REGIONAL TRADE AGREEMENTS AND THEIR IMPACT ON SERVICES TRADE

The General Context

Ten years after the entry into force of the World Trade Organization (WTO) and the suspicion that we continue to know uncomfortably little about the service sector lingers on. This is not to say that service industries around the world do not know their own plight and outlook. As is widely known, services were the object of a host of reforms in the last fifteen years, particularly in the developing world, ranging from privatization to full-fledged regulatory overhauls. The learning-by-doing curve has been bullish but policy-makers and regulators are still at it, trying to comprehend what happened and where to go next.

That lingering feeling perhaps is strongest in relation to the external implications of internal processes. Nowadays, countries are accountable at many a forum for their domestic actions. Trade negotiations abound of the sort that forces countries to think and act fast - or else lose their strategies, their policies and, unfortunately, their markets. Countries, even when already some distance down the learning path, continue to be unsure about how best to translate their domestic priorities at the negotiating table. To complicate things even further, the multilateral regime now has to co-habitate with regional initiatives. The trade in services regime had just been born with the Uruguay Round and already in the first round to follow faces tough choices imposed by the rise of a strong and dynamic regionalism.

To be sure, services liberalization across countries did not start with the Uruguay Round. Western Europe had already been at it for forty years, since the advent of the Treaty of Rome which laid down the free movement of persons, services and capital alongside that of goods as the crucial element in the conformation of an "Internal Market of the European Economic Community". Even the recourse to *regional free trade agreements*, as opposed to the much broader, supranational economy-wide European approach to services liberalization, predated the multilateral compact, as attested by CUSFTA (Canadian-U.S. Free Trade Agreement) - entered into force on 1st of January 1989. What is new in 2005, effectively, is that two universes now apply to services trade, the regional and the multilateral, when only fifteen years ago services, with the exception of the European Economic Communities, were fully free from any binding trade obligations *at virtually any level.*

Since CUSFTA, 26 services agreements have been notified to the WTO out of a total of 161, while the world possibly is in the process of negotiating at least another dozen at this very moment, including some involving more than 30 countries at once as the Free Trade Area of the Americas (FTAA). Since then, therefore, the regional and multilateral universes have expanded, albeit in a somewhat uncoordinated fashion, clearly guided by the precepts laid down in the services free trade agreements of the nineties. Even though the negotiation of "new generation" trade agreements that included trade in services coincided in large measure with the reform push of the nineties in many developing countries, it would be highly fallacious to correlate the two phenomena. The agreements did not promote any of the market openings that took place but merely, in some cases and to a very limited extent, reflected that opening in schedules of commitments. The typical practice so far has been for countries to bind less than their existing regulatory situation *even when that situation corresponds to an open market*.

As liberalization has been recent in many developing countries, many of them seek time and "policy space" to revisit, reevaluate and, perhaps, re-regulate. The translation of that for negotiating purposes is fairly clear for those that want to see it: caution in negotiating new commitments which includes, if necessary, a staunch reluctance to enter into new agreements.

A Tale of Two Models?

By the time the WTO came into force on 1st January 1995, the world was primed for trying its own hand at services free trade agreements. With the European experience as a useful but rather distant reference[1], there were two approaches to such agreements that carried the day. In the Gats, the world could see a broad-based agreement, inclusive of all services sectors and forms of commercialization, with varying degrees of flexibility in the application of its principles and the mechanics of liberalization. In the Nafta, it could see an equally broad based agreement, with a somewhat more complex structure for services activities, not inclusive of all services sectors but fairly ambitious from a market opening perspective, though also equipped with flexible rules and liberalization instruments. The choices were there and countries did indeed begin to pick and choose in the presence of their burgeoning regional drive.

Nowadays a cursory look at the complex web of regional and bilateral agreements indicates that the two initial models have been widely followed and, in some cases, somewhat "improved" - depending on the criterion adopted. In what follows below, a brief introduction to both models will be provided alongside an also introductory review of agreements that either borrowed or departed from them. A closer examination of the details of either model as they have been applied across the world will then be attempted in the section to follow.

Nafta

The negotiations for the conclusion of a North-American Free Trade Agreement" (Nafta) took place in the beginning of the nineties. Already in August 1992, the governments of Canada, Mexico and the United States would announce the conclusion of the negotiations for an agreement that, like its predecessor between Canada and the U.S., included provisions on trade in services in several of its chapters. Thus, Chapter XI dealt with Investment, Chapter XII with Cross-Border Trade in Services, Chapter XIII with Telecommunications, Chapter XIV with Financial Services and Chapter XVI with Temporary Entry of Business Persons. Other chapters, particularly the ones dealing with standards, government procurement, intellectual property and competition policy, monopolies and state enterprises, also incorporated references to services-related matters.

Not all chapters of Nafta, contrary to the belief of many, represent an inducement to free trade in services. In fact, whole service sectors have been excluded from the purview of the agreement, such as the air transport services, basic telecommunications and maritime transport services sectors. In some cases, provisions limit the scope of liberalization applied to a theme or issue, the best example of that being the movement of natural persons which is circumscribed to "business persons". Conversely, in other cases, the agreement went beyond its predecessor and included liberalization commitments for the land transport services sector (excluded in CUSFTA) alongside a number of annexes on the professions.

Gats

[1] Even though the EC Treaty and the evolution of services liberalization within the E.U. have done much to influence both the Gats and Nafta, its role as a *model* for the subsequent new generation of free trade agreements applying to services has been general at best. The most plausible reason for this is that no other region in the world approaches the social, economic, geographical, or historical features of the Old Continent and its integration process.

The General Agreement on Trade in Services (Gats), as the name reveals, is a general agreement like the Gatt. It came into force with the rest of the Uruguay Round Agreements on 1st January 1995 - when the World Trade Organization (WTO) itself came into force. It has 29 articles, divided into 6 parts, and 6 annexes of which 4 are of a sectoral nature (financial services, telecoms, air transport and maritime transport). The first *general* characteristic of the Gats is its universal coverage of sectors and modes of commercialization (or "modes of supply" as stated in the agreement itself). It is a binding arrangement among governments and not a mere best-endeavors compact. Most of its general features resemble those of the Gatt, such as: each member has a vote and can exit the agreement with a previous notice; there is a dispute settlement system applicable to all members; rules can only be altered subject to an overall consensus; all members accept as a package the results of the multilateral, plurilateral and bilateral negotiations.

Clearly, the Gats included some important adaptations to general Gatt law and practice. Thus, non-discrimination, in both of its manifestations – most-favored-nation and national treatment – apply to services *and* service suppliers (firms or people). Unlike the Gatt, a principle of market access was necessary to set parameters within which the concept could exist in relation to services. Even principles such as transparency had its own particularities vis-à-vis services: as the regulation is so vast for all service sectors combined, the agreement established the obligation for members to set up contact points where relevant information should be made available upon request. As with the Gatt, the notion of free trade agreements and economic integration is a matter of disciplines and Article V of the Gats, as its Gatt counterpart, Article XXIV, permits regional agreements but only under certain conditions: a substantial sectoral and modal coverage alongside a substantial absence or elimination of discriminatory measures.

Where Gats went fully beyond Gatt was in some key regulatory matters. An article on domestic regulation, for example, recognizes that countries have a threshold of regulation that will not be considered restrictive subject to certain conditions. Another article, on recognition, permits countries to recognize education, experience and certificates obtained in other countries for the supply of services, permitting also that such recognition take place unilaterally or *via* a bilateral agreement. Gats also delves into monopolies and exclusive service suppliers, business practices and security exceptions – all of which are more relevant for trade in services than in goods.

Hybrids and Originals

The influence of Nafta and the Gats was pervasive. No agreement could afford to disregard it as either a model or a reference. In the case of the Gats, additionally, countries do have to be more than mindful of its Article V obligations, particularly the commitment to a substantial sectoral coverage (both in terms of sectors and modes of supply) and to the absence or elimination of substantially all discrimination. There have been hybrids, however, which for the purposes of the present analysis refer to agreements that have combined elements of both Nafta and Gats in some aspects. There have also been "originals", which also for the purposes hereby set out refer to agreements that have added new, and not only combined existing, elements of relevance to trade in services.

