

## **FTAA – Free Trade Area of the Americas**

### **Draft Agreement**

#### **Chapter on Services**

• **CHAPTER ON SERVICES**

**Article 1: SCOPE [OF APPLICATION]**<sup>1, 2, 3, 4</sup>

[1.1. This chapter applies to measures [adopted or maintained] by a Party [relating to] [affecting]] [cross-border] trade in services [by] service providers/suppliers of another Party, [including measures respecting] [Such measures include [but are not limited to measures affecting]]:

a) the production, distribution, marketing, sale, and delivery of a service;

b) the purchase or use of, or payment for, a service;

[c) the access to and use of [distribution and transportation systems] [distribution, transport, [or] [and] telecommunications networks and services] in connection with the provision/supply of a service;]

[d) the presence[, including commercial presence,] in its territory of a service provider of another Party; and,]

e) the provision of a bond or other form of financial security as a condition for the provision of a service.

[f) access to and use of services required by the Parties to be offered to the general public to supply a service.]]

[1.1. This chapter applies to measures adopted by Parties [directly] affecting trade in services.]

[1.1. This Chapter shall apply to all measures adopted by the Parties that affect trade in services, in all sectors and in all the different modes of supply, including those stemming from the delivery of commercial services by the public sector, at the national, federal, regional or local levels, as well as those stemming from bodies in the exercise of powers delegated by the national, federal, regional or local government.]

[1.2.<sup>5</sup> For the purposes of this chapter, cross-border trade in services or cross-border supply of services [shall be defined as] [means] the supply of a service:

a) from the territory of one Party into the territory of another Party;

b) in the territory of one Party [by [a] person[s] of that Party to [a] person[s] of another Party] [to the consumer of another Party]; or

c) by [natural persons] [a national] of a Party in the territory of another Party.

However, it does not include the [delivery] [provision]\*\* of a service in the territory of a Party [through] [by] an investment<sup>6</sup> in that territory.]

[1.2. For purposes of this Chapter, trade in services is defined as the delivery of a service:

<sup>1</sup> Some countries believe that aspects related to the right of governments to regulate services, as well as exceptions to certain disciplines which could eventually be relevant to the issue of scope and coverage, will be defined subsequently.

<sup>2</sup> One country recognizes that the NGSV will identify where appropriate supplementary disciplines for specific sectors, and that specialized provisions need to be developed for financial services.

<sup>3</sup> Some countries consider that aspects related to "mode 3" of the GATS "*commercial presence*" should be considered by the Negotiating Group on Investment. Channels of communication should be opened between the NGSV and the NGIN to ensure consistency and avoid duplication with respect to investment-related aspects of the services and investment chapters.

<sup>4</sup> One country recognizes that the NGSV will continue discussion of the possibility of establishing specific provisions for sub-national measures.

<sup>5</sup> Some countries noted that they wanted to reserve the flexibility to decide whether this should be included under Scope [of Application] or under Definitions.

\*\* Brackets only in English: this symbol will appear wherever multiple English expressions are represented by a single expression in Spanish.

<sup>6</sup> One country noted that the terminology will need to be conformed to that used in the Investment Chapter.

- a) from the territory of a Party into the territory of any other Party;
- b) in the territory of a Party to a consumer of services of any other Party;
- c) by a service [provider][supplier] of a Party through a commercial presence in the territory of any other Party;
- d) by a service [provider][supplier] of a Party through the presence of natural persons of a Party in the territory of any other Party.]

[1.3. For [the] purposes of this Chapter:

- a) “measures [that a Party adopts or maintains] [adopted [or maintained]] [by a Party] [by the Parties]” means [any provision], [measures] [adopted [or maintained]] [whether in the form of a law, decree, regulation, rule, procedure, decision, administrative order, or any other form]<sup>7</sup> [having an effect on trade in services], [adopted] [taken] by:
  - i) [central, regional, or local governments and authorities][[the] [governments and ][[central], [regional]] [national or federal, [or] state [or] [provincial,]] [departmental, municipal or local authorities]], [or] [and]
  - ii) [the] [non-governmental] [bodies] [or] [the] [organizations] [in the exercise of] [regulatory, administrative or other powers of a governmental nature that have been delegated to them] [powers delegated [to them]] by [central, regional, or local] governments [or][and] [central, regional, or local] [authorities]] [mentioned in] [subparagraph a) above] [subparagraph (i)].]

[1.4. In fulfilling its obligations and commitments under this Chapter, each Party shall take [the necessary][such reasonable] measures as may be available to it to [secure][ensure] their observance by [state, provincial, departmental, municipal or][regional and] local governments and authorities and by non-governmental bodies [within][in] its territory.]

[1.5. For [the] purposes of this Chapter:

- [a] The term “services” includes any service of any sector, except services supplied in the exercise of governmental authority;]
- [b] A “service supplied in the exercise of governmental authority” means any service which is supplied neither on a commercial basis, nor in competition with one or more service providers[, including activities undertaken by a Central Bank or a monetary or an exchange authority [or by any other public entity]].]

[1.6. References to [central or] national [or federal], state, [regional] provincial [or departmental, municipal or local] governments [and authorities] include non-governmental entities that perform regulatory or administrative functions or other functions of a governmental nature delegated to them by such governments [or authorities].]

[1.7. For developing countries and, particularly, the smaller economies, there shall be flexibility in meeting the commitments, and special conditions of treatment shall be given to promote the balanced growth of the Parties and facilitate their increasing participation in trade in services in the Hemisphere.]

[1.8. This chapter does not apply to:

- [a] the cross-border trade in financial services;]

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<sup>7</sup> Some countries noted that they wanted to reserve the flexibility to decide whether this should be in Scope [of Application] or Definitions.

b) air services, including domestic and international air transportation services, whether scheduled or nonscheduled, and related services in support of air services, other than:

i) aircraft repair and maintenance services during which an aircraft is withdrawn from service;

[ii) specialty air services; and,

iii) computerized reservations systems.]

c) [government procurement by a Party or a state enterprise;] [government procurement by a Party<sup>8</sup>]; or,]

[d] [subsidies or grants provided by a Party or a state enterprise, including government-supported loans, guarantees, and insurance.] [promotional or development measures granted by one Party or by a State enterprise, including loans, guarantees, insurance, grants and tax incentives granted by governments of the Parties;]]

[e] the services or functions of government, such as law enforcement, correctional services, pensions [or unemployment insurance or social security] [income security or insurance, social security or insurance,], social welfare, public education, public training, health, or [child care] [child care or protection].]

[f] services supplied in the exercise of governmental authority. A “service supplied in the exercise of governmental authority” means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers.]]

[1.8. This Chapter does not apply to:

a) those services supplied in the exercise of governmental authority, on a non-commercial basis.

b) measures related to certain air transport services.]

[1.9. [Nothing in this chapter shall be construed to] [This Chapter does not]:

[a] impose\* any obligation on a Party with respect to a national of another Party seeking access to its employment market, or employed on a permanent basis in its territory, or to confer any right on that national with respect to that access\* or employment[; or,] [,]

[b] prevent a Party from providing a service or performing a function such as law enforcement, correctional services, pension or unemployment insurance or social security services, social welfare, public education, public training, health, and child protection.] [or]

[c] impose\* any obligation or grant any right to a Party, with respect to government procurement made by the other Party.]]

[1.10. Notwithstanding paragraph [1.9 b)] [1.8.e)], whether a service provider of a Party, duly authorized, provide services or performs a governmental function such as correctional services, pension or unemployment insurance or social security services, social welfare, public education, public training, health, and child care or child protection, in the territory of another Party, the provision of those services shall be protected by the provisions of this chapter.]

[1.11. With respect to the non-governmental bodies cited in sub-paragraph a) ii) of paragraph 1.3 of this article, which perform regulatory, administrative or other governmental functions delegated pursuant to the legislation of each Party, the central government shall take such reasonable measures as may be available to it to secure the compliance of these organizations with the provisions of this chapter.]

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<sup>8</sup> One country noted that the terminology will need to be conformed to that used in the Government Procurement Chapter.

\* Brackets only in Spanish: this symbol will appear wherever multiple Spanish expressions are represented by a single expression in English.

[1.12. The provisions of this chapter shall apply to measures related to services envisaged in the annex on Temporary Movement of Natural Persons, solely to the extent and within the time limits stipulated in that annex.]

