



MODERNIZING SERVICES IN NAFTA

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Let's examine four aspects around NAFTA and Services

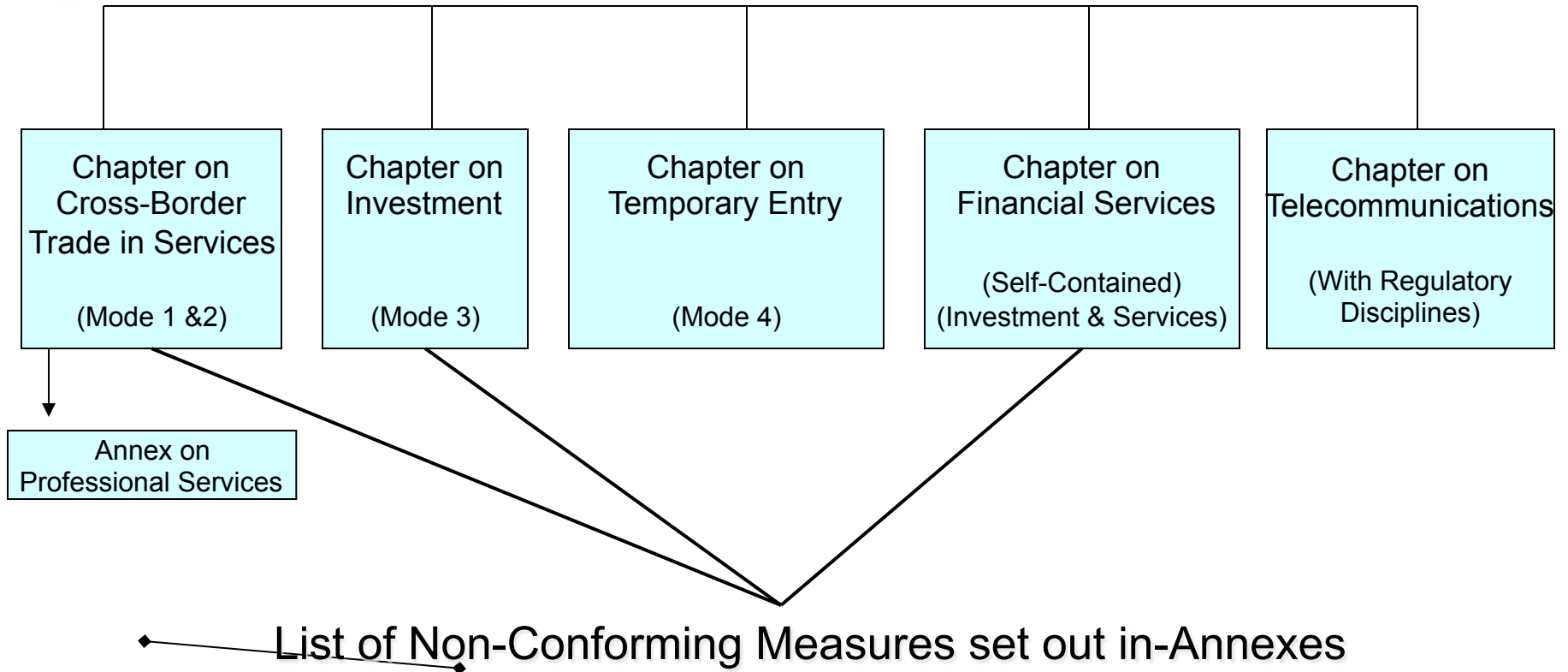
- ❖ WHAT DID **NAFTA 1.0** ACHIEVE IN SERVICES?
- ❖ WHAT HAS CHANGED IN THE WORLD OF SERVICES TRADE?
- ❖ HOW IS NAFTA 1.0 LACKING WITH RESPECT TO ITS TREATMENT OF SERVICES?
- ❖ PROSPECTS FOR SERVICES MODERNIZATION IN **NAFTA 2.0**?



