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Regional versus multilateral liberalization of services

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Abstract: Many WTO members have been engaging in efforts at the regional level to liberalize services trade even as they are negotiating under the GATS. This duplication of negotiating effort might appear misplaced, unless regional trade agreements can actually produce results going beyond those at the multilateral level and thus serve the interests of their members. This paper explores in what areas regional agreements on services have surpassed the GATS in terms of delivering on three key objectives set out by all service agreements, namely the promotion of transparency, stability, and liberalization for services trade. The paper comments on how countries may evaluate where to best direct their negotiating efforts, according to the type of service activity in question, and suggests that regional agreements can prove to be useful in supporting and pushing forward multilateral services liberalization.

A proliferation of regional trade agreements (RTAs) has been observed since the mid 1990s. Salient characteristics of most recently concluded RTAs are their ambitious nature and their attempt to carry out trade liberalization and integration not only for goods but also for services.

How have countries fared with their participation in regional trade agreements in services as compared with what they have done under the WTO General Agreement on Trade in Services (GATS)? More generally, how successful have RTAs been as compared with the success known by the GATS in terms of liberalizing services trade? These are questions of considerable significance now that regionalism has taken on such a widespread appeal and in light of the debate on the merits or demerits, in particular for developing countries with limited negotiating resources, of putting efforts into a regional approach to trade liberalization.

Since it is well known that the GATS achieved very little in terms of liberalization for services trade during the Uruguay Round, the question that is explored in this paper is whether regional agreements can do this better. This paper provides some observations on how certain regional agreements in services compare with

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the GATS in terms of fulfilling certain key objectives and suggests answers to the intriguing question of whether or not more progress can be made towards services trade liberalization at the regional level rather than at the multilateral level. Though the multilateral forum is always presumed to be the superior option for carrying out trade liberalization, the paper nonetheless suggests that given the inherent nature of services trade and the constraints and structural weaknesses observed in the GATS, regional agreements can be both welfare-enhancing for their participants and worthwhile options for negotiating efforts.

1. Growing interest in a regional approach to services liberalization

While the phenomenon of growing regional integration with the objective of liberalizing services trade has become a generalized one, it has been particularly prevalent in the Western Hemisphere. NAFTA's initiative in 1994 with the inclusion of Mexico inspired many developing countries in the region to join a wave of services trade liberalization. As of end 2001, the number of concluded RTAs in the hemisphere containing disciplines for services trade accounted for no less than fourteen.[1] Further, countries in the region have been negotiating the hemispheric Free Trade Area of the Americas (FTAA) since May 1998, scheduled for completion in January 2005.

In Asia, an early effort by Australia and New Zealand to create the Closer Economic Relations Trade Agreements (ANCERTA) in 1988 was followed a decade later by the ASEAN Framework Agreement on Services (AFAS).[2] Several more agreements have been concluded recently (FTAs negotiated by Singapore with Australia in 2001 and with the United States in 2002) and many more agreements are underway, indicating a heightened interest by economies of this region to undertake regional initiatives encompassing services.

How can one explain the growing inclination to liberalize services trade in regional settings? Services trade liberalization within RTAs is more complicated than goods trade, for at least two reasons. First, most of the ways in which services can be supplied require proximity between producers and consumers. This proximity demands that the international exchange of services be performed by the movement of either service producers or service consumers, or by the movement of capital to invest in service activities.[3] In other words, the time and space involved in the

1 NAFTA-type free trade agreements include the Group of Three Agreement (G3, between Mexico, Colombia and Venezuela), and free trade agreements between Mexico and Bolivia, Mexico and Costa Rica, Mexico and Nicaragua, Chile and Mexico, Chile and Canada, Chile and Central America, Mexico and the Northern Triangle (Honduras, Guatemala, and El Salvador), the Dominican Republic and Panama and the Dominican Republic and CARICOM.

2 Members of ASEAN Framework Agreement on Services are The Governments of Brunei Darussalam, the Republic of Indonesia, Lao People's Democratic Republic, Malaysia, Union of Myanmar, the Republic of the Philippines, the Republic of Singapore, the Kingdom of Thailand and the Socialist Republic of Vietnam.

3 These are defined as modes of service supply by the WTO General Agreement on Trade in Services (GATS). Mode 1 – cross-border trade; mode 2 – consumption abroad; mode 3 – commercial presence; and mode 4 – movement of natural persons.

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production and consumption of services cannot be separated in circumstances other than those for cross-border trade.

Second, barriers to services trade encompass a vast array of non-tariff measures in the form of national laws, regulations and administrative controls that go beyond traditional trade barriers to strike at the heart of national policy (WTO, 2001). Liberalizing services trade involves reducing the degree of discrimination or restrictions contained in these national laws and regulations in a political context of often heightened sensitivity about policies that cut close to the heart of the domestic economy and consumer concerns. This is clearly a more challenging task than simply reducing tariffs and thus requires more reflection as to the appropriate way, the appropriate timing, and the appropriate forum in which to carry out services liberalization.

2. Shared objectives of all services agreements

In general terms both the GATS and regional trade agreements contain similar disciplines with respect to services trade. More importantly, both levels of agreements have three shared and overriding objectives, namely the promotion of transparency, stability and liberalization for services trade. The next two sections probe the question of how well each level of agreement has been able to meet these objectives for its members.

The GATS contains familiar disciplines with respect to services trade, many similar to those contained in the GATT 1994. However, unlike the latter, only two of the basic GATS disciplines are of general application, the most-favored nation (MFN) provision and the transparency provision. Two other basic provisions with respect to national treatment and market access are of specific application and apply only to service sectors included in national schedules of commitments, a considerable weakening of basic trade tenants. The GATS also contains some unfinished rules as well, namely on subsidies, emergency safeguard measures, and government procurement, as well as certain disciplines with respect to domestic regulation.

3. How does the GATS fulfill the objectives of services agreements?

With respect to the three objectives specified above, the GATS comes up rather lacking in terms of its ability to provide transparency and stability to service providers of WTO members. It also comes up short on the objective of having achieved liberalization of services trade.

The GATS and transparency

The GATS features the concept of transparency in its Preamble: 'Wishing to establish a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade under conditions of transparency and

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progressive liberalization …'. The GATS promotes transparency in services trade via several articles that contain publication and notification requirements, namely Articles III, V, VI, VII, VIII, and IX.

