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Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era

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discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
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Contents

Abstract 1

Introduction 3

Chapter I

CLASSIFICATION AND CHARACTERIZATION ISSUES OF THE ELECTRONIC SUPPLY OF SERVICES IN THE WTO

1 Introduction: e-commerce, electronic services and international trade

1.1 – The new frontiers in the trade debate on e-commerce: the electronic supply of services and its WTO unresolved issues 7

1.2 - Defining electronic supply of services for WTO purposes 9

2 The historical approach on e-commerce and e-services within the WTO

2.1 - The WTO Work Programme on e-commerce 11

2.1.1 The genesis of the discussions on e-commerce and the internet in the WTO 11
2.1.2 The sector specific approach for e-commerce within the WTO 13
2.1.3 The state of play on e-commerce: low pace and uncertain prospects 15

2.2 – The cross-cutting issues relevant for service trade 18

2.2.1 The moratorium on the imposition of customs duties on electronic transmissions 18
2.2.2 The "classification issue" and the treatment of digital content products 19
2.2.3 Technological neutrality as a reason to favour the applicability of the GATS discipline to trade in digital content products 22

2.3 - Electronic services and the WTO: the evolution in the GATS/CTS discussions 25

2.3.1 The discussions on services in the Work Programme on electronic commerce 25

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
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2.3.2 The role of the Annex on Telecommunications and the Reference Paper for the access to the supply of electronic services 27

3 Modal and sectorial services classification in the GATS: a look at the implications for electronic services

3.1 – An out-dated classification of services in the GATS agreement 30

3.1.1 The GATS infrastructure and the definition of trade in services: an overview 30
3.1.2 The WTO services classification system and its drawbacks: W/120 and CPC lists 32
3.1.3 The consequences of a rigid classification system: CPCProv vs CPC 2.0 35
3.1.4 Other relevant international services classifications 39

3.2 - The sectorial classification of electronic services in the GATS context 42

3.2.1 Technological neutrality in the sectorial classification of electronic services 42
3.2.2 Technological neutrality and the US-Gambling *dispute* 47

3.3 – The modes of supply and the internet 50

3.3.1 Disaggregation of commitments through the modes of supply 50
3.3.2 The mode of supply of electronic services: a policy-biased debate 53

4 The rise of new electronic services

4.1 - Introduction: uncertainties in the sectorial classification of the electronic supply of services 59

4.2 - The convergence phenomenon and its impact on the classification of ICT services 61

4.2.1 Defining telecommunication and computer services after the digital revolution 61
4.2.2 The "audiovisual issue" poisoning the debate on digital transmissions 66
4.2.3 The manner and the content of transmission: clarifying the EU-US divergences and the possible interpretative scenarios 68

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
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Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

4.3 - New types of electronic services? 73

4.3.1 Search engines 74
4.3.2 Social networks 77
4.3.3 Streamed video content 79
4.3.4 Cloud services 81

4.4 - Interim conclusions: getting out of the impasse through the jurisprudential interpretations? 84

4.4.1 The starting point: schedules of commitments and treaty interpretation 84
4.4.2 The ordinary meaning, the object and the purpose of the schedules of commitments 86
4.4.3 The DSB going beyond a technological neutral approach? 89

Chapter II

TRADE BARRIERS TO THE CROSS-BORDER SUPPLY OF ELECTRONIC SERVICES: DOMESTIC REGULATION AND FREE FLOW OF INFORMATION

1. Trade barriers and the internet: an introduction

1.1 - The rationale of non-tariff barriers and the lack of discipline for trade in services 93
1.2 - The "balkanization" of the internet and the emergence of cross-border specific trade barriers 96

2. The GATS general discipline relevant for the cross-border supply of services

2.1 – Procedural transparency obligations 100

2.1.1 Publication transparency: GATS Art. III 100
2.1.2 Administration transparency: GATS Art. VI 1-3 103

2.2 - MFN treatment and the Annex on Article II exemption 105

2.2.1 MFN in GATS as an horizontal obligation 105
2.2.2 The consequences of the MFN exemption for trade in electronic services 107

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
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Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

3. The GATS specific obligations on market access, non-discrimination and domestic regulation and their relevance for the supply of electronic services

3.1 - The puzzling interaction between market access, national treatment and domestic regulation in GATS Articles XVI, XVII and VI 110

3.1.1 The GATS system for specific obligations: market access and national treatment commitments 110
3.1.2 Market access and national treatment barriers to the supply of electronic services 113
3.1.3 Market access or domestic regulation? The characterization of a zero-ban in US-Gambling 117

3.2 - Clarifying the scope of domestic regulation in the GATS 121

3.2.1 Current obligations and the built-in agenda of GATS Art. VI:4 121
3.2.2 Domestic regulation and electronic services 126

4. National policy space *versus* free supply of foreign services: the role of the GATS general exception and its evolving interpretation

4.1 - The rational at the basis of the general exceptions in the WTO 128

4.2 - The general exception necessity test: from the least-trade-restrictive approach to a more intrusive weighing and balancing test 130

4.3 - The general exception *chapeau* and its role in preventing *de facto* discriminatory treatments 135

5. The impact of GATS rules in "regulating" the cross-border flow of information through the internet: internet filtering and data protection

5.1 - Public morality and public order as reasons to justify censorship 138

5.1.1 The public moral exception: historical backgrounds 138
5.1.2 What moral? 141
5.1.3 The WTO case law on public morality 143

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
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Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

5.2 - State intervention through internet filtering: the "Great Firewall of China" and the GATS 148

5.2.1 Internet filtering in China: between blockages and self-censorship 148
5.2.2 The Great Firewall of China as a GATS trade barrier? 151

5.3 - Privacy as a reason to discriminate against foreign service providers 159

5.3.1 Data Protection in the WTO: an additional barrier to internet trade? 159
5.3.2 Assessing the EU system for cross-border data protection from a GATS perspective 162
5.3.3 Possible WTO inconsistent features of the EU privacy directive 167
5.3.4 The availability of the GATS general exception defence? 170

6. Conclusions: in the hands of the adjudicators? 173

Chapter III

ELECTRONIC SUPPLY OF SERVICES IN THE BILATERAL TRANSATLANTIC RELATIONS

1 Introduction: framing the digital trade dialogue in the transatlantic relations 177

2 Multilateralism *versus* Regionalism: an overview of the traditional debate

2.1 - The rise of preferential trade: trends and evolution of Preferential Trade Agreements 179

2.2 - Preferential Trade Agreements and their relationship with the WTO system 182
2.3 – The drivers of preferential trade: beyond a pure static welfare analysis? 187

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
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Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

3 The US FTAs approach to trade in cross-border electronic services and e-commerce

3.1 – History and evolution of the US Free Trade Agreements: the Trade Promotion Authority (TPA) 193
3.2 - Structure of the agreements in the electronic supply of services context 196

3.2.1 Current and prospective TPA objectives: a renewed interest for digital trade 196
3.2.2 Stand-alone e-commerce chapters and the centrality of the digital content products debate 201
3.2.3 Cross-border supply provisions and classification choices: toward liberalization for digital trade 204

3.3 - Domestic regulation and data flows: a new approach toward the issue of free flow of information 209

4 The European Union evolutionary approach on FTAs: a focus on e-commerce and electronic services

4.1 - Competencies and trends in the EU multilateral and preferential trade deals 216

4.1.1 The evolution of the Common Commercial Policy: from mixed to exclusive EU competencies 216
4.1.2 A multifaceted EU attitude towards preferential trade: from a political driven approach to the 2006 Global Europe strategy 221

4.2 - The EU evolving approach in dealing with bilateral e-commerce and cross-border trade provisions 225

4.2.1 The new stand-alone e-commerce chapters 225
4.2.2 Classification strategies and the cross-border services chapters 228
4.2.3 Domestic regulation, general exceptions and e-commerce specific cooperation pledges 233

5 EU-US cooperation and divergences in e-commerce and electronic services: the possible implications for the TTIP negotiations

5.1 – The path towards the TTIP negotiations: framework principles and general objectives 237

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
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Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

5.2 – E-commerce and electronic services before the TTIP: EU-US transatlantic cooperative efforts 241

5.2.1 E-commerce and ICT in the New Transatlantic Agenda (1995-2006) 241
5.2.2 The Transatlantic Economic Council: a new but limited focus on ICT (2007-2011) 244

5.3 - The trade-related significance of the EU-US data protection debate 247

5.3.1 EU-US cooperation tools on data transfer and privacy 247
5.3.2 The "post-datagate" developments 250

5.4 - What role for the TTIP in fostering the liberalization of electronic services? 256

5.4.1 Distant e-commerce and e-services trade agendas 256
5.4.2 What to expect? A preliminary overview on the possible TTIP outcomes for digital trade 259

6 Conclusions: a positive impetus of bilaterals in stimulating further discipline for digital trade and data flows 267

Overall Conclusions 271

Annex I: *W/120 Service Sectoral Classification List* 275

Annex II: *European Union-United States Trade Principles for Information and Communication Technology Services* 283

Bibliography 285

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
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Abstract

The development of the internet and new information and communication technologies (ICT) opens new possibilities for businesses in many, virtually all, economic sectors for bridging distances and reaching an increased number of consumers. This is particularly true in the area of services where ICT allows completely new concepts to be created and existing services to be supplied in new forms and accessed remotely. The impact exerted by evolved ICT on industries has important consequences on international trade flows as well. Yet, multilateral trade provisions negotiated in the framework of the World Trade Organization (WTO), setting the general rules for the large majority of international trade, have not been developed taking the most recently developed technologies into account. Indeed, discussions within the WTO to define how rules predating the development of new information technologies and the internet can fit into this new scenario have been patchy and fragmented. Only relatively recently, with a renewed impetus in favour of the negotiations of bilateral and regional trade agreements, provisions specifically dedicated to digital trade have emerged.

The study aims first of all at defining and critically analysing to what extent multilateral trade rules, especially the ones negotiated in the context of the General Agreement on Trade in Services (GATS), are relevant and sufficiently detailed to appropriately characterize the cross-border trade in electronic services, including those "new" services, such as search engines, social networks and online televisions, emerged exclusively as a result of the development of internet technologies. Recognizing that service trade enabled by the internet is not immune from non-tariff barriers, it also aims at investigating whether the extant discipline is appropriate to prevent the emergence of disproportionate impediments to the cross-border provision of otherwise liberalized electronic services. Finally, in order to give account of the recent developments, it analyses the digital trade discipline arising out of the most relevant free trade agreements.

Through an analysis of relevant WTO agreements, past jurisprudential interpretations and official working documents, the study argues that, despite the absence of clarifications from a policy perspective and the existence of diverging policy positions, the WTO system should be sufficiently robust to coherently accommodate new electronic services within existing classification categories and to prevent the emergence of blunt and disproportionate barriers to digital trade. However, acknowledging the increasing trade relevance of free flow of data emerging also from the analysis of the outstanding provisions negotiated in recent Free Trade Agreements, it draws comparisons with certain aspects of the trade in goods architecture to suggest that the setting up of a multilateral framework on this specific subject - and of a related forum to discuss its trade-related aspects - could help minimizing the risks for disruptive digital obstacles to arise.

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Introduction

The international trade law relevance of the internet

Since the day the first domain name was registered in 1985, the internet has never stop growing[1]. Recent researches suggest that, due to the increasing availability of ubiquitous accessibility, up to 3 billion people worldwide - accounting for almost half of the world's population - will have access to the internet by the end of 2016[2]. In terms of economic impact, the activities related to the internet economy already account for up to 8% of the GDP in some countries; if the growth trend is confirmed, the internet economy will reach a value of 4.2 trillion dollars only in the G-20 economies[3].

The outstanding development of information and communication technologies (ICT) boosted by the increased availability of internet connectivity has changed the way businesses and customers interact in the globalized world. E-commerce, digital products and electronically-supplied services are reshaping trade patterns and the way goods and services are delivered. The internet has become indeed an essential tool in the day-to-day operations of several businesses, from tourism to financial/banking, from consulting services, to retailing, communication and audiovisual services. Additionally, because of the increasing availability of broadband and the constant improvements in terms of communication network outreach[4], the internet is acquiring a relevant role in people's leisure activities as well[5].

Because of its impact in reducing transaction costs and enabling new business models, the use of the internet as a mean of doing business assumes a crucial relevance in international

[1] Symbolic.com is the first domain name ever registered. Symbolic Computer Corporation was a company operating in hardware and software technologies; they registered the domain name on March 15th, 1985. See, symbolics.com.

[2] It is believed that, by the end of 2016, mobile devices will account for 80% of all broadband connections in the G-20 nations. The Boston Consulting Group, *The Digital Manifesto, How Companies and Countries Can Win in the Digital Economy*, BCG Report, January 2012, 6.

[3] Dean D. et al., *The $4.2 Trillion Opportunity, the Internet Economy in the G-20*, The Boston Consulting Group, March 2012, 3.

[4] See, Paltridge S., (Communication and Consumer Policy Division - OECD), *Market developments in the enabling communications infrastructure*, presentation held at the "WTO workshop on e-commerce" organized under the auspices of the CTS, Geneva, 17-18 June 2013. Available at www.wto.org.

[5] On August 27th, 2015, the social media Facebook hit for the first time in history the threshold of 1 billion users in one day. According to its Mark Zuckerberg, President and CEO of Facebook, Inc., on that day "1 in 7 people on Earth used Facebook to connect with their friends and family". See, Lee D., *Facebook has a billion users in a single day, says Mark Zuckerberg*, BBC News, 28 August 2015, available at bbc.com.

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trade practices as well. As a matter of fact, the internet is a tool suitable to encompass each phase of the international trade operations, from the ordering to the advertising and the distribution of physical goods and services. Even more important, the rapid development of ICT technologies has enabled an increasing array of new services to be directly supplied and consumed over the internet.

At global level, international trade rules negotiated in multilateral and bilateral *fora* are important in setting a binding international framework to discipline the supply of goods and services through the internet. In light of their inherent cross-border nature, the transactions and the operations performed through the internet are even more likely to be interested by international trade law obligations. However, most of these rules have been negotiated in pre-internet context and are sometimes difficult to be interpreted in the light of technological developments. Furthermore, although making use of the same mean of delivery, different uses of the Internet can result in different treatments in terms of applicable multilateral and preferential trade concessions. A clear understanding with regard to the extent of the applicability of international rules to this type of trade is then crucial in guaranteeing predictability to consumers and businesses.

Scope and purpose of the study

The purpose of this study is indeed to investigate on the main issues surrounding the development of the internet through the lens of international trade law obligations, taking into account a multiplicity of issues and sources, all of them concerning, in one way of the other, the "internet and international trade" realm. However recognizing that all the facets surrounding the internet and trade discourse cannot be tackled in an all-encompassing study, it narrows the scope of the analysis by focussing on trade in electronic services, certainly the most tangible (or intangible?) result of the digital revolution. Starting from the premises that, similarly to its *offline* counterpart, internet trade in services is and should be governed by international trade law obligations, the study aims at shading lights on three main research questions:

- is the WTO system for trade in services liberalization sufficiently flexible to embrace and discipline the cross-border trade of services arising out of the development in

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internet and new telecommunication technologies? And if so, to what extent can it accommodate different policy positions?

- is the general multilateral framework currently in place sufficiently resilient to prevent domestic digital-specific trade barriers to be erected?

- what are the lessons that can be learnt from bilateral and regional trade agreements on digital trade and to what extent these could be transposed into the multilateral trade system?

To do so, it will develop a three-pronged analysis touching upon different areas of international trade law, from the internet-trade significance of the general rules enshrined in the GATT 1947 and the WTO and its related jurisprudence to the relevance of the most recent arrangements negotiated at bilateral and plurilateral level, prompted by a renewed stance in favour of preferential trade.

More precisely, the first prong of the analysis will focus on the suitability of traditional *offline* trade rules to discipline a type of trade difficult to conceive at the time of their drafting. Chapter I of the study will then aim at investigating the relevant features of the multilateral framework historically negotiated for trade in services, analysing to what extent these can be considered suitable to accommodate various aspects and needs of digital delivery, from their classification to their liberalization templates.

The second part of the analysis will instead build on the assumption that, similarly to what happens in the *offline* trade, discriminatory practices can as well emerge in the digital context, under the guise of apparent legitimate non-trade domestic policies. Recognizing that a smooth development of trade in electronic services lies in the ability to keep the internet trade free from regulatory fragmentation and unnecessary obstacles, Chapter II will then investigate what is the level of liberalization currently granted to electronic services, how these commitments were undertaken and, most importantly, to what extent available trade rules are equipped to mitigate the risk of the emergence of domestic regulatory barriers capable of disproportionally disrupting transnational data flows.

Finally, the third part of the study will deal with the new regulatory developments taking place at preferential level concerning the internet, electronic commerce and the supply

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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of services. This is because the flexibility of preferential deals compared to the rigid structure of the multilateral trade framework can indeed provide a more updated picture of the policy options currently favoured by interested players trading in electronic services, and might also ultimately inform multilateral developments, if not in the short, at least in the medium term. For this reason, Chapter III will delve in great details into the approaches adopted by the United States and the European Union, arguably the most interested stakeholders when it comes to negotiating preferential rules for e-commerce and electronic services.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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Chapter I

CLASSIFICATION AND CHARACTERIZATION ISSUES OF THE ELECTRONIC SUPPLY OF SERVICES IN THE WTO

1. Introduction: e-commerce, electronic services and international trade

1.1 – The new frontiers in the trade debate on e-commerce: the electronic supply of services and its WTO unresolved issues.

The debate regarding ICT technologies and international trade rules has been based, especially at the outset, on the concept of e-commerce. The discussions were triggered initially in the context of the World Trade Organization where e-commerce was intended broadly as a type of trade encompassing a series of commercial activities related to the internet, from telecommunication networks, to the ordering of goods and services as well as the consumption of services over the internet. However, when the debate initiated in mid-nineties, e-commerce was perceived mainly as a simple alternative for the ordering and distribution of goods and services, still relatively insignificant in its size compared to the traditional means of supply. Overtime, and because of the enhanced possibilities granted through an augmented availability of internet accessibility and broadband, the electronic supply of services, intended as the delivery of services in form of digitised information flows[6], has instead acquired a prominent role in the e-commerce realm. This, however, has not been followed by a substantial structural change within the WTO with regard to the rules applicable to this type of trade. Discussions within the WTO have been patchy and fragmented, often focusing only on specific "cross-cutting" issues and, in any case, rarely leading to clear-cut and unanimous understandings.

In the framework of the international rules applicable to trade in services (GATS Agreement), the main characterization issue surrounding the debate on electronic supply has always lain in the difficulties to include new developments into the static and out-dated

[6] WT/GC/W/90, *WTO Agreements and Electronic Commerce*, Note by the Secretariat, 15 June 1998.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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classification list historically adopted by WTO Members to calibrate their level of services liberalization commitments. In this context, the lack of a clear political stand with regard to the technological neutral character of the WTO covered agreements, and the only partial acknowledgment of this principle by means of jurisprudential interpretations, still creates uncertainties with regard to the extent of the commitments undertaken by WTO Members in the ICT services realm. In particular, the lack of clarity pervades those service sectors such as telecommunication, computer and audiovisual, intrinsically more likely to be converging in light of increased technological possibilities; in this context, the existence of significant policy differences among important WTO Members certainly plays an important role in preventing discussions to reach tangible results.

The situation is even more problematic when technological advancements give rise to new services as, in these cases, a parallel with an *offline* service cannot reasonably be found because such services are not technically viable without the use of the internet. In these circumstances, an analysis of the past WTO jurisprudence might be of great help in indicating a more comprehensive and consistent interpretative approach.

The purpose of this first Chapter is to shade light on the specific characterization and classification problems arising out of the difficulties for multilateral trade rules to quickly adapt to the fast development of new communication and information technologies. After briefly identifying and defining the main subject of the study[7], it will give account of the discussions on the role of electronic commerce in international trade initiated already few years after the setting up of the WTO and evolved overtime to focus more decisively on the specific role of electronic services[8]. Having identified the outstanding issues surrounding the e-commerce and electronic services debate, it will then delve into the main features of the GATS Agreement trying to highlight to what extent this general framework does effectively accommodate service trade delivered through electronic means[9]. Finally, building on the above considerations, the last part of the Chapter will analyse the main features of the so-called “new electronic services” enabled exclusively by the use of internet technologies trying to understand if and how they can be captured in the extant GATS framework as well as

[7] *Infra*, para. 1.2.
[8] *Infra*, para. 2.
[9] *Infra*, para. 3.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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considering to what extent evolutionary jurisprudential interpretations can suffice to overcome the rigidity originating from the lack of policy developments[10].

1.2 - Defining electronic supply of services for WTO purposes

Throughout this work we will outline the difficulties emerged within the WTO in defining trade-related issues arising out of the development of the internet. As we will see, these issues touch upon a wide area of the trade discipline, including goods, services (comprising telecommunication services) and intellectual property rights[11]. Even within the restricted domain of the services discipline, we will acknowledge that, notwithstanding the increasing importance of the internet in shaping the supply of trade in services, no specific framework aimed at clearly identifying and undisputedly defining what has to be considered an "electronic service" ever emerged.

Before however delving into an analysis of the single categories in the list of specific commitments and trying to understand whether and how online services fit into old classification structures, it is then essential to better define the electronic delivery of services, that constitutes the object of this whole study, discerning it from other types of "e-commerce" trade involving electronic transmissions and the use of internet protocols.

Broadly speaking, it is possible to identify three types of service trade that are essential for e-commerce. Significantly, such categories have been recognized from the outset by the WTO itself when trying to assist the Council for Trade in Services in better defining the treatment of electronic commerce in the GATS legal framework[12]. According to the WTO Secretariat these categories are:

- *The provision of Internet access services themselves, meaning the commercial provision of access to the net for businesses and consumers.*

[10] *Infra*¸ para. 4.
[11] As mentioned in the next paragraph, e-commerce issues within the Work Programme on e-commerce have been discussed within four different bodies, namely the Council for Trade in Goods, the Council for Trade in Services, the TRIPS Council and the Committee on Trade and Development. *Infra*, para. 2.1.1.
[12] S/C/W/68, *The Work Programme on Electronic Commerce, Council for Trade in Services*, Note by the Secretariat, 16 November 1998, 8. See also, WT/GC/W/90, cit., 3-5.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
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Such services amount to pure basic telecommunication and, as we will see, can be easily identified through the list of GATS commitments. As such, they must comply with specific WTO agreements on telecommunications[13], where applicable, and with the general WTO discipline on anti-competitive behaviour (GATS Art. VIII) in the countries where the public telecommunication services are state-run. The latter provision is of particular relevance as it mandates monopolists not to frustrate commitments undertaken for other services provided through the internet, hence restricting to a certain extent their space of manoeuvre.

- *The use of the Internet as a channel for business-to-business or business-to-consumer distribution, by which goods and services are purchased over the net but delivered to the consumer subsequently in non-electronic form*.

In this second case, the service in question can be easily defined as electronic distribution, a category formally equivalent to the pre-existing "offline" distribution by mail or telephone[14]. The more classic examples in this sense are e-commerce portals – such as *amazon.com* - whose initial function was to place orders for the physical delivery of products and services[15]. Obviously, as remarked by the Secretariat, "a commitment on distribution services in not a commitment to allow the supply of any service or good which may be offered for sale over the internet"[16].

- *The electronic delivery of services, meaning transactions in which services products*[17] *are delivered to the customer in the form of digitised information flows and the entire transaction takes place electronically.*

This transaction, certainly the more problematic to define, clearly differs from the other two types of service trade, namely the one related to internet access for business and consumers – clearly falling within the basic telecommunication category – and the one using

[13] *Infra*, para. 2.3.2.
[14] In the W/120 classification, distribution services are broadly divided in wholesale, retail, commission agent and franchising. Exact correspondence with the CPCProv is provided. See, MTN.GNS/W/120*, Services Sectorial Classification list*, Note by the Secretariat, 10 July 1991, part 4.
[15] Overtime amazon.com has enlarged the range of services offered, so that now its core ordering and distribution activity is complemented by an array of additional services such as, for instance, cloud services and logistic services for business. Source: amazon.com
[16] WT/GC/W/90, cit., para. 17.
[17] The note specifies that, in this context, the word "products" refer both to services and goods. This specification can be seen as a consequence of the difficulties faced by WTO Members to agree on the definition of digital goods. *Infra*, paras 2.2.2 and 2.2.3.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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the internet as a channel for distribution services by which goods (or services) are purchased through the internet and delivered in non-electronic form. To better explain the differences between the electronic supply and the other two forms of services, the WTO Secretariat specified that "a commitment on distribution services is not a commitment to allow the supply of any service or good which may be offered for sale over the Internet. In the same way, a fully liberal commitment on basic telecommunications confers rights to supply telecommunications services; it is not a commitment to allow the supply of any service – banking services for example – which can be provided by telephone"[18].

Keeping these three categories in mind, this study will focus its attention mainly on the latter, certainly the most relevant and fast changing type of trade enabled by the continuous improvement of internet technologies and the increasing availability of broadband connectivity.

2. The historical approach on e-commerce and e-services within the WTO

2.1 - The WTO Work Programme on electronic commerce

2.1.1 The genesis of the discussions on e-commerce and the internet in the WTO

When the World Trade Organization was set up in 1995, the internet was still at an infant stage and so was the use of the internet for trade purposes[19]. At policy level, this was clearly reflected by the lack of discussions in the Uruguay Round about the role of the internet for trade and the consequent absence of specific agreements or understandings on the subject[20]. Not long after the setting up of the WTO, however, the relevance of the internet and

[18] S/C/W/68, cit., para. 31.
[19] To prove this argument it is often pointed out that, when the WTO Agreements entered into force in 1995, a company such as Google did not exist and the founder and current CEO of Facebook Inc., the most renowned social network worldwide, was 11 years old. In this sense, for instance, Gary Horlick, *Introductory remarks at the 13th WTO Annual Conference*, London, 15-16 May 2013.
[20] The only relevant activity pursued in the field of e-commerce in the context of the Uruguay Round is the liberalization of specific categories of services – value added telecommunication, audiovisual and computer – through the GATS Agreement. See, Wunsch-Vincent S., *WTO, E-commerce, and Information Technologies,*

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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electronic commerce for international trade was formally acknowledged on the occasion of the Second Ministerial Declaration in Geneva in 1998, when the Ministers of the WTO Members adopted the 'Declaration on Global Electronic Commerce'[21] setting up the so-called Work Program (WP) on Electronic Commerce and, at the same time, confirming the practice of not imposing custom duties on electronic transmissions[22].

Since the beginning of the discussions, WTO Members never perceived internet-enabled trade as a stand-alone issue. Rather, the approach adopted pointed at interpreting and adapting existing trade rules to accommodate the new challenges arising out of the availability and the widespread utilization of new technologies[23]. Consequently, the WP on Electronic Commerce did not envisioned the creation of an *ad hoc* committee but called instead the "relevant" existing WTO bodies to "examine all trade-related issues concerning global electronic commerce" under the supervision and coordination of the General Council[24]. This clearly reflected the difficulties faced by WTO Members to limit and systematize a series of issues that are, as it will be discussed, inherently multidisciplinary and fast changing.

In order to give full effect to the declaration, the WTO General Council promptly identified the Council for Trade in Goods (CTG), the Council for Trade in Services (CTS), the TRIPs Council and the Committee for Trade and Development (COMTD) as the relevant bodies in charge of discussing e-commerce. For the purposes of the work programme, e-commerce was defined broadly as "the production, distribution, marketing, sale or delivery of goods and services by electronic means"[25]. Each body was assigned a largely defined list of

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From the Uruguay Round through the Doha Development Agenda, in *ICT Task Force Series (Vol. 7)*, United Nations, New York, 2005, 5. See also, Hauser H., Wunsch-Vincent S., *A Call for a WTO E-Commerce Initiative*, in *International Journal of Communication Law and Policy*, 6, 2001, 8.

[21] WT/MIN(98)/DEC/2, *Declaration on Global Electronic Commerce*, adopted on 20 May 1998.

[22] On the debate on electronic transmissions, *infra*, para. 2.2.

[23] In this sense see the WTO special study on e-commerce published in 1998 aiming, among other things, at exploring "the various ways in which the agreements and activities of the World Trade Organization may have a bearing on electronic commerce". Bacchetta M. et al, *Electronic Commerce and the Role of the WTO*, WTO Special Studies 2, 1998, 45. See also the speech of the former WTO DG Renato Ruggiero "A Borderless World" addressed to the OECD Ministerial Conference in Ottawa, 7 October 1998, available at www.wto.org and Sacerdoti G., *Il Commercio Elettronico: tra Autonomia Privata, Interventi Statali e Iniziative Internazionali,* in Sacerdoti G., Marino G., (eds.) *Il commercio elettronico: profili giuridici e fiscali internazionali*, EGEA, 2001, 10.

[24] *Ibid*. See also, WT/GC/W/90, *WTO Agreements and Electronic Commerce*, Note by the Secretariat, cit., discussing how WTO Agreements and previously agreed work programmes relate to global electronic commerce.

[25] WT/L/274, *Work Programme on Electronic Commerce,* adopted by the General Council on 25 September 1998, 30 September 1998. See also, Venturini G. (ed.), *L'Organizzazione Mondiale del Commercio*, Giuffrè, 2005, 55-56.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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subjects to be dealt with in their specific field of expertise[26] that were subsequently fine-tuned through four background documents issued by the Secretariat and addressed to each of the bodies concerned[27].

2.1.2 The sector specific approach for e-commerce within the WTO

For trade in goods, the outstanding e-commerce issues identified by the General Council related to the classification of content products (software), the market access of IT products as agreed in the context of the Ministerial Declaration on Trade in Information Technology Products (ITA)[28], the customs duties for products traded over the internet and certain aspects of customs valuation and rules of origin related to e-commerce[29]. As for services, the CTS was tasked to consider issues related to the supply of services through the internet with a focus on the modes of supply and the sectorial classification of electronic

[26] WT/L/274, *Work Programme on Electronic Commerce,* cit.

[27] G/C/W/128, *The Work Programme on Electronic Commerce, Council for Trade in Goods*, Note by the Secretariat, 5 November 1998; S/C/W/68, *The Work Programme on Electronic Commerce, Council for Trade in Services*, cit.; IP/C/W/128, *The Work Programme on Electronic Commerce, Council for Trade in Goods*, Note by the Secretariat, 10 February 1999; WT/COMTD/W/51, *The Work Programme on Electronic Commerce, Committee for Trade and Development*, Note by the Secretariat, 23 November 1998.

[28] At the 1996 Singapore Ministerial Conference, 29 WTO Members signed the Ministerial Declaration on Trade in Information Technology Products (ITA) by which they bound themselves, on an MFN basis, to gradually eliminate customs duties and other charges with respect to certain IT goods. The ITA now counts for 76 WTO Members representing 96% of trade in IT goods. WT/MIN(96)/16, *Ministerial Declaration on Trade in Information Technology Products*, Singapore, 13 December 1996. G/L/160, *Implementation of the Ministerial Declaration on Trade in Information Technology Products,* 2 April 1997. For a comprehensive analysis of the history of the ITA and its implementation see, WTO, *15 Years of the Information Technology Agreement: Trade, innovation and global production networks*, WTO Publications 2012, available at www.wto.org. For a thorough analysis of international trade in electronic goods in the pre-ITA era see, Kostecki M.M., *Electronics Trade Policies in the 1980s*, in *JoWT*, 23:1, 1989. Discussions between signatories are undergoing to update and expand the product coverage of the Agreement. On recent developments of the negotiations on product coverage see, G/L/1041, *Report (2012) of the Committee of Participants on the Expansion of Trade in Information Technology Products*, 14 November 2012. Stakeholders and analysts recently called for a revision of the ITA to include issues other than customs duties. In this sense see, Lee-Makiyama H., *Future-proofing world trade in technology: turning the WTO ITA into the International Digital Economy Agreement (IDEA)*, ECIPE Working Paper 04, 2011. In June 2012, some WTO members launched plurilateral negotiations for the expansion of the product coverage of the ITA. In July 2015, nearly all the participants agreed to expand the products covered by the Agreement and eliminate tariffs on an additional list of 201 products. WT/L/956, *Declaration of the Expansion of Trade in Information Technology Products*, Communication from the European Union, 28 July 2015.

[29] Customs valuation is particularly relevant in the context of e-commerce with regard to trade in physical content products. Customs duties for these products (i.e. DVD movies) are usually determined on the basis of the value of the carrier media (the DVD) and not of the content but no obligation exists for WTO Member to generally apply such criteria. Interestingly, a commitment in this sense exists only in the specific sector of software in view of the Committee on Custom Valuation decision, VAL/8, *Decision on the Valuation of Carrier Media Bearing Software for Data Processing Equipment*, 24 September 1984. On customs valuation of digital content, see Wunsch-Vincent S. *The WTO, the Internet and Trade in Digital Products: EC-US Perspectives*, Hart Publishing, 2006, 43-48.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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services in the GATS Agreement, the MFN treatment, the discipline on market access, national treatment and domestic regulation applicable to such services and the e-commerce's implications of the obligations undertaken by WTO Members on basic telecommunications[30]. The COMTD was instead asked to discuss the potential benefits of e-commerce for consumers and producers in developing countries, their specific needs in term of physical and human infrastructures and the potential beneficial effects of the deployment of new technologies for employment and education[31]. Finally, a Secretariat note to the TRIPs Council urged the delegates to examine the intellectual property issues arising in connection with electronic commerce, with particular regard to the protection and enforcement of copyright and trademarks[32] and the access to new technologies.

Following up on the Secretariat notes, the sectorial bodies in charge analysed the e-commerce issues pertaining to their own field and provided progress reports to the General Council[33] so for it to issue recommendations to the 3rd and 4th Ministerial Conferences, held respectively in 1999 and 2001[34]. The overall view of the General Council was that, despite the need for clarification on certain specific issues[35], the WTO Agreements were comprehensive enough to encompass e-commerce and hence new *ad hoc* rules were not needed[36]. Indeed, at the 2001 Doha Ministerial Conference, beside the confirmation of the moratorium on

[30] Issues pertaining to the electronic supply of services in the Work Programme on e-commerce are thoroughly discussed below at para. 2.3.

[31] WT/COMTD/W/51, *The Work Programme on Electronic Commerce, Committee for Trade and Development*, cit.

[32] The Secretariat however pointed out that, although an explicit reference was made with regard to copyright and trademarks, issues related to other IP rights protected by the TRIPs Agreement may arise – even if to a lesser degree – when goods and services protected by said rights are traded over the internet. IP/C/W/128, *The Work Programme on Electronic Commerce, Council for Trade in Goods*, cit., paras 61-65.

[33] G/C/W/158, *Work Programme on Electronic Commerce, Information Provided to the General Council*, Council for Trade in Goods, 26 July 1999; S/L/74, *Work Programme on Electronic Commerce, Progress Report to the General Council*, Council for Trade in Services; WT/COMTD/19, *Contribution by the Committee on Trade and Development to the WTO, Work Programme On Electronic Commerce,* 15 July 1999; IP/C/18, *Work Programme On Electronic Commerce, Progress Report to the General Council*, TRIPS Council, 30 July 1999; G/L/421, *Chairman's Factual Progress Report to the General Council on the Work Programme on Electronic Commerce,* Council for Trade in Goods, 24 November 2000; S/C/13, *WTO Programme on Electronic Commerce*, Oral Report by the Chairman of the Council for Trade in Services to the General Council on Electronic Commerce, 6 December 2000; IP/C/20*, Work Programme on Electronic Commerce, Progress Report by the Chairman to the General Council*, TRIPS Council, 4 December 2000; WT/COMTD/26, *Work Programme on Electronic Commerce, Report by the Chairman* Contribution by the Committee on Trade and Development, 13 December 2000.

[34] Due to its overall failure, no discussion on e-commerce took place during the Seattle Ministerial Conference in 1999. See, *Statement by WTO Director-General M. Moore*, press/160, 7 December 1999, available at www.wto.org.

[35] On that occasion the Chairman of the General Council proposed to hold dedicated discussions on cross-cutting horizontal issues regarding e-commerce. WT/GC/M/65, *General Council, Minutes of the Meetings,* held on 8, 9 May 2001, para. 128.

[36] WT/GC/M/61, *General Council, Minutes of the Meetings,* held on 7,8,11 and 15 December 2000, para. 106.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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electronic transmissions[37], no new commitment was undersigned by the Parties and no specific negotiation on e-commerce was tabled for the Doha Round[38]. However, WTO Members were of the view that certain horizontal issues needed to be tackled at a higher level and hence dedicated discussions on cross-cutting issues were to be undertaken under the auspices of the General Council[39]. Indeed, following the Doha Ministerial Conference and before the 2003 Cancun Ministerial, five sessions of dedicated discussions took place[40]. The horizontal issues identified and discussed by the delegations ranged from classification of the content of electronic transmissions, development-related issues, fiscal matters in relation to e-commerce, the relationship between electronic and traditional trade, the issue of customs duties on electronic transmissions and jurisdiction problems[41].

At Doha, the Ministers had also instructed the General Council to consider an appropriate institutional arrangement for handling the Work Programme in the future and to report back at the next Ministerial Conference. However, at the Cancun Ministerial Conference, no further progress in this sense was recorded[42]. The solution endorsed at Doha to handle e-commerce issues through the General Council was informally confirmed, with the resulting outcome of withholding discussions in the sectorial groups, pending the clarification of relevant horizontal issues[43].

2.1.3 The state of play on e-commerce: low pace and uncertain prospects

Since no new form of institutional arrangement for the discussions on the Work Programme on Electronic Commerce was agreed upon on the occasion of the Cancun Ministerial Conference, the activities of the General Council with relation to e-commerce cross-cutting issues continued in the form of dedicated discussions, albeit with a less degree

[37] On this specific issue see *infra* para. 2.2.
[38] WT/MIN(01)/DEC/1, *Doha Ministerial Declaration*, 20 November 2001, para. 34.
[39] *Cfr*, footnote 23. See also WT/GC/W/434, *Electronic Commerce, Horizontal and Sectorial Issues which Require Further Analysis*, Communication from MERCOSUR, 7 May 2001.
[40] WT/GC/W/436, *First Dedicated Discussion*, 6 July 2001; WT/GC/W/475, *Second Dedicated Discussion*, 20 June 2002; WT/GC/W/486, *Third Dedicated Discussion*, 4 December 2002; WT/GC/W/492, *Fourth Dedicated Discussion*, 8 April 2003; WT/GC/W/509, *Fifth Dedicated Discussion*, 31 July 2003.
[41] *Infra*, para. 2.2.
[42] WT/MIN(03)/20, *Ministerial Statement*, 14 September 2003, para. 6.
[43] Significantly in 2003 the CTG acknowledged that "since the Doha Ministerial Conference, the Council for Trade in Goods (CTG) had not undertaken any discussion under the Work Programme on Electronic Commerce due to the fact that the horizontal issues remained under discussion in the General Council." G/L/635, *Report to the General Council on the Work Programme on Electronic Commerce*, Council for Trade in Goods, 9 July 2003, para. 2.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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of intensity. Since 2003, only three specific discussions took place under the General Council auspices[44] with many delegations lamenting the lack of progresses achieved and the need to pragmatically overcome the impasse reached on certain specific issues (i.e. the treatment of software)[45]. Coherently, subsequent Ministerial Declarations have not gone much further than recalling what was already included in the Doha Declaration[46] although few additions have been made. Firstly, the Declaration approved at the 6th Ministerial Conference in Hong Kong stressed the need to reinvigorate the discussions on electronically delivered software, an interest mainly pursued by the United States[47]. Secondly, on the occasion of the two more recent Ministerial Conferences, WTO Members also recognized the need to strengthen the work on e-commerce and, in particular, to reflect in depth on the implication of the access to e-commerce by developing countries and micro, small and medium sized enterprises[48]. In the preparation for the 2011 Ministerial Conference, efforts to include developmental issues in the work programme were prompted by the delegations of Cuba, Ecuador and Nicaragua through the submission of a "Draft Ministerial Decision on Effective Participation in Electronic Commerce as a Means to Combat Poverty"[49]. The text of the 2011 Ministerial Decision clearly reflects, albeit in a more succinct manner, the approach proposed by these countries.

Broadly speaking, however, besides the encouraging formal statements, the discussions on e-commerce issues at Ministerial and General Council level seem to have been poisoned by a lack of structure, also because of the absence of an e-commerce negotiating group in the Doha Round. The idea of putting the sectorial discussions on hold in view of first resolving e-commerce horizontal issues at the General Council level, although apparently

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[44] WT/GC/W/556, *Sixth Dedicated Discussion*, 30 November 2005; WT/GC/W/614, *Seventh Dedicated Discussion*, 27 November 2009; WT/GC/W/644, *Eight Dedicated Discussion*, 29 November 2011.
[45] WT/GC/W/556, cit., paras 2-3.
[46] WT/MIN(01)/DEC/1, *Doha Ministerial Declaration*, cit.
[47] WT/MIN(05)/DEC, *Hong Kong Ministerial Declaration*, 22 December 2005, para. 46. Before the 6th Ministerial Conference in Hong Kong, the United States submitted a specific request to the General Council asking the "minister's recognition of the special growth, development, and productivity benefits afforded by trade in software products". WT/GC/W/551, *Work Programme on Electronic Commerce*, Communication from the United States, 28 October 2005, para. 4.
[48] The seventh and eight Ministerial Conferences held in Geneva in 2009 and 2011 did not result in formal Ministerial Declarations. However, in these occasions, the Ministers adopted, *inter alia*, decisions on the WP on e-commerce. See, for the 2009 Conference, WT/L/782, *Work Programme on Electronic Commerce*, Decision of 2 December 2009, 10 December 2009, and for the 2011 Conference, WT/L/843, *Work Programme on Electronic Commerce*, Decision of 17 December 2011, 19 December 2011.
[49] WT/GC/W/635, G/C/W/650, WT/COMTD/W/179, *Effective Participation of Developing Countries in Electronic Commerce as a Means to Combat Poverty*, Communication from Cuba, Ecuador and Nicaragua, 14 July 2011.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
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logical, have proven so far unfruitful in terms of results achieved, above all the failure to make the moratorium on customs duties on electronic transmissions permanent and binding. Looking at the issues recently raised by some Members, the trend seems to be moving back to the original sectorial approach, this time without a formal coordination. This situation is probably the result of the lack of convergence in the fast-changing priorities of different Members. If we look at the development achieved at the last Ministerial Conference in 2011, for instance, it is clear that the liberalization of software trade and the request for consideration of developing countries needs are two completely different goals, driven by diverging policy interests.

The preparatory works for the Bali Ministerial Conference confirmed this trend. The works of the General Council on cross-cutting issues is almost stalling, with the latest dedicated discussions, which took place in November 2011, focusing exclusively on the preparation of the eighth Ministerial Conference and not adding any indication of the willingness of this body to tackle substantial issues[50]. On the sectorial side, on the contrary, there seems to be a renewed interest from certain WTO Members, the US, the EU and Australia in particular[51], to discuss issues pertaining to electronic services in the context of the CTS[52]. This is happening regardless of the failure to reach a positive settlement in many of the cross-cutting issues dealt with by the General Council. In sum, in view of the more recent developments and the importance of the Members involved, a statement on the need to

[50] WT/GC/W/644, cit., WT/GC/W/645, *Work Programme on Electronic Commerce*, Dedicated Discussions under the auspices of the General Council, 18 November 2011.

[51] See, S/C/W/338, *Contribution to the Work Programme on Electronic Commerce*, Communication from the European Union and the United States, 13 July 2011, encouraging WTO Members to adopt the ICT Trade Principles developed bilaterally by the EU and the US (see, Chapter III, para 5.2); S/C/W/339, *Work Program on Electronic Commerce: Ensuring that Trade Rules Support Innovative Advances in Computer Applications and platforms, such as Mobile Applications and the Provision of Cloud Computing Services*, Communication from the United States, 20 September 2011, tackling, among other things, the development of cloud computing and the classification problems arising out within the GATS (see, *infra* para. 4.3.4). See also the submission by the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, JOB/SERV/140, *Protection of Personal Information and the Development of Electronic Commerce*, Communication from the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, 11 March 2013.

[52] S/C/35, *Work Programme on Electronic Commerce*, Report by the Chairman of the Council for Trade in Services to the General Council, 30 June 2011; S/C/38, *Work Programme on Electronic Commerce*, Report by the Chairman of the Council for Trade in Services to the General Council, 6 July 2012; S/C/41, *Work Programme on Electronic Commerce*, Report by the Chairman of the Council for Trade in Services to the General Council, 4 July 2013. In light of its renewed interest for e-commerce related issues, the CTS organized a specific workshop on e-commerce on 17-18 June 2013. Relevant studies and presentations are available at www.wto.org. Another relevant issue raised in the context of the CTS by the US, Australia and Norway relates to the applicability of WTO rules (the GATS, the Annex on Basic Telecommunications and the Reference Paper) to international roaming pricing. See, S/C/W/335, *Proposal for a Workshop on International Mobile Roaming*, Communication from Australia, Norway and the United States, 28 February 2011 and S/C/W/337, *International Mobile Roaming, Possible Implications for GATS,* 13 July 2011.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
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reinvigorate the Work Programme on e-commerce was reasonably expected to surface from the Bali Ministerial Conference[53]. On the contrary, an endorsement from the Ministers for a renewed institutional framework to discuss e-commerce issues within the WTO appeared less likely. In the end the one-page ministerial decision reached at Bali did nothing more than simply reiterate the general objectives already identified in the past[54].

2.2 - Cross-cutting issues relevant for internet service trade

2.2.1 The moratorium on the imposition of customs duties on electronic transmissions

The first problem the WTO negotiators had to deal with while approaching the internet issue related to the imposition of customs duties on electronic transmissions. At the outset of the WP on e-commerce, the prevailing position maintained by the majority of the negotiators was that, in order to take advantage of its full potential, the internet needed to be left free from the constraints faced by traders in the off-line world, namely tariff and non-tariff barriers as well as heavy domestic regulation[55]. Notwithstanding this general consensus on the treatment of the internet for trade purposes, WTO Members never bound themselves in the sense of a permanent commitment not to apply customs duties on electronic transmissions but instead agreed on a temporary moratorium[56]. The moratorium, as defined in the 1998 Declaration on Global Electronic Commerce and confirmed on the occasion of subsequent ministerial conferences, does not clearly define the concept of electronic transmission, even if it is understood that it only covers the transactions undertaken entirely electronically, thus

[53] The existence of a renewed interest for e-commerce issues within the WTO is confirmed by the topic chosen for the 2013 WTO Public Forum titled "Expanding Trade through Innovation and the Digital Economy".
[54] WT/MIN(13)/32, WT/L/907, *Work Programme on Electronic Commerce, Ministerial Decision of 7 December 2013*, Bali, 11 December 2013, 1. Nothing new emerged from the Nairobi Ministerial as well. WT/MIN(15)/42, WT/L/977, *Work Programme on Electronic Commerce, Ministerial Decision of 19 December 2015*, Nairobi, 21 December 2015.
[55] See, for instance, WT/GC/W/85, *Electronic Commerce*, Communication from the European Communities and their Member States, 23 April 1998; WT/GC/W/86, *Global Electronic Commerce*, Communication from Australia, 23 April 1998. See also, *Joint EU-US Statement on Electronic Commerce*, 5 December 1997, para. 3(iv).
[56] "[…] Without prejudice to the outcome of the work programme or the rights and obligations of Members under the WTO Agreements, we also declare that Members will continue their current practice of not imposing customs duties on electronic transmissions." WT/MIN(98)/DEC/2, cit. The inclusion of this item in the 1998 Ministerial Declaration was fostered by the US through a proposal to the General Council. WT/GC/W/78, *Global Electronic Commerce,* Proposal by the United States, 9 February 1998.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
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Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

excluding the online ordering of products which are subsequently delivered in physical form[57]. More importantly, since the moratorium amounts merely to a political statement with an uncertain legal value, it is impossible for WTO Members to challenge a possible violation through the Dispute Settlement Body[58].

The reason at the basis of the perplexities from certain WTO Members to renounce permanently to the possibility to levy duties on internet transactions is to be mainly attributed to the lack of consensus with regard to the so-called "classification issue", arising out of the different policy positions with regard to the applicability of the GATT or the GATS to internet trade[59]. The "classification issue" in fact, had poised from the beginning the discussions on the treatment of internet transactions for WTO purposes so that certain WTO Members were refusing to undertake a commitment on duty-free electronic transactions before settling the question of the regime applicable to internet trade[60].

2.2.2 The "classification issue" and the treatment of digital content products

The classification issue arises only with regard to certain specific products traded through the internet[61], the so-called digital content products. With the development of ICT technologies, content products that were in the past stored and transported only through a physical medium, thereby not raising any doubt with regard to their characterization for WTO purposes, can now be digitalized and transmitted through electronic means without the need of a physical carrier. This has given rise to the heated debate on whether the digital content products traded electronically are to be subject to GATT or GATS rules because, if the "classification issue" for digital content products is resolved in favour of the application of one set of rules or the other, the impossibility descending from the moratorium to apply customs duties on electronic transactions may pose - from different perspectives - similar but opposite discrimination problems[62].

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[57] In this sense, see WT/GC/W/82, *Tariff Standstill for Electronic Commerce*, Proposal by Canada, 15 April 1998, para 5.
[58] Wunsch-Vincent S., *The WTO, the Internet and Trade in Digital Products: EC-US Perspectives,* cit., 28.
[59] *Infra,* para. 2.2.2.
[60] See, for instance, S/L/74, *Work Programme on Electronic Commerce*, cit., paras 22-23.
[61] The word "product" is understood here as a general term encompassing both goods and services.
[62] Even before the setting up of the Work Programme on Electronic Commerce, WTO Members were aware of the difficulties in characterizing electronic deliverables as falling within one or the other set of rules. See, in this sense, WT/GC/W/82, *Tariff Standstill for Electronic Commerce,* cit., para. 3(a). For the various initial concerns of WTO Members see, WT/GC/24, *Interim Review of Progress in the Implementation of the Work Programme*

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
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If, on one side, the applicability of GATT rules is acknowledged, the digital products (i.e. e-books) that are traded electronically to international markets are not subject to customs duties in light of the moratorium. In this case the like or substitutable products sold through a physical medium, that may instead be subject to ordinary tariffs, are undoubtedly discriminated against[63] and hence the operators choosing to trade by making use of traditional means of delivery are worse off[64]. On the other side, if the GATS Agreement is instead considered relevant to discipline trade in digital content products, the gap in the treatment between online and offline content products can be even more substantial[65]. This is because, regardless of the moratorium on customs duties, the GATS Agreement provides more leeway to WTO Members to schedule market access and MFN exemptions in specific areas[66]. It results that, in case of the indiscriminate application of the GATS rules to digital products, these would, on one hand, take advantage of a duty free treatment *ex* moratorium but, on the other hand, be subject to various degree of entry restrictions in accordance with each WTO Member specific list of GATS commitments.

In the WTO context, the difficulties to agree with one position or the other originally stem from different policy approaches adopted by the two main negotiating parties, the EU and the US[67]. Even if both parties share the general objective to avoid the replication in the

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on Electronic Commerce, Communication from the Chairman of the Council for Trade in Goods, 12 April 1999, paras 2.1-2.11.

[63] Hart M., Chaitoo R., *Electronic Commerce and International Trade Rules*, in *The Journal of World Intellectual Property*, 1999, 2:6, 916; Wunsch-Vincent S., *The WTO, the Internet and Trade in Digital Products: EC-US Perspectives,* cit., 39;

[64] In a submission to the General Council, the United States have criticized the discrimination argument by shifting the discussion to a pure economic debate and ignoring the legal issue: "It has been suggested that duty-free treatment of electronic transmissions could be trade distortive, as it diverts trade that may otherwise have occurred through physical medium into an electronic medium. Is there any evidence that electronic commerce is trade diverting? If it did prove to be diverting, is it not likely that it would result in a greater overall level of trade, both in narrow products directly connected to electronic commerce, and in the ancillary products and services indirectly connected to electronic commerce (e.g. computers, telecommunications services, software, etc.)? That being the case, would this not be a positive development?" WT/GC/16, *Work Programme on Electronic Commerce*, Submission by the United States, 12 February 1999, para. 2.

[65] In this sense, Sacerdoti G., *Il Commercio Elettronico: tra Autonomia Privata, Interventi Statali e Iniziative Internazionali,* cit., 18-19, quoting the example of audio-visual products delivered online through downloading and offline through the CD carrier medium.

[66] See Chapter II, paras 2.2 and 3.1.

[67] The progress report to the General Council submitted by the CTS in 1999 in the context of the Work Programme on Electronic Commerce clearly underlines the existence of diverging policy positions with regard to the classification issue. In particular, it is stated that: "Some delegations were of the view that all electronic deliveries are services and could not see any non-services products, which could be delivered electronically. Other delegations suggested that it still remained to be clarified whether there were a number of electronically delivered products which should be classified as goods and therefore subject to the GATT rather than the GATS. The question was also raised as to whether such products, even if classified as services, should be subject to full MFN and national treatment obligations and to general prohibition of quantitative restrictions. It was also

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

online world of the same barriers that the WTO is struggling to dismantle in the physical world, they diverge widely as to the characterization of digital content products. The US, on its side, is strongly in favour of maintaining the duty free moratorium and, at the same time, of applying the GATT rules to the delivery of content products through electronic means. This is because, being the US undoubtedly the main producer and supplier of content worldwide, the applicability of the GATT rules coupled with a permanent duty-free agreement on electronic transmissions[68] would grant the maximum level of liberalization for the products at stake. On the other side the EU supports the moratorium on electronic transmissions but excludes the applicability of GATT rules to digital content products[69]. The EU position, which is strongly biased in favour of the applicability of GATS rules to trade in digital content products, is motivated by the need to maintain the protection of its audio-visual sector from further liberalization arising out of the deployment of digital technologies[70].

Against this background, and given the absence in the WTO Agreements of a clear definition of what constitute a good or a service and the lack in both GATT and GATS classification systems of headings covering exclusively the content[71], it comes as no surprise

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suggested that there might be categories other than goods and services for classifying certain electronically delivered products; in some cases a downloaded product might be regarded as neither a good nor a service. However, it was pointed out that no suggestion was made to the effect that there was any product that would fall outside the scope of WTO agreements". S/L/74, *Work Programme on Electronic Commerce*, cit., para. 25.

[68] At the outset of the Work Programme, the US first proposed the temporary moratorium and then suggested the adoption of a permanent duty-free treatment for electronic transmissions to ensure liberalized customs treatment of electronic commerce. See, WT/GC/W/78, *Global Electronic Commerce,* Proposal by the United States, 9 February 1998; WT/GC/16, *Work Programme on Electronic Commerce*, cit., para. 2.

[69] As it will be discussed, in comparison with the GATT, the GATS offers more possibilities to selectively protect specific sectors from liberalization. The position of the EU with regard to the discipline applicable to digital content products have been formally explained through a communication to the CTS in 1998 and reiterated again at the General Council in 2003. See, S/C/W/87, *Work Programme on Electronic Commerce, Scope and Classification Issues*, Communication from the European Communities and their Member States, 9 December 1998, para. 5; WT/GC/W/497, *Work Programme on Electronic Commerce, Classification Issue*, Submission from the European Communities, 9 May 2003, para. 14. "Some WTO Members have also invoked a certain principle of "technological neutrality", which they have described as the need for a similar treatment of economically comparable transaction independently from the technology used. This is a desirable policy goal […]. However, it is not a WTO principle requiring the classification of digitised products as goods covered by the GATT 1994. Instead, WTO Members should draw the logical conclusion that the development of computers and telecommunications networks now allows service suppliers to provide directly their service to their customer, even if located abroad. Those suppliers do not need any more to put the outcome of their service on a physical support that, under the legacy of trade agreements, would be treated under the GATT if it crossed a border".

[70] The preoccupation from the EU side in relation to the possible broadening of market access obligations through the application of GATT rules is evident in WT/GC/W/497, cit., title 5: "The debate on the classification issue cannot be used to meet market access objectives but merely points to issues of possible inconsistency in market access".

[71] On the absence of classification tools to categorize content in the WTO see Wunsch-Vincent S*., The WTO, the Internet and Trade in Digital Products: EC-US Perspectives*, cit., 49-51.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

that the discussions undertaken in the context of the Work Programme did not lead to a reconciliation of the diverging policy positions. Notwithstanding the numerous statements urging negotiators to agree on a clear and definitive solution[72] or at least to adopt a more pragmatic approach[73], the starting point where the Secretariat admitted that "there is no classification which would permit us to say that all intangible products, or even all electronically delivered products, are services by definition"[74] remained in fact substantially unaltered throughout the Work Programme. The outcome of the most recent e-commerce discussions under the auspices of the General Council did not indicate that new developments in this field should be expected; this was confirmed in the context of the Bali Ministerial Conference[75].

2.2.3 Technological neutrality as a reason to favour the applicability of the GATS discipline to trade in digital content products

It is evident from the analysis above that the arguments advanced by the two main negotiating parties with regard to the application of customs duties to electronic transmissions and the treatment of digital content products have been heavily influenced by their respective policy choices. However, some reflections can still be drawn on the pertinence of categorizing digitized products as goods or services.

From a free-trade perspective, it is clear that the application of GATT rules to electronic transmissions, intended as "digitalized information transmitted by electronic means"[76], can results in a greater level of trade liberalization. This can happen provided that the duty-free moratorium is maintained or, ideally, made binding and permanent. In the opposite scenario, where instead the GATT-like treatment is coupled with the possibility for countries to impose – where technically feasible – customs duties to digitized goods, the level

[72] See, for instance, WT/GC/W/436, *First Dedicated Discussion*, cit., para. 1; WT/GC/W/475, *Second Dedicated Discussion*, cit., para. 1.
[73] WT/GC/W/486, *Third Dedicated Discussion*, cit., para.1; WT/GC/W/492, *Fourth Dedicated Discussion*, cit., para. 1.
[74] S/C/W/68, cit., para. 37. See also G/C/W/128, cit., paras 2.1-2.3, for the initial position of the CTG on the classification issue.
[75] No mention of the "classification issue" can be found in the latest e-commerce dedicated discussion, WT/GC/W/644, cit.. See also, WT/MIN(13)/32, WT/L/907, *Work Programme on Electronic Commerce, Ministerial Decision of 7 December 2013*, cit., 1.
[76] The definition is borrowed from Hernandez-Lopez E., *Trade in Electronic Commerce Services under the WTO, The Need to Classify Electronic Transmissions as Services and not Tariff-Liable, The Journal of World Intellectual Property*, 2001, 4, 557. The same definition is found in G/C/W/158, cit., para. 2.2(iv).

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
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of liberalization varies in accordance with the bound tariffs negotiated by each specific member, hence the free trade gains might be lost or reduced[77]. However, in the first scenario, the duty-free moratorium is undoubtedly a tool introducing an element of "positive" discrimination[78] based on the technology used for the delivery of the product; it is in fact undisputed that products delivered through the internet are duty-free whereas physical goods are not. This differentiation in treatment, although coherent with the goal of promoting e-commerce, clashes abruptly with WTO Members stated objective to fit e-commerce and the use of ICT technologies for trade into WTO existing rules because it makes the GATT no longer technologically neutral[79]. To apply the GATT rules to trade in digital content products would also pose the problem of their exact classification within the Harmonized System Code (HS)[80] that is used in the GATT tariff schedules. This is because the HS nomenclature usually refers to the physical characteristic of the product and does not offer the possibility to categorize content[81].

If instead we welcome the concurrent position, namely the applicability of the GATS discipline to trade in digital content products, we might easily overcome – at least in practice - the problem of technological discrimination. In fact, although nothing in the GATS Agreement prevents WTO Members from introducing tariffs on trade in services, this practice is rare[82]. In a legal framework already free from the application of customs duties, the duty-free moratorium will still function as an assurance for the non-introduction of customs duties on electronic services, but its discriminatory effect would be watered down almost entirely.

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[77] The issue of the applicability of service or goods trade rules to specific products has been raised many times in WTO dispute settlement, lastly in the context of a dispute between the United States and China on the treatment of audiovisual products. See, Pauwelyn J., *Case Note: Squaring Free Trade in Culture with Chinese Censorship: The WTO Appellate Body on China – Audiovisual*, in *Melbourne J. of Int'l Law*, 11, 2010, 122-132, also analysing relevant EU and US jurisprudence.

[78] Hart M., Chaitoo R., *Electronic Commerce and International Trade Rules*, cit., 916.

[79] To stretch the comparison, one could think of a hypothetical differentiation in customs duties for goods traded by sea and by air.

[80] The Harmonized System (HS) is the internationally nomenclature system for classifying traded goods. It is governed by the *International Convention on the Harmonized Commodity Description and Coding System*, done at Brussels on 14 June 1983, entered into force in 1988 (UN Treaty Series, 1-25910, Vol. 1503) and administrated by the World Customs Organization (WCO).

[81] Hernandez-Lopez E., *Trade in Electronic Commerce Services under the WTO, The Need to Classify Electronic Transmissions as Services and not Tariff-Liable,* cit., 567; Wunsch-Vincent S.*, The WTO, the Internet and Trade in Digital Products: EC-US Perspectives*, cit., 49.

[82] With reference to customs duties, the Secretariat explained that "Customs duties are border measures and would therefore be relevant to cross-border supply, whether under mode 1 or mode 2. It is very uncommon for them to be applied to services: the Secretariat is aware of only one case – the application of customs duties on ship repair services purchased abroad by the US. There may however be other cases and there is no reason in principle why customs duties should not be applied to services, whether supplied electronically or in any other way". S/C/W/68, cit., para 34.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Indubitably, as already noted[83], acknowledging the applicability of the GATS Agreement will have the effect of reducing the overall level of market access for certain digital products, particularly the ones carrying audio-visual content[84]. However, the crucial difference with the GATT approach is that, in this case, further liberalization could be achieved "internally" through the appropriate negotiations mechanisms established by the GATS Agreement itself and not, as it is the case with the GATT, through the introduction of a discriminatory duty-free treatment. Also, this approach will not put into question the differentiation between tangible and intangible products that is at the basis of the development of a different discipline for trade in services[85]. In this way, the original aim to deploy extant WTO discipline to e-commerce without developing new *ad hoc* rules would be preserved.

Finally, from a strictly practical point of view, recent developments shows that, because of increasingly bandwidth capacity and improvements in internet accessibility, the supply of digital content products through the internet, intended for instance as the download of music or movies, might be soon completely replaced by the offer of the same content through internet streaming[86]. Arguably, the increasing utilization of the latter option, which is undisputedly characterized as a service, might render the digital content products issue more of a theoretical debate, with positive consequences in terms of the reconciliation of the diverging policy positions within the WTO.

[83] *Infra*, para. 2.2.2.
[84] On the market access issues in the GATS and their implications for electronic service trade see, Chapter II, para. 3.1.
[85] On the goods/services debate see, among others, Nicolaides P., *Economic Aspects of Services: Implications for a GATT Agreement*, in *JoWT*, 23:1, 1989; Abu-Akeel A.K., *Definition of Trade in Services under the GATS: Legal Implications*, *GW J. Int'l L. & Econ*., 32, 1999.
[86] The reference is to provider of subscription-based on-demand Internet streaming media such as Spotify or Netflix. Similar services have been developing on geographical basis; see, for instance, *Media as an Internet business*, presentation by Mr Gautam Sinha of Times Internet, India at the WTO workshop on e-commerce organized under the auspices of the CTS, Geneva, 17-18 June 2013. See *infra,* para. 4.3.3.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
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2.3 - Electronic services and the WTO: the evolution in the GATS/CTS discussions.

2.3.1 The discussions on services in the Work Programme on electronic commerce

Among the four WTO bodies in charge of debating e-commerce issues, the CTS has been certainly the more active in terms of substantial discussions. Because of their inherent intangibility, services are in fact the economic activity benefiting more from the development of the internet as a mean of delivery. Hence the need to examine the interpretation of specific GATS provisions in light of new technological developments has emerged within the CTS from the very beginning.

At the outset of the Work Programme, the Secretariat addressed a note to the CTS as a starting point for the discussion on electronic services and enlisted a broad bulk of issues for discussions, ranging from competition to regulation, from market access to privacy and transparency[87]. Since the beginning, the US and the EU have been the parties more involved in the discussions. The EU, in particular, proposed to deal with the topics identified by the Secretariat through a two-steps approach, giving precedence to the "clarification issues" (meaning the scope of the GATS, the MFN treatment and the transparency obligations in relation to e-commerce) and leaving the "analytical issues" (domestic regulation, competition, privacy and public moral) to later discussions[88]. From these premises, the Committee found a widespread consensus with regard to the full applicability of GATS rules, namely MFN, national treatment and market access commitments, to services delivered electronically. This was based on the general view of the delegates that the means of delivery (electronic or not) do not alter specific commitments nor render like-services "unlike" for MFN treatment

[87] S/C/W/68, cit., The complete list of issues identified by the Secretariat encompassed: scope and modes of supply of electronic services, MFN treatment, transparency, participation of developing countries, domestic regulation, recognition, competition-related provisions (including monopolies), the annex on telecommunications and the role of the reference paper, protection of privacy and public moral, market access and national treatment. Many of these issues are discussed in the following paragraphs and in Chapter II. The note also mentioned the issues of classification and customs duties for electronic transmissions. As discussed above, such issues have been considered later as horizontal and have been hence discussed directly by the General Council in the specific "dedicated discussions".

[88] S/C/W/70, *WTO Programme on Electronic Commerce*, Communication from the European Communities and their Member States, 23 November 1998, para. 2.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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purposes[89]. Another issue systematically considered by the CTS was the role of the Telecommunication Annex for the supply of electronic services[90].

Despite the encouraging inception of the discussions, however, many other issues identified by the Secretariat, such as the sectorial characterization of electronic services, although thoroughly discussed, could not be settled through the CTS[91]. Moreover, following the decision of the General Council to set up a series of dedicated discussions on horizontal issues in 2001[92], the e-commerce debate within the CTS lost momentum[93]. Significantly, in the period from 2002 to 2010, no further activity on electronic services took place. This happened regardless the famous decision issued by the DSB in 2004 and in 2005 dealing, for the first time, with the interpretation of the GATS Agreement in the context of cross-border supply of online gambling services[94].

In line with the general trend, a new push for discussions resurfaced only in recent years, this time however in a less coordinated manner, with the EU and the US encouraging the debate in accordance with their own specific policy interests[95]. If a renewed interest on internet and trade issues is certainly welcomed, it goes without saying that the new "issue-specific" approach underlying the recent developments might not constitute the ideal solution to deal with a multifaceted issue such as the international regulation of electronic services.

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[89] S/C/W/115, *Work Programme on Electronic Commerce, Progress Report to the General Council*, 16 July 1999, paras 8 and 15. See also, S/C/W/104, *Work Programme on Electronic Commerce*, Communication from Japan, 25 March 1999; S/C/W/108, *Work Programme on Electronic Commerce*, Communication from Australia, 18 May 1999; S/C/W/183, *Electronic Commerce Work Programme*, Communication from the European Communities and their Member States, 30 November 2000; WT/GC/W/434, *Electronic Commerce Horizontal and Sectorial Issues which Require Further Analysis*, cit.

[90] *Infra,* para. 2.3.2.

[91] I*nfra,* para. 3.3.

[92] I*nfra,* para. 2.1.2.

[93] S/C/W/220, *Report (2002) of the Council for Trade in Services to the General Council*, Council for Trade in Services, 3 December 2002, para. 32.

[94] WT/DS285/R, WT/DS285/AB/R, *United States – Certain measures affecting the cross-border supply of gambling and betting services*, 10 November 2004, 7 April 2005.

[95] See, S/C/W/338, cit.; S/C/W/339, cit.; S/C/W/348, *Contribution to the Work Programme on Electronic Commerce*, Communication from the European Union, Authorisations and licences: how to ensure the growth of electronic commerce through appropriate authorisation schemes: the case of the European Union, 26 September 2012; S/C/W/349, *Contribution to the Work Programme on Electronic Commerce*, Communication from Australia, Suggestions on ICT principles, 26 September 2012.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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2.3.2 The role of the Annex on Telecommunications and the Reference Paper for the access to the supply of electronic services

One of the thorny issues identified by the Secretariat to be discussed by the CTS and mentioned only briefly above [96] relates to the significance of the Annex on Telecommunications (hereafter "the Annex")[97] in securing access to telecommunication services which are essential for the supply of internet services.

The Annex is an instrument attached to the GATS and developed in the context of services negotiations. Its purpose is not to further liberalize telecom services, but to recognize the importance of the *access* and the *use* of public telecommunication services for a transparent and fair treatment of those services whose market access is already granted. Despite its misleading denomination, the purpose of the Annex is indeed to facilitate the liberalization of those non-telecommunication services requiring access to telecom networks[98]. In the words of some commentators, the Annex "is attached as a bonus to specific commitments in a given sector" and thus "can be seen as a general insurance policy for suppliers of other services that they would have access to the requisite telecommunications networks and services in WTO countries"[99].

The central pillar of the Annex is found in paragraph 5 where it is stated that, within the limit set forth through specific requirements[100], "each Member shall ensure that any service supplier of any other Member is accorded access and use of public telecommunications transport networks and services on reasonable and non-discriminatory terms and conditions"[101]. As noted in the literature, the Annex, that has been initially negotiated with telephone services in mind, plays a crucial role for the supply of services through the internet[102]. Through its central provision, it grants foreign suppliers the right to

[96] *Cfr*., footnote 87.
[97] GATS Agreement, Annex on Telecommunications, para. 5a).
[98] Weber R., Burri M., *Classification of Services in the Digital Economy*, Springer, 2012, 61-64; Clough M., *Trade and Telecommunications*, Cameron May, 2002, 39; S/C/W/68, cit., para. 21-23.
[99] Bronckers M., Larouche P., *A Review of the WTO Regime for Telecommunications Services*, in Alexander K., Andenas M. (eds), *The World Trade Organization and Trade in Services*, Martinus Nijhoff Publishers, 2007, 326-27.
[100] Annex, para. 5(e).
[101] *Ivi*, para. 5(a).
[102] Sacerdoti G., *Il Commercio Elettronico: tra Autonomia Privata, Interventi Statali e Iniziative Internazionali,* cit., 14.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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deliver services through the use of national telecom networks even when commitments on the liberalization of basic telecommunication services are not undertaken.

In the context of the Work Programme, the issue of the relevance of the Annex for the delivery of electronic services was debated abundantly within the CTS. The US pointed out that the Annex ensures that suppliers of services are able to use internet (or any other) protocols to supply a service included in a Member's schedule[103]. The EU highlighted the crucial relevance of the Annex in securing access to the telecommunication services that are in turn essential to provide internet access services[104]. Moreover, from the EU perspective, the Annex wording was construed in a way to encompass not only telecommunication services but also internet access and network services insofar as they constitute services "required explicitly *or in effect* by a Member to be offered to the public generally"[105]. In sum, however, a clear convergence among WTO Members as to the applicability of the Annex relevant obligations seems to exist only with regard to telecommunication transport services whereas it is still unclear whether said obligations apply to internet access providers[106].

Major providers of telecommunication services over the internet and major suppliers of internet access and network services, whether or not subject to the Annex obligations, might be in any case bound to the discipline envisioned by another GATS instrument, the so-called Reference Paper. The Reference Paper is integral part of the Agreement on Basic Telecommunications, which was negotiated in the aftermath of the Uruguay Round and entered into force in 1998[107]. The Agreement encompasses a series of additional commitments on liberalization of basic telecommunications undertaken by a restricted number of WTO Members and annexed to the existing GATS schedules through the Fourth

[103] S/C/W/130, *Clarification of the Relationship between Existing Services Commitments and the Internet*, Communication from the United States, 14 October 1999, para 7.
[104] "Since access to the internet requires access to and use of public telecommunications transport networks, WTO Members must ensure that providers of other Members are accorded this access and use on reasonable and non-discriminatory terms and conditions, as provided in the GATS Annex on Telecommunications". S/C/W/87, cit., para. 2.
[105] S/C/W/183, *Electronic Commerce Work Programme*, cit., para. 5. See also the similar position of Australia with regard to the applicability of the Annex to internet services: "Australia supports application of the Telecommunications Annex and Reference Paper wherever possible to communication services, including those used for e-commerce purposes. The Internet (as a communications service) is covered by existing agreements, particularly the Annex on Telecommunications". S/C/W/108, *Work Programme on Electronic Commerce,* Communication from Australia, cit., para. 18.
[106] S/C/W/100, *Interim Report on Electronic Commerce*, Council for Trade in Services, 17 March 1999, cit., para. 18.
[107] S/L/20, *Fourth Protocol to the General Agreement on Trade in Services*, 30 April 1996.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
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Protocol[108]. The Reference Paper, which is attached to the Fourth Protocol, enlists a series of regulatory principles to be applied to telecommunication operators and can be considered as the first attempt to introduce embryonic and sectorial competition rules in the multilateral trading system[109]. For WTO Members that are bound to both the Agreement and the Reference Paper[110], these principles amount to substantial obligations, hence they are challengeable through the DSB[111].

The relevance of the Reference Paper for the supply of electronic services is clear, looking especially at the first two principles[112]. According to Section 1, signatories of the Reference Paper need to maintain adequate measures to prevent anticompetitive behaviours of major suppliers. Section 2 instead refers to the interconnection obligation between telecommunication transport networks and services, which has to be ensured "at any technically feasible point in the network" in order to allow the users of one supplier to communicate with the user of another supplier. In the context of the Work Programme, the EU strongly supported the applicability of these principles not only to telecommunication services but also to internet access and network services[113]. In the EU's view, in fact, internet access, internet network and internet certification suppliers who are considered, alone or together, "major" suppliers, should be prevented from adopting anti-competitive behaviours in accordance with the Reference Paper competitive safeguards and interconnection principles[114]. However, although this view might be shared by other important Members,

[108] Weber R., Burri M., *Classification of Services in the Digital Economy*, cit., 65-67. S/L/20, *Fourth Protocol to the General Agreement on Trade in Services,* 30 April 1996.
[109] As noted by Bronckers and Larouche, "the telecommunications sector in most countries operated under a legal monopoly regime whereby one or a few operators held the exclusive right to provide telecommunications services. Whenever liberalization occurs, the former monopoly operator is by definition almost always the dominant player on the market. […] The RP contains a core of principles designed to ensure that the advantages of the former monopoly operator are not used to the detriment of new entrants on the telecommunications markets." Bronckers M., Larouche P., *A Review of the WTO Regime for Telecommunications Services*, cit., 330-31.
[110] The Agreement on Basic Telecommunication is a plurilateral agreement and it is thus binding only for certain WTO Members. Moreover, among the signatories, certain Members are not bound – or only partially bound – to the Reference Paper provisions.
[111] The compliance with certain Reference Paper principles has indeed been subjected to the DSB review in the Telecom-Mexico case. WT/DS204/R, *Mexico – Measures affecting Telecommunication Services*, Report of the Panel, 2 April 2004, paras 7.18-7.265.
[112] The importance of these principles has been reaffirmed through the ICT trade-principles negotiated between the US and the EU in 2011. S/C/W/338, cit., principle 9, also reported in Annex II.
[113] WT/GC/W/306, *WTO Work Programme on Electronic Commerce*, Communication from the European Communities and their Member States, 9 August 1999, paras 5-6.
[114] *Ibid*.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
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again, as for the Annex on Telecommunications, an analysis of available documents does not indicate a complete convergence within the CTS with regard to this last point.

3. Modal and sectorial services classification in the GATS: a look at the implications for electronic services

3.1 - An outdated classification of services in the GATS agreement

3.1.1 The GATS infrastructure and the definition of trade in services: an overview

As it has been pointed out in the previous paragraph, a specific, tailor-made discipline for regulating electronic services was never considered a suitable option to deal with the development of new technologies within the WTO. On the contrary, the solution adopted throughout the Work Programme was to maintain the general discipline applicable to trade in services and to clarify, where needed, the extent of these obligations to keep the pace with technological development. It resulted that the current applicable WTO discipline for trade in electronic services within the WTO relies heavily on the general discipline on services agreed upon in the GATS Agreement and on the level of commitments each WTO Member has negotiated therein. A brief analysis of the structure of the GATS Agreement is then necessary in order to shade light on the main problems that inevitably arise out of the transposition of said obligations in the new context of electronic services.

The system envisioned for the multilateral liberalization of services, which have been pursued within the WTO through the GATS Agreement, inevitably differs in its design from the one established for the liberalization of trade in goods[115]. Indeed, in order to make the process of liberalization of services possible, and in addition to the general obligations applied across all service sectors, WTO Members were given the possibility to undertake specific commitments with respect to market access and national treatment obligations in specific service sectors, thus excluding certain categories or restricting the degree of liberalization in

[115] For a thorough analysis of the GATS negotiations history and the contrasting positions see, Wolfrum R., Stoll P., Feinäugle C., *Max Planck Commentaries on World Trade Law, WTO - Trade in Services*, Martinus Nijhoff Publishers, 2008, 1-16.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
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various areas. This was aimed at leaving enough space of manoeuvre for them to find the right balance between liberalization and the protection of strategic national sectors[116]. The first result was the adoption of a broad classification list by which WTO Members were enabled to negotiate their own commitments according to both the categories of services[117] and their mode of supply[118]. A further striking difference with the GATT Agreement was the possibility provided by the GATS to insert specific derogation to the most important basic international trade principle, namely the Most Favoured Nation obligation[119]. The overall result was a more balanced and less intruding system for the regulation of international trade in services whose obligations however were - and still are - impossible to predict without analysing each Member's list of specific commitments.

