well as in need of a developing a comprehensive inventory of the legal measures affecting services trade. In fact, some analysts feel that amassing a comprehensive set of information at the national level on the barriers that affect services trade or restrict international competition in services is much more important from an economic policy and negotiating perspective.<sup>49</sup> It is of note that for Latin America, only Argentina submitted the assessment of trade in services for their economy.<sup>50</sup>

#### *Negotiating guidelines and procedures*

GATS Article XIX: 3 mandates that negotiating guidelines and procedures should be established for each round. Due to the failure of the WTO Seattle Ministerial Conference, agreement was not reached in 1999 on guidelines and procedures, and thus the Council for Trade in Services launched the GATS 2000 round of negotiations without guidelines. The Special Session took over the agenda from the Council for Trade in Services, and this issue as well. Following agreement on the road-map in May 2000, the Special Session has been focusing its attention on the elaboration of guidelines and procedures to carry out the market access negotiations after the stocktaking exercise of March 2001, with the help of proposals from WTO Members.<sup>51</sup>

Upon request by the Members, the WTO Secretariat prepared a document in January 2001 containing draft guidelines and procedures for the services negotiations on the basis of these submissions as well as the draft Seattle Ministerial Text and already-existing provisions of the GATS. Following criticism by developed countries that this first draft was focused too heavily on the needs of developing countries for flexibility, including the possibility of opening fewer service sectors and the grant of special treatment of least-developed countries, the guidelines were revised by the Secretariat and reissued in February 2001. Significantly, the revised text retains the main ideas from the first draft with

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<sup>48</sup> During the exercise, ten key issues were identified: (i) need to improve classification and definition of particular sectors and activities; (ii) need for Art VI: domestic regulation type measures and disciplines to ensure that such measures would not raise unnecessary barrier to trade; (iii) presence of important obstacles to movement of natural persons, including restrictions on obtaining work permits and visa, recognition of qualifications, compulsory membership in professional associations; (iv) role of mutual recognition agreements (v) non transparent and discriminatory taxation regimes, (vi) need for transfer of technology, (vii) issues relating to electronic commerce; (viii) subsidies granted by developed countries and its impact on developing countries services sectors; (ix) relationship between services sectors and services and good sector and the need to remove barriers in the complementary sectors; and (x) need to further clarify the boundary between mode 1 and 2. See WTO S/CSS/10.

<sup>49</sup> See Hoekman (1999).

<sup>50</sup> See S/CSS/W/44 of 29 January 2001, for further information.

<sup>51</sup> To date five submissions have been presented to the Special Session regarding negotiating guidelines and procedures. These are by the U.S. (S/CSS/W/4), the EU (Informal Paper dated 12 July 2000 entitled "Negotiating guidelines: drafting elements"), Hong Kong China (S/CSS/W/6), the African Group (S7CSS/W/7), and the Group of 24 developing countries (G-24), including most Latin American countries: Argentina, Bolivia, Brazil, Colombia, Dominican Republic, Ecuador, El Salvador, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay, and Venezuela. See S/CSS/W/13.

respect to negotiating modality in that the reference point for the negotiations shall be the current service schedules of members (which set out their market access and national treatment commitments) and that the deadline for concluding the negotiations should be determined at a later date.<sup>52</sup> The revised text also retains the proposal that no service sector or mode of supply should be excluded “a priori” from the negotiations. It also sets out the idea that countries should be given credit in the negotiations for “autonomous liberalization”, or market access measures that go beyond those agreed to by participants in the first services negotiations.

New criticism was directed to the revised document by several developing countries (the Group of 24 and the African Group) who feel that the text has gone backwards in omitting several key development-oriented proposals that were contained in the first version. No agreement was reached on either draft as of end February 2001 and it is likely that negotiating guidelines will only be agreed as part of the WTO Qatar Ministerial Meeting scheduled for the last quarter of 2001.<sup>53</sup> If this is indeed the case, then the start of the market access negotiations on services would also be delayed to early 2002 or possibly longer.

### *Negotiating modalities*

Negotiating modalities are also to be specified as part of the negotiating guidelines and procedures before the market access phase of the negotiations is undertaken. According to Article XIX:4, progressive liberalization under a negotiating modality(ies) to be adopted by the Special Session will be “facilitated through bilateral, plurilateral or multilateral negotiations directed towards increasing the general level of specific commitments undertaken by members”. A number of countries in the hemisphere have contributed to the discussion on negotiating modalities and made proposals in this regard. Such proposals center around the request-offer approach, the sectoral approach, the cluster approach, and the formula approaches.

*The request-offer approach* is a bilateral exchange of requests and offers, followed by the bilateral negotiations of market access and national treatment commitments on a mode-by-mode basis across all services sectors. The modality increases WTO member countries’ participation in the negotiations by allowing all participants to promote their specific interests directly on with respect to a specific service sector or sub-sector in a given market. It was on this basis of this modality that negotiations during the Uruguay Round took place. Abugattas points out another merit of the approach: it expedites the evaluation of the possible impact of the specific commitments that mirror the level of market openness as a result of the negotiations.<sup>54</sup> The “request-offer” approach has been supported by developing countries because it calls for less information on barriers to market access than other approaches. In the Western Hemisphere, Brazil has specifically come out in favor of following this negotiating modality in the current GATS 2000 negotiations. The U.S. supports this approach, in combination however, with several other approaches.

*The sectoral approach* focuses on the undertaking of an agreed set of commitments in an individual service sector, such as air transport or maritime transport. It may be carried out plurilaterally or multilaterally. The approach was adopted during the extended Uruguay Round negotiations for the basic telecommunications and financial services sectors. In the current round of GATS services negotiations the EU strongly supports this approach and has proposed the creation of subsidiary bodies dealing with negotiations on specific services sectors. Among countries in the hemisphere, this proposal has not received explicit written support to date. Through focusing negotiations on an individual sector, the “sectoral” approach could reduce the pressure to carve out MFN or other types of exemptions, as shown in the successful results of both the basic telecommunications and financial services negotiations.

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<sup>52</sup> The United States had proposed that the starting point of the negotiations should be the actual sector-by-sector limitations that governments currently impose on foreign service providers rather than those written into their WTO services schedule, and that the services negotiations should be completed by December 2002. Countries of Latin America and the Caribbean hold to the view set out in the Secretariat draft document.

<sup>53</sup> Bridges Weekly Trade News Digest, 13 February 2001 and 20 February 2001 (bridges@iatp.org)

<sup>54</sup> See Abugattas (2000).

However, this requires both that countries prioritize important services sectors and that they analyze the potential economic impact from the liberalization of the sector. Such preparations may discourage some countries from participating in a given sectoral negotiation.<sup>55</sup>

*The cluster approach* carries out the negotiations on the basis of an identification of sectors or sub-sectors related to a given service sector and the adoption of a coherent, pre-established and harmonized set of commitments for all of these services activities which are felt to be essential components of being able to effectively provide the service in question.

Chile and Australia, in a joint paper, advocate the cluster approach in order to organize service industries into groups of interconnected services so as to allow for more coherent and effective negotiating procedures. In a separate paper setting out some of their suggestions for the GATS 2000 negotiations, they define a “cluster” as a service node around which several interconnected services are articulated and which allow the main service to operate efficiently. The choice of clusters would be decided on a voluntary basis, where it was felt relevant for the appropriate service sectors.<sup>56</sup> In this regard, the question of classification is critical since the identification of all relevant sub-sectors related to a given service activity is the wheel of the cluster approach.

