2001a. *Communication from Mercosur: Computer and Related Services*, Council for Trade in Services document S/CSS/W/95, Geneva: World Trade Organization.
2001b. *Communication from Mercosur: Distribution Services*, Council for Trade in Services document S/CSS/W/80, Geneva: World Trade Organization.
2001c. *Communication from Mercosur: Tourism Services*, Council for Trade in Services document S/CSS/W/125, Geneva: World Trade Organization.
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Opening services markets at the regional level under the CAFTA-DR: the cases of Costa Rica and the Dominican Republic

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The cases of Costa Rica and the Dominican Republic (DR) offer interesting examples of why smaller countries choose to negotiate in a regional context, and help explain why the CAFTA-DR regional agreement has led both of them to make services commitments that go significantly beyond their WTO GATS schedules.

The story of regional opening in both countries must be prefaced by the following details at the outset, however. Not all regional negotiations are identical and not all regional partners have the same ability to extract a high level of engagement. Services trade negotiations are fashioned by the political and economic environment in which they take place and they encompass an international component and a domestic element. Governments can use trade negotiations to take advantage of the outside pressure offered by these processes to mobilize public support and domestic groups for their objectives. They may also build coalitions and alliances with other parties or transnational actors to enhance their chance of achieving their preferred outcome. This process seems to be easier to achieve in a regional context than in the multilateral context of the WTO negotiations for a variety of reasons, the most obvious one being the lack of focused external pressure and the absence in the multilateral context of clearly identified benefits traceable to desired objectives.

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When negotiators encounter adversity at home and strongly entrenched vested interests for the opening of certain sectors, however, building such coalitions may prove extremely problematic, to the point that achieving the services commitment may be impossible without a huge component of external pressure that can be exerted either in the form of the enticement of a very large market or the clout of a very powerful trading partner.

This chapter draws out the experiences of both Costa Rica and the Dominican Republic in their negotiation of the CAFTA-DR with the United States, contrasting the result of this negotiation with their WTO commitments in services, while also discussing the previous regional agreements into which both countries had entered. The chapter analyzes the process of negotiation in the context of domestic political constraints, domestic and external alliances, incentives, and perceived benefits and outcome.

1 Factual background on the CAFTA-DR negotiations

On the occasion of the IX Trade Negotiations Committee (TNC) Meeting of the Free Trade Area of the Americas process held in Managua on September 24, 2001, senior representatives of the five Central American countries and the United States met to discuss concrete steps to deepen their trade and investment relationship. The meeting was followed by a technical workshop held in El Salvador on November 27, 2001. A few months later, on January 16, 2002, in a speech at the Organization of American States in Washington, DC, President Bush announced that "the United States will explore a free trade agreement with the countries of Central America." Five additional technical workshops were held in 2002 with a view to preparing the negotiations.[1]

The negotiations between the United States and the five Central American countries[2] began in Costa Rica on January 8, 2003, and were well under way by the time of the Eighth FTAA Ministerial Meeting, which took place in Miami on 20 November, 2003. Two days prior to

[1] For more information, see www.whitehouse.gov/news/releases/2002/01/20020116-13.html and www.comex.go.cr/negociaciones/usa2/cronologianegociacion/antecedentes/default.htm.

[2] Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua.

the Ministerial, the US Trade Representative, Robert Zoellick, met with Sonia Guzmán de Hernández, secretary of industry and commerce of the Dominican Republic, and agreed to move ahead with negotiations to integrate the Dominican Republic into the free trade agreement being negotiated between the United States and the five nations of Central America. The two countries announced that their negotiation would begin in the DR in January 2004.[3]

Due to the intensive two-year preparatory work, the negotiating process itself for the CAFTA was fairly rapid and took approximately eleven months during 2003. The five Central American countries joined together to negotiate as a team with the United States, under the coordination of Costa Rica. Negotiators from both sides benefited from active participation by the business community. The private sector was present at each negotiating round in a "side room," or "*cuarto adjunto*," in order to be informed of progress and to input into the negotiating positions.

After nine negotiating rounds, the United States and four Central American nations (El Salvador, Guatemala, Honduras, and Nicaragua) concluded the negotiation of the US–Central American Free Trade Agreement on December 17, 2003, while Costa Rica announced that it needed more time. Negotiations were finalized with Costa Rica on January 25, 2004, two weeks after the United States had begun negotiating with the DR for its incorporation into the CAFTA. Because the Dominican Republic had agreed to accept the basic framework and rules of CAFTA, this made it easier for the United States and Dominican negotiators, as it basically meant that they had to negotiate only market access and some other issues bilaterally. Therefore, after only three rounds of negotiations, the United States and the Dominican Republic announced on March 15, 2004, the conclusion of their market access negotiations integrating the DR into CAFTA. The Agreement became known as the CAFTA-DR. As a general rule, it applies multilaterally between all parties. That is, the Agreement governs trade relations between each Central American country and the United States, among Central American countries themselves, between the United States

[3] For more information, see www.ustr.gov/Document_Library/Press_Releases/2003/November/USTR_Announces_Free_Trade_Talks_Will_Begin_with_Domincan_Republic.html. On August 4, 2003, the USTR had notified Congress of its intent to initiate free trade talks with the Dominican Republic.

and the DR, and between each Central American country and the DR.[4] This makes the CAFTA-DR the first agreement negotiated by Central America to be applied in this manner, thus also serving to deepen regional integration.

The CAFTA-DR FTA was subsequently approved by the congresses of all of the parties to the negotiations, with the exception of Costa Rica.[5] In the latter country the CAFTA-DR proved to be extremely controversial. Trade unions in the telecoms sector opposed any form of liberalization and privatization in that sector, and, since they were one of the most vocal members of the coalition against free trade and CAFTA, they made reforms of the telecoms sector (and its state monopoly) a prominent issue before, during, and after the CAFTA negotiations. Insurance was a different case. The liberalization of insurance services did not ignite the same type of opposition because unions representing the employees of the state-owned monopoly lacked the political clout of their telecoms colleagues. President and Nobel Peace Prize winner Oscar Arias, who took office for a second time in May 2006, put the agreement to a referendum, which took place on October 7, 2007.[6] In the first ever public referendum on a trade agreement, approved the CAFTA-DR by a 52–48 margin.[7] Three-fifths of the eligible population exercised their right to vote. In 2008 the United States and the other parties agreed to provide until January 1, 2009, for Costa Rica to complete the legislative steps required to join the agreement.[8]

[4] See González (2005). Exceptions include trade in goods, government procurement, and financial services; see www.sedi.oas.org/DTTC/TRADE/PUB/STUDIES/TU18_ENG_AGonzalez.pdf.

[5] President Bush issued a proclamation to implement the CAFTA-DR Agreement for El Salvador as of March 1, 2006. A similar proclamation was issued for Honduras and Nicaragua implementing the Agreement on April 1, 2006. In the case of Guatemala and the Dominican Republic, the Agreement was implemented as of July 1, 2006, and March 1, 2007, respectively.

[6] For more information, see www.nacion.com/ln_ee/2007/abril/14/latinoamericaya-070415034428.hggo05y7.html.

[7] In all, 51.6 percent of voters backed the agreement while 48.4 percent voted against it.

[8] CAFTA first entered into force between El Salvador and the United States. Article 22.5 of the agreement, as amended by the United States and El Salvador on March 10, 2006, states that "[u]nless the Parties otherwise agree, the Agreement shall not enter into force for any signatory after two years from the entry into force of the Agreement." Given that the agreement entered into force in El Salvador on March 1, 2006, this means that the deadline for Costa Rica was March 1, 2008. At the time of writing, Costa Rica had not yet implemented the Agreement.

2 Previous experience with regional agreements

Both Costa Rica and the Dominican Republic had already been involved in regional agreements before they began negotiating a free trade agreement with the largest single economy in the world and their close neighbor, the United States. For Costa Rica, its participation in the Central American Common Market (CACM) dated more than forty years. In 1962 Costa Rica had acceded to the General Treaty on Central American Economic Integration (the General Treaty), which had been signed by El Salvador, Guatemala, Honduras, and Nicaragua in 1960. The General Treaty provides the basic framework for Central American economic integration efforts to date.

With the return of democracy and the end of political tensions, Central America made a significant shift toward economic openness in the early 1990s. A presidential summit convened in Antigua, Guatemala, in June 1990 led to the adoption of a plan to reactivate economic integration. The new Central American Integration System (SICA) set up a legal and institutional structure for regional integration through the Tegucigalpa Protocol, which was signed in 1991 and later ratified by the congresses of all five countries, and Panama. In 1993 the five Central American countries signed the Guatemala Protocol, which amended the 1960 General Treaty. The priority program for reactivating the economic integration process focused, among other issues, on the full realization of free trade among the five CACM members by dismantling barriers to intraregional trade and establishing a unified common external tariff, coordinating external negotiations, and strengthening regional economic integration institutions.

