THE EVOLVING LEGAL ARCHITECTURE SHAPING THE DIGITAL TRADE IN SERVICES

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Abstract

The Mode 1 trade in digital services is rapidly expanding, and yet the legal architecture around those services remains relatively thin. States are developing new rules in this policy area, but those efforts are still at an embryonic stage. In this article, we explain how digitalization is affecting the trade in Mode 1 services, how the legal architecture around those services has evolved so far, what states are starting to do to strengthen trade rules on digital services, and what states can do to further promote greater regulatory cooperation around traded digital services.

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I. INTRODUCTION: WHAT PELOTON TELLS US ABOUT THE TRADE IN SERVICES

Not long ago, if a person in Chicago wanted to take a spin class, they did so at a local gym or spin studio. That same person may continue to do so now, or they may get on a Peloton exercise bicycle and be led through that class by an instructor coaching them from the Peloton studio in London. What was not so long ago a hyper-localized exchange of service now takes place across international lines and is greatly facilitated by digitalization. Peloton is but one of the many examples of the proliferation of the digital trade in services. As the 2019 World Trade Report notes, since 2011 the services trade has expanded three times faster than the goods trade and the main driver of that expansion is the spread of digital technology.[1] From advertising to accounting to insurance to movie streaming, digital technologies are allowing a growing array of services that were once exchanged locally or nationally to be traded internationally.[2]

The growth in digitally-enabled and digitally-oriented services is so new that, to some degree, it has outpaced the construction of the international legal architecture that governs global trade.[3] The rules around the trade in goods have a much longer history and are much more fully enumerated than the rules around trade in services.[4] World Trade Organization (WTO) rules classify services into four "modes."[5] Mode 1, the focus of this paper, is the set of services that may be traded internationally without the buyer or seller crossing a border, such as when a European consumer streams video content from Netflix, which is based in the United States.[6] In this paper, our central research question is: how is the

1. WTO Secretariat, *World Trade Report 2019: The Future of Services Trade*, 14 (2019).
2. *Id.* at 29–31.
3. *See id.* at 92–93 (explaining legal services are restricted due to stringent licensing and qualification requirements).
4. See *infra* Part IV (B).
5. RACHEL E. FEFER, CONG. RSCH. SERV., R43291, US TRADE IN SERVICES: TRENDS AND POLICY ISSUES 2 (2020).
6. *Id.* Mode 2 refers to services in which the purchaser crosses a border to obtain the service, such as when a student travels internationally to purchase education. Mode 3 is when the trade in service is done by an international firm that has set up a "commercial presence" in the country. Mode 4 refers to when the seller of the service crosses the border to conduct the sale.

international legal structure that governs the Mode 1 digital trade in services evolving, and why is it evolving that way?

We view answering this question as relevant to and helpful for three areas of scholarship: trade, technology, and international law. The growth of digital services forces trade policymakers, trade scholars, and trade lawyers to grapple with how the changing nature of international commerce kaleidoscopically shifts many of the conceptual conundrums that have long been the *problématique* of trade politics. We also contend that the recommendations we make with regards to regulatory cooperation at the end of this article could be actionable first steps for promoting greater international coordination and thus ameliorate trade frictions. For technology scholars, we hope that our discussion of trade law is useful for thinking through the evolving nature of the legal and political tectonic forces that shape how new technologies are governed. With regards to legal scholarship, given the embryonic nature of the legal architecture around digital services, we believe that this policy area makes an excellent case study of how new technologies can shape the trajectory of extant bodies of law and how a legal system can adapt to those new technologies.

Our question is of more than academic interest; it is highly relevant commercially. In 2017, the trade in Mode 1 services was worth 3.7 trillion dollars.[7] In 2018, the trade in information and communication technology (ICT) services alone, not to mention all of the digitally-enabled services like the Peloton example, accounted for 71.4 billion dollars of U.S. exports.[8] Digitalization is becoming crucial to a wide range of services and is no longer just in traditionally digital realms like ICT. The United Nations Conference on Trade and Development (UNCTAD) found that half of all traded services are enabled by the technology sector.[9] In fact, these statistics likely understate the economic importance of the digital services trade; as the Congressional Research Service notes, "more U.S. services are traded internationally and many more service industry jobs in the United States are linked to international trade than traditional trade statistics indicate."[10]

To answer our question of how the international legal structure that governs Mode 1 digital trade in services is evolving and why it is evolving that way, we proceed as follows. First, we explain how digitalization has expanded the trade in Mode 1 services. It has done that by reducing the proximity burden, facilitating the trade in media content, enabling the servitization of manufacturing, and creating more demand for data-related services. Second, we examine the tensions between states' desire to jealously guard their policy sovereignty with their desire to promote commerce. Here, we particularly focus on national security imperatives and privacy concerns. Third, we analyze how the challenge of differentiating between states' use of legitimate regulations versus their deployment of disguised protectionism, paying special attention to the goods-services division and to digital service taxes. In each of these areas,

7. WTO Secretariat, *supra* note 1, at 22.
8. FEFER, *supra* note 5, at 4.
9. Joshua P. Meltzer, *Governing Digital Trade*, 18: S1 WORLD TRADE REV. s23, s28 (2019).
10. FEFER, *supra* note 5, at 11.

we are not trying to give a full account of their legal history (which would be impossible to do in a single article), but rather trying to show how they impact the burgeoning trade in digital Mode 1 services. Finally, we investigate new approaches to building the beginnings of an international legal architecture around this trade. We review regional trade agreements such as the Comprehensive Economic and Trade Agreement (CETA), the Comprehensive and Progressive Agreement for the Trans-Pacific Partnership (CPTPP), and the United States-Mexico-Canada Agreement (USMCA), as well as ongoing efforts at the WTO.[11] Finally, we advance a set of recommendations for moving regulatory cooperation on digital services trade forward, specifically arguing that states can use a combination of private standards, networked governance, mutual recognition, and binding treaties.

II. HOW INCREASING DIGITALIZATION IS EXPANDING THE TRADE IN SERVICES

A. Reducing the Proximity Burden

Unlike a good, which can be shipped, the purchase of a service often requires the buyer and seller to be in the same location. The consumer of a pair of shoes is not required to physically meet the producers of those shoes. The person getting a haircut *is* required to physically meet the person cutting their hair. This difference between goods and services is so common that it is frequently taken for granted, but it nevertheless has profound implications for the exchange of goods and services. The exchange of services places a significant "proximity burden" on buyers and sellers because it requires them, often at considerable expense, to come into close physical proximity with each other.[12] That expense can easily overwhelm whatever other benefits or costs savings might arise from obtaining that service from a provider that was farther away. Because of the proximity burden, many services, like haircuts, have traditionally been essentially untradeable, while most goods could easily be traded.[13] The proximity burden meant that, historically, the bulk of the international trade in services were Mode 3 services.[14] The growth of digital technologies like cloud computing, online task platforms, and better telecommunications services means that the proximity burden no longer applies to a whole range of services like document processing or financial advising that

11. We are examining the EU, the United States, and Canada specifically because they are likely to be the leading standard setters in this nascent legal area.

12. *See* Joseph Francois & Bernard Hoekman, *Services Trade and Policy*, 48 J. ECON. LIT. 642 (Sept. 2010) (surveying the literature on services trade); WTO Secretariat, *supra* note 1, at 9 (noting that "[t]rade in services has traditionally faced higher costs compared to trade in goods, largely due to the 'proximity burden' of services trade . . . .").

13. *See* Francois & Hoekman, *supra* note 12, at 5–6 (noting the proximity constraints for services transactions may require more local presence than is the case with goods).

14. *See id.* at 6 (explaining that there are services where the proximity burden remains strong enough to necessitate local delivery and "foreign ownership (establishment) is required (mode 3).").

it once inhibited, and has therefore made those services tradeable.[15] Given this, it is no surprise that the share of global trade in Mode 3 services is declining while the share of global trade in Mode 1 services is increasing.[16] Because of digitalization, even in industries like health care which traditionally have had very significant needs for proximity, a growing array of services can now be exported across borders.[17] New digital technologies that radically reduce that proximity burden mean that an increasing share of the trade in medical services can now take place through Mode 1 rather than Mode 4 (or not occurring at all given the costs of Mode 4).[18]

Beyond expanding the list of tradeable services, the fall in the proximity burden and the concomitant growth of Mode 1 services also opens up new opportunities within service industries. To establish a physical presence requires capital to build and maintain a brick-and-mortar location and so a greater ability to engage in Mode 1 services may reduce the often prohibitively high entry costs for small enterprises.[19] A reduced proximity burden may be particularly beneficial to small businesses and individuals from developing countries.[20] Digitalization can also help small businesses by aiding them in reaching customer bases outside of their home country, reducing their regulatory compliance costs, and obviating the hassles of physical travel to a different country.[21] In this way, digitalization is promoting what Baldwin has termed "telemigration."[22] It bears pointing out, though, that the extent to which reduced proximity burdens can actually be leveraged for the benefit of producers and consumers will be significantly influenced by the legal architecture around the international trade in these services.[23]

B. Facilitates the Trade in Media Content

Prior to digitalization, media content was, by necessity, attached to goods. The news was consumed via physical newspapers and magazines. Music was consumed via records or CDs. Movies took the form of VHS tapes or DVDs. Even via less tangible media such as television, technological limitations meant that the transmission of significant amounts of information across borders was

15. *See id*. at 4 (summarizing studies that found information technology helped accelerate productivity in a range of service industries, including financial services).

16. WTO Secretariat, *supra* note 1, at 26.

17. *See id.* at 101 (describing how wireless networking and robotic technology could allow for telesurgery).

18. Similar dynamics augmented by remote learning arising from the coronavirus pandemic may happen in education.

19. WTO Secretariat, *supra* note 1, at 37. This may be why small and medium-sized enterprises in services are able to expand into international markets more quickly than their 1980s predecessors or their manufacturing counterparts today.

20. Richard Baldwin, *Digital Technology and Telemigration*, FIN. EXPRESS (Oct. 9, 2019), https://thefinancialexpress.com.bd/print/digital-technology-and-telemigration-1570632591.

21. *See id*. (noting that telemigration allows emerging market workers to directly exploit their comparative advantage of lower labor costs).

22. RICHARD BALDWIN, THE GLOBOTICS UPHEAVAL: GLOBALIZATION, ROBOTICS, AND THE FUTURE OF WORK 115–46 (2019).

23. *See, e.g.*, WTO Secretariat, *supra* note 1, at 173 (examining research into how regional trade agreements are affected by different types of legal architectures).

costly. Digitalization has changed all of that. News, television, music, and virtually every other form of audiovisual entertainment has been divorced from physical goods, and thus is now more accurately thought of as a service and can more easily be transmitted across international lines. The extent to which media content is a service and the extent to which it gets traded has increased substantially.[24] This can clearly be seen in U.S. export statistics. From 2012 to 2017, U.S. exports of film, music, and software increased from approximately 9 billion to 22 billion.[25] Some aspects of media content, such as copyright, are already robustly governed by international trade law,[26] but, as we will discuss below in relation to the China-Audiovisuals case, in other areas the international legal structure is still in the early stages of construction.

C. Enables the Servitization of Manufacturing

An important aspect of the proliferation of the digital services trade involves the "servitization of manufacturing," i.e., the increasing degree to which manufactured goods require the use, sale, and/or complementary provision of services. These can include the services that have traditionally been associated with manufacturing, such as finance, transport, and R&D, but can also be relatively new services like cloud computing.[27] 3D printing, to use just one example, demonstrates the drivers of this trend.

The manufacturing sector is increasingly reliant on service inputs, services within the manufacturing process (R&D, design, marketing), and services sold bundled with goods.[28] For example, it was once the case that hearing aids were very labor-intensive to produce, relatively costly, not necessarily comfortable because they could not be customized for the user, and potentially embarrassing to the user since their size meant that they were difficult to hide within the ear canal.[29] Then, in the span of just over a year in the mid-2000s, the industry underwent an enormous and rapid transformation; virtually the entire industry transitioned from traditional manufacturing to 3D printing.[30] Now, a user would get their ear canal scanned by their audiologist, a digital copy of that scan would be used to create a specialized computer-aided design file for the shell of their hearing aid, and then that hearing aid would get produced and sent to them by

24. SUSAN LUND & JAMES MANYIKA, HOW DIGITAL TRADE IS TRANSFORMING GLOBALISATION 3 (Int'l Ctr. for Trade & Sustainable Dev. & World Econ. Forum, 2016).

25. WTO Secretariat, *supra* note 1, at 29.

26. SHAYERAH ILIAS AKHTAR ET AL., CONG. RSCH. SERV., RL34292, INTELLECTUAL PROPERTY RIGHTS & INTERNATIONAL TRADE 15 (2020).

27. Magnus Lodefalk, *Servicification of Firms and Trade Policy Implications*, 16 WORLD TRADE REV. 59, 60 (2013).

28. WTO Secretariat, *supra* note 1, at 104.

29. *See generally* Caroline Freund et al., *Is 3D Printing a Threat to Global Trade? The Trade Effects You Didn't Hear About* 4–5 (World Bank Group, Policy Research Working Paper 9024, 2019); Trade Talks, *Will 3D Printing Increase Trade? Hear All About It*, PETERSON INST. INT'L ECON. (Nov. 12. 2019), https://www.tradetalkspodcast.com/podcast/110-will-3d-printing-increase-trade-hear-all-about-it; Stephen McBride, *This Technology Everyone Laughed Off Is Quietly Changing the World*, FORBES (Jul. 15, 2019, 8:29 AM), https://www.forbes.com/sites/stephenmcbride1/2019/07/15/this-technology-everyone-laughed-off-is-quietly-changing-the-world.

30. *See, e.g.*, Freund et al., *supra* note 29, at 7 (finding an increase in trade for hearing aids relative to comparable goods around 2007, when 3D printing technology was being adopted).

the manufacturer, which in practice were typically located in Denmark and Switzerland, as the firms in those countries were early adopters of 3D printing.[31] This switch to 3D printing allowed hearing aids to be customized for each user (thus reducing discomfort and stigma), improved the sonic quality of the hearing aid, and, at the same time, lowered costs by reducing the production process from nine steps to three.[32] Because these hearing aids were both better and more affordable (due to the new servitization of the product), the international trade in them increased by 58% after the adoption of 3D printing.[33] An analysis of thirty-five other products showed similar results suggesting that this was not an idiosyncrasy of hearing aids.[34]

3D printing and other advanced services are not just changing a handful of specialty items either. They undergird many aspects of the automation and mechanization that have promoted gains in manufacturing output.[35] They can reduce production costs; GE Aviation says 3D printing has made the production of some of its jet fuel nozzles 75% cheaper.[36] For a variety of products, like those jet fuel nozzles, much of the value added is in the creation of the computer-aided design file, rather than the creation of the physical product.[37] It merits repeating here that this servitization is predicated upon enormous cross-border data flows, flows that may be impeded by data localization rules and especially if those rules get broader and stricter.[38]

Services can help manufacturing firms' competitiveness by allowing them to bundle services with goods, helping them in using data to reduce negative environmental and social impacts, and assisting them in gaining entry to foreign markets via distribution and matchmaking services.[39] Furthermore, once goods-oriented networks and relationships are established, they make it easier to then trade services and so there is complementarity between the goods and services trade.[40] Servitization may have important distributional implications as well. As the 2019 World Trade Report cautions, "AI, 3D printing and advanced robotics could reduce the role of labor as a source of comparative advantage. . . ."[41] This discussion shows just a few ways in which servitization can change where and how value gets added, and so, as servitization accelerates, the legal architecture around it will only become more important.

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31. *See* McBride, *supra* note 29, at 3 (demonstrating how Invisalign, an orthodontic service, uses a similar business model).

32. Freund et al., *supra* note 29, at 4.

33. *Id.* at 2.

34. *Id.* at 3.

35. WTO Secretariat, *supra* note 1, at 16.

36. Richard D'Aveni, *The 3-D Printing Revolution*, HARV. BUS. REV., May 2015, at 44.

37. R.S. Neeraj, *Trade Rules for the Digital Economy: Charting New Waters at the WTO*, 18 WORLD TRADE REV. 121, 126 (2019).

38. Lodefalk. *supra* note 27, at 67.

39. *Id.* at 61.

40. WTO Secretariat, *supra* note 1, at 57; Andrea Ariu et al., *The Interconnections Between Services and Goods Trade at the Firm-Level*, 116, J. INT'L ECON. 173, 174 (2019). As will be discussed below in more detail, an increasing array of products have both a good component and a service component which, however pleasing that might be to the consumer, raises thorny questions in terms of legal architecture and the GATT/GATS division.

41. WTO Secretariat, *supra* note 1, at 105.

D. Creating Demand for Data-Related Services

The importance of data in the commercial sphere has become obvious to the point of being cliché, but it is nevertheless worth thinking through the ways in which that overarching phenomenon connects to the increasing trade in digital services. Digitalization has created a greater quantity of data, a greater demand for data-related services, and a greater need to move data across international borders.[42]

Many of these changes, such as digitized media and manufacturing servitization, are built around large amounts of data.[43] Firms that have long been in the business of leveraging data are obviously helped by this. An insurance firm now has a greater ability to gather information about its users in different regions and compile local data sets into a global overview of their customers and so can respond to changes in risk.[44] But this can be seen in sectors of the economy that are usually thought of as being very traditional. For example, John Deere purchased an AI start-up, Blue River Technology, that uses machine learning (based on huge quantities of data) to engage in "precision agriculture," thereby reducing pesticide and fertilizer usage.[45]

As all of this new data has been generated, two new services have become especially significant: cloud computing and platform provision. Cloud-computing essentially amounts to the outsourcing of computing power.[46] Business owners increasingly need to leverage computing power to analyze those large new flows of data. They could buy servers and hire IT personnel, but that is expensive and probably lies well outside of their core competencies. So instead, they effectively rent that computing power from a company like Microsoft or Amazon and pay based on how much computing power they use.[47] As the amount of data generated grows, the computing power needed to process all that data grows with it, and so the major cloud-computing providers become more necessary and thus more highly demanded over time.[48]

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42. DAN CIURIAK & MARIA PTASHKINA, THE DIGITAL TRANSFORMATION AND THE TRANSFORMATION OF INTERNATIONAL TRADE 6 (Int'l Ctr. for Trade & Sustainable Dev. & Inter-Am. Dev. Bank, 2018). ("Data flows are not, for the most part, digital transactions, because, except where data is a product, there is no payment and no paper trail of invoices and receipts. These flows are, however, integral to—and essential enablers of—digital and digitally enabled trade.").

43. *Id.* at 1.

44. Meltzer, *supra* note 9, at 29.

45. James Vincent, *John Deere is Buying an AI Startup to Help Teach its Tractors How to Farm*, THE VERGE (Sept. 7, 2017, 12:52 PM), https://www.theverge.com/2017/9/7/16267962/automated-farming-john-deere-buys-blue-river-technology.

46. *See* Renee Berry & Matthew Reisman, *Policy Challenges of Cross-Border Cloud Computing*, 4 J. INT'L COM. & ECON. 1, 28 (2012) (evaluating the threat that cloud computing poses to India's IT outsourcing business).

47. *Id.* at 3, 5.

48. Even other large firms in tech services rely on them. Once Netflix was heavily relying on streaming instead of mailing DVDs, it needed a genuinely massive ability to actually handle and manage all of that data. Who had that infrastructure? Amazon. Without cloud-computing via AWS, there is no Netflix. *See* Max Slater-Robins, *Netflix Finally Transitioned to the Cloud. That's Huge . . . for Amazon,* SLATE (Feb. 12, 2016, 4:42 PM), https://slate.com/business/2016/02/netflix-completes-seven-year-transition-to-aws.html; Jon Brodkin, *Netflix Finishes Its Massive Migration to the Amazon Cloud: After Move to Amazon, Only the DVD Business Still Uses Traditional Data Center*, ARS TECHNICA (Feb. 11, 2016, 10:30 AM), https://arstechnica.com/information-

Platforms are just as important as cloud-computing. A standard definition of a platform is a business that connects producers and consumers.[49] In other words, it is a service provider and the service it is providing is reducing the transaction costs associated with information exchange for both the producers and the consumers.[50] To give just two examples, Google connects the producers of the world's knowledge to anyone who wants to consume that knowledge while Apple's App Store connects producers of apps with app purchasers. Given their centrality between producers and consumers, a wide array of other economic actors needs to interface with these platforms.

