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Services in Regional
Agreements between Latin
American and developed
countries

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Abstract

The paper analyses the main features of trade agreements covering services concluded between Latin American countries and developed country partners. The General Agreement on Trade in Services (GATS) is devoted a full section with a view to setting out key analytical parameters for the ensuing approach to individual agreements with the United States, the European Union and Japan. By means of a very detailed comparison across agreements, a typology is established for classifying specific elements with relation to whether they simply mirror GATS provisions ("GATS-neutral"), go beyond GATS provisions ("GATS-Plus") or fall short of GATS provisions in some respect ("GATS-Minus"). In doing that, it becomes apparent that often-made generalizations can be wrong and that any analysis focused on one or two elements in isolation is bound to be incomplete, inconclusive or simply inaccurate. A full section is also devoted to the question of policy space with a particular emphasis on if and when the agreements herein in question curtail governments' prerogatives to regulate and make policy on matters relating to services. The paper acknowledges that there are indeed many "sore spots" in those agreements but demonstrates that many of the existing mechanisms permit in any case some level of leeway for policy-makers. The paper concludes with ten lessons regarding trade in services agreements between Latin American countries and developed trading partners.

Introduction

It was not until the mid-nineties, fifty years after the end of the Second World War, that the international trading system saw the introduction of trade in services in its purview. The Uruguay Round, GATT's eighth, only got off to a start once trade in services was put safely outside the main track of negotiations. Nine years later the World Trade Organization (WTO) would enter into force and with it a full-fledged General Agreement on Trade in Services (GATS) alongside the results of the first-ever round of "specific commitments" on all services sectors involving, from the outset, all of the "Members" of the newly-created organization (no longer "Contracting Parties"). That agreement is now eleven years old and is currently undergoing its second round of negotiations in the context of the Doha Development Agenda (DDA). Meanwhile, the world has changed substantially its trade in services physiognomy to encompass a myriad of regional, sub-regional and bilateral agreements in an increasingly complex web of rules, principles and commitments.

Latin America has been a major player in the evolving trade in services regime. Participation in the Uruguay Round was massive, including a landmark proposal by Latin American countries in February 1990 —the first full draft of an agreement comprising 34 articles and nineteen pages— which provided language to much of the then emerging agreement and did much to focus the discussion on crucial elements of the negotiations such as the mechanics of liberalization and the treatment of developing countries. Regionally, the first Latin American country to join in a free trade agreement covering services trade was Mexico who did so even before the GATS Agreement was sealed, signed and delivered, by being a party to the

North American Free Trade Agreement (NAFTA) which entered into force a full year before the WTO and GATS. NAFTA was an innovation in many ways and, in addition to being the first plurilateral trade agreement to include services ever, was also the first such agreement to be concluded between the developed and the developing world. It would in effect inaugurate a trend which continues to evolve in the region, as countries continue to seek out agreements with developed partners. Since 1994, the region has also been involved in the so-called Free Trade Area of the Americas (FTAA) negotiations, a hemispheric project involving 34 countries from Argentina to Canada (with the exception of Cuba), something which eleven years later looks more like the past than the future despite a considerable body of literature and negotiating history.

Latin American countries continue to seek out partners in the developed world for trade in services pacts and so far the following agreements have been concluded, chronologically by signature and entry into force: NAFTA (1992-1994), Mexico-EU (2000-2000), Mexico-EFTA (2000-2001), Chile-EU (2002), Chile-US (2003-2004), Chile-EFTA (2003-2004), Mexico-Japan (2004-2005) and Peru-US (2005). Negotiations are still underway between the European Union¹ and Mercosul as well as the Andean Community, and between the US and Colombia and Ecuador. Finally, a Chile-Japan Study Group was established in November 2004 and one year later the leaders of the two countries decided to launch negotiations on a so-called "Japan-Chile Economic Partnership Agreement / Free Trade Agreement".

This paper aims to review the existing trade in services agreements between Latin American countries and developed country partners with a view to detailing, comparing and drawing related conclusions as to their similarities and differences in relation to a set of the following five crucial elements: definition and coverage, core principles, mechanics of liberalization, domestic regulation and sectoral purview. The initial focus of the paper will be on the world's first multilateral pact on trade in services, the GATS, whence emanates much of what is now rule and principle in that trade. The remaining sections will then look, at a high level of detail, at the approaches and provisions embodied in the existing trade in services pacts between Latin American countries and developed trading partners. The paper will also analyze the economic, juridical and policy consequences of the different approaches and provisions, finishing with a section on costs and benefits followed by the lessons to be drawn from the exercise.

¹ The first services offers were made in 1999.

I. WTO: The Advent of the GATS

The GATS is a general agreement just as the Gatt itself. The first multilateral instrument for trade in goods, the "Gatt 1947", signed on 30 October 1947, had 38 articles distributed in 4 parts and 9 annexes (none of which was of a sectoral nature). The first multilateral instrument for trade in services, the GATS, in force since 1 January 1995, contains 29 articles distributed in 6 parts, in addition to 6 annexes of which 4 have a sectoral nature (financial, telecommunication, air transport and maritime transport services). The Gatt-47 evolved during more than five decades and was replaced by Gatt-94 as a result of the Uruguay Round. The GATS is now eleven years old.

A. Definition and Coverage

The GATS does not contain a definition of the term "service" as such. In its Article I, it defines "services" to include "any service in any sector except services supplied in the exercise of governmental authority" while its article on definitions (Article XXVIII) is silent on the term. The closest to a definition, therefore, is a reference to the sectors that may be included in the broad services universe alongside a carve-out for services which are defined in the following item in the same article as services which are "supplied neither on a commercial basis nor in competition with one or more services suppliers".²

² Article I:3(c) of the GATS.

Article I defines what is "trade in services" in terms of four modes of supply – namely: (1) cross-border supply where the service itself moves from the territory of one member to another (crucial for

transport and telecommunication services); (2) consumption abroad where the consumer moves to the territory where the service is being supplied (crucial for tourism services); (3) commercial presence where the service supplier establishes itself overseas to supply services (crucial for any service); (4) presence of natural persons where the service supplier is a natural person and moves to the country where the service is to be supplied (crucial for consultancy and other services).³ The GATS therefore includes all forms of international commercialization of services, not only the form analogous to what has been known as trade in goods - the cross-border supply - but also three other forms which go beyond the service itself to involve the movement of consumers, investment and natural persons.

Article XXVIII(a) includes all types of measures under the purview of the agreement, whether in the form of a law, regulation, rule, procedure, decision, administrative action or "any other form" while its alinea (c) defines measures "affecting trade in services" to include the purchase, payment or use of a service, the access to and use of services offered to the public generally and the presence of persons in the consuming country. To complete a remarkably vast coverage, Article I:3(a) defines "measures by Members" as measures taken by any level of government (central, regional or local) and by non-governmental bodies *via* delegated powers.

There are, of course, localized exclusions, exceptions and limiting provisions. As to sectors, the agreement excludes traffic rights and related services in air transport services⁴ and prudential measures in financial services.⁵ As to the movement of natural persons, the exclusions apply to employment, citizenship and residence "on a permanent basis".⁶ Article XIV, "General Exceptions", goes beyond the traditional exceptions for measures protecting public morals or order, human, animal or plant life or health to include measures that ensure the "equitable and effective imposition or collection of taxes" or that relate to the "avoidance of double taxation". An additional article, the XIV *Bis*, has exceptions relating to security.

B. Core Principles

There are three principles that are crucial for the primary objective of a free trade agreement such as the GATS: market access (Article XVI), national treatment (Article XVII) and most-favored-nation (Article II). National treatment and m.f.n. treatment together comprise the traditional non-discrimination concept, common to the Gatt – whether between national and foreign services or suppliers or amongst all member countries of the GATS. Market access is captured in an article for which there is no general correspondence in the Gatt.

There is no definition of market access as such but the related article lists a number of measures that are considered restrictions – five of a quantitative nature (quotas, monopolies or economic needs tests, value of service transactions or assets, total number of service operations or total quantity of service output, total number of natural persons, and the participation of foreign capital), two of a qualitative nature (specific types of legal entity or joint venture requirements). For national treatment, there is no list of agreed restrictions but the related article sets out that to meet the "treatment no less favorable" obligation treatment formally identical or formally different may be accorded as long as it does not modify "the conditions of competition in favor of [national]

³ Article I:2 of the Gats.

⁴ Annex on Air Transport Services of the Gats, paragraph 2.

⁵ Annex on Financial Services, paragraph 2(a).

⁶ Annex on Movement of Natural Persons Supplying Services under the Agreement, paragraph 2.

services or service suppliers".⁷ For m.f.n., there is the standard definition of treatment no less favorable than a Member "accords to like services and service suppliers of any other country".⁸

Two aspects stand out in relation to the core principles of the GATS. First, the principles apply not only to services but to the suppliers of services as well. This is an important difference when compared with the application of the concept in trade in goods and introduces a number of sensitive issues such as the treatment of professionals or of investment made in connection to a commercial presence. Second, the principles apply not only to discriminatory measures against foreign services, suppliers and interests but also to non-discriminatory measures which may also affect significantly the supply of services in a particular market. Four of the measures listed as market access limitations in Article XVI, in addition to being quantitative in nature, are also non-discriminatory in their application – i.e., are applied in the same fashion in the market to both national and foreign service and service suppliers.

The GATS also has a number of traditional rules and principles, common to the multilateral trading system since its inception: transparency (Article III), economic integration (Article V), restrictions to safeguard the balance of payment (Article XII) and dispute settlement and enforcement (Article XXIII). Other innovative principles will be addressed below.

C. Mechanisms of Liberalization

In order to make acceptable the application of the ambitious core principles of the agreement, it was imperative in the negotiations to find the means to qualify and attenuate it, so that member countries could join in progressively. A mechanism of liberalization was devised so as to permit countries to commit in *some and not all* sectors and *in some and not in all* modes of supply. The agreement made market access and national treatment negotiated principles – i.e., principles whose application would be a matter of negotiation and not of automatic application.

Thus, even though the principles are ambitious, their application is tempered by the conditions countries are able to maintain on the basis of their negotiations with trading partners. In addition, countries can “choose” not to bind modes of supply – i.e., to leave them unbound. All of these indications are supposed to be included in the so-called “Schedules of Specific Commitments” where, therefore, countries will include the sectors and sub-sectors and, for each of these, indicate, for each of the modes of supply, the measures it binds in relation to market access and national treatment. If it chooses not to bind a particular mode of supply for a particular sub-sector for either market access or national treatment, it can simply inscribe the word “unbound”.