**Article 2: SECTORAL COVERAGE<sup>1</sup>**

[2.1. This Chapter shall, in principle, have universal coverage of all service sectors.]

[2.1. The comprehensiveness of the coverage shall be linked to the extent and rate at which the modes of supply for the provision of services are liberalized. In this regard, special attention shall be given to the particular interests of smaller economies in liberalizing those sectors and modes important to the facilitation of their development needs.]

[2.2. Special disciplines shall be established for determined services sectors whose particular characteristics so require them.]

[2.3. No provision of this Chapter shall be construed to prevent a Party from having the right to regulate and to introduce new regulations to achieve legitimate domestic political objectives.]

[2.4. This Chapter shall not apply to the following service sectors:

a)

b)

c)]

**Article 3: MOST FAVORED NATION TREATMENT**

[3.1. Each Party shall [immediately and unconditionally] accord to [services and] service providers/suppliers of another Party treatment no less favorable than that it accords, [in like circumstances], to [like] [services] [and] [like] service providers/suppliers of any other Party or of a non-Party.]

[3.1. With respect to the measures covered by this Chapter, each Party shall immediately and unconditionally accord to the services and service providers of any other Party treatment no less favorable than that it accords to [like][similar]\*\* services and [like][similar]\*\* service providers of any other Party or of third countries.]

[3.2. The provisions of this Chapter shall not be construed to\* prevent a Party from conferring or according advantages to adjacent countries in order to\* facilitate the exchange, limited to contiguous frontier zones, of services that are locally produced and consumed.]

[3.2. Without prejudice to the provisions of the preceding paragraph, any Party may confer or accord advantages to adjacent countries and smaller economies, regardless of whether they are Parties, in order to facilitate the exchange of services.]

[3.3. The developing countries may maintain exemptions from the principle embodied in paragraph 3.1.]

[3.3. Smaller economies and developing countries may identify exceptions to the MFN principle for specific sectors.]

[3.3. A Party may maintain a measure inconsistent with paragraph 3.1, provided that the measure is simultaneously listed in the Annex on Article II Exemptions of GATS and in the Annex on Exemptions to this paragraph.]

[3.4. The FTAA can coexist with bilateral and sub-regional agreements, to the extent that the rights and obligations under these agreements are not covered by or go beyond the rights and obligations of the FTAA.]

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<sup>1</sup> Some countries recognize that some of the ideas included in this article could subsequently be relocated under other provisions of the chapter on services, depending on the progress achieved in analysis and in discussions.

[3.5. The principle embodied in paragraph 3.1 shall be applicable in all cases to agreements reached between Parties and non-Party third countries.]

[3.6. This Chapter shall not prevent any of its Parties from being a party to or entering into of an agreement liberalizing trade in services between the parties to such an agreement, provided that such agreement:

a) has substantial sectoral coverage<sup>1</sup>, and

b) provides for the absence or elimination of substantially all discrimination between the parties, in the sense of Article ( ), in the sectors covered under sub-paragraph (a), through:

i) the elimination of existing discriminatory measures, and/or

ii) prohibition of new or more discriminatory measures, either at the entry into force of that agreement or on the basis of a reasonable time-frame, except for measures permitted pursuant to Articles ( ). ]

[3.6. This Chapter shall not prevent Parties from entering into or being party to agreements in pursuit of liberalizing trade in services or wider economic integration at the sub-hemispheric level.]

[3.7. In evaluating whether the conditions in paragraph 3.6(b) are met, consideration may be given to the relationship of the agreement to a wider process of economic integration or trade liberalization between the countries concerned.]

[3.8. (a) When [a smaller economy is a party][developing countries are parties] to an agreement of the type [mentioned][referred to] in paragraph 3.6, flexibility shall be provided for regarding [the requirement of substantial liberalization][the conditions set out in said paragraph, particularly with reference to sub-paragraph (b) thereof], in accordance with [their][the] level of development [and national economic objectives] [of the countries concerned, both overall and in individual sectors and subsectors];

Notwithstanding paragraph 3.11, in the case of an agreement of the type referred to in paragraph 3.6 involving only developing countries, more favorable treatment may be granted to juridical persons owned or controlled by natural persons of the Parties to such an agreement.]

[3.9. Any agreement referred to in paragraph 3.6 shall be designed to facilitate trade between the parties to the agreement, and shall not in respect of any Party outside the agreement raise the overall level of barriers to trade in services within the respective sectors or subsectors, compared to the level applicable prior to such an agreement.]

[3.10.<sup>2</sup> If, in the conclusion, enlargement, or any significant modification of any agreement under paragraph 3.6, a Party intends to withdraw or modify any of its commitments in a manner inconsistent with this Agreement, it shall provide at least 90 days advance notice of such modification or withdrawal, and the procedure for modifying commitments shall be applied.]

[3.11. Service providers of any other Party that are juridical persons constituted under the laws a party to an agreement referred to in paragraph 3.6 shall be entitled to the treatment granted under such agreement, provided that it engages in substantive business operations in the territory of the parties to such agreement.]

[3.12. a) Parties that are parties to an agreement referred to in paragraph 3.6 shall promptly notify to the ( ) any such agreement and any enlargement or significant modification of said agreement. They shall also make

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<sup>1</sup> Some countries understand this condition in terms of the number of sectors, volume of trade affected, and modes of supply. To meet this condition, the agreements shall not provide for the *a priori* exclusion of any mode of supply.

<sup>2</sup> Some countries will consider a text on the modification of lists that they will submit in due course.

available to ( )<sup>3</sup> such relevant information as it may request. ( ) may establish a working party to examine such an agreement or enlargement or modification of such agreement and report to ( ) on its consistency with this Article.

b) Parties that are parties to an agreement referred to in paragraph 3.6 that is implemented on the basis of a time-frame shall periodically report to ( ) on its implementation. ( ) may establish a working party if it deems such a working party necessary, to examine such reports.

c) Based on the reports of the working parties referred to in sub-paragraphs (a) and (b), ( ) may make recommendations to the parties as it deems appropriate.]

[3.13. A Party that is party to an agreement referred to in paragraph 3.6 may not seek compensation for trade benefits that may accrue to any other Party from such agreement.]

#### **Article 4: TRANSPARENCY**

[4.1. Each Party shall publish\* promptly [in its official organs of record [and in accordance with its legislation]] and [, except in emergency situations,] [shall notify the Committee on Trade in Services and each of the Parties] no later than the date [of the entry into force of the Agreement], [of its entry into force] all [[relevant][pertinent] laws, regulations, and administrative directives and [all] other [generally applicable] decisions, [resolutions][rulings] \*\*,] [and][or]] [measures] [of general application] that pertain to or affect [the operation of the provisions][the provisions] of this chapter [enacted by federal, central, and state governments or by non-governmental regulatory agencies]. International agreements referring to or affecting trade in services to which one of the Parties is a signatory shall also be published [and notified].]

[4.2. When publication of the information [mentioned] [referred to] in paragraph 4.1 is not feasible [or practical], [it shall be made] [the Parties shall make all possible efforts to make it] otherwise publicly available.]

[4.3. Each Party shall inform promptly [to the other Party] [to ( )] and at least once a year, the [introduction][establishment] of new, or [the introduction of] changes to existing laws, regulations or administrative guidelines [which considerably affect][that it considers to affect significantly] trade in services [covered by its specific commitments under this chapter][reached as a result of the commitments of each Party].]

[4.4. [Each Party shall establish national inquiry points.] [For purposes of compliance with the provisions of this Article, the Parties shall use the inquiry points established at the national level, as set out in paragraph 3 of Annex III of the Toronto Ministerial Declaration.] [Parties shall respond promptly to all requests for specific information presented by the other Parties on all their laws] [and] [regarding any of its measures] [referred to in paragraphs 4.1 and 4.2] [of general application or international agreements referred to in paragraph 4.1, through the contact points or the National Information Centers [identified by each Party].] [The inquiry offices that provide specific information to the other Party's requests on all such matters as well as those subject to the notification requirement in paragraph 4.3, shall be listed in the Annex to this Article.] [Special provision shall be made for the smaller economies, allowing for flexibility in the time-limit to establish such inquiry points as well as for the provision of technical assistance (particularly in the areas of information technology) in order to enable these states to successfully fulfill their obligations in this area.]]

[4.5. To the extent possible, each Party shall provide a reasonable opportunity for interested persons and for the Party to make observations on proposed measures.]