Much in the way that global trade in goods depends on railroads and shipping lines, digital trade depends on global data flows to move information. Data flows are integral to cloud computing, streaming sites, and Internet of Things-connected devices like smart speakers.[51] As the Coalition of Services Industries points out, "data is the lifeblood of digital services and the entire digital ecosystem."[52] As e-commerce becomes more prevalent and increasingly lucrative, so do data flows, which are now estimated to be more valuable than the global trade in goods.[53] Because digital trade is so dependent upon the free flow of data, the development of e-commerce correlates to a rise in the importance of data streams.[54] Firms need this data to move across borders. Data transfers, even those that are exclusively between different parts of the same multinational corporation, are likely to cross borders and encounter different domestic regulatory frameworks.[55]

Data policy frictions like privacy regulations, source code access, and localization requirements can strongly impede those cross-border data flows.[56] Navigating different regulatory frameworks in each country where a service exporter wishes to do business introduces a high level of friction to the trade in services.[57] The difficulties of doing business in the current regulatory landscape are made concrete by the potential effects of reducing these requirements. Estimates suggest that "if economies lifted their restrictions on the cross border flow of data, the imports of services would rise on average by 5 per cent across

technology/2016/02/netflix-finishes-its-massive-migration-to-the-amazon-cloud/. *See also* Alex Hern, *Amazon Web Services: The Secret to the Online Retailer's Future Success*, GUARDIAN (Feb. 2, 2017, 2:00 PM), https://www.theguardian.com/technology/2017/feb/02/amazon-web-services-the-secret-to-the-online-retailers-future-success (discussing AWS).

49. *See generally* Berry & Reisman, *supra* note 46, at 3–4 (describing types of cloud services and platforms).

50. *Id.*

51. *Id.*

52. Hannah Monicken, *Business Groups Emphasize Data Flows as E-Commerce Talks Resume*, INSIDE U.S. TRADE (June 28, 2019, 4:38 PM), https://insidetrade.com/daily-news/business-groups-emphasize-data-flows-e-commerce-talks-resume.

53. James Manyika & Michael Chui, *By 2025, Internet of Things Applications Could Have $11 Trillion Impact*, FORTUNE (July 22, 2015, 9:53 AM), https://fortune.com/2015/07/22/mckinsey-internet-of-things.

54. *See id.* (demonstrating the need for analytical software processing of data generated by oil platform sensors for "predictable maintenance issues").

55. Berry & Reisman, *supra* note 46, at 31.

56. Susan Aaronson, *Why Trade Agreements Are Not Setting Information Free: The Lost History and Reinvigorated Debate over Cross-Border Data Flows, Human Rights, and National Security*, 14 WORLD TRADE REV. 671, 674 (2015).

57. *Id.*

all economies. . . ."[58] Troublingly for these firms, the politics of data management have ossified in a way that makes international coordination more difficult.[59] As one representative of the Information Technology Industry Association argues, data privacy, more than any other issue, has "taken on a theological quality," and so even when states are not that divergent in the details, they so fundamentally distrust each other's theoretical views on privacy that locking in agreement on privacy policy becomes extremely difficult.[60]

III. THE TENSION BETWEEN MAINTAINING SOVEREIGNTY AND PROMOTING COMMERCE

Facilitation of commerce demands lowering barriers and standardizing rules across borders, while a desire for domestic sovereignty requires a self-contained set of distinct rules. The complexities of free trade agreements are a testament to this complication. Each parties' motivated defense of their domestic authority conflicts with the shared authority necessary to move goods and services across borders.[61] These contradictory desires for economic globalization and political sovereignty are implicated in the emerging growth of digital trade.[62] Concerns about sovereignty play out as technical, structural, and political frictions, all stemming from a fundamental desire to retain domestic authority and sovereignty's incompatibility with the requisite necessities of international trade.[63] With regards to the trade in digital services, these tensions manifest in three areas: national security exceptions, privacy and data localization, and technical frictions.

A. National Security Exceptions

Perhaps more than any other trade policy area, national security exceptions highlight the tension between states wanting to jealously guard their sovereignty but also wanting to promote commerce.[64] National security exceptions have long been understood as a de facto *carte blanche* that states can invoke in trade policy.[65] The exact language of these provisions differs from one agreement to the next, but the principle remains the same: governments do not have to disclose vital security information, nor can they be blocked from taking measures that

58. WTO Secretariat, *supra* note 1, at 96.

59. *See* Aaronson, *supra* note 56, at 690 (discussing the conflicting goals of the EU, US, and other WTO members).

60. Hannah Monicken, *Industry: U.S., EU in Practice Not Far Apart on Privacy in E-Commerce Talks*, INSIDE U.S. TRADE (May 17, 2019, 5:23 PM), https://insidetrade.com/daily-news/industry-us-eu-practice-not-far-apart-privacy-e-commerce-talks.

61. *See* Aaronson, *supra* note 56 at 677–79 (evaluating the pros and cons of utilizing the global trade regime and WTO as the method for promulgating binding rules about flows of information across borders).

62. *Id.*

63. *Id.*

64. *See generally* Roger P. Alford, *The Self-Judging WTO Security Exception*, 2011 UTAH L. REV. 697, 697–759 (2011) (discussing the WTO and national security exception).

65. *Id.* at 698 ("Given this impressive record, it is surprising to find in the WTO an unreviewable trump card, an exception to all WTO rules that can be exercised at the sole discretion of a Member State—the WTO security exception.").

protect their citizens, particularly while a crisis is unfolding.[66] The US export control regime in the late 1940s is an early example of invoking the national security exception in the General Agreement on Tariffs and Trade (GATT) regime. Embroiled in an escalating conflict with the Soviet Union, the United States facilitated free licensing of military goods to allies in Western Europe while controlling the export of those same critical goods to Eastern Europe.[67] This regime clearly violated the most favored nation principle, but since it was employed to protect U.S. security interests, the United States was within its rights, according to the GATT Council.[68]

Most Free Trade Agreements (FTAs), including every FTA signed by the United States up to the present, use identical or similar language to the national security exceptions of the GATT and General Agreement on Trade and Services (GATS).[69] These Articles allow a signatory to "tak[e] any action which it considers necessary" in order to protect itself.[70] The critical adjectival phrase "it considers necessary" has sparked significant legal debate. The United States and Russia, among others, contend that this phrase indicates a self-judging provision.[71] That is, only the state itself can determine whether the invocation of the exception is justified.[72]

If this is the case, then any measure that can be interpreted as vital to national security is non-justiciable, and thus, the WTO Dispute Settlement Panel cannot rule on its legality.[73] In copying this language, signatories to WTO agreements and other FTAs or BITs grant themselves *carte blanche* to abuse the agreement when even the vaguest link to national security presents itself.[74]

This broad interpretation of the blanket exemption held true for the first few decades of the GATT until 1975, when Sweden employed the exception to protect their domestic footwear industry, claiming that shoe manufacturing was indispensable for their emergency economic planning.[75] The GATT was not called upon to issue a ruling and, in fact, the GATT/WTO did not issue a panel ruling on the use of the national security exception until 2019.[76] In 1982, the GATT Council recognized the potentially damaging effects of security-motivated trade measures but essentially agreed with the European community's

66. *Id.* at 702–03.
67. *Id.* at 709.
68. *Id.* at 709–10.
69. *Id.* at 735–36.
70. *Id.* at 703.
71. William Alan Reinsch, *The WTO's First Ruling on National Security: What Does It Mean for the United States?*, CTR. FOR STRATEGIC & INT'L STUD. (April 5, 2019), https://www.csis.org/analysis/wtos-first-ruling-national-security-what-does-it-mean-united-states.
72. Alford, *supra* note 64, at 704.
73. *See* Mona Pinchis-Paulsen, *Trade Multilateralism and U.S. National Security: The Making of the GATT Security Exceptions*, 41 MICH. J. INT'L L. 109 (2020) (giving an excellent review of non-justiciability and the burgeoning use of security exceptions).
74. *See* Steve Masiello et al., *Commentary, Significant Changes In Government Contracts Domestic Preference Requirements May Be On The Horizon*, 59:12 GOV'T CONTRACTOR 79 (2017) ("The president, therefore may significantly reduce the applicability of the TAA to federal procurements by determining that the TAA does not apply for national security reasons.").
75. Alford, *supra* note 64, at 704.
76. Daria Boklan & Amrita Bahri, *The First WTO Ruling on National Security Exception*, 19 WORLD TRADE REV. 123, 135 (2020).

argument that invoking Article XXI "required neither notification, [nor] justification, nor approval," an interpretation of the security exemption based on "thirty-five years of implementation of the General Agreement."[77] That interpretation has largely stood and continues to receive support from many states.[78]

After a controversial series of decisions regarding Argentine measures to mitigate an economic crisis, many states explicitly invoked the self-judging nature of national security exception in trade and foreign investment treaties to protect their executives from a review of their security measures.[79] While not all treaties expressly forbid tribunal review, trade agreements are shifting towards domestic control of national security exceptionalism, rather than standardizing tribunal review.[80] Domestically, executives are allowed to use national security as a sort of "unreviewable trump card."[81] These powers notwithstanding, states have often shown at least some restraint in using these national security exceptions because, given the ample legal room for maneuver that surrounds them, a state that egregiously uses them would find itself a target of these kinds of exceptions in retaliation as well.[82] The overuse of these exceptions could undermine the multilateral system, which presents another check to their overuse for those states that believe that the system as a whole is in their best interest.[83]

The Trump Administration notably experimented with this executive authority and largely dropped any pretense of restraint. In 2018, President Trump used Section 232 of the Trade Expansion Act of 1962 to impose tariffs on imports of steel.[84] In an ensuing federal case concerning the Trump Administration's unprecedented weaponization of the national security exception, a judge somewhat facetiously asked whether the President could declare peanut butter a matter of national security and, thus, subject to tariffs.[85] The President's legal team dodged the question.[86] The court then declared that it would be "an improper inquiry" for the court to analyze whether the steel and aluminum tariff "has a nexus" to national security, effectively answering their own hypothetical in the affirmative.[87] The ruling made it clear that while some facets of the tariff process are subject to scrutiny, the President is essentially the

77. *Decision Concerning Article XXI of the General Agreement*, L/5426 10 (Dec. 2, 1982), GATT B.I.S.D. (29th Supp.) (1983).

78. *See* Masiello, *supra* note 74, at ¶ 93 (explaining, in 2017, that executives have broad authority to invalidate agreements under the modern GATT/WTO national security exception rules).

79. Karl P. Sauvant et al., *The Rise of Self-Judging Essential Security Interest Clauses in International Investment Agreements*, in 188 COLUM. CTR. ON SUSTAINABLE INV., PERSPS. ON TOPICAL FOREIGN DIRECT INV. ISSUES (2016).

80. J. Benton Heath, *The New National Security Challenge to the Economic Order*, 129 Yale L.J. 1020, 1059 (2020).

81. Alford, *supra* note 64, at 698.

82. Van den Bossche & Akpofure, *supra* note 74, at 4–5.

83. *Id*.

84. Proclamation No. 9705, 11 C.F.R. 2811 (2018).

85. *See* Glenn Thursh, *Trump's Use of National Security to Impose Tariffs Faces Court Test*, N.Y. TIMES (Dec. 19, 2018), https://www.nytimes.com/2018/12/19/us/politics/trump-national-security-tariffs.html ("'Could he, say, put a tariff on peanut butter?' Judge Kelly asked, peering over her glasses.").

86. *Id*.

87. Transpacific Steel LLC v. United States, 466 F. Supp. 3d 1246, 1254 (Ct. Int'l Trade 2020), *rev'd*, 4 F.4th 1306 (Fed. Cir. 2021).

sole arbiter of national security.[88] Given the paucity of rulings on the national security exception, executives can interpret the exception as broadly as they wish, even potentially threatening the free trade of peanut butter. At least through September 2021, the Biden administration has so far been reluctant to roll back the use of 232 protectionism.[89]

Though 232 has generally been used in more economically traditional sectors like steel and aluminum, the extent to which the national security argument—however specious—has been used to advance arguments for maximum sovereignty, even at the costs of economic efficiency, points to some of the disagreements that may arise as digital services like cloud computing promote commerce but also potentially have national security implications.[90]

International rulings in recent years have added a few small limitations to the use of security exceptions. In *Russia—Measures Concerning Traffic in Transit*, the Panel Report narrowed the interpretation of Article XXI of GATT, saying that invocations of the exception are subject to review and striking down the oft-touted non-justiciable argument.[91] This ruling means that Article XXI of GATT and the equivalent language in GATS are subject to review by WTO panels.[92] The Panel decision states that "it has jurisdiction to determine whether the requirements of Article XXI (b)(iii) of the GATT 1994 are satisfied."[93] While the decision does assuage some concerns about protectionism, the ruling does not lay to rest all disputes about this blanket exception.[94] In order for the Panel to determine that it had jurisdiction, it examined the three subsections of Article XXI(b), which specify occasions in which the exception can be cited.[95] While this subparagraph includes the rather broad situation "emergency in international relations" and the potentially limitless "goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment," these three subsections do limit states' ability to invoke the exception.[96] The WTO Panel reasoned that by including these three specific situations in which the Article applies, the original drafters indicated the

88. *Id*.

89. On the abuse of Section 232, *see* Scott Lincicome & Inu Manak, *Protectionism or National Security? The Use and Abuse of Section 232*, CATO INST. (Mar. 9, 2021), https://www.cato.org/policy-analysis/protectionism-or-national-security-use-abuse-section-232.

90. Hedaia-t-Allah Nabil Abd Al Ghaffar, *Government Cloud Computing and National Security*, REV. ECON. & POL. SCI. (Mar. 23, 2020), https://www.emerald.com/insight/content/doi/10.1108/REPS-09-2019-0125/full/html.

91. Panel Report, *Russia—Measures Concerning Traffic in Transit*, ¶7.56, WTO Doc. WT/DS512/R, (adopted Apr. 5, 2019) [hereinafter Traffic Panel Report].

92. *Id*.

93. *Id*. It is important to note that the Panel was not second-guessing Russia's determination of its national security needs but rather was merely stating that the situation was within one of the three subsections of Article XXI (b)(iii) that justified an exception.

94. *See Members Adopt National Security Ruling on Russian Federation's Transit Restrictions*, WTO (Apr. 26, 2019), https://www.wto.org/english/news_e/ news19_e/dsb_26apr19_e.htm ("The United States, however, found the panel's analysis unpersuasive and problematic for systemic reasons.") [hereinafter *Ruling on Transit Restrictions*].

95. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154.

96. *Decision Concerning Article XXI of the General Agreement*, L/5426 10 at (b)(iii) (Dec. 2, 1982), GATT B.I.S.D. (29th Supp.) (1983).

limitations of the exception.[97] Surely, if pleading national security can only exempt a state in certain cases, then the exception could not have been intended to be completely self-judging. Instead, these subsections enumerate situations which can be objectively determined by a WTO Panel, meaning that the WTO's national security exceptions are not non-justiciable.[98]

However, a fair number of national security exceptions are not tempered by these subparagraphs. The CPTPP and USMCA, notably, include the "which it considers" self-judging clause without the limitations of specific occasions in which national security should apply.[99] Without these situations clearly enumerated, it is far easier for countries to argue that the exception is completely self-judging.[100] Furthermore, the reaction to the WTO's ruling by prominent Members suggests that the self-judging exception is far from laid to rest.[101] The United States has indicated its unwillingness to accept this limitation of what it argues is a sovereign right, condemning the finding as "seriously flawed" and "premature."[102] Any attempts to issue rulings on U.S. invocations of national security exceptionalism or to negotiate narrower security exceptions are likely to be met with stiff resistance.[103] Both within the WTO and in other FTAs, it seems likely that the broader applicability of the national security exception will continue to be permitted.[104] That could have major implications for certain digital services like machine learning, data storage, and cloud computing that could plausibly intersect with national security considerations.[105]

As the *Russia-Measures Concerning Traffic* case shows, it is not only the United States that has increased its use of national security exceptions. Globally, there has been a distinct increase in citations of national security as the legal rationale for restrictive trade and foreign investment measures.[106] One reason for this uptick is the encroachment of national security into matters other than the purely militaristic.[107] Modern security threats can include "economic crises, cybersecurity, infectious disease, climate change, transnational crime, and corruption."[108] At the inception of the GATT, national security threats were

97. Traffic Panel Report, *supra* note 91, at ¶7.82.

98. *Id.*

99. The Agreement between the United States of America, the United Mexican States, and Canada, Nov. 30, 2018, 19 USC 4511, art. 32.2; Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Aus.-Brun.-Can.-Chil.-Jap.-Malaysia-Mex.-N. Zea.-Per.-Sing.-Viet., Mar. 8, 2018, art. 29.2 [hereinafter CPTPP].

100. *See* Steven Schill & Robyn Briese, *"If the State Considers": Self-Judging Clauses in International Dispute Settlement*, 13 MAX PLANCK Y.B. UNITED NATIONS L. 61 (2009) (detailing the effect of "self-judging clauses" contained in international agreements).

101. WTO Secretariat's Info. and External Rels. Div., *supra* note 94.

102. Tom Miles, *U.S. Says WTO National Security Ruling 'Seriously Flawed,'* REUTERS (Apr. 26, 2019, 11:39 AM), https://www.reuters.com/article/us-usa-trade-wto/u-s-says-wto-national-security-ruling-seriously-flawed-idUSKCN1S21V9.

103. *See id.* (noting the objections of the U.S.).

104. S*ee id.* (highlighting the U.S.'s history of pushing for broad self-governance of FTAs).

105. Al Ghaffar, *supra* note 90, at 1.

106. Joel Slawotsky, *The National Security Security Exception in US-China FDI and Trade*, 6 CHINESE J. COMP. L., 228, 230 (2018); Pinchis-Paulsen, *supra* note 73, at 130–34.

107. *See* Al Ghaffar, *supra* note 90 (noting the encroachment of national security issues into the realm of cloud computing).

108. Heath, *supra* note 80, at 1024.

immediately recognizable by the movement of troops or fissionable materials.[109] Now, non-state actors, actor-less threats, and emerging technologies are all critical parts of national security.[110]

Digital trade is particularly vulnerable on this front. With broader applications of national security, "nearly every online business, data transfer, or emerging technology" has the potential to warrant use of a security exception.[111] This means that the trade rules which would facilitate the growth of digital trade can be waived in any instance that a country feels would threaten their data privacy, a critical piece of technology, or any number of other security justifications.[112] The growth of digital trade, and the benefits therein, could be stymied by abuse of this loophole.[113] The WTO may have narrowed the scope of the security exception slightly, but broader definitions of national security allow governments more instances in which sovereignty can supersede trade obligations, and countries appear more willing now than ever before to use that opportunity.[114]

Finally, digital services at least touching upon national security and geopolitics is not entirely hypothetical or in the future. To give just one example, Microsoft works closely with both the United States government and the Chinese government.[115] Microsoft developed a customized version of the Windows 10 operating system for local governments and state-owned enterprises in China that allowed them to use their own encryption and localize data.[116] Microsoft has trained many of China's best AI researchers and has helped many Chinese AI startups.[117] In fact, it is so prominent in that area that, as one researcher put it, Microsoft Research Asia "is considered the West Point for Chinese premium tech talent."[118] West Point is not entirely a metaphor either. Microsoft helped a university run by the Chinese military do cutting edge

109. *Cf.* The White House, *A National Security Strategy for a New Century*, HOMELAND SEC. DIGIT. LIBR. (Oct. 1998), https://www.hsdl.org/?view&did=2959 (detailing the United States' modern approach to national security).

110. *See* Heath, *supra* note 80, at 1031–33 (detailing new national security challenges).

111. Robert D. Williams, *The Future of America's National Security and Innovation Ecosystem*, LAWFARE (Nov. 30, 2018, 3:01 PM), https://lawfareblog.com/balance-future-americas-national-security-and-innovation-ecosystem.

112. *See* Joshua P. Meltzer, *Cybersecurity, digital trade, and data flows: Re-thinking a role of international trade rules* (Glob. Econ. and Dev. at Brookings., Working Paper No. 132, 2020) (considering new international trade rules in the advent of digital trade and the use of national security exceptions).

113. *Id.*

114. *Cf. Ruling on Transit Restrictions*, *supra* note 94 (detailing the U.S.'s resistance to the decision accepting a narrow readings of national security exceptions).

115. Ma Si, *New Windows 10 Courts Government Deals*, CHINA DAILY (Mar. 21, 2017), http://www.chinadaily.com.cn/bizchina/tech/2017-03/21/content_28621478.htm; He Wei, *Microsoft Unveils Windows Tailored for Government Customers*, CHINA DAILY (May 25, 2017, 6:51 AM), https://www.chinadaily.com.cn/business/tech/2017-05/25/content_29487296.htm.

116. Wei, *supra* note 115.

117. Nicholas Thompson & Ian Bremmer, *The AI Cold War That Threatens Us All*, WIRED (Oct. 23, 2018, 6:00 AM), https://www.wired.com/story/ai-cold-war-china-could-doom-us-all.

118. Will Knight, *Microsoft's Roots in China Have Positioned It to Buy TikTok*, (Aug. 6, 2020, 11:30 AM), https://www.wired.com/story/microsofts-roots-china-positioned-buy-tiktok.

research on AI and facial recognition.[119] Microsoft also won the $10 billion JEDI contract to provide cloud computing services for the U.S. military.[120] One could imagine a plethora of ways in which these very sensitive and very significant services being supplied to both the U.S. and Chinese governments by the exact same company could present thorny dilemmas with respect to sovereignty and commerce. As digital services continue to grow, examples like this will become legion.

