

Innovations of Regionalism in Services in the Americas

Sherry Stephenson and Maryse Robert¹

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I. Introduction

More than any other region in the world, the Americas was the first to embrace regionalism wholeheartedly and has remained at the forefront in developing innovative approaches to the treatment of services trade. In the mid-1980s and early 1990s, numerous countries in the Americas undertook reforms aimed at dismantling protectionist

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measures in their own markets and at promoting a more open and dynamic pattern of integration into the world economy. In several countries, trade in services and investment rulemaking were at the forefront of the reforms being undertaken. It was felt that easing restrictions on foreign investment could foster economic growth and that removing barriers to trade in services could lead to lower prices, improved quality and greater variety of both goods and services, as well as stimulate exports.

Since 1994, numerous free trade agreements (FTAs) have been signed by countries of the Americas. To expand their trade opportunities, they have signed FTAs among themselves and have also reached out to partners beyond their own borders such as the European Union (EU), China, Japan, Singapore and South Korea, among others.

While the Canada-U.S. FTA (CUSFTA), which entered into force in 1989, was the first trade agreement to cover trade in services in the Americas, it is the North American Free Trade Agreement (NAFTA) negotiated a few years later which set a model for other FTAs to follow in the region. The path-breaking influence of NAFTA cannot, in fact, be overstated in the services and investment area, as it set an alternative course to the treatment of these important issues from that negotiated in the General Agreement on Trade and Services (GATS) of the World Trade Organization (WTO). In so doing, it inspired a generation of regional agreements that has pushed the envelope in the services and investment areas well beyond that at the multilateral level.

This paper focuses on the innovations of regionalism in services that have been developed by countries in the Americas. It discusses the new approach that NAFTA brought to the structure of a services agreement, highlighting the design of rules in general and those for the key sector of financial services in specific, as well as for the temporary movement of labor. It compares and contrasts the similarities and differences between the NAFTA-type FTAs negotiated within the Americas and FTAs negotiated between countries of the Americas and those in other regions. The paper reviews in a very preliminary manner, based on available data, the results produced by the first generation of FTAs in the Americas, examining the extent to which these agreements have stimulated greater output in services as well as greater cross-border trade and investment in services for their members. It discusses the possibilities for convergence of those FTAs with similar structure in the Americas. And lastly, it touches upon the governance problem created for the multilateral system by the widening gap between FTAs and the WTO GATS.

II. Development of a New Framework for Services Trade in the Americas

The crafters of NAFTA in the early 1990s took a different path from the negotiators of the WTO GATS, though both agreements were being negotiated simultaneously. While political caution on the part of developing countries dictated a very timid approach to the structure of the GATS as well as the adoption of a “positive list” or gradual approach to the undertaking of market access commitments, the NAFTA negotiators took the opposite track of high ambition. Spurred by the active participation of the business community,

they abandoned the CUSFTA model, which applied only to a list of covered services where services that were not covered were not subject to the obligations of the agreement, to famously adopt the alternative “negative list” approach to market opening. Although often mistakenly understood as meaning a complete liberalization of service restrictions, in reality the “negative list” translated into an across-the-board legal assurance of access for service providers and investors at the level of existing regulations.

The greatest achievement of this alternative approach developed in the Americas in terms of services and investment was to bring the main virtues of the GATT for trade in goods, namely transparency and the predictability of a rules-based system, to bear on services in a way that the WTO GATS structure and rules failed to do. This proved to be of great importance because over time, as countries began to perceive the numerous shortcomings of the GATS and its rigidities, the alternative offered by the NAFTA structure became increasingly attractive and its adherents increasingly numerous.

Since the mid-1990s the countries of the Americas have been at the vanguard of the negotiation of NAFTA-type free trade agreements, whose salient characteristics are their ambitious nature and their objective of carrying out trade liberalization and integration not only for goods but also for services, as well as other key issues such as intellectual property and government procurement. Since the entry into force of the NAFTA on January 1, 1994 countries in the Western Hemisphere have negotiated and concluded no fewer than twenty-four (24) sub-regional arrangements² among themselves containing disciplines on trade in services, either in the form of new FTAs or as part of an effort to deepen already-existing regional economic integration groupings.

Most countries in the Americas have embraced the comprehensive, negative-list approach of the NAFTA for services in their FTAs negotiated with other partners in the region. Twelve countries stretching from Canada to Chile along the Pacific Coast, and the Dominican Republic, have negotiated similar-type FTAs using this approach. Moreover, the members of the Central American Common Market (CACM)³ also chose the same approach in their services and investment agreement whereas the members of the Andean Community⁴ and those of CARICOM⁵ each opted for a negative-list services agreement within their own separate integration process, though with a slightly different structure from that of NAFTA. In South America the members of the Common Market of the

² As of April 16, 2011.

³ The CACM members are: Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua.

⁴ The current members of the Andean Community are: Bolivia, Colombia, Ecuador, and Peru. The liberalization of trade in services has been suspended in the Plurinational State of Bolivia since December 2006, in accordance with Decision No. 659 of the Commission of the Andean Community (“Service Sectors Subject to Further Liberalization or Regulatory Harmonization”) of December 14, 2006. Decision No. 659 also provides that financial services and the further liberalization of the minimum percentages of nationally-produced programming on national free-to-air television will be subject to special treatment and will continue to be regulated by sectoral decisions on which, to date, the members of the Andean Community have not yet agreed. For more information, see <http://www.comunidadandina.org/normativa/dec/D659.htm>

⁵ The members of CARICOM are: Antigua and Barbuda, the Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, Saint Lucia, St. Kitts and Nevis, St. Vincent and the Grenadines, Suriname, and Trinidad and Tobago.

South (MERCOSUR)⁶ chose a different model than the NAFTA and adopted the Protocol of Montevideo on Trade in Services in 1997, with the objective of achieving full liberalization of trade in services and an open regional market for services through periodic rounds of negotiations. Seven such rounds have already taken place. The Protocol of Montevideo, which entered into force on December 7, 2005, establishes a program for the liberalization of intra-trade in services within an overall implementation period of ten years from the date of entry into force, i.e. by December 2015. Although modeled after the “positive list” approach of the GATS, MERCOSUR countries have also innovated with respect to the WTO by agreeing in 2001 to a transparency exercise consisting of the listing of all existing restrictions in services trade with a view to their progressive removal. This transparency exercise is complemented by a “*standstill*” provision prohibiting the adoption of new restrictions.⁷ It is worth noting though that Uruguay, a MERCOSUR member, has also elected the NAFTA-type approach in its free trade agreement with Mexico, which entered into force on July 15, 2004, albeit the negative list has yet to be completed.⁸

Although there is no doubt that the Americas is in fact the region that has the most wholeheartedly moved beyond the multilateral system toward deeper and more comprehensive services disciplines, and for this reason among others, it is noteworthy of distinction and of study, two countries have in recent years gone back on the NAFTA model. In 2006, the Bolivarian Republic of Venezuela withdrew from the Group of Three (G3) FTA,⁹ between Colombia, Mexico and Venezuela, which had entered into force on January 1, 1995. And Bolivia withdrew from the Bolivia-Mexico FTA, in force since January 1, 1995, and replaced it with an Economic Complementarity Agreement (No. 66) with Mexico, which came into force on June 7, 2010. The Plurinational State of Bolivia

⁶ The members of MERCOSUR are: Argentina, Brazil, Paraguay, and Uruguay. On July 4, 2006, MERCOSUR members approved the Protocol of Adhesion of the Bolivarian Republic of Venezuela to MERCOSUR. The entry into force of the Protocol must be ratified by the parliaments of the five countries involved. As of April 2011, the approval of the Congress of Paraguay was still pending.

⁷ In December 2008 MERCOSUR adopted a Plan of Action to Further the Program for the Liberalization of Trade in Services. This Plan of Action has a four-stage timeline, the target being to complete the liberalization program in 2015. By 2009: each Member had to analyse the current situation in order to define the least sensitive sectors (whose liberalization would not pose serious problems), as well as those of intermediate and high sensitivity, and those whose regulatory frameworks could be harmonized or complemented. By 2010: each Member committed to consolidate the regulatory status quo of sectors where no commitments yet exist; to eliminate restrictions on market access and national treatment in the least sensitive sectors; and to take steps to harmonize or complement regulatory frameworks in sectors where this is deemed necessary. By 2012: each Member committed to eliminate restrictions on market access and national treatment in sectors of intermediate sensitivity. By 2015: each Member committed to eliminate restrictions on market access and national treatment in the most sensitive sectors and to eliminate domestic regulatory measures that have been identified as bureaucratic obstacles to intra-zone trade. For more information, see

http://www.sice.oas.org/Trade/MRCSRS/Decisions/DEC4908_s.pdf On December 16, 2010 the MERCOSUR Common Market Council reiterated to MERCOSUR members the need to implement the December 2008 decision. For more information, see http://www.sice.oas.org/Trade/MRCSRS/Decisions/DEC5410_s.pdf.

⁸ The agreement does not cover financial services, air transport services or government procurement. For more information, see http://www.sice.oas.org/TPD/MEX_URY/Negotiations/Texto_s.pdf

⁹ For more information, see <http://www.sice.oas.org/Trade/go3/G3INDICE.ASP>.

considered “the chapters on investment, services, intellectual property and government procurement incompatible with the country’s new Constitution, which had entered into force in February 2009.”¹⁰ The scope of the new agreement is strictly limited to trade in goods and does not include any service-related provisions.

Several countries of the Americas have in turn taken the NAFTA-type approach beyond the borders of the region to “export” this model around the world. They have negotiated similar agreements with trading partners in Asia, Northern Africa and the Middle East. To present, 23 NAFTA-type agreements have been negotiated over the past 15 years between countries of the Americas and those outside the region, most of these with countries in East Asia. At present, the largest experiment in regional integration involving services is being carried out under the Trans-Pacific Partnership (TPP) negotiations, begun in March 2010. The TPP is slated to become the nucleus of a possible future Free Trade Area of the Asia Pacific (FTAAP), with a tentative completion date of November 2011. The TPP, once completed, would then be expected to gradually evolve into an APEC-wide agreement, eventually embracing all 21 APEC members. Of the current nine participants in the TPP negotiations, seven have previously negotiated NAFTA-type agreements including services and investment, and this is the model that is being followed for the future agreement.¹¹

The following section discusses the innovations of the NAFTA approach and in what ways it has provided a new framework for services trade, including a discussion of how the earlier NAFTA-type agreements have been deepened since 2002.

A. Innovations in Structure and Rules

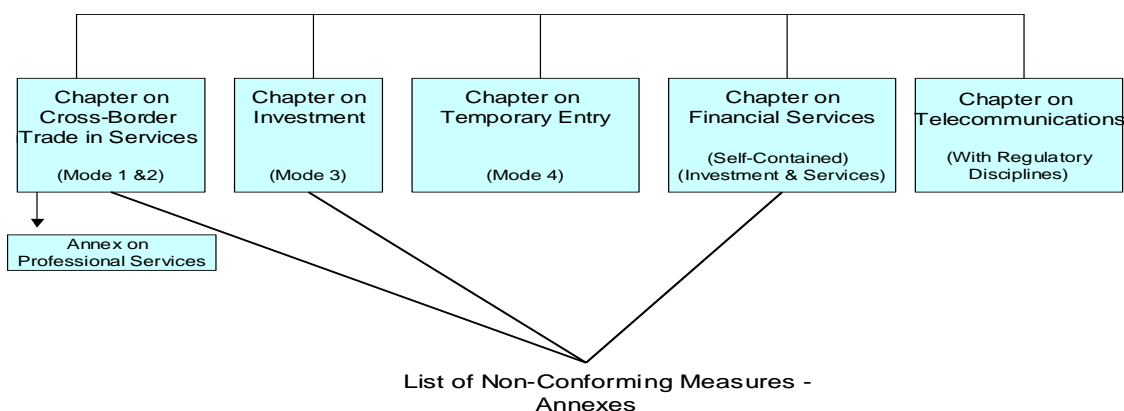
The structure of the NAFTA-type agreements reflects recognition of modal neutrality which has been codified through a more or less equal treatment of the modes of supply within the agreement. This structure is set out in the chart below. The Cross-Border Services Chapter covers modes 1, 2 and 4 (the latter to a limited extent) and often contains an Annex on Professional Services. The Chapter on Investment covers investment in both goods and services (mode 3 plus additional types of investment). The Chapter on Temporary Entry for Business Persons contains a set of provisions to facilitate administrative and legal procedures for temporary entry for a limited number of categories under mode 4. Separate chapters deal with Financial Services and Telecommunications in a more in-depth manner.

CHART __

¹⁰ See ECLAC (2010) [Latin America and the Caribbean in the World Economy 2009 - 2010](#)

¹¹ The nine members participating in the Trans-Pacific Partnership (TPP) negotiations at present include: Brunei, Chile, New Zealand and Singapore (the original four members of the Trans-Pacific Strategic Economic Partnership (TPSEP) agreement that came into effect in 2006), as well as Australia, Malaysia, Peru, the United States and Vietnam. All of these countries with the exception of Malaysia and Vietnam, have previously negotiated and currently have in place a NAFTA-type agreement involving services and investment. Japan has expressed an interest in joining the TPP negotiations but its Parliament has not yet officially decided to do so.

Structure of most FTAs for Services in the Americas



Other chapters in the agreements that apply to both goods and services in a comprehensive manner include those on: intellectual property rights; government procurement; electronic commerce; and in the more recent agreements, a chapter on transparency. Finally, NAFTA-type agreements in the Americas provide for measures that violate the basic disciplines of the agreement to be recorded in lists of Existing and Future Non-Conforming Measures that are set out in Annexes. The main features of each chapter are discussed below.