NAFTA innovated in three major ways with respect to services

- **STRUCTURE**: separate chapters for modes of service supply and for selected sectors; many chapters with horizontal coverage of goods & services, all within the same legal text)
- **MODALITY** : NAFTA pioneered the “negative list approach” for services liberalization, since followed by many agreements around world
- **RULE-MAKING** : extent and depth of disciplines was path—breaking at the time

1. NAFTA's STRUCTURE for SERVICES



NAFTA's coverage of SERVICES is spread throughout the agreement

- Under NAFTA 1.0, services disciplines address issues of cross-border trade (modes 1 and 2) in one Chapter, address generic (i.e. non-services specific) disciplines on investment (mode 3) in another Chapter, and the temporary entry of business people (partial mode 4) in another Chapter
- Approximate symmetry of treatment is established through separate chapters for the various modes
- Specific sectoral treatment carried out through individual chapters on telecoms; financial services
- Disciplines of general application found in other chapters that apply to both goods and services:
LIST FOLLOWS

2. NAFTA's LIBERALIZING MODALITIES FOR SERVICES

Positive list or “bottom up”

Characteristics

- Inclusion of sectors depends on negotiators
- Specific commitments for sectors and modes of supply with national treatment and market access limitations
- Unconditional MFN treatment (but with temporary exemptions)

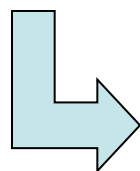
Negative List or “top down”

Characteristics

- Comprehensive sectoral coverage
- Unconditional MFN treatment and national treatment (reservations allowed)
- No local presence requirement
- Lists of non-conforming measures set out in annexes

NAFTA List of Non-Conforming Measures – Annexes: What Do They Contain ?

Annex I: Existing Non-Conforming Measures with Respect to:



National Treatment	(Services; Investment; Financial Services)
MFN	(Services; Investment; Financial Services)
No Local Presence	(Services)
Market Access	(Services; Financial Services)
Performance Requirements	(Investment in Goods & Services)
Senior Management / Board of Directors	(Investment in Goods & Services; including Financial Services)
Cross-Border Trade	(Financial Services)

“RATCHET” discipline: Once liberalized, a non-conforming measure included in Annex I is eliminated for good

Annex II: Future Non-Conforming Measures:

List of sectors-activities for which a Party can maintain existing non-conforming measures indefinitely or adopt measures in the future that are more restrictive.



➤ Chapter on Temporary Entry for Business Persons

- Provisions to facilitate administrative and legal procedures for temporary entry
- Visa requirements/procedures & employment considerations remained outside agreement
- Five categories covered for temporary entry: business visitors; intra-company transferees; investors; traders; and professionals (according to a list)
- No requirements for labor certification
- No numerical limits except for professionals (specific quotas included from Mexico to U.S. and Canada but became quota-free over time)

3. NAFTA'S DEEPER DISCIPLINES WENT FAR AT THE TIME

- **Sector-Specific Disciplines** :
Telecommunications; Financial Services;
Professional Services
- **Horizontal Disciplines (applying to Services and Goods)**: Competition Policy; Standards;
Intellectual Property; Government
Procurement, SOEs
- **Ratchet mechanism**: Built-in or “automatic”
liberalization of services measures



NAFTA definition for Rules Origin for services set the standard for liberalized treatment

- NAFTA ROO for services is very liberal: any service provider established in a NAFTA party and carrying out “**substantial business operations**” (no matter what nationality of owners) can qualify
- Rules of Origin for Services focus on producers rather than products
- ROO for services not sector or service-specific but across the board: simple in design and application ensure that NAFTA-type FTAs are not trade-restrictive
- Now the majority of RTAs covering services opt for a similar liberal rule of origin, with a view to promoting FDI inflows



NAFTA has known tremendous success, facilitated by services

- 1) Has greatly increased trade among the countries in North America – two times what could have been expected without NAFTA
- 2) Has created an inter-locking system of integrated production networks in North America, defined by thousands of global value chains
- 3) Has provided employment opportunities for many new workers in services
- 4) Has stabilized trade relations and dynamized investment flows between the 3 parties



AND... The NAFTA model for services has been reproduced all over the world!