B. Privacy and Data Localization

Cross-border movement of data is helpful to businesses that span borders, but some countries assert that their citizens' privacy can only be properly protected if those citizens' data is kept in-country and stored according to very specific requirements, and so those countries want to hold on to as much policy sovereignty as possible with regards to privacy and data location, even if it abrades international business.[121] Privacy and data localization are thus good examples of digital services policy areas that affect the sovereignty-versus-commerce-facilitation conundrum.

Another iteration of the tension between facilitating trade and respecting domestic authority emerges in policy disagreements about privacy and data localization.[122] European states began enacting broader privacy rights and regulations in the 1970s.[123] The history of fascist regimes and the Soviet-backed authoritarian governments in Eastern Europe during the Cold War era made Europeans (both in the 1990s context and today's context) particularly sensitive to privacy as a right.[124] As part of the construction of the single market, the EU created a unified Data Protection Directive in 1995 but left implementation up to the member states.[125] By the 2010s, differing implementations started to be viewed as problematic and there was a widespread sense that data protection regulations needed to be significantly updated, given advances in technology and globalization post-1995.[126] The new EU law that replaced the 1995 Data Protection Directive was the General Data Protection Regulation (GDPR) which

119. Madhumita Murgia & Yuan Yang, *Microsoft Worked with Chinese Military University on Artificial Intelligence*, FINANCIAL TIMES (Apr. 10, 2019), https://www.ft.com/content/9378e7ee-5ae6-11e9-9dde-7aedca0a081a.

120. Kate Conger et al., *Microsoft Wins Pentagon's $10 Billion JEDI Contract, Thwarting Amazon,* N.Y. TIMES (Oct. 25, 2019), https://www.nytimes.com/2019/10/25/technology/dod-jedi-contract.html; Tom Simonite, *Microsoft Is the Surprise Winner of a $10B Pentagon Contract*, WIRED (Oct. 25, 2019, 8:45 PM), https://www.wired.com/story/microsoft-surprise-winner-dollar10b-pentagon-contract.

121. Brad Smith, *Answering Europe's Call: Storing and Processing EU Data in the EU*, MICROSOFT: EU POL'Y BLOG (May 6, 2021), https://blogs.microsoft.com/eupolicy/2021/05/06/eu-data-boundary.

122. On data policy disagreements, particularly with regards to privacy, human rights, and national security, *see* Aaronson, *supra* note 57, at 675–79.

123. STEPHEN P. MULLIGAN et al., CONG. RSCH. SERV., R45631, DATA PROTECTION LAW: AN OVERVIEW 41 (2019).

124. *See* Olivia B. Waxman, *The GDPR Is Just the Latest Example of Europe's Caution on Privacy Rights. That Outlook Has a Disturbing History*, TIME (May 24, 2018, 7:12 PM), https://time.com/5290043/nazi-history-eu-data-privacy-gdpr (tracing modern European privacy law back to the World War II and Cold War eras).

125. Mulligan et al., *supra* note 123, at 41.

126. *Id.*

went into effect in May 2018.[127] The GDPR is an attempt to strengthen consumers' privacy rights by requiring that digital firms get clear, transparent consent to collect data from users, requiring that users be allowed to have data portability, and requiring those firms to respect users' "right to be forgotten" by deleting data the users no longer want available on the digital firms' platforms.[128]

In contrast to the EU, which tends to place freedom of expression and privacy rights on the same footing, the United States tends to place freedom of expression above privacy rights.[129] As importantly, United States privacy regulations tend to be written more narrowly.[130] Whereas "U.S. data privacy statutes generally are sector-specific, European privacy regulations have generally concerned *any* entity's accumulation of large amounts of data."[131] But again, it bears noting that despite the headline-level differences in their position, the United States and the EU economies are highly integrated and data already can flow between them through the EU-US Privacy Shield.[132] Under the Privacy Shield agreement, U.S. firms that wanted to transfer data from the EU self-certified that they adhere to twenty-three privacy principles determined by the EU.[133] The GDPR's standards are higher than those of the Privacy Shield, and so U.S. firms effectively needed to comply with both the Privacy Shield and the GDPR.[134] Adapting to these higher standards of privacy is largely accepted as a cost of business in the European market, and the GDPR's more stringent policies are understood as required to participate fully in this lucrative realm.[135] As the Court of Justice of the European Union invalidated the Privacy Shield framework in July of 2020, both the United States and the EU are likely to pursue alternative avenues for continued data cooperation, and the involved parties are committed to maintaining a degree of cooperation between varying privacy regimes.[136]

U.S. tech firms have made some policy changes to more fully come into compliance with the GDPR. For example, Google revamped its privacy dashboard to be more transparent and Facebook announced that it, too, would create a clearer, more user-friendly privacy interface and would be more open

127. *Id.*

128. *Id.* at 45.

129. Noam Cohen & Mark Scott, *Times Articles Removed From Google Results in Europe*, N.Y. TIMES (Oct. 3, 2014), https://www.nytimes.com/2014/10/04/business/media/times-articles-removed-from-google-results-in-europe.html.

130. Mulligan., *supra* note 123, at 40.

131. *Id.*

132. Privacy Shield replaced the Safe Harbor Agreement after Safe Harbor was struck down by the European Court of Justice. *See* Henry Farrell, *Constructing the International Foundations of E-Commerce—The EU-U.S. Safe Harbor Arrangement*, 57 INT'L ORG. 277, 296 (2003).

133. *Id.*

134. Hayley Evans & Shannon Togawa Mercer, *Privacy Shield on Shaky Ground: What's Up with EU-U.S. Data Privacy Regulations*, LAWFARE (Sept. 2, 2018, 2:31 PM), https://www.lawfareblog.com/privacy-shield-shaky-ground-whats-eu-us-data-privacy-regulations.

135. *Cf.* Jennifer Lund, *What is GDPR and How Does It Impact Your Business?*, SUPER OFFICE (May 4, 2021), https://www.superoffice.com/blog/gdpr (outlining the costs on businesses imposed by the GDPR).

136. *Schrems II Confirms Validity of EU Standard Contractual Clauses, Invalidates EU-U.S. Privacy Shield*, JONES DAY (July 2020), https://www.jonesday.com/en/insights/2020/07/schrems-ii-confirms-validity.

about its data collection.[137] These moves, however, seem unlikely to be enough to satisfy EU authorities. In January 2019, France fined Google fifty-seven million euros for not being clear and transparent enough with users on how it was gathering their data.[138] This was the biggest fine levied under the GDPR to that point.[139] This fine and other rulings like it could become significant friction points moving forward because, unlike the EU's previous fines, this was the first time that the data practices at the core of Google's (and Facebook's) business model have been deemed illegal.[140] Even beyond the GDPR, Europe's more robust data privacy understandings are increasingly being fused with competition concerns.[141] To give one example, German competition authorities have said that Facebook being able to encroach on privacy without users leaving is a measure of its market power.[142]

Another remaining friction point concerns data localization. One of the major demands made by European states has been that large technology firms store users' data in-country.[143]

These data localization requirements present large U.S.-based technology firms with an implicit deal: you get to keep collecting troves of data and in exchange we, the Europeans, can be more confident that this data cannot be accessed by the U.S. government. From the perspective of those tech giants, this makes commercial sense given how valuable that data is. In 2017, the amount of revenue that Facebook generated from European users' data grew to $8.86 per user, a 41% increase over the previous year which was faster growth than any other region worldwide.[144] This is why, with very little complaining, Facebook built data centers in Ireland and Sweden.[145]

Meanwhile, the United States has made banning data localization a high priority in the e-commerce chapters of trade agreements it negotiates.[146] It pushed for those when it was still a negotiating party on the Trans-Pacific

137. Nitasha Tiku, *Europe's New Privacy Law Will Change the Web, and More*, WIRED (Mar. 19, 2018, 6:00 AM), https://www.wired.com/story/europes-new-privacy-law-will-change-the-web-and-more.

138. Mathieu Rosemain, *France Fines Google $57 Million for European Privacy Rule Breach*, REUTERS (Jan. 21, 2019), https://www.reuters.com/article/us-google-privacy-france/france-fines-google-57-million-for-european-privacy-rule-breach-idUSKCN1PF208.

139. *Id.*

140. *The French Fine Against Google is the Start of a War*, ECONOMIST (Jan. 26, 2019), https://www.economist.com/business/2019/01/24/the-french-fine-against-google-is-the-start-of-a-war.
Meanwhile, smaller European firms are making data privacy a central way to differentiate themselves from the tech titans and a central part of their marketing pitch to European consumers. *See* Mark Scott, *European Cloud Companies Play Up Privacy Credentials*, N.Y. TIMES (Jun. 9, 2015, 7:00 PM), https://bits.blogs.nytimes.com/2015/06/09/european-firms-play-up-privacy-credentials.

141. *Europe's Beef with GAFA: Big Tech Faces Competition and Privacy Concerns*, ECONOMIST (Mar. 23, 2019), https://www.economist.com/briefing/2019/03/23/big-tech-faces-competition-and-privacy-concerns-in-brussels.

142. *Id.*

143. Smith, *supra* note 121.

144. Tiku, *supra* note 137.

145. Amazon also opened data centers in France, Britain, the Netherlands, Finland, and Belgium. Mark Scott, *U.S. Tech Giants Are Investing Billions to Keep Data in Europe*, N.Y. TIMES (Oct. 3, 2016), https://www.nytimes.com/2016/10/04/technology/us-europe-cloud-computing-amazon-microsoft-google.html.

146. Hannah Monicken, *Business Groups Emphasize Data Flows as E-Commerce Talks Resume*, INSIDE U.S. TRADE, (June 21, 2019, 4:38 PM), https://insidetrade.com/daily-news/business-groups-emphasize-data-flows-e-commerce-talks-resume.

Partnership (TPP) and during talks to create a Transatlantic Trade and Investment Partnership (TTIP), a proposed free trade agreement between the United States and the European Union.[147] In 2017, the U.S. Trade Representative singled out South Korea's data localization requirements as "a key barrier to digital trade."[148] Prohibiting localization requirements was one of the ways in which the U.S.-Mexico-Canada Agreement altered the North America Free Trade Agreement.[149] Data localization requirements have emerged as one of the main areas of disagreement between the United States, the EU, and China in talks for a multilateral e-commerce agreement under the aegis of the WTO.[150]

These disagreements can be understood as clashes between competing spheres of self-rule.[151] Traditionally, states have been free to autonomously regulate varying levels of privacy expectations.[152] The context of each nation's history gives rise to distinct cultural differences in regulatory expectations. Sovereign jurisdiction allows them to codify these privacy philosophies into law. In order to allow the free flow of digital information and services, however, each must be willing to compromise sections of these domestically developed frameworks.[153] Continued disagreements over localization requirements and privacy standards can thus be understood as an expository example of the tension between domestic jurisdiction and the push for greater global trade.[154] While in some cases, the benefits of international commerce have triumphed over isolationist compulsions, the underlying discord between nations' protective sovereignty and the imperative of cooperation for international trade remains a fundamentally unanswered problem that is not likely to go away anytime soon.[155]

147. *See TPP Countries to Discuss Australian Alternative to Data-Flow Proposal*, INSIDE U.S. TRADE (Jul. 5, 2012, 1:04 PM), https://insidetrade.com/daily-news/tpp-countries-discuss-australian-alternative-data-flow-proposal (describing U.S. data flow proposals); *Business Groups Prioritize Action on Cross-Border Data Flows in TTIP*, INSIDE U.S. TRADE (May 30, 2013, 11:55 PM), https://insidetrade.com/inside-us-trade/business-groups-prioritize-action-cross-border-data-flows-ttip (discussing the United States' prioritization of data protection).

148. Isabelle Hoagland, *USTR: Korean Restrictions on Location-Based Data a 'Key Barrier to Digital Trade*, INSIDE U.S. TRADE (Apr. 14, 2017, 12:00 PM), https://insidertrade.com/daily-news/ustr-korean-restrictions-location-based-data-key-barrier-digital-trade.

149. United States-Mexico-Canada Agreement art. 19.12, Nov. 30, 2018, 134 STAT. 11, 2018 CAN. T.S. NO.2020/5; 19 U.S.C. § 4511 (enacting the USMCA, including the prohibition on localization) [hereinafter USMCA]. *See also* Anupam Chander & Uyen Le, *Data Nationalism*, 64 EMORY L. J. 677, 685–88 (Mar. 2015) (stating that Canada's Personal Information Protection and Electronic Documents Act (PIPEDA), does not prohibit transfer of data outside Canada, but BC and Nova Scotia has provinces require that information held by public institutions (hospitals, colleges, the government) has to stay inside Canada).

150. *Divisions Emerge as Some WTO Members Push for E-commerce Deal*, INSIDE U.S. TRADE (Jul. 27, 2018).

151. Theodore F. Claypoole, *Data Localization and the Limits of "Everything from Everywhere"*, NAT'L L. REV. (Feb. 22, 2021), https://www.natlawreview.com/article/data-localization-and-limits-everything-everywhere.

152. *See* Nigel Cory & Luke Dascoli, *How Barriers to Cross-Border Data Flows Are Spreading Globally, What They Cost, and How to Address Them*, INFO. TECH. & INNOVATION FOUND. (July 19, 2021), https://itif.org/publications/2021/07/19/how-barriers-cross-border-data-flows-are-spreading-globally-what-they-cost (demonstrating that policymakers have broad authority to regulate data privacy).

153. *Id.*

154. *Id.*

155. *See* World Trade Report, *Six Decades of Multilateral Trade Cooperation: What Have We Learnt?* WTO 77 (2007), https://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report07_e.pdf ("Domestic politics makes international cooperation always more difficult.").

C. Technical Frictions

A less obvious but nevertheless important vector of domestic jurisdiction coming into conflict with international trade comes from the technical frictions that can prevent easier digital trade between states.[156] While these do not seem to be as politicized as other barriers, they may nevertheless comprise very real constraints on commerce.[157] Misaligned spectrum policies and persnickety electronic-signature regulations can be burdensome on firms even in otherwise open and highly developed markets.[158] Further opportunities for countries to assert sovereignty occur in commonly accepted necessities, including domain name registration, conformity assessments, restricted payment methods, and encryption standards[159] Notice and takedown requirements can present similar frictions and have been an area of contention even between otherwise similarly-situated states like Canada and the United States.[160] While these safety policies can constitute necessary aspects of regulatory frameworks in the digital sphere, they can nonetheless introduce unnecessary and counterproductive friction to the streamlining of international trade.[161]

These technical frictions run counter to one of the major advantages of the Mode 1 digital services trade which is that, because it does not require the establishment of a commercial presence (like Mode 3) or the movement of people across borders (like Modes 2 and 4), Mode 1 trade tends to be less affected by regulatory trade barriers than the other modes.[162] Because of this, and because of the reduced proximity burden, digitalization significantly reduces entry costs.[163] Still, there are certain forms of entry barriers specific to the digital services trade that can be especially problematic. Some countries may require specific licenses for e-commerce activities, and, even worse, in some of those countries the requirements are applied in a discriminatory manner toward foreign firms.[164] Other forms of entry barriers can include forced public-private or joint venture partnerships, local content requirements, and discriminatory public procurement practices.[165] These barriers can be particularly burdensome for small businesses, as they tend to disproportionately rely on digital services such as online payment and e-commerce websites to facilitate export sales.[166]

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156. *See* USMAN AHMED & GRANT ALDONAS, ADDRESSING BARRIERS TO DIGITAL TRADE 7 (Int'l Ctr. for Trade & Sustainable Dev. & World Econ. F., 2015), https://e15initiative.org/wp-content/uploads/2015/09/E15-Digital-Ahmed-and-Aldonas-Final.pdf (for a background of hinderances on digital trade).

157. *Id.*

158. *Id.*

159. *Id.*

160. *See* Suzi Fadhilah Bt. Ismail et al., *Transplanting the United States' Style of Safe Habour Provisions on Internet Service Providers via Multilateral Agreements: Can One Size Fit All?*, 26 INT'L ISLAMIC U. MALAYSIA L. J. 369, 374 (2018) (noting the United States practices private takedown notices (applying safe harbor), whereas Canada uses the notice and notice system, in which websites that receive notification are given seven days to respond).

161. Fefer, *supra* note 5, at 11.

162. *Id.* at 12.

163. WTO Secretariat, *supra* note 1, at 100.

164. *Id.* at 96.

165. Fefer, *supra* note 5, at 11–12.

166. *Id.* at 13.

IV. LEGITIMATE REGULATION AND DISGUISED PROTECTIONISM

One of the core ideas undergirding international trade law is that states have a right to engage in legitimate regulation, but that disguised protectionism ought to be curtailed.[167] The challenge of differentiating between the two can be difficult. Regulatory differences are often quite complex, and even when everyone agrees on the impact of a given regulation—a big if—the intent of that regulation is frequently in the eye of the beholder. Some scholars argue that regulatory trade barriers are just clever means of protecting domestic businesses from foreign competition, while others note that the further international law wades into domestic regulatory matters, the more potential it has to constrain national sovereignty.[168] Many of these difficulties are particularly acute for digitally enabled trade in services, as highlighted by the most high-profile WTO dispute over Mode 1 trade in services to date: the US-Gambling case.

A. The US-Gambling Case[169]

Antigua and Barbuda (hereafter Antigua) rely heavily on tourism for revenue.[170] In 1995, Hurricane Luis caused widespread damage in Antigua, hurting the tourism industry.[171] To fill that gap, Antigua facilitated the construction of a "remote access" gambling industry.[172] By 1999, Antigua had 119 licensed gambling operators that generated almost 10% of the country's GDP.[173] Much of this gambling was on American sports by people in the United States,[174] and thus the provision of this form of entertainment (gambling) was being provided via Mode 1 trade in services. The federal statutes under consideration included the Interstate Wire Act, the Travel Act, and the Illegal Gambling Business Act.[175] The Wire Act banned gambling by means of

167. Robert Staiger and Alan Sykes, *International Trade, National Treatment, and Domestic Regulation*, 40 J. LEGAL STUD. 149 (2011).

168. Moonhawk Kim, *Disguised Protectionism and Linkages to the GATT/WTO*, 64 WORLD POLITICS 426, 437–440 (2012); Alan Sykes, *Regulatory Protectionism and the Law of International Trade*, 66 U. CHI. L. REV. 1 (1999); Ford C. Runge, *Trade Protectionism and Environmental Regulations: The New Nontariff Barriers*, 11 NW. J. INT'L L. & BUS. 47, 54 (1990). *See generally* Kyle Bagwell and Robert Staiger, *National Sovereignty in an Interdependent World* (Nat'l Bureau Econ. Rsrch., Working Paper No. 10249, 2004) (analyzing the sovereign rights of nations and the extent these rights interfere with achieving international objectives).

169. Panel Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services* WTO Doc. WT/DS285/R (adopted Apr. 20, 2005) [hereinafter US Gambling Panel Report]; Appellate Body Report, *US—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc. WT/DS285/AB/R (adopted Apr. 20, 2005).

170. *The World Factbook*, CENTRAL INTELLIGENCE AGENCY, https://www.cia.gov/the-world-factbook/countries/antigua-and-barbuda/ (last visited Aug. 29, 2021).

171. *Luis splits island of Barbuda*, TAMPA BAY TIMES (Sept. 10, 1995), https://www.tampabay.com/archive/1995/09/10/luis-split-island-of-barbuda.

172. Panel Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services* WTO Doc. WT/DS285/R, 72 (adopted Apr. 20, 2005).

173. JEFFREY DUNOFF ET AL., INTERNATIONAL LAW- NORMS, ACTORS, PROCESS: A PROBLEM-ORIENTED APPROACH 635 (Aspen Casebook Series, 5th ed., 2020).

174. *Id.*

175. US Gambling Panel Report, *supra* note 169, at 183.

telephone or other wire devices unless specifically authorized by a state.[176] The United States' Interstate Wire Act made it illegal to use "a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers . . . on any sporting event or contest. . . ."[177] The Travel Act made it a criminal act to gamble when said act included interstate travel, or interstate or foreign mail.[178] The IGBA made it illegal to use the Internet as a means of engaging in the placing, receiving, or making of a bet.[179] These three laws, and in particular the Interstate Wire Act, in effect prohibited the Mode 1 trade in this service while allowing the local provision of that service.

The United States argued that these trade barriers were necessary to combat "money laundering, organized crime, underage gambling, and pathological gambling" and thus legitimate domestic regulation.[180] Antigua countered that those were specious arguments covering the "real" interest, which was to protect domestic gaming interests.[181] As evidence for that argument, they pointed out that U.S. law allowed Internet gambling when on the premises of a licensed operator.[182] The *Antigua-Gambling* case was then, in effect, the WTO adjudicating these competing claims.

