

## *Trade in Services: A Holistic Solution to New-Found Issues in Trade Law?*

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## TRADE IN SERVICES REGULATION IN THE DATA-DRIVEN ECONOMY

**MIRA BURRI\***

*The multi-faceted character of the digital challenge combined with the inherent fluidity of digital technologies render the regulatory design that can adequately accommodate them complex and hard to elaborate. This article addresses one particular aspect of the digital trade discourse and seeks to identify its links with the regulation of trade in services in particular. It does so by examining the current state of affairs in those sectors that are most pertinent for digital trade (telecommunications, computer and audio-visual services) under the regulatory framework of the World Trade Organization (WTO) and then traces more recent regulatory developments in preferential trade venues. The article finally evaluates the process of adaptation of international trade law and addresses broader governance questions about the efficacy of this adaptation and the adequacy of the chosen evolutionary path.*

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## I. INTRODUCTION

Digital trade has become a critical policy topic but there is often a lack of clarity as to its precise definition. Some sources plainly equate digital trade to electronic commerce and construe it narrowly as the online sale of goods and services.<sup>1</sup> Increasingly however, there has been a shift towards a broader understanding of digital trade that has to do with enabling innovation and the free flow of data in the digital environment, which becomes symptomatic with the more recent drive to foster the overall digital economy.<sup>2</sup> This latter drive is associated with the particular focus on data as an essential element of contemporary economies, as ubiquitous digitisation, powerful hardware, and the Internet as interconnected networks have changed the volume, the intensity, and indeed, the nature of data flows.<sup>3</sup> Data is now said to be the ‘new oil’,<sup>4</sup> as much of modern economic activity, innovation and growth appears dependent on data.<sup>5</sup> Studies have revealed the vast potential of data as a trigger for more efficient business operations, innovative solutions and better policy choices in all areas of societal life.<sup>6</sup> This transformative potential refers notably not only to ‘digital native’

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<sup>1</sup>See Digital Trade in the US and Global Economies, Part 1, USITC Pub. 4415, Inv. No. 332–531 (Jul. 2013) [hereinafter *USITC 2013*]. For an overview of existing definitions, see e.g., Andrew D. Mitchell, *Toward Compatibility: The Future of Electronic Commerce within the Global Trading System*, 4(4) J. INT’L ECON. L. 683, 685–686 (2001); Lior Herman, *Multilateralising Regionalism: The Case of E-Commerce* 8-10 (OECD Trade Policy Working Paper 99, 2010).

<sup>2</sup>See, e.g., the definition suggested by New Zealand, *What is ‘the Digital Economy’ and ‘Digital Trade’?*, NEW ZEALAND FOREIGN AFFAIRS & TRADE, <https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-concluded-but-not-in-force/digital-economy-partnership-agreement/what-is-the-digital-economy-and-digital-trade/>.

<sup>3</sup>See JAMES MANYIKA ET AL., MCKINSEY GLOB. INST., *BIG DATA: THE NEXT FRONTIER FOR INNOVATION, COMPETITION, AND PRODUCTIVITY* (2011) [hereinafter MANYIKA ET AL.]; VIKTOR MAYER-SCHÖNBERGER & KENNETH N. CUKIER, *BIG DATA: A REVOLUTION THAT WILL TRANSFORM HOW WE LIVE, WORK, AND THINK* (2013) [hereinafter MAYER-SCHÖNBERGER & CUKIER].

<sup>4</sup>*The World’s Most Valuable Resource Is No Longer Oil, but Data*, THE ECONOMIST, May 6, 2017.

<sup>5</sup>MANYIKA ET AL., *supra* note 3. For an overview of the implications of Big Data and Big Data analytics, see Mira Burri, *Understanding the Implications of Big Data and Big Data Analytics for Competition Law: An Attempt for a Primer*, in *NEW DEVELOPMENT IN COMPETITION LAW AND ECONOMICS* 241, 242 (Klaus Mathis & Avishalom Tor eds., 2019).

<sup>6</sup>See, e.g., MANYIKA ET AL., *supra* note 3; MAYER-SCHÖNBERGER & CUKIER, *supra* note 3; NICOLAS HENKE ET AL., MCKINSEY GLOB. INST., *THE AGE OF ANALYTICS: COMPETING IN A DATA-DRIVEN WORLD* (2016); Mark Bacchetta et al., *WORLD TRADE*

areas, such as search or social networking, but also to ‘brick-and-mortar’, physical businesses, such as in manufacturing or logistics.<sup>7</sup> Emerging technologies, like Artificial Intelligence (AI), are highly dependent on data inputs as well.<sup>8</sup>

Another, and particularly relevant for this article’s discussion, sub-trend has to do with the increased trade in services enabled through digital transformations. Digitisation has made a vast number of services, such as legal, engineering, IT (information technology) and financial services, tradable. It has been estimated that more than 50% of the world’s traded services have already been digitised.<sup>9</sup> Digitisation also fuels the trend of ‘servicification’, whereby there is an increase in the use, produce and sale of services<sup>10</sup> and some goods, such as software, are now traded as services. In addition, many of the newer generation of IT products, such as smartphones or video game consoles, inherently include some sort of supported new content, which transcend the purchase of the initial product and ultimately turn the devices into platforms for the sale of services. Furthermore, online user-generated reviews and ratings increase the level of trust for many individuals and play an increasingly important role in choosing products and services—be it when buying a book on *Amazon* or booking a hotel on *Booking.com*.<sup>11</sup> Overall, the relationship between trade in goods and trade in services becomes more complex in the digital space and this has had implications under current international trade law—for instance, because it may often be hard to draw a clear line between a good and a service.

This article tackles the narrow as well as the broad dimensions of digital trade, as they are both dependent upon regulatory solutions in the domain of global economic law. It is fair to note from the outset that digital trade in both its dimensions has raised a great number of governance challenges, even in the narrow sense of online sale of goods and services. Digital trade also places

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ORGANIZATION, *World Trade Report 2018: The Future of World Trade: How Digital Technologies Are Transforming Global Commerce* (2018)[hereinafter WTO (2018)].

<sup>7</sup> MANYIKA ET AL., *supra* note 3.

<sup>8</sup> KRISTINA IRION & JOSEPHINE WILLIAMS, PROSPECTIVE POLICY STUDY ON ARTIFICIAL INTELLIGENCE AND EU TRADE POLICY 11 (2019).

<sup>9</sup> See, e.g., Daniel Castro & Alan McQuinn, INFO. TECH. & INNOV<sup>N</sup>. FOUND<sup>N</sup>., CROSS-BORDER DATA FLOWS ENABLE GROWTH IN ALL INDUSTRIES (2015); MANYIKA ET AL., *supra* note 3.

<sup>10</sup> Everybody is in Services: The Impact of Servicification in Manufacturing on Trade and Trade Policy, STOCKHOLM: NAT<sup>L</sup> BOARD OF TRADE (2012); Rainer Lanz & Andreas Maurer, *Services and Global Value Chains – Some Evidence on Servicification of Manufacturing and Services Networks* (WTO Working Paper ERSD 3, 2015).

<sup>11</sup> MANYIKA ET AL., *supra* note 3.

particularly high demands on seamlessness and interoperability,<sup>12</sup> which may be hard to satisfy as different regulatory domains are affected. The interface between rules stemming from different phases of technological advancement is equally challenging, as the article explains later on.

Beyond the immediate regulation of the online sale of goods and services, international economic law matters for digital trade in various other, perhaps less obvious, ways: it may cover solutions with regard to infrastructure, interconnection and technical standards, but also more generally address the underlying conditions with regard to the freedom of firms to create and distribute new products and services globally and engage in innovation.<sup>13</sup> The difficulties in this context have only been augmented through the increased dependence on data, which has brought about a new set of concerns. The impact of data collection and use upon privacy has been particularly widely acknowledged by scholars and policy-makers alike, as well as felt by regular users of digital products and services,<sup>14</sup> but there are other concerns with regard to national security and overall data sovereignty as well. With the increased value of data and the associated risks, governments have sought new ways to assert control over it – in particular by prescribing diverse measures that ‘localise’ the data, its storage or suppliers, so as to keep it within the state’s sovereign space.<sup>15</sup> Erecting these kinds of barriers to data flows impinges directly on trade and may endanger the realisation of an innovative data economy.<sup>16</sup>

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<sup>12</sup> Urs Gasser & John G. Palfrey, *Fostering Innovation and Trade in the Global Information Society: The Different Facets and Roles of Interoperability*, in TRADE GOVERNANCE IN THE DIGITAL AGE 123, 137 (Mira Burri & Thomas Cottier eds., 2012).

<sup>13</sup> Yochai Benkler, *Growth-oriented Law for the Networked Information Economy: Emphasizing Freedom to Operate over Power to Appropriation*, in KAUFFMAN TASKFORCE ON LAW, INNOVATION AND GROWTH, RULES FOR GROWTH: PROMOTING INNOVATION AND GROWTH THROUGH LEGAL REFORM 313(2011).

<sup>14</sup> Paul Ohm, *Broken Promises of Privacy: Responding to the Surprising Failure of Anonymization*, 57 U.C.L.A. L.R. 1701 (2010); Paul M. Schwartz & Daniel J. Solove, *The PII Problem: Privacy and a New Concept of Personally Identifiable Information*, 86 N.Y.U. L.R. 1814, 1894 (2011); Omer Tene & Jules Polonetsky, *Big Data for All: Privacy and User Control in the Age of Analytics*, 11(5) N.W. J. TECH. & INTELL. PROP. 239 (2013); Big Data: Seizing Opportunities, Preserving Values, THE WHITE HOUSE, EXEC. OFF. PRES. (May 2014); Urs Gasser, *Perspectives on the Future of Digital Privacy*, 135 Z.S.R. 335, 448 (2015); Urs Gasser, *Recoding Privacy Law: Reflections on the Future Relationship Among Law, Technology, and Privacy*, 130 HARV. L. REV. 61, 70 (2016).

<sup>15</sup> See Anupam Chander, *National Data Governance in a Global Economy* (UC Davis Legal Studies Research Paper No. 495, 2016); see also Anupam Chander & Uyên P. Lê, *Data Nationalism*, 64 EMORY L.J. 677 (2015) [hereinafter *Chander & Lê*].

<sup>16</sup> USITC (2013), *supra* note 1; Digital Trade in the US and Global Economies, Part 2, USITC Pub. 4485, Inv. No 332–540 (Jul. 2014). For a country survey, see Chander & Lê, *supra* note 15.

Overall, the multi-faceted character of the digital challenge combined with the inherent fluidity of digital technologies, render the regulatory design, which can adequately accommodate them, complex and hard to elaborate. This article addresses one discrete aspect of the digital trade discourse and seeks to identify its links with the regulation of trade in services in particular. It does so by examining the current state of affairs in those sectors that are most pertinent for digital trade under the regulatory framework of the World Trade Organization (WTO) and then traces more recent regulatory developments in preferential trade venues. The article finally evaluates the process of adaptation of international trade law and addresses broader governance questions of the efficacy of this adaptation and the adequacy of the chosen evolutionary path.