The list of sectors in the offers and the schedule of commitments is therefore “positive” since countries include only the ones where some level of commitment will positively apply. Negative lists, on the contrary, indicate only the sectors where there are remaining restrictions: sectors not mentioned are to be considered fully liberalized. In addition to the positive list of sectors, countries have the right under the GATS to keep their restrictions and ultimately retain the option to bind them or not. It should be noted that this relatively high level of flexibility in the GATS liberalization process, as attractive and necessary as it was during the Uruguay Round to ensure that the agreement came about, is still fully dependant on the negotiating power of member countries. The determination of the sectors a country ultimately includes in its schedule will be the result of negotiations and the capacity of the country in question to do or not do as trading partners demand. In other words, the pressure of the major developed trading partners is perhaps a much

⁷ Article XVII:2 and 3 of the Gats.

⁸ Article II:1 of the Gats.

more important determining factor as to the final sectoral make-up of a developing country schedule than any of the flexibilities available in the agreement.

Finally, another part and parcel of the mechanics of liberalization imbedded in the GATS is the principle of the most-favored-nation (m.f.n.) treatment. Despite great difficulties in providing for non-discrimination in some sectors,⁹ it was possible to include the principle in the agreement but only once countries agreed to accept an annex on m.f.n. exceptions. The annex provided for a one-shot opportunity for countries to lodge exceptions and since then reviews are supposed to occur every five years with a view to eliminating remaining exceptions.

D. Regulatory Situation

The success of the negotiations that created the GATS also owed much to the capacity on the part of negotiators to recognize important realities of trade in services and to adapt them to the emerging multilateral regime then under negotiation. That was the case with a number of domestic regulation issues, most of which were ultimately addressed in Article VI of the agreement. The importance of such an article cannot be overemphasized given the incidence of domestic measures in all the activities covered by the GATS. Aspects of regulation that may be the object of mutual recognition agreements were also dealt with in the agreement by means of a specific provision, Article VII, fully devoted to the subject.

Article VI starts off addressing governance issues. Thus the first paragraph deals with the need to ensure the reasonable, objective and impartial administration of relevant measures while the second calls on members to maintain or institute judicial, arbitral or administrative tribunals or procedures for necessary reviews and appropriate remedies. To provide for all that is set out in those paragraphs is indeed an ambitious proposition which is why a clarification is made that countries are not effectively obliged to comply where their "constitutional structure or the nature of [their] legal system" does not permit them to do so. The third paragraph then touches on applications for licenses and their disciplines.

Perhaps the main contribution by Article VI was its paragraph 4 where qualification requirements, technical standards and licensing requirements— all items of great importance in the commercialization of services nationally and internationally – were singled out as potential barriers to trade and linked to three main minimal complying prerequisites: being based on objective and transparent criteria, not being more burdensome than necessary to ensure the quality of the service and, for licenses, that the procedures avoid being themselves a restriction on the supply of the service. The Council for Trade in Services has since the entry into force of the agreement pursued work relating to the development of disciplines and the improvement of the article itself.

E. Sectors

Another important recognition embodied in the GATS relates to the need for provisions that address specific aspects of certain sectors. The agreement thus has sectoral annexes – on air transport services, financial services and telecommunications – whose main objective is to clarify and complement framework provisions – and not to replace them as liberalization instruments. These annexes were the result of a "sectoral testing exercise" during the Uruguay Round negotiations whereby the core principles of the agreement were "tested" in many sectors so as to ascertain the need for special sectoral provisions. In most cases, there were no major

⁹ Transport sectors, particularly air transport, tend to have discriminatory arrangements in place which make the application of m.f.n. undesirable if not simply infeasible.

inconsistencies between what could be envisaged as trade in services liberalization in general and in any particular sector. Clarifications served to emphasize sectoral aspects that for many reasons needed emphasis – such as the case of the prudential carve-out in financial services, or the exclusion of traffic rights and related services in the air transport services sector. Unlike agreements that would follow, GATS had no stand-alone agreement for any sector at the end of the negotiations.

II. Latin American Bilaterals with Developed Trading Partners

Since NAFTA entered into force in 1994 thus becoming the first free trade agreement involving developed and developing countries to contain provisions on trade in services in the world, other agreements were concluded in the Americas that followed that trend. All Latin American countries are members of at least one bilateral or regional agreement regarding services trade, in addition to being members of the WTO and, therefore, subject to the disciplines of GATS. In all agreements negotiated between Latin American countries and developed trading partners, the services dossier was included.

A. Agreements with the United States

Agreements concluded with the United States have followed the NAFTA model inasmuch as possible. There are variations across trading partners but generally the structure and the mechanics of the U.S. bilaterals have a straight-forward NAFTA cast—both in Latin America as elsewhere. Thus, in most cases there are chapters like NAFTA's Chapter XI on Investment, Chapter XII on Cross-Border Trade in Services, Chapter XIII on Telecommunications, Chapter XIV on Financial Services and Chapter XVI on the Temporary Entry for Business Persons. As well, other chapters that touch on services matters—notably those relating to norms, government procurement, intellectual property, competition policy, monopolies and state enterprises—have also been included in subsequent U.S. bilaterals.

Not all services-related chapters in NAFTA are effectively as free-trade inducing as many believe. In some cases, entire sectors were virtually excluded from the scope of application of the agreement: the case of air transport services, basic telecommunications and maritime transport. In other cases, provisions limited the scope of application of crucial issues such as the case of the temporary movement of natural persons which is tailored only for business persons. In other cases, NAFTA did go beyond its predecessor agreement, the Canada-US Free Trade Agreement (CUSFTA), providing for some liberalization in sensitive segments such as land transport services (excluded in the bilateral agreement) or intellectual property. Perhaps the best example of a free-trade bias in NAFTA was given in the financial services sector by means of a chapter that, in addition to providing market opening innovations, effectively constituted a stand-alone agreement.

Besides Mexico, other Latin American countries to have concluded agreements with the U.S. are Chile, the Central American countries and the Dominican Republic —the latter two in the context of one agreement referred to as U.S.-CAFTA-DR. Chile's agreement entered into force in 2004 while the CAFTA-DR deal should enter into force sometime in 2006. The U.S. is currently negotiating individually with three Andean countries— Peru, Colombia and Ecuador, having already concluded the negotiations with Peru on December 7th, 2005. The Peruvian draft agreement reads as a multiparty arrangement since Colombia and Ecuador have also been a part of the negotiation and is currently, at the time of drafting of the present study, undergoing a legal review that should, among other things, modify it to reflect the bilateral understanding between Peru and the US.

Common aspects to NAFTA and the US agreements with Chile, CAFTA-DR and Peru include the following:

- They all have the same chapters generally, the same overall structure and the same liberalization mechanism;
- The Chapter on Cross-border trade in services relates to modes 1, 2 and 4, with mode 3 being treated in a separate chapter on investment (for all investment, goods and services); there is also a chapter on the temporary movement of business persons which deals with procedures relating to mode 4;
- The definition and coverage extend to measures at the central and regional levels of government; financial services and telecoms have their own chapters as well; air transport services are excluded with the exception of aircraft repair and maintenance services and specialty services;
- The core principles for the NAFTA-type agreements are national treatment, most-favored-nation treatment and market access, alongside a principle called "local presence" which prohibits a duty of establishment as a pre-condition for the supply of cross-border services;
- They all have similar transparency, domestic regulation, mutual recognition, transfer of payments and denial of benefits provisions.
 - On domestic regulation, they all borrow from only two of the six paragraphs of GATS Article VI;
 - On transparency, all agreements have a specific chapter on the matter in addition to an article on "transparency in development and application of regulations";
 - On governance issues such as administrative proceedings and review and appeal, all agreements have articles in the transparency-specific chapter;

- The mechanics of liberalization is based on the lodging of measures that do not conform to the principles of national treatment, most-favored-nation, market access and local presence;¹⁰
 - the list is negative: only sectors or sub-sectors that have restrictions in place appear on it, all the rest being taken for liberalized;
 - any liberalizing changes in regulation are immediately bound under the agreement (a "ratcheting mechanism");
- There is a commitment to consult annually to review the implementation of the chapter and "other issues of mutual interest";
- The cross-border chapter contains an annex on professional services which deals with standards, temporary licensing and review;
- There are provisions on express delivery services —whether in an annex or within an article entitled "Specific Commitments";

Even though the similarities are clearly strong, it would be fallacious to think that there are no significant differences between NAFTA and its follower agreements. In fact, there are important differences regarding issues that have been identified as of particular interest to developing countries in general —and certainly to those in Latin America.

The discussion of specific *sectoral* differences between NAFTA and its follower-agreements in Latin America will be left for later in the present study. As can be seen in the table below, however, there are important *general* differences both between NAFTA and its follower agreements as well as between the followers themselves regarding a number of elements. The table thus compares all Latin American NAFTA-type agreements in accordance with specific differing elements and whether these elements add (+) or subtract (-) from NAFTA provisions.

The following should be highlighted from the above findings:

- The NAFTA-plus elements relate mostly to clarifications and/or complementations included in specific provisions —as exemplified by the Articles on domestic regulation and mutual recognition;
- Another NAFTA-plus element refers to the inclusion of a chapter on electronic commerce —issue that was non-existent as such as the time of drafting of NAFTA;
- The NAFTA-minus elements refer to issues that are crucially important for developing countries: the temporary entry of natural, and not only business persons; and, the elimination of citizenship and permanent residency requirements, particularly with respect to professional services.

¹⁰ The chapters on investment and on financial services have more principles against which parties can lodge reservations: establishment of financial institutions, cross-border trade, new financial services and data processing and senior management and board of directors.