By 2007 trade liberalization among the CACM members had moved forward in the area of goods through a near-complete tariff elimination.[9] The Protocol on Investment and Trade in Services, originally signed in March 2002, and based on the NAFTA approach with lists of

[9] Tariffs apply only to a few originating products: unroasted coffee and sugar cane for the five countries; roasted coffee for Costa Rica with El Salvador, Guatemala, Honduras, and Nicaragua; ethylic alcohol for El Salvador with Costa Rica and Honduras; and petroleum derivatives and distilled alcoholic beverages for Honduras and El Salvador; see SIECA (Secretariat of Central American Economic Integration) (2007). Agreements on rules of origin, unfair business practices, safeguards, standardization measures, metrology and authorization procedures, and sanitary and phytosanitary measures were adopted in the 1990s, whereas the agreement on dispute settlement entered into force in 2003 and was amended in 2006; www.sieca.org.gt/site/VisorDocs.aspx?IDDOC=CacheING/17990000000004/7990000000004.swf.

non-conforming measures, was updated in February 2007 to take into account the commitments made by all CACM members in their free trade agreements, in particular in the CAFTA-DR.[10]

Additionally, Costa Rica had negotiated previous regional trade agreements with two other large trading partners in the Western Hemisphere before entering into the CAFTA-DR negotiations, namely with Mexico (in force since January 1, 1995) and with Canada (in force since November 1, 2002). Both free trade agreements were in place for several years prior to the start of the CAFTA-DR negotiations.

The FTA with Mexico followed the NAFTA model, with the comprehensive coverage of all services sectors under a negative-list approach. Nevertheless, Costa Rica was able to exclude its sensitive service sectors from any commitments through exempting these areas in its Annex of future non-conforming measures.[11] The negotiations with Canada focused primarily on trade in goods, as Canada was engaged in a broad national consultation on services at the time and considered that it was preferable to wait for the results of that consultation before including services disciplines in the agreement. Therefore, the two parties agreed to cooperate in the WTO and plurilateral fora, to review developments related to trade in services and investment, and to consider the need for further disciplines in these areas within three years of the date of the entry into force of the FTA. Canada and Costa Rica have yet to deepen these disciplines, however. The FTA also referenced the existence of the Canada–Costa Rica bilateral investment treaty (in force since 1999).[12]

Other FTAs to which Costa Rica was a party, and which it negotiated jointly with its CACM partners, prior to entering into the CAFTA-DR negotiations were with other Latin American trading partners, namely Chile (in force since February 2002) and the Dominican Republic (in force since March 2002). For these agreements, market access negotiations were carried out bilaterally between the Dominican Republic and each CACM

[10] For more information, see *SIECA Bulletin* of February 23, 2007: www.sieca.org.gt/site/VisorDocs.aspx?IDDOC=CacheING/17990000001314/17990000001314.swf.

[11] Such annexes in NAFTA-type agreements allow parties to exclude the services sectors and/or measures that they do not wish to liberalize or even to bind. It differs from the Annex on existing non-conforming measures, which contains those measures that would otherwise violate the core disciplines of the trade agreement set out in the chapters on cross-border services and investment. In the case of the annex on existing non-conforming measures, parties are allowed to maintain the measures listed, but agree to bind them at the level of application.

[12] See www.international.gc.ca/tna-nac/documents/FIPA/COSTARICA-E.PDF.

member,[13] and, likewise, between Chile and each CACM member.[14] These two FTAs, in fact, apply only on a bilateral basis between the partner country and the particular Central American country. The services chapter in the FTA with Chile follows a negative-list approach with a list of existing and future non-conforming measures in annexes, whereas the investment chapter makes reference to the bilateral investment treaty between each CACM country and Chile (no market access component), and calls for the possibility of broadening the investment disciplines within two years of the entry into force of the agreement. The FTA with the DR follows a negative-list approach with respect to the services chapter and requires a standstill regarding existing measures in relation to national treatment, MFN treatment, and local presence. Although the parties also agreed that, within six months of the date of the entry into force of the FTA, they would negotiate their lists of non-conforming measures, they never did. The chapter on investment does not include a market access component.

Additionally, in 2001 Central American countries concluded the negotiation of the normative framework of their free trade agreement with Panama. The FTA followed the NAFTA-type approach. Panama and each Central American country negotiated bilaterally on market access, including lists of non-conforming measures for services and investment. The Costa Rica–Panama FTA was signed on August 7, 2007.[15]

Also prior to CAFTA, in 2002 Costa Rica began negotiating a free trade agreement with CARICOM (not including Haiti, which officially joined CARICOM in 2006).[16] The agreement focuses primarily on trade in goods and does not encompass services. It was signed in March 2004, after the conclusion of the CAFTA-DR, and entered into force in November 2005.[17]

Except for the FTAs with Mexico and Chile, which provided for comprehensive sectoral coverage of services but allowed Costa Rica

[13] For the FTA between Central America and the Dominican Republic, see www.comex.go.cr/acuerdos/comerciales/TLC%20Dominicana/default.htm.

[14] For the FTA between Central America and Chile, see www.comex.go.cr/acuerdos/comerciales/TLC%20Chile/default.htm.

[15] For more information, see www.comex.go.cr/acuerdos/comerciales/TLC%20Panama/Firma%20del%20Tratado/Costa%20Rica%20Firma%20TLC/default.htm.

[16] The following countries are CARICOM members: Antigua and Barbuda, the Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, St Kitts and Nevis, St Lucia, St Vincent and the Grenadines, Suriname, and Trinidad and Tobago.

[17] See www.comex.go.cr/acuerdos/comerciales/centroamerica/Caricom/english.pdf.

flexibility to exclude its most sensitive services sectors, none of the other prior free trade agreements significantly covered the area of services trade, as shown in table 15.1. None of these prior regional negotiations was able to produce the required amount of external pressure to persuade the Costa Rican government to commit to reform in its three most sensitive services sectors, namely telecommunications, insurance, and distribution, in part because none of the prior negotiating partners was a *demandeur* for this openness, with the exception of Mexico, which, at first, was interested in having a telecoms chapter, but then dropped the idea when Costa Rica opposed it. Thus, it proved to be only through engagement with the United States in the CAFTA-DR context that reform was agreed in these three sectors.

The Dominican Republic had more limited experience with regional agreements prior to entering into the CAFTA-DR negotiations as a latecomer in January 2004, as shown in table 15.2. The partial-scope agreement with Panama, signed in July 1985 and in force since November 2003, covers only a few goods. The FTA with the five CACM countries was more comprehensive, as it also includes chapters on government procurement, intellectual property, investment, and services. Signed in 1998, it entered into force in October 2001 for Guatemala and El Salvador, in December 2001 for Honduras, in March 2002 for Costa Rica, and in September 2002 for Nicaragua. As mentioned above, however, none of these bilateral agreements, which applied separately with each Central American country, included a list of non-conforming measures for services, even though the agreement requires a standstill on all measures related to the obligations on national treatment, MFN treatment, and local presence.[18]

The free trade agreement between the Dominican Republic and CARICOM was signed in August 1998 and ratified by the Dominican congress in January 2000. The agreement covers the four modes of supply and has a standstill requirement for measures affecting MFN, national treatment, and local presence obligations. The parties agreed "to commence without delay . . . the drafting of the relevant documents such as the list of sectors to be liberalized." It seems that this was never carried out, however. Thus, besides its experience with the GATS, the DR had very limited experience with regional trade agreements on services prior to the CAFTA-DR.

[18] See article 10.13 (2) of the agreement: www.sice.oas.org/Trade/camdrep/CARdo_2s.asp#10.13.

Table 15.1 *Free trade agreements signed by Costa Rica prior to the CAFTA-DR*

Agreement/partner(s)	Date of signature	In force for Costa Rica	Services disciplines
CACM	July 23, 1962	September 23, 1963	Comprehensive coverage of investment and cross-border trade in services; negative-list approach; the Protocol on Investment and Trade in Services was signed on March 24, 2002, and updated on February 22, 2007; list of non-conforming measures
Mexico	April 15, 1994	January 1, 1995	Comprehensive coverage of investment and cross-border trade in services; negative-list approach; list of non-conforming measures
Dominican Republic (Central America–Dominican Republic)	April 16, 1998	March 7, 2002	Negative-list approach; standstill for cross-border trade and investment in services; parties agreed that, within six months of the entry into force of the FTA, they would negotiate their lists of non-conforming measures (these lists have not been made public); no market access for investment in goods
Central America–Chile	October 18, 1999	February 15, 2002	Comprehensive coverage for cross-border trade in services; negative-list approach; no market access for investment in goods and services; FTA references the BIT between Chile and each CACM country
Canada	April 23, 2001	November 1, 2002	No comprehensive coverage of service trade; parties agreed to cooperate in the WTO and plurilateral fora, and to review developments related to trade in services and investment, and consider the need for further disciplines within three years of the entry into force of the FTA

Sources: OAS, Foreign Trade Information System (SICE), www.sice.oas.org, and Ministry of Foreign Trade of Costa Rica, www.comex.go.cr.

