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Trade in services negotiations: A review of the experience of the United States and the European Union in Latin America

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Contents

Figure Index

Table Index

Abstract

Since the entry into force of the results of the Uruguay Round, Latin American countries have embarked in an active trade policy based on negotiations of Free Trade Agreements. These agreements cover a wide range of goods, services and 'new trade' issues. The models followed in negotiations with the United States are based on NAFTA provisions. The European Union has adopted a General Agreement on Trade in Services (GATS) type approach, although some differences exist. This paper analyses the services provisions negotiated by the United States and the European Union with Latin American countries, focusing on the differences between the models and their results.

Introduction[1]

Trade in services negotiations has become one of the major issues of bilateral negotiations between Latin American countries and developed countries. The free trade agreements (FTA) concluded by some Latin American countries (LAC) with the European Union (E.U.) and the United States (U.S.) cover a wide range of goods, services and 'new trade' issues. Trade agreement in the services sector plays different roles in the negotiations process and domestic policy-making. They may be used as a bargaining chip and can collaborate to overcome resistance to reform processes undertaken when vested interests oppose liberalisation and block political initiative to open access or prevent the establishment of an appropriate regulatory framework. Also, trade agreements may contribute to policy stabilisation by establishing a contractual framework that cannot be changed unilaterally. Therefore, they can also create a time path for introducing reforms in a gradual manner and act as an "insurance policy" that the rules of the game will not be modified arbitrarily without a cost. Finally, trade agreements provide political support for trade in services liberalisation because they ensure reciprocal market deregulation.

Nevertheless, caution must be exerted by developing countries, including LAC. If liberalisation through trade agreements is not adequately assessed, in particular from an institutional standpoint, it may affect regulatory strength at home, if the right to regulate —following best international practices— is not properly preserved.

[1] See Sáez (2004 and 2005).

One important aspect is to keep in consideration the link between the regulatory ability and modes of supply. In particular, cross-border transactions liberalisation and their impact on the adequacy of the domestic regulatory environment.

Also, developing countries may have to assume heavy regulatory obligations and liberalisation commitments that may not be consistent with their level of economic and institutional development. Regarding rules and disciplines, developing countries must look for commitments on regulatory principles rather than implementing prescriptive regulations.

Last but not least, the treatment of sectors for which liberalisation is not politically feasible or desirable must be addressed in advance. For instance, this may be the case for educational, health and social services, in particular social security services. One example is Canada, which, in the context of NAFTA negotiations, established a "cultural exception", whereby cultural industries were excluded of the services and investment provisions in the agreement. Therein countries agreed to exclude social services and measures that favour minority populations from the scope of the services and investment provisions of the agreement, albeit through the annexes. The E.U. has also established its own exceptions, both at World Trade Organization (WTO) and in bilateral agreements, in the services negotiations: audio-visual services are not included in its bilateral trade agreements. Developing countries may also establish their exceptions on the basis of domestic political constraints or general public policy goals. When negotiating commitments they must be perfectly aware not only of their own constraints but also of their counterparts and learn to use them.

When assessing the impact of liberalisation of trade in services, account must be taken not only of direct gains to consumers and industries that are users, but also of the impact (externalities) that it may have on the development of other areas of interest; such as gains in terms of growth of agricultural, manufacturing or mining exports.

On the other hand, developing a new regulatory environment to create the necessary mechanisms to ensure the quality and reliability of the service and the functioning of market rules, including those necessary to prevent firms operating in the market from restricting competition, is indispensable and should be in place before a new set of property rights and market structures are determined.

Summarising, negotiations in the services area require a set of policy definitions at the domestic level, which provide a general and coherent framework with regard to key issues:

(a) The desired involvement of the State, if any, in the services sector and its appropriate modality: as an exclusive services provider, or in competition with the private sector, through a regulatory role, or a combination of the three options;

(b) The extent of private sector involvement, i.e. to what extent it will participate in the provision of services. For instance, a country may wish to preserve certain services exclusively for government provision,[2] or may limit the participation of the private sector to certain industry segments;[1]

(c) The extent of foreign services providers' participation;

(d) Which services sector to commit in trade agreements; and

(e) The institutional arrangement that is necessary to support specific services sector.

Developing countries may draw on the many experiences —the successful and the not-so-successful ones— that are available, from both developed and developing countries, before choosing one specific approach to liberalisation (Prieto, 2005). There are a number of different stories that provide a range of venues to address deregulation and liberalisation.

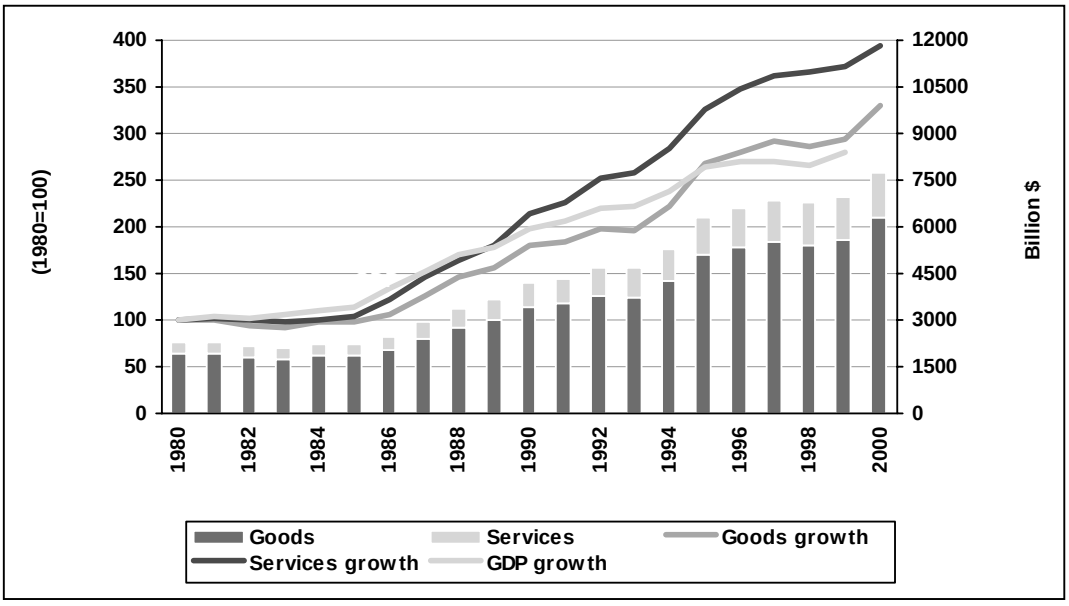
[2] For instance, in certain developed countries the public sector is the sole provider of health and educational services.

In recent years, Latin American economies have embarked in an active strategy of trade negotiations. During the Uruguay Round, and since the entry into force of the WTO, countries have participated in services negotiations in general, and in particular, in financial and telecommunications agreements concluded in 1997 (Dobson & Jacquet, 1998 and Hufbauer & Wada, 1997).[3] At the bilateral and regional levels, agreements have been negotiated and concluded among countries within the region and with countries outside the region, particularly developed countries. Although both the European Union and the United States have included investment and services chapters in their bilateral negotiations with Latin American countries, the approaches adopted have followed different patterns.

This paper undertakes an analysis of services provisions, and the main results of these processes. The paper is organized as follows. The first section discusses the importance of trade in services in some LAC. The next section analyses the different models followed in the services negotiations and the legal sources of the services provisions of the bilateral agreements signed between the United States and Mexico, Chile and D.R-CAFTA, respectively, and addresses the approach adopted by the E.U. in its negotiations with Mexico and Chile. Conclusions are summarised in the final section.

Figure 1

GROWTH IN GDP, TRADE IN GOODS AND TRADE IN SERVICES: 1980-2001



Source: Based on WTO data.

[3] An assessment of the participation of developing countries in the services negotiations at the WTO can be found in Marchetti (2004).

I. Trade in services liberalisation

Since the mid eighties, exports of services have grown at a faster pace than trade in goods and GDP (figure 1).[4] Commercial services accounted for about 19-20% of total world trade in 2002 (WTO, 2003).

