

Evaluating Approaches to the Liberalization of Trade in Services: Insights from Regional Experience in the Americas

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Since the entry into force of the North American Free Trade Agreement (NAFTA) on January 1, 1994 countries in the Western Hemisphere have concluded no fewer than 14 sub-regional arrangements containing disciplines on trade in services. Thus, for developing country negotiators in need of finding innovative solutions to the challenges posed by services trade liberalization, the experience of the Western Hemisphere represents a rich laboratory of different avenues to liberalization and rule making. The principal objective of this paper is to facilitate the service negotiators' complex task of evaluating these different avenues. To this end, the paper reviews various approaches to liberalization of trade in services adopted within existing sub-regional arrangements in the Western Hemisphere. It then analyzes the interrelationship between the components most frequently encountered in services agreements and their implications for trade liberalization from the perspective of three elements: coverage, extent of liberalization, and depth of commitments. This three-tiered framework may help trade negotiators in developing countries identify more clearly the mechanisms through which to attain their negotiating objectives, whether at the multilateral or regional levels.

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1. Approaches to liberalization of trade in services in the Western Hemisphere

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. Under a positive list approach, countries undertake national treatment and market access commitments specifying the type of access or treatment offered to services or service suppliers in scheduled sectors. Members of MERCOSUR, the Common Market of the South, adopted one version of the positive list approach with a view to liberalizing services trade within the region. According to MERCOSUR’s Protocol of Montevideo on Trade in Services, 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 the members of the group within ten years, once the Protocol enters into force.

The alternative top-down approach to services trade liberalization 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. Non-conforming measures in the annexes are then usually liberalized through consultations or periodic negotiations. The top-down or negative list approach has been incorporated into a large majority of the sub-regional agreements in the Western Hemisphere encompassing services. 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 on services to other sub-regional 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 and Central America as a whole; 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).

The Andean Community adopted a somewhat different version of the negative list approach. Decision 439 on Trade in Services specifies that the process of liberalization 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 within a five-year period set out to conclude in 2005. A process to harmonize national regulatory regimes in key service sectors is to be conducted in parallel.

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 set out in the annexes), thus giving national service providers precise knowledge of foreign markets. In the bottom-up agreements the sectoral coverage of commitments as well as the type and comprehensiveness of information provided on the commitments may vary significantly between the members. 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.

A. Principles on trade in services: MFN and National Treatment

National treatment and most-favored nation treatment (MFN) are two of the most basic building blocks to any agreement on services. Not surprisingly, all fourteen sub-regional agreements in the Americas contain basic obligations regarding national treatment and MFN treatment (with the exception of CARICOM Protocol II for the latter). The national treatment and MFN principles might be incorporated into agreements on trade in services in different ways. Under GATS, 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.¹ In the Western Hemisphere, MERCOSUR and the Andean Community set out the two principles in an unqualified form, which means that there can be no deviation from the application of the MFN or national treatment principles among members. Likewise, 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.

¹ 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.

B. Rules and disciplines

This section depicts the approaches to services trade of Western Hemisphere sub-regional integration agreements in seven areas: domestic regulation, recognition, quantitative restrictions, denial of benefits, monopoly disciplines, general safeguards, and modification of schedules.

DOMESTIC REGULATION. According to MERCOSUR's Protocol of Montevideo, national measures relating to qualification requirements and procedures, technical standards, and licensing requirements must be based on objective and transparent criteria and not more trade restrictive than is necessary to ensure the quality of the service, among other requirements. This is similar to the provisions of Article VI of the GATS. 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 MERCOSUR discipline is contained in a more narrowly focused article related to the licensing and certification of professionals. In addition, the scope of the disciplines on domestic regulation in the services chapter of NAFTA-type agreements is also narrower, applying only to the cross-border supply of a service, rather than to the supply of a service as is the case in MERCOSUR and the GATS.² However, these agreements contain separate chapters on technical standards covering goods and services, and on competition policy. The Andean

² 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, as discussed in section C, 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).

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 nonconformity or fail to comply with the liberalizing commitments contained in the agreement.

RECOGNITION. All Western Hemisphere agreements encourage, but do not mandate, the recognition of the education, licenses, or certifications of providers of professional services (subject to exceptions). This stands in contrast to GATS, which is neutral toward recognition (that is, GATS authorizes recognition, but does not encourage or mandate it). All the sub-regional agreements in the Western Hemisphere 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 encouragement of recognition agreements under the Andean Community Decision 439 is somewhat pre-empted by the strong disciplines for moving towards harmonization of basic regulatory structures among members.