[4.6. Any Party may notify the ( ) of any measure adopted by another Party which, in its judgment, affects the operation of this Chapter.]

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<sup>3</sup> Some countries believe that once the corresponding institutional aspects have been defined, the parentheses shall be replaced by the name of the respective authority.

[4.7. [No provision of][Nothing in] \*\* this Chapter shall impose on any\* Party the obligation of [providing][supplying] confidential information the disclosure of which could constitute an [obstacle][impediment] to enforcing [its domestic laws] [the laws] or that [in any other way] would be contrary to the public interest, or that could [harm][prejudice] the legitimate commercial interests of public or private enterprises.]

#### **Article 5: DENIAL OF BENEFITS**

[5.1. A Party may deny benefits derived from this Chapter, subject to prior notification and consultation:

- a) to a service provider of another Party, when it determines the service is being supplied from or in the territory of a non-Party country;
- b) when the service is being supplied by an enterprise that is not duly constituted, authorized, or domiciled, pursuant to national legislation, in any other Party.
- c) when an enterprise constituted, authorized, or domiciled in any Party does not conduct substantial operations in the territory of that other Party and is owned or controlled by a non-Party country.]

[5.1. [Subject to prior notification and consultation.] a Party may deny the benefits [derived from] [of] this Chapter to a service provider/supplier of another Party [when the Party determines that] [where] the service is being provided/supplied by [an enterprise] [a company] that has no [substantial] [substantive][or real] business\* activities in the territory of any [other] Party and [, in accordance with legislation currently in force in said Party,] that is owned or controlled by persons of a non-Party.]

[5.1. A Party may deny benefits deriving from this Chapter, through notification and consultation:

- a) To the delivery of a service, if it is determined that the service is being supplied from or in the territory of a country that is not a Party;
- b) To a service provider, if it is established that the service is being supplied by a person of a country that is not a Party.]

[5.1. In order to enjoy the benefits of this Chapter, and to be considered as services originating in the region service suppliers must be:

- a) natural persons, who are citizens of or have permanent residence in a Party, in accordance with the respective national regulations
- b) juridical persons authorized or domiciled, in accordance with the national legislation, in the respective Party and that effectively carry out substantial operations in the territory of that Party.

In the case of a cross border supply of services produced and offered directly from the territory of another Party, by natural or juridical persons, the appropriate preceding paragraph shall apply.]

[5.2. A Party may deny the benefits of this Chapter to service suppliers of another Party where:

- a) the service is being supplied by a company owned or controlled by nationals of a non-Party, and:
  - (i) the denying Party does not maintain diplomatic relations with the non-Party, or
  - (ii) the denying Party adopts or maintains measures with respect to the non-Party that prohibit transactions with the company or that would be violated or circumvented if the benefits of this Chapter were accorded to the company.]

[5.3. In the case where a Party has doubts regarding the origin of a service, consultations may be sought with the

Party involved. If within ( ) days the parties are unable to resolve the doubts regarding the origin of the service, each of the parties involved may seek the intervention of the (dispute settlement entity – as defined in the Chapter on Dispute Settlement).]

**Article 6: NATIONAL TREATMENT<sup>1, 2</sup>**

[6.1. [In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein][Subject to the exceptions listed in the Annexes], each Party shall accord to services and service suppliers of any other Party, in respect of all measures affecting the supply of services, treatment no less favorable than that it accords to its own like services and service suppliers.]

[6.1. Each Party shall accord to the [services and] service providers/suppliers of another Party treatment no less favorable than that it accords, in like circumstances, to its [services and] service providers/suppliers.]

[6.2. The treatment granted by a Party under paragraph 6.1 means, with respect to a province or state, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that province or state to service providers of the Party of which it forms a integral part.]

[6.2. The commitments assumed under this Article shall not be construed to require any Party to compensate for inherent competitive disadvantages which result from the foreign character of the like services or service suppliers.]

[6.2. The Parties shall maintain exemptions to the Principle enshrined in paragraph 6.1.]

[6.3. The Parties may meet the requirement of paragraph 6.1 by according to services and service suppliers of the other Parties, either formally identical treatment or formally different treatment to that it accords to its own like services and service suppliers.]

[6.4. Formally identical or formally different treatment shall be considered to be less favorable if it modifies the conditions of competition in favor of services or service suppliers of the Party compared to like services or service suppliers of any other Party.]

[6.5. Developing countries and smaller economies, in particular, may establish exceptions to the principle set out in paragraph 6.1.]

[6.5. Exceptions to this principle shall be allowed, in the case of smaller economies, in pursuit of sustainable national development objectives and to enable their fuller participation in the overall FTAA process.]

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<sup>1</sup> Some countries indicated that the current proposal does not prejudge the modalities and procedures of negotiation on market access and national treatment.

<sup>2</sup> Some countries reserved the right to make reservations to national treatment, most favored nation treatment, and other principles that are considered pertinent regarding specific matters or sectors at a later date.

**Article 7: MARKET ACCESS<sup>1, 2, 3</sup>**

**Market Access**

[7.1. With respect to market access through the four modes of supply identified in Article ( ), each Party shall accord services and service suppliers of any other Party treatment no less favorable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule [of Specific Commitments annexed to this Chapter] [and in accordance with appropriate regulations consistent with the provisions of Article ( ) on Domestic Regulation].]

[7.1. Each Party shall accord to services and service providers of the other Parties, access to its market, through any of the modes of supply established for trade in services.]

[7.2. The Parties undertake to permit the cross-border movement of capital where this is an essential part of a market-access commitment on cross-border trade in their Schedule of Commitments, as well as transfers of capital to its territory where market access commitments are undertaken in respect of commercial presence. ]

[7.3. [In sectors where market access commitments are undertaken, the Parties cannot maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule the following measures[, among others]<sup>4</sup>:] [In sectors and modes of delivery to be liberalized pursuant to the decision in Article ( ), no Party may maintain or adopt any of the measures defined below:]

- a) limitations on the number of service suppliers, whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirement of an economic needs test;
- b) limitations on the [total] value of service assets or transactions in the form of numerical quotas or the requirement of an economic needs test;
- c) limitations on the [total] number of service operations or on the [total] quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test;
- d) limitations on the [total] number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test;
- e) measures which restrict [or require] specific types of juridical persons or joint ventures through which a service supplier [of another Party] may supply a service; and
- f) limitations on the participation of foreign capital in terms of maximum percentage limit on foreign share holding or the total value of individual or aggregate foreign investments.]

[7.4. The Committee on Services, at the request of any of the Parties, may order that sectoral studies be conducted for the purpose of defining those service sectors and sub-sectors which, by virtue of their characteristics and specificities, might be subject to a specific sectoral liberalization process.]

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<sup>1</sup> Some countries indicated that the current proposal does not prejudice the modalities and procedures of the negotiation on market access and national treatment.

<sup>2</sup> Some countries believe that to ensure full integration and development of small economies, the more developed countries should grant access to their markets in sectors or subsectors of interest to the small economies. In addition, liberalization commitments could be established, taking into account the different levels of development of the economies.

<sup>3</sup> Some countries consider that the concept of "Market Access" is closely related to the precepts relative to "Most Favored Nation Treatment," "National Treatment," and "Standard of Treatment."

<sup>4</sup> Some countries consider that there could be other measures in addition to those indicated in this paragraph.

**Market Access**

[7.1. Each Party shall accord to the services and service suppliers of the other Parties, access to their markets, across all modes of supply established in the definition of trade in services in Article ( ) of this Chapter.]

[7.2. Developed countries shall facilitate the development and strengthening of services trade in smaller economies and developing countries, through, inter alia:

- a) providing increased access to technology to enhance efficiency and competitiveness (specifically in the area of services which has been revolutionized by the advent of the internet, e-commerce etc.)
- b) improving access to distribution channels and information networks
- c) liberalizing market access in sectors and modes of supply of interest to them (e.g. movement of natural persons).]

[7.3. Larger and more developed countries shall seek, through their national contact points, to facilitate the access of the service suppliers of smaller economies to information related to their respective markets, concerning:

- a) commercial and technical aspects of the supply of services (particularly in newer areas)
- b) registration, recognition and obtaining of professional qualifications; and
- c) the availability of services technology.]

[7.4. Special priority shall be given to the smaller economies of the hemisphere in the implementation of paragraphs 7.2 and 7.3. Particular account shall be taken of the serious difficulty of the smaller economies in fulfilling certain negotiated commitments in view of their specific vulnerabilities and their development, trade and national economic needs.]