## II. TRADE IN DIGITAL SERVICES UNDER THE WTO FRAMEWORK

### *A. The General Agreement on Trade in Services*

The General Agreement on Trade in Services (GATS) seeks to protect the equality of competitive opportunities for companies, regardless of their origin and the origin of their services, and facilitates the progressive liberalisation of services sectors. While the GATS is similar in its objectives to the General Agreement on Tariffs and Trade (GATT), its approach and structure are different, as in contrast to trade in goods, services regulation was a new negotiation topic during the Uruguay Round (1986–1994) and demanded more flexibility and ways to safeguard domestic policy space.<sup>17</sup>

The GATS covers all services sectors,<sup>18</sup> except for those services ‘supplied in the exercise of governmental authority’.<sup>19</sup> The notion of ‘services’ is not explicitly

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<sup>17</sup> Pierre Sauv  & Anirudh Shingal, *Reflections on the Nature of Preferences in Services*, in THE PREFERENTIAL LIBERALISATION OF TRADE IN SERVICES 401 (Pierre Sauv  & Anirudh Shingal eds., 2014).

<sup>18</sup> See General Agreement on Trade in Services art. I:1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183 [hereinafter *GATS*]; see also arts. I:2 & I:3, GATS. For interpretation, see Appellate Body Report, *European Communities — Bananas*, WTO Doc. WT/DS27/AB/R (adopted Sept. 9, 1997) (hereinafter *Appellate Body Report, EC — Bananas*); Appellate Body Report, *Canada — Certain Measures Affecting the Automotive Industry*, WTO Doc. WT/DS139/AB/R (adopted May 31, 2000).

<sup>19</sup> GATS, *supra* note 18, art. I:3(b). Paragraph (c) clarifies that, “‘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’. For interpretation, see Eric H. Leroux, *What Is a “Service Supplied in the Exercise of Governmental*

defined in the GATS or elsewhere in the WTO law and jurisprudence. However, Article I:2 GATS defines ‘trade in services’ as the supply of a service in four different ‘modes of supply’.<sup>20</sup> These modes of supply are not of definitional value only but are important for the listing of specific commitments for different sectors and sub-sectors.

The Most Favoured Nation (MFN) is the core general obligation under the GATS and pursuant to Article II:1, each WTO Member is obliged to ‘accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like service and service suppliers of any other country’. In contrast to the GATT, however, where the MFN principle admits no exemptions, the GATS allows for some flexibility. Members may specify that the MFN would not be applicable to certain measures, provided that those measures are listed in and meet the conditions of the Annex on Article II Exemptions (the so-called ‘opt-out’ approach).<sup>21</sup> The exemption is framed as a one-off opportunity to be used only until the date of entry into force of the WTO Agreement, i.e. January 1, 1995, or for new Members, at the time of their accession to the WTO.<sup>22</sup>

The general MFN obligation is supplemented by *specific* commitments accepted by individual Members and listed in the so-called ‘Schedules of Specific Commitments’, which are appended to the GATS and form an integral part of the treaty. These schedules show the positive commitments (‘opting-in’) of a Member with regard to *national treatment* and *market access*, and the conditions, i.e. the terms and limitations of these commitments.<sup>23</sup> ‘Market access’ is articulated in Article

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*Authority*” under Article I:3(b) and (c) of the General Agreement on Trade in Services, 40 J. WORLD TRADE 345 (2006).

<sup>20</sup> The modes of services supply are: (1) *mode 1 (cross-border)*: from a territory of one Member into the territory of any other Member; (2) *mode 2 (consumption abroad)*: in the territory of one Member to the service consumer of any other Member; (3) *mode 3 (commercial presence)*: by a service supplier of one Member through commercial presence in the territory of any other Member; and (4) *mode 4 (presence of natural persons)*: by a service supplier in one Member, through presence of natural persons of a Member in the territory of any other Member.

<sup>21</sup> See GATS, *supra* note 18, art. II:2.

<sup>22</sup> Members can now only exempt a measure from the application of the MFN treatment under art. II:1, GATS by obtaining a waiver pursuant to art. IX:3 WTO Agreement (see Annex on Article II Exemptions, ¶ 2).

<sup>23</sup> Pursuant to art. XX GATS, each schedule specifies: (i) terms, limitations and conditions of market access; (ii) conditions and qualifications on national treatment; (iii) undertakings relating to additional commitments; (iv) where appropriate, the timeframe for implementation of such commitments; and (v) the date of entry into force of such commitments.



XVI GATS and addresses quantitative restrictions to services trade. In those sectors where a Member commits, it must refrain from adopting or maintaining six particular types of limitations and measures, unless otherwise specified in the schedules.<sup>24</sup> The ‘national treatment’ obligation of Article XVII GATS is of a broader, qualitative nature and prescribes that, ‘each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of service, treatment no less favourable than that it accords to its own like services and service suppliers’. Although only a specific commitment under GATS, the meaning of national treatment remains the same as under GATT.<sup>25</sup> The GATS also provides for the negotiation of *additional* commitments with respect to measures affecting trade in services not subject to scheduling under Article XVI GATS (market access) or Article XVII GATS (national treatment)—regarding, for instance, qualifications, standards or licensing matters.<sup>26</sup>

In practice, the schedules represent a codification of the conditions in a specific national market upon which a foreign services provider can rely upon. These schedules provide also for legal certainty as a Member can modify or withdraw a commitment only after a three-year period from the date it entered into force and has to bear the consequences of the modifications undertaken, possibly making concessions in other areas.<sup>27</sup> This fairly flexible regime of the GATS allows not only for opening of services markets but also for keeping them protected to some degree. This legal solution is linked to the political processes during the Uruguay Round and has to do, at least partially with a hard-fought battle between trade and cultural values, as explained briefly below.

In the following subparts, we review the sectors that are most pertinent for digital trade. These are the telecommunications, the computer and related, as well as the audio-visual services sectors, as they affect all the layers of the communications

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<sup>24</sup> These are defined exhaustively in litera (a) through (f) of Article XVI:2 and cover: (a) limitations on the number of service suppliers; (b) limitations on the total value of service transactions or assets; (c) limitations on the total number of service operations or on the total quantity of service output; (d) limitations on the total number of natural persons that may be employed; (e) measures which restrict or require specific types of legal entity or joint venture; and (f) limitations on foreign capital participation. *See* GATS, *supra* note 18, art. XVI:2.

<sup>25</sup> Appellate Body Report, *EC – Bananas*, *supra* note 18, ¶ 241. On the relationship between NT and market access commitments, *see* Panel Report, *China – Certain Measures Affecting Electronic Payment Services*, ¶¶ 7.661–7.669, WTO Doc. WT/DS413/R (adopted Aug. 31, 2012).

<sup>26</sup> GATS, *supra* note 18, art. XVIII.

<sup>27</sup> GATS, *supra* note 18, art. XX.

model of the Internet—networks, applications and content.<sup>28</sup> Financial services is another sector that is of pertinence but will not be discussed in this article.

**i. Telecommunications services**

Telecommunications services have been, even before contemporary Internet services became critical, in their very essence, transnational. This has demanded coordination between countries over time and has been accordingly mirrored in their regulation. A piece of evidence in this sense is the fact that the first intergovernmental organisation, the International Telegraph Union, is in the area of telecommunications.<sup>29</sup> This intrinsic need for cooperation is also reflected in the law of the WTO with regard to telecommunications, as this subpart shows.

Attaining a higher level of coordination was not however easy, nor swift, since the telecommunications sector was in a state of profound transition in the 1990s, as countries were privatising and opening for competition the previously state-owned or state-controlled Post, Telegraph and Telephone (PTT) agencies.<sup>30</sup> As these reforms progressed, there was a growing interest, shared in particular amongst major globally positioned corporations, that these changes become reflected in the international regulatory frameworks too. Telecommunications were to be addressed ‘as a distinct economic activity, a tradable service, rather than simply as a medium or a conduit for conducting trade’.<sup>31</sup> The negotiation of the commitments for telecommunication services took a while and was complicated as the national incumbents wanted to keep some of their privileges with regard to the so-called ‘basic’ telecommunications services, while liberalising the newer and less regulated, ‘value-added’ services.<sup>32</sup> Reflecting these difficulties, the WTO law with regard to

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<sup>28</sup> See, e.g., Tim Wu, *Application-Centred Internet Analysis*, 85(6) VA. L. R. 1163 (1999); Yochai Benkler, *From Consumers to Users: Shifting the Deeper Structures of Regulation toward Sustainable Commons and User Access*, 52 FED. COMM. L. J. 561 (2000).

<sup>29</sup> The International Telegraph Union was transformed into the International Telecommunication Union (ITU) in 1932 combining the International Telegraph Convention of 1865 and the International Radiotelegraph Convention of 1906.

<sup>30</sup> For an analysis of the reforms in Europe and the United States, see, e.g., Ian Walden, *European Union Communications Law*, in TELECOMMUNICATION LAW AND REGULATION (Ian Walden ed., 2018); Karen Lee & Jamison Prime, *US Telecommunications Law*, in TELECOMMUNICATION LAW AND REGULATION (Ian Walden ed., 2018).

<sup>31</sup> Ian Walden, *The International Regulatory Regime*, in TELECOMMUNICATION LAW 346, 347 (Ian Walden & John Angel eds., 2001).

<sup>32</sup> The scheme used for negotiating the commitments adopted a distinction made in the US in the so-called *Computer Inquiries*. It listed as basic telecommunications services: voice telephone; packet-switched data transmission; circuit-switched data transmission; telex; telegraph; facsimile and private leased circuit services and other (lit. (a) to (g) and (o)). The

telecommunications is to be found in two discrete instruments—the *Annex on Telecommunications*, which was agreed upon during the Uruguay Round, and the *Fourth Protocol on Basic Telecommunications Services*, which was the result of subsequent negotiations.

The Annex on Telecommunications defines its objective as ‘elaborating upon the provisions of GATS with respect to measures affecting access to and use of public telecommunications transport networks and services’.<sup>33</sup> In this sense, the Annex itself does not contain or lead to any particular additional market access or national treatment obligations for telecommunications services. It comes into effect once a Member has offered a specific commitment in a given services sector,<sup>34</sup> and ensures that foreign services suppliers are accorded access to public telecommunications networks and services subject to reasonable and non-discriminatory terms and conditions.<sup>35</sup> With the benefit of hindsight, it is clear that the Annex, despite being an act on telecommunications, concerned mostly liberalised non-telecommunications services, such as banking, insurance or other financial services, which, to perform effectively, required access to and the use of communications networks and services. The Annex was also important to the earlier mentioned ‘value-added’ telecommunications services, for which Members had already made commitments.<sup>36</sup> Overall, the Annex provided legal certainty and prevented access to telecommunications from becoming a non-tariff barrier to trade.<sup>37</sup>

The second instrument agreed upon after the end of the Uruguay Round is known as the *Agreement on Basic Telecommunications* and was annexed to the existing GATS schedules through the Fourth Protocol.<sup>38</sup> The Agreement on Basic

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remaining telecommunications services of the W/120 classification list were framed as value-added services (lit. (h) to (n)). See WTO, Draft Model Schedule of Commitments on Basic Telecommunications, Job. No 1311 (1995).

<sup>33</sup> Section 1 Annex on Telecommunications. Section 2(b) explicitly excludes from the scope of the Annex ‘measures affecting the cable or broadcast distribution of radio or television programming’.