- All FTAs in the Western Hemisphere covering services have followed the negative list approach – (with the exception of Mercosur)
The most recent example is the Pacific Alliance Agreement
- In Asia: Many FTAs have decided to adopt the negative list approach - most recently RCEP and ASEAN
- Even the EU has adopted negative listing for its most recent trade agreements – first in investment, now for all services modes (example: CETA)



BUT... NAFTA is showing its age

NAFTA came into existence in 1994 – one year before the WTO

Is nearly a generation old by now -

EXAMPLES OF THE SERVICES WORLD IN 1994

- Year the World Wide Web (i.e. the Internet) came into existence.
- No smartphones, no iPads, no flat-screen TVs ... no Google, no Netflix, no Dropbox, no Thumb Drives, no Cloud storage
- Cell phones available but expensive; battery as big as the phone!
- Email was expensive so people used fax machines!

Our present reality for services is quite different from 25 years ago

- ❖ NOW IN WORLD OF GLOBAL VALUE CHAINS; INTEGRATED PRODUCTION NETWORKS
- ❖ FDI IS LEADING TRADE FLOWS
- ❖ **DIGITAL ECONOMY NOW PREDOMINANT**
 - Number of internet users worldwide is 3.2 billion. In addition, there are an estimated 971 million websites online
 - World is home to 7.2 billion mobile phones, and they're multiplying five times faster than we are
 - 45X growth in data flows 2005-2014; now data flows generate more economic value than global goods trade (now at 400 terabits per second)

WHAT HAVE BEEN THE ADVANCES IN THE SERVICES AREA SINCE NAFTA?

- At WTO level – none, since the adoption of Protocol IV and Protocol V to the GATS on Telecoms and Financial Services in 1996 and 1997
- At RTA level – picture is dramatically different from 25 years ago
 - Considerable expansion of services disciplines
 - Greater services liberalization
 - Proliferation of RTAs with recent ones going well beyond NAFTA in crucial areas

NAFTA NEEDS MODERNIZING – AND ESPECIALLY IN SERVICES !

Examining How Far Recent Trade Agreements on Services Have Come

- **TiSA** (50 participants; text mostly finalized at end 2016; future uncertain; services progress substantial)
- **TPP** (11 participants; text finalized and signed in March 2016; U.S. withdrew in February 2017; future uncertain; progress on services substantial)
- **CETA** (29 parties; agreement between Canada and EU finalized; came into force provisionally in September 2017; often cited as gold standard FTA)
- **KORUS** (2 parties; agreement between Korea and U.S.; came into force in March 2012; most modern trade agreement in force for U.S.)

Many new services areas are covered in new agreements but not by NAFTA

- E-commerce
- Express delivery / logistics services
- Maritime transport
- Energy
- Environment services /
- Domestic regulation
- Transparency
- SMEs
- Regulatory coherence
- Development
- Competitiveness & business facilitation

**-5 of these
involve market
access opening
plus rules
-3 new discipline
areas
-3 areas of
enhanced
cooperation**

Issues	TiSA	TPP	CETA	KORUS		NAFTA
Cross-border Trade in Services	X	X	X	X		X
Investment	X	X	X	X		X
Financial Services	X	X	X	X		X
Telecommunications	X	X	X	X		X
Air Transport ¹	X	X	X	X		X
Maritime Transport	X		X			
E-commerce	X	X	X	X		
Competitive Delivery / Logistics ²	X	X		X		
Energy Services	X					
Environment Services	X		X			
Professional Services	X	X	X	X		X
Mutual Recognition of Professional Qualifications ³	X	X	X	X		X
Movement of Natural Persons	X	X	X			X

Issues	TiSA	TPP	CETA	KORUS		NAFTA
Domestic Regulation	X		X			
State-owned Enterprises	X	X	X			X
Government Procurement	X	X	X	X		X
Competition Policy/ Monopoly supplier	X	X	X	X		X
Transparency	X	X	X	X		
SMEs	X	X				
Cooperation and Capacity-building		X	X			
Competitiveness and Business Facilitation		X				
Development		X	X			
Regulatory Coherence		X	X			



Notes

¹ The agreements do not cover air traffic rights, but only auxiliary air transport services.