Another relevant characteristic of the GATS Agreement is the lack of a clear-cut definition of what constitute a "service" for international trade purpose. Indeed, as it will discussed below, the GATS Agreement provides only for the definition of "trade in services" distinguishing it into four broad categories in accordance with the mode of supply/delivery[120]. The reason for the absence of a clear-cut definition of "service" can be interpreted not only as the result of the difficulties in negotiating a one-size-fits-all definition[121], but also as an attempt by the drafters to avoid the crystallization of the object of the agreement and to set up a system suitable to stand the test of time and of technological developments[122]. For trade purposes, in fact, what was considered to be important to define was the way in which services are delivered rather than their characteristics. However, as it will be explained below, merely avoiding to provide a definition of "service" could not completely overcome the issue

[116] Due to the sensitiveness surrounding the liberalization of trade in services compared to goods, since the beginning of the negotiations the need to take into consideration national policy objectives was highlighted. See, MIN.DEC/Chair, *Statement by the Chairman and Adoption of the Ministerial Declaration*, 20 September 1986, Part II. Coherently, the Preamble of the GATS Agreement recognizes "the right of Members to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives" and the whole Agreement provides more tools for WTO Members to deviate from general obligations. In this sense see, for instance, Adlung R., Carzaniga A., *MFN Exemptions under the General Agreement on Trade in Services: Grandfathers Striving for Immortality?,* in *JIEL*, 12(2), 2009, 357–392. See also, Vranes E., *The WTO and Regulatory Freedom: WTO Discipline on Market Access, Non-Discrimination and Domestic Regulation Relating to Trade in Goods and Services*, in *JIEL*, 12(4), 2009, 953–987.
[117] *Infra*, para. 3.1.2.
[118] *Infra,* para. 3.3.1.
[119] See, Chapter II, para. 2.2.
[120] See GATS Agreement, Art I.2.
[121] Wolfrum R., Stoll P., Feinäugle C., M*ax Planck Commentaries on World Trade Law, WTO - Trade in Services*, cit., 38.
[122] Abu-Akeel A.K., *Definition of Trade in Services under the GATS: Legal Implications*, cit.,

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
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of technological enhancement[123]. The problem of keeping the pace with the development of new services remained because of the possibility granted to WTO Members to select and diversify their level of liberalization through the lists of specific commitments.

3.1.2 The WTO services classification system and its drawbacks: W/120 and CPCprov lists

In order to allow WTO Members to define their specific commitments and exceptions in the context of the GATS negotiations, a list of service headings was needed. However, contrary to what happened to trade in goods, where a detailed list of goods and customs headings was already developed through the World Customs Organization (WCO), fully endorsed by the WTO and generally accepted worldwide[124], a broadly recognized classification applicable to services and specifically targeted to their liberalization was not existing at the time of the Uruguay Round[125].

To overcome this problem, the WTO Secretariat had to come up with a draft classification list specifically tailored to services liberalization, taking as a reference the ones elaborated for statistical purposes[126]. The classification list agreed upon during the Uruguay Round negotiations, and by which the commitments were and are still made, is the Services Sectoral Classification List (Annex I), better known in WTO jargon as the W/120 because of the numbering assigned to the working document reporting it[127]. This list was prepared by the GATT Secretariat in 1991 and presents an aggregate of the more detailed categories contained in another list, the provisional Central Product Classification (CPCProv)[128], elaborated in the United Nations context by the Statistical Commission and approved in the 12th plenary meeting of the UN Social and Economic and Social Council (ECOSOC) in 1989 with

[123] *Infra,* para. 4.4.
[124] *Cfr.,* footnote 80.
[125] S/CSC/W/61, *Services Classification in WTO Jurisprudence*, Note by the Secretariat, Committee on Specific Commitments, 12 March 2013, paras 1.1-1.6.
[126] UN et al., *Manual on Statistics on International Trade in Services 2010*, Statistical Papers Series, No 86, ST/ESA/M.86/Rev. 1, Geneva, Luxembourg, New York, Paris, Washington D.C., 2010, 14.
[127] MTN.GNS/W/120*, Services Sectorial Classification list*, cit.
[128] UN et al., *Manual on Statistics on International Trade in Services 2010*, cit., 14.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Resolution 1989/3[129]. Before the development of the CPCProv, no international classification covering the whole spectrum of outputs of the various services industries was available[130].

The CPCProv list defines both services and goods (transportable and non-transportable)[131] that are the output of economic activities. The items in the list are classified through a five digit code system to embrace a high level of disaggregation. Each item in the list is referred as the output of one of the activities listed in the International Standard Industry Classification of all Economic Activities (ISIC) elaborated by the United Nations as well[132]. The CPCProv, however, was not developed necessarily having the classification of services for trade negotiation purposes in mind; on the contrary, the CPC stated goal was "to provide a general framework for international comparison of data from various types of statistics that present data by kinds of product"[133], which means, in other words, to facilitate statistical evaluations and to enhance harmonization among various economic fields.

The W/120 list adopted for the GATS commitments counts for 12 service sectors and makes explicit, although not systematic, numerical reference to the CPCProv classification[134]. Such list is supposed to encompass each and every service sector and to define it in a broad way. For the sake of coherence, the categories and sub-categories are considered exclusive, meaning that a single service cannot belong to multiple categories.

The macro sectors identified are:

1) Business Services
2) Communication Services
3) Construction and Related Engineering Services
4) Distribution Services
5) Educational Services
6) Environmental Services

[129] E/1989/89, *Resolutions and Decisions of the Economic and Social Council*, Official Records 1989, New York, 1990, 10.
[130] Weber R., Burri M., *Classification of Services in the Digital Economy*, cit., 17.
[131] *Ibid*.
[132] The ISIC encompasses all the productive economic activities and its main purpose is to provide a standard set of economic activities so that entities can be classified in accordance with the activity they carry out. The latest version of the ISIC is available at unstats.un.org.
[133] Provisional Central Product Classification (CPCProv), preface, available at unstats.un.org.
[134] The complete W/120 classification list is reported in annex I.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
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Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

7) Financial Services
8) Health and Related Social Services
9) Tourism and Travel Related Services
10) Recreational, Cultural and Sporting Services
11) Transport Services
12) Other Services

This instrument has served the purpose of enabling cross-country comparisons in order to facilitate the negotiating process among WTO Members during GATS negotiations in the Uruguay Round. However, because of its close relationship with the CPCProv, this list cannot be considered as originally conceived for that specific purpose. Regardless, the W/120 is to date the reference list upon which WTO accessing countries still negotiate their own commitments in the field of services. Since the Uruguay Round, no other classification list have been proposed for adoption within the WTO regardless of the fact that other types of classifications have been developed in the meantime[135].

The main problem with every classification exercise, however, is rigidity. Classifications are static in nature and, once the commitments are made on the basis of a specific model, the possibility of modification is reduced. In the context of the GATS, where the level of commitments reflects extremely delicate balances and the level liberalization of each sector is granted by each Member only after long and complex political negotiations, to amend the classification list or to adopt a new one would imply enormous efforts for the Members to renegotiate the terms of their commitments and recreate the balance achieved in 1994.

The practical impossibility to revise the W/120 on a regular basis leads to potential issues, more so when it comes to new technologies. In the latter case, in fact, specific problems may arise. Firstly, even if the W/120 is supposed to encompass each and every conceivable service, the possibility for new technologies to enable the creation of brand new services that are not covered by previous existing categories cannot be ruled out[136]. Secondly,

[135] *Infra,* para. 3.1.3.
[136] In this sense, one could think, for instance, about the concept of the search engine, a type of service that could not have been foreseen before the development of the internet but is now part of every internet user daily life. *Infra*, para. 4.3.1. See also, Gao H., "Googling for the Trade-Human Rights Nexus in China: Can the WTO Help?", in Burri M., Cottier T. (eds.), *Trade Governance in the Digital Age*, Cambridge, 2012, 247-275. For an analysis of "new electronic services" and their classification problems see *infra,* para. 4.3.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

because of new methods of communication, certain services might be now delivered in multiple ways, hence might now fall within the scope of other categories that are subject to different levels of liberalization[137]. Finally, another important consequence of the development of new patterns of communication is the so-called convergence phenomenon between sector categories[138]. Indeed, certain services are now bundled and delivered together and is hence increasingly hard to classify them in single headings[139].

In sum, if the existence of drawbacks in a rigid classification for services liberalization is undisputed, the fact that this system was developed in a pre-internet era raises specific problems when it comes to the classification of new electronic services[140]. However, as explained below, a classification method suitable to overcome these issues and, at the same time, to safeguard the possibility for WTO Members to rely upon a single classification system is not easy to conceive.

3.1.3 The consequences of a rigid classification system: CPCProv vs CPC 2.0

Since, as it has been pointed out, the W/120 relationship with the UN Classification System is only an incidental one and no systematic link exists between the UN Statistical Division and the WTO Secretariat in this sense, the crystallization of WTO Members

[137] In this sense, for instance, VoIP (Voice over Internet Protocol) telephone services are now commonly available alongside traditional telephony.

[138] "'Convergence' refers to the coming together of what were previously thought of as separate sectors, namely, telecommunications, information technology and media, as a result of technological developments", Larouche P., "Dealing with Convergence at the International Level", in Géredin D., Luff D. (eds), *The WTO and Global Convergence in Telecommunications and Audio-visual Services*, Cambridge, 2004, 390 et seq. Convergence takes place at different levels. First, it can already be seen at the level of terminal equipment and networks. Computers, for instance, can be used not just for computing, but also for telecommunication and the reception of audio-visual media. Similarly, networks originally conceived for telecommunications or broadcasting of audio-visual media can now be used for the other purpose, as well as accessing the Internet. Secondly, convergence can take place at the service level, with the introduction of new services combining elements of telecommunications and media. Thirdly, the industry itself converges through alliances and cross-sectoral mergers.

[139] For WTO classification purposes, the relevant type of convergence is the one taking place at the service level. Examples of initial convergence phenomenon are pay-per-view or video-on-demand, combining both telecommunication, media and computing elements. See, Larouche P. *Dealing with Convergence at the International Level,* cit. On the difficulties to distinguish between audio-visual, telecommunication and broadcasting services in the WTO framework see, Nihoul P.L.G., *Audio-visual and telecommunications services: a review of definitions under WTO law*, in Géredin D., Luff D. (eds.), *The WTO and Global Convergence in Telecommunications and Audio-visual Services,* cit., 357 et seq.

[140] The sectorial classification issues arising out of the development of new electronic services are discussed more in detail at paragraph 4.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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commitments through an *ad hoc* list did not prevent the UN body to improve and update the original CPCProv list.

Indeed, the United Nations CPCProv has been updated a few times in view of the fact that new needs have emerged and new services needed to be included. The first update dates back to 1998 when the UN Statistic Division replaced the CPCProv with the 1.0 version of the CPC list. This new classification list differed from the first one because it already aimed at reflecting new technologies in the service sectors. Further classification efforts culminated in the release of the CPC 1.1 in 2002 and the CPC 2.0 in 2008 that have been focused, among other things, on the improvement of classification in the field of telecommunication and internet services[141]. A new revision started in 2011 and is now being finalized by the Expert Group on International Statistical Classification[142].

Obviously, however, the modifications proposed in the more recent versions of the CPC have not been included in the W/120 list that is still to these days based on the CPCProv developed in 1991, hence departing significantly from the most recent classification lists elaborated by the UN. In particular, when comparing the old CPCProv with the latest classification released by the UN statistical division (the CPC 2.0), it is immediately clear how new technologies have shaped and influenced its evolution.

Looking more in depth at the service sectors relevant for the internet and IT technologies (see Table I below)[143], one can immediately notice that the telecommunication services heading (former CPCprov 752 falling within the "communication services" heading) has now been included in heading 8, pertaining to business services. Also, the former two-digit heading named "computer related services" (CPCProv 84) has been replaced by the heading "telecommunications, broadcasting and information supply services" which encompasses not only telecommunication services but also new important and previously absent categories such as "online content" (843) and "internet telecommunications services" (842), disregarding instead those services previously identified as falling within the "computer services" category. Needless to say that the new categories included in the CPC 2.0 do not find any parallel in the CPCProv and, consequently, in the W/120 classification.

[141] CPC 1.0, 1.1 and 2.0 are available at the registry of the UN Statistical Division website: unstats.un.org

[142] See, Meeting of the Expert Group on International Statistical Classifications, Final Report, ESA/STAT/AC.267/4, 27 August 2013, paras 94-98, available at unstats.un.org.

[143] As will be discussed below, telecommunication, computer and audiovisual are the service categories in which new electronic services are more likely to fall into. See, *infra,* para. 4.2.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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Table I. A Comparison between CPCProv and CPC 2.0 of the service sectors relevant to IT technologies[144]

			CPCProv	CPC 2.0
84			***Computer and Related Services***	***Telecommunications, Broadcasting and ISS***
	841		**Consultancy Services related to Computer Hardware**	**Telephony and Other Telecommunication Services**
		8411		Carrier Services
		8412		Fixed Telephony Services
		8413		Mobile Telecommunication Services
		8414		Private Network Services
		8415		Data Transmission Services
		8419		Other Telecommunication Services
	842		**Software Implementation Services**	**Internet Telecommunication Services**
		8421	Systems and Software Consulting Services	Internet Backbone Services
		8422	Systems Analysis Services	Internet Access Services
		8423	Systems Design Services	
		8424	Programming Services	
		8425	System Maintenance Services	
		8429		Other Internet Telecommunication Services
	843		**Data Processing Services**	**Online Content**
		8431	Input Preparation Services	Online Text Based Information
		8432	Data Processing and Tabulation Services	Online Audio Content
		8433	Time Sharing Services	Online Video Content
		8434		Software Downloads
		8439	Other Data Processing Services	Other Online Content
	844		**Data Base Services**	**News Agency Services**
		8441		News Agency Services to Newspapers and Periodicals
		8442		News Agency Services to Audiovisual Media
	845		**Maintenance and Repair Services of Office Machinery Including Computers**	**Library and Archive Services**
		8451		Library Services
		8452		Archive Services
	846			**Broadcasting, Programming and Program Distribution Services**
		8461		Radio and Television Broadcast Original
		8462		Radio and Television Channel Programmes
				Broadcasting services, multi-channel distribution services
	849		**Other Computer Services**	
		8491	Data Preparation Services	
		8499	Other Computer Services n.e.c.	

[144] As a consequence of the replacement of the computer services category with a broader one encompassing both telecommunication and information supply services (ISS), a comparison between the classification of IT-related services in the CPCProv and in the CPC 2.0 has included also the CPCProv heading 752, referring to telecommunication services only. Source: unstats.un.org

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
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Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

75			***Post and Telecommunication Services***	(No correspondence in CPC 2.0)
	752		**Telecommunication Services**	
		7521	Public Telephone Services	
		7522	Business Network Services	
		7523	Data and Message Transmission Services	
		7524	Programme Transmission Services	
		7525	Interconnection Services	
		7526	Integrated Telecommunication Services	
		7529	Other Telecommunication Services	

The comparison between the two CPC classifications clearly shows an important shift in favour of a broader category encompassing services related to both telecommunication and the internet. This can be interpreted as a reaction to the need to deal with the phenomenon of convergence of IT services mentioned above. It also demonstrates that the high consideration attached to a whole service category (computer services), that in 1994 was deemed of such an importance to be assigned a specific double-digit heading, can vanish almost completely in a relatively short timeframe[145].

At the WTO level, the direct consequences of this change might not be significant. In fact, because of the practical impossibility to revise the W/120 list, the existence of more coherent and updated classification options is not likely to affect WTO Members' services liberalization commitments agreed upon through the GATS schedule. The preservation of the status quo at the WTO level, however, does not prevent this diversification in classification methods to result in unpleasant effects. Indeed, the coexistence of different versions of the same classification scheme is likely to raise other types of problems. By way of example, new and updated versions of the CPC classification, departing significantly from the original CPCProv, can be adopted by national bodies for statistical purposes or, more importantly, endorsed as a negotiating basis in other trade-related contexts, i.e. bilateral and regional free trade agreements[146].

[145] Some of the services headings previously listed under the "computer services" category are now scattered around other headings. For instance, the heading "maintenance and repair services of office machinery including computers", previously listed under "computer services" has now been moved to category 87, "maintenance, repair and installation services". Other categories, such as former heading 843, "data processing services", have now disappeared.

[146] By means of example, the EU-Korea FTA makes use of both the CPCProv and the CPC 1.0 in order to identify individual sectors and sub-sectors for the liberalization of services. See, *Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part* (signed on 6 October 2010, provisionally applied since 1 July 2011), Annex 7-A-1, para. 2.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
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3.1.4 Other relevant international services classifications

The CPC classification is not the only tool elaborated by international organizations for the purpose of classifying and accounting for goods and services data. Other classification exercises have been undertaken by the UN itself and by other international and regional bodies. Such classifications, however, are often calibrated to reflect different objectives, mainly statistical ones, and they might not constitute the most appropriate tool to list services for the purpose of fostering their liberalization. However, because they are more easily amended, they might as well be useful in revealing new trends in the overall perception of existing services and thus provide options and new insights on how to effectively adjust the outdated lists used in the context of multilateral negotiations to better account for technological developments.

Various tools other than the CPC list are commonly used nationally, regionally and internationally for statistical purposes; a non-exhaustive list is presented and briefly commented below:

- The International Standard Industrial Classification, Rev.4 (ISIC4)[147]
- The System of National Accounts 2008 (2008 SNA)[148]
- The Balance of Payments Manual, Rev.6 (BPM6)[149]
- The OECD-Eurostat Trade in Services Classification (OECD)[150]
- The Extended Balance of Payments Services Classification (EBOPS)[151]

The International Standard Industrial Classification Rev.4 (ISIC4) is the international reference classification of productive activities and provides a set of categories that can be utilized for the collection and reporting of statistics. Since the adoption of the first edition, many countries have used ISIC as a basis for their national activity classification or have developed national classifications derived from ISIC. Interestingly, the latest version of ISIC

[147] *International Standard Industrial Classification of all the Economic Activities, Rev 4 (ISIC4)*, UN Department of Economic and Social Affairs, ST/ESA/STAT/SER.M/4/Rev.4, New York 2008, available at unstats.un.org

[148] *System of National Accounts (SNA) 2008*, UN et al., ST/ESA/STAT/SER.F/2/Rev.5, New York 2009, available at unstats.un.org. SNA 2008 is the fifth revision of the original SNA, first drafted in 1968.

[149] IMF, *Balance of Payments and International Investment Position Manual*, Sixth Edition, Washington, D.C., 2009, available at www.imf.org.

[150] OECD/Eurostat, *OECD Statistics on International Trade in Services*, Brussels/Luxembourg/Paris, 2000.

[151] Available at unstats.un.org.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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has paid a renewed attention to the identification of new industries categories, especially in the field of services; noteworthy, a new section titled "Information and Communication" has been introduced[152]. Moreover, an alternative aggregation model has been proposed for the Information Technology sector. Such proposal aims at encompassing economic activities falling within three ICT broad sectors, namely manufacturing, trade and services[153]. Broadly speaking, however, this approach does not seem compatible with the W/120 or the CPC that, for obvious reasons, clearly separates the production of goods and services.

The System of National Accounts (SNA) 2008 establishes accounting rules for the activities of the economy of a country and it is thus broadly employed by national governments. For this reason it does not focus specifically on the transactions between the "home" economy and the rest of the world but instead differentiates between national and foreign-controlled enterprises, regardless of their place of establishment.

The latest version of the Balance of Payments Manual 6 (BPM6) developed by the IMF describes, as explained in the Manual on Statistics on International Trade in Services 2010 (MSITS 2010), "the concepts that underlie the international investment position, the balance of payments and the other changes in the assets and liabilities account"[154] and "serves as the standard framework for statistics on the transactions and positions between an economy and the rest of the world"[155]. Similarly to the SNA 2008, such classification makes a differentiation between residents and non-residents, taking into account the change of economic ownership of goods or the provision of services.

Finally, the Extended Balance of Payments Services Classification (EBOPS) and the Joint OECD-Eurostat Trade in Services Classification, compiled respectively by the OECD/Eurostat and by the IMF, elaborate on the classification of services from the BPM starting point and break down a number of BPM service items adopting the same "resident/non-resident" approach. Although these tools have sought correspondences with the CPC, the UN itself has admitted that "the need for a convergence of the product classifications of industry and trade, for comparative purposes, requires further development

[152] "The main components of this section are publishing activities, including software publishing, motion picture and sound recording activities, radio and TV broadcasting and programming activities, telecommunications activities and information technology activities and other information service activities." See, *International Standard Industrial Classification of all the Economic Activities Rev.4 (ISIC)*, cit., Part Three, J.

[153] See, *International Standard Industrial Classification of all the Economic Activities Rev.4 (ISIC)*, cit., Part Four, B.

[154] UN et al., *Manual on Statistics on International Trade in Service*s, Statistical Papers Series, No 86, ST/ESA/STAT/SER.M/86, Geneva, Luxembourg, New York, Paris, Washington D.C., 2002*,* 13.

[155] See, *Balance of Payments and International Investment Position Manual*, cit., 1.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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work to more closely align the structural components of EBOPS and CPC". However, even if developed from a statistical starting point, both classifications can be considered as the first attempt to take account of the GATS needs, especially among the telecommunications and financial services sectors, in the development of international statistical and accounting tools[156]. For this last reason, among the different instruments available for the classification of trade in services, these two latter tools seems to constitute the only viable alternatives to the CPC classification.

In sum, although the classifications mentioned above might not play a crucial role in informing the types of service classification used to list GATS specific commitments, it is worth noticing that the efforts of collecting statistical data in different forms and ways do still play an invaluable role for trade negotiators. Indeed, trade officials need statistics as a guide to negotiate specific commitments, to evaluate market access opportunities and assess the extent of the liberalization achieved. It results that, the closer such statistical classifications are to the W/120 and the CPC, the easier it is to cross-check relevant data in order to propose and to request new liberalization offers[157]. For these reasons, WTO delegates are regularly informed about changes, modification and updates regarding the most important statistical classifications even if these are managed in other international or regional forum[158]. Nevertheless, apart from the risk of fragmentation and incoherence - already mentioned in the context of the CPC 2.0 - that the use of different classifications in the multilateral and bilateral frameworks obviously poses, it is also worth recalling that, unlike the W/120 and the CPC lists, developing countries are not involved in the development and management of, for

[156] UN et al., *Manual on Statistics on International Trade in Services 2010*, cit., at 15.

[157] The general need for more coordination between extant service classifications used for statistical purposes and those used for specific liberalization commitments was highlighted already in 2002 in the first edition of the *Manual on Statistics of International Trade in Services* (MSITS), a joint study elaborated by all the main actors at the international level, ranging from the UN Statistical Office, to the WTO, the OECD, the IMF, the UNCTAD and the European Commission. As reported in the foreword of the study, "*the Manual sets out an internationally agreed framework for the compilation and reporting of statistics of international trade in services in a broad sense. It addresses the growing needs, including those of international trade negotiations and agreements, for more detailed, more comparable and more comprehensive statistics on this type of trade in its various forms. The recommendations, which will be promoted by our six organizations, will enable countries to progressively expand and structure the information they compile in an internationally comparable way.* UN et al., *Manual on Statistics on International Trade in Services 2010*, cit., foreword.

[158] See, for instance, S/CSC/M/64, *Committee on Specific Commitments, Report of the meeting held on 4th October 2012*, Note by the Secretariat, 22 October 2012, para A.1, Changes of Services Classification in BPM6: Presentation by WTO International Trade Statistics Section,. See also, S/CSC/M/66, *Committee on Specific Commitments, Report of the meeting held on 20th March 2013,* Note by the Secretariat, 30 April 2013, para. 1, Item A, Classification Issues.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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instance, the OECD-Eurostat classification [159]. This could for sure have long term repercussions on the way the interests and the needs of these countries are (or are not) reflected into more innovative instruments.

3.2 - The sectorial classification of electronic services in the GATS context

3.2.1 Technological neutrality in the sectorial classification of electronic services

As briefly mentioned at the beginning of the chapter, in absence of an *ad hoc* discipline for electronic services, the sectorial identification of the services supplied through electronic means should abide - in principle - by the same rules for the identification of services supplied through other, more traditional, means. Broadly speaking, this implies that services delivered through the internet should fall within the same sectorial classification headings of their "offline" counterparts. It results that, potentially, and provided that technological progresses enable it, each and every service identified in the sectorial list should be subject to the same liberalisation commitments, regardless of whether it is delivered offline or online. This is already straightforward, for instance, in the voice telephony sector where there is now full coexistence between "Voice over the Internet" (VoIP) technologies and standard voice telephony. By the same token, this could and should hold true for a wide range of services, ranging from professional, audio-visual or entertainment, when the *function* of the new service, enabled by new available technologies, is the same of a pre-internet one that is indisputably falling into one category or another[160]. If we accept these premises we are embracing, at least to a certain extent[161], the concept of technological neutrality.

Technological neutrality is not a one-size-fits-all concept as it can be adapted to various contexts and circumstances. In the EU framework, for instance, this concept

[159] Weber R., Burri M., *Classification of Services in the Digital Economy*, cit., 21 "the OECD Classification is worked out by approx. 40 industrial countries, i.e. less developed countries are not represented in its expert groups".
[160] As discussed in subsequent paragraphs, this will however not always be the case. *Infra,* para. 4.3.
[161] As explained immediately below, for GATS purposes, technological neutrality can be declined in two ways. Only one of the two seems to have been accepted by WTO Members and confirmed by WTO jurisprudence. *Infra*.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
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underpins a general obligation for EU Member States not to regulate the market in a way to discriminate one technology over the other[162]. However, the same piece of legislation defining technological neutrality also allows, when deemed justified, to favour one technology over the other[163]. Obviously, the regulatory obligation and even the possibility for a technological discrimination in the regulatory architectures are justified by the positive nature of the EU integration process. In the context of a negative integration infrastructure[164], such as the WTO, the concept of technological neutrality can obviously only be declined negatively, that is to say only when obligations and commitments have already been negotiated for traditional services[165].

As discussed earlier, in the context of the WTO, the concept of technological neutrality can be helpful when debating on the multilateral rules applicable to trade in physical *versus* digital products[166]. In the narrower context of the GATS, however, this concept can be understood as encompassing two very different situations. On one side, technological neutrality can be intended as ensuring the same treatment to services falling within the same mode of supply (*intra-modal neutrality*)[167]. *Inter-modal neutrality*, on the other side, can come into play with regard to services supplied through different *modes* (e.g. cross-border *vs* commercial presence) that can be, at the same time, supplied through a different *mean* (e.g. electronic *vs* onsite supply).

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[162] For a thorough analysis of the principle of technological neutrality in EU law see, Kamecke U., Korber T., *Technological neutrality in the EC regulatory framework for electronic communications: a good principle widely misunderstood*, in *European Competition Law Review*, 5, 2008, 330-337.

[163] EU Directive 2002/21/EC introduces the concept of technological neutrality by stating that "the requirement for Member States to ensure that national regulatory authorities take the utmost account of the desirability of making regulation technologically neutral, that is to say that it neither imposes nor discriminates in favour of the use of a particular type of technology, does not preclude the taking of proportionate steps to promote certain specific services where this is justified, for example digital television as a means for increasing spectrum efficiency". Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), *OJ* L 108/33 of 24 April 2002, Recital 18.

[164] The distinction between positive and negative integration was first coined by Timbergen in 1954. Negative integration was referred to measures consisting on the abolition of a number of impediments to the operation of an economic area. On the other side, positive integration was intended as "the creation of all the institutions required by the welfare optimum which have to be handled in a centralised way." See, Ortino F., *Basic Legal Instruments for the Liberalisation of Trade: A Comparative Analysis of EC and WTO Law*, Hart Publishing, 2004. For an analysis of the negative and positive integration provisions in WTO treaties see, for instance, Cottier T., *The legitimacy of WTO law*, NCCR Working Paper No 2008/19, November 2008.

[165] Compared to the EU framework, the GATS concept of technological neutrality is narrower as it applies only when specific national treatment and market access obligations are undertaken for each service category.

[166] As maintained earlier, the need not to discriminate between products (goods or services) making use of different technologies can be functional in favouring the applicability of GATS instead of GATT rules. *Infra,* para. 2.2.3.

[167] This expression is borrowed from Sascha Wunsch-Vincent. See, Wunsch-Vincent S., *The Internet, cross-border trade in services, and the GATS: lessons from US-Gambling*, in *World Trade Review*, 5:3, 2006, 330.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
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Intra-modal technological neutrality implies that, once a WTO Member has undertaken a commitment for a specific service in one of the four modes of supply, the fact that the foreign supplier of the service makes use of a different mean of delivery within the same mode of supply should not change the nature of the commitments undertaken in the GATS[168]. In this context, technological neutrality refers to the idea that a commitment covers all means by which the service in question might be delivered within a mode of supply. This means that services supplied through one specific mode (i.e. cross-border) are to be treated equally in terms of national treatment and market access obligations regardless of the mean of supply (e.g. electronic *vs* cable).

The idea of *inter-modal* technological neutrality, on the other side, goes one step further by purporting that electronic and non-electronic services should in principle be treated in the same manner, regardless of their national of foreign origin[169]. Such a concept aims at answering to a broader question, namely whether the nature of a service can change due to the fact that such service is supplied via a traditional or an electronic mean. In this sense, the idea of inter-modal technological neutrality is inextricably linked to the broader and very much debated concept of "likeness"[170], that has been traditionally a valuable and a problematic tool

[168] In the offline world, this could be exemplified by referring to a complete liberalization in mode 1 (cross-border supply) of postal services between two countries. In this case, a technological difference can be constituted by the fact that "provider A" delivers its services by ship whereas "provider B" does the same by air. In this case, the concept of sectorial technological neutrality would purport that the different means of delivery within the same mode of supply cannot give rise to any discrimination in the treatment of the two services providers. In this case, in fact, an intra-modal distinctions based on the technique of delivery could be challenged as inconsistent with MFN treatment obligations. See, S/C/8, *Work Programme on Electronic Commerce*, Interim Report to the General Council, 31 March 1999, Annex.

[169] See, Wunsch-Vincent S., *The Internet, cross-border trade in services, and the GATS: lessons from US-Gambling*, cit., 330.

[170] The concept of likeness is at the basis of international trade rules insofar as non-discriminatory obligations, especially national treatment, are applicable only between "like" or "directly competitive" products. Nonetheless, WTO Agreements do not define precisely how likeness between goods or services should be assessed so that, eventually, it has been for the adjudicators to undertake such an assessment on a case-by-case basis. For an in-depth examination of the concept of likeness in WTO law, see, among others, Hudec R. E., "'Like Product': The Differences in Meaning in GATT Articles I and III", in Cottier T., Mavroidis P. (eds.), *Regulatory Barriers and the Principle of Non-discrimination in World Trade Law,* University of Michigan Press, 2000, 101-123. Zedalis R., *A Theory of GATT "Like" Product Common Language Cases*, in 27 Vand. J. Transnatl. L. 33, 1994. The concept of likeness in the GATS Agreement, although similar to the GATT's, retains some important differences. As noted in the doctrine, "there are several differences between the national treatment obligations in, respectively, GATT Article III and GATS Article XVII. First, while the GATT covers only products, the GATS' national treatment obligation, as the MFN obligation, extends to products (services), but also to producers, i.e. service suppliers. Second, GATS Article XVII does not distinguish between tax and other regulatory measures. Third, GATS Article XVII does not contain a reference to "directly competitive products", but only to "like" services and service suppliers." Cossy M., *Determining "likeness" under the GATS: Squaring the circle?,* WTO Economic Research and Statistics Division, Staff Working Paper ERSD-2006-08, September 2006, 4. On the concept of likeness in trade in services, see also, Diebold F., *Non-Discrimination in International Trade in Services 'Likeness' in WTO/GATS*, Cambridge, 2010; Pauwelyn J., "The unbearable

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
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for policy and decision makers to identify the relevant market access and national treatment obligations both at goods and services level[171]. Regardless, a clear determination of whether electronic and traditional services are to be considered "like" services is not only a theoretical exercise. On the contrary, because MFN and national treatment obligations only apply to "like" services, such a determination is crucial in determining the breadth of the liberalization encompassed in the GATS lists of specific commitments[172].

Although the WTO texts do not mention the opportunity to endorse either intra-modal or inter-modal technological neutrality methodology when interpreting the covered agreements, many of its Members have repeatedly maintained a favourable approach in this sense[173]. This approach, however, has been mainly focused on intra-modal technological

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lightness of likeness", in Panizzon, M, Pohl N., Sauvé P. (eds), *GATS and the Regulation of International Trade in Services*, Cambridge, 2008, 358-369.

[171] In the GATT 1947 context, the main criteria for determining likeness were laid down in the report of the Working Party on *Border Tax Adjustments*. In this document, the Working Party identified several criteria to be taken into account when determining likeness between goods. Such criteria included "the product's end-uses in a given market, consumers' tastes and habits, which change from country to country, the product's properties, nature and quality". L/3464, *Border Tax Adjustments*, Report of the Working Party adopted 2 December 1970. Subsequent jurisprudential interpretations elaborated on the concept of "like-products" and its differences with the definition of "directly competitive products" in the context of the national treatment on taxation provided for in Art III.2 GATT. (WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, *Japan - Taxes on Alcoholic Beverages*, 4 October 1996, paras 18-25; WT/DS31/AB/R, *Canada - Certain Measures Concerning Periodicals*, 30 June 1997, paras 30-32; WT/DS75/AB/R, WT/DS84/AB/R, *Korea - Taxes on Alcoholic Beverages*, 18 January 1999, paras. 112-124; WT/DS87/R, WT/DS110/R, *Chile - Taxes on Alcoholic Beverages*, 15 June 1999, 7.48-7.54). On the other hand, likeness with regard to regulatory measures (Art III.4 GATT) was further developed in the EC-Asbestos dispute. In this context, the Appellate Body interpreted such criteria as follows: "This approach has, in the main, consisted of employing four general criteria in analysing "likeness": (i) the properties, nature and quality of the products; (ii) the end-uses of the products; (iii) consumers' tastes and habits – more comprehensively termed consumers' perceptions and behaviour – in respect of the products; and (iv) the tariff classification of the products. [footnote omitted] We note that these four criteria comprise four categories of "characteristics" that the products involved might share: (i) the physical properties of the products; (ii) the extent to which the products are capable of serving the same or similar end-uses; (iii) the extent to which consumers perceive and treat the products as alternative means of performing particular functions in order to satisfy a particular want or demand; and (iv) the international classification of the products for tariff purposes." WT/DS135/AB/R, *European Communities - Measures Affecting Asbestos and Asbestos Containing Products*, 12 March 2001, para 101. In the GATS framework, on the other side, the concept of likeness has been discussed for the first time by the WTO adjudicators in the context of the EC-Bananas III dispute. In this case, however, the Panel did not undertake an in depth analysis, making only a short reference to the fact, in determining likeness between services, the "nature" and the "characteristics" of such services need to be taken into account. A similar approach has been adopted by the Panel in the Canada-Autos dispute. See, WT/DS27/R/USA, *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, 22 May 1997, para. 7.322; WT/DS139/R, WT/DS142/R, *Canada – Certain Measures Affecting the Automotive Industry*, 11 February 2000, para. 10.307. Finally, in the US-Gambling dispute, the Panel did not rule on the issue of likeness insofar as it applied judicial economy. WT/DS285/R, *US – Gambling*, cit., para. 6.426.

[172] Inter-modal likeness (or likeness across-modes) is broadly discussed in Cossy M., *Determining "likeness" under the GATS: Squaring the circle?,* cit., 12-15 and Diebold N.F., *Non-Discrimination in International Trade in Services: Likeness in WTO/GATS,* cit., 220-237.

[173] Weber R., Burri M., *Classification of Services in the Digital Economy*, cit., 75 and footnote 188.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
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neutrality. In the context of the Work Programme on Electronic Commerce, WTO Members have in fact shown widespread support for the applicability of such position[174] by clearly stating "that the GATS applies to all services regardless of the means of technology by which they were delivered" and that "this was further reinforced by the fact that in no area of the WTO were there different rules for different techniques of delivery"[175]. Overtime, WTO Members have repeatedly confirmed such understanding within the CTS, when dealing with specific service sectors. In particular, the US has been a strong supporter of the technological neutral approach in the field of audiovisual[176] and telecommunication services[177].

On the other side, doubts on whether electronically delivered products and those delivered by more traditional methods should be considered "like products" (inter-modal likeness) were raised since the inception of the discussions, with WTO Members fretting to highlight "the important role of customisation in electronic commerce", "the specific nature of digitalized content, which could be stored and accessed repeatedly" and, more importantly, the fact that "likeness depends on the attributes of the products in question, rather than on the technological means of their delivery"[178]. Eventually, reckoning the complexity underlying the concept of likeness also in light of WTO jurisprudence[179], Members were only able to agree on the fact that likeness does not depend on whether a service is delivered electronically or otherwise "within the limits of individual sectors and modes of supply"[180] leaving the

[174] "It [*the Council for Trade in Services*] was also of the general view that the GATS is technologically neutral in the sense that it does not contain any provisions that distinguish between the different technological means through which a service may be supplied. Some delegations expressed a view that these issues were complex and needed further examination". S/L/74, *Work Programme on Electronic Commerce,* cit., para. 4.
[175] S/C/8, *Work Programme on Electronic Commerce,* cit., Annex. "It was noted that the principle of technological neutrality also applied to scheduled commitments, unless the schedule specified otherwise: it was therefore possible for Members to schedule commitments in a non-technologically neutral manner*"*.
[176] When dealing with audiovisual services, the US reaffirmed this principle by stating that "Members need to respect the principle of technological neutrality, which is a fundamental tenet of the WTO, and must refrain from pursuing reclassifications that could erode existing commitments". S/CSS/W/31, *Audiovisual and Related Services*, Communication from the United States, Council for Trade in Services, 18 December 2000, para. 10.
[177] "Evolving networks can use all these services and technologies in a seamless, technology neutral manner. Omission of any one of these services or technologies undermines an investment environment, thereby denying a Member's users the variety of transmission means that are increasingly linked into a seamless network, each optimized for particular needs". S/CSS/W/30, *Market Access in Telecommunications and Complementary Services: the WTO's Role in Accelerating the Development of a Globally Networked Economy*, Communication from the United States, Council for Trade in Services, 18 December 2000, para. 9.
[178] S/C/8, *Work Programme on Electronic Commerce*, cit*,* Annex.
[179] "Members also noted that the issue of likeness is one of the most complex legal issues, not only in the GATS, but also in the GATT and that there is considerable GATT jurisprudence which establishes that the determination of likeness can only be made on a case-by-case basis", S/L/74, *Work Programme on Electronic Commerce,* cit., para. 8.
[180] S/L/74, *Work Programme on Electronic Commerce,* cit., para. 8.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
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question open as to whether electronic and traditional services are to be considered like-services outside these limits.

3.2.2 Technological neutrality and the US-Gambling Dispute

The lack of a formal acknowledgment of the technologically neutral nature of the GATS has been indisputably overcome by subsequent authoritative jurisprudential interpretations. The technologically neutral approach has in fact been confirmed, albeit only partially[181], in the famous *US-Gambling* decision[182].

In 2003, Antigua and Barbuda (hereinafter "Antigua") requested the WTO's DSB to establish a Panel regarding measures applied in the United States affecting the cross-border supply of gambling services by foreign providers[183]. Antigua claimed that certain US federal and state measures making unlawful the supply of gambling and betting services on a cross-border basis violated the GATS market access and national treatment obligations undertaken by the US through its schedule of commitments. Antigua claimed, among other things, that although the US was banning all types of internet-supplied gambling services, the US could not uphold such a prohibition in the face of GATS mode 1 commitments. The US, on the other side, maintained that no specific commitment on cross-border gambling services had been undertaken and that, in any case, a non-discriminatory prohibition of remote supply of gambling services would have been justified by the "public moral" exception provided for in GATS Article XIV[184].

In order to rule on the claims raised by both parties[185], the adjudicators had to reason, first of all, on the applicability of GATS obligations to a new type of activity, namely the

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[181] As it will be explained below, doubts remain as to the existence of likeness between services falling between different modes of supply.

[182] WT/DS285/AB/R, WT/DS285/R, *United States – Certain measures affecting the cross-border supply of gambling and betting services,* cit.

[183] Antigua brought its complaint to the WTO after Jay Cohen, a US citizen and operator of an internet sports-book service based in Antigua, was jailed in the United States for the remote supply of gambling services in violation of the 1961 US Wire Communications Act. Pauwelyn J., *Rien ne Va Plus? Distinguishing domestic regulation from market access in GATT and GATS*, in *World Trade Review*, 4:2, 2005, 132.

[184] For an in-depth analysis of the *US-Gambling* decision, see, among others, Pauwelyn J., *Rien ne Va Plus?,* cit.; Wunsch-Vincent S., *The Internet, cross-border trade in services, and the GATS: lessons from US-Gambling*, cit.; Delimatsis P., *Don't Gamble with GATS, The Interaction between Articles VI, XVI, XVII and XVIII GATS in the Light of the US-Gambling*, in *JoWT*, 40;6, 2006, 1059-1080; Ortino F., *Treaty Interpretation and the WTO Appellate Body Report in US – Gambling, a critique*, in *JIEL,* 9:1, 2006, 117–148.

[185] Issues related to electronic supply of services, market access commitments and public morality are dealt with in Chapter II.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
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internet-supply of gambling services. Against this background, the Panel eventually considered gambling services delivered through the internet as having the exact same *function* of any other gambling service delivered on a cross-border basis hence confirming that to limit the range of possible means of delivery constitutes an unlawful restriction of market access. Indeed, in the context of this dispute, the Panel noted that "a market access commitment for mode 1 implies the right for other Members' suppliers to supply a service through *all means of delivery* (emphasis added), whether by mail, telephone, Internet etc., unless otherwise specified in a Member's Schedule" further clarifying "that this is in line with the principle of "technological neutrality", which seems to be largely shared among WTO Members". In this sense, the adjudicators ruled that "where a full market access commitment has been made for mode 1, a prohibition on one, several or all means of delivery included in this mode 1 would be a limitation on market access for the mode"[186].

Turning instead to the issue of what has been defined above as "inter-modal" likeness, the Panel and the Appellate Body adopted a more cautious approach; this notwithstanding the fact that such argument was raised by the parties. On one side, the US maintained that significant differences existed between the on-site and electronic gambling services in terms of customer experiences, regulatory environment and the risk associated in the different services[187]. For these reasons, the existence of specific regulatory concerns justified exclusively in light of the *remote* mean of supply of gambling services was sufficient to demonstrate that online and on-site gambling services are "unlike" for WTO purposes and can thus be subjected to different requirements and degrees of liberalization without violating national treatment obligations[188].

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[186] WT/DS285/R, *United States – Certain measures affecting the cross-border supply of gambling and betting services,* cit., para. 6.285. The same interpretation has been then confirmed by the Panel in the China – Audiovisual dispute. See, WT/DS363/R, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, 12 August 2009, para. 7.968. On the China – Audiovisual dispute and the technological neutrality debate in the GATS, see Pauwelyn J., *Case Note: Squaring Free Trade in Culture with Chinese Censorship: The WTO Appellate Body on China – Audiovisual*, cit., 132.

[187] Wunsch-Vincent S., *The Internet, cross-border trade in services, and the GATS: lessons from US-Gambling*, cit., 335.

[188] The United States maintained that "the remote supply of gambling services presents additional regulatory risks that do not exist, or are not present to the same degree, in non-remote settings, such as casinos. In a casino, the gambler must be physically present. Therefore, he or she can be identified with a reasonable degree of certainty. Casinos are thus able to restrict access to minors, known criminals, persons who are known to be financially insolvent, and so on. However, due in large measure to the virtual anonymity of remote media such as the Internet, remote supply gambling operations cannot reliably identify their customers. […]. Similarly, disreputable suppliers can exploit the anonymity of remote media in ways not possible with non-remote supply of gambling services. Remote gambling also presents special health and youth protection risks in part because it is available to anyone, anywhere – including compulsive gamblers and children – who can gamble 24 hours a

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
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On the other side, and although for the purpose of the dispute Antigua was mainly interested in having the intra-modal neutrality principle upheld, they incidentally raised the more general issue of likeness between services delivered online and offline, maintaining a straightforward opinion with regard to the applicability of the concept of likeness to services delivered through different means. In this sense, by referring to the doctrine[189] and to previous jurisprudence[190], Antigua claimed that, contrary to what happens with trade in goods, likeness between services is easier to prove because "in the case of trade in services the characteristic of the product – the services – are intangible and often easily adaptable" and thus "even if the services and service suppliers are "unlike" it will often be relatively simple to adapt the foreign service and service supplier in order to make this "like" their domestic counterpart"[191]. Also, in order to underline the intrinsic discriminatory nature of the apparently non-discriminatory different treatment maintained by the US for offline and online services, Antigua stressed the fact that "by definition, cross-border supply requires the use of remote communication – thus if the different mode of supply ipso facto results in a conclusion that services are 'unlike' it would render Members' commitments in respect of cross border supply under the GATS meaningless"[192] further specifying that "a commitment to national

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day with a mere "click of the mouse." Isolation and anonymity compound the danger. In the words of a gambling addict interviewed on the videotape provided by the United States, "nobody has to see you do it" and "nobody has to know". WT/DS285/R, *US – Gambling*, cit., paras 3.210-3.211.

[189] Davey W.J., Pauwelyn J., "MFN Unconditionality: A Legal Analysis of the Concept in View of its Evolution in the GATT/WTO Jurisprudence with Particular Reference to the Issue of 'Like Product'", in Cottier T., Mavroidis P.C., (eds.), *Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law*, The University of Michigan Press, 2000, 13-50.

[190] Antigua referred to two previous disputes (WT/DS27/R/USA, *EC-Bananas III*, cit., para. 7.322 and WT/DS139/R, WT/DS142/R, *Canada – Autos*, cit., paras 10.247-10.248) dealing with likeness in the context of the GATS agreement, underling how such a concept needs to be interpreted more broadly when dealing with services than with goods. According to Antigua, such an interpretation is to be discerned also from the famous "accordion" comparison, issued by the Appellate Body, when likeness was defined as a flexible concept, having different meanings in different WTO Agreements, in different circumstances. In this circumstance, in fact, the adjudicators stressed that "the width of the accordion in any of those places must be determined by the particular provision in which the term 'like' is encountered as well as by the context and the circumstances that prevail in any given case to which that provision may apply". See, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, *Japan - Taxes on Alcoholic Beverages*, cit., 21.

[191] WT/DS285/R, *US – Gambling*, cit., para. 3.149 and footnote 265. To stress this point Antigua also referred to the reasoning developed in the *EC-Asbestos* dispute when the Appellate Body reckoned that ""like" products may have different characteristics or qualities, and that important aspects of a "likeness" analysis include: (i) determining what characteristics or qualities are important in assessing "likeness," (ii) determining to what degree or extent the products must share qualities or characteristics to be considered "like" and (iii) deciding from whose perspective "likeness" should be considered."

[192] WT/DS285/R, *US – Gambling*, cit., para. 3.161. Antigua also stressed that "the regulatory system of the importing WTO Member must offer the foreign services and suppliers an opportunity to be or become "like." For example, a WTO Member cannot set up a regulatory system that is only open to domestic services and suppliers and then argue that all foreign services and suppliers are "unlike" because they are unregulated. *Ibidem*, para 3.149.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
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treatment for cross-border supply would be meaningless because the simple fact that a service is supplied cross-border would make that service and its supplier "unlike" their domestic counterparts and remove the national treatment obligation[193].

In the end, although the arguments put forward by both parties raised interesting and controversial issues, the Panel and the Appellate Body did not consider an interpretation of inter-modal likeness essential to solve the dispute and eventually ended up exercising judicial economy on this specific claim[194]. Hence, for the purpose of the dispute, a classical test for likeness of electronic versus non-electronically delivered services was not produced, nor it was clarified how the likeness of domestic versus foreign service providers should be assessed[195]. This, however, should not undermine the importance of the *US-Gambling* jurisprudence. Indeed, although leaving some relevant aspects opened, the jurisprudential interpretation given by the Panel and subsequently confirmed by the Appellate Body with regard to the intra-modal technologically neutral nature of the GATS certainly constitutes a milestone for the WTO jurisprudence and an important precedent for shading light on the uncertain status of WTO Member's commitments in the field of electronic services.

3.3 - The modes of supply and the internet

3.3.1 Disaggregation of commitments through the modes of supply

The classification of services in the GATS Agreement offers another possibility for WTO Members to classify the level of commitments they are willing to undertake. Indeed,

[193] WT/DS285/R, *US – Gambling*, cit., para. 3.150.

[194] In WTO law, judicial economy is applied, at the adjudicators' discretion, when it is possible to solve the dispute without analysing all the legal claims put forward by the parties. Such principle has been firstly defined in the *US – Wool Shirts and Blouses*, when the Appellate Body made clear that "given the explicit aim of dispute settlement that permeates the DSU, we do not consider that Article 3.2 of the DSU is meant to encourage either panels or the Appellate Body to 'make law' by clarifying existing provisions of the WTO Agreement outside the context of resolving a particular dispute. A panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute". WT/DS33/AB/R, *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, 25 April 1997, 19.

[195] "The Panel recalls that it has found that a number of the challenged US measures are in violation of Article XVI. We are of the view that the Panel does not need to examine whether the challenged measures are also inconsistent with the United States' national treatment obligations under Article XVII of the GATS in order to assist the parties in resolving the dispute at issue. We believe that the essence of Antigua's claims will be addressed by a finding on Article XVI alone. Therefore, the Panel exercises judicial economy with regard to Antigua's claim under Article XVII". WT/DS285/R, *US – Gambling*, cit., para. 6.426. For a thorough analysis of the GATS provision on Article XVI (market access) and Article XVII (national treatment) see Chapter II.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
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besides the sectorial classification provided for by the W/120 list, the structure of the GATS allows to accept different levels of commitments when the same service is supplied in different "modes", thus further disaggregating the level of liberalization for each category of services. Specifically, Article I.2 of the GATS Agreement categorizes four different modes by which a specific service, identified in the sectorial classification list, can be delivered[196]. These are defined in accordance with the position of the service's suppliers and consumers and are then supposed to encompass each and every conceivable type of service delivery[197].

In practice, the greater share of foreign services are delivered through a commercial presence (mode 3) or, increasingly, through a cross-border (mode 1)[198], a mean of supply reminiscent of the traditional idea of trade in goods[199]. The GATS Agreement, however, also foresees the (less frequent) possibility for the service consumer or the service provider (as a natural person) to cross the border in order to facilitate the consumption or the supply of the service (modes 2 and 4). The resulting effect of this approach is that, when negotiating its commitments on the basis of the W/120 list, each WTO Member is allowed to carefully calibrate its degree of liberalization and its level of openness for each mode of supply[200]. In

[196] "For the purposes of this Agreement, trade in services is defined as the supply of a service: (a) from the territory of one Member into the territory of any other Member; (b) in the territory of one Member to the service consumer of any other Member; (c) by a service supplier of one Member, through commercial presence in the territory of any other Member; (d) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member". GATS Agreement, Art I.2. For an analysis of the four modes of supply, see, among others, Wolfrum R., Stoll P.T., *WTO Trade in Services, Max Planck Commentaries on World Trade Law*, cit., 48-53.

[197] This is confirmed by the fact that, although the creation of a "mode 5" specifically aimed at addressing electronic trade has been sometimes proposed by commentators, WTO Members never considered it as a valuable option, instead relying on the concept of technological neutrality. (Mode 5 has been proposed for instance, by Tinawi E., Berkey J.O., *E-Services and the WTO: The Adequacy of the GATS Classification Framework*, OECD Paris Forum on Electronic Commerce, 12-13 October 1999, at 10; the same argument has been raised by Talal Abu-Ghazaleh, Chairman of Talal Abu-Ghazaleh Organization on the occasion of the open plenary session of the 2013 WTO Public Forum, *Expanding Trade through Innovation and the Digital Economy*, held in Geneva on 1-3 October 2013). Indeed, as reported by the Council for Trade in Services, in the context of the Work Programme on e-commerce Members were of the general view that "the electronic delivery of services falls within the scope of the GATS, since the Agreement applies to all services regardless of the means by which they are delivered, and that electronic delivery can take place under any of the four modes of supply." S/L/74, *Work Programme on Electronic Commerce,* cit., para. 4. In this sense, see also S/C/W/108, *Work Programme on Electronic Commerce,* Communication from Australia, cit., para. 1.

[198] Trade in services through commercial presence still represents the larger portion of the worldwide value. However, a significant portion of the overall increase has been in the cross-border trade. See, Chaudhuri S., Karmakar S., "The Liberalization of Cross-Border Trade in Services: a Developing Country Perspective", in Marchetti J.A., Roy M., *Opening Markets for Trade in Services: Countries and Sectors in Bilateral and WTO Negotiations*, Cambridge, 2009, 185.

[199] Appleton A.E., Plummer M.G. (eds.), *The World Trade Organization: Legal, Economic and Political Analysis*, Springer, 2005, 823.

[200] Restrictions to liberalization can be listed not only for market access, but also for the national treatment obligations. This results in further complexities with regard to the actual level of liberalization of foreign services. Indeed, when market access obligations are undertaken, a foreign service can still lawfully be

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
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other words, a WTO Member can theoretically opt for the liberalization of services in one specific sub-category for one specific mode of supply and, at the same time, retaining market access and national treatment limitations in the same sub-category for all the other modes of supply.

Figure 5.3 Level of commitments (market access), all WTO members

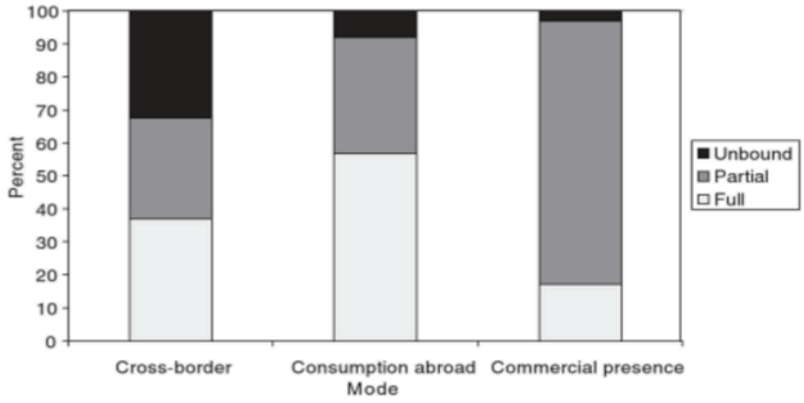

Table II: Level of GATS Market access commitments.[201]

The possibility to horizontally disaggregate each service sector commitment by four different modes was obviously foreseen as an important strategy to offer more leeway to WTO Members in order to obtain the maximum level of liberalization even in those sectors where countries are more reluctant to indiscriminately open their markets to foreign competitors. However, this solution is not immune to structural problems. Although the definition of the four modes of supply is, in most of the cases, easily identifiable, when different categories are established and commitments are undertaken accordingly, it is crucial to unambiguously define the boundaries of each category. Indeed, if the differences in the level of commitments for different modes of supply are minimal, the problem could be a mere theoretical one. When instead the level of commitments between different modes varies significantly (none *vs* unbound)[202], to define in which modal category each specific service

discriminated against a domestic one if exceptions from the national treatment obligations are scheduled. For further discussions on market access and national treatment obligations in GATS, see Chapter II.

[201] Source: Chaudhuri S., Karmakar S., *The Liberalization of Cross-Border Trade in Services: a Developing Country Perspective*, cit., 199.

[202] For the purpose of market access and national treatment obligations in the GATS Agreement, four degrees of commitments are possible: full liberalization (expressed as "none"), commitment with limitations (expressed as "none except…"), no commitment (expressed as "unbound") and no commitment technically feasible (expressed as "unbound*" with an explanatory footnote at the bottom of the page). See, S/L/92, *Guidelines for the Scheduling of Specific Commitments under the General Agreement on Trade in Services (GATS)*, Adopted by the Council for Trade in Services on 23 March 2001, 28 March 2001, 11-12. See also, Munin N., *Legal Guide to GATS*, Kluwer Law International, 2010, 137-138.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
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fall within is much more important because this can change the level of multilateral liberalization a specific service is subject to. As it will be discussed below, and keeping in mind the difficulties that WTO Members face in modifying their lists of commitments[203], a clear-cut distinction of the boundaries for each mode of supply is even more important in case new technologies enable new services to be supplied. In this last scenario, in fact, WTO Members might eventually find themselves bound to the liberalization of certain services which did not even exist at the time the commitments were taken or have now gained a prominent position that could not have been foreseen a decade or two ago.

3.3.2 The mode of supply of electronic services: a policy-biased debate?

Coming to the specific realm of foreign electronic services, one should first of all point out that such services do not have automatically to be considered as falling within one single modes of supply. Although, as we shall discuss below, mode 1 and mode 2 seem to be the most likely categories electronic services should fall into, commercial presence (mode 3) might also be of a certain relevance for online services; this is because the definition of online services is not restricted to the electronic cross-border supply. Online services are not cross-border in nature and they can in fact be delivered - remotely - even when the foreign supplier is physically established in the same country of the final consumer through a branch or a subsidiary (mode 3).

Turning however to the most intriguing issue, that is the characterization of foreign electronic services supplied from outside the national boundaries, the identification of mode 1 as the appropriate category might seem straightforward. Indeed, the main property a service has to retain in order to fall within the mode 1 category is the possibility for a cross-border delivery without the need for either the producer or the consumer of the service to move from one country to the other[204]. In an attempt to clarify the boundaries of the cross-border mode of supply, an explanatory document released by the GATS Committee in 2001 pointed out that "international transport, the supply of a service through telecommunications or mail, and services embodied in exported goods (i.e. services supplied in or by a physical medium, such

[203] *Infra*, para. 3.1.2.
[204] Wolfrum R., Stoll P.T., *WTO Trade in Services, Max Planck Commentaries on World Trade Law*, cit., 49.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
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as a computer diskette or drawings) are all examples of cross-border supply, since the service supplier is not present within the territory of the Member where the service is delivered"[205].

Certainly, when it comes to services delivered through the internet, it is difficult to imagine why this category should not fall within the cross-border supply mode as defined by the GATS Committee. Online supply seems in fact to match perfectly with the quintessential idea of cross-border delivery. As straightforward as the principle might look like, however, it does not save entirely from the risk of confusion. Indeed, historically, certain WTO Members have tried to instil doubts on the common perception that, similarly to telephone services, foreign electronic services should be characterized as cross-border supply (mode 1). The possibility that, in all or only certain circumstances, such services might fall within the "consumption abroad" mode (mode 2) has been raised repeatedly.

The modes of supply are generally defined on the basis of the origin of the supplier and the consumer and the degree and type of territorial presence they have at the moment the service is delivered[206]. In practical terms, the only difference between the two modes of supply at issue lies in the fact that, in the cross-border mode, the service is delivered within the territory of a Member from the territory of another Member whereas, in mode 2, the service is delivered outside the territory of the Member. Well before the internet developed and became a common business tool, the difficulties in clearly separating between the cross-border supply and the consumption abroad modes were highlighted in the narrower financial services realm. In 1997, in the context of the Committee on Trade in Financial Services, the Secretariat of the WTO admitted through an informal note that, in certain circumstances, some ambiguity might be perceived on the issue of the distinction between mode 1 and mode 2[207]. For GATS purposes, some of the reasons why it is important to solve this ambiguity have been mentioned above[208]. In the context of the financial services, these reasons and their

[205] S/L/92, *Guidelines fort the scheduling of specific commitments under the General Agreement on Trade in Services*, cit, para. 28.
[206] MTN/GNS/W/164, *Scheduling of initial commitments in trade in services: explanatory note*, GATT Secretariat, 3 September 1993, part II.B
[207] JOB/3706, *Report of Informal Consultations held on 27 June 1997 on the Distinction between Modes 1 and 2 in Financial Services, Committee on Trade in Financial Services*, Informal Note by the Secretariat, in S/L/92, *Guidelines fort the scheduling of specific commitments under the General Agreement on Trade in Services*, cit., Attachment 2.
[208] *Infra,* para. 3.3.1. Further arguments, such as the possible divergences in the applicable jurisdiction regulating transactions were these to be considered under mode 1 or mode 2 has been raised. It was argued that the modal classification debate might also have other important legal consequences that reach beyond the previously addressed question of market access. Frequently, the question is asked which national legal system is applicable

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
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link with technological developments were already obvious. At that time, the Secretariat noted in fact that *"*electronic means associated with the globalization of financial markets has made it possible to "deliver" a financial service almost anywhere in the world. Once the physical presence of the consumer ceases to be a benchmark for determining the place of delivery of a service, it becomes extremely difficult to determine in an unambiguous manner where a service is delivered"[209] and further specified that "the question becomes particularly relevant when one of the two modes is unbound in a Member's schedule, while the other mode is either fully bound or bound with few limitations"[210].

Furthermore, even if this issue was identified within the specific realm of financial services, it was immediately clear that this problem had the potential to touch upon the definition of services other than financial ones. As the Secretariat in fact highlighted at the end of its informal note, "any substantive solution would have immediate implications for a broad range of other services which are commonly traded cross-border, such as telecommunication services. Since any attempt to draw the line between the modes of supply for a financial service would have direct relevance to other service sectors, this issue might ideally be dealt with in parallel by the Committee on Specific Commitments"[211].

The ambiguity which emerged initially in the context of financial services was triggered by the possibility, enabled by the development of electronic means, to deliver a service everywhere in the world without the need of the physical presence of the consumer. Given that, the most important difference between mode 1 and mode 2 in the context of electronic delivery lies in the place of delivery of the service. When the delivery of the service does not require the physical presence of the consumer, it could become troublesome to define the country where the service is delivered, hence to understand to which market access obligations that specific service, delivered by that specific mean, should be subjected to.

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to a cross-border electronic service transaction: the country where the supplier is located (country of origin-principle) or the country where the consumer is located (country of destination-principle) If, for example, a US entertainment service provider makes films available for download to French consumers, does the service provider have to comply with French, US or other (content) regulations? See, Wunsch-Vincent S., *The WTO, the Internet and Trade in Digital Products: EC-US Perspectives,* cit., 68. However, the fact that discussions on applicable jurisdiction for services never took place in the WP on e-commerce realm can be interpreted as an important signal that WTO Members do not consider such thorny issues as falling within the GATS scope.

[209] JOB/3706, *Report of Informal Consultations held on 27 June 1997 on the Distinction between Modes 1 and 2 in Financial Services,* cit., para. 3.

[210] *Ivi*, para. 1.

[211] *Ivi*, footnote 3.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
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Examples were provided for financial services related to loans, insurances and foreign bank accounts[212].

Mode	*Supplier Presence*	*Consumer Presence*	*Example*
Mode 1 Cross-border supply	Service supplier not present within the territory of the Member making the commitment to liberalise trade in a specific service.	Service delivered to the consumer within the territory of the Member making the commitment, from the territory of another Member.	Consumer is making a cross-border telephone call, ie, use of an international telecommunication service.
Mode 2 Consumption abroad	Same as Mode 1.	Service delivered to the consumer outside the territory of the Member making the commitment, in the territory of another Member.	Consumer goes to the movies in a foreign country.

Table III : GATS Mode 1 vs GATS Mode 2[213]

Following the approach adopted for financial services, some authors noticed that certain WTO Members have tried to cast doubts on the otherwise fully recognized cross-border nature of online services in general, proposing mode 2, "the consumption abroad" mode, as a possible alternative interpretation[214]. In the context of the Work Programme on Electronic Commerce, the United States pointed out that the mode 2 might be a more suitable solution, insofar as consumers "visit foreign web sites electronically, and initiate transactions at those sites"[215]. On the opposite side of the spectrum, other WTO Members instead applied an analogical approach to justify the classification of services delivered online to fall within the mode 1. Japan, for instance, justified this position on the basis that "we have categorized

[212] See, S/FIN/W/9, *Technical issues concerning financial services schedules*, Note by the Secretariat, 29 July 1996, para 10, when the Secretariat pointed out that "when borrowing money from a foreign bank located abroad, one does not actually need to physically move oneself nor one's property; the borrowed funds could be supplied and consumed abroad, or they could be supplied and consumed in the home country of the consumer or in any other country." See also, JOB/3706, *Report of Informal Consultations held on 27 June 1997 on the Distinction between Modes 1 and 2 in Financial Services,* cit., para. 4.
[213] Source: Wunsch-Vincent S., *The WTO, the Internet and Trade in Digital Products: EC-US Perspectives,* cit., 28.
[214] *Ivi*, 65-67.
[215] WT/COMTD/17, *Communication from the US*, Work Programme on Electronic Commerce, 12 February 1999, para. 4.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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the cross-border supply of services by telephone or facsimile as mode 1" hence "the cross-border supply of services through electronic commerce should also be considered as mode 1"[216].

As a matter of fact, the arguments raised in 1997 with regard to financial services and then expanded in the bigger context of the Work Programme appear to remain living matter. To better delineate this issue, one can think for instance about the recent phenomenon of *Facebook*, a social networking service (see Table IV below). Social networks are services offered for free to a wide array of consumers, regardless of their nationality and their geographical location. They usually consist on individual platforms where each user can upload content and information allowing a selected group of users to access them[217].

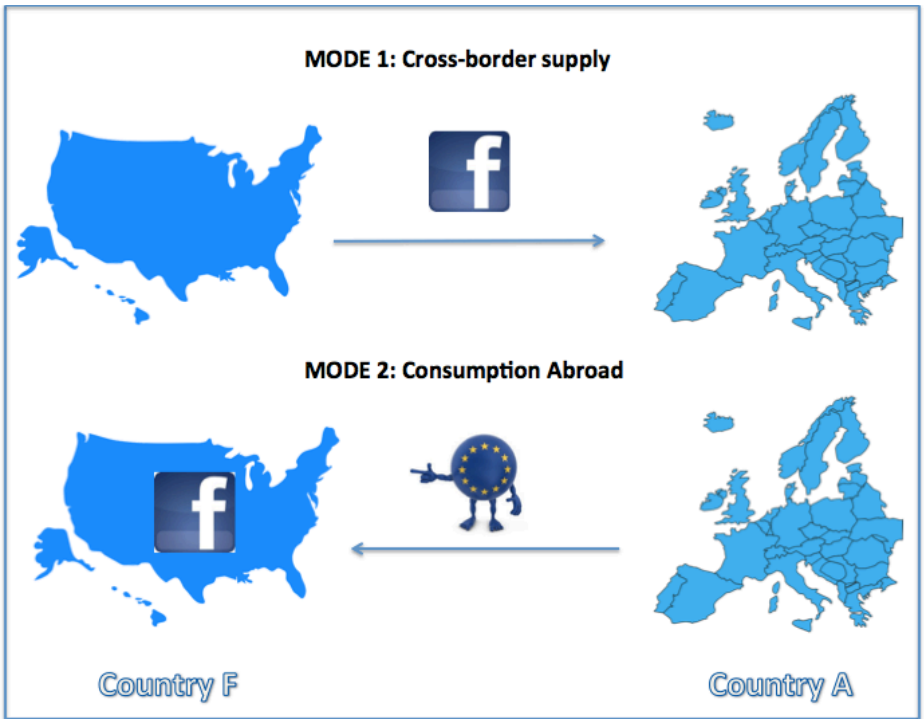

Table IV: Social Networks: mode 1 vs mode 2

If we assume that the social network service "travels" across borders from country F to country A, a *Facebook* user in Country A would be able to enjoy access to its the social network portal only if Country A has undertaken a commitment in mode 1. On the contrary, if

[216] S/C/W/104, *Communication from Japan*, Work Programme on Electronic Commerce, cit., para. 14.
[217] More precisely, social network sites have been defined as "web-based services that allow individuals to (1) construct a public or semi-public profile within a bounded system, (2) articulate a list of other users with whom they share a connection, and (3) view and traverse their list of connections and those made by others within the system. The nature and nomenclature of these connections may vary from site to site." Boyd D.M., Ellison N.B., *Social Network Sites: Definition, History and Scholarship*, in *Journal of Computer-Mediated Communication*, 13:1, 2007, 211.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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we assume that, by connecting to the *Facebook* domain name, the user of Country A "travels" to Country F, then the service will be available only when Country A has undertaken market access commitments in mode 2.

The position supported by the United States is clearly aimed at the maximum level of liberalization to services delivered online. Market access and national treatment commitments are in fact more comprehensive in the consumption abroad mode rather than in the cross-border supply one[218]. This is not surprising considering that the US are traditionally an exporter of online services, including content. On the other side, the position maintained by Japan, and certainly supported by other important players such as the EU[219] is certainly, politically-wise, more cautious but probably more coherent with the overall GATS structure.

From a policy standpoint, discussions at WTO level has not given rise to any clear-cut position so far. From a jurisprudential perspective, instead, the Panel and the Appellate Body has been called to rule on electronic services supplied cross-border in the abovementioned *US-Gambling* dispute. Interestingly, in that context, not only Antigua but also the United States failed to raise the issue[220], so that the Panel and the Appellate Body implicitly confirmed the applicability of the mode 1 commitments to the cross-border supply of gambling services[221]. Although this might signal an implicit recognition of the applicability of mode 1 to foreign online services, it has to be noticed that, lacking a clear statement in this sense from the adjudicators, subsequent decisions might as well follow a different line of thought, especially if the characteristics of the online services at issue will significantly differ from gambling services.

In conclusion, because of the diverging level of multilateral commitments in different modes, it is clear that, notwithstanding the important interpretation followed in *US-Gambling*, the modal classification of online services remains an important issue to be clarified. Indeed, although the widespread position has so far been inclined to accept the "cross-border" nature of online services, the importance of the delivery of electronic services in everyday businesses

[218] *Infra*, para. 3.4.1, Table II.
[219] Wunsch-Vincent S., *The Internet, cross-border trade in services, and the GATS: lessons from US-Gambling*, cit., 325.
[220] This might have been due to the fact that, in the specific case, the market access commitments undertaken by the US in the field of gambling services were identical for mode 1 and mode 2. WT/DS285/R, *US – Gambling*, cit., para. 3.29.
[221] The Panel clearly stated that "this dispute concerns one of the four modes of supply under the GATS, that is, the so-called "cross-border supply" of gambling and betting services". WT/DS285/R, *US – Gambling*, cit., para. 6.29.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
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enabled by rapid technological developments coupled with the increase in the varieties of the services provided through the internet might render the definition of these services even more blurred[222].

4 The Rise of New Electronic Services

4.1 - Introduction: uncertainties in the sectorial classification of the electronic supply of services

The acknowledgment of both the applicability of the GATS regime to electronic supplied services and the endorsement by WTO Members and the Dispute Settlement Body of the principle of technological neutrality have so far excluded the possibility to engage in discussions on the need of a specific classification sector for electronically supplied services. In the WTO context, such services are then supposed to be included in one of the existing categories identified in the W/120 list[223].

The confirmation that electronic delivery is included within the GATS classification schemes already in place does not seem to create particular problems in the case of services being now delivered through electronic means but for which an "offline" counterpart existed at the time of the GATS negotiations. In these cases, in fact, the principle of technological neutrality, in the sense of *intra-modal* technological neutrality discussed above[224], is of great help in clarifying the scope of the obligations. As it has been clearly stated by the Panel and the Appellate Body in the *US-Gambling* dispute, the mean of delivery within each mode of supply is not relevant for the determination of market access commitments[225]. On the contrary, regulations prohibiting the use of one of the potential mean for delivering cross-border

[222] S/C/W/104, *Communication from Japan*, cit., para. 14.
[223] This regardless of certain WTO Member's attempts to cast doubts on the appropriateness of such interpretation. See, WT/GC/W/247, *Preparations for the 1999 Ministerial Conference*, Work Programme on Electronic Commerce, Communication from Indonesia and Singapore, 9 July 1999, para. 17, when Indonesia and Singapore argued that "as e-commerce is a relatively new technological innovation, most countries would not have factored it in when they scheduled their GATS commitments during the Uruguay Round". See also, albeit confined to the context of financial services, S/FIN/M/31, *Report of the Meeting held on 9 May 2001*, Committee on Trade in Financial Services, 1 June 2001, para. 11 reporting the opinion of India that "given the bottom-up approach of the GATS, the commitments for new services delivered through new technologies would have to be taken afresh and existing commitments would not apply to them".
[224] *Infra*, paras 3.2.1 and 3.2.2.
[225] *Cfr*, footnote 186.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
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services (the electronic supply, in this case) amount to "a zero quota for those means of delivery" and thus constitute "a limitation in the form of numerical quota within the meaning of GATS Article XVI:2(c).[226]"

Electronic services for which a counterpart can be found in the schedules of commitments are indubitably falling within the scope of the obligations undertaken by WTO Members in the context of the GATS Agreement. However, when technological developments enable the creation of new services or at least modify the way in which such services are delivered or consumed, this straightforward reasoning is more difficult to apply[227]. Even accepting the technologically neutral approach, new services, that are most of the time delivered through the internet, cannot always immediately be identified as falling within one sector or sub-sector category or another. Instead, sometimes these new solutions might either:

i) Create confusion as to their exact classification because of the utilization of new technologies (convergence);
ii) Include a series of features which, taken individually, could fall within different categories of sub-categories or provide a service whose *function* is not easily comparable to existing ones.

In these two cases, the concept of technological neutrality might be of little relevance because of the absence of a similar service that is delivered through "traditional" means. Consequently, sectorial classification for these new services might be problematic. Indeed, as mentioned earlier, even if recent classification efforts promoted by different organizations have taken into account new technological developments in trade in services including specific sub-category to better identify certain services delivered through the internet, this evolution has not found any parallel within the WTO[228].

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[226] WT/DS285/R, *United States – Certain measures affecting the cross-border supply of gambling and betting services,* cit., para. 6.363 et seq. See, in general, Wunsch-Vincent S., *The Internet, cross-border trade in services, and the GATS: lessons from US-Gambling*, cit. Specifically on market access obligations in the US-Gambling dispute see *Rien ne Va Plus? Distinguishing domestic regulation from market access in GATT and GATS*, cit., 161-168.

[227] The possibility for new services falling outside the clear-cut W/120 categorization to arise was already foreseen in the early discussions of the WP on e-commerce. See, WT/GC/W/247, *Preparations for the 1999 Ministerial Conference*, cit., para. 18, when it was stated, "the guiding principle should be no backtracking of Members existing commitments. If necessary, Members should even undertake additional commitments, especially in light of the new types of services that have not existed before, and/or are likely to arise in the future".

[228] *Infra*, para. 3.1.2.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
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4.2 - The convergence phenomenon and its impact on the classification of ICT services

Due to the convergence phenomenon, confusion may arise mainly in relation to specific classification sectors, namely Telecommunication Services, Audiovisual Services and Computer Services and their sub-categories. Indeed, many important services enabled by new technologies, including the ones we have define as electronic services, are likely to fall within such categories. As briefly mentioned above, the convergence phenomenon is generally intended as the coming together of different service sectors as a result of technological development. Although this can materialize at different levels (terminal equipment, services, industry), here we will refer exclusively to the convergence of services combining together elements of computing, telecommunication and media[229].

Before delving into the main issues originating from the development of new technologies, it is necessary to analyse more in depth the sector categories at issue.

4.2.1 Defining Telecommunication and Computer Services after the Digital Revolution

WTO Members have always considered telecommunication as a key sector to liberalize because functional to enable trade in other service sectors. The reason behind it and the instrument developed to this end, (Annex on Telecommunication, Reference Paper) has been analysed above[230]. However, the network function is not the only one attributable to telecommunication services. On the contrary, the categories listed in the W/120 telecommunication headings and sub-headings can also identify stand-alone services that are suitable to provide direct value added to final consumers. In order to understand the issues arising out of the development of technological development, it is then important to focus on the meaning and the scope of each specific sub-heading, rather than on the obligations stemming from specific instruments.

[229] *Infra,* para. 3.1.2 and *cfr.,* footnote 138.
[230] *Infra,* para. 2.3.2.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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In the W/120 list, telecommunication services constitute the heading C of the broader "communication" category. The list breaks them down in 14 sub-sectors. (a. - n.) and an "other" category. For the purpose of the negotiations of the agreement on basic telecommunication services, the first eight sub-headings were considered to constitute basic telecommunication services[231], whereas the remaining ones were defined as value-added telecommunication[232], hence excluded from the scope of the negotiations[233]. This breakdown, however, does not necessarily reflect any particular national practice, so that, as we shall see, services included in the basic telecommunication area can also be regarded as value-added telecom[234].