GATS Article XVI delineates six types of restrictions that states may not impose unless they have specifically reserved the right to do so in their specific commitments.[183] This is why those commitments are said to have a negative-list character; a state is not allowed to impose any barrier that is not specifically enumerated in its specific commitments.[184] The six types of restrictions are: (1) the number of service suppliers, (2) the value of service transactions, (3) the number of operations or quantity of output, (4) the number of people supplying that service, (5) the type of legal entity, and (6) limitations on the participation of foreign capital.[185] GATS Article XVII goes on to say that states should extend national treatment to foreign service providers unless they have included limitations on national treatment in their specific commitments.[186] Antigua argued that the United States violated its market access commitments under the first of those commitments: the number of service suppliers.[187] However, the GATS also contains exception clauses under Article XIV which permit it to impose barriers to trade in services that would otherwise be prohibited if doing so was necessary "to protect public morals or maintain order", "to protect human, animal or plant life or health", to prevent "deceptive and fraudulent

176. Albena P. Petrova, *How to Interpret Exceptions Under GATS Article XIV and How to Set the Trend for Implementation and Compliance in WTO Cases Involving 'Public Morals' and 'Public Order' Concerns*, 6 RICH. J. GLOBAL L. & BUS. 45, 51 (2006).
177. Dunoff et al., *supra* note 173, at 635.
178. Petrova, *supra* note 176, at 50–51.
179. *Id.*
180. Dunoff et al., *supra* note 173, at 642.
181. US Gambling Panel Report, *supra* note 169, at 10.
182. *Id.* at 31–32.
183. World Trade Organization, General Agreement on Trade in Services, art. XVI.
184. *Id.*
185. *Id.*
186. World Trade Organization, General Agreement on Trade in Services, art XVII.
187. US Gambling Panel Report, *supra* note 169, at 51.

practices", or to protect individuals' privacy and personal data.[188] The chapeau, or introductory provision, of Article XIV says that exception is "subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services."[189] So the questions before the WTO Panel and then the WTO Appellate Body were the following: (1) did the United States violate its specific commitments under Article XVI, and, (2) if it did so, did those violations fall under the exceptions under Article XIV, and, (3) if it did, did those barriers satisfy the chapeau of Article XIV?[190]

As to the first question, in the United States commitment schedule, Section 10.D. is titled "Other Recreational Services (except sporting)."[191] Under that Section, the United States lists no reservations under Mode 1. So then the question became 'does gambling count as sporting or not?'[192] If it did fall under that heading, as the United States claimed that it did, then the United States was not in violation of its GATS commitments. Under the Central Product Classification system used in the W/120 document that states used to prepare their GATS Commitment Schedules, the five-digit "gambling and betting services" (96492) falls under the four-digit "Other recreational services" (9649), not under "Sporting services" (9641).[193] Therefore, gambling is not to be considered as "sporting" and thus falls under the "Other Recreational Services (except sporting)," meaning that because the United States had not given itself a carve-out in this and so it was in fact in violation of its GATS commitments, specifically Article XVI (a) that prohibits limitations on the number of suppliers and XVI (c) that prohibits limits on the quantity of output.[194] The Panel also said that when the United States agreed to no limitations on market access for Mode 1 on gambling and betting services, this included the digitally enabled supply of gambling and betting services.[195] The Panel report goes on to say that "GATS does not limit the various technologically possible means of delivery under Mode 1."[196]

Having answered the first question as to whether the United States was in violation of its GATS commitments in the affirmative, the panel then turned to the second question: did the United States' violations of its Article XVI commitments fall under the Article XIV exceptions?[197] The United States argued that this differing treatment of local and international provision of this service was necessary to achieve domestic regulatory objectives, namely,

188. World Trade Organization, General Agreement on Trade in Services, art XIV.

189. *Id.*; Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154.

190. U.S. Gambling Panel Report, *supra* note 169, at 51–59, 99–114.

191. U.S. Schedule of Commitments Under the General Agreement on Trade in Services, Section 10.D, WTO Doc. WT/GATS/SC/90 (1994).

192. US Gambling Panel Report, *supra* note 169, at 23, 28–32, 149–150.

193. *Id.* at 157–59.

194. *Id.* at 227–33.

195. U.S. Gambling Panel Report, *supra* note 169, at 215.

196. *Id*. at 202.

197. *Id.* at 233–260.

combatting "money laundering, organized crime, underage gambling, and pathological gambling."[198] So then the Panel needed to determine if these measures were "necessary" and this meant that they needed to engage in a balancing test over how restrictive the measures were with how much those measures contributed to the policy ends to which they were devised.[199] The panel acknowledged the restrictiveness of the measures but found that these measures did indeed fall under the Article XIV exceptions pertaining to "protecting public morals and public order."[200]

Then the panel finally turned to the third question: did those measures satisfy the requirements of the chapeau (introductory provision) to Article XIV which amounts to asking whether the United States' measures constituted arbitrary or unjustifiable discrimination.[201] Here the AB somewhat modified the Panel's reasoning but nevertheless ruled that the United States had engaged in unjustifiable discrimination because the Interstate Horseracing Act allowed using the Internet to offer betting services but only allowed domestic suppliers, not foreign suppliers, to do so, and so the WTO ruled in Antigua's favor.[202] Antigua, however, was so small that any retaliatory tariffs it took would have essentially no impact on the United States but would hurt its own citizens by raising their purchase costs, so it has never attempted to do so.[203] This means that, in effect, Antigua has never been compensated despite winning the case. Separately, to satisfy other WTO member states, the United States modified its GATS schedule to specifically exclude gambling.[204]

What does this case say about the tension between trying to constrain disguised protectionism without impinging on governments' legitimate regulations? Whether or not the United States engaged in disguised protectionism here is not at all obvious and is almost totally in the eye of the beholder. Furthermore, the WTO Appellate Body decision was narrow, which is understandable, but that means that it provides little jurisprudential forward guidance. This case also suggests just how much flexibility states have to implement and defend regulations that impede the digital services trade and suggests just how difficult it is to challenge another states' domestic service regulations. Finally, for all of importance of the highly detailed argument over classification, the practical outcome of the case (the United States maintained its policies and changed in GATS schedule while Antigua got little to nothing) was a product of politics. Something similar along these lines might have been said about the Chinese regulations at issue in *China-Audiovisuals* (discussed below).

Thus, how to differentiate between what is allowed and what is not with regards to regulatory impediments to the trade in digital services was left wide

198. *Id.* at 242.
199. US Gambling Panel Report, *supra* note 169, at 242–44, 254.
200. World Trade Organization, General Agreement on Trade in Services, art XIV.
201. US Gambling Panel Report, *supra* note 169, at 261, 268–271.
202. WTO Appellate Body Report, *supra* note 169, at 120.
203. Sallie James, *U.S. Response to Gambling Dispute Reveals Weak Hand*, CATO INST. (Nov. 6, 2006), https://www.cato.org/free-trade-bulletin/us-response-gambling-dispute-reveals-weak-hand.
204. Simon Lester, *The WTO Gambling Dispute: Antigua Mulls Retaliation as the US Negotiates Withdrawal of Its GATS Commitments*, AM. SOC'Y INT'L L. (April 8, 2008).

open, at least at the multilateral level.[205] At that multilateral level, there have been some small steps toward building a more robust set of rules, which we cover in greater detail below, but those steps are proceeding at a glacial pace compared to the speed of technological change.[206] Consequently, it is at the regional level where the most concrete legal norms around the digital services trade have started to develop.[207] Meanwhile, the central challenge here has only grown over time.

B. How Digital Services Make Adjudicating Legitimate Regulation Versus Disguised Protectionism More Difficult

The legitimate regulation versus disguised protectionism conceptual problem for international trade law is particularly challenging with regards to digital services for several reasons. First, TBT and SPS-aligned organizations such as International Standardization Organization (ISO) and the World Animal Health Organization (OIE) provide a helpful boost to regulatory cooperation in goods; no similarly effective organizations/rules exist to do that in services.[208] The WTO's trade rules subject states' regulation of goods to a three-part test.[209] First, "if a state's regulations match the recommendations of a designated international non-governmental organization such as ISO or the OIE, that regulation is automatically considered WTO-compliant."[210]

Second, "if a state's regulations do not match those recommendations, they must have a scientific basis."[211] The second stage creates an additional constraint on states' regulations by implicitly asserting that regulatory differences not based on science must be motivated by a desire to give an unfair advantage to domestic firms and thus are simply disguised protectionism. This was very much intentional. During the negotiation of the Uruguay Round, USTR Clayton Yuetter argued that "standards that cannot be supported scientifically will properly be subject to WTO challenge. Bad science is too often just disguised protectionism."[212] Importantly, though, services regulations are less frequently scientific or technical in nature than they are for goods.[213] Even though GATT

205. Merit Janow & Petros Mavroidis, *Digital Trade, E-Commerce, the WTO and Regional Frameworks*, 18 WORLD TRADE REV. s1, s7 (2019).

206. *Id.* at S1–S7.

207. *Id.* ("international frameworks might be expected to develop between jurisdictions that have the most confidence in each other, the most experience, or the greatest trade flows."). *See generally* P. Sauyé & A. Shingal, *Why Do Economies Enter into Preferential Agreements on Trade in Services? Assessing the Potential for Negotiated Regulatory Convergence in Asian Services Markets*, 33 ASIAN DEV. REV. 56, 56–73 (2016) (providing a discussion of preferentialism in services).

208. *See generally Facilitating Trade Through Regulatory Cooperation: The Case of the WTO's TBT/SPS Agreements and Committees*, WTO (2019), https://www.wto.org/english/res_e/booksp_e/tbtsps19_e.pdf (giving a background on the regulatory status of the WTO and the relative lack of such mechanisms for services).

209. Gary Winslett, *Protectionism, in* THE LANGUAGE OF WORLD TRADE POLITICS: UNPACKING THE TERMS OF TRADE 32, 38 (Klaus Dingwerth & Clara Weinhardt eds., Routledge 2019).

210. *Id*.

211. *Id.*

212. Clayton Yuetter, *'Gatting' the Greens - Environmentalists Must Live With Trade*, FIN. TIMES, September 2, 1994.

213. WTO, *supra* note 1, at 157. *See also* Fefer, supra note 3, at 3 (noting that Mode 1 trade does not face as many barriers as Modes 2, 3, and 4).

rules do not apply to services, this difference is still important because it means that one of the usual heuristics observers use to determine if a regulatory difference is protectionist or not simply does not work as well or as often for digitally-enabled services. Additionally, the negative list approach used by the GATT and then the WTO which proved so helpful to reducing protectionist barriers to the flow of goods is less helpful for generating the kind of regulatory cooperation needed to promote trade in services.[214]

Third, that regulation has to be the least trade-restrictive means of achieving the regulatory goal. The WTO is thus attempting to respect states' regulatory prerogatives while limiting their ability to use regulatory means for protectionist ends.[215] Even though the regulations promulgated by ISO and other standards bodies are not legally binding, because they are automatically considered WTO-compliant there is still a powerful incentive to adopt those standards.[216] But those standards are mostly on goods.[217]

Additionally, some commercial activities combine aspects of both goods and services and so it is unclear whether they should be governed by goods rules (the GATT) or services rules (GATS).[218] The WTO framework is predicated on a clear dichotomy between goods and services.[219] Emerging digital technologies challenge the clarity of this classification system.[220] A book is very clearly a tangible good and so that same book, delivered electronically, can be considered a good. An e-book, after all, is merely a book delivered through a novel means of delivery. However, the book is transformed into an intangible good delivered remotely to consumers and can be seen as an Internet service in that way.[221] As e-commerce continues to rapidly develop, this classification question is becoming more important.

This is not merely a technical challenge. The rules surrounding the international trade in goods are much more specifically enumerated than they are for services, meaning that if electronically delivered products are categorized as goods, then the liberalizing rules around it are much more robust than if those products are classified as services.[222] For example, the GATT, which governs the trade in goods, bans quantitative restrictions and allows for discriminatory regulations only in a quite limited number of circumstances.[223] The GATS, which covers services, only contains bound commitments that states have proactively signed on to.[224] Thus, the national treatment obligations that

214. Thomas Bollyky & Petros Mavroidis, *Trade, Social Preference and Regulatory Cooperation* 1 (EUI Working Papers, RSCAS 2016/47, 2016).

215. Winslett, *supra* note 209, at 38.

216. *Id.* at 38.

217. WTO Secretariat, *supra* note 1, at 164–65.

218. Merit Janow & Petros Mavroidis, *Digital Trade, E-Commerce, the WTO and Regional Frameworks*, 18 WORLD TRADE REV. 1, 2 (2019).

219. *Id.*

220. *Id.*

221. *See generally* Anupam Chander, *The Internet of Things: Both Goods and Services*, 18 WORLD TRADE REV. 9 (2019) (discussing "Smart" or Internet delivered goods and services).

222. Paola Conconi & Joost Pauwelyn, *Appellate Body Report on China-Audiovisuals*, 10 WORLD TRADE REV. 97–98 (2011).

223. *Id.*

224. *Id.*

generally apply to the GATT do not apply to services because dumping and other market distorting actions are unregulated except through MFN and specific commitments states have positively identified.[225]

This critical difference means that countries are likely to have fewer commitments in the services trade than in the goods trade.[226] Similarly, the remedies available to a state to counteract dumping in goods are well-established.[227] In contrast, anti-dumping duties are prohibited with regards to services.[228] Because the GATT rules that govern goods are much more constraining than the GATS services rules, the country that is attempting to defend its domestic regulations as legitimate will attempt to portray the commercial activity in question as a service whereas the country that is challenging those regulations will argue that it is a good.[229]

Unfortunately, the core international agreements are silent on the goods-versus-services classification question. The GATS does not define the concept of "service" beyond saying that "trade in services is defined as the supply of a service."[230] The GATT, similarly, does not define the term "good."[231] While the dichotomy between "good" and "service."[232] Bundled services and goods occur frequently, even outside of the digital trade realm.[233] For example, a smartwatch may be a tangible product, but it also provides services to its users, from heartrate monitoring[234] to GPS positioning.[235]

Several WTO cases have touched upon this question. In *Canada-Periodicals*, the Appellate Body examined Canadian restrictions on advertising after the United States complained about the Excise Tax that made it prohibitively expensive for magazines to publish split-run editions.[236] These split-runs allow periodicals to sell the same page to different advertisers, depending on the region in which each version of the edition will run.[237] While Canada banned the import of these types of split-run periodicals, *Sports Illustrated Canada* would produce split-run editions in New York and then transmit them electronically to Toronto and then print and distribute the split-

225. *Id.*

226. *Id.*

227. *See id.* (noting the divergence in anti-dumping regulation of goods and services).

228. *Id.*; *see also* United States v. Eurodif S. A., 555 U.S. 305 (2009) (showing the goods versus services division in anti-dumping treatment even came before the Supreme Court in 2009).

229. *See* Conconi & Pauwelyn, *supra* note 222, at 95–118 (discussing the Chinese and United States dispute regarding film as a good or a service).

230. GATS: General Agreement on Trade in Services, Apr. 15, 1994, Annex 1B, 1869 U.N.T.S. 283, 285.

231. Conconi & Pauwelyn, *supra* note 222, at 98.

232. *See id.* at 98–100 (noting the problems that "today's sophisticated 'content' industry" creates).

233. *See id.* at 97–106 (discussing the legal and metaphysical distinctions between "goods" and "services" in the context of GATT and GATS).

234. Chander, *supra* note 221, at 15–18.

235. *See* Diksha Kashyap, *New Product Design Process: 6 Major Steps Involved*, YOUR ARTICLE LIBRARY, https://www.yourarticlelibrary.com/production-management/new-product-design-process-6-major-steps-involved/57462 (last visited Aug. 31, 2021) (discussing a general overview of the product design process).

236. Aaron Scow, *The Sports Illustrated Canada Controversy: Canada "Strikes Out" in Its Bid to Protect Its Periodical Industry from U.S. Split-Run Periodicals*, 7 MINN. J. INT'L. L. 245 (1998).

237. *See id.* at 249–50 (explaining that the publisher would sell advertising space to advertisers in the regional market).

run edition, thus avoiding any physical importation of the product.[238] The Excise Tax was the Canadian government's reaction to this loophole, an 80% tax on advertisements that were published in split-run editions.[239] The United States argued that the Canadian laws violated Canada's GATT commitments, as the import ban was "an impermissible import restriction" and the Excise Tax "an impermissible internal tax."[240]

The United States specific complaint was that these measures amounted to disguised protectionism that ensured that only Canadian magazines could compete for advertising aimed at the Canadian market.[241] Canada argued that these measures were not protectionist but rather a reasonable effort aimed at maintaining a distinct cultural space.[242] Canada claimed that the Excise Tax applied to advertising services, and thus fell under GATS,[243] under which Canada had made no commitments in the realm of advertising.[244] The WTO Panel found that GATS and GATT can apply simultaneously and are not mutually exclusive.[245] The decision concluded that although periodicals contain services, including advertisements, the final product on which the Tax was applicable is a good, and thus GATT commitments applied.[246] This decision established that goods and services can could coexist, as can GATT and GATS. This possibility of simultaneous coexistence was upheld in a WTO dispute over Chinese commitments in the realm of audiovisuals.

C. China-Audiovisuals

Prior to China's accession to the WTO, it had an extremely restrictive audiovisual market. Only firms approved by the state could import films after they had been reviewed by censors who would prohibit any content they believed could harm "public morals," "injure the national glory," or "destroy social stability."[247] Despite agreeing to liberalize its audiovisual market, China retained restrictions on four kinds of cultural content: (1) reading material, (2) audiovisual home entertainment, (3) sound recordings, and (4) films for theatrical release.[248]

Starting in the mid-2000s, U.S. businesses pressured the United States government to file suit before the WTO, citing violations on three counts.[249] First, China was not allowing foreign firms the right to import the relevant

238. *Id.* at 256.
239. *Id*.
240. *Id.* at 261.
241. *Id.* at 248.
242. *Id.* at 281.
243. *Id.* at 261.
244. *Id.* at 268.
245. *See* Appellate Body Report, *Canada-Certain Measures Concerning Periodicals*, ¶ 9, WTO doc. WT/DS31/AB/R (adopted June 30, 1997) [hereinafter Appellate Report Canada Periodicals].
246. *See id.* ¶ 35 (concluding that the GATT commitments applied).
247. Conconi & Pauwelyn, *supra* note 222, at 99, 107.
248. *Id*.
249. *China Update*, INSIDE U.S. TRADE (June 6, 2008), https://insidetrade.com/inside-us-trade/china-update-465.

goods, i.e. movie reels.[250] Second, Chinese laws created obstacles to the distribution of imported copyright-protected goods.[251] The United States argued that these first two were violations of China's GATT commitments.[252] Third, China violated distribution rights of foreign firms in China.[253] The United States argued that this violated China's GATS commitments.[254] China's GATS commitments include obligations to no less favorable treatments of foreign suppliers of audiovisual distribution as well as no restrictions on the market access for foreign suppliers of audiovisual products.[255] Central to the dispute was disagreement over how to classify audiovisual products. The United States argued that films for theatrical release were a good because they were, at the time, delivered via physical film reels.[256] China and the EU argued that the reels were incidental to the provision of entertainment which was, in their view, clearly first and foremost a service.[257] The United States countered that "the vast majority of goods are commercially exploited through a series of associated services and that China's argument would transform virtually all goods into services."[258]

As is so often the case, the arguments made by each side were clearly utilitarian. The United States was arguing that films were goods because that would mean that the stronger rules in the GATT would apply.[259] If, however, films were primarily services (as China argued), then the United States' first two complaints were moot from the start.[260]

Ultimately, the Dispute Settlement Panel side-stepped this goods-services distinction question.[261] They ruled in favor of the United States, saying that China had violated GATS Articles XVI and XVII; services suppliers must be given treatment no less favorable than that given to domestic suppliers except as otherwise provided for in the members' service schedule.[262] The Panel did not rule on whether electronically transmitted media counts as a good or a service, although the Appellate Body found that sound recordings delivered

250. Request for the Establishment of a Panel by the United States, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, ¶ 3, WTO Doc. WT/DS363/5 (Oct. 11, 2007).

251. *Id*.

252. *Id*.

253. *Id*.

254. *Id*.

255. *Id*.

256. *China IPR Panel Reveals Deep U.S.-EU Split Over Film Sound Recordings*, INSIDE U.S. TRADE (Aug. 15, 2008), https://insidetrade.com/inside-us-trade/china-ipr-panel-reveals-deep-us-eu-split-over-film-sound-recordings.

257. *See id.* (noting the EU has wanted to protect its own AV culture market while US has sought to open that market back up).

258. Appellate Body Report, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, ¶173, WT/DS363/AB/R, (Dec. 21, 2009) [hereinafter China Audiovisuals Report].

259. *See id.* at 24 (explaining the stance that the U.S. took).

260. *See id.* at 42 (explaining the stance that China took).

261. *Id*.

262. China Audiovisuals Report, *supra* note 258, ¶173; *U.S. Prevails in Key Points in Market Access WTO Case With China*, INSIDE U.S. TRADE (Aug. 14, 2009), https://insidetrade.com/inside-us-trade/us-prevails-key-points-market-access-wto-case-china.

electronically are covered by GATS.[263] Instead, the Appellate Body repeated the determination from the *Canada-Periodicals* case in ruling not on the product itself but rather the measure under dispute.[264] In *China-Audiovisuals*, because the contested regulations limited the importation of goods, the relevant statute was GATT.[265] Whether or not the WTO ever issues a conclusive definition of "goods" and "services," e-commerce is clearly already challenging the current system of categories. While thus far the Panel and Appellate Body have been able to analyze measures "under both the GATT 1994 and the GATS,"[266] it is unclear what the future of these bundled goods and services with new means of delivery will be at the WTO.