In spite of its stated emphasis on transparency, the GATS is inherently a non-transparent agreement, particularly in the way in which it was designed and is currently pursued. This primarily derives not from the normative disciplines on transparency included in the various articles, but rather through the scheduling approach that has been adopted to set out bound commitments on services trade. Although not conceived as transparency instruments, nonetheless the national schedules of commitments are the only place in which information on access conditions to WTO member service markets is made explicit. In order to appease the sensitivities of many developing country members of the GATT, during the Uruguay Round, who were concerned with the incorporation of a new and uncharted area of trade into multilateral rules and unconvinced at the time of the benefits to be derived from services trade liberalization, a 'positive list' approach based upon the notion of 'progressivity' was adopted for the GATS. This approach was made operational through the scheduling of voluntary commitments, resulting in a situation of very unequal obligations and undertakings in the services area.

For service providers the current GATS scheduling structure means that it is impossible to obtain information on any service sector not included in a national schedule. Additionally, the possibility of including the mention of 'unbound' against conditions of either 'market access' or the 'national treatment' with respect to any of the four modes of service supply or delivery means that, even for included sectors, there is no obligatory transparency or disclosure of regulatory practice. This legal situation, combined with the fact that developing countries in particular scheduled relatively few sectors and undertook relatively few bound commitments in those sectors, means that most of the services universe for WTO Members lies outside the scope of effective transparency so that nothing is known about either market conditions or regulatory practices. Moreover, the transparency obligation set out in GATS Article III to notify changes in laws, regulations, and administrative procedures for all measures affecting services trade applies only to committed sectors. Thus no requirement is in place for notification on other sectors outside the schedules.

The scheduling technique adopted for the GATS has also led to confusion and a lack of transparency. Schedules have been criticized as not being user-friendly and difficult to interpret. The confusion is to some extent due to the complexity of disentangling trade protection, overly restrictive approaches to national regulation, and the pursuit of legitimate public policy goals (Feketekuty, 2000). It can also be traced to the interweaving of market access and national treatment measures in the commitments and the overlap that has arisen for the scheduling of certain types of discriminatory quantitative restrictions under both Articles XVI and XVII. The GATS requires that the six different types of market access limitations be inscribed in the market access column, irrespective of whether the measures are discriminatory

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or non-discriminatory ones. WTO Members have attempted to address this problem in the *Guidelines for the Scheduling of Specific Commitments under the GATS* adopted by the Council on Trade in Services on 23 March 2001; however the guidelines are of little help in this context and some specialists feel that they may be even less demanding than Article XX: 1 and 2 of the GATS on *Schedules of Specific Commitments*. Moreover, they do not clear up the situation for the commitments that have been undertaken in the previous Uruguay Round.

This situation confuses the true nature of WTO members' scheduled commitments and leads to different interpretations as to their content, especially regarding commercial presence (Low and Mattoo, 2000). Additionally, there is still a lack of clarity as between whether certain types of measures which are non-quantitative and non-discriminatory but which may have a restrictive impact on trade are to be scheduled or whether they are to be treated as exclusively falling under the purview of GATS Article VI on 'domestic regulation'.[4]

The GATS and stability

In terms of providing a stable framework for the conduct of services trade, the GATS scores rather poorly. Legally binding measures guaranteed under stable conditions provide credibility to those who engage in services activities – services providers, investors, workers and consumers. Thus promising not to withdraw or go back on liberalization commitments can be as important as lowering barriers to services trade, because the promise gives services providers a clear vision of their market opportunities and a time horizon within which to plan. However, this level of stability and thus credibility is not currently present in the GATS.

The possibility allowed for under the GATS of including commitments in national schedules that are bound at a more restrictive level than the 'status quo' (or less than actual regulatory practice) means that effectively service providers are not necessarily provided with accurate information on market access possibilities through this multilateral instrument. This can be compared to the possibility that developing countries were provided during the Uruguay Round to bind their tariffs at higher than the applied rate, allowing therefore for the possibility of changing the applied tariff rate at any point as long as the rate falls below the higher ceiling rate.

Translating such a situation from the goods framework to that of services trade is particularly serious however, because the barriers to market access in services are not explicit, price-oriented barriers such as tariffs but rather non-transparent, non-tariff barriers in the form of discriminatory treatment embedded in laws, regulations and administrative acts and procedures. This means that not only is transparency a key element for the effective conduct of services trade, but that stability provided

4 It has been suggested by Rudolf Adlung that perhaps the core problem is not so much uncertainty with regard to the two categories of market access and national treatment but rather lack of coverage. For example, a measure relevant to Article VI on domestic regulation such as non-discriminatory 'minimum requirements' (minimum capital requirements; minimum size of department stores, hotels, hospitals, etc.) would not fall under either GATS Article XVI or XVII but may have similarly restrictive effects.

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through a multilateral legal instrument cannot be effective without such an instrument reflecting the actual level of regulatory practice. Otherwise the stability of policy action cannot be guaranteed, creating a deterrent for both investment and trade decisions.

It might be argued that one indication that the GATS services schedules are proving to be of limited usefulness is that very few disputes have arisen in the area of services trade under the WTO. Either service providers are not aware of the content of the schedules of commitments, are still unfamiliar with the operation of the agreement, or the commitments are not being used as an effective tool for pursuing trade policy interests.[5]

The GATS and services trade liberalization

Liberalization of services trade is achieved through the removal or lowering of regulatory barriers to services trade and through the diminishing of discrimination *vis-à-vis* foreign as compared with domestic service providers. It is well known that the outcome of the Uruguay Round in services was a modest one with respect to actual services trade liberalization. Viewed primarily as an exercise in binding the 'status quo' (or on occasions less than the 'status quo' as discussed above) in national schedules, the GATS has not so far been able to advance the trading community towards real market opening in services. Most specific commitments scheduled by both developed and developing countries are in fact 'stand-still bindings' and do not enlarge market access for service providers, committing the government concerned only to maintain the current level of access (Mashayekhi, 2000). Moreover, the commitments often incorporate important limitations, conditions, and qualifications. The one exception to this situation has been in the area of telecommunications with the adoption of the Fourth Protocol. However, many analysts feel that the negotiations on basic telecommunications were fortunate in their timing, as countries had already moved to carry out unilateral deregulation and investment liberalization at home or had planned such reforms and were able to carry these policies over to the WTO context and bind them.