--Cross-Border Trade in Services: The chapter on Cross-Border Trade in Services in these regional trade agreements (RTAs) recognizes and captures the importance of open cross-border trade in services and provides the legal certainty for service exporters to choose which mode of supply best suits their comparative advantage and is most cost effective. This is assured in the agreements through a provision called “no local presence requirement” which guarantees that services can be traded through modes 1 and 2 without being tied to a commercial presence abroad (unless otherwise specified in the non-conforming measures). This feature is an important one for developing trading partners, as the large majority of their exporters are small and medium-sized firms, which are then able to export through the low-cost information technology channels of the Internet on the same footing as larger firms with more capital and international branches. The chapter on Cross-Border Trade in Services contains the basic disciplines of most-favored-nation (MFN) treatment, national treatment, market access, no local presence, and denial of benefits. More recent agreements also include provisions on market access, transparency, and domestic regulation (these obligations apply to both cross-border trade in services and investment in services). The chapter often contains an Annex on Professional Services whose purpose is to facilitate the movement of professionals through provisions to encourage trading partners to recognize the equivalence of their qualifications.

--Investment: NAFTA-type FTAs have highlighted and captured the inter-related nature of investment in services and goods through a separate investment chapter which

covers both within its disciplines. Investment in the NAFTA-type agreements is much broader than “commercial presence” under the WTO GATS, where mode 3 is limited to foreign direct investment (FDI) only. Under the NAFTA approach the definition of investment is broad and asset-based. It is more encompassing than the traditional definition of FDI because it also includes portfolio investment as well as tangible and intangible assets such as intellectual property, among other assets.¹² The chapter on investment contains disciplines based on three pillars: protection by means of legal security through clear and transparent rules on issues such as expropriation and transfers; guarantee of market access through maintenance of the ‘status quo’ or liberalization of barriers to investment; and dispute settlement provisions specific to investment (“investor state” provisions).

--Temporary Entry: Contrary to the situation with investment, this chapter under the NAFTA is much narrower than the definition of mode 4 under the WTO GATS. While the latter covers the temporary movement of all natural persons, under the NAFTA-type agreements this has traditionally been limited to business persons. However, these provisions do not include obligations for visas or allow for employment considerations. Generally, there is no market access component in this chapter, although specific quotas may and have been specified separately or in side agreements.¹³

--In-depth Treatment of Specific Sectors: Two sectors in particular have been signaled out under the NAFTA approach for more in-depth treatment due to their importance for economic development and services trade. These are financial services and telecommunications. The Financial Services chapter covers cross-border trade and a broad definition of investment in financial services. It is self-contained and has its own specific disciplines for the liberalization of trade in financial services as well as its own trade-related regulatory disciplines for financial services (but does not include specific types of regulations). Prudential requirements are outside the scope of this chapter. The Telecommunication chapter contains specific disciplines for the telecommunications sector which are of a “pro-regulatory” nature and a part of competition policy. This chapter in the NAFTA-type agreements further elaborates on the WTO Reference Paper for Telecom with deeper rules and disciplines. It does not, however, provide for an explicit market access component which is covered for telecommunications in the cross-border and investment chapters.¹⁴

¹² The definition of investment in NAFTA is broad and asset based. It includes an exhaustive list of investment assets linked to the activities of an enterprise such as FDI, portfolio investment and various forms of tangible and intangible property, whereas the new US FTAs include an open-ended, asset-based definition of the term investment, which includes FDI, portfolio investment and various forms of tangible and intangible property.

¹³ It must be noted that although the definition of mode 4 under the WTO GATS does in principle cover all categories of labor, in fact it has been used by countries to schedule commitments for temporary movement of skilled labor categories only. To date there have been no cases of WTO members that have scheduled commitments for the temporary movement of semi-skilled or lower-skilled workers. And the attempt to negotiate a fuller treatment of mode 4 following the Uruguay Round (1994) proved unsuccessful.

¹⁴ NAFTA Chapter Thirteen on Telecommunications, which builds on CUSFTA Annex 1404.C, was negotiated before the WTO Reference Paper, and, as such, does not cover all the issues addressed in the Reference Paper.

B. Innovations in Market Access

Together with their differences in structure, NAFTA-type agreements are also notable for innovations in their approach to market access. This pertains to their comprehensive inclusion of all service sectors within the scope of the agreement, the unconditional application of all the key disciplines of the agreement, a dynamic, in-built provision for ongoing liberalization they contain and the high degree of transparency they bring to the treatment of all exceptions (or non-conforming measures) to the liberalization requirements. These are all discussed in more detail below.

--Comprehensive inclusion of all service sectors: In contrast to the WTO GATS and positive list agreements where inclusion of service sectors and sub-sectors within lists of commitments is completely voluntary as is the type of national treatment and market access commitments that will be accorded to the four modes of supply for each of these sectors, the NAFTA-type approach requires that all service sectors be included within the disciplines of the agreement (other than air transport and services provided by government authorities on a non-competitive basis). As a result of this large degree of freedom under the GATS where both national treatment and market access are conditional rather than unconditional obligations, there is a large degree of variation in the service agreements following a positive list approach with respect to the number and type of commitments included in schedules for traded services. This is not the case under NAFTA, where the requirement for comprehensive sectoral coverage largely shifts the negotiations under this approach from a focus on which sectors to include in liberalization commitments to a focus instead on the residual restrictions those members to the agreement wish to maintain on their service sectors.

--Unconditional application of disciplines: Under the NAFTA approach the main disciplines of the agreement must be applied to all service sectors on an unconditional basis, unless otherwise indicated. All measures affecting trade in services are to be liberalized in order to conform to these disciplines unless otherwise specified in annexes containing reservations, or non-conforming measures. Core disciplines of the agreement for cross-border services trade are MFN treatment, national treatment, market access and no local presence requirement. In the case of investment in goods and services, the core disciplines are MFN treatment, national treatment, no nationality requirements to be applied to senior management and boards of directors and certain prohibited performance requirements. However, this does not mean that NAFTA agreements automatically liberalize all services trade and all investment flows, as is sometimes believed. If countries wish to maintain restrictions on services trade, they are able to do so, subject to the outcome of the negotiations. Those measures that do not comply with core disciplines must then be set out in annexes of non-conforming measures, as mentioned above. This is the so-called "list-or-lose" technique. Non-conforming measures in the annexes can then be (but are not necessarily) liberalized through a commitment to future consultations

or periodic negotiations. Additionally, a very few sectors may sometimes be permanently exempted from all disciplines under the NAFTA approach.¹⁵

BOX 1

MODALITY: Contrasting Approaches to Liberalization in RTAs

<p>Positive list or “bottom up”</p> <p style="text-align: center;">Characteristics</p> <ul style="list-style-type: none"> --Specific commitments by sectors and modes of supply with national treatment and market access limitations --MFN treatment (with temporary exemptions) 	<p>Negative List or “top down”</p> <p style="text-align: center;">Characteristics</p> <ul style="list-style-type: none"> --Comprehensive sectoral coverage --Unconditional MFN treatment and national treatment (reservations allowed) --No local presence requirement --Listing of non-discriminatory quantitative restrictions
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--Ratchet: One very innovative provision in the NAFTA labeled the “ratchet clause” effectively provides for ongoing liberalization through the requirement that all measures brought into effect following the conclusion of the agreement in question that provide for greater market access will automatically be considered bound such that the more liberal access must be applied by members to their trading partners on a permanent basis in the future. This requirement makes NAFTA-type agreements dynamic instruments rather than fixed in time like the WTO GATS or other positive-list agreements, under which all aspects of market opening must be negotiated in future rounds of negotiations and included in future schedules of commitments before they are contractually applied to trading partners.

--Transparency: The NAFTA approach require that members provide detailed information in a transparent form on the barriers to trade in services that remain in place under the agreement (i.e., the non-conforming measures set out in the annexes). Information must be provided on each measure, including the title and reference to the law in question, the sector it affects, an indication of the core discipline/s that it violates, as well as a brief description of its contents, thus giving national service providers precise knowledge of foreign markets. This is in considerable contrast to the GATS or positive list agreements which only require a brief indication of the type of restriction affecting a given sector. Moreover, in the latter context, the type of conditions and limitations on market access and national treatment included in national schedules can be listed as ceilings on or minimum levels of treatment and thus do not necessarily reflect actual

¹⁵ These two types of measures that violate the core disciplines of the NAFTA-type agreements are set out in two separate annexes: a first annex contains those measures that violate the core disciplines explained above and which are subject to the ratchet mechanism; and a second annex contains those (few) measures or sectors that are permanently exempt from all disciplines. Most of the NAFTA-type agreements have both types of annexes. For more information, see Findlay and al. (2005) and Stephenson (2002).

regulatory practice. This possibility results in less transparency for service providers and less legal and economic certainty regarding market access. Under the NAFTA this is not possible, and all remaining restrictions must not only be justified but they must be precisely identified and applied at the level of existing law.

The “negative list” NAFTA approach described above thus innovated in many ways with respect to the “positive list,” or “bottom-up,” approach of the GATS. Although in reality neither of the two negotiating modalities guarantees full liberalization of services trade and is not presumed to do so unless this objective is explicitly set out by members to a given integration agreement, the NAFTA approach developed a number of innovations in its treatment of services as discussed above that improve upon the positive list approach. Two of the major benefits of the NAFTA approach are key ones for the success of any trade agreement. The first lies in its greater ease of use for service providers who are the ones actually trading under the agreement. The second lies in its greater ease of implementation for government officials who must ensure compliance with the disciplines of the agreement.

As mentioned above, members of all but one of the sub-regional agreements negotiated by countries in the Americas have adopted the NAFTA modality of the “negative list” approach for liberalizing services trade as outlined above (see Box 2).¹⁶ This stands in contrast to countries in other regions of the world, where the “positive list” approach continues to dominate. However, many of the regional trade agreements (RTAs) that countries of the Americas have exported to trading partners outside the region have also been based on a NAFTA-type, negative list approach, which means that the innovations discussed in this section for the treatment of services trade have found their way around the world.

BOX 2
Liberalization Modality in RTAs in the Americas

Choice of Liberalization Modality	
<u>Negative List Approach</u>	Entry into Force
NAFTA	1994
Costa Rica-Mexico	1995
Canada-Chile	1997
Mexico-Nicaragua	1998
Chile-Mexico	1999
Mexico-Northern Triangle	2001
CACM-Dominican Republic	2001 ¹⁷
Chile-CACM	2002 ¹⁸
CACM-Panama	2003 ¹⁹

¹⁶ For more information on the experience of Latin American countries in implementing the trade agreements they have signed with the United States, see Robert (2011).

¹⁷ The agreement entered into force in: Costa Rica on March 7, 2002; El Salvador on October 4, 2001; Guatemala on October 3, 2001; Honduras on December 19, 2001; and Nicaragua on September 3, 2002.

¹⁸ The agreement entered into force in 2002 in Costa Rica and El Salvador; in 2008 in Honduras; and in 2010 in Guatemala. The bilateral protocol between Chile and Nicaragua was signed on February 23, 2011.

¹⁹ The agreement entered into force in: Costa Rica on November 23, 2008; El Salvador on April 11, 2003; Guatemala on June 22, 2009; Honduras on January 9, 2009; and Nicaragua on November 21, 2009.

Chile-United States	2004
Mexico-Uruguay	2004
CARICOM	2006 ²⁰
Andean Community	2006 ²¹
CAFTA-DR-US	2006 ²²
Chile-Panama	2008
Peru-United States	2009
Chile-Peru	2009
Chile-Colombia	2009
Canada-Peru	2009
Colombia-Northern Triangle	2009 ²³
Colombia-Canada	2011 ²⁴
	Signed
Colombia–United States (signed)	2006
Panama-United States (signed)	2007
Canada-Panama (signed)	2010
Mexico-Peru (signed)	2011
<u>Positive List Approach</u>	Entry into Force
MERCOSUR	2005

C. Improving the Early NAFTA Model

Between the years 1994 and 2002, the United States executive was unable to obtain trade negotiating authority from Congress and the U.S. did not initiate any new FTAs²⁵ after the original NAFTA, partly due to the strong reactions domestically to the feared effects from the passage of the agreement.²⁶ This gap allowed the negotiators to observe how

²⁰ The CARICOM Single Market entered into force on January 1, 2006.

²¹ For more information, see: http://www.comunidadandina.org/comercio/comercio_servicios.htm

²² The agreement entered into force in: Costa Rica on January 1, 2009; Dominican Republic on March 1, 2007; El Salvador on March 1, 2006; Guatemala on July 1, 2006; and Honduras and Nicaragua on April 1, 2006. For more information on how Costa Rica and the Dominican Republic have been willing to overcome political economy obstacles to take on significant disciplines in the area of services trade in the CAFTA-DR, see Robert and Stephenson (2008).

²³ The agreement entered into force in El Salvador on February 1, 2010; Guatemala on November 13, 2009; and in Honduras on March 27, 2010.

²⁴ It is expected that the FTA will enter into force on July 1, 2011.

²⁵ The exception is the U.S.-Jordan FTA which contains one single article on trade in services referring to the GATS. The U.S.-Jordan FTA entered into force on December 17, 2001.

²⁶ Trade Promotion Authority (previously known as “Fast Track Authority”) is granted by Congress to the U.S. President so that the executive branch can negotiate trade agreements that Congress must approve or disapprove but not amend. However, it is not automatically granted; the authority must be requested and voted upon. It was in effect from 1975 to 1994, allowing for the completion of the NAFTA and the Uruguay Round, but lapsed between 1994 and 2002. It was restored in 2002 by the Trade Act of 2002 but expired on July 1, 2007 and has since not been renewed. The five years between 2002 and 2007 allowed the United States executive to negotiate several FTAs, among them the following: Chile-U.S. FTA; U.S.-Singapore FTA; U.S.-Australia FTA; U.S.-Morocco FTA; CAFTA-DR; U.S.-Bahrain FTA; U.S.-Oman FTA and Peru-U.S. Trade Promotion Agreement (PTPA). Three additional FTAs were completed and signed before the Trade Promotion Authority expired, namely the following: Colombia-U.S. Trade Promotion Agreement (CTPA); U.S.-South Korea FTA (KORUS); and Panama-U.S. Trade Promotion Agreement, although the latter three have not yet been approved by the U.S. Congress. The earlier Trade

the NAFTA text was being implemented and to work on improvements to perceived shortcomings. Once new Trade Promotion Authority was granted to the President under the Trade Act of 2002, negotiators incorporated several changes into future NAFTA-type FTAs. Such improvements served to strengthen the original NAFTA template. Specifically, three additional disciplines were added to the chapter on cross-border trade in services that were made applicable as well through cross-referencing to investment in services within the chapter on investment. These include the following:

--A “Market Access” discipline with a text similar to that of GATS Article XVI setting out a requirement not to allow restrictions on six types of market access barriers.