The Dominican Republic, El Salvador, and Honduras have jointly proposed the negotiation of a Tourism Annex to the GATS, based on the concept of a “cluster” of tourism services.<sup>57</sup> Their proposal underlines how trade liberalization in the very heterogeneous tourism sector would be more effective if the many highly related activities currently classified under other services sectors were to be included in a “cluster” of tourism-related activities, thus focusing on the tourism sector as a whole for the purpose of negotiations. The need to deal effectively as well with the trade implications of anti-competitive conduct in tourism-related activities is also underlined. The proposal puts forward a draft text for an Annex on Tourism including sections on definitions, competitive safeguards, consumer safeguard, access and use to information, cooperation for sustainable development of tourism, and relationship of the WTO GATS draft Annex to other international organizations. Several tourism-related activities drawn from various service sectors across all services sectors are set out in an attachment to the draft Annex.<sup>58</sup> A second proposal submitted by the Dominican Republic, El Salvador and Honduras plus Nicaragua and Panama in late 2000 reinforced the concept of a “cluster” of tourism industries and includes a set of tourism characteristic products based on the definition given by the World Tourism Organization to the Tourism Satellite Account at its conference in June 1999.<sup>59</sup>

*The formula approach (model schedule)* sets out agreed objectives for the liberalization of a specific service sector and can be achieved in various ways. For example, agreement might be reached on the removal of certain types of limitations found in national schedules (e.g. exclusion of cabotage in maritime transport negotiations), or compliance may be required with certain negotiated specified obligations (e.g. the Memorandum of Understanding in Financial Services specifies the content of market access commitments and includes other provisions dealing with specific issues), or commitments additional to the individual requests-offers may be agreed (e.g. the Reference Paper on the Basic Telecommunications). A more far-reaching version of the formula approach would be to provide for an

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<sup>55</sup> In the basic telecommunications and financial services negotiations, the number of participating countries was around one-half and two-thirds of the WTO membership (59 and 74 countries, respectively, with 22 and 17 of these from the Western Hemisphere).

<sup>56</sup> Chile and Australia set out several service sectors that might be examples of clusters. These include multi-modal transport, electronic commerce, environmental services, and some professional services such as legal services. See paper prepared by Chile and Australia on “GATS 2000: Towards Effective Liberalization of Trade in Services – Proposals for Action”, presented to the APEC Committee on Trade and Investment, May 2000.

<sup>57</sup> See submission on Tourism Services; Job No. 5658, Job No. 4406, S/CSS/W/7, and S/CSS/W/4, respectively.

<sup>58</sup> These tourism-related activities include several under the categories of rental/leasing services, other business services, communications services, construction and related engineering services, distribution services, education services, environmental services, financial services, tourism and travel related services, recreational, cultural and sporting services, and transport services. More than 50 related service sub-sectors are listed. The proposal draft Annex on Tourism and the listed sub-sectors in the attachment can be found in WT/GC/W/372.

<sup>59</sup> See S/CSS/W/19.

overall standstill with respect to unbound or unscheduled measures, as the United States has proposed.<sup>60</sup> The incorporation of a discipline on ratcheting in an agreed model schedule would go much farther towards facilitating progressive liberalization of services trade. This discipline requires the binding of any new level of liberalization with respect to services trade, without the possibility of retrenching.<sup>61</sup>

The various types of “formula” approaches described above require an acceptable degree of reciprocity as well since all members signing onto them must abide by the same disciplines and implement the same level of liberalization. Although no interest has been expressed to date by Latin America and the Caribbean in this modality, these countries may at some point be interested in the formula approach for certain service sectors as a way to facilitate the liberalization of modes 3 and 4 through negotiated agreement on the elimination of requirements to the movement of capital and natural persons that might be more difficult to reach in isolated request-offer negotiations (e.g. equity, nationality, residency, qualification and so on).

#### *Treatment of autonomous liberalization*

In compliance with Article XIX:3, the negotiating guidelines for the market access component of the GATS 2000 negotiations are also to establish modalities for the treatment of liberalization undertaken autonomously by WTO members since the previous negotiations. How can autonomous liberalization be defined? One way is through examining if such liberalization is based on reciprocity. Only if a country has reduced barriers to trade in services autonomously and not in return for a reciprocal reduction by its trading partner, can this be defined as autonomous liberalization. Mattoo (2000) identifies this as a type of “ex ante” behavior: autonomous liberalization is a type of “ex ante” assurance of credit, whereas other forms of liberalization involve reciprocity as they are based on the reciprocal exchange of concessions.

The big question surrounding this issue arises when the liberalizing country seeks “credit”. How would such credit be granted?<sup>62</sup> Hoekman suggests thinking of credit in terms of “the *quid pro quo* to be put on the table by high income countries and major middle income emerging markets in return for a significant increase in bindings by developing countries”. Mattoo suggests an alternative way of proceeding: the agreed formula for giving credit to autonomous liberalization efforts would be applied not against current actual levels of protection but against the levels bound in the previous round of negotiations.<sup>63</sup>

In this regard, the U.S. has proposed the following: “Any member that has liberalized autonomously in a particular sector, mode, or type of measure since the end of the Uruguay Round and through the end of the current round should make the nature of the liberalization known to interested trading partners. Then the member and interested trading partners should discuss and seek agreement on their respective bindings relative to the autonomous liberalization.” Chile supports this type of request-offer approach for the treatment of autonomous liberalization.<sup>64</sup> Brazil, however, maintains a much stronger stance with respect to this question, advocating the elaboration of a multilaterally agreed methodology to quantify the autonomous liberalization that has been carried out by WTO Members.<sup>65</sup> The granting of credit would thus take place under agreed principles. In this context Brazil has submitted

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<sup>60</sup> The U.S. has proposed a standstill, or the agreement not to take any new measures restricting services trade during the period of the GATS negotiations. See S/CSS/W/4.

<sup>61</sup> See Pinera (2000) and Prieto and Burrows (1999). A ratcheting clause has been included at the sub-regional level in both NAFTA and all of the NAFTA-type agreements that have subsequently been negotiated by Mexico or Chile.

<sup>62</sup> This is an important issue, especially for Latin American countries that undertook enhanced liberalization in telecommunications under the basic telecommunications negotiations. Abugattas (2000).

<sup>63</sup> See Hoekman (1999), Mattoo (2000) and Low and Mattoo (2000).

<sup>64</sup> See Prieto and Burrows (1999) and S/CSS/W/4.

<sup>65</sup> See Brazil's proposal for the 1999 Ministerial Conference (WT/GC/W/333) and subsequent proposal on the possibility of granting credit for autonomous liberalization. ...“The negotiation of specific commitments may take place, according to the following principles: ... (e) the granting of negotiating credits for autonomous liberalization undertaken by members, adopting as the basis for the negotiation those commitments made in the Uruguay Round and subsequent mandated sectoral negotiations”. The U.S. has also proposed a formula approach for setting agreed targets for multilateral liberalization against which the value of autonomous liberalization measures might be gauged (S/CSS/W/4).

a proposal to the negotiations, seeking to develop a system that would assign a “numeral credit” for measures of autonomous liberalization that in turn could be used as “currency” to obtain concessions from other WTO Members in areas of interest. This credit would be based on the addition of points obtained from the application of agreed numerical criteria applied to different types of liberalized measures.

### **Latin America and the Caribbean and Ongoing Efforts to Liberalize Services**

In conclusion, Latin America and the Caribbean have come a long way towards developing a substantial interest and activism in the area of trade in services since the mid-1990s. From limited participation in the first multilateral trade negotiations encompassing services and a very modest level of overall service commitments with little liberalizing content, Latin American and Caribbean governments have come to recognize the importance of services trade to the growth and efficiency of their economies and have moved to adopt a much more pro-active stance towards liberalization. This change in attitude, bolstered in large part by a widespread domestic consensus on the desirability of regulatory reform, has been manifested at the multilateral level in growing participation in the GATS and in the current multilateral services negotiations (GATS 2000). After many Latin American and Caribbean countries undertook new or expanded commitments in the extended negotiations on basic telecommunications and financial services under the WTO in 1997, they have continued to contribute substantively to the current GATS 2000 negotiations. From submissions to the preparations for the Seattle Ministerial Conference in December 1999, to input in the discussions of the work of the GATS subsidiary bodies, and lastly to the submission of proposals to the GATS Council in Special Session on the issues of services classification, of negotiating guidelines and procedures, the choice of a negotiating modality, and the sequencing of negotiations, Latin American countries in particular have been making their positions known and their voices heard.

Despite increased participation in the services work of the GATS and in the negotiating discussions, many of the submissions by Latin America and the Caribbean to the multilateral services negotiations under the GATS reflect an undercurrent of caution towards what some countries appear to fear as too rapid a liberalization of the service sector. Thus many submissions insist upon retaining the appropriate flexibility for developing WTO members to undertake fewer commitments and proceed progressively with liberalization. Elaborating a common approach to the issue of providing credit for autonomous liberalization is also of concern to many countries of the hemisphere.