Table 15.2 *Trade agreements signed by the Dominican Republic prior to the CAFTA-DR*

Agreement/partner(s)	Date of signature	In force	Services disciplines
Panama	July 17, 1985	November 2, 2003	No coverage of cross-border trade in services and investment
Central America–Dominican Republic	April 16, 1998	Guatemala: October 3, 2001 El Salvador: October 4, 2001 Honduras: December 19, 2001 Costa Rica: March 7, 2002 Nicaragua: September 3, 2002	Negative-list approach; standstill for cross-border trade and investment in services; parties agreed that, within six months of the entry into force of the FTA, they would negotiate their lists of non-conforming measures (these lists have not been made public); no market access for investment in goods
CARICOM	August 22, 1998	Barbados, Jamaica, and Trinidad and Tobago: December 1, 2001 Guyana: October 6, 2004 Suriname: August 2005 Dominican Republic: February 5, 2002	Coverage of cross-border trade and investment in services; standstill is required for measures affecting MFN, national treatment, and local presence obligations; the Parties agree to commence without delay the drafting of the relevant documents to be liberalized

Sources: OAS, Foreign Trade Information System, www.sice.oas.org and www.seic.gov.do.

3 The motivations behind the CAFTA-DR negotiations

Securing their access to the US market and, most importantly, attracting foreign investment were the driving forces behind the quest of the CAFTA-DR countries for a closer relationship with the United States. They, along with several other countries from the Caribbean basin (a total of twenty-four countries), had benefited since 1984 from the Caribbean Basin Initiative (CBI), a US non-reciprocal preferential trade arrangement, which allows exporters from beneficiary countries to claim duty-free or reduced-duty treatment for eligible products (goods only) imported into the customs territory of the United States. The CBI is the name commonly used to refer to the 1983 Caribbean Basin Economic Recovery Act (CBERA). To retain this preferential access, beneficiary countries are required to provide internationally recognized rights for workers and effective protection of intellectual property rights, including copyrights for film and television material. Moreover, the US president can terminate beneficiary status and suspend or limit a country's CBERA benefits.[19]

In 2004 the Dominican Republic was the largest CBERA beneficiary, accounting for 23.8 percent of total US imports from CBERA countries, whereas Costa Rica captured 9.9 percent of the total. Other CAFTA-DR countries (Honduras at 21.2 percent, El Salvador at 10.9 percent, and

[19] In 2000 the Caribbean Basin Trade Partnership Act (CBTPA), a major enhancement of the CBERA program, was signed into law by President Bill Clinton as part of the Trade and Development Act of that year. It extended non-reciprocal preferential tariff treatment to textile and apparel products assembled from US fabric that had previously been excluded from the program. The CBTPA was also intended to encourage the diversification of CBI countries' economies, viewed by American policy-makers as a key step toward economic development that would decrease the region's dependence on aid and reduce illegal immigration into the United States, as well as the trafficking of illegal drugs. The main drawbacks of the CBERA and CBTPA are that they cover only goods and are subject to a periodic renewal process by the US Congress. The CBTPA is, in fact, a transitional measure through September 30, 2008, or until the FTAA or a comparable FTA between the United States and individual CBERA countries enters into force. CAFTA-DR parties ceased to be CBERA/CBTPA beneficiaries the day the CAFTA-DR entered into force in each respective country. The WTO waiver for CBERA, which allowed the United States to extend on a non-reciprocal basis trade preferences to a limited number of countries, expired on December 31, 2005. In 2007 the United States submitted revised waiver requests for the CBERA, the Africa Growth and Opportunity Act (AGOA), and the Andean Trade Preference Act (ATPA) programs. These requests were blocked by Paraguay; see http://www.wto.org/english/news_e/news07_e/goods_council_23nov07_e.htm and www.wto.org/english/news_e/news07_e/good_counc_9july07_e.htm.

Guatemala at 10.3 percent) were also important beneficiaries.[20] The key motivation of the CAFTA-DR countries in pursuing an FTA with the United States was to consolidate – as well as to expand – their preferential access to the US market under the CBI and to make this access permanent.

While preferential liberalization has been flourishing for decades in the Americas, as illustrated by the revitalization of the "old-type" sub-regional trade arrangements in the early 1990s and the numerous free trade agreements negotiated between countries of the region over the past fifteen years, the new regionalism of the recent FTAs represents a break with history (for more information, see Salazar-Xirinachs and Robert, 2001). Instead of sector-specific tariff concessions, most recent trade agreements signed by Latin American countries include a universal, automatic, and across-the-board elimination of tariff barriers (da Motta Veiga, 2004), as well as deep disciplines in a broad number of areas. In fact, these agreements respond to a new economic logic, which is investment-driven (Lawrence, 1997; Ethier, 1998). This is particularly true for smaller developing economies such as the Central American countries and the Dominican Republic, for which the signaling effect of an FTA with a developed country helps to attract investment, serves as an export platform of goods and services to larger markets, and, in so doing, contributes to the fostering of growth and development (Salazar-Xirinachs, 2004). Such agreements also lock in key domestic reforms. This explains why smaller developing countries have signed on to free trade agreements over the past decade that contain disciplines in "new" areas, such as trade in services, investment, technical barriers to trade, competition policy, and IPR.

The motivation of developed countries in this new regionalism often goes beyond economic factors. For the United States, a number of geostrategic objectives were front and center in negotiating the CAFTA-DR. In his OAS speech announcing CAFTA, President Bush clearly stated that "[t]he future of this hemisphere depends on the strength of three commitments: democracy, security and market-based development. These commitments are inseparable, and none will be achieved by half measures. This road is not always easy, but it's the only road to stability and prosperity for all the people . . . who live in this hemisphere."[21]

[20] For more information, see http://www.usitc.gov/publications/pub3954.pdf.
[21] See footnote 1.

4 Objectives of the services negotiators

In a letter to members of Costa Rica's Legislative Assembly in January 2003, ten days before the United States and Central American countries began negotiating CAFTA, Costa Rica's trade minister, Alberto Trejos, stated that the negotiation with the United States was not an end in itself for his government but, rather, an important step in the continuing integration of the country with the world economy. Trejos added: "We are aware of the benefits, but also of the concerns and difficulties that such closeness with the largest economy in the world would inspire. We are entering this process with the objective that Costa Rica take advantage of the numerous opportunities the agreement will bring but our eyes are wide open with respect to the challenges and sensitivities that we will need to address."[22]

With respect to services, Trejos highlighted that Costa Rica would aim at "furthering the growth of cross-border trade in services flows between Central American countries and the United States through the establishment of a clear and precise legal framework, which will include the principles agreed to at the multilateral level and be compatible with the constitutional provisions of the parties." Trejos had in mind article 121 of the Costa Rican constitution, which states that "wireless services must be under the authority of the government."[23] We shall return to this point in the discussion of the telecoms sector.

Trejos also mentioned in his letter that Costa Rica would aim to "promote the development and diversification of services in the country, recognizing not only the intrinsic value of services but also their contribution to the competitiveness of the productive sector, taking into account the differences in size and development between the Central American economies and the United States."[24] Costa Rica also wanted to ensure that there would be rules on the temporary entry of business persons and that the agreement would foster increasing investment flows, in particular through the establishment of a legal framework that protects investments and promotes a stable and secure business climate.

[22] See "Letter to Members of the Legislative Assembly," Ministry of Foreign Trade of Costa Rica, January 17, 2003; available at www.comex.go.cr/negociaciones/usa/publicaciones/0049-3.pdf.
[23] Article 121 (14 [c]) of Costa Rica's constitution; see www.constitution.org/cons/costaric.htm.
[24] See footnote 19.