<sup>34</sup> Panel Report, *Mexico – Measures affecting Telecommunications Services*, WTO Doc. WT/DS204/R (adopted Apr. 2, 2004) [hereinafter *Mexico – Telecom*].

<sup>35</sup> Annex on Telecommunications Section 5, The General Agreement on Trade in Services, Apr. 1994.

<sup>36</sup> Panel Report, *Mexico – Telecom* (¶¶7.273–7.288 clarified that the scope of the Annex also includes not only value-added but also basic telecommunications services, when commitments for these services had been made).

<sup>37</sup> Kelly Cameron, *Telecommunications and Audio-Visual Services in the Context of the WTO: Today and Tomorrow*, THE WTO AND GLOBAL CONVERGENCE IN TELECOMMUNICATIONS AND AUDIO-VISUAL SERVICES 21, 21 (Damien Geradin & David Luff eds., 2004).

<sup>38</sup> GATS, *supra* note 18, art. XX:3.

Telecommunications consists of a series of specific commitments, which provide for a very liberal regime for telecom services across all subsectors and modes of supply. A major breakthrough of the Agreement was the adoption of the so-called *Reference Paper*, incorporated as an additional commitment into the Members' schedules.<sup>39</sup>

The Reference Paper is a unique document in the law and practice of the WTO, containing a set of regulatory principles for basic telecommunications. Although fairly short and comprising only six sections, the Reference Paper ensured, together with new commitments under the Fourth Protocol, the opening of telecommunications markets and rendered telecommunications the best-covered sector under the GATS.<sup>40</sup> The Reference Paper was an apt tool that prevented discrimination against new entrants during the precarious process of liberalising the telecommunications markets.<sup>41</sup> Furthermore, the legal principles of the Reference Paper created a basic regulatory model on the global level that shaped the WTO Members' domestic frameworks. Another noteworthy feature of the Reference Paper is the inclusion of competition law-like provisions, covering core concepts of competition law related to market dominance and abuse of dominant position,<sup>42</sup> as well as some sector-specific rules. Critical amongst the latter is the obligation on major suppliers of public telecommunications transport networks and services to ensure interconnection with their networks and services 'at any technically feasible point in the network' and under non-discriminatory terms and conditions.<sup>43</sup> The other provisions (Sections 3 to 6) of the Reference Paper address

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<sup>39</sup> GATS, *supra* note 18, art. XVIII. The Reference Paper is usually added in Annex to the schedule of specific commitments of a particular Member.

<sup>40</sup> A total of 108 WTO Members have made commitments for telecommunications services. Out of these Members, 99 have committed to extend competition in basic telecommunications (*e.g.*, fixed and mobile telephony and real-time data transmission). In addition, 82 WTO Members have committed to the regulatory principles of the Reference Paper. The complete list of commitments and exemptions is available here: TELECOMMUNICATIONS COMMITMENTS AND EXEMPTIONS, [https://www.wto.org/english/tratop\\_e/serv\\_e/telecom\\_e/telecom\\_commit\\_exempt\\_list\\_e.htm](https://www.wto.org/english/tratop_e/serv_e/telecom_e/telecom_commit_exempt_list_e.htm).

<sup>41</sup> Marco C.E.J. Bronckers & Pierre Larouche, *A Review of the WTO Regime for Telecommunications Services*, in THE WORLD TRADE ORGANIZATION AND TRADE IN SERVICES 318 (Kern Alexander & Mads Andenas eds., 2009).

<sup>42</sup> The far-reaching effect of these competition law-like rules has been confirmed by the WTO Panel Report, *Mexico – Telecommunications*, *supra* note 36. See also Eleonor M. Fox, *The WTO's First Antitrust Case – Mexican Telecom: A Sleeping Victory for Trade and Competition*, 9 J. INT'L ECON. L. 271(2006).

<sup>43</sup> *Reference Paper on Telecommunications Services*, WORLD TRADE ORGANISATION, [https://www.wto.org/english/tratop\\_e/serv\\_e/telecom\\_e/tel23\\_e.htm](https://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm) (last visited May 10, 2020).

universal service, licensing, regulators' independence and scarce resources, and create a fundamental framework of non-discrimination and transparency for the sector.<sup>44</sup>

Summing up, one can argue that in the field of telecommunications services, we have a deep intervention of the WTO rules, which not only open key telecommunications markets to foreign services and services suppliers but also regulate important aspects of competition in the sector, seeking to ensure a level playing field, while also ensuring interconnection and interoperability. Despite some possible lines of critique towards the Reference Paper, such as the vagueness of its provisions and the exclusion of certain obligations with regard to number portability or carrier selection,<sup>45</sup> the value of the Reference Paper should not be underestimated, as it binds a great number of countries with often profoundly diverse economic conditions and regulatory history.<sup>46</sup> All these aspects of WTO telecom rules have undoubtedly contributed to the smooth functioning of critical infrastructure and facilitated the emergence of global communications networks. While global Internet traffic developed later on independently, it did make use of the network basis and benefitted from the liberalised telecommunications markets.<sup>47</sup>

## ii. Computer and related services

A similarly deep intervention, which may substantially limit the regulatory space available domestically, comes from the WTO rules on computer and related services. Here too and in stark contrast to the audio-visual sector, as we explain below, industrial policy considerations were at the forefront and liberalisation was forcefully advanced amongst the WTO Members. For computer and related services, which was a fairly new sector at the time of the Uruguay Round and thus

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<sup>44</sup> For a detailed analysis, see Damien Geradin & Michel Kerf, *Levelling the Playing Field: Is the WTO Adequately Equipped to Prevent Anti-Competitive Practices in Telecommunications?*, in THE WTO AND GLOBAL CONVERGENCE IN TELECOMMUNICATIONS AND AUDIOVISUAL SERVICES 130 (Damien Geradin & David Luff, eds., 2004) [hereinafter Geradin & Kerf]; Mira Burri, *The Law of the World Trade Organization and the Communications Law of the European Community: On a Path of Harmony or Discord?*, 41 J. WORLD TRADE 833 (2007).

<sup>45</sup> Markus F. Klein & Andreas Freytag, *The Case for a More Binding WTO Agreement on Regulatory Principles in Telecommunications Markets*, 23 TELECOMM. POL'Y 625 (1995).

<sup>46</sup> Geradin & Kerf, *supra* note 44, at 147.

<sup>47</sup> Dennis Weller & Bill Woodcock, *Internet Traffic Exchange: Market Developments and Policy Challenges*, OECD Digital Economy Papers 207 (2013).

was largely devoid of regulation, as well as of trade barriers,<sup>48</sup> essentially all WTO Members have made far-reaching commitments for both market access and national treatment. For example, the European Union (EU) has committed for all computer and related services sub-sectors: (a) consultancy services related to the installation of computer hardware; (b) software implementation services; (c) data processing services; (d) data base services; maintenance and repair; and (e) other computer services. The EU has listed no limitations for the first three modes of supply (cross-border; consumption abroad and commercial presence) but remains unbound for the presence of natural persons (mode 4).<sup>49</sup> The latter restriction has been somewhat relaxed during the Doha round and selected EU Member States, as well as other industrialized countries like Switzerland,<sup>50</sup> have inserted more liberal conditions for high-skilled services suppliers in the sector.

Overall, computer and related services mark a very high level of liberalisation and the wiggle-room available for domestic regulators is thus limited. This may become problematic in the digital age, as the distinction between audio-visual media and computer services becomes blurred and proper classification accordingly becomes difficult to establish. For instance, social networking sites<sup>51</sup> may be classified as both computer and related services and as content platforms under the audio-visual services sector, which entails a radically different level of commitments, as the following section details.

### iii. Audio-visual services

The flexibility of the GATS, which permits different levels of commitments for different services sectors, can be, at least partially, explained by a contention between trade and cultural interests that originated and escalated during the Uruguay Round of negotiations. The positions within this clash have been well documented elsewhere.<sup>52</sup> Critical for this article's discussion is the fact that on

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<sup>48</sup> SACHA WUNSCH-VINCENT, *THE WTO, THE INTERNET AND DIGITAL PRODUCTS: EC AND US PERSPECTIVES* 118 (2006); *See also Background Note by the Secretariat, Computer and Related Services*, WTO Doc. S/C/W/45 (Jul. 14, 1998).

<sup>49</sup> European Communities and their Member States, Schedule of Specific Commitments, Trade in Services, Supplement 3, WTO Doc. GATS/SC/31/Suppl. 3 (Apr. 4, 1997).

<sup>50</sup> WTO, Switzerland: Schedule of Specific Commitments, WTO Doc. GATS/SC/83 (Apr. 15, 1994).

<sup>51</sup> For a detailed analysis, *see* ROLF H. WEBER & MIRA BURRI, *CLASSIFICATION OF SERVICES IN THE DIGITAL ECONOMY* 115 (2012).

<sup>52</sup> The debate has to do with the dual nature of cultural products and services, which while being commodities can also be carriers of values and identities. The EU, and especially France, have pushed for the exclusion of culture-related goods and services from the rules of the WTO and for their special treatment. The US on the other hand has favoured a

matters of cultural policy relevance, there is a deep disagreement between the key negotiating parties—the EU and the United States (US). As a consequence, we have seen the formation of very different regimes for content, on the one hand, and for network/application services, on the other. This mismatch appears only more radical, as well as inappropriate, in the face of convergence of information technology, telecommunications and media services and the advanced digitisation of the services economy.<sup>53</sup>

The trade versus culture contention and the failure to reconcile the EU and the US positions have ultimately meant for the international regulation of services that, in spite of the considerable economic gains to be reaped from the liberalisation of audio-visual media services, almost all Members have made few or no commitments. This is true for EU and its Member States, who have made no commitments at all,<sup>54</sup> as well as for Switzerland, Canada and a number of developing countries. The exceptions to the rule of non-commitment are the US, Japan and New Zealand, and some of the recently acceded WTO Members.<sup>55</sup> Overall, audio-visual media is the least liberalised services sector.<sup>56</sup>

What is noteworthy when looking at the Members' commitments for audio-visual services is that they reflect a resolute 'all-or-nothing' approach. The scheduling flexibility permitting different options ranging between full liberalisation and absolute non-commitment is not made use of. This is odd because for sub-sectors where government regulation and trade restrictions are uncommon, such as sound recording, there are still no commitments. From a systemic perspective, this is inappropriate because the very goals of an international trade agreement are compromised: "This absence of any guarantee of openness stands in stark contrast to the economic and trade importance of the [audio-visual] sector (and in particular its intensive use of technology and creativity) as well as the importance

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trade-oriented approach that does not allow for any particular special treatment of cultural goods and services and subsumes them under the basic WTO rules. *See, e.g.,* Mira Burri, *Trade versus Culture in the Digital Environment: An Old Conflict in Need of a New Definition*, 12(1) J. INT'L. ECON. L. 17, (2008) [hereinafter *Burri (2008)*]; Mira Burri, *The EU, the WTO and Cultural Diversity*, in *CULTURAL GOVERNANCE AND THE EUROPEAN UNION: PROTECTING AND PROMOTING CULTURAL DIVERSITY IN EUROPE* 195 (E. Psychogiopoulou ed., 2015).

<sup>53</sup> Burri (2008), *supra* note 52.