This cautious activism at the multilateral level contrasts with a strong pro-activism at the regional level in the area of services liberalization, where all of the Latin America and Caribbean countries without exception have negotiated one or more (and sometimes several) sub-regional integration agreements encompassing trade in services. All of these agreements go beyond the GATS in either developing deeper disciplines, or providing for greater liberalization and market access opportunities for service providers, or enhancing transparency - or a combination of all three.<sup>66</sup> Two sub-regional agreements even posit the complete removal of all restrictions affecting services and service providers falling within their arrangement, while other agreements posit an effective standstill or prohibition on the adoption of any new restrictive measures.<sup>67</sup> A few agreements even set out the unconditional application of both MFN and national treatment.

The willingness of Latin American and Caribbean countries to go beyond the GATS and undertake substantial liberalizing commitments and to either harmonize certain essential regulations affecting service providers or to promote the conclusion of recognition agreements as an alternative

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<sup>66</sup> For an analysis of how far and in what way the sub-regional agreements in the Western Hemisphere go beyond the WTO GATS, see Stephenson (2001).

<sup>67</sup> The two sub-regional agreements that set out as their objective the elimination of restrictive measures affecting service suppliers are the members of the Andean Community and of Mercosur. The NAFTA and NAFTA-type agreements impose a prohibition on the introduction of any new restriction that is not specified in the annexes of non-conforming measures to the agreements. Caricom members are trying to identify measures affecting services trade in order to avoid the adoption of any new restrictions and thus implement an effective stand-still.

means to facilitate services trade in a reduced-country setting deserves comment.<sup>68</sup> Not being willing to offer similar liberalization at the multilateral level most likely reflects the greater ease and ability to arrive at consensus on these often-sensitive issues in a context with smaller numbers of more like-minded governments. It certainly also mirrors the differing goals of members to sub-regional agreements who are striving to reach a level of “deep” economic integration in line with their political and strategic objectives. Members to sub-regional agreements perceive that not only is the negotiating process easier in a setting of fewer participants, but the implementation of such commitments may be as well since this involves extending such obligations or commitments only to the other members of the agreement. The reality of the situation may, however, often differ from this perception since implementing services commitments of a liberalizing nature necessarily involves the modification of domestic laws, regulations, decrees, and procedures, as these are the means through which services trade is actually controlled. Reforming domestic regulation in a small country setting will generally involve the same amount of work as carrying this out on a multilateral basis. Nonetheless, the perception remains that services liberalization is easier to achieve among a limited number of participants with clearly defined, similar objectives. Perception aside, in the Western Hemisphere, those countries that have been willing to initiate and sustain domestic reforms for services on a wide scale have been able to bind these reforms at the sub-regional level and to push the liberalization process forward on this scale at a much faster pace in the case of most arrangements than it has proceeded under the GATS.

The will to go beyond multilateral liberalization at the sub-regional level may also be a reflection of the awareness of countries in the hemisphere of the need to comply with the obligations of GATS Article V, which requires all economic integration agreements to be more liberalizing and far-reaching in their effects than the GATS. This is in order to ensure that these agreements (representing a violation of the MFN principle in trade) result in trade creation rather than trade diversion for the wider trading community.

Lastly, Latin America and the Caribbean have also been participating in negotiations at the hemispheric-wide level under the Free Trade Area of the Americas (FTAA) negotiations, launched at the Second Summit of the Americas in Santiago de Chile in April 1998 and scheduled to be completed no later than 2005. While undertaken by a much larger number of countries (34 participants), the FTAA negotiations are also serving to stimulate reflection on what has worked at the multilateral level under the GATS and what has worked at the sub-regional level for services, and consequently what may be improved upon with respect to both in a hemispheric-wide agreement. This should make the hemispheric-wide services agreement a much stronger and more coherent instrument than the GATS is in its present form. Even as Latin America and the Caribbean have progressed substantially in the services area over the past decade, the growing importance of services trade will ensure that it will continue to occupy the attention of countries in the hemisphere for a long time in the future.

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<sup>68</sup> See Stephenson (2000).

## II. ACTIVISM IN SERVICES LIBERALIZATION AT THE REGIONAL LEVEL ?

A strong wind of liberalization has blown over trade in services in the Western Hemisphere. It began in 1994, when the North American Free Trade Agreement (NAFTA) entered into force, followed in 1995 by the first multilateral disciplines on services to become effective under the World Trade Organization. Since then countries in the hemisphere have concluded no fewer than fourteen subregional arrangements on trade in services, involving all of the participants in the Free Trade Area of the Americas (FTAA). These agreements represent not only concrete proof of a heightened interest in the services area, but also recognition of the importance of efficient service sectors to economic growth and development. The agreements indicate a desire of members to liberalize markets in services, a sector that has traditionally been closed to international trade and competition. This liberalization at the subregional level has, in turn, promoted interest and active participation in services negotiations at the hemispheric level within the FTAA process and in the second round of services negotiations at the multilateral level under the WTO.

### Approaches to Liberalization of Services Trade

Two major approaches toward the liberalization of trade in services have been manifest within the Western Hemisphere, as elsewhere in the multilateral trading system: the “positive list,” or “bottom-up,” approach; and the “negative list,” or “top-down,” approach. All fourteen subregional agreements that encompass services have used one or the other of these two modalities to liberalize trade in services. The positive list approach emphasizes progressive liberalization of services trade through the undertaking of commitments regarding market access, the treatment of foreign service suppliers in specific service sectors, or both. Additional liberalization in sectors where commitments are not initially undertaken is to be carried out through periodic rounds of negotiations. The positive list, bottom-up approach is the one that was agreed and carried forward during the Uruguay Round of Multilateral Trade Negotiations and is now in place at the multilateral level under the WTO General Agreement on Trade in Services, or GATS, in effect since January 1995. A second round of services negotiations at the multilateral level began in January 2000.

Within the Western Hemisphere, members of MERCOSUR (Common Market of the South) have chosen to follow a variant of the positive list approach, one that sets a specific goal of achieving a common market in services within a specific timeframe. Much like the GATS approach, the Protocol of Montevideo on Trade in Services of MERCOSUR, signed in December 1997, stipulates that services liberalization is to be progressive among members and is to be carried out through annual rounds of negotiations. In contrast to the GATS preamble, which states the desirability of “the early achievement of progressively higher levels of liberalization of trade in services through successive rounds of multilateral negotiations aimed at promoting the interests of all participants on a mutually advantageous basis. . . .” MERCOSUR members have agreed that the ultimate result of their progressive liberalization process will be the complete elimination of all restrictions affecting either services trade or service suppliers in all sectors. This common market in services is to be achieved within a ten-year period, beginning with the implementation of the protocol (which had not taken effect as of December 2000 ).

Members of the Andean Community have adopted the same objective as MERCOSUR but set a different timetable, namely, the complete elimination of barriers to intraregional trade in services within a five-year period. Decision 439 on Trade in Services, adopted in June 1998, specifies that this process is to begin when comprehensive national inventories of measures affecting trade in services for all members of the Andean Community are finalized. Discriminatory restrictions identified in these inventories are to be lifted gradually through a series of negotiations, ultimately resulting in a common market free of barriers to services trade. A process to harmonize national regulatory regimes in key service sectors is to be conducted in parallel.

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The negative list, top-down approach has been incorporated into a large majority of the subregional agreements in the Western Hemisphere encompassing services. These agreements oblige their parties to liberalize all forms of discriminatory treatment in all service sectors except for sectors or measures included in lists of reservations accompanying the agreement. These reservations exclude specific sectors and measures either temporarily or permanently. In certain agreements, however, these reservations are to be liberalized over time through periodic negotiations. Canada, Mexico, and the United States pioneered this approach in NAFTA. Since NAFTA took effect in January 1994, Mexico has played a pivotal role in extending this liberalization approach and similar types of disciplines to other subregional agreements it has signed with countries in South and Central America. These include the Group of Three agreement, negotiated between Mexico, Colombia, and Venezuela, and bilateral free trade agreements Mexico has concluded with Bolivia, Chile, Costa Rica, Nicaragua, and the Northern Triangle group, consisting of El Salvador, Guatemala, and Honduras. Chile has concluded similar agreements with Canada (in effect since July 5, 1997), and Central America as a whole (signed in October 1999); the Dominican Republic has negotiated NAFTA-type agreements with Central America as a whole, which had not taken effect as of December 2000, and with the Caribbean Community and Common Market (CARICOM) in August 1998.