--A strengthened provision on “Transparency” in the chapter on cross-border trade in services, together with an additional new chapter on Transparency covering goods, services and investment;

--A provision on “Domestic Regulation” with a text similar to that of GATS Article VI, including the ‘necessity test’ clause.

--Inclusion of a separate chapter on Electronic Commerce covering the object of electronic transmission as “digital products” rather than as “services” for purposes of the agreement.²⁷

This new strengthened NAFTA template thus incorporated some of the key features of the WTO GATS that had been missing, including the disciplining of quantitative restrictions and restrictive forms of association on service activities, as well attempting to ensure that domestic regulations in the forms of qualification and licensing requirements and procedures are based on objective and transparent criteria and are not “more burdensome than necessary to ensure the quality of the service.” The strengthened transparency disciplines also were designed to ensure that opaque regulations do not take away from the market opening gains of the services agreements. These new disciplines in the revised NAFTA template were incorporated into all the FTAs concluded by the United States between 2002 and July 2007, when the Trade Promotion Authority expired, namely those in the Americas with Chile, CAFTA-DR and Peru, as well as in FTAs with Colombia and Panama that are still awaiting approval by the U.S. Congress. Canada has also applied the revised NAFTA template in its FTAs with Peru, Colombia and Panama,

Promotion Authority should cover implementing bills with respect to these three trade agreements entered into before it expired in 2007. See USTR website at: www.ustr.gov

²⁷The determination of whether the outcome of an electronic transmission is a “good” or a “service” is still outstanding at the WTO, although there is still a moratorium on the application of duties on electronic transactions. However, the revised NAFTA template defines electronic commerce in the following manner: For purposes of this Chapter: *digital products* means computer programs, text, video, images, sound recordings, and other products that are digitally encoded and transmitted electronically, regardless of whether a Party treats such products as a good or a service under its domestic law; *electronic means* means employing computer processing; and *electronic transmission* or *transmitted electronically* means the transfer of digital products using any electromagnetic or photonic means (Article 15.6 from the Chapter on Electronic Commerce, Chile-U.S. FTA, emphasis in text).

albeit with its own adjustments. For example, the new provisions on market access and domestic regulation in the cross-border chapter on trade in services do not apply to investment in services. The Canadian FTAs do include a chapter on transparency but there is no provision on transparency in the cross-border trade in services chapter.

III. Taking the NAFTA Template around the Globe?

Countries of the Americas have negotiated more free trade agreements with partners outside the region as they have with regional partners and are turning their attention outward at present even more. According to the information on the SICE website of the OAS, 30 trade agreements are in force between countries of the Americas, four of these in the form of customs unions and 26 FTAs, while 29 FTAs are in force between countries of the Americas and those outside the region. Even more striking, currently 26 FTAs are either signed or under negotiation between countries of the Americas (as of January 2011), while 40 FTAs are signed or under negotiation with extra-regional trading partners.²⁸

The majority of these FTAs with extra-regional partners resemble the negative list NAFTA-template because they have been led primarily by five countries - Mexico, Chile, the United States, Canada and Peru who have all been proponents of this approach in their trade agreements. However, not all of the agreements with extra-regional partners are as similar in structure and content as are the FTAs in the Americas. Countries of the Americas have shown themselves willing to adapt the NAFTA-template to the desires and constraints of their trading partners, or, in the case of the European Union, to adopt the template of the EU.

Table 1 in the Annex sets out a comparison of the main provisions relating to services that are found in a selection of FTAs within the Americas, highlighting how very similar all of these agreements are in form and substance. Table 2 sets out a similar comparison for FTAs negotiated between countries of the Americas and Asian partners, and Table 3 for trade agreements with the European Union.

Many of the FTAs concluded between countries in the Americas and partners in Asia look nearly identical to the NAFTA template. This is the case for the U.S.-Singapore FTA in Table 2 (as well as the U.S.-Australia and U.S.-Korea FTAs). Most of the FTAs concluded with Asian partners contain the same basic provisions and disciplines; however there are some variations in the NAFTA template. The FTAs that Chile has signed (with Korea and China) do not have an MFN clause for services, for example, as Chile did not want to extend these same trade benefits to other partners. Chile's FTA with Korea is also missing the provision on domestic regulation. China has insisted upon using the positive list approach to scheduling services commitments in all of its regional agreements, and this is the case for its FTAs with countries in the Americas – Chile, as

²⁸ See sections on “Trade Agreements” and “Trade Policy Developments” on the OAS Foreign Trade Information System (SICE) website, at www.sice.oas.org

well as the two other FTAs it has concluded with Peru and Costa Rica. The Ratchet Clause of the NAFTA approach is missing from these FTAs with China, as is the Annex on Professional Services. Instead, the agreements with China contain a Section to facilitate the “Temporary Entry of Business Persons” which includes several categories, including specialists.

It is of note that the Trans-Pacific Strategic Economic Partnership (TPSEP), a NAFTA-type FTA in force since 2006 between Chile, Brunei, New Zealand and Singapore, is being taken as the template for the negotiations to create the TPP, or “Trans-Pacific Partnership” between nine countries of the Asia Pacific region. The TPP negotiations were officially launched at the APEC Summit in November 2010.²⁹ The four TPSEP members have been joined by Australia, Malaysia, Peru, the United States and Vietnam. The original TPSEP agreement contains an accession clause. These nine countries may be joined in the future by Malaysia, Canada, Japan, the Philippines, South Korea and Taiwan, who have all expressed interest in participating in the negotiations. The TPP initiative is of considerable importance because it is viewed as a possible way forward for the proposed Free Trade Area of the Asia Pacific (FTAAP), an initiative that has been endorsed by the 21 APEC Leaders.³⁰ A future TPP would thus represent a major trading bloc that could possibly be expanded within the Asia Pacific region, taking the NAFTA-type template as its basis.

IV. Negotiating Services with the European Union?

Negotiating with the EU has been a quite recent phenomenon for countries in the Americas. To date the EU has concluded agreements that cover services with Mexico, Chile, CARIFORUM³¹ and more recently with six countries of Central America as well as Colombia and Peru.³² Negotiations with Central America, Colombia and Peru were

²⁹ The TPP negotiations were officially launched at the APEC Summit in November 2010 and a target date of November 2011 has been set for the completion of these negotiations. For information, see <http://www.ustr.gov/about-us/press-office/blog/2010/october/update-trans-pacific-partnership-negotiations>.

³⁰ The Declaration from the most recent APEC Leaders Meeting that took place in Yokohama, Japan in November 2010 includes the following official endorsement of the FTAAP effort: “We will take concrete steps toward realization of a Free Trade Area of the Asia-Pacific (FTAAP), which is a major instrument to further APEC’s regional economic integration agenda...” The Leaders’ Statement can be found at: http://www.apec.org/en/Press/News-Releases/2010/1114_leaders.aspx.

³¹ CARIFORUM States refers to the 14 member countries of CARICOM (Antigua and Barbuda, the Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Saint Lucia, St. Kitts and Nevis, St. Vincent and the Grenadines, Suriname, and Trinidad and Tobago) and the Dominican Republic.

³² The EU, Colombia and Peru announced the conclusion of their negotiations for a trade agreement in May 2010 in the framework of the VI EU-Latin America and Caribbean (LAC) Summit. Chief negotiators of the European Commission, Peru and Colombia met in Brussels on March 23-24, 2011 to initial the final texts. The text is available at: <http://trade.ec.europa.eu/doclib/press/index.cfm?id=691>. Likewise, negotiations with the six countries of Central America (Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama) and the EU were concluded in May 2010 and announced at the VI EU-LAC Summit. On March 22, 2011, Central America and the European Union initialled the Association Agreement after its legal review. The initialing will be followed by the process of translation, signature and ratification. The text is available at: <http://trade.ec.europa.eu/doclib/press/index.cfm?id=689>

concluded in 2010 and the agreements are in the ratification process. Negotiations are ongoing with MERCOSUR, and with Canada.

The earliest EU agreement with a country in the Americas was that with Mexico (2000). However, the services chapter is more of a framework than a body of obligations, requiring the market access commitments for services to be carried out at a later date, in conjunction with the conclusion of the Doha Round. However, the subsequent EU agreements with countries of the region display a distinct pattern which follows the EU template for services. Though covering essentially the same content as the revised NAFTA template for services, the EU approach is nonetheless quite different in many ways, which are reviewed in this section.

A. Broader Focus and Heavier Institutional Structure

The EU agreements have a much broader focus than the NAFTA and are conceived as political and development instruments as well as trade promoting agreements. They cover a very broad range of activities and areas. Unlike NAFTA-type FTAs, the EU agreements with countries in the Americas contain sections on Political Dialogue which extend to cooperation in foreign and security policy, as well as Social Dialogue. Generally, the agreements are divided into three parts: trade, political issues and economic cooperation.

Similar to the EU itself, the trade agreements negotiated by the EU with other partners are very heavy in institutional structure. They create numerous bodies, including an Association Committee, a Joint Consultative Committee, Special Committees for specific disciplines, and an Association Parliamentary Committee. In contrast, the NAFTA-type FTAs usually create only one overall committee to follow the implementation of the agreement, plus a Committee on Trade Capacity-Building for those FTAs where this chapter is included.

Like the NAFTA-type FTAs, the EU agreements contain separate chapters for the treatment of each mode of service supply within a broader section called a "Title" which covers both Trade in Services and Investment (or Establishment as it is often labeled). A chapter on mode 3 or "Commercial Presence" contains disciplines for foreign direct investment in goods and services, while a chapter on "Cross-Border Supply of Services" is devoted to modes 1 and 2, and a chapter on "Temporary Presence of Natural Persons for Business Purposes" (in some agreements) to facilitate mode 4 is similar to the NAFTA chapter on "Temporary Entry of Business Persons."³³ While the U.S. has become less open to dealing with mode 4 in its regional agreements, the EU seems to have moved in the opposite direction.

Unlike the NAFTA-type FTAs, the EU agreements on services/investment concluded with countries in the Americas do not include provisions on investment protection and

³³ The chapter on "Temporary Presence of Natural Persons for Business Purposes" is found in the EU agreements with CARIFORUM and Central America. However, in the case of the EU agreement with Chile, there is only a brief Article on "Movement of natural persons," with no market access component.

investor-State dispute settlement, as the EC did not have competence to develop disciplines on foreign direct investment prior to the entry into force of the Lisbon Treaty.³⁴ The Transparency requirements in these agreements are also less stringent and are not set out in a separate chapter, although the agreements do contain a provision on Domestic Regulation. Similar to the NAFTA template, the EU agreements place high emphasis on financial services and telecommunication services and include separate chapters for these with detailed provisions. However, the EU agreements single out other service sectors as well for special focus, including international maritime transport (in the Chile, CARIFORUM and Central American agreements) and computer services, courier services and tourism services (in the CARIFORUM and Central American agreements). The EU agreements follow a positive list approach for the scheduling of service commitments since the EU Commission does not have competence with respect to its member states to negotiate on all services and investment issues.³⁵ Countries in the Americas have thus been obliged to adapt to this positive-list scheduling approach when entering into agreements with the EU.

B. Emphasis on Development Cooperation in EU Agreements

Trade agreements concluded between the European Union and countries in the Americas contain a strong focus on development cooperation. EU agreements underscore the intention for carrying out cooperation in nearly every conceivable sphere of economic activity, including energy, transport, customs, statistics, data protection, consumer protection, tourism, mining, science and technology, information technology, audio-visual, investment promotion, small enterprises, illegal immigration, drugs and combating organized crime. Capacity Building is also a big component of EU agreements.

This is particularly the case in the CARIFORUM-EC Economic Partnership Agreement (EPA).³⁶ The Caribbean countries, for various reasons, were able in their negotiations with the European Union, to conclude an agreement that strongly puts into practice the concept of an asymmetrical treatment of levels of development. The EPA highlights several development-related objectives, notably those of contributing to the reduction and eventual eradication of poverty, promoting the gradual integration of CARIFORUM

³⁴ Article 207 of the Lisbon Treaty in force since December 1, 2009 brings foreign direct investment under the umbrella of Europe's common commercial policy for the first time, making it the exclusive competence of the European Community.

³⁵ Within the EU, trade in services issues do not fall exclusively under the competence of the Community as they go beyond Articles 113 and 238 of the Treaty that accords supranational treaty-making powers to the Community on behalf of all the member states. Thus when implementing the services provisions and obligations of a trade agreement, these must be approved by each EU Member State in accordance with domestic laws. For this reason the EU is required to negotiate on services through a positive list approach, allowing each EU member state to indicate its specific limitations with respect to individual sectors.

³⁶ The CARIFORUM-EC Economic Partnership Agreement was signed on October 15, 2008 by most CARICOM countries, the EU and the Dominican Republic. Guyana signed on October 20, 2008 and Haiti on December 11, 2009. It has applied provisionally since December 29, 2008. The authors are grateful to Alicia Nicholls who provided some of the insights on the innovations of the CARIFORUM-EC EPA for this section. Please also see Sauvé and Ward (2009).

States into the world and improving CARIFORUM States' capacity in trade policy and trade related issues, and the Agreement aims toward the progressive asymmetrical liberalization of trade. Similar to the CAFTA-DR, the EPA builds on and helps to deepen regional integration³⁷ (Article 4).

Development cooperation (Article 7) is recognized by the Parties as a crucial element of the Partnership. It is specifically stated that this cooperation can take both financial and non-financial forms. Article 8 outlines several broad priority areas for development cooperation between the Parties. With regard to services and investment, the diversification of CARIFORUM's exports through new investment and the development of new service sectors are mentioned. Areas of cooperation are further expounded upon in the development cooperation articles of the individual chapters of the Agreement. Specific tasks that are identified for technical assistance and capacity building in the tourism section (Article 117) include the upgrading of CARIFORUM's national accounts with the view to facilitating national and regional tourism satellite accounts and the development of internet marketing strategies for small and medium-sized (SME) tourism enterprises. Article 121(2)(f) speaks to establishing mechanisms for promoting investment and joint ventures between service suppliers of the EC and CARIFORUM States, and enhancing the capacities of investment promotion agencies in the latter. The targeted and direct nature of these provisions in the EPA is noteworthy as such provisions in most international investment agreements tend to be indirect and vaguely worded.³⁸ The more recent agreements between the EU and Central America and the EU and Peru and Colombia also include important provisions for cooperation.