C.	**Telecommunication services**	**CPC Prov. Correspondence**
a.	Voice telephone services	7521
b.	Packet-switched data transmission services	7523**
c.	Circuit-switched data transmission services	7523**
d.	Telex services	7523**
e.	Telegraph services	7522
f.	Facsimile services	7521**+7529**
g.	Private leased circuit services	7522**+7523**
h.	Electronic mail	7523**
i.	Voice mail	7523**
j.	On-line information and data base retrieval	7523**

[231] Basic telecommunications include all telecommunication services, both public and private that involve end-to-end transmission of customer supplier information. Basic Telecommunication Services are defined in the Decision on Negotiations on Basic Telecommunications as "telecommunications transport networks and services". *Decision on Negotiations on Basic Telecommunications*, Annex to the Agreement Establishing the World Trade Organization, para. 1.

[232] Value-added telecommunication services are telecommunications for which suppliers "add value" to the customer's information by enhancing its form or content or by providing for its storage and retrieval. WTO Secretariat, *Guide to the GATS: an overview of issues for further liberalization of trade in services*, Kluwer International Law, 2001, 533. The distinction between basic and value-added telecommunications does not originate from WTO Negotiations but instead from US telecommunications law as this division was instrumental in delineating the jurisdiction of the US Federal Communications Commission (FCC). In this context, basic telecommunications were defined as "the offering of transmission capacity for the movement of information" whereas value-added services were identified as "any offering over the telecommunications network which is more than a basic transmission service". Weber R., Burri M., *Classification of Services in the Digital Economy*, cit., 67-68.

[233] Services covered by the Agreement on basic telecommunications include voice telephony, data transmission, telex, telegraph, facsimile, private leased circuit services (i.e., the sale or lease of transmission capacity), fixed and mobile satellite systems and services, cellular telephony, mobile data services, paging, and personal communications systems. Value-added services were not covered.

[234] See, S/C/W/74, *Telecommunication Services*, Background Note by the Secretariat, 8 December 1998, para. 7.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
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k.	Electronic data interchange (EDI)	7523**
l.	Enhanced/value-added facsimile services, incl.	7523**
store and forward, store and retrieve		
m.	Code and protocol conversion	n.a.
n.	On-line information and/or data	
processing (incl.transaction processing)		843**
o.	other	

Table V: MTN.GNS.W/120, 2.C, Telecommunication Services

Looking more carefully at each sub-sector category (see Table V above), one can immediately notice how some of them (telex, telegraph, facsimile services) identify out-dated technologies whose liberalization cannot be deemed as economically relevant at the time of writing. Some other sub-headings (data transmission services, online information, data processing, data base retrieval) are instead not immediately intelligible. Furthermore, no clarification as to their exact scope is provided in the WTO list, although a cross-reference with the already mentioned CPCProv List exists[235]. It results that, in these cases, diverging interpretation could create confusion as to these sub-headings exact meaning, especially in light of the fast-changing development in technology constantly enabling new services to be provided.

The issue of the inaccuracy of the classification listing for telecommunication services is not new. Indeed, in 1998, the GATS Secretariat was already perfectly conscious of the problem when it was stating that "the distinction between many of [the W/120] subsectors has blurred with the adoption of new transmission technologies, the enhanced ability to integrate different technologies, and the advent of service suppliers who distinguish themselves not by specializing in particular telecom services, but rather by the market segments they seek to serve. Voice, data, fax, and a full range of value-added telecom services can and are being carried indiscriminately as digitalized information flows over telephony networks or leased lines of just about any supplier"[236]. However, the problem is nowadays exacerbated by the

[235] The double asterisks following the CPCProv reference 7523 (data and message trasmission services) indicate that the GATS subsector concerned relates only to some parts of the CPCprov item description. This indicates that the correspondence between the W/120 and the CPCprov is far from perfect and, more particularly, that there is no way to determine which portion of the CPC description is intended to be relevant for the W/120 item. WTO Secretariat, *Guide to the GATS,* cit., 534.
[236] S/C/W/74, *Telecommunication Services*, cit., para 9.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
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capillary dissemination of such technologies and their almost ubiquitous consumers' accessibility[237].

For the purpose of the identification of services enabled by new technologies, the most problematic sub-headings are probably the ones referring to data transmission, data processing and online information (*b*, *c*, *j*, *n*). Here, the crucial issue is to identify the meaning to be attributed to the word "data". When the list was drafted, this term was probably intended as defining signs other than voice and images, which were instead transmitted through voice telephone, telex or facsimile services[238]. However, with the introduction of digitisation, the boundaries of such definition might now be blurred. Indeed, as far as new technologies are concerned, images, video, documents and sounds are all transmitted using the same code, so that it might even be argued that the entry "data transmission" in the W/120 encompasses all digital transmission, regardless of the final characteristics of the content transmitted[239]. This said, however, one should also recognize that other entries pertaining to telecommunication, and more precisely falling within the "value-added telecom" definition, potentially cast doubts on the above interpretation. Looking, for instance, at the sub-heading j) "online information", one can immediately realize that, contrary to the "data transmission" entry, which merely identify the nature of what is being conveyed, such a sub-heading defines the purpose of the data exchange, in this case, the access to information through the internet[240]. This can add further uncertainties in the discussions, especially when, as explained below, positions originating from precise policy considerations are factored in.

A further complication for services supplied electronically arises with the existence, in the W/120 list, of a specific service category for "Computer Services". In terms of classification structure, computer services are classified under the Business Service category and include five sub-sectors.

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[237] Although, at the time of writing, only one-third of the world's population is reported to having access to the internet, some of the most important Internet companies have recently committed to a global effort to increase internet accessibility by cutting data delivery costs with the ultimate goal of providing universal internet access. See, Internet.org, *A Focus on Efficiency, A Whitepaper from Facebook, Ericsson and Qualcomm*, September 16, 2013, available at http://internet.org/.

[238] Nihoul P.L.G., *Audio-visual and telecommunications services: a review of definitions under WTO law*, cit., 367.

[239] As it will be discussed below, different interpretations of this issue are one of the main reasons at the basis of the difficulties faced WTO Members in reconciling their view with regard to internet-delivered audiovisual content. *Infra*, para. 4.2.2.

[240] Nihoul P.L.G., *Audio-visual and telecommunications services: a review of definitions under WTO law*, cit., 367.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
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B.	Computer and Related Services	CPC Prov. Correspondence
a.	Consultancy services related to the	841
	installation of computer hardware	
b.	Software implementation services	842
c.	Data processing services	843
d.	Data base services	844
e.	Other	845+849

Table VI: MTN.GNS.W/120, 1.B, Computer Services

Although, as we have already discussed, new classification lists seems to have now integrated such category into the telecommunication sector[241], the W/120 keeps the two categories separated. However, the fact that most of the computer services can now be supplied online has made them extremely difficult to distinguish from value-added telecommunication[242]. In this sense, entry c) "data processing services" stands out as particularly problematic and signals a potential inconsistency. This is because the CPCprov. correspondence attributed to it is identical to the one ascribed to the entry "online information" included in the telecommunication sector[243]. Also, entry d) "data base services", although formally excluding "electronic data and message transmission services"[244] from its scope, does not explicitly clarify whether such exclusion applies to all the activities encompassed in such item or only to some of them[245]. This was probably due to the fact that, at the time of the W/120 drafting, a service such as "electronic data interchange" (one of the W/120 telecom entry that is cross-referenced with the CPC 7523 sub-category) was considered as a service

[241] *Infra,* para. 3.1.3. In particular, see Table I.
[242] Tuthill L., Roy M., "GATS classification issues for information and communication technology services", in Burri M., Cottier T. (eds), *Trade Governance in the Digital Age,* Cambridge, 2012, 157. See also S/C/W/45, *Computer and Related Services, Background Note by the Secretariat*, Council for Trade in Services, 14 July 1998, paras 2-4, recognizing already in 1998 that "the IT industry has grown out of a convergence of telecommunications, computer technology and software as well as more content-oriented industries such as broadcasting and publishing. Their blend can yield hybrid IT services difficult to categorize into any particular sector".
[243] S/CSC/W/44, *Classification in the Telecom Sector under the WTO-GATS Framework*, Communication from the European Communities, 10 February 2005, para. 9.
[244] The corresponding CPCProv entry for database services (844) defines them as "all services provided from primarily structured databases through a communication network" but it excludes "data and message transmission services (e.g. network operation services, value-added network services)" as they are already classified in class 7523 under the telecommunication category.
[245] Tuthill L., Roy M., *GATS classification issues for information and communication technology services,* cit., 164.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
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used only by businesses in the management of their supply chain[246]. As mentioned, however, and depending on the interpretation, nowadays data and message transmission services can instead include a wide array of broadly accessible electronic services.

4.2.2 The audiovisual issue poisoning the debate on digital transmissions

Considerations on the scope of the commitments undertaken in the field of telecommunications cannot be interpreted without taking into account the diverging policy positions of the two main players, the EU and the US, with regard to audiovisual services[247].

As well documented, the reasons at the basis of the historical divergences, that greatly predate the development of the internet, stem from the existence of a traditional comparative advantage from one of the two sides. Indeed, the lion's share of the audiovisual production has always originated from the US[248] and, by contrast, the EU has always tried to protect his industry, justifying discriminatory policies as necessary to protect its cultural identity[249]. With the development of digital technologies and the internet, the debate has been taken to the next level, with the US looking to take advantage of the new technologies to liberalize trade in

[246] Weber R., Burri M., *Classification of Services in the Digital Economy*, cit., 55.

[247] For a discussions on the different policy goals underlying the EU and the US trade policy positions see, Wunsch-Vincent S., *The WTO, the Internet and Trade in Digital Products: EC-US Perspectives,* cit., 103-164.

[248] The concerns from the European countries to protect their audiovisual sector from foreign (US) competition surfaced already in the context of the ITO negotiations. Indeed, the final text of the GATT Agreement of 1947 provided for a clause allowing for screen quotas to be maintained under certain conditions. See, GATT, Art. IV. The exceptional nature of this provision is reaffirmed in paragraph 10 of GATT Art. III (National Treatment). It is argued that the cinema exception to the national treatment obligation was eventually allowed in the GATT 1947 because the cinema regulation was considered as being more related to cultural policies than to economics and trade. See, Chao T.W., *GATT's Cultural Exemption of Audiovisual Trade: The United States May Have Lost the Battle but not the War*, in *U. Pa. J. Int'l Econ. L.*, 17:4, 2014, 1132.

[249] This argument, broadly referred as "cultural exception debate" originates from different views on the function to be attributed to the audiovisual product, namely of mere entertainment or a vector for the dissemination of cultural values. The literature on the implication of the cultural exception debate within the WTO is copious. See, for instance, Burri M., *Trade and Culture in International Law: Paths to (Re)conciliation*, in *JoWT*, 44:1, 2010, 49–80; Shi J., Chen W., *The 'Specificity' of Cultural Products versus the 'Generality' of Trade Obligations: Reflecting on 'China – Publications and Audiovisual Products*, in *JoWT*, 45:1, 2011, 159–186; Voon T., *China and Cultural Products at the WTO: WTO Appellate Body Report, China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, in *Legal Issues of Economic Integration*, 37:3, 2010, 253–259. Specifically, on the trade-culture debate in the digital era see, Burri M., *Trade vs Culture in the Digital Environment, an old Conflict in Need of a new Definition*, in *JIEL*, 12:1, 2008, 17–62.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
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content and the EU striving to apply the same approach secured for the "off-line" trade in audiovisual services[250]. Such a divergence has given rise to two very distant interpretations.

The W/120 list provides for a specific heading dedicated to audiovisual services (see Table VII below) under the category named "Communication". The latter, it is worth recalling, also includes telecommunication services.

D.	Audiovisual services	CPC Prov. Correspondence
a.	Motion picture and video tape production and	9611
	distribution services	
b.	Motion picture projection service	9612
c.	Radio and television services	9613
d.	Radio and television transmission services	7524
e.	Sound recording	n.a.
f.	Other	

Table VII: MTN.GNS.W/120, 2.D, Audiovisual Services

The fact that the Secretariat felt the need to identify a specific sub-category for audiovisual services is already an important indicator of the sensitiveness underlying this sector's liberalization. Indeed, a similar parallel cannot be found in the CPCProv list, where most of the services identified for GATS purposes as falling in the "audiovisual" sectors (*a*, *b* and *c*) are reported under the category "Community, Social and Personal Services" as they are intended to refer mainly to the production and distribution of radio and television services[251].

[250] In 2010, the EU revised the legal framework set forth in the previous legislation dealing exclusively with broadcasting (directive 89/552/EEC of 3 October 1989 better known as "Television without Frontiers" (TVWF) Directive) to include audiovisual services supplied on-demand. Significantly, for the purpose of the new directive, 'audiovisual media service' means "a service as defined by Articles 56 and 57 of the Treaty on the Functioning of the European Union which is under the editorial responsibility of a media service provider and the principal purpose of which is the provision of programmes, in order to inform, entertain or educate, to the general public by electronic communications networks within the meaning of point (a) of Article 2 of Directive 2002/21/EC. Such an audiovisual media service is either a television broadcast as defined in point (e) of this paragraph *or an on-demand audiovisual media service* […]". [emphasis added]. See, Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), *OJ* L 95, 15 April 2010, Art 1(a).

[251] These entries dissociate between production and distribution destined to movie theatres and the ones intended for (radio or tv) broadcasting. Such entries do not encompass any form of data or content transmission and are thus, for CPCProv purposes, outside the scope of the telecommunication category. Nihoul P.L.G., *Audio-visual and telecommunications services: a review of definitions under WTO law*, cit., 374. This point is confirmed by the explanation provided in the CPCProv subheading 96132 (Television Services) defining television services as the "Production of television programmes whether live or on tape or other recording medium for subsequent

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Significantly, the most problematic entry, namely "radio and television transmission services", is instead included in the CPCProv list under the Telecommunication Services division and named "Programme Transmission Services[252]. Such class is then broken down into two further subclasses (television and radio) that both make reference to transmission exclusively in the form of broadcasting.

Section: 7 - Transport, storage and communications services
Division: 75 - Post and telecommunications services
Group: 752 - Telecommunications services
Class: 7524 - Programme transmission services
Subclass: 75241 - Television broadcast transmission services
Subclass: 75242 - Radio broadcast transmission services

Table VIII: Breakdown of the Transport, Storage and Communication Services category in the CPCProv.

From the short analysis above it is then possible to argue that, while the CPCProv list clearly looks at the programme transmission services (intended as broadcasting services) as telecom services, the same cannot be inferred in the context of the W/120, where radio and television transmission services are included into the *ad hoc* audiovisual services category. It results that, for GATS purposes, and in contrast with the CPCProv, radio and television transmission services are to be considered separate from data transmission services with the final (and probably not casual) outcome that these two different categories can be, and as a matter of fact are, subject to different level of liberalization commitments.

4.2.3 The manner and the content of transmission: clarifying the EU-US divergences and the possible interpretative scenarios

The reason at the basis of the different classification headings for data and radio/television transmission services originated probably from the fact that, when the W/120 list was drafted at the end of the eighties, certain types of content were necessarily to be conveyed through a specific transmission technology. In a pre-digital era, in fact, audiovisual content was generally delivered through broadcasting whereas data was essentially supplied

broadcast. […]" but explicitly excluding the transmission services for television programmes as these are "classified in class 7524 (Programme transmission services)."

[252] Significantly, in light of what discussed in the previous paragraph regarding the meaning to be attributed to the word "data", it is worth underlying that, in the CPCProv, this entry is preceded by the class 7523, "data and message transmission services".

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

through point-to-point telecommunication networks, so that a correspondence could be easily drawn between the manner of transmission and the content transmitted. Such scheme, however, it is hardly applicable today; with the development of digitization first, and internet broadband later, this link has completely vanished.

The clearest example in this sense is online television, a type of service not available at the time of the GATS negotiations. If one has to consider only broadcasting services as falling within the radio/television transmission services heading, online television would be excluded, as it relies on a technology not based on an uninterrupted chain of transmission (broadcast) but on switching nodes. If we had then to characterize online television only by the transmission technology employed, this should probably be intended as a "packet – or circuit-switched data transmission service"[253].

If this was the approach adopted in the W/120, the debate on the exact characterization of services delivering audio and video content through telecommunication networks would be immediately resolved in favour of the applicability of the telecom commitments to online television and similar services. Curiously, however, and contrary to what established in the CPCProv[254], the W/120 list does not seem to necessarily endorse the audiovisual/broadcasting dichotomy as nowhere in the list the word broadcast appears[255]. Instead, as we have already seen, in the specific category of audiovisual services every phase of the business, from production, to distribution, to transmission is encompassed[256]. The audiovisual services classification in the W/120 list is in fact based exclusively on the final outcome of the service delivered (a sound, a video) rather than on the technology employed for the transmission (signal or data). On one side, this approach seems to be perfectly in line with the principle of technological neutrality discussed above. On the other side, it should be noticed that certain important WTO Members, such as the EU, although endorsing a technologically neutral

[253] Luff D., "Current International Trade Rules Relevant to Telecommunication Services", in Géredin D., Luff D. (eds.), *The WTO and Global Convergence in Telecommunications and Audio-visual Services,* cit., 38.
[254] As we have seen, in the CPCProv list, the subheadings 75241 and 75242 refer to television and radio *broadcast* transmission services, hence implicitly excluding television and radio services not delivered through broadcast. Although a certain degree of correspondence exists, the W/120 does not report an exact equivalency with the CPCProv list. WTO Secretariat, *Guide to the GATS: an overview of issues for further liberalization of trade in services*, cit., 533.
[255] This regardless of the fact that, in its GATS schedule of commitments, the EU has explicitly specified that the definition of telecommunications refers exclusively to "the transport of electro-magnetic signals … excluding broadcasting" which is instead defined as "the uninterrupted chain of transmission required for the distribution of TV and radio programme signals to the general public, but does not cover contribution links between operators". See, GATS/SC/31/suppl 3, *European Communities and Their Member States, Schedule of Specific Commitments*, Supplement 3, 11 April 1997, 2.
[256] *Infra*, para. 4.2.2.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

approach in the audio-visual service realm, have explicitly rejected the possibility to include broadcasting within the definition of telecommunications[257], thus applying a double standard when interpreting the scope of the two categories.

It is argued here that, in supporting such a position, the EU has adopted an inconsistent line of reasoning. Indeed, if we have to exclude broadcasting from the scope of the telecommunication services category, data transmission service would be exclusively linked to the transport of electro-magnetic signals (telecommunications services, as intended by the EU). In this way, a void would be created with regard to the exact classification of data transmission services operated through broadcasting (i.e. datacasting)[258]. The same, as we have seen, would not be true for the audiovisual service category, as in this case, a technologically neutral approach seems to be favoured. For this reason, and leaving the policy objectives aside, an approach also including broadcasting within the telecommunication services realm – such as the one endorsed by the United States[259] - seems more functional in encompassing the increasing range of possibilities enabled by new technologies.

If, however, we solve the broadcasting issue by recognizing that such a transmission technology can be applied to both data and audiovisual services, the problem of the exact definition of "data" remains. As briefly mentioned above, when the W/120 list was drafted, the word "data" was probably intended as encompassing signs not made of voice or images, hence mainly documents[260]. Nowadays, this interpretation looks particularly restrictive, as most of the data transmitted through telecom networks is intended to eventually be decoded as video or images.

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[257] See, GATS/SC/31/suppl 3, *European Communities and Their Member States,* cit., 2. See also, S/GBT/M/8, *Group on Basic Telecommunications, Report of the Meeting of 14 February 1997*, 24 February 1997, para. 2.

[258] Datacasting or Data Broadcasting is the broadcasting of data over a wide area via radio waves. It most often refers to supplemental information sent by television stations along with digital television, but may also be applied to digital signals on analogue TV or radio. Datacasting may also be known as Digital Terrestrial Datacasting or Enhanced Television.

[259] The United States implicitly confirmed that, according to their view, certain broadcasting services are included in the telecom category when, in the context of the negotiations on basic telecommunications, they included an Article II MFN exemption for certain satellite transmission services. When the EU noticed that such an exemption would not have been possible because falling outside the scope of the basic telecommunication negotiations, the US maintained that "such services were treated as telecommunications services in the United States and not as broadcasting services. For this reason they were not included in the United States Uruguay Round commitments regarding radio and television transmission services." See, S/GBT/M/9, *Report of the Meeting of 15 February 1997,* Group on Basic Telecommunications, 10 March 1997, para. 4. See also, Nihoul P.L.G., *Audio-visual and telecommunications services: a review of definitions under WTO law*, cit., 375.

[260] *Infra,* para. 4.2.1.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

In order to overcome this debate in accordance to its policy objectives, the EU has historically interpreted the entry "data transmission" as excluding the "content" transmitted through telecommunication from the transmission activity itself, although not systematically specifying where such content should be scheduled[261]. Such an interpretation has been challenged by the US on the grounds that the distinction between audiovisual and telecommunication content that existed in the analogue setting is not as easy to replicate in the digital one[262] and, more importantly, that such an approach would generally introduce uncertainties as to the coverage of those services going beyond the mere transmission of signals[263]. At the time of the discussions, the WTO Secretariat summarized such positions recognizing that "as a general rule of thumb, it has become accepted that commitments involving programming content are classified under audiovisual services, while those purely involving the transmission of information are classified under telecommunications" although recognizing that "especially for the sub-category of Radio and television transmission services (CPC 7524), it sometimes becomes difficult to determine exactly the boundary between services classified under telecommunications and those classified under audiovisual services[264].

[261] When defining telecommunication services in its list of specific commitments, the EU clarified that "commitments in this schedule do not cover the economic activity consisting of content provision which require telecommunications services for its transport. The provision of that content, transported via a telecommunications service, is subject to the specific commitments undertaken by the European Communities and their Member States in other relevant sectors." GATS/SC/31/suppl 3, *European Communities and Their Member States,* cit., 2. The position of the EU vis-à-vis telecommunications is broadly discussed in S/CSC/W/44, *Classification in the Telecom Sector under the WTO-GATS Framework*, Communication from the European Communities, cit., paras 15-22.

[262] Wunsch-Vincent S. *The WTO, the Internet and Trade in Digital Products: EC-US Perspectives*, Hart Publishing, 2006, 72.

[263] In a communication to the CTS Committee on Specific Commitments, the United States delineated its concerns *vis-a-vis* the EU position as follows: "the United States is concerned about the EC's proposal because of its potential to limit the scope of the telecommunications sector. More specifically, the EC's proposed classification scheme, contrary to its intended purpose, may add greater uncertainty into the sector with respect to value-added services. First, the generic nature of the scheme may leave many Members unclear about the scope of commitments in the sector. Second, it introduces uncertainty as to the coverage of telecommunications services that extend beyond mere transmission or transport of signals. These "value-added" services are an essential component of the telecommunications services sector, and the United States would consider any classification scheme that does not explicitly cover them to be difficult to accept. Third, such a classification scheme that does not explicitly cover value-added services may actually result in diminishing existing commitments, which runs counter to the purpose of negotiations. Indeed, many Members already have a "value-added" services category in their schedule of commitments". See, S/CSC/W/45, *Classification in the Telecommunications Sector under the WTO-GATS Framework*, Communication from the United States, 22 February 2005, para. 2.

[264] S/C/W/40, *Audiovisual Services, Background Note by the Secretariat*, 15 June 1998, para. 4.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
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La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
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From the analysis above, it is clear that the content/transmission interpretation has been proposed by the EU as a tool to resolve the otherwise thorny issue of the protection of the EU audiovisual industry in the digital era. This has been necessary when the strict broadcasting/audiovisual content dichotomy vanished. However, it is maintained here that, although functional in pursuing a specific goal, the solution proposed by the EU is conceptually weak. The reason being that, in trying to separate content from transmission, the EU disregarded completely the fact that data is now capable to convey audio and video content as well as information. Lacking this acknowledgement, the transmission/content argument seems to be overlooking one important step in the technological "chains" that brings content to the final consumer.



What it is argued here is that, for WTO purposes, the audiovisual sector should not be considered as a stand-alone category, detached from value-added telecommunication. On the contrary, the networks and the channels employed to convey audiovisual content are increasingly matching the ones utilized for information transmission, which is, in turn, another form of content. This is because digital transmission, whether through broadcasting or point-to-point telecommunication, occurs in any case through the transmission of data. In this sense, the commitments undertaken for data transmission should be intended as a rule generally applicable to each form of data transmission, regardless of the final content of the product being transmitted[265]. When, instead, certain types of content are specifically identified in the list of commitments, the general rule, and hence the liberalization commitment going with it, would be overcome. Accordingly, the radio and television transmission services entry included in the audiovisual category of the W/120 should be intended as an exception to the general rule, functioning as *lex specialis* and, if considered appropriate, derogating from the general obligation; in this way, even in the digital economy, WTO Members would retain the possibility to adapt their levels of commitment in accordance with the policy goals intended,

[265] Here we understand "content" as encompassing each form of final production resulting from the telecommunication activity and the transmission of data.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

this time however recognizing that this possibility amount to an exception rather than to the recognition that the "radio and television transmission" entry is a stand-alone category separated from data transmission.

Additionally, the adoption of this approach would automatically result in the exclusion of certain specific services transmission from the audiovisual realm. We are referring here to the transmission of photo and images (one could think, for instance at services such as Flickr or Instagram). Although undoubtedly "visual" *per se*, such forms of content do not seem to be mentioned in any of the entries related to the audiovisual sector as the transmission services referred therein are confined to "television and radio". Accordingly, lacking a specific entry regulating this type of content, such services would fall within the general rule on data transmission in the telecommunication category, leaving only radio and television content services to be included in the audiovisual category.

4.3 - New types of electronic services?

As we have broadly discussed above, new technologies have enabled service providers to adapt and improve an array of already existing services (e.g. TV broadcasting) so that such services can now take advantage of different types of transmission technologies. However, although the discussions over new technologies and their relationship with international trade rules have most of the times wheeled around the audiovisual debate, the fast development of the internet and ICT technologies has also resulted in the emergence of other types of electronic services. Such services are generally enabled through the internet and fostered by its increasing accessibility to consumers. Although probably not perceived as such[266], they have become already essential tools in people's basic everyday activities.

The classification of these services (i.e.: search engines, social networks, cloud services, VoIP) can then raise confusion when it comes to identify their level of liberalization, also because overlaps may occur due to the technological convergence and their multi-functionality. Despite their relative novelty, these services are consumed by a broad audience, hence, because of their inherent cross-border nature and their potential worldwide consumer's

[266] Most of the times, such services can be delivered free of charge to consumers because as profits are earned through advertising. See, Gao H., *Googling for the Trade-Human Rights Nexus in China: Can the WTO Help?*", cit.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

reach, legal certainty with regard to the level of liberalization granted to them through the GATS is crucial.

The difficulty in agreeing on clear-cut definitions with regard to new services has the immediate effect of casting doubts on the actual level of liberalization that these services are to be subjected to. This is true for all the possible solutions that the GATS Agreement offers for liberalization, namely the "general obligations" (most-favoured nations treatment and transparency) as well as the so-called "specific commitments" (market access, national treatment and additional commitments). Indeed, when it is not possible to identify these new services as falling within one of the pre-existing categories of the W/120 or other classification lists, the degree of liberalization WTO Members have to grant to these services is unknown.

The uncertainty stemming from the lack of clarity with regard to the GATS commitments for new electronic services is amplified by their fast development and their growing importance in the overall trade in services. Furthermore, some of these new services function as platforms to enable electronic trade in other liberalized services[267].

Although some commentators have raised the issue before, an analysis of the appropriate classification entry for such services has never been formally undertaken in the WTO framework. As we will see below when discussing the possible classification of some of these services, to find appropriate criteria generally applicable to each service is problematic, as most of them retain unique peculiarities.

4.3.1 Search engines

The necessary tool enabling customers to browse the internet is the search engine[268]. Because of its inextricable relationship with the internet, the function of the search engine was obviously not conceivable in a pre-internet era. Nor was the economic importance that such tools would have acquired in such a short frame of time predictable[269]. Search engines are

[267] Lee-Makiyama H., *Future-proofing world trade in technology: turning the WTO ITA into the International Digital Economy Agreement (IDEA)*, cit., 18.

[268] The main function of a search engine is enabling access. Search engines are gateways to possibly relevant information on the internet and function through search algorithms controlling supply and demand, structuring the information and indexing it. Van Eijk N., "Search Engines, the New Bottleneck of Content Access", in Preissl B., et al (eds), *Telecommunication Markets: Drivers and Impediments,* Springer, 2009, 142.

[269] The most popular search engine service, Google, was created in January 1996 as a research project by Larry Page and Sergey Brin when they were both PhD students at Stanford University, California. The search engine

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
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today widely employed by internet users both in the workplace and for private reasons[270]. They usually represent the starting point for any internet query on the web, being this the search for information (web news), communication (email web portals), content (online television, music streaming) or shopping of physical products or services (e-commerce), thus functioning as a "bottleneck of content access"[271].

Although probably not perceived as such, search engines are services themselves, subject to trade and, when delivered by mean of one of the four GATS modes of supply, to WTO rules. However, because of their virtual non-existence at the time of the W/120 drafting, their exact classification, and consequently their level of multilateral liberalization, might today be uncertain[272]. In order to find an appropriate entry for GATS classification purposes, it is essential to reason on the characteristics and the function of this service. As it is self-evident that a parallel in the offline world is difficult to find, the principle of technological neutrality might not be applicable. Hence, an appropriate entry is probably to be found in one of the two categories analysed above, telecommunication and computer services[273].

If one considers the function of the service, being essentially the provision of a list of webpages coherently organized in accordance with a user's query[274], it is possible to identify two W/120 entries that might be of a certain relevance, namely "database services" and "online information and database retrieval".

1) "database services" in the computer services heading are defined in the CPCProv 844 entry as "all services provided from primarily structured databases through a

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was then complemented with a series of related services. In 2012 Google hit $50 billion in revenue. In the first quarter of 2014, Google's revenue was $15.4 billion. See, Google Inc. Investor Relations Press Release, available at investor.google.com.

[270] It has been estimated that, at the time of writing, Google processes over 40,000 search queries every second on average, which translates to over 3.5 billion searches per day and 1.2 trillion searches per year worldwide. See, www.internetlivestats.com.

[271] This expression is borrowed from Van Eijl N.

[272] Curiously, search engines are not indisputably identified in the EU framework as well. Indeed, the Audiovisual Media Service Directive focuses mainly on audiovisual content whereas the framework for the communication sector has a similar handicap because, coherently with the EU position maintained in the WTO, telecommunication services are only those consisting "wholly or mainly in the conveyance of signals on electronic communication networks", hence excluding every type of content service. See, Van Eijk N., *Search Engines, the New Bottleneck of Content* Access, cit., 152-153.

[273] We are here excluding audiovisual services as, in accordance with what discussed above, search engine services do not include the provision of audio and video content *per se*.

[274] Different search engines using different algorithms might return diverging lists of results for an identical query. The consumer's satisfaction with regard to the search results have signalled the success or decline of various search engine services provided over the years.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
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Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

communication network" with the explicit exclusion of "data and message transmission services";

2) "Online information and database retrieval" in the telecommunication category, does not find any specific CPCProv correspondence, being the entry identified the general CPC 7523 referring to the more general data transmission services category. Lacking a specific definition, such entry might be the difficult to interpret; however, further guidance can be obtained looking at the definition provided for sub-category 75232 "electronic message and information services". Such services are defined as "network and related services (hardware and software) necessary to send and receive electronic messages (telegraph and telex/TWX services) and/or to access and manipulate information in databases (so-called value-added network services)"[275].

From the above it is clear that none of the two alternatives have been elaborated having search engines in mind. In particular, the "database services" option might be difficult to accept as it refers specifically to the delivery of services "from primarily structured databases", a condition a search engine does not satisfy. The second alternative, "online information and database retrieval" seems to leave more space for interpretation. As a matter of fact, the search engine function provides information to customers as a result of a query and such information is undoubtedly provided on-line. Doubts may arise if reference is made to the CPC entry 75232 above because, again, "electronic messages and information services" are defined as services necessary "…to access or manipulate information in databases". However, as explained above, in this specific case an exact correspondence between the CPCProv and the W/120 is not identified so the services included in this entry do not have to be necessarily limited to the definition provided in the CPC general entry. Additional support to this interpretation can be found in classification lists elaborated in more recent times, such as the CPC 2.0, that introduce a specific subheading identifying "web search portal content" services, hence search engines[276] and includes them in the "Online content" heading.

[275] The other sub-heading in the data and message transmission services category (75231) of the CPCProv refers exclusively to network services and does not seem appropriate to define search engines.
[276] As mentioned in paragraph 3.1.3, the CPC 2.0 innovates greatly with regard to new technologies by merging all the services referring to telecommunication, internet and broadcasting in a single category. Such category

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

In any case, it should also be pointed out that the CPCProv general correspondence in the W/120 for "online information" services is the same as the one for "data transmission service" discussed above. If the interpretation elaborated above in relation to the "audiovisual debate" is maintained, the "data transmission services" entry would function as a residual category for those services based on data transmission but unable to be identified in a specific entry in light of the type of content delivered. It results that, although the more appropriate service category for search engine seems to be "online information" within the telecommunication category, it would still be possible, in case of disagreement, to include search engines in the "data transmission service" residual category.

4.3.2 Social networks

The internet has increasingly entered the daily life of consumers. If search engines have turned the internet into an easily accessible technology for individual consumers to retrieve information and content, the rise of the social networks phenomenon, another revolutionary development in the field of Information Society, has signified the introduction of internet technologies in the daily relationship between individuals, groups and organizations. Social networking sites are precisely defined as web-based services allowing individuals to construct a public or semi-public profile, articulate a list of other users with whom they share a connection, and view their list of connections and those made by others within the system[277].

As was already the case with search engines, social network services could not have been foreseen before the development of the internet. Again, in looking for an appropriate W/120 classification entry, the technologically neutral approach does not reveal any meaningful comparison. It results that an appropriate solution can only be identified by examining the main functions and characteristics of this service and then looking for the more

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introduces the heading "Online Content" (843), which is in turn broken into five sub-headings, identifying different types of content (text based information, audio content, video content, software downloads, other online content). In particular, the subheading "other online content" (8439) includes, among others, the entry "Web search portal content" (84394) that is in turn defined, in the explanatory note, as "content provided on web search portals, i.e. extensive databases of Internet addresses and content in an easily searchable format". The inclusion of search engines in the CPC 2.0 "Online Content" heading can be interpreted as a confirmation that the heading "online information" in the W/120, although not specifically identifying the types of services provided through search engines, would apply to services delivering online information different from those delivering content that are specifically identified in other headings (i.e.: radio and television).

[277] Boyd D.M., Ellison N.B., *Social Network Sites: Definition, History and Scholarship*, cit., 211.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

appropriate sub category in the classification entries related to computer, telecommunication or audiovisual services.

When examining the main *characteristic* of a social network, the same alternatives proposed for search engine services are at the forefront. In this case, however, the outcome might be the opposite. Indeed, unlike search engines, the access to certain types of content provided on a voluntary basis by social networks users is not open to everybody, but is instead most of the times contingent upon a subscription and based on the information provided by other users (text-based information, pictures, videos) and stored in a database managed by the service provider. For this reason, social networking services are more likely to fall within the "database services" category (844) because, unlike search engines, they are this time provided "from primarily structures databases and through a communication network[278]."

Looking at the *function* of social networking services, however, further clarifications might be needed; indeed, unlike search engines, the idea underlying social networking services is the exchange of information between users, which in turn implies the provision of a telecommunication service. Here, however, one should also point out that the main characteristic of this service is based on the idea of connecting communities of users, usually sharing common interests or tastes; in this sense we argue that the communication occurring between users is only incidental to the fulfillment of the main function of the service, hence the main characteristic of the service (database service) trumps its communication feature because functional to fulfill its main purpose. By the same token, the sharing of a video through a social network cannot be characterized as constituting an audiovisual service.

This argument, however, hold true only when the communication function is related to the characteristic of the social network service and cannot be applied when a social network platform provides other services not strictly related to its main purpose. We are referring here, for instance, to the "private messaging" feature provided, for instance, by the worldwide known social networking service "Facebook". Indeed such service assigns an email address to each user thus allowing users to reach out to other clients that are not necessarily part to the group or community. For classification purposes, this function, although apparently bundled together with the social network, should be regarded as a stand-alone service, falling within the "electronic mail" sub-heading, explicitly identified in the W/120 list; the same hold true

[278] Weber R., Burri M., *Classification of Services in the Digital Economy*, cit., 117-118.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
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Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

for any other type of services provided through the social network platform but detached from its main purpose (i.e. online games).

4.3.3 Streamed video content

Another type of service not conceivable before digitization is certainly the one of video on-demand. Contrary to traditional broadcasting, video on-demand allows users to select audiovisual content at a given time, often on a pay-per-view basis. Video on-demand is not necessarily related to the internet; on the contrary, such service has been initially provided through cable and satellite technologies. However, the enhanced possibilities provided by the increasing availability of broadband connectivity allow now such services to be easily provided over the internet through streaming.

Keeping with the concept of technological neutrality, one should probably first of all acknowledge that, similarly to services provided through cable and satellite technologies, the provision of audiovisual services over the internet can occur both on an on-demand form and on a broadcasting-like manner ("pure" online television or IPTV)[279]. The difference between this two types of services, and the need to regulate them in a technologically neutral manner, is captured in the EU legislation, as the Audiovisual Media Service Directive differentiates between "television broadcasts or linear services" and "on-demand or non-linear services"[280], the former being out of the scope here because broadly discussed above in the context of the audiovisual debate.

[279] We are referring here – inaccurately - to "broadcast-like" services because the sole use of the term "broadcast" would not encompass services provided through the internet. As already discussed, (para. 4.2.3), broadcasting implies the transmission of content through radio waves, a condition not met in the case of online television. A more proper terminology would be to differentiate between linear and non-linear audiovisual services. Such approach is adopted by the EU, although in that case, the confusion with the use of the term "broadcasting" is not completely solved.

[280] In the EU framework, "television broadcasting" or "television broadcast" (i.e. a linear audiovisual media service) is defined as "an audiovisual media service provided by a media service provider for simultaneous viewing of programmes on the basis of a programme schedule"; on the other side, an "on-demand audiovisual media service" (i.e. a non-linear audiovisual media service) is identified as an audiovisual media service provided by a media service provider for the viewing of programmes at the moment chosen by the user and at his individual request on the basis of a catalogue of programmes selected by the media service provider. See, Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services, cit., Art 1(e) and (g).

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
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Lacking a specific entry in the CPCProv and in the W/120 list defining video on-demand[281], the classification of such services for GATS purposes can only be inferred by applying the same reasoning adopted for the other "new" services discussed above. In this sense, being video on-demand strictly related to audiovisual content, their classification should probably fall within the audiovisual commitments W/120 related to Radio and Television Transmission Services, which is in turn cross-referenced to Programme Trasmission Services (7524) in the CPCProv. Indeed, coherently with what discussed above regarding the specificity to be attributed to television and radio content, services such as Netflix[282], providing original television series and movies at the user's request, are to be considered as television transmission services.

If video on demand do not seem to pose any additional classification problem compared to online television, the situation might be more uncertain in relation to other types of services providing streamed video but not necessarily suitable to be characterized as video on-demand services. We are referring here to those services offering web platforms for user generated video content, the most popular being Youtube. Although indisputably providing audiovisual content, and being transmitted on user's demand, such services differ from on-demand video services in one important respect; indeed the videos on these platforms are usually generated by the users themselves and, for this reason, it might not be appropriate to characterize them as television services as defined in the CPCProv[283]. If one has to follow the reasoning developed above and hence considers the existence of specific commitments for the transmission of radio and television services as an exception to the general rule, it would be possible to claim that web platforms for the hosting of users generated content videos should not be subject to the W/120 Audiovisual Services commitments as their main function is not

[281] Video on-demand are instead properly classified in the latest CPC 2.0 under the already mentioned "online content" category at entry Streamed Video Content (84332) and defined as "streamed video data sent over the Internet".

[282] Netflix, Inc is a company originally providing on-demand Internet streaming media at accessible prices. In 2014, it counted 44 million users in 40 countries. See, Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934, 3 February 2014, available at ir.netflix.com. Netflix has now launched its IPTV (internet protocol television), separated from the on-demand service. However, for the purpose of the discussions, we are referring here only to the on-demand streaming service.

[283] Television Services are defined in the CPCProv as programmes "for entertainment, for promotion, education or training or news dissemination, including pictures or plays that are *normally produced in television studios*. Also included are productions such as sport covering, weather forecast, interviews" [emphasis added]. Such definition implies a certain level of professional work in order for a production to be classified as a television service.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
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the transmission of television services[284]. This has been implicitly confirmed also at the EU level, where user generated content does not seem to be included in the list of audiovisual services[285].

If however web-hosting platforms are not included in the audiovisual category, other classification entries should be identified. In this sense, one could take guidance from the newer CPC 2.0 that includes a specific headings for different forms of online content, including a sub-heading specifically addressed to all forms of streamed video content (84332). Lacking however analogous correspondences in the CPCProv list, and hence in the W/120, similarly to the search engines case, the only possible landing point seems to be the entry "online information and database retrieval" or, residually, the "data transmission service" headings, both cross referenced to the CPCProv "Data and Message Transmission Service" (7523)[286].

4.3.4 Cloud services

"Cloud" is certainly one of the latest buzzwords appeared in the ICT vocabulary. As a matter of fact, these types of services has been available for a long time, mostly only for business purposes but also for a broader category of consumers, just disguised under different names or embedded into other services. Today's "cloud" is only an expansion of the scope, scale and availability of these services[287].

Cloud services are generally referred to as network computing where a program or application runs on a connected server rather than on a PC, a tablet or a smartphone. Cloud computing is a model for enabling ubiquitous, convenient, on-demand network access to a shared pool of configurable computing resources (e.g., networks, servers, storage, applications, and services) that can be rapidly provisioned and released with minimal

[284] The confusion arises from the different wording employed in the CPCProv and W/120 to identify such services that are referred as programme television services in one case and to audiovisual services in the other.
[285] For the purpose of discussing the general framework for the development of the AVMS directive, the European Commission published a document identifying the types of services falling within the audiovisual definition. The services identified in this sense were film, telefilms, serials on demand, sport events on demand, entertainment shows on demand, reality shows on demand, video reports of concerts and live arts performances on demand, TV news reports on demand, advertising other than text and still images delivered in connection with on demand services. User-generated content is not mentioned. See, MEMO/05/475, *The Commission Proposal for a Modernisation of the Television without Frontiers Directive*, Brussels, 13 December 2005.
[286] As mentioned before, the same reasoning would apply to other forms of online content, notably web hosting of images such as Flickr. *Infra*, para. 4.2.3.
[287] Alhadeff J., *Cloud Computing Policy Paper,* European-American Business Council Policy Paper, June 2011.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

management effort or service provider interaction[288]. It then refers to both the applications delivered as services over the internet and the hardware and systems software in the data centers that provide those services[289]. A clear understanding with regard to the liberalization status of cloud computing is crucial for WTO purposes. Such services are in fact based on the cross-border transfer of data. As it will be discussed later on, WTO Members might be interested, for many reasons, in avoiding transfers of their citizens' data in foreign countries, where regulations for data treatment and privacy are more or less stringent[290].

Obviously, cloud services do not appear in the W/120 list, nor they are reported in the CPCProv. In addition, they are not accurately defined even in more recent classifications[291]. For GATS purposes, the proper classification of such services needs then to be found in already existing subclasses.

When reasoning on the proper classification for cloud services, the "computer services" category is certainly at the forefront as cloud computing, albeit in remote servers, allows to store and process data and no proper communication activity seems to be provided. Such a position was endorsed, for instance, by the US in a relatively recent submission to the Council on Trade in Services where it was stated that "notwithstanding convergence, the category of computer and related services remains the fundamental locus for cloud computing under the GATS"[292].

Although no specific W/120 entry in the "computer services" category seems to provide an exact description of the function of cloud computing, the closest definition seems to be the "data processing services". This can be inferred by an analysis of the

[288] Mell P., Grance T., *The NIST Definition of Cloud Computing, Recommendations of the National Institute of Standards and Technology*, NIST Special Publication 800-145, September 2011, 2.
[289] Armbrust M. et al., *A View of Cloud Computing: clearing the clouds away from the true potential and obstacles posed by this computing capability,* in *Communication of the ACM*, 53:4, 2010, 50.
[290] On the issue of privacy and international trade rules, see, Chapter II.
[291] In the CPC 2.0, cloud services might be defined as "other hosting and IT infrastructure provisioning services" (83159) as such category includes "data storage services, i.e. managing or administrating the storage and back-up management of data such as remote back-up services, storage, or hierarchical storage management (migration)". However no specific entry is reserved to cloud services.
[292] The US justified this position by explaining that "when determining under which category a certain activity is classified, "a key distinction to bear in mind is that between *use* and *supply*, wherein telecommunications may be used as a 'means of delivery' for many other services. Suppliers of such services as computer services, audiovisual services and other communications-enabled services, classified elsewhere in the GATS list, are common examples of users of telecommunications networks and services. S/C/W/339, *Ensuring that Trade Rules Support Innovative Advances in Computer Applications and platforms, such as Mobile Applications and the Provision of Cloud Computing Services*, cit., para. 11.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

correspondences between different versions of the CPC classifications[293]. The CPC 2.0 provides indeed for the entry "other hosting and IT infrastructure provisioning services" (83159) which in turn include "data storage services", a description close enough to the cloud services basic function. Entry 83159 of the CPC 2.0 is cross-referenced to the CPC 1.1 85960 "data processing services" entry, which is in turn referenced to the 84320 "data processing and tabulation services" in the CPCProv[294].

In sum, from the reasoning above, it seems that, when data storage is provided, a service should be necessarily identified as a "computer service". But does this always hold true? First of all, it is important to recognize that cloud services are provided in many forms and, most importantly, are usually embedded, and most of the times essential, for the provision of other services[295]. Social networks and emailing services are the clearer examples in this regard as they make abundantly use of data storage. Indeed, when uploading a picture or a video on a social network platform, data is uploaded into a server managed by the platform owner. The same happens with almost all types of emailing services, as they commonly offer the possibility to access emails through a web portal, hence to retrieve the information (emails, annexes), previously uploaded in a server.

In this context, should email services and social networks be classified as computer services as they involve data storage? The answer, it is argued, should be no. Indeed, as already discussed above when analyzing the appropriate classification for social networks and search engines, it is here maintained that, in order to identify the classification for a specific service, and in line with the principle of technological neutrality, the more efficient and neutral way should be to look at the characteristics and the purpose of the service regardless of the technology or technologies employed. Following this line of thoughts, email services, whose main purpose is the exchange of electronic mail, should be classified in the appropriate telecommunication entry[296]; by the same token, social networks should, as discussed above, fall within the "database service" category. The data processing category would be instead at the forefront when the main function of the services is the storage of data, as it is the case, for instance, with Dropbox. In light of the WTO Members increased sensitiveness toward cross-

[293] When new versions of the CPC are elaborated, numerical correspondences with previous versions are provided.
[294] Entry 843 of the CPCProv is in turn paralleled with entry 1.B(c) "data processing services" in the W/120.
[295] Kommerskollegium, *How Borderless is the Cloud? An introduction to cloud computing and international trade,* Swedish National Board of Trade, September 2012, 3.
[296] The W/120 include a specific heading for electronic mail, 2C(h).

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

border data transfer as well as the existence of different level of WTO commitments in computer and telecommunication services[297], such an interpretation might be helpful in setting the boundaries among services requiring data storage but, at the same time, combining different technological features.

4.4 - Interim conclusions: getting out of the impasse through the jurisprudential interpretation?

4.4.1 The starting point: schedules of commitments and treaty interpretation

The already mentioned *US-Gambling* dispute is a clear example of a situation in which technological developments have enabled a new mean of supply but have maintained the core features of the service identical. As we have seen, this does not mean that for every new service delivered *online* there is always an *offline* counterpart, hence a classification heading under which it can be indisputably listed. On the contrary, new services arising out of technological development may or may not be easily included in the old classification models employed in the WTO list of commitments so that a further interpretative effort might be necessary. Services, like goods, can be physiologically replaced by newer ones, featuring identical or similar functions. Sometimes, however, divergences due to the different technologies employed might raise doubts in relation to the exact classification headings they are to be ascribed to. In this case, when previous commitments for specific categories and specific modes of supply have been made, to agree on a shared definition of new services might be problematic.

Above, we have elaborated on possible ways to interpret new services arising out of technological developments. Such interpretations are based mainly on the firm conviction that, lacking the possibility to regularly update the GATS schedules of commitments, the only way to include new services within the GATS framework is to endorse a technologically neutral approach or, when not feasible, to look at the main function/purpose of the service in order to

[297] Lee-Makiyama H., *Future-proofing world trade in technology: turning the WTO ITA into the International Digital Economy Agreement (IDEA)*, cit., 19.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
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identify the most suitable classification category. Although no agreement has ever been reached by WTO Members in this regard, few WTO disputes have so far involved technological development, both at goods and services level. It is then interesting to analyse them in order to understand whether the jurisprudential interpretations developed on those occasions confirm or disregard what argued so far.

When interpreting the meaning to be attributed to the various provisions in the WTO covered Agreements, the DSB adjudicators have always resorted to the general rules of treaty interpretation provided for in the Vienna Convention on the Law of Treaties (VCLT)[298], notably Articles 31 and 32. However, in order to perform a consistent interpretation of the Schedules of Commitments, the DSB had first of all to decide whether such documents constituted an integral part of the WTO Agreements[299], hence subject to "classical" treaty interpretation rules, or instead should have been considered as acts differing from the main treaty texts and thus interpreted in accordance with different rules. Although a perceived difference between treaty text and schedules existed because of the more "bilateral" trait of the latter, the adjudicators always opted firmly in favour of interpreting the schedules of commitments in the WTO agreements in light with the VCLT. As far as GATT Schedules are concerned, this was clarified already in 1998 in the context of the *EC-Computer Equipment* dispute, when the AB stated that "the fact that Members' Schedules are an integral part of the GATT 1994 indicates that while each Schedule represents the tariff commitments made by one Member, they represent a common agreement among *all* Members"[300]. In this context, the AB did contemplate the possibility that schedules may be of a different character than treaties, so to be interpreted in light of the legitimate expectations of the exporting WTO Members but it eventually rejected this possibility, as this interpretation would have undermined the security and predictability of the schedules[301].

The same approach has been then endorsed for the GATS schedules in the already mentioned *US-Gambling* dispute when the Appellate Body, after recalling the *EC-Computer*

[298] Vienna Convention on the Law of Treaties, UN Doc. A/Conf.39/27, signed in Vienna, 23 May 1969, entered into force, 27 January 1980.
[299] In more precise terms, the question is whether schedules of commitments meet the definition of "treaty" in Article 2(1)(a) of the VCLT. "Treaty means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation".
[300] WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, *European Communities – Customs Classification of Certain Computer Equipment,* 5 June 1998, para. 109.
[301] Van Damme I., *The Interpretation of Schedules of Commitments,* in *JoWT*, 41:1, 2007, 9.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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Equipment jurisprudence[302], added that "in the context of the GATS, Article XX:3 explicitly provides that Members' Schedules are an "integral part" of that agreement. Here, too, the task of identifying the meaning of a concession in a GATS Schedule, like the task of interpreting any other treaty text, involves identifying the common intention of Members" concluding that, in the case at issue, "the meaning of the United States' GATS Schedule must be determined according to the rules codified in Article 31 and, to the extent appropriate, Article 32 of the Vienna Convention"[303].

In sum, the DSB has consistently rejected the possibility for schedules of commitments, both in the GATT and in the GATS realm, to be interpreted as instruments detached from the covered agreements, hence precluding the possibility to apply different interpretative principles[304]. At the current status, it is difficult to imagine how the WTO adjudicators would adopt a different reasoning in future disputes.

4.4.2 The ordinary meaning, the object and the purpose of the schedules of commitments

The positive affirmation by the DSB of the applicability of the VCLT to the schedules of commitments was certainly helpful in setting a common interpretative framework in the WTO dispute settlement mechanism. However, a clear interpretative framework for the schedules has not prevented further uncertainties to arise. Not surprisingly, the most important divergences between importing and exporting countries originated when the interpretation of the market access obligations for recently developed IT goods or services was at stake. In those cases, and in accordance with the jurisprudence mentioned above, the DSB had to define the ordinary meaning, the object and the purpose of the schedules of commitments, in line with VCLT Article 31[305].

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[302] WT/DS285/AB/R, *United States – Certain measures affecting the cross-border supply of gambling and betting services*, cit., para. 159.
[303] *Ivi*, para. 160.
[304] It has been argued, for instance, that schedules of commitments can constitute "unilateral declarations". However, this possibility seems to be problematic to endorse in the WTO context because, in order to determine one State's intent, the interpretation of unilateral declarations developed in the international law context relies heavily on national laws. See, Van Damme I., *The Interpretation of Schedules of Commitments,* cit, 13-21.
[305] VCLT Article 31 postulates that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". In WTO jurisprudence, adjudicators had always made clear that the requirement of VCLT Art 31 are cumulative as "the interpretation pursuant to the customary rules codified in Article 31 of the Vienna Convention is ultimately a holistic exercise that should not be mechanically subdivided into rigid components". See WT/DS269/AB/R,

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
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In the context of trade in IT goods, the issue of the classification of newly developed products was raised in the framework of the International Technology Agreement (ITA)[306]. Similarly to the GATS Agreement for services, the ITA provides for a list of IT products to which a zero-duty rate has to be applied[307]. The ITA, unlike the GATT, is thus subject to the same "aging" problem affecting the GATS as most of the products listed therein can become easily obsolete when new technologies are developed. Even if, compared to the GATS Agreement, the process to amend the list of specific products subject to the zero-duty rate is certainly easier[308], in 2008 Chinese Taipei, the United States and Japan filed a complaint against the tariff treatment applied by the European Union to certain newly developed IT products[309] that were not included in the ITA list[310]. In particular, the EU was excluding products such as "flat panel display devices", "set-top boxes" and "multifunctional printers" from the ITA duty-free treatment because, it argued, featuring characteristics that did not exist at the time the concessions were being negotiated[311]. On the opposite side, the complainants were arguing in favour of an evolutionary interpretative approach of the schedules[312].

In order to provide a meaningful interpretation to the ordinary meaning of the tariff headings at issue, besides the dictionary definitions, the Panel looked more generally at the GATT Agreement infrastructure, concluding that its overall object and purpose is to provide "security and predictability in the reciprocal and mutually advantageous concessions

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WT/DS286/AB/R, *European Communities – Customs Classification of Frozen boneless Chicken Cuts*, 12 September 2005, para. 176.

[306] WT/MIN(96)/16, *Ministerial Declaration on Trade in Information Technology Products*, cit.

[307] *Ivi*, Attachments A and B.

[308] Paragraph 3 of the Annex to the ITA provides that "Participants shall meet periodically under the auspices of the Council on Trade in Goods to review the product coverage specified in the Attachments, with a view to agreeing, by consensus, whether in the light of technological developments, experience in applying the tariff concessions, or changes to the HS nomenclature, the Attachments should be modified to incorporate additional products". However, negotiations to amend the product coverage initiated already in 1998 never led to any significant development. See, WTO, *15 Years of the Information Technology Agreement: Trade, innovation and global production networks*, cit., 32-35.

[309] The products at issue were Flat Panel Displays Devices, Set-Top Boxes and Multifunctional Digital Machines.

[310] WT/DS375/R, WT/DS376/R, WT/DS377/R, *European Communities and its Member States – Tariff Treatment of Certain Information Technology Products*, 16 August 2010.

[311] Peng S., *Renegotiate the WTO "Schedules of Commitments"?: Technological Developments and Treaty Interpretation,* in *Cornell Int'l L.J.*, 403, 2012, 411.

[312] Significantly, the US was of the view that "if ITA participants only provided duty-free treatment to the products with technologies that existed at the time the ITA was concluded, very few ITA products would be eligible for duty-free treatment today". Peng S., *Renegotiate the WTO "Schedules of Commitments"?*, cit., 413.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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negotiated by parties for the reduction of tariffs and other barriers to trade[313].” Importantly, the adjudicators also shared the complainants’ view that “the objectives of security and predictability also require that concessions cover products even if those products did not exist in that form at the time the concessions were granted”[314]. Consequently, the Panel eventually adopted an extensive interpretation of the commitments undertaken by the EU and confirmed that the products at issue, although not existing at the time of the negotiations, were entitled to take advantage of the zero-duty treatment because they complied with the narrative description provided for each heading. It is clear that, with this type of reasoning, the Panel has attached more importance to the *functionality* and the purpose of the products at issue rather then to their technical features[315].

In the GATS framework, the AB was faced with a similar issue in 2009 in the context of the already mentioned *China-Audiovisual* dispute[316]. In this case, one of the complaints put forward by the United States related to the extent of China’s commitments with regard to electronic distribution of sound recordings[317]. According to the United States, when China accepted to liberalize distribution of sound recordings, it did also commit to offer market access to electronic distribution service providers. China, on the other hand, maintained that electronic distribution was not covered as this was not a widespread type of activity when their representatives negotiated the list of commitments before China’s WTO accession[318]. In practice, in defining the extent of China’s commitment, the adjudicators were asked to decide on whether the scope of the commitment is to be defined in light of the “ordinary meaning” at the time of the negotiations or at the time of the dispute. Although similar in some regards, the issue faced by the adjudicators departed from the *US-Gambling* dispute in a small but

[313] WT/DS375/R, WT/DS376/R, WT/DS377/R, *European Communities and its Member States – Tariff Treatment of Certain Information Technology Products*, cit., para. 7.549.
[314] *Ivi*, para. 7.927
[315] For instance, in ruling on the treatment to be applied to “set-top boxes”, the Panel concluded that “in the context of this concession, the term "modem" should not be interpreted in an overly narrow or technical sense, but *should be informed by the clear emphasis on functionality*. Accordingly, we found that devices that incorporate, or have built in, technologies that enable them to access the Internet and provide interactive information exchange may fall within the scope of the concession.” *Ivi*, para. 7.957. (emphasis added).
[316] WT/DS363/AB/R, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, cit.
[317] China’s commitments on sound recordings distribution services grant full market access and full national treatment for GATS modes 1 and 2. See, GATS/SC/135, *The People’s Republic of China Schedule of Specific Commitments*, 12 February 2002, 21.
[318] After lengthy negotiations started in 1995, subject to specific obligations, China became a full member of the WTO in 2001. WT/L/432, *Accession of the People’s Republic of China, Decision of 10 November 2001*, 23 November 2001.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
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important detail. If in the context of gambling the provision of remote betting services was already available before the internet through, for instance, the telephone, here the digitization of the sound recording was allowing for the first time the transmission of the final product without a physical support[319].

In order to rule on the issue, the AB performed a thorough review of the Panel analysis in light of VCLT Article 31. Significantly, in confirming the Panel initial decision on the applicability of the China commitment to electronic distribution, the AB went one step further in the analysis. First of all, it refused to uphold China's claim that the ordinary meaning of the commitments should be ascertained at the moment they are undertaken, on the basis that such a reading would give rise to different interpretations depending on the time of each WTO Member's accession[320]. Secondly, and more importantly, the AB ruled that the principle of progressive liberalization, identified through the dispute as "object and purpose" of the GATS Agreement, did not "lend support to an interpretation that would constrain the scope and coverage of specific commitments that have already been undertaken by Members and by which they are bound"[321]. Coherently, it eventually opted for an evolutionary interpretation concluding that "the terms used in China's GATS Schedule *are sufficiently generic that what they apply to may change over time*" further explaining that "GATS Schedules, like the GATS itself and all WTO agreements, constitute multilateral treaties with continuing obligations that WTO Members entered into for an indefinite period of time, regardless of whether they were original Members or acceded after 1995"[322].

4.4.3 The DSB going beyond a technologically neutral approach?

The interpretations of the dispute settlement body in the cases mentioned above are of great significance in setting a precedent in favour of a more "evolutionary" approach of the

[319] Not surprisingly, in its submission to the Appellate Body, China criticized the Panel reasoning on the basis that "it wrongly disregarded evidence submitted by China demonstrating that the ordinary meaning of *the terms "sound recording" and "distribution" related only to tangible/physical goods*, and reached premature conclusions on the ordinary meaning of these terms before examining them in their context and in the light of the object and purpose of the GATS" (emphasis added). See, WT/DS363/AB/R, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, cit., para. 38.
[320] WT/DS363/AB/R, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, cit. para. 397.
[321] *Ivi*, para. 394.
[322] *Ivi*, para. 396. (emphasis added)

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
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WTO covered agreements, at least in terms of the interpretation of the schedules of commitments and concessions; even more because this reasoning has been endorsed for interpreting the scope of the commitments undertaken both in the goods and the services realms.

On one side, the DSB has clarified, at least implicitly[323], that the principle of technological neutrality surfaces not only in the definition of the boundaries of the GATS modes of supply, as it has been the case for the *US-Gambling* dispute. Instead, such principle permeates the whole WTO system and needs to be taken into account at the outset of each dispute, when the scope of the GATS commitments or GATT concessions is evaluated and the object of the dispute is defined. This seems to be motivated by the AB recognition that WTO treaties "constitute multilateral treaties with continuing obligations"[324] and that, absent the practical possibility for WTO Members to amend or modify the lists of commitments on a regular basis, a technological neutral approach is essential to preserve their effectiveness.

However, as we have seen above, the technological neutrality approach is not necessarily sufficient to solve the classification problems arising out when new services are developed and no parallel can easily be found in the *offline* world[325]. In this sense, the interpretation of the DSB seemed to have gone even further than simply acknowledging the relevance of the technological neutral character of the WTO; indeed, the reference in the *China-Audiovisual* dispute to the idea that the commitments can be "sufficiently generic" to encompass services not foreseen at the time of the negotiations has probably opened a whole now room for interpretation. Unfortunately, however, the GATS dispute at issue did not involve such a scenario, as distribution of sound recording was obviously a service already available, albeit in other forms, well before the digital revolution. Consequently, lacking the need to delve more into the issue of "new electronic services" for the purpose of solving the case at issue, the AB did not offer further insights on the meaning of the "sufficient generic" formula apart from confirming that such a reasoning is consistent with the technologically neutral approach.

[323] The technological neutral character of the GATT is never explicitly mentioned in the *EC-IT products* dispute. On the contrary, the *China-Audiovisual* case quote the reasoning developed by the AB in the *US-Gambling* dispute.
[324] WT/DS363/AB/R, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, cit., para. 396.
[325] Such cases are broadly discussed in para. 4.3.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
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In any case, what we have argued above when trying to identify suitable classification entries for "new services" such as search engines and social networks is that the more efficient and neutral way to classify them should be to look at their main *purpose* or *function*, rather than at their additional features or the way they are delivered[326]. After all, this is another way to apply the principle of technological neutrality when a straightforward comparison with an already existing service cannot be drawn.

As a matter fact, the argument of *functionality* has been already employed by the Panel in the above-mentioned *EC-IT Products* dispute in order to define the exact positioning of certain products within the ITA schedules of concessions[327]. On the GATS's side, this argument has not been explicitly employed to solve the *China-Audiovisual* dispute. However, an helpful interpretation in this sense can be found, maybe surprisingly, in the context of the famous *EC-Banana* case, a dispute clearly not related to technological development issues. Indeed, in this context, when defining the meaning of "wholesale trade services" the Panel clarified that "the CPC description of "wholesale trade services" is based on the identification of a core activity, that is "reselling merchandise", which could be accompanied by a variety of other related subordinate activities the objective of which would be to facilitate the delivery of the described services". Coherently, it concluded that "the subordinate activities listed in the headnote to CPC section 6 (such as maintaining inventories, breaking bulk, etc.), when they accompany the reselling of merchandise and are not performed as a separate service in their own right, are within the scope of wholesale trade service commitments"[328].

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[326] *Infra,* para. 4.3.4.

[327] For instance, in ruling on the treatment to be applied to "set-top boxes", the Panel concluded that "in the context of this concession, the term "modem" should not be interpreted in an overly narrow or technical sense, but *should be informed by the clear emphasis on functionality*. Accordingly, we found that devices that incorporate, or have built in, technologies that enable them to access the Internet and provide interactive information exchange may fall within the scope of the concession." WT/DS375/R, WT/DS376/R, WT/DS377/R, *European Communities and its Member States – Tariff Treatment of Certain Information Technology Products*, cit., para. 7.957. (emphasis added)

[328] WT/DS27/R/USA, *European Communities - Regime for the Importation, Sale and Distribution of Bananas, Complaint by the United States*, cit., paras 7.291 et seq. Such argument was subsequently confirmed by the Appellate Body that further clarified the interpretation as follows: "We note that the CPC Headnote characterizes the "principal services" rendered by wholesalers as "reselling merchandise". This means that "reselling merchandise" is not necessarily the only service provided by wholesalers. The CPC Headnote also refers to "a variety of related, subordinated services" that may accompany the "principal service" of "reselling merchandise". It is difficult to conceive how a wholesaler could engage in the "principal service" of "reselling" a product if it could not also purchase or, in some cases, import the product. Obviously, a wholesaler must obtain the goods by some means in order to resell them. In this case, for example, it would be difficult to resell bananas in the European Communities if one could not buy them or import them in the first place". See, WT/DS27/AB/R, 9 September 1997, para. 226.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
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It is argued here that the reasoning of the Panel in the *EC-Banana* dispute, although specifically targeted to wholesale trade services, would fit squarely within the context of "new electronic services" as well and, if uphold in future disputes, would then probably provide much more clarity to the WTO and its Members as it would enhance their understanding of the extent of the GATS commitments undertaken in light of technological developments.

This can be easily demonstrated by transposing such reasoning in the electronic services realm and taking the social networks case as an example. As we have seen, social networks main *function* can be characterized as connecting communities of users sharing common interests or tastes; for this reason, we have classified them as "database services"[329], disregarding their "communication" feature. Indeed, if we apply the *EC-Banana* reasoning, the fact that to fulfil their purpose such services need to feature subordinate activities such as telecommunication (instant messaging) and data storage (photo sharing) would not matter for the purpose of defining their exact classification. In the wording of the *EC-Banana* dispute, such subordinate activities would in fact only "facilitate the delivery of the described services". This would in turn confirm that, in the GATS framework, the classification problems arising out from the convergence phenomenon and the development of new electronic services can effectively be overcome by simply looking at the primary *function* of the service concerned.

[329] *Infra*, para. 4.3.2.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
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Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

Chapter II

TRADE BARRIERS TO THE CROSS-BORDER SUPPLY OF ELECTRONIC SERVICES: NON-DISCRIMINATION, DOMESTIC REGULATION AND FREE FLOW OF INFORMATION

1. Trade barriers and the internet: an introduction

1.1 - The rationale of non-tariff barriers and the lack of discipline for trade in services

Trade barriers and the prevention of their distorting effects on international trade represent the main reason the GATT Agreement first and the WTO later were set up[330]. The negotiators of the first provisional GATT 1947 Agreement, a covenant entirely devoted to discipline international trade in goods, were focussing their efforts on reducing the prohibitive level of tariffs and quantitative restrictions, by far the more trade distorting measures at that time. Overtime, however, and with the constant decrease of the overall impact of tariffs on international flow of goods, the need to tackle new types of trade barriers, the so-called non-tariff barriers (NTBs), emerged. Indeed, many of the trade concerns raised by the Contracting Parties in the GATT context were already pointing at the existence of discriminatory treatments in terms of licensing, standards and technical regulations that were applied in such a way to favour domestic production[331]. These concerns were initially discussed during the Tokyo Round, when a first version of the Agreement on Technical Barriers to Trade was

[330] The preamble of the GATT 1947 explicitly evokes the fundamental economic theories of international trade as it states that the GATT Contracting Parties should conduct their relations in the field of trade and economic endeavour "with a view to raising standards of living, *ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods*." (emphasis added). The reference to the full use of resources echoes the fundaments of international economic, in particular Ricardo's theory of comparative advantages and, even more, the Heckscher-Ohlin (H-O) model postulating that patterns of trade are determined by differences in factors endowments. The substantial reduction of tariffs and other barriers to trade" is identified in the GATT 1947 as the fundamental mean to achieve such goals. Krugman P.R., Obstfeld M., Melitz M., *International Economics, Theory&Policy,* 9th Edition, 2012, Part I.

[331] MTN/3B/12*, Group 3(b), Packaging and Labelling, Note by the Secretariat on Meeting of May 1974*, 17 May 1974.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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signed[332]. The agreement, known as the "Standards Code" was however conceived as a plurilateral treaty, binding only on the signatories and thus leading to a fragmentation of the GATT 1947[333]. During the Uruguay Round efforts were made in order to detail the scope of the Standards Code as well as broadening its membership. The result was the conclusion of the Agreement on Technical Barriers to Trade (commonly referred to as the "TBT Agreement")[334], an instrument aimed at avoiding the discriminatory effects of technical regulations and standards applied to goods[335], but this time binding on all the WTO Members in light of the "single undertaking" principle[336]. In addition, the TBT Agreement was complemented by the Agreement on Sanitary and Phytosanitary Measures (the so-called "SPS Agreement")[337] aimed at tackling the discriminatory effects of national measures targeted specifically at preserving the health of humans, animals and plants[338].

Overtime, the principles entrenched in both Agreements, and the role to be attached to the standard-setting organizations mentioned therein[339], were further clarified through landmark jurisprudential decisions[340]. In the meantime, technical regulations and standards

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[332] Marceau G., Trachtman J.P., *The Technical Barriers to Trade Agreements, the Sanitary and Phytosanitary Measures Agreement and the General Agreement on Tariffs and Trade: a Map of the World Trade Organization Law of Domestic Regulation of Goods*, in *JoWT*, 36(5), 2002, 813.

[333] Agreement on Technical Barriers to Trade, 1979, GATT, BISD 26S/8.

[334] LT/UR/A-1A/10, *Agreement on Technical Barriers to Trade*, WTO Agreement, Annex 1/A. (hereinafter "TBT Agreement").

[335] TBT Agreement, Art. 1.3.

[336] In order to avoid the fragmentation and the consequent "free riding" phenomenon typical of the GATT 1947 system, the WTO endorsed the single undertaking principle. This means that, to come into force, every agreement needs to be signed by each WTO Member (WTO Agreement, Art. II(2)). However, the possibility of concluding plurilateral agreements, binding only on Members who accept them, is still granted through Art. II(3). Picone P., Ligustro A., *Diritto dell'Organizzazione Mondiale del Commercio*, Padova, 2001, 27 et seq.

[337] LT/UR/A-1A/12, *Agreement on the Application of Sanitary and Phytosanitary Measures*, WTO Agreement, Annex 1/A. (hereinafter "SPS Agreement").

[338] For a review of the main features of the SPS Agreement see, among others, Alemanno A., *Trade in Food: regulatory and judicial approaches in the EC and the WTO*, London, 2007; Scott J., *The WTO Agreement on Sanitary and Phytosanitary measures. A commentary*, Oxford, 2007; Gruszczynski L., *Regulating Health and Environmental Risks under WTO Law. A Critical Analysis of the SPS Agreement*, Oxford, 2010; Naiki Y., *Accountability and legitimacy in global health and safety governance*, in *JoWT*, 43:6, 2009, 1255-1279.

[339] Both Agreements identify the standard setting bodies responsible for elaborating standards and guidelines to be taken by WTO Members as a reference when introducing national regulations. See, SPS Agreement, Annex A.3; TBT Agreement, Annex I.

[340] So far a substantial number of WTO disputes have involved the interpretation of specific provisions of both the TBT and the SPS Agreement, some of them simultaneously. Many of these disputes have reached a final decision by the panel or the appellate body. See, DS406, *United States - Measures Affecting the Production and Sale of Clove Cigarettes*, DS400, *European Communities - Measures Prohibiting the Importation and Marketing of Seal Products*, DS392, *United States - Certain Measures Affecting Imports of Poultry from China*, DS386, *United States - Certain Country of Origin Labelling Requirements*, DS381, *United States - Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, DS291 - *European Communities - Measures Affecting the Approval and Marketing of Biotech Products*, DS290, *European Communities - Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, DS231,

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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affecting trade in goods and posing potential discriminatory effects have been, and still are, effectively monitored through the notification system allowing WTO interested Members to "raise concerns" in the appropriate committees before potentially discriminatory measures are adopted[341]. All in all, the system envisioned by both agreements has been generally considered effective, at least in signalling the rise of new potential NTBs[342].

Broadly speaking, the need for a further step in lifting extant barriers to trade in goods was clearly the result of the recognition that, with the general lowering of tariffs, countries were resorting to less transparent and more elaborated solutions to protect the national industry. Such urgency was not perceived in the context of trade in services, where much of the efforts in the Uruguay Round were still focussed on the negotiation of initial market access commitments and the development of a precise discipline potentially limiting the ability of WTO Members to freely regulate their services environment was not considered acceptable in the context of this type of trade. This latter point was implicitly confirmed in the preamble of the GATS Agreement itself that, contrary to its GATT counterpart, recognized "the right of Members to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives and, given asymmetries existing with respect to the degree of development of services regulations in different countries, the particular need of developing countries to exercise this right"[343].

It followed that, not surprisingly, in the GATS context the potential discriminatory character of qualification requirements, technical standards and licensing in service trade were touched upon only briefly, with the introduction within the GATS Agreement of a specific provision, Article VI, devoted to domestic regulation. Such provision however postponed the development of a more punctual "TBT style" discipline to further negotiations, so far not concluded[344].

European Communities - Trade Description of Sardines, DS135, *European Communities - Measures Affecting Asbestos and Products Containing Asbestos*, DS48, *European Communities - Measures Concerning Meat and Meat Products (Hormones),* DS2, *United States - Standards for Reformulated and Conventional Gasoline*.

[341] "Trade concerns" are raised by WTO Members through a consultation system taking place under the supervision of the SPS and the TBT Committees. These Committees are established pursuant to specific provisions set forth by Article 12 of the SPS Agreement and Article 13 of the TBT Agreement.

[342] The list of specific trade concerns raised both at SPS and TBT level are regularly published in the WTO portal: www.wto.org.

[343] GATS Agreement, Preamble.

[344] *Infra*, para. 3.2.1.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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In spite of the lack of a specific instrument in the WTO system, services can be subject to a wide array of non-tariff barriers both on the basis of the supplier's nationality or the place of delivery. In certain cases such discriminatory treatments are allowed in light of the specific negotiated commitments[345]. However, when no specific national treatment exceptions are foreseen, domestic regulations, such as qualification requirements or licensing, can result in discriminatory and potentially unjustified effects for the foreign service supplier or for those services delivered through one mode of supply or another. Discriminatory effects can also arise from an unbalanced application of the general exception provision included in the GATS Agreement (Article XIV), when the policy space granted to WTO Members to preserve specific national interests is used to conceal protectionist goals.

In a connected and globalized world, barriers to service trade are likely to assume a crucial importance for the years to come. This effect cannot but be amplified by the augmented possibilities provided by new technologies that are enabling the supply of an increasing array of services with no the need for a physical presence in the destination territory.

1.2 - The "balkanization" of the internet and its significance for cross-border services

In the online context, after an initial phase in which States adopted a complete liberal approach, tendencies to increase the regulation of the internet within national borders have emerged. Indeed, with the internet at its infancy stage, no need was perceived by national governments to regulate its content as this new technology was merely considered as a channel of communication and information, a mere additional tool complementing the already existing means of mainstream communication[346]. The scenario has now completely changed with internet technologies allowing instant access to all sorts of service provisions, from communication to information, from instant consulting to entertainment. The internet, originally seen as a "luxury good", has now become an ordinary tool for everyday activities,

[345] As discussed below, GATS schedules allows for the introduction of specific derogation to the national treatment obligations. *Infra*, para. 3.1.1.
[346] Bacchetta M. et al, *Electronic Commerce and the Role of the WTO*, WTO Special Studies 2, 1998, 7.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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both for businesses and for consumers, thanks also to its evolution toward a more participatory channel enabled by its increasingly ubiquitous access[347].

Because of its tremendous impact in influencing all sorts of activities and its virtual universal reach, after an initial "anarchic" phase, its development has inevitably attracted the attention of domestic regulators, reasonably worried for not being able to replicate the same level of monitoring and control already in place for similar offline activities and necessary to ensure the legality of the services provided within their jurisdictions as well as their minimum quality standards.