² The TPP and KORUS cover only express delivery services and not logistics (found in the Annex to the chapter on Cross-border Services Trade).

³ Found in the TPP and NAFTA under the Annex on Professional Services to the chapter on Cross-border Trade, in KORUS under the Appendix 12-A-1: Sectors for Mutual Recognition and Temporary Licensing to the chapter on Cross-border Trade, and in CETA under the chapter on Mutual Recognition of Professional Qualifications. Proposed in TiSA under the chapter on Professional Services.

Note: The TPP additionally has a chapter on Transparency and Anticorruption that is not found in CETA. Nor has it been proposed for the TiSA negotiations.

Sources: TiSA texts available at Wikileaks; Texts of the TPP, CETA, KORUS, and NAFTA agreements consulted on official websites.

EXAMINING POSSIBLE NEW SERVICES AREAS FOR INCLUSION IN NAFTA II

E-COMMERCE

--Probability for inclusion: **HIGH**

--Common text already exists in TiSA; TPP for all 3 NAFTA parties

--Scope for controversy
NOT LIKELY other than for privacy concerns

--Importance: **HIGH** (for data flows)

EXPRESS DELIVERY/ LOGISTICS

--Probability for inclusion: **HIGH**

--Common text already exists in TiSA & TPP (on Express Delivery only) for all 3 NAFTA parties

--Scope for controversy
NOT LIKELY

--Importance: **HIGH** (for operation of regional supply chains)

EXAMINING POSSIBLE NEW SERVICES AREAS FOR INCLUSION IN NAFTA II

MARITIME TRANSPORT

--Probability for inclusion: **LOW**

--Common text exists in TiSA: U.S. has indicated it is not on board

--Scope for controversy: **HIGHLY LIKELY** (Jones Act in U.S. entrenched)

--Importance: **HIGH** (for regional transport corridors)

ENERGY SERVICES

--Probability for inclusion: **MEDIUM**

--Common text exists in TiSA; not clear if Mexico is fully on board

--Scope for controversy: **LIKELY** sensitive in Mexico, depending upon scope

--Importance: **HIGH** (for regional integrated energy markets)

EXAMINING POSSIBLE NEW SERVICES AREAS FOR INCLUSION IN NAFTA II

DOMESTIC REGULATION

--Probability for inclusion:
LOW

--Common text exists in
TiSA: U.S. has not
indicated its agreement;
prefers to focus on
transparency disciplines

--Scope for controversy:
HIGHLY LIKELY

--Importance: **HIGH** (to
discipline non-discriminatory
measures)

ENVIRONMENT SERVICES

--Probability for inclusion: **HIGH**

--Common text exists in TiSA;
priority area for all 3 parties
unclear if U.S. attitude changed

--Scope for controversy:
UNCLEAR

--Importance: **HIGH** (to bring
focus on environment area)

EXAMINING POSSIBLE NEW SERVICES AREAS FOR INCLUSION IN NAFTA II

TRANSPARENCY

--Probability for inclusion:
HIGH

--Common text exists in
TiSA & TPP; priority area

--Scope for controversy:
SMALL

--Importance: **HIGH** (to
discipline non-
discriminatory measures)

SMALL & MEDIUM SIZE ENTERPRISES (SMEs)

--Probability for inclusion: **HIGH**

--Common text exists in TiSA &
TPP; priority area for all 3 parties;
NAFTA 2.0 Chapter text agreed

--Scope for controversy:
SMALL

--Importance: **HIGH** (to bring more
small firms into regional trade)

EXAMINING POSSIBLE NEW SERVICES AREAS FOR INCLUSION IN NAFTA II

DEVELOPMENT

--Probability for inclusion:
LOW

--Common text exists in
TPP

--Scope for controversy:
LIKELY; U.S. may not find
this area relevant

--Importance: **High** (to
Mexico?) **Medium-Low**
(to Canada and U.S.?)