V. Financial Services: A New Architectural Approach and Improved Commitments

The financial services sector has evolved at a rapid pace over the last twenty-five years, as a result of new technologies, greater competition, and deregulation. On the trade front, the Americas as a region has been at the forefront of a new architectural approach and improved commitments in financial services. NAFTA was the first agreement to address financial services in a comprehensive manner in the region. The CUSFTA provisions were, for the most part, concession-based, which means that each Party granted the other limited concessions. With the exception of insurance, financial services were not covered by national treatment and other key provisions in CUSFTA.

A. The Americas: A Stand-Alone Chapter on Financial Services

Since NAFTA, several NAFTA-type FTAs signed between countries of the Americas have included a stand-alone chapter on financial services, which is self-contained, and

³⁷ The Regional Preference Clause (Article 238(2)) attempts to help strengthen this intra-CARIFORUM integration by mandating that whatever is given to the EU must be given to all other CARIFORUM states. This is specifically targeted at the relationship between CARICOM and the Dominican Republic.

³⁸ UNCTAD (2008).

independent of the chapters on investment and cross-border trade in services, albeit some provisions included in these two chapters remain relevant.³⁹

Scope and Coverage

The scope of the chapter on financial services in NAFTA-type agreements reflects the twin objective of liberalizing trade in financial services, while ensuring that the Parties safeguard their capacity to supervise their financial systems. This explains why although some provisions (such as MFN and transparency) of the chapter are of general application, different rules apply to investment and cross-border trade. The NAFTA-type FTAs cover investment in financial institutions and cross-border trade in financial services. A financial institution is not defined in terms of the activities that an enterprise carries on. Rather, it is defined in terms of how it is regulated in the country in which it is located. If an enterprise carrying on a particular activity is regulated as a financial institution, it is a financial institution covered by the chapter on financial services. In contrast, if an enterprise carrying on the identical activity in another country is not regulated as a financial institution, it is covered by the investment chapter.⁴⁰

The concept of cross-border trade in financial services in the NAFTA-like agreements is identical to the one found in the chapter on cross-border trade in services of these same agreements. It covers cross-border trade as defined by mode 1 under GATS, consumption abroad or mode 2 under GATS, and movement of natural persons or mode 4 under GATS. The definition of financial services is not linked to that of financial institution, which implies that a financial service may or may not be provided by a financial institution.⁴¹

The NAFTA approach on financial services also innovates in that the chapter on financial services incorporates by reference a number of articles from the chapters on cross-border trade in services (Denial of Benefits, and transfers and payments⁴²) and investment

³⁹ In addition to NAFTA, all the FTAs from the region covered in this study follow this approach with the exception of the Chile-Mexico FTA, which includes a work program to negotiate provisions on financial services in the future (see Chile-Mexico FTA, Article 20-08: Unless otherwise agreed by the Parties, the FTA specifies that the negotiations shall begin on June 30, 1999). The U.S.-Singapore FTA also opted for the NAFTA approach.

⁴⁰ A financial institution is defined as any financial intermediary or other enterprise that is authorized to do business and regulated or supervised as a financial institution under the law of the Party in whose territory it is located, whereas a financial institution of another Party is a financial institution, including a branch, located in the territory of a Party that is controlled by persons of the other Party. It would therefore include a subsidiary in Guatemala of a U.S.-owned bank. The definition would also include a financial institution in El Salvador controlled by the incorporated U.S. subsidiary of an enterprise of a non CAFTA-DR country, such as a European bank. However, it would not include a financial institution controlled by a U.S. branch of a European bank. Therefore, only subsidiaries from third countries can benefit from these FTAs.

⁴¹ In NAFTA, financial services means a service of a financial nature, including insurance, and a service incidental or auxiliary to a service of a financial nature, whereas in the Chile-U.S. FTA, CAFTA-DR, PTPA, Canada-Colombia FTA, Canada-Peru FTA and U.S.-Singapore FTA, financial services is defined as any service of a financial nature, and financial services include all insurance and insurance-related services, and all banking and other financial services (excluding insurance), as well as services incidental or auxiliary to a service of a financial nature.

⁴² For the article on transfers and payments in the cross-border trade in services chapter, this applies to CAFTA-DR, PTPA, Canada-Colombia FTA and Canada-Peru FTA.

(Transfers, Expropriation and Compensation, Special Formalities and Information Requirements, Denial of Benefits, and Investment and Environment).⁴³ Moreover, the investor-State dispute settlement of the investment chapter⁴⁴ is incorporated into the chapter on financial services solely for claims that a Party has breached the articles on expropriation and compensation, transfers, or denial of benefits. A joint committee on financial services will review if the prudential carve-out applies to the measure being singled out in the claims.⁴⁵

Rules and Disciplines on Investment

The provisions which apply to investment include the national treatment obligation, which covers all phases of an investment from establishment to sale. The NAFTA and the Canada-Colombia and Canada-Peru FTAs also contain language on states and provinces (NAFTA Article 1405(4)) or sub-national governments (Article 1102 in the Canada-Colombia and Canada-Peru FTAs) not included in the Chile-U.S. FTA, CAFTA-DR, PTPA and U.S.-Singapore FTA. It is worth noting that the most recent FTAs signed by the United States, including those covered in this paper, allow the application of the “home-state rule,” under which states can discriminate against banks or insurance companies established in other states. Echandi notes that “countries such as El Salvador and Guatemala were interested in allowing their banking groups to penetrate the U.S. market to serve their Salvadoran and Guatemalan communities. Providing best-in-state treatment would have prevented the United States from applying the home-state rule that traditionally has applied to some financial services....”⁴⁶

The new FTAs⁴⁷ also contain a provision on payment and clearing systems setting out the obligation of each Party to provide national treatment by granting financial institutions of another Party established in its territory access to payment and clearing systems operated by public entities, and to official funding and refinancing facilities available in the normal course of ordinary business. The text clearly indicates that this obligation is not intended to confer access to the lender of last resort facilities in the host country.

⁴³ In the Canada-Colombia and Canada-Peru FTAs, the article on investment and environment is entitled health, safety and environmental measures.

⁴⁴ NAFTA, Chile-U.S. FTA, CAFTA-DR, PTPA, Canada-Colombia FTA, Canada-Peru FTA, and U.S.-Singapore FTA.

⁴⁵ The provision on scope and coverage in the U.S. NAFTA-based FTAs also states that the chapter does not apply to measures adopted or maintained by a Party relating to activities or services forming part of a public retirement plan or statutory system of social security; or activities or services conducted for the account or with the guarantee or using the financial resources of the Party, including its public entities, except that the chapter on financial services shall apply if a Party allows any of these activities or services to be conducted by its financial institutions in competition with a public entity or a financial institution. Annex 12.1.3(a) of the PTPA further clarifies the language relating to activities or services forming part of a public retirement plan or statutory system of social security. The language in the NAFTA is very similar but does not include the reference to activities conducted in competition between financial institutions or between public and private entities as being covered by the chapter, whereas the Canadian NAFTA-based FTAs further clarify the scope of the chapter on financial services in an Annex (see Annex 11.10.3(a) of the Canada-Colombia and Canada-Peru FTAs).

⁴⁶ Echandi (2010, p. 287).

⁴⁷ Chile-U.S. FTA, CAFTA-DR, PTPA, Canada-Colombia FTA, Canada-Peru FTA and U.S.-Singapore FTA.

NAFTA, the Canada-Colombia FTA and the Canada-Peru FTA include an article on “Establishment of Financial Institutions” (NAFTA Article 1403) or “Right of Establishment” (Canada-Colombia and Canada-Peru Article 1104) stating that an investor of another Party should be permitted to establish a financial institution in the territory of a Party in the juridical form chosen by such investor without the imposition of numerical restrictions⁴⁸ or requirements to take a specific juridical form.⁴⁹

A novel feature included in the most recent FTAs signed by the United States is the article on market access for financial institutions, which is very similar to GATS Article XVI (2) on market access, albeit the limitations on foreign capital in financial institutions were not included. However, unlike the GATS, the article does not cover cross-border trade in financial services, only investment. Under this article, each Party must refrain from imposing any of the quantitative restrictions listed in the provision (see for example, CAFTA-DR Article 12.4), which “applies horizontally on the basis of a negative list approach, in principle allowing the parties to list all nonconforming measures.” In the case of the Chile-U.S. FTA, the approach is slightly different. The article on market access for financial institutions “applies only to commitments in insurance and insurance-related services, following a positive list approach.”⁵⁰ Annex 12.9 on specific commitments in the Chile-U.S. FTA borrows from the NAFTA approach and the article on “right of establishment with respect to certain financial services” (NAFTA Article 1403). For banking and other financial services, the approach taken by the Chileans is that of the negative list approach of NAFTA.

The article on new financial services in NAFTA and the other FTAs requires a Party to allow financial institutions of another Party to provide any new financial services that it permits its own financial institutions. The Party may determine the institutional and juridical form through which the service will be provided and may require authorization for the supply of the service. Under the Chile-U.S. FTA, as in the GATS-based Chile-EC Association Agreement, “the introduction of a new financial service is permitted, provided that its introduction does not require the party to adopt a new law or modify an existing law. However, the regulatory authorities can refuse the authorization only for prudential reasons.”⁵¹

⁴⁸ Numerical restrictions means limitations imposed, either on the basis of a regional subdivision or on the basis of the entire territory of a Party, on the number of financial institutions whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test.

⁴⁹ The Canada-Colombia and Canada-Peru FTAs further clarify that the obligation not to impose requirements to take a specific juridical form does not prevent a Party from imposing conditions or requirements in connection with the establishment of a particular type of entity chosen by an investor of the other Party. Moreover, subject to the article on national treatment, a Party may impose terms and conditions on the establishment of additional financial institutions and determine the institutional and juridical form that shall be used for the supply of specified financial services or the carrying out of specified activities, and may also, in exceptional circumstances, prohibit a particular financial service or activity. Such a prohibition may not apply to all financial services or to a complete financial services sub-sector such as banking. The Canadian FTAs also stipulate that without prejudice to other forms of prudential regulation, a Party may require that an investor of the other Party be engaged in the business of providing financial services in the territory of that Party.

⁵⁰ R. Sáez (2010, p.150).

⁵¹ Ibid., p. 151.

The NAFTA-type FTAs include a provision on senior management and boards of directors, stating that the host country cannot require financial institutions of another Party to engage individuals of any particular nationality as senior managerial or other essential personnel, or that more than a minority of the board of directors of a financial institution of another Party be composed of nationals of the Party, persons residing in the territory of the Party, or a combination thereof.

The FTAs set out reservations, existing non-conforming measures to the obligations on national treatment, MFN, market access for financial institutions (except NAFTA and the Canadian FTAs which do not include such obligation), senior management and boards of directors, and establishment/right of establishment (NAFTA/Canada-Colombia and Canada-Peru). The concept of “ratchet” pioneered by the NAFTA is also included, albeit a note in Chile’s non-conforming measures indicates that ratcheting does not apply to market access for financial institutions and the right of establishment of certain financial services. Peru does the same for market access for financial institutions. Chile’s chief negotiator for financial services stated that the country “felt some discomfort with ratcheting for requiring a specific juridical form.” He noted that “experience in the regulation of financial services shows that requiring a specific juridical form (generally incorporation) is needed to ensure appropriate public disclosure.”⁵²

U.S. NAFTA-type FTAs have led to deeper liberalization on investment related to financial institutions on the part of developing countries in eliminating restrictions on the juridical form of financial services suppliers going beyond the establishment of subsidiaries to allow direct branching, in some cases not immediately, but within a specific time frame. This is particularly true in Latin America, as observed in Chile (life and non-insurance); Colombia and Guatemala (insurance and banking); Costa Rica and El Salvador (insurance); the Dominican Republic (direct insurance and reinsurance); and Peru (all financial services).⁵³

Rules and Disciplines on Cross-border Trade

While the disciplines and rules on investment in the chapter on financial services are far-reaching, the two obligations on cross-border trade in financial services are more narrow. First, national treatment is granted only to a limited number of services, that is those explicitly covered and listed in an annex to the agreement. Unlike the NAFTA, the most recent NAFTA-based FTAs do not contain a standstill clause. Therefore, except for listed services, there is no limitation on the Parties from adopting more restrictive measures. The second obligation requires Parties to allow consumption abroad but this obligation does not require a Party to permit services providers from another Party to do business or solicit in its territory. Moreover, without prejudice to other means of prudential regulation of cross-border trade in financial services, a Party may require the registration of cross-border financial service suppliers of another Party and of financial instruments.

⁵² R. Sáez (2010, p.151).

⁵³ Marchetti (2008, p. 331).

Commitments on cross-border trade made by countries that have signed an FTA with the United States show that substantial progress has been made. This is particularly true, once again, in the case of Latin American countries. As underlined by Roy, Marchetti, and Lim, these commitments go “beyond the requirements of the WTO Understanding on Commitments in Financial Services in this area by adding commitments on the cross-border supply of insurance intermediation (broking and agency) and of portfolio management services by asset management firms to mutual funds.”⁵⁴

Provisions of General Application

Finally, as noted above, several provisions in the chapter on financial services in the NAFTA-type FTAs are of general application and apply to both cross-border trade in financial services and to financial institutions, investors, and their investments in financial institutions.⁵⁵ In the case of MFN, the chapter allows for exceptions. NAFTA and the new NAFTA-based FTAs, as is the case in the GATS Annex on Financial Services, permit a Party to recognize prudential measures of another Party or of a non-Party. Such recognition may be accorded unilaterally; achieved through harmonization or other means; or based upon an agreement or arrangement with another Party or a non-Party.⁵⁶ A Party is therefore not bound to accord MFN treatment to another Party. As noted by Echandi, this “provision may be of particular importance for countries such as the United States, which condition the establishment of foreign financial institutions in their territory on compliance with numerous regulatory and prudential requirements.”⁵⁷

Transparency is another obligation of general application in the chapter on financial services. The provision requires that each Party, to the extent practicable, publish in advance any regulations of general application relating to the subject matter of the chapter that it proposes to adopt; and provide interested persons and another Party a reasonable opportunity to comment on these proposed regulations.⁵⁸ As noted by Raúl Sáez, the article on transparency in the new NAFTA-type FTAs builds on NAFTA Article 1411 “but goes further in imposing transparency and dialogue on the regulators,” as each Party shall maintain or establish appropriate mechanisms that will respond to inquiries from interested persons regarding measures of general application covered by

⁵⁴ Roy, Marchetti, and Lim (2009, p. 342).

