

**DECISION 439: GENERAL FRAMEWORK OF PRINCIPLES AND RULES
AND FOR LIBERALIZING THE TRADE IN SERVICES IN THE ANDEAN
COMMUNITY***
[excerpts]

(ANDEAN COMMUNITY)

DECISION 439: General Framework of Principles and Rules and for Liberalizing the Trade in Services in the Andean Community was signed on 11 June 1998.

THE COMMISSION OF THE ANDEAN COMMUNITY,

HAVING SEEN:

Articles 3, paragraph f) of the part about Economic and Social Cooperation Programs and Actions, 11, 55, and 139 of the Cartagena Agreement, and Proposal 3/Amend. 1 of the General Secretariat;

WHEREAS:

The IX Andean Presidential Council, meeting in Sucre, Bolivia, expressed its intention to liberalize the trade in services within the subregion and, accordingly, instructed the Commission to approve a general framework of principles and rules for attaining that objective;

For its part, the X Andean Presidential Council, meeting in Guayaquil, Ecuador, reiterated the importance placed on free trade in services within the Andean Community. To that end, it instructed the Commission to adopt during the first half of 1998 the aforementioned general framework with regard to services which shall serve as the basis for the pertinent Decisions, in order for the Andean Community to have a market with freely circulating services by the year 2005 at the latest;

The progressive creation of an Andean Common Market in Services is a basic element for the consolidation of subregional integration;

* *Source:* The Andean Community (1998). "Andean Community DECISION 439: General Framework of Principles and Rules and for Liberalizing the Trade in Services in the Andean Community", available on the Internet (<http://www.sice.oas.org/trade/JUNAC/decisiones/dec439e.asp>). [Note added by the editor.]

It is essential to establish Community principles and rules for liberalizing the trade in services in order to strengthen and diversify the service production and distribution sectors in the Andean Community;

Services are an essential element of the trade in goods, transfer of technology and circulation, within the subregion, of capital and persons connected with the provision of services;

The Member Countries of the Andean Community need to improve their share of the international trade in services in order to secure an effective position in the global market;

The growing importance of services in the economic and social development of Member Countries and the linkage between those services and the new technologies are a determining element for the consolidation of the competitive advantages of subregional production;

Services account for a significant percentage of the Subregion's gross domestic product and contribute effectively to the creation of jobs;

There are services of subregional origin that have already been liberalized with favorable results for both the providers and users, thus helping to bolster the process of Andean integration;

The World Trade Organization's (WTO) General Agreement on the Trade in Services, particularly article V, and the other multilateral and plurilateral negotiations underway have created a favorable climate for liberalizing the trade in services within the subregion;

DECIDES:

To approve this

General Framework of Principles and Rules For Liberalizing the Trade in Services in the Andean Community

CHAPTER I GENERAL PURPOSE

Article 1. The purpose of this General Framework is to establish a set of principles and rules for the progressive liberalization of the trade in services within the subregion, with a view to creating the Andean Common Market in Services by eliminating restrictive measures within the Andean Community.

In accordance with the terms and conditions of the commitments established under this General Framework, the Member Countries shall the strengthening and

diversification of Andean services and shall promote harmonize their sectoral national policies in the areas that require it.

CHAPTER II DEFINITIONS

Article 2. The following definitions shall apply for purposes of this General Framework:

Trade in services: The supply of a service of any sector, using any of the following modes:

- From the territory of a Member Country into the territory of another Member Country;
- In the territory of a Member Country to a consumer of another Member Country;
- Through the commercial presence of service supplier of a Member Country in the territory of another Member Country; and
- By natural persons from a Member Country into the territory of another Member Country.

Measure: Any provision, whether in the form of a law, decree, resolution, regulation, rule, procedure, decision, administrative standard, or in any other form, adopted or applied by Member Countries.

Measures adopted by Member Countries that affect the trade in services:

This shall cover measures referring to:

- The purchase, payment or use of a service;
- Access to such services as are offered to the general public by order of those Member Countries and the use of those services as a result of the provision of a service; or
- The presence, including the commercial presence of persons from one Member Country in the territory of another Member Country for the purpose of providing a service.

Commercial presence: Any kind of business or professional establishment in the territory of a Member Country for the purpose of providing a service through, for example:

- The establishment, acquisition or maintenance of a juridical person; or
- The creation or maintenance of a branch or of a representative office.