<sup>54</sup> WTO, European Communities and their Member States, Schedule of Specific Commitments, Trade in Services, Supplement 3, GATS/SC/31/Suppl. 3 (1997).

<sup>55</sup> WTO, Council for Trade in Services, Audiovisual Services, Background note by the Secretariat, S/C/W/310 (2010).

<sup>56</sup> As of Jan. 2009, there were only 30 WTO Members with commitments. For all commitments and exemptions, *see: Audio-visual Services*, WORLD TRADE ORGANISATION [https://www.wto.org/english/tratop\\_e/serv\\_e/audiovisual\\_e/audiovisual\\_e.htm](https://www.wto.org/english/tratop_e/serv_e/audiovisual_e/audiovisual_e.htm) (last visited May 26, 2020).

of the predictability and stability given by commitments—that is, the certainty that certain restrictions won't be maintained or introduced in the future.”<sup>57</sup>

The current round of trade negotiations—the Doha Development Agenda—launched in 2001 and originally to be completed by 2005,<sup>58</sup> holds no promise of change in the domain of audio-visual services. Although the Doha round is not stalled because of audio-visual media services, and the intensity of the trade versus culture clash within the WTO seems to have somewhat subsided, the present state of requests and offers for the sector reveals very few new commitments and no future-oriented rule-making. Despite the recognition shared by key WTO Members that the audio-visual sector has changed dramatically,<sup>59</sup> in particular in the face of convergence and of the sweeping transformations caused by the Internet, there is little agreement on the way forward. The EU is adamantly pursuing its non-committal approach,<sup>60</sup> despite the many requests by other WTO Members to address the status quo by either full commitments or by more targeted actions, such as binding of the current level of market opening or commitments under specific sub-headings (e.g., film production, distribution and projection services and sound recording).<sup>61</sup> The US, on the other hand, is pushing for the deepest form of liberalisation possible.<sup>62</sup> Switzerland has attempted to find a middle-ground and voiced proposals on how to reconcile the existing extreme positions by suggesting for instance more flexible design solutions that address cultural diversity safeguards, subsidies, public service, illicit content and competition issues.<sup>63</sup> Despite the sensible as well as pragmatic nature of the Swiss proposals, they had little chance of altering the politically charged and path-dependent debate on media matters. It is also fair to note that these discussions stem from the early 2000s and since then the regulatory environment has been profoundly transformed—both by the more recent technological advances, as well

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<sup>57</sup> Martin Roy, *Audiovisual Services in the Doha Round: Dialogue de sourds, the Sequel?*, 6 J. WORLD INV. & TRADE 923, 940–941(2005)[hereinafter Roy].

<sup>58</sup> Ministerial declaration, *Doha Ministerial Declaration*, WTO Doc. WT/MIN(01)/DEC/W/1 (Nov. 20, 2001).

<sup>59</sup> Christoph B. Graber, *Audio-visual Policy: The Stumbling Block of Trade Liberalisation*, in THE WTO AND GLOBAL CONVERGENCE IN TELECOMMUNICATIONS AND AUDIOVISUAL SERVICES 165 (D Geradin & D. Luff eds., 2004); Roy, *supra* note 57, at 931–936.

<sup>60</sup> Communication from the European Communities and its Member States, *Draft consolidated GATS Schedule*, WTO Doc. S/C/W/273 (Oct. 9, 2006).

<sup>61</sup> Background note by the Secretariat of the Council for Trade in Services, *Audio-visual Services*, WTO Doc. S/C/W/310 (Jan. 12, 2010).

<sup>62</sup> Communications from the United States, *Audio-visual and Related Services*, WTO Doc. S/CSS/W21 (Dec. 18, 2000).

<sup>63</sup> Communication from Switzerland, *GATS 2000: Audio-visual Services*, WTO Doc. S/CSS/W/74 (May 4, 2001).



as by the developments around the trade and culture debate, which has moved away from the WTO venue with the 2005 The United Nations Educational, Scientific and Cultural Organisation (UNESCO) Convention on Cultural Diversity.<sup>64</sup>

As a final note and against the backdrop of the above analyses, it can be underscored that the openness of the telecommunications and the computer-related services sectors is in stark contrast to the well-preserved domain of audio-visual media. An important and logical question then is, how these rules mix and what their actual impact is in the age of rapid Internet-induced changes. It should also already be cautioned that the confrontation originating from the debate on trade and culture, especially since it plays out between two major powers, has not remained contained within the field of audio-visual services but has had spill-overs to other areas, possibly to an extent that seriously affects the potential of the WTO as a multilateral form that governs all trade to react and properly adapt in the digital age.

*B. WTO: Assessing its fitness for the digital age*

The state of WTO law as analysed above is the one currently valid and enforced. The WTO Agreements, as adopted during the Uruguay Round in 1995, despite a few add-ons, such as the Information Technology Agreement (also updated in 2015), have so far not reacted in a forward-looking manner to the changes triggered by the advent and wide spread of digital technologies. One could argue of course that laws need not change with each and every new technological invention.<sup>65</sup> And indeed, the law of the WTO lends credence to such an argument, as it possesses intrinsic flexibility and resilience—both in the substance and in the procedure—that could possibly accommodate the changes brought about by burgeoning digital trade. As highlighted earlier, the WTO is based on powerful principles, such as the MFN and the National Treatment obligations, which underlie all WTO Agreements and could potentially address technological developments better than new made-to-measure regulatory acts. WTO law also often tackles many issues in a technologically neutral way, with regard to the

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<sup>64</sup> UNESCO Convention on the Protection and Promotion of Cultural Diversity (adopted 20 October 2005; in force 18 March 2007). For appraisal, see Rachael C. Smith, *The UNESCO Convention on the Protection and Promotion of Cultural Expressions: Building a New World Information and Communication Order?*, 1 INT'L J. COMM. 24 (2007); Mira Burri, *Trade and Culture in International Law: Paths to (Re)conciliation*, 44(1) J. WORLD TRADE 49 (2010)[hereinafter Burri (2010)]; Mira Burri, *The UNESCO Convention on Cultural Diversity: An Appraisal Five Years after its Entry into Force*, 20 INT'L J. CULTURAL PROP. 357 (2014).

<sup>65</sup> See Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, THE UNIV. OF CHI. LEG. FOR. 207 (1996).

application of the basic principles, with regard to subsidies and government procurement. Furthermore, in terms of evolution of norms, the WTO is equipped with an effective dispute settlement system. There is strong evidence in the WTO jurisprudence for both the capacity of the dispute settlement mechanism and for the relevance of the Internet in trade conflicts.<sup>66</sup> The *US – Gambling*<sup>67</sup> case can be mentioned in this context: not only did it confirm that GATS commitments apply to electronically supplied services but also clarified key notions of services regulation, such as likeness and the scope of the ‘public morals/public order’ defence under the general exceptions of Article XIV GATS.<sup>68</sup>

Subscribing to such a view of the WTO’s ‘adaptive governance’<sup>69</sup> is flawed however. The number of unresolved issues is indeed worrisome. Some relate to the ways WTO rules, in particular under the GATS, were designed, allowing WTO Members to tailor their commitments. Others relate to dated classifications of goods, services and sectors, upon which these commitments were based and which have become disconnected from contemporary trade practices.<sup>70</sup> Furthermore, many of the contentious issues, which often block digital trade negotiations, stem

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<sup>66</sup> In fact, all major GATS cases have had a substantial Internet-related element. See, Panel Report, *Mexico – Telecoms*, *supra* note 34; Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc. WT/DS285/R, (adopted Nov. 10, 2004); Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc. WT/DS285/AB/R (adopted Apr. 2005); Panel Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WTO Doc. WT/DS363/R, (adopted Aug. 12, 2009); Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WTO Doc. WT/DS363/AB/R, (adopted Dec. 21, 2009); WTO Panel Report, *China – Certain Measures Affecting Electronic Payment Services*, WTO Doc. WT/DS413/R (adopted Aug. 31, 2012).

<sup>67</sup> *Id.* In *US – Gambling*, Antigua brought a claim against the US alleging that its restrictions on cross-border gambling services violated its obligations under the GATS. The Panel and the Appellate Body’s findings focused on the violation of the US obligations for market access under Article XVI GATS.

<sup>68</sup> Markus Krajewski, *Playing by the Rules of the Game? Specific Commitments after US – Gambling and Betting and the Current GATS Negotiations*, 32 LEG. ISSUES OF ECON. INTEGRAT. 417, (2005); Sacha Wunsch-Vincent, *The Internet, Cross-Border Trade in Services, and the GATS: Lessons from US – Gambling*, 3 WORLD TRADE REV. 1 (2006) [hereinafter Wunsch- Vincent (2006)]; Panagiotis Delimatsis, *Don’t Gamble with GATS – The Interaction between Articles VI, XVI, XVII and XVIII GATS in the Light of the US – Gambling Case*, 40 J. WORLD TRADE 1059 (2006).

<sup>69</sup> Rosey Cooney & Andrew T.F. Lang, *Taking Uncertainty Seriously: Adaptive Governance and International Trade*, 18(3) EUR. J. INT’L L. 523 (2007).

<sup>70</sup> See MIRA BURRI & THOMAS COTTIER (EDS.), *TRADE GOVERNANCE IN THE DIGITAL AGE* (2012).

from more fundamental policy divergences. They often relate to different ‘trade and ...’ pairs, that is, issues that have not only economic but broader societal implications,<sup>71</sup> which render solution-finding processes difficult. The ‘trade and culture’ contestation is the pre-eminent example in this context.

The legal uncertainties stemming from technologically biased rules and classifications are accompanied with a layer of political contention. Taking this EU–US distributional conflict into account and applying the theoretical framework of international regime complexity,<sup>72</sup> it can be assumed that more uncertainty and fragmentation will ensue down the road.<sup>73</sup> The WTO as a ‘member-driven’ organization<sup>74</sup>, lacks the institutional capacity to react and steer towards an adequate multilateral solution.<sup>75</sup> This is well exemplified by the discussions in the framework of the 1998 WTO Work Programme on Electronic Commerce, which although engaging early on the WTO Members with the topic of digital trade and envisaging adjustments of the WTO rules in the areas of goods and services trade and intellectual property protection, did not bear any fruit so far.<sup>76</sup> At the same time, since the Work Programme on E-Commerce was launched in 1998, the picture has changed in many critical respects. The significance of digital trade, both in its contribution to the economic growth of many countries and the preoccupation of governments with digital trade-related policies, has significantly grown.<sup>77</sup> On the one hand, this progress and the changing interests relate to new, previously unknown or not fully developed technological applications, such as mobile telephony or cloud computing, which have become important platforms for business.<sup>78</sup> On the other hand and more vitally, they relate to the Internet and

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<sup>71</sup> See, e.g., Andrew T.F. Lang, *Reflecting on “Linkage”: Cognitive and Institutional Change in the International Trading System*, 70(4) THE MOD. L. R. 523 (2007).

<sup>72</sup> Kal Raustiala & David G. Victor, *The Regime Complex for Plant Genetic Resources*, 58(2) INTL. ORG. 277 (2004); Karen J. Alter & Sophie Meunier, *The Politics of International Regime Complexity*, 7(1) PERSP. ON POL. 13 (2009)[hereinafter Alter & Meunier]. Alter and Meunier talk of ‘international regime complexity’ to signify the presence of nested, partially overlapping, and parallel international regimes that are not hierarchically ordered and stress that the lack of hierarchy is particularly typical of the international level.