CARICOM members finalized Protocol II on Establishment, Services, and Capital covering trade in services and investment in July 1997. It entered into force provisionally in July 1998. The protocol itself does not specify an approach to services liberalization but envisages removing all existing restrictions on trade in services in the region through a program to be established upon entry into force of the protocol.

The fourteen subregional arrangements constitute a set of occasionally overlapping agreements containing various levels of disciplines and obligations. All of these agreements, however, are distinguished by their ambitious objectives that in most cases go well beyond those defined at the multilateral level. Although the GATS rules and disciplines provide the least common denominator for trade in services in the hemisphere, all of the subregional agreements posit much freer services trade and stronger disciplines than does GATS.<sup>69</sup> This may be either with respect to the type of disciplines they contain, to the wider scope of liberalization they envisage, to the ultimate objectives they embrace, or to a combination of these factors. In services, it may safely be said that subregional efforts at liberalization are giving multilateral liberalization a strong push forward.

### **Convergence and Divergence**

A large number of the subregional agreements on trade in services in the Western Hemisphere, particularly those that have followed the NAFTA model, have numerous similarities. This section analyzes the major points of convergence and divergence apparent in the approaches to liberalization that these agreements take regarding six criteria: principles; rules and disciplines; market access; negotiating modality; exclusions; and special sectoral treatment.

#### *Principles on Trade in Services*

All fourteen subregional agreements contain basic obligations regarding national treatment, and all but the CARICOM Protocol II carry obligations regarding most-favored-nation (MFN) treatment.<sup>70</sup> These two principles constitute two of the most basic building blocks to any agreement on services, just as they do in the goods area. MERCOSUR and the Andean Community set out these two principles in an unqualified form, which means that there can be no deviation from the application of the MFN or national

<sup>69</sup> The content of these agreements is summarized in OAS Trade Unit (1999). In contrast to these comprehensive trade agreements, a number of sectoral agreements on services have also been signed, sometimes as formal agreements and other times as more informal cooperation agreements. Some of these subregional and bilateral sectoral agreements on services carry with them rules and disciplines, while others are limited to specifying good intentions or cooperative action. Such sectoral stand-alone agreements, by their nature, cannot be considered in the same way as those integration arrangements that contain comprehensive provisions and rules covering all services. See OAS Trade Unit (1998) for information on these stand-alone agreements.

<sup>70</sup> The fact that the CARICOM protocol does not contain a provision on MFN treatment means that no CARICOM member is obliged to accord MFN treatment to other CARICOM members for any trade concession granted to non-members.

treatment principles among members. Under GATS, in contrast, national treatment is not a general obligation but rather the result of specific commitments by each WTO member, and MFN, although a general obligation, can be qualified through time-bound exemptions.<sup>71</sup>

The free trade agreements that have followed the NAFTA model set out both MFN and national treatment as unconditional principles. Country-specific exceptions (also known as reservations or non-conforming measures) to either of these principles may be taken for services sectors on either a temporary or a permanent basis, however. These exceptions should be specified at the federal, state, or provincial level either at the time the agreement comes into force or within a specified period of time thereafter and are set out in the lists of reservations to a given agreement. Besides these two fundamental principles, a basic discipline also exists in the NAFTA-type agreements not to impose a local presence requirement on a service provider from another member or in other words, not to require the establishment of a representative office or branch in a member country's territory as a condition for the cross-border provision of a service. This is referred to as the "right of non-establishment."

All subregional arrangements covering trade in services in the Western Hemisphere adhere to the principle of transparency and contain an article to this effect. All agreements (with the exception of CARICOM Protocol II) stipulate an obligation to publish relevant measures affecting trade in services, and most agreements go further to require notification as well. Upon entry into force, the CARICOM protocol requires notification of existing restrictions on the provision of services and right of establishment by each member to the CARICOM Council for Trade and Economic Development.<sup>72</sup> As under GATS, MERCOSUR, the Andean Community, NAFTA, and all NAFTA-type agreements oblige the prompt publication of measures affecting trade in services and service providers at the national level. Again similar to GATS, MERCOSUR, NAFTA, and the NAFTA-type agreements also require notification of changes in existing laws and any new laws, regulations, and administrative procedures affecting trade in services. In an innovative step, NAFTA and some NAFTA-type agreements also contain the right for parties to comment on proposed changes, to the extent possible. Like GATS, NAFTA and all NAFTA-type agreements as well as MERCOSUR further require parties to establish contact points or information centers and to provide information on measures affecting services trade upon request (see table 3 for summary of basic principles of the subregional agreements).

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<sup>71</sup> Under Article II of GATS, the MFN principle can be the object of temporary exceptions with respect to specific service sectors. An annex to GATS Article II specifies the procedures under which such exemptions may be sought and the time period for such exemptions (in principle not more than ten years). The annex subjects MFN exemptions to periodic review and future negotiation. The GATS definition of MFN does not necessarily imply liberal or restrictive conditions of market access; it simply requires that the most favorable treatment given to any service supplier be accorded to all foreign service suppliers equally, in all sectors, and for all modes of supply. National treatment is a principle of a specific nature under GATS resulting from the negotiating process and applies only to those sectors and modes of supply that participants incorporate specifically into their national schedules of commitments.

<sup>72</sup> Protocol II of CARICOM defines right of establishment as the right to engage in any non-wage-earning activities of a commercial, industrial, professional, or artisanal nature and to create and manage economic enterprises within the region.

**Table 3**  
**Summary of Principles Relevant to Trade in Services**

<b>Agreement</b>	<b>MFN treatment<sup>a</sup></b>	<b>National treatment</b>	<b>Transparency</b>	<b>No local presence</b>
GATS	Yes	Yes	Yes	No
MERCOSUR	Yes	Yes	Yes	No
CARICOM	No	Yes	Yes	No
Andean Community	Yes	Yes	Yes	No
NAFTA	Yes	Yes	Yes	Yes
Group of Three	Yes	Yes	Yes	Yes
Bolivia-Mexico	Yes	Yes	Yes	Yes
Costa Rica-Mexico	Yes	Yes	Yes	Yes
Canada-Chile	Yes	Yes	Yes	Yes
Chile-Mexico	Yes	Yes	Yes	Yes
Central America-Dom. Rep.	Yes	Yes	Yes	Yes
CARICOM-Dominican Rep.	Yes	Yes	Yes	Yes
Mexico-Nicaragua	Yes	Yes	Yes	Yes
Central America-Chile	Yes	Yes	Yes	Yes
Mexico-Northern Triangle	Yes	Yes	Yes	Yes

a. With exemptions to MFN treatment allowed under the Annex to the GATS and subject to a list of reservations for all other arrangements, as in the case of national treatment, except for those of MERCOSUR and the Andean Community.

*Rules and Disciplines: Areas of Convergence*

Several of the rules and disciplines for trade in services contained in the subregional agreements of the Western Hemisphere are very similar, notwithstanding the different approaches to liberalization chosen by the members to the agreements. These include, among others, domestic regulation, recognition of licenses or certifications obtained in a member country, quantitative restrictions, subsidies, denial of benefits, and general exceptions (see table 4 for summary of areas of convergence on key rules and provisions).<sup>73</sup>

**DOMESTIC REGULATION.** GATS recognizes the right of WTO members to regulate services within their territories in order to meet national policy objectives. National laws and regulations, however, must be transparent, administered with due process, and changed or adapted in a predictable manner. Further, such laws and regulations should not be more trade restrictive than is necessary to fulfill a legitimate objective (necessity test). Members must explain the specific objectives intended by their regulations upon request, provide an opportunity for trading partners to comment upon proposed regulations, and give consideration to such comments.

**Table 4**  
**Rules and Disciplines on Trade in Services: Areas of Convergence**

<b>Agreement</b>	<b>Domestic regulations</b>	<b>Recognition</b>	<b>Quantitative restriction</b>	<b>Subsidy disciplines</b>	<b>Denial of benefits</b>

<sup>73</sup> GATS includes references to avoid double taxation. NAFTA-type agreements also include such a provision in their chapter on general exceptions.