Like trade in goods, developed countries dominate trade in services, but developing countries especially in Asia have acquired a significant share in total trade (see tables 1 and 2). In fact, countries' share in world trade in services is similar to their share in world trade in goods. Trade in services represents around 19-20% of world trade in goods and services. But important differences exist among countries. According to the data available, there seems to be no specific pattern with regard to trade in services and level of development. For instance, Canada and Germany share of exports of services represent almost 13% of total trade, a figure marginally different from that of South Africa, Malaysia and some Latin American countries.

Regarding the kind of commercial services traded, the available statistics show that transportation services[5] represented in 2004 a 24% of the total, down from 27% in 1990. Travel services[6] accounted in 2004 for 29% of total trade in services, down from 34% in 1990. On the other hand, trade in other commercial services increased from 37.5% in 1990 to 47% in 2004.[7]

4 There are a number of methodological problems in trade in services statistics. The figure we are including here must be interpreted with caution, see WTO (2003) and United Nations (2002).

5 Includes air, maritime and other transport services (see www.wto.org/english/res_e/statis_e/its2005_e/charts_e/chart_iv02.xls).

6 Includes business travel and personal travel (health care, education and other expenditures).

7 Other commercial services include communications, construction, insurance, financial, computer and information services, royalties and license fees, other business services, and personal, cultural and recreational services.

Table 1

WORLD TRADE BY SELECTED REGIONS AND ECONOMIES: 2004

(Billions of US$ and percentages, based on balance of payments data)

Region/country	Exports			Imports			World Trade	
	Value	Share		Value	Share		Share	
	Total	Goods	Commercial services	Total	Goods	Commercial services	Goods	Commercial services
World	**11 140**	**80.9**	**19.1**	**11 060**	**81.1**	**18.9**	**100**	**100**
North America	**1 709**	**77.8**	**22.2**	**2 284**	**85.3**	**14.7**	**18.1**	**17.4**
Canada	378	87.6	12.4	335	83.3	16.7	3.2	3.2
Mexico	202	93.1	6.9	216	91.1	8.9	1.9	1.9
United States	1 129	71.8	28.2	1 733	85.0	15.0	13.1	12.0
South and Central America	**347**	**83.9**	**16.1**	**293**	**80.3**	**19.7**	**2.9**	**2.9**
Argentina	39	87.7	12.3	28	76.7	23.3	0.3	0.3
Bolivarian Republic of Venezuela	40	97.5	2.5	22	80.2	19.8	0.3	0.2
Brazil	108	89.4	10.6	79	79.6	20.4	0.8	0.8
Chile	38	84.5	15.5	29	78.2	21.8	0.3	0.3
Colombia	19	89.2	10.8	20	80.7	19.3	0.2	0.2
Europe	**5 032**	**77.6**	**22.4**	**4 864**	**78.9**	**21.1**	**44.6**	**44.6**
European Union (25)	4 580	77.8	22.2	4 443	78.5	21.5	40.6	40.7
Russian Federation	204	90.1	9.9	129	74.6	25.4	1.5	1.4
Ukraine	39	84.7	15.3	34	86.3	13.7	0.3	0.3
Africa	**275**	**82.7**	**17.3**	**258**	**78.9**	**21.1**	**2.4**	**2.4**
Egypt	26	46.7	53.3	26	71.4	28.6	0.2	0.2
South Africa	56	85.7	14.3	58	84.2	15.8	0.5	0.5
South Africa	56	85.7	14.3	58	84.2	15.8	0.5	0.5
Asia	**3 060**	**85.3**	**14.7**	**2 852**	**82.1**	**17.9**	**26.6**	**26.5**
Australia	112	77.8	22.2	131	80.4	19.6	1.1	1.1
China	655	90.5	9.5	606	88.2	11.8	5.7	5.7
Hong Kong (China)	314	82.9	17.1	299	90.0	10.0	2.8	2.8
India	117	66.3	33.7	138	70.3	29.7	1.2	1.1
Indonesia	76	91.2	8.8	70	69.5	30.5	0.7	0.6
Japan	634	85.0	15.0	541	75.2	24.8	5.3	5.2
Malaysia	143	88.4	11.6	118	84.1	15.9	1.2	1.2
New Zealand	28	72.3	27.7	29	76.3	23.7	0.3	0.3
Philippines	43	90.4	9.6	50	89.9	10.1	0.4	0.4
Republic of Korea	298	86.6	13.4	269	81.6	18.4	2.6	2.5
Singapore	233	84.3	15.7	200	81.9	18.1	2.0	1.9
Taipei (China)	199	87.2	12.8	187	84.0	16.0	1.7	1.7
Thailand	115	83.5	16.5	108	78.7	21.3	1.0	1.0

Source: Prepared by the author on the basis of WTO International Trade Statistics, 2005.

Developing countries' participation in trade in services negotiations have raised interest in determining in what specific sectors do developing countries present trade advantages (Nielson and Taglioni, 2004). One of the main conclusions is that there is a wide range of sectors of interest and specific successful cases: audio-visual, business, computer and related services, construction, distribution, higher education and training, financial services, health care, internet-related services, professional services and port and other shipping facilities. Mattoo and Wunsch (2004), analyse the growth of outsourcing activities in developed countries and their increased importance as services exports from developing countries[8].

[8] Prieto (2003), assesses the necessary ingredient for a services export promotion strategy for Latin-American countries.

Table 2

WORLD EXPORT OF COMMERCIAL SERVICES: 1994- 2004

(US$ millions)

	1994	1997	2000	2001	2002	2003	2004
World	**1 031 100**	**1 318 200**	**1 485 100**	**1 488 700**	**1 588 100**	**1 804 700**	**2 127 500**
North America	**214 600**	**274 800**	**331 300**	**319 200**	**327 200**	**342 100**	**379 000**
Canada	23 210	30 724	39 271	38 280	39 832	41 945	46 754
Mexico	10 075	10 997	13 567	12 550	12 474	12 477	13 931
United States	181 277	233 049	278 468	268 417	274 852	287 695	318 297
South and Central America	**31 100**	**38 500**	**47 100**	**46 200**	**44 700**	**48 900**	**55 800**
Argentina	3 213	4 382	4 648	4 364	3 111	3 967	4 851
Bolivarian Republic of Venezuela	1 454	1 189	1 057	1 242	913	791	1 008
Brazil	4 817	5 488	8 961	8 718	8 790	9 570	11 473
Chile	2 764	3 799	3 995	4 071	4 315	4 870	5 872
Colombia	1 522	2 096	1 984	2 123	1 799	1 831	2 064
Costa Rica	1 163	1 116	1 911	1 875	1 842	1 996	2 197
Ecuador	640	639	793	799	859	830	885
El Salvador	338	460	673	680	750	811	921
Guatemala	659	542	702	948	1 053	954	1 063
Haiti	7	172	158	123	132	116	111
Honduras	207	328	429	432	473	538	593
Nicaragua	80	126	187	188	192	213	243
Panama	1 172	1 515	1 961	1 958	2 241	2 520	2 690
Paraguay	411	634	596	525	531	558	555
Peru	951	1 457	1 495	1 398	1 428	1 560	1 725
Uruguay	1 324	1 413	1 249	1 099	727	751	960
European Union (25)	**466 800**	**571 600**	**646 300**	**670 600**	**731 900**	**867 700**	**1 016 500**
Extra-EU (25) exports	...	...	...	...	...	366 700	427 100
European Union (15)	**443 100**	**538 300**	**610 600**	**633 400**	**692 700**	**822 400**	**962 100**
Extra-EU (15) exports	193 400	252 800	276 500	285 600	307 400	363 900	431 800
Russian Federation	8 425	14 079	9 565	11 215	13 451	16 088	20 164
Ukraine	2 747	4 937	3 800	3 897	4 583	5 013	6 041
Africa	**22 500**	**28 200**	**30 500**	**30 700**	**32 000**	**39 700**	**47 600**
Egypt	7 693	9 096	9 687	8 815	9 127	10 837	14 048
South Africa	3 557	5 210	4 888	4 533	4 576	7 328	8 066
Middle East	**...**	**21 400**	**29 100**	**27 700**	**27 200**	**30 600**	**35 500**
Israel	6 549	8 659	14 457	11 743	10 955	12 227	14 179
Jordan	1 543	1 717	1 599	1 391	1 473	1 462	1 499
Asia	**216 200**	**292 700**	**307 800**	**303 300**	**326 100**	**356 000**	**450 400**
Australia	13 767	18 058	18 197	16 295	17 447	20 629	24 774
China	16 354	24 504	30 146	32 901	39 381	46 375	62 056
Hong Kong (China)	31 142	38 514	38 668	39 370	42 946	45 570	53 578
India	6 031	8 926	16 030	16 799	19 125	23 092	39 638
Indonesia	4 680	6 792	5 061	5 362	6 519	5 143	...
Japan	56 776	74 631	73 362	68 630	70 155	75 933	94 933
Malaysia	9 200	15 569	13 812	14 331	14 753	13 459	16 655
New Zealand	3 599	4 180	4 363	4 318	5 094	6 370	7 830
Republic of Korea	16 233	25 439	29 746	28 103	27 345	31 502	40 047
Singapore	22 939	27 988	29 307	29 005	29 894	30 622	36 542
Taipei (China)	13 115	17 021	19 890	19 760	21 501	23 028	25 531
Thailand	11 425	15 619	13 785	12 932	15 304	15 694	18 932