⁵⁵ In addition, the NAFTA-type FTAs also include a provision on the establishment of a Financial Services Committee.

⁵⁶ The text of the chapter on financial services also stipulates that the Party according recognition of prudential measures shall provide adequate opportunity to another Party to demonstrate that circumstances exist in which there are or will be equivalent regulation, oversight, implementation of regulation, and, if appropriate, procedures concerning the sharing of information between the Parties. Where a Party accords recognition of prudential measures, the Party shall provide adequate opportunity to another Party to negotiate accession to the agreement or arrangement, or to negotiate a comparable agreement or arrangement.

⁵⁷ Echandi (2010, p. 290).

⁵⁸ Each Party’s regulatory authorities must also make available to interested persons their requirements, including any documentation required, for completing applications relating to the supply of financial services. Decisions on completed applications must be made within 120 days and the applicant must be promptly notified. The transparency obligation does not require a Party to furnish or allow access to information on the financial affairs of individual customers or confidential information. In addition, in the CAFTA-DR and the PTPA each Party commits to promote regulatory transparency in financial services.

the chapter. Sáez underlines that there was “some concern (...) about how soon Chile’s agencies and Central Bank would be able to fully comply; [given that] the obligations required setting up special offices and training personnel, so a two-year grace period after the entry into force of the trade agreement was included” in Annex 12.11 of the Chile-U.S. FTA.⁵⁹ In the case of Peru, the grace period is 18 months after the entry into force of the Peru-U.S. Trade Promotion Agreement (PTPA Annex 12.11) and the Canada-Peru FTA (Annex 1111).

The CAFTA-DR is the only FTA to innovate with a provision on domestic regulation specifically related to financial services. It 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 the chapter applies are administered in a reasonable, objective, and impartial manner.

All the NAFTA-type FTAs include a provision on self-regulatory organizations requiring a financial institution or a cross-border financial service supplier of another Party to be a member of, participate in, or have access to, a self regulatory organization to provide a financial service in or into the territory of that Party. The new US FTAs state that the Party shall ensure observance of the national treatment and MFN obligations by such self regulatory organization, whereas the Canadian FTAs also include the provisions on right of establishment and transparency. The new US FTAs also contain a provision on expedited availability of insurance products stating that the Parties recognize the importance of maintaining and developing regulatory procedures to expedite the offering of insurance services by licensed suppliers. In addition, an article on exceptions in the NAFTA-type FTAs prevents “limits on the application of measures for prudential reasons.”⁶⁰

Finally, the chapter on financial services covers both State-to-State disputes and investor-State disputes. In the latter case, if the claimant alleges that the measure which was violated is of a prudential nature, the case will be decided by the Financial Services Committee (composed of a representative of each Party’s authority responsible for financial services) and its decision will be binding on the tribunal.⁶¹

B. RTAs with Asia and the EC: Competing Architectural Approaches

⁵⁹ R. Sáez (2010, p. 152).

⁶⁰ Ibid, p. 151.

⁶¹ In the case of Chile, the country’s chief negotiator for financial services emphasized that “one major outstanding issue was still unresolved when the financial services chapter was closed: capital controls and the balances-of-payments exceptions.” This issue was finally resolved at the highest political level. Annex 10-C (investment chapter) applies to measures adopted by Chile which could be subject to dispute settlement by U.S. investors when applying a restriction on payments and transfers. The claim can be submitted only within one year after the measure is adopted. The objective is to distinguish between volatile and non-volatile capital flows, “reflecting Chile’s application of the URR [unremunerated reserve requirements] to address the former in the 1990s.” (Ibid., p. 154). The same language can be found in the PTPA.

While the NAFTA approach has been embraced by numerous countries of the Americas when negotiating free trade agreements among themselves, no unique model emerges in their trade agreements with Asian and European countries. In fact, several countries, particularly in Latin America, have experienced with competing architectural approaches. For instance, while the U.S.-Singapore FTA adopts the NAFTA structure, the Mexico-Japan contains a chapter on financial services which stipulates that “The Parties shall be bound by the terms and conditions that each Party is committed to under the Organisation for Economic Cooperation and Development Code of Liberalisation of Capital Movements, as may be amended, and the GATS, including the Understanding on Commitments in Financial Services, and under other international agreements to which both Parties are parties.”⁶² To further clarify, a note in the same article states that “Nothing in this Chapter shall be construed to affect the terms and conditions committed to by either Party under the respective agreements referred to in this Article.” In contrast, the NAFTA-based Chile-Korea FTA as well as the TPSEP, which contains a chapter on trade in services covering all four modes of supply of a service and negative listing but no chapter on investment, include a work program to negotiate provisions on financial services in the future,⁶³ whereas the Chile-China FTA excludes financial services from the coverage of the GATS-based Protocol on Cross-Border Trade in Services and does not include any separate provisions on financial services.

The trade agreements between countries of the Americas and the EC have also resulted in different approaches but all based on the GATS. The EC-Mexico agreement is a framework agreement with no substantive provisions on trade in services. It states that “the Joint Council shall decide on the appropriate arrangements for a progressive and reciprocal liberalisation of trade in services, in accordance with the relevant WTO rules, in particular, Article V of the General Agreement on Trade in Services (GATS), and taking due account of the commitments already undertaken by the Parties within the framework of that Agreement.”⁶⁴ On financial services, “The Parties undertake to establish cooperation in the financial services sector, in conformity with their laws, regulations and policies and in accordance with the rules and disciplines of the GATS, in light of their mutual interest and long and medium-term economic objectives.”⁶⁵ In contrast, the Chile-EC Association Agreement contains a specific chapter on financial services, which covers all modes of supply and includes key provisions also found in the GATS such as the articles on national treatment and market access, a prudential carve-out, recognition as well as other disciplines on new financial services, data processing, and effective and transparent regulation in the financial services sector. The CARIFORUM-EC EPA and the EC-Central America Association Agreement also follow the GATS approach but cover cross-border trade in financial services in the chapter on cross-border trade in services, and investment in financial services in the chapter on commercial presence (CARIFORUM-EC EPA) and establishment (EC-Central America)

⁶² See Article 108 of the Mexico-Japan FTA.

⁶³ Unless otherwise agreed by the Parties, these FTAs specify that the negotiations shall begin four years (Chile-Korea FTA, Article 21-5) and two years (TPSEP Agreement, Article 20-2) after the entry into force of the Agreement, respectively. The TPSEP also calls for the negotiations of an investment chapter within two years of the entry into force of the agreement (Article 20.1).

⁶⁴ See Article 6 of the Agreement.

⁶⁵ See Article 16 of the Agreement.

which cover both goods and services. Both agreements include national treatment and market access obligations in both chapters, and the CARIFORUM-EC EPA also has a separate provision on MFN.⁶⁶ In addition, both agreements feature a separate chapter with provisions of general application on the regulatory framework such as transparency and mutual recognition and a separate section in that chapter which contains specific provisions for financial services, for example on new financial services, data processing, and effective and transparent regulation.

⁶⁶As with goods trade, the MFN clause for cross-border trade in services and commercial presence is asymmetrical. It states that whenever the EU offers better treatment to services providers of another country, this treatment will automatically extend to CARIFORUM services. CARIFORUM countries on the other hand only have to do so where they conclude trade agreements with major trading economies, defined as “any industrialized country, or any country accounting for a share of world merchandise exports above one percent.” The MFN clause does not apply to regional agreements in the Caribbean [CARICOM Single Market and Economy (CSME) and the CARICOM-Dominican Republic FTA] although any advantage granted to the EU must also be granted to fellow CARIFORUM countries.

VI. Temporary Movement of Persons: Going further with Labor Mobility

Labor mobility has been an area where the NAFTA did not innovate in the same way as it did in other provisions. Always sensitive, the labor mobility issue became even more so after the implementation of NAFTA to the degree that the FTAs concluded by the United States after 2002 have not treated mode 4 at all. However, Canada has been willing to go much further in its recent FTAs which are very innovative in their treatment of mode 4. Other countries in the Americas have been able to obtain greater opening for labor movement in their negotiations with extra-regional partners in Europe and Asia.

A. Labor Mobility in FTAs between Countries of the Americas

NAFTA deals with mode 4 through a separate chapter entitled “Temporary Movement of Business Persons” as mentioned in Section II.A, whose purpose is to facilitate temporary entry for business people between the United States, Canada, and Mexico involved in goods or services trade or in investment activities. The categories defined under NAFTA are limited to: traders and investors; business visitors (BVs); intra-company transferees (ICTs); and professionals. In the case of business visitors who are allowed short stays of up to 90 days. The novel element of NAFTA with respect to labor mobility is the “Trade NAFTA” or TN visa it introduced.⁶⁷ This TN visa was uncapped in 1994 for Canadians and has been uncapped for Mexicans since 2004. Upon demonstrating proof of a job offer, the TN visa permits employment for one year with unlimited renewal.

In addition to the chapter on temporary entry, the NAFTA and subsequent agreements with a similar structure contain an Annex on Professionals, specifically targeted at professional service suppliers. The Annex in these agreements is intended to promote the development of mutually acceptable standards and criteria for licensing and certification of professional service suppliers -- based on factors such as educational background, qualifying examinations and experience. Additionally, the Annex encourages NAFTA Parties to provide recommendations for furthering the process of mutual recognition. A qualifying list of professions is set out in an Appendix to the agreement. In the case of NAFTA, 62 different professions are specified, for which the applicant must have the necessary qualification requirements. The United States originally placed a quota on the number of professionals that could be admitted from Mexico at 5,500 per year, but this has since been eliminated.

Under the FTA between the U.S. and Chile, labor mobility was expanded slightly for professional workers and, similar to NAFTA, a new H-1B1 visa was created. The visa provided for an initial stay of 18 months but with unlimited extensions. In addition, an annual quota of 1,800 visas for professionals from Chile was granted in addition to the fixed total of H-1B visas open to skilled workers and professional service providers from all countries. The new visa category created under the FTA is meant for temporary

⁶⁷ Summarized in Stephenson (2008).

migrants with stays of up to 18 months initially, but with the possibility of unlimited extensions.

The reaction of the public and subsequently the opposition of the U.S. Congress to the labor mobility components of these FTAs that created new visa categories and numerical quotas for skilled professionals were particularly strong. Key congressmen objected that trade agreements had stepped into the realm of immigration matters. As a consequence of this outcry, no free trade agreement negotiated by the United States since 2002 has contained a chapter to facilitate the temporary movement of skilled workers.⁶⁸ Thus the later FTAs with Central America and the Dominican Republic (CAFTA-DR) as well as with Peru, Colombia, Panama and Korea, contain no chapter on temporary entry. They do however contain an Annex on Professionals with similar objectives as the Annex under NAFTA. However, these Annexes explicitly state that “No provision shall impose any obligation on a party regarding its immigration measures” and the Annexes contain no market access commitments.

In the case of Canada, the other developed country trader in the Americas, the situation has evolved in the opposite manner. Interestingly, and perhaps due to pressures from the private sector and apparent labor shortages in the Canadian market prior to the current crisis, the government has negotiated recent FTAs that go quite far toward providing increased access not only for professionals but also for semi-skilled foreign workers. While the FTA that Canada negotiated with Chile in 1997 looks very much like the NAFTA, with the only categories of workers covered being those of investors, traders and BVs, ICTs and professionals, it was notable in that Canada placed no numerical limits on 72 of these categories of professional labor.

Strikingly, the two recent FTAs negotiated by Canada with Colombia and Peru go much further. They cover all professional categories with no numerical limits and no specified length of stay, meaning that visas could in theory be renewed indefinitely. For the first time they also expand coverage of worker categories beyond highly trained professionals to include “technicians.” In both the Colombia and Peru FTAs, Canada has listed 50

⁶⁸ The only exception to this is the FTA with Australia where no market access provisions for labor mobility were included in the text itself but a new visa category E-3 was created by an Act of the United States Congress as a result of the United States-Australia Free Trade Agreement (AUSFTA). On May 11, 2005, President Bush signed into law the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005 (Pub. L. No. 109-13). Division B of the Emergency Supplemental Appropriations Act is the REAL ID Act of 2005. Section 501 of the REAL ID Act created a new category of E visa, the E-3 visa. The E-3 visa allows for the admission of an alien who is a national of the Commonwealth of Australia and who is entering the U.S. to perform services in a “specialty occupation.” The E-3 provisions became effective upon signing of the Act. The E-3 visa is similar in many respects to the H-1B visa. Important differences include the fact that spouses of E-3 visa holders may work in the United States without restrictions (unlike other US non-immigrant visas, even the TN visa issued to Canadian and Mexican citizens), and that the E-3 visa is renewable indefinitely (in two-year increments). Australian citizens applying for an E-3 visa are also no longer subject to the 65,000 annual visa limit for H-1B visas; although there is a separate annual quota of 10,500 E-3 visas, this is believed to be much more generous to Australians than requiring them to compete with all other nations for H-1B visas. Visas issued to spouses and children are not included in the E3 quota and spouses and children do not need to be Australian citizens.

categories of technicians to be admitted into the Canadian market with no specified length of stay. These technicians must have an educational degree with two years of technical training. Technician categories include, among others, mechanics, construction inspectors, food and beverage supervisors, chefs, plumbers and oil and gas well drillers. This recent innovation in the Americas constitutes a major innovation for the treatment of temporary entry in trade agreements.