While the negotiations with Central America were based on a template (the FTA text negotiated by Chile and Singapore), the Central Americans were nonetheless able to incorporate a few changes to the template to suit their interests. The Dominican Republic was in a different situation when it began negotiating with the United States. The CAFTA text already existed, and the Dominicans agreed that they would sign on to the normative framework that had been negotiated by the Central American countries, while negotiating market access for goods and services and a few other issues bilaterally. The main objective of the Dominican Republic in joining the CAFTA was to secure the access to the United States that it already had under the CBI, but on a permanent basis. In the absence of an agreement, the Dominican Republic feared that it would lose parity with its main regional competitors – Central American countries – in the US market. In addition, the DR wanted to expand and diversify its trade with the United States and foster investment and competitiveness through a reduction in transaction costs, the elimination of barriers to entry, improved transparency, and legal certainty. In services, the country aimed at consolidating and strengthening the opening process it had begun in the 1990s. Finally, the Dominicans wanted to have access to a rules-based dispute settlement mechanism, which they could use should a dispute arise with the United States or another CAFTA partner.[25] The CBI does not include such a system.

5 Organization of the negotiating efforts

As mentioned earlier, the five Central American countries negotiated as a team with the United States. The Costa Rican team, headed by Trejos and chief negotiator Anabel González of the Ministry of Foreign Trade, was very well organized. The negotiation involved more than 150 civil servants working for eighteen governmental institutions. There were 360 meetings to consult with all the productive sectors. More specifically, representatives of 900 firms and fifty-seven chambers and associations of the goods sector, as well as forty-nine sub-sectors, were consulted. In the case of services and investment, thirty chambers, thirty-five associations,

[25] For more information on the objectives of the Dominican Republic in these negotiations, see Sandra Nogué, "Telecomunicaciones en el DR-CAFTA," mimeo, Santo Domingo', August 2007. See also DR1.com, "Dominican-American Chamber of Commerce on FTA," February 19, 2004.

twenty-two professional colleges, and twenty-seven private institutions took part in the preparation of negotiating positions and remained involved until the very end of the negotiations. Three hundred and thirteen representatives of eighty-four associations, sixty-one members of the productive sector, and twenty-three representatives of civil society took part in sixty meetings of the "*cuarto adjunto*" before, during, and after each of the ten negotiating rounds.[26]

To ensure that information on the CAFTA would be available to all, the Costa Rican team prepared reports on the results of each negotiating round and made these reports available on the website of the Ministry of Foreign Trade. In addition, 25,000 copies of documents on specific issues covered in the CAFTA were distributed to the Costa Rican population. Moreover, the Costa Rican team organized numerous forums and seminars and accepted the invitation of ninety-three organizations of the private sector and civil society to participate in 103 public fora. At the conclusion of the negotiation, Trejos had also paid forty visits to the Costa Rican Legislative Assembly to brief parliamentarians on the Agreement.[27]

In the Dominican Republic, time was of the essence, as there were very few weeks to prepare documents and to consult with the private sector and civil society. The entire negotiation lasted only three months. The negotiating team was under the leadership of the industry and commerce minister and chief negotiator Sonia Guzmán de Hernández. The Dominicans created a special office, the Oficina Especial para la Negociación del Tratado de Libre Comercio con los Estados Unidos, headed by the deputy industry and commerce minister, Hugo Rivera Fernández, to coordinate the negotiations with the United States.

The public and private sectors worked closely together. Some Dominican negotiators commented that the two sectors were "*del mismo lado de la acera*" (that is, "on the same side of the street"), albeit, at times, both sides did not share the same views. As was the case with the Costa Ricans, the Dominicans counted on a core team of negotiators, but also

[26] For more information, see Alberto Trejos, "Resultados de la negociación del TLC con Estados Unidos. Palabras de Alberto Trejos, Ministro de Comercio Exterior de Costa Rica al Plenario Legislativo," February 2, 2004; available at www.comex.go.cr/acuerdos/comerciales/CAFTA/plenario.pdf.

[27] See announcement by Alberto Trejos, at www.comex.go.cr/acuerdos/comerciales/CAFTA/plenario.pdf.

on the participation of representatives of numerous government entities. For example, at the second round of negotiations, which took place in Puerto Rico in February 2004, Dominican newspapers reported that the Dominican team was composed of seventy-four government representatives and fifty-two private sector representatives. Approximately eighty government officials took part in the third and last negotiating round in Washington in March 2004.[28]

6 Sensitive issues in the services negotiations in the CAFTA-DR

The services sector accounts for approximately 60 percent of Costa Rica's gross domestic product and 62 percent of employment. Several key services are provided under monopolistic conditions. In fact, although Costa Rica prohibits all monopolies, the legal framework for competition policy "excludes from its scope providers of public services under concession and state monopolies established by law" (WTO, 2007: ix) in sectors such as electricity transmission, insurance, certain telecommunications services, maritime ports and airports, and fuel supply.

The CAFTA-DR negotiations offered a unique opportunity to Costa Rica's main trading partner, the United States, to push for the liberalization of some of these monopolistic practices, particularly in the telecoms and insurance sectors. Another key objective of the United States was to address restrictions on distribution created through restrictive dealer protection regimes. Dealer distribution issues also arose in the Dominican Republic, as well as in El Salvador, Guatemala, and Honduras.

During the CAFTA negotiations Abel Pacheco, the president of Costa Rica at the time, stated on numerous occasions that the country would not open the telecoms sector to private participation.[29] The Instituto Costarricense de Electricidad (ICE), an autonomous state institution created in 1949 to develop and produce hydroelectric power, was given the right to operate telecommunications services in 1963. Although Costa Rica's "legal framework does not give ICE the exclusive right to provide services, the Constitution requires any new concession awarded to another

[28] See DR1.com, February 11, 2004.

[29] See, for instance, the newspaper *La Nación* of San José, October 6, 2003.

firm to be approved by the Legislative Assembly, or a general law."[30] The telecoms components of the ICE Group include ICE Telecomunicaciones, which provides basic local, long-distance and mobile telephony, and Radiográfica Costarricense (RACSA), which offers value added services, internet connection, and satellite communication services. Even if the constitution did not establish a monopoly in favor of these institutions, de facto, a state monopoly exists in Costa Rica in the telecoms sector, as only the ICE Group holds concessions to operate in this sector.

In March 2000 the government of Miguel Angel Rodríguez attempted to open up the telecoms sector to private investment. Dubbed the "*combo energético*," the new ICE law would have allowed private investment in the telecoms and electricity sectors without privatizing the ICE. The new law (Ley de Transformación del ICE) was adopted by forty-five of the fifty-five members of the Costa Rican Legislative Assembly on March 20, 2000. To demonstrate their opposition to this new law, trade unions (in particular those of ICE) and students' associations organized strikes and riots all over the country requesting the withdrawal of the new ICE law. To appease those who had been protesting in the streets for several days against the liberalization of the telecoms and electricity sectors, the government took the decision in early April to send the law to a Special Joint Committee (Comisión Especial Mixta) made up of representatives of trade unions, civil society, and the various political bodies. In October 2000, after examining various options to reform these sectors, the committee recommended to the Rodríguez government to focus on the institutional strengthening of the ICE, but rejected the liberalization of the "*combo energético*." Other attempts in 2000 and 2002 to open up the telecoms sector to private investment suffered the same fate and were never approved (WTO, 2007: 91).

The United States was aware of the political sensitivities related to the telecoms sector in Costa Rica. In a visit to the country on October 1, 2003, ten months after the beginning of the CAFTA negotiations, Zoellick made it clear that he was not asking for the privatization of the telecoms sector but, rather, for the opening of this service industry. He did state, however, that Costa Rica had to open its telecoms sector if it wished to ensure its participation in the CAFTA. In meetings with Costa Rica's

[30] See article 121 (14) of the political constitution of Costa Rica, at www.constitution.org/cons/costaric.htm.

minister of foreign trade, several members of the Legislative Assembly, and representatives of the private sector, Zoellick reiterated to his hosts that this issue had to be dealt with in the FTA. He also mentioned that he was prepared to exclude Costa Rica, if necessary, when sending the CAFTA text to the US Congress.

Costa Rica's government was a major proponent of the CAFTA and did not want to be excluded from it. Following the visit of the US Trade Representative, the Costa Rican newspapers began to discuss the "price" the country would have to pay for not being a party to CAFTA. The papers reported on the fact that the United States accounted for over 50 percent of the country's exports in 2002, while the Netherlands came second at 5.9 percent and Guatemala third at 4.5 percent. More than 1,600 Costa Rican firms had exported 1,800 products to the United States that year.[31] Two-thirds of these firms were small and medium-sized firms. Costa Rica's export promotion agency, PROCOMER, stated that a total of 146,000 jobs (including 73,000 direct jobs) linked to the export of goods to the United States would be lost in Costa Rica should the country be excluded from the CAFTA.[32] Moreover, the United States also accounted for 40 percent of all foreign direct investment in the country in 2002.