Source: Prepared by the author based on WTO International Trade Statistics, 2005.

These studies tend to confirm that developing countries' interest in the services sector cover a wide range of sectors and activities, and by adopting the appropriate policies, they can take active part in world trade.

Table 2 shows the growth rate of services exports in different regions and selected countries. Asian developing countries' trade in services show remarkable growth in the last ten years, although the expansion is highly dominated by China and India. For instance, India's trade in services grew from US$6 billion in 1994 to US$40 billion. China's services exports grew from US$ 16 billion to US$62 billion in the same period. In other cases, services exports almost doubled in a decade.

In the case of Latin America, although services exports grew significantly, the rate was relatively slower than for Asian developing countries. Brazil is the economy that shows the most dynamic growth rate of services exports (table 2). This explains the region's fall in the share of world services exports. The factors behind these trends must be assessed carefully in order to design the right policy towards enhancing trade in services.

One of the vehicles that LAC have followed to foster trade in general are FTA, these agreements have been negotiated with countries within and outside the region. Different approaches have been followed (Marconini, 2005). The next section examines the models that have prevailed so far in negotiations with the U.S. and the E.U.

II. The models and their legal sources

Trade in services negotiations imply a number of technical difficulties that arise by the nature of the issues involved. Among them, Prieto (2005) has highlighted the multifunctional nature of the services sector and the multimodality of services trade. The former are related to the fact that services are a key feature for the overall performance of the economy (Deardorff, 2001; Marchetti, 2004), services are an essential infrastructure of the trade sector and services are a business activity in their own right. When dealing with services activities these linkages must be taken into account in order to ensure that the different functions will be performed in the most efficient manner (Hodge, 2002).

The multimodality characteristic of trade in services reflects the fact that the provision of services can take place through different modes of supply. In fact, sometimes a service can be provided cross-border, or through the establishment of a commercial presence or through the movement of the consumer or the supplier of the service, or through all of them simultaneously.

Another characteristic of trade in services is that —for many services sector— the final stages of "production" take place simultaneously with the final consumption of the services. Therefore, a country's services exports depend on the infrastructure and factors of production available in the host/destination country where the consumption takes place.

For example, for an international phone call to be completed requires the appropriate infrastructure in the host country. Furthermore, international transport services require the port, airport and road infrastructure available in the country of destination. Finally, certain professional services require the joint production with domestic inputs to be delivered to the final client (Mirza & Nicoletti, 2004).[9]

International agreements that have dealt with trade in services negotiations have tackled these difficulties through different approaches. In the 1990s, as a result of the Uruguay Round (UR) negotiations, trade in services was actively integrated into the international trade agenda. There are two basic models of integration in the services area:[10] (i) the NAFTA-type model (NM); and (ii) the WTO/GATS model respectively.

A. The General Agreement on Trade in Services (GATS) framework

The General Agreement on Trade in Services is one of the agreements that contain the results of the Uruguay Round of multilateral trade negotiations. It is relevant, therefore, to review the GATS provisions to understand the main differences *vis à vis* bilateral services provisions.

The GATS applies to measures[11] adopted by Members that affect the supply of services.[12] GATS is based on the non-discrimination principle that governs the multilateral trading system contained in the most favoured nation (MFN) clause that ensures non-discrimination in the treatment to which a WTO Member is entitled from other Members. This clause is applied under the GATS "immediately and unconditionally to services and suppliers of services from any other Member". However, before the WTO Agreement became effective, Members were allowed to impose exemptions to this clause. Under the GATS, exemptions are subject to periodical review, and, in principle, should not extend beyond ten years.

The non-discrimination principle is also established in the national treatment clause, which represents the Members' commitment to grant no less favourable treatment than they grant their own nationals (juridical or natural persons), in this case with respect to services and suppliers of similar services that they may have committed in their schedules annexed to the agreement. Accordingly, the suppliers of services and the services they provide shall be governed by the same rules, requirements and regulations as suppliers of services in their own countries, except any conditions and qualifications set out in their schedules of commitments.

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9 Even if there are no restrictions to trade in services, as long as the adequate inputs are not available in the "destination" country, services exports will not take place.

10 One influential model was the one adopted by the E.U. in the Treaty of Rome. The Treaty of Rome signed in 1958 —which contains the key elements of European integration— included a brief but powerful reference to trade in services. The original article 59 (now article 49) prohibits restrictions on freedom to provide services within the Community in respect of nationals of Member States who are established in a state of the Community other than that of the person for whom the services are intended. Article 60 (now 50) stated that "the person providing a service may, in order to do so, temporarily pursue his activity in the state where the service is provided, under the same conditions as is imposed by that state on its own nationals". Services supplied on a permanent basis are governed by the provisions on "right of establishment" set forth in article 52 (now 43) of the Treaty of Rome, this provision prohibits restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State. Such prohibition shall also apply to restrictions on the setting up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any other Member State (Sáez, 2005).

11 According to the definitions in the Agreement, measure means any measure adopted by a member, whether it is in the form of a law, regulation, rule, procedure, decision, administrative action or any other form. They mean measures taken by: (i) central, regional or local governments and authorities and (ii) non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities.

12 Services include any service in any sector except services supplied in the exercise of governmental authority. A service supplied in the exercise of governmental authority means any service supplied on neither a commercial basis nor in competition with one or more service suppliers.

Under the GATS, two important qualifications are established. The first states expressly that this commitment does not oblige Members to compensate for differences originating in the foreign character of the supplier. The second is that it recognises that there may be a "formally different" treatment. For example, that the foreign supplier of services may be subject, to "additional" requirements, to which nationals are not. However, those must not entail in practice any advantage in favour of the national services providers.

Four "modes of supply" are defined, whereby services may be delivered (table 3). Modes of supply capture the specific characteristics of trade in services and show that it can be conducted by different means, depending on the type of services. As can be seen, often for a single service activity, all four modes can take place simultaneously.

The agreement also contains provisions aimed at assuring that trade in services is regulated in a transparent and predictable manner. Minimum operation rules are defined to prevent the proliferation of measures that may nullify or impair negotiated concessions or restrict trade. For this reason, the agreement includes obligations on transparency, by establishing that any measures affecting trade in services must be public. Similarly, it contains provisions on domestic regulation that consider minimum criteria to ensure that regulations governing domestic policy —e.g., service quality, licensing requirements, and authorisation procedures— do not constitute unnecessary barriers to trade in services.

Table 3
MODES OF SUPPLY AND THE GATS

Presence of supplier in the territory of Member	Other criteria	Mode
Not present	**Service supplied:** • In territory of one Member from the territory of any other Member. • To a consumer of Member outside his territory, in the territory of any other Member.	Cross-border supply Consumption abroad
Present	**Service supplied in territory of:** • One Member, through commercial presence of supplier of other Member. • In territory of Member and supplier from other Member is present in the form of a natural person.	Commercial presence Movement of natural person

Source: WTO S/L/92 (28 March 2001).