Table 1

NAFTA-TYPE AGREEMENTS: PLUS OR MINUS				
ELEMENT	NAFTA	CHILE-US	CAFTA-DR-US	PERU-US
Scope and Coverage				
Temporary Entry for Business Persons	Chapter 16 and annexes on business visitors, traders and investors, intra-corporate transferees and professionals.	NAFTA-neutral: Chapter Fourteen reproduces NAFTA and its annexes.	NAFTA-minus: There is no such chapter	NAFTA-minus: There is no such chapter
Core Principles				
Standard of Treatment	Article 1204 grants the best of treatment between national treatment and mfn	NAFTA-minus: There is no such principle	NAFTA-minus: As in Chile-US	NAFTA-minus: As in Chile-US
Market Access	There is no such principle – only article on quantitative restrictions and non-discriminatory measures	NAFTA-plus: Article 11.4 borrows from Gats XVI but nothing on capital participation.	NAFTA-plus: As in Chile-US	NAFTA-plus: As in Chile-US
Mechanics of Liberalization				
Citizenship or Permanent Residency Requirements	Article 1210 commits to eliminating them within 2 years for professional services (including the right to retaliate with equivalent restrictions) and to "determining the feasibility of removing" them for other service sectors.	NAFTA-minus: Article 11.10 on implementation has a similar NAFTA 1210:4 on the feasibility of removal but nothing as committed as NAFTA 1210:3 on professional services	NAFTA-minus: There is no commitment whatsoever on citizenship or residency. Understanding on immigration confirms that nothing in the agreement should affect immigration matters.	NAFTA-minus: There is a side letter committing the US to "initiate a review" (and not eliminate) of state-level measures in a number of states on citizenship or residency applied to a number of professions.
Electronic Commerce	There is no provisions dealing with the matter	NAFTA-plus: Chapter 15 is devoted to it, prohibiting customs duties or discrimination but permitting restrictions to be scheduled; no date for full liberalization.	NAFTA-plus: As Chile-US	NAFTA-plus: As Chile-US
Treatment of Regulation				
Requirements	There is no domestic regulation article. Article 1210:1 on licensing and certification corresponds to Gats VI:4 and 1210:2 to Gats VII:1 and 2.	NAFTA-plus: Article 11.8:1 and 2 correspond to Gats VI:3 and 4 while Article 11:9 tracks broadly with Gats Article VII, including no obligation on non-Parties.	NAFTA-plus: As in Chile-US	NAFTA-plus: As in Chile-US

Source: Prepared by the author.

III. Agreements with the European Union

In addition to its own internal process of services liberalization, the EU is an important protagonist in services regionalism. In Latin America, it has concluded two full-fledged FTAs on services—one with Chile, another with Mexico—and continues to pursue an intensive agenda in that respect in the region, including inter-regional efforts with Mercosul and the Andean Community. The EU has also delved into services in other regions of the world but the Chilean and Mexican agreements are by far the most ambitious insofar as effective liberalization is concerned. For example, in both the association agreements with the so-called Mediterranean countries (MED) (Tunisia, Israel, Morocco, Jordan, Algeria, Lebanon and the Palestinian Authority) and the Trade, Development and Cooperation Agreement (TDCA) with South Africa (fully in force since May 2004), the EU has focused on economic cooperation in a wide range of service sectors as opposed to liberalization.

The agreement with Mexico is referred to as the "Economic Partnership, Political Coordination and Cooperation Agreement" and has become known as the "Global Agreement". It was signed on 8 December 1997 and entered into force on 1 October 2000. Services liberalization effectively started on 1 March 2001, according to a decision (2/2001) adopted on February of that year, with a standstill of discriminatory measures. The agreement is now in its second phase when a substantial portion of restrictions is supposed to be eliminated (missed the March 2005 deadline) and a scheduled established for the

remaining barriers until 2011. The agreement borrows from both the GATS and the NAFTA, in addition to innovating in some aspects.

The EU-Chile Association Agreement was signed on November 2002 and has been provisionally in effect since 1 February 2003. It also covers a political dialog and cooperation issues but the liberalization part is the most ambitious. Trade in Services is covered in Part IV, Title III which also covers non-services-related establishment (Chapter III). Unlike NAFTA, therefore, all services investment is dealt with under trade in services. A review is foreseen every three years to oversee the implementation of the service provisions and make recommendations to the Association Council. The main commonalities between the Chile-EU Association Agreement and the Mexico-EU Global Agreement insofar as services are concerned are the following:

- On definition and coverage, both agreements consider as a "service supplier" a "person" and there are no national majority rules applicable to management or capital participation. The language is a little different in each case but this "rule of origin" is liberal in both cases, therefore;
 - Both agreements are based on four modes of supply as in the GATS;
 - Both agreements exclude subsidies, audiovisual services and national maritime cabotage, in addition to air transport services directly related to the exercise of traffic rights;
 - Both agreements include measures at all levels of government, including local;
 - Both clarify that a legal person from the second party must have substantive business operations in the first party in order to be considered a first party legal person;
- On core principles, both agreements borrow significantly from GATS in the language of the three main liberalization articles: market access and national treatment and most-favored-nation;
- On sectors, both agreements have specific provisions dealing with financial services (a chapter in both cases), as well as international maritime transport services and telecommunication services (chapters and sections).

It is interesting to note, however, that despite a higher level of ambition than what is characteristic in North-South agreements on services liberalization, there may be more differences between the Mexico-EU and the Chile-EU agreements than similarities.

The table below indicates the main differing elements, explains their application in each case and illustrates which agreement, in each case, would be more liberal in its outlook. As a general rule, the Chile-EU is more liberal in its provisions than its Mexican counterpart.

Table 2

EU-TYPE AGREEMENTS IN LATIN AMERICA: MAIN DIFFERENCES AND OUTLOOK			
ELEMENT	MEXICO-EU	CHILE-EU	MORE LIBERAL
Definition and coverage			
Regulatory Carve-out	Article 8 carves out non-discriminatory regulations	No such carve-out	Chile-EU
Electronic Commerce	Nothing on the subject	Recognition of the importance but no liberalization provisions	Chile-EU
Mechanics of Liberalization			
Standstill and deadline	Initially for three years, followed by phasing-out schedule in ten years.	None	Mexico-EU
List of Sectors	Negative	Positive	Mexico-EU
Review	Council can change calendar and lists anytime	Review every three years for more liberalization in general and in two years to consider (not liberalize) mode 4.	Depends on the implementation.
Citizenship and Residency	Nothing on the subject	Under domestic regulation, periodic consultations on feasibility of removing such measures	Chile-EU
Domestic Regulation			
Transparency	Principle not included	Principle included under services plus a general obligation	Chile-EU
Governance	Nothing on reviews, remedies, treatment of applications	Disciplines on application for licenses and certification but in Mutual Recognition article	Chile-EU
Requirements Recognition	Nothing on the subject Commitment: no later than 3 years, establish the steps to engage in such agreements	As Gats VI:4 Only encouragement	Chile-EU Mexico-EU
Sectors			
Maritime Transport	Commitment to unrestricted market access and non-discrimination, as well as access to ports, infrastructure, etc.	Same commitment as Mexico-EU but goes further to clarify the measure it will not introduce, prohibit or abolish.	Chile-EU
Financial Services	Details establishment and cross-border	According to 4 modes	Chile-EU
	National Treatment simpler	National treatment as in the Gats: formally identical, conditions of competition, etc.	Chile-EU
	Most-favored nation – has the principle Carve-outs: prudential but also blanket carve-out for non-discriminatory measures New financial services – as permitted domestically	There is no such principle Only prudential carve-out	Mexico-EU Chile-EU
Telecommunications	Recognition – nothing on the subject No disciplines on the sector	Only when new law or modification of a law is not necessary Article on the subject Commitments based on WTO Reference Paper	Mexico-EU Chile-EU Chile-EU

Source: Prepared by the author.

IV. Agreements with Japan

The only existing agreement between Japan and any Latin American country, including provisions on trade in services, is the "Agreement between Japan and the United Mexican States for the Strengthening of the Economic Partnership" signed on 17 September 2004 and entered into force on 1st April 2005.

The agreement adopts the NAFTA approach, the main commonalities being the following:

- Separate Chapters on Investment and Cross-Border Supply of Services;
- Separate Chapters for Financial Services;
- Separate Chapters for the Temporary Movement of Business Persons;
- Possibility of scheduling reservations in regards to all core liberalization principles;
- Negative list approach to scheduling.

There are also important differences which will be reviewed in detail and comparatively in tables 3-7 below. The most important broader differences are the following:

- Lack of Chapter on Telecommunication Services;
- Lack of Market Access article in the cross-border chapter unlike US bilaterals;
- No liberalization provisions as such for financial services;
- A commitment to include measures relating to local government.

V. Comparing Provisions

A. Definition and Coverage

Defining trade in services was a difficult matter already in the Uruguay Round when the GATS was born. Many of the subsequent agreements that followed did not choose to define the concept but just adopt or adapt GATS' approach to the issue: relying on four modes of supply as the operational way to frame the commercial universe of the agreement. The Latin American agreements with the US adopted NAFTA's approach to "cross-border trade" where modes 1, 2 and 4 are covered in one chapter while mode 3 in another. Other definitions would then have a stronger bearing on what would effectively be the agreement's rule of origin.

The most "defining" definition of all is the one relating to persons. While in NAFTA "person" refers to both natural persons and enterprises sufficing for them to be merely present in one of the Parties, the GATS limits the definition of "juridical person of another Member" to national majority ownership and control. In other words, while according to NAFTA Citibank established in Canada would be considered a US-origin supplier just by virtue of being a US enterprise, the same Citibank would have to have a majority ownership and control by Americans as well in order to qualify as a US supplier in Canada according to the GATS. This is a crucial place, therefore, where the GATS tends to be much more restrictive than NAFTA and its follower agreements.

The US Latin American bilaterals follow NAFTA and have therefore a fairly open rule of origin for firms. It is interesting to note, however, that the EC Latin American bilaterals, despite following GATS in a number of important ways, deviate from the WTO Agreement in this particular aspect. Both the Mexico-EU and the Chile-EU bilaterals adopt definitions which also focus on persons that are merely "set up in accordance with the laws of"¹¹ or "constituted or otherwise organized under the law of"¹² one of the Parties.

As to the coverage, all agreements are reasonably broad regarding measures covered. Thus, both NAFTA and its type agreements, as well as GATS and its type agreements, apply to all kinds of measures that affect trade in services, including measures by non-governmental bodies. The difference begins in terms of level of government covered by the agreements. The US Latin American agreements, for example, exclude measures taken by local governments from the purview of the agreements while the EU counterparts include them. Services supplied by the government are fully excluded from all agreements, with a particular emphasis on prudential measures in the financial services sector. It is also a widespread practice to exclude measures relating to immigration, citizenship, residency and employment from the agreements, the difference residing at times in review or liberalization commitments with respect to one of more of these elements. In all Latin American bilaterals with developed countries, subsidies are also excluded from the purview of the agreement while government procurement is not only included as it is devoted a full title (a chapter congregating a number of articles).