<sup>73</sup> See Alter & Meunier, *supra* note 72, at 16.

<sup>74</sup> Thomas Cottier, *Challenges Ahead in International Economic Law*, 12:1 J. INT’L ECON. L. 3 (2009).

<sup>75</sup> Gregory C. Shaffer & Mark A. Pollack, *Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance*, 94 MINN. L. R. 706, 773 (2010).

<sup>76</sup> Sacha Wunsch-Vincent & Arno Hold, *Towards Coherent Rules for Digital Trade: Building on Efforts in Multilateral versus Preferential Trade Negotiations*, in TRADE GOVERNANCE IN THE DIGITAL AGE 179 (Mira Burri & Thomas Cottier eds., 2012).

<sup>77</sup> USITC (2013), *supra* note 1.

<sup>78</sup> See, e.g., WTO, *Communication from the European Union and the United States: Contribution to the Work Programme on Electronic Commerce*, S/C/W/338 (2011).

now to data as essential fundamentals for innovation with deep societal implications.<sup>79</sup>

### III. RELEVANT DEVELOPMENTS IN PTAS

The lack of progress within the WTO context has driven and continues to drive countries to seek other venues that better reflect their interests and allow for speedier solutions. Global trade law and policy over the last two decades reflect this regime-shifting<sup>80</sup> and can be distinguished by the great and growing number of preferential trade agreements (PTAs), agreed upon bilaterally, regionally or between regions.<sup>81</sup> It is important to stress in this context that in many of these deals digital trade issues have formed an essential part of the reasoning behind seeking the PTA, as well as of the content of the PTA itself. In the following, we do not intend to disentangle and analyse the entire ‘spaghetti bowl’<sup>82</sup> of PTAs but look at the developments relevant for the above discussed services sectors (telecommunications, computer and related, and media services), with examples from some recent and particularly sophisticated treaties.

#### *A. PTA rules and commitments with regard to telecommunications services*

Telecommunications services are regulated explicitly in almost all PTAs agreed upon in the past two decades, whose number is now above 340,<sup>83</sup> regardless of

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<sup>79</sup>See, e.g., YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* (2006); ANUPAM CHANDER, *THE ELECTRONIC SILK ROAD: HOW THE WEB BINDS THE WORLD IN COMMERCE* (2013); WTO (2018), *supra* note 6.

<sup>80</sup>See, e.g., Laurence R. Helfer, *Regime Shifting in the International Intellectual Property System*, 7(1) *PERSP. ON POL.* 39 (2009).

<sup>81</sup>See, e.g., Mark Bacchetta et al., WORLD TRADE ORGANIZATION, *World Trade Report 2011: The WTO and Preferential Trade Agreements: From Co-existence to Coherence* (2011).

<sup>82</sup>The notion of ‘spaghetti bowl’ is attributed to Jagdish Bhagwati’s work on the negative effects of preferentialism due to, amongst other things, the lack of transparency and the increased complexity of overlapping trade rules. See, e.g., JAGDISH BHAGWATI, *TERMITES IN THE TRADING SYSTEM: HOW PREFERENTIAL AGREEMENTS UNDERMINE FREE TRADE* (2008).

<sup>83</sup>The information stems from an own dataset (TAPED: Trade Agreement Provisions on Electronic-commerce and Data) that seeks to comprehensively trace developments in PTAs in the area of digital trade governance. See Mira Burri & Rodrigo Polanco, *Digital Trade Provisions in Preferential Trade Agreements: Introducing a New Dataset*, 23 *J. INT’L ECON. L.* 187 (2020); see also <https://unilu.ch/taped> (last visited May 20, 2020)[hereinafter Burri].

whether they subscribe to a negative or a positive list of committing for services.<sup>84</sup> A general trend that can be discerned is for very detailed and lengthy chapters that codify the WTO Reference Paper and the Annex on Basic Telecommunications and reflect the high level of commitments under the GATS, but also often go beyond them. Another observable trend is the convergence of the EU and the US templates for telecommunications chapters. To illustrate both these trends, we look at the Comprehensive and Progressive Agreement for Transpacific Partnership (CPTPP<sup>85</sup>) and the recent EU–Japan Free Trade Agreements (FTA)<sup>86</sup>, with some references to the United States–Mexico–Canada Agreement (USMCA)<sup>87</sup> and the Comprehensive Economic Trade Agreement (CETA)<sup>88</sup> between Canada and the European Union.

### i. The CPTPP and the USMCA

The CPTPP builds upon the Transpacific Partnership Agreement (TPP)<sup>89</sup>, which was one of the most ambitious mega-regional trade deals between the US and

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<sup>84</sup> On positive versus negative list committing, see Rudolf Adlung & Hamid Mamdouh, *How to Design Trade Agreements in Services: Top Down or Bottom Up?*, 48(2) J. WORLD TRADE 191 (2014); Aaditya Mattoo & Pierre Sauve, *The Preferential Liberalization of Services Trade: Economic Insights*, in THE PREFERENTIAL LIBERALIZATION OF TRADE IN SERVICES: COMPARATIVE REGIONALISM 37 (Pierre Sauvé & Anirudh Shingal eds., 2014); Martin Roy, *Services Commitments in Preferential Trade Agreements: Surveying the Empirical Landscape*, in THE PREFERENTIAL LIBERALISATION OF TRADE IN SERVICES 15 (Pierre Sauvé & Anirudh Shingal eds., 2014).

<sup>85</sup> Comprehensive and Progressive Agreement for Transpacific Partnership, (Mar. 8, 2018), <https://www.iilj.org/wp-content/uploads/2018/03/CPTPP-consolidated.pdf> [hereinafter CPTPP].

<sup>86</sup> Agreement between the European Union and Japan for an Economic Partnership, (Jul. 17, 2018), [https://trade.ec.europa.eu/doclib/docs/2018/august/tradoc\\_157228.pdf](https://trade.ec.europa.eu/doclib/docs/2018/august/tradoc_157228.pdf) [hereinafter EU–Japan FTA].

<sup>87</sup> Agreement between the United States of America, the United Mexican States, and Canada, (Nov. 30, 2018), <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between> [hereinafter USMCA].

<sup>88</sup> Comprehensive Economic and Trade Agreement between Canada of the One Part, and the European Union and its Member States, of the Other Part, Sept. 14, 2016, 2016/206 (NLE), (consolidated text), [http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc\\_154329.pdf](http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf) [hereinafter CETA].

<sup>89</sup> The Trans-Pacific Partnership Agreement, (Feb. 4, 2016), <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text> [hereinafter TPP].

eleven countries in the Pacific Rim.<sup>90</sup> Upon the withdrawal of the United States decided by the Trump administration, under an adjusted title but without radical substantive changes, the remaining states decided to move forward. The CPTPP entered into force on December 30, 2018 and represents 13.4% of the global gross domestic product or \$13.5 trillion, making it the third largest trade agreement after the North American Free Trade Agreement (NAFTA) and the single market of the EU.<sup>91</sup> Beyond the broader economic impact, the CPTPP sought to be a ‘21st century’ agreement that would match contemporary global trade better than the ‘analogue’ WTO Agreements.<sup>92</sup> This naturally renders the provisions with regard to telecommunications and media services of particular interest to this article’s discussion.<sup>93</sup>

The CPTPP chapter for telecommunications services is very detailed (comprising 26 Articles) and seeks to ensure a level playing field for telecommunication services and service suppliers. There is a general recognition of the liberal approach towards regulation, whereby the CPTPP Parties recognise the value of competitive markets to deliver a wide choice in the supply of telecommunications services to enhance consumer welfare.<sup>94</sup> In situations where the competition is effective or if a given service has newly entered the market, regulation is deemed to be unnecessary.<sup>95</sup> Parties remain free however, to choose how they wish to implement their obligations under the Chapter.<sup>96</sup>

The provisions on access and use of public telecommunications services are strengthened in comparison to the text of the Annex and the Reference Paper by including number portability<sup>97</sup> and enhanced transparency requirements.<sup>98</sup> There is

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<sup>90</sup> Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam.

<sup>91</sup> Zachary Torrey, *TPP 2.0: The Deal Without the US: What’s New about the CPTPP and What Do the Changes Mean?*, THE DIPLOMAT, Feb. 2018.

<sup>92</sup> See, e.g., Tania Voon, *Introduction: National Regulatory Autonomy and the Trans-Pacific Partnership Agreement*, in *Trade Liberalisation and International Cooperation: A Legal Analysis of the Trans-Pacific Partnership Agreement 1* (Tania Voon ed., 2013).

<sup>93</sup> For a great overview of the CPTPP and how it consolidates previous trade deals between the CPTPP partners, see, e.g., Rodrigo P. Lazo & Sebastian G. Fiedler, *A Requiem for the Trans-Pacific Partnership: Something New, Something Old and Something Borrowed?*, 18 MELB. J. INT’L L. 1, 30–39 (2017).

<sup>94</sup> CPTPP, *supra* note 85, art. 13.3 ¶ 1.

<sup>95</sup> CPTPP, *supra* note 85, art. 13.3 ¶ 1.

<sup>96</sup> CPTPP, *supra* note 85, art. 13.3, ¶¶ 1–3.

<sup>97</sup> CPTPP, *supra* note 85, art. 13.5 ¶ 4. Each Party shall ensure that suppliers of public telecommunications transport services in its territory provide number portability for mobile services and any other services designated by that Party, on a timely basis and on

a specific provision on transparency with regard to roaming rates, whereby all the Parties are called upon to cooperate on promoting transparent and reasonable rates for international mobile roaming services so that the growth of trade between the Parties and consumer welfare are promoted and enhanced.<sup>99</sup> Parties may choose to take certain steps in this regard, such as: (a) ensuring easy accessibility of information regarding retail rates to consumers and (b) minimizing impediments to the use of technological alternatives to roaming, whereby consumers have the facility to access telecommunications services using any device of their choice, while visiting the territory of another Party.<sup>100</sup>

Article 13.23 CPTPP is entirely new and seeks to ensure flexibility in the choice of technology, so that suppliers of public telecommunications services can choose ‘the technologies they wish to use to supply their services, subject to requirements necessary to satisfy legitimate public policy interests, provided that any measure restricting that choice is not prepared, adopted or applied in a manner that creates unnecessary obstacles to trade’.<sup>101</sup> The same rule has been reiterated in the USMCA,<sup>102</sup> which follows the CPTPP template in almost all elements, including the establishing of a Committee on Telecommunications, which should review and monitor the operation of the Chapter, with a view to ensuring its effective implementation ‘by enabling responsiveness to technological and regulatory developments in telecommunications to ensure the continuing relevance of this Chapter to Parties, service suppliers and end users’.<sup>103</sup>

The USMCA has however added another provision, previously unknown from other templates, with regard to the conditions for the supply of value-added services.<sup>104</sup> Thereby, the USMCA Parties recognise the importance of value-added services to innovation, competition, and consumer welfare and pledge ‘not to impose on a supplier of value-added services requirements applicable to a supplier of public telecommunications services without due consideration of the legitimate public policy objectives, the technical feasibility of the requirements, and the

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reasonable terms and conditions. Certain exceptions apply to Brunei, Malaysia and Vietnam (see footnote 6 to art. 13.5).