**Market Access**

**[Nondiscriminatory Quantitative Restrictions**

7.1. No Party shall apply limitations on:

- a) the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test.
- b) the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test.
- c) the total number of service operations or on the total quantity of services output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test.
- d) the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of a numerical quota or the requirement of an economic needs test.]

**[Access and Use**

7.2. Each Party shall ensure that the service supplier of any other Party is accorded access to and use of public telecommunications transport networks and services on reasonable and non-discriminatory terms and conditions, for the supply of a service to which a Party's obligations under this Chapter apply.]

**[No Local Presence<sup>5</sup>**

7.3. No Party may require a service supplier of another Party to establish or maintain a representative office or any form of company, or to be resident, in its territory as a condition for the cross-border supply of a service.]

**Market Access**

**[Non-Discriminatory Quantitative Restrictions]**

[7.1. Each Party shall indicate [at the date of entry into force of this Agreement] in its non-discriminatory “Quantitative Restrictions” Annex any non-discriminatory quantitative restriction that it maintains at the national or federal and state or provincial levels.]

[7.2. Each Party shall notify the other Parties of any non-discriminatory quantitative restriction that it adopts[, other than at the local government or municipal level,] after the date of entry into force of this Agreement and shall set out the restriction in its Annex on Non-discriminatory Quantitative Restrictions.]

[7.3. The Parties shall endeavor periodically, but in any event at least every [two] years, to negotiate the liberalization of the non-discriminatory quantitative restrictions set out in the non-discriminatory “Quantitative Restrictions” annex pursuant to paragraphs 7.1 and 7.2.]

[7.3. The Parties shall periodically, at least every two years, endeavor to negotiate the liberalization or elimination of:

- a) existing non-discriminatory quantitative restrictions that maintain:  
at the national or federal and state or provincial levels, as set out in the Annex on Non- discriminatory Quantitative Restrictions; or
- b) non-discriminatory quantitative restrictions adopted by a Party after the date this Agreement has entered into force.]

[7.4. No Party shall require a service provider of another Party to establish or maintain a representative office or any form of enterprise, or to be resident in its territory as a condition for the cross-border provision of a service.]

**Article 8: DEFINITIONS**

**[SERVICES:**

[All][Any] service[s] in any sector, except those services supplied in the exercise of governmental authority.]

**[SUPPLY OF A SERVICE:**

The production, distribution, marketing, sale, and supply of a service.]

**[SERVICE SUPPLIED IN THE EXERCISE OF GOVERNMENTAL AUTHORITY:**

[Service supplied neither on a commercial basis, nor in competition with one or more service [providers][suppliers][, including activities carried out by a central bank or by a monetary and exchange authority, or by any other public entity].]

[Any service supplied by a public institution, which is not supplied under commercial conditions, nor in competition between one or more service suppliers.]

[Any service which is supplied neither on a commercial basis, nor in competition with one or more economic

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<sup>5</sup> One country recognizes that specialized provisions need to be developed for financial services.

enterprises, and includes:

- a) activities conducted by the central bank or monetary authority or any other public entity, in pursuit of monetary or exchange rate policies;
- b) activities forming part of a statutory system of social security or public retirement plans;
- c) activities forming part of a system of national security or for the establishment or maintenance of public order; and
- d) other activities conducted by a public entity for the account of or with the guarantee or using financial resources of the government.]]

**[SERVICE PROVIDER:**

[All][Any] persons who suppl[y][ies] a service. [When the service is not supplied by a juridical person directly, but rather through other forms of commercial presence, for example, a branch or representative office, the service provider (i.e., the juridical person), through that presence, shall nevertheless be granted the treatment granted to service providers on the basis of the Chapter. Such treatment shall be granted to the presence through which the service is supplied, without having to grant it to any other party of the provider located outside the territory in which the service is being supplied.]]

**[SERVICE PROVIDER OF A PARTY:**

A person of a Party that seeks to provide or provides a service.]

**[SERVICE CONSUMER:**

Any person that receives or uses a service.]

**[MEASURE:**

[Any [measure][provision] adopted by a Party, [at any level of government,] whether in the form of a law, [decree, resolution,] regulation, rule, procedure, decision, or administrative [provision][rule][, [requirement or practice,] or in any other form].]

[Any law, regulation, [rule,] procedure, [decision or administrative practice, *inter alia*][, requirement, or practice].]]

**[MEASURE ADOPTED OR MAINTAINED BY A PARTY:**

[Shall mean][Means] measures adopted by:

- a) [central], [national or] federal, state, [provincial, departmental, municipal or local] and local [government authorities][governments and authorities]; and
- b) non-governmental institutions [that perform functions][exercising powers] delegated to them by the governments or authorities referred to in sub-paragraph (a).]

**[MEASURES ADOPTED OR MAINTAINED BY PARTIES AFFECTING TRADE IN SERVICES:**

[This deals with measures related to:]

- a) Purchase, payment, or use of a service;
- b) access to and use of services required by those Parties to be offered to the general public in order to

deliver a service;

c) Presence, including commercial presence, of persons of a Party in the territory of another Party for the delivery of a service.]

**[LEVEL OF GOVERNMENT:**

[Refers to the national, state, regional, departmental, federal, municipal, provincial, cantonal, etc. levels at which measures affecting trade in services in the Parties can be adopted.]

[Reference to national[,] [or] federal, [or provincial] [or] [and] state governments includes non-governmental agencies with regulatory, administrative, or other governmental powers conferred on them by those governments.]]

**[CROSS-BORDER TRADE IN SERVICES or CROSS-BORDER SUPPLY OF SERVICES:**

[The supply of a service:] [Means the supply of a service:]

- a) from the territory of a Party into the territory of another Party;
- b) in [the] territory of a Party, by [a] person[s] of that Party, to [a] person[s] of another Party; or
- c) by a national of a Party in the territory of another Party; but [excluding] [does not include] the provision of a service in the territory of a Party [by][by means of] an investment<sup>1</sup> [in that territory].]

**[PROVISION OF SERVICES**

The supply of services:

- a) from the territory of one Party into the territory of any other Party;
- b) in the territory of a Party to a consumer of services of any other Party;
- c) by a service [provider][supplier] of a Party through a commercial presence in the territory of another Party; and
- d) by a service [provider][supplier] of a Party through the presence of natural persons of a Party in the territory of any other Party.]

**[SERVICE OF ANOTHER PARTY:**

[The service supplied:

- a) from the territory of or in the territory of the other Party; or
- b) by a service supplier of the other Party, through commercial presence or through presence of natural persons.]

[The service supplied:

- a) from or in the territory of that other Party, by a service provider of that Party;
- b) in the case of the delivery of a service through commercial presence, or through the presence of

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<sup>1</sup> One country recognizes that the terminology is to be conformed to that used in the FTAA Investment Chapter.

natural persons, by a service provider of another Party.]]

**[COMMERCIAL PRESENCE:**

Any type of commercial or professional establishment, through, among other[s] [means]:

- a) the constitution, acquisition, or [maintenance][stay] of a juridical person; [or][as well as]
- b) [the creation or maintenance of] a [local] branch or representative office, [within][in] the territory of a Party, for the purpose of supplying\* a service.]

**[SECTOR:**

Service sector means:

- a) with reference to a specific commitment, one or more subsectors of that service, or all of them, as specified in the list of a Party;
- b) otherwise, the entirety of this sector of services, including all of its subsectors.]

**[ENTERPRISE:**

[Any][An] entity constituted or organized pursuant to [existing][applicable] law, whether or not for profit, and whether privately or government owned, [as well as other organizations or economic entities organized in conformity with the applicable legislation such as] including [companies][firms,] [trusts,] [corporations], holdings, partnerships, sole proprietorships, joint ventures or other forms of associations, [and branches of an enterprise]. [Notwithstanding the above, corporations with bearer shares are not included.]]

**[ENTERPRISE OF A PARTY:**

An enterprise constituted or organized pursuant to the legislation of a Party, including local branches in the territory of a Party and carrying out economic activities in that territory.]

**[COMPANY:**

An entity constituted or organized under applicable law, whether or not for profit, and whether privately or governmentally owned or controlled. Forms that a company may take include a corporation, trust, partnership, sole proprietorship, branch, joint venture, association, or similar organization.]