Perhaps the most prominent hybrid RTA in services is the "General Framework of Principles and Rules and for Liberalizing the Trade in Services in the Andean Community" (henceforth, "the Andean Framework"), as set out in Decision 439 of July 11, 1998. As a first, the Andean Framework aims at the creation of an "Andean Common Market in Services", admittedly a much more ambitious objective than most existing agreements dealing with services which involves, in addition to the elimination of intra-zone barriers, the "harmonization of national policies in the sector".[2] Unlike Nafta,

[2]Andean Community, "General Framework of Principles and Rules and for Liberalizing the Trade in Services in

the Andean Framework does not exclude any sectors or modes of supply. Unlike the Gats, it incorporates the obligation of *status quo* or standstill whereby member countries commit not to establish new, or raise the level of non-conformity of existing, measures. Unlike the Nafta, this obligation, as all others, applies to all levels of government (central, provincial/state and local). There is no possibility of m.f.n. exemptions and a later Decision, the 510, entitled "Adoption of the Inventory of Measures Restricting the Trade in Services" of October 31, 2001, committed countries to draw up inventories of non-conforming measures – a clear negative listing instrument - and eliminate them by 2005. Even special and differential treatment is foreseen, under Decision 439, for Bolivia and Ecuador.[3]

EUROPE: THE ORIGINAL APPROACH

The most original approach of all is, of course, the one that came before all others: the European Communities with its almost fifty-year old regime construction unparalleled in depth or amplitude by any other arrangement. Alongside the free movement of persons, services and capital, "services-sensitive" concepts such as the freedom of establishment[4], the freedom to provide services[5] and the mutual recognition of qualifications[6] have been crucial to the development of a services regime within the Communities and the Union. These provisions have direct effect and Member States should in principle modify national laws that restrict these freedoms. As the guardian of the EC Treaty, the Commission is empowered to bring forward harmonization proposals as well as to commence infringement proceedings under Article 226 EC against a Member State whenever incompatibilities with Community law are found. Despite great progress in some areas, the perception is that the EC Treaty provides guarantees in theory, having not in many cases been tested in practice. Harmonization efforts and recourse to infringement proceedings are also deemed as insufficient for further progress. This is why a "Draft Directive on Services in the Internal Market" has been proposed as late as January 2004 and is still under discussion in the European Parliament and other European institutions.[7]

As to agreements that have adopted fully original approaches since the advent of Gats and Nafta, mention should be made of the so-called European Union Agreements, also known as the E.U. FTA's. These agreements, despite an overall predilection for Gats rules and principles, differ from Gats by going beyond trade to deal with concepts such as "cooperation" and "development". In the case of the E.U. FTA's with the "MED" countries (12 Mediterranean countries which since the Euro-Mediterranean Conference of November 1995, have been involved in talks on 'Association Agreements'), there are actually only shallow provisions on the liberalization of trade in services but a strong emphasis on economic cooperation on a number of service sectors. The "Trade, Development and Cooperation Agreement" with South Africa, in force since January 2000, is similar to the MED agreements in its immediate recourse to economic cooperation rather than liberalization commitments, with a particular focus on sectors as ICT, transport, tourism and financial services.[8]

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the Andean Community", Article 1.

[3] Andean Community, "General Framework....", Article 22.

[4] Article 43 of the Treaty of Rome.

[5] Article 49 of the Treaty of Rome.

[6] A December 1998 Directive of the Council of Ministers was supplemented and amplified by a second Directive in 1992.

[7] For a better understanding of the internal debate on the draft Directive, see Charlie McCreevy, European Commissioner for Internal Market and Services, Statement to the European Parliament on Services Directive, European Parliament Plenary Session Strasbourg, 8 March 2005.

[8] Trade, Development and Cooperation Agreement, E.U.-South Africa, Title IV.

Finally, the Asean Framework Agreement on Services (Afas) signed in December 1995, three years after the establishment of the Asean Free Trade Area (Afta), also constitutes a rather original compact on services trade. Alongside the expansion and deepening of commitments ("Gats-*plus*"), the framework calls for the enhancement of cooperation amongst member countries[9] singling out four items in that context: infrastructural facilities, joint production, marketing and purchasing arrangements, R&D and exchange of information.[10] The work on services is conducted by the Coordinating Committee on Services (CCS), one of 29 existing committees of senior officials. It should be noted, however, that services figure prominently, over and beyond the Afas, in broader integration projects such as the development of Trans-Asean transportation network consisting of major inter-state highway and railway networks, principal ports and sea lanes, the interoperability and interconnectivity of the national telecommunications equipment and services and the Trans-Asean energy networks, which consist of the Asean Power Grid and the Trans-Asean Gas Pipeline Projects are also being developed.[11]

Comparing the Comparable

In what follows, a detailed comparison will be attempted of the two main models of RTAs on services, in relation to a number of key aspects of the emerging regional regulatory regime. As will gradually become apparent, agreements tend to differ both in terms of the overall models followed as well as in terms of specific provisions or concepts modified from those models. Thus, if one takes the Gats as the initial reference, one can refer to agreements or parts of agreements as Gats-plus or Gats-minus, depending on the criterion adopted. For ease of reference, henceforth Nafta-based and Gats-based agreements will be referred to, respectively, as "NBAs" and "GBAs".

Definitions, Rules of Origin

Every RTA has a section on “definitions” where relevant terms are defined for the purposes of the agreement. As may be expected, these definitions tend to differ across agreements which in turn result in distinct approaches amongst them to matters as relevant as the scope, the structure and the mechanics of their provisions. In large measure, agreements “can afford” to take liberties with different definitions – for example, some variance in defining sectors, whenever applicable. There is a key aspect, however, where the text matters particularly a great deal: the rule of origin for services and services suppliers which defines those that can be granted or denied the benefits accruing from the liberalization process implicit in any agreement. In fact, a number of definitions comprise the rule or rules of origin of a particular agreement.

NBAs do not define “trade in services”, as do the Gats and GBAs. NBAs define “cross-border trade in services” to be something that corresponds to Gats’ three out of four modes of supply: cross-border supply proper, consumption abroad and the movement of natural persons.[12] In NBAs, commercial presence is included under a broad investment chapter that covers more than presence and more than

[9] Asean, Asean Framework Agreement on Services, Article I.
[10] Asean, Asean Framework Agreement on Services, Article II.
[11] In addition to trade and cooperation provisions in the Afas itself, services trade and investment are also part of an array of broader instruments such as the Asean Vision 2020 of 15 December 1997 and the Asean Concord II, also known as the Bali Concord II of 7 October 2003 which created an Asean Economic Community (Aec). The Aec calls for a single market and production base, with the free flow of goods, services, investment and labor; as to capital other than long-term invesment, the Aec seeks a "freer" flow and not full freedom.

[12] Nafta, art. 1213:2.

services: it is a chapter on both goods and services investment (and not just commercial presence). The broad definition of cross-border that includes the supply of services by "nationals" from one party in the territory of another party is then limited to the "temporary movement of business persons" which in NBAs has usually been the object of a specific chapter.

It is in that context, of modal definitions, that one can extract the relevant rules of origin. In the case of NBAs, the central definition that determines origin both for cross-border services trade as well as for investment in services is the one relating to "person". "Person" in NBAs usually refers to both natural persons and enterprises, and "person of one Party" refers to "a national or enterprise of a Party".[13] "National" is usually defined as a "natural person who is a citizen or permanent resident of a Party".

As to enterprises, NBAs define them according to the place of constitution and organization and not by reference to the nationality of ownership and control as does the Gats. This implies that any enterprise established in any of the member or parties of the agreement, whatever the origin of its ownership and control, is considered of a regional origin and entitled to the benefits from the agreement. One interesting aspect about NBAs, however, is that for purposes of the denial of benefits, firms that have third country ownership or control can be denied benefits but even then, only if the enterprise in question has "no substantial business activities" in the territory of any Party.[14]

Gats defines juridical persons of another member as persons that are owned or controlled by natural or juridical persons of that member. In the case of juridical persons, control means having "the power to name a majority of directors or legally direct its actions" while ownership refers to having over 50% of the equity interest.[15] In other words, in Gats and GBAs the tendency has been to be restrictive in defining beneficiary juridical persons or enterprises: it is not applicable to all those established in a member but only to those that have the right ownership and control situation (over 50% and majority of directors, etc.).