<sup>98</sup> CPTPP, *supra* note 85, art. 13.22.

<sup>99</sup> CPTPP, *supra* note 85, art. 13.6 ¶ 1.

<sup>100</sup> CPTPP, *supra* note 85, art. 13.6 ¶ 2.

<sup>101</sup> CPTPP, *supra* note 85, art. 13.23 ¶ 1. Paragraph 2 clarifies that when a Party finances the development of advanced networks, it may make its financing conditional on the use of technologies that meet its specific public policy interests. It is clarified further in a footnote that ‘advanced networks’ includes broadband networks.

<sup>102</sup> USMCA, *supra* note 87, art. 18.15.

<sup>103</sup> CPTPP, *supra* note 85, art. 13.26; USMCA, *supra* note 88, art. 18.27.

<sup>104</sup> USMCA, *supra* note 87, art. 18.14.

characteristics of the value-added services at issue.<sup>105</sup> This is a rule that seeks to provide certain safeguards for the so-called ‘over-the-top’ (OTT) services providers and is meant to counter tendencies for increased regulatory burden on platform and digital services providers.

Net neutrality is another important digital economy topic that has been given specific attention in the CPTPP—however not in the telecom but in the electronic commerce chapter. Article 14.10 titled “Principles on Access to and Use of the Internet for Electronic Commerce” states that “subject to applicable policies, laws and regulations, the Parties recognize the benefits of consumers in their territories having the ability to: (a) access and use services and applications of a consumer’s choice available on the Internet, subject to reasonable network management; (b) connect the end-user devices of a consumer’s choice to the Internet, provided that such devices do not harm the network; and (c) access information on the network management practices of a consumer’s Internet access service supplier.”<sup>106</sup> While it is commendable that net neutrality is endorsed, this comes with reservations with regard to reasonable network management and is not linked to legal remedies for situations, such as blocking, throttling, discriminating or filtering content. Other, much ‘harder’, rules that may be of critical importance for the telecommunications services and services providers are the general ban on localisation measures and the safeguarding of the free flow of data that the CPTPP endorses.<sup>107</sup> Furthermore, the CPTPP Parties recognise that a supplier seeking international Internet connection should be able to negotiate with suppliers of another Party on a commercial basis.<sup>108</sup>

A second set of provisions outside of the telecom chapter that needs to be mentioned comes from the Chapter 8 on technical barriers to trade and relates to encryption standards. It is a reaction to a practice by several countries that impose direct bans on encrypted products or set specific technical regulations that restrict the sale of encrypted products.<sup>109</sup> China is a prominent but not the only example in this context with its attempt to enforce an indigenous standard for wireless

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<sup>105</sup>USMCA, *supra* note 87, art. 18.14.

<sup>106</sup> CPTPP, *supra* note 85, art. 14.10.

<sup>107</sup> Article 14.13(2) prohibits the Parties from requiring a “covered person to use or locate computing facilities in that Party’s territory as a condition for conducting business in that territory”. In addition, “[e]ach Party shall allow the cross-border transfer of information by electronic means, including personal information, when this activity is for the conduct of the business of a covered person” (Article 14.11(2) CPTPP).

<sup>108</sup> CPTPP, *supra* note 85, art. 14.12.

<sup>109</sup> See Branislav Hazucha, *Technical Barriers to Trade in Information and Communication Technologies*, in RESEARCH HANDBOOK ON THE WTO AND TECHNICAL BARRIERS TO TRADE 525 (Tracy Epps & Michael J. Trebilcock eds. 2013).



networks—the WLAN Authentication and Privacy Infrastructure (WAPI) standard, which was a proprietary standard diverging from the internationally agreed upon Wi-Fi.<sup>110</sup> Annex 8-B, Section A.3 addresses such concerns. Pursuant to it, with respect to a product that uses cryptography and is designed for commercial applications, “no Party shall impose or maintain a technical regulation or conformity assessment procedure that requires a manufacturer or supplier of the product, as a condition of the manufacture, sale, distribution, import or use of the product, to: (a) transfer or provide access to a particular technology, production process or other information, for example, a private key or other secret parameter, algorithm specification or other design detail, that is proprietary to the manufacturer or supplier and relates to the cryptography in the product, to the Party or a person in the Party’s territory; (b) partner with a person in its territory; or (c) use or integrate a particular cryptographic algorithm or cipher, other than where the manufacture, sale, distribution, import or use of the product is by or for the government of the Party.”<sup>111</sup> Despite certain exceptions,<sup>112</sup> by banning the forced provision of encryption keys or the adoption of indigenous standards, the CPTPP addresses well this newer kind of digital trade barriers and caters for the growing concerns of large companies like International Business Machines (IBM) and Microsoft that thrive on free data flows with less governmental intervention.<sup>113</sup> Annex 8-B adds also provisions on regional cooperation on telecommunications equipment,<sup>114</sup> as well as on the electromagnetic compatibility of IT equipment products, which are novel and may be of importance for telecom operators.<sup>115</sup>

## ii. CETA and the EU–Japan FTA

With regard to cross-border trade in services, the EU’s traditional approach has been to follow the GATS model and only positively (and relatively conservatively) commit. The level of commitments in its PTAs has largely mirrored the offers made by the EU during the Doha Round, so unlike the US, the EU has not gone

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<sup>110</sup> See Christopher S. Gibson, *Globalization and the Technology Standards Game: Balancing Concerns of Protectionism and Intellectual Property in International Standards*, 22 BERKELEY TECH. L. J. 1403, 1475 (2007). The case was settled diplomatically, as China decided to forbear from mandating the WAPI standard.

<sup>111</sup> CPTPP, *supra* note 85, Annex 8-B.

<sup>112</sup> The provision does not prevent law enforcement actions and does not apply to networks owned or controlled by the government, or to government measures related to supervision, investigation, or examination of financial institutions or markets (Sections A.4 and A.5).

<sup>113</sup> See H. Liu, *Inside the Black Box: Political Economy of the Trans-Pacific Partnership’s Encryption Clause*, 51 J. WORLD TRADE 309 (2017).

<sup>114</sup> CPTPP, *supra* note 85, Annex 8-B, Sec. C.

<sup>115</sup> CPTPP, *supra* note 85, Annex 8-B, Sec. B.

substantially GATS-plus in its PTAs.<sup>116</sup> This is clearly reflected in the CETA, whose telecom chapter seems to be a mere reiteration of the provisions of the Annex on Telecommunications and the Reference Paper,<sup>117</sup> with the add-on on number portability.<sup>118</sup> Despite the negative list committing, with which the EU experimented for the first time in CETA, we do not see any radical differences, since the levels of commitments for telecommunications were already fairly high under the GATS. Something that is peculiar to CETA and can be mentioned is the Annex attached to the services chapter, which sets out an understanding on new services not classified in the United Nations (UN) Provisional Central Product Classification (CPC) in its provisional 1991 version as used during the Uruguay Round negotiations. The Understanding specifies that the commitments made do not apply in respect to any measure relating to a new service that cannot be classified under the CPC.<sup>119</sup> Parties have an obligation to notify the other party about such new services and enter into negotiations to incorporate the new service into the scope of the Agreement, at the request of one of the Parties.<sup>120</sup> This can potentially be the case with some new services in the telecom, IT or media context that come to the market as a result of new technological advances. So far there is, however, no practice with regard to the application of the Understanding.

The EU and Japan's Economic Partnership Agreement entered into force on 1 February 2019 after some seven years of negotiation. It is an ambitious and comprehensive deal and similarly to the TPP/CPTPP was meant to reflect the new practical reality of digital trade. For the first time in EU trade treaties, it covers all trade done by electronic means and signals some repositioning of the EU on issues of data.<sup>121</sup> The EU–Japan FTA was negotiated in parallel to the mega-regionals endorsed by the United States and one can in this sense naturally look for certain 'borrowing' and cross-references between the different treaties.

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<sup>116</sup> EU FTAs tend to cover more WTO-plus areas while having less liberal commitments. For a detailed analysis, see HENRIK HORN, PETROS C. MAVROIDIS & ANDRÉ SAPIR, *BEYOND THE WTO? AN ANATOMY OF EU AND US PREFERENTIAL TRADE AGREEMENTS* (2009).

<sup>117</sup> CETA, *supra* note 88, Ch. 15.

<sup>118</sup> CETA, *supra* note 88, art. 15.10.

<sup>119</sup> CETA, *supra* note 88, Annex 9-B: Understanding on New Services Not Classified in the United Nations Provisional Central Product Classification (CPC), 1991, ¶ 1.

<sup>120</sup> It is clarified that this regime does not apply to an existing service that could be classified under the CPC but that could not previously be provided on a cross-border basis due to lack of technical feasibility. *Id.* ¶ 4.

<sup>121</sup> See Proposal for a Council Decision on the conclusion of the Economic Partnership Agreement between the European Union and Japan, COM (2018) 192 final, Apr. 18, 2018. For updates and the text of the Agreement, see <https://ec.europa.eu/trade/policy/in-focus/eu-japan-economic-partnership-agreement/> (last visited May 10, 2020).

The EU–Japan FTA’s chapter on telecommunications goes slightly beyond the GATS, and beyond CETA. Unlike other, mostly US-led, deals and typically for the EU approach (apart from CETA), the rules on telecommunications form part of the Chapter on Trade in Services, Investment Liberalisation and Electronic Commerce (Chapter 8). The Section on Telecommunications Services encompasses Articles 8.41 to 8.57 and in structure and in substance largely follows the US template, including provisions on number portability<sup>122</sup> and international mobile roaming<sup>123</sup>—the latter commitment entirely missing from CETA and earlier EU FTAs. Yet, the EU–Japan FTA also misses important provisions endorsed by the CPTPP and the USMCA, such as for instance those regarding co-location,<sup>124</sup> access to poles, ducts, conduits, and rights-of-way,<sup>125</sup> as well as those on submarine cable systems,<sup>126</sup> and rules on flexibility in the choice of technology.<sup>127</sup> Novel to the EU–Japan FTA are the recognition of the importance of the principle of technological neutrality in electronic commerce,<sup>128</sup> as well as the much discussed provision on the ‘Free Flow of Data’, which states that the ‘Parties shall reassess within three years of the date of entry into force of this Agreement the need for inclusion of provisions on the free flow of data into this Agreement’.<sup>129</sup> These are however to be found in the section on electronic commerce and not the one on telecommunications services.

The EU–Japan FTA goes at great length in stressing that none of the commitments made apply for audio-visual services. The Telecommunications Services Section specifies in this regard that it “does not apply to measures affecting: (a) broadcasting services as defined in the laws and regulations of each Party; and (b) services providing, or exercising editorial control over, content transmitted using telecommunications transport networks and services.”<sup>130</sup> There are also explicit exclusions of audio-visual services in the services chapter, in general and with specific regard to investment liberalisation,<sup>131</sup> cross-border trade in services,<sup>132</sup> electronic commerce<sup>133</sup> and subsidies.<sup>134</sup> The EU also reserves the

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<sup>122</sup> EU–Japan FTA, *supra* note 86, art. 8.45.