Other than the telecom area, both the limited number of sectors included in national schedules as well as the limited number of overall commitments, particularly by developing countries, testify to the lack of success of the GATS to date in this objective. It remains of course to be observed what the outcome of the current round of GATS 2000 negotiations will bring for multilateral services trade. However, the insistence by many developing countries on following a traditional request and offer approach for the services negotiations, as set out in the *Guidelines for the Services Negotiations*, adopted in March 2001, to the detriment of other possible modalities, such as a cluster or a formula approach, means that the method of negotiation itself may prove a factor in limiting the liberalizing outcome of the negotiations.

5 It is also possible that the absence of disputes may be due to the fact that most services commitments are at or below status-quo levels.

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4. How do RTAs fulfill the objectives of services agreements?

With respect to the three objectives specified above, many regional trade agreements come much higher on the scale than does the GATS in their ability to provide transparency and stability to service providers of their members. Many RTAs go significantly beyond the GATS in terms of deepening disciplines for services trade. They also rate more favorably on the objective of achieving relatively greater liberalization of services trade.

An alternative approach to structuring a services agreement

Many regional trade agreements have innovated over the multilateral approach through having been able to integrate a full set of disciplines for trade in both goods and services at the time of their negotiation. While the WTO is fragmented into three parts with disciplines applying to goods only in Part I (the GATT 1994), an agreement with disciplines applying to services only in Part II (the GATS), and an agreement with disciplines applying to intellectual property rights only (TRIPS) in Part III, certain regional trade agreements have been able to follow an 'integrated' approach to address these forms of trade. Inspired by the NAFTA, these RTAs have incorporated disciplines on investment, government procurement, the movement of natural persons, monopolies, intellectual property rights, and technical barriers to trade that apply to both trade in goods and trade in services alike. This has allowed for a legal structure that is coherent and seamless with respect to the application of trade rules, a situation corresponding more closely to that of actual trading conditions.

An alternative approach to services liberalization

Along with a more integrated structure, many RTAs have adopted a different modality for services trade liberalization based on a 'negative list' approach whereby all measures affecting services trade in all service sectors are considered to be free of restriction unless listed in lists of reservations. Such lists of reservations contain measures that are not in conformity with the core disciplines of the agreement, primarily with disciplines of most-favored nation treatment, national treatment, the right of cross-border supply, and the removal of non-discriminatory quantitative restrictions. Thus these RTAs go about services liberalization in a very different way from the GATS, applying disciplines on services trade from the 'top–down' perspective to cover the entire universe of service activities (unless otherwise specified), rather than building the coverage of liberalizing disciplines and from the 'bottom–up' as down the GATS.

Many developing countries have also chosen to pursue this type of 'negative list' approach to services liberalization within RTAs. This has been particularly the case for developing countries within the Western Hemisphere rather than outside it, perhaps due to their exposure and familiarity with the NAFTA and to the energetic efforts by Mexico to export this type of agreement to other Latin American

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Table 1. Approaches to services liberalization by RTAs

Positive list approach	Negative list approach
ASEAN (1997)	Andean Community (1998)
MERCOSUR (1997)	CARICOM (1998)
	Central America–Panama (2001)
	Chile–Canada (1997)
	Chile–Mexico (1998)
	Chile–Central America (2000)
	Group of Three (1995)
	Mexico–Bolivia (1995)
	Mexico–Costa Rica (1995)
	Mexico–Nicaragua (1998)
	Mexico–Northern Triangle (2001)
	NAFTA (1994)

countries. Within the Western Hemisphere no fewer than 12 RTAs have adopted a 'negative list' approach for carrying out services trade liberalization, as shown in Table 1. And members to the only RTA in the hemisphere appearing as an exception to this rule – MERCOSUR – have come around to a hybrid-type approach through agreeing in 2001 to an obligatory transparency exercise, or the required listing of all existing restrictions in service sectors before mid 2002, so as to begin the process of removal of restrictions after that date. This obligatory transparency requirement, combined with a 'status quo' provision proscribing the introduction of any new restrictions after this date, amounts to fundamentally the same approach as that of a negative list. So it could be said that for all effective purposes, all of the regional agreements in the Western Hemisphere have adopted a negative list modality to carry out services liberalization.

Regional trade agreements and transparency

The regional trade agreements that have followed the alternative approach to services liberalization described above are much more transparent instruments for service providers than is the GATS. This is the case firstly because members to RTAs based on 'negative listing' are obliged to provide transparency through the listing technique with respect to non-conforming measures or reservations (i.e., those measures which will not be immediately liberalized on the part of a member country). These reservations must be set out comprehensively and all service sectors must be included in this exercise. Thus the annexes to such agreements provide a complete and accurate picture of the existing restrictions to market access or national treatment in a given market. Such reservations are also listed in a manner that is clearer than for the GATS commitments. Based on measures rather than sectors, these reservations are less dependent on a standard classification system. They must be listed at the level of regulatory practice and are further divided as

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between discriminatory measures and non-discriminatory measures. The former are subject to eventual removal, while the latter are only subject to a listing requirement for transparency purposes.

Several of the regional agreements oblige the elaboration and exchange of national inventories of measures affecting trade in services among members as part of the preparation towards removal of such restrictions. This is the case for the Andean Community where the content of such inventories was finalized and adopted in Decision 510 of the Commission of the Andean Community on *Adoption of the Inventory of Measures Restricting Trade in Services* on 31 October 2001. The finalized inventory of measures for each member country is attached to this decision and is publicly available. This Decision allows for the citizens of an Andean member to provide any services without restraint to countries in the region, except for those listed in the Inventory. Restrictions are to be progressively phased out by the year 2005 through annual negotiations.

The same is true for the members of CARICOM who finalized their respective inventories of measures affecting services trade on 1 March 2002 and have made them publicly available.[6] The removal of such restrictions in the context of the implementation of *Protocol II on Establishment*, *Services and Capital* will take place on the basis of these inventories. Restrictions contained in the inventories are those measures that would impede or infringe upon the rights of CARICOM nationals to provide services, move capital, and establish business enterprises within the region and that CARICOM Members have committed to remove through programs to be carried out in 2003, 2004, and 2005.