In addition, the GATS contains provisions regarding restrictive business practices and monopoly and exclusive services suppliers, that refer to measures that (public or private) services providers may adopt in a manner that restricts or affects the ability of other suppliers to provide a service and compete in the market, in particular in a manner inconsistent with that Member's obligations under the most favoured nation clause and specific commitments obligations assumed.

To promote trade facilitation, Members may recognise the education or experience obtained, requirements met, or licenses or certifications granted in a particular country. These deal with mutual recognition of qualification certificates in general, including professional services.

In terms of market access, the types of barriers that affect trade in services are defined by the agreement. GATS Article XVI contains an exhaustive list of measures that were considered to constitute market access barriers during the Uruguay Round negotiations.

To ensure that services and services providers are treated no less favourably than domestic services and services suppliers, Members adopted a national treatment clause that captures the jurisprudence developed by the GATT in 1947.

Regarding the scheduling of commitments, GATS follows a mixed method. For the application of the MFN clause, scheduling follows a negative-list approach. This means that said clause applies to all services, except for those sectors identified in a list of exemptions negotiated during the UR.[13]

Table 4

SCHEDULE OF GATS COMMITMENTS

Sector	**Market access Article XVI**	**National treatment Article XVII**	**Additional commitments Article XVIII**
Supply	**Restriction**	**Definition**	**Measure**
Cross-border Consumption abroad Commercial presence Movement of natural person	• Limitations on the number of service suppliers, monopolies, or exclusive service suppliers; • Limitations on the total value of assets or service transactions; • Limitations on the total number of service operations or on the total quantity of service output; • Limitations on the total number of natural persons that may be employed in a particular service sector; • Measures which restrict or require specific types of legal entity through which a service supplier may supply a service; and • Limitations on the participation of foreign capital.	Subject to any conditions and exceptions set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.	Measures affecting trade in services not subject to scheduling under articles XVI or XVII, including those regarding qualifications, standards or licensing matters. Such commitments shall be inscribed in a Member's schedule.

Source: Sáez (1999).

In contrast, specific commitments regarding market access and national treatment are based on a positive-list approach (table 4). In other words, market access and national treatment commitments are undertaken only in those sectors that are specifically scheduled, and under the terms and conditions set therein. Also, the GATS permits the scheduling of commitments with respect to each of the modes of supply separately. But once a sector is included in a Member's schedule and the terms and conditions of market access and national treatment are defined, for each mode of supply, measures not listed must comply with the overall obligations under GATS provisions and the member's schedule of commitments.

The main advantage of this approach is that when making a commitment, its depth and quality can be regulated in function of concessions granted by other countries. It also grants —theoretically— greater security, in that each country undertakes only what is specifically scheduled in the list.

[13] Exemptions may also be negotiated during accessions.

The GATS contains a number of annexes to address specific issues relevant for certain sectors for example, movement on natural persons, basic telecommunications, financial services.[14] In this latter sector, however, as in others, restrictions to cross-border supply of services and consumption abroad may be particularly significant from a commercial standpoint. And frequently they are warranted to ensure the system's stability and integrity, as well as to protect investors, depositors, policy-holders or persons to whom a fiduciary duty is owed by a financial service supplier. The supply of these services is governed by a set of "prudential" regulations, oriented at preventing moral hazard problems inherently associated to this sector's activities (e.g., risk overexposure, existence of implicit or explicit insurance). These provisions in the annex regarding "prudential measures" have been generally construed as a broad exclusion of this type of measures from the GATS regulations.

Table 5
TRADE IN SERVICES IN THE AMERICAS

Agreement	Model
Andean Community	GATS
Canada-Chile	NAFTA
Central America-Chile	NAFTA
Central America-Canada	NAFTA
Chile-El Salvador	NAFTA
Chile-Mexico	NAFTA
DR-CAFTA	NAFTA
EC-Chile	GATS
EC-Mexico	GATS
EFTA-Chile	GATS
EFTA-Mexico	GATS
Japan-Mexico	NAFTA
MERCOSUR	GATS
NAFTA	
Republic of Korea-Chile	NAFTA
United States-Chile	NAFTA

Source: Based on WTO Data and www.sice.oas.org (model classification is ours).

B. Trade in services in the NAFTA-type agreements

According to WTO data, there are 31 free trade agreements notified under Article V (economic integration) of the GATS. Among them, 12 are agreements signed by Western Hemisphere countries, not including MERCOSUR and the Andean Community of Nations (CAN). Table 5 contains a list of the agreements notified to the WTO and included in the Organization of American States database, classified by the model used. It is interesting to notice that among Latin American countries, except for MERCOSUR and the CAN, the most frequently used model is the

[14] Four instances of public sector intervention in financial services have been identified, indicating the ones that are relevant for the WTO (1997). In the first place, macroeconomic policies, although they may affect trade in financial services, are totally out of the scope of the GATS. A second range of public policies that affect trade in financial services are prudential regulations. On this matter, the WTO states that it is not necessary to include prudential measures in the member-specific commitment schedules, because they are not considered barriers to market access or to national treatment. A third category refers to regulatory measures that are not prudential; these measures need not be scheduled unless they represent a barrier to market access or national treatment. And the fourth level of policies includes, among others, limitations on foreign participation in the domestic market. Here, the reduction and elimination of such measures is at the core of the trade liberalization efforts of the GATS.

NAFTA (Sáez, 2004). In the near future, if negotiations are concluded, three CAN members, i.e. Colombia, Ecuador and Peru, will sign a free trade agreement with the U.S. under the same model. Agreements that follow the GATS approach are MERCOSUR, CAN and the agreements signed by EFTA and the EC with Chile and Mexico.

Trade in services in the NAFTA-type model (NM) is ruled by different chapters of the agreement. In fact, in order to better understand its set of rules, it is necessary to analyse a number of chapters, representing the different elements that affect trade in services. The agreement's architecture for trade in services combines provisions contained in the NAFTA, incorporating some GATS rules, and gathering the experience gained over time since the entry into force of these two agreements and the new issues that emerged in the past ten years.

There are three main differences between GATS/WTO and NAFTA type agreements, mainly concerning the structure of the disciplines, the substantive rules and the scheduling of commitments (table 6). In NM, the services disciplines are included in different chapters: cross-border trade in services, investments, financial services, movement of businesspersons, and telecommunications (dealing, with value-added services mainly).

In the NAFTA-Type agreements, the investment chapter regulates services provided by means of a commercial presence. On the other hand, the cross-border trade in services chapter governs cross-border supply, consumption abroad and the temporary movement of natural persons. Regarding the rules on temporary movement of business people, the corresponding chapter deals with the procedural terms and conditions, as well as with general formalities to be complied with by a natural person that falls within one of the four categories of businesspersons (business visitors, traders and investors, intra-company transferees, and professionals). Although a similar chapter was included in the U.S.-Chile bilateral agreements, this issue was not included in the DR-CAFTA. The chapter follows a "positive list" approach because it defines the category of persons who may apply for the procedures included in the chapter. The NM contains two additional and relevant chapters dealing with trade in services: the telecommunications chapter supplements the provisions of both the investment and cross-border trade in services chapters[15]. Finally, the chapter on financial services deals with disciplines applicable to this sector[16].

The GATS[17] is a self-contained agreement[18] —with rules applicable to all services— and additional rules included in annexes for certain services/issues. In particular, the annex on most-favoured nation exemptions; on movement of natural persons supplying services; on air transport services; on financial services and on telecommunications.[19]

Regarding disciplines, the NM and GATS have differences in their treatment and in some cases in their substance (table 6). In terms of rules, the main differences between the two agreements are related to market access, domestic regulations' provisions, which are not included in the NAFTA, and local presence, performance requirements, and senior management's obligations that are part of NAFTA but are not specifically addressed in GATS.[20] Although other provisions are common to both agreements, this does not mean that they are similar in scope.

15 There is no specification of what modes of supply the chapter applies to.

16 The relationship between other provisions of the agreement and trade in services and investment provisions has not been tested yet.

17 An extensive discussion on GATS and its operation can be found in WTO (2001) .

18 Not in a legal sense, but regarding the applicable disciplines, the GATS is part of the WTO.

19 Other annexes to the GATS refer to sectoral negotiations.

20 Due to the scope of both GATS and NAFTA services provisions, the fact that some aspects are not specifically addressed does not necessarily mean that they are excluded; but this is something that will be clarified over time through dispute settlement or further elaboration of the provisions.