**[COMPANY OR OTHER LEGAL ENTITY:**

- a) substantially owned if more than 50% of the equity interest therein is beneficially owned by nationals mentioned in subparagraphs 5(a) and (b) above;
- b) effectively controlled if nationals mentioned in subparagraph (a) of this paragraph have the power to name a majority of its directors or legally manage its operations.]

**[EXISTING:**

means in effect on ( ).]

**[PERSON:**

A natural or juridical person.]

**[NATURAL PERSON:**

Shall be defined as:

- a) a citizen of the Party;
- b) a permanent resident of that Party in accordance with the National legislation of the respective Party.]

**[NATURAL PERSON OF ANOTHER PARTY:**

[A national of any other Party under the law of that Party.]

[A natural person residing in the territory of that other Party or in that of any other Party and who, according to the legislation of that other Party, is a national of that other Party.]]

**[JURIDICAL PERSON:**

[Shall be defined as a company or other legal entity constituted in a Party in conformity with their respective laws, provided that such company or other legal entity:

- a) has its registered office and central administration and carries out substantial activity within the Parties of the Agreement.
- b) is substantially owned and effectively controlled by persons listed in paragraphs 5(a) and (b) above.]

[Any juridical entity duly constituted or organized in any other manner, according to applicable legislation, whether for profit or not for profit, and whether publicly or privately owned, including any corporation, trust, partnership, joint venture, sole proprietorship, or association.]]

**[JURIDICAL PERSON OF ANOTHER PARTY:**

[Any juridical person constituted or organized in accordance with the legislation of the other Party and that develops or intends to develop substantial commercial operations in the territory of that Party or of any other Party.]

[A juridical person of another Party:

- a) is “owned” by persons of a Party if those persons have full ownership of more than 50 percent of its capital stock;
- b) is “controlled” by persons of a Part if they have the power to appoint the majority of its directors or legally manage its operations;
- c) is “related” to another person when it controls or is under the control of that person, or when both are under the control of the same person.]]

**[NON-DISCRIMINATORY QUANTITATIVE RESTRICTION:**

A nondiscriminatory measure that imposes limitations on:

- a) the number of service providers, whether in the form of a quota, a monopoly, an economic needs test, or by any other quantitative means; or
- b) the operations of any service provider, whether in the form of a quota, an economic needs test, or by any other quantitative means.]

**[PROFESSIONAL SERVICES:**

Services whose provision requires specialized post-secondary education or equivalent training or experience, and for which the right to practice is granted or restricted by a Party, but not include services provided by trades-persons or vessels and aircraft crew members.]

**[SPECIALTY AIR SERVICES:**

[Services include] Aerial mapping, aerial surveying, aerial photography, forest fire management, fire fighting, aerial advertising, glider towing, parachute jumping, aerial construction services, heli-logging [of wooden tree trunks], aerial sightseeing, flight training, aerial inspection and surveillance, and aerial spraying services.]

**[DIRECT TAXES:**

Deals with all taxes on total income, on elements of income or of capital, including taxes on gains from alienation of property, taxes on estates, inheritances, and gifts, and taxes on total amounts of wages or salaries paid by enterprises, as well as taxes on capital appreciation.]

**SECTION ON OTHER ISSUES RELATED TO THE ABOVE  
(AS DETERMINED BY EACH COUNTRY OR GROUP)**

**Domestic Regulation**

[1. [In establishing its domestic regulations,] in those sectors in which commitments are undertaken, each Party shall ensure that all measures of general application affecting trade in services are administered in a reasonable, objective, and impartial manner.]

[2. Where authorization is required for the supply of a service on which a [specific] commitment has been made, the competent authorities of the Party involved shall, within a reasonable period after the submission of an application considered to be complete under domestic laws and regulations, inform the applicant of the decision regarding the application. At the request of the applicant, the competent authorities of the Party shall provide without undue delay information regarding the status of the application.]

[3. In sectors where specific commitments regarding professional services are undertaken, each Party shall establish adequate procedures to verify the competence of the professionals of other Parties. Such procedures may be covered in an annex for professional services.]

[3. a) In sectors in which a Party has undertaken commitments, pending the entry into force of the disciplines developed pursuant to the above paragraph, the Party shall not apply licensing and qualification requirements and technical standards that nullify or impair such commitments in a manner which:

-does not comply with the criteria outlined in subparagraphs (a) through (f) of the above paragraph; and

-it could not reasonably have been expected of that Party at the time the commitments in those sectors were made.

b) In determining whether a Party is in conformity with the obligation under (a) of this paragraph, account shall be taken of the international standards of relevant international organizations applied by that Party.]

[4. The liberalization process shall be pursued while observing the right of each Party to regulate and introduce new regulations within its territory in pursuit of its national policy objectives for the services sector. The regulations may regulate, *inter alia*, national treatment and market access, provided that they do not nullify or impair the obligations under this Chapter or the commitments in Parties' Schedules.

[5. a) Each Party shall maintain or institute as soon as practicable judicial, arbitral or administrative tribunals or procedures which provide, at the request of an affected service supplier, for the prompt review of, and where justified, appropriate remedies for, administrative decisions affecting trade in services. Where such procedures are not independent of the agency entrusted with the administrative decision concerned, the Party shall ensure that the procedures in fact provide for an objective and impartial review.

b) The provisions of subparagraph (a) shall not be construed to require a Party to institute such tribunals or procedures where this would be inconsistent with its constitutional structure or the nature of its legal system.]

[6.-<sup>1</sup> With a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services, the necessary disciplines shall be developed. Such disciplines shall aim to ensure that the requirements, *inter alia*:

a) are based on objective and transparent criteria such as competence and the ability to supply the service;

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<sup>1</sup> One country considers that the content of such a paragraph would depend on the nature of other disciplines to be developed under this Chapter.

- b) avoid unnecessary regulations and are not more burdensome than necessary to ensure the quality of the service;
- c) are not in themselves, in the case of licensing procedures, restrictions on the supply of the service;
- d) limit the regulation in scope to what is necessary for the attainment of their objectives;
- e) avoid abusive monopoly or dominant positions in the market;
- f) are aimed at stimulating the use of market mechanisms to achieve regulatory objectives.]]

### **[National Regulations**

#### **[Procedures**

1. The Parties shall establish procedures for:

- a) a Party to notify another Party and include in its relevant lists:
  - i) commitments pursuant to Article 10;
  - ii) amendments of measures referred to in Article 08(1), (2), and (3); and,
  - iii) quantitative restrictions in accordance with Article 07, and
- b) consultations on reservations, quantitative restrictions, or commitments, with a view to further liberalization.]

#### **[Granting [permits, authorizations] [licenses and certificates]**

[1. For the purpose of ensuring that any measure that a Party adopts or maintains regarding the requirements and procedures for granting [permits, authorizations,] licenses [and][[or] certificates] to nationals of any other Party does not constitute an unnecessary barrier to trade, each [Party][one of the Parties] shall endeavor to ensure that [these][such] measures:

- a) are based on objective and transparent criteria, such as the capacity, [and] ability [and competence] to supply a service;
- b) are not more burdensome than necessary to ensure the quality of a service; and
- c) do not constitute a disguised restriction on the [supply] [to the cross-border supply] of a service.]

[1. The Parties shall agree to establish mutual recognition and licensing requirements and other regulations, in order to ensure that services or service suppliers comply with the criteria applied by each Party for the authorization, licensing, operation and certification of service suppliers, particularly for professional services.]

2. Where a Party recognizes, either unilaterally or by agreement with a non-Party State, education, experience, licenses, or certifications obtained in the territory of another Party or of a non-Party:

- a) nothing in Article 03 shall be construed to require a Party to accord such recognition to education, experience, licenses, or certifications obtained in the territory of the other Party; and,
- b) a Party shall afford the other Party an adequate opportunity to demonstrate that education, experience, licenses, or certifications obtained in the territory of another Party should also be recognized or to conclude

an agreement or arrangement of comparable effect.

3. Each Party shall, following the entry into force of this Agreement, eliminate all citizenship or permanent residency requirements. Where a Party does not comply with this obligation with respect to a particular sector, it shall list said requirements in its Section A of the “Nonconforming and Future Measures” annex. The other Party may adopt or maintain, as its sole remedy, an equivalent requirement in the same sector and for such period as the non-compliant Party maintains its requirement.

4. The Parties shall consult periodically with the view to determining the feasibility of removing any remaining citizenship or permanent residency requirement for the licensing or certification of service providers from other Parties.