As commented previously, the members of MERCOSUR are likewise in the middle of a transparency process begun in 2001 under which members will set out restrictions to market access and national treatment for service providers in all service sectors by mid 2002 as a prelude to the complete removal of such restrictions no later than the year 2007.

The information contained in the inventories that have been generated as part of the regional efforts to carry out services liberalization is essential to both creating free movement of services trade and to efforts aimed at harmonizing existing regulations in member states. It contributes extraordinary commercial value to the conduct of services trade among members and also assists these countries in their participation in services negotiations at the multilateral level under the GATS.

For members of the ASEAN Framework Agreement on Services who are following a similar approach to services liberalization as that of the GATS, enhanced transparency in this effort is obtained through the listing of commitments in the regional context in a separate list. Members inscribe only commitments that go beyond the GATS, thus enabling an easy and rapid identification of the GATS-plus element of regional services liberalization.

6 The inventories of the Andean Community members can be found as part of Decision 510 of October 2001 and are located at the Andean Community website. The inventories of the members of CARICOM can be found at the CARICOM website and were issued along with press release 34/2002 of 1 March 2002.

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Regional trade agreements and stability

Many regional trade agreements offer greater stability through their provisions to service providers than does the GATS. Several RTAs in the Western Hemisphere include an explicit 'status quo' provision for the treatment of existing service measures which precludes the introduction of any new restrictions on services trade among members while other agreements provide for this implicitly. This is the case of the Andean Community and CARICOM. Article 10 of Andean Community Decision 439 on Services applies to all new measures affecting trade in services adopted by member countries and does not allow for the establishment of new measures that would increase the degree of non-conformity or fail to comply with the commitments contained in Article 6 (market access) and Article 8 (national treatment) of the Decision. Article 36 of the CARICOM Protocol is also a 'status quo' or standstill provision, prohibiting members from introducing any new restrictions on the provision of services in the Community by CARICOM nationals. Other NAFTA-type RTAs effectively provide for the 'status quo' through the combination of disciplines in the agreement and the negative list approach to listing reservations.

Additionally, the listing of existing restrictions in the various RTAs in the Western Hemisphere must be done at the level of actual application of such measures. In the case of the NAFTA and the NAFTA-type regional agreements, all reservations must be listed with reference to the actual law or regulation in which they are embedded and a description provided to summarize the content of such legislation. Actual legislation must also be referenced for restrictions set out in the inventories of the Andean Community and of CARICOM. This requirement imparts a heightened stability to these agreements as not only are such measures accurate and comprehensive, but they are bound so that no new restrictions can be introduced.

Regional trade agreements and deepening services disciplines

Regional trade agreements can target deeper integration among members than can an agreement at the multilateral WTO level that currently encompasses more than 140 members. This is indeed the case with the provisions of the various regional services agreements where, in two areas in particular, recognition and regulatory harmonization, such agreements attempt to go well beyond the GATS.

Many RTAs adopt a more pro-active approach to recognition than does the GATS. NAFTA includes an annex on professional services which requires rather than allows members to encourage the relevant bodies in their respective territories to develop mutually acceptable standards and criteria for the licensing and certification of professional service providers, to provide recommendations on mutual recognition to the parties and to develop procedures for the temporary licensing of professional service providers of another party. All NAFTA-type agreements include a similar annex. And in contrast to GATS Article VII, which merely authorizes recognition, NAFTA Article 906 mandates recognition of the

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equivalence of technical standards for goods or services whenever the home country can demonstrate, to the satisfaction of the host country, that its standards adequately fulfil the host country's legitimate objectives.

Article 13 of Andean Community Decision 439 requires each member country to recognize the licenses, certifications, professional degrees, and accreditations granted by another member country, in accordance with the criteria established under a Decision, which is currently being drafted, to be adopted by the Andean Commission. Its objective will be to elaborate a general, mandatory standard containing the conditions for the recognition of titles, licenses, and other requirements for the exercise of each service profession. Article XI of the MERCOSUR Protocol on Services also goes beyond the GATS provisions on recognition. MERCOSUR members are 'committed to encourage' professional entities to develop standards and criteria for the exercise of professional services. Similar to NAFTA, professional bodies are assigned a prominent role in proposing and drafting recommendations for the mutual recognition of professional qualifications in the area of services. Once adopted by the Common Market Group, recommendations must be implemented in all member countries within an agreed time frame. Professional bodies are not mentioned in GATS Article VII.

Article 35 of the Protocol on Establishment, Services and Capital directs the CARICOM Council for Human and Social Development to establish common standards and measures for accreditation or, when necessary, for the mutual recognition of diplomas, certificates and other evidence of qualifications of nationals of CARICOM members. This provision calls for the creation of a framework for a comprehensive policy on the free movement of CARICOM nationals in the Caribbean Community.

The generally stronger language used by RTAs to address the topic of recognition would appear to suggest that countries perceive the benefits of such agreements to outweigh their costs involved in their negotiation (Stephenson, 2001a). In practice, however, there appear to be very high transaction and regulatory costs associated with concluding such agreements even at the sub-regional level. Only one MRA has been signed between the three NAFTA partners and one umbrella agreement signed within MERCOSUR that covers four different professional service sectors.

Regulatory harmonization, similar to the elaboration of recognition agreements, is an option for countries that are fairly similar in terms of economic development, national preferences and social and political capacity to implement harmonized rules and standards. The Andean Community, MERCOSUR and CARICOM are working in this direction. Specifically, Article 15 of Andean Community Decision 439 (1998), stipulates that, based on studies conducted by the Andean Community General Secretariat, the Andean Community Commission shall adopt relevant sectoral decisions aimed at harmonizing regulations in specific services sectors. Two institutional features of the Andean Community appear to have played a crucial role in making the harmonization alternative appear more viable to member states: the existence of a 'supranational' mechanism in the form of the Secretariat and the legal

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status of the Commission's formal decisions which are directly enforceable in member countries without requiring further ratification. As part of their objectives to establish a common market, both the Andean Community and MERCOSUR have created sectoral services working groups in order to study and possibly elaborate basic regulatory norms that are meant to be common to all members.