There are deviations, of course. The Mercosul's Montevideo Protocol, for example, is largely based on the Gats but adopts a much more liberal definition of juridical person for the purposes of intra-zone services trade. The Mercosul instrument also refers to "persons" but, in contrast to Nafta, opts for "juridical person" as opposed to "enterprises". All the same, the juridical persons do not have ownership or control limitations, sufficing for them to be established in one of the member States of Mercosul to be able to benefit from the benefits accruing from the agreement – in much the same way as in Nafta.

Scope and Coverage

All existing agreements tend to have a very broad definition of what is meant by "measures", normally extending at least to any "law, regulation, procedure, requirement or practice"[16] as in Nafta and NBAs. The Gats and GBAs normally add also the catch-all phrase "or any other form" to the definition which ensures that *a priori* absolutely no measure is outside the general purview of the agreement. Both types of agreements also include under "measures adopted or maintained" by a Party the notions of supply, purchase, payment, use or a service, the access to and use of publicly offered services and the presence of persons supplying services from the territory of one member in the territory of another member.[17]

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[13] Nafta, art. 201.
[14] Nafta, arts. 1113 and 1211.
[15] Gats, art. XXVIII(n)(i)-(ii).
[16] Nafta, art. 201.
[17] Nafta, art. 1201 and Gats, art. XXVIII:(c).

As to the scope of "measures by members", the GBAs tend to be broader since NBAs exclude measures taken by local governments (municipal level) from the application of national treatment, most-favored-nation and local presence.[18] Furthermore, NBAs do not even include a best endeavors clause such as Article I:3 of the Gats whereby members commit themselves to taking "such reasonable measures…to ensure their observance by regional and local governments". NBAs have a similar provision in the general objectives of the agreement but it only refers to "state and provincial governments" – and not "local" ones.[19]

All agreements have some reference to the exclusion of services supplied in the exercise of governmental functions as in Article I of the Gats. NBAs normally spell out the principal activities that would be excluded in that context as does Nafta itself.[20] In the special case of prudential measures taken by Central Banks and monetary authorities for systemic reasons, all agreements establish a carve-out, always by means of sectoral provisions relating to the financial services sector. No agreement has yet defined what these measures should be in their specific context.

There are also important sectoral exclusions at the regional level, usually of the same sort as the ones agreed at the Uruguay Round. Thus, the air transport services sector stands out also regionally as a sector that does "best" outside the realm of free trade agreements. Experiments such as Open Skies or other attempts at liberalization of the sector never find a corresponding place in the provisions of RTAs on services with one major exception: Mercosul's Montevideo Protocol on Trade in Services which includes in an annex provisions on the liberalization of sub-regional air services.[21] Another sector that has been excluded in some agreements is the cultural services sector. Nafta inherited the exclusion agreed in the Canada-U.S. FTA and made it applicable only to the two countries – and not Mexico. The bilateral Canada-Chile also excluded cultural services industries from the purview of the agreement.

It should be noted that a number of recent RTAs on services, particularly the ones negotiated bilaterally by the U.S. such as with Chile and Central America (Cafta)[22], have incorporated an important sectoral "inclusion": that of electronic commerce. These agreements have a specific article devoted to the matter which ensures that any measure relating to it is subject to the chapters on cross-border and financial services and the corresponding annexes of non-conforming measures. This is an important development since the treatment of electronic commerce has not been yet resolved at the multilateral level or other regional levels such as the FTAA – to cite an example.

Non-discrimination

All agreements cover both traditional notions of non-discrimination – same treatment as accorded to

[18] Nafta, arts. 1206 and 1108.
[19] Nafta, art. 105.
[20] Nafta, art. 1201:3 provides that nothing would prevent a party from providing the following: "a service or performing a function such as law enforcement, correctional services, income security or insurance, social security or insurance, social welfare, public education, public training, health, and child care".
[21] Mercosul, since 1996, had an agreement on sub-regional air services that liberalized the intra-zone traffic between sub-regional airports. When it was signed, in 1997, the Protocol incorporated that agreement into an annex, thus ensuring compliance and consistency between the two instruments (the Protocol itself and the sub-regional air services agreement).
[22] The U.S.-Jordan Agreement, in force since December 2001 already had a specific article devoted to electronic commerce which, among other things, reaffirmed the principles that had already been announced in a previous Joint Statement on Electronic Commerce.

national services and service suppliers (national treatment) and same treatment as that accorded to the most-favored trading nation (m.f.n.).

NBAs tend to adopt more limited definitions of national treatment – possibly due to the fact that Gats Article XVII already represented an improvement on the earlier Nafta version. GBAs, therefore, tend to include both the notion of treatment no less favorable than that accorded to national services and service suppliers but also the notions of treatment formally identical or formally different and the criterion that goes along with it: that whatever treatment is bestowed, it infringes the national treatment principle if it "modifies the conditions of competition" in favor of national services or suppliers.[23]

For cross-border purposes, Chapter XII, Nafta only deals with service "providers", not making any reference to services themselves. The more complete sort of treatment is reserved for the investment chapter where the no-less-favorable criterion is applied to both investors and investments. In any case, both the cross-border trade in services chapter as well as the investment chapter clarify the treatment among states or provinces. It is also interesting to note that the Gats criterion of modifying conditions of competition only finds a parallel in the national treatment provision of the financial services chapters of NBAs - even though it is coined there in terms of affording "equal competitive opportunities".

It should be noted that the apparent "shortcomings" of Nafta regarding the definition of cross-border national treatment, the criterion for its application and other aspects are still evident in very recently concluded agreements such as the U.S.-Chile (in force since 1st January 2004) or the U.S.-Australia agreements (in force since 1st January 2005). In the U.S.-Australia FTA, for example, the article on cross-border national treatment does not make any reference to services either (only to service suppliers) nor to the applicable treatment to states and/or provinces. As to the "equal competitive opportunities" criterion, it also remained applicable only to financial services – and not to cross-border trade in services or investments in both goods and services.

The other facet of non-discrimination, the most-favored-nation treatment, also constitutes a central aspect of all agreements. All agreements refer to m.f.n. as a treatment that applies even when the best treatment available is the one granted to a non-Party or member of a particular agreement. The main difference relates to the discipline applied to the principle. Thus, GBAs have adopted Gats' approach to having m.f.n. as a general principle which is slated to apply to all service sectors after "in principle" a maximum of ten years – which is the maximum period granted in principle for the initial, one-shot specific exemptions permitted at the entry into force of the WTO Agreements.[24] Nafta and NBAs do not set time limits for the application of m.f.n. non-conforming measures which can be set out in member country schedules and do not have any timeframe within which to be eliminated.

Finally, it should be noted that Nafta has an important provision regarding "standard of treatment" that does not find a parallel in the Gats or GBAs. It primarily sets out that the better treatment available between national treatment and m.f.n. treatment should be the one granted to service suppliers of any other party. In other words, if China gets a better treatment in a particular State of the United States than national service or service suppliers do in that same State, Mexican or Canadian suppliers should be entitled to get "Chinese" and not national treatment in that state – in other words, Mexican and Canadian suppliers should get m.f.n., and not national, treatment granted in that State. In any case, such a provision may have seemed necessary because under Nafta countries could lodge reservations vis-à-vis the m.f.n. principle whereas in Gats that was only possible once, as an exception, and subject to elimination within a defined period of time.

[23] Gats, Art. XVII.
[24] Gats, Annex on Article II Exemptions.

Market Access

The notion of "market access" does not appear as such in the Nafta. Article XVI of the Gats is the genesis of this practice and all GBAs include an article by that name. Article XVI and its followers do not define what market access is, however, limiting itself to a listing of measures that are considered market access barriers. These comprise an exhaustive list of five quantitative and one qualitative type of measure making Article XVI the provision that deals with all quantitative measures – whether discriminatory or non-discriminatory. Under Gats and GBAs, the measures listed under the market access article are prohibited and have to be eliminated at some point in the future.