With the increasing "balkanization" of the internet, trade in electronic services taking advantage of internet technologies has been then inevitably rendered more complicated by the emergence of new types of service-specific national regulations to be abided by in order to obtain "virtual" market access. For instance, although in the context of cross-border internet trade the suppliers do not have or do not need a commercial presence in the legal jurisdiction of their intended consumers, the local presence has been sometimes a decisive requirement in order for an operator to supply its services remotely[348]. Other types of regulations enacted or discussed by national authorities have been connected to licensing, taxation purposes[349] or intellectual property rights protection[350]. Although most of the times perfectly legitimate, all in all the proliferation of several types of diverging local requirements, mainly construed to achieve different policy goals, can have a detrimental effect on services supplied from abroad. In addition, among the possible means of restriction to trade in electronic services, the ones generally impacting data flows horizontally without a link to the specific characteristic of one particular service are certainly the most trade disruptive. Indeed, for most of the services, the free flow of content (or data) is the main and sole ingredient for the correct functioning of the internet as a mean for doing business. However, governments might be willing to restrict or

[347] Dean D. et al, *The Digital Manifesto, How Companies and Countries can win in the Digital Economy,* The Boston Consulting Group, January 2012, 7.

[348] Interestingly, this possibility is excluded in many of the Free Trade Agreements recently negotiated by the US. For instance, the US-Korea FTA established that "neither Party may require a service supplier of the other Party to establish or maintain a representative office or any form of enterprise, or to be resident, in its territory as a condition for the cross-border supply of a service." See, *Free Trade Agreement between the United States and the Republic of Korea*, Chapter 12, Art. 12.5.

[349] In 2014, for instance, the Italian government has been on the verge of introducing the so called "Google Tax" on web companies, a tax designed to ensure firms that advertise and sell in Italy do so only through companies with a tax presence. Di Foggia C., *Google Tax, critiche alla tassa made in Italy sui big del web*, 11 November 2013, www.lastampa.it.

[350] On grounds of IP protection, in 2014 Spain introduced the possibility for Spanish media to request monthly fees to search engines (mainly Google) in order to enlisted media articles on Google News. Hern A., *Spain moves to protect domestic media with new "Google tax"*, 31 October 2014, www.theguardian.com.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
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Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

regulate the flow of information from or into their borders for non-economic reasons such as privacy, consumer protection, national security or public morality. These concerns existed well before the development of the internet but are now significantly more important because of the scope and the volumes of the businesses potentially affected. When data flow is put at risk, however, consequences for businesses operating through the internet can be significant.

Regulations and restrictions of this sort, horizontally or more specifically targeted to particular services, are extremely relevant in the context of this study because, insofar as they have an effect on the cross-border trade, they could be subject to the discipline foreseen in the GATS Agreement.

In the first Chapter of this study, the focus has been devoted to investigate the multilateral trade rules applicable to the classification and characterisation of the internet supply of services. This was done, first of all, in order to understand whether or not new internet services are to be subject to the same rules applicable to trade in offline services and, if so, how do they fit within existing pre-internet classification schemes. At the end of the analysis we have concluded that, although supplied through a new and more pervasive technology, absent any specific set of rules or explicit exemptions, services provided through the internet are to be included within the existing GATS discipline and classified in light of their purported "function", rather than their mean of delivery. What was not discussed in the first part of this work was however if the liberalization obligations set forth in the GATS Agreement are relevant and sufficient to guarantee a smooth development of internet services trade.

This second Chapter will then delve more into the details of the GATS discipline in order to evaluate whether and to what extent domestic regulations and restrictions on the cross-border supply of electronic services can be impacted by international trade obligations. Starting with an analysis of the GATS provisions that are horizontally applicable to all the types of service trade regardless of the level of commitments undertaken by each WTO Member - transparency and the most favoured nation obligations[351] - and whose applicability in the context of electronic services is not questionable, we will then delve more into the details of the meaning and extent of the specific GATS obligations on market access and non-discrimination, with a particular focus on those sectors we have identified in Chapter I as

[351] *Infra*, para. 2.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
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Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

being of particular relevance for trade in electronic services[352]. We will then focus also on the still unclear effects for trade in electronic services of the unfinished discipline on domestic regulations, its relationship with the market access provision as also discussed in the WTO jurisprudence, and the potential implications of the conclusion of the undergoing negotiations on Article VI.4[353]. Finally, the last part of the study will be devoted to the analysis of the specific leeway granted through the GATS to deviate from general or specific commitments for public policy reasons. After an analysis of the relevant features of the GATS general exception (Article XIV) and its evolving jurisprudential interpretations[354], we will analyse two specific situations particularly relevant for trade in electronic services (internet filtering in China and the EU data protection system) in which some aspects of the general exception, namely public morality and privacy, could be raised as a justification to apply otherwise discriminatory behaviours[355].

2. The GATS general discipline relevant for the cross-border supply of services

Although not negotiated having e-commerce or the supply of internet services in mind, the GATS Agreement contains a series of general principles applicable to each service sector but particularly relevant for cross-border trade in electronic services. These are included in Part II of the Agreement and refer to the transparency and the most-favoured nation (MFN) obligations.

In theory, these principles apply horizontally regardless of the different specific commitments undertaken by WTO Members. However, since the MFN obligation can, as we shall see, be subject to possible and important derogations whereas transparency applies more consistently to any type of domestic service regulation, we will be dealing here firstly with transparency, and we will then in a second moment turn to the analysis of the MFN principle in the GATS Agreement analysing both its scope and the effects of the MFN exemptions for trade in electronic services.

[352] *Infra,* para. 3.1
[353] *Infra,* para. 3.2.
[354] *Infra*, para. 4
[355] *Infra*, para. 5.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
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2.1 – Procedural transparency obligations

2.1.1 Publication transparency: GATS Art. III

One of the most recurrent, and yet underestimated obligations is the so-called general transparency provision. Broadly, the rationale at the basis of transparency obligations in international trade is that, when a domestic measure is introduced, WTO Members, and those interested stakeholders likely to be affected by said measure, should have a reasonable lapse of time to acquire enough information in order to adapt their practices or, if possible, to seek modifications[356]. Generally speaking, transparency plays a crucial role in international trade as it increases predictability and legal certainty[357]; not surprisingly, it is a recurrent feature of most of the agreements concluded under the WTO umbrella[358]. Particularly in the services realm, such an obligation is important as unclear and not immediately available domestic practices can hinder to a great extent the pattern of trade; indeed uncertainty may favour service suppliers that have an easier access and more familiarity with national regulatory practices (i.e.: domestically established suppliers) to the detriment of businesses operating remotely[359]. This is obviously also true in case of services supplied electronically on a cross-border basis[360].

In the GATS Agreement, the general transparency clause is provided for in Article III; this is included in the General Obligations and Disciplines section of the GATS (Part II) meaning that, theoretically, the obligations stemming from it are to be applied horizontally,

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[356] The rationale of transparency obligations in the WTO framework has been confirmed by the Appellate Body in the *US – Underwear* dispute with reference to the transparency provision in the GATT Agreement (Art. X:II). See, WT/DS24/AB/R, *United States - Restrictions on Imports of Cotton and Man-made Fibre Underwear*, 10 February 1997, 21.

[357] Krajewski M., *National Regulation and Trade Liberalization in Services: The Legal Impact of the General Agreement on Trade in Services (GATS) on National Regulatory Autonomy*, Kluwer Law International, 2003, 124. WT/WGTCP/W/114, *The Fundamental WTO Principles of National Treatment, Most-Favored Nation and Transparency*, Background Note by the Secretariat, 14 April 1999, paras 52-60. Kern A., *The GATS and financial services: the role of regulatory transparency* in *Cambridge Review of International Affairs*, 20:1, 2007, 117-119.

[358] Provisions mandating for transparency in the adoption of domestic measures are found in GATT Art. X, GATS Art. III and VI as well as in the SPS Agreement (Art. 7), the TBT Agreement (Art. 2) the TRIPS (Art. 63.1-63.4), the TRIMs Agreement (Art. 6) and the Agreement on Preshipment Inspection (Art. 2.5-2.8).

[359] Delimatsis P., "Article III GATS, Transparency", in Wolfrum R., Stoll P., Feinäugle C. (eds), *Max Planck Commentaries on World Trade Law, WTO, Trade in Services*, Vol. 6, Martinus Nijhoff Publishers, 2008, 92-93.

[360] Already in 1999, in the context of the Work Programme on Electronic Commerce, the general consensus among WTO Members was that "the obligations of Article III on transparency apply to all laws and regulations affecting the supply of a service through electronic means". See, S/L/74, *Work Programme on Electronic Commerce, Progress Report to the General Council,* 27 July 1999.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
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with no need to look at the sectors where actual liberalization has been granted[361]. Contrary to the similar provision in the GATT[362], GATS Article III on transparency concerns exclusively the obligation to publish and notify domestic laws and regulations ("procedural transparency") and does not delve into the "due administration" aspects of transparency[363]. In this sense, such provision requires WTO Members to promptly make available "all the relevant measures of general application which pertain to or affect the operation" of the Agreement[364]. The use of the term "affect" signals the broad scope of this obligation, which mandates WTO Members to publish all the types of measures that can have, directly or indirectly, an effect on the obligations undertaken under the GATS Agreement[365]. Moreover, Art. III also includes the obligation for each Member to inform the Council for Trade in Services (CTS) of the introduction of any new law or similar capable to affect the specific commitments undertaken under the GATS Agreement[366] as well as to establish national "enquiry points" to provide information to other Members upon request[367].

It is immediately evident how the development of services taking advantage of internet technologies and delivered on cross-border basis relies heavily on the possibility for the supplier to be duly kept abreast of the regulatory evolutions in each national market. However, certain features of the general discipline envisioned in GATS Article III present some drawbacks and unclear points; for instance, the publication requirement (Art. III.1) does not explicitly set forth a specific lapse of time between the publication and the entry into force[368]. On the contrary, it is specifically stated that the publication of an official translation of a regulation affecting trade in electronic services might occur at the same time of its entry into force, without constituting a violation of the GATS. If this might not create concerns for large

[361] The other important horizontal obligation provided in the GATS Agreement, the MFN treatment, is discussed below. *Infra*, para 2.2.1.
[362] Unlike GATS Art. III, the parallel GATT provision includes both publication and administration obligations. This is confirmed already by the article heading "publication and administration of trade regulation" which curiously does not mention the term "transparency". See GATT Art. X.
[363] "Due administration" obligations in the GATS are dealt with in the next paragraph.
[364] GATS Art. III.1.
[365] GATS, Art. XXVIII.c.
[366] GATS, Art. III.3.
[367] GATS, Art. III.4.
[368] The TBT Agreement, for instance, requires WTO Members to allow a "*reasonable interval between the publication of technical regulations and their entry into force in order to allow time for producers in exporting Members, and particularly in developing country Members, to adapt their products or methods of production to the requirements of the importing Member"*. (TBT Agreement, Art 2.12.) An identical wording can be found in the SPS Agreement (Annex B, para. 2).

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
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Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

companies that are usually in the position to monitor the legal developments occurring in each relevant market, the situation might not be as simple for those SMEs that, despite their reduced size, can still reach out distant markets taking advantage of ICT technologies.

Another detail somehow diminishing the transparency provision's reach is the confinement of the notification duty only to those sectors where specific commitments have been undertaken[369] and, among them, only when the measure at issue is supposed to have a *significant effect* on trade in services (Art. III.3)[370]. In addition, the wording of the paragraph mandating for the notification does not seem to imply any possibility for third parties to submit comments or intervene in any way in the decision making process, as it happens, for instance, in the context of the SPS and the TBT committees. On the contrary, the wording of Art III.3 does not mandate for the notification of the measure to the CTS before its entry into force. Finally, with regard to the commitment to establish one or more national "enquiry points" to provide prompt replies to other parties' requests, such a mechanism is only opened on a government-to-government basis, hence interested stakeholders other than institutional ones are not allowed to submit any request[371]. Again, looking at the TBT discipline, the comparison is striking[372].

Overall, the publication transparency provision in the GATS is certainly less demanding than similar WTO requirements for trade in goods. Such difference is probably due to the lack of willingness from WTO Members to embark in burdensome obligations in the service field that, at the time of the negotiations, was still at its first stages of liberalization. The Preamble of the GATS Agreement seems to confirm this interpretation as the need for a transparent management of domestic regulation is mentioned together with the importance of "giving due respect to national policy objectives" and the need to improve liberalization

[369] Cattaneo O., Nelson J., *Regulation of Services Traded Electronically*, OECD Working Party of the Trade Committee, TD/TC/WP(2002)32/FINAL, 11 December 2002, 7. This seems to be at odds with the heading of Part II of the GATS "General obligations and disciplines" under which the transparency provision is included.
[370] Krajewski M., *National Regulation and Trade Liberalization in Services,* cit., 126. Specific guidelines have been adopted by the CTS proposing a common format for WTO Member's GATS notifications. S/L/5, *Guidelines for the Notifications under the General Agreement on Trade in Services*, 4 April 1995.
[371] The possibility to extend such mechanism to private stakeholders was suggested by Japan although in the context of the Working Party on Domestic Regulation (WPDR). See, JOB(03)/45/Rev.1, *Draft Annex on Domestic Regulation, Communication from Japan, Working Party on Domestic Regulation*, 2 May 2003, para. 13.
[372] Pursuant to Art. 10 of the TBT Agreement "Each Member shall ensure that an enquiry point exists which is able to answer all reasonable enquiries from other Members *and interested parties* in other Members […]" (emphasis added).

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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through "successive rounds of multilateral negotiations"[373]. In sum, the publication and notification requirements in the GATS as they are currently shaped cannot be considered as playing an important role in preventing trade barriers to arise, especially when trade in cross-border services is at stake.

2.1.2 Administration transparency: GATS Art. VI 1-3 and 6

As stated above, an important difference exists between transparency obligations in the GATT and the GATS Agreement. As we have seen, in contrast to GATT Art. X, GATS Art. III embraces only those "procedural obligations" related to the prompt publication of domestic measures affecting trade in services without mentioning the due administration principles to be applied *vis-à-vis* foreign services operators. Curiously, the administration aspects of these obligations are dealt with in another key provision of GATS, namely Art. VI. In particular, the obligations related to transparency found therein are the ones enshrined in paragraphs 1-3 and paragraph 6; the other sections of the provision refers to substantial obligations on domestic regulation and, as we shall see, are for the time being of a very limited reach[374].

The first paragraph of Article VI reports a very general obligation for WTO Members to manage the measures affecting trade in services in a "reasonable, objective and impartial manner"[375]. Due to its indefinite wording, the scope of such obligation seems to be left voluntarily to the appreciation of WTO judges that however are asked to rule only on a case-by-case basis. Not surprisingly, the vagueness of this provision has so far prevented WTO Members to successfully invoke its violation. In the *US-Gambling* dispute, for instance, Antigua was not able to make a *prima facie* case that the lack of access for Antigua suppliers to an authorization mechanism for supplying gambling services in the United States amounted to an unfair administration of the measures at issue[376]. The scope of this provision is further

[373] GATS Agreement, Preamble, Recital 2 and 3.
[374] Diebold N.F., *Non-discrimination in International Trade in Services: 'Likeness' in WTO/GATS*, Cambridge, 2010, 30. As it will be broadly discussed, although related to procedural transparency provisions, paragraphs 4 and 5 of GATS Art. VI deal with "regulatory transparency" and "necessity" as they aim at limiting the unnecessary distortive effects of domestic regulation. *Infra*, para 3.2.1.
[375] GATS Art. VI:1. See also, Cattaneo O., Nelson J., *Regulation of Services Traded Electronically*, cit., 7.
[376] WT/DS285/R, *United States – Measures Affecting the cross-border Supply of Gambling and Betting Services,* 10 November 2004, 6.430-6.437.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
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La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

restricted by the fact that the obligation applies only "in sectors where specific commitments are undertaken". As noted by Delimatsis, this suggests that, for all the other sectors, measures of general application, although subject to the publication requirement *ex* Art. III.1, can be applied in a discriminatory manner[377]. This is not the case in the GATT, where administration requirements apply to the same array of measures covered by the publication requirement[378].

Less vague transparency obligations are found in the following two paragraphs of Article VI where WTO Members are asked to have in place adequate judicial tribunals to promptly review the administrative decisions affecting trade in services in an objective and impartial fashion[379] as well as a system requiring administrative authorities to promptly inform service suppliers about the status of the application when this is legally required to supply a specific service[380]. Contrary to the general discipline on publication transparency found in GATS Art. III, the "administrative" provisions aim at benefiting directly foreign suppliers by preventing the possibility for *de facto* discriminatory treatments; indeed, if properly implemented[381], such obligations can have a beneficial effect on cross-border suppliers as in this case private operators are directly involved[382]. Again, however, a more careful look at the wording of both paragraphs reveals that if the "due process" obligation of Art. VI:2 is to be applied regardless of the committed sectors, this is not true for Art. VI:3 where, it is stated, the obligation for the competent authority arises only when "a specific commitment has been made". This could further create confusion as to the exact scope of the rights of private operators and the obligations of WTO Members descending from the GATS transparency provisions.

Finally, a further obligation provided for in Art. VI:6 requires WTO Members to set up adequate procedures to verify the competence of service suppliers when professional services are liberalized[383]. Needless to say that the non-discriminatory effects of this provision

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[377] *Infra*, 2.1.1. Delimatsis P., *Article III GATS, Transparency*, cit., 100 (9).
[378] GATT, Art. X:1 and X:3.
[379] GATS, Art. VI:2(a).
[380] GATS, Art. VI:3.
[381] It has been pointed out that, although in many countries the requirement of Art VI:2 is already fulfilled and, in many cases, it is a matter of constitutional law, other systems may not foresee such a guarantee from administrative decisions, hence the fulfilment of the GATS due process obligation can have a great impact on national regulation. Krajewski M., *National Regulation and Trade Liberalization in Services,* cit., 128.
[382] Delimatsis P., *Article III GATS, Transparency*, cit., 100 (9).
[383] GATS, Art. VI:6. This provision echoes similar measures of the TBT and the SPS agreement requiring product or processes conformity assessment to be undertaken fairly. However, in these cases, the procedural discipline goes much further in details than simply requiring "adequate" procedures. See, TBT Agreement, Art. 5; SPS Agreement, Annex C:1.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
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Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

might be of great relevance when new technologies enable professional services[384] to be delivered cross-border as in these cases the competence of the service providers might be more difficult to prove.

2.2 – The MFN treatment and the Annex on Article II exemption

2.2.1 MFN in GATS as an horizontal obligation

Together with the National Treatment, the Most-Favoured Nation (MFN) is the most important tool employed in trade agreements to achieve non-discrimination, and ultimately trade liberalization, as it requires States to extend the treatment granted to the "most-favoured" partner to all the other parties[385]. Not surprisingly, the GATT 1947 already embraced the MFN principle in its most extensive form, making it general, reciprocal and unconditional[386]. In the trade in goods realm, the MFN clause has been often paralleled with the concept of external non-discrimination, hence concerning only the treatment of those goods entering national borders. Indeed, the MFN clause in the GATT 1947 referred to the charges and the formalities "imposed on or in connection with importation or exportation"[387]

[384] For GATS purposes, professional services are those defined under section 1.A of the W/120 list. They include, among others, engineering, architectural, medical, legal and accounting services.

[385] An analysis of the historical use of the MFN treatment reveals that such a clause was mostly used, in many forms, for socio-political reasons, rather than economic ones, as a "promise" between States to grant each other, or only unilaterally, a favourable treatment. See, Cole T., *The Boundaries of Most Favoured Nation Treatment in International Investment Law,* in *Michigan Journal of International Law,* 33:3, 2012, 543-553. As to the scope of MFN clauses, it has been noted that "there is no commonly used formulation of a clause for MFN treatment. In fact, agreement in treaties on MFN treatment has historically taken many forms to reflect the intentions of the parties" so that "prior to the "codification" in the GATT of the exceptions to the MFN treatment, there were literary investigations as to whether exceptions from the MFN, if not explicitly indicated in the treaty, may nonetheless be inferred on the grounds of overriding national interest (e.g. the protection of public health or public morality) or overriding international public policy (e.g. suspension of the MFN treatment due the imposition by the "League of Nations" of trade sanctions against the beneficiary of the MFN treaty clause)." See, Abu-Akeel A.K., *The MFN as it applies to Service Trade: New Problems for an Old Concept,* in *JoWT*, 33:4, 1999, 103, footnote 1-3. In the WTO context, the MFN clause is considered as one of the two "legs" (the other being the national treatment) to achieve the general "constitutional" principle of the whole system, namely non-discrimination. Picone P., Ligustro A., *Diritto dell'Organizzazione Mondiale del Commercio,* Padova, 2001, 101-103.

[386] GATT, Art. I. MFN clauses can be framed differently in accordance with the willingness and the bargaining power of the parties involved. In particular, MFN clauses can be arranged as one-way or two-ways concessions (unilateral/reciprocal), can concern the benefits extended to certain or to all third countries (determinate/indeterminate, bilateral/multilateral) and can involve all or only certain aspects of trade (specific/general). The MFN clause in the WTO is framed to be as most comprehensive as possible; it is indeed reciprocal, indeterminate, multilateral and general. Picone P., Ligustro A., *Diritto dell'Organizzazione Mondiale del Commercio,* cit., 103-107.

[387] GATT, Art. I.1.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
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as well as to internal taxes and in respect of all laws, regulations and requirements affecting the sale of those products[388].

In the GATS framework no need was felt to specify the type of actions to which the clause was applicable to so that GATS Members are generally supposed to apply a "treatment" no less favourable than they accord to any other country[389], regardless of the sectorial commitments undertaken in each specific service sector[390]. Looking more in depth at the wording of the GATS MFN provision it is possible to identify further differences with the parallel GATT measure; firstly, the scope of the measures covered seems to be greater as these are identified as "any measures covered by this Agreement"[391]; secondly the subjects involved are different compared to the parallel GATT provision. Indeed, while the GATT necessarily requires the MFN treatment to be applied to foreign goods entering national borders, the GATS explicitly includes within the scope of the MFN provision not only services but also services *suppliers*[392]. In these latter respects, the MFN clause in the GATS framework seems to be even more comprehensive than the discipline foreseen for trade in goods. However, as we shall see, other GATS features, such as the possibility for WTO Members to list MFN exemptions[393] and, more importantly, to undertake different sectorial commitment for market access and national treatment[394], risk to outweigh the apparent augmented liberalization effects of the general MFN clause.

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[388] A cross-reference is made to the provisions of GATT Art. III.2 e III.4 (non discrimination).

[389] GATS, Art. II.1. The "no less favourable" wording has been interpreted by the Appellate Body as encompassing both *de jure* and *de facto* discrimination. See, WT/DS27/AB/R, *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, 9 September 1997, paras 231-234.

[390] Similarly to the transparency provision discussed above, the Most Favoured Nation clause of the GATS appears in the "General Obligations and Disciplines" section, hence its applicability is horizontal.

[391] The GATS scope is defined in Art. I:1 as including not only measures involving the cross-border supply, but also other modes. Moreover, the term "measures" in the GATS is defined broadly to include measures taken by local governments as well as non-governmental bodies exercising powers delegated by the government. Matoo A., *MFN and the GATS,* in Cottier T., Mavroidis P., (eds.) *Regulatory Barriers and the Principle of Non-discrimination in World Trade Law: Past, Present, and Future*, University of Michigan, 2010.

[392] Diebold N.F., *Non-discrimination in International Trade in Services: 'Likeness' in WTO/GATS*, cit., 136. It has however been noted that the "likeness" issue inevitably descending from the application of the MFN clause is much more uncertain in case of services/services suppliers than goods as the instruments employed to determine the origin of goods (value added, nationality) are hardly applicable in the services realm. See, Abu-Akeel A.K., *The MFN as it applies to Service Trade: New Problems for an Old Concept,* cit., 116-118.

[393] *Infra,* para. 2.2.3.

[394] *Infra*, para. 3.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
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2.2.2 The consequences of the MFN exemption for trade in electronic services

So far, a comparative analysis between the transparency and MFN provisions of the GATT and the GATS Agreements has revealed a general level of coherence between the two sets of norms, although with minor differences. However, as mentioned above, in the MFN context the GATS has introduced the possibility for WTO Members to deviate from the general MFN obligation by way of listing a series of exemptions in a specific annex[395]. This new feature, entirely absent in the GATT framework, has allowed - and still allows - WTO Members to discriminate among third countries when trade in certain services is at stake[396]. In practice, when no obligations are taken in terms of market access and national treatments[397], listing an MFN exception is enough to justify discrimination in the treatment of services supplied by nationals of different third countries. This is true also when, although certain specific obligations are already undertaken, a WTO Member decides to provide further access to certain suppliers. Even in this case, in presence of a MFN exemption, there would be no obligation to extend the privilege to other parties[398].

The MFN exemptions are regulated through the Annex on Article II Exemptions, attached to the GATS Agreement; pursuant to such annex, the exemptions have to be listed at

[395] GATS Art. II.2 provides that "A Member may maintain a measure inconsistent with paragraph 1 provided that such a measure is listed in, and meets the conditions of, the Annex on Article II Exemptions."

[396] According to Adlung and Carzaniga, the reason for the introduction of the MFN exemptions annex are threefold: firstly, the exemption was needed because of the existence of bilateral treaties not fully compatible with the GATS system; secondly, contrary to the GATT, the need of an exemption was felt because the scope of the possible MFN inconsistencies in trade in services is wider as this involves not only the exchange of final products but also the movement of production factors; thirdly, and more pragmatically, it is maintained that the possibility to list MFN exemptions was a tool requested by the United States to be used as a threat during the negotiations in order to obtain concessions in areas of interest. See, Adlung, R., Carzaniga A., *MFN Exemptions under the General Agreement on Trade in Services. Grandfathers Striving for Immortality?*, in *JoWT*, 12:2, 2009, 359.

[397] *Infra*, para. 3.

[398] This point has been clarified in the Group on Negotiations on Services when it was clearly stated that "A Member taking a national treatment or a market access commitment in a sector must accord the stated minimum standard of treatment specified in its schedule to all other Members. The m.f.n. obligation requires that the most favourable treatment actually accorded in all sectors, whether the subject of a commitment or not, must also be accorded to all other Members. Where an m.f.n. exemption has been granted for a measure, a Member is free to deviate from its Article II obligations, but not from its Article XVI and Article XVII commitments". MTN/GNS/W/164, *Scheduling of Initial Commitment in Trade in Services, Explanatory note,* Group on Negotiations on Services, 3 September 1993, para 14. On this subject see also Matoo A., *MFN and the GATS,* cit., para 3.1 and Abu-Akeel A.K., *The MFN as it applies to Service Trade: New Problems for an Old Concept,* cit., 124 et seq.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
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the time of the accession to the WTO and no other possibility to add more is granted[399]. Furthermore, the Annex foresees a revision from the CTS for those exemptions granted for more than five years[400] and suggests, in any case, long-lasting exemptions not to be maintained for more than 10 years[401]. However, despite of the existence of a discipline for the management of the exemptions, and of a suggested time-frame for an expiration date, many of the exemptions have been listed for an "indefinite" period of time[402] and are thus regularly in place notwithstanding the three CTS revisions undertaken so far[403]. Progresses in the sense of an elimination of the MFN exemptions have not materialized even in the context of the Doha Round discussions where a proposal to collectively eliminate the exemptions has not been welcomed with enthusiasm[404].

Clearly, the reluctance on the WTO Members' side to eliminate a "grandfather" privilege acquired at the moment of the WTO accession is justified by the fact that, even if the MFN exemptions are supposed to be granted to give enough time to adjust their policies to a new legal environment, in reality, those are tabled in order to pursue specific policy objectives. This is evident by looking at the numbers of MFN exemptions tabled by each WTO Members and the time limitation foreseen.

By looking at the numbers and the types of exemptions granted, one can also reason on whether this very specific GATS feature can have a significant impact in creating distorting effects on trade in cross-border electronic services. Indeed, looking at the telecommunication, computer and audiovisual sectors, so the ones considered in the Chapter I as the most relevant for trade in electronic services, one can immediately notice that MFN discriminations exist at least in one of these three areas, namely the audiovisual sector.

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[399] The Annex clearly specifies that any other future requests to give non-MFN treatment can only be met through the WTO waiver procedures provided for in Art IX.3 of the WTO Agreement. See, GATS, Annex on Article II Exemptions, para. 2; see, Matoo A., *MFN and the GATS,* cit., para. 2.

[400] Annex on Article II, paras 3-4.

[401] *Ivi*, para. 6.

[402] Adlung, R., Carzaniga A., *MFN Exemptions under the General Agreement on Trade in Services. Randfathers Striving for Immortality?*, cit., 367.

[403] The revisions have taken place so far in 2000, 2005 and 2011. See, S/C/M/45, *Council Review of MFN Exemptions, Report of the Meeting Held on 5 July 2000,* Council for Trade in Services, 18 August 2000, S/C/M/76, *Report of the Meeting Held on 4 November 2004,* Council for Trade in Services, 4 February 2005, S/C/M/78, *Report of the Meeting Held on 23 February 2005, Council for Trade in Services,* 17 May 2005, S/C/M/102, *Report of the Meeting Held on 17 November 2010,* Council for Trade in Services, 21 February 2011.

[404] "in the negotiations a collective request had been submitted requesting Members to eliminate their exemptions as part of the Doha outcomes. So far, the response to that collective request from Members had been very disappointing." S/C/M/102, cit., para. 9.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
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Significantly, 114 out of 491 total MFN exemptions are tabled in this latter category[405], some of which, not surprisingly, by the European Union. In particular, the European Union's latest services offer still reports nine different MFN exemptions related to the audiovisual services sector, some of them particularly controversial, and none of them mentioning a foreseen expiration date[406].

The sensitiveness of this issue for the EU surfaces also when looking at the discussions within the CTS aiming at reviewing existing MFN exemptions. Significantly, in these contexts, the EU was always keen to remark that the purpose of the review is to "examine whether the conditions that created the exemptions still prevailed" as established by paragraph 4 of the Annex on Article II Exemptions, and not to "provide explanations or to assess the necessity of MFN exemptions in the framework of this MFN review"[407]. In the same fashion, the EU was also very explicit in pointing out that, with regard to the duration of the exemptions, "other questions that are of a more general character including questions that fell within the scope of paragraph 6 of the Annex*,* should be discussed in the context of the Doha negotiations"[408]. As well known, however, no tangible result in the trade in services realm has ever emerged from the Doha Negotiations.

In conclusion, by looking at the types of exemptions listed for audiovisual services and the position maintained to justify them, a unilateral decision from the EU, or from other countries, in the direction of their removal does not seem a viable option, at least in the short term. On the other side, and for the purpose of this study, whether the survival of a substantial number of exemptions on audiovisual services can results in a significant impact on trade in audiovisual services supplied through electronic means is hard to anticipate. After all, the effect of MFN exemptions in a specific service sector cannot but be appreciated in connection

[405] In terms of number of exemptions tabled, audiovisual services are preceded only by transport services. On the other side, only a limited number of exemptions have been requested for telecommunication services and computer services. Adlung R., Carzaniga A., *MFN Exemptions under the General Agreement on Trade in Services. Grandfathers Striving for Immortality?*, cit., 371.

[406] TN/S/O/EEC, *Communication from the European Communities and its Member States, Conditional Initial Offer,* 10 June 2003, 153-165. This list is based on a consolidated schedule comprising the EU25 States, hence excluding only Bulgaria, Romania and Croatia. The spirit of the EU exemptions on audiovisual services is clearly defensive. For instance, one of the most disputed exemptions allows the EU to deviate from the MFN treatment and impose redressive duties "in order to respond to unfair pricing practices, by certain third countries distributors of audiovisual works." As explained by the EU itself in the context of the CTS review, such a measure introduces the possibility for the EU to apply countervailing duties also in the context of services, a possibility not yet regulated in the GATS. S/C/M/102, cit., paras 65-66.

[407] S/C/M/76, cit., para. 144.

[408] S/C/M/102, cit., para. 22, S/C/M/76, cit., para. 18.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
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with the specific commitments on market access and national treatment[409]. It is however undeniable that the possibility for certain WTO Members to maintain discriminatory treatments among foreign suppliers of audiovisual services, whether or not delivered in digital forms, does not improve predictability.

3. The GATS specific obligations on market access, non-discrimination and domestic regulation and their relevance for the supply of electronic services

3.1 - The puzzling interaction between market access, national treatment and domestic regulation in GATS Articles XVI, XVII and VI

3.1.1 The GATS system for specific obligations: market access and national treatment commitments

One of the most striking differences between the GATT and the GATS agreements lie in the possibility for GATS signatories to carefully calibrate, at least to a certain extent[410], the level of openness they are prepared to offer to third country suppliers. Through the schedules of specific commitments it is indeed possible for GATS Members to differentiate the degree of liberalization intended by listing commitments to market access and national treatment in specific sectors[411]. Moreover, for each service sector, such commitments can be further singled out among the four modes of supply[412]. Such a possibility is not offered in the context

[409] An MFN exemption would be of little significance in case no commitments on market access and national treatment are undertaken in the same service sector. On the other side, when specific commitments are undertaken and at the same time a MFN exemption is granted, the GATS Secretariat made clear that "a Member is free to deviate from its Article II obligations, but not from its Article XVI and Article XVII commitments. Therefore, in such cases, a Member may accord treatment in that sector more favourable than the minimum standard to some Members, as long as all other Members receive at least that minimum standard of market access and national treatment appearing in its schedule". S/L/92, *Guidelines for the Scheduling of Specific Commitments under the General Agreement on Trade in Services,* Adopted by the Council for Trade in Services on 23 March 2001, 28 March 2001, para. 21.

[410] Not all the GATS obligations are specific. As discussed above, MFN and transparency principles apply horizontally, although with some exceptions.

[411] See, GATS, Arts XVI and XVII. The GATS Agreement offers a residual possibility in Art. XVIII to identify other commitments different from those envisioned by the two previous paragraphs. Examples of these types of commitments are those related to the Reference Paper on Basic Telecommunications discussed in Chapter I.

[412] See GATS, Art. XVI.1. On the contrary, no reference to the differentiation of commitments through different modes of supply is provided for national treatment obligations; however, the possibility to differentiate them is implicitly confirmed through the WTO Scheduling Guidelines. S/L/92, *Guidelines for the Scheduling of Specific*

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
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of the GATT, where the general principles of quota elimination and national treatment are broadly applicable to all goods[413].

Although only briefly explained in the GATS Agreement[414], the way commitments are to be scheduled by GATS Members has been detailed by the Group of Negotiations on Services during the Uruguay Round[415] and then further revised by the CTS in 2001 when the Doha Round was launched[416]. First of all, it is generally understood that in case a WTO Member does not intend to undertake any type of commitment in a specific service sector, such sector does not need to appear at all in the list of initial offers[417]. Secondly, when limitations are meant to be applied to all sectors, they do not have to be repeated in each and every heading; such limitations are instead to be listed in the specific "horizontal commitments" section, at the beginning of the schedule[418]. Finally, when commitments are meant to be applicable only to specific sectors, the level of liberalization intended needs to be declared for each of the four modes of supply. In this case the term "none" indicates a full commitment in the market access or national treatment columns[419], the word "unbound", on the contrary, signals the lack of liberalization and a list of specific measures indicates the WTO Member willingness to exempt those measures from the general liberalization principle.

As for the meaning of the two specific obligations, curiously enough the GATS Agreement adopts two different approaches to define the scope of market access and national treatment. Market access is not defined specifically in Article XVI of the Agreement where, on the contrary, an exhaustive list of broadly applicable cases is provided, ranging from quantitative restrictions to restriction to foreign equity participation[420]; if Members do not

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Commitments under the General Agreement on Trade in Services, cit., paras 26-35. See also, Krajewski M., *National Regulation and Trade Liberalization in Services,* cit., 77.

[413] See GATT Arts III and XI. Even for agricultural products, the opportunity to impose quantitative restrictions as safeguard measures has been substituted with the possibility to increase customs duty rates. See, *Agreement on Agriculture*, Arts 4.2, 5.4 and 5.5.

[414] GATS, Art. XX.

[415] MTN.GNS/W/164 and MTN.GNS/W/164.Add 1., *Scheduling of Initial Commitments in Trade in Services, Explanatory Note*, Group on Negotiations on Services, 3 September and 30 November 1993.

[416] S/L/92, *Guidelines for the Scheduling of Specific Commitments under the General Agreement on Trade in Services,* cit.

[417] *Ivi*, 25.

[418] *Ivi*, 36.

[419] The GATS Agreement also mandates that, for practical reasons, in case a limitation applies both to market access and national treatment, this only needs to be scheduled under the market access column. GATS, Art. XX:2.

[420] The measures listed comprise four types of *quantitative* restrictions (a - limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test; b - limitations on the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test; c - limitations on the total number of service

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
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schedule specific limitations, measures falling within each one of the cases mentioned in the list of Article XVI.2 cannot be maintained[421] and this apply also when said measures do not create a discriminatory treatments vis-à-vis third countries[422]. Importantly, the CTS guidelines clarifies that if maximum limitations in the number of operators or the contingency upon an economic need test criteria do fall within the measures applicable under market access, those measures that instead set forth minimum access standards (i.e., minimum capital requirements) or other types of access standards (i.e. financial soundness) are excluded from the scope of Article XVI and are instead to be evaluated under Article VI on domestic regulation[423]. However, although this differentiation appears straightforward, uncertainty remains for those measures that although not explicitly defined in Article XVI, effectively - and *de facto* - limit market access[424]; as we will see, the exact scope of market access obligations and its relationship with the domestic regulation provision (Art VI.4 and 5) has fuelled an heated debate also in the realm of electronic services, in the context, again, of the aforementioned *US-Gambling* dispute[425].

When instead domestic provisions do not fall within the list of measures identified for market access limitations but nonetheless insert a discriminatory treatment between foreign and domestic services, these have to be listed in the national treatment column. According to GATS Article XVII, and contrary to the provision on market access, national treatment limitations can be maintained for any type of measures[426] that "modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member"; these can be both market access measures,

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operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test; d - limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test) as well as limitations on *forms of legal entity* (e - measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service) and on *foreign equity participation* (f - limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment). See, GATS, Art. XVI.2.

[421] Krajewski M., *National Regulation and Trade Liberalization in Services,* cit., 82.

[422] S/L/92, *Guidelines for the Scheduling of Specific Commitments under the General Agreement on Trade in Services,* cit, 4.

[423] *Ivi,* 4-5.

[424] Krajewski M., *National Regulation and Trade Liberalization in Services,* cit., 83-84.

[425] *Infra*, para. 3.1.3.

[426] According to GATS Art. XVII.1, national treatment obligations apply to "all measures affecting the supply of services". If such wording is read in conjunction with the definitions of "measure" "supply of services" and "measure affecting trade in services" provided in GATS Art. XXVIII, the scope of national treatment obligations appears to be particularly broad.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
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such as those listed in Article XVI, as well as licencing and qualification requirements, such as those referred to in Article VI.4 and 5[427].

3.1.2 Market access and national treatment barriers to the supply of electronic services

As we have seen, according to GATS Article XVI, limitations on market access can be exclusively based on a specific list of six cases. For this reason, however, each of these cases cannot but be interpreted broadly so to encompass many different possibilities. As far as electronic services are concerned, the number of restrictions available to WTO Members to limit market access can be further narrowed down. Indeed, as broadly discussed in Chapter I, most of the value added of taking advantage of new available ICT technologies resides in the possibility to supply services remotely. Although this does not prevent a service supplier to establish itself in each and every country where it intends to do business, and then provide its services electronically, this cannot be considered as a standard practice. On the contrary, as most of the suppliers of electronic services base their gains on the comparative advantages of not requiring a physical establishment in the consumer's country[428], when looking at market access restrictions to electronic supply of services it is reasonable to focus mainly on those applicable to GATS mode 1 or 2, hence excluding the type restrictions connected to mode 3, such as the limitation on the participation of foreign capital[429]. On the other side, a specific list of cases is not foreseen for national treatment restrictions, so that, in this area, more heterogeneous types of restrictions may surface.

Among the market access and national treatment limitations in sectors relevant for the electronic supply of services, the more frequent types of restrictions to mode 1 and 2 have been identified by the OECD mainly in the requirement of a commercial presence or residency to supply the service. Additional recurrent measures are the requirement of cooperation with/authentication from a domestic-established supplier as well as the exemption,

[427] *Infra*, para. 3.2.1.
[428] By means of example, the most famous provider of social networking services around the world Facebook Inc., owns seven subsidiaries and only four of them physically located outside the United States. It is then not surprising to read that a great portion of the property owned by the company are located within the United States borders. See, Facebook Inc. Annual Report 2013, 84, available at investor.fb.com. In addition, it is sometimes the case that the restrictions scheduled under mode 3 are more burdensome than those envisioned for mode 1 and 2, hence rendering these latter modes more attractive. Cattaneo O., Nelson J., *Regulation of Services Traded Electronically*, cit., 8.
[429] GATS Agreement, Art. XVI(f).

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
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for the foreign supplier operating on a cross-border basis, from various types of public funds[430].

Looking broadly at the schedules of commitments more relevant for the supply of electronic services, restrictions to mode 1 and 2 are not extremely frequent, with a reasonably high number of WTO Members having marked "none" in the specific list for some of the service sectors[431]. Between the two modes of supply, more restrictions are scheduled for the cross-border mode rather than the consumption abroad[432] (see Table IX-A and IX-B below). This however should not lead to underestimate the impact of such barriers; indeed, because of the growing scale of ICT enabled cross-border trade, although their level of restrictiveness remains the same, their impact will inevitably increase.

Table IX-A, Structure of commitments, all Members, MODE 1[433]

Sector	**Total**	**Market Access**			**National Treatment**		
		Full	Partial	Unbound	Full	Partial	Unbound
Business Services							
Legal Services	56	14%	73%	13%	18%	68%	14%
Accounting/auditing/bookkeeping	67	24%	51%	25%	28%	46%	25%
Architectural Services	61	43%	39%	18%	43%	43%	15%
Medical & dental services	49	27%	22%	51%	37%	14%	49%
Data processing services	66	61%	23%	17%	64%	18%	18%
R&D services (natural sciences)	33	73%	9%	18%	73%	12%	15%
Advertising services	51	61%	27%	12%	59%	22%	20%
Management consulting services	62	65%	21%	15%	71%	16%	13%
Communication Services							
Courier services	33	39%	33%	27%	45%	30%	24%
Voice telephone services	76	8%	84%	8%	20%	70%	11%
Private leased circuit services	66	9%	88%	3%	30%	64%	6%
Electronic mail	63	24%	71%	5%	41%	54%	5%
Online info & data base retrieval	65	22%	72%	6%	43%	51%	6%

[430] Cattaneo O., Nelson J., *Regulation of Services Traded Electronically*, cit., 11.
[431] *Ivi*, 9 and Annex I.
[432] See S/C/W/99, *Structure of Commitments for GATS Modes 1, 3 and 3,* Background Note by the Secretariat, 3 March 1999, 2. This somehow confirms the rationale at the basis of the US position discussed in Chapter I favouring the "consumption abroad" as the right mode of supply to identify cross-border electronic services.
[433] S/C/W/99, *Structure of Commitments for GATS Modes 1, 2 and 3,* cit., 6.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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Audiovisual services	19	21%	53%	26%	21%	47%	32%
Educational Services							
Secondary education	34	65%	26%	9%	29%	65%	6%
Adult education	31	65%	32%	3%	61%	35%	3%
Financial Services							
Non-life insurance	74	11%	61%	28%	19%	47%	34%
Acceptance of deposits	80	20%	19%	61%	24%	16%	60%
Lending of all types	79	16%	27%	57%	23%	22%	56%
Trading in securities	71	15%	27%	58%	18%	25%	56%
Tourism Services							
Travel agencies	100	55%	17%	28%	60%	13%	27%
Recreational Services							
Entertainment services	39	44%	8%	49%	46%	8%	46%
News agency services	25	84%	12%	4%	76%	24%	0%

Table IX-B, Structure of commitments, all Members, MODE II[434]

Sector	**Total**[a]	**Market Access**			**National Treatment**		
		Full	Partial[b]	Unbound	Full	Partial[b]	Unbound
Business Services							
Legal Services	56	20%	73%	7%	18%	68%	14%
Accounting/auditing/bookkeeping	67	34%	54%	12%	42%	46%	12%
Architectural Services	61	74%	16%	10%	70%	18%	11%
Medical & dental services	49	47%	49%	4%	51%	41%	8%
Data processing services	66	70%	21%	9%	74%	15%	11%
R&D services (natural sciences)	33	70%	15%	15%	70%	15%	15%
Advertising services	51	65%	27%	8%	63%	25%	12%
Management consulting services	62	69%	23%	8%	76%	15%	10%
Communication Services							
Courier services	33	48%	39%	12%	55%	30%	15%
Voice telephone services	76	38%	53%	9%	22%	68%	9%
Private leased circuit services	66	47%	50%	3%	33%	62%	5%
Electronic mail	63	33%	57%	10%	37%	51%	13%

[434] S/C/W/99, *Structure of Commitments for GATS Modes 1, 2 and 3,* cit., 7.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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Online info & data base retrieval	65	31%	58%	11%	40%	46%	14%
Audiovisual services	19	26%	63%	11%	26%	53%	21%
Educational Services							
Secondary education	34	71%	26%	3%	71%	26%	3%
Adult education	31	65%	35%	0%	61%	39%	0%
Financial Services							
Non-life insurance	74	15%	57%	28%	26%	43%	31%
Acceptance of deposits	80	30%	45%	25%	36%	40%	24%
Lending of all types	79	28%	47%	25%	34%	42%	24%
Trading in securities	71	28%	52%	20%	28%	51%	21%
Tourism Services							
Travel agencies	100	69%	18%	13%	73%	12%	15%
Recreational Services							
Entertainment services	39	85%	10%	5%	85%	8%	8%
News agency services	25	88%	12%	0%	84%	16%	0%

To complement the WTO Secretariat data, the OECD has undertaken a further study highlighting more in depth the situation of mode 1 and mode 2 commitments by breaking down the bindings by service sectors[435]. Although providing the coverage only for a selected number of GATS Members[436] and not including the data from subsequent Members acceding the WTO, the study reveals important features in the sectors more relevant for what we have defined in Chapter I as "new electronic services", namely telecommunication, audiovisual and computer services. For example, with regard to computer services, it shows that although the general level of bindings is high, an important country such India is not bound to any market access or national treatment obligation for mode 1 and 2 on database and data processing services whereas other relevant countries, such as Mexico and Brazil, are not bound at all[437]. As for audiovisual services, the study confirms a general reluctance of many important GATS signatories, with the notable exception of the United States, to bind themselves to provide

[435] OECD, *Electronic Commerce: Existing GATS Commitments for Online Supply of Services*, TD/TC/WP(99)37/FINAL, Working Party of the Trade Committee, 7 December 2000.
[436] The country coverage of the paper is all OECD members (taking the EU as one entity), plus the six non-member observers to the Trade Committee (Argentina, Brazil, Chile, Hong Kong China, Singapore, Slovak Republic) and some other developing economies (Egypt, India, Indonesia, Malaysia, Morocco, the Philippines, South Africa and Thailand).
[437] OECD, *Electronic Commerce: Existing GATS Commitments for Online Supply of Services,* cit., 23 et seq.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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market access and national treatment in the field of radio and television transmission services as well as sound recording[438]. Finally, as far as value added telecommunication services are concerned, the analysis shows a general liberal tendency, although again notable exceptions stand out, for instance, in the case of Egypt and Hong Kong and, although only partially, Chile, Brazil, Thailand[439].

In conclusion, the analysis reveals a variegated and patchy framework in terms of market access and national treatment commitments for the modes of supply more relevant for electronic services. Although one should certainly acknowledge that the existence of limitations in the schedule of commitments does not necessarily amounts to actual *de facto* restrictions, it is also true that the presence of numerous and, more importantly, country-specific requirements risks to undermine the real value added of the cross-border supply of electronic services.

3.1.3 Market access or domestic regulation? The characterization of a zero-ban in US-Gambling

At the time of the GATS negotiations, many more efforts were devoted to set up a practical system to reduce, at least to a certain extent, the level of discrimination and market access for trade in services. As previously mentioned, a framework to discipline the regulatory side of trade in services was only rapidly sketched and a more precise discipline postponed to further, *ad hoc*, negotiations. These, however, never came to a conclusion so that, at the moment, no precise discipline has been negotiated in this regard[440].

Although the rationale at the basis of market access and domestic regulation limitations appears clear, with the former pertaining mainly to quantitative restrictions and the latter dealing with qualitative features of the service at issue[441], due also to the lack of precise discipline for the regulation of trade in services, when looking practically at restrictive

[438] *Ivi*, 40-41.
[439] As far as value added telecommunication services are concerned, India and Chile have no bindings in mode 2 whereas Thailand and Brazil are unbound for mode 1. More limitations applies for Hong Kong whereas Egypt did not undertake any liberalization commitment. OECD, *Electronic Commerce: Existing GATS Commitments for Online Supply of Services,* cit., 70-71.
[440] The status of the negotiations in this regard is discussed below. *Infra*, para. 3.2.1.
[441] Cattaneo O., Nelson J., *Regulation of Services Traded Electronically*, cit., footnote 9 distinguishong between *restrictions* as those relating to market access, and *regulations*, falling instead within Art. VI.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
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national provisions, the boundaries between the two can be blurred. This is particularly important because, in practice, the categorization of a national measure under "domestic regulation" rather than under "market access" results in the application of a much more lenient discipline; on the contrary, to misinterpret this categorization in favour of market access rules risks to result in an illegitimate WTO intrusion into its Members regulatory autonomy, hence going well beyond to what was originally agreed in the GATS framework[442].

The contrast between the two possible interpretations has not only been theoretical; in fact, this has materialized in the context of the *US-Gambling* dispute when the WTO judges had to decide on the exact GATS discipline to be applied to a US ban on foreign gambling services. In this case, the national provisions at stake (the US Wire Act and other measures) were precluding each and every service supplier to provide gambling services remotely, establishing a set of penalties for those caught not in compliance with Federal and State regulations[443]. In examining the claim, both the Panel and the Appellate Body decided that, in "prohibiting the use of at least one or potentially several means of delivery included in Mode 1", the measures at stake constituted a "zero quota' for, respectively, one, several or all of those means of delivery"[444], ultimately declaring that the measure contained "a limitation 'in the form of numerical quotas' within the meaning of Article XVI:2(a) and a limitation 'in the form of a quota' within the meaning of Article XVI:2(c)", hence a market access restriction[445].

The decision of the WTO judiciary to consider the measures at stake a zero quota within the meaning of Article XVI was not probably crucial for the purpose of the specific dispute. Indeed, although in light of the US schedule a violation of the US market access commitments was eventually recognised, other WTO inconsistencies would have probably emerged had the judges considered the measures at stake as falling within the "domestic

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[442] Pauwelyn J., *Rien ne va plus? Distinguishing Domestic Regulation from Market Access in GATT and GATS,* World Trade Review, 4:2, 2005, 133.

[443] Three different US Federal Measures were at the core of the dispute: the Wire Act, the Travel Act and the Illegal Gambling Business Act together with a series of State and territorial measures. See, WT/DS85/2, *United States – Measures Affecting the Cross-border Supply of Gambling and Betting Services,* Request for the Establishment of a Panel by Antigua and Barbuda, 13 June 2003.

[444] WT/DS285/R, *United States – Measures Affecting the Cross-border Supply of Gambling and Betting Services,* cit., para. 6.362; WT/DS285/AB/R, *United States – Measures Affecting the Cross-border Supply of Gambling and Betting Services,* 7 April 2005, para. 259.

[445] WT/DS285/R, *United States – Measures Affecting the Cross-border Supply of Gambling and Betting Services,* cit., para. 6.363; WT/DS285/AB/R, *United States – Measures Affecting the Cross-border Supply of Gambling and Betting Services,* cit., para. 265.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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regulation" realm[446]. This aside, from a strictly legal perspective, the rationale at the basis of the Panel and the Appellate Body decisions has been subject to criticism. For instance, by drawing a comparison between the GATT and GATS provisions on market access and domestic regulation[447], Joost Pauwelyn highlighted that the measures at stake in the *US – Gambling* dispute, although apparently constituting a "zero quota", were instead dealing with the qualitative, and not the quantitative, side of government intervention[448]. Although recognizing that national regulations may retain features of both market access and domestic regulation and hence an overlap may occur, Pauwelyn drew the line between those types of measures suggesting that the formers should be considered as those setting maximum limitations and leaving no space of action for the service supplier while the latters instead are those setting the minimum requirements a service supplier may (or may not) adapt to[449]. Because, in Pauwelyn's view, the US measures were aiming at regulating the *way* gambling services were to be supplied, and not establishing a minimum number of operators, they should have been evaluated in the context of the domestic regulation provision of Article VI, so through an evaluation of the appropriateness of the qualification requirements established by the United States to supply gambling services in their territory[450].

Interestingly, however, this fierce critique has been counterbalanced by diverging, more supportive, interpretations. Indeed, although drawing the same conclusions with regard

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[446] It is argued here that, in any case, the discriminatory traits of the US measures would have led WTO judges to acknowledge that such measures constituted unlawful and unnecessary barriers to trade within the meaning of Article VI.

[447] Domestic Regulation provisions are those identified as requiring minimum standards. In the GATT Agreement these are constituted mainly by the Article III provision on non-discrimination and by the two sets of rules on technical barriers (TBT Agreement) and sanitary measures (SPS Agreement) introducing minimum standards also in case of non-discrimination. Those two sets of norms are paralleled in the GATS agreement by Article XVII on non-discrimination and Article VI on domestic regulation. For a parallel between market access, non-discrimination and domestic regulation provisions in GATT and GATS see, Vranes E., *The WTO and Regulatory Freedom: WTO Disciplines on Market Access, Non-Discrimination and Domestic Regulation Relating to Trade in Goods and Services,* cit.

[448] Pauwelyn J., *Rien ne va plus? Distinguishing Domestic Regulation from Market Access in GATT and GATS,* cit., 136. The same conclusions are reached by Vranes who maintained that "the panel overlooked that the measure at issue did not *per se* prohibit the supply of the services, to which the United States has committed in its schedule; rather, the US measure implicitly *permitted* the supply *by other means*, and thereby actually constituted a qualitative regulation of how the services in question should be supplied". Vranes E., *The WTO and Regulatory Freedom: WTO Disciplines on Market Access, Non-Discrimination and Domestic Regulation Relating to Trade in Goods and Services,* cit., 975-976.

[449] Pauwelyn J., *Rien ne va plus? Distinguishing Domestic Regulation from Market Access in GATT and GATS,* cit., 152-161.

[450] Article VI postulates that licenses, qualification requirements and technical standards should be: "(a) based on objective and transparent criteria, such as competence and the ability to supply the service; (b) not more burdensome than necessary to ensure the quality of the service; (c) in the case of licensing procedures, not in themselves a restriction on the supply of the service". For an analysis of the GATS Art. VI, see *infra,* para. 3.2.1.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
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to the different characteristics of market access and domestic regulation (setting, respectively, maximum or minimum requirements), Delimatsis argued that, in the specific case, the measures that the US was putting in place were not aiming at setting minimum standards so to ensure a certain level of *quality* of the service, but amounted instead to a deliberate market access restriction, (setting a maximum - in this case zero – requirement) adopted in order to protect morality, public order or to avoid frauds[451].

Both the academic interpretations mentioned above are clearly built upon a solid, logical reasoning; they also both start from the same understanding of the functions to be attached to market access and domestic regulations provisions in the GATS Agreement. Instead, the different conclusions reached are the result of the intrinsic difficulties and the remaining overlaps between two GATS provisions[452], both aiming at fostering positive services liberalization, hence also when non-discriminatory (or at least formally non-discriminatory) measures are at stake.

The *US-Gambling* case, and the refusal of the Appellate Body to analyse more in dept the relationship between these provisions[453], remains there to remind WTO Members that, until a clearer interpretation is developed and a more precise discipline on domestic regulation is concluded, a non-discriminatory national measure regulating trade in services needs to comply with more than one GATS provision. Whether this may act as a disincentive for WTO Members to submit additional market access offers, hence further slowing down the already difficult liberalization process, is certainly a question worth asking.

[451] Delimatsis P., *Don't Gamble with GATS: the interaction between articles VI, XVI, XVII and XVIII GATS in the light of the US-Gambling case*, in *JoWT*, 40:6, 2006, in particular 1069-1072.
[452] Vranes E., *The WTO and Regulatory Freedom: WTO Disciplines on Market Access, Non-Discrimination and Domestic Regulation Relating to Trade in Goods and Services,* cit., 976.
[453] In reviewing the Panel's interpretation of Article XVI(c) in light of the US measures, the Appellate Body decided that, for the purpose of the dispute it was not "neither necessary nor appropriate for us to draw, in the abstract, the line between quantitative and qualitative measures, and we do not do so here. Yet we are satisfied that a prohibition on the supply of services in respect of which a full market access commitment has been undertaken is a quantitative limitation on the supply of such services." WT/DS285/AB/R, *United States – Measures Affecting the Cross-border Supply of Gambling and Betting Services,* cit., para. 250.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
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3.2 - Clarifying the scope of domestic regulation in the GATS

3.2.1 Current obligations and the built-in agenda of Art VI:4

So far we have explored the tools and the obligations for services liberalization provided for in the GATS Agreement in the form of market access and non-discrimination commitments and we have also seen that, as far as electronic services are concerned, to discern between market access, non-discrimination and domestic regulations might not be always a straightforward exercise. However, although briefly mentioned, the GATS provision dedicated to domestic regulation, and its impact on trade in electronic services, has not been so far thoroughly discussed[454]. We refer here to domestic regulation as the discipline pertaining to those national measures that are aimed at ensuring the quality of the service supplied and which do not discriminate or constitute quantitative limitations[455], so, in other words, those *origin-neutral* measures purportedly aiming at guaranteeing a certain level of quality in the delivery of a service.

In this sense, the only obligation agreed upon in the GATS Agreement is found in Article VI:5, which has however to be read in conjunction with Art VI:4. Indeed, Art. VI:5 stipulates that "Members shall not apply licensing and qualification requirements and technical standards that nullify or impair such specific commitments". This brief and rather vague statement is then explained more in details through a reference to paragraph 4 where it is clarified that, in general terms, domestic regulations should be "(a) based on objective and transparent criteria, such as competence and the ability to supply the service; (b) not more burdensome than necessary to ensure the quality of the service; and (c) in the case of licensing procedures, not in themselves a restriction on the supply of the service". These incomplete criteria are thus far the only binding yardsticks for the early detection of regulatory arbitrariness and protectionist abuse in the GATS[456] and apply exclusively to those service sectors where specific commitments are undertaken. Moreover, no further guidance has thus far been developed through jurisprudential interpretation because, with the only exception of

[454] The GATS provision on domestic regulation has been so far discussed only in relation with its "administration transparency" parts. See, *infra*, 2.1.2.
[455] Delimatsis P., *Concluding the WTO services negotiations on domestic regulation: hopes and fears*, in *World Trade Review*, 9:4, 2010, 643, footnote 3.
[456] *Ivi*, 645.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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the *US-Gambling* dispute discussed in Chapter I, Articles VI:4 and VI:5 have never been subject to the scrutiny of the DSB[457].

Even if GATS negotiators were keen to adopt a particularly cautious approach with regards to the WTO "intrusion" into national regulatory autonomy[458], they nonetheless mandated the development of a more precise discipline on domestic regulation to further negotiations as part of the so-called "built-in" agenda[459]. Indeed, Art. VI mandates the Council of Trade in Services to negotiate an *ad hoc* discipline "with a view of ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services"[460]. In the mind of the negotiators, this discipline should have served the purpose of avoiding "overly burdensome"[461] regulations for service suppliers that, although not openly discriminatory, might have constituted a disincentive for the foreign supplier to enter a specific market in the same way the TBT and SPS Agreements envisioned for trade in goods[462].

The domestic regulation discipline, when concluded, would have been endorsed by the CTS, with the final goal to be included in the Agreement. This was indeed the path already foreseen – albeit never concluded – for the specific disciplines of the accountancy sector mentioned below[463]. Although not explicitly established within the text of Article VI, scholars are of the view that, once concluded and endorsed by the CTS, the discipline on domestic

[457] WT/DS285/R, *United States – Measures Affecting the cross-border Supply of Gambling and Betting Services,* cit., 6.303-6.307. However, in this context, the analysis of the article VI undertaken by the Panel is only functional to point out the differences between domestic regulation and market access obligations.
[458] The GATS Preamble explicitly recognizes "the right of Members to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives"
[459] The GATS, including its Annexes and Related Instruments, sets out a work programme which is normally referred to as the "built-in" agenda. Besides Article VI:4, other GATS provisions provide for issue-specific negotiations intended to define rules and disciplines for emergency safeguards (Article X), government procurement (Article XIII), and subsidies (Article XV).
[460] GATS, Art. VI:4.
[461] Krajewski M., *National Regulation and Trade Liberalization in Services,* cit., 130.
[462] The first draft version of GATS Article VI mandated for the inclusion of a necessity test similar, but less detailed, to the discipline envisioned in the TBT and SPS Agreement. Such provision however was not retained in the final text. See, MT.GNS/35, *Draft, Multilateral Framework for Trade in Services, Introductory Note by the Chairman on the GNS Negotiations of a Framework Agreement,* 23 July 1990. See also, Wolfrum R., Stoll P.T., Feinaugle C. (eds.), *WTO - Trade in Services*, Max Planck Commentaries on World Trade Law, Martinus Nijhoff Publishers, 2008, 179.
[463] The Decision of the CTS adopting the discipline relating to the accountancy sector unequivocally states that "commencing immediately and continuing until *the formal integration of these disciplines into the GATS*, Members *shall*, to the fullest extent consistent with their existing legislation, not take measures which would be inconsistent with these disciplines". S/L/63, *Decision on Disciplines related to the Accountancy Sector*, Adopted by the Council for Trade in Services on 14 December 1998, 15 December 1998, para 3. (emphasis added)

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
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regulation would be incorporated in the GATS by means of an Annex together with an amendment of Article VI:5[464] thus making it an integral and enforceable part of the Agreement in light of Article XXIX[465]. Another, less likely procedure to include the discipline within the GATS Agreement would be to incorporate it in the form of a Reference Paper that, similar to what already foreseen for telecommunication services, can be integrated into the schedules of specific commitments of WTO Members by means of Article XVIII[466]. This latter approach however does not seem an optimal solution, as it would require each Member to take additional commitments in their schedules, hence leaving the possibility for a heterogeneous application of the discipline.

Although the works for the conclusion of a discipline on domestic regulation started soon after the entry into force of the GATS Agreement, these were firstly aimed at the development of a set of rules dedicated only to the accountancy sector. Such a discipline was effectively concluded in 1998 under the auspices of the Working Party on Professional Services (WPPS), duly established by the CTS to fulfil such purpose[467] and adopted in the same year by the CTS itself[468]. Having achieved its goal, the WPPS was then abolished and replaced by the Working Party on Domestic Regulation (WPDR) with the aim, this time, to develop "any necessary disciplines to ensure that measures relating to licensing requirements and procedures, technical standards and qualification requirements and procedures do not constitute unnecessary barriers to trade in services"[469].

So far, however, the discussions on domestic regulation have proceeded slowly, also because these are implicitly linked to the on-going negotiations on specific commitments[470] and this might have created a vicious circle: on one side, WTO Members might be reluctant to allow for a more "aggressive" discipline in terms of WTO intrusion on domestic regulation when certain trade partners do not guarantee market access in strategic sectors in the first

[464] Delimatsis P., *Concluding the WTO services negotiations on domestic regulation: hopes and fears*, cit., 669.
[465] GATS Art. XXIX stipulates that "The Annexes to this Agreement are an integral part of this Agreement."
[466] As already discussed in Chapter I, GATS Art. XVIII (additional commitments) allows WTO Members to negotiate further obligations that are not already subject to market access and non-discrimination commitments.
[467] S/WPPS/W/21, *Discipline on Domestic Regulation in the Accountancy Sector,* Working Party on Professional Services, 30 November 1998.
[468] S/L/63, *Decision on Disciplines related to the Accountancy Sector*, Adopted by the Council for Trade in Services on 14 December 1998, 15 December 1998.
[469] S/L/70, *Decision on Domestic Regulation*, Adopted by the Council for Trade in Services on 26 April 1999, 28 April 1999, para 2.
[470] Negotiations on specific commitments are undertaken pursuant to GATS Article XIX:2. Wolfrum R., Stoll P.T., Feinaugle C. (eds.), *WTO - Trade in Services*, cit., 180.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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place. On the other side, however, the on-going uncertainty surrounding the exact extent of the discipline on domestic regulation might as well have refrained WTO Members from granting further liberalization[471]. Although not yet reaching a successful and definitive outcome, the WPDR discussions have nonetheless produced a draft discipline[472]. Such initial set of rules focuses on both transparency/procedural issues as well as substantial obligations on qualifications, licensing requirements and technical standards outlining a more precise and, in certain cases, demanding discipline[473].

One important item seems however to be still missing from the draft framework outlined by the negotiators; this is not at all surprising as we are referring here to one of the most thorny issues when it comes to regulatory autonomy, namely the so-called "necessity test"[474]. Although in fact the inclusion of such a "proxy" within the discipline would seem only logical considering the wording of the mandate of Article VI:4[475], a discipline similar to what provided for in the TBT and SPS Agreements for trade in goods has not yet been discussed[476]. This is even more striking if one considers that a similar provision is instead included in the *ad hoc* discipline developed earlier for the accountancy sector[477] that paved the way for the establishment of the WPDR.

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[471] Krajewski M., *National Regulation and Trade Liberalization in Services,* cit., 132.

[472] Room Document, *Discipline on Domestic Regulation Pursuant to GATS Article VI:4,* Working Party on Domestic Regulation, Second Revision, Informal Note by the Chairman, 20 March 2009. See also, S/WPDR/W/45, *Discipline on Domestic Regulation Pursuant to GATS Article VI:4*, Working Party on Domestic Regulation, Chairman Progress Report, 14 April 2011.

[473] For instance, the draft discipline encourages WTO Members to give "due consideration" to the recognition of qualifications acquired in another country (Art. VII, para. 27), although these provisions are not as developed as those included in the SPS Agreement in relation to equivalency and mutual recognition. (i.e.: SPS Agreement Art. 4 and TBT Agreement Art. 2.7).

[474] The Trade in Services division of the WTO Secretariat admitted in 2011 that "the current state of play is characterised by unequal progress concerning various paragraphs of the draft disciplines. On some paragraphs agreement has been reached on an *ad referendum* basis; on others, language proposals have been reduced to a single alternative with brackets, in addition to the Chair's March 2009 text; while for paragraphs, multiple alternatives and language options remain. In addition, the question of whether a normative standard in the form of a "necessity test" should be included into the disciplines *is still to be solved.*" Room Document, *Discipline on Domestic Regulation Pursuant to GATS Article VI:4,* cit, para 21. (emphasis added).

[475] As already mentioned, Article VI.4 mandates for a discipline aiming at ensuring that certain services-related measures " do not constitute *unnecessary* barriers to trade in services". (emphasis added)

[476] Necessity tests are explicitly provided for in Articles 2.2 and 2.5 of the TBT Agreement and Articles 2.2 and 5.6 of the SPS Agreement.

[477] According to the Discipline on Domestic Regulation in the Accountancy Sector, "Members shall ensure that measures not subject to scheduling under Articles XVI or XVII of the GATS, relating to licensing requirements and procedures, technical standards and qualification requirements and procedures are not prepared, adopted or applied with a view to or with the effect of creating unnecessary barriers to trade in accountancy services. For this purpose, Members shall ensure that such measures are not more trade-restrictive than necessary to fulfil a legitimate objective. Legitimate objectives are, inter alia, the protection of consumers (which includes all users of accounting services and the public generally), the quality of the service, professional competence, and the

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
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On one side, the adoption of a necessity clause in the domestic regulation discipline would certainly be consistent with the approach adopted in other WTO areas[478]; on the other side, it is also undeniable that, similarly to what already happening in the SPS and TBT contexts, a necessity test for domestic regulation in services would place a significant burden on national regulators to demonstrate that no other less burdensome solutions exist to secure a certain level of quality to the provision of services. The main problem here boils down to the fact that, contrary to the SPS framework where international standards and risk assessments procedures are based on objective scientific evidence, a yardstick against which a measure related to the quality of services can be tested, and thus a presumption of necessity can be instituted, is much more difficult to detect in the context of trade in services[479]. The risk, and the consequent reluctance of WTO Members to bind themselves to general principles, is to give the DSB a too broad space of manoeuvre to interpret non-discriminatory national measures, thus curtailing somehow WTO Members' regulatory flexibility, but this time without the implicit "blessing" provided by international standard setting organizations.

It is then clear from the above that an agreement on a broad necessity test for domestic regulation of services in the WTO will be difficult to achieve. Although this might be seen as a missed opportunity to empower the WTO with the task of tackling regulatory trade barriers in service sector, the importance of the conclusion of the Art. VI.4 discipline is not to be underestimated. Additional important measures other than the necessity test are indeed under discussions and a positive conclusion of the negotiations might give a significant effect on the compliance to already existing obligations; this is because the draft discipline foresees the establishment of a Committee on Domestic Regulation that, similarly to what is already happening with the SPS and TBT committees, would serve as a valuable forum for WTO Members to engage in discussions and raise concerns with regard to the trade-distorting effects of national regulatory provisions[480]. This might have a positive effect in improving the

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integrity of the profession." S/WPPS/W/21, *Discipline on Domestic Regulation in the Accountancy Sector,* cit., para. 2.

[478] In 2003, the WPDR requested the Secretariat to prepare a background note on necessity tests in WTO agreements. See, S/WPDR/W/27, *Necessity Tests in the WTO*, Note by the Secretariat, 2 December 2003.

[479] Delimatsis P., "Towards a horizontal necessity test for services: Completing the GATS Article VI:4 mandate", in Panizzon M., Pohl N., Sauvè P. (eds), *GATS and the Regulation of International Trade in Services*, Cambridge, 2008, 389.

[480] Chapter XI of the Draft Discipline on Domestic Regulation reads that "The Council for Trade in Services shall establish a Committee on Domestic Regulation to oversee the implementation of these disciplines and the operation of Article VI of the GATS including any further work under Article VI:4 of the GATS". See, Room

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
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transparency and the efficiency of national regulatory measures, included, as we shall see, those affecting cross-border trade in electronic services.

3.2.2 Domestic regulation and electronic services

The relevance for trade in electronic services of the domestic regulation provision, and its corresponding negotiations, might be not immediately intelligible. Indeed, it is probably true that such provision was drafted having in mind the regulatory obstacles related to the physical establishment of a foreign service supplier and the need to avoid that overregulation would have resulted in a strong disincentive for foreign service suppliers to consider establishment in a third country while at the same time withholding the possibility for WTO Members to enact regulatory measures in order to correct market distortions or minimize externalities[481]. However, certain domestic regulations and practices, that might as well fall within the meaning of Art. VI definition, could affect also cross-border trade in services. Furthermore, they can also be specifically targeted at those sectors we have identified as more relevant for the supply of "new" electronic services[482].

Both the Council for Trade in Services and the Working Party on Domestic Regulation have been active in this sense, trying to identify more precisely the array of domestic regulations suitable to fall within the scope of Article VI for each specific service category and mode of supply[483]. This effort has been undertaken, albeit only recently, for all the broad service sectors categories included in the W/120 list, hence also for those sectors and modes of supply more relevant for trade in electronic services.

With regard in general to cross-border trade in services, the main regulatory barrier identified is the local establishment sometimes provided for as a mandatory requirement for a foreign company to be entitled to supply also cross-border services within the national

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Document, *Discipline on Domestic Regulation Pursuant to GATS Article VI:4,* cit., para. 47. See also, Delimatsis P., *Concluding the WTO services negotiations on domestic regulation: hopes and fears*, cit., 661.

[481] S/WPDR/W/48, *Regulatory Issues in Sectors and Modes of Supply,* Working Party on Domestic Regulation, 13 June 2012, para. 11.

[482] In Chapter one we have identified telecommunication, audiovisual and computer services categories in the W/120 list as the most relevant sectors for electronic services.

[483] S/WPDR/W/48, *Regulatory Issues in Sectors and Modes of Supply,* cit.; S/C/W/304, *Cross-Border Supply (Modes 1&2)*, Council for Trade in Services, Background Note by the Secretariat, 18 September 2009; S/C/W/299, *Telecommunication Services,* Council for Trade in Services, Background Note by the Secretariat,10 June 2009; S/C/W/300, *Computer Services,* Council for Trade in Services, Background Note by the Secretariat, 22 June 2009; S/C/W/310, *Audiovisual Services,* Council for Trade in Services, Background Note by the Secretariat, 12 January 2010.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
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borders. This however amounts more to a market access restriction to be evaluated under GATS Article XVI rather than a regulatory provision *ex* Art VI:4. Besides that, the overall perception is that the issues related to domestic regulation are not outstanding for this particular mode of supply, mainly because of the practical difficulties in enforcing any type of licensing or qualification measure to a service supplier when not physically located in its market[484]; however, it is also recognized that, lacking the possibility to intervene on the supply front, it would still be feasible for a government to act instead on the consumer side by discouraging national consumers from buying foreign services not considered as providing the same level of quality required for in-market suppliers[485]. New technologies are and will render this process common and systematic, thus "decreasing the helplessness of governments in cyberspace"[486].

Looking instead more precisely at the relevant service sectors, some electronic service-specific types of regulations can be identified as falling within the scope of Article VI. For instance, in the value-added telecommunication realm, the most important case relates probably to the divergent regulations regarding the different degree of liability for internet service suppliers (the so called "over the top" services) for third party content that are certainly maintained in order to improve the quality of the service but can as well constitute a disincentive if they are too much diverging across countries[487]. In the audiovisual services context instead, among the types of regulations potentially falling within the domestic regulation provision, licensing is at the forefront especially where authorizations remain still anchored to the out-dated television/broadcasting dichotomy and prohibit the provision of the

[484] The GATS Secretariat in this sense recognized that "to deal effectively with cross-border supply, governments might need to have some regulatory reach beyond their borders, to increase coordination with the authorities in the national jurisdiction of the suppliers concerned and to rely to a considerable extend on an expectation that suppliers outside their borders will abide by the laws in the client's jurisdiction" but noting also that "thus far, governments have not proven to be inclined to invent new restrictions on cross-border supply". S/C/W/304, *Cross-Border Supply (Modes 1&2)*, cit., para 34.

[485] S/WPDR/W/48, *Regulatory Issues in Sectors and Modes of Supply,* cit., para 264. Taken to the extreme, this is what happens in case, for reasons of data protection, national consumers are not allowed to access online foreign services. *Infra,* para 5.3.2 discussing the EU Privacy directive.

[486] Wunsch-Vincent S., *Electronic Services: Its Regulatory Barriers and the Role of the WTO,* Doktorandenseminar SS 2001, St. Gallen, July 2001, 11.

[487] Different approaches in different geographical areas may not achieve a desirable balance but instead erect onerous trade-inhibiting barriers. On divergent approaches on ISP liability see, for instance, Farano B.M., *Internet Intermediaries' Liability for Copyright and Trademark Infringement: Reconciling the EU and U.S. Approaches*, TTLF Working Paper No. 14, 2012, available at www.law.stanford.edu. See also, S/WPDR/W/48, *Regulatory Issues in Sectors and Modes of Supply,* cit. para 101.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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service through different networks[488] or limit the availability of movies licenses for a given period of time[489].

All in all, although domestic regulation provisions affecting cross-border trade in electronic services might not be (yet) seen as the most prohibitive trade barrier, the renewed attention of the national legislator toward e-commerce and electronic services coupled with enhanced technological capabilities to monitor the flow of information and the provision of internet services could as well increase the possibility for more burdensome (although non-discriminatory) requirements for suppliers of cross-border services. In this situation it is clear that the lack of a proper discipline on domestic regulation and the difficulties outlined above in concluding the WPDR negotiations would make such new obstacles to trade in electronic services more difficult to tackle, at least in the WTO framework.

4. National policy space *versus* free supply of foreign services: the role of the GATS general exception and its evolving interpretation

4.1 – The rationale at the basis of the general exceptions in the WTO

Sections 2 and 3 above focused on the extant trade obstacles resulting from the so far uncompleted process of multilateral liberalization of service trade and the possible implications for electronic services. As we have seen, many of these restrictions are perfectly coherent with the system envisioned for the GATS liberalization, being merely the result of the lack of willingness from WTO Members to agree of a more systematic – GATT-like –

[488] S/WPDR/W/48, *Regulatory Issues in Sectors and Modes of Supply,* cit. para 111.
[489] The national systems in place for the distribution of licenses for movies can favour certain types of business rather than others. Although non-discriminatory *per se*, such arrangements may make certain markets less attractive for foreign suppliers of audiovisual services. One example in this sense is the licensing system for renting movies in digital format in Italy. According to this system, a movie can be offered for subscription VOD (that is to say, in a package for streaming in exchange for a monthly flat rate) only after 6 years from the first airing in movie theatres. For those services suppliers offering digital content on a flat rate, this means that the offer of movies in Italy for such services cannot but be outdated. Not surprisingly, Netflix, the biggest worldwide provider of subscription VOD services started only recently its operation in Italy. See, Salvioli L., *Per la TV è il momento dello streaming, ma c'è il nodo licenze,* 10 February 2014, available at www.ilsole24ore.com.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
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liberalization and the resulting possibility for WTO Members to exclude – fully or partially – certain sectors from the liberalization obligations[490].