Table 6

PROVISIONS DEALING WITH TRADE IN SERVICES: NAFTA-TYPE AGREEMENTS

Cross-border trade in services *Scope and coverage (modes of supply)*	**NAFTA** *(1); (2); (4)*	**Scheduling**	**GATS** *(1); (2); (3); (4)*	**Scheduling**	**DR-CAFTA** *(1); (2); (4)*	**Scheduling**	**U.S.-Chile** *(1); (2); (4)*	**Scheduling**
MFN	Article 1203	Negative	Article II	Negative	Article 11.3	Negative	Article 11.3	Negative
National treatment	Article 1202	Negative	Article XVII	Positive	Article 11.2	Negative	Article 11.2	Negative
Market access	Not included	n.a.	Article XVI	Positive	Article 11.4	Positive	Article 11.4	Positive
Standard of treatment	Article 1204	n.a.	Not included	n.a.	Not included	n.a.	Not included	n.a.
Local presence	Article 1205	Negative	Not included	n.a.	Article 11.5	Negative	Article 11.5	Negative
Quantitative restrictions	Article 1207			Positive	n.a.	n.a.	n.a.	n.a.
Liberalisation of non-discriminatory measures	Article 1208	n.a.	Not Included	n.a.	n.a.	n.a.	n.a.	n.a.
Transparency		n.a.	Article III [b]	n.a.	Article 11.6	n.a.	Article 11.6	n.a.
Transfers		n.a.	Article XI		Article 11.10	n.a.	---	n.a.
Domestic regulations	Article 1210[a]	n.a.	Article VI	Article XVIII[c]	Article 11.8	n.a.	Article 11.8	n.a.
Mutual recognition	Article 1210	n.a.	Article VII	n.a.	Article 11.9	n.a.	Article 11.9	n.a.
Investment provisions – *Scope and coverage*								
MFN	Article 1103	Negative	n.a.	n.a.	Article 10.4	Negative	Article 10.3	Negative
National treatment	Article 1102	Negative	n.a.	n.a.	Article 10.3	Negative	Article 10.2	Negative
Minimum standard of treatment	Articles 1104-1105	Negative	n.a.	n.a.	Article 10.5	Negative	Article 10.4	Negative
Performance requirements	Article 1106	Negative	n.a.	n.a.	Article 10.9	Negative	Article 10.5	Negative
Senior management	Article 1107	Negative	n.a.		Article 10.10			Negative
Transfers	Article 1109	n.a.			Article 10.8			n.a.
Business persons	Chapter	Positive	Positive		Not included		Chapter	Positive
Specific sectors								
Financial services	Chapter	Negative	Annex and V Protocol		Chapter	Negative	Chapter	Negative
Basic telecommunications	Not included	n.a.	Annex and IV Protocol		Chapter	Additional rules	Chapter	Additional rules
Professional services	Annex 1205	Positive	Work program		Annex 11.9		Annex 11.9	Positive

Source: based on agreement provisions.

[a] Only licensing requirements.
[b] Also other provisions.
[c] Positive.
n.a.: not available.

The third aspect refers basically to the extent that the obligations accorded to specific sectors or services activities apply. In the case of NAFTA, a negative-list approach is adopted, meaning that all the provisions of the agreement are applicable, except where specifically scheduled to the contrary in the respective annexes and under the terms, conditions and limitations thereunder.[21] On the other hand, the GATS follows a hybrid approach. With regards to MFN obligation, a negative-list approach is followed, but regarding national treatment and market access commitments it takes a positive-list approach, meaning that these basics rules are applicable to the sectors and activities contained in each member's list of commitments and under the terms, conditions and limitations thereunder. One important additional aspect is that certain provisions are applicable to the extent that a sector is listed in a Member's schedule.

A major difference between the two agreements concerns the scheduling of commitments and their evolution over time. The NM includes a "ratcheting" provision that contemplates that whenever a country modifies a scheduled non-conforming measure by reducing its degree of non-conformity, this change is immediately frozen and represents the new level of commitment. No such provision exists in a GATS/WTO type of agreement (see Prieto and Stephenson, 1999).

C. U.S. trade in services negotiations in the Americas: the case of U.S.-Chile and DR-CAFTA

In 2004, the Chile U.S. FTA entered into force and in 2006 the DR-CAFTA agreement will follow. Currently, the U.S. has concluded an FTA with Peru and is negotiating an FTA with two other members of the Andean Community (Colombia and Ecuador). These agreements have followed the NM, but important differences exist. Table 6 compares the services provisions in post-NAFTA negotiations in the Americas. When analyzing the main rules of the FTA signed by the United States in trade in services, several similarities and differences are observed. These are explained, mainly by:

(i) Differences in trade relations between the trading partners. In fact, NAFTA reflects the closer and deeper trade and economic relationship between its members;

(ii) Participants' level of liberalisation at the time of negotiating the agreement. For instance, none of the original NAFTA members was able to engage in negotiations in the basic telecommunication sector when the agreement was originally negotiated. And in the financial sector, the particular situation of Mexico was specifically addressed;

(iii) The GATS' entry into force is also a relevant factor in explaining the differences observed. The experience gained since the entry into force of the investments and services provisions, was incorporated, for instance, regarding the dispute settlement provisions of the investment chapter; and

(iv) Finally, the domestic political context in the U.S. has evolved against the NAFTA template, explaining that certain issues have not been included. For example, a chapter on movement of business persons.

The agreements negotiated by the U.S. with Chile and DR-CAFTA, are based on NAFTA disciplines, but do not incorporate all NAFTA disciplines, and also differences exist between U.S.-

[21] In the NM, the first annex includes those sectors and measures that are not in conformity with key obligations contained in the NAFTA. Specifically, those obligations are MFN, national treatment, performance requirements, local presence, and senior management. The rest of the disciplines must be fulfilled by all the sectors. The second annex contains services sectors or activities, as well as measures where no commitments are assumed regarding the same set of disciplines described above. Annex III contains all commitments in the financial services sector.

Chile and DR-CAFTA.[22] In terms of coverage, the chapters cover all services activities, except for air transportation, and subsidies measures. Financial services, telecommunications and government procurement are address in specific chapters.

Regarding the differences with NAFTA, U.S.-Chile and DR-CAFTA include rules governing quantitative restrictions; disciplines on regulations and mutual recognition based on GATS. For the former, disciplines on market access were included to ensure the operations of services providers, whereas in the latter no elaborated discipline on domestic regulations and trade facilitation (mutual recognition) —that are key to reduce the costs to enter market for services providers once market access and national treatment limitations are eliminated— was included. The investment chapter does not include market access disciplines.

As for differences between the provisions in DR-CAFTA and Chile-U.S., in the case of investments, the DR-CAFTA agreement does not include provisions dealing with disputes arising from restrictive measures with regards to payments and transfers, as were negotiated by Chile.

Though the services chapters are very similar, differences are related mainly with the measures included in the respective annexes and with future work of foreign legal consultants and civil engineers, an issue not included in DR-CAFTA.

The DR-CAFTA agreement does not include a chapter addressing competition policy issues. Finally, no chapter on movement of business persons is included in the DR-CAFTA, but the cross-border trade in services chapter includes the supply of a service "by a national of a Party".[23]

1. Financial services provisions[24]

Financial services negotiations were particularly important because of the issues involved and this sector's features. In both cases, the text is a mix of NAFTA financial services chapters, GATS obligations, and specific industry interest.[25] The national treatment provision negotiated with Chile and DR-CAFTA is different than in NAFTA, as the obligation is of general character and does not specify treatments at the sub-federal level. However, when scheduling its specific commitments in the financial services sector, the U.S. defined national treatment upon the foreign bank's 'home state' in the United States, as that term is defined under the International Banking Act, where that Act is applicable. A domestic bank subsidiary of a foreign firm will have its own 'home state', and national treatment will be provided based upon the subsidiary's home state, as determined under applicable law and also under other specified non-conforming measures, including some at the sub-federal level.