On quantitative measures, Nafta did not include a prohibition but only a best endeavors clause regarding the "liberalization or removal" through periodic negotiations at least every two years. The same cannot be said about a number of NBAs that tended to "innovate" on the basis of the original Nafta approach and added a market access article very much similar to the one appearing in the Gats. The U.S. FTAs since the one with Jordan that entered into force in December 2001 (Australia, Chile and Singapore), for example, have a market access article in the chapter on cross-border trade in services that prohibits four of the five measures listed under Article XVI of the Gats. The fifth measure is prohibited also but in the Investment Chapter, since it deals with the participation of foreign capital in national firms.[25]

Nafta and NBAs attempted to go beyond the Gats in a couple of important market access aspects. First, under the chapter on cross-border trade in services, a prohibition is included regarding the "duty of establishment" – i.e., the obligation upon cross-border suppliers to establish in the local market[26] Second, under the chapter on investment, Nafta introduced a prohibition on so-called "performance requirements" – i.e., requirements that governments at times impose for the establishment, acquisition, expansion, management, conduct or operation of an investment made by a foreign investor. Even though it is true that Gats and GBAs do not spell out either of these prohibitions, it is also true that just like Nafta, Gats requires the scheduling of such measures when they are applied to scheduled sectors or sub-sectors. In addition, the prohibition in Nafta is neither of immediate or time-bound application and parties can schedule them in annexes without any commitment to their eventual elimination. Nafta and NBAs have been therefore clearer on what is meant by both prohibitions but not necessarily more forceful in actually putting them into effect.

Domestic Regulation

Nafta does not have a specific article devoted to domestic regulation as does the Gats in its Article VI. Gats also has language in the preamble recognizing the right of members to regulate their economies according to national policy objectives – something that is absent from Nafta. Nafta does go beyond the Gats, however, with respect to "good government" disciplines where the commitment is to ensure a reasonable, objective and impartial administration: this commitment in Nafta is not limited only to sectors where specific commitments are undertaken, applying therefore to the full universe of service sectors covered by the agreement. In fact, by virtue of an article on administrative proceedings, Nafta actually extends good government to all goods and service sectors covered by the agreement.[27]

[25] Earlier agreements that adopted the Nafta content and structure wholesale were the ones negotiated by Chile, Mexico and Canada – namely, Chile-Canada and Chile-Mexico - which entered into force, respectively, on July 1997 and August 1999.
[26] Nafta, art. 1205. The concept is also known as the "right of non-establishment".
[27] Nafta, art. 1804.

Once again, NBAs negotiated as from the U.S.-Jordan FTA in 2001, have differed from Nafta also in respect to domestic regulation. These agreements now have an article on domestic regulation which reproduces the same language as Article VI of the Gats and make a reference to the negotiations foreseen in paragraph 4 of that article on qualification requirements and procedures, technical standards and licensing requirements. Conversely, other agreements, such as Mexico-E.U., that are based on Gats provisions and mechanisms to a large extent, have not included an article on domestic regulation.

The main effect that the inclusion of a domestic regulation article *à la* Gats has had in both NBAs and GBAs is to ensure that the criteria mentioned in Article VI of the Gats apply not only to the licensing and certification of "nationals" as does the Nafta but also to qualification requirements other than licenses and certificates, as well as procedures, technical standards and licensing requirements as applied to all services (and not only professional services) and services suppliers (and not only natural persons).

Nafta does not have a specific article on transparency but picks up on all the aspects covered by Gats Article III in a number of different places in the agreement – many of which under Chapter 18 on publication, notification and administration of laws. Perhaps the most "ambitious" provision of Nafta in this context, which has also been incorporated in later NBAs, is the recourse "to the extent possible"[28] to prior comment on proposed changes in relevant laws and regulations. GBAs do not provide for such recourse and a host of countries tend to oppose it when negotiating FTAs that include services trade or investment.

Mutual Recognition

All agreements have some form of mutual recognition discipline, all of them at least committing members and parties to the possibility of recognizing each others' education or experience obtained, requirements met, or licenses or certifications granted. Nafta and NBAs that followed until the U.S. Jordan FTA did not have an article similar to article VII of the Gats and focused on professional services when they dealt with mutual recognition. The "second-generation" NBAs incorporated an article with the same title as Article VII and broadened the application of its provisions to all service suppliers – and not just professionals as in the Nafta.[29]

It is in that context also that the Nafta sets out the obligation that members or parties eliminate "any citizenship or permanent residency requirement … for the licensing or certification of professional service providers" within two years of the date of entry into force of the agreement. That commitment has not been implemented still today in spite of its reappearance in a number of NBAs such as Chile-Mexico (which in fact stipulated an immediate elimination of those requirements and not in two years) and Chile-Canada.[30] The effect has been that parties to these agreements had then the right to keep these measures themselves – a possibility which was foreseen in cases where parties did not comply with the two year deadline.

[28] Nafta, art. 1802:2.
[29] It should be noted that the coverage of professionals in Nafta was limited anyway to highly-skilled professionals. Neither here nor elsewhere in the agreement does Nafta go beyond commitments it had assumed at the WTO.
[30] Paragraph 3 of Nafta Article 1210.

Mechanics of Liberalization

There are many commonalities between Gats and Nafta in terms of the mechanics of liberalization. Both types of agreements allow for the scheduling of reservations or limitations vis-à-vis the key liberalization principles of the agreement. Both foresee the possibility of binding existing measures or regulatory situations, both deal with quantitative and qualitative measures of both discriminatory and non-discriminatory nature.

Reservations or Limitations

The terminology varies a bit but the central idea is the same: that member countries or parties to an agreement have the right to "reserve" a particular measure or limitation in relation to certain liberalization principles. One of the main differences is that NBAs, unlike the GBAs, allow for reservations to be lodged in relation to the m.f.n. principle, something which was a one-shot possibility in the context of the Gats. E.U. FTAs tend to have a straight-forward application of m.f.n. as does the GBAs. Mercosul's Montevideo Protocol, for example, did not make provision for any exemption from m.f.n. and all member countries will have to apply it fully as from the entry into force of the instrument. Another aggravating factor in Nafta is the fact that the lodging of reservations with respect to m.f.n. is very generic in nature, encompassing full sectors, and not focused on specific measures within sectors. In all three Nafta countries, these reservations were made generically for the aviation, fisheries, telecommunications transport networks and telecommunications transport services.

Nafta also allowed for reservations being lodged in relation to activities reserved for the State, a recourse that was only resorted to by Mexico in order for petroleum, other hydrocarbons and basic petrochemicals alongside a number of other service sectors (electricity, communications via satellite, telegraph, postal services, radiotelegraph services, rail transport services, control, inspection and surveillance of maritime and inland ports, airports and heliports) to be kept outside the scope of the agreement.[31]

Future Measures

Nafta has an important particularity which was adopted also by the NBAs: it allows for reservations being lodged with respect to future measures. The Gats does not allow for this, limiting the scope of limitations to existing measures and prohibiting the introduction of new restrictive measures in sector where commitments have been made. Nafta, by contrast, permits Parties to indicate sectors, sub-sectors or activities where it may maintain existing, or adopt new or more restrictive, measures that do not conform with obligations imposed by national treatment, most-favored-nation and local presence in the cross-border trade in services chapter and national treatment, most-favored-nation, performance requirements and senior management and board of directors in the investment chapter. Needless to say, this is a very significant "loophole" in the otherwise free trade bias of the Nafta agreement.

Binding

Both types of agreements rely significantly on the "binding" of measures – existing or even future (as in Nafta). Binding is a concept borrowed from tariff negotiations in the Gatt where members or parties fixed "for posterity", or at least until the next round of negotiations, a particular tariff level in relation to which they committed not to become more restrictive in the future; if they did so, in addition, they would have to compensate trading partners for the adverse effects of that action. In services, the

[31] Nafta, Annex III.

concept is the same, albeit it is applied to measures and not tariffs.

The main difference amongst existing agreements relates to whether the possibility of leaving a sector, measure, mode of supply or regulatory situation unbound. Nafta and NBAs do not allow for any "unbinding". Every annex, with all its scheduled measures, whether existing or future, is fully bound, so that there is nothing in Nafta or its related agreements that remains unbound after the negotiations. The Gats and GBAs are, of course, quite different in that respect since they do allow full sectors or sub-sectors to remain unbound (not included in the schedule), and even for each individual sector or sub-sector that is included in a schedule the possibility remains for leaving specific measures unbound in terms of modes of supply and/or the market access and national treatment principles.