B. Labor Mobility in Agreements Negotiated with Extra-regional Partners

In trade agreements the European Union has negotiated with countries in the Americas, mode 4 is brought within the scope of the agreement in a way similar to that followed under the GATS. Categories of workers included in mode 4 commitments by the EU include the four which are traditional for preferential trade agreements (PTAs) (traders and investors, BVs, ICTs, and independent professionals). In the EU Association Agreement with Chile, besides the coverage of mode 4 in the text of the agreement, there is additionally a specific article on the “Movement of Natural Persons,” as well as an Annex on Professionals (Annex VII).⁶⁹ In the Annex, the EU specifies 33 categories of professional service providers that it will accept from Chile without numerical limit, for a time period of 3 months, subject to the “necessary academic qualification and experience.” Interestingly, Chile did not commit reciprocally to accepting any professionals from the EU.

The CARIFORUM-EC EPA follows a similar structure but expands on the categories of workers to include additional categories important for CARIFORUM members. These include contractual service suppliers, independent professionals and graduate trainees as follows:⁷⁰

- *Contractual service suppliers (CSS)*: Service suppliers who are in possession of a contract for a specific project but who are not being transferred within or employed by a firm. Applicable to a specific list of activities and permits temporary entry for a cumulative period of six months.
- *Independent professionals (IPs)*. A new category, the IPs covers natural persons of the EC Party or of the Signatory CARIFORUM States engaged in the supply of a service and established as self-employed in the territory of that EC Party or Signatory CARIFORUM State who have no commercial presence in the territory of the other Party and who have concluded a bona fide contract (other than through an agency as defined by CPC 872) to supply

⁶⁹ The specific article on “Movement of Natural Persons” (Article 101) contains only a review requirement: “Two years after the entry into force of this Agreement, the Parties shall review the rules and conditions applicable to movement of natural persons (mode 4) with a view to achieving further liberalization.”

⁷⁰ It should be mentioned however that several of the EU Member States have attached “economic needs tests” (ENTs) to their commitments on mode 4 entry. Actual access provided, even under the expanded commitments, will depend upon how these ENTs are interpreted and applied in practice. No definitions were supplied with the ENT entries, and some are applied quite restrictively.

services with a final consumer in the latter Party requiring their presence on a temporary basis in that Party in order to fulfil the contract to provide services. The provisions for the CSSs category also apply to IPs, i.e. a specific list of activities and temporary stay for up to six months.

- *Graduate trainees.* Graduate trainees, another new category, consist of workers from CARIFORUM States who have a university degree and are temporarily transferred to the parent company or to a commercial establishment for career development or to obtain training in business methods. They may enter for a period of up to one year.

In this agreement the European Union committed to accept 29 categories of professional services providers without numerical limit from the Caribbean and the Dominican Republic provided they have a university degree and 3 years experience. The CARIFORUM members did not commit reciprocally to accepting any EU professionals. It is interesting to note that the categories of CSS, IPs and Graduate Trainees are not included in the NAFTA or NAFTA-type FTAs.

The agreements negotiated by Mexico and Chile with Japan look very similar in form and content to the NAFTA template. mode 4 is treated in a chapter on “temporary movement of business persons” and defines the same four categories usually seen in trade agreements (Traders and Investors, Business visitors, Intra-corporate transferees, and independent professionals). However, Japan has set a time limit of 3 years for three of these categories which is a fairly generous length of stay.

Some countries in the Americas started to push the envelope in regional agreements on mode 4 and have begun to innovate even in most sensitive aspect of services trade. Although the regional agreements still focus almost exclusively on professional service providers, many have gone well beyond the WTO GATS in providing access for a greater number of professional categories. Some also offer the possibility of long-term or even unlimited visa renewals once professionals are settled in the country. Recent FTAs negotiated by Canada open the door even wider to extend access to categories of semi-skilled technicians in the FTAs with Colombia and Peru. The CARIFORUM-EC EPA has opened market access to contractual service suppliers and independent professionals (for 6 months) and to graduate trainees (for 1 year), the latter two new categories not found in the WTO GATS. Australia has innovated in its recent FTA with Chile to cover the spouses and dependents of ICTs and CSSs residing in the country longer than one year. Thus regional trade agreements involving countries in the Americas are moving slowly but surely (other than those with the U.S.) beyond the purely professional categories of labor to include independent professionals, semi-skilled workers, technicians, graduate trainees – and even spouses and dependents – within their scope, and often for considerable periods of time.⁷¹

⁷¹ See Stephenson (2010) for more information on developments and initiatives to provide greater access for professional service suppliers and other categories of workers in recent trade agreements.

VII. Dispute Settlement: Why are RTAs not Used to Settle Services Disputes?

One way in which FTAs in the Americas have not innovated is in the area of dispute settlement for services. Almost no disputes involving trade in services have been brought by members under any FTA. While the NAFTA contains dispute settlement provisions that were considered substantive and far-reaching at the time of its adoption, very few disputes of any type have been adjudicated under its purview. In the 17 years since the agreement came in effect in 1994, only three disputes have been brought to arbitration by NAFTA members under NAFTA Chapter Twenty, one of these involving services. Even more striking, a canvassing of the FTAs negotiated post-NAFTA with countries of the Americas indicates that no disputes on services have been brought for adjudication under these agreements.⁷² This appears somewhat puzzling, as the large and growing numbers of FTAs should presumably have led to a number of trade frictions. The lack of trade disputes among members of these arrangements being brought to arbitration would seem to indicate either that the agreements are not being used to their full extent, or that the complexity of determining compliance is too great in terms of demands on time and resources compared with the perceived benefits of enforcing negotiated modifications in laws and practices.

Table 4 in the Annex sets out a summary list of all of the disputes that have been taken to the WTO in the area of services. As of January 2011, these services disputes number 20. Of these disputes, the U.S. has been a complainant in nine, the European Communities in four, Canada and Japan each in one, with the other five complaints having been brought by developing WTO members. Three disputes involve the sale and distribution of bananas, three disputes involve measures affecting financial information services, three disputes involve distribution services and two disputes involve measures affecting the automotive industry. Interestingly, none of the 20 disputes brought to the WTO involved countries who were parties to regional trading arrangements, other than the dispute on telecommunications between the U.S. and Mexico summarized below.⁷³ Thus in only one case could the parties to a dispute have chosen between the WTO forum and the regional forum.

⁷² In the past 17 years, only three disputes have been brought up under the NAFTA (in force since 1994). See discussion by Patrick Macrory on “Chapters 19 and 20 of NAFTA: An Overview and Analysis of NAFTA Dispute Settlement,” in K. Kennedy (2004), *The First Decade of NAFTA: The Future of Free Trade in North America* and the NAFTA Secretariat website at www.nafta-sec-alena.org and www.naftanow.org.

⁷³ The only other dispute involving countries who are members to a regional trading arrangement is the complaint brought by Honduras against Nicaragua concerning measures affecting imports from Honduras and Colombia. However, this complaint was brought to the WTO in June 2000, before the Central American Agreement on Investment and Trade in Services (*Tratado Centroamericano sobre Inversiones y Comercio de Servicios*) signed on August 24, 2002 and its amending Protocol signed on February 22, 2007 to take into account the results of the CAFTA-DR negotiations. For more information, see www.sieca.int.

Once again, NAFTA has proved to be a testing ground in this regard, as two of its members (United States and Mexico) have been involved in two disputes on services, one of which was taken to the NAFTA for resolution and the other to the WTO for resolution. The services dispute brought by Mexico against the United States for resolution under NAFTA Chapter Twenty centered around a disagreement on cross-border trucking. The second dispute on services which arose between the United States and Mexico centered on practices in the area of telecommunications and was taken by the United States to the WTO for resolution rather than to the NAFTA. It is interesting to compare these two key disputes on services and to try and understand the reasons for the difference in the choice of forum, as is done in the sections below.

It is interesting to speculate on the possible reasons for the lack of disputes raised under FTAs in general and on services in particular.⁷⁴ Explanations could center on a greater familiarity of governments with the WTO instruments and a greater confidence that the decisions of the WTO dispute settlement body will be understood and respected. Additionally, governments could be swayed by the possibility of retaliation under the WTO if there is no compliance with decisions, which possibility does not exist under most FTAs. There may be a greater degree of comfort and confidence as well in the level of expertise of the panelists to adjudicate disputes at the multilateral level as well as an interest to use the WTO vehicle as a reference point for future jurisprudence on similar issues that might arise in the future in the services area, which would not be the case with decisions arising from the regional FTAs. Lastly, since most of the trade in services takes place between the larger trading nations, the WTO would be the only possible vehicle for the settlement of their disputes, as most of the FTAs to date containing services provisions have been negotiated between larger developed and smaller developing countries but not yet between major trading partners (i.e. Brazil, China, India, Japan, the U.S. and the European Union).

A. Services Dispute between NAFTA Members on Cross-Border Trucking

Under the NAFTA Annex I, the United States agreed to allow, three years after the signature of the NAFTA, Mexican motor carriers into the four U.S. bordering states—California, Arizona, New Mexico, and Texas—and Mexico would allow U.S. motor carriers into Mexico's six border states. The second part of the commitment was that six years after the entry into force of the NAFTA, Mexican motor carriers would be entitled to travel throughout the United States and US motor carriers would be entitled to travel throughout Mexico. NAFTA also permitted a person of Mexico to establish, three years after the signature of the NAFTA, an enterprise in the United States to provide truck services for the transportation of international cargo between points in the United States; and seven years after the date of entry into force of the NAFTA, bus services between points in the United States. NAFTA also kept in place the moratorium on grants of authority for the provision of truck services by persons of Mexico between points in the United States for the transportation of goods other than international cargo.

⁷⁴ The authors are grateful for the insights of Martin Roy of the Services Division in the WTO Secretariat on this question. For relevant sources, please see: Porges (2010) and Piérola and Horlick (2007).

On December 17, 1995, President Clinton issued an executive order extending the moratorium on cross-border trucking with Mexico, arguing that Mexican motor carriers were not as safe as U.S. motor carriers, therefore requesting more time to evaluate the situation. As a result, the Mexican government initiated a NAFTA Chapter Twenty State-to-State dispute. An arbitration panel was formed to evaluate Mexico's complaint alleging that the United States had violated NAFTA.

In this dispute brought under the NAFTA, Mexico challenged certain measures maintained by the United States affecting the cross-border supply of trucking services from Mexico to the U.S. Canada exercised its right to participate in the proceedings as a third party. More specifically, Mexico claimed that the United States had violated NAFTA by failing to phase out U.S. restrictions on cross-border trucking services and on Mexican investment in the U.S. trucking industry, as is required by the U.S. commitments in NAFTA Annex I, despite affording Canada national treatment. Therefore, Mexico claimed that the United States was in breach of Articles 1202 (national treatment for cross-border services) and 1203 (MFN treatment for cross-border services). It also stated that the United States had breached Articles 1102 (national treatment) and 1103 (MFN treatment) by refusing to permit investment by Mexican nationals in companies in the U.S. that engage in the transportation of international cargo.

The United States argued that the national treatment language of Article 1202, "in like circumstances," did not apply in the situation because Mexico's regulatory system did not have the same rigorous standards as the regulatory systems of the U.S. and Canada. Therefore, the U.S. claimed that it was justified in treating Mexico's services suppliers differently. The U.S. also claimed that its moratorium could be justified under Chapter Nine (standards) or Article 2101 (General Exceptions).

An arbitral panel under Chapter Twenty of the NAFTA issued its final report on February 6, 2001. The Panel found that the U.S. refusal to review and consider for approval applications for authority by Mexican-owned carriers to provide cross-border trucking services was (and remains) a breach of the U.S.'s obligations under Annex I, Article 1202 and Article 1203 of the NAFTA. Secondly, the Panel rejected the U.S.' claim that its actions were justified by the "in like circumstances" language in Articles 1202 and 1203, or by the exceptions set out in Chapter Nine or under Article 2101, concluding that the inadequacies of the Mexican regulatory system were not a sufficient legal justification for the U.S. to maintain a moratorium on the consideration of applications for U.S. operating authority from Mexican-owned and/or domiciled trucking service providers. Thirdly, the panel found that by failing to permit Mexican nationals to invest in U.S. businesses that provide transportation of international cargo within the U.S., the U.S. was (and remains) in breach of its obligations under Annex I, Article 1102 and Article 1103.

After the panel's ruling, the U.S. and Mexico agreed to a Cross-Border Trucking Services Demonstration Program which gave licenses to a select number of Mexican carriers to operate in the U.S under strict regulations. However, the U.S. Congress withdrew funding for the Program on March 11, 2009. In response, Mexico imposed retaliatory tariffs in the

amount of \$2.4 billion on a number of U.S. agricultural and industrial goods on March 16, 2009. Mexico later expanded the list of U.S. items subject to punitive tariffs. On March 3, 2011, fully a decade after the NAFTA Panel had issued its report, U.S. President Barack Obama and Mexican President Felipe Calderon announced that the two parties had come to a resolution of this outstanding dispute and that they had reached a preliminary agreement aimed at resolving the bilateral dispute over access of Mexican trucking services to the U.S. market. Once the final agreement on a new cross-border trucking program is concluded, Mexico will immediately lower by 50 percent the retaliatory tariffs it slapped on some U.S. exports. The remaining 50 percent of the value of the tariffs will be suspended when the first Mexican operator is expected to receive operating authority under the new program.

B. Services Dispute between NAFTA Members on Telecommunications

The second dispute that arose on services between these same two NAFTA members involved a complaint by the United States with regard to Mexico on its measures affecting telecommunications services.