			<b>s</b>		
GATS	Yes	Yes	Yes <sup>a</sup>	Future	Yes
MERCOSUR	Yes	Yes	Yes <sup>a</sup>	Future	Yes
CARICOM	Yes <sup>b</sup>	Yes	Not specified	No	Yes
Andean Community	Yes <sup>b</sup>	Yes	Yes	No	Yes
NAFTA	Yes <sup>b</sup>	Yes	Yes	No	Yes
Group of Three	Yes <sup>b</sup>	Yes	Yes	No	Yes
Bolivia-Mexico	Yes <sup>b</sup>	Yes	Yes	No	Yes
Costa Rica-Mexico	Yes <sup>b</sup>	Yes	Yes	No	Yes
Canada-Chile	Yes <sup>b</sup>	Yes	Yes	No	Yes
Chile-Mexico	Yes <sup>b</sup>	Yes	Yes	No	Yes
Mexico-Nicaragua	Yes <sup>b</sup>	Yes	Yes	No	Yes
Central America-Dominican Republic	Yes <sup>b</sup>	Reference: GATS)	Yes	No	Yes
CARICOM-Dominican Republic	Yes <sup>b</sup>	Yes	Yes	No	Yes
Central America-Chile	Yes <sup>b</sup>	Yes	Yes	No	Yes
Mexico-Northern Triangle	Yes <sup>b</sup>	Yes	Yes	No	Yes

a. Disciplines on quantitative restrictions only apply to those sectors where specific commitments are made.

b. Rules on domestic regulations in these agreements are set out in a more narrowly focused manner and apply only to the licensing and certification of professional service suppliers.

Although MERCOSUR envisages a similar provision on domestic regulations, neither NAFTA nor the NAFTA-type agreements contain an article on domestic regulation per se in their chapter on trade in services. Rather, the equivalent of the GATS discipline is contained in a more narrowly focused article related to the licensing and certification of professionals. These requirements are meant to ensure that any measure on licensing or certification of nationals of another member country (professional service suppliers only) does not constitute an unnecessary barrier to trade. However, where the GATS article states that the measure in question should not restrict the supply of a service under any mode, the NAFTA-type agreements narrow this requirement to the cross-border supply of a service.<sup>74</sup>

The Andean Community agreement on services likewise does not contain disciplines on domestic regulation per se but partially addresses the issue through an article that binds members not to establish new measures that would increase the degree of non-conformity or fail to comply with the liberalizing commitments contained in the agreement.

RECOGNITION. GATS contains an article to encourage the recognition of the education, licenses, or certifications of service suppliers in general, with the possibility of allowing other WTO members to negotiate their accession to such arrangements. In the subregional agreements on services of the Western Hemisphere, such recognition is more narrowly targeted to providers of professional services. Like GATS, such recognition is encouraged in the agreements of the hemisphere but is not mandated.

<sup>74</sup> NAFTA-type agreements are structured so that the disciplines of the services chapter cover only cross-border trade in services (modes 1 and 2 of service supply, according to the GATS definition), while commercial presence for services (mode 3 of service supply) is covered in a separate chapter on investment that encompasses disciplines relevant to both goods and services, and the movement of natural persons (mode 4 of service supply) is covered in a separate chapter on the temporary entry for business persons. A business person means "a citizen of a Party who is engaged in trade in goods, the provision of services or the conduct of investment activities" (see NAFTA, Article 1608).

All the subregional agreements also contain an obligation to develop a generic blueprint aimed at defining procedures for assisting service professions to achieve mutual recognition of licenses and certifications. The NAFTA-type agreements contain an obligation to abolish nationality or permanent residency requirements in effect for the recognition of diplomas and the granting of licenses for the providers of professional services from other parties within two years of entry into force of the respective agreements. If the deadline is not met, the other party does not need to respect the obligation. Parties to these agreements are also to consult periodically on the feasibility of such objectives. The agreement between the Dominican Republic and CARICOM does not have a provision on recognition but specifies that matters not covered in the agreement shall be governed by the relevant provisions of GATS. Parties to this agreement are endeavoring to develop a separate chapter on professional services that would achieve mutual recognition of licenses and certifications.

The MERCOSUR agreement on services contains a provision on the recognition of professionals through the development of mutually acceptable criteria to determine the equivalence of licenses, certifications, professional degrees, and accreditations granted by another member country. The agreement also encourages the elaboration of mutually acceptable standards and criteria for the exercise of professional services that would later be adopted by the various member governments. Members of the Andean Community are in the process of drafting criteria to permit the mutual recognition of licenses, certifications, professional degrees, and accreditations granted in the various member states.

**QUANTITATIVE RESTRICTIONS.** All the subregional agreements covering services contain an article on non-discriminatory quantitative restrictions, but the focus of the agreements differs. The MERCOSUR agreement prohibits the introduction of new non-discriminatory quantitative measures on any scheduled commitment and sector. This prohibition mirrors a similar requirement of GATS.

The approach adopted in NAFTA and the NAFTA-type agreements requires a listing of quantitative restrictions on services in annexes, separating those that are discriminatory from those that are not, with subsequent notification to other parties of a given agreement of any new non-discriminatory quantitative restriction that a party may adopt. To promote further liberalization, these top-down agreements request the parties to consult periodically with each other and endeavor to negotiate the liberalization or removal of such restrictions.

**SUBSIDY DISCIPLINES.** GATS does not set out any actual disciplines governing the use of subsidies for service activities but specifies that future discussions will take place to develop multilateral disciplines with the aim of avoiding the trade-distorting effects of such subsidies and to address the appropriateness of countervailing procedures. Such negotiations have not yet come to any agreement in this area. NAFTA and the NAFTA-type agreements, the Andean Community, and CARICOM do not contain provisions on subsidies. MERCOSUR specifies that general subsidy disciplines, once elaborated, will apply to services.

**DENIAL OF BENEFITS.** GATS allows a member to deny the benefits of the agreement to the supply of a service and to a service supplier from or in the territory of a non-member of the WTO. Under the WTO, a service supplier that is a juridical person is defined as any legal entity subject to majority ownership, effective control, and affiliation with another person. All subregional agreements in the hemisphere (with the exception of MERCOSUR) go further than GATS to define a service supplier not only as a legal entity under majority ownership or effective control, but also as one that must conduct substantial business activities or operations in the territory of any of the member countries in order to benefit from a given agreement.

#### *Rules and Disciplines: Areas of Divergence*

Major rules and disciplines in which the subregional agreements diverge from each other include standard of treatment, treatment of investment, monopoly disciplines, general safeguards, and modification of schedules (see Table 5 for a summary).

**Table 5**  
**Rules and Disciplines on Trade in Services: Areas of Divergence**

Agreement	Standard of treatment	Treatment of investment	Monopoly disciplines	General safeguards	Modification of schedules
GATS	No	Within GATS	Yes	Future	Yes
MERCOSUR	No	Separate protocols	Separate protocol	No	Yes
CARICOM	No	Within Protocol II	Separate protocol	Yes	Not specified
Andean Community	No	Decisions 439 and 291 <sup>a</sup>	Separate decision	No	...
NAFTA	Yes	Separate chapter	Yes	No	...
Group of Three	No	Separate chapter	Yes	No	...
Bolivia-Mexico	No	Separate chapter	No	Future	...
Costa Rica-Mexico	No	Separate chapter	Future	Future	...
Canada-Chile	Yes	Separate chapter	Yes	No	...
Chile-Mexico	Yes	Separate chapter	Yes	No	...
Mexico-Nicaragua	No	Separate chapter	Future	Future	...
Central America-Dominican Republic	No	Separate chapter	Yes	Future	...
CARICOM-Dominican Rep.	No	Separate chapter	Yes	No	...
Central America-Chile	Yes	Bilateral agreement	Yes	No	...
Mexico-Northern Triangle	No	Separate chapter	No	Future	...

... Not relevant

a. For more on decision 291 on investment, see chapter 9, Salazar-Xirinachs and Robert, 2001.

**STANDARD OF TREATMENT.** Many of the NAFTA-type agreements include a “standard of treatment” clause that requires each party to accord service providers of any other party the more favorable of any treatment provided under the principles of MFN and national treatment. The provision appears in NAFTA and in the bilateral agreements Chile has entered into with Canada, Mexico, and Central America. None of the other subregional agreements contain such a provision.