Regional trade agreements and services trade liberalization

The above has shown that with respect to achieving the objectives of transparency and stability, many RTAs stand superior to the GATS. Several RTAs also go beyond the GATS in terms of the liberalizing content of their disciplines for services trade, as will be seen below. A few provisions found in regional agreements already contain an inherently liberalizing bias. These will be commented in turn.

Standard of treatment: The NAFTA and NAFTA-type agreements include a clause to this effect requiring that the better of either MFN or national treatment to be given to a service provider from a member.

Racheting provision: This provision found in the NAFTA and NAFTA-type agreements obliges members to an agreement to consolidate any new liberalizing measure they may take which improves the conditions afforded to service providers. This clause effectively adds an autonomic built-in dynamic to the agreement by preventing members from moving backward in their liberalization policies. A similar provision is found in the Andean Community agreement. Decision 510 establishes that when two or more members deepen the liberalization of particular services or subsectors, the resulting benefits are to be extended, immediately and unconditionally, to other member countries.

No local presence requirement: NAFTA and NAFTA-type agreements do not require local presence as a condition for foreign service providers to provide a service, thus allowing service firms and individuals to determine the most cost-efficient way possible for them to carry out their trade.

No citizenship or permanent residency requirement: Members to NAFTA and NAFTA-type agreements have included a strongly liberalizing provision such that no citizenship or permanent residency requirement be required to license or certify professional service providers of another member. This obligation represents a much deeper commitment than any set forth in the GATS with respect to services trade liberalization, as the schedules of many WTO members contain indications to the effect of requiring either citizenship or permanent residency in order to provide a service.[7]

Unconditional MFN and national treatment: The MERCOSUR and the Andean Community agreements require the unconditional application of both the MFN and national treatment principles among members, thus setting out a level of discipline that is absolute in services trade.

Liberal origin requirement: Nearly all of the RTAs in the Western Hemisphere offer a more origin provision to qualify service providers as beneficiaries of the provisions of the agreement (under the 'Denial of Benefits' provision) than does the

7 However, members to these RTAs are having difficulties putting this obligation into practice.

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GATS. Generally this provision (such as in NAFTA and MERCOSUR) applies to all companies invested within the regional space, as long as they have a real economic presence, irrespective of their ownership. The main requirement in these agreements is that all companies or service providers must be registered with a legal domicile in the member country in question and must carry out substantial business activities.[8] This liberal origin provision effectively means that the liberalization of services trade benefits the entire range of established service providers. As such RTAs can be expected to generate very little trade-diverting activity with respect to services trade from third countries.

Beyond these more liberalizing disciplines, however, what have regional agreements actually been able to accomplish with respect to liberalization of services trade? Have their members been able and willing to go further than the GATS to actually open markets? This question is explored below through the examination of the liberalization commitments of selected countries in both the regional and multilateral contexts.

(*a*) *Comparing Mexico's commitments under NAFTA and under GAT*

Examining the commitments undertaken by Mexico for services trade within the NAFTA and within the GATS allows for an evaluation of its regional vs. multilateral zeal for services liberalization. A cursory examination of Mexico's commitments reveals that in general two aspects of services trade appear to be more liberalized in the NAFTA context. These are first, the lifting of a general equity ceiling for foreign direct investment for individual investors (most often capped at 40–49 per cent in the sectors included in Mexico's GATS commitments), as well as the generalized NAFTA obligation for liberalized cross-border trade (which is not found in all cases in the GATS context). A detailed examination of each sector is beyond the scope of this paper; however, the financial services sector provides an interesting case study, and a comparison of the commitments undertaken in this sector in both contexts is summarized in Table 2.

The main difference in the treatment of financial services liberalization by Mexico in the regional context is found in the more liberal stance towards foreign investors from other NAFTA members who do not face any individual limits on foreign direct investment in Mexico's financial sector. Additionally, the effective control of the investment or activity in question does not have to be by Mexicans under the NAFTA (as specified in its GATS schedule). Thus in the financial services sector the treatment provided to NAFTA members in the regional context is indeed considerably better than what is offered to other WTO members. However, in neither case is cross-border trade for financial services guaranteed. This sector may

8 The fact that RTAs are more liberal than the GATS for origin requirements may also be viewed as part of their compliance with the obligation of GATS Article V:6 which states that any service supplier (judicial person) of a member country to an RTA shall be allowed the preferential treatment granted under the agreement as long as the service supplier carries out substantive business operations in one of the member countries of the agreement. This requirement of GATS Article V is basically the same as the one reproduced in the RTAs of the Western Hemisphere.

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Table 2. Comparison of Mexico's NAFTA and GATS commitments for the finanacial services sector

	GATS	NAFTA
Insurance & Reinsurance	FDI allowed up to 40%	Aggregated FDI up to 49% in Mexican firms
	Limit on individual holdings of 20%	No limits on FDI for foreign insurance companies
	Effective control must be by Mexicans	Various restrictions on cross-border trade
	Mode 1 – unbound	
Commercial Banks Deposits & Lending	FDI up to 40%	Aggregate FDI up to 30% of capital in banks
	Limit on individual holdings 20%	Initial limits on FDI in foreign financial affiliates, i.e. foreign banks but none after 2000
	Effective control must be by Mexicans	Cross-border purchases of financial services in Mexican pesos not allowed
	Mode 1 – unbound	
Financial Leasing	FDI up to 49% (for multiple banking)	Aggregate FDI up to 49%
	Limit on individual holdings of 10% or 20%	No limits on FDI for foreign firms
	Effective control must be by Mexicans	No limits on individual holdings
	Mode 1 – unbound	
Securities firms	FDI up to 40%	Aggregate FDI up to 30% of capital in securities firms (Mexican)
	Limit on individual holdings of 20%	Initial limits on individual holdings but none after 2000
	Effective control must be by Mexicans	No limits on FDI for foreign firms
	Mode 1 – unbound	No limits on individual holdings

be somewhat unique, however, in showing a relatively large margin of regional preference on the part of Mexico, whereas other service sectors may provide fairly similar access. Mexico in most cases was willing to bind its negotiated NAFTA liberalization at the multilateral level in the Uruguay Round (given that the NAFTA negotiations were conducted in parallel and concluded prior to the conclusion of the multilateral talks).