In August 2000, the United States sought consultations with Mexico, alleging that Mexico had adopted anti-competitive and discriminatory regulatory measures, had tolerated certain privately-established market access barriers and had failed to take needed regulatory action in its basic and value-added telecommunications sectors.⁷⁵ In April 2002 a panel was established under the WTO Dispute Settlement Understanding, and two years later in June 2004, the WTO's Dispute Settlement Body adopted the panel's report, which concluded, *inter alia*, that Mexico had failed to ensure the application of cost-oriented international interconnection rates (in breach of Sections 2.1 and 2.2 of the WTO Reference Paper on Telecommunications, inscribed in Mexico's GATS Schedule of Specific Commitments); had failed to impose regulatory measures to prevent anti-competitive practices on the part of the main telecommunications operator (in breach of Section 1.1 of the Reference Paper, inscribed in Mexico's GATS Schedule of Specific Commitments); and had failed to ensure access to and use of public telecommunications networks on reasonable and non-discriminatory terms (in breach of Section 5 of the GATS Annex on Telecommunications. A similar commitment was made under NAFTA 1302).⁷⁶

It is interesting to speculate on the reasons behind the different choices in the venue for the dispute settlement of these two services complaints summarized above. However, the difference in the outcomes is striking. The United States was able to obtain fairly rapid compliance from Mexico under the WTO dispute settlement mechanism to modify its pricing practices in Telmex whereas Mexico, despite a clear decision of the NAFTA Panel in its favor, was unable to obtain compliance from the United States to modify its practices on trucking for over a decade. While it is difficult to know whether it is the robustness of the dispute settlement process, or the willingness of the parties involved to

⁷⁵ WTO Document WT/DS204/1 of August 29, 2000.

⁷⁶ WTO Document WT/DS204/R of April 2, 2004.

comply with the Panel decision, or a combination of both that made the difference, this contrasting experience may not encourage countries who have the choice of a forum for settling their grievances in the services area to choose an FTA dispute settlement process over the WTO process.

VIII. Have FTAs Produced any Results: Examining their Impact

Assessing the impact of free trade agreements has always been a complex issue.⁷⁷ The challenge is even greater for trade in services, where statistics have only been recorded for a short period of time and then only on a limited basis. Statistics on bilateral trade flows in services exist only among a few trading partners. Given the limited datasets available on services trade, it is difficult at the present to run robust regressions.⁷⁸ However, to try and obtain some rough indication of whether the FTAs entered into by countries in the Americas have had any significant impact on services trade we developed and applied a very simple methodology to calculate “excess growth.” This methodology attempts to capture how trade in services has evolved after the entry into force of some key FTAs based on a comparison of the performance of services trade between the same partners and prior to the agreements.⁷⁹ It is explained in Box 3.

Box 3 on “Excess Growth Methodology”

The “excess growth” methodology measures the growth in trade in services between the members of an FTA *as compared with* the growth of trade in services with non-members of the FTA. Calculations of total trade include imports and exports. Data are drawn from international (OECD and IMF Balance of Payments) and national sources (USTR Dataset and Eurostat) to obtain statistics on trade in services *by trading partner*. Calculations are carried out for: (a) the average growth in total trade in services between a member of a given FTA and the other members, which is labeled intra-zone trade; and (b) the average growth in total trade in services between that same member and the rest of the world, excluding other members, or the extra-zone trade. By subtracting the growth in extra-zone trade from the growth in intra-zone trade, i.e. (a) – (b), it is possible to obtain a measure of “excess growth” which indicates whether trade in services between a member of a FTA and the other members has grown faster (positive excess growth) or slower (negative excess growth) than trade with non-members.

⁷⁷ See Baier and Bergstrand (2005) for a comprehensive discussion.

⁷⁸ Ideally, the best way to examine the effect of FTAs is with gravity models (for services trade, goods trade and FDI), but the data and computational requirements of such exercises are beyond the scope of this paper.

⁷⁹ The authors wish to recognize with gratitude the original contribution of Thibaud Delourme in developing the statistical approach for this methodology and applying it to the regional groupings to obtain the results reported in this section for services trade and goods trade.

This “excess growth” is then calculated for every member. The “total excess growth” is calculated for the regional grouping as a whole by subtracting the growth of total extra-zone trade from the growth of total intra-zone trade. These calculations are carried out for two periods: before and after the agreement enters into force in order to observe the performance of services trade and test whether the existence of an FTA might be a factor in accelerating the growth of intra-zone trade relative to the growth of extra-zone trade or not. Expectation is for the “excess growth” in services trade of the members of a FTA involving services liberalization to be higher after the agreement enters into force than it was prior to the agreement. Results are also shown for the Δ Growth, which is simply the differential in excess growth after and before the FTA : Δ Growth = Excess growth after the agreement minus Excess Growth before the agreement.

A. Factors to Take into Account in Applying the “Excess Growth” Methodology

Services trade should hypothetically be stimulated among partners to a free trade agreement in three different ways: either through actual liberalization of services, unleashing greater productivity and competitiveness of services suppliers; through the positive impact of greater security and transparency generated by the binding of market access obligations combined with appropriate regulatory disciplines; or through the greater demand for services trade generated by increased investment flows responding to the signaling effect of the agreement on policy reform and stability and expanded market size for economies of scale. Thus we presume that any subsequent increase in either the demand for, or the supply of services or both, should result in a larger increase in services trade with partner countries rather than with non-partner countries.

However, it must be recognized at the outset that the results obtained from the application of the “excess growth” methodology do not allow for the attribution of a direct casual effect between the entry into force of an FTA and the resulting performance of services exports. The calculation does not necessarily imply any causality. Several factors could enter into play that might impact upon the observed outcomes that would be impossible to isolate within a simple calculation. Such factors include, among others, endogenous changes in demand and the appearance of new services exporters on the world market. Regressions would allow for a better indication of causality but they could not be carried out due to the limitations (time series and partner breakdown) for available statistics on services trade. The “excess growth” methodology does allow us to observe performance of services trade in a pre- and post-FTA situation and does provide some interesting results. These should be taken cautiously and only as general indications of trends and are best interpreted in the context of the specific knowledge of each agreement.

The time frames for calculating the “excess growth” figures have been chosen in function of the longest time period of available and comparable statistics for services trade for the

parties to an agreement. The years studied were symmetrical, that is an attempt was made to cover the same number of years prior to and after the agreement.

We applied the “excess growth” methodology to four different FTAs involving countries of the Americas for which it was possible to gather reliable datasets.⁸⁰ As a point of comparison, we also applied the same “excess growth” methodology to examine the change in trade in goods for these same four FTAs. Interestingly, for these agreements, “excess growth” in services (between partner countries) is shown to increase after the FTA entered into force, in some cases significantly. And for members of three out of four FTAs, the differential in “excess growth” is shown to increase more for services than for goods, indicating that the impact of the FTA on stimulating growth in services trade has been greater after its entry into force than its impact in stimulating growth in goods trade. The results of these calculations are set out in Tables 5 through 8 in the Annex and are summarized below.

B. Positive “Excess Growth” of Services Trade for four FTAs

For the case of the U.S. and Chile, applying the methodology indicates that over the five years prior to their FTA agreement (2000-2004), total trade in services declined at an average rate of 8.11% a year. At the same time, services trade between the U.S. and the rest of the world increased by 3.67% year and services trade between Chile and the rest of the world by 6.36% a year, resulting in an “excess growth” of -11.78% for the U.S. and -14.47% for Chile. In other words, over the period 2000-2004, trade in services between the U.S. and Chile grew at a rate 11.78 percentage points lower than trade between the U.S. and the rest of the world, and 14.47 percentage points lower than trade between Chile and the rest of the world. The “excess growth” for the U.S. and Chile combined was -12.00% over that same period. After the agreement, the negative growth trend is completely reversed. As shown in Table 5, during the five years following the entry into force of the FTA, trade in services between the two trading partners is calculated to grow by 8.61% a year on average (2004-2009). The growth in trade with the rest of the world accelerates too, but not as much, resulting in an “excess growth” of 3.11% for the U.S. and Chile combined, indicating that for both countries, trade in services has grown at a faster rate than that with other countries, in contrast to the earlier period. The differential in excess growth after and before the FTA is larger for services trade than for goods trade (15.11% compared with 11.08%), indicating that the agreement has stimulated growth of services trade relatively more than goods trade. Once again, these results are purely descriptive and do not necessarily imply any causality. Chile’s faster rate of growth in general following the FTA could also have had an impact on this positive outcome.

⁸⁰ Although we examined the “excess growth” trends for NAFTA as well as for the EC-Chile Association Agreement, the results in both cases were not felt to be accurate enough to warrant inclusion in the discussion as it was not possible to carry out the calculations in the same manner as for the other agreements given the limitations in the data sets. As NAFTA was concluded some time ago, there are no time series on services trade available for Mexico and Canada for the years prior to the agreement. And for the EC-Chile agreement, the dataset only allowed for one year’s observation prior to its entry into force (2003), which we did not consider a sufficient benchmark for the purpose of the comparison.

Similar results appear in the case of the U.S. and Singapore, shown in Table 6. “Excess growth” in services rises from -1.60% during the five years prior to the FTA (2000-2004) to -0.09% for the U.S. during the five years following the FTA (2004-2009) and for Singapore, from -10.20% to -6.22% over these two same periods. For the U.S. and Singapore combined, the change in “excess growth” during these same time periods moves from -2.48% to 0.94%. We note that, even after the FTA, growth in services trade is at a slower pace than that with the rest of the world, which may partially be explained by the large amount of services already traded between the two countries prior to the trade agreement and the dominant role that services already played in both, with the U.S. and Singapore being the pre-eminent service economies of the world. This also seems to be confirmed by the differential in excess growth after and before the FTA, which is larger for goods trade than for services trade (3.89% compared with 1.54%) for the U.S.-Singapore FTA, as shown in Table 6. However, the growth differential between intra- and extra-FTA trade in services for both the U.S. and Singapore has considerably narrowed after their agreement entered into force.

The agreement between Mexico and Japan (2005) is associated with a significant increase in “excess growth” of trade in services, as seen in Table 7. While the excess growth in services trade for Japan and Mexico combined shows -13.79% during the five years before the FTA (2000-2005), it rises to 8.54% during the four years following the agreement (2005-2008). The excess growth in goods trade experiences the opposite evolution, slowly dramatically from 24.17% on average during 2000-2005 to 0.58% during the four years after the FTA. The differential in excess growth after and before the FTA is strongly positive for services (22.33%) but negative for goods (-23.59%). Thus the FTA appears to have significantly increased the importance of services trade between these two partners.

In the case of the more recent CARIFORUM-EC EPA, results are summarized in Table 8. The “excess growth” for services for the EU and CARIFORUM countries combined rises from -4.96% over the period 2000-2008 to 7.64% after the agreement (period 2007-2009). This increase is especially important in the case of the CARIFORUM, where their trade with the EU grows at 5.69% a year, as compared with a drop of -7.08% for their trade with the rest of the world. The differential in excess growth after and before the FTA is again in this case strongly positive for services (12.60%), more than double that for trade in goods (5.45%). Thus the agreement appears to have significantly increased the importance of services trade between these two partners. However, this strongly positive outcome is based on a short period of time and cannot necessarily be interpreted as a long term trend.

In sum, the above four FTAs which we were able to examine on the basis of minimally adequate datasets all show patterns in their services trade growth consistent with the expectation that intra-regional growth in services should increase after a free trade agreement enters into force and that growth of intra-FTA trade relative to trade with outside partners should be higher after the agreement than before. These expectations are confirmed by application of the “excess growth” methodology, which is one method among many, to try and examine the impact that the formation of an FTA might have on

services trade, though admittedly imperfect. Results can also be strongly influenced by changes in the world economy as well as those in the context of the country observed.

IX. Possibility for Convergence of FTAs in the Americas?

Several experiments are underway in the Americas of which there is little awareness as of yet to consolidate similar regional trade agreements. Given the large number and overlapping levels of regulatory complexity created by FTAs with various configurations of membership, a bottom-up movement toward convergence has begun recently in the Western Hemisphere. The move toward convergence represents an attempt to rationalize the complications created by numerous sets of disciplines and market access requirements among several like-minded parties to FTAs based on a similar NAFTA-type template.

The effort at convergence in the Americas has been spearheaded under the guise of the *Arco del Pacífico* initiative and involves 11 Latin American countries that border the Pacific and who are parties to 11 existing NAFTA-type FTAs. Participating countries are Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, and Peru. The United States and Canada, although also parties to NAFTA and NAFTA-type FTAs, are not participating in this convergence effort.⁸¹

The objectives of the *Arco del Pacífico* initiative are three: to deepen existing trade agreements and eventually move toward common rules; to broaden economic cooperation and trade facilitation among participating countries; and to engage more deeply in coordinated economic relations with the Asia-Pacific region.⁸² To date, six ministerial meetings have been held and four Working Groups have been set up to focus the discussions, including a key one on “Trade Convergence and Economic Integration.”⁸³ This Working Group has been given the task of identifying ways of moving toward common rules on accumulation of origin, a complex issue. The group has also been asked to analyze existing trade and integration agreements in the areas of technical barriers to trade, sanitary and phytosanitary measures, customs procedures, trade facilitation, countervailing measures, services, investment, government procurement,

⁸¹ The U.S. is a party to six FTAs with countries in the Americas (NAFTA with Canada and Mexico, and FTAs with Chile, Peru and the five Central American countries plus the Dominican Republic) and two more signed but not yet in force (with Colombia and Panama). There has, however, been an explosion of trade agreements in the region to which the U.S. is not a party, including the discussions of the *Arco del Pacífico*, South American unification efforts and multiple bilateral agreements. The only ongoing negotiation in which the U.S. is currently participating is that of the TPP or the Trans-Pacific Partnership Agreement. Though a relatively latecomer to the negotiations of regional agreements, despite the NAFTA, Canada has been actively pursuing FTAs over the recent period and has negotiated six such agreements with countries in the Americas (namely with Chile, Colombia, Costa Rica, Panama and Peru, besides the NAFTA). Canada is involved in ongoing negotiations with CARICOM, Central America (CA-4), and the Dominican Republic.

⁸² See chapter IV on “Integration and Trade Initiatives” of the ECLAC study (2009) on *Latin America and the Caribbean in the World Economy, 2008 Trends*, p.103-104.