QUANTITATIVE RESTRICTIONS. All the sub-regional agreements covering services contain an article on nondiscriminatory quantitative restrictions, but the focus of the agreements differs. The MERCOSUR agreement prohibits the introduction of new nondiscriminatory 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 nondiscriminatory 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.

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 nonmember 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 sub-regional 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.

MONOPOLY DISCIPLINES. 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 countries in the context of specific agreements. In the Western Hemisphere some agreements contain disciplines on monopoly service providers and others do not. 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 provisions on competition, although MERCOSUR members are in the process of developing separate protocols on competition policy.

GENERAL SAFEGUARDS. In the Western Hemisphere, only the CARICOM agreement includes an operational safeguard article at the time of this writing. Several of the sub-regional agreements, including NAFTA and MERCOSUR, do not contain a general safeguard article for services trade.³ Other agreements specify that general safeguards may be applied once future disciplines are developed on the subject, presumably when those being discussed at the unilateral level are finalized.

GOVERNMENT PROCUREMENT. Because of the large number of contracts tendered, government procurement is an important component of market access in services. At the sub-regional 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

³ 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.

Group of Three and in certain of the bilateral free trade agreements. 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.

MODIFICATION OF SCHEDULES. Modification of national schedules is possible under the MERCOSUR agreement, subject to conditions similar to those set out in GATS, which allows its members to modify or withdraw a commitment contained in their services schedules after a period of three years, subject to negotiating appropriate compensation. This is not the case for any of the top-down or NAFTA-type agreements because they do not contain schedules of commitments.

C. Investment

One important difference between the approaches to services liberalization by countries in the Western Hemisphere relates to the interplay between services and investment. MERCOSUR members, following the GATS approach, incorporated investment in services as one of the four modes of service delivery (mode 3, or commercial presence). At the same time, MERCOSUR members have agreed to separate

protocols on investment.⁴ 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 from other parties, albeit with country-specific reservations. CARICOM includes commercial presence as an integral part of the agreement. The Andean Community includes commercial presence as part of its services agreement, but also has a separate agreement on investment (Decision 291).

D. 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 not only more difficult and sensitive for governments, but also a long-term process. Thus the emphasis in many services agreements on the progressive nature of liberalization.

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

⁴ 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.

activity and, once listed, are considered to be binding. GATS lists six types of limitations or restrictions that may be placed on market access commitments undertaken by WTO members; other forms of restrictions are not allowed. 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 nondiscriminatory 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.

All four modes of service supply specified in GATS (cross-border delivery, consumption abroad, commercial presence, and movement of natural persons) are included within the scope of the sub-regional 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.

E. Exclusions and Reservations

Certain service sectors have been excluded both from GATS and from the sub-regional arrangements. One example is the air transport sector, where traffic rights or routing agreements are excluded from all of the sub-regional arrangements as they have been from the GATS. Likewise, GATS and all the sub-regional agreements exclude government services when they are provided on a noncommercial basis and are not in competition with one or more service suppliers. These would include such services as education or health care provided exclusively by the government on a not-for-profit basis (non-commercial basis).

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.

F. 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 sub-regional 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 1 sets out the different service sectors that have received special attention in the fourteen sub-regional 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 that appear the most frequently.

<<Table 1>>

G. Combining the principal elements of a services agreement

Identifying options that best address the interests of their own countries is of critical importance for negotiators. An evaluation of the alternatives in the design and implementation of disciplines leading to the liberalization of trade in a complex area like services not only requires an understanding of what the different options are, but also of how the options interrelate and what each of them implies in terms of services trade liberalization. In order to shed further light on the approaches to liberalization espoused by agreements on services trade in the Western Hemisphere, this section organizes the various options regarding the structure and contents of agreements on services into a three-vector matrix comprising coverage, liberalization principles, and depth of commitments (see Figure 1).

<<Figure 1>>

A. Coverage

The first issue that needs to be defined in any agreement on services is the coverage of the liberalizing commitments—which activities are subject to the disciplines

of the agreement? In the context of services trade, the term “coverage” is two-dimensional and comprises the modes of supply ("cross-border" and "cross border plus commercial presence") on the one hand, and the number of service sectors included under the trade disciplines on the other. Cross-border trade includes trade from the territory of one party to the territory of the other party; trade by a person of a party (in the territory of that party), to a person of the other party; and trade by a national of a party in the territory of the other party. Cross-border trade plus investment includes all of the above, plus commercial presence in the form of foreign direct or portfolio investment.