(*b*) *Comparing Singapore's commitments under ASEAN and under GATS*

In examining the commitments which Singapore has undertaken with respect to services trade in the regional context under ASEAN and in the multilateral context under the GATS as set out in Table 3, it is evident that Singapore has accepted a higher degree of market openness at the regional level with its ASEAN partners than it has under the GATS for a limited number of service sectors. Singapore has offered fully liberalized market access for ASEAN members in travel agents and tour guide services, maritime auxiliary services, value-added networks in telecommunications and selling and marketing of air transport services, while it has either not yet

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Table 3. Comparison of Singapore's AFTA and GATS commitments on services

Service Sector	Mode	GATS	ASEAN
Engineering services	3	Limited corporation with registration requirement for a director	Limited corporation with not less than 80% of directors to be registered
Selling and marketing of air transport	1 & 2	Not committed	No restriction
Travel agent and tour operators; Tourist guide services	3	Travel agencies and tour operators must be a private limited company	No restriction
Maritime auxiliary	2 & 3	Not committed	No restriction
Telecommunications	3	Licensing requirement	No restriction

Table 4. Comparison of Brazil's MERCOSUR and GATS commitments on services

Service sub-sector	Mode	GATS	MERCOSUR
Accounting, auditing and bookkeeping services	2	Unbound	No restriction
Pharmacy and librarian services	1, 2, & 3	Unbound	No restriction
Computer and computer-related business services	1, 2, & 3	Unbound	No restriction
Research and development services for natural sciences	3	Unbound	No restriction
Technical testing and analysis services & related scientific and technical consulting	3	Unbound	Joint venture requirement

committed these sectors under the GATS or has done so with certain limitations. Engineering services have also been opened to a greater degree to its ASEAN partners. However, in both contexts Singapore maintains a fairly restrictive practice in requiring residency on the part of foreign service providers for all service sectors. Overall, the marginal degree of regional openness in services is relatively modest, although the ASEAN services liberalization is an ongoing process.

(*c*) *Comparing Brazil's commitments under MERCOSUR and under GATS*

For Brazil, it is likewise the case that its commitments in the MERCOSUR context show a small margin of preference over what Brazil has undertaken to commit for foreign service providers in the GATS context. Examining Brazil's commitments on services trade at both the regional and multilateral levels as set out in Table 4, reveals that the sectors of accounting, auditing, bookkeeping, pharmacy and librarian services, computer services, research and development services, and technical testing and analysis services have all been offered without restriction to Brazil's MERCOSUR partners (as of end 2001) but have not been included in Brazil's GATS commitments. The rest of Brazil's commitments are fairly similar as between the

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multilateral and regional contexts as this point in time. Dissecting the precise reality of the situation, however, is an arduous task given that the commitments made in both contexts are currently mixed together in one listing. On the basis of the sectors identified as receiving differential treatment, it would be possible to conclude that Brazil has granted marginally better access for regional service providers.

Assessing and qualifying the achievements of RTAs in services liberalization

On the basis of the above assessment carried out as of early 2002, it would appear that the achievements of RTAs with respect to furthering services trade liberalization in terms of market opening have not been very significant, other than for certain selected sectors and in certain well-specified ways. As of this point in time, it would seem that members of regional trade agreements have not progressed much more in terms of actual services liberalization at the regional level than at the multilateral level. However, it should be remembered in this context that members of regional agreements have set themselves objectives that are much more ambitious than the objectives set by members of the GATS. If these objectives are pursued vigorously over the coming few years within the specified deadlines set out in the agreements, then the margin of differential liberalization and market openness should widen considerably.

In this context it is worthwhile recalling these objectives. Members of customs union groupings, including MERCOSUR, Andean Community and CARICOM (following the example of the European Union on a larger scale) have all set for themselves the objective of the complete removal of all restrictions on trade in services among members. The Protocol of Montevideo of December 1997 specifies the liberalization of services trade within a ten-year period through the conduct of successive annual rounds of negotiations. To date three rounds of negotiations have taken place, the first ending just after the conclusion of the Protocol in 1998, the second ending in June 2000, and the third ending in December 2001. Members will soon be at the halfway mark in the time frame set out for achievement of the Common Market, and it will be important to observe whether the margin of differential liberalization will increase significantly in the near future.

Andean Community Decision 439 on Trade in Services sets out a similarly ambitious goal for its members, namely the objective of creating the Andean Common Market through the removal of all restrictions on services trade by the year 2005. This is to be done through the elimination of all measures included in the *Inventory of Measures restricting Trade in Services* adopted in October 2001, along with the accompanying harmonization of essential regulatory measures.

CARICOM objectives set out in *Protocol II on Services, Capital and Right of Establishment* adopted in June 1998 are also to achieve a complete elimination of the identified restrictions to the movement of people and capital throughout the region. CARICOM's program could even be said to be the most ambitious in this regard, as

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it encompasses a broad number of skilled workers identified in the *CARICOM Skilled Nationals Act* in this liberalization objective, requiring that restrictions be removed from these specified categories of persons who would have the right to move freely within the region (including self-employed service providers and entrepreneurs together with their managerial, technical and supervisory staff and spouses and immediate family members). Complete liberalization is to be achieved by 2005 at the latest.

While the regional agreements in the form of free trade agreements do not posit complete liberalization of restrictions to services trade, nonetheless NAFTA and NAFTA-type agreements do include provisions for periodic review and negotiation of restrictions or non-conforming measures set out at the signature of the agreement. This is particularly the case with respect to the commitment to periodically negotiate the removal of non-discriminatory quantitative restrictions. And the ASEAN members aim to realize a free trade area in services on the basis of progressive rounds of GATS-plus negotiations. Such negotiations have to date concentrated on the finance, telecommunications and tourism sectors and will continue with negotiations on air and maritime transport and professional services.

Why have RTAs gone further with services trade liberalization?