Unlike the other subregional agreements, NAFTA and all NAFTA-type agreements also contain a ratchet mechanism that ensures that all future liberalization eliminating restrictions on a service sector or discriminatory treatment affecting a service supplier from another party is automatically bound in the agreement.

**TREATMENT OF INVESTMENT.** One important difference between the approaches to services liberalization by countries in the Western Hemisphere relates to the interplay between services and investment. At the multilateral level, GATS does not contain a comprehensive body of disciplines to protect investment, but it does incorporate investment in services as one of the four modes of service delivery (mode 3, or commercial presence). Within the hemisphere this approach has been followed by MERCOSUR members, which also have agreed to separate protocols on investment.<sup>75</sup>

In contrast, NAFTA and the NAFTA-type agreements (with the exception of the Central America-Chile agreement) set out investment rules and disciplines for both goods and services in a separate chapter. These agreements guarantee the free entry of investments of other parties, albeit with country-specific reservations. The Central America-Chile agreement incorporates, in its investment chapter, the

<sup>75</sup> Before concluding a Protocol on Services, MERCOSUR members elaborated two protocols containing comprehensive disciplines on investment: the Protocol of Colonia for the Reciprocal Promotion and Mutual Protection of Investment was signed on January 17, 1994, and the Protocol of Buenos Aires for the Promotion and Protection of Investments of Third States was signed on August 5, 1994. These two protocols, like the one on services, have not yet been brought into effect.

bilateral investment treaties each Central American country signed with Chile. The parties may at any time decide to broaden the coverage of the investment rules in the bilateral investment treaties (and must analyze the possibility within two years after the agreement enters into force). CARICOM includes commercial presence as an integral part of the agreement. The Andean Community also includes commercial presence as part of its services agreement. It also has an agreement on investment (Decision 291), signed in 1991 (see chapter 9, Salazar-Xirinachs and Robert, 2001).

**MONOPOLY DISCIPLINES.** Unlike GATT, GATS contains very general disciplines over monopoly practices and exclusive service suppliers. These disciplines aim to ensure that monopoly suppliers do not abuse their market position or act in a way inconsistent with the specific commitments undertaken by a WTO member. In the Western Hemisphere some agreements contain disciplines on monopoly service providers and others do not.<sup>76</sup> NAFTA, the Group of Three, and several of the bilateral agreements set out disciplines on monopoly practices with respect to both goods and services and extend those disciplines to state-owned enterprises as well. The agreement between the Dominican Republic and CARICOM not only contains a provision on monopoly and exclusive services suppliers, but also envisages the future elaboration of a provision on anticompetitive business practices. The Andean Community has a separate agreement on competition (Decision 285), as does CARICOM (Protocol VIII). The other agreements of the hemisphere neither contain nor envisage anti-competitive provisions, although MERCOSUR members are in the process of developing separate protocols on competition policy.

**GENERAL SAFEGUARDS.** GATS contains an article pertinent to general safeguard action, inspired by a similar article in GATT.<sup>77</sup> In the Western Hemisphere, only the CARICOM agreement includes an operational safeguard article at the time of this writing. Several of the subregional agreements, including NAFTA and MERCOSUR, do not contain a general safeguard article for services trade, while other agreements specify that general safeguards may be applied once future disciplines are developed on the subject.<sup>78</sup>

**MODIFICATION OF SCHEDULES.** GATS foresees the possibility of modifying schedules (that is, withdrawing concessions). Any WTO member may modify or withdraw a commitment contained in its services schedule after a period of three years, subject to negotiating appropriate compensation. Modification of national schedules is also possible under the MERCOSUR agreement, subject to similar conditions. This is not the case for any of the top-down or NAFTA-type agreements because they do not contain schedules of commitments.

### *Market Access*

Because services do not face trade barriers in the form of border tariffs or taxes, countries restrict market access for service providers through discriminatory treatment contained in laws, decrees, and national regulations. Thus the liberalization of trade in services implies modifications of national laws and regulations, which make services negotiations both more difficult and more sensitive for governments as well as a long-term process. Table 6 summarizes the following market access components of services trade agreements in the hemisphere: sectoral coverage; coverage of modes of supply; and government procurement.

Under the bottom-up approach, market access, like national treatment, is the object of commitments that specify the conditions under which foreign service suppliers can enter a given market. These commitments are taken for each service sector or activity and, once listed, are considered to be binding. GATS lists six types of limitations or restrictions that may be placed on market access

<sup>76</sup> See also chapter 11 on Competition Policy, Salazar-Xirinachs and Robert, 2001.

<sup>77</sup> Article X of GATS allows members to modify or withdraw a specific commitment one year after the commitment enters into force. The country doing so must show the Council on Trade Services that the modification or withdrawal cannot await the lapse of the three-year period provided for in Article XX of GATS.

<sup>78</sup> The NAFTA agreement, the Group of Three, and the bilateral agreements that Chile has signed with Canada, Central America, and Mexico do not contain a general safeguard article, but they do contain an article on safeguards for balance of payments difficulties, in the case of disequilibrium in the current account.

commitments undertaken by WTO members; other forms of restrictions are not allowed.<sup>79</sup> Under the top-down, NAFTA-type approach, the concept of "market access" does not appear as a separate article in the services chapter but is addressed under disciplines related to non-discriminatory quantitative restrictions as well as through a guaranteed national treatment provision applying to discriminatory measures. In both areas, the NAFTA-type agreements follow a "list or lose" approach, listing any measure not in conformity with these disciplines, thus ensuring transparency.

GATS includes four modes for the delivery of services within its scope of application: cross-border delivery; consumption abroad; commercial presence; and movement of natural persons. In the latter two cases the factors of production—capital and labor—move to provide the service in a foreign location. As shown in table 6, all four modes of service supply are included within the scope of the subregional agreements in the hemisphere, but the treatment of the last mode of service supply, movement of natural persons, varies considerably. In the MERCOSUR agreement, as in GATS, the ability of service suppliers to move within the region on a temporary basis is dependent upon scheduled commitments (at least during the ten-year transition period). The Andean Community agreement requests members to facilitate the free movement and temporary presence of natural or physical persons for the provision of services. CARICOM provides for the temporary movement of persons as service providers solely in conjunction with the establishment of foreign-owned business activities, including management, supervision, and technical staff and their spouses. NAFTA and the NAFTA-type agreements contain obligations that are limited to the temporary movement of business service providers only rather than the movement of natural persons in general, so this mode of service delivery is only partially covered in several agreements.

Because of the large number of contracts tendered, government procurement is an important component of market access in the services.<sup>80</sup> It has been included within GATS, but during and subsequent to the Uruguay Round no agreement was reached on how services procurement should be treated. The intention, stated in GATS, is for WTO members to negotiate future disciplines in this area. At the subregional level, NAFTA broke new ground by including government procurement for services within the scope of the chapter on government procurement, requiring all federal agencies and several state enterprises to open public contracts to service providers in the three NAFTA member countries (under a positive list approach for entity coverage and a negative list approach for services coverage). Similar provisions are included in the Group of Three and in certain of the bilateral free trade agreements (see table 6).

The Andean Community agreement on services includes government procurement within its scope of application, although it establishes no disciplines. If a separate instrument is not finalized before January 2002, then members will be required to apply the national treatment principle for government procurement to the services sector. The MERCOSUR protocol does not include government procurement within its scope, but negotiations are ongoing to develop a separate instrument in this area. CARICOM does not include government procurement, nor is there a separate protocol envisaged as yet in this area.

**Table 6**  
**Market Access for Service Providers**

<b>Agreement</b>	<b>Coverage of sectors</b>	<b>Coverage of modes</b>	<b>Government procurement</b>
GATS	Selective	All	Future
MERCOSUR <sup>a</sup>	Universal	All <sup>b</sup>	Future, separate protocol
CARICOM	Undetermined	All <sup>b</sup>	No

<sup>79</sup> The six types of limitations to market access specified in GATS are limitations on: the number of service suppliers; the total value of service transactions or assets; the total number of service operations or on the total quantity of service output; the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of specific service; measures that restrict or require specific types of legal entity or joint venture; and the participation of foreign capital.

<sup>80</sup> See also chapter 12 on government procurement, Salazar-Xirinachs and Robert, 2001.