Services provided in the exercise of governmental authority: those which the government or public institutions of any Member Country provide under non commercial conditions or not in competition with one or several service providers,

including the activities of a central bank or a monetary and exchange authority or any other public institution.

Supply of a service: This shall cover the production, distribution, marketing, sale and provision of a service.

CHAPTER III SCOPE OF APPLICATION

Article 3. This General Framework shall apply to measures adopted by Member Countries that affect the trade in services in all of the service sectors and in the different modes of supply, including those provided by the central, regional or local public sector, as well as those furnished by institutions delegated to do so.

Article 4. This General Framework shall not be applicable to services provided in the exercise of governmental authority.

The procurement of services by government agencies or public institutions of Member Countries shall be subject to the principle of national treatment among Member Countries, pursuant to a Decision to be adopted no later than January 1st, 2002. In the event that the Decision in question fails to be adopted by that date, the Member Countries shall grant national treatment immediately.

This Regulatory Framework shall not be applicable to measures connected with air transportation services.

Article 5. Service sectors or sub-sectors that are governed by sectoral Decisions that exist on the date this Decision or its amendments enter into effect, shall be regulated by the rules and regulations of those Decisions. With respect to those sectors and sub-sectors, the provisions provided in this General Framework shall apply in a supplementary manner.

CHAPTER IV PRINCIPLES AND COMMITMENTS

Article 6. Each Member Country shall grant services and service providers from the other Member Countries access to its market through any of the modes established in the definition of the trade in services of article 2, without prejudice to the provisions of article 14 of this General Framework.

Article 7. Each Member Country shall immediately and unconditionally grant the services and service providers from other Member Countries treatment that is no less favorable than that granted to services and providers of similar services from any other country, whether or not a member of the Andean Community.

Without prejudice to that established under the foregoing paragraph, any Member Country may confer or grant advantages to adjacent countries in order to facilitate the

exchange of services that are produced and used locally, limited to contiguous border zones.

Article 8. Each Member Country shall grant the services and service providers from other Member Countries treatment that is no less favorable than that granted to its own services or providers of similar services, without prejudice to the provisions of article 14 of this General Framework.

Article 9. Each Member Country shall promptly publish, and in any case no later than the date of its entry into force, all measures of general application that refer to or affect the operation of what has been established in this General Framework, including international agreements signed with third parties, and shall inform the General Secretariat of the Andean Community thereof. If it is not practicable to publish that information, it shall be made otherwise publicly available.

Such international agreements signed with third parties as may refer to or affect the operation of what has been established in this General Framework shall be notified to the General Secretariat of the Andean Community, which in turn shall inform the Member Countries thereof.

For purposes of the first paragraph, Member Countries shall not be required to provide confidential information, the disclosure of which would impede compliance with the domestic body of laws of each Member Country, run counter to the public interest or national security, or cause prejudice to the legitimate commercial interests of public or private enterprises.

Article 10. The Member Countries, as of the entry into force of this General Framework, bind themselves not to establish new measures that would increase the degree of nonconformity or fail to comply with the commitments contained in articles 6 and 8. This commitment shall cover all measures adopted by Member Countries that affect the trade in services supplied by the central, regional or local public sector and by institutions delegated to provide them.

Article 11. Without prejudice to what is provided under this General Framework, each Member Country may adopt or apply the necessary measures to:

- Protect public morals or to maintain the public order;
- Protect the human, animal and plant life and health, and conserve the environment;
- Protect essential national security interests;
- Guarantee the imposition or the equitable and effective collection of direct taxes with respect to services or service providers of other Member Countries, even if such measures are inconsistent with the national treatment obligation contained in article 8;
- Implement provisions for avoiding double taxation contained in international agreements signed by the Member Country, even if such measures are inconsistent with the obligation stipulated in Article 7 to provide most-favored-nation treatment; and
- Obtain the enforcement of laws and regulations concerning:

- The prevention of deceptive and fraudulent practices or related to the effects of default on services contracts;
- The protection of the privacy of individuals with regard to the processing and dissemination of personal data and the protection of the confidential nature of the records and accounts of individuals; and
- Public safety.

The measures listed in this article shall not be applied in manner that is disproportionate to the objective sought, be aimed at protecting national services or service providers, be implemented in such a way that they constitute an unnecessary obstacle to subregional trade in services or a means of discrimination against Andean Community services or service providers in relation to the treatment granted to other countries, whether or not they are members of the Andean Community.