The Americans also wanted to liberalize the insurance sector, which had been under a state monopoly since 1924 through the Instituto Nacional de Seguros (INS). Three laws govern the insurance sector: the Ley Monopolios del Instituto Nacional de Seguros (Law no. 12), the Ley de Reorganización del Instituto Nacional de Seguros (Law no. 33), and the Ley de Monopolio de Reaseguros (Law no. 6082). They grant the INS a monopoly over all types of insurance, including life insurance, damage and civil liability, and reinsurance.[33] Unlike other financial services, insurance did not have a regulatory body at the time of the CAFTA negotiations.

While the Costa Rican population was relatively satisfied with the quality of telecoms services provided by the ICE, the INS did not enjoy the same popularity. As noted in the 2001 WTO *Trade Policy Review* of Costa Rica, "According to the authorities, the insurance market in Costa Rica is affected by a number of problems, including the high cost and

[31] See *La Nación*, October 13, 2003.
[32] See *La Nación*, October 22, 2003.
[33] Contracts concluded by cooperatives or mutual societies were grandfathered by the 1924 law.

narrow range of services compared with those available in more competitive markets" (WTO, 2001: 103).

Unlike telecoms, the formal request for the liberalization of the Costa Rican insurance sector came late in the game in the CAFTA negotiations, albeit the United States had expressed interest in the opening of the insurance sector since the beginning of the negotiations. On December 15, 2003, two days before the end of what was supposed to be the last negotiating round, the United States tabled a proposal seeking the liberalization of the insurance sector in Costa Rica. Trejos underlined that the US insurance liberalization proposal was put forward too late for Costa Rica to complete the necessary technical work in time to conclude negotiations during that round. While the other four Central American countries concluded their negotiation on a comprehensive CAFTA deal with the United States on December 17, the Costa Rican delegation went home to seek further guidance from their capital on making a number of concessions.

By the December negotiating round, the Costa Ricans had drafted a text for the "gradual and selective" market opening of certain telecommunications services: private network services, internet services, and mobile wireless services. They needed more time, though, to study the US proposal on insurance, and they also wanted to get a better deal on textiles and agriculture, including such items as sugar, poultry, beef, pork, onions, and potatoes. In fact, Costa Rica's trade minister told *Inside US Trade* that "[w]hen free trade agreement negotiations between the US and Costa Rica reconvene in January [2004], Costa Rica will be looking to the US for improved market access offers on textile and agricultural products. Otherwise, it will be difficult for Costa Rica to open up its telecommunications and insurance markets."[34]

The tactics used by the Costa Rican negotiating team gave it leverage. Throughout the negotiations the Costa Ricans had briefed members of their private sector in the "*cuarto adjunto*" and had emphasized the need for a "balanced" agreement. With a view to affecting the negotiation outcome to its advantage and with the full support of its private sector, Costa Rica withheld its signature from a CAFTA deal in December 2003. Good managerial and organizational skills, as well as solid technical expertise, strengthened its choice of tactics and increased its bargaining leverage.

[34] *Inside US Trade*, January 2, 2004.

The United States and Costa Rica agreed to continue negotiating in January 2004, and they reached a deal on January 25. Costa Rica proudly announced that it had successfully excluded two politically sensitive products, onions and potatoes,[35] from tariff elimination and that it had won favorable market access commitments from the United States on poultry and other products not granted to the other four Central American countries, as well as secured preferential treatment for wool apparel.[36] For political economy reasons, it was of the utmost importance for Costa Rica to ensure that farmers support the agreement. As noted by a former Central American negotiator, while trade unions and anti-free-trade leaders did not enjoy broad public support, farmers did. In fact, if farmers had opposed the CAFTA, it would have been extremely difficult for the Costa Rican government to win approval for the agreement.

On telecoms (see Echandi, 2005), Costa Rica highlighted that it had negotiated a separate annex based on the text it had presented to the United States. For the first time, Costa Rica committed to the gradual opening, on a non-discriminatory basis, of private network services and internet services by January 1, 2006, and mobile wireless services no later than January 1, 2007. The biggest difference in the agreement from a proposal discussed in December 2003 was that the agreement would allow Costa Rica to first create a regulatory authority and then to begin opening its market. The Costa Ricans committed to have this framework in place by January 1, 2006.[37] Costa Rica also agreed to introduce legislation to modernize ICE and made regulatory commitments on universal services, transparency, allocation of scarce resources (such as

[35] These products will be subjected to a tariff rate quota (TRQ) that expands annually but does so without any tariff reductions.

[36] On poultry, the United States agreed to a seventeen-year TRQ for Costa Rica that allows just 300 tons of access in the first year of the agreement. Costa Rica also negotiated the phasing out of its tariffs over twenty years for rice and dairy product, and a fifteen-year TRQ for the pork and beef sectors. On sugar, Costa Rica will receive 11,000 tons of additional market access for raw sugar. That amount is on top of the 15,796 tons of access Costa Rica is allotted under the Uruguay Round TRQ. Costa Rica has also been given 2,000 tons of access for organic sugar, a niche market Costa Rica had been keen on accessing in the United States. Costa Rica secured preferential treatment for wool apparel, which will receive a 50 percent discount from normal duties for 500,000 square meter equivalents (SMEs) of apparel made with third-country wool. This arrangement is available to Costa Rica for the first two years of the agreement, with a provision allowing the United States and Costa Rica to discuss the possibility of renewing it. See *Inside US Trade*, January 30, 2004.

[37] *Inside US Trade*, January 30, 2004.

radio spectrum), interconnection, network access, information services, submarine cable systems, and flexibility in the choice of network technology. The Report of the US Industry Sector Advisory Committee for Trade Policy Matters Services (ISAC 13) of March 2004 commented that "while these commitments are somewhat modest, they represent significant progress for the Costa Rican market" (ISAC 13 [Industry Sector Advisory Committee on Services for Trade Policy Matters], 2004a: 16).

On insurance, Costa Rica agreed to eliminate its monopoly and to fully open this sector, albeit gradually. The biggest difference on insurance between what was on the table in December and what was agreed to in January was, as in the telecoms case, that Costa Rica be allowed to develop a regulatory framework before opening its market, according to a Central American official.[38] The result is that the deal would open, on a non-discriminatory basis, some types of insurance to service providers of any party immediately, while other types will be opened much more gradually.

By January 1, 2007, Costa Rica committed to establish an independent insurance regulatory authority separate from and not accountable to any supplier of insurance services. By no later than the entry into force of the CAFTA-DR, Costa Rica must liberalize the purchase of all types of insurance (except compulsory automobile insurance and occupational risk insurance) by Costa Ricans abroad (akin to mode 2 in the GATS). The country made more limited commitments on the supply of insurance on a pure cross-border basis (akin to mode 1 in the GATS). In the latter case, only maritime, aviation, and transport insurance, reinsurance, services necessary to support global accounts, auxiliary insurance services, and insurance intermediation services are liberalized, which means that these services can be supplied by cross-border insurance suppliers without establishment in Costa Rica and that those suppliers can indeed solicit Costa Ricans for the business. Moreover, Costa Rica agreed to allow, on a non-discriminatory basis, insurance service suppliers of any party, to establish and effectively compete to supply insurance services directly to the consumer in its territory for all lines of insurance (except compulsory automobile and occupational risk insurance) by January 1, 2008, and the latter two types of insurance by January 1, 2011 (see Echandi, 2006).

[38] *Inside US Trade*, January 30, 2004.

The decision to liberalize the insurance sector was not as difficult as in the case of telecoms. Although there was a state monopoly providing insurance services, there were many loopholes in practice, allowing, for example, Costa Ricans to buy insurance abroad and for multinationals doing business in Costa Rica to be covered by their parent company's insurance contracts.

In strong contrast to Costa Rica, the services sector was not a key issue in the CAFTA-DR negotiations for the Dominican Republic. In fact, with the exception of the restrictions on distribution created through its dealer protection regime, few services issues were controversial, as the telecoms and insurance sectors had already been liberalized. The difficult negotiating issues for the Dominican Republic involved market access in agriculture and IPR. Nonetheless, the services sector was and remains of great importance to the Dominican economy, as it now accounts for approximately 70 percent of the country's GDP, and services are a core part of the FTA.