As to sectoral exclusions, the US Latin American bilaterals follow NAFTA and exclude air transport services (except for aircraft repair and maintenance and specialty services). The EU counterparts also exclude these services and go further to exclude audiovisual services, maritime cabotage, government procurement and subsidies as well. Finally, with respect to natural persons, NAFTA is limited to business persons while GATS applies to all categories of natural persons. US Latin American bilaterals have fared even worse than NAFTA at this subject while the EU counterparts managed to maintain a broader coverage —much as in GATS. It should be noted that by virtue of reservations relating to existing and future measures, parties to agreements, particularly the US bilaterals, have been able to exclude full sectors from any obligation. NAFTA and US bilaterals, for example, always exclude maritime transport services in the US annexes.¹³

¹¹ Article 3(e) of Chapter I of Title II on Trade in Services of the Mexico-EU Agreement.

¹² Article 96(f) of the Chile-EU Agreement.

¹³ As to thematic exclusions, it is interesting to note that neither US nor EU bilaterals with the region include disciplines on subsidies or safeguards relating to services —whether in services-related chapters or elsewhere. In contrast, insofar as government procurement is concerned, all such bilaterals include them, but in separate chapters that cover both goods and services.

Table 3

SCOREBOARD: DEFINITION AND COVERAGE

ITEM	US BILATERALS	EU BILATERALS	JAPAN BILATERALS
Definition of Trade in Services	GATS-Minus Modes 1, 2 and 4 under Cross-Border Chapter; mode 3 in different chapter applying to both goods and services.	GATS-neutral Four modes as in the GATS	GATS-Minus Similar to US Bilaterals
"Person"	GATS-Plus In terms of "nationals" and enterprises	GATS-Plus In terms of natural and juridical but without the national ownership and control majority rules.	GATS-Plus In terms of "persons" but also without national ownership and control majority rules.
Denial of Benefits	GATS-Plus Denial possible for non-Party firms owned or controlled by non-Party persons. Also, party firms that have no substantial business operations.	GATS-Plus There is no denial of benefits provisions but definition is liberal. Firms in origin countries have to have substantial operations (no matter if they are non-Party)	GATS-Plus Same as NAFTA and US bilaterals.
Definition of "Measure"	GATS-Plus All types, including "practice".	GATS-Plus All types, including "any other form."	GATS-neutral Same as EU bilaterals
"Measures adopted or maintained by a [Party][Member]"	GATS-Minus Exclude measures adopted or maintained at the local level of government from the application of the core liberalization principles; does not include best endeavors clause on compliance at all levels of government.	GATS-neutral Specify that all levels of government are included and includes best endeavor clause on compliance.	GATS-Minus Clarify in general article that local government is included for both countries; does not include best endeavors clause on compliance.
Prudential Measures	GATS-neutral Excluded by virtue of an exceptions article in a chapter on Financial Services.	GATS-neutral Excluded by virtue of a specific article in a chapter on Financial Services.	GATS-neutral Excluded by virtue of an exceptions article in a chapter on Financial Services.
Governmental Functions	GATS-neutral Related activities are excluded.	GATS-neutral Related activities are excluded.	GATS-neutral Related activities are excluded.
Sectoral Exclusions	GATS-Minus Exclude all air transport services, except repair and maintenance and specialized air services.	GATS-Minus Exclude air transport services but includes selling and marketing and CRS. Excludes explicitly audiovisual and national maritime cabotage services.	GATS-Minus Exclude air transport services but includes selling and marketing and CRS. Excludes explicitly national maritime cabotage services.
Natural Persons	GATS-Minus Limited to temporary entry of business persons.	GATS-neutral Cover full range of mode 4.	GATS-Minus Limited to temporary entry of business persons.

Source: Prepared by the author.

B. Core Principles

One of the most important differences between NAFTA and GATS was the absence of a market access article in NAFTA. The US Bilaterals that followed NAFTA, however, introduced such an article under the cross-border trade in services chapter, obviating the need for the NAFTA articles on quantitative restrictions and liberalization of non-discriminatory measures. Still on market access, NAFTA and the US Bilaterals go beyond GATS in two important aspects: first, an article on local presence prohibits the so-called "duty of establishment" for the supply of services; second, an article on performance requirements under the Investment Chapter prohibits them for both goods and services—an innovation in trade agreements. EU bilaterals do not have either prohibition, following GATS approach to market access and including all matters relating to the four modes of supply under one single Title of the overall agreement (Title II).

On non-discrimination, all agreements have provisions on national treatment and most-favored-nation treatment. There are important differences in the language, however, particularly in the case of national treatment. NAFTA, in addition, had a provision which linked the two types of non-discrimination—national treatment and most-favored-nation—to a third concept: that of "standard of treatment" whereby parties to the agreement are ensured that they will get the best treatment available—whether *via* non-discrimination between nationals and foreigners (national treatment) or *via* non-discrimination between other parties (most-favored-nation).

The table below assembles the main aspects regarding core principles and details their salient features so as to facilitate comparisons and perspectives in relation to GATS provisions.

Table 4
SCOREBOARD: CORE PRINCIPLES

ITEM	US BILATERALS	EC BILATERALS	JAPAN BILATERALS
Market Access			
Market Access	GATS-Minus Article included in NAFTA-based structure, limited to cross-border.	GATS-neutral Have specific article applied to all modes.	GATS-Minus Same as US bilaterals
Local Presence	GATS-Plus Have article that prohibits requirement to establishment for the supply of cross-border services; reservations in schedules are possible.	GATS-neutral Silent on the matter	GATS-Plus Same as US Bilaterals
Performance Requirements	GATS-Plus Have article under investment chapter that lists and prohibits a number of TRIMs for both goods and services; reservations in schedules are possible.	GATS-neutral Silent on the matter	GATS-Plus Same as US Bilaterals
Senior Management and Boards of Directors	GATS-Plus Have article under investment chapter providing for prohibition on national preference for senior management but allows national majority on board of directors; reservations in schedules are possible.	GATS-neutral Silent on the matter	GATS-Plus Same as US Bilaterals
Non-Discrimination			
National Treatment	GATS-Minus Clarify that "regionally" (other than central or federal) treatment has to be the same as accorded to national suppliers but there is a carve-out from liberalization principles for local governments anyway.	GATS-neutral No clarification needed because all levels of government covered anyway.	GATS-Minus In Mexico-Japan, only Japan commits to local government in national treatment.
	GATS-Minus No reference to according national treatment via treatment formally identical or different depending on whether conditions of competition are modified. Same in investment chapter.	GATS-neutral Follow the GATS on formally identical or different and on conditions of competition.	GATS-Minus Same as US Bilaterals.
Most-favored-nation	GATS-neutral Traditional definition extending best treatment granted to non-Parties (see part below regarding mechanics of liberalization).	GATS-neutral Same as US Bilaterals	GATS-neutral Same as US Bilaterals
Standard of Treatment	GATS-neutral Did not include NAFTA provision which foresaw the better treatment between national treatment and m.f.n.	GATS-neutral Silent on the matter	GATS-neutral Silent on the matter

Source: Prepared by the author.

C. Mechanism of Liberalization

All US and EU bilaterals have important similarities in terms of mechanisms of liberalization. The notion of lodging reservations or limitations to the application of liberalization principles, alongside the possibility to bind measures or regulatory situations, is common in all bilaterals here in question. Also, the inclusion of non-discriminatory measures as liberalization targets is a feature of most of these agreements. They all deal with both quantitative and qualitative measures as well.

There are many differences, however. For example, regarding reservations or limitations, the Mexico-EU Agreement provides for a "regulatory carve-out"¹⁴ for non-discriminatory measures which in fact allows a Party to "regulate...in so far as regulations do not discriminate against services and service suppliers of the other Party". On the other hand, the same agreement also provides for a standstill regarding discriminatory measures and for the elimination of all remaining discrimination within ten years. In addition, there are differences as to the principles against which Parties may lodge reservations/limitations or whether future measures may also be the subject of scheduling. There are differences in the types of lists foreseen for sectoral scheduling: a positive vs. a negative listing depending on whether Parties list sectors they commit to liberalize or not liberalize. The level of binding is another crucial difference since in some cases parties have to bind the totality of their regulatory situation for all sectors included in the agreement while in others a partial binding is acceptable. Finally, the deadlines for accomplishing certain objectives—particularly liberalization itself—can vary, when they exist at all.

The Mexico-EU agreement is perhaps the most peculiar agreement in regards to mechanics of liberalization. While it is very ambitious in respect to non-discriminatory measures where it commits to an immediate standstill and to a "decision providing for the elimination of substantially all remaining discrimination"¹⁵ within a "transitional period of ten years",¹⁶ it also provides for an unprecedented carve-out for non-discriminatory measures—presumably not applicable to the non-discriminatory measures listed as restrictive measures under the article on market access.

The table below details, explains and compares the main elements regarding the mechanism of liberalization.

¹⁴ Article 8 of the Mercosul-EU Global Agreement.

¹⁵ Article 7:3 of the Decision n. 2/2001 of the EU-Mexico Joint Council.

¹⁶ Article 7:3(a) of the Decision n. 2/2001 of the EU-Mexico Joint Council.

Table 5

SCOREBOARD: MECHANICS OF LIBERALIZATION

ITEM	US BILATERALS	EC BILATERALS	JAPAN BILATERALS
Principles	GATS-Plus Added market access principle to NAFTA-type agreement and kept local presence obligation. Through investment chapter, included obligations on performance requirements and senior management and board of directors.	GATS-Minus Three core liberalization principles just as in GATS in the Mexico agreement but with carve-out for treatment granted under agreements notified under Article V. The Chile-EU has no m.f.n. principle for services.	GATS-Plus Same as US bilaterals.
Reservations/ Limitations	GATS-neutral Can be lodged, in addition to market access and national treatment, in relation to m.f.n. and local presence. Under investment chapter, can also be lodged in relation to performance requirements, senior management and board of directors.	GATS-Minus Can be lodged in relation to market access and national treatment. M.f.n. is virtually free from any obligation – not even reservations are necessary.	GATS-Plus Same as US bilaterals.
Future Measures	GATS-Minus Parties can reserve their rights to maintain existing or adopt new and more restrictive measures in relation to all core liberalization principles.	GATS-neutral There is no such provision.	GATS-Minus Same as US bilaterals.
Binding	GATS-Plus The full regulatory situation of a party is to be bound; there is no possibility of leaving unbound. Transparency effect is full-fledged.	GATS-neutral Chile-EU follows GATS approach: it is possible to leave sectors and modes of supply unbound within sectors.	GATS-Plus Same as US bilaterals.
Standstill	GATS-neutral There is no such provision.	GATS-Plus Mexico-EU agreement provides for a standstill on discriminatory measures	GATS-neutral There is no such provision.
Regulatory Carve-out	GATS-neutral There is no such provision.	GATS-Minus Mexico-EU agreement provides for carve-out for non-discriminatory measures.	GATS-neutral There is no such provision.
Lists of Sectors	GATS-Plus Negative list approach: whatever is not listed is fully liberalized.	GATS-neutral Positive list approach: whatever is not listed is virtually fully obligation-free (m.f.n. still applies unless object of a specific exception).	GATS-Plus Same as US bilaterals.
Reviews, Deadlines	GATS-Minus Implementation articles set out obligation to consult annually, or as otherwise agreed, to "review the implementation and consider other matters of mutual interest". Language is therefore not forcefully calling for more liberalization. GATS Article XIX:1 is more forceful on that aspect. US-Chile provides for consulting on the "feasibility of removing... citizenship and residency requirements".	GATS-Plus Chile-EU provides for review within three years with a view to "further deepening liberalization". Mexico-EU provides for three-year deadline to agree on a decision to eliminate substantially all discrimination (not complied with) and on an overall ten-year deadline for achieving it.	GATS-Minus Same as US bilaterals.