It is interesting to note that in the preparatory discussions leading up to the new round of services negotiations under the GATS, begun in February 2000, as well as in the discussions that have taken place since that time, developing countries from Latin America, the Caribbean and East Asia who have negotiated services liberalization in a regional context have participated actively. However, many of the submissions made by these WTO members to the GATS Council or its subsidiary bodies on the issues of negotiating guidelines and procedures, the choice of a negotiating modality, the sequencing of negotiations and specific negotiating proposals, reflect an undercurrent of caution towards what some countries appear to fear as too rapid a liberalization of the service sector. Thus many submissions insist upon retaining the appropriate flexibility for developing WTO members to undertake fewer commitments and proceed slowly and progressively with liberalization. A fear of going too fast has meant that developing countries on the whole have discarded modalities other than the request and offer procedure. Elaborating a common approach to the issue of providing credit for autonomous liberalization is also of concern to many developing countries.

This cautious activism at the multilateral level contrasts with the strong pro-activism at the regional level that has been commented on above (Stephenson, 2001b). All of the agreements that have been discussed in this paper go beyond the GATS in providing for greater transparency and stability as well as positing greater liberalization, although the actual achievement of this liberalization remains relatively modest in several instances to date. As commented on in the previous section, a few RTAs (those in the form of customs unions) even posit the complete removal of all restrictions affecting member services and service providers.

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The willingness of several countries, and in particular developing countries, to go beyond the GATS and undertake far-reaching liberalization commitments at the regional level along with either the harmonization of essential regulations affecting services trade or the promotion of recognition agreements as an alternative means to facilitate services trade in a regional setting is striking. What factors lie behind this reality? Two reasons may be forwarded, other than the possible political consideration of viewing RTAs as instruments for furthering foreign policy and security considerations through cementing closer economic relationships.

Greater regional ambition may reflect awareness on the part of members to regional trade agreements of the need to comply with the obligations of GATS Article V, which requires all economic integration agreements to be more liberalizing than the GATS (or 'GATS plus'). Article V stipulates that RTAs should: a) have substantial sectoral coverage; and b) provide the for 'absence or elimination of substantially all discrimination' through elimination of existing discriminatory measures and/or through the prohibition of new or more discriminatory measures either at the entry into force of the agreement or on the basis of a reasonable time frame. The 'substantial sectoral coverage' refers to the number of sectors, volume of trade affected, and modes of supply. In order to meet this condition, agreements should not provide for the 'a priori' exclusion of any mode of supply.[9]

Although the requirements in Article V are loosely drafted and difficult to interpret with precision, particularly in light of the paucity of existing data on services trade, nonetheless it is clear that multilateral disciplines require that all RTAs encompassing services be more ambitious in their objectives and go well beyond the GATS in terms of liberalization.[10] The difficulty arises in interpreting what is involved in 'going beyond' in a precise manner, as there is a lack of clarity with respect to the kind of barriers that an RTA should be expected to eliminate. To date few RTAs involving developing countries have been notified to the WTO Committee on Regional Trade Agreements, thus making it difficult to determine how WTO members will apply these conditions to regional agreements.

The second and perhaps more plausible reason why RTAs have attracted such enthusiasm is due to the greater ease and ability to arrive at consensus on the often sensitive issues of services liberalization in a context with smaller numbers of more like-minded governments. Members to regional trade agreements perceive that not only is the negotiating process easier in a setting of few participants, but the implementation of such commitments may also possibly be easier to implement as well, since this involves extending such obligations or commitments only to the other members of the agreement.

9 It should be noted that the requirements of GATS Article V with respect to regional integration agreements on services are the same whether the agreement takes the form of a customs union or a free trade area.

10 Geza Feketekuty has written that it is difficult to see how the conditions set out in Article V can be effectively monitored with the kind of data that are normally available at present for services trade. This point is also made by the author. See Feketekuty (2000) and Stephenson (2000).

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The reality of the situation may, however, often differ from this perception since implementing services commitments of a liberalizing nature necessarily involves the modification of domestic laws, regulations, decrees and procedures, the means through which services trade is controlled. Reforming domestic regulations in a small country setting will generally involve the same amount of work and the same generation of domestic consensus as carrying this out on a multilateral basis. Nonetheless, the perception remains that services liberalization is easier to achieve among a limited number of participants with clearly defined, similar objectives. Perception aside, in the Western Hemisphere, many countries that have been willing to initiate and sustain domestic reforms for services on a wide scale have been able to bind these reforms in their regional agreements on a more comprehensive scale than they have done under the GATS, thus helping to push the liberalization process forward at a faster pace than it has proceeded at the multilateral level for most service sectors.

Compatibility with respect to normative frameworks and disciplines[11]

The common denominator of all regional services agreements offering preferential liberalization among a sub-set of WTO members is the requirement for these agreements to be compatible with Article V of the GATS and to ensure a greater depth of liberalization among members than that of the GATS as outlined above. All preferential agreements, whether they include two members (as in bilateral agreements), a small number of geographically close countries, or 34 members (as in the future FTAA agreement), must comply with the same requirements and be judged in terms of the same criteria and against the same yardstick. However, not all preferential integration agreements may need to show the same extent of 'GATS-plus' compliance, and this is where the complexity arises.

By definition, members to preferential agreements that are customs unions will strive for a deeper level of integration than will members to free trade area agreements, as underlined when discussing the objectives of such agreements in the previous section. The potential difficulty that might be foreseen in the case of various competing services agreements could be envisaged when the normative framework of such agreements varies considerably in terms of the disciplines they contain. For example, if disciplines included in agreements entered into by the same countries were to differ considerably, then it could be imagined that a conflict of fora might arise as to when and under what conditions these disciplines would apply. A services agreement at the hemisphere level incorporating, for example, a safeguard clause co-existing with sub-regional agreements without such a clause, might potentially lead to confusing signals for service suppliers, especially when the same type of disciplines is being developed at the multilateral level. Thus it would be desirable for the regional agreement with the largest sub-set of members (such as the future FTAA agreement) to contain as comprehensive a set of disciplines as possible, in order to

11 This section and the following section draw heavily upon ideas presented in Abugattas and Stephenson (2002, forthcoming).

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establish the basis for service operators to function within the largest economic space available other than the multilateral one.

Does regional liberalization of services trade make sense?