Andean Community <sup>a</sup>	Universal	All <sup>b</sup>	Future, separate
NAFTA	Universal <sup>c</sup>	All <sup>b</sup>	decision
Group of Three	Universal <sup>c</sup>	All <sup>b</sup>	Included
Bolivia-Mexico	Universal <sup>c</sup>	All <sup>b</sup>	Included
Costa Rica-Mexico	Universal <sup>c</sup>	All <sup>b</sup>	Included
Canada-Chile	Universal <sup>c</sup>	All <sup>b</sup>	Included
Chile-Mexico	Universal <sup>c</sup>	All <sup>b</sup>	No
Mexico-Nicaragua	Universal <sup>c</sup>	All <sup>b</sup>	No
Central America - Dominican Rep.	Universal <sup>c</sup>	All <sup>b</sup>	Included
CARICOM-Dominican Rep.	Universal <sup>c</sup>	All <sup>b</sup>	Included
Central America-Chile	Universal <sup>c</sup>	All <sup>b</sup>	Future
Mexico-Northern Triangle	Universal <sup>c</sup>	All <sup>b</sup>	Included
			No

a. The Montevideo Protocol of MERCOSUR specifies the full liberalization of services with respect to all sectors and measures within a ten-year period. The Andean Community Decision 439 sets out the same objective, to be achieved over a five-year period.

b. Mode 4 is covered partially.

c. Air transport is excluded.

#### *Negotiating Modality*

As explained earlier in this chapter, the bottom-up negotiating modality is based upon positive listing, whereby members to an agreement list national treatment and market access commitments specifying the type of access or treatment offered to services or service suppliers in scheduled sectors. This modality was adopted by MERCOSUR to carry out its liberalization of services trade during a ten-year transition period. Annual rounds of negotiations based on the scheduling of increasing numbers of commitments in all sectors (with no exclusions) are to result in the elimination of all restrictions to services trade among members, once the protocol enters into force.

The alternative top-down negotiating modality is based upon negative listing, whereby all sectors and measures are to be liberalized unless otherwise specified in annexes containing reservations, or non-conforming measures. This is the so-called list-or-lose technique. Any exception to sectoral coverage and to non-discriminatory treatment must be specified in the annexes. Non-conforming measures in the annexes are to be liberalized through consultations or periodic negotiations. Once again, this is the approach pioneered by NAFTA and followed by all subsequent NAFTA-type agreements since then.

NAFTA represents a status quo agreement regarding services, in the sense that no mechanism for the future liberalization of reservations or non-conforming measures was incorporated into the agreement and no timetable specified for ongoing liberalization efforts. Certain of the free trade agreements negotiated after NAFTA go further in their commitment to ongoing liberalization of trade in services. All of the agreements signed by Mexico (although not the subsequent agreements negotiated by Chile) contain an article stipulating "future liberalization," whereby parties are to negotiate the liberalization and removal of non-conforming measures listed in the annexes; the articles thereby introduce a marked element of dynamism into these agreements.

Andean Community members have chosen a negotiating modality that is based on negative listing but that is to be carried out over a transition period and that places heightened emphasis on transparency during the liberalization process. Decision 439 sets a goal of eliminating all restrictions on services trade and service providers among members to the agreement within a five-year period (beginning in the year 2000 or shortly thereafter). This is to begin with an exchange of national inventories of measures affecting trade in services, containing the universe of both discriminatory and non-discriminatory measures. Negotiations are to result in the removal of all discriminatory measures, and a parallel process is to be undertaken to harmonize measures that do not discriminate against foreign

services but nonetheless impede foreign access. The CARICOM protocol seeks the full removal of all restrictions on trade in services and service providers. Members are in the process of establishing a timetable and selecting a negotiating modality for this purpose.

Table 7 summarizes the negotiating modality adopted by the fourteen subregional agreements and indicates the relative focus of service negotiators in each case. Services negotiations carried out under the positive listing modality are focused on the inclusion of commitments in national schedules and on the need to determine their broad equivalency for the purpose of reciprocity. This is much more difficult to do for services than for goods, because barriers to foreign service providers are not quantifiable border measures such as tariffs and quotas, but rather discriminatory elements contained in national laws, decrees, and regulations. Under the negative listing modality, negotiations focus on the content of the lists of reservations, or non-conforming measures, to ensure that these do not excessively compromise the liberalizing objective of the agreement.

In reality neither of the two negotiating modalities guarantees full liberalization and is not presumed to do so unless this objective is explicitly set out by members to any given integration agreement. The top-down agreements provide a great deal of information in a transparent form on the existing barriers to trade in services (non-conforming measures), thus giving national service providers knowledge of foreign markets. In the bottom-up agreements the sectoral coverage of commitments may vary significantly between the parties. Moreover, the type of conditions and limitations on market access and national treatment in national schedules are often listed as ceilings on or minimum levels of treatment and thus do not necessarily reflect actual practice. This possibility results in less transparency for service providers and less legal and economic certainty regarding market access.

**Table 7**  
**Negotiating Modality for Services**

<b>Agreement</b>	<b>Modality</b>	<b>Focus of negotiations</b>
GATS	Positive list	Included commitments
MERCOSUR	Positive list	Included commitments
CARICOM	Not yet defined	Not yet defined
Andean Community	Negative list	Content of inventories of measures
NAFTA	Negative list	List of reservations
Group of Three	Negative list	List of reservations
Bolivia-Mexico	Negative list	List of reservations
Costa Rica-Mexico	Negative list	List of reservations
Canada-Chile	Negative list	List of reservations
Chile-Mexico	Negative list	List of reservations
Central America-Dominican Rep.	Negative list	List of reservations
CARICOM-Dominican Rep.	Negative list	List of reservations
Mexico-Nicaragua	Negative list	List of reservations
Central America-Chile	Negative list	List of reservations
Mexico-Northern Triangle	Negative list	List of reservations

#### *Exclusions*

Certain service sectors have been excluded both from GATS and from the subregional arrangements. One example is the air transport sector, where traffic rights or routing agreements are excluded from GATS as they are from all of the subregional arrangements. Likewise, GATS and all the subregional agreements exclude government when they are provided on a non-commercial basis and are not in competition with one or more service suppliers, services such as educational or health services provided exclusively by the government.

Nearly all of the subregional agreements exclude subsidies from their coverage (MERCOSUR is the exception), and about half of the agreements exclude government procurement for services. Financial services are excluded from the agreement between Mexico and Costa Rica, and cross-border financial services are excluded from the agreements signed by Chile with Canada, Mexico, and Central America.

It is important for service providers to be able to know which sectors in the top-down agreements have been either excluded from the liberalizing scope of the agreement or qualified by reservations or non-conforming measures. In the case of some agreements such reservations have been finalized at the time of signature and published in annexes. This is the case for NAFTA, for the Canada-Chile and the Chile-Mexico free trade agreements, and for the Costa Rica-Chile component of the Chile-Central America agreement. In these agreements one or more parties have listed reservations to air, land, and water transport services; communications services; construction services; cultural services; financial services; energy services; professional services; social services; recreation and sport services; and business services.

For the other NAFTA-type agreements such lists of reservations have not been published along with the agreement. They have either been subsequently finalized and published in national sources (the Group of Three and the Costa Rica-Mexico agreements), or have not yet been finalized (Bolivia-Mexico, Mexico-Nicaragua, Central America-Dominican Republic, CARICOM-Dominican Republic, and the other countries of Central America-Chile). The inability to access such critical information removes a vital element of transparency from these latter agreements and makes them much less valuable to service providers.

### *Special Sectoral Treatment*

Given the wide-ranging nature and complexity of the many sectors included within the services area, various sectors have often received special attention. These sectors have been the subject either of separate chapters in various subregional integration agreements or of annexes to a chapter or protocol. Such individual chapters or annexes spell out with greater precision the rules and disciplines governing the sector in question, the form of acceptable regulatory intervention, or the definition of the scope of liberalization.

Table 8 sets out the different service sectors that have received special attention in the fourteen subregional agreements of the Western Hemisphere. The temporary entry for business persons (actually not a sector but a mode of service supply), professional services, and telecommunications are the three sectors that appear the most frequently.