Even apart from audiovisuals and this case, differences in regulatory treatment continue to bedevil the bilateral trade in new technologies between the United States and China.[267] Foreign executives routinely report strong pressure to share intellectual property with local partner firms; this problem is so severe that, according to one survey, half of all American technology firms say that they limit investment in China to protect their intellectual property.[268] This has become one of the core American complaints against China.[269] In essence, the United States holds that China's IP regime amounts to disguised protectionism.[270] All of these threats to intellectual property are particularly troublesome to today's firms because intangible assets like intellectual property are comprising an increasing share of firms' overall value.[271] This is precisely why U.S. negotiators have argued that any e-commerce agreement under the WTO needs to protect source code and prohibit forced technology transfers.[272]

On the other hand, China is becoming an excellent place for American software developers and inventors to gain experience.[273] China's regulatory environment is becoming more innovation friendly and more protective of intellectual property while many consumer-oriented sectors of the Chinese

263. *WTO Weighs In on Public Morals Defense in Rejecting China IPR Appeal*, INSIDE U.S. TRADE (Dec. 25, 2009), https://insidetrade.com/inside-us-trade/wto-weighs-public-morals-defense-rejecting-china-ipr-appeal.

264. *Id.*

265. Chander, *supra* note 221, at 20–21.

266. *Id.* at 21.

267. *See America Still Leads in Technology, but China Is Catching Up Fast*, ECONOMIST (May 16, 2019), https://www.economist.com/special-report/2019/05/16/america-still-leads-in-technology-but-china-is-catching-up-fast (exploring the trade war regarding new technologies between China and the United States).

268. *See id.* (stating that foreign executives tell horror stories regarding pressure to share secrets).

269. *See* Dennis C. Blair & Keith Alexander, *China's Intellectual Property Theft Must Stop*, N.Y. TIMES (Aug. 15, 2017), https://www.nytimes.com/2017/08/15/opinion/china-us-intellectual-property-trump.html (noting that Chinese companies have stolen trade secrets from virtually every sector of the American economy); Dan Harris, *China-US Trade Wars and the IP Elephant in the Room*, CHINA L. BLOG (Aug. 30, 2017), https://www.chinalawblog.com/2017/08/china-us-trade-wars-and-the-ip-elephant-in-the-room.html.

270. Harris, *supra* note 269.

271. WTO Secretariat, *supra* note 1, at 55; RYAN AVENT, THE WEALTH OF HUMANS: WORK, POWER, AND STATUS IN THE TWENTY-FIRST CENTURY 105–07 (St. Martin's Press, 2016).

272. *US Sets Out Goals For E-Commerce Negotiations at WTO*, INSIDE U.S. TRADE (Apr. 20, 2018), https://insidetrade.com/daily-news/us-sets-out-goals-e-commerce-negotiations-wto; *see also* USMCA, *supra* note 149, art. 19.12 (showing that the USMCA bars requiring firms to disclose source code).

273. Clive Thompson, *How a Nation of Tech Copycats Transformed into a Hub for Innovation*, WIRED (Dec. 29, 2019), https://www.wired.com/2015/12/tech-innovation-in-china.

economy are open and liberalized.[274] This conceptual fault line is not unique to the U.S.-China relationship. It also plagues the U.S.-EU trading relationship.[275]

D. Digital Services, Taxes, and the Question of Discriminatory Treatment

The growth in traded digital services creates new challenges for governments. Different governments are trying to address those challenges in varying ways, but then those responses themselves become contested, with one state arguing that what they are doing is a legitimate policy while others assert that it is really just disguised protectionism.[276] This has most clearly occurred in the context of digital services taxes and the transatlantic relationship, but before we examine those digital service taxes, it is important to understand how the growth of trade in digital services challenges tax authorities.[277]

First, their digital nature means that their official sales location can easily be located in a different country from the buyer.[278] That creates huge opportunities for tax minimization.[279] Stationary targets have traditionally been the easiest for tax authorities to find and focus on.[280] This was why harvests, mines, and ports were some of the most important locations of tax collection for early states.[281] Hyper-mobile assets, on the other hand, are a taxman's nightmare.[282] Digital goods and services are obviously a lot more mobile than physical goods and more tangible services. An automaker's factory is where it is. Service at a coffee shop occurs at an easily definable location. While this difference between digital and tangible goods is pretty obvious, its implications for tax minimization often go overlooked. When a firm sells a digital product, it has an easier time construing that transaction as taking place in a tax-favorable location. Apple's iTunes maneuvers in Europe demonstrate this well.

EU consumers who purchased a song on Apple's iTunes from 2008 to 2016 may have been sitting a bus stop in Berlin, a cafe in Lyon, or at home in Naples, but none of them officially made that song purchase in the country in which they were sitting.[283] Rather, all three officially purchased their songs in Luxembourg despite probably having never been there.[284] Apple created iTunes SARL, a subsidiary in Luxembourg that is responsible for iTunes sales in the EU.[285] Apple then created an arrangement with Luxembourg in which it agreed to route

274. EDWARD TSE, CHINA'S DISRUPTORS, 72–75, 114–15 (Portfolio, 2015).

275. Alan Rappeport et al., *Europe's Planned Digital Tax Heightens Tensions with the United States*, N.Y. TIMES (Mar. 19, 2018), https://www.nytimes.com/2018/03/19/us/politics/europe-digital-tax-trade.html.

276. *Id.*

277. *Id.*

278. Itai Grinberg, *The Looming Tax War*, FOREIGN AFFAIRS (Jan. 27, 2020), https://www.foreignaffairs.com/articles/united-states/2020-01-17/looming-tax-war.

279. *Id.*

280. *Id.*

281. *Id.*

282. *Id.*

283. Charles Duhigg & David Kocieniewski, *How Apple Sidesteps Billions in Taxes*, N.Y. TIMES (Apr. 28, 2012), https://www.nytimes.com/2012/04/29/business/apples-tax-strategy-aims-at-low-tax-states-and-nations.html.

284. *Id.*

285. SARL stands for Société Anonyme à Responsabilité Limitée. It is the French-language equivalent of Inc.

transactions through iTunes SARL in Luxembourg, and in exchange, Luxembourg agreed to tax Apple at lower rates.[286]

This arrangement was so obviously an attempt to get out of paying taxes that Apple executives did not even bother to try to spin it any other way. Robert Hatta, who oversaw Apple's iTunes sales in European markets when this arrangement was being set up said, "We set up in Luxembourg because of the favorable taxes . . . downloads are different from tractors or steel because there's nothing you can touch, so it doesn't matter if your computer is in France or England. If you're buying from Luxembourg, it's a relationship with Luxembourg."[287] Amazon has adopted a basically identical strategy. When you buy something from Amazon in the EU, you are actually buying it from Amazon's subsidiary in Luxembourg, Amazon SARL.[288]

It is not just songs and other media content that are sold this way, either. Facebook and Google's digital advertising sales are just as easy to move in terms of sales location as Apple Music songs.[289] Another digital service that merits special attention is the sale of user data. Just as the sale of a song or advertising can be relocated, so too can the sale of users' data.[290] These three things: media content, advertising, and data collectively comprise such a large share of the major technology firms' revenue that their portability is no trifling matter.[291] It means that they can locate huge chunks of their profits and thus taxable revenue wherever they like.[292] This is further fueled by the extent to which large technology firms are so intensively built on intellectual property.[293]

Second, the centrality of intellectual property to these firms' operations, and particularly in combination with the proliferation of subsidiaries, means that they are much more capable of shifting profits across international lines than more traditional firms with more tangible assets.[294]

Let us assume that in a given month a tech firm makes 100 million dollars in profit in a high tax location and 1 million dollars in low tax location. This tech firm can transfer its intellectual property to a subsidiary in the low tax country. Then the subsidiary charges the firm in the high-tax location a large licensing fee, in this case let us say 95 million dollars, for the use of that intellectual

286. Duhigg & Kocieniewski, *supra* note 283.

287. *Id*.

288. Tom Bergin, *Special Report: Amazon's Billion-Dollar Tax Shield*, REUTERS (Dec. 6, 2012), https://www.reuters.com/article/us-tax-amazon/special-report-amazons-billion-dollar-tax-shield-idUSBRE8B50AR20121206; Ian Griffiths, *How One Word Change Lets Amazon Pay Less Tax On Its UK Activities*, THE GUARDIAN (Apr. 4, 2012), https://www.theguardian.com/technology/2012/apr/04/amazon-fulfilment-less-tax-uk-activities.

289. Tiku, *supra* note 137.

290. European Commission Press Release, The Commission, Digital Taxation: Commission Proposes New Measures to Ensure That All Companies Pay Fair Tax in the EU (Mar. 21, 2018) [hereinafter Digital Taxation].

291. *Id*.

292. *Id*.

293. Katz Sapper & Miller, *Tax Reform's Impact on Tech Companies: The Good, the Bad, and the Ugly,* TECHPOINT INDEX (Feb. 8, 2018), https://techpoint.org/2018/02/tax-reforms-impact-tech-companies-good-bad-ugly.

294. *Offshore Profit Shifting & the U.S. Tax Code—Part 1 (Microsoft and Hewlett-Packard): Hearing Before the Permanent Subcomm. on Investigations of the Comm. on Homeland Sec. and Gov't Aff*., 112th Cong. 101 (2012) [hereinafter *Hearings*].

property. That effectively means that the part of the firm in the high tax country would only make 5 million dollars and the subsidiary in the low tax country would make 96 million dollars, saving the firm money at the expense of the high tax country's revenue base. This is what is known as transfer pricing.[295] As Senator Carl Levin has put it, transfer pricing is "the corporate equivalent of the secret offshore accounts of individual tax dodgers."[296] Again, as with the Luxembourg song problem, big technology firms are able to do this to a much greater extent than firms that deal in more tangible goods and services that are less wedded to intellectual property.[297]

It is via this kind of transfer pricing that Microsoft has avoided paying taxes even on revenue it generates in the United States.[298] A Senate investigation made the case against this kind of chicanery succinctly:

> Microsoft U.S. avoids U.S. taxes on 47 cents of each dollar of sales revenue that it receives from selling its own products right here in this country. The product is developed here. It is sold here, to customers here. And yet Microsoft pays no taxes here on nearly half the income. By routing its activity through Puerto Rico in this way Microsoft saved over $4.5 billion in taxes on goods sold in the United States during the 3 years surveyed by the Subcommittee. That is $4 million a day in taxes that Microsoft is not paying.[299]

Microsoft's maneuvers demonstrate another means by which firms can move money across border. They give intellectual property away to foreign subsidiaries for substantially lower rates than they are worth and then allow the subsidiary to keep the extra profit.[300] For example, in 2011, Microsoft licensed intellectual property to its subsidiaries Microsoft Ireland and Microsoft Singapore for $2.8 billion and $1.2 billion respectively, but then those netted $9 billion and $3 billion respectively.[301] What that meant was that Microsoft effectively shifted $8 billion in profits, and thus taxable income, from the United States so as to pay less in taxes.

A related problem to both the IP and profit shell game and the Luxembourg song issue is that valuing intellectual property is notoriously difficult.[302] What is Apple's logo worth? Just exactly how much is a particular patent held by Google worth? How would a tax authority even start to evaluate that? That difficulty makes all of the other aspects of this issue even more challenging.

Large technology firms are more capable of using these tax minimization strategies than are other more traditional firms.[303] One way to estimate the ease with which different sectors can take advantage of these maneuvers is to look at

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295. *Id*. at 2.
296. NICHOLAS SHAXSON, TREASURE ISLANDS: UNCOVERING THE DAMAGE OF OFFSHORE BANKING AND TAX HAVENS 14 (Palgrave MacMillan 2011).
297. *Hearings*, *supra* note 294, at 67.
298. *Id*. at 79.
299. *Id*. at 3.
300. *Id*. at 116.
301. *Id*. at 3.
302. *Id*. at 78.
303. *Id*. at 67.

how much cash each sector has parked overseas.[304] Technology firms have over $700 billion parked overseas, more than all of the other sectors in the S&P 500 combined.[305] Of all of the industries in the S&P 500, technology firms paid the least in taxes over a ten-year period.[306] In the EU, technology firms have an effective tax rate that is approximately half of that paid by non-digital firms.[307]

States that want to collect taxes from these firms end up in a seemingly never-ending whack-a-mole exercise while states that want to use low taxes as a competitive advantage become that much more tenacious in defending the sweetheart deals they give to these firms.[308] Some EU member states such as Ireland and Luxembourg have offered very favorable terms to digital service firms.[309] Ireland allowed Apple to pay taxes in 2014 at a rate of only 0.005 percent and it did so in large part because Apple supports about 6,000 jobs in Ireland.[310] Apple needs to have its workers do their work somewhere and locating those jobs Ireland has saved it roughly $220,000 per job per year in avoided taxes.[311] Without the tax advantages, Apple likely would not support nearly as many jobs in Ireland. Other EU states object to this, as they see it as aiding tax avoidance.[312] All of the states can see that digital firms' revenue is growing quickly (more than four times as fast as the revenue at other multinational corporations by one estimate) and want their piece of that.[313]

This tax competition was one of the major impetuses behind the EU Commission's 2018 digital service tax proposal that out a preferred solution and a back-up, potentially interim, solution if that preferred option cannot be quickly implemented.[314] The preferred solution is for states to tax digital firms on profits that are generated in their state, regardless of whether they have a physical presence there or not.[315] In other words, if a German buys an iTunes song sitting at a Frankfurt bus stop, it would not matter that Apple has iTunes SARL set up in Luxembourg or that they are the official seller of the song. The purchaser is in Germany, so the purchase gets taxed in Germany. A digital firm would be subject to this rule if it met any of the following three criteria: (1) it has more

304. *Earnings Parked Overseas Tearsheet*, ZION RESEARCH GROUP (Dec. 21, 2017).

305. *Id*.

306. Douglas MacMillan, *How the Tax Overhaul Will Affect Tech Companies' Earnings*, WALL ST. J. (Jan. 30, 2018), https://www.wsj.com/articles/how-the-tax-overhaul-will-affect-tech-companies-earnings-1517308201.

307. Digital Taxation, *supra* note 290.

308. Jennifer Rankin, *Amazon Ordered to Repay 250m by EU Over 'Illegal Tax Advantages*,' THE GUARDIAN (Oct. 4, 2017 6:25 PM), https://www.theguardian.com/technology/2017/oct/04/amazon-eu-tax-irish-government-apple.

309. *Id*. at 4.

310. *Id*. at 3–4; *Pay Up: The European Commission is Right to Get Tough With Tax-Dodging Tech Companies*, LONDON TIMES (Oct. 5, 2017 12:01 AM), https://www.thetimes.co.uk/article/pay-up-fvx8hzc76.

311. Jim Tankersley, *The No-Win Game of Apple's Taxes*, WASH. POST (Aug. 30, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/08/30/the-no-win-game-of-apples-taxes.

312. European Commission, *Fair Taxation for the Digital Economy*, at 1 COM (2018) 147 final (Mar. 21, 2018).

313. *Id*.

314. Digital Taxation, *supra* note 290.

315. Jim Tankersley & Alan Rappeport, *As Nations Look to Tax Tech Firms, U.S. Scrambles to Broker a Deal*, N.Y. TIMES (Jul. 12, 2019), https://www.nytimes.com/2019/07/12/business/economy/tech-company-taxes.html.

than 7 million euros in annual revenue in any EU member state, (2) it has more than 100,000 users in any member state in a given year, or (3) it has more than 3000 contracts with businesses in a member state in a given year.[316] The Commission proposes that in the interim, and for longer if that first option cannot be implemented soon, a three percent tax be levied on revenues generated by sales of digital advertising, the operation of platforms that facilitate economic exchange between users, and the sale of user data.[317] In an attempt not to burden startups and small companies, this tax would only apply to those businesses that have at least 750 million euros in annual global revenue and have at least 50 million dollars in European revenue.[318]

One of the major potential roadblocks to either policy being adopted is how smaller states in the EU, some of whom benefit from the status quo, react to the initiative.[319] As one researcher has argued, "The taxation will go to the biggest markets with the most sales, and that effectively means that activities which could be taxed in Estonia will be transferred to Germany. . . . [S]ome member states may question whether that redistribution is a good thing."[320] As we mentioned earlier, Ireland and Luxembourg have been the progenitors of the most significant sweetheart deals and so obviously have a track record of their own unilateralism when it comes to tax policy and digital services.[321] For their part, Sweden, Denmark, and Finland were opposed to a special digital tax.[322] The Netherlands and Malta also both objected to the digital tax on sovereignty grounds.[323]

It is at this point that we return to the question of legitimate policy response versus disguised protectionism. This proposal generated significant transatlantic disagreement because U.S.-based firms and the U.S. government both saw it as an attempt to specifically and illegitimately target those U.S.-based technology firms.[324] The EU, however, insisted that there is no anti-American animus in the proposal and points to the fact that many of the 120-150 firms that would have to pay such a tax are not American.[325] Meanwhile, individual states were advancing similar legislation that fell along these very same fault lines.[326]

316. European Commission, *Fair Taxation for the Digital Economy*, at 1 COM (2018) 147 final (Mar. 21, 2018).

317. *Id*. at 4.

318. *Id*. at 4.

319. Alan Rappeport et al., *Europe's Planned Digital Tax Heightens Tensions With the United States*, N.Y. TIMES (Mar. 19, 2018), https://www.nytimes.com/2018/03/19/us/politics/europe-digital-tax-trade.html.

320. *Id*.

321. Rankin, *supra* note 308.

322. *Nordic Countries Oppose EU Plans for Digital Tax on Firms' Turnover*, REUTERS (May 31, 2018), https://www.reuters.com/article/us-eu-digital-tax/nordic-countries-oppose-eu-plans-for-digital-tax-on-firms-turnover-idUSKCN1IW337.

323. *See generally* Daniel Bunn, *A Summary of Criticisms of the EU Digital Tax*, TAX FOUND. (Oct. 22, 2018), https://taxfoundation.org/eu-digital-tax-criticisms/#_ftn17 (summarizing the Netherlands' and Malta's objections to the digital tax).

324. Rappeport, *supra* note 319.

325. Viktoria Dendrinou, *American Tech Giants Face New Tax Grab in Europe*, BLOOMBERG (Mar. 20, 2018 12:12PM), https://www.bloomberg.com/news/articles/2018-03-20/why-tech-giants-may-have-to-pay-more-taxes-in-europe-quicktake.

326. Rappeport, *supra* note 319.

Given the EU Commission's proposal seemed to not be advancing, in 2019 France announced a three percent tax on digital revenues accrued by technology companies with more than 750 million euros in global sales.[327] As with the Commission's proposal, it was not strictly limited to foreign companies,[328] but U.S. businesses as well as U.S. government officials argued that a digital service tax (DST) was discriminatory against American technology firms and would violate the principle of national treatment of services under WTO rules.[329] The U.S. Trade Representative launched a 301 investigation of France's digital service tax.[330] That 301 reports called for 2.4 billion in retaliatory tariffs against French goods and argued that numerous statements by French politicians demonstrated the DST's discriminatory intent and that more than half of firms expected to be subject to the tax were American while no French firms were expected to be subject to it.[331]

France ultimately agreed to suspend the collection of the DST in exchange for the United States suspending collection of those retaliatory tariffs while negotiations were ongoing under the auspices of the OECD.[332] But France was not alone in imposing these new digital service taxes, far from it. The UK, Italy, Austria, Turkey, Canada, Spain, and Mexico, among others, all have either passed or are considering their own digital service taxes.[333]

Part of the reason the United States dislikes other states imposing digital service taxes is that it wants that tax revenue as well.[334] U.S. officials can sometimes see the EU as tax-happy in general and especially towards U.S. companies. A 2016 decision by the EU to force Apple to pay $14.5 billion in back taxes to Ireland was forcefully objected to by both U.S. political parties.[335]

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327. *France Announces Plans to Implement Digital Services Tax*, INSIDE U.S. TRADE (Jan. 4, 2019 11:20 AM), https://insidetrade.com/daily-news/france-announces-plans-implement-digital-services-tax; Liz Alderman, *France Moves to Tax Tech Giants, Stoking Fight With White House*, N.Y. TIMES (July 11, 2019), https://www.nytimes.com/2019/07/11/business/france-digital-tax-tech-giants.html; *France Promises to Lift Digital Services Tax Once OECD Finds Solution*, INSIDE U.S. TRADE (Apr. 19, 2019) (stating that France also promised to rescind its own DST if and when the OECD agree on a new taxation mechanism for digital services.).