As we have seen, Nafta allows for sectoral exclusions, future measures and other provisions that dilute its otherwise free trade bias. However, the Nafta, by requiring bindings on all that is included in the negotiations is clearly a more transparent agreement than its Gats counterparts. It should be noted that a significant pro-liberalization instrument in Nafta and NBAs is the so-called "ratchet" mechanism whereby a member country has to apply immediately to all other members any liberalization that takes place in its regulatory regime – even if the member country in question has reserved its position by binding the previous restriction in its corresponding annex. In other words, whenever Nafta countries liberalize unilaterally they have to extend the benefits of that to all member countries automatically – in the absence of any negotiation. That is the equivalent of requiring an "instant" binding of any pro-market move occurring in the free trade area.

Sectoral Listing

Perhaps the most salient difference between Nafta and Gats, and the agreements based on them, has to do with the listing of sectors, sub-sectors or activities. This difference, which in principle is resolved at the WTO[32], has been the source of great divergence in various negotiating fora. The negotiations on a Free Trade Area of the Americas (FTAA), for example, have pitted Nafta against Mercosul countries over whether the listing should or not be based on Gats as Mercosul would like it to be.

The Gats modality is known as a "positive list approach" because members, once they have negotiated and determined the nature and content of their schedule, can indicate the sectors, sub-sectors or activities for which they will "positively" make commitments, and leave out those where there is no intention whatsoever to commit in terms of market access and national treatment. The Nafta approach is in large measure the opposite: countries have to list only sectors, sub-sectors and activities where commitments *cannot* be equivalent to full liberalization, leaving out the ones that are already fully liberalized. Under Nafta, therefore, the list is "negative" in the sense that included sectors, sub-sectors and activities are *not* fully committed – unlike the excluded ones.

The difference in the type of listing is therefore most significant not only for what it means *to list* but, more importantly, for what it means *not to list.* Under the Gats, sectors, sub-sectors and activities not listed are therefore *fully free* from any commitment on market access or national treatment under Gats. Conversely, under Nafta, sectors, sub-sectors and activities not listed are *fully committed* to those principles. This difference does, however, have another important consequence that tends to favor the Nafta approach as a *liberalizing* instrument. With the negative list approach, Nafta essentially obliges Parties to reveal fully what the regulatory situation is for all sectors, sub-sectors and activities included in the agreement. Whether included in the lists or not, the regulatory situation for all of them is clear because being left off the list has itself a very clear meaning: full liberalization. With Gats, by the time the negotiations are over and the schedules agreed, all the excluded sectors, sub-sectors and activities remain "a mystery" since there is nothing in the agreement that foresees the revealing of their

[32] This, in any case, does not mean that all members are fully satisfied with the prevailing approach in the Gats.

regulatory situation.

Clearly, negative lists are favored by countries that feel confident that their regulatory regime, by and large as it is, is adequate and should not undergo major changes in the foreseeable future. Positive lists tend to be favored by countries that either do not feel that confident or that simply want to retain the control over a big portion of services trade and investment policy for its own national reasons. Clearly, positive lists can preserve greater "policy spaces" and have the preference of countries that may, for example, be undergoing transitions or adaptations in their services regime and need some time to see that process through. It should not come as a surprise that for the most part developing countries tend to prefer the positive list approach. After all, their regulatory system is often much less sophisticated or much more recent than their developed counterparts. Sophistication in this context denotes know-how to regulate and achieve public policy objectives. As to being recent, regulatory regimes in developing countries have been undergoing major changes in the last decade to fifteen years, a relatively short period in many cases for policy-makers to base their assessments of market, environmental or social effects of those changes. Very often, developing countries may still need some time before committing to an existing regulatory situation "for posterity" – thus, the predilection for positive listing.

The literature has often been deceiving when characterizing Nafta and NBAs as necessarily more liberalization-prone just on the basis of its negative listing of sectors, sub-sectors and activities. The truth is that a host of other aspects have necessarily to come into the analysis before one can feel confident about such a view. The fact that Nafta and NBAs require clarity regarding the regulatory situation of all measures affecting trade and investment in services does make them very transparent agreements. However, many other of their provisions pose significant limits on sectoral coverage and overall scope – notably: the possibility of reservations vis-à-vis the m.f.n. principle, the possibility of reservations in regard to future measures, the exclusion of certain sectors, the absence of liberalization obligations on local governments. A reliable assessment of the contribution of different approaches to liberalization and/or sustainable development must necessarily take all relevant aspects into account - and not just the more visible ones.

Deadlines

Both Nafta and Gats have handed down to regional agreements a relatively strong set of rules and disciplines on market access, national treatment and most-favored-nation. All the same, the rhetorical strength of all these rules and disciplines is mitigated by the way they are actually applied – via schedules of reservations or limitations often in the absence of timeframes, phasing-outs, or deadlines. Methods and modalities of liberalization are indeed important features of an agreement. Positive-list agreements such as the GBAs, for example, do tend to be more lenient on liberalization to the extent that they do not even commit countries to schedule their full regulatory situation. On the other hand, the commitment to set a final date for free trade to occur is clearly a much stronger commitment than any of the principles, mechanisms or other aspects of trade agreements. In the absence of deadlines and time-limited schedules, what agreements on services trade may accomplish is nothing more than the legitimation of existing or even future[33] restrictions – something which may in fact freeze, and not facilitate, the liberalization process.

A time-limited commitment can be general as to the application of an entire agreement, as is the case, for example, with Mercosul's Montevideo Protocol that sets a 10-year limit to full intra-zone liberalization.[34] Annual rounds of negotiations are foreseen until on the tenth year, all exceptions,

[33] The reservation of future measures, as seen above, is possible via Annex II of the Nafta.
[34] However, the 10-year time limit applies as from the entry into force which has not, as of February 2005, occurred yet.

limitations, restrictions, whether by sector or mode of supply have been eliminated wholesale. In addition, as from the entry into force of the agreement, there are no sectoral exclusions (with the exception of some aspects of air transport services), and m.f.n. is applied unconditionally to all sectors. Another agreement that is very clear on deadlines is the "General Framework of Principles and Norms for the Liberalization of Trade in Services in the Andean Community" – object of a specific Andean Community Decision (439) – which sets 2005 as the time-limit for the conclusion of an Andean "Common Market in Services" – effectively a much more ambitious undertaking than just an FTA in services.[35]

In Nafta, the only deadlines relating to all sectors and sub-sectors refer to quantitative restrictions – the type of measures for which, unlike Gats and GBAs, there is no prohibition. Nafta here sets out that Parties will have to periodically, at least every two years, *endeavor* to negotiate the liberalization or removal of the quantitative restrictions.[36] For other types of measures affecting trade in services, Nafta does not specify any temporal obligations, thus leaving qualitative, discriminatory measures, future measures, activities reserved for the State and exceptions to m.f.n. and non-discriminatory measures, without any time horizon whatsoever regarding further liberalization or market opening. It should be noted that NBAs did not start to include any general reference to time-frames until August 1999 when Mexico and Chile concluded their FTA and included a provision on "future liberalization" – a practice that Mexico pursued in all its ensuing agreements. Even then, however, mention was simply made of future rounds of negotiations being launched with a view to deepening liberalization – that, in the absence of a clear time-frame.[37]

In Nafta and NBAs, deadlines that apply to effective liberalization relate to specific sectors – in particular to professional and financial services. Perhaps the most forceful and liberalizing provision in that context is the one relating to cross-border professional services where it is established that within two years of the date of entry into force of this Agreement Parties would eliminate any citizenship or permanent residency requirement applicable to the licensing or certification of professional service suppliers.[38] Still in professional services, the agreement established a commitment to setting up a working program for common procedures for the authorization of foreign legal consultants and a review of this commitment within a year from the entry into force of the agreement. For temporary licenses for engineers, a working program was also called for.[39] NBAs also followed these general approaches to time-frames in professional sectors.[40]

For financial services, Nafta did better than some of its follower agreements. In addition to a chapter on the sector, the agreement stipulates that Parties will "no later than January 1, 2000, consult on further liberalization of cross-border trade in financial services".[41] The Chile-Canada and Chile-Mexico FTAs excluded financial services from the scope of the agreement, even though in the case of Chile-Mexico it was foreseen that by 30 June 1999 at the latest negotiations on a financial services