5. The Annex on Professional Services sets out procedures for recognizing education, experience, and other rules and requirements governing professional service providers.]

**[Annex on Professional Services**

*Purpose*

1. The aim of this annex is to establish the rules to be observed by Parties in reducing and gradually eliminating barriers to the provision of professional services in their territories.

*Processing Licensing and Certification Applications*

2. Each Party shall ensure that its competent authorities, within a reasonable time after the submission of an application for a license or certification by a national of another Party:

- a) where the application is complete, make a determination on the application and inform the applicant of that determination; or,
- b) where the application is not complete, inform the applicant without undue delay of the status of the application and the additional information that is required under the Party’s law.

*Development of Professional Standards*

3. Parties shall encourage the relevant bodies in their respective territories to develop mutually acceptable standards and criteria for licensing and certification of professional service providers and to provide the Committee with recommendations on mutual recognition.

4. The standards and criteria referred to in paragraph 3 may be developed with regard to the following matters:

- a) education: accreditation of schools or academic programs;
- b) examinations: qualifying examinations for licensing, including alternative methods of assessment such as oral examinations and interviews;
- c) experience: length and nature of experience required for licensing;
- d) conduct and ethics: standards of professional conduct and the nature of disciplinary action for nonconformity with those standards;
- e) professional development and re-certification: continuing education and ongoing requirements to maintain professional certification;
- f) scope of practice: extent of, or limitations on, permissible activities;

g) local knowledge: requirements for knowledge of such matters as local laws, regulations, language, geography, or climate; and,

h) consumer protection: alternatives to residency requirements, including bonding, professional liability insurance, and client restitution funds, to provide for the protection of consumers.

5. On receipt of a recommendation referred to in paragraph 3, the Committee shall, within a reasonable time, review it to determine whether it is consistent with the terms of this Agreement. Based on the Committee's review, each Party shall encourage its respective competent authorities to implement the recommendation, where appropriate, within a mutually agreed time.

#### *Temporary Licensing*

6. Where the Parties agree, each Party shall encourage the relevant bodies in its territory to develop procedures for the temporary licensing of professional service providers of the other Party.

#### *Review*

7. The Committee shall periodically, and at least once every three years, review the implementation of this Annex.]

#### **General Exceptions**

[1. [Notwithstanding the provisions of this and other chapters of this Agreement] [Without prejudice to the foregoing provisions], [the Parties] [each Party] may adopt [or apply] measures [necessary to ensure the observance of laws and regulations for]:

a) [to protect][the protection of] public morals or [to maintain][the maintenance of] public order [and safety];

b) [to protect][the protection of] human[, plant] and animal life and health [and preserve][or the conservation of] the environment;

c) [to protect][the protection of] the national security;

d) to secure the compliance with laws and regulations related to:]

i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts [for the purpose of supplying services to natural or juridical persons of the Parties];

ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of the confidentiality of individual records and accounts; or

iii) guaranteeing public security;

[e) protecting national, artistic, historical or archeological treasures;]

[f) inconsistent with the objectives envisaged in the Articles on national treatment, provided that the difference in national treatment is aimed at ensuring the equitable or effective imposition or collection of direct taxes in respect of services or service suppliers of the other Party.]]

[2. The measures listed above in this Article shall not be applied in a manner disproportionate to their purpose, shall not have protectionist aims in favor of domestic services or service providers, and shall not be applied in such a manner as to constitute an unnecessary obstacle to intraregional trade in services or a means of discrimination

against services and/or service providers of FTAA *vis a vis* the treatment accorded other countries whether or not they are Parties.]

[2. The provisions of this chapter do not apply to the social security systems of any Party, nor to activities in the territory of any Party related, even occasionally, to the exercise of official authority.]

[3. Nothing in this chapter shall prevent any Party from enforcing its laws, regulations and requirements with respect to entry, stay, work, labor conditions and establishment of natural persons, with the understanding that such enforcement, if any, shall not be carried out in a manner that nullifies or limits the benefits obtained by any of the Parties under any specific provision of this chapter.]]

### **General Exceptions**

Subject to the requirement that the following measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction to trade in services, nothing in this Chapter shall be construed to prevent the adoption or enforcement by any Party of measures:

- a) necessary to protect public morals or to maintain public order;
- b) necessary to protect human, animal or plant life or health;
- c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Chapter, including those relating to:
  - i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts;
  - ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts;
  - iii) safety.
- d) inconsistent with Article (National Treatment), provided that the difference in treatment is aimed at ensuring the equitable or effective imposition or collection of direct taxes in respect of services or service suppliers of other Parties;
- e) inconsistent with Article (MFN), provided that the difference in treatment is the result of an agreement on the avoidance of double taxation in any other international agreement or arrangement by which the Party is bound.
- [f) public safety.]]

### **Security Exceptions**

1. No provision in this Chapter shall be construed to:

- a) impose upon a Party the obligation to furnish information, the disclosure of which that Party deems contrary to its essential security interests; or
- b) prevent a Party from adopting measures it deems necessary to protect its essential security interests with respect to:
  - i) the supply of services intended directly or indirectly to secure the provisioning of the armed forces;

- ii) fissile or fusionable material or the materials used to manufacture them;
- iii) those measures applied in war-time or in case of severe international tension; or

c) prevent a Party from adopting measures in fulfillment of their obligations assumed under the United Nations Charter for the maintenance of international peace and security.

[2. Measures adopted pursuant to subparagraphs b) and c) of paragraph 1 and their elimination shall be reported to ( ), to the extent possible.]

**[[Non-obligatory] Local Presence**

No Party shall require a service provider of another Party to establish or maintain a representative office or any form of enterprise, or to be resident in its territory as a condition for the cross-border provision of a service.]

**[Standard of Treatment**

Each Party shall accord service providers from other Parties the better of the treatments required by the Articles on Most Favored Nation Treatment and National Treatment.]

**[Recognition**

Each Party shall recognize the licenses, certificates, professional titles and accreditations, granted by another Party in any service area requiring such documents, in accordance with the criteria agreed upon or the decisions on the issue adopted by the Committee on Services.]

**[Regulatory Exclusions**

Each Party may regulate the supply of services in its territory, to the extent that the regulations do not discriminate against services and service suppliers of the other Party, in comparison with its own like services or like service suppliers.]

**[Additional Commitments**

The Parties may negotiate additional commitments in the field of regulations.]

**[List of Specific Commitments**

1. Each Party shall indicate on a List of Specific Commitments the service sectors, subsectors and activities in which it will assume commitments. In each sector and for each of the four modes of supply established in Article ( ), the Party shall specify:

- a) the terms, limitations and conditions for market access;
- b) the terms, limitations and conditions for national treatment;
- c) the obligations related to additional commitments.

2. Any measures that are incompatible with the obligations referring to market access and, at the same time, national treatment shall be included in both columns of the List of Specific Commitments.]

**[Reservations for Commitments]**

1. The Articles on Most-favored Nation Treatment, National Treatment and Non-obligatory local presence do not apply to:

a) any existing non-conforming measure that is maintained by:

i) a Party at the national or federal level, and at the provincial or state level, as set out in its [Section A][Schedule] of the Annex on “[Existing][and Future] Non-conforming Measures”; or

ii) a local or municipal government.

b) the continuation or prompt renewal of any non-conforming measure referred to in subparagraph (a); or

c) an amendment to any non-conforming measure referred to in subparagraph (a) to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with Articles ( ) (Most-favored Nation Treatment), ( ) (National Treatment) and ( ) (Non-obligatory local presence).

2. The Articles ( ) (Most-favored Nation Treatment), ( ) (National Treatment) and ( ) (Non-obligatory local presence) do not apply to any measure that a Party adopts or maintains with respect to sectors, sub-sectors or activities, as set out in its [Section B][Schedule] to the Annex on “[Nonconforming and]Future Measures.”

3. (Sections A and B) shall be completed no later than two years after the date on which the Agreement comes into force. The Smaller Economies shall be granted a period of up to five years to complete their (Sections A and B).]

**[Liberalization of Nondiscriminatory Measures]**

Each Party shall set out, in its non-discriminatory “Quantitative Restrictions” annex, its commitments to liberalize quantitative restrictions, licenses requirements, and other nondiscriminatory measures.]

**[Future Liberalization]**

1. Through future negotiations called by the Commission [Responsible for the Administration of the Agreement] [to be held periodically], the Parties shall [jointly] broaden the liberalization achieved in the different service sectors, with a view to eventually eliminating the remaining restrictions [set out in the Article on Reservations [or Commitments]].