However, market access and national treatment exemptions to otherwise fully liberalized access of foreign services are not the only legal tool available to WTO Members to prevent full liberalization. On the contrary, the whole WTO system offers a series of exceptions, usually applicable retrospectively and regardless of the products or services concerned, actionable at the condition that certain national interests are at stake or specific emergencies occur[491]. As for the GATT Agreement, the derogations actionable in exceptional circumstances are, for instance, those to the principle of the general elimination of quantitative restrictions provided for in GATT Article XI.2, those related to the safeguard of the balance of payments of Article XII and the more general emergency action clause of Article XIX. In the services realm, emergency derogations are foreseen as well in case of balance of payments issues (Article XII). A general emergency safeguard measure is also included in Article X, subject however to further negotiations that never came to any meaningful conclusion[492].

The emergency provisions mentioned above are certainly functional to preserve enough leeway for WTO members in case economically problematic situations arise. Such provisions do not however safeguard the interest of WTO Members to preserve full autonomy in those non-trade areas that might instead be affected in the process of liberalization of trade in goods or services. The need to preserve national policy space in non-trade areas is instead guaranteed through the so-called "general exceptions"; such provisions are found in both the GATT (Article XX) and the GATS (Article XIV) Agreements, albeit in slightly different wordings, and are probably the most frequently employed tolls in WTO litigation[493]. The importance of the general exceptions is also accrued by the fact that no prior WTO

[490] The unconditional exclusion of audiovisual service trade from the EU list of specific commitments discussed above is certainly the clearer example in this sense. Indeed, such a possibility is granted to the EU – as well as to all the WTO Members – by the system of specific concessions, and not in light of a specific exception. *Infra*, para 3.1.

[491] We are excluding here from the scope of the analysis the regional integration exception of GATT Art. XXIV and GATS Art. V because, if implemented in accordance with the requirements set forth in both agreements, these are not supposed to produce restrictive effects on trade. Regional integrations and the relationship with the multilateral trade system will be analysed in Chapter III.

[492] See, Lee, Y.S., *Discussions on safeguard measures in the service trade: GATS Article X,* in *Safeguard Measures in World Trade, The Legal Analysis*, Edward Elgar Publishing, 2014, 183-203; see also, Marconini M., *Emergency Safeguard Measures in the GATS, Beyond Feasible and Desirable,* UNCTAD Working Paper, UNCTAD/DITC/TNCD/2005/4, 9 March 2005.

[493] In WTO litigation to raise one of the clauses of the general exception (either in GATT or GATS) in order to justify not WTO consistent national practices has become almost customary practice for the defending party.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
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authorization is needed to derogate from WTO trade commitments, hence the correct application of the exceptions is reviewable only *ex post* through litigation[494].

Because of their inherent importance in maintaining a balance between free trade and non-trade goals, Article XX - and its GATS counterpart, Article XIV - have been considered as the "cornerstone of the multilateral trading system, allowing for the pursuit of other legitimate non-economic policy goals and, at the same time, avoiding the use of the general exceptions to pursue rent-seeking, protectionist policies, undermining existing obligations and commitments"[495]. However, only the "legitimate non-economic policy goals" included in GATT Article XX/GATS Article XIV exhaustive lists are entitled to take advantage of said protection[496]. Sometime, however, as we shall see for instance in the case of public morality[497], whether or not a national measure fall within the list of said policy goals could be itself a matter of dispute.

4.2 - The general exceptions necessity test: from the least-trade-restrictive approach to a more intrusive weighing and balancing test

We have seen before while examining the WPDR negotiations for a draft discipline on domestic regulation that the inclusion of a necessity test in the Article VI:4 discipline,

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[494] Picone P., Ligustro A., *Diritto dell'Organizzazione Mondiale del Commercio*, CEDAM, 2002, 321.

[495] Cottier T., Delimatsis P., Diebold N., "Article XIV General Exception", in Wolfrum R., Stoll P.T., Feinäugle C., (eds.), *Max Planck Commentaries on World Trade Law – Trade in Services,* cit., 289.

[496] The exhaustive list of reasons available to WTO Members to derogate from GATT general obligations are: (a) public morals; (b) human, animal or plant life or health; (c) importations or exportations of gold or silver; (d) compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, (e) products of prison labour;(f) national treasures of artistic, historic or archaeological value; (g) conservation of exhaustible natural resources (h) pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to the CONTRACTING PARTIES and not disapproved by them (i) involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan; (j) distribution of products in general or local short supply. The array of national policy reasons to derogate from GATS obligations are instead: (a) *public morals or public order;* (b) human, animal or plant life or health;(c) compliance with laws or regulations which are not inconsistent with the provisions of the GATS Agreement including those relating to (i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts; (ii) the *protection of the privacy of individuals* in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts; (iii) safety; (d) equitable or effective imposition or collection of direct taxes in respect of services or service suppliers of other Members; (e) agreement on the avoidance of double taxation or provisions on the avoidance of double taxation in any other international agreement or arrangement by which the Member is bound. As we shall see, the public morality and the privacy exceptions of GATS Article XIV could be of particular relevance for trade in electronic services.

[497] *Infra*, para. 5.1.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
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although probably helpful in highlighting the existence of apparently non-discriminatory national measures that result instead in trade-obstructing effects, is unlikely, the main reason probably being that, unlike the trade in goods scenario, an international standard setting body dealing with standards applicable to services does not exist[498].

In the general exceptions context, on the other side, a necessity test has always existed, has been widely employed and its interpretation has evolved substantially during the years[499]. Indeed, the national measures maintained in violation of WTO commitments can be justified only if *necessary* to achieve one of the public policy goals listed in the GATT Article XX or GATS Article XIV. The necessity tests in GATT and GATS general exceptions have been defined by the WTO Secretariat as reflecting the balance in WTO agreements "between two important goals: preserving the freedom of Members to set and achieve regulatory objectives through measures of their own choosing, and discouraging Members from adopting or maintaining measures that unduly restrict trade"[500].

Although initially adopting a more deferential approach in the appreciation of the necessity of the measures to achieve the national public policy goal, the WTO adjudicators elaborated overtime a more structured and probably intrusive test so that the party recurring to the general exception has found increasingly difficult to justify the necessity of its measures vis-à-vis possible alternative options[501].

Indeed, the initial jurisprudential interpretation of the necessity test was based on the analysis of the appropriateness and effectiveness of the disputed national measure in relation to the final goal pursued (the so-called means-ends test)[502] but was already considering the possible existence of other reasonably available, but less trade-restrictive measures to achieve the same goal. This interpretation was laid down for the first time in the *US-Section 337* case when the Panel clearly stated that "a contracting party cannot justify a measure inconsistent with another GATT provision as "necessary" in terms of Article XX(d) if an alternative

[498] *Infra*, para. 3.2.1.
[499] Repertories of the Appellate Body reasoning on the general exception clauses in GATT and GATS are available at the WTO website page, www.wto.org.
[500] S/WPDR/W/27, *Necessity test in the WTO*, cit., para 4.
[501] It is worth mentioning that the test elaborated by the Appellate Body with reference to GATT Article XX and GATS Article XIV are not immediately applicable to other WTO provisions establishing a necessity test. As recalled by the WTO Secretariat, "in spite of similarities between the wording of necessity tests in different WTO provisions, […] each provision would have to be interpreted in the light of the object and purpose of the Agreement of which it is part." *Ivi,* para. 4.
[502] According to Trachtman, "these tests consider whether the means chosen is indeed a rational means to a purported end". See Trachtman J.P., *Trade and...Problems, Cost-Benefit Analysis and Subsidiarity*, in *EJIL*, 9, 1998, 35.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it" adding that "if a contracting party *could reasonably secure that level of enforcement* in a manner that is not inconsistent with other GATT provisions, it would be required to do so"[503]. This first addition to the original means-ends test placed already a certain degree of discretionary power upon the WTO judiciary to evaluate whether an "alternative measure" could actually achieve the same level of protection of the disputed one[504].

The necessity doctrine evolved again from the least restrictive test, with a shift from a focus to the measure relative to trade effects to the relationship between the measure and the end sought[505]. This shift materialized in the context of the famous *Korea-Beef* case and was then subsequently confirmed in the *EC-Asbestos* dispute when the Appellate Body recognized that, in order to evaluate the consistency with the necessity test of GATT Article XX, an evaluation by the adjudicators of the degree of contribution of the measure to the end sought (*weighing and balancing)* was indispensable[506]. In this light, the measures contributing substantially to reach the stated goal should be generally considered necessary[507], whereas for those merely contributing to this achievement, an evaluation of other factors, such as the extent of the contribution of the measure and the availability of less trade restrictive measures, needs to be undertaken.

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[503] L/6439 - 36S/345, *United States – Section 337 of the Tariff act of 1930*, Report by the Panel adopted on 7 November 1989, 16 January 1989, para 5.26. (emphasis added)

[504] It is maintained that the least-restrictive means approach drove GATT panels to turn with increasing frequency toward different forms of technical expertise in order to identify the optimal economically efficient design for a regulatory measure to achieve a given policy goal. Lang A., *World Trade Law after Neoliberalism: re-imagining the global economic order,* Oxford, 2011, 265-266.

[505] Osiro D.A., *GATT/WTO Necessity Analysis: Evolutionary Interpretation and its Impact on the Autonomy of Domestic Regulation*, in *Legal Issues of Economic Integration,* 29:2, 2002, 129.

[506] WT/DS/169/AB/R, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef,* 10 January 2001; WT/DS/135/AB/R, *European Communities – Measures affecting Asbestos and Asbestos-containing Products*, 5 April 2001.

[507] In the *Korea-Beef* case the Appellate Body clearly stated that "a treaty interpreter assessing a measure claimed to be necessary to secure compliance of a WTO-consistent law or regulation may, in appropriate cases, take into account the relative importance of the common interests or values that the law or regulation to be enforced is intended to protect. The more vital or important those common interests or values pursued, the easier it would be to accept as "necessary" measures designed to achieve those ends. WT/DS/169/AB/R, *Korea-Beef*, cit., para 162. This interpretation was then confirmed in the *EC-Asbestos* case when the Appellate Body recognized the importance of the national common interest pursued by France (health) and ruled in the sense that "France could not reasonably be expected to employ any alternative measure if that measure would involve a continuation of the very risk that the Decree seeks to "halt". Such an alternative measure would, in effect, prevent France from achieving its chosen level of health protection". WT/DS/135/AB/R, *EC – Asbestos*, cit., para. 174.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
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The process of *weighing and balancing* as defined in *Korea-Beef* has been summarized in the context of the *US-Gambling* dispute when the Appellate Body stated that "the process begins with an assessment of the "relative importance" of the interests or values furthered by the challenged measure. Having ascertained the importance of the particular interests at stake, a panel should then turn to the other factors that are to be "weighed and balanced". The Appellate Body has pointed to two factors that, in most cases, will be relevant to a panel's determination of the "necessity" of a measure, although not necessarily exhaustive of factors that might be considered. One factor is the contribution of the measure to the realization of the ends pursued by it; the other factor is the restrictive impact of the measure on international commerce"[508]. Furthermore, the Appellate Body has confirmed in *Brazil-Tyres* that the *weighing and balancing* test "involves a "holistic" weighing and balancing exercise "that involves putting all the variables of the equation together and evaluating them in relation to each other after having examined them individually, in order to reach an overall judgement"[509].

Not surprisingly, the jurisprudential developments in the interpretation of the necessity test in the GATT and GATS general exceptions have been subject to the deep scrutiny and analysis from the academic side[510]. One of the most important criticisms raised against the *weighing and balancing* test is certainly related to the fact that such a reasoning empowers WTO judges to undertake a sort of "proportionality *stricto sensu* test[511] similar to what already established within the European Union, but this probably without the necessary

[508] WT/DS285/AB/R, *US-Gambling*, cit., para. 306.
[509] WT/DS332/AB/R, *Brazil – Measures Affecting the Import of Retreated Tyres,* 3 December 2007, para. 182. Such reasoning has been confirmed ever since, most recently in the context of the *EC-Seals* dispute. WT/DS400/AB/R, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, 22 May 2014, paras 5.204-5.217.
[510] See, among others, Osiro D.A., *GATT/WTO Necessity Analysis: evolutionary interpretation and its impact on the autonomy of domestic regulation",* cit.; Kapterian G., *A Critique to the WTO Jurisprudence on Necessity*, in *ICLQ*, 59:1, 2010, 89-127.
[511] The foundations of the proportionality test in EU jurisprudence are found in the *Fedesa and Others* case when the ECJ identified three steps (appropriateness, necessity and proportionality *stricto sensu*) in the proportionality analysis: "In accordance with the principle of proportionality, which is one of the general principles of Community law, the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question, it being understood that when there is a choice between several appropriate measures recourse must be had to the least onerous, and *the disadvantages caused must not be disproportionate to the aims pursued*." A finding that a measure is disproportionate means that the Member must reduce the level of protection it gives to its pursued interest. This significantly interferes with a Member's domestic regulatory choices. Case C-331/88, *Fedesa and Others* [1990] ECR I-4023, para. 2. (emphasis added)

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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legitimacy to perform such an evaluation[512]. In other words, by analysing and evaluating the importance of specific societal values protected through the general exceptions - and deciding whether these are important enough to allow a more or less degree of departure from international trade law obligations[513] – WTO adjudicators, through the *weighing and balancing* construct, are entering the realm of national policy, a field that "the WTO community has accepted should remain uncompromised by the pursuit of trade liberalization" so that, "provided that the measure fall within one of these legitimate expectations, the goal's relative value [should remain] beyond review"[514].

In practice, this sort of "intrusion" by the WTO adjudicators might not be considered particularly problematic in the eyes of national authorities when domestic policies deviate from WTO obligations, for instance, on health grounds, as this is a societal interest commonly shared by WTO Members. This has been the case in the context of the *EC-Asbestos* dispute, when the Appellate Body was bluntly clear in underlying that "the objective pursued by the measure is the preservation of human life and health through the elimination, or reduction, of the well-known, and life-threatening, health risks posed by asbestos fibres. The value pursued is both vital and important in the highest degree"[515]. In other circumstances, however, the level of convergence with regard to the definition and the importance to be attached to societal values might instead vary significantly, especially when national, cultural and historical heritages play a significant role in shaping diverging definitions and perceptions of the same value across countries, as for instance in the case of public morality. Indeed, as

[512] Picone P., Ligustro A., "*Diritto dell'Organizzazione Mondiale del Commercio*", cit., 328 et seq. The boundaries within the action of the WTO judiciary bodies should be confined does not seem to include the possibility to undertake proportionality evaluations. Indeed, as defined in the Dispute Settlement Understanding *"[…]a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements […]". Understanding on rules and procedures governing the settlement of disputes*, WTO Agreement, Annex 2, (DSU), Art. 11. As noted by Kapterian, "the issue of contention thus arising from the use of the latter three devices [proportionality, balancing test and cost-benefit analysis] when applying the necessity test is whether and to what extent the unelected and unaccountable adjudicating body can and/or should engage in an exercise of "second-guessing" the policies choices of popularly elected national governments". Kapterian G., *A Critique to the WTO Jurisprudence on Necessity*, cit., 100.

[513] This faculty is clearly stated in *Korea-Beef* when the AB reasoned on the *weighing and balancing* principle maintaining that "in sum, determination of whether a measure, which is not "indispensable", may nevertheless be "necessary" within the contemplation of Article XX(d), involves in every case a process of weighing and balancing a series of factors which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, *the importance of the common interests or values protected by that law or regulation*, and the accompanying impact of the law or regulation on imports or exports." (emphasis added). WT/DS169/AB/R, "*Korea –Beef*, cit. para. 164.

[514] Kapterian G., *A Critique to the WTO Jurisprudence on Necessity*, cit., 119.

[515] WT/DS/135/AB/R, *EC – Asbestos*, cit., para. 172.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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discussed below, in these cases, an appreciation and evaluation by an unelected and unaccountable WTO judiciary body of the importance of such values within a given society might then be much more problematic[516].

4.3 - The general exception *chapeau* and its role in preventing *de facto* discriminatory treatments

Within the construct of GATT and GATS general exceptions, necessity - and all its jurisprudential interpretative evolutions – constitutes only the first part of a two-tier test a trade restrictive measure needs to satisfy in order to lawfully deviate from WTO non-discriminatory obligations. The second part of this test is laid down in the preamble – or *chapeau* – of GATT Article XX and GATS Article XIV. Contrary to the necessity step, the second part of the test is considered as representing the expression of *good faith,* and was hence drafted in view of preventing a *de facto* abuse of the exceptions by WTO Members[517].

The Appellate Body has confirmed such interpretation of the *chapeau* wording for the first time in the WTO context on the occasion of the *US-Gasoline* dispute when it stated that "[t]he chapeau is animated by the principle that while the exceptions of Article XX may be invoked as a matter of legal right, they should not be so applied as to frustrate or defeat the legal obligations of the holder of the right under the substantive rules of the *General Agreement*. If those exceptions are not to be abused or misused, in other words, the measures falling within the particular exceptions must be applied reasonably, with due regard both to the legal duties of the party claiming the exception and the legal rights of the other parties concerned"[518]. Later on, this concept has been further specified in the famous *US-Shrimps* dispute when, in line with the general principles of international law, the WTO adjudicators highlighted that "[t]he chapeau of Article XX is, in fact, but one expression of the principle of good faith. This principle, at once a general principle of law and a general principle of international law, controls the exercise of rights by States. One application of this general

[516] *Infra*, para. 5.1.
[517] The preamble subordinates the possibility to derogate from WTO obligations "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 the same conditions prevail, or a disguised restriction on international trade". GATT Article XX, Preamble. The same wording is provided in the correspondent GATS Article XIV.
[518] WT/DS2/9, *United States – Standards for Reformulated and Conventional Gasoline*, 20 May 1996, 22.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
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principle, the application widely known as the doctrine of *abus de droit*, prohibits the abusive exercise of a State's rights and enjoins that whenever the assertion of a right "impinges on the field covered by [a] treaty obligation, it must be exercised bona fide, that is to say, reasonably." An abusive exercise by a Member of its own treaty right thus results in a breach of the treaty rights of the other Members and, as well, a violation of the treaty obligation of the Member so acting"[519].

The main difference between the necessity test and the requirement set forth in the preamble lies in the fact that the latter evaluation is not on the merit of the national measure but should instead been undertaken taking into account the *way* a measure is actually enforced to achieve a specific policy goal[520]. This makes possible for a measure justified under one of the policy goals to survive the necessity test but to be then rejected because of violation of the *good faith* requirement of the *chapeau*.

As a matter of fact, although the objective and the rationale at the basis of the *chapeau* appear clear, Article XX does not provide for further clarifications on the legal interpretative routes to be followed by adjudicators to interpret the *good faith* clause[521]. Similarly to the necessity test analysed above, it has been in fact up to the WTO adjudicators to clarify its correct interpretation. However, although the *chapeau* wording has been interpreted by the Panels and the Appellate Body several times in the past[522], an explicit explanation of the reasoning to be applied to interpret its terms has been formally elaborated only relatively recently, in the *Brazil-Tyres* dispute[523]. In this context, when reasoning on the lawfulness of an exception granted to certain importers from the general Brazilian ban on the import of

[519] WT/DS58/AB/R, *United States – Import Prohibition of Certain Shrimp and Shrimp Products,* 12 October 1998, para. 159.
[520] This was established by a GATT 1947 dispute in 1983 when the Panel noted that "the Preamble of Article XX made it clear that it was the application of the measure and not the measure itself that needed to be examined". L/5333 - 30S/107, *United States – Imports of Certain Automotive Spring Assemblies,* Report of the Panel adopted on 26 May 1983, 11 June 1982, para 56. The same approach was subsequently endorsed by the WTO Appellate Body in the *US-Gasoline* dispute when it was stated that "[t]he chapeau by its express terms addresses, not so much the questioned measure or its specific contents as such, but rather the manner in which that measure is applied". WT/DS2/9, *United States – Standards for Reformulated and Conventional Gasoline*, cit., 22.
[521] In particular, the meaning to be attached to the concepts of "arbitrary and unjustifiable discrimination" and "prevailing same conditions", (including their interpretative difference with the non-discrimination provisions) is not immediately intelligible from the *chapeau* wording. See, Davies A., *Interpreting the Chapeau of GATT Article XX in Light of the "New" Approach in Brazil-Tyres*, in *JoWT*, 43:3, 2009, 519-520
[522] It has been argued that the same reasoning was already implicitly applied in the context of the *US-Gasoline* and the *US-Shrimps* disputes. Davies A., *Interpreting the Chapeau of GATT Article XX in Light of the "New" Approach in Brazil-Tyres*, cit., 519-520.
[523] WT/DS332/AB/R, *Brazil – Measure Affecting Imports of Retreated Tyres*, cit.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
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retreated tyres, the Appellate Body clearly stated that "the analysis of whether the application of a measure results in arbitrary or unjustifiable discrimination should focus on the cause or rationale given for the discrimination" concluding that "there is arbitrary or unjustifiable discrimination […] when a Member seeks to justify the discrimination resulting from the application of its measure by a rationale that bears no relationship to the accomplishment of the objective that falls within the purview of one of the paragraphs of Article XX, or goes against this objective"[524].

In other words, according to the Appellate Body, each and every derogation from a domestic measure already justified through one of the general exception policy goals is to be considered as an "arbitrary and unjustifiable discrimination" if no reason strictly related to the policy goal pursued can be invoked for such deviation[525]. More importantly for what we will discuss below, the Appellate Body has also ruled that, as a matter of principle, in evaluating the justifiability of a measure under the *chapeau*, no consideration needs to be attached to the fact that a derogation to the policy measure might not result in significant consequences for the policy goal pursued or for trade. The applicability in the *chapeau* analysis of such a "quantitative" balancing exercise has been indeed explicitly refused and criticized by the Appellate Body[526].

[524] In the case at hand, a ban on the import of retreated tyres was waived only for certain types of imports as a result of a national court injunction. *Ivi*, paras 246-247.

[525] Such an interpretation seems to satisfy also the "same prevailing conditions" requirement as the lack of same conditions between countries can be raised as a reason to justify a deviation from the national policy measure, hence making said deviation "justifiable". However, as recalled recently by the Appellate Body, the "conditions" to be analysed in the context of the *chapeau* are only those related to the policy goal at issue. In the recent *EC-Seals* dispute, the AB has reiterated that "the identification of the relevant "conditions" under the *chapeau* should be understood by reference to the applicable subparagraph of Article XX under which the measure was provisionally justified and the substantive obligations under the GATT 1994 with which a violation has been found. If a respondent considers that the conditions prevailing in different countries are not "the same" in relevant respects, it bears the burden of proving that claim" WT/DS400/AB/R, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, cit., para 5.301.

[526] In its reasoning, the Appellate Body explicitly rejected the Panel's "quantitative approach" purporting that a discrimination should not be characterized as "unjustified" if its impact is not "significant". In this regard the AB stated that: "analysing whether discrimination is "unjustifiable" will usually involve an analysis that relates primarily to the cause or the rationale of the discrimination. By contrast, the Panel's interpretation of the term "unjustifiable" does not depend on the cause or rationale of the discrimination but, rather, is focused exclusively on the assessment of the *effects* of the discrimination. The Panel's approach has no support in the text of Article XX and appears to us inconsistent with the manner the Appellate Body has interpreted and applied the concept of "arbitrary or unjustifiable discrimination" in previous cases" WT/DS332/AB/R, *Brasil - Tyres,* para. 229.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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5. The impact of GATS rules in "regulating" the cross-border flow of information through the internet: internet filtering and data protection

5.1 - Public morality and public order as reasons to justify censorship

5.1.1 The public moral exception: historical background

As discussed, the general exception clauses enshrined in both GATT and GATS Agreements provide an important leeway for WTO Members to deviate, under certain circumstances, from horizontal or specific multilateral trade obligations. Although, technically, all the items included in the exhaustive list of policy goals[527] can be invoked regardless of the products or services at stake, one of the specific items in the list, the public morality exception, is certainly more likely than others to be invoked in the context of trade in electronic services. The safeguard of public order or public morality can be indeed one of the most important reasons to be advanced as justifications for a restriction to the cross-border flow of information, being this through books, traditional media or ICT technologies.

The public morality clause has been a recurrent feature of trade agreements well before the conclusion of the GATT 1947. A similar waiver can be in fact traced back already in previous international agreements such as the "International Convention Relating to the Simplification of Customs Formalities"[528] signed in 1923 and concluded for the purpose of giving effect to the principle of the equitable treatment of commerce laid down in Article 23 of the Covenant of the League of Nations[529]. Indeed, in the protocol attached, the Parties acknowledged that the obligations descending from the Convention did not "in any way affect those which they have contracted or may in future contract under international treaties or agreements relating to the preservation of the health of human beings, animals or plants (particularly the International Opium Convention), the protection of *public morals or*

[527] *Infra,* para 4.1.
[528] International Convention Relating to the Simplification of Customs Formalities, in *The American Journal of International Law*, 19:4, Supplement: Official Documents (Oct., 1925), 146-166.
[529] "Subject to and in accordance with the provisions of international conventions existing or hereafter to be agreed upon, the Members of the League: […](e) will make provision to secure and maintain freedom of communications and of transit and equitable treatment for the commerce of all Members of the League. *The Covenant of the League of Nations,* Article 23.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
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international security"[530]. A more structured "GATT-like" public morality exception was laid down not long after in the "International Convention for the Abolition of Import and Export Prohibitions and Restrictions"[531] when the Parties elaborated for the first time a wording similar to the GATT *chapeau* and listed public order and public morality among the legitimate reasons to depart from the obligations laid down in the Convention[532]. In that occasion, the drafting Committee was of the opinion that such waivers were not only compatible with international trade, but indispensable for a correct management of international trade practices[533].

With the entry into force of the GATT 1947, the public moral clause has become a standard practice in many other international trade and economic integration agreements, with its wording most of the time echoing the GATT formulation or making even an explicit reference to it[534]. Such clause has been also included in other types of international agreements not dealing specifically with trade liberalization[535] or establishing deeper forms of integration[536].

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[530] Protocol to the International Convention Relating to the Simplification of Customs Formalities, in *The American Journal of International Law*, cit., para. 1

[531] Convention for the Abolition of Import and Export Prohibitions and Restrictions, in *The American Journal of International Law*, 25:3, Supplement: Official Documents (Jul., 1931), 121-145.

[532] "The following classes of prohibitions and restrictions are not prohibited by the present Convention, on condition, however, that they are not applied in such a manner as to constitute a means of arbitrary discrimination between foreign countries where the same conditions prevail, or a disguised restriction on international trade: 1. Prohibitions or restrictions relating to public security. 2. Prohibitions or restrictions imposed on moral or humanitarian grounds […]. *Ivi*, Art. 4.

[533] Charnovitz S., *The moral exception in trade policy*, in *Va. J. Int'l L.*, 38, 1998, 10.

[534] The Stockholm Convention establishing the *European Free Trade Association* (EFTA) includes a wording similar to GATT Art. XX, although less detailed. *Convention establishing the European Free Trade Association* (EFTA), Art. 12(a), January 4, 1960. The North American Free Trade Agreement (NAFTA) even makes an explicit reference to GATT Art. XX: "GATT Article XX and its interpretative notes, or any equivalent provision of a successor agreement to which all Parties are party, are incorporated into and made part of this Agreement". *North American Free Trade Agreement*, Chapter 21, Art. 2101, December 17, 1992. The public moral clause is a recurring feature of more recent FTAs negotiated by the EU or the US, but also in those concluded by Asian countries. Wu M., *Free trade and the protection of public moral*, in *Yale Journal of International Law*, 33, 2007, 221- 222.

[535] The clearest example in this sense is found in the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), where public moral reasons can be raised as a justification for a restriction to the enjoyment of certain rights established in the Convention (right to respect private life and family, freedom of thought conscience and religion, freedom of expression, freedom of assembly and association). *ECHR*, Arts 8.II, 9.II, 10.II, 11.II.

[536] The Treaty on the Functioning of the European Union provides a waiver to the free trade rules of the Customs Union similar in its wording to the one found in GATT Art. XX: "The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of *public morality, public policy or public security*; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States". *TFEU*, Art. 36. (emphasis added)

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
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Unfortunately, the GATT (and then the WTO) discussions on the public morality clause were never examined in depth during the negotiations so that the initial formulation proposed by the United States was adopted in the final text[537]. The lack of further discussions could be interpreted as meaning that the "founding fathers" of the GATT Agreement shared the same understanding of public morality so that any further discussion on this was considered superfluous[538]. It resulted that, notwithstanding the rather extensive diffusion of the public moral exception in international law practice, because of their characteristic brief wording and the lack of a list of exhaustive circumstances falling within such definition[539], subsequent agreements do not provide any useful guidance for a better understanding of the meaning and the scope to be attached to this concept. Moreover, it should also be noted that even a comparison among the jurisprudential interpretations provided by the judiciary bodies established through different international instruments – as for instance the EU treaties and the ECHR – cannot constitute an ideal solution, because not easily transferrable to the WTO context. This is because, most of the times, said adjudicators are provided with different degree of legitimacy by the parties, hence the level of deference in the interpretation of delicate national policy interests and societal values cannot but vary significantly.

It results that the legal reasoning employed to give meaning to the concept of public morality as defined in the GATT and the GATS Agreements, and more importantly, the level of deference to be left on the parties in defining such concept, cannot be based on jurisprudential interpretations elaborated in different contexts. However, despite its - at least theoretical - importance, for many years the public moral exception has been dormant and, consequently, GATT and WTO judges lacked the occasion to rule on this specific clause[540]. Only relatively recently the Appellate Body was faced with the task of elaborating a jurisprudential interpretation of this concept in the context of the already mentioned *US-Gambling* and the *China-Audiovisual* disputes, but also in the more recent *EC-Seals* case. As we shall discuss below, the interpretation given in these occasions, although maybe

[537] One of the very few comment regarding the meaning to be attached to the public morality clause was raised by the Norwegian delegation, arguing that such a waiver should have served the purpose of avoiding the excessive exchange of alcoholic beverages in view of promoting abstinence. S. Charnovitz, *The moral exception in trade policy*, cit., 8.

[538] This point can be further reinforced in consideration of the fact that only 23 nations signed the first GATT 1947 Agreement.

[539] Mavroidis P. *The General Agreement on Tariffs and Trade: a commentary*, Oxford, 2005, 208-209.

[540] This was in stark contrast with the extensive use made by the Parties of other clauses of Article XX. Feddersen C.T., *Focusing on substantive law in international economic relations: the "Public Moral of GATT's Article XX(a) and "conventional" rules of interpretation*", in *Minn. J. Global Trade,* 7:75, 1998, 85.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
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controversial, can help in shading lights on the relevance of such clause for trade in electronic services, with particular regard to internet filtering.

5.1.2 What moral?

We have discussed above the main features of the two-tier test elaborated in the WTO jurisprudence highlighting the reasoning at the basis of the necessity test and the good faith provision of the *chapeau* and investigated how the Appellate Body has evaluated the legality of a domestic measure in relation to the policy goal pursued. What has not been discussed so far is instead the possibility of the existence of diverging opinions with regard to the meaning to be attached to the policy goals listed in the general exceptions. If this might only be a theoretical problem for most of the goals listed in GATT Article XX[541], this exercise could be more problematic for those broadly defined policy goals, such as – precisely - public morality, whose definition or boundaries may be perceived differently when social, cultural and historical values vary. This is exacerbated by the fact that no additional clarification is provided in the WTO as to the meaning of public morality nor a list of circumstances falling within such definition is outlined[542].

It goes without saying that the larger the scope of the definition of morality, the broader the chances for a WTO Member to deviate from trade liberalization obligations[543]. More importantly, and lacking any clear definition, no further indication is provided in the Agreements as to whether, in case of a dispute, the burden of defining what public morality means rests on the WTO judges, the defendant or the complainant. The main question is then, probably, *what* morality the WTO covered agreements refer to, so, in other words, whether for WTO purposes this concept should be defined unilaterally or universally.

As we have seen, the WTO texts do not seem to provide any further help in defining the boundaries of public morality nor in solving the problem of the allocation of responsibilities for the definition of such concept. A preliminary, albeit very general,

[541] For instance, the meaning of "human, animal or plant life or health" is difficult to dispute as the concept of health and life are universal and do not vary among different societies. What can instead vary is the level of protection each State decides to grant to its citizens. See, Marwell J.C., "*Trade and morality: the WTO public morals exception after gambling*" in *New York University Law Review*, 81, 2006, 816.
[542] Charnovitz S., *The moral exception in trade policy*, cit., 8.
[543] Mavroidis P. *The General Agreement on Tariffs and Trade: a commentary,* cit., 208.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
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guidance can however be found in WTO jurisprudence, precisely in the context of the *EC-Hormones* dispute, when the Appellate Body firmly stated that "merely characterizing a treaty provision as an "exception" does not by itself justify a "stricter" or "narrower" interpretation of that provision"[544]. In the same dispute, albeit when interpreting the SPS Agreement provisions, the WTO judiciary body also recognized the interpretative principle of *in dubio mitius* by recalling that "if the meaning of a term is ambiguous, that meaning is to be preferred which is less onerous to the party assuming an obligation, or which interferes less with the territorial and personal supremacy of a party, or involves less general restrictions upon the parties"[545]. Besides that, however, no further and more specific guidance have been developed for the definition of the public morality concept.

Essentially, the definition of *what* is public morality in the WTO context seems to be strictly linked to the identification of the subjects entitled to define it. Following this line of though, three possible scenarios can be foreseen. If one thinks, first of all, to public morality as a concept encompassing a series of values that are universally and evenly accepted around the globe, it could be reasonable to expect WTO judges to be entitled to define what circumstances can be encompassed within this concept and what are instead to be left out[546]. If instead public morality is perceived as a series of values shared by the majority of the WTO Members, it would make sense, in case of a dispute, to define the concept on the basis of the opinion of the majority of WTO Members, and regardless of the position of the defending party[547]. Lastly, if one believes that public morality cannot be universally defined, when the

[544] WT/DS26/AB/R, *European Communities - Measures Concerning Meat and Meat Products (Hormones),* 16 January 1998, para 104.
[545] *Ivi*, para. 165, footnote 154. Charnovitz S., *The moral exception in trade policy*, cit., 7.
[546] Criticism can however be raised against this interpretation. First of all, such reasoning would probably end up in recognizing only a handful of principles as falling within the public morality realm; more importantly, from a strictly practical point of view, if already widely shared among its members, such principles would not need to be protected through state intervention, hence rendering the exception itself redundant. Wu M., *Free trade and the protection of public moral*, in *Yale Journal of International Law*, cit., 215. In rejecting the universal approach, Diebold maintained that, "imposing a internationally uniform definition of morals and order […] would be contrary to the object and purpose of Articles XIV(a) and XX(a) GATT" concluding that "an international interpretation that fails to protect the substantive values of individual Members would render the morals and order exceptions largely ineffective, turning it into a toothless tiger". Diebold N., *The Morals and Order Exceptions in WTO law: Balancing the Toothless Tiger and the Undermining Mole,* in *JIEL,* 11:1, 2008, 55-56.
[547] This approach is only apparently more balanced that the previous, universal one, as it could give rise to the opposite effect. By emphasizing the "rightfulness" of certain public morality goals, this time however not all shared by the unanimity of the WTO parties but "only" by a majority, such interpretation would give priorities to certain policy goals over the others. This could result in eventually give the impression that WTO members are

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
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exception is raised by the defendant, deference should be applied by the WTO judiciary and the complaining parties.

Looking, merely for ease of reference, to the case law developed in the context of different international organizations, the judiciary bodies seemed to have favoured traditionally to the latter interpretation. This was, for instance, the rationale at the basis of the decision of the European Court of Human Rights (ECtHR) in the *Handyside v. United Kingdom* case of 1976 when, in balancing the rights to censorship against the freedom of expression, the Court ruled that "the view taken by their respective laws of the requirements of morals *varies from time to time and from place to place*, especially in our era which is characterized by a rapid and far-reaching evolution of opinions"[548]. A similar, but more straightforward conclusion was reached this time by the European Court of Justice (ECJ) in the *Regina v. Henn and Darby* case when it was stated that "under the first sentence of Article 36 of the EEC treaty it is in principle for each Member State to determine in accordance with its own scale of values and in the form selected by it, the requirements of public morality in its territory"[549]. Although, as mentioned above, reference to judiciary interpretations developed in the context of organizations other than the WTO should be handled with great care, it is remarkable that in both cases the Courts have ruled in favour of an unilateral interpretation notwithstanding the fact that more significant cultural and historical similarities existed among the parties participating in these organizations (EEC and ECHR) than among WTO Members.

5.1.3 The WTO case law on public morality

In the WTO context, adjudicators have been so far faced with the task of interpreting the public morality clause only in three occasions. This happened for the first time in 2004 when the US raised the public morality exception in order to justify discrimination on the treatment of foreign based gambling services operators in the context of the already discussed *US-Gambling* case[550] on the basis that the provision of *online* gambling services had

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legitimized to adopt measures aimed at the protection of third parties citizens. Wu M., *Free trade and the protection of public moral*, cit., 241. See below for the discussion on outwardly directed measures.

[548] ECtHR, *Handyside v. United Kingdom (dec.),* no 5493/72, December 7, 1976, para 4. (emphasis added).

[549] ECJ, *Regina v. Henn and Darby*, C-34/79, Judgment of the Court of 14 December 1979, summary, para 2.

[550] Clearly, in this case, the general exception clause invoked by the US was GATS Art. XIV. Such a clause mirrors for the most part the original GATT Art. XX exception, especially as far as the *chapeau* provision is

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
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implications related to organized crime, money laundering, frauds, public health and protection of minors[551]. In its first interpretation, the reasoning of the Panel seemed to adhere, at least in general terms, to the positions already analysed in the context of the ECJ and the ECtHR, keener to accept a unilateral definition of morality. In particular, the judges stated that the concept of public morality "can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values" adding that "Members *should be given some scope to define and apply for themselves the concepts of "public morals" and "public order*" in their respective territories, according to their own systems and scales of values"[552] but failing to outline more in details the concept of "prevailing" values and to indicate how the importance of such values for the community should be evaluated internally[553].

Moreover, although particularly straightforward, this initial definition does not seem to be coherent with the subsequent steps of the panel's reasoning[554]; indeed, before positively considering the possibility for gambling activities to be limited for reasons of public morality, the Panel looked into the practice of other States highlighting that "other jurisdictions have accepted that gambling activities could be limited or prohibited for public policy considerations, in derogation of general treaty or legislative rules"[555] and, only then,

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concerned. However, one of the most important differences lies precisely in how the concept of public morality is shaped. The GATS clause indeed provides for the possibility to deviate from GATS obligations not only for reasons of public morality, but also to maintain *public order.* However, in a footnote, it is specified that the *public order* exception is actionable only when "a genuine and sufficiently serious threat is posed to one of the fundamental interests of society". Diebold N., *The Morals and Order Exceptions in WTO law: Balancing the Toothless Tiger and the Undermining Mole*, cit., 13 et seq. It is worth noting that no clear-cut boundaries have been drawn between the concept of public morality and public order. On the contrary, in the *US-Gambling* case, the Panel explicitly recognized that some overlaps exist between the two concepts as public order "refers to the preservation of the fundamental interests of a society, as reflected in public policy and law" and these interests "can relate, inter alia, to standards of law, security and *morality*". WT/DS285/R, *US - Gambling*, para. 6.467 (emphasis added). For an analysis of the public order and public moral exception in GATS Art. XIV see, Cottier T., Delimatsis P., Diebold N., *Article XIV – General Exception*, cit., 287-328.

[551] WT/DS285, *United States – Measures affecting cross-border supply of gambling and betting services,* Executive summary of the second written submission of the United States, January 16, 2004, para 37.

[552] WT/DS285/R, *United States – Measures Affecting the cross-border Supply of Gambling and Betting Services,* cit., para. 6.461. (emphasis added) In addition, by making reference to the *Korea-Beef* and the *EC-Asbestos* cases the Panel also noted that the AB jurisprudence have repeatedly recognized the right for WTO Members applying similar societal concepts, "to determine the level of protection that they consider appropriate".

[553] It has been maintained that the Panel also failed to clarify whether it is sufficient for a WTO Member to state the importance of a public morality need in the course of the dispute or, in order to be considered legitimate, such position needs instead to be backed by more hard evidence, i.e.: opinion pools, parliamentary documents and so on. Wu M., *Free trade and the protection of public moral,* cit, 233. As discussed immediately below, this point seemed to have been addressed more consistently in the more recent *EC-Seals* dispute.

[554] Marwell J.C., *Trade and morality: the WTO public morals exception after gambling*, cit., 817.

[555] The Panel examined more in depth the cases specifically related to internet gambling in a footnote when stating that "In view of technological developments, a number of countries have developed – or are in the

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
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concluded that "measures prohibiting gambling and betting services, including the supply of those services by the Internet, could fall within the scope of Article XIV(a)"[556]. Absent any further clarification in this regard, and following the Panel's reasoning, one could wonder whether the failure to pinpoint at similar practices in other States would have led to a different conclusion with regard to the applicability of the concept of public morality to national measures limiting the supply of online gambling services.

The second case involving public morality was instead raised in the context of a more complicated dispute between China and the United States, involving both the GATT and the GATS Agreement for the allegedly discriminatory treatment enacted by China toward foreign audiovisual products and related services. In this case, the public morality exception was raised by China to justify the existence of a burdensome, state-controlled, mechanism of "content review" on the imported editorial and audiovisual products, hence making recourse to Article GATT XX(a). The view of the WTO adjudicators in this case recalled explicitly the conclusion reached in the *US-Gambling*, at least insofar as it reckoned some space for the party invoking the clause to define the concept of public moral "according to their own system and scale of values"[557]. Indeed, before entering into the specific analysis of the contested measures, the Panel explicitly assumed "that each of the prohibited types of content listed in China's measures is such that, if it were brought into China as part of a physical product, it could have a negative impact on "public morals" in China within the meaning of Article XX(a) of the GATT 1994"[558].

The main difference with the *US-Gambling* ruling lies however in the fact that, this time, the Panel did not seek any form of legitimacy through a comparison with third parties national systems and did not look into the systems applied in other jurisdiction to find similarities in the treatment afforded to imported editorial and audiovisual products in relation to public morality goals. This is not surprising as, in this case, it would have been more

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process of developing – special legal framework for Internet gambling for instance, Australia, Austria, Belgium, Brazil, Denmark, Finland, Iceland, Italy, The Netherlands, Sweden, United Kingdom. Other countries currently apply to Internet gambling the laws and regulations developed for traditional gambling [for instance, Canada, France]. The regulations targeting Internet gambling appear to us to be as stringent, if not more, that regulations applying to traditional forms of gambling. Some countries seem to restrict drastically or even prohibit entirely Internet gambling for instance, Estonia, Hong Kong, Iceland, Norway, Uruguay". WT/DS285/R, *United States – Measures Affecting the cross-border Supply of Gambling and Betting Services,* cit., 6.473, footnote 914.

[556] *Ivi*, paras 6.473-6.474.

[557] WT/DS363/R, *China – Measures affecting trading rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, 12 August 2009, para. 7.759.

[558] *Ivi*, para. 7.763.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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complicated for the Panel to find suitable comparisons. Indeed, if special legal requirements for the supply of online gambling services are common among many of the WTO Members, a comparison with national systems mandating import bans on morality grounds to editorial or audiovisual products carrying, for instance, "capitalist liberalism thoughts"[559] would have been much trickier. Although the partial shift in the reasoning of the adjudicators in these two disputes can be certainly ascribed to a different sensitivity of the matters at stake for the defending parties[560], it still represents an important step toward the recognition of a unilateral and more deferential approach of the WTO when defining the concept of public morality.

Finally, the third and so far latest chance for WTO adjudicators to deal with the concept of public morality presented itself in the context of the more recent *EC-Seals* dispute, when Canada and Norway complained about an EU regulation prohibiting, albeit with some exceptions, the placing on the EU market of seals products[561]. In order to ascertain whether the concern at issue constituted a public morality issue, the Panel, in contrast with the *US-Gambling* case, focused exclusively on the existence of such concern within the territory invoking the exception (the EU), disregarding the practice of third parties in the same way the Panel in the *China-Audiovisual* case has done[562]. Curiously, however, in this case the conclusion of the existence of a public morality concern within the EU with regard to seal welfare was reached only after a precise analysis of the public morality debate at the basis of the adoption of the disputed regulation, that was aimed essentially at verifying the existence of a genuine interest among EU citizens in safeguarding seals welfare[563]. The Appellate Body later confirmed the same conclusion[564].

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[559] Gao H., *The Mighty Pen, the Almighty Dollar and the Holy Hammer and Sickle: an Examination of the Conflict Between Trade Liberalization and Domestic Cultural Policy with Special Regard to the Recent Dispute Between the United States and China on Restrictions on Certain Cultural Products*, in *The Asian Journal of WTO & International Health Law and Policy*, 2:2, 2007, 326.

[560] The political sensitivity of the censorship issue in China was implicitly reckoned by the complainant itself. In this regard the Panel recalled "the United States has not specifically contested that if content defined by China as prohibited were imported as part of a physical product, this could have a negative impact on public morals in China" WT/DS363/R, *China – Measures affecting trading rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, cit., para. 7.763

[561] Regulation (EC) n. 1007/2009 of the European Parliament and the Council of 16 September 2009 on trade in Seals Products, *OJ* L 286/36.

[562] "the question of whether a measure aims to address public morals relating to a particular concern in the society of a regulating Member requires, in our view, an assessment of two issues: first, whether the concern in question indeed exists in that society; and, second, whether such concern falls within the scope of "public morals" as "defined and applied" by a regulating Member "in its territory, according to its own systems and scales of values"." WT/DS400/R, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, 25 November 2013, para. 7.383.

[563] "In our view, therefore, the references above to "ethical considerations" in the Commission Proposal, combined with the reference to a "public morality debate" in the Council of Europe Recommendation, provide

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
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In conclusion, the case law referring to the understanding of what and whose moral needs to be ascertained in the judicial review of GATT Art. XX(a) and GATS Art. XIV(a), seems then to suggest a partial shift from an initial reference to third parties practice (*US-Gambling*) to a complete deference to the appreciation of the defending parties on the need to define public morality and protect it exclusively on the basis of their own system and scales of values or, in other words, unilaterally. This is certainly in line also with the preamble of the GATS Agreement, which refers to "the right of Members to regulate […] in order to meet *national* policy objectives"[565], thus implicitly admitting that policy objectives differ across WTO Members.

However, although similar in their reasoning, the two latter WTO cases dealing with public morality can be seen as differing at least in one important respect. While, on one side, the Panel and the Appellate Body in the *EC-Seals* case looked at the interest of EU citizens in having the seals products ban enacted, in the *China-Audiovisual* case a similar analysis of the popular involvement in the legislative process leading to the adoption of the disputed measures was not undertaken, hence the real perception of citizens toward the content of imported audiovisual and editorial products could not be verified. While the reasons at the basis of the different approach can be easily understood, one can still argue that, in practical terms, the burden of proof demanded to the EU to demonstrate the existence of an internal public morality concern was heavier than the one requested to China. Had the EC failed to demonstrate a genuine public opinion interest in having seals products banned, would this have reversed the Panel's findings? If so, wouldn't that be at odds with the extremely

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evidence that the public concerns about seal welfare constitute a moral issue for EU citizens". WT/DS400/R, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, cit., para. 7.396.

[564] WT/DS400/AB/R , *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products,* 22 May 204, paras 5.194-5.203. Commentators appear to support the reasoning of the WTO judiciary in the case at hand, and the importance to verify the existence of a public morality concern within the community enacting the restrictive measure, and not elsewhere. In particular, prior to the final Appellate Body decision, Professor Robert Howse showed his support for the applicability of the public morality clause to the EU ban by pointing out that "the EU seal regulation may also be an expression of the community's intrinsic ethical or spiritual beliefs about what constitutes cruelty, and a statement of outrage against such practices" and that "there is no reason why the content of public morals could not extend to beliefs of the importing country concerning the wrongfulness of consuming products produced in a manner that is perceived to constitute cruelty to animals", More importantly, and in line with the position later endorsed by the Panel and the Appellate Body, in order to proof the existence of an ethical belief, Howse noted that "the overwhelming majority vote in favour of the regulation by popular representatives of the European people in their Parliament". See, Howse R.L., Langille J., *Permitting Pluralism: The Seal Products Dispute and Why the WTO Should Permit Trade Restrictions Justified by Noninstrumental Moral Values*, in *Yale Journal of International Law*, 37, 2012, 412-413.

[565] GATS Preamble (emphasis added).

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
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deferential approach conceded to China? As will be discussed below in the case censorship, welcoming one approach or the other might be crucial in understanding whether certain internet filtering practices limiting the access of foreign electronic services can or cannot fall within the GATS public morality exception shield.

5.2 - State intervention through internet filtering: the "Great Firewall of China" and the GATS

5.2.1 Internet filtering in China: between blockages and self-censorship

Public morality is indeed an important tool in the WTO framework that, under certain conditions, can be invoked to "protect" certain national-specific values from being damaged by products and services originating from third countries.

As far as trade in goods is concerned, a ban justified on grounds of public morality can amount to the physical blockage of those goods deemed to be considered inappropriate; the EU ban on seal products analysed above constitutes a clear example in this sense. However, when dealing with trade in electronic services, the same result can be obtained only by disenabling the possibility for national consumers to access the foreign internet platform providing the service. The practice of the so-called State "internet filtering" is probably more common than how it is usually perceived as this is not only related to public morality or public order control but plays and increasingly relevant role in preventing different types of crimes and frauds, the most common being intellectual property rights infringements. Although trade distorting *per se*, the prevention of infringements of specific national laws is certainly legitimate; so could be in term of sovereignty, although most of the times questionable in terms of proportionality and balance with freedom of expression rights, the blockage of internet websites for public morality and public order concerns[566]. For WTO

[566] For an overview of the data regarding Internet filtering see, Faris R., Villeneuve N., "Measuring Global Internet Filtering", in Deibert R., Palfrey J., Rohozinski R., Zittrain J. (eds), *Access Denied, The Practice and Policy of Global Internet Filtering*, Cambridge, 2008, 5-27. According to this study, the categories subject to internet filtering in different countries are: Free expression and media freedom, Political transformation and opposition parties, Political reform, legal reform, and governance, Militants, extremists and separatists, Human rights, Foreign relations and military, Minority rights and ethnic content, Women's rights, Environmental issues, Economic development, Sensitive or controversial history, arts, and literature, Hate speech, Sex education and family planning, Public health, Gay/lesbian content, Pornography, Provocative attire, Dating, Gambling,

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
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purposes, the question of internet filtering does not then concern its legitimacy *per se*, but boils down essentially to the need of avoiding that such techniques are not employed in a broad way such as to damage legitimate foreign service providers and, consequently, favour domestic suppliers of "like" or similar services. Indeed, when applied in the online environment through various techniques of internet filtering, censorship can - intentionally or not - act as a powerful trade-distorting tool.

Among the various schemes currently in place to control internet content, the most comprehensive and sophisticated system of internet filtering is probably the so-called "Great Firewall of China", considered as representing the first generation of internet control techniques[567]. Moreover, the relevance of this system for the purpose of this study is accrued by the fact that the Chinese market constitutes a great share of the potential worldwide internet users[568], hence the existence in that specific market of a system preventing the access to certain electronic services is likely to have an important trade-distorting impact.

Broadly speaking, the Chinese system for internet filtering arising out of the joint implementation of different state regulations is composed by three main techniques of censorship: keyword blocking, hand censoring and the Great Firewall.

The first two types of controls are more targeted at specific texts and content posted online; in particular, "keyword blocking" refers to the system in place for the automatic removal of content deemed dangerous because containing one of the words or phrases deemed inappropriate; "hand censoring" refers instead to the practice undertaken by state officials to remove *ex post* the "inappropriate" content that somehow managed to pass through the first keyword screening[569]. In addition to the above, the Chinese authorities can do more in terms of deterrence when dealing with internet service providers over which they

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Gaming, Alcohol and drugs, Minority faiths, Religious conversion, commentary, and criticism Anonymizers and circumvention, Hacking, Blogging domains and blogging services, Web hosting sites and portals, Voice over Internet Protocol (VOIP), Free e-mail, Search engines, Translation, Multimedia sharing, P2P, Groups and social networking, Commercial sites. *Ibid,* Table 1.2. See also Erixon F., Hindley B., Lee-Makiyama H., *Protectionism Online: Internet Censorship and International Trade La*w, ECIPE Working Paper, 12/2009, 4-5.

[567] Deibert R., Rohozinski R., "Beyond Denial: Introducing Next-Generation Information Access Controls", in Deibert R., Palfrey J., Rohozinski R., Zittrain J. (eds), *Access Controlled,* The Shaping of Power, Rights, and Rule in Cyberspace, Cambridge, 2010, 4.

[568] According to International Telecommunication Union (ITU) data, 43.9% of China's population had internet access in 2013, accounting for roughly 22% of internet users worldwide. Source: ITU, *Measuring the Information Society Report* 2014, Geneva, Annex III, 242; see also www.internetlivestats.com.

[569] King G., Pan J., Roberts M., *How Censorship in China Allows for Government Criticism but Silences Collective Expression*, in *American Political Science Review*, 107, 2013, 332.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
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have legal jurisdiction; indeed, if at least part of the company's operations and computer servers are located in China, the government can delete information from the Internet entirely. To avoid such a definitive solution, however, Internet companies operating within the Chinese jurisdiction are called on to exercise "self-discipline"[570] and can be subject to sanctions and revocation of business licences in case of non-compliance[571]. This has been commonly accepted practice for all the IT companies willing to operate in China, including international hi-tech giants such as Yahoo!, Microsoft and, until 2010, Google[572].

The third type of censorship, the Great Firewall, is instead more relevant for those electronic services provided from abroad as it concerns exclusively the system for blocking entire foreign websites from been accessed within the country. While domestic sites, being subject to local laws and enforcement, are monitored through the techniques mentioned above, the control over cross-border communication is managed by the Ministry of Industry and Information Technology (MIIT) together with the Ministry of Public Security (MPS) which are empowered to screen the internet traffic coming from abroad and shut down any foreign website and other forms of communication such as SMS/MMS[573]. In practice, Internet connections in China are controlled by a handful of state-run operators that maintain advanced international gateways in Beijing, Shanghai, and Guangzhou; through this system, all the information coming from abroad and passing through said gateways is potentially monitored and the controversial content detected[574]. As a consequence, when a Chinese client tries to access a foreign website containing information previously considered inappropriate, no connection can be established with the foreign server.

It results that, contrary to what happens with “keyword blocking” and “hand censorship” for websites operating within the Chinese jurisdiction, when it comes to foreign websites the result of filtering is, most of the times, the complete blockage of the website or a

[570] A code of conduct for businesses operating in the internet sector in China has been developed in 2002 by the Internet Society of China under the name of “Public Pledge of Self-Regulation and Professional Ethics for China Internet Industry”. Available at www.isc.org.cn.
[571] Liu C., *Internet Censorship as a Trade Barrier: a look at the WTO consistency of the Great Firewall in the wake of the China-Google dispute*, in *Geo. J. Int'l L.*, 42, 2011, 1209-1210.
[572] Subject to a series of critics during the years from free speech activists, after a series of cyber attacks known as “Operation Aurora” and allegedly backed by chinese officials in 2010, Google decided to review its operation in China, launched in 2006, and shut down its chinese search engine google.cn and redirecting its traffic to its Hong Kong version, which is however subject to the Great Firewall filtering system. The official Google communication is available at googleblog.-blogspot.it.
[573] Erixon F., Hindley B., Lee-Makiyama H., *Protectionism Online: Internet Censorship and International Trade La*w, cit., 4.
[574] Liu C., *Internet Censorship as a Trade Barrier: a look at the WTO consistency of the Great Firewall in the wake of the China-Google dispute*, cit., 1208.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
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so-called DNS redirection[575]; only occasionally the filtering is more targeted, meaning that the blockage occurs only for certain webpages in a site, the ones allegedly containing the controversial terms. This however can still cause disruption to the normal flow of information, making the service as a whole less responsive or reliable, and ultimately less attractive to the Chinese consumer[576].

5.2.2 The Great Firewall of China as a GATS trade barrier?

From a GATS perspective, the technique of foreign services filtering is then the most relevant feature of the Chinese censorship regime, as it seems to introduce a different treatment between foreign-based and local providers of electronic services. From a practical standpoint, this is reinforced by the fact that the main non-Chinese providers of what we have defined in the first chapter as "new electronic services" (i.e. search engines, social networks, microblogs), has been historically one of the preferred targets of the Great Firewall of China[577]. At the same time, taking advantage of the lack of competition, similar services operating within the country and that have most of the times more solid connections with the government, thus abiding by national laws content control and self-censorship mentioned above, have in the meantime proliferated[578]; economically speaking, this had led to a significant shift in terms of allocation of advertising revenues.

[575] Most of the filtering happens as a result of the access blockage of the whole web server IP addresses or domain name servers (DNS) IP addresses, resulting in the impossibility to access all the websites pertaining to that particular IP address/physical server. DNS redirection occurs instead by DNS servers offering intentionally incorrect answers to IP addresses of certain domain names, "redirecting" the search to an already blocked IP address, with the ultimate result of blocking the access to the DNS required. See, Zittrain J, Edelman B., *Internet Filtering in China*, in *IEEE Internet Computing*, Research Paper n.62, March/April 2003, 76.

[576] This is the case, for instance, of foreign search engines such as google.com. Indeed, search engines cannot contain *per se* any controversial content but the result of the search might. For this reason in these cases the filtering occurs at a later stage, when the search is performed and this happens through URL Keyword Filtering or HTML Response-Keyword Filtering. *Ivi,* 77.

[577] Services such as Facebook, Twitter, Youtube are not officially accessible from Mainland China. Moreover, it was reported that, when shutting down temporarily foreign search engines such as Google, users were redirected automatically to the similar Chinese service Baidu. Erixon F., Hindley B., Lee-Makiyama H., *Protectionism Online: Internet Censorship and International Trade Law*, cit., 5. The automatic redirection to the Chinese search engine Baidu for users trying to access US search engines (Microsoft, Google and Yahoo!) is also reported by Google. Google, *Enabling Trade in the Era of Information Technologies: Breaking Down Barriers to the Free Flow of Information,* 2011, 7, available at static.googleusercontent.

[578] Apart from Baidu, by far the biggest search engine in China, in the absence of more renowned competitors, Chinese internet services such as the video hosting Youku, and the social networking platforms RenRen and Weibo have gained popularity among chinese netizens.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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Although interesting from a GATS standpoint, the question of the legality of the internet filtering system in China has never been brought to the attention of WTO judiciary. Admittedly, in the wake of Google's departure from China in 2010, the US went very close from requesting the establishment of a WTO Panel when, in 2011, it resorted to the consultation mechanism established through the GATS Art. III transparency provision[579] to request China "detailed information on the trade impact of Chinese policies that may block U.S. companies' websites in China, *creating commercial barriers* that especially hurt America's small business"[580]; although this move seemed to have been prompted by the abovementioned Google-China case, this never led to any official response from the Chinese side, nor any decisive follow up action was undertaken by the US[581].

Nevertheless, because of its apparent trade distorting nature and in light of what discussed throughout the chapter in relation to the WTO consistency of certain electronic service-specific trade barriers, it can be interesting to reason on the possible outcome of a WTO claim on the inconsistency of the Great Firewall of China with the market access, transparency and domestic regulation requirements as well as on the availability of the public morality defence of GATS Art. XIV(a). In order to do so, it would be necessary first of all to understand whether China committed to the any sort of liberalization for the services concerned. If so, it should be analysed if and what types of GATS measures are likely to be violated by the Chinese internet filtering system; finally, the availability of the GATS general exception defence should be evaluated in light of the jurisprudential interpretation developed by the Appellate Body, with the inclusion of the necessity analysis[582].

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[579] According to GATS Art. III.4 "Each Member shall respond promptly to all requests by any other Member for specific information on any of its measures of general application or international agreements within the meaning of paragraph 1". *Infra* 2.1.1.

[580] Emphasis added. According to the United State Trade Representative (USTR), the US requested China a series of 25 questions related to the Chinese rules governing website blocking, the function of the State Internet Information Office, the cases of inadvertently blocking and the information considered critical or illegal by the Chinese authorities. See, *United States Seeks Detailed Information on China's Internet Restrictions*, USTR Press Release, available at ustr.gov.

[581] In the immediate aftermath of the Google withdrawal from China, former US Secretary of State Hillary Clinton gave a speech on internet freedom mentioning explicitly China as one of the countries threatening the free flow of information. See, Hillary Clinton, *Remarks on Internet Freedom*, January 21, 2010 available at www.state.gov. More interestingly, in the same period, Google released a "White Paper" highlighting the main international trade issues arising out of the emergence of barriers to free flow of information. See, Google, *Enabling Trade in the Era of Information Technologies: Breaking Down Barriers to the Free Flow of Information*, 2010.

[582] Rundle M., Birdling M., "Filtering and the International System: A Question of Commitment", in Deibert R., Palfrey J., Rohozinski R., Zittrain J. (eds), *Access Denied, The Practice and Policy of Global Internet Filtering*, cit., 88-90.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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Since, as we have seen, the Great Firewall of China seems to apply to foreign services with a greater level of intensity, the analysis should first of all start by examining whether China has undertaken mode 1 GATS commitments in the W/120 categories we have referred to as encompassing new electronic services[583]. As we have seen in Chapter I, following a *functional* approach, new electronic services might fall within different service sectors, from Audiovisual and Computer services to Telecommunication. In particular, the W/120 entries relevant for the services we have identified in the previous chapter are the following:

W/120 entry	**W/120 category**	**CPCprov code**	**Examples of e-services (*e.g.*)**
Online Information and Database Retrieval	Telecommunication Services	7523	- Search Engines (*Google*) - Video Shraing Platforms (*Youtube*)
Data Transmission Services	Telecommunication Services	7523	- Search Engines/residual
Database Services	Computer Services	844	- Social Networks (*Facebook*)
Data Processing Services	Computer Services	843	- Cloud Services (*Dropbox*)
Radio and Television Transmission Services	Audiovisual Services	7524	- Video On-Demand (*Netflix*)

In the case of China, the schedule of commitments for the cross-border supply indicates no limitations (none)[584] - hence full market access and national treatment - for online information services, data transmission services and data processing services[585]. If we welcome the reasoning elaborated in Chapter I, this would mean that, for GATS purposes, China has agreed to provide electronic services such as search engines, cloud services and video sharing platforms delivered cross-border the same treatment afforded to domestic-based

[583] See, Chapter I, para. 4.3.
[584] The disaggregation of GATS commitments through the four modes of supply and the debate over the mode of supply applicable to electronic services are analysed above. See, Chapter I, paras 3.3.1 and 3.3.2.
[585] GATS/SC/135, *The People's Republic of China, Schedule of Specific Commitments,* 14 February 2002. Initially, some limitations were listed by China for data transmission services and online information services in the telecommunication category, but these related to a cap in foreign equity participation for modes 1 and 3, so clearly something not related to internet filtering. In any case, such restrictions were only temporary and have now expired.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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"like" services. Apparently, however, this is not the case for database services (e.g. social networks) and radio and television transmission services (e.g. video on-demand), both absent in the list of specific commitments[586], hence to be considered unbound for all the four modes of supply[587]. It results that, as far as China is concerned, violations of GATS commitments might occur only for certain types of electronic services.

Having ascertained the existence of liberalization commitments in at least some of the categories relevant for new electronic services, the second step would be to examine whether and what types of GATS provisions can be violated by the Great Firewall of China. In other words, absent in the China's schedule any specific limitation to the cross-border supply of certain electronic services, can we consider the effect of the Great Firewall a trade barrier? If so, does this system of internet filtering violate market access commitments, national treatment commitments or other provisions, for instance transparency and domestic regulation?

As we have seen, although most of the times resulting in a complete blockage of the website at issue and not only the censorship of "undesired" content, the filtering of foreign websites is not systematic, although the rationale for the blocking is not transparent. It results that, although many foreign electronic services are blocked, some others, maybe less popular or considered not problematic, can still be accessed from China[588]. If this is the case, although having an undeniable *effect* in restricting market access, the Great Firewall of China cannot probably be characterized as violating GATS market access commitments because, following the *US-Gambling* reasoning, it does not amount to a "zero quota" or a "limitation in the form

[586] *Ibid*. In the *China-Audiovisual* case, an analysis of China's commitments for the distribution of audiovisual products was undertaken. For the purpose of the dispute, however, the Panel focused exclusively on the distribution of physical goods, noting however that China's commitment in the distribution of audiovisual products in physical form included not only retail and wholesale, but also renting and leasing (CPC 83202). Notwithstanding, the Panel did not go as far as claiming that the same reasoning should apply to the supply of video on-demand. This seems to leave space for the interpretation maintained here, that is VOD should fall within the "radio and televisione service transmission" category (not committed by China). WT/DS363/R, *China – Measures affecting trading rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, cit., paras 7.1313 - 7.1336.

[587] "market access and national treatment commitments apply only to the sectors or sub sectors inscribed in the schedule". S/L/92, *Guidelines for the Scheduling of Specific Commitments under the General Agreement on Trade in Services,* cit., para. 25.

[588] By means of example, the video sharing service Youtube, owned by Google Inc., has been blocked in China since 2009. A similar French service named Dailymotion, (featuring, among its content the popular tian'an men square video), is regularly accessible from China according to the test site www.greatfirewallofchina.org. Given this example, one may also think of the possibility to invoke a MFN violation. Again, however, as the dynamics behind the blockages are unknown, this might not be the case either.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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of numerical quota"[589] hence, although *de facto* limiting the market access of certain services, it will hardly fall within one of the six types of measures provided for in GATS Article XVI.

It is instead more plausible to envisage a possible national treatment violation since, as highlighted above, the Chinese content control system employs different, more direct and probably less trade distorting, technical solutions for the control of domestic internet services. Although the GATS national treatment provision does not prevent Members to implement "formally different treatments" to meet the national treatment requirement[590], this should indeed not modify "the condition of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member"[591]. In order to ascertain a national treatment violation, a complainant would need to demonstrate the trade distorting effect resulting from the application of a different treatment to "like" services. This can be done by comparing, for instance, the market share of national and foreign like services, at least where the latter are not completely censored[592]. Such exercise would probably not be necessary when access to foreign services is completely banned but similar services supplied by domestic operators are available. In this latter case, it would be indeed difficult to argue against the existence of a less favourable treatment towards foreign services providers[593].

Finally, as far as the GATS domestic regulation provision is concerned, Article VI sets up a series of requirements we have defined as referring to both administration transparency and *origin-neutral* regulation[594]. As for the former, we have seen that Article VI requires, among other things, WTO Members to apply measures affecting trade in services in a

[589] WT/DS285/R, *United States – Certain measures affecting the cross-border supply of gambling and betting services,* cit., para. 6.363 et seq.
[590] GATS, Art. XVII.2.
[591] GATS, Art. XVII.3.
[592] This would be the case for certain foreign search engines that are not completely blocked but whose continuous filtering makes them difficult and less user-friendly to surf compared to domestic, self-censored, search engines, turning Chinese consumers to domestic solutions. For instance, according to the New York Times, Google's market share in China has fallen down to 10% in 2014, compared to more than 30% in 2009, when the website google.cn was operated domestically. The market share lost by Google has been transferred mostly to domestic search engines, mainly to the national market leader Baidu. See, Bradsher K., Mozur P., *China Clamps Down on Web, Pinching Companies Like Google*, 21 September 2014, www.nytimes.com.
[593] Gao advances the argument that the Great Firewall does not need to apply to domestic services simply because other techniques can be applied to reach the same objective. It results that, accordingly, foreign websites are not subject to a less favourable treatment. Gao H., "Googling for trade-human rights nexus in China: Can the WTO help?", in Burri M., Cottier T. (eds), *Trade Governance in the Digital Age,* Cambridge, 2012, 262-263. It is argued here that this reasoning is flawed because the national treatment should be evaluated in terms of trade and economic effects and not in terms of the successfulness of the policy goal pursued. Moreover, although the argument of the technical feasibility to reach the policy goal is certainly valid, this needs not to be taken into consideration at this stage of the analysis but later on, in case the general exception of Art. XIV is raised and the *weighing and balancing* test is undertaken.
[594] *Infra*, paras 2.1.2 and 3.2.1.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
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"reasonable, objective and impartial manner"[595] and to institute "practicable judicial, arbitral or administrative tribunals or procedures which provide, at the request of an affected service supplier, for the prompt review of, and where justified, appropriate remedies for, administrative decisions affecting trade in services"[596]. Both requirements are hardly met in the case of the Great Firewall as the process and criteria applied to foreign-based internet filtering is all but transparent. It is not by chance that some of the requests advanced by the United States through the Art. III.4 transparency mechanism mentioned above were aimed precisely at understanding the rules underlying the blockages and the existence of possible means for redress[597]. In terms instead of "pure" domestic regulation, pending, as discussed, the conclusions of a more detailed discipline, the provision of Art. VI.5 can nonetheless be relevant as it mandates Members to apply qualification requirements that are not more burdensome than necessary to ensure the quality of the service and are based on objective and transparent criteria[598]. However, a practical problem in successfully arguing in favour of such a violation lies in the fact that those qualification requirements should "not reasonably have been expected of that Member at the time the specific commitments in those sectors were made"[599]. For China, GATS commitments were undertaken at the time of accession in 2001, well after the Great Firewall was put in place[600]. In addition, and more in general, it is also unlikely that the practice of internet filtering for public morality purposes could be regarded as a qualification requirement aimed at guaranteeing a certain standard of quality for the provision of services. If this is the case, Article VI.5 might not find application altogether.

From this brief overview, it seems that the GATS measure most likely to be violated by the Great Firewall of China is, where applicable, the national treatment provision of

[595] GATS, Art. VI.1.
[596] GATS, Art. VI.3.
[597] In its submission, the US outlined, among others, the following questions to the Chinese Government: *b*. What are the guidelines and criteria for blocking access to foreign websites? How often are these guidelines and criteria changed or published? Where are these guidelines published? Are they made public in advance of their implementation? Which ministries are responsible for drafting them? *c*. What is the process for implementing a restriction on a website? How does the relevant entity determine whether an entire website should be blocked or only services or content deemed illegal? Can an affected service supplier appeal a decision to block access to their website? If so, what is the procedure for appealing, and where is that procedure published? Can a service supplier use the court system to appeal a decision to block access to their website? If so, has any such appeal ever been successful? […] *h*. Is the same process used to prevent access to foreign and domestic websites providing similar services in China? If the process is different, please describe the differences. See, *United States Seeks Detailed Information on China's Internet Restrictions*, cit.
[598] GATS, Arts VI.4 and VI.5. *Infra*, para. 3.2.1.
[599] GATS, Art. VI.5.
[600] Gao H., *Googling for trade-human rights nexus in China: Can the WTO help?*, cit., 266.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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Article XVII. This, coupled with the lack of clarity and objectivity in the management of internet filtering of foreign websites, resulting in a possible violation of the administration transparency provisions of Article VI.1 and VI.3, might lead a Panel to decide for the incompatibility of the Great Firewall with China multilateral trade commitments. Even so, however, in case of a dispute, China would be certainly entitled to justify its violation making use of the public morality and public order clause of GATS Art. XIV[601]. This, as we have seen above[602], would first of all force the adjudicators to decide for the adoption or the refusal of a deferential position toward the definition of public morality[603] and, secondly, to apply the well established two-tier test analysing the necessity of the measure at stake[604] and, ultimately, the good faith in its application[605].

As we have discussed, WTO adjudicators seemed to have been keener to favour a unilateral approach in the definition of public morality. In the case at hand, it would then be plausible to expect a WTO Panel to apply deference in this regard, in other words, leaving up to the Chinese Government to decide which content is to be blocked for reasons of public morality and public order[606]. The necessity analysis would probably be instead more complicated to handle. As discussed, the necessity test elaborated over the years by the Appellate Body have shifted from a linear "least trade restrictive measures" test, toward a more intrusive *weighing and balancing* approach allowing more national regulatory space for those goals considered important (by who?), but turning to be more demanding when the goal

[601] We argue here that, although paragraph a) of GATS Art. XIV allows derogations for both public moral and public order reasons, given the broad scope of the chinese filtering system and instead the clear intention in the GATS agreement to narrow down the possibilities to invoke the public order clause, if faced with such case, China would defend its measures on grounds of public morality only. See, Wu T., *The World Trade Law of Censorship and Internet Filtering,* in *Chi. J. Int'l L.*, 7:1, 2006, 284. See also Cottier T., Delimatsis P., Diebold N., *Article XIV General Exception,* cit., 295.
[602] *Infra,* paras 4 and 5.1.
[603] *Infra,* para. 5.1.2
[604] *Infra,* para. 4.2.
[605] *Infra,* para. 4.3.
[606] Admittedly, this approach would justify the censorship of types of content, for example political criticism, on public morality grounds. From a western perspective, this could certainly be seen as a disproportionate and serious violation of the freedom of expression. As discussed, however, an opposite approach would erroneously imply that WTO adjudicators hold some sort of legitimacy in the definition of domestic behaviours other that trade, including human rights. Broude and Hestermeyer have examined the idea that international trade law has sufficient overlaps with human rights law so that a sort of confluence exists between the two goals. Although apparently mutual reinforcing, the conclusion reached by the authors is in the sense that no such confluence exists between the two sets of rules. Indeed, the authors concluded that "any commonality between the [*two*] fields is arbitrary, inconsistent and unforeseeable" and that "the functional economic justification ends where expressions and information no longer have market-perfecting contribution". Broude T., Hestermeyer H*., The First Condition of Progress? Freedom of Speech and the Limits of International Trade Law*, in *Virginia Journal of International Law*, 54:2, 2014, 295-321.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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pursued is of less relevance[607]. The introduction of an embryonic form of proportionality test can be particularly relevant for the case of Chinese censorship, as the protection of Chinese citizens from the exposure to certain contents such as "capital liberalism thoughts"[608] might be considered by the adjudicators as not particularly important, hence the measure adopted to reach this goal (the Great Firewall) justifiable only if it can be proven to provide a substantial contribution to the end sought[609]. If this is the case, and given the important trade-restricting effect of the measures at stake (a complete ban of certain electronic services) the fact that the Great Firewall operates in an opaque way, selectively and unpredictably could lead the adjudicators to rule that this system is not *necessary* for the purpose of GATS Article XIV[610], and that other less trade-restrictive ways should be considered. The lack of transparency on the reasons and the techniques underlying the filtering of foreign websites[611] can certainly be pinpointed as an unnecessary restrictive feature whose removal could provide more predictability to foreign operators, making the whole system less trade restrictive, thus less GATS inconsistent.

If this is the case, the second step of the two-tier analysis, namely the good faith clause of the *chapeau* might not be necessary to be undertaken as the failure to pass the necessity test would probably already suffice to rule in favour of the inconsistency of the filtering system with the national treatment and transparency obligations of the GATS Agreement. In any case, for sake of completeness, the reasoning pertaining to the actual application of the measure, rather than the measure itself, might reveal probably the more interesting feature, trade-wise, of the Great Firewall as the *chapeau* provision serve explicitly the purpose of "ensuring that the exception is not abused"[612]. Indeed, when faced with the *chapeau* provision, China would need to explain why certain foreign services are entirely blocked whereas other similar ones

[607] *Infra*, para. 4.1 making reference to the *Korea-Beef* and *EC-Asbestos* jurisprudence.
[608] Gao H., *Googling for trade-human rights nexus in China: Can the WTO help?*, cit., 269.
[609] As previously mentioned, according to the Appellate Body, "the more vital or important those common interests or values pursued, the easier it would be to accept as "necessary" measures designed to achieve those ends. WT/DS/169/AB/R, *Korea-Beef*, cit., para. 162.
[610] As recalled, the process of *weighing and balancing* for those measures not considered indispensible to reach the goal involves the following factors: the contribution made by the compliance measure to the enforcement of the law or regulation at issue, *the importance of the common interests or values protected by that law or regulation*, and the accompanying impact of the law or regulation on imports or exports. WT/DS169/AB/R, "*Korea –Beef*, cit. para 164.
[611] It is reported that companies offering internet based services either inside or outside China are not provided with any official list of prohibited materials or keywords but are instead invited to interpret rather vague regulations. See, Thompson C., *Google's China Problem (and China's Google Problem)*, The New York Times, 23 April 2006, available at www.nytimes.com.
[612] WT/DS285/R, *United States – Measures Affecting the cross-border Supply of Gambling and Betting Services,* cit., 6.581.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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are accessible, why the blockage is at times only temporary or, finally, why the Chinese internet user searching for one foreign service has been automatically redirected to a domestic similar service[613].