[35] Andean Community, Decision 439, art. I.
[36] Nafta, art. 1207.
[37] The FTA between Chile and Canada which was negotiated and concluded two years previous to the México-Chile FTA, however, did not include any reference to future liberalization.
[38] Nafta, art. 1210. The article also goes on to say that in case that obligation is not fulfilled by one Party, other Parties will have the right to maintain, for the same sector and for the same time as the Party is non-compliant, the same non-confirming requirement. Until today, not much has effectively been accomplished with respect to this commitment.
[39] It is a generalized perception that there has been little effective movement in Nafta regarding the mutual recognition of professional qualifications, the elimination of citizenship or permanent residency requirement or on some of the other matters the agreement was purported to do.
[40] The México-Chile FTA, for example, called for the immediate, and not in two years, removal of citizenship and permanent residency requirements for professionals – art. 10-12:3.
[41] Nafta, Annex 1404.4.

chapter should start – something which has not prospered as committed.[42] In Nafta, the land transport sector also had a decisive deadline in terms of "seven years after the date of entry into force….to consider further liberalization commitments" – which did not result in any effective "further liberalization commitments" at all.[43]

Cooperation

As mentioned previously in this study, some RTAs on services have been original in their treatment of important notions such as "cooperation" and "development". The E.U. has perhaps been the most active protagonist in devising agreements that include those aspects - a phenomenon which is intrinsically highly positive since it involves the richest grouping of countries in the world. It should not come as a surprise that the most cooperation or development-minded compacts deal with the ACP – Europe's former colonies in Africa, the Caribbean and the Pacific. The ACP-E.U. Partnership Agreement, or Cotonou Agreement, signed in June 2000, replaced the Lomé Conventions – its precursor for the foregoing 25 years. Even though the Cotonou Agreement is a far cry from a "conventional" services agreement, it contains a chapter on trade in services under a part devoted to cooperation strategies. The language of the text recognizes from the outset that ACP countries may not be prepared for wholesale liberalization and that they need first and foremost "some experience in applying the Most Favored Nation treatment under Gats".[44]

The cooperation envisaged under E.U. services agreements does not focus specifically on trade in services but rather on the workings of prominent services sectors. The Agreement with Morocco, for example, in force since 1st March 2000, has an article on right of establishment and services which leaves to an "Association Council" the task of making recommendations as to when services liberalization should be pursued by both parties[45], but singles out, in addition to broad-based issues that also relate to services such as education and training, a number of service sectors where cooperation should occur – namely: financial, transport, telecommunications and information technology, energy, tourism. That pattern is pursued in most of the MED Agreements (the "Euro-Mediterranean Agreements") as well as for the Mexico and Chile agreements, both of which are much more substantive on effective trade in services liberalization as well. The Agreement with South Africa had also a great emphasis on cooperation in the absence of much commitment on services liberalization. As to the ACP-European Union Partnership Agreement, its article 41:5 actually mandates E.U. assistance to ACP countries in certain sectors.

Cooperation has also been an important innovation for a number of agreements negotiated by Asian countries – particularly in South-East Asia. Thus, as previously mentioned, the Asean Framework on Services, already in its Article II, pinpoints specific areas of cooperation: infrastructural facilities, joint production marketing and purchasing arrangements, research and development and exchange of information, making a reference to another "Framework Agreement on Enhancing Asean Economic Cooperation".[46] It is interesting to note that both the Thailand-Australia and the Singapore-Australia Agreements also have specific provisions on cooperation. While the former lists specific areas such as R&D, human resource and professional development, data management and small and medium enterprises capacity enhancement[47], the latter has a full chapter on education cooperation, including

[42] México-Chile FTA, art. 20-08:(a).
[43] Nafta, Annex 1212:3.
[44] Cotonou Agreement, Article 41:4.
[45] E.U. Morocco Agreement, Title III, Article 31:2.
[46] Asean, Asean Framework on Services, Article II:2.
[47] Thailand-Australia Free Trade Agreement (TAFTA), Article 808.

even an article on student mobility and scholarship arrangements.[48] Even though these types of provisions may be perceived as *soft* by trade aficionados because they do not involve market openings, their value as guiding principles should not be underestimated, particularly when the language is mandatory ("shall" as opposed to "may", and so forth).

Regional Scoreboard: Liberalization *vs.* Development

Of course, the relationship between liberalization and development is not necessarily adversarial from an economic standpoint as the present sub-title suggests. In trade negotiations, however, the two focuses have become important political adversaries, with countries on both sides of the trade-and-development spectrum vying for methods and modalities that best accommodate their social and economic profile. Assessing what has been happening at the regional and bilateral levels in services can point to different realities depending on whether one is looking at the agreements as instruments of liberalization *per se* or as instruments that should contribute to sustainable development – and not just to the liberalization process itself. What may be Gats-*plus* in terms of liberalization may be Gats-*minus* in terms of development, depending on the perspective of each particular country.[49]

The difference in views here reveals the traditional divide that exists between those that consider liberalization as either equivalent or virtually equivalent to the best development policy available for countries, and those that believe that liberalization is just a part of a much broader policy package that can only lead to development if accompanied by a host of other policies. Both sides can possibly agree that a RTA or any trade agreement is not supposed to provide for development by itself. In negotiations, however, differences remain as to how much development-related provisions should be mixed in with trade liberalization-related provisions for an agreement to be considered a sufficient contribution to a country's development.

Liberalization

As far as liberalization is concerned, RTAs in services have not fared as well as they could. The analysis of the previous sections of this paper pointed to a significant number of flexibilities, loopholes, exclusions, mandate violations, lack of time-frames and no provisions for future negotiations. For the most part, countries negotiated one-shot deals that effectively legitimated restrictions and froze them that way for applicable sectors, modes of supply and levels of government. Also, in virtually every case, countries at most bound the regulatory situations that they had in place at the time of the negotiation instead of "going any extra mile" for trading partners. Any differences in terms of GATS commitments possibly have more to do with timing than with content as such. If regional offers were better than those committed at the Uruguay Round, that often reflected the fact that countries liberalized further after the Round or simply felt more confident about offering commitments in additional sectors or modes of supply.

Given the lack of assessments, and the usual difficulties associated with analyzing services, it would be very difficult to be categorical on whether RTAs produced effective liberalization of markets or whether that liberalization was bullish in creating market opportunities for participating countries. What is ascertainable, however, is that all the differences in methods and modalities between the two

[48] Singapore-Australia Free Trade Agreement (SAFTA), Chapter 15.

[49] Negative lists, for example, could be perceived as Gats-*plus* by countries that favor faster and indiscriminate liberalization agreements and Gats-*minus* by those that need more "policy-space" to put adequate regulations and policies in place. In the literature, the term Gats-*plus* normally only refers to elements that may have been introduced *in addition* to those set out in the Gats original construct, without the distinction hereby suggested with respect to the criterion used.

main “schools” of agreements – Nafta and Gats – did not prove to be sufficiently significant to cause notoriously different outcomes, since many of those differences tended to cancel each other as good or bad liberalization tools. If one factors in the fact that countries normally only committed at best to maintaining their regulatory *status quo* in their schedules (and not to open new markets or eliminate new restrictions), one can also imagine that the real “market” effect of RTAs in services was often minimal in most cases. Most of the “free-trade” benefit should then reside in the higher predictability that comes from the transparency and irreversibility of commitments made – and not in effective market openings.

Another pro-liberalization aspect of trade agreements that did not seem to evolve much at the regional and bilateral levels was that of domestic regulation and regulatory harmonization or mutual recognition. Gats provides for both aspects, respectively by means of Articles VI and VII. Mattoo & Sauvé (2002) pointed to how with few exceptions[50], RTAs in services did not advance a great deal in clarifying what could be a necessity test that would ensure “proportionality” between regulatory means and objectives. The truth is that a number of agreements, especially pre-U.S.-Jordan NBAs, did not even include an article on domestic regulation that applied to the full universe of services. The domestic regulation focus of many of these agreements has been exclusively on licensing and certification of professionals and only for cross-border purposes at that, since there is no corresponding provision in their investment chapters. As to harmonization and mutual recognition agreements, there has been very little progress even in agreements, such as Nafta, that adopted timetables for common procedures, future work and other commitments.