Source: Prepared by the author.

D. Regulatory Situation

The treatment of domestic regulation varies across the US and EU Bilaterals with Latin America. In all four main aspects of domestic regulation —transparency, governance, requirements, and recognition— differences emerge. Those differences occur even among agreements "of the same type" as is the case in some aspects between the Mexico and Chile EU agreements.

One major difference already between NAFTA itself and its follower-agreements, for example, is the absence of a domestic regulation article *per se* in NAFTA. Agreements have also tended to borrow specific provisions from NAFTA or GATS and rearrange them in some cases: for example, in the Chile-EU agreement, disciplines on the application of licenses and certifications appear under the mutual recognition article¹⁷ as opposed to the article on domestic regulation. NAFTA has in one article provisions regarding transparency (contact points, publication, notifications, etc.) and good governance (tribunals, prior comment, remedies, etc.) while US bilaterals separate them into transparency and domestic regulation articles, as do EU bilaterals as well. As to requirements, particularly those enunciated under Article VI:4 of the GATS, they appear in different places, sometimes with a slightly modified language; in the Mexico-EU agreement, there is no such provision.

The table below details, explains and compares the main elements regarding the treatment of domestic regulation issues.

Table 6

SCOREBOARD: REGULATORY SITUATION

ITEM	US BILATERALS	EC BILATERALS	JAPAN BILATERALS
Good governance – measures of general application, tribunals, procedures	GATS-Plus Paragraphs 1 and 2 of GATS VI are under transparency article with more complete language (that applies to the overall agreement and not only to services).	GATS-Minus There is no such reference.	GATS-Plus Same as US bilaterals except that paragraphs 1 and 2 of GATS VI appear in various articles of a chapter on implementation and operation of the agreement.
Good governance – reviews and appeals	GATS-Plus GATS VI:2 is under transparency article with more complete language	GATS-Minus There is no such reference.	GATS-Plus Under a specific article in implementation chapter
Good governance - authorizations	GATS-neutral Paragraph 3 of GATS Article VI are reproduced in domestic regulation article	GATS-Minus Chile-EU GATS VI:3 under mutual recognition; Mexico-EU: nothing on this.	GATS-neutral Same as US bilaterals
Requirements	GATS-neutral Same as GATS VI:4	GATS-neutral Same as GATS VI:4	GATS-Minus Same as GATS VI:4 but with briefer language (title of article is only licensing and certification) and no reference to GATS negotiations on the matter.
Recognition	GATS-neutral Article based on GATS VII	GATS-Plus Chile-EU makes reference to GATS VII. Mexico-EU adds commitment to establish necessary steps to negotiate mutual recognition agreements within three years.	GATS-Minus One paragraph referring to general obligation.

Source: Prepared by the author.

¹⁷ Article 103 of the Chile-EU Agreement.

E. Sectors

One of the primary differences regarding sectoral provisions between NAFTA and the GATS refers to whether or not they deal with liberalization *per se*. While in NAFTA, sectoral chapters or annexes provided for market opening *via* procedures, deadlines, standstill commitments and other instruments, in GATS sectoral annexes were not intended to provide for liberalization but only to clarify or complement provisions from the framework agreement—and nothing else. That difference, however, would not be retained in the subsequent agreements between Latin American countries and developed countries— particularly in the case of agreements concluded with the EU. All such bilateral agreements did include sectoral provisions of the "liberalization sort".

All agreements tend to have sectoral provisions on financial services and telecommunications. While the EU agreements included provisions international maritime transport services, US agreements were much more focused on professional services and express delivery. Financial services is the sector that in almost all cases is dealt with a virtually stand-alone agreement— a chapter or annex that has a full-fledged set of rules and principles that can effectively replace any framework provision.

The table below summarizes all the main salencies and differences among the agreements in consideration.

Table 7

SCOREBOARD: SECTORS

ITEM	US BILATERALS	EC BILATERALS	JAPAN BILATERALS
Financial Services			
Instrument	Gats-plus Agreements have specific chapter which is a "stand-alone" agreement; all the same, some aspects are linked to other chapters.	Gats-plus Both Mexico and Chile have separate chapters that detail liberalization obligations.	Gats-neutral The agreement has a separate chapter for the sector but simply legitimizes commitments made by the Parties under the Oecd and the Gats.
Principles	Gats-plus Adds new principles based on NAFTA such as the "right of establishment of financial institutions" and "new financial services". National treatment in NAFTA was more ambitious than in US bilaterals (no longer best treatment amongst that accorded across many states of the Union).	Gats-minus Chile has a market access article and a more ambitious national treatment clause (base on Gats) than Mexican counterpart agreement.	Gats-minus Agreement does not have traditional principles.
Dispute Settlement	Gats-plus Specific provisions	Gats-plus Specific provisions	Gats-minus No dispute settlement provisions
General Deadlines	Gats-neutral No deadlines	Gats-plus Chile-EU: Special committee to "facilitating and expanding trade in financial services" within three years. Mexico-EU: annual meeting but no reference to further liberalization.	Gats-neutral No deadlines
Specific Deadlines	Gats-plus Chile committed to the opening of voluntary savings pension plans by March 1, 2005.	Gats-neutral None	Gats-neutral None
Mechanism of Liberalization	Gats-plus Reservations possible for all core liberalization principles.	Gats-neutral While Chile-EU is a positive list, Mexico-EU is a negative list.	Gats-neutral None
Prudential carve-out	Gats-neutral All agreements have it.	Gats-neutral All agreements have it.	Gats-neutral All agreements have it.
Telecommunications			
Overall Outlook	Gats-plus Provisions combine some access to and use of public telecommunication network provisions from Gats Annex with the reference paper of the post-Uruguay Round negotiations.	Gats-plus Provisions tend to correspond, roughly, to the Wto-negotiated and optional reference paper	Gats-neutral Nothing on telecoms
Transport Services			
General Treatment	Gats-neutral No specific chapter.	Gats-neutral No specific chapter.	Gats-neutral No specific chapter.
Air Transport	Gats-minus No chapter or annex – merely an exclusionary provision under the article on scope and coverage. Do not include selling and marketing or CRS services.	Gats-neutral No chapter or annex – merely an exclusionary provision under the article on scope. Include selling and marketing or CRS services.	Gats-neutral No chapter or annex – merely an exclusionary provision under the article on scope. Include selling and marketing or CRS services.

Table 7 (concluded)

ITEM	US BILATERALS	EC BILATERALS	JAPAN BILATERALS
Maritime Transport	Gats-neutral Nothing on the sector	Gats-minus Section specially devoted to the sector, ensuring that unrestricted access continues to be the norm. Exclusion of cabotage in scope.	Gats-neutral Nothing on the sector
Other Transport	Gats-neutral Nothing on the sector	Gats-neutral Nothing on the sector	Gats-neutral Nothing on the sector
Professional Services			
General Outlook	Gats-plus Vary as to professions covered but "plus" elements regarding regulatory approaches, international standards (Chile), working groups (Peru), temporary licensing of engineers (Chile, Peru), future liberalization of foreign legal consultants (Chile)	Gats-neutral Virtually nothing specific on professional services with the exception of brief mention under mutual recognition.	Gats-neutral Nothing on the sector
Express Delivery			
General Outlook	Gats-plus All US bilaterals have it while NAFTA had no such provisions; an annex in Chile agreement, as specific commitments in Cafta and Peru agreements	Gats-neutral Nothing on the sector	Gats-neutral Nothing on the sector
Existing Access	Gats-plus All express desire to maintain existing level of access; Cafta and Chile commit to a standstill; Peru commits only to consultations in case access level is questioned.	Gats-neutral Nothing on the sector	Gats-neutral Nothing on the sector
Monopoly	Gats-plus Cafta and Peru commit to avoid abuse of monopoly position. Chile and Cafta commit not to direct revenues from postal monopoly to benefit express delivery firms.	Gats-neutral Nothing on the sector	Gats-neutral Nothing on the sector

Source: Prepared by the author.

VI. Main Consequences of the Differences

The comparisons made in the previous sections attest to the fact that differences can be deceiving. Generally, for example, the NAFTA approach to liberalization is often perceived as more ambitious than the approach embodied in the GATS but detailed comparisons demonstrate that matters are not so simple. There are bullish and bearish aspects to both approaches, particularly in their more recent incarnations as regional agreements. The Latin American pacts are illustrative of that. There are some important misconceptions when it comes to comparing agreements on trade in services. There are also some visible differences that say a lot about their aims and objectives.

Thus, for example, the often perceived pro-liberalization bias of negative, as opposed to positive, lists may be too limiting in its outlook, particularly when additional elements are brought into the analysis —such as: the duration of the measure, the nature of the measures, whether parties can lodge reservations for future measures, whether reservations can be used to exclude sectors from the scope of application of the agreement, whether there are effective domestic regulation disciplines in the agreement or even if harmonization or mutual recognition are foreseen in it. NAFTA, for example, excluded the basic telecommunication sector *via* party schedules while the US excluded maritime transport services by stating it in its own schedule. Canada also excluded audiovisual services in its NAFTA schedule. Another NAFTA characteristic which was adopted in US Bilaterals in Latin America was the exclusion of measures at the local level of

government, effectively carving-out a potentially significant realm of restrictive regulation from the scope of those agreements.