As noted earlier, mode four has been defined narrowly in most of the subregional agreements as “temporary entry for business persons,” whereas under GATS it refers more broadly to the “movement of natural persons.” Thus, with the exception of MERCOSUR and the Andean Community, only the business component of labor mobility has been incorporated within the hemispheric agreements. Professional services are highlighted in the majority of the subregional agreements, with the objective of promoting the recognition of licensing and qualification requirements, through the elaboration of an agreed set of criteria for the equivalency of diplomas and titles, for the various professions among members to an agreement.

### **Services in the FTAA Negotiations**

The following objectives for services negotiations within the Free Trade Association of the Americas were set out in the San José Declaration of March 1998: to establish disciplines to progressively liberalize trade in services so as to permit the achievement of a hemispheric free trade area under conditions of certainty and transparency; and to ensure the integration of smaller economies into the FTAA process. Vice ministers subsequently defined the mandate of the FTAA Negotiating Group on Services (NGSV) to be the development of a framework incorporating comprehensive rights and obligations in services and the identification of appropriate supplementary sector-specific standards.

**Table 8**  
**Provisions for Specific Service Sectors in the Subregional Integration Agreements**

<b>Agreement</b>	<b>Trade in services</b>	<b>Temporary entry of business persons</b>	<b>Professional services</b>	<b>Telecommunications</b>	<b>Financial services</b>	<b>Air transport</b>	<b>Land transport</b>
MERCOSUR	Protocol of Montevideo	Annex to the protocol	...	...	Annex to the protocol	Annex to the protocol	Annex to the protocol
Andean Community	Decision 439	...	...	Decision 462	...	...	...
CARICOM	Protocol II	...	1995 and 1996 policy decisions <sup>a</sup>	...	...	Multilateral agreement <sup>b</sup>	...
NAFTA	Chapter 12	Chapter 16	Annex to chapter 12	Chapter 13	Chapter 14	...	Annex to chapter 12
Group of Three	Chapter 10	Chapter 13	Annex to chapter 10	Chapter 11	Chapter 12	Annex to chapter 10	...
Bolivia-Mexico	Chapter 9	Chapter 11	Annex to chapter 9	Chapter 10	Chapter 12	...	...
Costa Rica-Mexico	Chapter 9	Chapter 10	Annex to chapter 9	...	...	...	...
Canada-Chile	Chapter H	Chapter K	Annex to chapter H	Chapter I	...	...	...
Chile-Mexico	Chapter 10	Chapter 13	Annex to chapter 10	Chapter 12	...	Chapter 11	...
Mexico-Nicaragua	Chapter 10	Chapter 12	Annex to chapter 10	Chapter 11	Chapter 13	...	Annex to chapter 10
Central America-Dominican Republic	Chapter 10	Chapter 11	Annex to chapter 10	...	...	...	...
CARICOM - Dominican Republic	Annex II	Annex on temporary entry of business persons	Future	...	...	...	...
Central America-Chile	Chapter 11	Chapter 14	Annex to chapter 11	Chapter 13	...	Chapter 12	...
Mexico-Northern Triangle	Chapter 10	Chapter 13	Annex to chapter 10	Chapter 12	Chapter 11	...	Annex to chapter 10

a. These decisions allow for the free movement of skilled persons who have university degrees as well as artists, sports persons, musicians, and media workers, among the CARICOM countries.

b. The CARICOM Multilateral Air Services agreement governs the operation of air services within the Caribbean Community.

During the first phase of the negotiations (June 1998–November 1999), members of the NGSV discussed in depth the scope of a future agreement on services and six elements of consensus that had been agreed at the end of the preparatory phase of the FTAA process (March 1995 to March 1998). These six elements include sectoral coverage, most-favored-nation treatment, national treatment, market access, transparency, and denial of benefits. Discussion has centered on the treatment to be granted to these elements in a future chapter on services. The meetings of the negotiating group have benefited from an exchange of views in these areas that have drawn both from the rules and disciplines contained in GATS as well as those contained in the subregional agreements of the hemisphere. At the meetings during the year 2000, the negotiating group moved toward fulfilling the mandate given by trade ministers at the Toronto Ministerial Meeting in December 1999 and began to prepare a draft text of a services agreement. At the end of 2000, the negotiating group finalized a draft text containing proposed language for the six issues of consensus and for other issues that the participating delegations felt were related.

As in other FTAA negotiating groups and bodies, the NGSV has benefited from the expertise and analytical support of the Tripartite Committee, as well as from background studies prepared upon request by that committee. These include, among others, a compendium on "Provisions on Trade in Services in Trade and Integration Agreements of the Western Hemisphere." This compendium sets out in a comparable format the provisions relating to services as they appear in the various subregional agreements. Another study prepared and published by the Tripartite Committee is entitled "Sectoral Agreements on Services in the Western Hemisphere."<sup>81</sup> The Tripartite Committee has also provided technical assistance to the members of the negotiating group in four specific areas: subregional workshops conducted to facilitate the completion by FTAA participants of national "Inventories of Measures affecting Trade in Services"; the elaboration of a work program on statistics for international trade in services; the preparation of a glossary of terms for trade in services to facilitate the negotiations; and the elaboration of the "Manual for Completing the Questionnaire on Measures Affecting Services Trade in the Hemisphere."

### **Challenges for the Future**

Three critical issues in the services area were outstanding at the end of the second FTAA negotiating phase (January 2000–March 2001) that must be resolved before a services chapter can be finalized and market access negotiations can begin in the services area.

The first is to decide upon a modality for liberalizing trade in services, namely, whether to adopt a positive list, bottom-up approach to services liberalization or a negative list, top-down approach, or some modified form of either. Resolution of this critical question is necessary before further progress can be made on the rules and disciplines to be included in the services chapter, because the form of many of these obligations is dependent on the given liberalizing modality. A second issue is whether the commitments made by countries will reflect the status quo and how far and in what way they will go beyond current market openness for service suppliers. The third issue is the relationship between services and investment. Given the importance of investment to services trade, it will be important to identify this interrelationship clearly and to ensure that the modalities negotiated by the Negotiating Groups on Services and Investment are compatible. The question of how to deal with the elaboration of specific sectoral disciplines for services will need to be tackled once these three issues are resolved.

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\* These publications may be found on the Trade Unit web page at <http://www.sice.oas.org/Tunit/tunite.asp>.



## The Organization of American States

The Organization of American States (OAS) is the world's oldest regional organization, dating back to the First International Conference of American States, held in Washington, D.C., from October 1889 to April 1890. The establishment of the International Union of American Republics was approved at that meeting on April 14, 1890. The OAS Charter was signed in Bogotá in 1948 and entered into force in December 1951. Subsequently, the Charter was amended by the Protocol of Buenos Aires, signed in 1967, which entered into force in February 1970; by the Protocol of Cartagena de Indias, signed in 1985, which entered into force in November 1988; by the Protocol of Managua, signed in 1993, which entered into force in January 29, 1996; and by the Protocol of Washington, signed in 1992, which entered into force on September 25, 1997. The OAS currently has 35 Member States. In addition, the Organization has granted Permanent Observer status to 48 States, as well as to the European Union.

The basic purposes of the OAS are as follows: to strengthen peace and security in the Hemisphere; to promote and consolidate representative democracy, with due respect for the principle of non-intervention; to prevent possible causes of difficulties and to ensure the pacific settlement of disputes that may arise among the Member States; to provide for common action on the part of those States in the event of aggression; to seek the solution of political, juridical and economic problems that may arise among them; to promote, by cooperative action, their economic, social and cultural development, and to achieve an effective limitation of conventional weapons that will make it possible to devote the largest amount of resources to the economic and social development of the Member States.

**MEMBER STATES:** Antigua and Barbuda, Argentina, The Bahamas (*Commonwealth of*), Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Dominica (*Commonwealth of*), Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, St. Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, Trinidad and Tobago, United States, Uruguay and Venezuela.

**PERMANENT OBSERVERS:** Algeria, Angola, Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Egypt, Equatorial Guinea, European Union, Finland, France, Germany, Ghana, Greece, Holy See, Hungary, India, Ireland, Israel, Italy, Japan, Kazakhstan, Korea, Latvia, Lebanon, Morocco, Netherlands, Norway, Pakistan, Philippines, Poland, Portugal, Romania, Russian Federation, Saudi Arabia, Spain, Sri Lanka, Sweden, Switzerland, Thailand, Tunisia, Turkey, Ukraine, United Kingdom, and Yemen.

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