Limiting the ways in which services suppliers can contest foreign markets might significantly increase these suppliers’ costs. At the margin, restrictions on either cross border trade or commercial presence might have the effect of completely blocking foreign entry by virtue of the fact that a service supplier’s might have only one option to access the domestic market.

With regard to the number of sectors included in services agreements, the approach predating the GATS was focused on individual sectors within which commitments to liberalize are limited to specific sectors or subsectors of an industry, mutually agreed upon by countries that are party to the agreement. Sectoral agreements with regard to air, land and sea transportation are typical examples of this method.⁵ When the option of universal sectoral coverage is adopted as under the GATS and all of

⁵ It should be noted that agreements on specific service sectors would not be meet the conditions set out in Article V of the GATS, particularly with respect to the necessity for any preferential agreement to include “substantially all sectors,” and thus probably would not be deemed compatible with WTO requirements.

the services agreements subsequently concluded in the Western Hemisphere, there are essentially two mechanisms by way of which the liberalization commitments may be met: the bottom-up or positive list approach and the top-down or negative list approach, the implications of which have already been referred to.

B. Liberalizing principles

Two basic approaches can be adopted in applying the principles that guide efforts to open foreign markets: establishing liberalizing principles as general obligations (as is the case of the NAFTA-type agreements) or as part of the specific commitments. In the case of GATS, some of the obligations, including MFN, are of a general nature, whereas others (such as national treatment) are part of the specific commitments. The choice of either approach will have multiple implications. From the perspective of foreign investors and service suppliers, the existence of specific commitments in a services agreement might cause confusion as to the actual business opportunities that such a commitment entails.

Four liberalizing principles for trade in services are usually taken into consideration in developing a serious agreement:

i) Most-favored nation. This is one of the fundamental principles to secure non-discrimination in international trade. The principle obliges member countries to give the most favorable treatment accorded to any of their trading partners, to all the other

members immediately and unconditionally. Many countries accord preferential treatment to some of their commercial partners in certain sectors such as transportation, telecommunications, recognition of professional qualifications and other services. Exemptions to the MFN requirement may be included within the provisions of the agreement. However, a strong commitment to comply with this principle will reduce discriminatory treatment in international trade and will concurrently strengthen transparency in trade.⁶

ii) No local presence requirement. Many countries frequently require a local presence (that is, an established trade presence) as a condition for foreign individuals or juridical persons wishing to provide services within their territory. This is usually the case with services that require close supervision to guarantee better consumer protection. This requirement may hinder international trade because it may impose higher costs to foreign service suppliers who are not allowed to use the other modes of supply. Thus, allowing service providers to choose their preferred mode of supply can be expected to lower their costs and stimulate trade.

⁶ An important question arising in the context of the MFN principle is how to treat the nexus between regional and multilateral initiatives aimed at liberalizing trade in services. Thus far, GATS has dealt with this nexus through a very general standard—embodied in Article V—that establishes the requirements preferential trading arrangements must meet in order to be deemed consistent with the GATS. Specifically, Article V stipulates that an agreement providing for preferential, discriminatory treatment on trade in services: have “substantial sectoral coverage” (in terms of number of sectors, volume of trade and modes of supply); provides for the elimination of “existing discriminatory measures;” and not result in “new or more discriminatory measures.” The difficult questions of interpretation raised by the requirements contained in GATS Article V, coupled to the constraints on the availability of adequate data on services, make the implementation of Article V very difficult and weaken the potential contribution that regional arrangements can make toward the liberalization of services trade. For a detailed analysis of GATS Article V, see Stephenson (2000).

iii) National treatment. This principle stipulates that services and service providers from another country be accorded treatment no less favorable than that accorded to like services and service providers of national origin. Violations to national treatment in the area of trade in services include a wide variety of situations ranging from nationality or permanent residence requirements to discriminatory practices with regard to fiscal measures, access to local credit and foreign exchange practices, limitations of the type of services which may be rendered by foreign suppliers and many others.

iv) No quantitative non-discriminatory restrictions. Technical considerations or market-size may induce governments to establish quantitative non-discriminatory restrictions on the rendering of given services. Such is the case in the allocation of radio and television frequencies, the number of banks allowed to operate in a given market or the number of telecom companies authorized to provide cellular and basic telephony services in a given region within the country. These restrictions may also be associated with unfair business practices that may limit competition and allow for open discriminatory actions in favor of a limited number of suppliers. Technology and other technical considerations permitting, a gradual elimination of these measures is a prerequisite for full liberalization of trade in services.