<sup>123</sup> EU–Japan FTA, *supra* note 86, art. 8.57.

<sup>124</sup> USMCA, *supra* note 87, art. 18.11; CPTPP, *supra* note 85, art. 13.13.

<sup>125</sup> USMCA, *supra* note 87, art. 18.12; CPTPP, *supra* note 85, art. 13.14.

<sup>126</sup> USMCA, *supra* note 87, art. 18.13; CPTPP, *supra* note 85, art. 13.15.

<sup>127</sup> USMCA, *supra* note 87, art. 18.15; CPTPP, *supra* note 87, art. 13.23.

<sup>128</sup> EU–Japan FTA, *supra* note 86, art. 8.70(30).

<sup>129</sup> EU–Japan FTA, *supra* note 86, art. 8.81.

<sup>130</sup> EU–Japan FTA, *supra* note 86, art. 8.41(2).

<sup>131</sup> EU–Japan FTA, *supra* note 86, art. 8.6(2)(c).

<sup>132</sup> EU–Japan FTA, *supra* note 86, art. 8.14(2)(d).

right to adopt or maintain any future measure with respect to broadcast transmission services.<sup>135</sup> This careful carving-out of media services has been a feature of all trade treaties of the EU and reflect the marked position of the EU in the trade and culture debate and the pronounced wish to preserve domestic policy space.

*B. PTA rules and commitments with regard to computer and related services*

The overview of PTA developments with regard to computer and related services can be held relatively short, since in this sector almost all countries have pursued higher commitments and facilitated market access. Indeed, many agreements that subscribe to a negative scheduling do not explicitly mention computer and related services in their services chapters, except for the standard for many countries exclusion of ‘computer reservation system services’ (CRS).<sup>136</sup> For the EU, this has not always been the case, since, as earlier mentioned, with regard to cross-border trade in services, the EU has followed the GATS model and its commitments under it. For the computer services sector, the provisions foresee deep liberalisation of all computer and related services at the two-digit CPC 84 level,<sup>137</sup> while core content services delivered electronically, such as banking, are explicitly excluded.<sup>138</sup> Under the CETA, which included for the first time for the EU, a negative list of commitments, we have full commitments for computer and related services for both Canada and the EU. The level of commitments varies only with

<sup>135</sup> EU–Japan FTA, *supra* note 86, art. 8.70(5).

<sup>134</sup> EU–Japan FTA, *supra* note 86, art. 12.3(7).

<sup>135</sup> EU–Japan FTA, *supra* note 86, Reservation 11, Annex II: Reservations for Future Measures, Schedule of the European Union.

<sup>136</sup> Computer reservation system services are defined as services provided by computerized systems that contain information about air carriers’ schedules, availability, fares and fare rules, through which reservations can be made or tickets may be issued. *See, e.g.*, CPTPP, *supra* note 85, art. 10.1; CETA, *supra* note 88, art. 8.1.

<sup>137</sup> EU–South Korea FTA, art. 7.25, in a way identical to the EU’s Doha round offer; see WTO, Understanding on the Scope of Coverage of CPC 84 – Computer and Related Services, Communication from Albania, Australia, Canada, Chile, Colombia, Croatia, the European Communities, Hong Kong China, Japan, Mexico, Norway, Peru, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, Turkey and the United States, TN/S/W/60, S/CSC/W/51 (2007).

<sup>138</sup> EU–South Korea FTA, art. 7.25, ¶ 4: ‘Computer and related services enable the provision of other services such as banking by both electronic and other means. The Parties recognise that there is an important distinction between the enabling service such as web-hosting or application hosting and the content or core service that is being delivered electronically such as banking, and that in such cases the content or core service is not covered by CPC 84.’

regard to the provision of those services by contractual services suppliers and independent professionals under Article 10.8 CETA, where individual EU Member States have included exceptions or not committed at all. The same is true for the EU–Japan FTA, where the exceptions are framed in annexes; Japan has listed no exceptions. Overall, the commitments for computer and related services are very high and by subscribing to the two-digit CPC, some of the definitional/classification issues pertaining to a technologically driven sector might have been addressed.

*C. PTA rules and commitments with regard to audio-visual services*

**i. The approach of the European Union**

The EU approach has been in general to seek not only the clear exclusion of the entire audio-visual sector in its PTAs but also to pursue a delineation from neighbouring sectors, such as telecommunications, computer and related, or electronic commerce services, as earlier noted with regard to the EU–Japan PTA. As another example, one can refer to CETA, where in defining the scope of the services chapter, Article 9.2 states that despite the far-reaching liberalisation commitment of both Parties, ‘even in this case and as a reflection of Canada’s and the EU’s continuing pro-cultural stance, some sectors are *a priori* excluded. For the EU, these are audio-visual services; for Canada, the carve-out relates to its ‘cultural industries’.<sup>139</sup> ‘Cultural industries’ are defined as “(a) the publication, distribution or sale of books, magazines, periodicals, or newspapers in print or machine-readable form; (b) the production, distribution, sale, or exhibition of film or video recordings; the production, distribution, sale, or exhibition of audio or video music recordings; the publication, distribution, or sale of music in print or machine-readable form; or (c) radio communications in which the transmissions are intended for direct reception by the general public, and all radio, television, and cable broadcasting undertakings and all satellite programming and broadcast network services.”<sup>140</sup> If we compare with the W/120 classification for audio-visual services under the GATS, which includes motion picture and video tape production and distribution services; motion picture projection service; radio and television services; radio and television transmission services and sound recording, the scope of ‘cultural industries’ is somewhat broader. Exclusion of subsidies and

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<sup>139</sup> CETA, *supra* note 88, Ch. 32 ‘Exceptions’.

<sup>140</sup> CETA, *supra* note 88, art. 1.1; *see also* USMCA, *supra* note 87, art. 32.6(1). Canada uses this definition consistently also in other FTAs, such as for instance in the Bilateral Investment Treaty with Costa Rica.

government support for audio-visual services and cultural industries further preserves the domestic policy space for both the EU and Canada.<sup>141</sup>

In the case of the CETA, one may deem it somewhat peculiar that despite this strong commitment to the objective of cultural diversity, which the EU and Canada share and have voiced not only in the course of the ‘exception culturelle’ debate in the Uruguay negotiations but also in the UNESCO negotiations on cultural diversity instruments,<sup>142</sup> there are no provisions on cultural exchange and cooperation, or some sort of fostering culture through trade, which can be beneficial for both Parties. Cultural cooperation and market access commitments have peaked for the EU with the EU–CARIFORUM and EU–South Korea PTAs, largely as an effect of the 2005 UNESCO Convention on Cultural Diversity implementation— they have not been followed up however in later agreements.<sup>143</sup>

## ii. The US approach

As noted earlier, the US approach towards the audio-visual sector has been pronouncedly different when compared to that of the EU. This should be understood within the broader context of its ‘Digital Agenda’,<sup>144</sup> which the United States has endorsed and made substantial efforts to implement in all trade venues.<sup>145</sup> As the multilateral forum of the WTO could not move forward, largely because of the trade versus culture predicament, the US has made good use of the preferential venues. The agreements reached by the US since 2002 with Australia, Bahrain, Chile, Morocco, Oman, Peru, Singapore, the Central American countries,<sup>146</sup> Panama, Colombia and South Korea, all contain critical WTO-plus and WTO-extra provisions in the broader field of digital trade. In the area of services trade, the US Digital Agenda focuses on Entertainment, Telecom and IT and seeks to ensure, when possible, that the most liberal form to schedule trade commitments (negative list) is used, so that new services are automatically covered by the commitments, as well as seeks to ensure the absence of discrimination

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<sup>141</sup> CETA, *supra* note 88, art. 7.7.

<sup>142</sup> Burri (2010), *supra* note 64; CETA, *supra* note 88, Preamble, Recitals 6, 7.

<sup>143</sup> *See, e.g.*, MIRA BURRI & KEITH NURSE, CULTURE IN THE CARIFORUM-EUROPEAN UNION ECONOMIC PARTNERSHIP AGREEMENT: REBALANCING TRADE FLOWS BETWEEN EUROPE AND THE CARIBBEAN? (2019).

<sup>144</sup> *See* US Congress, Bipartisan Trade Promotion Authority Act of 2001, H. R. 3005, 3 October 2001; Sacha Wunsch-Vincent, *The Digital Trade Agenda of the US: Parallel Tracks of Bilateral, Regional and Multilateral Liberalization*, 1 *Aussenwirtschaft* 7 (2003)[hereinafter Wunsch-Vincent(2003)].

<sup>145</sup> Wunsch-Vincent (2003), *supra* note 144.

<sup>146</sup> The DR–CAFTA includes Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and the Dominican Republic.

against electronic service delivery. Furthermore, the US Digital Agenda specifies that for audio-visual services, trade partners are not asked to dismantle existing financial support schemes for culture and content production. Neither are trade partners asked to eliminate existing regulations that discriminate against foreign content in traditional technologies like broadcasting or cinema. Rather trade partners are asked to schedule their existing audio-visual regulations and thus ‘freeze’ them at a particular level. Yet, under the Digital Agenda, the US should be requesting commitments on new audio-visual services like video-on-demand and new digitised forms of content distribution.<sup>147</sup>

In line of this agenda and despite its inflexible position in the WTO context, the US has shown deference to the culturally inspired measures of its PTA partners in the media sector and granted the policy space needed for these measures. In this sense, some US PTAs specify that the parties are ‘not prevented from adopting or maintaining measures in the audio-visual and broadcasting sectors’ and that the non-discrimination provision does not apply to measures affecting the electronic transmission of so-called linear, point-to-multipoint traditional broadcasting services. Very often, however, these measures are bound at their present level,<sup>148</sup> and could relate only to conventional ‘offline’ technologies. It is also evident that the leeway given to the US partners with respect to trade in cultural products “reflect[s] quite accurately the negotiating capacity of the states involved”— acting under the sizeable economic weight of the US, the rule of thumb is that the smaller the country, the more concessions it admits.<sup>149</sup> Australia, as the most affluent of these states, managed to preserve existing quotas for local content in commercial broadcasting<sup>150</sup> and remains free to maintain existing measures and adopt new ones in the areas of (a) multi-channelled free-to-air commercial television broadcasting services; (b) free-to-air commercial television broadcasting services; (c) subscription television broadcasting services (d) free-to-air radio broadcasting services; (e) interactive audio and/or video services (f) spectrum and licensing; and (d) subsidies or grants.<sup>151</sup> This ample policy space is subject to certain limitations pertaining either to not exceeding the existing ceilings or to the application of

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<sup>147</sup> Wunsch-Vincent (2006), *supra* note 68, at 119–120.

<sup>148</sup> Wunsch-Vincent (2003), *supra* note 144, at 15–16; Tania Voon, *A New Approach to Audiovisual Products in the WTO: Rebalancing GATT and GATS*, 14 U.C.L.A. ENT. L. REV. 1, 25–26 (2007).

<sup>149</sup> Ivan Bernier, *The Recent Free Trade Agreements of the United States as Illustration of Their New Strategy regarding the Audiovisual Sector*, Apr. 2004, at 15, [http://www.coalitionsuisse.ch/doss\\_sc/unesco\\_ccd/bernier\\_us\\_ftas\\_and\\_av\\_sector1.pdf](http://www.coalitionsuisse.ch/doss_sc/unesco_ccd/bernier_us_ftas_and_av_sector1.pdf).