The recourse to reservations for future measures, a particularity of NAFTA and subsequent US bilaterals, can at times be more sweeping (since it is so general and open-ended) than a specific bound commitment that has no "future cover" and remains a target for future liberalization. In other words, the negative vs. positive aspect of scheduling lists simply cannot be considered in isolation lest it confuses more than clarifies the liberalization drive of trade in services agreements. Of the agreements herein considered, only Chile-EU adopts positive lists, following GATS Article XX. As seen above (table 2), that agreement tends to be more GATS+ than its Mexican counterpart by virtue of a number of other characteristics that can be equally or even more important than just the form of listing commitments. Negative listing does not "liberalize more" because liberalization hinges on many other aspects of an agreement. Clearly, it tends to be more transparent than positive listing but that is quite a different matter from liberalization *per se*.

Another important misconception refers to rules and principles. Much has been said about the pro-liberalization innovations that prohibited the duty of establishment (local presence articles in NAFTA and US bilaterals) or that introduced, albeit under investment provisions, the prohibition of performance requirements (articles with the same name in NAFTA and US bilaterals). Principles such as these are never "general obligations", however —i.e., obligations which imply automatic compliance and are not subject to negotiations. These principles, inasmuch as they are ambitious and point to areas where countries do tend to be restrictive in their regulatory regime, are normally principles against which parties can lodge reservations. The ambition of the articles, therefore, is highly tempered by the recourse parties can have, and often do, to scheduled reservations and/or limitations.

Once again, of the Latin American agreements herein considered, only the Chile-EU has no provisions on local presence or performance requirements. Yet, even in the absence of specific provisions on those two matters, the GATS approach still requires the scheduling of related measures. If a country applies national content or trade balancing provisions in services, GATS and its follower-agreements require scheduling of those measures anyway. The added flexibility with the GATS approach is not in not having the articles or even in not prohibiting explicitly the measures: it is in "permitting" (if the country has any bargaining power to speak of) non-binding by modes of supply which in effect allows countries to keep those matters away from the negotiating table.

There are additional visible characteristics that underpin some of the common misconceptions regarding pacts on trade in services. The question of deadlines, for example, is one of them. The fact is that having a temporal horizon to the total liberalization of trade in services has been rare indeed. NAFTA itself, for example, only makes a reference to a deadline in connection to quantitative restrictions where it commits to "endeavor to negotiate" their elimination "periodically, but in any event at least every two years".¹⁸ For all other types of general (and not sectoral) obligations, NAFTA is silent regarding deadlines —whether in the overall preamble to the agreement or in its articles on general aims and objectives. This has been reproduced in the US bilaterals in Latin America where not even a comparable provision on quantitative restrictions appears. Thus, for all the annexes that in NAFTA and the US bilaterals refer to national treatment, most-favored-nation, local presence, performance requirements or senior management and boards of directors, in addition to future measures, activities reserved to the State and quantitative restrictions, there is no time limit as to by when full liberalization should be achieved.

¹⁸ Article 1207 of NAFTA.

The only reference to general deadlines in the subsequent US bilaterals refers only to consulting annually to review the implementation of the related chapter (cross-border) "and consider issues of mutual interest —which is quite different from a commitment to full liberalization. The Chile-US pact, as mentioned before, also had a reference to citizenship and permanent residency requirements but only with a view to "determining the feasibility of" removing restrictions.¹⁹ As shown on table 7 above, only sectoral provisions tend to have deadlines in some cases —as for professional and financial services in the US bilaterals. The same table has also shown how the commitment to reviews is more ambitious in the EU bilaterals with Mexico and Chile. In fact, the Mexico-EU pact is clearly the most ambitious, being the only one of the agreements under purview herein that has a clear time horizon.

Even though GATS is clearly more flexible (less "liberalizing") than NAFTA in overall terms, the fact is that GATS tends to be more comprehensive in its coverage and in its provisions than NAFTA. Some of that distinction has been brought forward to subsequent agreements. Thus, the Mexican and Chilean agreements with the EU apply to all four modes of supply and do not limit the scope of any of them as do the US bilaterals in regards to mode 4 where only "business persons" are subject to any liberalization commitment. In the case of the Chile-EU agreement, the definition of national treatment is the same as GATS, contrary to NAFTA and the US bilaterals which are silent on crucial matters such as formally identical or formally different treatment, or the notion of modification of conditions of competition as a parameter for gauging the treatment actually afforded. The Chile-EU agreement has another particularity where it is more ambitious than any of the other agreements herein considered: it does not provide for the possibility of reserving m.f.n. treatment —a clear pro-liberalization instrument in and of itself.

For the most part, however, both GATS and NAFTA approaches have become considerably hybrid in subsequent agreements, mixing crucial elements from both "schools" to reflect as best as possible particularities of each negotiating context. Thus, while the US bilaterals have increasingly adopted the GATS rendition of market access or national treatment alongside domestic regulation and mutual recognition, the EU bilaterals have borrowed NAFTA's negative listing in the case of the Mexico agreement and various provisions in the chapter on financial services in both the Mexico and Chile agreements. This "hybridization" of subsequent agreements on trade in services in Latin America (and other places) has made them converge in important aspects. This is why, increasingly, the proof of the pudding is in whether there are clear deadlines by which liberalization is to be achieved and, most importantly, whether these deadlines are being at all respected.

¹⁹ Article 11.10 of the Chile-US Agreement.

VII. Policy Space: Which Policy, What Space?

A common criticism of agreements on trade in services has been that they result in very little effective liberalization. As the agreements, starting with the GATS, hardly ever have clear deadlines for full market openings while they permit countries either not to bind at all or to bind limitations or reservations, including for future measures, it is only "natural" that liberalization as such would be the exception, and not the rule, in most cases. It could be said that the main objective served (not sought) by most trade in services agreements is to lock-in place existing regulatory situations (and not change them), whether they are particularly open or particularly closed, vis-à-vis foreign interests.

A. Sensitive Matter

Paradoxically, however, agreements that cover trade in services have been consistently regarded as particularly sensitive for governments around the world —both from developing as well as developed countries. The reason for that, contrary to a perception commonly held in some quarters, has less to do with the pros and cons of liberalization *per se* than with the much more pressing and complex issue of how best to regulate a national economy with a view to fulfilling a number of diversified strategic policy objectives. Some countries may feel they have already done their best in that regard and are therefore confident to commit to existing situations internationally, *via* trade agreements. Others may feel they still have a way to go in

order to "put their house in order" and are, accordingly, hesitant to make international commitments. Quite a few happen to be somewhere in the middle, perhaps feeling confident about some sectors and not about others.

In Latin America as in the rest of the world, therefore, agreements covering trade in services introduce the notion of binding existing regulatory situations—which, in principle, may seem much less ambitious than agreements that foresee actual tariff cuts or the elimination of subsidies (as is the case in industrial products and agriculture). It is true that tariff or subsidy reductions tend to be more visible and, certainly, more quantifiable than some of the barriers to trade in services. Nevertheless, binding services-related regulations, as opposed to numerical reduction levels of protection in goods trade, is widely regarded as a sensitive matter for two main overriding reasons:

- The impact of regulatory changes, particularly in services sectors whose relationship to an economy tends to be much more multi-faceted and multi-targeted than in goods sectors, are difficult to ascertain *ex ante*: one needs to try and err first, take a hard look at the impact *ex post*, and then go back to the regulatory table to reformulate and even re-regulate accordingly;
- Since binding effectively "freezes" a maximum level of restriction for particular sectors or modes of supply, countries that bind need to be convinced that the existing regulatory situation is acceptable (or optimal) not only at the time the binding is undertaken but also, and most importantly, for the near and distant future, given that once bound it cannot be changed "backwards" (more restrictive) unless a high price is paid for it (compensating partners in an agreement).

The preservation of "policy space" thus emerges as an important concern relating to services for many countries insofar as trade in services agreements tend to limit the discretion of governments to regulate or re-regulate as or when they please.

The new millennium after all brought with it a strong criticism of the principal tenets of the so-called "Washington Consensus", some of which impinge strongly on services activities such as privatization, deregulation, and market opening in general. Many countries, particularly developing, have tried to change and adapt their policy and regulatory structures in order to address perceived problems with those policies. That has required "policy space"—i.e., room to change regulations, including if necessary towards making them more restrictive to foreign interests. Whether much has really happened in that direction ever since, or whether instead necessary reforms have been further delayed, is matter for an analysis which is beyond the scope of the present paper. What can be safely affirmed, however, is that this type of questioning is at the bottom of the policy space debate, as countries attempt to "correct" past, and avoid future, mistakes. Locking-in place whatever they have in their regulatory regime can be seen as an unwarranted straight-jacket at a time when much should be re-examined, restructured and ultimately re-regulated on the basis of recent experience.

It should be noted that the notion of addressing "development" in the current round of negotiations at the WTO tracks broadly with the overall preservation of policy space. Those that favor addressing development issues more directly seek either the recognition of specific policies or measures that should be permitted for development reasons, or, alternatively, the introduction of principles that provide for a "blanket" permission for development-related policy or measures. In both cases, the overriding objective is to preserve the space to make policy—development policy—and to avoid any possible further encroachment into the domestic regulatory realm.

B. Specific Provisions

The differences that have been herein explored among agreements on trade in services have a corresponding differentiated impact on the question of policy space. Clearly, the scope, depth and obligation implied by negotiated provisions and commitments in each case define the space governments will retain to make policy and regulate. It is the combination of a number of factors, however - and not merely specific factors in isolation - which is crucial in this context.

In terms of definition and coverage, for example, agreements vary as to whether they cover measures by local governments or not. Clearly, EU bilaterals tend to limit policy space more than US or Japan bilaterals since they include all levels of government in their scope. Regarding the regulatory situation of countries, the scope of provisions can also determine the leeway countries retain to regulate matters such as tribunals, review, appeal and others. US bilaterals here tend to be more ambitious and therefore limit the space of policy-makers since they have more complete and detailed provisions than the GATS itself and stipulate their application to the whole universe of covered sectors and not only to those included in country schedules of specific commitments —as does the GATS. EU bilaterals do not even provide for this type of language in their agreements with Latin American countries.