With regard to the insurance sector, national treatment will be provided according to a non-U,S. insurance financial institution's state of domicile, where applicable, in the United States. In relation to the most favoured nation clause, there are no substantial changes with respect of what was agreed in NAFTA.

A significant modification with regard to NAFTA is the inclusion in both agreements of a "market access for financial institutions" article, similar to article XVI of GATS. However, in the cases of U.S.-Chile and DR-CAFTA, limitations on foreign ownership were not included as a market access restriction. The scheduling of commitments approach followed in the U.S.-Chile and DR-CAFTA, are different for the banking sector for this provision. In the former, in lieu of the

[22] An in-depth comparative analysis of the CAFTA and U.S. Chile Agreement can be found in http://www.sice.oas.org/tpcstudies/

[23] Also there was an exchange of side letters between DR-CAFTA nations stating that no "provision of the Agreement shall be construed to impose any obligation on a Party regarding its immigration measures"; see www.ustr.gov/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts, "Understanding Regarding Immigration Measures", August 5, 2004,

[24] See Sáez & Sáez (2005).

[25] For an analysis of GATS and financial services, see the works by Claessens and Jansen (2000) and Dobson and Jacquet (1998).

market access article, there is the general commitment that each Party shall permit an investor of the other Party that does not own or control a financial institution to establish a financial institution under the domestic law without imposing numerical restrictions, and for an investor that owns or controls a financial institution in the Party's territory to establish in that territory such additional financial institutions as may be necessary to permit the supply of the full range of financial services allowed under the domestic law of the Party at the time of establishment of the additional financial institutions. Furthermore, the right of establishment includes the acquisition of existing entities. In addition, neither party "may restrict or require specific types of juridical form with respect to the initial financial institution that the investor seeks to establish, but may impose terms and conditions on establishment of additional financial institutions and determine the institutional and juridical form through which particular permitted financial services or activities are supplied."

In the case of DR-CAFTA, the provisions on market access for financial institutions were maintained and non-conforming measures were addressed in the respective annex.

DR-CAFTA financial services chapter includes an article dealing with domestic regulation that states that except "with respect to non-conforming measures listed in its Schedule to Annex III, each Party shall ensure that all measures of general application to which this chapter applies are administered in a reasonable, objective and impartial manner." This provision is similar to GATS Article VI standards for domestic regulations and was not included in the U.S.-Chile agreement.

In relation to cross-border trade, including in this category "consumption abroad", both agreements contain two types of commitments. Regarding the insurance sector, commitments on cross-border insurance services are assumed for those risks related to maritime shipping and commercial aviation and space launching and freight (including satellites), with such insurance to cover any or all of the following: goods being transported, the vehicle transporting the goods, and any liability arising therefrom; and goods in international transit; reinsurance and retrocession, services auxiliary to insurance, and insurance intermediation such as brokerage and agency. Those commitments are similar to the commitments contained in the WTO's Understanding on Commitments on Financial Services.

Regarding cross-border provision of banking services and other financial services, commitments apply to the supply or transfer of financial data and financial data processing; advising services and other auxiliary services, excluding brokerage for banking services and other financial services. NAFTA includes, in addition, a stand-still obligation.

As for consumption abroad (considered as part of the cross-border trade in services), commitments allow persons (natural or legal) to acquire services in the other country. However, it is not meant to be an authorisation to conduct or "solicit" business. This is without prejudice of prudential measures that could be required, such as the registration of cross-border providers of financial services.[26]

In relation to "new financial services", the possibility to provide this kind of services was included, but certain innovations were negotiated *vis à vis* NAFTA. In particular, to safeguard the role of both the regulator and the Congress when amendments to the domestic legislation are required. At the same time, the regulator's right to reject is limited exclusively on prudential grounds.

Concerning "senior management and boards of directors", commitments assumed are similar to NAFTA standards, in particular to ensure that financial institutions are not required to engage individuals of a certain nationality, nor that more than a minority of the board of directors of a

[26] Unlike NAFTA, the possibility to examine future liberalization of the financial services provision is not considered, although there is no impediment to incorporate it in future bilateral negotiations.

financial institution be composed of "nationals of the Party, persons residing in the territory of the Party, or a combination thereof."[27]

Provisions dealing with exceptions, as in NAFTA and GATS, are oriented to safeguard the management of the monetary and exchange-rate policies, the financial system's stability and protection to investors, depositors, policy holders or persons with whom a financial institution or cross-border supplier of financial services is indebted by means of a fiduciary obligation. Some GATS provisions are incorporated regarding these kinds of measures and commitments. In addition, some provisions on the enforcement of laws or regulations in general terms, including those relating to the prevention of deceptive and fraudulent practices, or dealing with the effects of a default on financial services contracts were also introduced.

Provisions on transparency are similar to NAFTA's and are intended to prevent that by means of certain practices of regulators, the financial services supplier rights are limited or impaired. The chapter contains some provisions to safeguard the services suppliers' rights when self-regulated entities exist or membership is required in order to be entitled to provide services, and provisions concerning the access to payment and compensation systems. Many of these provisions are based on NAFTA and the WTO's Understanding on Commitments on Financial Services.

Finally, in relation to dispute resolution, both the consultation procedure and the development of the dispute itself, including the provisions on investor-State disputes, when associated to the chapter's exceptions, are modelled under and similar to the ones contained in NAFTA.

The "right of establishment" in NAFTA, whose nature is more general, and was very much influenced by discussions among the three countries during the NAFTA negotiations, is different in the U.S.-Chile FTA. In this case, as was mentioned above, there are more developed rules that apply to the banking and securities sectors in lieu of the market access obligations. In the case of DR-CAFTA, the are no articles dealing with right of establishment and the market access article applies in full to the banking and securities sectors under the terms and conditions established in the respective annex on financial services commitment. U.S. non-conforming measures scheduled under right of establishment in the banking and securities sectors in its bilateral agreement with Chile were included as market access non-conforming measures in DR-CAFTA.

In the agreements, Chile and Central American countries adopted regulatory changes by allowing the establishment of insurance companies through branches. In order to implement these modifications, countries agreed on different modalities and transition arrangements in order to give time to the industry to prepare for a more competitive scenario and for authorities to pass new legislation when required.

As usual, when negotiating services and investment liberalisation commitments, rules are very demanding and regularly no country can fully comply with them. Table 7 presents a comparative summary of the type of reservations adopted by each country in the financial services sector.[28] As was mentioned, countries may negotiate terms and conditions to be applied to their commitments, regarding the so-called "non-conforming measures". There are two approaches to scheduling of commitments: positive and negative listing. Specifically for financial services, a hybrid approach was adopted. Banking services and the other financial services (except for insurance) a negative-list approach is followed, except for commitment regarding market access in

[27] These commitments are less ambitious than those contained in the "Understanding on Commitments on Financial Services" negotiated during the Uruguay Round.

[28] In this case, it is possible to present a comparative analysis of the type of commitment assumed. In the case of the other services activities reservations apply to different type of sectors and it is not possible to present the main differences.

the case of the U.S.-Chile agreement. For commitment on market access for insurance services, a positive-list approach was adopted under DR-CAFTA.

Table 7
NON-CONFORMING MEASURES IN FINANCIAL SERVICES ANNEX

	MFN		National treatment		Senior management		Market access		Right of establishment		Cross-border trade	
	B	I	B	I	B	I	B	I	B	I	B	I
Chile	3	3	0	0	1	2	0	1	23	0	1	0
Costa Rica	4	0	0	0	0	0	2	3	n.a.	n.a.	1	0
Dominican Republic	0	1	0	1	0	0	4	1	n.a.	n.a.	0	0
El Salvador	5	1	5	1	2	0	5	1	n.a.	n.a.	2	0
Guatemala	2	1	0	0	0	0	2	1	n.a.	n.a.	1	1
Honduras	2	1	1	0	0	0	6	0	n.a.	n.a.	1	0
Nicaragua	2	0	0	0	1	1	3	1	n.a.	n.a.	4	1
U.S.-Chile [a]	8	3	3	1	1	1	0	1	12	0	0	3
U.S.-CAFTA [b]	7	2	3	0	1	0	8	1	n.a.	n.a.	1	2
U.S.-NAFTA [c]	3	0	7	1	2	0	n.a.	n.a.	n.a.	n.a.	2	1

Source: www.sice.oas.org/tpcstudies

[a] U.S.-Chile: corresponds to U.S. commitment, market access restrictions in the banking and securities sectors were scheduled under right of establishment provisions.