It is then argued that, even if a WTO Panel will find the measure at stake as necessary to pursue the legitimate policy goal of public morality in accordance with the first tier of the test, China would find very problematic to justify its "cherry-picking" filtering in light of the good faith requirements of the *chapeau.*

5.3 - Privacy as a reason to derogate from GATS obligations and its relevance for electronic services

5.3.1 Data Protection in the WTO: an additional barrier to internet trade?

As we have seen, in the WTO context, the blockage or selective filtering of internet content is not necessarily shielded by the public morality clause of the general exception. Although Internet filtering is certainly not prohibited from a WTO perspective, when specific GATS market access and national treatment commitments are undertaken, the control of internet content should be enacted in such a way not to violate the necessity test and the good faith requirement of the *chapeau*. Public morality however is not the only justification allowed by the GATS to erect entry barriers to otherwise liberalised services; another particularly relevant objective virtually actionable to obstruct, legitimately or not, the provision of services, including electronic ones, is certainly privacy and data protection[614].

Pursuant to lit. c) ii of GATS Article XIV, and subject to the *chapeau* requirements, WTO Members are allowed to derogate from GATS obligations for "the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the

[613] Erixon F., Hindley B., Lee-Makiyama H., *Protectionism Online: Internet Censorship and International Trade Law*, cit., 5

[614] The accrued importance of privacy in the context of international trade in electronic services was identified immediately in the context of the WTO work programme on e-commerce; this however has never led to any more substantial discussion on the issue. See, WT/L/274, *Work Programme on Electronic Commerce,* Adopted by the General Council on 25 September 1998, 30 September 1998, para. 2.1, where the General Council mandated the CTS to "examine and report on the treatment of electronic commerce in the GATS legal framework. The issues to be examined shall include: […] - protection of privacy and public morals and the prevention of fraud (Article XIV)".

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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protection of confidentiality of individual records and accounts"[615]. The importance of this clause is certainly accrued in the context of trade in electronic services that, as discussed, are essentially based on data intensive application and whose supply is most of the times completely dependent on the cross-border data flow[616]. In the online environment the growing importance of data exchange for businesses might then render this exception potentially crucial in shielding trade-restrictive national policies discriminating foreign providers of cross-border services on the basis of the data protection regimes applicable in their own jurisdictions. Indeed, personal data has been labelled as the "currency" of the digital economy, with most of the big internet companies relying heavily on the harvesting of consumer information to better profile and target their services but also to sell aggregate data and increase profits[617]. In this sense, the blockage or the unfair treatment towards foreign service providers justified on privacy grounds enter even more strongly into the international trade domain as it touches upon one of the most important sources of revenues for internet companies[618].

Similarly to the case of public morality, the WTO treaties do not provide any clarification on the exact meaning of data protection[619]. In addition, no further guidance can be drawn from the WTO case law as, to date, the privacy clause as never been raised in the context of WTO litigation. Admittedly, however, in this case the concept of data protection itself is more narrowly defined and self-explanatory as it clearly pertains exclusively to the processing and dissemination of personal data that are provided to the service supplier. Moreover, contrary to the public morality clause case, societal and cultural differences are hardly relevant in shaping the definition of privacy and data protection so that the debate on the universal *vs* unilateral interpretative approaches discussed above in relation to public

[615] This clause is included in Art. XIV lit c) postulating that Members can maintain measures "necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement".
[616] Meltzer J., *The Internet, Cross-Border Data Flows and International Trade*, Brookings Center for Technology Innovation n.22, February 2013, 2 and 11.
[617] MacDonald D.A, Streatfeild C.M., *Personal Data Privacy and the WTO,* in *Houston Journal of International Law,* 36:3, 2014, 626, further adding that "[i]f personal data is the currency of the digital economy, then "big data" is its jackpot"."
[618] For an analysis of the so called "big data" phenomenon and its impact on business operations see, Manyika J. et al., *Big data: The next frontier for innovation, competition, and productivity*, McKinsey Global Institute, June 2011.
[619] This lack of clarity in the definition of privacy might be interpreted as the willingness for the WTO not to enter into the realm of what is considered to touch upon fundamental governmental and sovereignty questions. Weber R., *Regulatory Autonomy and Privacy Standards under the GATS,* in *AJWH,* 7:1, 2012, 36.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
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morality does not seem to apply[620]. This is further demonstrated by the fact that, besides having formal recognition as a fundamental right through the ICCPR[621], at multilateral level privacy is also constantly debated in the context of other different international *fora,* although such discussions have not yet given rise to any binding instrument[622].

Notwithstanding the above, and lacking a global set of accepted privacy standards[623], privacy measures adopted by WTO Members and indirectly affecting GATS commitments are likely to diverge and to set different levels of restrictiveness for the services involved. From a GATS perspective, the measures on data protection enacted by Member States still have to abide by the obligations on market access, national treatment and domestic regulation enshrined in the GATS. In this sense, following the *US-Gambling* case approach discussed above in relation to market access, a domestic law prohibiting the transfer of data outside the national territories, hence practically preventing national consumers to access a foreign service supplied cross-border, could be regarded as constituting a "zero quota", hence a quantitative restriction within the meaning of GATS Article XIV(a) and (c)[624]. Or, following an opposite interpretation, it could instead be considered a measure "of general application affecting trade in services" within the meaning of GATS Art. VI.1, thus subject to the embryonic "necessity" provision of Art VI:4 and 5 postulating that such measures should be "not more burdensome than necessary to ensure the quality of the service"[625]. Moreover,

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[620] This however does mean that countries cannot retain different views with regard to the importance to be attached to data protection for its citizens in relation to other values such as, for instance, security.

[621] Article 17 of the International Covenant on Civil and Political Rights postulates that "no one shall be subjected to arbitrary or unlawful interference with his *privacy*, family, home or correspondence, nor to unlawful attacks on his honour and reputation". (emphasis added)

[622] Starting from 1980, the OECD has developed relevant documentation on privacy and data protection, both in general and with specific focus on the internet economy; OECD, *Recommendation of the Council concerning Guidelines governing the Protection of Privacy and Transborder Flows of Personal Data* (1980), C(80)58/FINAL, as amended on 11 July 2013 by C(2013)79; OECD, *Ministerial Declaration on the Protection of Privacy on Global Networks,* Working Party on Information Security and Privacy, DSTI/ICCP/REG(98)10/FINAL, Ottawa, 7-9 October 1998; OECD, *Recommendation of the Council on Cross-border Co-operation in the Enforcement of laws Protecting Privacy,* Working Party on Information Security and Privacy*,* 2007; OECD, *Seoul Declaration for the Future of the Internet Economy,* Ministerial Session, 18 June 2008; OECD, *Recommendation of the Council on Principles for Internet Policy Making*, 13 December 2011, C(2011)154. Also the UN has been involved in privacy matters. See, UNGA, *Guidelines for the Regulation of Computerized Personal Data Files*, A/RES/45/95, 14 December 1990. More recently the UN General Assembly has voted for a resolution on privacy in the digital age to reaffirm its commitments to data protection after the so-called "datagate". See, UNGA, *The right to privacy in the digital age*, A/RES/68/167, 18 December 2013.

[623] Weber R., *Regulatory Autonomy and Privacy Standards under the GATS,* cit., 30-31.

[624] *Infra,* para. 3.1.3.

[625] *Infra,* para. 3.2.1. Privacy can be regarded as an aspect of consumer interest, hence falling within the scope of GATS Article VI. Weber R., *Regulatory Autonomy and Privacy Standards under the GATS,* cit., 35.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
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depending on how the domestic privacy provisions are shaped, a measure on data protection could also be regarded as violating national treatment or MFN commitments.

When a GATS violation is ascertained, the defence of GATS Article XIV will still be available. However, although the recourse to the GATS privacy clause may not trigger the same delicate problems of legitimacy discussed for public morality, the deviation from GATS commitments, being this market access, national treatment or MFN, would be tolerated only when "necessity" can be demonstrated and when such measures are applied in good faith. Here, again, the same analysis undertaken in the case of the Great Firewall of China would need to be carried out.

Following this line of thought, the section below will take the current EU system for data protection into consideration, trying to analyse its potential inconsistencies with the GATS discipline.

5.3.2 Assessing the EU system for cross-border data protection from a GATS perspective

The data protection framework in force within the European Union is commonly considered as one of the most elaborated and demanding systems in the world[626]. The discipline common to the 28 EU Member States is set forth in directive 95/46/EC and relates to the right to privacy with respect to the processing of personal data[627], including, of course, those provided electronically. Although leaving some scope for national adaptations, the directive set the rules regulating the management of personal data collected by EU persons or

[626] The extent to which the EU data protection system is perceived as the most comprehensive and probably demanding worldwide can be summarized in the critical remarks by Peter Fleischer, Google's Global Privacy Counsel who, discussing the revision of the EU privacy directive, declared that "like many people in the privacy profession, throughout my career, I had always thought it was sensible to apply Europe's privacy laws worldwide, in the interests of maintaining one, consistent worldwide standard. I'm changing my mind now. As the proposals to revise the privacy laws in Europe become whackier by the day, I am starting to believe that the "world" will have to watch Europe do its own thing in its own backyard, while maintaining a different, faster, more innovative pace in the "rest of world". See, peterfleischer.blogspot.it/

[627] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, *OJ* L 281, 23/11/1995, Art. 1.1. The directive further specifies that "personal data" means "any information relating to an identified or identifiable natural person" and that the "processing of personal data" should be intended as "any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organization, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction". *Ivi,* Art. 2.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

organisations against the risk of misuse as well as the rights of data owners and the correspondent mechanisms for redress in case of misuse[628].

Notwithstanding the already high level of protection required by the current framework, the system set forth through the directive is currently under review and, when approved, will take the form of a regulation, directly binding among all EU Member States with no need for national transposition[629]. According to the European Commission proposal, the revision of the data protection framework serves the purpose of "modernizing" the EU privacy standards making them suitable for the digital age and allowing more consumers' control over their own data[630]. Since however discussions on the new discipline are still undergoing and a final text is not yet available, the analysis on the compatibility of the EU data protection rules with the GATS system will be undertaken taking into consideration the framework currently in force.

Generally speaking, the EU directive seems to openly acknowledge the potential restrictive impact of data protection rules on business operations; in this sense, Article 1.2 clearly states that "Member States shall neither restrict nor prohibit the free flow of personal data between Member States for reasons connected with the protection afforded under paragraph 1". The importance of safeguarding the free flow of data is however only stressed in case of intra-community exchange; on the contrary, when data transfers are supposed to cross the EU borders and exit the jurisdictions of the EU Member States, the need to safeguard data protection seems to acquire a more prominent position *vis-à-vis* the business operation needs.

Indeed, Chapter IV of the EU directive sets a specific, more stringent, framework for data transfer to third countries raising then some doubts with regard to the possible existence

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[628] *Ivi*, Chapter II and III.

[629] In January 2012, the European Commission proposed a legislative text with the aim of improving the data protection rules by creating a more comprehensive framework with the inclusion of specific rules on the use of personal data for the prevention, detection, investigation or prosecution of criminal offences and related judicial activities. The proposal is still under discussion at the European Parliament and the Council. See, Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), 012/0011 (COD), Brussels, 25 January 2012. The status of revision of the EU data protection framework will be analysed in more detail in Chapter III when discussing the current EU-US dialogue on privacy.

[630] See, *Safeguarding Privacy in a Connected World, A European Data Protection Framework for the 21st Century*, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2012) 9 final Brussels, 25 January 2012.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
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of discriminatory, WTO inconsistent, behaviours. As a general rule, the directive indicates that the transfer of personal data outside the EU is prohibited unless the third countries are considered as providing an adequate level of protection[631]; in certain, albeit unclear, circumstances it is up to the European Commission to determine whether and when adequacy is achieved[632], and to publish its findings through a Commission Decision. No exact definition is provided for the concept of *adequacy* although the directive indicates what factors need to be taken into consideration to this purpose[633]. Furthermore, although the wording of Article 25 seems to indicate that adequacy determinations are to be undertaken in light of single data transfer operations, the "Article 29 Data Protection Working Party" (Article 29 WP), an official advisory body set up by in accordance with the directive[634], has recognized that the growing amount of data exchange required for trade purposes makes individual assessments technically impossible and that instead *general* adequacy determinations of third party data protection regimes are more suitable for the purpose of the directive[635].

By way of derogation, and subject to a series of further conditions, Article 26 offers the possibility to Member States to authorize the transfer of personal data when the third country does not fulfil the general adequacy requirement[636]. The Article 29 WP has however clarified that such cases concern situations where the risk to the data subject are small or the public interests "override the data subject's right to privacy" adding that, being exemptions to

[631] Directive 95/46/EC, cit., Art. 25(1).
[632] Directive 95/46/EC, cit., Art. 25(3) and 25(6). The procedure for the adequacy determination is laid down in Article 31(2).
[633] Article 25(2) indicates that "the adequacy of the level of protection afforded by a third country shall be assessed in the light of all the circumstances surrounding a data transfer operation or set of data transfer operations; particular consideration shall be given to the nature of the data, the purpose and duration of the proposed processing operation or operations, the country of origin and country of final destination, the rules of law, both general and sectorial, in force in the third country in question and the professional rules and security measures which are complied with in that country".
[634] Articles 15, 29 and 30 of the EU privacy directive lay down the rules, the composition and the tasks of the Working Party advisory body. The Working Party has then established its own rules of procedures. See, ec.europa.eu/justice/
[635] Indeed, the Article 29 Working Party recognized already in 1998 that "given the huge number of transfers of personal data leaving the Community on a daily basis and the multitude of actors involved in such transfers, no Member State, whatever the system it chooses to implement Article 25, will be able to ensure that each and every case is examined in detail. This does not of course mean that no cases will be examined in detail, but rather that mechanisms will need to be developed which rationalise the decision-making process for large numbers of cases, allowing decisions, or at least provisional decisions, to be made without undue delay or excessive resource implications". Working Party on the Protection of Individuals with regard to the Processing of Personal Data, *Working Document Transfers of personal data to third countries: Applying Articles 25 and 26 of the EU data protection directive*, Adopted by the Working Party on 24 July 1998, DG XV D/5025/98, 26. See also, Reyes C.L., *WTO-Compliant Protection of Fundamental Rights: Lessons form the EU Privacy Directive*, in *Melb. J. Int'l L.*, 12:141, 2011, 2.
[636] Directive 95/46/EC, cit., Art. 26(1).

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
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the general principle, these have to be interpreted restrictively[637]. It is however clear that, notwithstanding the possibility provided by the directive to deviate from the general principles, the discipline laid down in Article 25 remains the most relevant feature for the purpose of personal data transfer to third countries. It follows that, given the level of discretion provided to the European Commission to decide whether or not to undertake an adequacy determination, three situations might occur *vis-à-vis* third countries, each of them having a different implication for the transfer of EU personal data:

1) the Commission has determined the *adequacy* of the third country data protection system;
2) the Commission or the Working Party have determined the *inadequacy* of the third country data protection system;
3) *no adequacy determination* has been undertaken by the Commission or the Working Party.

So far, the Commission has reached a positive conclusion with regard to adequacy only for a handful of third countries meaning that, in such cases, personal data can flow from the 28 EU countries (and three EEA member countries) to third countries without any further safeguard being necessary[638]. Instead, in some other cases, notably for instance the ones of the US, Australia, and Canada[639], no formal decision has been taken by the European Commission but the Working Party has issued an adequacy determination reaching a negative conclusion and identifying the need for the introduction of appropriate safeguards in order to overcome the divergences. In some but not all of these circumstances[640], the Working Party

[637] Working Party on the Protection of Individuals with regard to the Processing of Personal Data, *Working Document Transfers of personal data to third countries: Applying Articles 25 and 26 of the EU data protection directive*, cit., 24.
[638] The list of the Commission and the Working Party decisions on the adequacy of the protection of personal data in third countries so far reached can be found at ec.europa.eu/justice/
[639] Working Party on the Protection of Individuals with regard to the Processing of Personal Data, *Opinion 1/99 concerning the level of data protection in the United States and the ongoing discussions between the European Commission and the United States Government*, 5092/98/EN/final, WP 15, adopted by the Working Party on 26 January 1999; Article 29 Data Protection Working Party, *Opinion 3/2001 on the level of protection of the Australian Privacy Amendment (Private Sector) Act 2000*, 5095/00/EN/WP40 final, adopted on 26 January 2001; Article 29 Data Protection Working Party, *Opinion 2/2001 on the adequacy of the Canadian Personal Information and Electronic Documents Act*, 5109/00/EN/WP 39, adopted on 26 January 2001.
[640] No agreement, for instance, has been reached between the EU and Australia after the inadequacy finding of the Working Party on 2001. Australia and the EU retain only a more specific agreement pertaining to the treatment of passenger name record data. See, Agreement between the European Union and Australia on the

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

opinion has been followed by the conclusion of negotiations pursuant to Article 25.5 of the Directive, ultimately allowing for the data transfers[641]; for instance, this has been the rationale at the basis of the data protection agreement reached in 2000 between the EU and the US (the so-called *Safe Harbour Agreement*)[642].

Technically, the fact that the Working Party does not reach a positive decision does not necessarily imply that the third country at issue is somehow "blacklisted". In theory, as explained by the Working Group itself, even if follow up bilateral negotiations are not undertaken, in these cases "the public message would rather be that no general guidance regarding that particular country is yet available"[643], hence the evaluation needs to be undertaken nationally, and on a case-by-case basis. However, it is reasonable to expect that, although not binding *per se,* the negative judgement of the Working Party could have a decisive role in influencing the decisions of the national authorities.

Finally, for those countries where no adequacy assessment has been undertaken by the Working Party at all and, consequently, no Commission Decision has been reached, it is still up to each EU Member States authority to evaluate whether and in what circumstances the data transfer can take place. Although, in theory, this should be done for each data transfer, in practical terms the Working Party itself recognized that national authorities need to develop a system "which rationalise the decision-making process for large number of cases"[644]. In any case, this process cannot but create a multiplication of potentially diverging evaluations by national authorities as well as a general status of uncertainty pending an EU determination[645].

In conclusion, it is undeniable that the different possibilities provided by the privacy directive coupled with the variety of bodies involved (Commission, Working Party, national agencies) in the evaluation of the third-country systems in place for data protection give rise

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processing and transfer of European Union-sourced passenger name record (PNR) data by air carriers to the Australian customs service, *OJ, L 213*/49, 2008.

[641] "At the appropriate time, the Commission shall enter into negotiations with a view to remedying the situation resulting from the finding made pursuant to paragraph 4". Directive 95/46/EC, cit., Art. 25(5).

[642] Under this arrangement, US entities participating to the scheme can earn a presumption of adequacy with the EU standards. Commission Decision of 26 July 2000 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the safe harbour privacy principles and related frequently asked questions issued by the US Department of Commerce, *OJ, L 215/7*. The Safe Harbour Agreement and its more recent developments will be further analysed in Chapter III when discussing EU-US bilateral negotiations.

[643] Working Party on the Protection of Individuals with regard to the Processing of Personal Data, *Working Document Transfers of personal data to third countries: Applying Articles 25 and 26 of the EU data protection directive*, cit., 27.

[644] *Ivi*, 26.

[645] Reyes C.L., *WTO-Compliant Protection of Fundamental Rights: Lessons form the EU Privacy Directive*, cit., 7.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
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Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

to a patchy scenario where the *iter* to obtain the final green light for data transfer to each third country might differ procedurally and maybe also substantially. As examined below, this can easily create, at least in theory, a fertile ground for GATS discriminations to arise.

5.3.3 Possible WTO inconsistent features of the EU privacy directive

Although no WTO complaint in this specific regard has ever been raised, the analysis below will try to follow the possible reasoning a WTO Panel would develop if asked to rule on the legality of the EU privacy directive with the GATS system. Following the same path developed above for the case of internet filtering[646], we will then first analyse the Privacy Directive critical points with regard to market access, domestic regulations and MFN obligations having then a look at the possible grounds for defence available under the privacy exception of GATS Art. XIV c) ii.

The starting point of the analysis would be to understand whether, for GATS purposes, the privacy directive does constitute a measure "affecting trade in services"[647] and, most importantly, whether the EU has undertaken any market access commitment in the areas likely to be affected by the directive. Admittedly, however, the first question can be easily resolved by looking at the preamble of the directive itself where it is explicitly recognized, albeit only in relation to the EU internal market, that "the free movement of goods, persons, services and capital" require "that personal data should be able to flow freely from one Member State to another"[648]. As instead for the possibility that the EU privacy measures affect services for which specific commitments have been undertaken by the EU, given the wide array of categories liberalized through the EU schedule and the growing importance of

[646] *Infra,* para. 5.2.2.
[647] Pursuant to Article I of the GATS, the agreement applies to "measures by Members affecting trade in services". The term "affecting" has been subject to jurisprudential interpretations that have defined its scope. In the GATS context, the Appellate Body delved into the interpretation of this term in the context of the *Canada-Auto* dispute when, making reference to the *EC-Banana* case, recalled that "the word "affecting" implies a measure that has "an effect on", which indicates a broad scope of application. This interpretation is further reinforced by the conclusions of previous panels that the term "affecting" in the context of Article III of the GATT is wider in scope than such terms as "regulating" or "governing". WT/DS139/AB/R, WT/DS142/AB/R, *Canada – Certain Measures Affecting the Automotive Industry*, 31 May 2000, 158.
[648] Directive 95/46/EC, cit., whereas 3.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

data transfer for the correct functioning of many services, it is hard to imagine how none of them will be somehow affected[649].

Having ascertained the relevance of the privacy directive in the context of the GATS framework, we will now turn to the identification of possible GATS inconsistencies.

First of all, it is immediately clear that, if we adopt the reasoning developed by the Appellate Body in the context of the *US-Gambling* dispute, a general ban imposed on data transfer to third countries as a result of an inadequacy determination would constitute a "zero quota" within the meaning of Article XVI lits a) and c) *vis-à-vis* otherwise liberalized services[650]. However, similarly to what discussed above in the case of gambling and public morality, this interpretation might be subject to criticism as, also in the case at hand, the main determinant of the discriminatory treatment is not the establishment of a quota but is somehow dependent on the "quality" of the service itself, at least if the data protection is regarded as an intrinsic qualitative feature of a service. If in this case we were to follow the position maintained by Pauwelyn described above, the market access clause of Article XVI would not be considered relevant[651]; instead the appropriate GATS measure to evaluate the Privacy Directive against would probably be the domestic regulation provision of Article VI:5 dealing with licensing, technical standards and *qualification requirements*[652]. Here however, and taking also into consideration the so far unfinished status of the discipline on domestic regulation[653], it is difficult to imagine how a WTO Panel would be in the position to rule in the sense of the unnecessary burdensomeness of a measure aimed at protecting personal data[654]; in fact, GATS Article VI requires, among other things, that "in determining whether a Member is in conformity with the obligation under paragraph 5(a), account shall be taken of

[649] As recalled in Chapter I, with the notable exception of audiovisual services, for the EU has generally liberalized trade in the most important sectors relevant for electronic services (telecom and computer services).
[650] The two subparagraphs of GATS XVI provide that, where market access commitments are undertaken, WTO Members shall not apply, respectively, "limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test" and "limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test". GATS, Art. XVI a) and c).
[651] The criticism raised to the "zero quota" approach developed by the Appellate Body is discussed above. *Infra*, para, 3.1.3.
[652] As recalled above, Article VI:5 must be read in conjunction with the - albeit incomplete - discipline foreseen in Article VI:4. *Infra*, para 3.2.1.
[653] *Ibid*.
[654] The discipline foreseen through Art. VI:4, and provisionally applied through the cross-reference of Article VI:5 requires, among other things, qualification requirements to be "not more burdensome than necessary to ensure the quality of the service".

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
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international standards of relevant international organizations"[655]. In this case however, lacking - as discussed - a common internationally accepted benchmark on this delicate topic, the problem of legitimacy would certainly arise, making a finding of violation by a WTO Panel extremely problematic.

Market access and domestic regulation are not however the only GATS measures potentially touched upon by the privacy directive; the administration transparency provision of Article VI:1, requiring as discussed to administer measures affecting services in a "reasonable, objective and impartial manner"[656], might be certainly of a particular relevance in light of the fact that, although formally the directive requires transfer-by-transfer adequacy determinations to be undertaken by national authorities, in certain cases such evaluations are carried out on a countrywide basis by the European Commission, hence inserting a possible discriminatory feature in the process. In case of a dispute, the EU would need to argument the reasons at the basis of such behaviour and to prove that the administration of such measures is not "unreasonable". Moreover, strictly related to administration transparency, but probably even more importantly, the treatment afforded to certain countries and not others in terms of countrywide adequacy determinations, as well as the possibility allowed only in certain cases to enter into bilateral agreements, might also fall short of the MFN principle enshrined in Article II which, we recall here, applies to all GATS measures regardless of the specific commitments[657]. Specifically, the MFN principle might acquire a decisive relevance with reference to two specific aspects: firstly, some grounds for a MFN violation might surface because, in light of the procedure developed by the European Commission, the evaluation is undertaken only for some countries, and no formal procedure to request such an evaluation seems to be provided to others. The achievement of a positive evaluation creates an unbalanced situation *vis-à-vis* other countries that, in absence of such positive determination, still need to rely on the individual evaluations of national authorities in each EU Member State. Secondly, in case of a negative outcome, the possibility for a third country to overcome the data transfer restrictions through bilateral agreements is not automatic as, pursuant to the directive, it is up to the European Commission, "at the appropriate time", to "enter into negotiations with a view to remedying the situation resulting from the finding made pursuant

[655] GATS, Art. VI:5 lit b).
[656] *Infra*, para. 2.1.2.
[657] The only possible way to deviate from the general MFN principle in the GATS is to list the measures concerned in the Annex on Article II Exemptions. *Infra*, para. 2.2.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

to paragraph 4"[658]. Again, this could be easily regarded as a MFN violation because the treatment afforded to one country is not "immediately and unconditionally" extended "to service suppliers of any other Member"[659].

5.3.4 The availability of the GATS general exception defence?

That said, in case of a dispute, a Panel would need to confirm that the array of possible GATS inconsistencies apparently embedded into the EU privacy discipline cannot be justified by the specific privacy exception of Article XIV analysed above[660]. Although this clause has never been invoked before in the context of a WTO dispute, it is reasonable to expect that the judges would follow the well-established two-pronged test of necessity and good faith[661].

As for the first part of the evaluation, it is argued here that, in consideration of the wide range of official international instruments developed and discussed in different international *fora* with regard to privacy, the latest being the 2013 UN resolution 68/167 on the "Right to privacy in the digital age"[662], when examining the "necessity" of the EU measures a Panel would probably defer from delving into a discussion on the importance of the value at stake, taking this for granted, and will focus more in detail on the availability of less trade restrictive means to achieve the same level of protection required by the Privacy directive. However, also in this case, the LTR test would probably be resolved in favour of the EU. As we have seen, the general rule of thumb set up by the directive is the outright prohibition of data transfer whenever third countries are considered as not adequately protecting EU citizens' personal data[663]. Indeed, notwithstanding the high level of restrictiveness of a total ban, it would still be problematic for a Panel to argue that the same level of protection sought by the EU can be achieved without prohibiting the transfer of data

[658] Directive 95/46/EC, cit., Art. 25.5.
[659] GATS, Art. II:1. Jurisprudential interpretations have clarified that the MFN provision in the GATS is not comparable to the similar provision in the GATT Agreement. Accordingly, in the *EC-Bananas III* case, the Appellate Body has clarified that, for GATS purposes, the MFN encompasses both *de jure* and *de facto* discriminations. WT/DS27/AB/R, *European Communities - Regime for the Importation, Sale and Distribution of Bananas,* cit., para. 233.
[660] *Infra,* para. 5.3.1.
[661] *Infra*, para. 4.
[662] The resolution, voted in the aftermath of the so called "datagate" in the US, calls upon States "(a) to respect and protect the right to privacy, including in the context of digital communication; (b) to take measures to put an end to violations of those rights and to create the conditions to prevent such violations, including by ensuring that relevant national legislation complies with their obligations under international human rights law". UNGA, *The right to privacy in the digital age*, cit., para. 4.
[663] Directive 95/46/EC, cit., Art. 25.4.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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because, once the information leaves the EU jurisdiction, the controls over it from EU authorities cannot be guaranteed, making virtually impossible to "secure compliance with not WTO inconsistent laws and regulations" as provided by GATS Article XIV c) itself.

In addition, whether the evaluation is undertaken on a case-by-case basis, as probably initially foreseen by the privacy directive, or through a countrywide adequacy determination by the Commission does not seem to alter the principle itself. Moreover, the use of term "adequate" seems to already indicate a more lenient and international "trade-friendly" approach compared to the "equivalency" requirement provided for in other circumstances[664]. We then argue here that, in evaluating the necessity of the ban on data transfer, a Panel would make recourse to the reasoning elaborated in the context of the *EC-Asbestos* dispute when, albeit in the different context of health protection, the Appellate Body ruled that:

> "it is undisputed that WTO Members have the right to determine the level of protection of health that they consider appropriate in a given situation. France has determined, and the Panel accepted, that the chosen level of health protection by France is a "halt" to the spread of asbestos-related health risks. By prohibiting all forms of amphibole asbestos, and by severely restricting the use of chrysotile asbestos, the measure at issue is clearly designed and apt to achieve that level of health protection"[665]

And subsequently concluded, with reference to the existence of "reasonably available alternatives" that:

> "France could not reasonably be expected to employ any alternative measure if that measure would involve a continuation of the very risk that the Decree seeks to "halt""[666].

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[664] Perez Asinari M.V., *Is There any Room for Privacy and Data Protection within the WTO?*, in *Electronic Communication Law Review*, 9, 2002, 275-276. "Equivalency" of national measures is commonly required in the food law. In this field, the concept of equivalency is internationally accepted and explicitly referred to in the SPS Agreement (Article 4) as well as in the Codex Alimentarius Commission documents. See, for instance, CAG/GL 53-2003, *Guidelines on the Judgment of Equivalence of Sanitary Measures Associated with Food Inspection and Certification Systems* and CAG/GL 34-1999, *Guidelines for the Development of Equivalence Agreements Regarding Food Import and Export Inspection and Certification Systems*.

[665] WT/DS/135/AB/R, *European Communities – Measures affecting Asbestos and Asbestos-containing Products*, cit., para. 168.

[666] *Ivi*, para. 174.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
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Finally, although some doubts on the actual necessity of an outright ban may arise by considering that, in certain circumstances, bilateral agreements reached after a inadequacy determination have been set up to allow the data transfer under certain specific conditions, we argue here that this latter point pertains more to the "application" of the measure rather than the measure itself and, as such, its compatibility with the general exception can be more satisfactorily addressed in the context of the *chapeau* analysis.

Turning now precisely to the possible inconsistencies of the EU privacy system under the *chapeau*, it is worth recalling first of all that such test is aimed at revealing the existence of arbitrary behaviours that are not related to the stated objective of the measure so that "there is arbitrary or unjustifiable discrimination […] when a Member seeks to justify the discrimination resulting from the application of its measure by a rationale that bears no relationship to the accomplishment of the objective […], or goes against this objective"[667]. In the case at hand, the existence of a discriminatory treatment with regard - at least - to the MFN principle and the administration transparency provision has been discussed. The aim of the *chapeau* analysis would be to ascertain whether sufficient reasons exist for such a discrimination to be considered "justifiable". As we have seen, however, the critical point here is not related to the fact that certain countries obtain adequacy determinations and others do not; instead, the issue arise exactly because the *way* in which the decision to undertake such a determination analysis is taken is unclear. The same holds true for the initiation of bilateral negotiations in the aftermath of an inadequacy finding as, again, no clear and systematic procedure is established for the initiation of bilateral discussions[668].

In both cases, and in line with the *Brazil-Tyres* interpretation, the arbitrary way of proceeding on the European Commission side, clearly not linked to the objective of the measure, would hardly survive the *chapeau* test because, similarly to the case of internet censorship, it is not justified under a public policy perspective. On the contrary, were these procedures be eventually publicly streamlined and systematized to allow third countries to

[667] WT/DS332/AB/R, *Brazil – Measure Affecting Imports of Retreated Tyres*, cit., paras 246-247. *Infra*, para. 4.3.
[668] Reyes C.L., *WTO-Compliant Protection of Fundamental Rights: Lessons form the EU Privacy Directive*, cit., 34.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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demand adequacy determinations and, in case of negative results, to request the possibility to find commonly accepted solutions through bilateral negotiations, the arbitrariness of the measure would be easily removed, probably together with its main GATS-inconsistent feature. As a matter of fact, in the food safety law area, the European Commission already grants such possibility as a result of the obligations descending from the SPS Agreement and, indirectly, the Codex Alimentarius Commission[669].

6. Conclusions: in the hands of the adjudicators?

Throughout the Chapter, we have outlined the main features of the GATS Agreement focussing the attention on those provisions that are leaving potential space for trade barriers to arise in internet service trade. The study undertaken had the purpose of shading lights on the positive instruments already in force through the GATS Agreement that are functional in guaranteeing a smooth development of cross-border trade of electronic services but, most of all, to highlight those features that can instead potentially threaten its expansion. The study has revealed that, in some cases, the scope of the provisions analysed is not yet perfectly clear in light of its "unfinished" status or its generic formulation. In some other circumstances, it is the structure of the Agreement itself to allow for the fragmentation of the commitments, the listing of specific exemptions (MFN) or even the complete suspension of the liberalization obligations for the protection of a series of non-trade interests.

More particularly, as far as horizontal obligations are concerned, the publication and administration transparency provisions of the GATS Agreement are certainly of great importance for those services, such as internet-based ones, delivered on a cross-border basis. However, as we have discussed at the beginning, these obligations do not seem to be as

[669] Pursuant to Art. 4(2) of the SPS Agreement, every WTO Member must be afforded the opportunity to ask for, and possibly obtain, the equivalence determination. Moreover, the importing Member is urged to "respond in a timely manner to any request from an exporting Member for consideration of the equivalence of its measures". See, SPS Agreement, Art. 4.2; see also G/SPS/19, *Decision on the Implementation of Article 4 of the Agreement on the Application of Sanitary and Phytosanitary Measures*, SPS Committee, 26 October 2001. In the EU context, third countries willing to import food of animal origin into the EU are requested to demonstrate that the food products destined to the EU market are produced in accordance of EU or equivalent standards. As required by the WTO system, European Commission procedures to obtain market access through equivalence determinations are transparent and non-discriminatory. Regulation (EC) No 854/2004 of the European Parliament and of the Council of 29 April 2004, laying down specific rules for the organization of official controls on products of animal origin intended for human consumption, in *OJ* L 226 of 25 June 2004, Chapter III.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
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demanding as their counterpart in the GATT, they do not leave much space for action to the private operators and are vaguely worded so that the possibility to invoke them in case of a dispute is limited. Moreover, further problems of predictability for the supply of electronic services can arise also as a result of the possibility granted to WTO Members to derogate from MFN obligation in light of the discipline set forth in the Annex on Article II. Looking at the current state of play, with the Doha Negotiations in a deadlock and with no foreseen spontaneous unilateral actions from WTO Members in the direction of the removal of such "privileges", the possibility for trade distorting – albeit legal – consequences of the application of the exemptions remain, especially in the field of audiovisual services.

However, besides transparency and MFN provisions, the real extent of existing obstacles to the liberalization of trade in electronic services seems to lie in the specific commitments currently in force among WTO Members. Indeed, notwithstanding the existence of horizontal commitments, the actual level of services liberalization still depends much on the specific commitments undertaken by each WTO Member, and this apply *mutatis mutandis* to the online context. Luckily, but with the notable exemption of audiovisual services, the impact of market access and national treatment restrictions listed in the categories and modes of supply relevant for "new" electronic services appear to be negligible. This however risks shifting the focus toward other types of trade distorting measures, namely licensing and technical and qualification requirements. As we have discussed, the boundaries of the discipline on domestic regulation set forth in GATS Article VI.4 are far from being defined and this risks creating further uncertainties when measures that are not subject to the market access and the non-discrimination provisions insert nonetheless burdensome requirements for the providers of electronic services. Indeed, the fact that, contrary to the similar discipline foreseen in the GATT context, such an important provision has never been invoked in WTO litigation is self-explanatory.

Notwithstanding the above, this study has however revealed how the most trade distorting feature of the GATS Agreement, potentially allowing for derogations to the already limited set of liberalization commitments for the supply of electronic services, lies in the general exception clause, broadly provided for in order to safeguard certain domestic non-trade interests. This is exacerbated by the fact that, because of their intrinsic characteristics, electronic services rely heavily on the flow of data and information for their effective

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
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functioning, but this flow can be relatively easily disrupted. It results that, because of these intrinsic features, perfectly legitimate public policy goals such as privacy protection or public morality can easily result in important trade distortions in the supply of internet services.

The WTO treaty text and the copious jurisprudence developed around the GATT and GATS general exceptions seem to provide enough safeguards – through the necessity test and the *chapeau* - against an improper use of the general exception to justify protectionist behaviours in the field of internet services. However, as we have seen in the two case studies analysed throughout the Chapter, existent domestic regulations impacting on the free flow of information and justified under the guise of public morality or data protection, are probably already leading to discriminatory, and at least to a certain extent, WTO-inconsistent behaviours.

Overall, given the problematic status of the Doha Negotiations and the difficulties in reaching new bindings in all the relevant areas, an improvement in the level of GATS horizontal and specific commitments or in the completion of the Article VI:4 discipline does not seem realistic, at least in the short-medium term. As will be analysed in the next Chapter, new significant commitments in this area are more likely to emerge only in the bilateral of plurilateral context.

In this static scenario, what the WTO can still offer is an open and coherent view with regard to the free flow of information, the currency - as we have seen - of the digital economy. However, lacking for the time being a set of common international understandings on the main issues related to international data flow (privacy and censorship), the burden of keeping an open *online* environment, free of unnecessary barriers to the information flows, inevitably rests on adjudicators; in this sense WTO judges are tasked to maintain the delicate equilibrium between national policy objectives and the development of *online* trade, taking the cue from the robust discipline developed for almost two decades in the *offline* world. As we have seen in the two hypothetical cases analysed throughout the Chapter, this might end up to be a complicated exercise as the issues related to data flows touches upon the very roots of States sovereignty but, at the same time, can easily result in discriminatory and unnecessarily burdensome applications.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
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In conclusion, the analysis has revealed that, in absence of further political pushes toward more liberalization of internet services or further clarification of the applicability of extant commitments, the instruments available to WTO adjudicators, although not ideal, should be at least sufficient in preventing bluntly discriminatory or unreasonable policies to emerge under the disguise of privacy needs and moral protection. In this sense, the fact that both cases have revealed potential inconsistencies of the national policies with the good faith provision is self-explanatory. It might not take too long to discover what the approach of the WTO judiciary in ruling on such thorny issues will be. Indeed, although for the time being no major concern has been brought to the dispute settlement body attention, it is unrealistic to rule out this possibility for the future. After all, the more the new currency will flow into WTO Members pockets, the more harmful to everybody's interests any type of internet restriction will be.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
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Chapter III

ELECTRONIC SUPPLY OF SERVICES IN THE BILATERAL TRANSATLANTIC RELATIONS

1 Introduction: framing the digital trade dialogue in the transatlantic relations

The analysis undertaken in the two previous chapters had the purpose to identify and examine the aspects of the broad WTO architecture capable of influencing, directly or indirectly, the development of e-commerce and cross-border trade in electronic services, with a particular focus on what we have defined as "new electronic services".

Despite certainly representing the overarching and most important international instrument for the development of trade law and policies, the multilateral arena has never been the only forum for countries to achieve trade liberalization. Preferential trade, under the form of regional, plurilateral or bilateral arrangements, always existed before and after the GATT and the WTO were established. In particular, due to a series of contingent reasons – one being certainly the deadlock in the Doha Development Round – bilateralism has witnessed a decisive renewed impetus in the last twenty years, prompted mainly by the trade policies pursued by the United States and, to a lesser extent, the European Union. Indeed, in the course of the last decade, both the EU and the US have initiated and most of the times concluded important bilateral trade deals with strategic partners; the highest point was reached in 2013, with the launch of the negotiations for a landmark transatlantic trade and investment partnership (TTIP).

In the preferential context both the EU and the US have pushed forward the dialogue on e-commerce and electronic services more decisively than in the WTO. Because of their advanced developmental status and their economic weight, both sides obviously have a strong interest in securing a smooth development of bilateral trade in electronic services, not only to progressively enable their industries to offer advances products and services in digital form

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
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but also to empower and improve already existing supply chains[670]. Again, the possibility to achieve this rests, for the most part, on the constant availability of one single but crucial commodity of today's knowledge-based economy, data, and the absence of obstacles on its cross-border transmission[671].

Despite this general theoretical convergence, the pursuit of liberalization through trade agreements in this area has been obviously designed, by the two parties, according to their own, sometimes diverging, historical positions and needs. As briefly mentioned elsewhere in this study, certain aspects of the EU and the US trade policies – sometimes not specifically related to the Internet sphere - necessarily influence, directly or indirectly, the parties' positions when dealing with digital trade with third parties. Some are well-known trade specific positions, such as the historical protection sought by the EU to the audio-visual sector; some others, such as the privacy debate over trans-boundary data flows, are instead only incidentally related to trade. The existence of diverging policy positions has resulted in the two parties developing different approaches toward liberalization of digital trade, necessary yielding distinctive outcomes. However, the TTIP negotiations currently undergoing represent an unprecedented historical juncture for the two parties to try and find acceptable compromises on these long-lasting divergences.

Keeping all the above in mind, the following paragraphs in the final Chapter of this study will investigate precisely the dynamics of preferential trade in relation to internet and electronic services. For the reasons outlined above the focus will be, on one side, on the development of electronic services and e-commerce provisions in EU and US free trade agreements and, on the other, on the relevant aspects of the on-going transatlantic dialogue, currently framed also in the context of the TTIP negotiations.

Firstly, Part 2 will introduce the relationship between multilateralism and preferential trade making reference to both the general WTO architecture, somehow accommodating certain forms of preferential trade, and to the classical economic theories, generally favouring

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[670] Hofheinz P., Mandel M., *Uncovering the Hidden Value of Digital Trade*, *Towards a 21st Century Agenda of Transatlantic Prosperity*, The Lisbon Council, Issue 19, 2015, 2-3.

[671] The US International Trade Commission identifies the main barriers to the development of digital trade as: localization of servers measures, data privacy protection measures, IPR-related measures (or lack of) and censorship. See, United States International Trade Commission, *Digital Trade in the U.S. and Global Economies, Part 2*, Washington, DC: U.S. International Trade Commission, 2014, Chapter 5.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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multilateralism over preferential trade although mainly basing their assumptions on classical trade patterns.

Part 3 and Part 4 will scrutinize the path followed by both the US and the EU leading to bilateralism and, more importantly, will analyse the outcomes of the different policy choices supported by the two parties in the area of trade in electronic services and e-commerce; to do so, these paragraphs will investigate in details the different approaches adopted in by the US (Part 3) and the EU (Part 4) in bilateral negotiations, highlighting the results achieved and the main outstanding divergences.

Finally, keeping the results of these analyses in mind, Part 5 will outline the historical evolution of the EU-US dialogue on e-commerce and digital trade, highlighting the main point of convergence as well as the trade irritants in this area. Building on these considerations, the final part of the study will then delve into the digital trade aspects of the current TTIP negotiations and analyse the framework in which these are taking place, trying to eventually anticipate the possible outcomes.

Part 6 will conclude.

2 Multilateralism *versus* Regionalism: an overview of the traditional debate

2.1 – The rise of preferential trade: trends and evolutions of Preferential Trade Agreements

In the last decade preferential trade agreements have proliferated in an unprecedented pace. The reasons at the basis of this trend can be certainly linked to the lack of improvements in the Doha Development Round as well as to the need to tackle issues that are only partially dealt with in the WTO (i.e. investments, environmental policies, competition). Furthermore, preferential arrangements, both in trade in goods and services, can be motivated by the willingness of different Members to agree on specific issues of mutual interest. However, because of their bilateral or regional nature, such agreements run the risk of resulting in unbalanced outcomes when the bargaining power is not equally distributed among the negotiating parties.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
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Although nowadays appearing as a completely new and contemporary phenomenon mainly prompted by the lack of action on the multilateral front, preferential trade deals have been developing, albeit in different forms, for many decades, mostly in parallel with multilateral trade agreements, thus giving rise to a sketchy landscape of overlapping preferential and multilateral trade rules. This development, however, has not been linear; on the contrary, economic regionalism is commonly referred to as having witnessed three major waves in the modern era[672].

The *first* wave is identified as the one confined to the integration process initiated in Western Europe in the aftermath of the Second World War, with the establishment of the European Coal and Steal Community (ECSC) in 1951, the European Economic Community (EEC) in 1957 and the European Free Trade Agreement (EFTA) in 1960[673]. Outside Europe, but taking inspiration from the European experience, during that period trade agreements were undertaken principally in Africa and Latin America with the setting up of the East African Community and the Central American common market, but they were found to be largely ineffective[674].

A *second* wave began in the mid-eighties when the former EC, that was deepening its integration and, after the break-up of the Soviet Union, starting to conclude PTAs with Central and Eastern Europe countries, firstly delayed the launching and then the conclusion of the Uruguay round, hence pushing the US to abandon its long-standing commitment to multilateralism grounded in the MFN principle. Recognizing that PTAs were the only means left for keeping the process of trade liberalization afloat, the US went on to conclude its first FTA with Israel in 1985, followed by Canada in 1989, as well as the North America Free Trade Agreement (NAFTA) jointly with Mexico and Canada (1994)[675].

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[672] WTO, *The WTO and preferential trade agreements: from co-existence to coherence*, World Trade Report 2011, 51.

[673] *Treaty Establishing the European Coal and Steel Community,* Paris, 18 April 1951, available at eur-lex.europa.eu, *Treaty Establishing the European Economic Community*, Rome, 25 March 1957, available at eur-lex.europa.eu, *Convention Establishing the European Free Trade Association (EFTA)*, Stockholm, 4 January 1960, available at www.efta.int.

[674] The collapse of the first forms of regional integration in Africa and Latin American is generally attributed to the fact that those forms of integration were based on a regional form of import substitution which inevitably led to conflict, because each member wanted a regional market for its own inefficient industries but was unwilling to buy the expensive or poor quality import-substitutes being produced by their partners. Pomfret R. "Regional Trade Agreements", in Fratianni M. (ed.), *Regional Economic Integration*, Amsterdam, 2006, 40.

[675] The NAFTA differs from the previous US FTAs as it not only involves more than two countries but also establishes a permanent body (the Secretariat) for the management of the Agreement.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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Finally, the rationale at the basis of the *third* push toward regionalism, commenced in the years 2000s, has been instead probably the general perception from all the stakeholders of a lack of dynamism at the multilateral level culminated in the failure of the Seattle Ministerial Conference in 1999[676]. This has led the US, followed suit by the EU, to abandon completely its commitment toward multilateralism and to turn in a more decisive fashion toward bilateralism or other forms of regional and plurilateral integration. The race between the two giants has, in turn, led to a renewal of efforts for PTAs in many countries in Africa, Latin America, Central and Eastern Europe as well as in South and Central Asia, previously undaunted supporter of multilateralism. The final result is that today, among the WTO Members, only Mongolia is not part to any PTA[677].

The creation of the NAFTA in 1994 and the proliferation of more advanced PTAs starting from the 2000s fuelled a huge policy debate over the compatibility with the MFN principle of an increasingly fragmented system of bilateral and regional preferences. Already in 1996, in the context of the Singapore Ministerial Conference, WTO Members felt the need to openly recognize the existence and the role of PTAs that "can promote further liberalization and may assist least-developed, developing and transition economies in integrating into the international trading system", while however at the same time reaffirming the primacy of multilateralism and renewing "[their] commitment to ensure that regional trade agreements are complementary to [the multilateral trading system] and consistent with its rules"[678].

This clear stance in favour of multilateralism did not however prevent important WTO Members to continue pursuing and deepening their preferential trade agenda. On the contrary, almost 20 years later, the existence of "trans-pacific" and "transatlantic" trade negotiations initiated by the United Stated[679] with major trading partners is a clear signal of the lack of

[676] See, Statement by former WTO Director General Mike Moore: "It is vital to maintain and consolidate what has already been achieved", Seattle Ministerial Conference, Press release 160, 7 December 1999.
[677] While in 1990 the PTAs in force (both notified and non-notified) were almost 50, this number raised up to around 300 in 2010. The average number of PTAs that a WTO Member is party to is 13. See, *The WTO and preferential trade agreements*, cit., 47.
[678] WT/MIN(96)/DEC, *Singapore Ministerial Declaration*, Adopted on 13 December 1996, 7.
[679] The Trans Pacific Partnership (TPP) negotiations were launched in 2008 with the aim to conclude a high-standards trade agreement among the US and 11 "like-minded" Asia-Pacific countries (Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam). Negotiations formally concluded on 4th October 2015. *Trans-Pacific Partners and United States Launch FTA Negotiations*, USTR Press Release, September 2008, available at ustr.gov. In June 2013, the US and the EU announced the launch of the negotiations for a Transatlantic Trade and Investment Partnership (TTIP) at the

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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interest from many of the most important WTO Members in keeping the WTO as the main and only forum for trade liberalization and innovation[680].

2.2 - Preferential Trade Agreements and their relationship with the WTO system

The GATT 1947 first and the WTO Agreements then did not rule out *a priori* the possibility for its Members to conclude bilateral and plurilateral agreements. Despite logically considered as a second-best alternative and a departure from the most-favoured nation principle of GATT Article I, preferential trade agreements in the form of either free trade agreements or customs unions[681] have always been accommodated into the GATT 1947 since the beginning through a specific exception, Article XXIV, then replicated in a similar formulation in GATS Article V. Indeed, as far as WTO obligations are concerned, the GATT Contracting Parties first and the WTO Members later have always been allowed to engage in preferential negotiations. However, this has never been a completely open-ended "authorization", as the space of manoeuvre to conclude such arrangements has always been limited, at least theoretically, by a series of cumulative requirements.

The cumulative substantial requirements for a "WTO-proof" regional trade agreement are included in Article XXIV itself and mirrored, although with some differences, in GATS

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margin of the G8 Summit. See, *Statement by President Barroso on the EU-US trade agreement with U.S. President Barack Obama, the President of the European Council Herman Van Rompuy and UK Prime Minister David Cameron*, Press Release, 17 June 2013, available at europa.eu.

[680] This, of course, is not openly stated; on the contrary, the commitments toward multilateralism are constantly reaffirmed in the context of PTA negotiations. Significantly, at the TTP launch in late 2008, the Ministers "reaffirmed their commitment to a successful conclusion to the WTO Doha negotiations and underscored that by promoting increased trade liberalization through a high-standard agreement, the Agreement will support continued ambition in the Doha round." How the conclusion of a Free Trade Agreement can be helpful in stimulating further developments of the Doha Round is not clearly explained. See, *Trans-Pacific Partners and United States Launch FTA Negotiations*, cit.

[681] For the purposes of Article XXIV, a customs union is defined as "the substitution of a single customs territory for two or more customs territories, so that (i) duties and other restrictive regulations of commerce […] are eliminated with respect to substantially all the trade between the constituent territories of the union or at least with respect to substantially all the trade in products originating in such territories, and, (ii) subject to the provisions of paragraph 9, substantially the same duties and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union". A free-trade area is instead defined as "a group of two or more customs territories in which the duties and other restrictive regulations of commerce [...] are eliminated on substantially all the trade between the constituent territories in products originating in such territories". GATT Agreement, Art. XXIV. It is reported that, in the initial proposal for a ITO charter, the exception from the MFN principle was only envisioned in the case of customs unions and was broadened only later to include also free trade agreements. It is also believed that the significance of this provision lies in the willingness from the US side to "reconcile US multilateral principles with Britain's and Europe's need for domestic stability" but could also be seen as a "part of the package of concessions granted to developing countries". See, Chase K., *Multilateralism compromised: the mysterious origins of GATT Article XXIV*, in *World Trade Review*, 5, 2006, 4-7.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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Article V. These conditions, set forth in paragraph 5 to 8 of article XXIV and subsequently clarified in the context of the Uruguay Round through an *Understanding on the interpretation of Article XXIV*[682], require in particular:

- that the duties are eliminated on "substantially all trade" between the constituent territories"[683].
- that the general incidence of the duties and other regulations "shall not on the whole be higher or more restrictive than the general incidence of the duties and regulations of commerce applicable" prior to the formation of the union or the adoption of the agreement[684];
- that, in case in the aftermath of the formation of a customs union an overall increase of duties occurs, the custom union would offer compensation to the other WTO Members in the form of reduction of duties on the other tariff lines[685];

The requirements set forth in Article XXIV find however a limitation in their applicability when developing countries are concerned; indeed, in this case, the 1979 Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries (so-called "Enabling Clause") allows for a more lenient treatment, precisely with regard to the liberalization on "substantially all trade" and the complete elimination of customs duties in preferential agreements concluded among developing countries[686]. This is particular important for the agricultural interests of developing

[682] *Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994*, Agreement Establishing the World Trade Organization, Annex 1A, Multilateral Agreements on Trade in Goods. This document was adopted notwithstanding the opposition of important WTO Members such as the EC, India and Yugoslavia. *The WTO and preferential trade agreements*, cit., 185.
[683] GATT, Art. XXIV:8(a) and (b). A similar wording is provided in GATS Article 5:1 in the sense that an agreement on trade in services should have substantial sectorial coverage, defined in terms of the number of sectors, the volume of trade affected and modes of supply.
[684] GATT, Art. XXIV:5.
[685] Such negotiations on the compensatory adjustments would need to follow the rules and procedures set forth in GATT Article XXVIII as elaborated by its subsequent "Understanding on the Interpretation of Article XXVIII of GATT 1994". See GATT, Art. XXIV:6.
[686] The Enabling Clause provides, among other things, that differential and more favourable treatment to developing countries can be accorded in case of "Regional or global arrangements entered into amongst less-developed contracting parties for the mutual reduction or elimination of tariffs and, in accordance with criteria or conditions which may be prescribed by the CONTRACTING PARTIES, for the mutual reduction or elimination of nontariff measures, on products imported from one another." L/4903, *Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries,* Decision of 28 November 1979, para. 2.c.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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countries.[687] A similar waiver is also provided in the discipline for trade in services whereby GATS Article V requires that "where developing countries are parties to an agreement […] flexibility shall be provided" with regard to the elimination of all the forms of discriminations and the substantial sectoral coverage requirement[688].

In order to check the compliance with the complicated requirements set forth in GATT Article XXIV, GATS Article V and in the Enabling Clause referring to free trade agreements and the customs unions, a Committee on Regional Trade Agreements (CRTA) – absent in the GATT 1947 structure - was established in the aftermath of the Uruguay Round[689]. This body, reporting to the General Council, replaced the *ad hoc* working parties and was tasked to "carry out the examination of agreements in accordance with the procedures and terms of reference adopted by the Council for Trade in Goods, the Council for Trade in Services or the Committee on Trade and Development" and "present its report to the relevant body for appropriate action"[690]. This new structure was complemented later, in 2006, through a decision by the General Council aiming at establishing a transparency mechanism for regional agreements and identifying more in details, although on a provisional basis, the duties of WTO Members engaged in preferential negotiations[691] although at the same time keeping and streamlining the role of the CRTA (and the CTD, for those agreements falling within the scope of the "Enabling Clause")[692].

[687] Matthews A., *Regional Integration and Food Security in Developing Countries*, FAO, Agricultural Policy Support Service, 2003, Chapter 4.
[688] GATS, Art. V.3(a).
[689] WT/L/127, *Committee on Regional Trade Agreements,* Decision of 6 February 1996, 7 February 1996.
[690] *Ivi*, para. 1(a).
[691] WT/L/671, *Transparency Mechanism for Regional Trade Agreements,* Decision of 14 December 2006, 18 December 2006. The decision is to be considered "provisional" as it is supposed to be subject to a review at the conclusion of the Doha Round as foreseen at paragraph 4 of the Doha Declaration.
[692] The Secretariat has prepared an informal document listing the notification obligations and the timeline from the early announcement of the kick-off of the negotiations for a preferential trade agreement to the Members considerations on the basis of the WTO Secretariat factual examination. The timeline is available at www.wto.org.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
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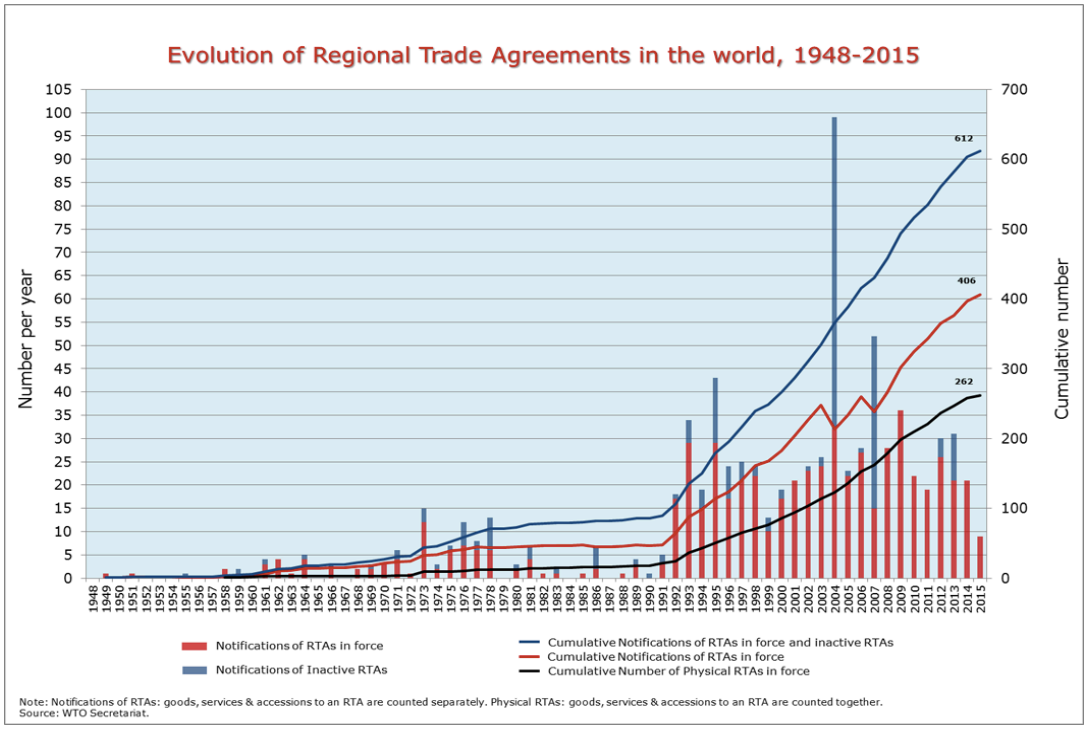

Table X: Source: WTO Secretariat, available at www.wto.org.

Retrospectively, the set up of the CRTA in the context of the Uruguay Round was timely as, in the last two decades, free trade areas and customs unions have flourished, and so has the number of WTO early notifications as shown in the table above. However, a general lack of consensus among the Members on the interpretation of certain aspects of Article XXIV – and especially on the concept of "substantial trade" - has prevented the effective monitoring and enforcement of GATT rules for regional arrangements. Significantly, despite the considerable number of analyses undertaken by the working parties first and the CRTA later, no report has ever been refused or adopted by the General Council notwithstanding the fact that only one working party has determined that a regional arrangement satisfied the criteria of Article XXIV[693]. Some of the relevant features of Articles XXIV have been instead subject to the Appellate Body scrutiny; indeed in the *Turkey-Textiles* case of 1999, the WTO judges shade some lights on the relationship between pre-existing GATT commitments versus third parties and the rights descending from Article XXIV to deviate from general GATT

[693] This was the case for the Customs Union between Czech Republic and Slovak Republic for which the working party was able to conclude the consistency of the Agreement with Article XXIV. See, World Trade Organization, *World Trade Report 2007, Six Decades of Multilateral Cooperation: What Have We Learnt*, 2007, 306.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
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rules[694]. In this case, the Appellate Body developed its interpretation of paragraph 4, 5 and 8 of Article XXIV indicating that two specific conditions needs to be met in order for a customs union to be allowed to deviate from GATT provisions: first, that a customs union is actually formed under the requirements of paragraphs 5 and 8, and second that the formation of the customs union would be prevented if a party were not allowed to introduce the GATT inconsistent measure[695]. However, although providing certain clarifications for the merit of the specific case, the analysis of the specific requirements of paragraphs 5 and 8 did not resolve all the interpretative doubts. Significantly, with regard to the double requirement of paragraph 8 to eliminate internal and external duties and other restrictive regulations from all "substantial trade", the judges recognized that "neither the GATT CONTRACTING PARTIES nor the WTO Members have ever reached an agreement on the interpretation of the term "substantially" in this provision. It is clear, though, that "substantially all the trade" is not the same as all the trade, and also that "substantially all the trade" is something considerably more than merely some of the trade"[696].

In light of the above, the renewed efforts in 2006 to improve the monitoring system can be seen as both the acknowledgment by the WTO of the impossibility for the multilateral trade system to systematically analyse and judge the compatibility of regional integrations with the multilateral rules as well as an attempt to nonetheless improve the situation by requiring Members to at least be transparent and to make the results of their preferential negotiations systematically available to the public. As noted by the WTO Secretariat itself in the 2011 Annual Report, the switch in the wording used in the 2006 decision calling the

[694] The dispute originated from a request for consultation by India concerning Turkey's imposition of quantitative restrictions on imports of a broad range of textile and clothing products as a result of the conclusion of a Customs Union between Turkey and the European Communities. India claimed that those restrictions were inconsistent with Articles XI and XIII of GATT 1994 whereas Turkey maintained that such measures were justified under article XXIV. WT/DS34/AB/R, *Turkey – Restrictions on Imports of Textile and Clothing* Products, 22 October 1999.

[695] *Ivi*, paras 58-63. This reasoning has been recently mentioned by the Appellate Body to confirm that, unless certain criteria are met, Article XXIV cannot be used "as a broad defence for measures in FTAs that roll back on Members' rights and obligations under the WTO covered agreements." WT/DS457/AB/R, *Peru – Additional Duty on Imports of Certain Agricultural Products*, 20 July 2015, paras 5.112-5.117.

[696] WT/DS34/AB/R, *Turkey – Restrictions on Imports of Textile and Clothing Products*, cit., paras 48-49.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
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CRTA to "consider" rather than "examine" the content of RTAs seems to confirm this interpretation[697].

2.3 - The drivers of preferential trade: beyond a pure static welfare analysis?

The theoretical debate over preferential treatment versus multilateralism has been going on for decades with the economic theories, from Viner to Bhagwati[698], strongly siding in favour of the multilateral approach by demonstrating the trade diverting effects of preferential agreements and the consequent net loss of consumer welfare and pointing out at the negative implications of the spaghetti bowl phenomenon[699]. Classical economic theories focused mainly on the analysis of the static welfare effects of preferential agreements since early FTAs dealt mainly with tariff reduction and rules of origin (RoO). However, as analysed below and pointed out in the 2011 WTO report, "new generation" PTAs clearly go beyond the classical provisions on tariff preferences and provide also inside-the-border commitments that improve and innovate in relation to classic WTO obligations.

The reference point in the economic discourse in relation to preferential versus multilateral trade can probably be identified in a publication by the economist Arvind Panagariya of 1999 aiming at offering an overview of the merits of regional arrangements as instruments of trade liberalization and building on an extensive literature review in the

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[697] The WTO report further acknowledged that this change of approach "may be viewed by some as a tacit acknowledgement by members that their interests would be better served by focusing efforts on improving transparency". *The WTO and preferential trade agreements*, cit., 185.

[698] Jacob Viner pioneered the static welfare analysis of PTAs outlining the theory of *trade creation* and *trade diversion* as a consequence of preferential trade deals. His studies were undertaken during the discussions for the Havana Charter. Viner J., *The Customs Union Issue*, Carnegie Endowment for International Peace, 1950, 221. More recently, the economic studies of J. Bhagwati have drawn again the attention to the effects of preferential trade versus multilateralism. This second wave of studies has instead coincided with the creation of the NAFTA and continued through what we have defined above as the third generation of preferential trade deals. See, among others, Bhagwati J, Panagariya A., "Preferential Trading Areas and Multilateralism: Strangers, Friends or Foes?", in Bhagwati J, Panagariya A (eds.), *The Economic of Preferential Trade Agreements*, Washington DC, 1996, 1-78. See also Bhagwati J, Panagariya A., *The Theory of Preferential Trade Agreements: Historical Evolution and Current Trends*, in *The American Economic Review*, 86:2, May, 1996, 82-87.

[699] This expression, indicating the complication arising from the application of domestic rules of origin in the signing free trade agreements across nations, was first used by Bhagwati in a discussion paper criticizing the US Government inclination toward preferential trade deals. Bhagwati J., *US Trade Policy: the infatuation with FTAs*, Columbia University Academic Commons, Discussion Paper Series No 726, 1995.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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context of PTAs emergence[700]. Relying on the Vinerian static welfare analysis of economic integration, the fundamental assumption of Panagariya is that "when countries import from and export to union members as well as outside countries, trade diversion is inevitable"[701]. In particular, by analysing the economic effects of PTAs on member countries, Panagariya rejects the argument that when members are "natural trading partners", (i.e. a disproportionate share of world trade takes place among countries which are geographically proximate), the gains from trade creation within blocks are likely to outweigh any possible losses from external trade diversion. Especially when PTAs include both high-tariff and low-tariff countries, the more the former import from the latter, the more a PTA is trade diverting. The PTA-led redistributive effects make high-tariff countries worse off and low-tariff countries better off. In the end, if PTA's members are small in relation to the outside world, the PTA turns out to be wholly trade diverting. Another more specific issue, strictly related to the debate on preferential trade, concerns the rules of origin, which allow in a PTA to avoid trade deflection and determine whether a good is granted duty-free movement within the area. On this subject, Panagariya argues that the rules of origin maximize trade diversion in high-tariff countries by requiring that goods destined to them be imported through their own borders rather than through low-tariff countries. Moreover, if traded intermediate inputs are used in production, in order to take advantage of the tariff preference in the final good, PTAs' members may be forced to shift their purchases towards internal sources of inputs even though these sources are more expensive than if purchased from more efficient external sources. These distortions, originated by the complex sets of rules of origin, are multiplied because of the existence of overlapping PTAs.

Turning to the implications for the multilateral trading system, Panagariya underlines that some authors identify a "domino" effect whereby idiosyncratic events (such as the completion of the European single market in the mid-1980s) create the economic incentives for outside countries to seek entry into an existing PTA and, as long as the entry into the PTA is free, this process can lead to global free trade[702]. However, in Panagariya's view, this process stops short of encompassing all countries and yielding global free trade. In his view,

[700] Panagariya A., *The Regionalism Debate: An overview,* in *The World Economy*, 22:4, 1999, 477-512.
[701] *Ivi*, 483.
[702] Panagariya refers in particular to the theory elaborated by Baldwin postulating that, in absence of entry barriers, the success of regional integration inevitably triggers a domino effect whereby "outsiders" will be sooner or later incentivised to enter the regional area. Baldwin R., *A Domino Theory of Regionalism*, National Bureau of Economic Research, Cambridge, Working Paper n. 4465, September 1993.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
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after a PTA reaches a certain size, insiders have an incentive to block further entry, whereas the profits of outsiders decline monotonically as the PTA expands.

In light of the foregoing, Panagariya concludes that PTAs serve mainly as stumbling blocks to global free trade[703]. Indeed, in terms of the effects over external trade, much of the evidence suggests a rise in trade barriers against non-members following the formation of a PTA. While a PTA can lead to a reduction in tariffs on intermediate inputs, yet such a reduction increases effective protection to the final good and can turn out to be welfare-reducing. In addition, to the extent that a country's applied tariff is below its bound rate, as usually for developing countries, producers' lobbying can very well result in increased tariffs. Especially in the case of FTAs, if a country is dependent on tariffs for revenue purposes to maintain fiscal balance or to face fiscal crises, as is true again for many developing countries, the removal of tariffs on the partner countries may force to raise the external tariffs[704]. Even in the absence of any increase in external trade barriers, the proliferation of crisscrossing FTAs leads to a replacement of the non-discriminatory MFN tariffs by the already mentioned "spaghetti bowl" phenomenon, whereby each FTA has its own rules of origin varying across goods and different tariff rates apply to the same good depending on what origin is assigned to it. Finally, in a political-economy setting in which producers' lobbying play the central role in determining trade policies, PTAs can energize and unify protectionist lobbies, turning them into effective obstacles against multilateral liberalization. This is especially true in case of PTAs between developed and developing countries, which in public discourse are commonly associated with large inflows of labour-intensive goods and lower wages for unskilled labour.

As we have seen in the paragraph above, and in spite of the critical economic doctrine and the scarce academic support, the multilateral trade system accommodates somehow preferential trade deals in both GATT and GATS. This is because the position of the WTO and of the advocates of the PTAs' consistence with the multilateral trading system has always

[703] This conclusion was supported by a study published by economist Philip Levy postulating that, under certain circumstances, the median voter might achieve a higher level of utility through an FTA rather than the multilateral option. Levy P.I., *A Political-Economic Analysis of Free-Trade Agreements*, in *American Economic Review*, 87:4, 1997, 506–19.

[704] For instance, in the aftermath of the peso crisis in Mexico (1994-95), the external tariff on more than 500 items went up from 20 to 35 per cent and the same phenomenon was observed in the wake of the fiscal crisis in Brazil (1998-99), where Mercosur raised its common external tariff by 3 per cent. Preusse H.G., *The New American Regionalism*, Edward Elgar Publishing, 2004, 124.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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relied on the concept of "open regionalism", which tends to identify approaches of regional integration different from the closed, import-substituting regionalism of the 1950s and 1960s. Open regionalism refers to "plurilateral agreements that are non-exclusive and open to new members to join. It requires first that plurilateral initiatives be fully consistent with Article XXIV of the GATT [...]. Beyond that, it requires that plurilateral agreements not constrain members from pursuing additional liberalization either with non-members on a reciprocal basis or unilaterally. [...] Finally, open regionalism implies that plurilateral agreements both allow and encourage non-members to join"[705]. Yet, even in presence of an open membership, discrimination against non-members at any point in time remains in place by definition and this does not prohibit the world trading system to become fragmented. It was just this fear of fragmentation that prompted Renato Ruggiero, first WTO Director General, to go a step further in defining "open regionalism". Apart from the mere compliance with GATT Article XXIV, to be consistent with the multilateral trading system according to Ruggiero "a gradual elimination of internal barriers to trade within a regional grouping will be implemented at more or less the same rate and on the same timetable as the lowering of barriers towards non-members. This would mean that regional liberalization would in practice as well as in law be generally consistent with the [MFN] principle"[706]. If one were to look for an example of Ruggiero's preferred form of regionalism, East Asia undoubtedly would provide it. Yet, in Panagariya's view, even in this case regionalism can neither escape being discriminatory nor overcome the fundamental contradiction between openness and discrimination against outsiders.

In light of the above, should we then conclude that the debate over the compatibility of PTAs with multilateralism should be resolved in the sense of the impossibility to reconcile the two solutions? Although this work does not aim at providing a definitive answer to this thorny and very much complicated debate, to provide a broad overview of the issues at stake, a further element regarding the evolution in the structure of newly signed FTAs needs to be taken into account in order to better appreciate if and how trade diverging devices can however also provide positive effects for the multilateral trade system, especially for the overall purpose of this study.

[705] *Economic Report of the President*, United States Government Printed Office, Washington 1995, 220.
[706] Ruggero R., *The Road ahead: International Trade Policy in the era of the WTO*, The Fourth Annual Sylvia Ostry Lecture. Ottawa, 28 May 1996, available at www.wto.org.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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Indeed, if the first wave of regionalism could be characterized as falling into the patterns described by Panagariya, newly signed PTAs seem instead to encompass a different approach to economic integration. Being limited to trade in goods and taking into account exclusively the conventional static welfare effects related to tariff reduction, the analysis of Panagariya concludes that, because of their intrinsic discriminatory nature, the first wave of PTAs are trade diverting and cannot but impact negatively on multilateral trade liberalization. However, in the meantime, multilateral MFN tariffs have been decreasing and have now reached their lowest level. Moreover, given the considerable number of zero duty MFN rates in many countries and widespread goods exclusions, only 16 per cent of world trade is currently eligible for preferential tariffs. Therefore, rather than being confined to "shallow", negative integration tools aiming at eliminating tariff barriers among members, PTAs have for some time started promoting a "deeper"[707], positive integration through the coordination, if not a complete harmonization, of inside-the-border policy areas and regulatory frameworks, which are not (or only partially) dealt with at multilateral level. Data from the WTO shows that most of the new PTAs cover areas such as competition, product standards, regulatory regimes, investments, movement of capital, agriculture, environmental and labour standards[708]. This explains why the deep integration agenda cannot be pursued independently of PTAs[709].

The rationale for a deep integration agenda lies in the development of increasingly fragmented production networks, reflecting the need for companies to gain competitive advantages through the exploitation of factor price differences. The more fragmented the production chain is, the more significant are the costs due to the difficulties of doing business in different country-specific settings. The aim of deep integration agreements is hence to fill the governance gap between countries resulting from the globalization process on a range of regulatory issues that are essential to the success of the networks. Signing deep integration

[707] Lawrence R., *Regionalism, multilateralism and deeper integration,* Brookings Institution Papers on Economic Activities, 1997, 4.

[708] Analysing the deep integration provisions included in recently signed FTAs, the WTO Secretariat identifies two different types of measures, *WTO+* and *WTO-X*, referring respectively to those provisions falling already under the current mandate of the WTO but increasing the level of openness and those provisions introducing new policy areas in the FTA list of items for negotiations. See, *The WTO and preferential trade agreements*, cit., 128-131.

[709] As it has been observed, nowadays "a discriminatory tariff may matter less than the selective recognition of product safety standards or a selective access to government procurement matters". Mattoo A., Subramanian A., *A China Round of Multilateral Trade Negotiations,* Peterson Institute for International Economics, Working Paper Series WP 11-22, 2011, 6.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
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PTAs is estimated to increase trade in production networks by almost 8 per cent on average[710]. In turn, high levels of trade in production networks significantly raise the likelihood of signing deep integration agreements.

If we adopt this perspective, move beyond a pure welfare analysis and take into account their recent spread in scope and coverage, PTAs could also be qualified as being "integrationist" devices, which complement, rather than substitute, multilateralism. This phenomenon is certainly more evident in recently signed FTAs focusing less on trade in goods and more on immaterial service trade and regulatory issues. However, contrary to the phenomenon of trade diversion stimulated by the conclusion of FTAs, this form of preferential deep integration cannot clearly be explained and assessed by means of a classical welfare analysis. To a certain extent, in fact, inside-the-border commitments are likely to bring beneficial effects to every business operator regardless of its nationality. The most relevant consequence from the above is that, since deep integration provisions are embedded into regulatory frameworks that apply to all, they *de facto* extend their scope to non-members as well. For instance, if transparency provisions are implemented as a consequence of a bilateral agreement, third countries will automatically benefit from them. The same holds true for the principle of mutual recognition, which applies regardless of the origin of the products. It is thus clear that, even if difficult to quantify, PTAs encompassing policy areas other than tariff reduction may generate positive effects for third countries, hence complementing (rather than substituting) the multilateral process or even testing "pilot" initiatives, further inspiring and informing the multilateral deep integration agenda. It is in this sense that, in the next paragraphs, we will examine the innovative "deep" integration provisions relative to trade in cross-border and internet services that, as we have discussed in the previous chapters, do not seem to be finding any meaningful development in the more rigid and complicated multilateral framework. To do so, we will focus on the bilateral relations between the US and the EU, certainly the more developed in this area.

[710] *The WTO and preferential trade agreements*, cit., 123.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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3 The US FTAs approach to trade in cross-border electronic services and e-commerce

3.1 History, evolution and legal basis of the US Free Trade Agreements: the Trade Promotion Authority (TPA)

Among the most relevant international trade players worldwide, the US clearly stands out as one of the more active WTO Members with regard to the negotiations and conclusions of FTAs and other forms or regional integration with neighbouring and third countries. Although, as we have seen before, the US has been for a long time one of the fiercest supporters of the multilateral option as the only available solution to foster open trade[711], this has partially changed in the eighties when, because of the deadlock in the discussions for the creation of the World Trade Organization, the US turned to bilateralism and negotiated its first FTA with Israel in 1985. Since then the US have concluded bilateral and regional trade agreements with more than 20 partners[712] on the basis of GATT Article XXIV and GATS Article V and many other crucial negotiations, such as the TTP with Asian countries and the TTIP with the EU, have been concluded or are in the pipeline.

Although the interests by the US Government towards bilateralism was already evident in the Eighties, the US activities in the context of FTAs have witnessed an additional boost starting from 2002, when the US Congress restored the Trade Promotion Authority (TPA) also known as "Fast Track".