Article 12. Member Countries shall facilitate the free movement and temporary presence of natural or physical persons and of employees of service suppliers from other Member Countries with relation to activities performed within the scope of this General Framework, as agreed in that regard by the Andean Council of Ministers of Foreign Affairs.

Article 13. Each Member Country shall recognize the licenses, certifications, professional degrees and accreditations granted by another Member Country, for any service activity requiring such documents, in accordance with the criteria established by a Decision on the subject to be adopted by the Commission.

CHAPTER V LIBERALIZATION PROCESS

Article 14. Notwithstanding that provided in the previous articles, the Commission of the Andean Community, by December 31, 1999 at the latest, shall through a Decision adopt an inventory of the measures maintained by each Member Country that are contrary to the principles contained in articles 6 and 8 of this General Framework.

Article 15. With the purpose of moving forward in the liberalization of the trade in services within the subregion, which will have a substantial sectoral coverage, the Member Countries shall gradually and progressively eliminate the measures contained in the inventory referred to in the previous article, through annual negotiations coordinated by the General Secretariat, whose results shall be expressed in Decisions to be adopted by the Commission of the Andean Community.

The Commission of the Andean Community, meeting as the Enlarged Commission, when pertinent, may adopt Decisions based on sectoral studies prepared by the General Secretariat, in order to further the liberalization or harmonize rules and regulations in services sectors or subsectors included in the inventory referred to in the previous article. The Commission may also, based on those studies, define the sectors which because of their characteristics and unique features, shall be subject to specific sectoral liberalization or harmonization.

The liberalization of trade in services within the subregion shall conclude by the year 2005 at the latest, through the elimination of the measures maintained by each Member Country. In any case, the sectors covered by Decisions issued in accordance with the stipulations of the previous paragraph, shall be regulated by those Decisions.

Article 16. Two or more Member Countries may hasten or deepen the liberalization of particular service sectors or sub-sectors. Such benefits as may result from that acceleration and deepening shall be extended, immediately and unconditionally, to the country having already liberalized that sector and, through negotiation, to the other Andean Community Member Countries.

Negotiations conducted in accordance with the stipulations of the foregoing paragraph shall be open to the participation of the other Member Countries. Member Countries that do not take part in the resulting agreements may through negotiation accede to them at any time. These initiatives, together with any such bilateral agreements as may result from them, shall be notified to the General Secretariat of the Andean Community, which shall inform the pertinent Community bodies and the rest of the Member Countries.

CHAPTER VI TREATMENT OF COMPLEMENTARY ISSUES

Article 17. Until the Community rules on the subject have been approved, the Member Countries shall adopt such measures as may be necessary to prevent, avoid and sanction practices that distort competition in the trade in services in their own market, including those that are needed to ensure that service providers established in their territories that have dominant market positions, do not abuse those positions.

Article 18. Member Countries shall ensure that such promotional measures as they may apply to service activities do not distort competition within the subregional market and shall adopt Community rules regarding incentives for the trade in services.

Article 19. No Member Country shall impose restrictions on international payments and transfers for current and capital transactions connected with the fulfillment of commitments stemming from this General Framework, except pursuant to article 20 below and in keeping with the rights and obligations derived from the Articles of Agreement of the International Monetary Fund.

CHAPTER VII BALANCE OF PAYMENTS SAFEGUARDS

Article 20. Notwithstanding the stipulations of this General Framework, such Member Country as may have adopted restrictive measures on trade in services with third countries in order to cope with the existence or threat of serious external financial or balance of payments problems, may extend those measures, with the prior authorization of the General Secretariat, to trade in services within the subregion.

When the situation foreseen in the previous paragraph calls for immediate measures, the Member Country may apply such corrective measures as it deems necessary and shall inform the General Secretariat of the Andean Community thereof within a period not to exceed 5 days.

Such corrective measures as may be applied pursuant to the foregoing paragraphs:

- may not discriminate among the Member Countries of the Andean Community;
- shall be progressively eliminated as the situation that called for them improves;
- shall not exceed what is necessary in order to cope with national circumstances;
- may give priority to the supply of such services which are more essential to their economic or development programs, but they shall not select or maintain such restrictions for the purpose of protecting a particular service sector;
- shall be compatible with the Articles of Agreement of the International Monetary Fund.

Article 21. On being notified of the measures adopted pursuant to the foregoing article, the General Secretariat of the Andean Community, with the technical assistance of specialized experts, whose designation and form of participation shall be governed by the General Secretariat's regulations, shall analyze the balance of payments situation of the Member Country affected. Its corresponding decision shall be handed down within a period of no more than 30 days.