Market access liberalization of services requires the removal of discriminatory treatment among members to various services agreements. This is where the question of competing fora takes on considerable relevance and importance because of the unique nature of the liberalization of services trade. Changes in national laws or regulations are required under such liberalization in order to bring about a situation of national treatment, whereby foreign service providers are offered the same market access conditions as domestic service providers. Changes in national laws and regulations are lengthy processes and necessitate developing and obtaining a consensus among policy makers, service operators, regulators, and consumers. Applying one set of laws and regulations to suppliers within a given preferential agreement and another, different set to those within another preferential agreement, and possibly yet another set to members of the GATS is a daunting task, and in certain sectors almost an impossibility. Thus the question of the most appropriate forum to liberalize services and remove discrimination takes on considerable importance, as governments may not wish to undertake this process several times, on the one hand, and may not be able to differentiate their treatment among service suppliers, on the other hand.

Deciding what is the optimal level to carry out services liberalization in a context of competing agreements is a critical issue. Article V of the GATS only specifies that all regional agreements must go further in their market access liberalization than the multilateral system but does not specify how far nor how competing liberalization in various regional agreements may be assessed against each other. Thus the question really boils down to one of the practicality of applying different laws and regulations to different suppliers (problematic, as discussed above) and one of economics. Does it make economic sense to carry out the liberalization of services trade on a fragmented basis?

Answering this economic question would not seem possible in a political economy context without a consideration of the nature of services themselves. Service sectors and service products vary widely in terms of their characteristics, the efficient scale of their output, and their sensitivity in national economies. For the purpose of pursuing this question, it might be useful to consider services sectors as grouped in the following four categories in order to better understand the economic rationale that might underlie the most appropriate level for their liberalization:

1. Infrastructure-type services: financial; telecom; energy; transport
2. Business-type services: distribution; professional services; other business services; tourism; construction/engineering services; environmental services
3. Social-type services: educational services; health services
4. Other services: recreational services; cultural services

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As is well known, infrastructure services are critical to the efficient operation of all economies and provide critical inputs into all economic activities, including the manufacturing and agricultural sectors, as well as all other service activities. These infrastructure or network services, to be efficiently supplied, require large amounts of capital to operate and large economies of scale to produce. The optimum level for liberalization of such services is therefore the largest market possible, in order to attract and accommodate investment from the most efficient service operators. Thus a preferential liberalization of these particular activities might not make good economic sense, as it would limit the ability of a country to draw upon the most efficient suppliers and thus maintain a higher-cost, less efficient national setting for such critical services. The world or global market is the logical forum to target for the liberalization of these services. However, regional negotiations and agreements may play an important role nonetheless in the liberalization process for these services, as they may allow for the binding of liberalization commitments that have not yet been undertaken under the GATS. Such commitments could then be extended '*de facto*', as has been done by the NAFTA members for all covered sectors (with the exception of certain financial services commitments on the part of Mexico) to other WTO members on an MFN basis.

In the case of the second category of business-type services, or those services that are not produced on a network basis but that respond to commercial criteria in their production, the sectors break down into two groups. Tourism and business services (other than professional services) are already quite open sectors in most countries, and thus it would make little sense to think of liberalization on a regional level or a restricted scale. Again, however, regional agreements could still be useful in allowing for commitments in these sectors to be bound, which could then likewise be applied on an MFN basis. Construction/engineering and professional services are often highly restricted sectors as they are subject to strict regulated national standards for compliance that may set out quite restrictive criteria for the determination of the equivalence of qualifications by these service providers. Regional agreements have a useful role to play in these sectors, as it should be generally easier to develop a common set of criteria for the recognition of the equivalence of standards and/or the equivalence of diplomas and educational and professional training for the granting of licenses to practice various professional services when this is carried out among a smaller sub-set of member countries. Similar national educational and legal systems that are often found in countries of the same geographic region or those of the same legal/cultural background facilitate such recognition agreements. Therefore liberalization of these service sectors at the regional level might make good economic and political sense and also be more practicable to achieve.

The case of the third category of social-type services or those related to consumer health and welfare, are services that are typically quite sensitive to certain national concerns and have been the object of very few multilateral commitments under the GATS. Given these concerns, it might also prove easier to liberalize such sectors on a smaller scale and among countries that have more similar levels of development,

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consumer preferences, and backgrounds. However, certain activities within these service sectors (such as computer training schools or specialized language schools, or private clinics for certain types of specialized health services) might lend themselves to liberalization at a broader level, in order to attract the most efficient suppliers available for these 'niche', or more specialized services. Once again, for these specific service activities, regional agreements could serve as a catalyst for the binding of commitments that could be transcribed at the appropriate moment to the multilateral GATS level.

The fourth category above is a mixed one, without a clear definition of what might be the most economically appropriate level of liberalization. Recreational services and cultural services represent differing levels of sensitivity for consumers in different countries, and therefore the question of how much and where to liberalize these sectors must be decided by the national interests of participants to any negotiation.

5. Conclusion

Services negotiations have taken on an extraordinary dynamism since the end of the Uruguay Round and the entry into force of the GATS in January 1995. Numerous regional agreements have been concluded with the objective of liberalizing services trade and others are under negotiation at present. However, the superposition of different and simultaneous negotiating fora at the multilateral, regional, and sub-regional levels should oblige reflection on the various merits of these time and resource-intensive efforts. Overlapping negotiations will require the definition by participants of negotiating priorities and goals in each forum, including the critical determination of what might be the most appropriate level of liberalization for the service sectors in the agreements. The discussion in this paper suggests that even for those sectors where the global market is the most appropriate and economically efficient ambit for liberalization, regional agreements could still be useful in generating liberalizing commitments, which could then be applied '*de facto*' on an MFN basis and bound during the current round of GATS negotiations.

For some service sectors, the regional level may well be the most appropriate and realistic level of liberalization and the one that makes sense in terms of negotiating effort. The answer to the question of how governments can determine where to focus their efforts in opening service markets will depend not only upon the nature of the service in question and the optimal scale of economic activity, but also upon the political context and difficulty of carrying out liberalization, the sensitivity of the sector, and the definition of national interest, and thus may vary according to the sector in question. The discussion in this paper has shown that regional agreements in services have already gone a long way beyond multilateral GATS disciplines and have played a positive role in generating negotiating enthusiasm and awareness on the part of many WTO members and, in particular, many developing countries. Several regional agreements appear to be on their way to achieving significantly

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higher degrees of market openness for member service providers, much of which may subsequently be channeled into the WTO. Thus these efforts should be valued as a means for pushing both services trade liberalization and the multilateral system forward.

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