[b] U.S.-DR-CAFTA: corresponds to U.S. commitment, in this case there are no provisions on right of establishment and restrictions included in U.S.-Chile Agreement under ROE were scheduled as market access restrictions.

[c] U.S.-NAFTA: corresponds to U.S. commitment, in this case there are no principles on right of establishment subject to future review non-conforming measures were not scheduled. In this case no market access provisions were included.

B: Banking and securities services.
I: Insurance services.
n.a.: not available.

2. Telecommunications sector

The telecommunications chapter supplements the provisions of both the investment and cross-border trade in services chapters, incorporating what could be considered as "additional commitments." In fact, obligations under this chapter refer to measures[29] to ensure that access conditions, operation of telecommunications services providers and national treatment provisions of the agreement are not nullified or impaired by anti-competitive behaviour of dominant services providers.[30] Additionally, there are provisions aimed at ensuring transparency and non-discrimination of governmental regulations. Likewise, it defines minimum requirements to be incorporated in the regulations that affect the telecommunications sector, particularly regarding interconnection, universal services, regulatory body, licensing procedures, allocation and use of scarce resources. Several of these topics incorporated therein, as well as their treatment, follow the lines of the so-called "Reference Paper" agreed at the telecommunications negotiations concluded at the WTO in 1997, but are much more prescriptive.

[29] This chapter deals with measures associated to access to, and use of, any public telecommunications network or service, or interconnection, and imposes obligations concerning the major suppliers of public telecommunications and information services.

[30] The main purpose of this chapter is to introduce detailed provisions to ensure that the major/dominant telecommunications services provider does not abuse its position. It establishes specific rules and disciplines applicable to major suppliers of telecommunications services.

The telecommunications chapter reflects the industry's interest to ensure, by means of specific rules, general conditions of access to, use of, and interconnection to basic facilities necessary to provide telecommunications services, including value-added and enhanced services. This chapter is based on NAFTA rules, the GATS' annex on telecommunications services, and the Reference Paper negotiated under the WTO framework in 1997 (see Hufbauer & Wada, 1997, and Sáez, 1999) .[31]

In the case of DR-CAFTA, this chapter includes an annex specifically dealing with Costa Rica's liberalisation commitments, one of the most politically sensitive issues that this country had to address during the negotiations.

3. Other provisions

Finally, regarding other provisions that affect the right of the parties to adopt measures under certain circumstances, the U.S.-Chile and DR-CAFTA countries agreed not to apply restrictions on investment and services to safeguard the balance of payments.

D. E.U. trade in services agreements with Chile and Mexico

Trade in services matters do not fall exclusively under the competence of the European Commision,[32] because it goes beyond Articles 113 (133) and 238 of the Treaty that provides treaty-making powers to the Community. This means that when implementing the services provisions and obligations of an agreement, the results of the negotiations must be approved by each Member State in accordance with its domestic laws. In contrast, the trade in goods results and provisions of a trade agreement are approved and implemented by the Council.[33] In services negotiations, the E.U. has not followed a single approach. In general, negotiations with developing countries have left the services negotiations pending, with the exceptions of the Association's agreements with Chile, Jordan and Mexico.

In this section we examine the differences between the services provisions negotiated by the E.U. and Chile and the E.U. and Mexico (see table 8). Although both agreements borrow the definition of trade in services from GATS, they are drafted differently in terms of sectoral coverage. Both exclude subsidies, audio-visual services and maritime cabotage, GATS excludes *a priori* only air transportation services and services supplied in the exercise of governmental authority. Financial services, maritime and government procurement are treated separately. The services provisions of the agreement cover less issues than the GATS, but the core aspects of trade in services liberalisation are included. The relationship between different provisions of the overall agreement and services disciplines will be determined over time.

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[31] However, it is worthy to note that some matters included in NAFTA and associated to technical barriers to trade and cooperation, were not included in the Chile-USA FTA. Likewise, NAFTA provisions accepted cross-subsidization practices that were later addressed at the WTO as anti-competitive practices and again during the Chile-USA bilateral negotiations.

[32] E.U. law regarding international agreements with non-E.U. members can be classified into three broad categories: a) Community acting alone and negotiating a trade agreement with a non-member state when the content of the negotiation falls wholly within the competence of the Community. This is the case of trade in goods agreements; b) agreements with shared competence, where the Community and its Member states act together, this is the case of trade in services provisions or intellectual property rights agreements; and c) agreements where Member states act alone, for example, in the context of bilateral investment treaties and/or double taxation agreements. A complete discussion on the development of the law, both through the relevant Treaty Articles and the EC jurisprudence can be reviewed in Hartley (1998), A. Arnull, A. Dashwood, M. Ross & D. Wyatt (2000) and N. Moussis (2001).

[33] This classification is the result of combining Treaty provisions, in particular the E.U. Treaty Article 113 (133) dealing with commercial agreements and Article 238 (310) on association agreements, with jurisprudence developed through time by the European Court of Justice when addressing specific case law. Negotiations are conducted by the Commission after the Council has granted appropriate authorization, but the terms and conditions for conducting negotiations are laid down by the Council. When negotiating trade in services agreements, the Commission has a smaller range of options because it is not only subjected to Council directives and approval, but it also has to take into account other possible aspects, in particular country-specific concerns and interests.

Definitions are different in both agreements. Chile-E.U. follows the GATS framework and terminology closer. The Mexico-E.U. agreement provides for MFN treatment, except in the case of economic integration. Chile-E.U. does not include such type of obligation. Both agreements contain market access and national treatment disciplines modelled under the GATS.

The Mexico-E.U. agreement contains a "stand-still" obligation similar to Art. V.1.b.ii of the GATS, and establishes a three-year period to incorporate each party's list of commitments, including a phase-out period of ten years to reach the level of liberalisation agreed between them. The three-year period elapsed in January 2005 and the agreement still does not include commitments except on financial services, but negotiations are under way.

On the other hand, the Chile-E.U. agreement provides for a review every three years to further deepen liberalisation and reduce or eliminate remaining restrictions. Also this agreement includes a specific article on movement of natural persons intended to achieve further liberalisation through a review process two years after the entry to force of the agreement.

Table 8

TRADE IN SERVICES UNDER THE E.U.'s BILATERAL AGREEMENTS WITH CHILE AND MEXICO

Obligations	Chile	Mexico
Coverage	GATS (-)	GATS (-)
Definitions	Closer to GATS	≠ GATS
Market access/national treatment	GATS	GATS
MFN	No MFN provision	MFN with exception for FTA
Trade liberalisation	Review clause	Liberalisation commitments
Regulations	GATS-type Art. 6 on domestic regulation	Carve-out provision
Mutual recognition	Included	Included
Maritime sector	GATS (+)	GATS (+)
Telecommunications	Yes	No
Financial services	GATS-type approach + understanding	Understanding on FS and some NAFTA provisions

Source: Based on Sáez (2005).

The Mexico-E.U. agreement contains a regulatory "carve-out" that confirms the right to regulate in so far as regulations do not discriminate. In the Chile-E.U. agreement, an article based on Article VI.4 on Domestic Regulation and Article VII of the GATS on Mutual Recognition was negotiated, but does not go beyond this agreement. Both texts contain provisions on mutual recognition but do not specify sectors or means to achieve them.

a) Maritime disciplines

Concerning specific disciplines for certain sectors, international maritime transport was addressed to ensure the effective application of the principle of unrestricted access to the international maritime market and traffic on a commercial and non-discriminatory basis. Also, treatment no less favourable than that accorded to its own ships was accorded with regard to, *inter alia*, access to ports, use of infrastructure and auxiliary maritime services of the ports, and related fees and charges, customs facilities and the assignment of berths and facilities for loading and unloading, is adopted. Furthermore, both agreements permit international maritime service suppliers to have a commercial presence in each country's territory under conditions of establishment and operation no less favourable than those accorded to its own service suppliers or those of any third country, whichever are the better.