2. The removal of the remaining restrictions shall include the progressive reduction and/or dismantling of the nonconforming measures set out in Section A, together with the progressive incorporation into Section A of the sectors, subsectors, and activities set out in Section B.]

**[Future Work]**

1. The Committee for Trade in Services shall delegate to working groups the task of considering issues related to the harmonization of regulations in specific service sectors. This shall be done in a specific manner and for given periods of time.

2. For the purposes of this Paragraph, the work of the relevant international organizations shall be taken into account.]

**[Committee on Cross-Border Trade in Services]**

The Committee on Cross-Border Trade in Services shall carry out the functions indicated in Article ( ).]

**[Consultations]**

1. Each Party shall examine closely the issues raised by any other Party related to a matter affecting the operation of this Agreement and shall create the appropriate conditions for holding consultations on such issues.
2. At the request of a Party, the Council for Trade in Services may hold consultations with one or more Parties on a specific issue on which there was no success in finding a satisfactory solution through the consultations provided for in paragraph 1.]

**[Council for Trade in Services]**

1. The Committee on Trade in Services is created. It is made up of representatives of each of the Parties, one regular and one alternate.
2. The functions of the Committee shall be:
  - a) To supervise the implementation of and compliance with the Agreement on Services.
  - b) Take cognizance of those matters brought before the Committee by the Parties on which the Committee shall issue recommendations it deems pertinent.
  - c) Design mechanisms to assess cases on which the Committee does not have sufficient technical expertise, taking into account the provisions of the Dispute Settlement Body.
  - d) Establish such subsidiary organs as it considers appropriate for the effective discharge of its functions.
  - e) The Council for Services shall have a Chair, a Vice-Chair and a Secretary.
  - f) Draft its own regulations.]

**[Dispute Settlement]**

Any dispute arising by virtue of the operation of this Agreement shall be settled based on the provisions of Chapter ( ) on Dispute Settlement of this Agreement.]

**[Technical Cooperation]**

1. The provisions of GATS Article IV shall be incorporated into this Chapter with special emphasis made on the establishment of “enquiry points” and the availability of services technology.
2. Technical assistance in the area of Services within the FTAA, shall be channeled through the Council on Trade in Services.
3. The Parties shall foster, to the greatest extent possible, participation of both relatively developed and relatively less developed countries in the development programs of international and regional organizations.
4. The Parties shall foster and support cooperation in the area of services among relatively developed and relatively less developed countries.
5. In collaboration with the relevant international organizations, the Parties shall provide less developed countries of the hemisphere with information on services and developments in services for the purpose of strengthening the service sectors in such countries.

6. The Parties shall pay special attention to the initiatives of the relatively less developed countries to access technology transfer, training and other activities that foster the infrastructure development and expansion of their trade in services.]

**[Relations with Other International Organizations]**

The Council for Services shall make the necessary provisions to engage in consultations and cooperation with the United Nations and its specialized agencies, as well as with other services-related intergovernmental organizations.]

**[Restrictions to Protect the Balance of Payments<sup>2</sup>**

1. In the event of serious balance of payments or external financial difficulties or threat thereof, a Party may adopt or maintain restrictions on trade in services with respect to measures covered by the Articles on most favored nation treatment, local presence, national treatment and market access, including payments or transfers for transactions relating to the sectors affected by such measures. It is recognized that certain balance of payments pressures may necessitate the use of restrictions in order to achieve, among other things, the maintenance of a level of financial reserves sufficient to implement its economic development program or economic transition.

2. The restrictions referred to in paragraph 1 *supra*:

- a) shall not discriminate among Parties;
- b) shall be consistent with the Articles of Agreement of the International Monetary Fund (IMF);
- c) shall avoid unnecessary damage to the commercial, economic and financial interests of the Parties;
- d) shall not exceed those necessary to deal with the circumstances referred to in paragraph 1 *supra*; and
- e) shall be temporary or shall be phased out progressively as the situation indicated in paragraph 1 *supra* improves.

3. In determining the incidence of such restrictions, the Parties may give priority to the supply of services that are more essential to their economic or development programs, but such restrictions shall not be adopted or maintained for the purpose of protecting a given service sector.

4. Restrictions adopted or maintained under paragraph 1 *supra* or any changes therein shall be notified promptly to the Parties.

- 5.
  - a) The Parties applying the provisions of this Article shall promptly consult on the restrictions adopted under said provisions.
  - b) The Council shall establish procedures for periodic consultations with the objective of enabling such recommendations to be made as it deems appropriate to the concerned Party.
  - c) Such consultations shall assess the balance of payments situation of the concerned Party and the restrictions adopted or maintained under this Article, taking into account, inter alia, such factors as:
    - i) the nature and extent of the external financial difficulties and of the balance of payments;
    - ii) the external, economic and trading environment of the consulting Party;
    - iii) alternative corrective measures which may be available.
  - d) The consultations shall address the compliance of the applicable restrictions with paragraph 2 of this

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<sup>2</sup> Some countries believe that the FTAA Chapter on Services should include an article or articles on payments and transfers, as well as safeguards, in the field of balance of payments and will submit a draft proposal for said article(s) at the appropriate time.

Article, in particular the progressive phaseout of restrictions, in accordance with sub-paragraph (e) of said paragraph.

e) In such consultations, all findings of statistical and other facts presented by the IMF relating to foreign exchange, monetary reserves and balance of payments shall be accepted, and conclusions shall be based on the assessment by the IMF of the balance of payments and external financial situation of the consulting Party.]

### **[Special Safeguards<sup>3</sup>**

1. For the purpose of addressing problematic market conditions in particular service sectors, linked to the creation of new sectors, the correction of structural problems within the market or the threat of the disappearance of service sectors, a Party may adopt safeguard measures in a non-discriminatory manner with the proviso that they will be eliminated gradually as the reason for their adoption disappears. For this purpose, the Party shall notify it to the Committee for Trade in Services and offer evidentiary proof justifying the adoption of such measures.

2. The Committee on Services shall determine, *inter alia*, the procedures for the implementation of necessary measures in relation to:

a) urgent safeguard measures

b) trade-distortive subsidies.]

### **[Subsidies**

The Parties shall develop disciplines in order to avoid and counteract the effect of subsidies that distort trade in services. Negotiation of these disciplines shall be concluded no later than the date of the entry into force of the FTAA agreement.<sup>4]</sup>

### **[Competition**

1. Each Party shall adopt the measures necessary to prevent, avoid and sanction practices that distort competition in the trade in services within its domestic market, including those necessary to ensure that service providers established on their territories that enjoy a position of dominance in the market do not abuse their position.

2. The provisions of Article ( ) shall also apply to the cases of exclusive service providers, where one of the Parties, whether formally or *de facto*:

i) authorizes or stipulates a small number of service providers, or

ii) substantially hinders competition among suppliers on its territory.

3. The Committee for Trade in Services shall, at the request of one of the Parties that has reason to believe that a service provider from the other Party is abusing its dominant position, require the said Party to provide specific information on the relevant operations of the supplier.

4. The Parties shall study all aspects involved in existing international transport services within the hemisphere with a view to adopting the domestic laws to ensure that such services operate in a competitive environment and do not constitute an obstacle to expansion in regional trade.]

### **[Special and Differential Treatment**

<sup>3</sup> Some countries consider it advisable for the Negotiating Group on Services to examine the issue of safeguards in services.

<sup>4</sup> Some countries indicated that the main elements of these disciplines are envisaged in document FTAA.ngsv/w/44.

1. The Parties undertake to accord special and differential treatment to smaller economies and less developed countries in the Hemisphere, with respect to: time periods, temporary exceptions in fulfilling their obligations and special assistance to facilitate the adjustment process and improve competitiveness, taking into account the sensitivity of some service sectors, their importance in generating employment and their role in attaining the legitimate development goals of such economies.
2. The more developed countries shall accord special market access conditions to the services from smaller and less developed economies of the Hemisphere in those modes of supply in which their greatest competitive advantages lie.
3. For the purposes of bolstering development in emerging services sectors of interest to smaller and/or less developed economies in the Hemisphere, the Parties undertake to provide conditions that facilitate market access to service providers in such sectors and to foster technical and financial cooperation.
4. The increasing participation of smaller and/or less developed economies in trade in services within the Hemisphere shall be encouraged through the adoption of the provisions under Article IV of GATS relating to:
  - i) the strengthening of their domestic services capacity and its efficiency and competitiveness, *inter alia* through access to technology on a commercial basis.
  - ii) the improvement of their access to distribution channels and information networks; and
  - iii) the liberalization of market access in sectors and modes of supply of export interest to them.
5. The Parties shall provide the appropriate resources, including financial resources, to the extent permitted by their respective resources and regulations, to further the adjustment to the gradual process of liberalization of trade in services throughout the Hemisphere.
6. In fulfilling the obligations they assume, smaller and/or less developed economies shall be accorded relative flexibility with respect to opening up fewer sectors, liberalizing fewer types of transactions, gradually expanding market access in line with its development process and the adoption of special safeguards.]