328. Alderman, *supra* note 327.

329. *Business, Tech Groups Raise EU Digital Taxation, Regulatory Issues with USTR*, INSIDE U.S. TRADE (Dec. 21, 2018), https://insidetrade.com/daily-news/business-tech-groups-raise-eu-digital-taxation-regulatory-issues-ustr; *USTR Pledges to Take Action Against Digital Services Taxes*, INSIDE U.S. TRADE (June 21, 2019), https://insidetrade.com/daily-news/ustr-pledges-take-action-against-digital-services-taxes.

329. *USTR To Launch Section 301 Investigation Into French Digital Services Taxes*, INSIDE U.S. TRADE (July 10, 2019), https://insidetrade.com/daily-news/ustr-pledges-take-action-against-digital-services-taxes.

330. *Id*.

331. Press Release, U.S. Trade Rep., Conclusion of USTR's Investigation Under Section 301 into France's Digital Services Tax (Dec. 2, 2019), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/december/conclusion-ustr%E2%80%99s-investigation.

332. Itai Grinberg, *The Looming Tax War*, FOREIGN AFFAIRS (Jan. 17, 2020), https://www.foreignaffairs.com/articles/united-states/2020-01-17/looming-tax-war; Tankersley & Rappeport, *supra* note 315; OECD, *Secretariat Proposal for "A Unified Approach" under Pillar One* (Oct. 9–Nov. 12, 2019) [hereinafter A Unified Approach]; *U.S.-France Détente Offers Little Clarity on Future OECD Talks*, INSIDE U.S. TRADE (Jan. 23, 2020), https://insidetrade.com/daily-news/us-france-dst-détente-offers-little-clarity-future-oecd-talks [hereinafter U.S.-France Détente].

333. U.S.-France Détente, *supra* note 332.

334. Tankersley & Rappeport, *supra* note 315.

335. James Kanter & Mark Scott, *Apple Owes $14.5 Billion in Back Taxes to Ireland, E.U. Says*, N.Y. TIMES (Aug. 30, 2016), https://www.nytimes.com/2016/08/31/technology/apple-tax-eu-ireland.html.

Paul Ryan slammed the EU decision as "awful."[336] A bipartisan quartet of Senators (Hatch, Wyden, Schumer, and Portman) also sent a letter to the Treasury Department strongly objecting to the EU's tax and state aid investigations of related to the tech titans.[337] As Edward Kleinbard, a former chief of staff on the congressional joint committee on taxation, argues, "Even though U.S. companies are the grandmasters of tax avoidance . . . because of the nature of U.S. politics [the case] would be framed by the United States as Europe overreaching and discriminating against 'our team.'"[338] The decision was ultimately overturned by the European Court of Justice in July 2020, but the trajectory of events around it nevertheless suggests significant conceptual and political differences between the United States and the European Union with regards to taxing digital services.[339]

Meanwhile, under the OECD, states were negotiating over how to reduce base-erosion and profit-shifting (BEPS) tax minimization.[340] Those negotiations revolve around two pillars. Pillar One is about expanding states' ability to tax economic activity even when the firm in question does not have a physical presence there, so Pillar One is directly about the digital trade in services.[341] Pillar Two is about helping states deter firms from engaging in the profit-shifting activities discussed earlier.[342] Other countries have suggested curbing arm's length transfer pricing, a move the United States opposes.[343] Still others suggested a strong desire to see some form of digital services taxes, a move U.S. Commerce Secretary Wilbur Ross completely rejected as a non-starter and dismissed out of hand as "silly."[344] The Trump Administration wanted concessions from other countries on Pillar Two without making any genuine concessions of its own on Pillar One and even officially withdrew from the talks altogether.[345]

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336. Naomi Jagoda, *EU's $14.5B Tax Ruling Against Apple 'Awful'*, THE HILL (Aug. 30, 2016 2:28 PM), https://thehill.com/policy/finance/293829-ryan-eu-tax-ruling-against-apple-awful.

337. Letter from Orrin Hatch, Ron Wyden, Rob Portman, & Charles Schumer, U.S. S. Comm. On Fin., to Sec'y of the Treasury (May 23, 2016), https://www.finance.senate.gov/chairmans-news/hatch-wyden-portman-schumer-continue-push-for-fairness-in-eu-state-aid-investigations.

338. Kanter & Scott, *supra* note 335.

339. Ruth Mason, *Special Report on State Aid—Part 3: Apple*, 154 UNIV. VA. L. ECON. RSCH. PAPER SERIES 735 (2017).

340. Grinberg, *supra* note 332; Tankersley & Rappeport, *supra* note 315; A Unified Approach, *supra* note 332.

341. *See* Walter Hellerstein, *Reflections on the Cross-Border Tax Challenges of the Digital Economy*, TAX NOTES INT'L 630–632 (Nov. 25, 2019), https://www.taxnotes.com/special-reports/digital-economy/reflections-cross-border-tax-challenges-digital-economy/2019/11/21/2b3rc (regarding the OECD's proposal to use of formulary apportionment).

342. *Id*.

343. *Mnuchin Suggests US Won't Back Mandatory Rules to Curb Digital Services Taxes*, INSIDE U.S. TRADE (Dec. 13, 2019), https://insidetrade.com/daily-news/mnuchin-suggests-us-wont-back-mandatory-rules-curb-digital-services-taxes.

344. *Le Maire: If U.S. Wants to Curb Tax Evasion, It Must Agree to Digital Taxes*, INSIDE U.S. TRADE (Jan. 31, 2020), https://insidetrade.com/daily-news/le-maire-if-us-wants-curb-tax-evasion-it-must-agree-digital-taxes.

345. *OECD Group Reaffirms Commitment to Digital Tax Deal this Year; U.S. Concerns Linger*, INSIDE U.S. TRADE (Jan. 31, 2020), https://insidetrade.com/daily-news/oecd-group-reaffirms-commitment-digital-tax-deal-year-us-concerns-linger; Rappeport, *supra* note 319.

Things changed when Joe Biden became president. Treasury Secretary Janet Yellen was eager to forge an agreement on this.[346] She restarted the discussion with a new proposal of a global minimum tax rate of fifteen percent (Pillar Two) and replacing the new digital service taxes with a new tax that would be based on where a firm sold its services (Pillar One).[347] Bruno Le Maire, the French finance minister, pointed out the major change in approach from the previous administration, saying "Let's be clear, we have someone with whom it's easy to discuss, easy to build compromises and easy to bridge some gaps between the different nations."[348] Yellen's proposal quickly gathered at least some support. In June 2021, the G7 announced an agreement that included the fifteen percent minimum tax rate along with a new tax applied to twenty percent of the profits made by large firms that are above a ten percent profit margin.[349] The Biden Administration has projected that this plan would raise U.S. tax revenue by approximately 500 billion over a decade.[350] As that projection implies, the biggest winners from this deal would be the governments of the largest economies that would now wrestle back their ability to tax these firms shielding assets in tax havens, and thus the biggest losers would be the firms and the tax havens.[351]

Though the G7 has agreed to this in principle, there is still a long road to home before this deal is finalized. Many of the difficult details remain to be resolved before it gets taken up by the G20, and China thus far has been cool to the idea.[352] Meanwhile, between those very eager to increase these taxes (France) and those reluctant to do so (Ireland, Hungary, Cyprus, and Malta), the EU is not particularly unified in its negotiating position.[353] A number of EU states are also worried that the new tax might not include Amazon since its profit margin could be below the ten percent threshold.[354] Additionally, any plan would need the United States included, and so any deal would have to be approved by Congress. Despite their other complaints about large tech firms, Congressional Republicans seem opposed to this idea, and everyone wants everyone else to move first.[355] The EU wants the deal approved by Congress before they end their digital service taxes while the United States wants the digital service taxes scrapped first.[356] Finally, it is worth noting that given the

346. *Paradise Lost: Twilight of the Tax Havens*, ECONOMIST (June 5, 2021), https://www.economist.com/finance-and-economics/2021/06/03/twilight-of-the-tax-haven.

347. *Id*.; Hellerstein, *supra* note 341.

348. Alan Rappeport, *Finance Leaders Reach Global Tax Deal Aimed at Ending Profit Shifting*, N.Y. TIMES (June 5, 2021), https://www.nytimes.com/2021/06/05/us/politics/g7-global-minimum-tax.html.

349. *Id*.

350. *Id*.

351. *Paradise Lost: Twilight of the Tax Havens*, *supra* note 346.

352. *Id*.

353. *Id*.

354. David Milliken & Kate Holton, *Tech Giants and Tax Havens Targeted by Historic G7 Deal*, REUTERS (June 5, 2021 11:57 AM), https://www.reuters.com/business/g7-nations-near-historic-deal-taxing-multinationals-2021-06-05/.

355. Rappeport, *supra* note 348.

356. *A Less Loophole-Riddled System for Taxing Companies is Within Reach*, ECONOMIST (June 12, 2021), https://www.economist.com/leaders/2021/06/12/a-less-loophole-riddled-system-for-taxing-companies-is-within-reach.

way the deal is structured, it may only end up bringing in 50–80 billion dollars to governments annually, which is not a small change, but is not as high as some might hope for.[357]

These same kinds of legitimate regulation versus disguised protectionism arguments have plagued the transatlantic competition policy relationship vis-à-vis digital services as well. As Daniel Crane, an expert in antitrust law, puts it, "[i]n the U.S., firms can enjoy and exploit their dominance as long as they don't do so in plainly anticompetitive ways . . . but in Europe, they have to take special pains not to do things that extend their dominance."[358] Makan Delrahim, Assistant Attorney General for the Antitrust Division of the Department of Justice, agrees, remarking that "European competition law still imposes a 'special duty' on dominant market players, while we in the U.S. do not believe any such duty exists."[359]

The EU, especially under Competition Commissioner Margrethe Vestager, has taken a much tougher competition policy line with regards to these large digital service providers. To wit, in May 2017, the EU fined Facebook $122 million over misleading statements that it made when it was seeking approval for its acquisition of WhatsApp in 2014.[360] In June 2017, the EU fined Google $2.7 billion for promoting its own price comparison service in its search results while demoting competitor price comparison services.[361] In July 2018, the EU imposed a $5 billion fine on Google because it had forced device manufacturers to pre-install the Google search app and the Chrome browser if they wanted to use the Android operating system and the Google Play store; the EU Commission said that this hurt competition by pushing users to use Google's products and not giving rivals a fair chance.[362] Amazon and Apple are both currently also being investigated by the Commission on competition grounds.[363] Europe's more robust data privacy understandings are increasingly being fused with competition concerns.[364] To give one example of this, the German

357. *Id.*

358. David Streitfeld & Mark Scott, *Amazon's E-Book Business Being Investigated in Europe*, N.Y. TIMES (June 11, 2015), https://www.nytimes.com/2015/06/12/business/international/european-union-amazon-ebooks-antitrust-investigation.html.

359. MAKAN DELRAHIM, ASSISTANT ATT'Y GEN., ANTITRUST DIV. U.S. DEP'T OF JUST., GOOD TIMES, BAD TIMES, TRUST WILL TAKE US FAR: COMPETITION ENFORCEMENT AND THE RELATIONSHIP BETWEEN WASHINGTON AND BRUSSELS 7 (Feb. 21, 2018).

360. Mark Scott, *E.U. Fines Facebook $122 Million Over Disclosures in WhatsApp Deal*, N.Y TIMES (May 18, 2017), https://www.nytimes.com/2017/05/18/technology/facebook-european-union-fine-whatsapp.html.

361. Mark Scott, *Google Fined Record 2.7 Billion in EU Antitrust Ruling*, N.Y. TIMES (June 27, 2017), https://www.nytimes.com/2017/06/27/technology/eu-google-fine.html.

362. Adam Satariano & Jack Nicas, *E.U. Fines Google $5.1 Billion in Android Antitrust Case*, N.Y.TIMES (July 18, 2018), https://www.nytimes.com/2018/07/18/technology/google-eu-android-fine.html; Sam Schechner & Douglas MacMillan, *Google is Fined Five Billion by EU in Android Antitrust Case*, WALL ST. J., (July 18, 2018, 8:09 PM), https://www.wsj.com/articles/google-to-be-fined-5-billion-by-eu-in-android-case-1531903470.

363. Elizabeth Schulze, *If You Want to Know What a US Tech Crackdown Might Look Like, Check Out What Europe Did*, CNBC (June 7, 2019, 2:01 AM), https://www.cnbc.com/2019/06/07/how-google-facebook-amazon-and-apple-faced-eu-tech-antitrust-rules.html.

364. *Big Tech Faces Competition and Privacy Concerns in Brussels*, ECONOMIST (Mar. 23, 2019), https://www.economist.com/briefing/2019/03/23/big-tech-faces-competition-and-privacy-concerns-in-brussels.

competition authority has said that Facebook being able to encroach on privacy without users leaving is a measure of its market power.[365]

U.S. government officials have routinely complained that these actions, however high-minded they might sound, are actually unfair bullying of American firms.[366] From their perspective, the EU actions are those of a stodgy, hidebound, Old World engaging in protectionism on behalf of the outdated so as not to have to compete with the new.[367] Barack Obama, in an interview with Recode, encapsulated this framing when he said "[w]e have owned the Internet. Our companies have created it, expanded it, perfected it in ways that they can't compete. And oftentimes what is portrayed as high-minded positions on issues sometimes is just designed to carve out some of their commercial interests."[368] All of this means that there is a transatlantic disagreement with regards to the provision of digital services that sits adjacent to the tax policy disagreement.

V. NEW APPROACHES

A. CETA, CPTPP, and Digital Services Trade

The Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union, signed in 2016, includes a chapter on electronic commerce and nods towards Canada and the EU's aspiration to promote more trade in digital services between them.[369] Unfortunately, the steps it takes to either promote trade in digital services or find some way through the thicket of differentiating between legitimate regulation and disguised protectionism are baby steps at best.[370] Chapter nine (Services) excludes cultural industries for Canada and audiovisuals for the EU.[371] Given the economic significance of these

365. *Id.*

366. *See* Robert Wielaard, *EU Blocks GE, Honeywell Merger*, CBS NEWS (Jul. 3, 2001, 10:11 AM), https://www.cbsnews.com/news/eu-blocks-ge-honeywell-merger/ (discussing U.S. Senators who accused the EU of protectionism, warning of a "chilling effect" on relations); Dirk Auer & Geoffrey A. Manne, *Is European Competition Law Protectionist?*, ICLE at 2–3 (Mar. 3, 2019) (discussing criticism of protectionism from both sides of the political aisle about the Commission based on European competition law that shields European industries from larger American companies).

367. *Id.*

368. Kara Swisher, *White House. Red Chair. Obama Meets Swisher*, VOX (Feb. 15, 2015, 12:32 PM), https://www.vox.com/2015/2/15/11559056/white-house-red-chair-obama-meets-swisher.

369. Comprehensive Economic and Trade Agreement (CETA), Can.-E.U., Oct. 30, 2016, ch. 9 [hereinafter CETA]. On service liberalization in preferential trade agreements that goes beyond the GATS, *see* Martin Roy et al.,, *Services Liberalization in the New Generation of Preferential Trade Agreements (PTAs): How Much Further Than the GATS*? 155-192 (World Trade Rev., Working Paper ERSD-2006-07, 2006).

370. A rather pointed lack of ambition with regards to services is not confined to CETA. In fact, in some instances, countries have actually committed to less in regional trade agreements than they have to the GATS under the WTO. On GATS-minus commitments, *see* Rudolf Adlung & Sebastien Miroudot, *Poison in the Wine? Tracing GATS-minus Commitments in Regional Trade Agreements* 1045–1082 (Working Paper No. ERSD-2012-04, 2012) and Rudolf Adlung & Peter Morrison, *Less Than the GATS: 'Negative Preferences' in Regional Services Agreements*, 13, J. INT'L ECONOMIC L., 1103, 1103–1143 (2010).

371. *See* CETA, *supra* note 369, at 74–78. It is also worth noting that CETA only covers Mode 1 and Mode 2 trade in services. Modes 3 and 4 are specifically excluded. France was one of the central drivers of the EU's audiovisual carve-out. France has been supportive of a horizontal or general exclusion approach to cultural exceptions, as opposed to a more targeted approach. Maria Trinidad Garcia Leiva, *Cultural Diversity and Free Trade: The Case of the EU-Canada Agreement*, 23 INT'L J. CULTURAL POL'Y 6 (2015).

industries, those are major sectors to exclude. That it was these specific industries chosen suggests that both parties fear that liberalization in digital services, particularly in these sectors, could benefit American technology companies and American cultural content producers more than their own businesses.[372] Of course, each of the parties would say that carving these sectors out is not about protecting domestic businesses but rather about safeguarding cultural distinctiveness. In this way, the carve-outs sit exactly along the disguised protectionism versus legitimate regulation fault line we discussed earlier.

Chapter eleven (Mutual Recognition on Professional Qualification) could, in theory, be extremely helpful. Both Canada and the EU are service-oriented economies and improving the efficiencies of their service sectors could be very helpful to overall economic growth and to the competitiveness of their service providers in global markets.[373] However, in practice all that it does of substance is to instruct each party to encourage its relevant authorities to make recommendations on proposed mutual recognition agreements to a committee that will then decide on the proposed MRA.[374] Chapter twelve (Domestic Regulation) instructs the parties to set up their licensing regime in a way that is transparent, objective, established in advance, and made publicly available, but does little else.[375] It does not, for example, give any recommendations for industries or occupations that may be ready for a limited MRA right now.[376] Let us suppose that architectural licensing is fairly similar in the EU and Canada. An MRA just on architectural licensing may allow an architect in Canada to more easily provide services via electronic delivery of blueprints to clients in the EU and vice versa. Successfully completing such an MRA for architects could create momentum for MRAs in other professions as well. Chapter twenty-one (Regulatory Cooperation) is similarly structured and similarly brief.[377] Even if an MRA for architects was not politically feasible, greater regulatory cooperation could help facilitate the international trade in that service.[378] We use architects here as example, but the principle should hold for many occupations.

Chapter sixteen (Electronic Commerce) starts on a hopeful note, saying that the parties "recognise that electronic commerce increases economic growth and trade opportunities in many sectors and confirm the applicability of the WTO rules to electronic commerce" but then the rest of the chapter does little to

372. *See* Leiva, *supra* note 371, at 9–11 (discussing the impact of CETA on the political economy including free trade and cultural policies).

373. *See The Service Economy*, OECD 11 (2020), https://www.oecd.org/sti/ind/2090561.pdf ("[B]arriers to international trade and investment continue to pose obstacles to the globalization of service sectors. Doing away with these barriers is essential for fulfilling the potential… of competitive advantage."); CETA, *supra* note 369, ch. 11(3) (discussing that mutual recognition of professional qualifications would allow the parties to develop higher standards for their service providers above other parties in the global market).

374. *See* CETA, *supra* note 369 ch. 11, art. 11.3 (outlining the negotiation of an MRA).

375. *Id.* at ch. 12, art. 12.3.

376. *See Id.* at ch. 11, art. 11.2 (lacking the guidance for industries ready for limited MRA now).

377. *Id.* at ch. 21.

378. *See* Anabela Correia de Brito et al., *The Contribution of Mutual Recognition to International Regulatory Co-operation* 13 (OECD, Working Papers No. 2, 2016) ("Attention is growing on the potential of international regulatory cooperation (IRC) to help policy makers maximise welfare and address the potential barriers to economic integration and trade.").

promote electronic commerce.[379] In fact, the whole of Chapter sixteen is a mere two pages long. Two. Like Chapter eleven, Chapter sixteen gives few concrete instructions. Its only substantive recommendation is for the parties to encourage a dialogue on electronic signatures, intermediary suppliers who transmit or store data, spam emails, and anti-fraud initiatives.[380] Such a dialogue is a nice start, but when that is the alpha and omega of substantive legal directives in the e-commerce chapter, that belies an extremely limited ambition.

There are several potential causes of that limited ambition. As noted earlier, the EU and Canada may fear the benefits of liberalization go to U.S. technology giants. After all, there is a dearth of large digital firms native to Europe. Of the two hundred largest digital firms in the world, only eight are from Europe and none are in the top fifteen.[381] Big technology firms feed on large, liquid pools of data, users, capital, and skilled labor; European fragmentation undercuts that.[382] Though Toronto is becoming a leading research hub for artificial intelligence, it is still the case that none of the major North American technology firms are native to Canada.[383] Another reason might be that Canadian and European government officials are prioritizing privacy and other regulatory sovereignty concerns over facilitating commerce.[384]

In our earlier sections, we identified a number of barriers to the digital services trade. Few of those are explicitly focused on in CETA's e-commerce chapter or anywhere else in the agreement. Furthermore, what provisions are in the agreement have very "legalization" to them. International law scholars have defined legalization as deriving from the extent to which an agreement obliges the parties abide by the agreed-upon terms, has precise rather than vague provisions, and delegates dispute adjudication and other enforcement responsibilities to third-party institutions like the UN or WTO.[385] There is little to none of that here. CETA's provisions with regards to a number of barriers to the trade in digital services are either totally absent or are so imprecise and delegate so little authority to third parties that they amount to the softest of soft law.[386] In our final section below, we proposed a set of measures meant to

379. CETA, *supra* note 369 at ch. 16, art. 16.2.

380. *Id.* at ch. 16, art. 16.6.