In addition, in the particular case of Chile-E.U., the Parties shall not: (a) introduce cargo-sharing clauses in future bilateral agreements with third countries, other than in those exceptional circumstances where liner shipping companies from the Party concerned would not otherwise have an effective opportunity to ply for trade to and from the third country concerned; (b) prohibit cargo-sharing arrangements in future bilateral agreements concerning dry and liquid bulk trade; (c) abolish, upon the entry into force of the Agreement, all unilateral measures and administrative, technical and other barriers which could have restrictive or discriminatory effects on the free supply of services in international maritime transport.

b) Telecommunications disciplines

Regarding the telecommunications sector, the Mexico-E.U. agreement does not currently contain any specific obligations for this sector. This may be due to the facts that negotiations on specific commitments are still under way and this is probably a sector that will address more specific and developed disciplines to ensure effective market access and national treatment.

The Chile-E.U. agreement contains both specific disciplines for the sector and commitments on market access and national treatment. Regarding the former, Chile and the E.U. agreed to include similar issues that were covered by the WTO/GATS Reference Paper negotiated in 1997. Also, the substantive content of the obligations is very similar.

c) Financial services disciplines

Both agreements contain more disciplines on financial services than the GATS, but follow different approaches. Mexico-E.U. is a mix of disciplines from the Understanding on Commitments in Financial Services of the GATS and some NAFTA provisions. In contrast, Chile-E.U. contains a mix of disciplines from GATS and the Understanding of the GATS.

The scope of the chapter, the classification of financial services and the basic definitions in both agreements are based on the GATS Financial Services Annex, but each has a different definition for modes of supply. The E.U.–Mexico agreement merges modes 1 and 2, while commercial presence obligations are a combination of Article XVI of the GATS and the Understanding on Financial Services of the GATS. In this latter case, the obligation requires that each "Party shall allow the financial service suppliers of the other Party to establish a commercial presence in its territory". It also establishes that a party "may require a financial service supplier of the other Party to incorporate under its own law or impose terms and conditions on establishment that are consistent with the other provisions of the chapter on trade in services". Finally, for modes 1, 2, and 3 there is a standstill obligation.

Regarding the movement of natural persons (mode 4), the obligations are like those under NAFTA on the subject of key personnel, establishing that no Party may require a financial service supplier of the other Party to engage individuals of any particular nationality as senior managerial or other key personnel" and neither can they require "that more than a simple majority of the board of directors of a financial service supplier of the other Party be composed of nationals of the Party, persons residing in the territory of the Party, or a combination thereof."

Also, the E.U.-Mexico agreement adopted a NAFTA-type definition of national treatment and includes an MFN obligation except in the case of economic integration agreements.

On the other hand, the financial services chapter in the Chile-E.U. agreement is self-contained and follows GATS architecture, adopting the same definitions, scope of application and logic of interpretation for the agreement.

On specific commitments, both agreements follow a similar positive-list approach to the GATS', except in the case of the E.U. that follows the Understanding's negative-listing procedure.

In addition, the E.U.-Mexico agreement includes a standstill provision and a ratcheting obligation, similar to NAFTA's.

Both agreements include a carve-out for "reasonable measures" adopted for prudential reasons. In addition, the Mexico-E.U. agreement sets forth an obligation on the right to regulate "in so far as regulations do not discriminate against financial service or financial service suppliers of the other Party in comparison to its own like financial services and financial services suppliers," and include a necessity test,[34] to assess whether a measure is an unnecessary barrier to trade.

Regarding transparency, the provisions are very similar in both agreements and their aim is to ensure a minimum standard of best regulatory practice by providing in advance to all interested persons any measure of general application that the Party proposes to adopt in order to allow an opportunity for such persons to comment on the measure, and encourage the implementation of international recommendations on financial supervision and money laundering.

The E.U.-Mexico agreement follows very closely the NAFTA obligation on new financial services, ensuring that a financial institution may provide any new financial service of a type similar to those services that a Party permits its own financial service suppliers to provide under its domestic law in like circumstances. Also, it allows to "determine the juridical form through which the service may be provided and may require authorisation for the provision of the service," but in this latter case, a decision shall be made within reasonable time and may only be refused for prudential reasons. The agreement between Chile and the E.U. elaborates on the basis of NAFTA, but incorporating the positive-list approach and the legal framework of the Parties. Regarding the latter, the introduction of a new financial service is permitted as long as it does not require a new law or the modification of an existing law.

Last but not least, regarding dispute settlement, both agreements contain specific provisions when a dispute in this sector emerges. One of the aspects that the agreements ensure is that consultations shall include officials of the authorities responsible for the sector regulation. But there is no requirement for financial authorities participating in consultations "to disclose information or take any action that would interfere with individual regulatory, supervisory, administrative or enforcement matters". Furthermore, if there is a request of information for supervisory purposes, such information must be requested to the competent financial authority. In addition, the bilateral agreement between Chile and the E.U. establishes that the provision of such information may be subject to the terms, conditions and limitations contained in the other Party's relevant law or to the requirement of a prior agreement or arrangement between the respective financial authorities. Also, the necessary expertise on financial services matters of the arbitrators must be ensured.

[34] Under WTO law, a "necessity test" establishes the consistency of a measure with an agreement obligation based on whether the measure is "necessary to achieve a policy objective". This test determines that the measures that restrict trade are permissible only if they are necessary to achieve a policy objective. See WTO Analytical Index – Guide to WTO Law and Practice, March 2004.

III. Conclusions

The recently concluded free trade agreements in Latin America cover a wide range of goods, services and 'new trade' issues. In terms of services negotiations, the structure and text of any new bilateral agreement is strongly influenced by past and current negotiations and by emerging issues.

The Agreement's provisions on services negotiated between the United States and Latin American countries are largely inspired by the NAFTA approach as a general legal reference and in the way trade in services is addressed, but have also included provisions from GATS/WTO obligations and developments that have taken place since the entry into force of NAFTA, particularly in the telecommunications and financial services negotiations. Mainly the level of bilateral trade relations explains differences, the countries' degree of liberalisation at the moment of initiating negotiations and, as mentioned previously, the GATS entry into force. Although the agreements cover a wide range of services, financial and telecommunications services arise as the main targeted sectors. This is reflected in the detailed disciplines negotiated for these sectors and in the fact that these are the sectors where the main regulatory reform and liberalisation measures were undertaken. While, in other sectors, the freezing of the *status-quo* was the targeted outcome.

As for commitments, the results of the negotiations are similar to concessions exchanged in previous bilateral accords by all countries, but are broader and deeper than the commitment undertaken at the WTO in the case of Latin American countries.

The U.S. did not introduce any significant modification to its regulatory regime in the context of this negotiation but committed to maintain its current level of liberalisation.

In the European Union's negotiation with Chile and Mexico —the only Latin American countries that have concluded trade negotiations with the E.U.— a framework based on GATS was followed. Three sectors are perceived as priorities: financial services, telecommunications and international maritime transportation. Indeed, in the negotiations with both Chile and Mexico, these sectors were dealt with extensively and separately, although they did not follow a uniform model. In terms of disciplines, the Agreement with Chile followed closer the GATS provisions. The bilateral agreement with Mexico, on the other hand, contains a mix of disciplines that combines aspects of GATS and NAFTA, but except for the financial services sector, no specific commitments have been negotiated. In the case of maritime transport, specific disciplines have also been included to ensure the effective application of the principle of unrestrictive access to international markets and traffic. The development of these principles through the negotiated disciplines is very similar across the agreements analysed.

In the case of of those countries that have negotiated services chapters with the United States, after NAFTA entered into force, have benefited from the experience and the reservations introduced by each of the NAFTA members. In fact, in many cases some of the reservations introduced by non-NAFTA members in their negotiations with NAFTA members were "mirror reservations" that covered important sensitive issues, in particular social services, minority and aboriginal affairs, among others.

One of the main shortcomings of the results in the services negotiations, both with the United States and the European Union, is that they contemplate no additional disciplines to reduce regulatory burdens that affect services providers or a future calendar to reduce remaining barriers and tackle regulatory constraints. Nevertheless, the contractual nature of the agreements may provide —under the right political leadership— a framework to pursue further liberalisation.

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