## ANNEX 1

### TO THE REPORT OF THE NEGOTIATING GROUP ON SERVICES ISSUES FOR FURTHER DISCUSSION

#### Disciplines on Subsidies

*This communication from Mercosur is of a preliminary nature, and is subject to potential changes, as internal talks, and debates and proposals developed in the NGSV unfold. The purpose of this presentation is to contribute elements for an analysis of the topic.*

Evidence contained in different documents compiled by international organizations indicates that a range in subsidy practices is evident in major service sectors, such as: audiovisual, air and sea transport, tourism, and financial services. The presence of subsidies in insurance, postal services, construction, research and development, and advertising has also been confirmed.

The effect of these policies can not be accurately assessed, but there is empirical evidence indicating that these practices with potentially distorting effects are concentrated in certain specific sectors.

Some regional integration agreements on goods and services contain specific provisions for establishing certain disciplines on subsidies.

Mercosur considers that the FTAA's future chapter on services should contain specific disciplines related to eliminating and prohibiting subsidies that have distorting effects on the market or that cause shifts in normal trade flows.

Thus, the NGSV should consider the following questions:

#### **1. Factors to consider in the preparation of disciplines on subsidies:**

- aspects of MFN and national treatment
- specificity by type of delivery
- territorial application
- transparency
- is the concept of "necessity" important?
- importance of the "least trade restrictiveness" concept
- neutralizing measures
- exceptions
- terms for eliminating subsidies
- flexibility for certain countries

#### **2. Approach for the establishment of disciplines:**

a) general disciplines and b) potential development of specific disciplines by sector (for example, WTO "Reference Paper" on Basic Telecommunications, which contains provisions on cross-subsidies capable of altering competitive conditions).

By way of summary, Mercosur considers that the disciplines on subsidies in services must, in principle, give clear consideration to the following aspects:

- a) Prohibition on export subsidies (an illustrative list of measures could, for example, be prepared).
- b) Prohibition on causing harm to, or shifts in third markets, with compliance subject to a case by case resolution by the FTAA's Dispute Settlement System.
- c) Subsidies that are permitted or non-actionable, among which could be considered, for example, subsidies earmarked for services with social benefits.

### **Quantitative Restrictions**

1. In the light of the forthcoming discussions in the Negotiating Group on Services on Market Access and National Treatment, the delegation of Chile considers that this is an appropriate juncture for sharing some ideas on the differences between those quantitative restrictions that are discriminatory and those that are not. In this regard, the following is worth noting:

2. Articles XVI (Market Access) and XVII (National Treatment) of the General Agreement on Trade in Services (GATS) fall under the section on specific commitments (Part III). Thus, the GATS deals in like fashion with National Treatment restrictions and Market Access restrictions, (whether or not they are discriminatory). However, in the case of Article XVI, six types of measures affecting trade in services are identified, and they may not be applied in the sectors stipulated in their schedule of specific commitments, to a specific service provider of a WTO member country, unless, they are clearly specified in the respective schedules. As a result of the foregoing, one may conclude that under the current GATS structure, the countries are free to choose the sectors in which they are going to undertake National Treatment or Market Access commitments. However, should they undertake any Market Access commitments, they shall not maintain or adopt any of the six measures set forth in Art. XVI. 2 unless their own Schedules specify otherwise.

3. Likewise, GATS Article XX.2 stipulates that "measures inconsistent with both articles XVI and XVII shall be inscribed in the column relating to Article XVI. In this case, the inscription will be considered to provide a condition or qualification to article XVII as well." What this means is that many countries, when inscribing their National Treatment Restrictions, also list them in the Market Access column. In this way, in the example described below, there is clearly a measure which restricts Market Access, but which is also patently discriminatory (i.e., it is a limitation on National Treatment). However, given the wording of Art. XX.2 of GATS, this restriction may be listed only in the Market Access column without it being necessary (only optional) to list it in the National Treatment column. Furthermore, under the current structure of GATS the country concerned may state expressly that it has "no" restriction on National Treatment. This situation makes for confusion and lack of transparency, since, as one can appreciate from the example mentioned, if a service provider of any WTO member country wanted to supply services in country X, it would think that in the sector listed, there were no restrictions on National Treatment. Yet, upon arrival in the country, the supplier would be faced with the fact that there were indeed such restrictions but that they were mixed up with the restrictions on Market Access.

#### 4. Example

##### Specific Sector Commitments (Country X)

Sector or Subsector	Market Access Limitations	Restrictions on National Treatment	Additional Commitments.
Other educational services (92390)	4) For foreigners who wish to supply such services, the laws require membership of the Professional Teaching Corps. For mandatory membership, one must meet the nationality and residency requirements. In some cases, State institutions may recruit foreign professionals if there are no nationals willing to provide the service under the stipulated conditions.	4) None	

5. Bearing in mind the confusion caused by the situation described, and based on current regional agreements, Chile's proposal (February 10, 2000) draws a perfectly clear distinction between discriminatory quantitative restrictions (i.e. restrictions contrary to the principles of National Treatment and Most Favored Nation) and those that are **non-discriminatory**. Thus, for example, a measure that stipulates that “*a license from the relevant Ministry is required to operate a cable television system and such a license may be granted only to nationals of a given country*”, may constitute on the one hand a market-access restriction, and on the other hand, - which in the opinion of Chile is the most important, - it may be a measure that discriminates between nationals and foreigners (by keeping foreigners out of the market). By the same token, there are **non-discriminatory** quantitative restrictions (i.e. those measures that are not contrary to National Treatment or the Most Favored Nation Clause although they restrict transborder trade in services). For example, a measure that stipulates that “*the Postal company of a given country has been appointed to supply national and international mail dispatch services*”, only restricts Market Access (and, therefore, transborder trade in services), but does not stipulate any discrimination between nationals and foreigners, since pursuant to the rule, neither the nationals of the given country nor foreigners will be able to provide domestic and international mail dispatch services.

6. In this respect, Article 8 of the Chilean proposal sets forth that existing (and, in general, any existing measure inconsistent with the obligations of National Treatment, Most Favored Nation and the non requirement of Local Presence) *discriminatory quantitative restrictions* shall be listed in “section A”(which refers to existing nonconforming measures) of the Annex on “Nonconforming and Future Measures”. Should the case be otherwise, those measures shall not be enforceable on service providers of member countries of the Agreement. Furthermore, it is important to note that new discriminatory measures shall not be imposed on service suppliers of Members, and the existing measures may only be modified in a manner that further liberalizes transborder trade in services (except those measures listed in “section B” – that refer to future measures – in the Annex mentioned above). Likewise, Article 7 states that **non-discriminatory** quantitative restrictions shall be indicated in a specific Annex for this type of measures. However, in principle, there would be no obligation to bind the existing measures; rather, there would be an obligation to list them with a view to ensuring due transparency. In this way, though **non-discriminatory**, they may be modified, or new ones may even be adopted, with the obligation to notify the other Members, and to, “...at least every two years, endeavor to negotiate the liberalization of the quantitative restrictions...” (Art. 7.3 Proposal of Chile).

7. Moreover, and with a view to facilitating Market Access in the services sector, Art. 5 of the Chilean proposal prevents requiring a service provider to establish or maintain a representative office or other type of company, or to reside in the territory of any Member State as a condition for the transborder supply of a service.

8. Finally, it must be remembered that there is further room for duplication within the limitations on access, since among the six measures listed in Art. XVI.2, of GATS there are measures such as “e” and “f” that apply to the third mode of supply (commercial presence). In this regard, the position of Chile is that the issue of “commercial presence” should be addressed by the FTAA Negotiating Group on Investment and that such limitations should be analyzed by the Group.