⁸³ The other three Working Groups set up under the *Arco del Pacífico* initiative are: Trade Facilitation and Infrastructure; Investment Promotion and Protection; and Competitiveness.

competition policy and dispute settlement, in order to see how existing disciplines may be made to converge.⁸⁴

While only at the beginning, this convergence effort of the *Arco del Pacifico* represents a major initiative in the Americas to consolidate existing FTAs into a broader agreement.⁸⁵ The effort may gain in significance as governments finally react to the complexities of an ever-growing network of regional agreements and attempt to bring greater rationalization to this situation.⁸⁶

Another convergence effort is also taking place between six members of the ARCO, that is, between Mexico and Central America. In June 2008, on the occasion of the 10th Tuxtla Mechanism Summit, the countries of the region agreed to initiate negotiations aimed at achieving convergence of their free trade agreements into a single instrument. On March 26, 2009, the Vice ministers of Foreign Trade of Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and Mexico agreed on an action plan for the convergence of their free trade agreements. From May 2010 to February 2011, five negotiating rounds were held.⁸⁷

Finally, it is worth noting that four ARCO members, Chile, Colombia, Mexico, and Peru launched a new initiative in January 2011, the *Área de Integración Profunda* (AIP), which aims to accelerate the integration process among these four ARCO members by

⁸⁴ The website of the *Arco del Pacifico* initiative can be found at: <http://www.arcodelpacifico.org>. The 11 existing FTAs between the 11 participating countries are the following: Central America-Chile; Central America-Panama; Chile-Colombia; Chile-Mexico; Chile-Panama; Chile-Peru; Colombia-Northern Triangle (El Salvador, Guatemala, and Honduras); Costa Rica-Mexico; Mexico-Nicaragua, Mexico-Northern Triangle, and Mexico-Peru. Other agreements are currently being negotiated, for example, between Central American countries and Peru. See www.sice.oas.org.

⁸⁵ A parallel initiative launched by President George W. Bush, also in 2008, is the “Pathways to Prosperity in the Americas,” ongoing among 14 countries representing 86% of hemispheric trade. All these countries (including Uruguay which has an FTA with Mexico) is party to one of more similar NAFTA-type FTAs. The overarching goal of Pathways is to expand economic opportunities for all as markets become increasingly integrated and promote inclusive growth and prosperity, in part through the sharing of experiences and best practices aimed at empowering small business, facilitating trade, building a modern workforce, and developing stronger labor and environmental practices. Ministerial meetings among participating countries are held once a year. There are no plans to open talks on convergence at present and it is unlikely that this issue could come up in the near future. The website for the “Pathways to Prosperity in the Americas” is: <http://www.pathways-caminos.org>.

⁸⁶ If the *Arco del Pacifico* attempt at convergence should prosper, the question must be asked as to what becomes of the 11 bilateral and plurilateral FTAs currently in force among the 11 participants? Would the broader regional agreement replace these or would they all continue to co-exist, either during a transition phase or indefinitely? The solution envisaged by the negotiators of the now abandoned FTAA (Free Trade Area of the Americas) agreement designed to include all of the democratically elected governments of the Americas was to include a provision allowing pre-existing sub-regional integration agreements to continue operational only in the case where their provisions went beyond or were deeper than the broader regional FTAA agreement.

⁸⁷ The first round of negotiations for the convergence of the existing free trade agreements between Central American countries and Mexico took place in May 2010 in Mexico City. The second round was held in August 2010 in San Salvador. The third round of negotiations took place on September 27-30, 2010 in Mexico City, and the fourth round on January 31-February 4, 2011 in Guatemala.

creating a common market which would guarantee the free movement of goods, services, capital, and people.

X. Conclusion

There is no doubt that the Americas have been the proving ground for innovations in services agreements. The region has produced a major alternative to the liberalization of services trade in the form of the NAFTA template. A new generation of NAFTA-type agreements has also improved and strengthened the original template, incorporating key features of the WTO GATS for both cross-border trade in services and investment in services.

The NAFTA innovates in several areas with respect to the positive list of GATS, in terms of structure of the agreement; depth of provisions, liberalizing modality, transparency, in-built liberalizing mechanism, treatment of investment and of mode 4, to name a few elements. The NAFTA template has also been carried around the world in numerous free trade agreements negotiated between countries of the Americas and extra-regional partners, particularly in Asia and the Middle East. One such major initiative is the agreement being negotiated in the TPP, which is viewed as a possible way forward for an eventual FTAAP.

Assessing the impact of free trade agreements remains a complex issue, and particularly for trade in services. This paper has emphasized that albeit causality is difficult to prove, the authors' calculations show that for those FTAs with an adequate dataset to merit an examination of trends prior to and subsequent to the entry into force of an agreement, services trade has increased more between FTA partners than it has with the rest of the world. And examining the differential in growth resulting from the trade agreements shows that services trade increases relatively more than goods trade for most FTA members, indicating that the impact of the FTAs on stimulating growth in services trade has been greater than their impact in stimulating growth in goods trade.

Finally the increasing number of NAFTA-type agreements in the Americas has given also rise to a movement toward convergence and a rationalization of overlapping disciplines and market access opportunities, being led by Mexico and the Central American countries, and more broadly by the 11 members of the *Arco del Pacífico*. A more recent trend is characterized by the efforts underway between four ARCO members –Chile, Colombia, Mexico and Peru- to go beyond convergence and negotiate a deeper relationship based on the establishment of a common market.

Though the Americas region is no longer the main area of the world pursuing regionalism, it nonetheless continues to be at the forefront of experimentation in services rules, disciplines and liberalization. The torch of innovation is no longer being carried by one single country, the United States, but now other countries - Canada, Chile, Mexico, Peru, Central America and the Caribbean – are pushing forward with new developments in the treatment of services in regional trade agreements.

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ANNEX

Table 1: Comparison of Treatment of Services in RTAs within the Americas

Agreement	Modality*		National Treatment	Most Favored Nation	Market Access	Domestic Regulation	Transparency ⁸⁸	Carve-out for subsidies & grants	Ratchet Clause	Mutual Recognition Provisions	Denial of Benefits Clause	Dispute Settlement Provisions	Annex on Professional Services
	Positive List	Negative List											
NAFTA (1994)*	-	√	√	√	-	-	-	√	√	√	√	√	√
Chile-Mexico (1999)	-	√	√	√	-	-	√	√	√	√	√	√	√
CAFTA-DR (2006-2009)*	-	√	√	√	√	√	√	√	√	√	√	√	√
Chile-US (2004)	-	√	√	√	√	√	√	√	√	√	√	√	√
Canada-Peru (2009)	-	√	√	√	√	√	√	√	√	√	√	√	√
Canada-Colombia (signed in 2008)	-	√	√	√	√	√	√	√	√	√	√	√	√
Peru-US (PTPA) (2009)	-	√	√	√	√	√	√	√	√	√	√	√	√

*Agreements with more than two parties

⁸⁸ The NAFTA Agreement does not have a chapter entitled “Transparency”, but Chapter Eighteen entitled “Publication, Notification and Administration of Laws” contains transparency provisions, whereas the Canadian FTAs do not contain a provision on transparency in the chapter on cross-border trade in services but do include a chapter on transparency.

Table 2: Comparison of Treatment of Services in RTAs between Countries of the Americas and Asian Partners

Agreement	Modality		National Treatment	Most Favored Nation	Market Access	Domestic Regulation	Transparency	Carve-outs for subsidies & grants	Ratchet Clause	Mutual Recognition	Denial of Benefits Clause	Dispute Settlement	Annex on Professional Services
	Positive List	Negative List											
Chile-Korea (2004)	-	√	√	-	-	-	√	√	√	√	√	√	√
US-Singapore (2004)	-	√	√	√	√	√	√	√	√	√	√	√	√
Mexico-Japan (2005)	-	√	√	√	-	√	√	√	√	-	√	√	-
Chile-China (2010) ⁸⁹	√	-	√	-	√	√	√	√	-	√	√	√	-
Trans-Pacific Strategic Economic Partnership TPSEP (2006)*	-	√	√	√	√	√	√	√	√	√	√	√	√

*Agreements with more than two parties

⁸⁹ The Protocol on Trade in Services between Chile and the People's Republic of China is in force since August 1, 2010. The main agreement between the two countries has been in force since October 1, 2006.

Table 3: Comparison of Treatment of Services in RTAs between Countries of the Americas and the EU

Agreement ⁹⁰	Modality		National Treatment	Most Favored Nation	Market Access	Domestic Regulation	Transparency	Carve-outs for subsidies & grants	Ratchet Clause	Mutual Recognition	Denial of Benefits Clause	Dispute Settlement Provisions	Annex on Professional Services
	Positive List	Negative List											
EC-Chile (2003)	√	-	√	-	√	√	√	√	-	√	-	√	-
CARIFORUM-EC EPA (2008)* ⁹¹	√	-	√	√	√	√	√	√	-	√	-	√	-
EC-Central America (AACUE)* ⁹²	√	-	√	-	√	√	√	√	-	√	-	√	-

*Agreements with more than two parties

⁹⁰ EC-Mexico is a Framework Agreement. Article 6 on Trade in Services does not contain any substantive disciplines.

⁹¹ The EU Member States and all CARIFORUM states but Haiti signed the EPA in October 2008; the latter signed the Economic Partnership Agreement (EPA) on December 11, 2009. The Agreement will officially enter into force pending the completion of the process of ratification by the member states. However, until then CARIFORUM and Europe will provisionally apply the EPA. Through provisional application since December 29, 2008, the European Community and the signatory CARIFORUM States are able to benefit from the terms of the Agreement. For services and commercial presence (mode 3) the CARIFORUM countries use a positive list approach. However, for non-services investment, CARIFORUM uses a negative listing approach..

⁹² The negotiations were concluded on May 19, 2010. The agreement is between the 27 EU member States, on the one hand, and the five CACM members and Panama, on the other hand. The agreement is not yet in force.

Table 4: Summary Table of WTO Dispute Settlement Cases with a Services Component

Dispute	Complainant	Relevant GATS Articles	Current Status (as of November, 2010)
1. <u>DS413</u> China — Certain Measures Affecting Electronic Payment Services	United States	Art. XVI and XVII	In consultations on September 14, 2010
2. <u>DS378</u> China — Measures Affecting Financial Information Services and Foreign Financial Information Suppliers	Canada	Art. XVI, XVII and XVIII	Settled or terminated (withdrawn, mutually agreed solution) on June 20, 2008
3. <u>DS373</u> China — Measures Affecting Financial Information Services and Foreign Financial Information Suppliers	United States	Art. XVI, XVII, XVIII	Settled or terminated (withdrawn, mutually agreed solution) on December 4, 2008
4. <u>DS372</u> China — Measures Affecting Financial Information Services and Foreign Financial Information Suppliers	European Communities	Art. XVI:2(a), XVI:2(e), XVII, XVIII	Settled or terminated (withdrawn, mutually agreed solution) on December 4, 2008
5. <u>DS363</u> China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products	United States	Art. XVI, XVII	Report(s) adopted, with recommendation that China bring the measure into conformity on January 19, 2010
6. <u>DS309</u> China — Value-Added Tax on Integrated Circuits	United States	Art. XVII	Settled or terminated (withdrawn, mutually agreed solution) on October 5, 2005
7. <u>DS285</u> United States of America — Measures Affecting the Cross-Border Supply of Gambling and Betting Services	Antigua & Barbuda	Art. II, VI, VIII, XI, XVI, XVII	Antigua & Barbuda awarded limited cross-retaliation rights against US intellectual property to the tune of \$21 million annually on December 21, 2007
8. <u>DS237</u> Turkey — Certain Import Procedures for Fresh Fruit	Ecuador	Art. VI, XVII	Settled or terminated (withdrawn, mutually agreed solution) on November 22, 2002
9. <u>DS204</u> Mexico — Measures Affecting Telecommunications Services	United States	Art. VI:5, VI, VI:1, XVI, XVI:1, XVI:2, XVII, XVII:1, XVII:2, XVII:3, XVIII	Implementation notified by Mexico on August 31, 2005

Results from “Excess Growth Calculations” for four FTAs

Table 5 : U.S.-CHILE (2004)			2000- 2004	2004- 2009	Δ Growth
Average growth of Total Trade					
<i>US with Chile</i>	<i>Services</i>		-8.11%	12.27%	20.38%
	<i>Goods</i>		2.55%	14.64%	12.09%
<i>Extra-zone Trade</i>					
	<i>Services</i>		3.89%	9.16%	5.27%
	<i>Goods</i>		3.79%	4.78%	0.99%
Excess Growth					
	<i>Services</i>		-12.00%	3.11%	15.11%
	<i>Goods</i>		-1.23%	9.85%	11.08%

Sources : USTR, IMF, OECD.

Table 6 : U.S.-SINGAPORE (2004)			2000- 2004	2004- 2009	Δ Growth
Average growth of Total Trade					
<i>US with Singapore</i>	<i>Services</i>		2.05%	8.53%	6.48%
	<i>Goods</i>		-2.02%	-2.46%	-0.44%
<i>Extra-zone Trade</i>					
	<i>Services</i>		4.53%	9.47%	4.94%
	<i>Goods</i>		4.33%	5.39%	1.06%
Excess Growth					
	<i>Services</i>		-2.48%	-0.94%	1.54%
	<i>Goods</i>		-6.35%	-2.46%	3.89%

Sources : USTR, IMF,

Table 7 : MEXICO-JAPAN (2005)			2000- 2005	2005- 2008	Δ Growth
Average growth of Total Trade					
<i>Mexico with Japan</i>	<i>Services</i>		-8.54%	16.76%	25.30%
	<i>Goods</i>		28.06%	11.70%	-16.36%
Extra-zone Trade					
	<i>Services</i>		5.26%	8.25%	2.99%
	<i>Goods</i>		3.89%	11.12%	7.23%
Excess Growth					
	<i>Services</i>		-13.79%	8.54%	22.33%
	<i>Goods</i>		24.17%	0.58%	-23.59%

Sources : USTR, IMF,
OECD.

Table 8 : CARIFORUM-EC EPA (2008)			2000- 2008	2008- 2009	Δ Growth
Average growth of Total Trade					
<i>EU with Cariforum</i>	<i>Services</i>		5.39%	5.69%	0.30%
	<i>Goods</i>		5.32%	-7.08%	-12.40%
Extra-zone Trade					
	<i>Services</i>		10.35%	-1.95%	-12.30%
	<i>Goods</i>		10.61%	-7.24%	-17.85%
Excess Growth					
	<i>Services</i>		-4.96%	7.64%	12.60%
	<i>Goods</i>		-5.29%	0.16%	5.45%

Sources : EUROSTAT,
IMF, WTO