In making its decision, the General Secretariat shall consider the following elements:

- The nature and extent of the external financial and balance of payments problems of the Member Country affected;
- The economic environment of the Member Country affected;
- The observations of the other Member Countries; and
- Other possible corrective measures which may be available.

In the event that, pursuant to the balance of payment safeguard regulated by this Chapter, a Member Country adopts measures that restrict the flow of capital, thereby affecting other Andean Community Member Countries, an affected country could request the General Secretariat's pronouncement. If once the General Secretariat has made its pronouncement, the Member Country having imposed the measure requests its review by the Andean Court of Justice, the measure imposed shall remain in effect until the Court hands down its judgment.

CHAPTER VIII

SPECIAL TREATMENT FOR THE BENEFIT OF BOLIVIA AND ECUADOR

Article 22. Preferential treatment for Bolivia and Ecuador shall be given consideration during such negotiations as are carried out in the context of this General Framework, with regard to deadlines and temporary exceptions for compliance with their obligations, in keeping with the provisions of the Cartagena Agreement.

CHAPTER IX ORIGIN OF THE SERVICES

Article 23. The following shall be considered as services originating in the subregion, for purposes of enjoying the benefits stemming from this General Framework:

Those furnished by natural or physical persons with permanent residence in any of the Member Countries, in accordance with the respective national regulations;

Services provided by juridical persons incorporated, authorized or residing according to domestic law in any of the Member Countries, which effectively carry out substantial operations in the territory of any of those Countries, or by Andean Multinational Enterprises; and

In the case of the cross-border provision of services, such services that are produced and furnished directly from the territory of a Member Country by natural or physical persons or by juridical persons as stipulated in paragraphs 1 and 2 above.

Article 24. In the event that a Member Country harbors doubts about the origin of a service, it may initiate consultations with the Member Country involved. If doubts about the origin of the service have not been dispelled within a maximum period of thirty days, either of the parties involved may request the intervention of the General Secretariat of the Andean Community.

The General Secretariat shall undertake the corresponding investigation and shall render its finding within a period not to exceed thirty days, as of the date of reception of the request.

CHAPTER X FINAL PROVISIONS

Article 25. The General Secretariat shall summon government experts from the Member Countries to advise and support it in carrying out the activities provided for in this General Framework.

Article 26. In order to ensure the consistency and clarity of the General Framework established by this Decision, the ideas, definitions and interpretive elements contained in the General Agreement on Trade in Services (GATS) shall be applied to said General Framework, whenever pertinent.

Article 27. This Decision shall become effective on the date of its publication in the Official Gazette of the Agreement of Cartagena.

TRANSITORY PROVISIONS

First. Until the adoption of the Decision referred to in article 14 of this General Framework and, in any case, by January 1st, 2000 at the latest, the commitments set out in articles 6 and 8 shall be valid in accordance with the domestic laws in force in each Member Country.

Second. In order to comply with article 14 of this Decision, Member Countries shall initiate an exchange of information about the measures provided in their legislation that limit the application of the principles contained in articles 6 and 8. The General Secretariat of the Andean Community shall coordinate the exchange of information, preparation of the inventory and drafting of the proposed Decision.

Third. In order to contribute to the understanding and correct implementation of this Decision by the competent national authorities, the General Secretariat shall undertake a study of the scope of the criteria of origin established in article 23. The results of that study shall be reported to the Commission no later than six months after this Decision takes effect.

Fourth. During the two months after this Decision takes effect at the latest, the General Secretariat of the Andean Community shall prepare a draft Decision containing the rules that will regulate the liberalization of trade in financial services among Member Countries. That proposal shall consider the conditions for implementation of the principles, commitments and rules and regulations contained in this General Framework.

Fifth. No later than two months after this Decision takes effect, the Andean Committee of Telecommunications Authorities (CAATEL) shall be convened by the General Secretariat to draw up the draft Decisions on telecommunications that will contain the rules for regulating the liberalization of trade in those services among Member Countries. Those draft Decisions will consider the conditions for implementation of the principles, commitments and rules and regulations contained in this General Framework.

Sixth. Within six months after this Decision takes effect, the General Secretariat shall draw up a draft Community regime on the recognition of licenses, certifications, professional degrees and accreditations in any service activity that requires them.