Most of the curtailing of policy space takes place as a result of the mechanics of liberalization of the agreements in question —once again, always in conjunction with other related elements and, in particular, with the concepts incorporated into core principles of liberalization. The main parameters in this context are the following:

- Whether the agreement requires the full elimination of restrictions and the full binding of the resulting regulatory situation within a certain time period;
- Whether the agreement requires the full binding of a country's regulatory situation but not necessarily the full elimination of restrictions within a certain time period;
- Whether the agreement requires the full binding of a country's regulatory situation within a certain time period but allows for the binding of future restrictive measures;
- Whether the agreement allows for the non-binding of sectors or modes of supply;

Agreements such as the US bilaterals that go by a *negative list* approach to scheduling are clearly more limiting than EU bilaterals that adopt a positive list approach. Since the negative list approach requires that all sectors be included and bound and that any restrictive measure be inscribed otherwise the sector is considered fully liberalized, governments do surrender more of their regulatory power under US bilaterals than, for example, the EU bilateral with Chile or the GATS itself.

All the same, US bilaterals provide for the scheduling of *future measures* whereby countries preserve the "space" to adopt or maintain specific measures that can relate to full sectors (the case of maritime transport services in NAFTA, for example). In spite of the transparency provided by the scheduling of such entries, the fact is that annexes on future measures in NAFTA and US bilaterals are equivalent to a blanket non-binding of measures, the resulting effect being in no way distinct from the exclusion of sectors, modes or measures under positive listing as set out by the GATS and its follower agreements.

The scope of what is inscribed in schedules depends, of course, on the core principles to which scheduling obligations relate. Under the GATS and GATS-based agreements, schedules relate primarily to the principles of market access and national treatment, including a third column that addresses "additional commitments" which are only "additional" to the extent that they go

beyond those two principles. NAFTA and US bilaterals do not limit themselves to reservations with respect to market access and national treatment. While on the one hand, they would seem to be more ambitious than GATS since they prescribe more detailed obligations on key aspects of trade in services such as the prohibition of local presence, senior management and boards of directors, or the provision of new financial services, the fact remains that for all these principles reservations can be made in specific annexes. Annexes in NAFTA and US bilaterals are structured, of course, on the basis of a negative listing of sectors and measures so that the whole universe of sectors and measures is covered and the transparency effect is maximal. The depth of any liberalization achieved will not hinge, however, on the strong language of the principles but instead on the reservations taken in their regard.

The fact is that neither the GATS, nor NAFTA, nor the bilaterals ensued since in Latin America and around the world, have provided for liberalization principles of automatic application —i.e., principles that are not negotiable or against which reservations or limitations cannot be lodged. Where that might have been expected —on the matter of subsidies— GATS has missed a number of self-imposed deadlines for concluding related disciplines while regionally countries have not even tried to negotiate them. Government procurement has fared a little better, having been included in a number of NAFTA-like agreements, including the US bilaterals in Latin America. Still, chapters on government procurement also foresee the recourse to negotiation and annexes of entities and specific goods and services so that its application is not in any way universal from the outset. There is no doubt that the presence or absence of government procurement disciplines in an agreement is a crucial measure of the extent to which policy makers would or not lose their space in a matter of great strategic importance. On subsidies, matters are a little different since even in the absence of specific disciplines in the GATS, for example, member countries still have to schedule existing subsidies whenever they violate the precepts of the market access or national treatment articles —i.e., their policy space regarding the concession of subsidies has in any case been curtailed.

The ultimate curtailment of policy space a trade agreement, whether in goods or services, can provide goes beyond the type of scheduling of restrictive measures or the liberalization principles against which these measures must be gauged as to their restrictive effect. Agreements that definitely put a stop on certain prerogatives of national regulators are the ones that have deadlines for doing things —particularly those that lead to the full elimination of barriers to trade. Thus, for example, agreements such as the Chile-EU which foresee a review within three years from the entry into force of the agreement with a view to "further deepening liberalization" constitute a bigger "threat" to national policy-makers than agreements such as the US bilaterals in Latin America which merely call for annual consultations with a view to "review[ing] the implementation and consider other matters of mutual interest".

The more forceful and direct language of the Chile-EU agreement points to a definite time frame within which more liberalization will have to occur and regulators on both sides will have to surrender their purview over related matters to the obligations of the bilateral agreement. In the absence of any overall or sector-specific time horizon for full liberalization, ambitious scheduling methods or strongly enunciated obligations do not amount to much since countries can negotiate and lodge reservations which may simply remain indefinitely and safely "frozen" in time. The real limitation will depend on whether countries can negotiate the extent to which they apply these principles and, most importantly, whether the agreement as a whole or in part foresees deadlines for full liberalization.

It is the combination of mechanics of liberalization, scope of liberalization under core principles, and, most importantly, the existence of a commitment to liberalization within a certain time horizon, which can effectively seal the fate of policy-makers in countries that are parties to

trade in services agreements. Individual features of agreements are important but never in isolation. Finally, an aspect which is absent the text of any agreement but has a major influence on policy space is bargaining power: there is no doubt that countries with more bargaining power can effectively limit the policy space of countries with less bargaining power by "forcing" more ambitious disciplines or commitments when negotiating agreements —particularly bilateral ones.

C. Core Spots

The conceptual conflict underlying the debate on policy space is that between foreign trade liberalization and national sovereignty or autonomy. It is to be expected that a trade agreement would seek to eliminate barriers to trade. The difficulty does not reside there but on the trade *vs.* non-trade divide which is brought forward with particular vigor in agreements relating to services liberalization. The fact that the regulation of services goes *beyond* trade to reflect much broader national policy objectives introduces an unprecedented set of issues for which neither the GATS nor the agreements that followed it around the world have found consistent solutions. Article VI of the GATS and many later renditions of it at the regional level have addressed these issues only to a partial extent. The core problem of where to draw the line on trade and non-trade related matters in services remains for the most part unresolved.

For many developing countries "trade" does not lead necessarily to "development". For many, therefore, development is viewed as largely a non-trade-related matter, one that is highly influenced by national policy objectives which, in addition to ensuring the quality of services and services suppliers, address the "developmental asymmetries" between developed and developing countries. This dichotomy between the development and the non-development related universes mirrors in turn the dichotomy between economic efficiency *vs.* the distributional, social and cultural objectives embodied in the domestic regulation applying to services activities. Once again, there is nothing wrong with a trade agreement seeking economic efficiency *via* an increase in trade flows, contestability and competition. The problem for policy-makers —particularly in democracies where policies and regulations have a much stronger accountability *vis-à-vis* ballot boxes— is the extent to which the economic efficiency sought out by these agreements may or may not override legitimate developmental objectives by imposing an unwarranted level of obligations on member countries. Agreements on trade in services, whether in Latin America or elsewhere, have been often criticized for doing just that.

D. Investment, Privatization

The GATS has already been widely criticized by some quarters for having included a supply mode that requires investment on the part of suppliers —i.e., commercial presence or the possibility of establishment by foreign suppliers in national markets. Many perceive the GATS to be imposing the elimination of investment restrictions *via* the application of market access and national treatment provisions to mode 3. The WTO itself has responded in its webpage to these criticisms by pointing to the negotiated nature of the market access and national treatment obligations and the fact that member countries can keep restrictions as long as they schedule them.

As demonstrated above, Latin American bilaterals with developed countries, particularly those with the U.S., have gone further than the GATS by including a full chapter on investment which applies to both goods and services. They have, correspondingly, been even more criticized than the GATS, particularly since they go beyond just promotion and protection to include effective liberalization provisions such as market access, national treatment, most-favored-nation, standard of treatment, minimum standard of treatment, senior management and board of directors

and performance requirements. In other words, the criticism is first and foremost about the fact that these investment provisions had gone way beyond traditional and even more recent bilateral investment treaties since they delve into access obligations.

Of all the different principles whose application, albeit subject to reservations, may encroach on a national regulator's scope of activity, the one that has caused most of the preoccupation in Latin American bilaterals has been the provision on performance requirements. Under NAFTA and US bilaterals, such requirements are the object of a specific article that textually purports to prohibit them for both goods and services. The article details seven types of specific measures that should be eliminated and prescribe their prohibition with a particularly forceful language.²⁰ These measures are precisely the requirements that many developing countries would like to have the right to apply. Since a great deal of the mistakes of the recent past have been often perceived by these countries as derived from liberal policies such as privatization or the freeing of ownership and control requirements, the possible curtailment of space to apply these performance policies is seen as a major obstacle to what many of these countries consider the restoration of an adequate equilibrium in their FDI regime.

As mentioned in the previous section, the fact remains that strong disciplines do not amount to as much as they sound in the absence of some equally strong mechanics of liberalization, including first and foremost, deadlines for phasing-outs or the full elimination of restrictions. In regard to performance requirements, as with respect to all other strong core liberalization principles included in US bilaterals, parties can enter reservations with respect to the principle so that what is stringent *in the letter* of the agreement is actually tempered by the possibility of negotiation and reservation. In addition, NAFTA and US bilaterals are unambitious in terms of deadlines so that there is no time frame within which performance requirements that have been lodged as reservations need to be eliminated. In none of those agreements, negotiators have gone back to the negotiating the elimination or phasing out of those requirements.

To say, therefore, that NAFTA and US bilaterals are necessarily more ambitious than GATS and some EU bilaterals with respect to performance requirements or other equally-ambitious themes is therefore overly simplistic. This is particularly true given that if countries do apply any of the performance requirements normally listed in the US bilaterals, they would still have to schedule them under GATS for committed sectors. In other words, if a country required that 60% of its prime TV time were reserved to national productions, it would certainly have to schedule that "performance requirement" for a national content if it chose to include audiovisual services in its schedule of specific commitments. To say that GATS, NAFTA or US bilaterals constitute a definite curtailment of policy space is, however, overly simplistic as well since countries have some effective room for negotiation and the agreements are lack on time-frames and deadlines.

E. Public Services, Public Interest

One major critique of regional agreements dealing with services trade, whether in Latin America or elsewhere, emanates from some misguided perceptions —namely: that these agreements will tend to finish with public services; that these agreements call for privatization; that these agreements prohibit the public funding of national institutions; that public services will no longer be regulated according to the public interest. These concerns have certainly been brought out in the context of education and health services, both of which have a strong social component. Public services such as water distribution services, often supplied by public institutions, including *via* a monopoly, have also been the object of some concern. Developing countries tend to be more

²⁰ Article 1106 of NAFTA has been the inspiration for later agreements in Latin America.

sensitive to these matters given their perceived need to maintain the control of these areas in order to ensure the fulfillment of important national policy objectives such as universalization of access to essential services.