REGULATORY COHERENCE

--Probability for inclusion: **MEDIUM**

--Common text exists in TPP (also in
CETA but not in TiSA)

--Scope for controversy:
UNCLEAR but possible, depending
upon proposed text

--Importance: **HIGH** (to bring
discussions on domestic regulation
under a joint framework)

EXAMINING POSSIBLE NEW SERVICES AREAS FOR INCLUSION IN NAFTA II

COMPETITIVENESS & BUSINESS FACILITATION

--Probability for inclusion:
MEDIUM

--Common text exists in TPP

--Scope for controversy:
UNCLEAR

--Importance: **HIGH** (for
operation of regional supply
chains)

IN SUMMARY:

--5 areas with **HIGH**
Probability for inclusion
in NAFTA 2.0

--3 areas with **LOW**
Probability for inclusion
in NAFTA 2.0

--3 areas with uncertain
prospects

WHAT ABOUT OTHER PRIORITY AREAS FOR NAFTA SERVICES UPDATING?

- **Temporary Movement of skilled personnel:** High priority for Canada and Mexico
 - ❑ Not a new issue; already in NAFTA 1.0– but categories covered in Chp. 16 could be expanded considerably
 - ❑ For example, computer programmers; but US objects

- **Professional credentials:**
 - ❑ An institution could be established to encourage mutual recognition of professional credentials across a wide range of specialties. Institution should have some mechanism for encouraging and possibly compelling sub-federal jurisdictions (states, provinces) to practice mutual recognition once agreed.



CAN WE BE EVEN MORE AMBITIOUS?

- **Health Care:** Allow qualified foreign health care providers within NAFTA to be considered eligible as home providers to furnish health services. Allow large private insurers such as Aetna and Blue Cross to also be eligible for national treatment.
- **Radio & Television:** National restrictions on program content and station ownership could be phased out.
- **Transport Services:** Cabotage rules could be phased out for air, maritime and trucking services.



CAN WE BE EVEN MORE AMBITIOUS?

- **Data Localisation:** Require the free flow of data, together with a prohibition on data localization through servers located in national markets. Require these to be subject to existing laws on data privacy.
- **Higher Education:** NAFTA students could be equally eligible for admission to all colleges and universities in the region, and if admitted, could be equally eligible for scholarships

NAFTA UPDATING KEY TO REGIONAL GROWTH & PROSPERITY

- **ESSENTIAL FOR SUPPLY CHAINS** in North America
 - Chapters essential to support the continued operation and expansion of GVCs : E-Commerce; Digital Trade; Competitiveness & Business Facilitation; Logistics/ Express Delivery; Regulatory Coherence
- **ESSENTIAL TO KEEP PACE** with advances in trade agreements elsewhere

Stumbling blocks to NAFTA II for services modernization

- **POLITICAL CONSTRAINTS:** U.S. Emphasis on reducing bilateral trade deficits: For first time USTR has included deficit reduction as a specific objective for the NAFTA negotiations.
 - Since NAFTA implementation, the U.S. bilateral goods trade balance with Mexico has gone from a \$1.3 billion surplus to a \$64 billion deficit in 2016. Market access issues have arisen in Canada with respect to dairy, wine, grain and other products
- **U.S. Opposition to immigration**, which is confused with temporary movement of labor:
 - Canada's desire for expanded cross-border movement of business professionals
- **VESTED SECTORAL INTERESTS:** Maritime (Jones Act in U.S.); Radio/TV in Canada; Energy in Mexico



THANK YOU!
Sherry Stephenson

**MODERNIZING
SERVICES IN NAFTA**

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