Development

The issue of sustainable development, particularly that of developing countries, has figured prominently in the international trade agenda since the Uruguay Round. It makes sense, since services are omnipresent in the larger economy, providing the networks, the infrastructure and the crucial inputs that make it function smoothly - whether in agriculture, mining or industry, including social and environmental services and regulations that correct and bolster markets for real sustainable development. A trade agenda without services, in that sense, could be a lost opportunity. A trade agenda without sustainable development as a guiding principle, however, could be an additional cost to economies that are not yet sufficiently mature to sift and pick across regulatory alternatives and policy choices in services. The complexity of the service sector and of its linkages to good economic, environmental and social policy and regulation makes it much more sensitive than any other segment of the economy, particularly for countries that have not had the time or circumstance to achieve the necessary equilibrium in it, for the pursuit of sustainable development. Trade negotiations, as a principle, should not run roughshod over these concerns, lest economic prosperity and well-being are lost along the way.

The Doha Development Agenda, as the name suggests, has attempted to place sustainable development straight in the center of its concerns – clearly, among other things, a reflection of the high level of disgruntlement by developing countries with regard to the implementation of the WTO Agreements.[51] The effort is in principle laudable but very difficult to put into practice. Since the

[50] The European Union itself, and pre-E.U.-accession agreements negotiated between the E.U. and Central and Eastern Europe.

[51] The Doha Declaration explicitly refers to sustainable development as an objective: “We strongly reaffirm our commitment to the objective of sustainable development, as stated in the Preamble to the Marrakesh Agreement. We are convinced that the aims of upholding and safeguarding an open and non-discriminatory multilateral trading system, and acting for the protection of the environment and the promotion of sustainable development can and must be mutually supportive".

Uruguay Round, that seems to have been the plight of many a regional and bilateral trade in services agreement as well. In large measure, the difficulty is common to both RTAs and the multilateral system: in addition to evident political complexities, both systems have had a difficult time defining what is meant by development, sustainable or not, and what are the instruments to match it. At the multilateral level, the overriding objective of preventing the system from crumbling, and with it its much-appreciated disciplining effect, may have forced a reduction of the sustainable development agenda in favor of the attainment of market access objectives that can more easily point to a successful end of the Doha Round. At the regional level, sustainable development may have faltered because countries either failed to see the value of having it as a guiding principle or lacked the negotiating power to influence matters in that direction.

To the extent that most regional arrangements dealing with services trade have been based on Nafta or Gats, it is to be expected that their focus be more on free trade than on development-related matters – as they are themselves that way. All the same, Nafta was actually the first agreement to have environmental provisions and clear references to sustainable development while the WTO has a committee on trade and environment. For the most part, however, one could affirm that the "universes" of trade and sustainable development remained fairly distant in the regions – in services as it had "traditionally" been in goods. In Asia, for example, whether "new-age" (Japan-Singapore, Australia-Singapore, New Zealand-Singapore) or more traditional, RTAs have moved very slowly on issues of sustainability, retaining however a clear focus on trade liberalization. In the broader cooperation arrangement characterized by Asean, environmental and social matters appear as elements of functional cooperation and not within the realm of trade provisions. [52] Still, trade agreements that have at least attempted to approach the two universes have been more common in Asia than in other parts of the world, including when negotiated with developed countries outside the region.[53] Perhaps the agreements that do most of the mixing of trade and development provisions are those whose objectives are explicitly developmental in nature, such as the economic partnership agreements and their stated objective of pursuing sustainability in the development of ACP countries.

As for most of the other existing agreements, there is very little on development itself. In fact, even South-South agreements tend to leave out some of the *pièces de résistance* in the trade establishment's developmental lingo. For example, Mercosul never had a clearly-stated special and differential treatment provision[54] anywhere in its vast collection of protocols, decisions and resolutions, including its Montevideo Protocol on Trade in Services.[55] Another development *pièce* that also finds a hard time in regional South-South RTAs on services is the emergency safeguard mechanism (ESM) which for many developing countries is a *sine-qua-non* issue at the WTO. Asean, the main sponsor of the idea at the WTO, never contemplated having it for its own intra-zone services trade. The same applies to Mercosul, the Andean Community and a host of NBAs. In Nafta, there was a safeguard mechanism but it appeared only in the Mexican schedule on financial services, thus referring only to the opening of Mexico's financial sector.[56] Some agreements, such as Caricom and the Andean Framework (Decision 439), have safeguards but only insofar as balance of payments difficulties are concerned.[57]

[52] See Imai, Gueye (2003).
[53] The agreements negotiated by Australia with both Singapore and Thailand attest to that fact (see "Cooperation" above).
[54] Some actual provisions in Mercosul's agreements provide for some differential treatment in practice such as a longer phasing out time-table for certain products for Uruguay and Paraguay. There is nowhere, however, an explicit formulation of the S&D principle.
[55] Caricom and the Andean Community do have provisions on S&D, however.
[56] Nafta, Annex VII, Schedule of México, Section B.
[57] Caricom, Protocol II, art. 37c and Chapter VII, Article 20 of Decision 439 of the Andean Community.

Factoring Factors: Capital and Labor

Economic theory has repeatedly demonstrated the value of capital and labor moving together internationally so that adjustments in one factor can be compensated by changes in the other factor. As it turns out still in 2005, the mobility of capital has become the rule while the mobility of labor continues to be the exception. Agreements like Nafta have moved some distance by having chapters on each of the factors of production, both of which apply not only to goods or to services but to both – as in "normal" life. Still, Nafta itself is very limited on labor mobility, albeit very ambitious on capital mobility. There is no indication that this predicament might change in that context or any other in the world.

Capital

The movement of capital in trade agreements has found an important anchor in the theme of investment. With Nafta, investment has become effectively a trade issue by virtue of its inclusion as a chapter governing both goods and services transactions. Nafta in that sense went beyond the results of the Uruguay Round where investment-related matters were treated only partially: in the TRIMs agreement which dealt solely with aspects of investments specifically related to trade in goods and, of course, in the Gats Agreement which focused on investment *via* one of its modes of supply – the number 3, commercial presence.

As many agreements attempted to emulate Nafta provisions since its inception, many of them have included investment provisions in their purview. The ones that have opted for not doing so clearly had problems convincing their constituencies of the value of surrendering that much "policy space". Among the countries with that sort of "spatial" concerns in relation to investment number the richest in the world which gathered at the OECD to negotiate and draft a so-called Multilateral Agreement on Investment (MAI). The fiasco in 1998, when these countries decided to put an end to the negotiations and not even come back to the negotiating table, should have put a damper on similar initiatives at other levels – particularly given that countries like Canada and the United States found strong opposition at home to anything approaching a plurilateral or multilateral agreement on the matter. Nothing could be farther from the truth, however: those countries, as well as many others in the Americas, continue to push for an ambitious outcome on investment in the FTAA negotiations.

As it turns out, therefore, developed countries seem to prefer ambitious investment pacts with developing countries - whether bilaterally, plurilaterally or multilaterally, or yet, *via* a bilateral investment treaty or a trade agreement – to modest ones with developed countries, and that for two principal reasons:

- Investment arrangements with developing countries have a greater incentive to lock in place favorable liberalization and protection regimes alongside reliable dispute settlement provisions - of the sort that is significant enough for any opposition at home to be either virtually inexistent or easily rebuffed;
- Clearly, bargaining power between unequal partners goes a long way in explaining why the strong resistance to the issue when negotiating with like-minded and "like-fitted" countries and the steadfast push to the issue when negotiating with countries at lower levels of development. Investment has therefore become an askew theme, having a better chance to prosper internationally the greater is the bargaining differential of the countries involved.

That in the real world trade and investment are part and parcel of the same economic realm is irrefutable. That in the world of trade agreements the two issues need to be together, however, is a totally new matter that depends on the ultimate policy objective being pursued. To evaluate such a question, the impact of one or the other choice must be clear in terms of two potentially conflicting aims: the aim of attracting foreign long-term capital *vs.* the aim of having the prerogative to intervene and influence the investment profile and function in one's market. This second aim has come back to the policy debate in many countries, after a relative absence in the nineties, in the context of what has

been referred to as the preservation of "policy space". The dilemma, however, is bound to remain: investors shy away from too much *dirigisme* and that will continue to be the measure of the harsh reality surrounding foreign direct investment – in goods or in services.