As mentioned above, the key objective of the Dominican negotiators was to preserve and expand their country's preferential access to the United States. In fact, at the beginning of 2004 the Dominican Republic was the largest CBI beneficiary. Losing parity with Central American countries in the US market would have been devastating to Dominican industries, as 85 percent of all Dominican exports find their way to the United States. The country's trade relationship with the United States is paramount. Two-way trade amounted to $8 billion in 2003. US imports from the DR, of which more than 90 percent entered duty-free under CBERA and CBTPA, were essentially concentrated in the apparel sector.[39]

At the outset of the FTA negotiations in January 2004, the DR was the fourth largest US trading partner in Latin America, after Mexico, Brazil, and Colombia, and an important market for exports of US agricultural, fish, apparel, textile, and forestry products. For example, for two products consumed locally, the DR is the eighth largest US export market for corn, and the fifth largest US export market for soybean meal. While most Dominican products enter the United States duty-free under various preference programs, tariffs on US goods remain high. Average

[39] As a whole, the CAFTA-DR countries ranked as the twelfth largest market for US exports in 2003, and the fifteenth largest US supplier during the same year. In 2002 and 2003 about 80 percent of US imports from the CA-DR region entered free of duty.

Dominican tariffs on US goods at the time of the negotiation were 8.6 percent, while some above-quota tariffs on US farm products were well over 100 percent.

The most contentious services issue for the Dominicans was related to distribution services and the changes that the United States was demanding with respect to dealer protection regimes. Law no. 173 (Ley sobre Protección a los Agentes Importadores de Mercancías y Productos) regulates the rights of Dominican companies to distribute foreign brand-name products. Under this protectionist regime – not unique to the Dominican Republic, as it also exists in Costa Rica, El Salvador, Guatemala, and Honduras – foreign manufacturers in the DR had to negotiate exclusive agreements with local distributors, "often without a way to make changes should the dealer prove to be inefficient or otherwise lacking in performance," as noted by the US International Trade Commission in its 2004 publication on the potential economy-wide and selected sectoral effects of the CAFTA-DR (see USITC, 2004: 62). The Dominican Association of Import Wholesalers made the case against any changes to the country's dealer protection regime, arguing that a similar protectionist regime existed in several US states and in Puerto Rico, but in the end it was not successful.

The March 2004 report of ISAC 13 comments favorably on the fact that the CAFTA-DR provides "that dealer contracts entered into after the entry into force of the Agreement will be governed by general contract law principles, including the freedom to contract and the freedom to terminate contracts at the end of the contract period or renewal period" (ISAC 13, 2004b: 9). In fact, the Dominican Republic is not to apply Law no. 173 to any covered contract signed after the entry into force of the CAFTA-DR unless the contract explicitly provides for the application of this law. The DR must instead apply the principles of the Código Civil of the Dominican Republic to the covered contract; treat the covered contract in a manner consistent with the obligations of the CAFTA-DR and the principle of freedom of contract; treat the termination of the covered contract as just cause for a goods or service supplier to terminate the contract or allow the contract to expire without renewal; and if the covered contract has no termination date, allow it to be terminated by any of the parties by giving six months advance termination notice. The agreement also provides that "damages calculated for the breach of a contract may be no greater than under general contract law, that

contracts are only exclusive if they explicitly require exclusivity and provisions promoting the use of neutral arbitration forums to resolve disputes."[40]

On telecoms, the Dominicans negotiated a side letter, which emphasizes that the Dominican Republic will meet the obligations of the CAFTA telecommunications chapter to provide for an open environment in which carriers have access to a network that they themselves do not own. The letter states that the Dominican Republic is flexible in how it meets the obligation of the chapter, both in terms of choosing market-based approaches over regulation to ensure an open system and in choosing how to regulate if regulations are deemed appropriate. Moreover, the side letter states that the Dominican Republic intends to satisfy several key obligations in the telecommunications chapter through "market-based competition," such as negotiations between suppliers and other enterprises or negotiations between telecommunications suppliers themselves. If these measures fail to shape a competitive communications market, the Dominican Republic will use regulations as prescribed in its own domestic law. The side letter emphasizes, however, that the telecommunications chapter does not prescribe a single approach to regulation.

Until 1990 the Dominican Telephone Company (CODETEL) had a de facto monopoly, as the sole provider of telecommunications services in the country. That year the Dominican government established the principle of free competition in the sector, allowing both nationals and foreigners to compete in telecoms. Since 1998 the sector has been regulated by Law no. 153–98 (Ley de Telecomunicaciones) and falls under the Dominican Institute of Telecommunications (INDOTEL), a decentralized entity with jurisdictional and financial autonomy.

In financial services (except insurance), the Dominican Republic was able to retain its capital dotation rules for bank branches and its "domestic legal requirements as to corporate form and local jurisdiction of incorporation as well as domestic law restrictions on corporate powers" (ISAC 13, 2004b: 14). The sector had been consolidated as a result of a 1992 law fostering the establishment of multiple service banks offering a wide range of services. In 2002 a new monetary and financial code was

[40] ISAC 13 (2004b: 9). See also annex 11–13 of the CAFTA-DR, section B: www.sice.oas.org/Trade/CAFTA/CAFTADR_e/chapter6_12.asp#SectionB.

approved by the Dominican congress, establishing the legal framework for the financial sector.[41]

7 Outcome of the services negotiations in the CAFTA-DR – beyond the GATS

The outcome of the services negotiations in the CAFTA-DR went considerably beyond what both Costa Rica and the Dominican Republic had undertaken in the GATS framework, as well as what they had proposed in their new GATS offers in the Doha Round negotiations and what they had agreed to in their previous regional agreements. This is true both in terms of the normative framework of the rules to which they subscribed, as well as the actual market opening in key services sectors. Both countries made substantial commitments to liberalization in cross-border trade, telecommunications, financial services, and distribution that are much more ambitious than their GATS commitments. In the WTO context, the CAFTA countries in general had undertaken only a few GATS commitments. Costa Rica's GATS schedule covers a little over 10 percent of all service sub-sectors, whereas the DR's schedule covers fewer than 40 percent. Key services sectors not inscribed in the Costa Rican schedule include communications, construction, distribution, environmental services, and most transport services, whereas the Dominican Republic excludes the distribution, education, transport, and environmental services sectors, among others.

Under the CAFTA-DR, the scope of the liberalizing commitments has been extended to all services and services sectors with very few exceptions by virtue of the negative-list approach (only the main air transport services and services provided under the purview of government authority do not fall within the scope). According to the negative-listing modality, all the core disciplines set out in the investment chapter (chapter 10) and the cross-border service trade chapter (chapter 11) of the agreement automatically apply to all service industries except for the specific exceptions that are set out in the annexes on non-conforming measures. Thus comprehensive sectoral coverage is a key feature of the negative-list approach of the CAFTA-DR.[42]

[41] See Law no. 183–02 of November 21, 2002.

[42] In the case of financial services, cross-border (mode 1) liberalization applies only to a positive list of sub-sectors.

The annexes of non-conforming measures were negotiated as an integral part of the agreement, and the exceptions they contain are specific to each CAFTA-DR member, as the sensitivities and regulatory frameworks differ between countries. One annex is applicable to existing non-conforming measures, where included measures must be grounded in actual laws and administrative decrees and are bound at the level of regulatory application. A second annex includes "future measures" or those areas such as social protection that the government wishes to exempt from relevant disciplines in order to have the freedom to raise barriers in the future.

Due to the negative-list modalities, the CAFTA-DR improves substantially upon the commitments scheduled by the two governments under the GATS, bringing the large majority of sectors that still lie outside multilateral obligations within the ambit and under the strong disciplines of the regional agreement. For those services that were already open to the world market, both countries bound the guarantee of market access and national treatment under the FTA. Additionally, the negative-list approach automatically extends all relevant disciplines to new services, those that have not yet been developed or commercialized, subject to areas reserved under annex II. This results in greater market access than the positive-list approach. Under the latter, each extension of trade disciplines to new services would have to be negotiated individually and included in a revised schedule of commitments.

While negative listing does not always result in greater market access, it always enhances transparency for service providers. For example, in its GATS schedule, Costa Rica left professional services unbound and did not subscribe to any type of commitment. Under the CAFTA-DR, Costa Rica maintained its restrictions on foreign professional service providers, but was required to state them explicitly, including references to the relevant laws that substantiate them.[43] These same restrictions can be

[43] These limitations pertaining to the foreign provision of professional services include the following: the right to join a professional association and participate in the Costa Rican market is conditioned on reciprocity; foreign professionals' ability to join associations is contingent on their obtaining the appropriate immigration status and demonstrating prior experience, varying between two and five years; only Costa Ricans belonging to the Colegio de Ingenieros Agrónomos can provide consulting services for agronomical sciences; and foreign professionals in the political science and international relations fields must join professional associations, and their market participation is subject to economic needs tests. See annex I of Costa Rica to the CAFTA-DR, found at www.sice.oas.org, under, "Trade Agreements"; it is mentioned in the study by the USITC (2004: 59).

found as a non-conforming measure in annex I of Costa Rica to the CAFTA-DR. Therefore, the negative-list requirement to cover all services sectors at the level of regulatory application requires both transparency and the binding of these restrictions at their current level, thus effectively ensuring a standstill. In the future, Costa Rica may make such requirements less onerous for professional service providers from other parties to the CAFTA-DR, but it may not make them more onerous.