The Trade Promotion Authority can be considered as the historical representation of the balance struck between the desire of political oversight over trade policy by the US Congress and the pragmatic acknowledgment that a certain level of detachment from politics is crucial for the President and the executive power in order to acquire the flexibility needed

[711] The strong US stand in favour of multilateralism has been however questioned by Chase. By analysing the genesis of the Havana Charter, Chase identifies the US as the most influential (albeit secret) supporter of a broad and comprehensive exception clause (the future GATT Article XXIV), to allow not only customs unions but also free trade deals to survive the MFN general rule. According to Chase, the US position was justified at the time by the existence of a free trade deal project, never concluded, between US and Canada. See, Chase K., *Multilateralism compromised: the mysterious origins of GATT Article XXIV*, cit., 14-23.

[712] This number does not take into account other forms of trade and investment cooperation such as the "trade and investment framework agreements" (TIFAs) concluded by the United States with several partners and setting the principles for dialogue and cooperation or the Bilateral Investment Treaties (BITs) currently in force for the United State. Source: ustr.org.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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to credibly negotiate trade agreements with third parties[713]. It is believed to be also an effective mechanism to reduce the vulnerability of Congress to political pressure and lobbying efforts from import-competing industries[714].

Such a mechanism has been in place, albeit in different forms, since 1934 when the US Congress developed for the first time a bill known as the "Reciprocal Trade Agreement Act" authorizing the executive power to enter into agreements for the reduction of tariffs, within pre-approved levels, but subjecting already such authority to periodic review and renewals[715]. This legislative framework served as a basis for the conclusion of many "post New Deal" agreements on tariff reduction culminated with the GATT 1947, but was not detailed enough to empower the executive branch to negotiate on non-tariff matters[716]. For this purpose, when international trade negotiations started to deal with subjects other than simple tariff reductions, a new authority for the executive branch was needed. This was codified eventually in the 1974 Trade Act[717], establishing a modern version of the TPA, the so-called "fast track" procedure, and enabling for the first time US negotiators to conclude non-tariff agreements in the context of the Tokyo Round[718]. After that, the "fast track" authority has been renewed three times, until 1994, with the same format, whereby the Congress agreed to consider trade agreement implementing legislation expeditiously and to

[713] The foundation of the Congress competence in overseeing and regulating international trade issues and duties collection descends directly from the US Constitution. Article I.8 gives Congress the power to "regulate commerce with foreign nations" and to "lay and collect taxes, duties, imposts, and excises". However, Article II confirms, on the other side, the presidential competence to negotiate treaties.

[714] Wunsch-Vincent S. *The WTO, the Internet and Trade in Digital Products: EC-US Perspectives*, Hart Publishing, 2006, 114.

[715] The bill was passed "for the purpose of expanding foreign markets for the products of the United States (as a means of assisting in the present emergency in restoring the American standard of living, in overcoming domestic unemployment and the present economic depression, in increasing the purchasing power of the American public, and in establishing and maintaining a better relationship among various branches of American agriculture, industry, mining and commerce)". 48 STAT.943, 19 U. S. C. §1351 et seq (1934).

[716] At multilateral level, the first GATT negotiation round giving rise to international trade obligations other than simple tariff reductions has been the Kennedy Round held between 1964 and 1967 when agreements on Customs Valuation and Antidumping were discussed. The Reciprocal Trade Agreement Act was not however providing the authority for the executive branch to negotiate on such matters.

[717] *Trade Act 1974*, 88 STAT 1978, 19 U.S.C. § 2101 et seq.

[718] The Tokyo Round gave rise to a series of codes dealing with non-tariff barriers or specific industry sectors. More precisely, the "Tokyo Round Codes" included agreements on: subsidies and countervailing measures (interpreting GATT Articles 6, 16 and 23 of GATT), technical barriers to trade (or Standards Code), import licensing procedures, government procurement, customs valuation (interpreting GATT Article VII), anti-dumping (interpreting GATT Article VI, replacing the Kennedy Round code), bovine meat, dairy and trade in civil aircraft. Source: ww.wto.org.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
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vote it without amendment, provided the President met certain statutory negotiating objectives and consultation requirements[719].

Because also of the lack of relevant negotiations on the horizons and the failure from the WTO side to launch a new round in the aftermath of the Seattle Ministerial Conference in 1999, the executive branch took eight more years to get a fourth Congressional approval for extension that, as mentioned, happened in 2002 with the Bipartisan Trade Promotion Authority Act[720] prompted by the George W. Bush administration giving a renewed impetus to a new generation of US bilateral trade agreements[721]. More importantly for the purpose of this study, the text paid for the first time significant attention to the trade issues relevant for internet services, including for the first time specific objectives in relation to e-commerce[722].

Indeed, from 2002 onwards, and before expiring in 2007, the renewed Trade Promotion Authority led to the kick-off of many multilateral and bilateral negotiations, some of them concluded in more recent years, such as the landmark agreement with South Korea. Finally in April 2015, after some delays, a new bill known as the Bipartisan Comprehensive Trade Priorities and Accountability Act of 2015 (BCTPA)[723] was proposed to the Committee on Finance and overcame the US Senate obstacle; however the text did not pass the House scrutiny, mainly because it was presented together with another proposal, the Trade Adjustment Assistance (TAA), that wasn't gathering the bipartisan support[724]. The draft text of the TPA was then presented as a stand-alone act later in June and gathered the approval of the House and the Senate[725], granting the Presidential authority to conclude international trade agreements up until 2021[726].

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[719] Fergusson I.F., *Trade Promotion Authority (TPA) and the Role of Congress in Trade Policy*, Congressional Research Service, April 27, 2015, 1.
[720] *Bipartisan Trade Promotion Authority Act* (BTPAA), 116 STAT 993, 19 U.S.C. § 3801 et seq.
[721] Although broadly consistent with the previous Congressional acts, the new TPA included a new focus on labour and environmental provisions that are defined in the text as "principal negotiating objectives". Hornbeck, J.F., Cooper W.H., *Trade Promotion Authority (TPA) and the Role of Congress in Trade Policy*, Congressional Research Service, November 4, 2010, 2-7.
[722] *Infra*, para. 3.2.
[723] See, Press Release, *Hatch, Wyden and Ryan Introduce Trade Promotion Authority Legislation*, 16 April 2015, available at www.finance.senate.gov.
[724] The Trade Adjustment Assistance is a program to reduce the damaging impact of imports felt by certain sectors of the US economy. Donnan S, Sevastopulo D., *Obama's fast-track trade bill stumbles in House*, The Financial Times, 12 June 2015, ft.com.
[725] See, Hughes S., *House Passes Fast-Track Trade Bill, but Senate Outcome Uncertain*, The Wall Street Journal, 18 June 2015, www.wsj.com; Donnan S, Sevastopulo D., *Obama clears last big hurdle to fast-track trade powers*, The Financial Times, 23 June 2015, ft.com.
[726] As a general rule, the authority provided to the President would expire in 2018. The text provides however for the possibility of a further three years extension if required by the President and "neither House of Congress adopts an extension disapproval resolution". See, *The Bipartisan Congressional Trade Priorities and*

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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The text differs from the previous 2002 version in many respects, notably because it focuses the attention to trade in agricultural products and sanitary barriers, intellectual property and regulatory practices. For what concerns trade in electronic services, the new bill identifies some negotiation objectives to be pursued in the area of "digital trade" hence broadening the scope from the sole context of "e-commerce", as previously framed in the 2002 TPA bill[727].

In general, aside from the content of the bill, the Congressional move toward a new TPA cannot but signal the significant interest that the executive and legislative US branches attach to the transatlantic and transpacific trade deals. In practical terms, the new authority will certainly increase the chances for the successful conclusion of the TTP, the TTIP, but also other important plurilateral negotiations still on-going at the WTO level notwithstanding the deadlock faced by the Doha Round[728].

3.2 - Structure of the US agreements in the electronic supply of services context

3.2.1 Current and prospective TPA objectives: a renewed interest for digital trade

The significant attention of the US Congress in squeezing a series of goals relevant for trade in electronic services into the 2002 and in 2015 TPA negotiation objectives is not surprising *per se* as it is certainly the result of political pressure exerted by the relevant US content and high-tech industries[729]. For the first time in 2002, internet and trade in electronic

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Accountability Act of 2015, (TPA-2015), S.995, hereinafter "BCTPA", Section 3(c)(1), "*Extension, disapproval process for congressional trade authorities procedures"*. Available at finance.senate.gov.

[727] See, *Infra*, para, 3.2.

[728] The Trade in Services Agreement (TiSA) and the Environmental Goods Agreement (EGA) aiming at lowering tariffs on environmental goods are examples of on-going negotiations fostered at plurilateral and WTO level.

[729] See, in this sense, the letter of 12th May 2015 from the US Information Technology Industry Council (ITI) CEO addressed to the Senate Majority and Democratic leaders explicitly declaring that "given the importance of fair access to foreign markets for the high-tech community, we will consider scoring votes in support of final passage of S. 995 in our 114th Congressional Voting Guide". Available at itic.org. According to Wunsch-Vincent, the e-commerce mandate in the 2002 TPA has been co-drafted directly with the ITI and passed on to the House of Representatives. See, Wunsch-Vincent S. *The WTO, the Internet and Trade in Digital Products: EC-US Perspectives*, cit., 120, footnote 119.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
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services have been indeed listed as one of the top priorities of the Congress mandate to be pursued by the executive branch in trade negotiations. This has been reflected, first of all, in the presence of a section of the 2002 TPA text specifically devoted to e-commerce, which is now reiterated in the 2015 TPA referring, as mentioned, to "digital trade"[730].

In general, the objectives included in the 2002 "electronic commerce" section are generally in line with the discussions undergoing at the time in the context of the WTO Work Programme on Electronic Commerce discussed in Chapter I[731]. The list of objectives seems indeed to touch upon the same thorny issues discussed at the time at multilateral level such as, for instance, the treatment of electronically-delivered services *vis-à-vis* physical products and the moratorium on electronic transmissions[732], sketching only very broadly the need for domestic regulations affecting e-commerce not to unduly restrict international trade. As we will discuss below, this framework has obviously been endorsed in bilateral trade negotiations and is now reflected in many of the trade agreements concluded by the US from 2002 onwards[733].

As far as the 2015 TPA is concerned, the text just approved by the US Congress seems at first sight to replicate the same objectives put forward in 2002. Looking however more in depth at the precise wording of the new TPA, few important differences stand out[734]:

- first of all, as already mentioned, the wording related to "electronic commerce" has now disappeared and has been substituted by "digital trade in goods and services". What that means in terms of negotiating goals is difficult to anticipate even if the new option can probably just be seen as a natural adaptation to the changing dynamics surrounding the internet discourse. In other words, to perpetrate the use of "electronic commerce" would only have risked to pose doubts on the applicability of trade rules to some of the services provided through electronic means[735];

[730] The specific section on e-commerce can be found in section B(9) of the 2002 TPA. See, Bipartisan Trade Promotion Authority Act (BTPAA), cit., § 3802 section B(9). The new "Bipartisan Congressional Trade Priorities and Accountability Act of 2015" text reports the "digital trade" objectives in section B(6).
[731] See, Chapter I, para. 2.1.
[732] BTPAA, cit., § 3802 section b(9), paras B(i), D and E.
[733] *Infra,* para. 3.2.2.
[734] For the full text see table XI below.
[735] Although the definition of e-commerce for WTO purposes seemed already to include most of the trade occurring through electronic means, (see Chapter I, para. 3.2.1), such wording does probably remain inextricably linked with the more traditional forms of internet transactions that is, to use the WTO Secretariat words, "the use of the Internet as a channel for distribution services, by which goods and services are purchased over the net but

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
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- secondly, the new text now mandates negotiators to push for the applicability to digital trade of the general trade rules agreed not only in the WTO framework but also in bilateral and regional agreements. Again, this specification might descend simply from the recognition that, in the meantime, an increasing number of trade concessions have been granted through preferential negotiations;
- thirdly, and more significantly, a new emphasis – completely absent from the 2002 text - is placed on the need to guarantee a smooth "cross-border data flow" making sure that "where legitimate policy objectives require domestic regulations that affect digital trade in goods and services or cross-border data flows […] any such regulations are the least restrictive on trade, non-discriminatory, and transparent, and promote an open market environment". This new overarching objective, clearly detached from the debate on goods *vs* services and on the definition of "digital trade", is certainly prompted by the preoccupations of the US content and ICT industries that national policies (especially those outlined in the previous Chapter and referring to privacy and internet filtering)[736] might be shaped in such a way to favour anticompetitive and unfair behaviours.

The attention towards internet-related trade interests in the TPA has not been however confined to the specific section related to e-commerce. Although not exclusively related to digital trade, other references disseminated among the negotiation objectives in the TPA reveal a significant attention toward internet-related issues, especially in the context of services. A similar consideration seems to be now replicated in the 2015 text.

On one side, the 2002 mandate clearly pushed US negotiators to improve market access conditions for IT products by enlarging the ITA participation and updating its coverage[737]; this is confirmed in the new 2015 TPA text[738]. On the other side, both TPAs devote significant attention to digital trade in the context of intellectual property protection as both texts make explicit reference to the need protect new and emerging technologies "and

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delivered to the consumer subsequently in non-electronic form." S/C/W/68, *The Work Programme on Electronic Commerce*, Note by the Secretariat, 16 November 1998, para 27.

[736] See, Chapter II, paras 5.1–5.3.

[737] The US Congress called to executive branch "to expand country participation in and enhancement of the Information Technology Agreement and other trade agreements" and to "commence negotiations covering […] information technology products. BTPAA, cit., § 3802 section b(7) and § 3803 section d. On the ITA agreement and its expansion see Chapter I, footnote 28.

[738] BCTPA, cit., section 2(a)12(B).

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
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new methods of transmitting and distributing products embodying intellectual property"[739] as well as ensure that "standards of protection and enforcement keep pace with technological developments, and in particular ensuring that right holders have the legal and technological means to control the use of their works through the Internet and other global communication media, and to prevent the unauthorized use of their works"[740].

More significantly for the purpose of this study, the negotiating objectives in the broad trade in services section, although only broadly sketched, play a decisive role in pushing liberalization in the trade in services area, hence including electronic services[741]. Although not explicitly specified in the TPA wording, the importance attached by the US Congress in 2002 to the liberalization of the specific service sectors relevant for trade in electronic services can be instead inferred from an internal report of the US Senate Committee on Finance, where the reasons at the basis of the negotiations objectives highlighted in the TPA are detailed. Indeed, among the objectives at the basis of service liberalization, the document places a particular emphasis on "the achievement of the maximum level of liberalization, including the cross border supply of services", the creation of a "free and open commercial environment for the development of electronic commerce" and the guarantee that "market access commitments apply no matter what technology is used to deliver the service"[742]. Moreover, one of the greatest innovations of the US approach toward services liberalization is stressed in the same documents where it is clearly stated that "where possible, services trade liberalization should be pursued through a negative list rather than a positive list approach". This, as we will see below, amounts to an important development in favour of the liberalization of electronic services where, as discussed in Chapter I, classification issues are likely to emerge.

[739] BTPAA, cit., § 3802 section b(4)(ii) and BCTPA, cit., section 2(b)5(A)(ii).
[740] BTPAA, cit., § 3802 section b(4)(iv) and BCTPA, cit., section 2(b)5(A)(iv). It is also worth noticing that the 2015 TPA set the elimination of "cyber thefts" among the main negotiation objectives. BCTPA, 2(b)5(A)(vi).
[741] BTPAA, cit., § 3802 section b(2). The new text does not introduce any relevant innovation aside from the recognition that service liberalization should be pursued "through all means, including through a plurilateral agreement with those countries willing and able to undertake high standard services commitments for both existing and new services". This latter paragraph can be probably considered as an implicit green light to the USTR to continue pursuing services liberalization also through the on-going plurilateral TiSA negotiations.
[742] Senate Committee on Finance, *Bipartisan Trade Promotion Authority Act of 2002*, Report together with additional views 07-139, 107th Congress, 2nd session, 23 February 2002, 10-11.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
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TPA 2002	TPA 2015
9) Electronic Commerce	**6) Digital Trade in Goods and Services and Cross-Border Data Flows**
The principal negotiating objectives of the United States with respect to electronic commerce are:	The principal negotiating objectives of the United States with respect to digital trade in goods and services, as well as cross-border data flows, are
1. to ensure that current obligations, rules, disciplines, and commitments under the World Trade Organization apply to electronic commerce;	1. to ensure that current obligations, rules, disciplines, and commitments under the World Trade Organization and bilateral and regional trade agreements apply to digital trade in goods and services and to cross-border data flows;
2. to ensure that **(i)** electronically delivered goods and services receive no less favorable treatment under trade rules and commitments than like products delivered in physical form; and **(ii)** the classification of such goods and services ensures the most liberal trade treatment possible;	2. to ensure that **(i)** electronically delivered goods and services receive no less favorable treatment under trade rules and commitments than like products delivered in physical form; and **(ii)** the classification of such goods and services ensures the most liberal trade treatment possible, fully encompassing both existing and new trade;
3. to ensure that governments refrain from implementing trade-related measures that impede electronic commerce;	3. to ensure that governments refrain from implementing trade-related measures that impede digital trade in goods and services, restrict cross-border data flows, or require local storage or processing of data;
4. where legitimate policy objectives require domestic regulations that affect electronic commerce, to obtain commitments that any such regulations are the least restrictive on trade, nondiscriminatory, and transparent, and promote an open market environment; and	4. with respect to subparagraphs (A) through (C), where legitimate policy objectives require domestic regulations that affect digital trade in goods and services or cross-border data flows, to obtain commitments that any such regulations are the least restrictive on trade, non discriminatory, and transparent, and promote an open market environment; and
5. to extend the moratorium of the World Trade Organization on duties on electronic transmissions.	5. to extend the moratorium of the World Trade Organization on duties on electronic transmissions.

Table XI: Comparison between electronic commerce chapters: 2002 TPA vs 2015 TPA

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
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3.2.2 Stand-alone e-commerce chapters and the centrality of the digital content products debate

Because of its specific interest as producer and exporter of content and electronic services, the US negotiating approach in the context of digital trade is certainly the most innovative and demanding also in comparison, as we will see, with the EU model[743]. Not surprisingly, the US has been the first worldwide player to insert specific binding new rules on digital trade/electronic commerce in its bilateral and regional agreements[744]. As discussed above, the interest towards digital trade and internet-related issues in international agreements stems from the wording of the 2002 TPA. This has led already to remarkable achievements in terms of actual bilateral and regional deals in this area; moreover, in light of the wording recently agreed by the Congress for the new 2015 TPA, it is clear that this trend is far from being over[745].

The first real, tangible results of the e-commerce mandate for the 2002 TPA are found, without any doubt, in the US-Chile and US-Singapore Free Trade Agreements entered into force, not surprisingly, only two years after the passage of the 2002 TPA[746]. From then on, the approach of the US towards e-commerce and digital trade in bilateral negotiations has remained unchanged. Although certain provisions on e-commerce already surfaced in previous US agreements[747], this two trade deals seem to welcome in full the US Congress indications on e-commerce and trade in service goals and can be seen as having set a template for future subsequent negotiations[748].

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[743] *Infra,* para. 4.

[744] Beside what agreed in the US FTAs, since 1997, the US concluded other 13 E-Commerce Statements with the Netherlands, EC, Ireland, Japan, France, Australia, UK, Egypt, Chile, Colombia, Philippines, Jordan and Singapore. Wunsch-Vincent S. *The WTO, the Internet and Trade in Digital Products: EC-US Perspectives*, cit., 202.

[745] On the contrary, the wording analysed above of the new TPA, although not revolutionary, seems to pay even more attention to digital trade in US negotiations.

[746] *US-Chile Free Trade Agreement* (USCFTA), *US-Singapore Free Trade Agreement* (USSFTA), in force since January 1st 2004. Legal texts available at www.ustr.gov.

[747] See, for instance, Article 7 (electronic commerce) of the *Agreement between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area*, signed in 2000 already mentioning some of the specific objectives then outlined in subsequent "post-TPA" trade deals. Available at ustr.org.

[748] Although featuring significant innovations in terms of domestic regulation and data transfer mentioned later on in the chapter, even the provisional TPP e-commerce text recently agreed embraces a similar blueprint with

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
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For what concerns electronic services, the greatest innovation of the two trade deals is certainly the inclusion of a stand-alone "electronic commerce" chapter, detached from the provisions dealing broadly with trade in goods and services[749]. In practice, the provisions found in these "e-commerce" chapters gathered together and tried to solve some of the relevant issues in the WTO e-commerce agenda, having very well in mind the thorniest topics of the time, namely the debate over the exact characterization and classification of the so-called "digital content products"[750].

In particular, both agreements establish a clear, permanent and enforceable duty free moratorium on electronic transmission[751], something that, as analysed, has always been an objective of the WTO e-commerce work program but could never find a final understanding because of the lack of consensus on the exact applicable regime for digital content products[752]. Moreover, the texts confirm the applicability of WTO rules to e-commerce[753] as well as the need to consider the value of the carrier medium alone when digital content is delivered through physical carriers[754]. The specific issue of digital content products is prominent in the e-commerce chapters, whereas the treatment of electronic services *per se* is only briefly outlined. This is understandable as, at the time of the negotiations, the status of the technology already allowed for a significant size of digitized products to be encoded and transmitted electronically but was not developed enough to offer broad access to electronic services carrying content[755].

Curiously, the wording of the US FTAs does not resolve the issue regarding the classification of digital content products although the applicability of the more liberal GATT

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regard to digital products and customs duties on electronic transmissions. See, *Trans-pacific Partnership* (hereinafter *"TPP"*), provisional text available at ustr.gov, Electronic Commerce Chapter, Arts 14.3-14.4.

[749] See, *US-Chile FTA*, Chapter 15, *US-Singapore FTA*, Chapter 14.

[750] The debate boils down essentially to whether such products should be classified as services or goods for WTO purposes hence be subject to completely different trade rules. See, Chapter I, para. 2.2.2.

[751] See, *US-Chile FTA*, Art. 15.3, *US-Singapore FTA*, Art. 14.3(1).

[752] See, Chapter I, para. 2.2.1.

[753] The applicability of WTO rules to the "e-commerce" area in general has been subsequently reaffirmed through authoritative jurisprudential cases, notably the *US-Gambling* dispute.

[754] Although this principle is already generally applied for customs valuation purposes, there is no formal WTO obligation in this sense. See, Chapter I, para. 2.1.2, footnote 21.

[755] When referring to digital content products, one could think about e-books, music and movies encoded in digitized form and then transmitted either through the internet or through a physical medium. Throughout our work we have instead referred to electronic services as those transactions, such as streamed video content, whereby "services products are delivered to the customer in the form of digitised information flows and the entire transaction takes place electronically". S/C/W/68, *The Work Programme on Electronic Commerce*, cit., para. 27.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
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regime (over the GATS) as always been the US preferred option. What the e-commerce chapters do is, first of all, to define the existence of a specific category of products ("digital products" or "digital content products"). Indeed the US-Singapore FTA defines digital products as "computer programs, text, video, images, sound recordings and other products that are digitally encoded, regardless of whether they are fixed on a carrier medium or transmitted electronically"[756]. Moreover, to underline the exceptional character of this provision, the US-Chile FTA clarifies that digital products exist as a category regardless of "whether a party treats such products as a good or a service under its domestic law", specifying also that "the definition of digital products is without prejudice to the on-going WTO discussions on whether trade in digital products transmitted electronically is a good or a service"[757]. Unfortunately, this innovation in the US FTAs is not paralleled with any analogous development in the multilateral trading system where similar definitions, although discussed, have never been agreed upon, nor the necessity to create a stand-alone category with specific applicable rules has ever been considered. This risks creating a further misalignment among the multilateral and bilateral narratives both in terms of binding obligations and jurisprudential interpretation.

Having said that, it is also worth noticing that, apart from identifying a specific category, the US e-commerce chapters do not provide significant benefits to digital content products in terms of substantial rules other than confirming the applicability of the MFN and National Treatment principle for this type of products, regardless of their online or offline character (technological neutrality)[758]. However, just because of the impossibility to agree on the applicable discipline for digital content products, even this obligation could be problematic to fulfil. This is because, as noted by Wunsch-Vincent, the provision on digital products concerns only MFN and National Treatment obligations whereas, on the other side, full market access for digital products is not mentioned. It results that, in case *online* digital content products were to be eventually classified as services for WTO purposes, these would be subject to the same non-discriminatory market access restrictions provided in each GATS

[756] *US-Singapore FTA*, Art. 14.4(2).
[757] *US-Chile FTA*, Art. 15.6.
[758] Article 14.3 in the US-Singapore e-commerce Chapter reads that "A Party shall not accord less favourable treatment to some digital products than it accords to other like digital products: […](b) so as otherwise to afford protection to the other like digital products that are created, produced, published, stored, transmitted, contracted for, commissioned, or first made available on commercial terms, in its territory. To complement this provision, the US-Singapore FTA provides a definition of digital products as meaning "computer programs, text, video, images, sound recordings and other products that are digitally encoded, regardless of whether they are fixed on a carrier medium or transmitted electronically. Similar wording is found in Article 15.4 of the US-Chile FTA.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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schedule of specific commitments. If trade in services in the relevant sectors is not fully liberalized, this would in turn result in the impossibility to abide by the principle of non-discrimination among online and offline digital products defined in the e-commerce chapter, as these two "types" of digital products (online *vs* offline) would be subject to different set of rules (GATS *vs* GATT), only one of them allowing for lawful, not justified, market access restrictions[759].

3.2.3 Cross-border supply provisions and classification choices: toward liberalization for digital trade

Although certainly relevant in clarifying the applicable rules to certain types of trade, the debate over digital content products represents only a minor interest in the context of this study that, as we have presented, focuses mostly on the classification and characterization of new electronic services distributed and enjoyed directly over the internet[760]. Unfortunately, because of the reduced relevance of these types of services at the time of the first FTA negotiations[761], the emphasis placed on such issue has been minimal and this is reflected by the absence of relevant rules in the e-commerce chapters. Indeed, the only relevant provision in this sense lies in articles 14.2 of the US-Singapore Agreement and 15.2 of the US-Chile Agreement, both reaffirming that "measures related to the supply of a service using electronic means fall within the scope of the obligations contained in the relevant provisions of […] Cross-Border Trade in Services"[762], an issue at the time still under discussion but that has

[759] Wunsch-Vincent S. *The WTO, the Internet and Trade in Digital Products: EC-US Perspectives*, cit., 209-212. Following this line of reasoning, the possibility to apply fair and non-discriminatory treatment to online digital products (e.g.: music download) vis-à-vis offline ones (e.g.: music CDs) would be always dependent on the cross-border supply commitments in the relevant service sectors. This would mean that, in order to fulfil the non-discriminatory obligations on digital products in the e-commerce chapter one of the parties would be forced to disregard relevant market access commitments on cross-border trade in services, something prevented by the same e-commerce chapters providing for the applicability of trade in services rules to trade in electronic services (Art. 14.2 of US-Singapore FTA and Art. 15 of US-Chile FTA). This structural paradox is defined by Wunsch-Vincent and Pierre Sauvé as the "carve-in/carve-out dilemma".

[760] In Chapter I we have defined "new electronic services" as those services enabled by ICT technologies that could not be available without the internet. See, Chapter I, para. 4.3.

[761] As we have seen, the US Agreements with Singapore and Chile have been negotiated at the beginning of the 21th century; at that time, the reduced availability of internet access and the still prohibitive costs of internet connections had not allowed services such as social media and online streaming to develop. Indeed, services such as Twitter, Facebook and Myspace did not yet exist.

[762] In the US-Chile FTA, this concept is further clarified in a footnote explaining that "for greater certainty, nothing in this Chapter imposes obligations to allow the electronic supply of a service nor the electronic transmission of content associated with those services except in accordance with the provisions of Chapter

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
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been clearly and definitively overcome not long after, through the jurisprudential interpretation of the *US-Gambling* landmark ruling[763]. Lacking any further guidance in the e-commerce Chapters, the treatment of what we have define "new electronic services" for US FTAs purposes can be appreciated only through an analysis of the general service chapters.

The general service chapters in US FTAs are defined under the title "cross-border trade in services" but are supposed to cover three of the four modes of supply as identified in the GATS Agreement and not only the so-called Mode 1, with the exception of GATS Mode 3, captured in the chapters on investments[764]. Specific rules are then usually framed for certain service sectors such as telecommunication and financial services[765]. For what concerns the general and specific commitments for trade in services, at first sight the US service chapters seem to mirror the WTO structure as they feature the same obligations on MFN, National Treatment and Market Access included in the GATS Agreement[766]. Looking however more in detail, two important specific diverging features stand out.

First of all, the three main obligations mentioned above are complemented by an additional provision on "local presence" setting a horizontal obligation (hence applicable to all service sectors) not to subject the cross-border provisions of services to the establishment of local companies or representative offices[767]. Although, as we will see below, this and other commitments can be overcome through specific derogations in the service annexes, this provision is certainly of particular significance as it demonstrates the clear willingness from

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Eleven (Cross-Border Trade in Services) or Chapter Twelve (Financial Services), including their Annexes (Non-Conforming Measures)".

[763] See, WT/DS285/R, *United States – Certain measures affecting the cross-border supply of gambling and betting services,* cit., para. 6.285. Technological neutrality in the context of the *US-Gambling* dispute is discussed in Chapter I, para. 3.2.3.

[764] In the US-Singapore FTA, the coverage of the cross-border trade in services chapter includes: the supply of a service (a) from the territory of one Party into the territory of the other Party; (b) in the territory of one Party by a person of that Party to a person of the other Party; or (c) by a national of a Party in the territory of the other Party. This scheme is defined as the 3+1 approach in contrast with the GATS type 4 modes approach. See, Latrille P., Lee J., *Services Rules in Regional Trade Agreements: How Diverse and How Creative Compared to the Multilateral Rules?*, World Trade Organization Economic Research and Statistic Division, Staff Working Paper ERSD-2012-19, 31 October 2012, para. 24.

[765] See, *US-Singapore FTA*, Chapter 9 and 10; *US-Chile FTA*, Chapter 12 and 13.

[766] See, for instance, Arts 8.3, 8.4 and 8.5 of the US-Singapore FTA.

[767] See, *US-Singapore FTA*, Art. 8.6 establishing that "A Party shall not require a service supplier of the other Party to establish or maintain a representative office or any form of enterprise, or to be resident, in its territory as a condition for the cross-border supply of a service." Similar provisions are found elsewhere in US FTAs. See, for instance, *US-Chile FTA*, Art. 11.6, *US-Australia FTA*, Art. 10.5; *TPP*, Art. 10.6. This reference is coherent with a provisions included in the e-commerce chapter of the TPP prohibiting local storage as a condition for cross-border service supply. *Infra,* para. 3.3.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
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the US negotiators to provide the most liberal environment to the supply of cross-border services, understood here as those services falling within the GATS mode 1[768].

The second, and even more striking, difference with the GATS Agreement lies in the way services are classified. Indeed, contrary to the traditional liberalization template employed in the GATS and many other services agreements requiring the listing of the service categories each party is willing to liberalize (positive list), the US FTAs introduce the so-called negative-list approach. In a nutshell this implies that, if not stated otherwise, all foreign services are to be considered liberalized, meaning that they have to be provided full market access, most-favoured nation and national treatments. The derogations from full liberalization are usually defined in a specific provision on "non-conforming measures", specifying that such measures can be maintained both at central and local level[769]. The articles on non-conforming measures are then cross-referenced to the respective annexes listing each party's measures to be allowed in derogation from full liberalization[770]. One should however point out that, contrary to what generally set forth in the GATS system, the service liberalization commitments in US FTAs explicitly exclude subsidies grants from the application of market access and non-discrimination, meaning that financial supports can in principle be allocated in a discriminatory fashion[771].

Despite this significant carve-out, the importance of the negative list approach in the context of electronic services and their liberalization is self-evident. Indeed, by providing default full market access and non-discriminatory treatment to all services, if no detailed measures are listed in the non-conforming measures annexes, this system has the potential to overcome the main classification issues outlined in Chapter I arising out of the combination of unbalanced commitments among different services categories coupled with the lack of clear

[768] This is in line with what mandated by the US Senate in the TPA. *Infra*, para. 4.2.1.
[769] See, *US-Singapore FTA,* Art. 8.7, *US-Chile FTA*, Art. 11.5, *US-Australia FTA*, Art. 10.6; *TPP*, Art. 10.7. Non conforming measures provisions also specify that the derogations applies to "the continuation or prompt renewal of any non-conforming measure […]" and "an amendment to any non-conforming measure […] to the extent that the amendment does not decrease the conformity of the measure.
[770] It is through the non-conforming measures provisions that the "carve-in carve-out" phenomena mentioned above does arise. This can occur specifically when so-called digital products provided on-line (hence falling within the services discipline) are subject to restrictions that physical goods carrying digital content are not required to comply with.
[771] See, *US-Singapore FTA,* Art. 8.2.3(d), *US-Chile FTA*, Art. 11.1.4(d), *US-Australia FTA*, Art. 10.1.4(d). The same carve-out has been confirmed in more recent US FTAs. See, for instance *US-South Korea FTA* (KORUS), Art. 12.1.4(d), *TPP*, Art. 10.2.3.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
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Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

definitions for new electronic services[772]. For instance, where doubts exist in relation to the exact classification of a service as potentially falling within the valued added-telecom services or the computer services categories (as, for instance, in the case of social networks discussed before)[773], the absence of any limitation on both broad service sectors would automatically render the question moot. Where instead a non-conforming measure is inserted in at least one of the "disputed" service sectors, this will be likely to be framed in such a way to define whether the service at issue should fall or not within the exception. This is because the negative list approach induces the parties willing to introduce an exemption to positively frame and clearly define the boundaries of the derogation so to ensure that liberalization is not inadvertently conceded because of lack of clarity.

The positive results of this system are evident in the context of the initial US FTAs where, aside from – and predictably so - the provisions related to audio-visual products, only very few non-conforming measures relevant for trade in electronic services are listed in the annexes by the US counterparts[774]. However, even in the audio-visual sector segment, and leaving aside those non-conforming measures listed with the purpose of safeguarding the government support the so-called national "cultural industry"[775], much of the attention is devoted by the parties signing FTAs with the US to maintain the possibility to regulate the broadcasting "free-to-air" sector and the traditional television and radio in general, through licensing provisions, the imposition of specific quotas on national content, the regulation of

[772] See, Chapter I, para. 4.
[773] See, Chapter I, para. 4.3.2.
[774] A minor exception marginally relevant for cross-border trade in electronic services can be found in the Singapore list of non conforming measure whereby Singapore do not allow for the registration and use of a ".sg" national domain name unless a company is registered in accordance with the Singapore company law. See, *US-Singapore FTA*, Annex 8A, Singapore List, 34.
[775] For instance, in the *US-Chile FTA*, Chile "reserves the right to adopt or maintain any measure that accords differential treatment to countries under any existing or future bilateral or multilateral international agreement with respect to cultural industries, such as audio-visual cooperation agreements. For greater certainty, government supported subsidy programs for the promotion of cultural activities are not subject to the limitations or obligations of this Agreement." See, *US-Chile FTA*, Annex II-CH-11. A similar non-conforming measure can be found in the recently signed *US-Colombia FTA* where Colombia "reserves the right to adopt or maintain any measure according preferential treatment to persons of any other country pursuant to any agreement between Colombia and such other country containing specific commitments regarding cultural cooperation or co-production in cultural industries and activities" and further specifies that "for greater certainty, articles 10.3, 10.4 and Chapter Eleven do not apply to "government support" for the promotion of cultural industries and activities." See, *US-Colombia FTA*, Annex II-COL-7. Although not strictly related to trade in cross-border electronic services, it can be argued that the similar discriminatory measures allowing subsidization of local content can nonetheless have an indirect negative impact on the competitiveness of foreign audio-visual services delivered through the internet. See, Wunsch-Vincent S. *The WTO, the Internet and Trade in Digital Products: EC-US Perspectives*, cit., 217.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
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Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

advertising and ownership limitations[776]. In this sense, the listing of specific non conforming measure in the audio-visual sector has the effect of "freezing" such limitations and confining them to the more "traditional" segment of the supply of audio-visual content, hence leaving the internet delivery of such products theoretically free from any restriction. When this situation occurs, the maximum level of liberalization is granted in all the main service categories we have considered more relevant for trade in digital services.

It is worth noticing that, although most of the agreements signed by the US are aligned with this trend, in a couple of cases limitations have been also provided for the internet delivery of audio-visual services: this is the case, for instance, of the US-Australia FTA where, aside from a significant carve out in the traditional broadcasting sector, Australia retained certain flexibilities in regulating the content also for new technologies in the context of the so-called "interactive audio and video services" since it managed to obtain that "upon a finding by the Government of Australia that Australian audio-visual content or genres thereof is not readily available to Australian consumers, access to such programming on interactive audio and/or video services is not unreasonably denied to Australian consumers"[777]. Another interesting provision regarding internet delivery is found in the recently signed US-South Korea FTA where quotas seem to be allowed not only for traditional broadcasting but also in the context of "subscription-based video services" whereby "any such measure that imposes a domestic content quota may set a level of Korean content no higher than the percentage permitted pursuant to the Communications Services – Broadcasting Services entry in Korea's Schedule to Annex I with respect to a cable system operator"[778]. Interestingly, in this case, subscription based video services are explicitly defined as encompassing a series of delivery technologies including "Internet Protocol based Television (IPTV) and Interactive Broadcasting"[779]. This means that, as openly admitted in the report to the USTR of the

[776] See, *US-Singapore FTA*, Annex II-Singapore-8; *US-Chile FTA*, Annex II-CH-3; *US-Australia FTA*, Annex II-Australia-5; *US-Colombia FTA*, Annex II-COL-11; *US-Korea FTA*, Annex II-Korea-24.
[777] See, *US-Australia FTA,* Annex II-Australia-6, para. e). It was later recognized by the USTR itself that "to accommodate uncertainties relating to technological change in this sector, Australia preserved its ability to take some new measures to assure continued availability of Australian content to Australian consumers, but will have to take US trade interests into consideration in designing any such new measures". See, Herd N., *Trade Liberalisation and Australia's Television Cultural Policy: Power and Interest in National Television Policy*, in *Westminster Papers in Communication and Culture*, 4:3, 59, 2007.
[778] *US-Korea FTA*, Annex II-Korea-27, para. 2(b).
[779] *Ivi*, Annex II-Korea-27, para. 2.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
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"Industry Trade Advisory Committee", Korea has reserved its rights to impose content restrictions also on new services and delivery platforms[780].

Overall, the negative list approach system coupled with the strong interest from the US side toward liberalization of digital products and electronic services seems to have yielded significant results in terms of bilateral liberalization commitments. Sometimes, even the thorniest issue – namely the provision of audio-visual content through electronic means – has been overcome completely. If this has to do with the lack of sensitiveness of the counterparts on the issue or the strong bargaining power of the US is hard to tell. Still, in some other albeit limited circumstances, the US was forced to concede certain limitations for audio-visual content delivered not only through traditional channels but also through new technologies. Although restricted in their scope, the existence of specific exemptions calling for more attention toward the full liberalization of content services in the digital audio-visual sector are certainly an interesting development worth to be monitored for future negotiations. In particular, the compromise solution reached with Australia, a negotiating party particularly interested in safeguarding its national content industry, might pave the way for similar solutions in the context, for instance, of the on-going transatlantic negotiations where significant defensive positions will be advanced from the EU side[781].

3.3 - Domestic regulation and data flows: a new approach toward the issue of free flow of information?

As discussed in Chapter II, limitation to digital trade in services can arise not only from direct market access restrictions or lawful discriminatory treatments negotiated multilaterally or bilaterally but also from the application of overly burdensome national rules

[780] The advisory committee, strongly in favour of complete openness for the content industry in the digital sector, commented that "It is disappointing that the Agreement does not contain more protections against unilateral or arbitrary use of this clause. While the conditions included in the reservation with respect to "new platforms" provide some assurances to the U.S. audio-visual sector, the industry has strong concerns about the reservations, and the Committee repeats its strong recommendation that these provisions do not set precedent for future agreements". See, United States, Industry Trade Advisory Committee on Services and Finance Industries (ITAC 10), *Advisory Committee Report to the President, the Congress and the United States Trade Representative on the U.S.-Korea FTA Agreement (KFTA)*, 25 April 2007, 9. Available at ustr.gov. On cultural policies in the US-Korea FTA see, Gagné G., *Free Trade and Cultural Policies: Evidence from the US-Korea Free Trade Agreement*, Paper presented at the 22nd World Congress of the International Political Science Association, Madrid, July 2012, available at paperroom.ipsa.org.

[781] *Infra*, para. 5.4.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

and procedures or disproportionate trade-distorting measures aiming at safeguarding non-trade interests. In particular, as abundantly discussed in the case studies presented above[782], measures aiming at protecting legit interests such as morality and privacy can easily have a significant disruptive effect over the delivery of any type of cross-border service dependent from free data and information flows.

In terms of domestic regulation, little developments have been traditionally provided in FTAs negotiated by the US. The US-Singapore FTA[783], for instance, inserts a provision on domestic regulation in the "cross-border trade in services" chapter that replicates the exact wording of the GATS Article VI:3 provision on administrative transparency[784], hence requiring administrative authorities to promptly inform service suppliers about the status of the application when this is legally required to supply a specific service[785]. The same provision also mirrors the discipline foreseen in GATS Article VI:4 requiring, as discussed above, the Council for Trade in Services to develop an appropriate discipline on the basis of three defined criteria[786]. In this case, however, the wording in the US-Singapore FTA raises significant uncertainties as to the possibility to practically enforce this provision because it specifically makes use of the "shall endeavour" formula, a wording usually expressing a best endeavour commitment rather than an obligation. These doubts are confirmed by the absence in the US FTAs of a provision similar to GATS Article VI:5, establishing a discipline enforceable on an interim basis[787]. Moreover, virtually all the US FTAs, including the

[782] See, Chapter II, paras 5.2 and 5.3.
[783] Virtually all the others US FTAs adopt the same approach on domestic regulation. See, *US-Australia FTA*, Art. 10.7; *US-Chile FTA*, Art. 11.8; *US-Colombia FTA*, Art. 11.7; *US-South Korea FTA*, Art. 12.7; *US-Peru FTA,* Art. 11.7.
[784] See, Chapter II, para. 2.1.2.
[785] *US-Singapore FTA*, Art. 8.8.1.
[786] *US-Singapore FTA*, Art. 8.8.2. The three criteria foreseen in GATS Article VI:4 for domestic regulation to comply with the GATS Agreement is that they are: (a) based on objective and transparent criteria, such as competence and the ability to supply the service; (b) not more burdensome than necessary to ensure the quality of the service; and (c) in the case of licensing procedures, not in themselves a restriction on the supply of the service. See, Chapter II, para. 3.2.1. A similar provision was already provided for in the context of NAFTA (Article 1210). Curiously, the US-South Korea FTA lists only two of the three criteria, leaving out the second one on the necessity of the measure to ensure the quality of the service.
[787] This deviation from the GATS wording is captured also in the context of a WTO study on services rules in RTAs where it is maintained that "when the RTA foresees a best endeavour obligation for the Parties to respect the proportionality principles of GATS Article VI.4 in the administration of their technical standards, qualification requirements and procedures and licensing requirements but does not sanction it by a nullification or impairment procedure as in Article VI.5 of the GATS, the omission seems to indicate clearly that there is no nullification or impairment procedure foreseen by the RTAs". See, Latrille P., Lee J., *Services Rules in Regional Trade Agreements: How Diverse and How Creative Compared to the Multilateral Rules?*, cit., para. 12.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
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recently agreed TPP, make an explicit reference to the on-going CTS negotiations on Article VI:4 clarifying that, if a multilateral discipline will be eventually agreed upon, the results will be brought into effect in the FTAs as well, after consultation between the parties[788]. The only structural and interesting innovation regarding domestic regulation for all types of trade is inserted in the TPP, with the inclusion of a specific Chapter on the so-called "regulatory coherence" aimed at fostering cooperation and early engagement in the regulatory approaches between TPP partners. In particular, this system is supposed to promote the establishment of coordination mechanisms in each of the signatory parties to improve the efficiency and minimize the trade distorting effect of national regulations enacted for public policy reasons[789]. To what extent these mechanism will be implemented and will affect regulations regarding electronic services is however difficult to anticipate.

Turning now to the general exception provision, and the possibility to derogate from otherwise mandatory obligations for certain non-trade reasons, again nothing relevant in the structure of the general exception seems to emerge from the FTAs so far concluded by the US. On the contrary, the GATS General Exception of Article XIV is *mutatis mutandis* incorporated into the FTAs and made applicable not only with reference to the cross-border trade in services chapters but also to the telecommunication and electronic commerce chapters[790]. In terms of the influence of such provision in the context of trade in electronic services, the complete and direct incorporation of the GATS general exception provision - together with its interpretative notes - indicates that the considerations on public morality and privacy developed in Chapter II and the analysis on necessity and proportionality with reference to the multilateral trade system should hold true also in the context of the US FTAs[791].

The only possible point of departure from the WTO seems to be related to the interpretation of the general exception clauses; although previous case law from NAFTA

[788] See, for instance, *US-Singapore FTA*, Art. 8.8.3; *TPP*, Art. 10.8.9.
[789] See, *TPP*, Chapter 25, encouraging for instance each party "to conduct regulatory impact assessments when developing proposed covered regulatory measures that exceed a threshold of economic impact, or other regulatory impact, where appropriate, as established by the Party".
[790] See, *US-South Korea FTA*, Art. 23.1.2; *US-Australia FTA*, Art. 21.1.2, *US-Colombia FTA*, Art. 22.1.2; *US-Chile FTA*, Art. 23.1.2; *US-Singapore FTA*, Art. 21.1.2; *US-Peru FTA*, Art. 22.1.2; *TPP*, Art. 29.1.3. All these provisions specify in a footnote that the applicable exception to trade in digital products (GATT Art XX or GATS art XIV) is contingent upon the resolution of the debate over the classification of such products as goods or services.
[791] See, Chapter II, paras 5.1 to 5.3.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
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Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

demonstrates otherwise[792], some of the US FTAs do not mention the need for adjudicators to consider the WTO jurisprudential interpretations when ruling on matters covered by the FTA general exception clause[793]. Aside from that, however, and similarly to the domestic regulation discipline, the general exception provisions included in the bilateral deals promoted by the United States do not bring any significant innovation for trade in electronic services.

The lack of improvements in the two areas of domestic regulation and exception provisions does not however prevent the US Agreements to innovate in other parts of the text specifically on regulatory aspects concerning internet trade. Although, as will shall see, still fairly limited in numbers and scope, such provisions – disseminated mainly in the e-commerce chapters - can be considered an initial step forward towards the definition of a specific set of rules to discipline digital services in future deals.

First of all, the US-Chile FTA inserts already an initial pledge for bilateral cooperation among the competent authorities in the two countries[794]; in particular, the parties are requested to share experience and information on specific aspects relevant for digital trade "such as regulations, laws, and programs in the sphere of electronic commerce, including those related to data privacy, consumer confidence, cyber-security, electronic signatures, intellectual property rights, and electronic government"[795] as well as – more importantly - "working to maintain cross-border flows of information as an essential element for a vibrant electronic commerce environment" [796]. The US-Australia deal abandons the general

[792] NAFTA Article 2101, incorporating for the most part the general exception clause of GATT, has been interpreted by NAFTA Panels in light of the GATT jurisprudence. In particular, when interpreting the NAFTA general exception clause in the context of a dispute on cross-border trucking services between Mexico and the United States, the NAFTA Panel explained that "under Article 2101, therefore, safety measures adopted by a Party—such as the moratorium on accepting applications for U.S. operating authority from Mexican trucking service providers—may be justified only to the extent they are "necessary to secure compliance" with laws or regulations that are otherwise consistent with NAFTA. Here again, the *GATT/WTO jurisprudence proves helpful in determining what "necessary" mean*". (emphasis added). See, NAFTA*, Arbitral Panel Established Pursuant to Chapter Twenty, In the Matter of Cross-Border Trucking Services*, Secretariat File No. USA-MEX-98-2008-01, February 6, 2001, para. 262.

[793] On the contrary, the dispute settlement chapter of the TPP explicitly provides that "with respect to any obligation of any WTO agreement that has been incorporated into this Agreement, the panel shall also consider relevant interpretations in reports of panels and the WTO Appellate Body adopted by the WTO Dispute Settlement Body". See, *TPP*, cit., Art. 28.11.3.

[794] Curiously, the US-Singapore FTA, although negotiated at the same time of the US-Chile Agreement, does not foresee a similar provision in the e-commerce Chapter.

[795] *US-Chile FTA*, Art. 15.5(b).

[796] *Ivi*, Art. 15.5(c). The residual pledges for cooperation aim to "(d) encouraging the development by the private sector of methods of self-regulation, including codes of conduct, model contracts, guidelines, and enforcement mechanisms that foster electronic commerce; and (e) actively participating in international fora, at both a hemispheric and multilateral level, with the purpose of promoting the development of electronic commerce".

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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cooperation pledge but points instead in the direction of consumer protection by inserting a provision, albeit vague, on the importance for the Parties of "maintaining and adopting transparent and effective measures to protect consumers from fraudulent and deceptive commercial practices when they engage in electronic commerce"[797].

More recent US FTAs seem to build on the past efforts and elaborate a bit more on the same concepts; indeed, the US-Colombia FTA better details the provision on consumer protection by calling for cooperation among the consumer protection agencies in the specific field of cross-border digital trade[798]. Moreover, the same agreement calls for a specific transparency rule on laws and regulation pertaining to electronic commerce[799]. It is however the trade deal with South Korea to be considered so far the most comprehensive US attempt to elaborate on deep regulatory principles for digital trade in FTA negotiations. Indeed, such agreement confirms the pledge for cooperation in the context of consumer protection and fraudulent practices by also inserting a specific call for mutual support among the competent authorities of both parties in the enforcement of the relevant national provisions[800]. In addition, the e-commerce chapter introduces new types of provisions related precisely to consumers' access to electronic services and digital products by requiring, for instance, that "consumers in its territory should be able to […] access and use services and digital products of their choice, unless prohibited by the Party's law"[801]. More significantly, an unprecedented provision points precisely at the issue of free flow of information by requiring that "the Parties shall endeavor to refrain from imposing or maintaining unnecessary barriers to

[797] *US-Australia FTA*, Art. 16.6. The importance attached to consumer protection in the e-commerce area is confirmed by a more general provision inserted in Chapter 14 of the same Agreement outlining the general principles for cooperation between the parties on cross-border consumer protection (this time not only in relation to e-commerce), and recalling the already existing bilateral and international mechanisms for cooperation such as the OECD Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practices Across Borders of 2003. See, *US-Australia FTA*, Art. 14.6.

[798] "The Parties recognize the importance of cooperation between their respective national consumer protection agencies on activities related to cross-border electronic commerce in order to enhance consumer protection. *US-Colombia FTA*, Art. 15.5.2.

[799] *US-Colombia FTA*, Art. 15.4. Specific rules on transparency for electronic services provisions can be however criticized for being redundant as they are likely to overlap with more general horizontal transparency provisions already included in the trade in services chapters or, where available, in specific chapters on transparency. See, Wunsch-Vincent S., "Trade Rules for the Digital Age", in Panizzon M., Pohl N., Sauvé P. (eds), *GATS and Regulation of International Trade in Services*, Cambridge, 2008, 521-522.

[800] See, *US-South Korea FTA*, Art. 15.5.

[801] *Ivi*, Art. 15.7. The same provision on the "use of internet for electronic commerce" also recognized that consumers should be able to "run applications and services of their choice, subject to the needs of law enforcement; connect their choice of devices to the Internet, provided that such devices do not harm the network and are not prohibited by the Party's law; and have the benefit of competition among network providers, application and service providers, and content providers.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
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electronic information flows across borders"[802], hence echoing the wording of the general exception provisions.

Finally, the TPP does elaborate even more on regulatory cooperation in the field of free flow of information, privacy and consumer protection building, in certain parts, on the wording of general exception and domestic regulation already embedded elsewhere and referring to the general discipline. First of all, the e-commerce chapter reaffirms the applicability to online commerce of the general consumer protection principles of the agreement in order to counteract fraudulent practices on the internet[803]. Secondly, and more significantly, the agreement displays an unprecedented attention towards information flows and personal data transfers; indeed the text features specific provisions aimed at highlighting the need to strike a balance between the legitimate domestic interest of protecting personal information and the need to avoid unnecessary barriers to arise because of diverging national rules on privacy. On one side, the TTP positively acknowledges the importance of data protection for online trade, encouraging the development of mechanisms to promote compatibility between different legal frameworks, including mutual recognition[804]. On the other side, however, the most significant commitment undertaken on privacy is actually the obligation to allow "cross-border transfer of information by electronic means, *including personal information*, when this activity is for the conduct of the business of a covered person"[805]. This very strong commitment is however counterbalanced by a waiver in the same provision allowing to deviate from the general obligation for (unspecified) public policy reasons; noteworthy, this possibility is in turn restricted through a *good faith* and a necessity test similar in its wording to the GATT two-pronged test[806]. Finally two other fairly new provisions, one related to data localization and the other to the disclosure of source codes, complete the picture pointing in the same vein at preventing the emergence of unnecessary regulatory obstacles to the provision of cross-border electronic services. In both circumstances, the TPP prohibits its signatories to require the localization of servers and the

[802] *Ivi*, Art. 15.8.
[803] See, *TPP*, Art. 14.7 cross-referencing the e-commerce provision to the general consumer protection rules of the Competition Chapter included in Article16.6.
[804] See, *TPP*, Personal Information Protection, Art. 14.8.
[805] *Ivi*, Cross-Border Transfer of Information by Electronic Means, Art. 14.11.1.
[806] *Ivi*, Cross-Border Transfer of Information by Electronic Means, Art. 14.11.3 maintaining that "Nothing in this Article shall prevent a Party from adopting or maintaining measures inconsistent with paragraph 2 to achieve a legitimate public policy objective, provided that the measure:(a) is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade; and (b) does not impose restrictions on transfers of information greater than are required to achieve the objective".

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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disclosure of source codes as a condition for the supply of the services; again, as far as local data storage is concerned, exceptions are possible for public policy reasons provided that such restrictions are proportionate and not arbitrary[807].

The analysis of the regulatory provisions specifically referring to e-commerce and trade in digital products undoubtedly reveals a growing attention of the US negotiators, and their counterparts, towards such issues with specific provisions getting more and more precise as new trade agreements are concluded. At first sight, the lack of innovation in the general exception and domestic regulation "classic" provisions seems then to be somehow counterbalanced through specific provisions targeting exclusively digital trade and trying to positively regulate what, in the multilateral context, is addressed only negatively through the GATS general exception (e.g. privacy and public morality provisions).

It is however to be noticed that most of the provisions mentioned above do not go at all in the direction of harmonizing the domestic regulatory practices nor they identify any external organization to be recognized as a reference standard setting entity to inspire relevant internal regulations on the subject matters[808]. Regulatory digital trade provisions are instead most of the times only limited at the recognition of the issues at stake and the need for more cooperation. Moreover, they are sometimes vaguely worded, so that the establishment of a clear obligation can be put into question[809]. It results that, although generally not explicitly waived from the applicability of the dispute settlement procedures[810], such provisions might turn out to be too generic to be actionable from one of the parties. Yet, despite this significant limitation, the importance of deep regulatory provisions on digital trade prompted in the US FTAs should not be underestimated; indeed, the recognition in a legally binding text of a general understanding between the Parties on the importance of certain issues surrounding digital trade represents already an important tool of pressure vis-à-vis the counterpart. More importantly, if regularly replicated in other FTAs, they also serve the purpose of adding political emphasis to certain policy issues so to create enough critical mass to be able to

[807] *Ivi*, Location of Computing Facilities, Source Codes, Art .14.13, Source Code, Art. 14.17.
[808] Reference to international regulatory or standard setting bodies would not be a novelty in the context of international trade law. This is common practice, for instance, in the context of the SPS Agreement that identifies three specific internationally recognized standard setting bodies. See, SPS Agreement, Annex A, para. 3.
[809] See, for instance, the provision in the US-South Korea FTA on free flow of information mentioned above establishing a so call "best endeavour" discipline. *US-South Korea FTA*, Art. 15.8.
[810] Herman L., *Multilateratising Regionalism: The case of e*-commerce, OECD Trade Policy Working Papers 99, 2010, para. 34.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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channel the policy discourse in the desired direction when faced with less "like-minded" counterparts[811]. Indeed, as we will see in the next paragraphs, the EU template on e-commerce matches only partially with the US one.

4 The European Union evolutionary approach on FTAs: a focus on e-commerce and electronic services

4.1 - Competencies and trends in the EU multilateral and preferential trade deals

4.1.1 The evolution of the Common Commercial Policy: from mixed to exclusive EU competencies

In contrast with the relatively recent endorsement by the US administration of various forms of regional trade integrations, the EU history of preferential trade deals dates far more back in time. As a matter of fact, preferential trade is inextricably linked to the creation of the European customs union first and, later on, the EU internal market. As mentioned at the beginning of the Chapter, the EU integration process is indeed at the basis of what has been defined as the *first* wave of regionalism, making *de facto* the European Economic Community probably the most important beneficiary of the GATT 1947 Article XXIV waiver for customs unions and free trade areas[812].

Along with the "internal" dimension of the free trade integration – evolved later into a more complete and elaborated internal market – EU Member States have recognized since the beginning the competence of the European institutions to conclude trade deals with third countries and, more in general, to manage external trade policies. However, contrary to the US case, the different and reduced level of integration among European countries has led, for long time, to mixed results. This is because, in the EU case, the allocation of competencies

[811] For instance, in the context of the on-going TTIP negotiations the US has already proposed a local data storage requirement prohibition in its e-commerce chapter offer, making the argument that, although privacy might not be within the remit of the agreement, free flow of information is. See, the comments of the European Commission Member at the Conference "Transatlantic Data Flows and the Trade and Investment Partnership (TTIP): Ensuring compatibility with European Data Protection standards" held at the European Parliament on 5 March 2014. Video available at greenmediabox.eu (from minutes 59 onwards).

[812] *Infra,* para. 2.1. Although the European Economic Union established in 1958 by the Treaty of Rome has been subjected to the examination of its compatibility with GATT Article XXIV, no formal decision has ever been finalized. See, Picone P., Ligustro A., *Diritto dell'Organizzazione Mondiale del Commercio*, Padova, 2001, 507-508.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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not only had to take into account the division of powers among executive and legislative branches – as it is the case for the US TPA - but also, and more importantly, the reluctance of sovereign States to give up their ability to regulate in certain trade-related matters[813]. This, as we shall see, has resulted for a long time in a mix of exclusive and shared competencies, certainly not facilitating the EU institutions in the trade negotiations both at multilateral and bilateral level.

The provision conferring the trade policy competencies to the EU institutions was included already in Article 113 of the Treaty of Rome, signed in 1958, whereby, after a transitional period[814], Members of the European Economic Community transferred the competence on external trade policy to the Council and the Commission[815]. In terms of the exact scope of the exclusive powers attributed to the Community in the external trade area, in 1979 the European Court of Justice (ECJ) ruled that, in light of the lack of more prescriptive indications in Article 113 of the Treaty of Rome, "the question of external trade must be governed from a wide point of view and not only having regard to the administration of precise systems such as customs and quantitative restrictions" adding that "a restrictive interpretation of the concept of common commercial policy would risk causing disturbances in intra-Community trade by reason of the disparities which would then exist in certain sectors of economic relations with non-member countries"[816].

The clear stand in favour of a broad interpretation of the concept of common commercial policy did not however solve all the issues surrounding the allocation of the Community exclusive competences in external trade matters. Indeed, at the time of the drafting of the Treaty of Rome, international trade was mainly perceived as encompassing only the exchange of physical goods, as foreseen in the GATT 1947. Not surprisingly the

[813] Together with the principles of subsidiarity and proportionality, the Treaty of the European Union (TEU) introduces the principle of conferral as one of the pillars of European law whereby "the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States". *TEU*, Art. 5.2.

[814] A transition period of twelve years was foreseen in the Treaty of Rome for the implementation of the necessary measures required for the establishment of the common market. *Treaty of Rome*, 25 March 1957, Art 8.

[815] In particular, the treaty provided that "the common commercial policy shall be based on uniform principles, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in case of dumping or subsidies". *Ivi*, Art. 113.

[816] ECJ, *Opinion given pursuant to the second subparagraph of Article 228(1) of the EEC Treaty - International Agreement on Natural Rubber*, Opinion 1/78 of the Court of 4 October 1979, para. 45.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
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Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

European Common Commercial Policy focussed only on this type of trade, leaving outside services, investments and intellectual property. Predictably, however, the issue of the competences to negotiate and conclude binding trade agreements in areas other than goods emerged in 1994 in the context of the WTO negotiations when the Council and the Member States - clearly in favour of retaining their competences on services and intellectual property right matters included in the new GATS and TRIPS Agreements - decided that the Final Act and the WTO Agreement would be signed on behalf of both the Commission and the Member States[817]; at the same time the European Commission requested an advisory opinion to the European Court of Justice in order to interpret the matter[818]. The ECJ opinion, commonly referred to as Opinion 1/94[819], leaned strongly in favour of Member States positions as it recognized the exclusive community competence in external trade policies only with regard to trade in goods[820] and cross-border trade in services[821], hence leaving the other three GATS modes[822] and the TRIPS matters[823] outside its scope[824]. This came as no surprise as previous attempts by the Commission to obtain a clear mandate on services and intellectual property had been already rejected in the run-up for the revision of the Treaty in Maastricht[825]. It

[817] For a thorough analysis of the positions of the European Commission, the Council and the Member States in the context of the WTO negotiations see, Kuijper P.J., *The Conclusions and Implementation of the Uruguay Round Results by the European Community*, in *Eur J of Int'l L.*, 6:2, 1995.

[818] The possibility to request the ECJ opinion on the compatibility of an international agreement with the EU treaties is foreseen in the *TEU*, Art. 218.11 (former Art. 228 of the Treaty of Rome).

[819] ECJ, *Competence of the Community to conclude international agreements concerning services and the protection of intellectual property - Article 228 (6) of the EC Treaty*, Opinion 1/94 of the Court of 15 November 1994 (hereinafter Opinion 1/94).

[820] *Ivi*, para. 22 and 34.

[821] In order to confirm the exclusive EU competence in the area of cross-border trade in services, the Court relied on the similarities between this type of trade and trade in goods. In particular it held that "As regards cross-frontier supplies, the service is rendered by a supplier established in one country to a consumer residing in another. The supplier does not move to the consumer's country; nor, conversely, does the consumer move to the supplier's country. That situation is, therefore, not unlike trade in goods, which is unquestionably covered by the common commercial policy within the meaning of the Treaty. There is thus no particular reason why such a supply should not fall within the concept of the common commercial policy". *Ivi*, para. 44.

[822] *Ivi*, para. 46-47. Here the Court based its conclusion on the existence of two different provisions in Article 3 of Maastricht Treaty, separating the common commercial policy with policies dealing with "the entry and movement of persons".

[823] Admittedly, the Court specified that this is the case except for those TRIPS provisions concerning the release and circulation of counterfeit goods that fall instead within the Common Commercial Policy.

[824] See, Hilf M., *The ECJ's Opinion 1/94 on the WTO – No Surprise, but Wise?,* in *Eur. J. Int'l L.* 6, 1995, 250-256; Bello J.H., *Opinion 1/94, Community Competence to Conclude Certain International Agreements*, in *AJIL*, 89:4, 1995, 772-788.

[825] Before the Opinion 1/94 was issued by the Court, the European Commission has already explicitly stated its position in the context of the intergovernmental conference in 1991 where it maintained that "the Union shall pursue a common policy on external economic relations covering: 1) trade, including export credit and credit insurance schemes, 2) economic and commercial measures involving services, capital, intellectual property, investment, establishment and competition." See, Commission of the European Communities, *Initial*

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
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resulted that the WTO Agreements had to be concluded as "mixed agreements" with the Council voting and approving the Uruguay Round results by majority only for those subjects falling within its exclusive competence[826] and each Member State still needing to ratify the remaining parts[827].

Since the time of Opinion 1/94, the EU legal and institutional system has evolved considerably, with significant modifications on the external competences of the Union being provided in the Treaty of Amsterdam (1997), the Treaty of Nice (2001) and, most importantly, the Lisbon Treaty (2011).

Only three years after the issuing of Opinion 1/94 and the signing of the WTO Agreements by the EU and its Member States, the Treaty of Amsterdam already provided for an initial modification in the Common Commercial Policy area with the Council being allowed to expand the exclusive competence of the Union for new subjects with unanimous vote without requiring an Intergovernmental Conference, hence making the task to bring services and IP under the exclusive competence of the EU less prohibitive[828]. The Treaty of Nice introduced instead a more substantial push toward the inclusion of services and intellectual property under the EU competencies as it amended again Article 113 (and re-numbered it as Article 133) by providing this time for EU competencies in these areas, with the caveat that the Council would have needed to act unanimously when concluding external deals in these two sectors[829] and that certain areas, such as the ones related to cultural and

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Contribution by the Commission to the Intergovernmental Conference on Political Union, sec 91(500), Brussels, 15 May 1991, 17.

[826] See, 94/800/EC, *Council Decision (of 22 December 1994) concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations* (1986-1994), *OJ* L 336, 23 December 1994. On the genesis of the decision see Kuijper P.J., *The Conclusions and Implementation of the Uruguay Round Results by the European Community*, cit., and Picone P., Ligustro A., *Diritto dell'Organizzzione Mondiale del Commercio*, cit., 554-555.

[827] See, Eksig M., *The EU's Common Commercial Policy: Institutions, Interests and Ideas*, Ashgate 2002, 32-37.

[828] See, *Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts*, in *OJ*, C 340, 10 November 1997, adding the following paragraph to Article 113: "5. The Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may extend the application of paragraphs 1 to 4 to international negotiations and agreements on services and intellectual property insofar as they are not covered by these paragraphs".

[829] See*, Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, signed at Nice, 26 February 2001*, in *OJ*, C 80, 10 March 2001, introducing the following amendment to TEC Article 133: "Paragraphs 1 to 4 shall also apply to the negotiation and conclusion of agreements in the fields of trade in services and the commercial aspects of intellectual property, insofar as those agreements are not covered by the said paragraphs and without prejudice to paragraph 6. By way of derogation from paragraph 4, the Council shall act unanimously when negotiating and concluding an agreement in one of the fields referred to in the first subparagraph, where that agreement includes provisions

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
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audio-visual services, would have remained a shared competence[830]. The inclusion of the whole GATS range of services within the exclusive competencies of the EU was confirmed later on by the ECJ[831].

Finally, the significant modifications introduced by the Lisbon Treaty on the whole EU institutional framework had, not surprisingly, an important impact in the allocation of powers and competencies also in the context of the EU external policy with former Article 133, now Article 207 of the Treaty of the Functioning of the European Union, being modified to indisputably encompass trade in services, the commercial aspects of intellectual property rights and foreign direct investments within the Common Commercial Policy[832]. At the moment, the only point of discrepancy with the discipline for trade in goods is that, in these areas, the unanimity rule - instead of the ordinary qualified majority – is required if unanimity is also necessary for the adoption of internal rules[833]. In addition, and particularly significant in the context of trade in electronic services, the unanimity is also always required for the "negotiations and conclusions of agreements in the field of trade in cultural and audio-visual services where these agreements risk prejudicing the Union's cultural and linguistic diversity" as well as in the fields of social, education and health services[834]. This, coupled with the

for which unanimity is required for the adoption of internal rules or where it relates to a field in which the Community has not yet exercised the powers conferred upon it by this Treaty by adopting internal rules. […]"

[830] *Ivi*, amending TEC Article 133 and introducing para. 6: "[…] agreements relating to trade in cultural and audio-visual services, educational services, and social and human health services, shall fall within the shared competence of the Community and its Member States. Consequently, in addition to a Community decision taken in accordance with the relevant provisions of Article 300, the negotiation of such agreements shall require the common accord of the Member States. Agreements thus negotiated shall be concluded jointly by the Community and the Member States".

[831] ECJ, *Opinion pursuant to Article 300(6) EC - General Agreement on Trade in Services (GATS) - Schedules of specific commitments - Conclusion of agreements on the grant of compensation for modification and withdrawal of certain commitments following the accession of new Member States to the European Union*, Opinion 1/08 of the Court Opinion (Grand Chamber) of 30 November 2009, paras 119-120, concluding that, with the modifications introduced by the Treaty of Nice, "the Community is now also competent to conclude, under the common commercial policy, international agreements relating to trade in services supplied under modes 2 to 4".

[832] See, *Consolidated Version of the Treaty on the Functioning of the European Union (TFEU),* in *OJ,* C 83, 30 March 2010, Art. 207.1 now providing that "the common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies". On the novelties introduced by the Lisbon Treaty in the context of the Common Commercial Policy see, Devuyst Y., *The European Union's Competence in International Trade After the Treaty of Lisbon*, in *GA. J. Int'l & Comp. L.*, 39, 2011, 639-661.

[833] TFEU, Art. 207.4.

[834] *Ivi*, Art. 207.4 a) and b).

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
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increased competencies of the European Parliament after Lisbon, still leaves significant power in the hands of single Member States to individually block liberalization in these areas[835].

4.1.2 A multifaceted EU attitude towards preferential trade: from a political driven approach to the 2006 Global Europe strategy

Despite the difficulties in the allocation of competencies among EU institutions and Member States, the EU has been active in negotiating partnership and trade deals well before the US turned to bilateralism, with trade agreements with Norway, Iceland and Switzerland concluded already in 1973[836] and broader Association Agreements signed even before, during the Sixties, with Greece and Turkey[837]. However, in contrast with the US approach explicitly aiming at increasing "competitive trade liberalization"[838], the EU engagement with third countries on trade matters has often originated from different premises and led to diverging outcomes. Indeed, in comparison to the US, the EU framework for bilateral and regional trade arrangements displays more complicated traits due to the multiple schemes negotiated by the Commission for trade and economic partnerships. This is because trade agreements with third parties take different forms in accordance with different situations such as the geographical proximity, the level of development and the time of the negotiations. Indeed, if the agreements signed with the EFTA countries mentioned above clearly aimed at boosting trade and economic integration among competitive and evenly developed territories, this has hardly be the case for most of the other deals negotiated with neighbouring countries; in fact, a long list of Partnership and Cooperation Agreements (PCA) concluded with the central and east European countries from 1990 onwards in a post Cold War context, and now falling within

[835] *Infra,* paras 4.2.2 and 5.4.1.
[836] The Agreements with Norway and Iceland have now been superseded by the European Economic Area arrangement whereas the Agreement with Switzerland remains the cornerstone of EU-Switzerland trade relations and it has been updated with two sets of sectoral bilateral agreements in 1999 and 2004.
[837] See, 63/107/CEE, *Accord créant une association entre la Communauté économique européenne et la Grèce*, *OJ,* 293/63, 18 February 1963; 64/733/CEE, *Accord créant une association entre la Communauté économique européenne et la Turquie - Protocole n° 1: protocole provisoire - Protocole n° 2: protocole financier - Acte final – Déclarations*, *OJ* 217/64, 29 December 1964. Following the accession to the EU, the Association Agreement with Greece is now obviously no longer in force. On the other side, the EEC-Turkey Association Agreement served as a basis for the conclusion of a Customs Union between the EU and Turkey in 1995.
[838] Among the trade negotiations objectives, the TPA passed by the Congress in 2002 lists explicitly "To foster economic growth, raise living standards, and promote full employment *in the United States*". BTPAA, cit., § 3802 section a(4). (emphasis added)

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
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the European Neighbourhood Policy (ENP)[839] were clearly undertaken having more security interest than trade goals in mind[840]; the same holds true for the Euro-Med Association Agreements, falling as well within the ENP, and seen mainly as an instrument to foster political stability in the southern EU neighbours[841]. Similar, although different in some respects, is the situation of the Stability and Association Agreements (SAA) negotiated by the EU with the Western Balkans and falling within the Stabilization and Association Process (SAP), implemented with the aim of eventual EU membership[842]. Finally, developmental rather than pure free trade reasons can be identified as the main driving force behind the negotiations of the Economic Partnership Agreements (EPA) concluded with the countries of Africa, the Caribbean and the Pacific area (ACP) and aiming also at promoting the European model of integration in other regional areas[843].

All the agreements mentioned above contain more or less detailed provisions on trade liberalization, although most of the times trade rules were not the main goal of the negotiations (SAAs, PCAs) or, although WTO-compliant, inserted some forms of unilateral

[839] See, Communication from the Commission to the Council and the European Parliament, *Wider Europe — Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours*, COM(2003) 104, Brussels, 11 March 2003; see also, Communication from the Commission, *European Neighbourhood Policy – Strategy Paper*, COM(2004) 373, Brussels, 12 May 2004.

[840] From 1994 onwards the European Communities concluded a series of partnership and cooperation agreements with several partners in Eastern and Central Europe and Central Asia. See, Council and Commission Decisions 99/602/EC, 99/614/EC, 99/515/EC, 99/490/EC, 99/491/EC, 98/401/EC, 97/800/EC, 98/149/EC, 99/593/EC, 2009/989/EC on the conclusion of the Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and the Republic of Armenia, the Republic of Azerbaijan, Georgia, the Republic of Kazakhstan, the Kyrgyz Republic, the Republic of Moldova, the Russian Federation, Ukraine, and the Republic of Uzbekistan, Tajikistan of the other part, respectively.

[841] Euro-Med Association Agreements have been concluded with some of the Mediterranean countries in the framework of the Barcelona Declaration adopted in 1995 and establishing a Euro-Mediterranean Partnership between the EU and 12 non-EU Mediterranean countries. See, Decisions 2006/356/EC (Lebanon), 2005/690/EC (Algeria), 2004/635/EC (Egypt), 2002/357/EC (Jordan), 2000/384/EC (Israel), 2000/204/EC (Morocco), 98/238/EC (Tunisia), plus an interim association agreement between the EU and the Palestine Liberation Organization (PLO) signed in 1997.

[842] The main pillars of the SAP are laid down in COM/1999/0235final, *Communication from the Commission to the Council and the European Parliament on the stabilisation and association process for countries of South-Eastern Europe - Bosnia and Herzegovina, Croatia, Federal Republic of Yugoslavia, former Yugoslav Republic of Macedonia and Albania* Brussels, 26 May 1999. So far, Stabilization and Association Agreements and Interim Agreements have been concluded with Serbia (2010), Montenegro (2010), Albania (2009), Bosnia and Herzegovina (2008), Croatia (2005 – before EU Accession), and Macedonia (2004).

[843] The EU has so far signed EPAs with CARIFORUM (signed in 2008, ratified in 2009), Papua New Guinea and Fiji (signed in 2009, ratified in 2011), Cameroon (signed in 2009, applied provisionally since 2014), Eastern and Southern Africa - ESA (signed in 2009, applied provisionally since 2012), South African Development Community – SADC (signed in 2014, not yet ratified), Eastern African Community – EAC (signed in 2014, not yet ratified). Moreover, the signature procedures for an EPA Agreement with ECOWAS (West Africa community) are currently on-going. Source: DGTRADE.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
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trade benefits for the less-developed party (EPAs)[844]. However, in contrast with the US case, the existence of heterogeneous instruments has made the emergence of a "EU model" for FTAs particularly difficult at the outset. This was also because, outside the political and developmental agendas pushed forward for neighbouring and ACP countries, the EU Commission initially refrained to engage in pure free trade negotiations with third countries, aiming instead at achieving its trade policy goals such as competition, investment and public procurement transparency at the multilateral level, within the framework of the Millennium Round of negotiations to be launched in Seattle in 1999[845]. Not surprisingly, very few stand-alone free trade negotiations detached from the neighbouring and developmental initiatives mentioned above were green-lighted during that period of time[846].

This situation started to change after the Cancun Ministerial Conference in 2003 when WTO negotiations failed to progress precisely on those "Singapore issues" of particular interest for the EU[847]. Indeed, under the leadership of a new Commissioner for Trade, Peter Mandelson, succeeding in 2005 the more multilateralism-oriented Pascal Lamy, the European Commission published a Communication, known as the Global Europe Strategy, highlighting the need for a new and more economically-driven trade strategy to support competitiveness and EU jobs growth[848]. For the first time, the document recognized the possibility – and the need – for the EU to deviate from multilateralism not only for neighbouring or developmental

[844] The "Cotonou Agreement", setting the cooperation framework for EPAs, declares that "economic and trade cooperation shall be implemented in full conformity with the provisions of the WTO, including special and differential treatment, taking account of the Parties' mutual interests and their respective levels of development", specifying however that "economic and trade cooperation shall take account of the different needs and levels of development of the ACP countries and regions. In this context, the Parties reaffirm their attachment to ensuring special and differential treatment for all ACP countries and to maintaining special treatment for ACP LDCs and to taking due account of the vulnerability of small, landlocked and island countries". See, *Agreement amending for the second time the Partnership Agreement between the members of the African, Caribbean and Pacific Group of States, of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000, as first amended in Luxembourg on 25 June 2005,* in *OJ*, L-287/3, 4 November 2010, Title II, Arts 34-35.