Labor

The sensitivities that are normally associated with the movement of people across borders were not absent from regional agreements – no matter how close neighboring countries felt when they sat down to craft a trade in services agreement. The GATS limits (temporary stay, not seeking employment, not related to citizenship or residency) have worked as useful parameters for a number of agreements. Where movement has been present, it has had a lot to do with the movement of professionals or business visitors. Nafta and many NBAs have included those categories in addition to traders and investors and intra-company transferees and in some cases have provided for special visas for professionals[58] subject to specific requirements. Gats and GBAs apply to all categories of services providers but the extent of any particular liberalization commitment will depend on what countries effectively commit in their schedules of commitments. Unlike Nafta and NBAs, these agreements only relate to the movement of natural persons as suppliers (or consumers) *of services* - and not of goods.

Regional agreements have remained a great distance from providing for "innovations" on the movement of people. Even when they did include labor mobility with a deeper level of liberalization commitment, the scope of categories included remained limited and not very attractive for countries that exhibit great competitiveness in their professional, technical or manpower services. For agreements that have opted for separate provisions for investment, whether in goods or services, the inclusion of only a few categories of natural persons comes highly short of providing a balance between factors of production. The norm has been for countries to shy away from broad-based principles or commitments on labor mobility liberalization – whether in the presence of investment provisions or not.

It is worth noting that whenever the opportunity presented itself regionally for a bargain to take place between labor mobility and other negotiating themes, countries have often preferred a conservative, as opposed to a demanding, stance. At the FTAA negotiations, for example, labor mobility did not come to integrate Mercosur's palette of demands even when in the presence of strong pressure from Nafta countries in favor of an investment chapter. In other words, Mercosur seems to have preferred to avoid *both* ambitious investment and labor provisions as opposed to charging a "labor" price for the inclusion of investment – a clear indication of how regionally the issue does not seem to be as important as some might suspect. It should be noted, however, that Mercosur has been keen on avoiding limiting is "policy space" at all costs – a position which should be common to many developing countries who would rather live without greater labor mobility and not "sacrifice" its autonomy by conceding too much on capital mobility (investment) - than the opposite.

Policy Space: Worse off?

As the liberalization and privatization waves of the nineties did not produce all that was promised by the Washington Consensus, societies became concerned, organized and vocal, governments reacted and changed, and a new concept emerged in trade negotiations which is fully consistent with the notion that if things were wrong in the last decade they should be corrected in the present one. That

[58] The U.S. has provided "Trade Nafta (TN)" visas for professionals of other member countries of Nafta. The U.S.-Chile agreement provided for a quota of 1,400 professionals while the U.S.-Singapore agreement provided for a quota of 5,400.

concept is that of "policy space" and it readily reveals the underlying concern of many in the world with being able to change things past and avoid stringent commitments on things future.

In services, where liberalization commitments do lock-in domestic, sensitive and strategic regulatory situations for posterity, the search for the preservation of policy space has become a guiding principle for many countries around the world. In so many ways, regional experiments have aggravated the suspicion of some that the big trading partners are indeed out to limit the supposedly scarce policy space of the poorer nations. Once again, there are some *pièces de résistance* that emerged in RTAs and do much to illustrate the debate. Two of them are especially revealing.

The first *pièce* is the provision for prior comment on proposed changes in relevant laws and regulations which appears in Nafta and in many NBAs that followed it. Many countries in the Americas have voiced a strong opposition to the notion in the FTAA negotiations, as it is perceived as a clear encroachment upon a country's otherwise sovereign right to regulate. The second *pièce* relates to the inclusion of investment provisions in free trade agreements – something which has been so far fully rejected at the multilateral level but which has moved a long way regionally – once again - with the advent of Nafta and its kin agreements. Within that context, there is an even more specific concern which is at the center of the controversy: the prohibition of performance requirements.

These requirements are precisely what many developing countries are seeking to keep or restore. As many of the mistakes of the past tend to be somehow linked to the wave of liberal policies on investment, including, first and foremost, privatization, policy-makers in many countries are keen to keep their "policy space" and be able to have recourse to some of those measures (trade balancing, local content, etc.) if necessary in the future. Those measures are also often seen as important bargaining chips in luring quality foreign direct investment to one's market. Policy-makers of this particular persuasion rather see the value of such measures to "force" multinationals to negotiate their entry as opposed to the value in having a system free of restrictions as a potent attractor of FDI. Without going into the merits of one position or another, the fact is that many developing countries are weary of this new potential curtailment of their policy space.

Conclusion: Dilemma or Inertia - Straddling the Regional Divide

As with trade in goods, there is an apparent dilemma between multilateralism and regionalism in trade in services as well. As with goods, the important underlying question from a national *economic* perspective in services is, as Fink and Mattoo (2002) put it, whether larger welfare gains can be produced through a regional (preferential) or multilateral (non-preferential) approach to liberalization. As with goods, the important underlying question from a national *political* perspective in services is whether a country can best advance its own national priorities, developmental and otherwise, *via* regionalism, multilateralism, both at the same time, or neither at the same time (unilateralism *per se*).

From a *systemic* standpoint, the dilemma is also quite forceful both economically as well as politically in services: is the world economy better off if countries "band" together in "small" groups and discriminate in favor of the group in their international services transactions? Is the world's governance better off if trade and investment in services is increasingly a matter of choice and negotiation among blocks, and not countries? This is where Jagdish Bhagwati's "spaghetti bowls"[59] meet Peter Sutherland's "stumbling blocks"[60]. The choices are indeed not easy but the fact is that the

[59] Bhagwati, Jagdish. (1995), "U.S. Trade Policy: The Infatuation with Free Trade Areas", in *The Dangerous Drift to Preferential Trade Agreements*, eds. Jagdish Bhagwati and Anne O. Krueger. Washington: American Enterprise Institute.

[60] On 16 September 1993, Peter Sutherland, then Gatt's Director-General, delivered a speech in Montevideo

world has not exactly "stopped" to reflect on these issues: it continues to move forward on both fronts – apparently somewhat indiscriminately.

The advent of regional trade in services arrangements seems to reflect much more inertia than dilemma. If countries were really torn between regional and multilateral approaches, there might be less of either. The fact is that the world seems to be comfortable with the *co-habitation* of both systems in services and RTAs covering services trade are proliferating very quickly. It would be a far shot to uphold, however, that this movement, as two-fold as it may be, is inspired by a clear, one-dimensional view on the benefits of regionalism either as a *mover* of economic growth and development or as a *shaker* of a possibly ailing multilateral system. Countries seem to be racing to conclude services agreements because "everybody is doing it". The movement seems to be more an expression of the (positive) inertia of a stampede[61] than of the (dampening) dilemma of competing universes.

Perhaps the strongest demonstration of inertia as opposed to dilemma is the record of RTAs covering services itself. If countries were really keen on the value of regional arrangements in services their approach to these agreements might be more straightforward and consistent. Nafta never went back to the negotiating table and failed to comply with significant commitments such as the liberalization of land transport. The Montevideo Protocol never went into force since it was signed in 1997. Many other agreements, including bilaterals such as Chile-Canada, excluded full important sectors from their disciplines (financial services, cultural "industries", etc.). Others do not apply any discipline to local measures. Most agreements have no final deadline for achieving full liberalization. Some of them allow for the scheduling of future restrictive measures. The record on development, as both a concept and an instrument, has been vacuous - at best.

And yet, RTAs in services continue to be negotiated. There seems to be a feeling that unless the "services regional bicycle" is pedaled, the "services region" will fall. In many cases, "banding together" on services trade and investment is also seen as a form of deterring the ambitions of more powerful trading powers. If Mercosul concludes a pact on services trade (and not quite investment), for example, it is supposedly less "vulnerable" to pressures from the North in the FTAA negotiations *even though its rule of origin is very liberal and in practice there is not a whole lot of discrimination against third parties anyway.*

The jury is out on RTAs on services.

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[61] "A sudden frenzied rush of panic-stricken animals". Source: www.dictionary.com .

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