The diverse and important US services community, through its Industry Sector Advisory Committee on Services for Trade Policy Matters report of March 2004, provides an evaluation to the US Secretary of Commerce and the US Trade Representative on the outcome of any negotiation covering services, as part of its mandate set out by section 135 of the Trade Act of 1974. In the case of the CAFTA-DR, the ISAC 13 has expressed the view that the agreement is generally very satisfactory and that it "meets the Committee's objectives of achieving new and expanded trade and investment opportunities."[44] In particular, the report states:

> The five CAFTA countries have made very substantial commitments to liberalization in cross-border trade, telecommunications and financial services. These commitments are very much more ambitious than their GATS commitments.

The United States International Trade Commission, as part of its mandate, is required to produce a study on the potential effects of all trade agreements into which the United States might enter. In the case of CAFTA-DR, the study was published by the USITC in August 2004. It confirmed the opinion of the ISAC 13 report on the liberalizing merits of the agreement, noting in particular:[45]

> The FTA generally improves upon the commitments scheduled by the Central American–Dominican Republic governments under the GATS, in many instances guaranteeing market access and national treatment in areas where the countries previously had no commitments. This is in part attributable to the "negative listing" methodology employed in all of the FTAs concluded by the United States.

[44] See ISAC 13 (2004a, 2004b). While the ISAC 13 reports are carried out from the point of view of US services industries, they nonetheless provide a very detailed description of the results of the Agreements by industry.

[45] See USITC (2004: 57) and WTO, *General Agreement on Trade in Services (GATS), Costa Rica: Schedule of Specific Commitments* (GATS/SC/22), April 1994.

The ISAC 13 committee did, however, note disappointment with the lack of a chapter and commitments to facilitate the movement of key personnel across borders. The CAFTA-DR does not include any provision to facilitate temporary movement other than an annex on professional services to the cross-border trade in services chapter (but without a market access component). No commitments are undertaken in this regard, which the ISAC 13 report terms a "serious shortcoming."[46]

While the 2004 study by the USITC was unable in the case of services to provide a quantitative measure of the effect that the CAFTA-DR will have on service trade due to the lack of disaggregated data on services trade, it nonetheless states that there should be positive effects arising from greater regulatory transparency and significantly improved market access conditions (USITC, 2004: 55).

In the next subsections, we first highlight aspects of the normative framework for services in the CAFTA-DR that go beyond the GATS rules. We then comment on the main liberalizing outcomes for Costa Rica and the DR by the main individual service sectors, comparing these with the commitments of the two countries under the GATS.

7.1 Normative aspects of the CAFTA-DR that go beyond the GATS

7.1.1 Cross-border services trade

The CAFTA-DR contains a chapter on cross-border services trade (chapter 11) that guarantees the right of service providers in all sectors to provide services without having a local presence, or without having to establish first in the country. This guarantee is not present in the GATS because each mode can be scheduled separately; often mode 1 is conditioned upon prior establishment, or "unbound". The agreement thus

[46] Congressional concerns over what were felt to be unauthorized provisions on temporary entry in the previous FTAs negotiated by the United States with Chile and Singapore have meant that no chapters on this area have been included in any subsequent regional agreement negotiated by the United States. According to the ISAC 13 report, at a minimum, a bilateral or regional trade agreement should include, in the case of business visitors, a binding for access to the most common short-term business activities and a prohibition of prior approval procedures, petitions, labor certification tests, or numerical limitations. For intra-company transferees, neither party to the agreement should be subject to employment tests, labor certification, or numerical limits. Particular attention should be given to the temporary entry of professionals. See ISAC 13 (2004a) and (2004b: 8).

ensures modal neutrality and the possibility for service providers to select the most efficient form of services delivery, or combination thereof.

7.1.2 Investment

The CAFTA-DR contains a chapter on investment (chapter 10) that guarantees market access and national treatment for investment in goods, services, intellectual property rights, and financial instruments. The chapter includes a comprehensive set of investor guarantees and protections, together with the unrestricted right of market access. This is the equivalent of a fully bound commitment on mode 3 under the GATS for all services sectors (other than any exceptions that might be indicated in the annexes). According to the ISAC 13 report, the CAFTA-DR makes "substantial progress in reducing the barriers to investment" and sets out strong investor protection. Such a comprehensive instrument on investment has met with considerable controversy in discussions at the WTO, is not under discussion in the Doha Round, and has not been agreed at the multilateral level.

7.1.3 Electronic commerce

Going well beyond the GATS, the CAFTA-DR includes an innovative chapter on electronic commerce (chapter 14), setting out a definition of "digital products" and establishing disciplines on these products, including:

- the non-discriminatory treatment of digital products (although this is subject to limitations listed in relation to services in relevant annexes);
- the prohibition of customs duties on electronically delivered digital products; and
- the application of customs duties on the basis of the value of the physical carrier medium and not of its contents.

Additionally, the agreement provides commitments to cooperate on electronic commerce policy development. There is no definitive agreement at the WTO at present on any of the above with respect to electronic commerce.

7.1.4 Regulatory transparency

The CAFTA-DR includes a separate chapter (chapter 18) on transparency, of general application to the whole agreement. The obligations in this chapter, together with other transparency provisions found in the

chapter on cross-border services trade, the chapter on investment, and the chapters on financial services and telecommunications, combine to provide a level of discipline significantly beyond the GATS in terms of ensuring transparency in regulatory processes. As many studies have emphasized, such transparency is of the essence in the services area, given the highly regulated nature of services activities, where regulatory measures, if undisciplined, can effectively nullify the liberalizing provisions of trade agreements (see, for example, OECD, 2002).

The overarching provisions in the chapter on transparency contain the same requirements as those in the GATS with respect to publication, contact points, and the establishment of independent tribunals, but they go further to include the following:

- the requirement that, "to the extent possible," regulatory measures under consideration be published in advance;
- the reasonable possibility of prior comment on such measures;
- the right for interested parties to receive reasonable notice and to present their case before final administrative actions are taken; and
- the requirement to treat the taking of bribes to influence public decisions on the adoption of regulations as criminal actions (ISAC 13, 2004a: 12).

7.2 Liberalizing aspects of the CAFTA-DR that go beyond the GATS for major sectors

7.2.1 Telecommunications

The results of the telecommunications negotiation for Costa Rica under the CAFTA-DR have been mentioned above. This outcome represents both regulatory reform and market opening. Costa Rica agreed in a separate annex to the telecoms chapter (chapter 13) to bind current market access conditions and to open its telecoms market for the first time, after a transition period, for three services: direct private network services, internet services, and mobile wireless services. This will mean effectively dismantling the de facto monopoly status of the Instituto Costarricense de Electricidad in certain telecoms activities. For political economy reasons, it was important for the Costa Rican team that the telecoms negotiation be a negotiation "specific" to Costa Rican interests, which explains why they insisted that their "specificities" be dealt with in an annex to the telecoms chapter.

While the telecoms market in the Dominican Republic was already open, it committed as well to strong market access obligations, going beyond its GATS schedule and covering all telecoms services without reservation (other than audiovisual services and the requirement for reciprocity for the sharing of the radio spectrum and national treatment with respect to satellite transmission television services, all three of which are reserved in the annexes).

In the case of both countries, regulatory commitments are also an important part of the agreement. Costa Rica agreed to accept regulatory principles and obligations drawn from the WTO Reference Paper on Telecommunications regarding transparency, universal service, the allocation of scarce resources (namely radio spectrum), interconnection, network access, and information services. It also granted private firms flexibility in the choice of network technology (ISAC 13, 2004a, under "Telecommunications"; see also USITC, 2004: 63). As noted earlier, Costa Rica further agreed to reform ICE and to establish an independent telecoms regulator. Additionally, both Costa Rica and the DR agreed to GATS+ regulatory commitments for all telecoms suppliers, including on resale, number portability, dialing parity, the provisioning of leased circuits, and co-location. As mentioned above, the DR included a side letter to the telecoms chapter that provides an overview of the government's approach to regulation, putting a premium on market-based competition.