381. *See Top 100 Digital Companies*, FORBES (2019), https://www.forbes.com/top-digital-companies/list/#tab:rank (ranking digital companies).

382. *See generally* THE DIGITAL TRANSFORMATION OF LABOR: AUTOMATION, THE GIG ECONOMY AND WELFARE (Anthony Larsson & Robin Teigland eds. 2020) (e-book) ("This book also seeks to illuminate what actors/groups are mostly benefited by digitalization/digital transformation and which actors/groups that are put at risk by it.").

383. *See* Rahul Kalvapalle, *AI Fuels Boom in Innovation, Investment and Jobs in Canada: U of T Report*, U OF T NEWS (June 23, 2020), https://www.utoronto.ca/news/ai-fuels-boom-innovation-investment-and-jobs-canada-report-says (discussing how artificial intelligence is leading to innovation and job creation); *see also Top 100 Digital Companies*, FORBES (2019), https://www.forbes.com/top-digital-companies/list/#tab:rank (ranking digital companies).

384. *See generally* David Uberti, *Canada's Proposed Privacy Overhaul Leans Toward European-Style Rules*, WSJ PRO (Nov. 25, 2020, 5:30 AM), https://www.wsj.com/articles/canadas-proposed-privacy-overhaul-leans-toward-european-style-rules-11606300200 (discussing Canadian privacy legislation that is similar to EU regulation).

385. On obligation, precision, and delegation as underpinnings of legalization, *see* Kenneth Abbott et al., *The Concept of Legalization*, 54 INT'L ORG., 401–419 (2000).

386. CETA, *supra* note 369, at ch. 16, art. 16.2-3.

advance regulatory cooperation in this area in a much more substantive way than CETA has attempted to do and that can be carried out even where there is little appetite for hard law.

The Comprehensive and Progressive Trans-Pacific Partnership (CPTPP) is a free trade agreement between Japan, Canada, Australia, Mexico, Chile, New Zealand, Malaysia, Peru, Singapore, Vietnam, and Brunei that came into effect at the end of 2018.[387] The CPTPP is a much more ambitious agreement than CETA with regards to the trade in digital services. A big part of that added ambition comes in Article 14.4 which states:

> No Party shall accord less favourable treatment to digital products created, produced, published, contracted for, commissioned or first made available on commercial terms in the territory of another Party, or to digital products of which the author, performer, producer, developer or owner is a person of another Party, than it accords to other like digital products.[388]

This article thus entrenches the national treatment principle as it pertains to digital products. It *even* echoes the GATT's use of "like products."[389] As Joshua Meltzer points out, there is no commonly agreed on definition of digital trade.[390] So it is helpful that the CPTPP provides a copy-able definition of what counts as a digital product. Chapter fourteen, Article 1 says "digital product means a computer programme, text, video, image, sound recording or other product that is digitally encoded, produced for commercial sale or distribution, and that can be transmitted electronically."[391] Our only critique is that, under this definition, it is still rather unclear on the extent to which digital *services* count as digital products.[392] A show on Netflix seems to fall under this definition,[393] but does telemedicine?

Like CETA, the CPTPP covers electronic signatures, but unlike CETA, it does more than call for a dialogue. It prohibits parties from refusing to accept signatures simply because they are electronic and says that the states involved cannot prohibit other parties from mutually determining appropriate authentication methods.[394] Because physical signatures require the signatory to be on-location, the refusal to accept electronic signatures has little function other than to disadvantage foreign service suppliers. It is blatant protectionism. There is no conceivable function of requiring physical, in-person signatures that could not be achieved in a less trade-disruptive manner.

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387. CPTPP, *supra* note 99.

388. *Id.* at ch. 14, art. 14.4.

389. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

390. Meltzer, *supra* note 9, at 33.

391. CPTPP, *supra* note 99, at ch. 14, art. 14.1.

392. CPTPP, *supra* note 99, at ch. 10, art. 10.2 specifically includes access to telecommunications services. With respect to market access, the CPTPP essentially repeats the language of the GATS. General Agreement on Trade in Services, Apr. 15, 1994, 1869 U.N.T.S 183, 33 I.L.M 1167 [hereinafter GATS].

393. *See generally* Emily Jackson, *CPTPP Side Deals Leave Door Open for Canada to Regulate Netflix, Experts Say*, FIN. POST (Mar. 8, 2018), https://financialpost.com/telecom/media/cptpp-side-deals-leave-door-open-for-canada-to-regulate-netflix-experts-say (discussing CPTPP impact on foreign audio-video services).

394. *Id.* at ch. 14(6); CPTPP, *supra* note 99, at ch. 14, art. 14.6.

The CPTPP is much more specific in terms of how licensing requirements are to be implemented so as to limit their impact on the trade in services.[395] In terms of data protection, the CPTPP again is more specific and more ambitious than CETA. It says that: "Each Party shall endeavour to adopt non-discriminatory practices in protecting users of electronic commerce from personal information protection violations occurring within its jurisdiction."[396] This inclusion of the phrase "non-discriminatory practices" here is important because data security has been one of the chief stated objectives behind policies like data localization.[397] The CPTPP also encourages mutual recognition agreements more explicitly than CETA and specifically calls for them in engineering and architecture under the auspices of APEC.[398] This may help achieve the momentum-building and commerce facilitation that we discussed earlier.

Additionally, the CPTPP includes language meant to help adjudicate the legitimate regulation-versus-disguised protectionism conundrum. It says that parties may adopt regulations to achieve legitimate public policy objectives so long as the regulations are "not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade; and does not impose restrictions on transfers of information greater than are required to achieve the objective."[399] On one hand, that is a good faith effort to include language that grapples with one of the central challenges in this policy area. On the other hand, it is hard to see how language like that would have altered the trajectory of either the *US-Gambling* case or the *China-Audiovisuals* case.

The CPTPP bans data localization, local presence requirements, and regulations that force firms to divulge source code.[400] Finally, the CPTPP is more specific in its guidance for promoting regulatory cooperation.[401] Still, despite all of these thrusts towards greater ambition, the CPTPP is not without its critics.[402] R.S. Neeraj, for example, argues that TPP is not a good benchmark for use in future multilateral negotiations because it does not reconcile tensions between the digital economy and the WTO or address anticompetitive concerns that are special to digital markets.[403]

To return to our discussion of the tension between sovereignty and facilitating commerce, all of these measures sacrifice small amounts of regulatory sovereignty for meaningful degrees of commerce facilitation and are thus appropriate initial measures that make sense to include in e-commerce

395. CPTPP, *supra* note 99, at ch. 10, art. 10.8.

396. *Id.* at ch. 14, art. 14.8.

397. *Id.*; *See generally* Lindsey R. Sheppard et al., *The Real National Security Concerns over Data Localization*, CSIS BRIEFS (Jul. 2021) (discussing data security and data localization).

398. CPTPP, *supra* note 99, at ch. 10, annex 10-A ("[T]he Parties recognise the work in APEC to promote the mutual recognition of professional competence in engineering and architecture, and the professional mobility of these professions, under the APEC Engineer and APEC Architect frameworks.").

399. *Id.* at ch. 14, art. 14.11.

400. *Id.* at ch. 14, art. 14.13, ch. 10, art. 10.6, ch. 14, art. 14.17.

401. *Id.* at ch. 14, art. 14.15, ch. 16, art. 16.25.

402. Neeraj, *supra* note 37, at 141.

403. *Id.* at 121.

chapters in future trade agreements.[404] Our recommendations below take them as a baseline and attempt to build upon them. They may also be useful if the CPTPP provisions cannot be copied in future agreements.

B. The United States-Mexico-Canada Agreement (USMCA) and Digital Services

NAFTA, the USMCA's direct predecessor, was negotiated in the late 1980s/early 1990s prior to the explosive growth of the Internet and its subsequent effects on trade. One of the most significant changes the USMCA made to NAFTA was the addition of an e-commerce chapter.[405] Although the United States withdrew from the Trans-Pacific Partnership, the e-commerce language in the CPTPP can be found throughout the USMCA.[406] Seeing as the Trump Administration was eager to renegotiate NAFTA and there had been significant technological advances since the early 1990s,[407] a wide range of stakeholders in each of the three states agreed that it would make sense to discuss e-commerce as part of the renegotiations.[408] What made this an even easier sell was that the TPP's e-commerce provisions were available as a starting point.

The USMCA's e-commerce chapter begins with a recognition of the "economic growth and opportunities provided by digital trade," as well as the importance of creating regulations that "avoid unnecessary barriers" to the continued growth of digital trade.[409] Like the CPTPP, the USMCA prohibits data localization requirements, bans discriminatory treatment of electronic signatures, establishes national treatment of digital products, and bars states from forcing firms to divulge their source code.[410] Taken as a whole, these provisions represent a concerted effort to protect the free flow of data critical for e-commerce, and a significant lowering of barriers to the growth of the digital economy. Given that these provisions are now in both the USMCA and CPTPP, these provisions may become a least common denominator and act as a

404. *See* CETA, *supra* note 369, at ch. 16, art. 16.3 (discussing that parties are forbidden from imposing customs duties, fees, or charges on a delivery transmitted by electronic means); CPTPP, *supra* note 99, at ch. 14 (encouraging reductions in regulatory sovereignty through avoiding unnecessary barriers to the use and development of electronic commerce to facilitate greater opportunities in cultivating e-commerce).

405. An additional impetus behind this new chapter is that there are significant spillovers between the parties with regards to ICT investments. Saeed Moshiri, *ICT Spillovers and Productivity in Canada: Provincial and Industry Analysis*, ECO. INNOVATION & NEW TECH. 1, 1–20 (2016).

406. Bashar Malkawi, *Digitalization of Trade in Free Trade Agreements with Reference to the WTO and the USMCA: A Closer Look*, CHINA & WTO REV. 149, 158 (2019).

407. Paul Wiseman, *What Trump's New North American Trade Deal Actually Does*, AP NEWS (Jan. 29, 2010), https://apnews.com/article/donald-trump-ap-top-news-international-news-global-trade-politics-222da26d3fe441dc0afca4194addfc6f.

408. *Id.*

409. USMCA, *supra* note 149, at ch. 19, art. 19.1(1).

410. *Id.* at ch. 19, arts. 19.4, 19.6, 19.11, 19.12, 19.16.

minimum floor of regulatory treatment.[411] The USMCA also bans customs duties on digital products.[412]

One provision in the USMCA that is not found even in the TPP is U.S. Section 230-equivalent protection for Internet service providers (ISPs) and other online platforms; Section 230 of the Communications Decency Act says Internet service providers are protected from liability for "information stored, processed, transmitted, distributed, or made available" on their platforms.[413] In 2017, at the outset of the USMCA negotiations, this was a high priority for the major technology firms and for Ron Wyden, the ranking Democrat on the Senate Finance Committee.[414] Interestingly, by 2019, even before the revised version of the USMCA had been signed, Republicans and Democrats were already having second thoughts about including 230-equivalent language in the USMCA.[415] Now that some Republicans and Democrats, albeit for different reasons, are advocating for changing Section 230,[416] should they significantly alter or repeal 230, the United States will not be in compliance with the USMCA.

There are, however, several important points of friction that were left unaddressed. The USMCA sidesteps the classification question, failing to identify electronic products as either goods or services.[417] Given the difficulties of coming to an accurate, helpful, and agreed-upon answer to that classification question, that is understandable, but without an authoritative answer to that question, the problems arising from the classification difficulty are only likely to grow over time.[418] At some point, some kind of answer to that question, even if not perfect, could be a helpful starting point for addressing the conundrums in this policy area. The agreement also does not require the harmonization of some very important digital trade regulation, which could prove problematic.[419] For example, each of the three signatories is charged with developing privacy and

411. *See generally* Michael H. Ryan, *USMCA, CPTPP and CETA- A Review and Comparison of the Provisions Concerning Trade in Telecommunications and Related Digital Services*, CANADIAN LEGAL INFO. INST. (Jan. 4, 2020), https://www.canlii.org/en/commentary/doc/2020CanLIIDocs69 (comparing the USMCA, CPTPP, and CETA).

412. USMCA, *supra* note 149, at ch. 19, art. 19.3.

413. Section 230 says "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." Communications Decency Act of 1996, 47 U.S.C. § 230; USMCA, *supra* note 149, at ch. 19, art. 19.17.

414. *Wyden, Internet Giants Lay Priorities for NAFTA Redo*, INSIDE U.S. TRADE (Jun. 30, 2017, 8:55 AM), https://insidetrade.com/daily-news/wyden-internet-giants-lay-out-digital-trade-priorities-nafta-redo.

415. *House Judiciary Leaders Chastise USTR for IP 'Safe Harbor' Language in USMCA*, INSIDE U.S. TRADE (Sept. 23, 2019, 8:30 AM), https://insidetrade.com/trade/house-judiciary-leaders-chastise-ustr-ip-safe-harbor-language-usmca; *House Panel Knocks Inclusion of Internet Liability Language in USMCA, Japan Deal*, INSIDE U.S. TRADE (Oct. 16, 2019, 2:53 PM), https://insidetrade.com/trade/house-panel-knocks-inclusion-internet-liability-language-usmca-japan-deal.

416. *See generally* Casey Newton, *Everything You Need to Know About Section 230*, VERGE (Dec. 29, 2020, 4:50 PM), https://www.theverge.com/21273768/section-230-explained-internet-speech-law-definition-guide-free-moderation (discussing controversy surrounding Section 230 and possible changes proposed by both political parties).

417. Malkawi, *supra* note 407, at 157 ("The USMCA has yet to determine if digital products should be treated as goods, services, or something new altogether."). The text does include a definition of "digital products" in Article 19.1.

418. *See, e.g., id.* (defining an electronic product as a service allows parties to impose restrictions on market access and national treatment while a goods definition is only subject to national treatment rules).

419. *Id.* at 156–57.

anti-spam laws, although there is little guidance on what that regulation should look like.[420] For the most part, the USMCA delegates power to the individual nations to develop legal frameworks that will protect digital trade.[421] In this way, it is an attempt to maintain full policy sovereignty while still promoting digital commerce and curtailing disguised protectionism.[422]

Still, even if all three countries attempt to work together in good faith, the difficulties of navigating three different regulatory frameworks can be costly, time-consuming, and prohibitively difficult for digital enterprises.[423] The text does reference the importance of promoting regulatory cooperation but does not spell out specific cooperation-promotion measures beyond states attempting their "best endeavors . . . to develop compatibility amongst domestic privacy regimes."[424] Notwithstanding these omissions, digital industry representatives are optimistic about the effects of the agreement on the growth of the digital market.[425]

C. Negotiating Efforts Under the WTO

Under the aegis of the WTO, the Joint Statement Initiative is an effort, albeit a relatively modest one, to build a more robust legal framework around electronic commerce. Seventy-five countries, including the United States, released a Joint Statement on Electronic Commerce at the December 2017 WTO Ministerial saying that they would explore possibilities for a WTO agreement on e-commerce; negotiations started in 2019.[426] The United States appears to want an ambitious agreement while China appears to prioritize maintaining policy sovereignty, and the EU appears to want to split the difference.[427] The parties were supposedly going to make concerted efforts toward an agreement at the June 2020 WTO Ministerial in Kazakhstan, but the coronavirus pandemic forced the ministerial and much of the negotiations around e-commerce to be postponed.[428] There have been some discussions of a staggered approach in

420. *Id.* at 156.

421. USMCA, *supra* note 149, ch. 19, art. 19.5 ("Each party shall maintain a legal framework governing electronic transactions. . . .").

422. *See generally* RACHEL F. FEFER ET AL., CONG. RSCH. SERV., R44565, DIGITAL TRADE AND U.S. TRADE POLICY, 36 (2019) ("The provisions of the proposed USMCA establishes new rules and disciplines to remove trade barriers and counter discriminatory action while also providing governments with flexibility.").

423. *See generally* Marben Acosta Teran, *Challenges on the Upcoming Global Regulation in E-Commerce*, MEXICOM LOGISTICS (Mar. 28, 2019), https://mexicomlogistics.com/challenges-on-the-upcoming-global-regulation-in-e-commerce/ (explaining challenges and problems left unaddressed by the USMCA).

424. Meltzer, *supra* note 9, at 44.

425. U.S.-Mexico-Canada Trade Agreement: Likely Impact on the U.S. Economy and on Specific Industry Sectors, Inv. No. TPA 105-003, USITC Pub. 4889 (April 2019) (Final). On what some of these strategies may look like, see David A. Wolfe, *A Digital Strategy for Canada: The Current Challenge*, 25 IRPP INSIGHT (Feb. 2019).

426. *See generally* Press Release, World Trade Organization, Joint Statement on Electronic Commerce (Dec. 13, 2017) (on file with the Office of the United States Trade Representative) ("We, as a group, will initiate exploratory work together toward future WTO negotiations on trade-related aspects of electronic commerce.").

427. *Id.* at 19–20.

428. *Twelfth WTO Ministerial Conferences*, WTO, https://www.wto.org/english/thewto_e/minist_e/mc12_e/mc12_e.htm (last visited Aug. 30, 2021).

which the parties agree to the provisions around which there is the most consensus and then work their way to more contentious issues.[429]

What may help is that they are taking the shape of a plurilateral, a negotiating structure that allows countries with similar policy outlooks in a given area to enter an agreement in which the commitments apply only to themselves.[430] Open plurilateral, sometimes called "critical mass agreements," like the expansion of the Informational Technology Agreement in 2016,[431] does not discriminate between members because the signatories extend their liberalization to all WTO members.[432] The negotiating parties get around the free-rider problems by getting a sufficiently high percentage of producers in that sector (i.e., a critical mass) to sign onto the agreement.[433] A second type of plurilateral, known as a closed plurilateral, does not require as high a percentage of WTO members to sign onto the agreement but gets around the free-rider problem by extending benefits only to signatories, so it does discriminate between members.[434] Because they discriminate, these closed plurilateral negotiations can only come into force if no state objects.[435] An example of a closed plurilateral is the Government Procurement Agreement.[436]

There is some evidence that a plurilateral may be the exact kind of agreement structure that could yield results despite the contentiousness of the politics around these issues. Indeed, the expansion of the ITA in 2015, the most significant expansion of the WTO since its creation, is in many ways attributable to it being plurilateral.[437] Particularly, if its provisions are justiciable, binding, and pay careful attention to distributional considerations, a plurilateral can be an effective means of advancing trade negotiations.[438] Plurilaterals help the negotiating parties by not employing a single undertaking that becomes susceptible to policy hostage-taking, by limiting the number of countries involved in the negotiations, by bypassing contentious issues where possible, by utilizing different commitments tiers or phase-in periods, and by helping to avoid nationalistic backlashes.[439] This format enjoys considerable support. The largest WTO members as well as the business community favor this approach, and there have been some reports that substantial progress is being made on e-commerce in hopes that an agreement can be reached by the November 2021 ministerial conference, though some of the most contentious issues like data

429. Fefer, *supra* note 5, at 22.

430. Bernard M. Hoekman & Petros C. Mavroidis, *Embracing Diversity: Plurilateral Agreements and the Trading System*, 14 WORLD TRADE REV. 101, 101 (2015).

431. Gary Winslett, *Critical Mass Agreements: The Proven Template For Trade Liberalization in the WTO*, 17 WORLD TRADE REV. 405, 407 (2018).

432. *Id*.

433. *Id*.

434. *Id.* at 407 n.2.

435. BERNARD HOEKMAN & CHARLES SABEL, OPEN PLURILATERAL AGREEMENTS, INTERNATIONAL REGULATORY COOPERATIONS AND THE WTO 3 (2019), http://www2.law.columbia.edu/sabel/papers/2019_Hoekman-Sabel_Global_Policy.pdf.

436. Winslett, *supra* note 431, at 406.

437. *Id.* at 405–06.

438. UNIVERSITY OF WARWICK, THE REP. OF THE FIRST WARWICK COMM'N, THE MULTILATERAL TRADE REGIME: WHICH WAY FORWARD? 30–32 (2007).

439. Winslett, *supra* note 431, at 417–425.

localization and privacy rules have yet to be resolved.[440] G7 leaders and the new WTO Director, General Ngozi Okonjo-Iweala, have argued in favor of a plurilateral as well.[441]

The main problem is that in early 2021, India and South Africa issued strong criticism of plurilaterals, implying that they would oppose them.[442] Because an e-commerce plurilateral would probably need to be a closed plurilateral, their assent will be needed.[443] Even if India and South Africa do not block progress on an e-commerce plurilateral and if one comes to fruition—- a big if—it will need to be supplemented by regulatory cooperation.[444] If India and South Africa do block progress, or if the negotiations stall for some other reason, then regulatory cooperation will be all the more necessary.[445] Thus, regardless of the outcome of the WTO negotiations on e-commerce, the shape of regulatory cooperation in digital services is worth considering.