None of the agreements herein analyzed have obligations on privatization. None of them oblige parties to finish with monopolies, whether public or private. None of them have disciplines on subsidies although discriminatory subsidies should be reserved or scheduled in some agreements. None of the agreements oblige parties to give up the right to regulate, particularly in regard to measures that related to quality, safety, price or other policy objectives that aim to ensure a certain quality level of the service. What most of the agreements do say of particular relevance to public services is that services provided in the exercise of governmental authority are fully outside their scope of application or liberalization. Thus, public services provided by governments are not covered by these agreements to begin with and should not be as threatened as has been assumed in some quarters.

F. Regulatory Autonomy

GATS, NAFTA and the agreements that followed have in large measure been sensitive to the fact that services liberalization is not supposed to eradicate completely a nation's right to regulate its services activities. Unlike goods, services are regulated according to diverse national policy objectives, perhaps most of which have nothing to do with economic efficiency or trade as such. Since by virtue of the four modes of supply all agreements covering services nowadays are applicable to a host of domestic measures, a place to draw the line between acceptable and non-acceptable, or compliant or non-compliant, regulations was imperative. GATS Article VI did just that by focusing on measures relating to qualification requirements, technical standards and licensing requirements and permitting related measures that were based on objective and transparent criteria, were not more burdensome than necessary to ensure the quality of the service and, in the case of licensing procedures, were not in themselves a restriction on the supply of the service. Latin American bilaterals with developed countries followed that orientation.

Although provisions on domestic regulation aim to discipline the application of some crucial types of measures in the supply of services (qualification requirements, technical standards and licensing requirements), they do not aim to discipline the whole universe of possible measures regulating services —and certainly not the non-market part of that universe. Countries primarily retain the right to regulate as long as they do not abuse their prerogative by being too discriminatory, opaque or bureaucratic in the administration of their regulatory regimes. Thus, the critique that agreements covering services ultimately aim to end, or severely limit, the right to regulate has to be taken with a grain of salt.

It remains incumbent upon each country, however, to know best how to regulate its service economy. In that sense, it is a matter of great urgency that countries define the aims, objectives and means to achieve optimal regulation before committing to trade agreements. Countries that neglect to do so will always have themselves to blame —and not the trade agreements.

VIII. Policy Lessons and the Multilateral vs. Bilateral/ Subregional Dichotomy

The experience had by Latin American countries that opted for negotiating trade in services agreements with developed countries is very rich and enlightening. To a large extent, it demonstrates the limits of a number of related elements common to services negotiations. As the countries from the region that have concluded these pacts vary widely in many of their attributes ranging from social and economic development to regulatory capacities and export competitiveness in services, any commonalities across agreements can be understood to reveal more about the developed than necessarily about the particular needs or aspirations of the developing trading partner. For example, the fact that US bilaterals, in all cases, have backtracked from NAFTA provisions on the elimination of citizenship and permanent residency requirements clearly points to changing determinants in the US and not in its trading partners.

As a general rule, it does not seem that differing bargaining capabilities on the part of Latin American countries have been able to produce notable differences in outcomes. There may, however, have been a coincidence between the lack of bargaining power on the part of some countries and the willingness to concede anyway on the part of others. At the root of this question is the appreciation, particular to each country, of what is the value of conceding in trade negotiations which in turn hinges on the view a country has of liberalization as a vehicle of growth and development. Another (blunt) way of putting it would be to say that in many cases what Chile or Mexico may have

been willing to concede, for example, the Cafta countries may have had to concede even when unwillingly in order for the agreement to reach a conclusion.

From a policy point of view, there may have been a number of lessons to draw. The ten most important ones, on the basis of the findings of the present paper, are the following:

1.- Not all Latin American countries have reasons to engage in trade in services agreements with developed trading partners. There seems to be three types of Latin American countries taking the lead in the current services regime:

a.- Countries that have already gone through major internal reforms, have opened up their economies either autonomously or by means of trade agreements and are ready to demand reciprocity for having done so —such as Chile and Mexico; and,

b.- Countries that have not necessarily gone through major internal reforms, have not necessarily opened up their service sectors either autonomously or by means of a trade agreement but that are ready to engage for systemic reasons (proximity to US interests) or the preservation of specific interests (Andean countries with the link between trade preferences and drug eradication);

c.-Countries that fall under a and b above —such as Peru.

2.- Developed countries are pursuing the easiest route to liberalization, one that will cost them the least. By striking deals with countries that are willing for a number of different reasons, the US and the EU can wage their bargaining power, get what they want and avoid conceding on what they do not want. Thus, for example, the US has made its bilaterals worse than NAFTA insofar as mode 4 is concerned while for the EU excluding audiovisual services and including commitments on maritime services is easier even than at the WTO;

3.- There is no dilemma between the multilateral and the regional "theater" in services trade. Countries seem to be perfectly comfortable with a "co-habitation" of both systems in services. If the option were really one or the other, perhaps one should be able to discern something different than the proliferation of *status quo* binding agreements and with little commitment at that. The evidence shows that the rule is for countries to do a "one-shot" deal, often in the absence of a final date for full liberalization, and walk away from the negotiating table almost indefinitely. Various NAFTA commitments were not delivered (eliminating citizenship and residency requirements, for example), Mexico and the EU did not yet comply with their February 2001 commitment to have schedules with ten-year phasing-outs within three year —i.e., February 2004. There is no real liberalization occurring regionally— and much less so multilaterally;

4.- The regional regime in services did not "pick up where the multilateral regime left" as was in some measure expected. In some cases, regionalism went backwards. The Uruguay Round had a fairly substantive "built-in" agenda in services: some sectoral negotiations and commitments for negotiations (and, in some cases, conclusions) on certain framework principles, namely, emergency safeguard measures, subsidies and government procurement. In addition, GATS Article VI called for additional work on a number of regulatory issues. On the sectors, in most cases herein considered, WTO post-Uruguay Round results were bound regionally. On the principles, however, not much at all has happened. Not even in mutual recognition agreements, a matter which "naturally" should lend itself to bilateral or plurilateral agreements, has there been any discernible push. As to going backwards, mode 4 in NAFTA and subsequent US bilaterals come to mind;

5.- Despite the much acclaimed "tale of two models"²¹ between GATS and NAFTA, it would be a far shot to uphold that different models resulted in significantly different outcomes across agreements. The Latin American agreements with developed trading partners attest to that fact. The main determining differences are not in the mechanism for liberalization or the language of core principles. They are in the overall commitment to liberalization that countries bring to the negotiating table which is reflected in provisions dealing with reviews with a view to deepening liberalization or commitments with a clear time frame. In the Chile-EU agreement, for example, it is much more important that there is a review every three years to "reduce or eliminate remaining restrictions" than the positive list approach adopted in the agreement;

6.- Regional agreements with Latin American countries have had little of the so-called "development issues" reflected in them. Countries in the region have either not demanded sufficiently or not been able to get the inclusion of "development-friendly" provisions in the agreements they negotiated with developed trading partners. Chile, in its agreement with the EU, did include a number of cooperation provisions including a specific one for services (Article 20) but still nothing of the dimension that normally is negotiated by the EU with countries in Africa, including South Africa, and in Asia. Defining what "development-friendly" is in the context of the FTAs on services has, however, been as difficult as it has been for the multilateral system. The Doha "Development" Agenda has been at pains to define forms of addressing the issue;

7.- Domestic regulation should perhaps be the main focus of agreements on services, particularly the ones involving developing and developed countries. All aspects of domestic regulation —transparency, good governance and regulatory requirements— are crucial for the functioning of a "balanced" market economy since they provide the predictability and reliability necessary for economic operators to produce, supply, invest and grow. Most of the issues reflected in GATS Article VI and most of the agreements considered herein are important, first and foremost, to national entrepreneurs who also need to have a predictable and reliable administrative, regulatory and policy framework within which to do business. Focusing on domestic regulation both as a *demandeur* as well as a "rule-taker" should be put forward much more forcefully than has often been the case;

8.- Mutual recognition agreements can perhaps be a much more forward way to address regulatory issues and provide for predictability and reliability for both sides of a particular trade in services agreement —thus, also contributing to greater trade and investment flows. Many of the measures that countries tend to bind (or not even bind) in their schedules of specific commitments, whether multilaterally or regionally, are measures that could be somehow dealt with or bypassed by mutual recognition agreements. This aspect of regional agreements has been too skimpily resorted to but could provide a means to go right at the core of potential regulatory problems for both developed and developing countries. Developed countries tend to have the more intricate and sophisticated regulatory regimes and developing countries should benefit from learning about them while trying to see how to reconcile existing practices overseas with the realities at home;

9.- The curtailment of the so-called "policy space" of developing countries has not been as dramatic as some suggest. If there is one thing that services agreements indeed do, it is to lock-in domestic measures that can embody important national policy objectives, reason for which they can be seen with suspicion by countries that are still not satisfied or comfortable with their own internal agenda and therefore want to avoid freezing it in international schedules of commitments. What has become evident in all the various agreements herein considered is that even in the presence of

²¹ The expression has been used by the author in another article whose publication is forthcoming: "Regional Trade in Services Agreements: Dilemma or Inertia?"

strong language regarding sensitive matters such as performance requirements, the praxis is to allow for the scheduling of reservations or limitations. On matters such as prior comment on proposed changes in relevant laws and regulations, bilaterals have gone back and forth but presumably there is room to negotiate its exclusion from a pact.

10.- Free trade agreements on services, as their counterparts on goods, tend to bypass the most important issues that persist in developing country economies. The liberalization of trade in services may be an important ingredient in a country's policy mix for growth and development but it clearly is only an ingredient amongst a host of other ingredients. It is neither an ambitious, nor an unambitious, agreement that will put a particular country in the right economic and social path no matter how complete and innovative, or neutral and innocuous, is the agreement in question. The right path can only be drawn by the country itself *via* a clear appreciation of what is necessary and the political will alongside the means to effectively do it. These agreements should not be seen as a panacea but as a means to an end. The matter would require further research and reflection, certainly, but if the regional regime is to be a "mover and a shaker" in economic relations in services (and in all other economic sectors), it should increasingly address "real world" issues such as the infrastructural deficiencies of developing countries, their inadequate access to international financial and technological markets, the high cost of doing business (partly a domestic regulation issue as mentioned before) and, of course, their export interest in services. It would be naïve to suppose that, for example, the opening up of the financial market *via* a trade agreement or a liberal offer on infrastructural services could necessarily result in solutions to the everyday problems of the developing world. A single liberalization focus may simply not do the trick.

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