<sup>150</sup> Australia-United States Free Trade Agreement, (May 18. 2004), at Annex I, <https://www.dfat.gov.au/trade/agreements/in-force/ausfta/Pages/australia-united-states-fta>.

<sup>151</sup> *Id.* at Annex II.

certain criteria for the assessment of future measures. Despite these limitations, the freedom granted to Australia in shaping its present and future cultural policy for the media is substantial, especially considering the typical US position on these matters. Singapore and Chile were also able to include relatively significant reservations, as did Costa Rica, the Dominican Republic and Morocco. On the other hand, Guatemala, Honduras, El Salvador and Nicaragua left their audio-visual sectors in practice open to imports and there is only little room for new domestic policy initiatives.

The case of the USMCA is also interesting to mention, since it brings together Canada and the US, as two countries on the opposing ends of the trade and culture debate and with contrasting approaches towards cultural industries' protection and governmental support. Like the original Canada–US FTA and its successor, the NAFTA, the USMCA includes a broad cultural exemption to allow Canada to continue favouring its domestic cultural industries, including publishing, film, television, news and music; there is no discrimination as to the type of format or as to offline or online distribution.<sup>152</sup> The cultural exemption under the USMCA and similarly to that under the NAFTA allows the US and Mexico to retaliate – if Canada goes too far in protecting its domestic industries, they ‘may take a measure of equivalent commercial effect’.<sup>153</sup> Interestingly, there is a provision saying that all retaliation disputes are to be resolved under the USMCA<sup>154</sup> and not under the WTO—a solution that may be linked to the unfortunate result of the *Canada – Periodicals* case decided under the WTO umbrella.<sup>155</sup> It needs to be noted that there are certain concessions made to the US: Annex 15-D requires Canada to (1) rescind the Canadian Radio-television and Telecommunications Commission broadcast regulatory policy that stopped the simultaneous substitution policy for broadcasts (the main problem being the Super Bowl) and (2) enable US home

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<sup>152</sup> USMCA, *supra* note 87, art. 32.6.

<sup>153</sup> USMCA, *supra* note 87, art. 32.6(4): Notwithstanding any other provision of this Agreement, a Party may take a measure of equivalent commercial effect in response to an action by another Party that would have been inconsistent with this Agreement but for paragraph 2 or 3.

<sup>154</sup> USMCA, *supra* note 87, art. 32.6(5).

<sup>155</sup> Panel Report, *Canada — Certain Measures Concerning Periodicals*, WTO Doc. WT/DS31/R, (adopted Mar. 14, 1997); Appellate Body Report, *Canada – Certain Measures Concerning Periodicals*, WTO Doc. WT/DS31/AB/R, (adopted June 30, 1997). The case signalled the unwillingness of the WTO adjudicative bodies to engage in balancing trade versus culture values, as the case was decided by the panel and the Appellate Body to the benefit of the US, and despite CUSFTA's cultural exception clause.



shopping broadcast services to be authorised for distribution in Canada (the main problem being the QVC).<sup>156</sup>

There are broad carve-outs for audio-visual services under the CPTPP as well, again mostly driven by Canada's stance on cultural matters. While this is unsurprising, some exceptions are interesting and noteworthy: so, while under Annex II, 'Canada reserves the right to adopt or maintain a measure that affects cultural industries and that has the objective of supporting, directly or indirectly, the creation, development or accessibility of Canadian artistic expression or content'<sup>157</sup>, Canada *cannot* adopt '(a) discriminatory requirements on service suppliers or investors to make financial contributions for Canadian content development; and (b) measures restricting the access to on-line foreign audio-visual content.'<sup>158</sup>

#### IV. APPRAISAL OF THE STATE OF SERVICES REGULATION IN THE DIGITAL ECONOMY

The article examined the state of regulation of services sectors key to the digital economy under the multilateral framework of the GATS and then traced their development in selected PTAs by looking at a few recent and particularly advanced trade deals of the United States and of the European Union respectively. It became on the one hand apparent that the WTO provides a comprehensive regulatory framework for services, however there are notable divergences across sectors, which ultimately fail to reflect the current state of a digitised economy. Legal adaptation has not occurred and there are a variety of problematic issues that have been raised by the WTO Members but remain unresolved. On the other hand, the enquiry into the preferential trade venues revealed that there have been some changes vis-à-vis the *status quo* of the corresponding rules and commitments under the GATS. Yet, it was also discernible that these transformations are not radical. Rather they follow the same path and are dependent on previous solutions, negotiated modalities and classifications, and even rely on the same language.<sup>159</sup> On critical issues, such as updated services classification, technological neutrality and other changes needed to reflect the sweeping changes of the digital

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<sup>156</sup> See, e.g., Emily Jackson, *No More American Ads during Canada's Super Bowl Broadcast: CRTC Policy Scrapped in USMCA*, FINANCIAL POST, Oct. 1, 2018.

<sup>157</sup> CPTPP, *supra* note 85, Annex II.

<sup>158</sup> *Id.*

<sup>159</sup> On path dependence in law, see, e.g., Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. R. 101 (2001); see also Sophie Meunier & Jean-Frédéric Morin, *No Agreement Is an Island: Negotiating TTIP in a Dense Regime Complex*, in THE POLITICS OF TRANSATLANTIC TRADE NEGOTIATIONS: TTIP IN A GLOBALIZED WORLD 173 (Jean-Frédéric Morin et al. eds., 2015).

environment and how services are traded in it, there is very little, even in the new generation of ‘21<sup>st</sup> century’ trade deals. The line of divergence between the telecommunications/IT and the audio-visual media services regulation is also subject to strong path-dependent effects and has become even more pronounced, especially in the PTAs of the EU. The practical reality of converged services and sectors appears to hardly matter.<sup>160</sup>

In the audio-visual media sector, one could observe that the level of commitments and the willingness to engage in any sort of liberalisation remain low, despite the fact that the trade and culture debate has become only marginal to key trade negotiations. Interesting to note is the changed position of the United States towards concessions in the audio-visual sector, accepted however under the important condition that they do not affect digital media, or this effect is explicitly contained. The detailed regulation of the telecom sectors and the liberal approach chosen for telecom and computer services in essentially all PTAs discussed, as well as the increasing similarities between the EU and the US templates for those sectors, may prompt one to think that what we are observing is a good example of legal adaptation. This first impression may be flawed however simply because the commitments and the substance of the WTO rules, under the Annex on Basic Telecommunications and the Reference Paper, were already very detailed and far-reaching. For instance, upon a closer look, many parts of the new PTA telecommunications chapters actually appear somewhat stuck in 1990s and do not reflect the market reality.<sup>161</sup> One particular critique that has been voiced refers to the lack of proper addressing of Internet access and how it should be classified. While the USMCA adds that ‘public telecommunications’ may include telephone and data transmission, it remains silent on Internet access.<sup>162</sup> Also, while the telecom chapters address ‘major suppliers of public telecommunications services’ and contain a number of obligations for them, the market share of such operators has been reduced over time, especially after the Open Internet Order, which reclassified fixed and mobile broadband Internet access service as a ‘telecommunications service’, was repelled by the Trump administration.<sup>163</sup> OTT providers, like Google, Facebook, Amazon Web Services and Microsoft, have now

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<sup>160</sup> See, e.g., Rostam J. Neuwirth, *Global Market Integration and the Creative Economy: The Paradox of Industry Convergence and Regulatory Divergence*, 18(1) J. INT’L. ECON. L. 21 (2015).

<sup>161</sup> Patricia J. Paoletta, *Update Needed: NAFTA Telecom Trade Provisions*, THE FEDERALIST SOCIETY, Feb. 26, 2018 [hereinafter Paoletta].

<sup>162</sup> *Id.*; See also Danny Kotlowitz & Tania Voon, *Services in the TPP: A Case Study of Telecommunications*, in TRADE LIBERALISATION AND INTERNATIONAL CO-OPERATION: A LEGAL ANALYSIS OF THE TRANS-PACIFIC PARTNERSHIP AGREEMENT 131 (Tania Voon ed., 2013).

<sup>163</sup> Federal Communications Commission (FCC), *Restoring Internet Freedom*, 33 FCC Rcd 311 (1), Jan. 4, 2018.

become the key players but remain outside of the scope of the telecom chapters.<sup>164</sup> Even on new rules, such as international mobile roaming, it appears that the mechanisms for the reciprocal lowering of roaming rates could be difficult to implement and might be superseded by technological and market developments.<sup>165</sup> In this sense, it appears that the path dependences still remain and the developments in PTAs have not brought about any major adjustments to the GATS framework for telecommunications, computer and media services. At the same time, it has become increasingly apparent that change is needed, so that the data-driven economy can develop and flourish. The new rules that PTAs have adopted are, however, not to be found in the treaty texts on services. Whatever truly new rule-making has occurred, such as on non-discriminatory treatment of digital products, data flows and data localisation, comes from the electronic commerce/digital trade chapters, which now have turned into a source of rules for telecom, IT and media services and services suppliers. This reflects the demand by stakeholders to address the digital economy as a cross-sectorial issue that is not solely about market access but more about achieving a level of interoperability between domestic legal systems.<sup>166</sup> This observation seems at least partially validated by the newer initiatives under the WTO towards an agreement on digital trade.<sup>167</sup> There, if one looks at the proposals tabled by the WTO Members, digital trade is commonly treated in a wider sense and countries try to incorporate some of the pertinent sector-relevant issues into this broader project, noteworthy in this context is the EU proposal,<sup>168</sup> which incorporates the current EU PTA template on telecommunication and computer-related services or the US proposal,<sup>169</sup> which is very extensive and combines the USMCA Digital Trade chapter with the US–Japan Digital Trade Agreement that covers financial and insurance services too. In this sense, it would be interesting to observe whether and to what extent legal adaptation will occur in the multilateral forum of the WTO and depending on the political climate, whether it will lead to a real reform of services regulation in an increasingly data-driven economy.

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<sup>164</sup> See Paoletta (2019), *supra* note 161.

<sup>165</sup> Danny Kotlowitz & Tania Voon, *Telecommunications Services in the Trans-Pacific Partnership: Will the Mobile Roaming Provisions Benefit Tourists and Traders?*, 17(2) MELB. J. INT'L L. 404 (2016).

<sup>166</sup> See, e.g., Mira Burri, *The Governance of Data and Data Flows in Trade Agreements: The Pitfalls of Legal Adaptation*, 51 U.C. DAVIES L. REV. 65 (2017); Burri & Polanco, *supra* note 83.

<sup>167</sup> Updates on the electronic commerce initiative, *Electronic Commerce*, WORLD TRADE ORGANISATION, [https://www.wto.org/english/tratop\\_e/ecom\\_e/ecom\\_e.htm](https://www.wto.org/english/tratop_e/ecom_e/ecom_e.htm) (last visited May 26, 2020).

<sup>168</sup> Communication from the European Union, *Joint Statement on Electronic Commerce*, WTO Doc. INF/ECOM/22 (Apr. 26, 2019).

<sup>169</sup> Communication from the United States, *Joint Statement on Electronic Commerce*, WTO Doc. INF/ECOM/23 (Apr. 26, 2019).