7.2.2 Insurance

Insurance is another sector in which the CAFTA-DR represents a substantial forward progress with respect to the GATS commitments of both countries. Costa Rica agreed for the first time to dismantle its long-standing government monopoly insurance provider, the Instituto Nacional de Seguros, and to liberalize its insurance market following a transition period. Costa Rica will permit access to its insurance market for insurance firms from CAFTA-DR parties on a cross-border basis upon the entry into force of the agreement for some lines of insurance, including MAT insurance, and will permit establishment after the transition period. This is applicable to all major aspects of insurance, namely life, non-life, reinsurance, intermediation, and services auxiliary to insurance. As mentioned earlier, the establishment of foreign insurance companies, including through branching, will be allowed after 2008,

although restrictions on third-party auto liability and on workers' compensation will continue until 2011, after which the sector will be fully liberalized. Costa Rica had not undertaken any GATS commitments for insurance.

Although insurance markets were already largely open to cross-border trade and foreign investment in the Dominican Republic (on a de facto basis, but not bound under the GATS), the CAFTA-DR nonetheless pushed forward the liberalization envelope by the commitment of the DR to allow foreign insurance providers to establish through a branch rather than a separately capitalized subsidiary. This includes the right to branch directly from one member market to the other.[47] In its GATS schedule, the DR bound only the right of commercial presence (mode 3) for insurance under the market access column, but specified a foreign equity ceiling of 40 percent. National treatment is left unbound, as are the other modes of supply. The CAFTA-DR therefore represents a significant GATS+ movement in this sector for both countries.

7.2.3 Banking and other financial services

In this area, the CAFTA-DR breaks new liberalizing ground with the commitments on bank branching for the Dominican Republic, going beyond what the DR scheduled under the GATS.[48] Under the CAFTA-DR, no limitations can be imposed on the acquisition of domestic banks or securities firms by foreign firms. The agreement also proved liberalizing in the area of asset and pension management, where firms from member countries will benefit from guaranteed national treatment and the right of establishment. Neither Costa Rica nor the DR had previously scheduled commitments related to asset management services under the GATS. The ISAC 13 report also indicates satisfaction with regulatory transparency in the financial services chapter.

Under the CAFTA-DR, each Central American country and the DR agreed that for two years after the agreement's entry into force the chapter on financial services will not apply to: measures taken by the parties concerning their financial institutions that supply banking

[47] The DR is to allow branches for insurance four years after the agreement's entry into force, while Costa Rica is to allow the establishment of foreign insurance providers in 2008 through either branches or subsidiaries. See USITC (2004: 65).

[48] While Costa Rican law does not allow for this, the government has agreed to pursue legislation that would permit it; see ISAC 13 (2004a).

services; Central American or DR investors and their investments in financial institutions in member countries; and cross-border trade in banking services between each Central American country and the DR. As noted by Costa Rica's chief negotiator, "The intent . . . is to allow the countries to agree during that time on the measures that will be deemed non-conforming pursuant to Article 12.9" (see González, 2005: 31).

7.2.4 Express delivery

For this sector, CAFTA-DR represents a substantial step forward. In the WTO context, the Services Sectoral Classification List does not include express delivery, while the postal and courier services raise some classification issues. Express delivery or courier services have now evolved to include a range of related services, such as freight transportation, storage and warehousing, and cargo handling. The negative-list approach of the CAFTA-DR treats express delivery services from a holistic point of view, ensuring that all these services are covered. Under the GATS, each service would have to be scheduled individually, and only with a complete scheduling of all relevant services would the service supplier be able to operate in an unfettered manner.

The CAFTA-DR recognizes express delivery services as a unique service sector and guarantees market access for these and all related services. As efficient customs clearance is essential in this area, the agreement also includes provisions to facilitate customs clearance. The agreement proscribes monopoly abuse by postal administrations when they also provide express delivery services as part of their operations. Both Costa Rica and the DR, as well as the Central American parties to the agreement, state that they have "no intention of directing revenues to their respective postal monopolies to benefit express delivery services."[49]

7.2.5 Distribution – dealer protection regimes

In the case of both Costa Rica and the Dominican Republic, the CAFTA-DR liberalizes previous long-standing restrictions on distribution created through dealer protection regimes. These regimes lock services exporters into exclusive and quasi-permanent relationships with local dealers, making them impossible to break and thus giving incumbent dealers

[49] ISAC 13 (2004a: 13); see article 11.13 and annex 11.13 of the agreement.

effective monopolies, independent of performance. Under the CAFTA-DR, such dealer protection regimes will be modified in Costa Rica and the Dominican Republic so that parties to future dealer distribution agreements may terminate them at the end of the contract period or renewal period without indemnification. Exclusivity may be required only if agreed and written into the contract, and arbitration is cited as a preferred method to resolve disputes.

Therefore, under annex 11.3 of the CAFTA-DR, which applies bilaterally between the United States and Costa Rica, and between the Dominican Republic and the United States, US suppliers are allowed the freedom to contract the terms of their distribution relationship, including the length of the contract and how to calculate indemnity for termination, as well as whether or not it will be an exclusive relationship. Although this component of the CAFTA-DR does not apply multilaterally among the CAFTA-DR parties, it represents nonetheless liberalizing reform of the distribution sector in Costa Rica and the Dominican Republic, neither of which scheduled distribution commitments under the GATS.

7.3 Coverage of the CAFTA-DR

The effective coverage of the CAFTA-DR is significantly different from the commitments that both Costa Rica and the DR have made under the GATS. Costa Rica's GATS schedule contains a very modest set of commitments, even as compared with many other developing WTO members. These account for fewer than 5 percent of the possible universe of GATS bindings (when counting separately all sub-sectors and all modes of supply, for both market access and national treatment). The commitments scheduled by the Dominican Republic in its GATS schedule are more numerous, but over a half of the entries with respect to market access and national treatment for each sub-sector inscribed are labeled "unbound," meaning that effectively no commitment has been made at all, bringing the real percentage for commitments considerably lower.

Therefore, the required comprehensive coverage that is a part of the CAFTA-DR for both sectors and measures, through which all services and service providers are brought under the national treatment obligation, the MFN obligation, and the market access obligation, represents a tremendous leap forward in terms of the two countries' willingness to discipline and liberalize services trade for their CAFTA-DR partners and constitutes a significant step beyond the GATS.

8 Conclusion

This study has reviewed the negotiating effort and results for Costa Rica and the Dominican Republic in the recent CAFTA-DR and has shown that this agreement goes significantly beyond the GATS, in terms both of its normative framework and of its disciplines, as well as in its coverage and liberalizing content. For these two countries, the CAFTA-DR has resulted in much greater openness of their services markets, particularly compared with what the two countries committed in their GATS schedules. It has also resulted in the binding or standstill of restrictive measures affecting all services sectors.

Although, clearly, not all regional agreements are identical and this outcome is not the same as that reached in other regional agreements that were previously negotiated by the two countries, our judgment is that this significant liberalizing, GATS+ result was made possible by the negative-list modality and the innovative normative framework of the agreement, together with the well-formulated requests and the negotiating strength that the United States was able to bring to the table because of the importance of its market for these two neighboring countries.

Thus, when the gains are perceived to be high enough, even small developing countries such as Costa Rica and the Dominican Republic have been willing and able to overcome political economy obstacles to take on significant disciplines in the area of service trade, including far-reaching provisions on regulatory transparency. They have not been as forthcoming at the multilateral level for a variety of reasons, including the lack of a clear incentive to undertake liberalizing commitments based on specific trade-offs (for example, services opening against greater reduction in barriers to agricultural trade); the slow and arduous nature of the request and offer negotiating modality of the GATS, given the large number of WTO members; and the requirement to expend negotiating capital that a multilateral commitment would imply in the current world, dominated by regional negotiations and a checkerboard of potential negotiating partners.

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16

Why isn't South Africa more proactive in international services negotiations?

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Services are increasingly central to economic activity across the developing world, and South Africa is no exception. By African standards, the South African economy is quite diversified and has a robust services sector that in some areas exports competitively, to developing countries and to developed markets. One would therefore expect to find the South African government assertively advancing these export interests through international trade negotiations, while selectively liberalizing access to its domestic services markets in order to ensure their long-term competitiveness and to promote economywide benefits. While there has been some movement in the latter direction, largely through unilateral reforms, in recent years this has not translated into a proactive services trade negotiating strategy.

This chapter explores the reasons for this anomaly, adopting a political economy approach. We argue that the government's negotiating logic in multilateral negotiations is dually informed by the notions of developing country solidarity and the need for developed countries to make the most substantive concessions in order both to fix perceived imbalances in the system and because developing countries need more policy space. This logic inhibits the elaboration of offensive positions in the Doha Round of WTO negotiations with respect to other developing countries, particularly in Africa. It does not explain, however, why South Africa has not

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