VI. POTENTIAL PATHWAYS FOR REGULATORY COOPERATION IN THE TRADE IN DIGITAL SERVICES

Regardless of whether states choose to collaborate on the digital trade in services bilaterally, regionally, or multilaterally, genuine progress is likely to require significant amounts of regulatory cooperation.[446] Moreover, being an earlier governor of a commercial space creates path dependencies and allows that polity to be a long-term leader in that space and so should be particularly eager to promote their preferred versions of international regulatory cooperation sooner rather than later.[447] There are a number of avenues by which states may promote regulatory cooperation but for our purposes here we will focus on four: private standards, networked governance, mutual recognition agreements, and binding international treaties.

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440. *WTO E-Commerce Talks Co-Convener: No Conclusions on Legal Path*, INSIDE U.S. TRADE (Mar. 16, 2021, 5:45 PM), https://insidetrade.com/daily-news/wto-e-commerce-talks-co-convener-no-conclusions-legal-path.

441. *G7 Leaders Outline WTO Reform Goals, Targeting Subsidies and S&DT*, INSIDE U.S. TRADE (June 13, 2021, 1:28 PM), https://insidetrade.com/daily-news/g7-leaders-outline-wto-reform-goals-targeting-subsidies-and-sdt; *Okonjo-Iweala: MC12 Should Include Plurilateral Progress, Moratorium Decision*, (June 24, 2021 12:21 PM) https://insidetrade.com/daily-news/okonjo-iweala-mc12-should-include-plurilateral-progress-moratorium-decision.

442. General Council, *The Legal Status of 'Joint Statement Initiatives' and Their Negotiated Outcomes*, WTO Doc. WT/GC/W/819 (February 19, 2021).

443. Hoekman & Sabel, *supra* note 436, at 3.

444. *See generally* Bernard Hoekman & Charles Sabel, *Open Plurilateral Agreements, International Regulatory Cooperation and the WTO* (Eur. Univ. Inst., EUI Working Paper RSCAS 2019/10) (describing the importance of cooperation in plurilaterals that underpin the agreements).

445. *Id.*

446. *See generally* BERNARD HOEKMAN, TRADE AGREEMENTS AND INTERNATIONAL REGULATORY COOPERATION IN A SUPPLY CHAIN WORLD, (Robert Schuman Centre for Advanced Studies Research Paper No. RSCAS 2015/04, 2015); Gary Winslett, *Choosing Among Options for Regulatory Cooperation*, 25 GLOBAL GOVERNANCE 100, 100–22 (2019); THOMAS BOLLYKY & PETROS MAVROIDIS, TRADE, SOCIAL PREFERENCE AND REGULATORY COOPERATION (EUI Working Papers. RSCAS 2016/47, 2016) (discussing regulatory cooperation in trade agreements).

447. David Bach & Abraham L. Newman, *Governing Lipitor and Lipstick: Capacity, Sequencing, and Power in International Pharmaceutical and Cosmetics Regulation*, 17 REV. INT'L POL. ECON. 665, 672 (2010).

A. Private Standards

When multiple parties have domestic constituencies that strongly desire greater regulatory cooperation in order to facilitate commerce, but also have domestic constituencies that express concerns about this regulatory cooperation, the parties' governments have a strong incentive to delegate regulation to a third-party institution.[448] These institutions can promulgate standards that mitigate the extent to which these issues get politicized;[449] the use of these private standards bodies grew significantly in the 1990s precisely because they were so adept at managing issues at the intersection of commerce and regulation where governance is deeply contested by both firms and activists.[450] Businesses and NGOs tend to support these bodies.[451] Firms like them because they tend to be quite technocratic and because those firms can directly engage with them on these technocratic grounds.[452] NGOs like them because they view these bodies as giving them some leverage over the standards-setting process.[453] These bodies tend to be formalized and open, thus alleviating some of the concerns around regulatory capture, but, at the same time, they are viewed by firms as promulgating regulations in ways that make them more cost-effective.[454] These bodies are generally good at dealing with rapidly changing circumstances (as is likely to happen in the technology space).[455] They also typically possess high levels of technical expertise.[456]

All of these factors mean that a set of private standards designed by an international body is likely the most fruitful means of promoting regulatory cooperation around the data privacy challenges discussed earlier. Those standards could be designed by an already existing institution like ISO or by a new body created by the parties involved, either globally or regionally depending on which states participate in it. Earlier, we shared a quote by a representative of the Information Technology Industry Association who said that the United States and the EU are not actually that far apart on the details of data privacy but that the disagreement between them had a taken on an almost theological quality.[457] Regulatory cooperation via private standards might help the parties focus on the details where there is more agreement and focus less on the theology where positions are less flexible.[458] It is worth noting that private standards such as those promulgated by these third-party institutions such as the

448. Winslett, *supra* note 446, at 103.
449. *Id.* at 115.
450. *Id.* at 116.
451. *Id.*
452. Winslett, *supra* note 446, at 115–116; *see also* Jullien, Bernard & Andy Smith, *Conceptualizing the Role of Politics in the Economy: Industries and their Institutionalizations*, 18 REV. INT'L POL. ECON. 358 (2011) (exemplifying that some scholars are more skeptical of this technocracy, seeing it as a way of marginalizing outsiders).
453. Winslett, *supra* note 446, at 116.
454. *Id.* at 105.
455. *Id.* at 106.
456. *Id.*
457. Monicken, *supra* note 60.
458. *See id.* ("But let's not get into [making] it a theological debate because it's not only inaccurate, it's ultimately extremely harmful to the negotiations. It sets up this false dichotomy and a false conflict.").

International Organization for Standardization (ISO) are not the same thing as voluntary standards even though these also, sometimes confusingly, get called private standards; the private standards issued by the Codex Alimentarius, ISO, or the OIE are a form of soft law but they are not the same thing as industry self-regulation.[459]

These kinds of private standards could be useful given the difficulties the Safe Harbor and Privacy Shield Agreements have encountered. Those agreements allowed U.S. firms to self-certify as protective of private information and, subsequently, to receive data transmissions from within the EU.[460] Data transfers are strictly regulated in the EU, but these frameworks lowered this barrier to free trade between allies.[461] Unfortunately, that spirit of cooperation did not fully allay European privacy concerns, and both Privacy Shield and Safe Harbor have since been shut down.[462]

One drawback of private standards bodies as a venue for regulatory cooperation is that because they are so centrally built to solve coordination problems around highly technical problems, when the issues at stake are differences in political principle or are distributional in nature, they become less effective.[463] A number of the areas of disagreement such as digital service taxes are more matters of political principle and distribution of benefits than they are technical challenges.[464] To return to the cases discussed earlier, it does not seem likely that the United States and China would have accepted a private standards body issuing guidance with regards to audiovisuals, but it may have been possible for a private standards body to find some form of administering online gambling that would have satisfied the regulatory concerns of the United States without preventing gambling service suppliers in Antigua from accessing the U.S. market. This suggests that private standards as a means of regulatory cooperation may be more effective when the primary concern is disguised protectionism as opposed to a loss of sovereignty.

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459. *See* David Vogel, *Private Regulation of Global Conduct*, *in* THE POLITICS OF GLOBAL REGULATION 151, 151–88, (Walter Mattli and Ngaire Woods ed., 2009) (discussing the industry self-regulation form of private standards); *see also* Virginia Haufler, *Globalization and Industry Self-Regulation*, *in* GOVERNANCE IN A GLOBAL ECONOMY: POLITICAL AUTHORITY IN TRANSITION 226, 231 (Miles Kahler and David Lake ed., 2003) (discussing the EnergyStar program); James Charles Smith, *Green Home Standards: Information and Incentives*, 54 HOUS. L. REV., 1139, 1139–89 (2017); TIMOTHY LYTON, KOSHER: PRIVATE REGULATION IN THE AGE OF INDUSTRIAL FOOD (Harvard University Press: Cambridge, 2013) (exemplifying the U.S.'s domestic use of third-party institutions).

460. U.S.-EU Safe Harbor Overview, EXPORT.GOV (Dec. 18, 2013, 3:45 PM), https://2016.export.gov/safeharbor/eu/eg_main_018476.asp.

461. *Id.*

462. Pulina Whiataker et al., *The End of the US-EU Privacy Shield*, MORGAN LEWIS (Jul. 17, 2020), https://www.morganlewis.com/pubs/the-end-of-the-us-eu-privacy-shield-but-standard-contractual-clauses-remain-valid; Daniel Alvarez, *Safe Harbor is Dead; Long Live the Privacy Shield?*, AM. BAR ASS'N (May 20, 2016), https://www.americanbar.org/groups/business_law/publications/blt/2016/05/09_ alvarez/.

463. Janina Grabs et al., *Private Regulation, Public Policy, and the Perils of Adverse Ontological Selection*, REGUL. & GOVERNANCE (Aug. 19, 2020), https://onlinelibrary.wiley.com/doi/full/10.1111/rego.12354.

464. *See* Joe Kennedy, *Digital Services Taxes: A Bad Idea Whose Time Should Never Come*, INFO. TECH. & INNOVATION FOUND. (May 13, 2019), https://itif.org/publications/2019/05/13/digital-services-taxes-bad-idea-whose-time-should-never-come (explaining that digital services taxes are ill advised but are technically possible).

B. Networked Governance

When negotiating parties recognize that a given regulatory difference is impeding the trade in services between them and strongly want to reduce the extent to which it does so, they can instruct their officials to cooperate internationally via informal networks, i.e., networked governance.[465] These networks have the advantage of being more politically insulated than more formal, more visible negotiating mechanisms.[466] These networks usually do not include political principles and are not generally slowed by the thicket of procedural rules that can accompany more formal options.[467] Interestingly, one policy area that the United States and the European Union have already used this kind of networked governance on is in competition policy.[468] Through the EU-U.S. Mergers Working Group, regulators in the two polities have exchanged procedural information in order to increase the likelihood of reaching similar decisions on proposed mergers.[469] That kind of regulatory cooperation in competition policy might be useful in transatlantic discussions regarding competition policy vis-a-vis the technology sector.

Additionally, given its structure and flexibility, networked governance may also be a useful way to promote cooperation on the technical barriers to the trade in digital services discussed earlier. Because networked governance mechanisms are more flexible and often less binding, states may have less acute sovereignty concerns if they start cooperating on regulation via this method. Additionally, these mechanisms may help actors discern the extent to which their negotiating partners are even interested in cooperating. That could be useful in cases where a state has concerns that the other is engaging in disguised protectionism.

Networked governance could be used in the areas of national security where the states involved are not seeking exemptions to trade rules but instead trying to solve collective action problems on shared priorities. This is in many ways what happened with the Passenger Name Records (PNR) Agreement.[470] The PNR, despite its brevity, creatively uses informal, flexible coordination.[471] Passenger name records (PNR) include the "name[s], payment details, itinerary, . . . and baggage information" of airline passengers and are used by law enforcement to screen for potential threats.[472] This is an important piece of post-9/11 U.S. security strategy that obviously requires international cooperation; in order for the Department of Homeland Security to effectively screen potential terrorist threats on international flights, they must share information with

465. Winslett, *supra* note 446, at 104–5.

466. *Id.*

467. Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT'L L. 1, 24 (2002); Pierre-Hugues Verdier, *Transnational Regulatory Networks and Their Limits*, 34 YALE J. INT'L L. 114 (2009); ANN-MARIE SLAUGHTER, A NEW WORLD ORDER (Princeton University Press, 2005).

468. Chad Damro, *Regulators, Firms, and Information: The Domestic Sources of Convergence in Transatlantic Merger Review*, 18 REV. INT'L POL. ECO., 409, 409 (2011).

469. *See id.* at 409–35 (discussing the EU-U.S. merger group).

470. Norman Zhang, *Trade Commitments and Data Flows: The National Security Wildcard*, 18 WORLD TRADE REV. s49, s49 (2019).

471. *Id.* at s51.

472. *Id.*

external security apparatuses. In the case of the EU, stringent privacy protections can impede this cooperation. European law restricts the transfer of any personal data outside of the EU, unless the European Commission issues an "adequacy opinion" that affirms the receiving party has comparably protective privacy regulations.[473] The United States, which employs a sectoral and more relaxed approach to privacy protection, has not received any such opinion.[474] Nevertheless, a U.S.-EU PNR Agreement currently allows European airlines to transfer PNR data directly to the U.S. Department of Homeland Security (DHS), albeit with limitations that personal data can only be used in counter-terrorist intelligence operations.[475] This framework is likely to be protected from potential GATS-compliance complaints by the national security exception, which allows countries to enact necessary measures to defend against security threats, including terrorism.[476] Not only is national security a helpful legal rationale, it clearly serves as sufficient impetus for international cooperation in an area that has been contentious. Already, other governments are looking to replicate this networked model of security governance.[477]

C. Mutual Recognition Agreements (MRAs)

States may choose to accept the regulatory decisions made by each other as equivalent. This is what the proposed dialogue on MRAs in professional qualifications in CETA aims to promote.[478] With this kind of MRA, if it were to come to fruition, a service provider in the agreed upon field who was licensed to operate in the EU would also be allowed to provide that service in Canada and vice versa.[479] Finally, a particularly ambitious option would be to use MRAs with a negative list. In other words, the parties would say that any professional license issued in one state is valid in the other except for in those areas specifically carved out by each party. This would echo the negative-list approach used by the GATS.[480] An MRA done bilaterally or regionally might be possible. In effect, that already exists within the EU.[481] One could imagine an MRA in some policy areas between countries like the three USMCA states that already cooperate on digital services.

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473. *Id.* at s50.

474. *Id.* at s54.

475. Agreement between the United States of America and the European Union on the Processing and Transfer of Passenger Name Record (PNR) Data by Air Carriers to the United States Department of Homeland Security, U.S.-E.U. (Jul. 23, 2007), https://www.dhs.gov/sites/default/files/publications/pnr-2007agreement-usversion.pdf.

476. Zhang, *supra* note 470, at s56.

477. *Id*. at s62.

478. EU–Canada mutual recognition agreement (MRA), EUR-LEX (2016) https://eur-lex.europa.eu/summary/EN/legissum:4350039 (last visited Aug. 31, 2021).

479. *Id.*

480. Marie-France Houde et al., *The Interaction Between Investment and Services Chapters in Selected Regional Trade Agreements*, *in* INTERNATIONAL INVESTMENT LAW: UNDERSTANDING CONCEPTS AND TRACKING INNOVATIONS (2008), https://www.oecd.org/daf/inv/internationalinvestmentagreements/40471729.pdf.

481. Mutual Recognition Agreements, EUROPEAN COMM'N, https://ec.europa.eu/growth/single-market/goods/international-aspects/mutual-recognition-agreements_en (last visited Aug. 31, 2021).

MRAs have a strong history of promoting cross-border commerce; an MRA is essentially what underpins the common market in the EU.[482] One advantage of an MRA is that it does not require a state to amend any of its domestic laws.[483] Given the political sensitivity of many regulations, that is no small advantage. Relatedly, MRAs may obviate the need for an international argument over whose standards should be the default standard.[484] Given this, mutual recognition agreements are often seen as easier agreements to conclude than those agreements that create a single standard.[485] One potential roadblock to MRAs, though, is that they require the parties to have high levels of trust in each other's regulatory effectiveness.[486] That is why mutual recognition agreements are generally accompanied by some form of regulatory floor.[487] MRAs maximize commerce facilitation and are excellent at dealing with disguised protectionism but they do imply a certain loss of sovereignty.[488] Indeed, the burgeoning European Community started using the MRA as a basis for building the common market precisely when they became more concerned with disguised protectionism than with maximizing each member state's sovereignty.[489] In addition to the challenge of cross-border qualifications, mutual recognition agreements may be helpful with regards to data security between allies and co-parties in free trade agreements.[490] On the other hand, given (1) the newness of the technologies, (2) how embryonic states' regulatory approaches are to these technologies, and (3) the high level of trust required by MRAs, it is difficult to see MRAs being used between lots of different states on a wide range of issues.[491]

D. Binding International Treaties

States can, of course, negotiate binding international treaties. Such treaties create policy certainty and establish clear rules.[492] The drawback is that states may fear that binding treaties, even if well designed, may become outdated and impede their ability to adapt to evolving circumstances.[493] The age-old question of whether the law is a weapon of the weak or merely a way for the powerful to codify their preferences surfaces quickly here too. Weaker states may worry that

482. Winslett, *supra* note 446, at 101.
483. *Id.* at 104.
484. *Id.* at 107.
485. Jacques Pelkmans, *Mutual Recognition in Goods: On Promises and Disillusions*, 14 J. EUR. PUB. POL'Y 699, 699–716 (2007).
486. Kalypso Nicolaidis, *Trusting the Poles? Constructing Europe Through Mutual Recognition*, 14 J. EUR. PUB. POL'Y 682, 683–87 (2007).
487. *See* Pelkmans, *supra* note 485, at 700 ("Thus, free movement needs to be ensured by stringent prohibitions of non-tariff measures such as quotas as well as the panoply of regulatory barriers. Without such prohibitions, the internal market would merely be a customs union.").
488. *Id.*
489. Gary Winslett, *How Regulations Became the Crux of Trade Politics*, 50 J. WORLD TRADE 47, 51–52.
490. *Mutual Recognition and Cooperation with Other Government Authorities*, EUROPEAN COMMISSION, https://ec.europa.eu/taxation_customs/mutual-recognition-and-cooperation-other-government-authorities_en (last visited Aug. 31, 2021).
491. Winslett, *supra* note 446, at 104.
492. *Id.* at 103.
493. *Id.*

a binding treaty would reinforce stronger states preferences as the default or that participating in the treaty negotiation and implementation will require significant legal expertise; meanwhile stronger states might worry that a treaty will constrain their ability to deploy their economic and political resources as they see fit.[494] The parties could in theory design the treaty to be imprecise or have many exemptions and escape clauses, but that would undermine the policy certainty benefits that are the treaty's *raison d'être*.[495] Conversely, the greater the treaty's level of legalization, i.e. the greater its level of obligation on the respective parties to follow the treaty's rules, the greater its precision, and the more it delegates interpretation and dispute adjudication, the more legalized it is and the more policy certainty it creates.[496]

Given the need for policy certainty with regards to taxes and given the clearly problematic nature of having tax policy handled via private standards or networked governance, a tax treaty under the auspices of the OECD's base erosion and profit-shifting initiative or based on the G7 agreement could be a massive step forward. Outside of tax policy, a more sweeping regional agreement on digital services in the mold of the Transatlantic Trade and Investment Partnership or a multilateral agreement along the lines of the Trade in Services Agreement (TISA) is not currently on the political agenda but could significantly advance regulatory cooperation on a range of issues.[497]

VII. CONCLUSION

To summarize, the main takeaways of our article are: (1) digitalization has expanded the range of services that can be traded via Mode 1 by reducing the proximity burden, accelerating the trade in media, servitizing manufacturing, and broadening traded data-related services; (2) that expansion notwithstanding, significant tensions remain between guarding policy sovereignty and promoting trade in digital services; (3) differentiating between legitimate regulation and disguised protectionism in this commercial area is difficult and will likely continue to be so; (4) CETA, the CPTPP, and USMCA have all started to incorporate provisions on digital services, albeit with varying levels of ambition while the WTO is also starting to take initial steps in this direction too; (5) to

494. Marc Busch et al., *Does Legal Capacity Matter? A Survey of WTO Members*, 8 WORLD TRADE REV. 559, 559–577 (2009).

495. B. Peter Rosendorff & Helen V. Milner, *The Optimal Design of International Trade Institutions: Uncertainty and Escape*, 55 INT'L ORG. 829, 829–857 (2004).

496. Kenneth W. Abbott et al., *The Concept of Legalization*, 54 INT'L ORG. 401, 401-20 (2000); *see also* Kenneth Abbot & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421, 434 (2000) ("Hard legal regimes, in contrast, grant greater independence to judicial or arbitral bodies but require them to follow agreed upon principles and to act only on specific disputes and requests. This combination of attributes…simultaneously constrains and legitimates delegated authority."); Gregory Shaffer & Mark A. Pollack, *Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance*, 94 MINN. L. REV. 706, 706–99 (2010).

497. Both U.S. and EU officials note that regulatory differences in services are quite costly and so promoting regulatory cooperation could be very beneficial to both parties. Alasdair Young, *Not Your Parents' Trade Politics: The Transatlantic Trade and Investment Partnership Negotiations*, 23 REV. INT'L POL. ECON 345, 358 (2016) (discussing how both U.S. and EU officials note that regulatory differences in services are quite costly and so promoting regulatory cooperation could be very beneficial to both parties).

more effectively advance regulatory cooperation and build a stronger legal architecture around the digital trade in services, we propose that states use private standards on issues around data privacy, networked governance on competition policy and technical barriers as well as some national security matters related to digital services, mutual recognition agreements on qualifications and data security between allies, and binding international agreements for digital service taxes. As the 2019 World Trade Report notes, "Globalization is not slowing or stalling. Rather, it is evolving, driven by trade in human skills, knowledge, and ingenuity."[498] The legal architecture is going to need to evolve too if it is to keep up with the changes happening in the digital services trade.

498. WTO, *supra* note 1, at 18.