C. Depth of commitments

The depth of the commitments undertaken in a trade agreement on services may vary substantially. An important determinant of the depth of commitments is the extent

to which an agreement is binding. Most provisions in GATS and NAFTA are binding; however, cooperation groupings such as APEC, are based on voluntary, unilateral and non-binding commitments.

Members to an agreement have at their disposal several instruments to achieve different levels of commitments. The most important of these are presented below and organized from lower to higher levels of commitments:

i) Transparency. This is normally the most basic or minimal level of commitment within a services trade agreement. It requires all members to the agreement to either directly inform the other parties or set up national "inquiry points" to facilitate access to all the existing measures, at the level of the central or federal government and of state, provincial or local governments, that may affect trade in services with respect to the disciplines developed for purposes of liberalization.

Lack of transparency in the design and enforcement of regulations constitutes one of the main impediments to services trade. Foreign investors, particularly those that are seeking to establish a commercial presence in the domestic market, are unlikely to commit resources in countries where it is unclear how the design and enforcement of regulation will affect their business activities.

ii) Ceiling Binding. A long established practice in merchandise trade agreements, the setting of a ceiling binding is also used for the adoption of commitments in trade in

service. For instance, in the GATS schedule of commitments, countries may set up or indicate conditions and limitations to market access and national treatment which are not part of the existing legal or regulatory measures within the respective country. An example of such binding could involve setting up maximum screening quotas for foreign audiovisual programs, expressed as a cap on the daily percentage of programs, where the country involved reserves the freedom to operate below the quota.

The practice of binding above the regulatory status quo introduces a significant degree of uncertainty into foreign service providers' decisions to contest a foreign market through cross-border trade or commercial presence. At the same time, governments engage in this practice because it provides them not only with the flexibility to adjust their regulatory frameworks in the event of unforeseen circumstances (e.g. financial crises), but also with significant negotiating coinage in future services negotiations.

iii) *"Freeze" or "standstill" on existing non-conforming measures.* This commitment involves freezing the existing regime and measures up to a given date and undertaking a commitment not to make such measures more non-conforming in the future. This commitment, known as a "grandfather" clause, is used in agreements on trade in goods and in some agreements on trade in services (as in NAFTA, at federal and provincial levels, and in GATS with regard to MFN).

iv) *Ratcheting.* In addition to the commitment to freeze existing measures, a moving floor of commitments can also be established. Such a mechanism prevents

countries from “backsliding” with respect to any unilateral liberalization implemented after the effective date of the freeze. If a given sector has been liberalized after the freeze date, any country party to the agreement cannot revert to a less liberal state for trade in the respective sector. This type of commitment, present in NAFTA- type agreements (at federal and provincial levels), is likely to have a positive effect on trade and investment in the member countries’ adopting it, as it signals to foreign service providers the countries’ commitment not to introduce sudden regulatory changes that reverse previous liberalization initiatives.

v) *"List or Lose."* This type of commitment supplements the "transparency" commitment and speeds up the process of liberalization. In the context of a negative list or top-down approach, the parties undertake the obligation to list all non-conforming measures to the agreed provisions of the agreement. Failure to include any non-conforming measure in the list is understood to eliminate the measure in question with respect to the other parties to the agreement. This is the approach adopted by NAFTA members with regard to the existing non-conforming measures at federal or national level. However, such approach failed to be implemented at the state or provincial level for those same countries.

vi) *Future Liberalization.* This type of commitment involves establishing procedures and deadlines to advance towards full liberalization of services trade among member countries.

3. Conclusion

The matrix developed above and set out schematically in Figure 1 is a highly simplified summary of the main components of a services trade agreement. In practice, the basic provisions presented therein are supplemented by additional disciplines in those areas discussed in the first part of this paper, namely government procurement, domestic regulation and mutual recognition, subsidies, safeguards, business practices, and procedures to liberalize the transit of business persons, among others.

Based on the three-tiered framework developed in the paper, services negotiators might develop a menu of options regarding the liberalization of services trade and consider the pros and cons of each option. Ideally, a country involved in a negotiation on services trade would select elements affecting coverage, liberalizing principles and depth of commitments so as to maximize the net benefits it expects to derive from an eventual agreement on services trade. The final combination that emerges from a negotiation will depend on the specific commercial interests of all participating countries and their individual views on the advantages that more open and liberalized service markets can afford. A customized method of negotiation can thus be designed, and a series of commitments can be envisaged for countries that wish to advance in the liberalization of their services trade.