[845] Woolcock S., *European Union policy towards Free Trade Agreements*, ECIPE Working Paper n. 03/2007, 5.

[846] Outside the framework of the EPA and ENP policies, the EU concluded trade agreements with Mexico (1997, with specific protocols on trade in goods and services negotiated in 2000 and 2001, currently under revision), South Africa (1999) and Chile (2002, with the Free Trade Agreement entered into force in 2003).

[847] The so-called Singapore issues were identified as "trade and investment, trade and competition policy, transparency in government procurement and trade facilitation". On these areas, no consensus to start negotiations could be reached at the Cancun ministerial. See, WT/MIN(03)/20, *Ministerial Statement*, Adopted on 14 September 2003, Ministerial Conference, Fifth Session, Cancún, 10 - 14 September 2003, 23 September 2003. As a consequence, only trade facilitation was kept in the Doha agenda whilst the other topics were dropped in 2004. See, WT/L/579, *Doha Work Programme, Decision Adopted by the General Council on August 2004,* 2 August 2004, 3.

[848] COM(2006) 567 final, *Global Europe: Competing in the World, A Contribution to the EU's Growth and Jobs Strategy,* Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Region, Brussels, 4 October 2006.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
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Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

reasons, but also to advance pure trade and economic interests; in this sense the Commission committed to make proposals "for a new generation of carefully selected and prioritised FTAs" recognizing that "while our current bilateral agreements support our neighbourhood and development objectives well, our main trade interests, including in Asia, are less well served. The content of these agreements also remains limited. We should continue to factor other issues and the wider role of trade policy in EU external relations into bilateral trade developments. But in order for trade policy to help create jobs and drive growth, *economic factors must play a primary role in the choice of future FTAs*"[849]. The 2006 Global Europe strategy was then renewed in 2010, substantially confirming the previous approach but stressing the need to focus on new areas (ASEAN in particular, but also US, China and Russia) as well as to negotiate "deep and comprehensive free trade agreements" with neighbouring countries to complement the already established association agreements[850]. Finally, the most recent "Trade for All" strategy published in October 2015 confirmed again the approach toward preferential agreements, stressing in particular the need to further bilateral trade talks with countries in the Asia-Pacific region[851].

The change in the approach effectively led to the kick-off of negotiations for a significant number of purely economically driven agreements with third partners, with the most significant result being the so-called first "new generation FTA" between the EU and South Korea signed in 2009[852]. In the meantime, other negotiations with important trading partners were initiated, with some of them, such as the ones with Canada, Singapore, Colombia, Peru, Ecuador and Vietnam now already concluded and awaiting ratification, and

[849] *Ivi*, 12. (emphasis added). The same concept was then reiterated in a subsequent Commission Communication of 2008 when it was stated that "At the bilateral and regional level, the EU's goal of comprehensive Free Trade Agreements (FTA), especially with important trading partners in Asia, will deliver an excellent framework and an effective tool to improve EU businesses market access opportunities. Besides eliminating tariffs, these agreements provide novel ways for effectively tackling unjustified non-tariff obstacles to trade. COM(2008) 874 final, *Reporting on market access and setting the framework for more effective international regulatory cooperation*, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the External Dimension of the Lisbon Strategy for Growth and Jobs, Brussels, 16.12.2008.

[850] COM(2010) 612 final, *Trade, Growth and World Affairs, Trade Policy as a Core Component of the EU's 2020 Strategy*, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, Brussels, 9 November 2010.

[851] COM(2015) 497 final, *Trade for All, Towards a more responsible trade and investment policy*, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, Brussels, 14 October 2015.

[852] *Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part*, in *OJ*, L 127/6, 14 May 2011, (hereinafter "*EU-Korea FTA*").

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
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some others, such as the TTIP with the United States and the FTA with Japan, currently under negotiations[853].

Contrary to the trade liberalization instruments negotiated in the past, new generation FTAs seem now to follow a more structured and stable template so that it is probably safe to say that that an "EU model FTA", similar to the US template, is now gradually emerging. It is for this reason that, in the paragraphs below, we will focus the attention mainly on the most recent EU negotiated FTAs in order to evaluate whether a specific trend for trade in electronic services is emerging and, if so, how distant this can be from the US approach discussed above.

4.2 - The EU evolving approach in dealing with bilateral e-commerce and cross-border trade provisions[854]

4.2.1 The new stand-alone e-commerce chapters

The initial lack of a stable template for EU FTAs negotiations displayed its consequences also on the provisions related to electronic commerce. In contrast with the US agreements, already including e-commerce chapters almost from the outset, the first attempts of stand-alone EU FTAs contained limited, if any, references to e-commerce and electronic trade. Indeed, the Trade, Development and Cooperation Agreement (TDCA) signed in 1999 with South Africa referred only briefly to information society (but not e-commerce) through one single article inserting a mere cooperation pledge[855]. Similarly, the Association Agreement between EU and Chile signed in 2002 only briefly mentioned the importance of cooperation between the parties on e-commerce matters without then including more specific

[853] An overview of the current status of the EU bilateral and multilateral trade and investments negotiations is available at trade.ec.europa.eu

[854] The EU position on e-commerce and cross-border services negotiations described in this paragraph is outlined also on the basis of an interview undertaken in spring 2013 with DGTRADE Trade Negotiator for Telecommunication, e-commerce, audio-visual and computer services.

[855] See, *Agreement on Trade, Development and Cooperation between the European Community and its Member States, of the one part, and the Republic of South Africa, of the other part*, (hereinafter "*EU-South Africa TDCA*") in *OJ*, L 311/3, 4 December 1999, "Article 55 - Information society - telecommunications and information technology" whereby the Parties "agree to cooperate in the area of information and communication technology (ICT) which they consider as key sectors of modern society and which are vital to economic and social development and to the development of an information society".

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
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Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

or binding provisions[856]. Finally, the "Global Agreement" concluded with Mexico and its protocol on services signed in 2001 do not mention e-commerce at all[857].

The situation changed significantly following the Global Europe strategy issued by the Commission in 2006, with the EPA agreement signed with CARIFORUM in 2008 already providing for a stand-alone chapter on e-commerce[858]. This was followed by similar templates included in the first proper "new generation FTA" signed with South Korea in 2009[859] and in the more recent Trade Agreements signed with Colombia and Peru in 2012[860]. The most recently negotiated agreements seem to follow the same path with the new EU-Singapore "initialled agreement" including similar, although more detailed, provisions on e-commerce[861] and the CETA with Canada somehow differing in the structure but not considerably in the content of the e-commerce provisions[862].

Turning to the details of the specific provisions, the new stand-alone e-commerce chapters mirror the US template only insofar as they all establish a clear, permanent and legally enforceable duty free moratorium on electronic transmissions and sometimes confirm

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[856] See, *Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Chile*, *of the other part*, (hereinafter "*EU-Chile AA*") in *OJ*, L 352/3, 30 December 2002, Article 104: "The Parties, recognising that the use of electronic means increases trade opportunities in many sectors, agree to Each Party shall ensure that its competent authorities, promote the development of electronic commerce between them, in particular by cooperating on the market access and regulatory issues raised by electronic commerce." Interestingly, the agreement introduced a significant footnote clarifying that the provision at stake is "without prejudice of the Chilean position on the question of whether or not electronic commerce should be considered as a supply of services"

[857] 2001/153/EC, Decision n. 2/2001 of the EU-Mexico Joint Council of 27 February 2001 implementing Articles 6, 9, 12(2)(b) and 50 of the Economic Partnership, Political Coordination and Cooperation Agreement (hereinafter "*EU-Mexico FTA*"), in *OJ*, L 70/7, 12 March 2001.

[858] See, *Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part* (hereinafter *"EU-CARIFORUM FTA")*, in *OJ*, L 289/I/4, 30 October 2008, Chapter 6, Articles 119-120.

[859] *EU-Korea FTA*, cit., Chapter 7, Section F, Articles 7.48-7.49.

[860] *Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part* (hereinafter "*EU-Colombia FTA"*), in *OJ*, L 354/3, 21 December 2012, Chapter 6, Articles 162-166.

[861] Negotiations for a EU-Singapore Agreement have been concluded in October 2014 and the authentic text is available as of May 2015 on trade.ec.europa.eu. At the time of writing the text is however yet to be formally approved by the European Commission and to be sent to the Council and the EU Parliament for ratification. In order to clarify the competences to ratify this specific agreement (exclusive or shared) the Commission has requested the Opinion of the European Court of Justice. See, IP/14/1235, *Singapore: The Commission to Request a Court of Justice Opinion on the trade deal*, European Commission Press Release, 30 October 2014, available at europa.eu.

[862] The Comprehensive Economic and Trade Agreement between EU and Canada (hereinafter "*CETA*") is awaiting legal scrubbing and ratification. The text however has been available since October 2014, for information purposes only, at trade.ec.europa.eu.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
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the applicability of WTO rules to e-commerce[863]. Aside from that, the remaining provisions are limited to cooperation pledges and "best endeavour commitments" to institute regular dialogues on various areas concerning e-commerce, ranging from recognition of electronic signatures, liabilities of service providers, unsolicited electronic commercial communication, paperless trading and consumer and data protection[864].

What is however more interesting to stress are the points of departure from the US approach. First of all, with the notable exception of the CETA probably influenced by the NAFTA orientation pursued by Canada, all the provision on e-commerce are included in broader sections specifically dedicated to "trade in services, establishment and electronic commerce"; in this way, the EU clarifies from the beginning that, in its view, electronic commerce pertains exclusively to the trade in services sphere. In addition, in some of the agreements, this is further and indisputably specified with *ad hoc* paragraphs[865]. Another related and recurring detail of EU e-commerce chapters is the use of the word "delivery" and "transmission" to characterize e-commerce, something again pertaining to the services realm.

Aside from the questions of the definition and characterization of e-commerce, the most important point of departure from the US template is the complete absence, in the EU agreements, of any reference to the concept of "digital products", something we have seen to be instead significantly pushed by the US industry[866]. To understand the reasons for this, that is in turn strictly related to the strong EU stance in favour of the characterization of e-commerce as trade in services, one need again to think about the strong defensive interest of the EU in field of audio-visual services and the "content" industry in general[867]. As we have seen when discussing the US FTAs structure, the creation of the *ad hoc* category of "digital products" in the US template encompassing digitally encoded products "regardless of whether

[863] *EU-CARIFORUM FTA,* Art. 119.3; *EU-Korea FTA*, Arts 7.48.1 and 7.48.3; *EU-Colombia FTA*, Art. 162.3; *EU-Singapore FTA*, Art. 8.57.1 and 8.58; *CETA*, Art. 18.1 and 18.2 (provisional).
[864] These articles usually take the name of "e-commerce dialogue" or "regulatory cooperation" and contain a non-exhaustive list of e-commerce related issues to be discussed bilaterally. See, for instance, *EU-CARIFORUM FTA*, Art. 120; *EU-Korea FTA*, Art. 7.49; *EU-Colombia FTA*, Art. 163; *EU-Singapore FTA*, Art. 8.61, *CETA*, Art. 18.5 (provisional).
[865] See, *EU-CARIFORUM FTA*, Art. 119.3; *EU-Colombia FTA*, Art. 162.3 both maintaining that "The Parties agree that deliveries by electronic means shall be considered as the provision of services". A similar, but different, specification is inserted instead in the EU-Singapore FTA whereby a specific provision on electronic services, non present in other EU FTAs, clarifies that "the Parties affirm that measures related to the supply of a service using electronic means falls within the scope of the obligations contained in the relevant provisions of this Chapter subject to any exceptions applicable to such obligations". See, *EU-Singapore FTA*, Art. 8.59.
[866] *Infra*, para. 3.2.2.
[867] See, Chapter I, paras 4.2.2 and 4.2.3.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
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they are fixed on a carrier medium or transmitted electronically"[868] and with "GATT like" MFN and National Treatment principles to be applied to them[869], do not resolve the issue of whether such products are to be considered goods or services; on the contrary, in the latter case, the creation of this category introduces a strong inconsistency in case digital products transmitted electronically are considered "services".

This is precisely the case for the EU that is willing to maintain the control and the possibility of derogation for audio-visual services delivered online through the GATS schedule of commitments. In practical terms, it would be impossible for the EU, wishing to maintain GATS market access and national treatment exemptions over digitally transmitted audio-visual products (e.g. downloaded movies), to treat such products in the same way of digital products encoded in physical carrier media (e.g. DVDs) as these fall indisputably within the GATT realm. In substance, by refusing to introduce such category, and having well clear in mind its position vis-à-vis online delivery of digital products, the EU avoids to create the problematic "carve-in/carve-out" phenomenon that is instead intrinsic in almost all US bilaterals[870].

4.2.2 Classification strategies and the cross-border services chapters

As a result of the clear EU position outlined above leaning in favour of the applicability of service rules to all the aspects of e-commerce, hence fully in line with the *US-Gambling* doctrine, most of the provisions in the EU FTAs relevant for this study are to be necessarily traced in the general trade in services chapters provided for in EU agreements.

Similarly to the case of e-commerce, the structure of the service chapters in EU FTAs has evolved overtime to take a new and more stable outline after the issuing of the 2006 Global Strategy. Before that, services chapters assumed different forms in different agreements; for instance, in the Trade, Development and Cooperation Agreement with South Africa, the Parties only confirmed the obligations undertaken in the GATS context while a

[868] This is the definition included in *US-Singapore FTA*, Art. 14.4(2).
[869] The provisions on digital products in US FTAs usually provide that "Neither Party may accord less favorable treatment to some digital products than it accords to other like digital products". See, *US-South Korea FTA*, Art. 15.3.2.
[870] As discussed above, stand-alone and well-structured e-commerce chapters emerged in US agreements starting only with the trade deals with Singapore and Chile in 2004.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

specific discipline of trade in services was only briefly sketched; the elaboration of specific liberalization schedules was delegated to further acts of the Cooperation Council[871]. On the other hand, the agreements concluded by the EU with Mexico and Chile contained more detailed service chapters and specific schedules of commitments, with additional disciplines already foreseen for individual service sectors[872]; contrary to the US template, but also to the subsequent EU developments, both agreements referred to the GATS structures (the four modes of supply) for the identification of services and specific commitments[873].

Starting with the Agreement with CARICOM signed in 2008, the service chapters promoted by the EU began to develop a fixed structure with the subsequent agreements with Korea, Colombia/Peru, Singapore maintaining an identical configuration (see Table XII below). It results that, with the exclusion of the most recent trade deal with Canada, all "new generation" EU FTAs now provide for a broad chapter on services (including, as said, e-commerce provisions) divided up in stand-alone sections, one of them specifically dedicated to the cross-border supply of services. Contrary to the previous arrangements, fully replicating the WTO structure, the cross-border supply section – and the liberalization commitments listed in the related specific schedules - are now intended to encompass both GATS mode 1 and mode 2[874], whereas GATS mode 3 and 4 are included in two other sections, namely on "Establishment" and "Temporary Presence of Natural Persons for Business Purposes". Further to that, a specific section on the regulatory framework (and *ad hoc* sub-sections for

[871] See, *EU-South Africa TDCA*, Title III, Arts 29 and 30. In particular, article 30 establishes that "The Parties will endeavour to extend the scope of the Agreement with a view to further liberalising trade in services between the Parties. In the event of such an extension, the liberalisation process shall provide for the absence or elimination of substantially all discrimination between the Parties in the services sectors covered and should cover all modes of supply including the supply of a service" adding that "The Cooperation Council shall make the necessary recommendations for the implementation of the objective set out in paragraph 1".

[872] Both agreements contain a general section on trade in services as well as specific provisions on maritime and financial services. The EU-Chile FTA also adds a specific section on telecommunication services. See, *EU-Mexico FTA*, Title II, Chapters I-III; *EU-Chile FTA*, Title III, Chapters I and II. Significantly, both agreements already contain a carve-out for audio-visual services. See, *EU-Mexico FTA*, Art. 2.2.a; *EU-Chile FTA*, Art. 95.2.b.

[873] The scope and coverage of both agreements mirror the GATS scheme insofar as they are defined "as the supply of a service:(a) from the territory of a Party into the territory of the other Party;(b) in the territory of a Party to the service consumer of the other Party;(c) by a service supplier of a Party, through commercial presence in the territory of the other Party;(d) by a service supplier of a Party, through presence of natural persons in the territory of the other Party. See, *EU-Mexico FTA*, Art. 2.1; *EU-Chile FTA*, Art. 95.1.

[874] See, for instance, *EU-Korea FTA*, Art. 7.4.3 clarifying that "for the purpose of this section cross-border supply of services is defined as the supply of a service: (i) from the territory of a Party into the territory of the other Party; and (ii) in the territory of a Party to the service consumer of the other Party". Similar definitions are found in the agreements with Colombia/Peru, CARIFORUM, Singapore and Canada.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
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certain service sectors, among which computer and telecommunication services)[875] is inserted and is usually followed by the already discussed e-commerce chapter and the one on exceptions[876].

TITLE IV: TRADE IN SERVICES, ESTABLISHMENT AND ELECTRONIC COMMERCE
CHAPTER 1: General Provisions
CHAPTER 2: Establishment
CHAPTER 3: Cross-Border Suply Services
CHAPTER 4: Temporary Presence of Natural Persons for Business Purposes
CHAPTER 5: Regulatory Framework
Section 1: Provisions of General Application
Section 2: Computer Services
Section 3: Postal and Courier Services
Section 4: Telecommunication Services
Section 5: Financial Services
Section 6: International Maritime Transport Services
CHAPTER 6: Electronic Commerce
CHAPTER 7: Exceptions

Table XII: Outline of the service Chapter in the EU-Singapore FTA. Source: trade.ec.europa.eu

Apart from the structural design of the service chapters, probably helpful in facilitating the process of reading and retrieving information, this new configuration clearly puts more emphasis on the cross-border dimension of trade in services and makes the system more similar, although not identical, to the US 3+1 template. In terms of scheduling, however, the two positions remain very distant, as the EU still requires commitments to be undertaken following the traditional and probably less "liberalization-friendly" positive list[877], in contrast

[875] Other than Computer and Telecommunication services, the sub-sections usually cover Financial services, Maritime Transport services and Postal and Courier services.
[876] Exceptions and domestic regulation provisions in EU FTAs are discussed in the next paragraph.
[877] See, for instance, *EU-Colombia FTA*, *Annex VII, Section B - List of Commitments on Cross-border Supply of Services of the European Union*, para. 1, indicating that "Cross-border supply of services in sectors or sub-sectors covered by this Agreement and not mentioned in the list below *is not committed*." (emphasis added).

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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with the negative list adopted in US trade deals, and whose benefits for the liberalization of electronic services have been already discussed[878]. This situation might be changing in the future as a new solution, very much in line with the US template, has now emerged with the draft CETA Agreement now providing for a negative list scheduling[879]. Whether this has been a one-time concession to the Canadian negotiators or a new EU approach will only be clarified once the text of the new agreements now under negotiations (EU-Vietnam, EU-Japan and TTIP in particular), will be available to the public.

In terms of actual commitments relevant for electronic services, and regardless of the choice of positive or negative scheduling, the EU has always adopted a very liberal stance vis-à-vis both telecommunication and computer services, where it can be said to be in principle aligned with the US liberal approach. However, computer services are liberalized following the so-called "Understanding on Computer Services" proposed by the EU at WTO level[880] that aims at clarifying the scope of computer services, agreeing on a double-digit liberalization (CP84)[881] and, most importantly for the EU, excluding from the realm of computer services anything that can be related to the transmission of "content"[882]. In the context of EU FTAs, the understanding is included in the body of the text under specific computer services sub-sections, resulting then in an actual two-digit liberalization in the

[878] *Infra,* para. 3.2.3.
[879] The structure of the CETA chapter on cross-border trade in services mirrors the US template as it foresees a complete national treatment and market access liberalization for all services giving then the possibility to list reservations (or non-conforming measures in the US jargon) for each category. See, *CETA*, Chapter 11, Arts 11.02 (national treatment), 11.05 (market access), 11.06 (reservations).
[880] What the EU proposed in 2002 in the context of the Committee on Specific Commitments was not to "negotiate an annex to the GATS with a list of services covered by CPC 84, as this list is bound to be rendered obsolete by rapid technological developments soon". Instead, under the EU proposal, WTO Members could have "indicate in the "sector" column of their schedule of commitments, under "CPC 84 – Computer and related services" that they subscribe to the "Understanding on the scope of coverage of CPC 84", which would be attached to the schedule." S/CSC/W/35, *Coverage of CPC 84 – Computer and Related Services*, Communication from the European Communities and Their Member States, 24 October 2002, para. 5.
[881] The need for a double-digit liberalization originated from the fact that "Computer services become more and more varied and complex. Evolved services such as web-hosting and application service providers (ASPs), are a combination of various sub-sectors of Chapter CPC 84: it is therefore increasingly difficult to distinguish between the different sub-headings of CPC 84, and sometimes between services covered under CPC 84 and neighbouring services such as telecommunications." *Ivi*, para. 1(ii).
[882] According to the EU, "Computer and related services enable the provision of other services (e.g., banking) by both electronic and other means. However, there is an important distinction between the enabling service (e.g., web-hosting or application hosting) and the content or core service that is being delivered electronically (e.g., banking). In such cases, the content or core service is not covered by CPC 84". *Ivi*, para. 9.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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schedules of commitments[883]. Telecommunication services is another "offensive" interest for the EU but again, similarly to the computer services arrangement, the EU is keen to specify that full liberalization of mode 1 and 2 concerns only telecommunication services "consisting of the transmission and reception of signals by any electromagnetic means" with the exclusion of "the economic activity consisting of the provision of content which requires telecommunications services for its transport", hence again carving out the "content-related" side of electronic transmissions without further specifications[884].

The very practical and outstanding difference between the US and the EU cross-border services provisions in FTAs lies then, not surprisingly, in the treatment of audio-visual services where the divergences in the approaches already discussed in the WTO context are exacerbated[885]. First of all, as we have seen, the EU is careful to exclude any possible incidental liberalization of audio-visual content by clarifying the exact perimeter of the computer and telecommunication categories; on the other side, not only the EU does not commit to any form of liberalization in the schedule of commitments but also introduces in its FTAs a complete sectorial exemption for audio-visual services so that no liberalization or regulation commitment negotiated for cross-border services can apply to the audio-visual services, regardless of the technology used for the supply[886]. This has been a recurrent trend not only in the "new generation FTAs" but also in the agreements with Chile and Mexico signed at the beginning of the new century[887].

In conclusion, the evolution of the EU FTAs structure has certainly brought more consistency and clarity on the EU policy goals in trade in services, including those involving

[883] See, *EU-CARIFORUM FTA,* Chapter 5, Section 2, Art. 88; *EU-Korea FTA*, Sub-section B, Computer Services, Art. 7.25; *EU-Colombia FTA,* Chapter 5, Section 2, Art. 132; *EU-Singapore FTA*, Chapter 5, Sub-Section 3, Art. 8.21. The CETA Agreement does not provide for the understanding; however, by adopting the negative list approach, and absent any significant reservation on computer services, the liberalization is *de facto* achieved.

[884] See, *EU-CARIFORUM FTA,* Annex IV-B, List of Commitments on Cross-Border Supply of Services – EC Party, 2.B; *EU-Korea FTA*, Annex 7-A-1 - EC Party, List of Commitments in Conformity with Article 7.7 (Cross-border supply of services), 2.B; *EU-Colombia FTA,* Annex VIII, Section B, 2.A; *EU-Singapore FTA*, Appendix 8-A-, Schedule of Specific Commitments in Conformity with Article 8.7, 2.B; The same concept is reiterated in the telecommunication Chapter of the CETA Agreement. See, *CETA*, Art. 17.15.

[885] See, Chapter I, para. 4.2.3.

[886] Together with maritime cabotage services and certain domestic and international air transport services, audio-visual services are *de jure* completely excluded from all liberalization provision in all FTAs. See, *EU-CARIFORUM FTA*, Art. 75.1.a; *EU-Korea* FTA, Art. 7.4.1.a; *EU-Colombia FTA*, Art. 118(a); *EU-Singapore FTA*, Art. 8.3(a); *CETA*, Art. 11.01

[887] See, *EU-Mexico FTA*, Art. 2.2.a; *EU-Chile AA*, Art. 95.2.b.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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new technologies, with some question marks still to be consolidated, such as the decision over the positive *vs* negative listing of commitments.

The general picture certainly reveals a strong interest from the EU to adopt a liberal and technologically neutral approach toward electronic commerce and the supply of electronic services. However, mirroring the WTO scenario, this generally liberal approach toward the liberalization of ICT services is still heavily poisoned by the necessity of EU negotiators to ensure the utmost level of protection to the EU cultural industry. The result is the adoption of an extremely cautious approach towards new technologies that has the purpose of anticipating to the greatest extent possible the effect of technological advancements on the media industry. However, as discussed in Chapter I when analysing the EU position in the WTO context, the willingness from the EU side to liberalize only those types of ICT services that do not carry any "content" is clearly functional in achieving this goal but cannot be considered an ideal solution for those "new electronic services" that, although not being the target of the EU protectionist measures, do carry some type of content but do not fall within any specific services classification category[888].

So far, the EU has managed to maintain a full redline on audio-visual services in online and offline both in the WTO context and in its bilateral negotiations basing its arguments on the content/transmission approach. With the TTIP negotiations undergoing, it will probably not take too much time to understand whether and how this approach will be reconciled with the longstanding US interests toward both audio-visual and new electronic services.

4.2.3 Domestic regulation, general exceptions and e-commerce specific cooperation pledges

If diverging positions between the US and EU exist regarding the liberalization commitments for electronic services, the same cannot be said as far as general rules of domestic regulation are concerned, intended here as those provisions referring to both

[888] In Chapter I we have characterized the "content/transmission" approach push forward by the EU as "conceptually weak" because failing to take into account the fact that, in the digital era, new and different technologies can allow for the transmission of the same content and that such content do not necessarily have to be characterized as "audio-visual", as it is the case for certain new electronic services (video content, social networks). See, Chapter I, paras 4.2.3 and 4.3.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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administrative transparency and services quality[889], as well as for the general exception principles.

Indeed, the EU FTAs do not seem to introduce any specific novelty with respect to the general discipline on domestic regulation although such provisions are not as standardised as the ones provided for in US trade deals. However, looking at the wording in each EU agreement, it seems that the attention being paid to these types of provisions in growing. In particular, if the EU-CARICOM Agreement only provided for those provisions on administrative transparency and due process aimed at benefiting directly the service supplier[890], the EU-South Korea FTA also introduced a first attempt, albeit only on a "best endeavour" basis, to limit the arbitrariness in the development of licensing and qualification requirements[891] as well as a reference to the incorporation into the Agreement of the GATS Article VI:4 discipline once concluded[892]. Such effort has been further complemented in the EU-Colombia FTA by the inclusion, pending again the incorporation of the Article VI:4 final discipline, of an *ad hoc* interim discipline similar to the one provided for in GATS Article VI:5[893]. Finally, the latest two free trade agreements concluded with Singapore and Canada showed different, albeit not revolutionary, approaches with the agreement with Singapore splitting up the general domestic regulation into three different articles, one dealing exclusively with its scope and definitions and the two others instituting mandatory rules for, respectively, the conditions and the procedures of licensing and qualifications (but, this time, without any reference to the GATS discipline[894]) and the trade deal with Canada following a similar approach[895]. The missing reference, in the last two agreements, to the GATS Article VI:4 discipline under elaboration can be interpreted as a sign of lack of trust in the conclusion of said negotiations at multilateral level; on the other side, this omission does not seem to be

[889] The two different general features of the GATS provision on domestic regulation have been discussed in Chapter II. See, Chapter II, paras 2.1.2 (administration transparency) and 3.2 (domestic regulation).
[890] See, *EU-CARIFORUM FTA*, Art. 87 (Procedures), mirroring paragraphs 2 and 3 of GATS Article VI aimed at ensuring due process and a reasonable handling of licensing and other procedures.
[891] "With a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services, while recognizing the right to regulate and to introduce new regulations on the supply of services in order to meet public policy objectives, each Party *shall endeavour to ensure*, as appropriate for individual sectors, that such measures are: (a) based on objective and transparent criteria, such as competence and the ability to supply the service; and (b) in the case of licensing procedures, not in themselves a restriction on the supply of the service. *EU-Korea FTA*, Art. 7.23.3. (emphasis added)
[892] *EU-Korea FTA*, Art. 7.23.4.
[893] *EU-Colombia FTA*, Art .131.5.
[894] *EU-Singapore FTA,* Art. 8.18-8.20.
[895] *CETA*, Art. 14.1-14.2.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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substituted by the development, from the EU and its counterparts, of a specific discipline on necessity and proportionality of qualification and licensing requirements vis-à-vis free trade. The interests toward domestic regulation seems now more focused on the processes, rather than on the content of the measures, to ensure that authorisations, licences and procedures are granted following principles of fairness transparency and non-arbitrariness[896].

If domestic regulation in EU FTAs does not seem to be subject to any significant innovative approach, even less important novelties are introduced in the area of the general exception provisions, where the wording and the list of exceptions in all the trade agreements prompted by the EU are clearly inspired by the GATT and GATS Agreements. In particular, and aside from the EU-CARIFORUM FTA[897], all the EU agreements contain general exceptions specifically addressed to trade in services similar to GATS Article XIV, always including public morality and privacy as possible reasons to derogate from commitments undertaken in the services chapters [898].

Having ascertained the lack of innovative developments in the general provisions on domestic regulations and exceptions, we now turn to analyse the regulatory provisions contained in e-commerce chapters and specifically addressed to electronic trade. Generally speaking, such provisions can be divided into actual, albeit vague, "deep digital trade rules"[899] and cooperation pledges. As for the former, the EU e-commerce chapters put a significant emphasis on data protection, this time not in the form of an exception, but as a general objective to "ensure the confidence of users of electronic commerce"[900]; in addition, specific stand-alone provisions on both consumer and data protection in e-commerce practices are included in the EU-Colombia FTA and in the CETA[901]. Further issues specific to e-commerce,

[896] Significantly, the buzzwords "necessary" and "proportionate" are never mentioned within the domestic regulation provisions in CETA and in the EU-Singapore FTA.
[897] The general exception provided for in this agreement is applicable to both trade in goods and services. See, *EU-CARIFORUM FTA*, Art. 224.
[898] See, *EU-Korea FTA*, Art. 7.50; *EU-Colombia FTA*, Art. 167; *EU-Singapore FTA*, Art. 8.62. The CETA Agreement differs from the common GATS wording as it does not include the *chapeau* provision. See, *CETA*, Art. 32.2.2.
[899] The expression "deep digital trade rules" is borrowed from Wunsch Vincent. See, Wunsch Vincent S., Hold A., "Towards coherent rules for digital trade: Building on effort in multilateral versus preferential trade negotiations", in Burri M., Cottier T. (eds.), *Trade Governance in the Digital Age*, Cambridge, 2012, 204 et ss.
[900] See, for instance, *EU-Colombia FTA*, Art. 162.2 stating in the "Objective and Principles" provision that "the Parties agree that the development of electronic commerce shall be consistent with the international standards of data protection". Similar understandings are found elsewhere: *EU-CARIFORUM FTA*, Art. 119.2; *EU-Korea FTA*, Art. 7.48.2; *EU-Singapore FTA*, Art. 8.57.4.
[901] *EU-Colombia FTA*, Art. 164 and 166; *CETA*, Art. 18.03.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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but only highlighted in few of the agreements, are paperless trading and electronic signatures[902] whereas claims for free flow of information as less recurrent compared to the case of the US. On the other side, pledges for cooperation on regulatory issues and the institution of regular dialogues are a recurrent feature in virtually all EU FTAs. Such provisions usually feature non-exhaustive lists of issues to be tackled by the parties, including, but not confined to, those mentioned in the deep digital trade rules[903]; regrettably they however do not specify any further action nor they institute specific bodies to follow-up on said cooperation.

Despite the rich array of issues highlighted in e-commerce chapters, one must certainly acknowledge that, similarly to the case of US FTAs, "deep digital trade rules" constitute, again, mere indications of policy directions to be followed, hence not mandating for real obligations to be abided by and, due to their vagueness and ambiguous wording, hardly enforceable. As a matter of fact it would be unreasonable to expect these issues, although strictly related to trade in electronic services, to be meticulously regulated in a trade law context. Lacking however broadly established international standards on digital rules to be referred to, such provisions should then instead probably be seen as a reinforcement to already existing rules disseminated throughout the agreements[904]; more importantly they should inform the dialogue and set the agenda for a fruitful cooperation to be undertaken among competent authorities pursuant to the aforementioned provisions on regulatory dialogue.

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[902] See, *EU-Colombia FTA*, Art 165 on the management of paperless trading whereby "The Parties shall endeavour, insofar as possible, and within their respective competences, to: (a) make trade management documents available to the public in electronic form; and (b) accept trade administration documents submitted electronically as the legal equivalent of their paper version" and *EU-Singapore FTA*, Art. 8.60 aiming at eventually achieved mutual recognition of electronic signatures.

[903] See, *EU-CARIFORUM FTA*, Art. 120; *EU-Korea FTA*, Art. 7.49; *EU-Colombia FTA*, Art. 163; *EU-Singapore FTA*, Art. 8.61; *CETA*, Art. 18.05. Issues usually included in the list for cooperation are: the recognition of certificates of electronic signatures, the liability of intermediary service providers with respect to the transmission, or storage of information; the treatment of unsolicited electronic commercial communications; the protection of consumers in the field of electronic commerce from, among others, fraudulent and misleading commercial practices in the cross border context; the protection of personal data; the promotion of paperless trading.

[904] For instance, in the EU-Korea FTA a commitment by the Parties to adhere to the *OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data* (adopted by the Council on 23 September 1980) as well as the *Guidelines for the Regulation of Computerized Personal Data Files* (adopted by the United General Assembly Resolution 45/95 of 14 December 1990) is mentioned in the context of data protection in the Financial Services Chapter. See, *EU-Korea FTA*, Art. 7.43, footnote 38.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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5 EU-US cooperation and divergences in e-commerce and electronic services: the possible implications for the TTIP negotiations

5.1 – The path towards the TTIP negotiations: context, principles and general objectives

On the 13th of February 2013, the US President Obama, the former European Council President Van Rompuy and the former President of the European Commission Barroso announced the initiations of "the internal procedures necessary to launch negotiations on a Transatlantic Trade and Investment Partnership (TTIP)"[905]. The launch of the TTIP negotiations was not an isolated initiative between the two biggest trading blocks worldwide but the result of years of economic and trade dialogues between the two administrations. These started in 1995 with the economic pillar of the New Transatlantic Agenda[906], developed further in 1998 with the Transatlantic Economic Partnership (TEP)[907] and evolved later on, in

[905] See, *Statement from United States President Barack Obama, European Council President Herman Van Rompuy and European Commission President José Manuel Barroso*, Brussels/Washington, 13 February 2013, Memo 13/94, available at europa.eu.

[906] The signing of the New Transatlantic Agenda in 1995 is in turn to be framed in the context of the Transatlantic Declaration of 1990, setting the framework for cooperation and instituting regular high-level meetings between US and EU officials. The New Transatlantic Agenda contained a specific pillar on "Contributing to the expansion of world trade and closer economic relations" and established a new private sector group, the Transatlantic Business Dialogue (TABD), to define and promote the specific trade and investment agenda items. Significantly, although mainly focussed on reaffirming the commitment of the two sides to multilateralism and the WTO, the economic pillar of the transatlantic agenda already foresaw that "Without detracting from our cooperation in multilateral fora, we will create a New Transatlantic Marketplace by progressively reducing or eliminating barriers that hinder the flow of goods, services and capital between us. We will carry out a joint study on ways of facilitating trade in goods and services and further reducing or eliminating tariff and non-tariff barriers". See, *The New Transatlantic Agenda*, available at eeas.europa.eu. The text is also available as Annex 10 of the Presidency Conclusions of the Madrid European Council held on 15 and 16 December 1995, at www.europarl.europa.eu/summits. For a thorough analysis of the EU-US economic relations and governance see, Pollack M.A, Shaffer G.C. (eds.), *Transatlantic Governance in the Global Economy*, Lanham, 2001, 7 et ss.

[907] The joint statement for a Transatlantic Economic Partnership stemmed from the realization that cooperation in many areas foreseen by the Transatlantic Agenda was not emerging and that, instead, trade disputes between the two sides of the Atlantic (bananas, beef) continued to flourish. To this end the European Commission proposed in 1998 the negotiation of a "single comprehensive agreement" to implement the "new transatlantic marketplace" to tackle trade barriers and increase liberalization in goods and services. See, Pollack M.A., *The Political Economy of the Transatlantic Partnership*, Robert Schuman Center for Advances Studies, European University Institute, 2003, 7 et ss. At the end, a less ambitious "Trade and Economic Partnership" emerged from the EU-US Summit held in May 1998 in London and focussed on regulatory cooperation and standards harmonization in specific areas and created steering and working groups to tackle specific industry issues. The joint statement was then implemented through an action plan published in November 1998. The text of the Transatlantic Economic Partnership Action Plan is available at eeas.europa.eu.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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2007, with the more institutionalized channel of the Transatlantic Economic Council (TEC) aiming more specifically at suggesting common regulations in various industries[908]. It was indeed under the TEC context that the idea for a comprehensive trade and investment agreement was elaborated, as the announcement was preceded by the release of the final report[909] issued by the "United States-European Union High Level Working Group (HLWG) on Jobs and Growth", a bilateral high level channel established in 2011 by the TEC itself "to identify and assess options for strengthening the transatlantic trade and investment relationship, especially in those areas with the highest potential to support jobs and growth."[910] The HLWG final report recommended specific areas to focus negotiations on with a twofold objective; on one side, to address bilateral trade and investment issues and, on the other side, in consideration of the economic and political weight of the Parties, to "contribute to the development of global rules"[911].

Soon after the political announcement, the European Commission effectively issued negotiations guidelines for approval to the Council[912] together with an impact assessment on

[908] The TEC was established on April 2007 at the EU/US Summit by German Chancellor Angela Merkel, at the time President of the European Council, former US President George W. Bush and former EU Commission President Jose Barroso as part of the EU/US framework agreement for advancing transatlantic economic integration. See, *Framework for advancing transatlantic economic integration between the European Union and the United States of America*, Washington, 30 April 2007, available at trade.ec.europa.eu. The TEC is at the moment the only high-level forum for EU-US discussions of economic and trade issues of mutual interests as well as broader global economic questions. The TEC works in accordance of work plans setting the current priorities and is supported by three "advisory" groups (the Transatlantic Legislators' Dialogue, the Transatlantic Consumer Dialogue and the Transatlantic Business Council). Current priorities are outlined in the *"Annexes to the TEC Joint Statement"* of 29 November 2011, available both at trade.ec.europa.eu and state.gov. More on TEC at *Infra*, para. 5.2.2.

[909] See, *Final Report, High Level Working Group on Jobs and Growth*, February 11, 2013, available at trade.ec.europa.eu

[910] The HLWG has been established following the recommendations issued at the 2011 EU-US Summit held in Washington where the US and EU leaders recognized that "We must intensify our efforts to realize the untapped potential of transatlantic economic co-operation to generate new opportunities for jobs and growth, particularly in emerging sectors. We are committed to making the EU-U.S. trade and investment relationship – already the largest and most integrated in the world – stronger. To that end, we have directed the TEC to establish a joint High Level Working Group on Jobs and Growth, co-chaired by the European Commissioner for Trade and the U.S. Trade Representative. We ask the Working Group to identify and assess options for strengthening the EU-U.S. economic relationship, especially those that have the highest potential to support jobs and growth." See, *EU-U.S. Summit Joint Statement*, Washington, 28 November 2011, Memo 11/842, available at europa.eu.

[911] *Final Report, High Level Working Group on Jobs and Growth* cit., 6. Elsewhere, the report noted more explicitly that "given the size and influence of the transatlantic partnership, the HLWG also supports the aim of developing rules in several areas that would not only be relevant to bilateral commerce, but would also contribute to the progressive strengthening of the multilateral trading system."

[912] The directives for the TTIP negotiations have been approved by the Foreign Affairs Council on 14 June 2013 and declassified on 9 October 2014. See, *Directives for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America*, Council of the European Union, 11103/13 RESTREINT UE/EU RESTRICTED, 17 June 2013.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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the possible effects of the liberalization in single sectors and in various scenarios[913]. The approval by the Council of the directives for negotiations (the "mandate") in June[914] led then to a second public announcement for the actual kick-off of the negotiations with the first round taking place already in Washington DC in July 2013 and, at the time of writing, negotiations currently proceeding at a speedy pace[915].

In line with the recommendations of the High Level Working Group, the open objectives and the principles at the basis of the TTIP are the creation of jobs through better market access, increased regulatory compatibility and the setting of global standards. More in particular for the purpose of this study, the mandate approved by the Council together with the letter sent by the USTR to the Congress to notify the kick-off of the negotiations[916] reveal further details on the broad expectations and objectives of the two parties. First of all, both documents recognize that, in light of the already low level of tariff among the parties, the untapped potential of transatlantic trade lies in the reduction of the so-called non-tariff barriers, mostly raised by differences, sometimes only formal, in regulatory practices; to this purpose, significant emphasis is attached to the processes of cooperation, harmonization and

[913] The impact assessment took into consideration three policy options (Policy option A: The baseline scenario, Policy option B: Tariff-only, services-only and procurement-only agreements, Policy option C: A comprehensive Free Trade Agreement) concluding that "there is a clear-cut case for the EU to enter into negotiations for a comprehensive and ambitious FTA (policy option C.2) as the preferred option." See, *Impact Assessment Report on the future of EU-US trade relations*, Commission Staff Working Document accompanying the document *Recommendation for a Council Decision authorising the opening of negotiations on a comprehensive trade and investment agreement, called the Transatlantic Trade and Investment Partnership, between the European Union and the United States of America*, Strasbourg, SWD(2013) 68 final, 12 March 2013. The impact assessment was then complemented by an independent economic study indicating the possibility of positive and significant gains for both economies in case of a conclusion of a comprehensive transatlantic trade deal. See, Francois J., Manchin M., Norberg H., Pindyuk O., Tomberger P., *Reducing Transatlantic Barriers to Trade and Investment, An Economic Assessment*, Centre for Economic Policy Research, London, March 2013, available at trade.ec.europa.eu.

[914] See, *Member States endorse EU-US trade and investment negotiations*, Memo 13/564, Brussels 14 June 2013, available at europa.eu.

[915] The tenth round of negotiations took place in July 2015 in Brussels. In the meantime, the European Parliament issued non-binding recommendations to the Commission on the TTIP negotiations. See, *European Parliament resolution of 8 July 2015 containing the European Parliament's recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership* (TTIP), P8_TA-PROV(2015)0252, 8 July 2015. The content of the resolution relevant for electronic services are discussed in the paragraphs below. *Infra*, para. 5.4.

[916] The US objectives for the negotiations with the EU were publicly described in a letter of the USTR to the U.S. Congress. See, *Letter by Ambassador Demetrios Marantis, Acting United States Trade Representative to the Honorable John Boehner, Speaker of the United States House of Representatives*. 20 March 2013. Available at ustr.gov.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
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mutual recognition[917]. Secondly, as far as trade in services is concerned, the mandates appear ambitious on both sides, with EU claiming its willingness to "bind the existing autonomous level of liberalisation of both Parties at the highest level of liberalisation captured in existing FTAs"[918] and the US to "seek to obtain improved market access in the EU on a comprehensive basis.[919]".

However, despite the generally positive tone permeating the starting positions of the Parties, it is clear from the documents that the devil is in the details and that significant divergences exist already in the initial positions. This is not only true for the long-standing and well-known transatlantic trade irritants such as GMOs and geographical indications[920] but also for the issues of interest for this study. Indeed, as we will discuss more in depth throughout the following paragraphs, divergences related to audio-visual services and data protection (two issues identified above as the main point of friction between the parties in the electronic services context) are already evident from the initial mandates and the subsequent official documents so far made available[921]. However, before analysing the possible scenarios for e-commerce and trade in electronic services in the TTIP, we will now turn to examining

[917] In its introduction the USTR letter to the Congress reads that "with average US and EU tariffs already quite low, new and innovative approaches to reducing the adverse impact on transatlantic commerce of non-tariff barriers must be a significant focus of the negotiations." See, *Letter by Ambassador Demetrios Marantis*, cit., 2. Similarly, the Council mandate instructs the Commission that, among other things, "the Agreement will aim at removing unnecessary obstacles to trade and investment, including existing NTBs, through effective and efficient mechanisms, by reaching an ambitious level of regulatory compatibility for goods and services, including through mutual recognition, harmonisation and through enhanced cooperation between regulators." *Directives for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America,* cit., para. 25.

[918] *Directives for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America,* cit., para. 15.

[919] *Letter by Ambassador Demetrios Marantis*, cit., 3.

[920] For instance, the EU mandate clearly sets the objective "to provide for enhanced protection and recognition of EU Geographical Indications through the Agreement, in a manner that complements and builds upon the TRIPS, also addressing the relationship with their prior use on the US market with the aim of solving existing conflicts in a satisfactory manner". *Directives for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America,* cit., para. 29. On the other side, without clearly mentioning GMOs or the EU/US divergences in the interpretation of the precautionary principle, the US letter to the Congress states that negotiations will "seek to build on key principles and discipline of the World Trade Organization (WTO) Agreement on the Application of Sanitary and Phytosanitary Measures to achieve meaningful market access, including commitments to base SPS measures on science and international standards or scientific risk assessments, apply them only to the extent necessary to protect human, animal or plant life or health, and develop such measures in a transparent manner, without undue delay". See, *Letter by Ambassador Demetrios Marantis*, cit., 3.

[921] Of particular significance is the already mentioned 2015 European Parliament resolution setting a series of significant, although not binding, "redlines" for the Commission. See, *European Parliament resolution of 8 July 2015 containing the European Parliament's recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership* (TTIP), cit. *Infra*, paras 5.3 and 5.4.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
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these and other related issues as discussed in the bilateral transatlantic dialogue mechanisms preceding the negotiations kick-off.

5.2 – E-commerce and electronic services before the TTIP: EU-US transatlantic cooperative efforts

5.2.1 E-commerce and ICT in the New Transatlantic Agenda (1995-2006)

Transatlantic interests towards e-commerce and its trade-related aspects date back to the very origin of the multilateral debate. Indeed, it was precisely the EU, supported by the US, to push for the creation of the WTO work program on electronic commerce broadly analysed in Chapter I[922]. From a bilateral point of view, and notwithstanding the launch of the e-commerce discussion at multilateral level, a preliminary understanding on e-commerce issues (albeit very general at that time) materialized first of all into a landmark "joint statement" signed at the margin of the 1997 EU-US Summit held in Washington DC[923]. In this first cooperative attempt, the EU and the US already outlined the desire for cooperation in many of the outstanding e-commerce issues such as the need of private-led development of e-commerce, the adequate protection of public interest objectives "such as privacy, intellectual property rights, prevention of fraud, consumer protection, and public safety" and the careful construction of new legislations so not to discriminate electronic commerce in comparison with other types of trade[924]. In more practical terms, and besides the very general statements of principles, through the joint document the EU and US found already a convergence on certain specific issues as they committed to work at global level in order to clarify that electronic transmissions should not be subjected to import duties and to secure meaningful

[922] WT/GC/W/85, *Electronic Commerce - Communication from the European Communities and their Member States*, 23 April 1998, para. 2 where it was stated that "The EC and their Member States believe that a debate should be initiated in the WTO on the following trade-related aspects of electronic commerce. A possible outcome of this comprehensive discussion could be a codification of an agreed set of basic principles on electronic commerce, aimed at clarifying the application of WTO provisions to electronic trade and underpinning market access and national treatment conditions bound by WTO Members and applicable to electronic transactions". See, Chapter I, para. 2.1.

[923] *Electronic Commerce - Joint Statement* released in conjunction with the U.S.-EU Summit, Washington, DC, December 5, 1997, available at 1997-2001.state.gov.

[924] *Ivi*, para. 3 (i-iv).

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

outcomes from the WTO commitments on basic telecommunication (the so-called Fourth Protocol) and the ITA, at that time both to be fully implemented[925].

The initial cooperative effort of the joint statement was then recalled and entered into the scheme of the transatlantic cooperation through the Transatlantic Economic Partnership (TEP) declaration at the EU-US London summit in 1998. In addition to that, the TEP Action Plan published few months later identified among the principles mentioned in the 1997 joint statement different actions to be jointly undertaken at multilateral and bilateral level. As for the formers, the EU and US reaffirmed their commitment towards the implementation of the WTO work programme and, in particular, the inapplicability of customs duty to electronic transmissions[926]. The bilateral issues presented instead a selection of some of the general topics mentioned in the 1997 statement and to be subjected to "further bilateral review and discussions" namely "the elimination of unnecessary legal and regulatory barriers; the promotion of voluntary standards that enhance interoperability, innovation, and competition; the continued duty-free treatment of electronic transmissions; the implementation globally of WTO basic telecommunications commitments; the completion of 'Information Technology Agreement II' and the facilitation of trade through use of electronic commerce"[927].

Despite the increasing interest toward trade-related e-commerce issues, the wide variety of topics mentioned in the action plan, together with their vague wordings, did not result, in the following years, in the development of a more systematic approach. On the contrary, and not surprisingly, an assessment published by the European Commission in 2000 recognized that, aside from the exchange of bilateral "trade irritants" relevant for e-commerce[928], "the work carried out has tended to take place on an *ad hoc* basis, depending on the relevant issue at stake (e.g. negotiation of the recognition of the US "safe harbour" for data privacy between DG MARKT and the DOC, discussion in the OECD and in other *fora* on the EU proposal on VAT, discussion of telecommunications liberalisation in the EU-US Information Society dialogue), rather than as indicated in the TEP action plan", adding that,

[925] *Ivi*, para. 4 (i-ii). The role of the Fourth Protocol and the Reference Paper is discussed in Chapter I, para. 2.3.2.
[926] "We will consult to ensure the implementation of the WTO work programme on the trade-related aspects of electronic commerce, including the examination by the relevant Councils and committees of the aspects identified in the work programme. We will pursue codification, by year-end 1999, of the standstill commitment on inapplicability of custom duties." See, *Transatlantic Economic Partnership Action Plan* cit., para. 2.2.
[927] *Transatlantic Economic Partnership Action Plan*, cit., para. 3.10.
[928] The Commission report mentions the EU data privacy law and the EU taxation framework as issues raised by the US side.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

"it appears that given the broad nature of the problems falling under the label "electronic commerce", as well as the rapidly changing environment and the existence of a number of other *fora*, both sides have found that *ad hoc* contacts on specific subjects is for the time being the most adequate way forward"[929].

From the 2000 Commission assessment onwards, the work on e-commerce and electronic services in the TEP framework did not appear to acquire a prominent role, with all public documents focusing on other areas of cooperation[930] and, most importantly, the transatlantic trade relations deteriorating due to the emergence of specific trade irritants on subsidies and antidumping issues, leading to WTO disputes[931]. Even after the 2004 "Dromoland Declaration"[932], aimed at giving a further boost to the economic relations, and the subsequent launch at the 2005 Summit of the "EU-US Initiative to Enlarge Transatlantic Economic Integration and Growth", specific e-commerce and ICT issues continued to be absent from the political priorities of the transatlantic relations[933]. In fact, only certain internet-related issues were very briefly mentioned in the initiative section on "Spurring Innovation and the Development of Technology"[934] and limited attention was devoted to ICT

[929] *The Transatlantic Economic Partnership, Overview and Assessment*, Coordination: DG TRADE.E.3 October 2000, para. II.11 (electronic commerce). Available at trade.ec.europa.eu

[930] See, *Report of the Transatlantic Economic Partnership Steering Group,* EU-U.S. Summit, Göteborg 14 June 2001, not mentioning any achievement in the e-commerce area nor planning any related activity within the list of priorities. Source: trade.ec.europa.eu.

[931] See, WT/DS/214/1, *United States - Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") - Request for Consultations by the European Communities*, 19 June 2003; WT/DS/317/1, *United States - Measures Affecting Trade in Large Civil Aircraft - Request for Consultations by the European Communities*, 12 October 2004.

[932] *Declaration on strengthening our economic partnership*, Dromoland Castle, US-EU Summit, County Clare June, 26 June 2004, whereby US and EU political leaders called "stakeholders on both sides of the Atlantic to engage in a vigorous discussion of concrete ideas on how to further transatlantic economic integration to the fullest, spur innovation and job creation and better realise the competitive potential of our economies and enterprises. We also ask senior officials from the EU and the U.S. Government to assess on each side of the Atlantic our bilateral economic relationship and to explore means to eliminate trade, regulatory and investment impediments to further economic integration". Available at trade.et.europa.eu.

[933] *EU/US Initiative to Enlarge Transatlantic Economic Integration and Growth*, 2005 UE/EU Summit, Washington 20 June 2005, available at trade.ec.europa.eu. ICT and e-commerce issues are not mentioned even in subsequent progress reports. See, *Economic Progress Report, 2007 EU-US Summit*, Washington DC, 30 April 2007.

[934] The activities mentioned in this sector somehow connected to e-commerce and electronic services are: "promote E-accessibility for the disabled, elderly and other citizens with accessibility issues; encourage deployment of key innovative technologies such as broadband and radio frequency identification devices, without prejudice to consumer and data protection; establish a dialogue on cyber-security to bring together regulators, law enforcement and, as appropriate, intelligence agencies; support OECD efforts to develop an approach to international redress for international internet purchases; cooperate to tackle spam through joint enforcement initiatives, and explore ways to fight against illegal "spy ware" and malware". See, *EU/US Initiative to Enlarge Transatlantic Economic Integration and Growth*, cit., 4-5. Objectives for each specific sector are further specified in a subsequent document. See, *Implementation of the Economic Initiative of the June 2005 EU-US Summit: Joint EU-US Work Programme*, Brussels-Washington November 2005, 6-10.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

in the Roadmap developed in 2005 for sectoral activities in regulatory cooperation[935]. This was later confirmed by the documents issued ahead of the following EU-US Summit in 2006[936].

Overall, the political and ambitious commitments already implicit in the joint statement on e-commerce in 1997 were clearly not fully pursued, at least at bilateral level, through the mechanisms set forth through the TEP. Although the reasons for it are difficult to discern, it is possible to assume that these are related to the prominence of other trade issues as well as the lack of significant irritants emerging from the e-commerce sphere at that time. As we will see below, even the Transatlantic Economic Council, established few months later, did not take - at least at the beginning – ICT and e-commerce as priorities as well.

5.2.2 The Transatlantic Economic Council: A new but limited focus on ICT (2006-2011)

The Dromoland Declaration and the follow-up activities in the 2005 and 2006 Summits mentioned above had the effect to increase the attention of the transatlantic dialogue towards economic and trade issues. At the Washington Transatlantic Summit in April 2007, the two sides further their cooperative efforts and agreed to reinforce economic cooperation by instituting an official "Framework for Advancing Transatlantic Economic Integration"[937] with the main aim of "fostering cooperation and reducing the regulatory burdens" and identifying as well a series of "lighthouse priority projects" to achieve progresses on[938]. More importantly, as mentioned, the new Framework instituted the Transatlantic Economic Council

[935] The "EU/US initiative" committed the two Parties to "establish a EU-US high-level Regulatory Cooperation Forum, through which senior U.S., European Commission and, where appropriate, other European Community regulators would be encouraged to exchange views, share experiences, and learn from each other regarding general or crosscutting regulatory cooperation approaches and practices of mutual interest". To this purpose, an initial roadmap for regulatory cooperation was drafted already in 2005. On ICT, the regulatory cooperation included in the Roadmap was limited to "Cooperation between the U.S. Department of Commerce and DG Enterprise and Industry and DG Information Society on the use of information and communication technology (ICT) standards in accordance with the Terms of Reference established in March 2004" with initial topics of discussion under the dialogue including "accessibility, security, and biometrics." See, *2005 Roadmap for US - EU Regulatory Cooperation*, 20 June 2005, Section II.3, available at trade.ec.europa.eu.

[936] See, *Vienna Summit Declaration*, 21 June 2006; *2006 EU-U.S. Summit Progress Report on the Economic Initiative*, 21 June 2006, Vienna; *Joint Report on the Roadmap for EU-US Regulatory Cooperation*, Annex 2 to Progress Report, on Economic Initiative, June 2006, para. III.3.

[937] See, *Framework for Advancing Transatlantic Economic Integration"* (hereinafter TEC Framework), Washington DC, 30 April 2007, available at trade.ec.europa.eu and georgewbush-whitehouse.archives.gov.

[938] *TEC Framework*, Section II and III.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

(TEC), a body tasked to develop the framework objectives, having for the first time the necessary political weight to set priorities and foster meaningful cooperation among already existing sectorial dialogues[939]. The TEC was officially advised in its work by the already existing transatlantic bodies representing different interests, namely the Transatlantic Business Dialogue (now Transatlantic Business Council), the Transatlantic Consumers Dialogue, and the Transatlantic Legislators Dialogue[940].

Despite the brand new and politically "heavier" structure, the priorities highlighted in the Framework reflected initially what already foreseen in the 2005 "Initiative to Enlarge Transatlantic Economic Integration and Growth", with transatlantic economic integration to be advanced in the areas of intellectual property rights, investment, secure trade, financial markets, and innovation[941] and, again, no significant emphasis attached to general e-commerce and ICT issues[942]; such priorities were developed in the course of the following years.

In 2010, however, a new boost came from the EU-US Summit for the TEC to focus their efforts on specific areas and improve the consultation processes[943]. In response to that the TEC developed a new approach, this time strongly centred on innovation and new technologies as a driver to business and trade development, clarifying that "innovation and commerce flourish where regulatory approaches provide a consistent, clear, and predictable business environment *that fosters the development of new technologies* and ensures high

[939] According to the Framework, the Council should have been "co-chaired, on the U.S. side, by a U.S. Cabinet-level official in the Executive Office of the President […] and, on the EU side by a Member of the European Commission […], collaborating closely with the EU Presidency". *TEC Framework*, Section IV.

[940] See, *Joint statement of the Transatlantic Economic Council,* November 9, 2007. Available at trade.ec.europa.eu.

[941] *TEC Framework*, Section V, Annexes 2-7.

[942] The TEC Annex on Innovation and Technology only listed a series of very specific technology-related cooperation areas for the two parties to focus on and ranging from nanotechnologies, public procurement e-accessibility, electronic health record systems and RFID. See, *TEC Framework*, Annex 7. See also, *Transatlantic Economic Council, Review of Progress under the Framework for Advancing Transatlantic Economic Integration between the United States of America and the European Union*, Report Progress of the first meeting of the TEC in Washington D.C, 9 November 2007, point D. available at trade.ec.europa.eu.

[943] At the 2010 EU-US Summit in Lisbon, EU and US leaders "tasked the TEC to develop a transatlantic agenda to stimulate growth and create jobs in key emerging sectors and technologies. We have also asked the TEC to identify ways to improve transatlantic consultation before regulators and agencies develop regulation in economically promising new technologies and sectors, to share best practices, and to develop joint principles with the aim of promoting maximum compatibility of regulations and the freest possible transatlantic flow of ideas, products, and services. We expect the TEC to report on progress in these areas in 2011. See, *EU-U.S. Summit Joint Statement*, 20 November 2010, available at www.whitehouse.gov.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

standards of health, safety, and environmental protection"[944]. In practical terms, this resulted in new areas of cooperation being delineated, among which ICT services acquired for the first time a prominent role in the transatlantic dialogue since the e-commerce declaration of 1997[945]. In this area the two sides committed to agree on ten general principles "to advocate the elimination of restrictions to the development of open competitive information and communication technology networks and to promote innovative IT infrastructures worldwide"[946]. These principles actually emerged only few months later, in April 2011, and were reported to the 2011 EU-US Summit as the most important result of the yearly cooperation[947]. Indeed, pending the conclusion of the TTIP negotiations, the "European Union-United States Trade Principles for Information and Communication Technology Services" represent at the moment the latest and most tangible outcome on ICT emerged from the bilateral transatlantic cooperation[948].

In terms of content, and their relevance for trade in electronic services, the "Principles" seem to endorse a very important free trade stance towards the supply of cross-border services since they advocate in favour of principles such as technological neutrality and interoperability (principles n. 2), free flow of information (principle n. 3) and prohibition of local content presence requirements as a condition for service supply (principle n. 4)[949]. It has however to be remarked that, despite the positive wording pointing in the direction of more openness for trade in ICT services, the document do not tackle the most important divergences between the EU and the US approaches that have been outlined in the previous paragraphs. On the contrary, the preamble of the document seems to limit the applicability of the subsequent principles only to those situations not falling within any of those sensitive

[944] See, *US-EU Transatlantic Economic Council Joint Statement*, 17 December 2010, Washington D.C., available at trade.ec.europa.eu. (emphasis added)
[945] See, *US-EU Transatlantic Economic Council Joint Statement - TEC - Sector Specific Statements*, 17 December 2010, Washington D.C., 6. available at trade.ec.europa.eu. Aside from ICT services, the new TEC "work plan" included areas already developed such as energy efficiency and IPR cooperation together with new topics such as a focus on SMEs, E-health and the treatment of Electronic Health Records, cooperation on Chemicals and E-mobility.
[946] *Ibid*.
[947] See, *Report to the Transatlantic Economic Council Co-Chairs to the Summit*, November 28, 2011.
[948] The full text of the "Principles" is reported in Annex I
[949] In particular, principle n.2 requires that "[…] Governments should not restrict the ability of suppliers to supply services over the Internet on a cross-border and technologically neutral basis, and should promote the interoperability of services and technologies, where appropriate", principle n. 3 instructs Governments "not to prevent service suppliers of other countries, or customers of those suppliers, from electronically transferring information internally or across borders, accessing publicly available information, or accessing their own information stored in other countries" and principle n. 4 requires "Governments should not require ICT service suppliers to use local infrastructure, or establish a local presence, as a condition of supplying services"

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

areas; in particular, beside confirming the obvious applicability of the obligations, exemptions and exceptions set forth in the GATS Agreement, the preamble explicitly mention that the "Principles" are "without prejudice to the policy objectives and legislation of the European Union and the United States in areas such as the protection of intellectual property, the protection of privacy and of the confidentiality of personal and commercial data, and the enhancement of cultural diversity (including through public funding and assistance)", hence including in one single sentence all the main crucial divergences between the two parties in this area[950].

For the reasons outlined above it is possible to infer that the Principles have been elaborated with the main objective of formalizing an understanding already implicit in the priorities of the two parties and to stimulate discussions as well as increasing even further the bargaining power in multilateral and bilateral negotiations in areas where transatlantic convergence already existed[951]. Not surprisingly, soon after their conclusion, the Principles were submitted "for consideration" by both the EU and the US to the WTO Council of Trade in Services as a contribution to the dormant Work Programme on Electronic Commerce[952]. By contrast, however, no developments or compromises transpire between the lines of the Principles in those areas where divergences between the EU and the US exist. As we will discuss in the last paragraphs below, lacking a strong political decision, the TTIP negotiations will hardly lead to important changes on most of these issues.

5.3 - The trade-related significance of the EU-US data protection debate

5.3.1 EU-US cooperation tools on data transfer and privacy

One of the main divergences between the US and the EU regulatory approaches that are relevant for trade in electronic services is the attitude toward data protection and privacy.

[950] The Preamble also clarifies that the principles are not intended to apply to financial services.
[951] This is explicitly stated in the Preamble when it is maintained that "The European Union and the United States […] intend to promote the implementation of these principles within their bilateral economic relationship and in their trade negotiations with third countries."
[952] S/C/W/338, *Communication from the European Union and the United States*, Contribution to the Work Programme on Electronic Commerce, 13 July 2011.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

As already discussed in Chapter II, in the internet era, a clear tension exists between the trade interest to allow for smooth and constant cross-border data flows and the need to secure the protection of consumer's data transmitted in foreign jurisdictions[953].

As briefly mentioned when analysing the current EU data protection regime governed by Directive 95/46/EC and its possible inconsistencies with the GATS general exception, the US and the EU have cooperated in the past to find a common solution to reconcile the different approaches; this has resulted in the conclusion already in 2000 of the so-called "Safe harbour agreement", recognized by the EU through a Commission Decision[954]. The Agreement is the result of a negotiation between US and EU authorities leading to the elaboration of common principles, known as the Safe Harbour Privacy Principles that, if abided by, would have been regarded as sufficient for a US entity to be considered as providing "adequate protection" for the purposes of personal data transfers outside the EU, hence to presumably conform with the EU standards[955]. Through this agreement, US-based companies interested in transferring data of EU citizens for commercial purposes into the US can voluntarily sign up to the Principles in circumstances where the transfer would otherwise not meet the EU standards for adequate protection. The functioning of the Safe Harbour arrangement relies upon the self-certification of adhering companies on certain specific commitments, thus on the incorporation of the Safe Harbour principles into companies privacy policies[956]. The companies adhering to the Principles are publicly disclosed and the list is regularly updated in the Department of Commerce website. Needless to say that all the main US-based ICT companies such as Facebook, Amazon, Google, Apple and eBay can be found in the list[957].

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[953] See, Chapter II, para. 5.3.

[954] *Commission Decision of 26 July 2000 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the safe harbour privacy principles and related frequently asked questions issued by the US Department of Commerce*, in *OJ*, L 215/7, 25 August 2000. The rationale at the basis of the conclusion of adequacy determination and specific data transfer agreements pursuant to directive 95/46/EC is discussed in Chapter II, para. 5.3.2.

[955] The "Principles" have been recognized following an opinion of the Article 29 Working Party. *Opinion 4/2000 on the level of protection provided by the "Safe Harbor Principles"*, Article 29 Data Protection Working Party, CA07/434/00/EN, Adopted on 16 May 2000.

[956] See also, *Communication from the Commission to the European Parliament and the Council on the Functioning of the Safe Harbour from the Perspective of EU Citizens and Companies Established in the EU*, COM(2013) 847 final, Brussels, 27 November 2013, 2-3.

[957] See, safeharbor.export.gov/list.aspx

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
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Besides the fact that the "Safe harbour agreement" aimed at governing the transfer of data for commercial purposes, the cooperation between the EU and the US on data transfers has been pursued also in other very specific areas with *ad hoc* agreements being concluded in the context of security activities prompted by the US, mainly aiming at fighting serious crimes and terrorism after 9/11. Following an adequacy determination assessment of the European Commission, in 2004 the EU concluded an agreement with the US allowing, under certain conditions, the access by the US Bureau of Customs and Border Protection of the Department of Homeland Security, to "the PNR [Passengers Name Records] data from air carriers' reservation/departure control systems ('reservation systems') located within the territory of the Member States of the European Community"[958]. Under the same premises, namely countering terrorism, the EU and the US also negotiated in 2009 an Agreement on the processing and transfer of Financial Messaging Data for the purposes of the Terrorist Finance Tracking Program, commonly known as the "SWIFT Agreement"[959] aimed at defining the boundaries for data transfer of financial information held in the EU to the US for the purpose of Terrorist Finance Tracking Program (TFTP) introduced in 2001 in the US[960]. Due to the

[958] 2004/496/EC, *Council Decision of 17 May 2004 on the conclusion of an Agreement between the European Community and the United States of America on the processing and transfer of PNR data by Air Carriers to the United States Department of Homeland Security, Bureau of Customs and Border Protection*, in *OJ*, L 183/83, 20 May 2004. The decision was preceded by an "adequacy determination" finding by the European Commission pursuant the procedures set forth in article 25 of directive 95/46/EC. See, *Commission Decision of 14 May 2004 on the adequate protection of personal data contained in the Passenger Name Record of air passengers transferred to the United States' Bureau of Customs and Border Protection*, in *OJ*, L 235/11, 6 July 2004, Art. 1. Following an action for annulment prompted by the European Parliament, the ECJ annulled the Council and Commission decisions – but not the Agreement - on the grounds that no Community competence existed for the Commission to conclude such deal. See, C-317/04, C-318/04, *Protection of individuals with regard to the processing of personal data - Air transport - Decision 2004/496/EC - Agreement between the European Community and the United States of America - Passenger Name Records of air passengers transferred to the United States Bureau of Customs and Border Protection*, Judgment of the Court (Grand Chamber) of 30 May 2006, European Parliament v Council of the European Union (C-317/04) and Commission of the European Communities (C-318/04), 67-70. The Council approved later the signing of the Agreement. See, 2007/551/CFSP/JHA, *Council Decision of 23 July 2007 on the signing, on behalf of the European Union, of an Agreement between the European Union and the United States of America on the processing and transfer of Passenger Name Record (PNR) data by air carriers to the United States Department of Homeland Security (DHS) (2007 PNR Agreement)*, in *OJ*, L 204/16, 4 August 2007.

[959] SWIFT stands for Society for Worldwide Interbank Financial Telecommunication, a cooperative of more than 10.000 financial institutions taking care of telecommunication and execution of financial transactions. See, www.swift.com.The Agreement usually takes the acronym of SWIFT because it was originated by the decision of the cooperative to transfer the central servers from the US to Europe, hence making harder for the US Treasury to legally acquire the required data for the TFTP in view of lack of jurisdiction. See, Pfisterer V., *The Second SWIFT Agreement Between the European Union and the United States of America – An Overview*, in *German Law Journal*, 11:10, 2010, 1175.

[960] The TFTP aims at collecting data on financial flows and analysing them to unmask those intended to finance terrorist activities. The purpose of the program is to enable US authorities to identify, to track and to pursue potential terrorists and their supporters. To this end, financial service providers residing or active in the United States can be required to submit relevant data to the US Treasury through administrative subpoenas. When data

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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contrast with the European Parliament, the agreement was re-negotiated the year after and a second version was voted by the Parliament and the Council, entered into force in August 2010[961] and has, to date, been considered positively by the EU institutions involved[962].

5.3.2 The "post-datagate" developments

The Safe Harbour together with the SWIFT and PNR Agreements did not however extinguish the debate over different existing standards for data protection, especially within the EU. On the contrary, the debate over the protection of EU citizens' personal data transferred to the US resurfaced vigorously in the aftermath of the revelation of the so-called "datagate" in 2013, when top-secret information on programs of mass surveillance managed by the US National Security Agency (NSA) were revealed by former NSA consultant Edward Snowden[963]. This prompted the initiation of an important debate at EU level not only in terms of national security but also of privacy and protection of data. This was because the documents leaked by Snowden revealed the existence of a secret NSA program – known as PRISM – specifically designed to access and receive data not only from telephone companies but, allegedly, also from the servers of all the main US providers of internet services and ICT products such as Google, Apple, Skype and Facebook[964].

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are instead stored outside the US, local laws, such as data protection rules in the EU, may contrast with the program. The SWIFT Agreement was then negotiated precisely to solve these types of conflicts. See, Pfisterer V., *The Second SWIFT Agreement Between the European Union and the United States of America – An Overview*, cit., 1173-1190.

[961] See, *Council Decision of 13 July 2010 on the conclusion of the Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for the purposes of the Terrorist Finance Tracking Program*, in *OJ*, L 195/3, 27 July 2010.

[962] This has been clearly stated in the Commission joint review report drafted in 2014 pursuant to Article 13 of the SWIFT Agreement where the Commission stated that "is satisfied that the Agreement and its safeguards and controls are properly implemented and that the findings of the second joint review have been followed up by the Treasury." See, COM(2014) 513 final, *Joint Review Report of the implementation of the Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for the purposes of the Terrorist Finance Tracking Program*, Staff Working Document, Brussels, 18 August 2014.

[963] Some of the Snowden's leaked documents were first published by *The Guardian* and *The New York Times* in June 2013 with subsequent disclosure of additional materials by other international newspapers an periodicals continuing throughout the year. See, for instance, Greenwald G., *NSA collecting phone records of millions of Verizon customers daily*, The Guardian, 6 June 2013, Savage C., Wyatt E., *U.S. Is Secretly Collecting Records of Verizon Calls*, The New York Times, 5 June 2013.

[964] Greenwald G., MacAskill E., *NSA Prism program taps in to user data of Apple, Google and others*, The Guardian, 7 June 2013. Ball J., *NSA's Prism surveillance program: how it works and what it can do*, The Guardian, 8 June 2013. When interviewed, the companies concerned denied any involvement in the NSA program. Rushe D., Ball J., *PRISM scandal: tech giants flatly deny allowing NSA direct access to servers*, The

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di BARASSI MARCO
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At political level the EU debate over the treatment of EU citizens' data transferred to the US was initiated, not surprisingly, by the European Parliament, that passed a first resolution in June 2013 on the impact of the US mass surveillance for the privacy of EU citizens[965]. The points highlighted in the resolution were emblematic in showing how Snowden's revelations had an impact not only within the national security and data protection domains but also in the trade-related dimension; significantly the resolution recognized first of all that "it would be unfortunate if the efforts to conclude a Transatlantic Trade and Investment Partnership (TTIP), which demonstrates the commitment to further strengthen the partnership between the EU and the US, were to be affected by the recent allegations"[966] but also made reference to the Safe Harbour Agreement and to the fact that "the Member States and the Commission are entrusted with the duty of guaranteeing the security and integrity of personal data" and "the companies involved in the PRISM case, as reported in the international press, are all parties to the Safe Harbour Agreement"[967]. In terms of actual recommendations, and for what concerned mostly the trade-related area, the resolution called the Commission "to ensure that EU data protection standards, and the negotiations on the current EU data protection package, are not undermined as a result of the Transatlantic Trade and Investment Partnership (TTIP) with the US" and to "conduct a full review of the Safe Harbour Agreement in the light of the recent revelations, under Article 3 of that agreement"[968]. More practically, the resolution also instructed the Civil Liberties, Justice and Home Affairs (LIBE) Committee to set up an "Inquiry on electronic mass surveillance of EU citizens" in order to investigate on the surveillance activities of the US authorities, evaluate the impact for

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Guardian, 7 June 2013. Rushe D., *Facebook and Google insist they did not know of Prism surveillance program*, The Guardian, 8 June 2013.

[965] 2013/2682(RSP), *European Parliament resolution on the US National Security Agency surveillance programme, surveillance bodies in various Member States and their impact on EU citizens' privacy*, 2 July 2013.

[966] *Ivi*, whereas K.

[967] *Ivi*, whereas I.

[968] *Ivi*, paras 7-8. Article 3 of the Safe Harbour Agreement states, among other things, that if "any body responsible for ensuring compliance with the Principles implemented in accordance with the FAQs in the United States is not effectively fulfilling its role, the Commission shall inform the US Department of Commerce and, if necessary, present draft measures in accordance with the procedure referred to in Article 31 of Directive 95/46/EC with a view to reversing or suspending the present Decision or limiting its scope". See, *Commission Decision of 26 July 2000 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the safe harbour privacy principles,* cit., Article 3.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
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the EU citizens and the available instruments and put forward recommendations to prevent further violations and strengthen IT security throughout the EU[969].

The work of the LIBE committee led to the adoption of a second and much more elaborated parliamentary resolution in 2014 calling for more precise and strong actions from the Commission and other EU institutions also in the area of security and data protection[970]. Among these, trade-related data protection matters were prominent, with the resolution analysing the Safe Harbour Agreement, taking the view that "under the current circumstances, Safe Harbour principles do not provide adequate protection for EU citizens", requesting the Commission to suspend the adequacy determination and the US authorities to work on a new framework for transfer of personal data[971]; in the same vein the Parliament called for the suspension of the SWIFT Agreement[972] and the reconsideration of some features of the PNR Agreement while calling at the same time for the development of an "Umbrella Agreement" in the field of police and judicial cooperation as a precondition for any further agreement on data transfer with the US[973]. Finally, although not dealing mainly with trade negotiations, the resolution also touched upon the data protection dimension of the TTIP; in this context the Parliament "warned" the Commission, but mostly the US authorities, that "the consent of the European Parliament to the final TTIP agreement could be endangered as long as the blanket mass surveillance activities and the interception of communications in EU institutions and diplomatic representations are not completely abandoned and an adequate solution is found for the data privacy rights of EU citizens", adding that, in their view, "EU data protection

[969] 2013/2682(RSP), *European Parliament resolution on the US National Security Agency*, cit., para. 16 (a-f).
[970] 2013/2188(INI), *European Parliament resolution on the US NSA surveillance programme, surveillance bodies in various Member States and their impact on EU citizens' fundamental rights and on transatlantic cooperation in Justice and Home Affairs*, 12 March 2014.
[971] *Ivi*, paras 35-41. The resolution explicitly points out that "the companies identified by media revelations as being involved in the large-scale mass surveillance of EU data subjects by the US NSA are companies that have self-certified their adherence to the Safe Harbour, and that the Safe Harbour is the legal instrument used for the transfer of EU personal data to the US (examples being Google, Microsoft, Yahoo!, Facebook, Apple and LinkedIn)".
[972] In 2013, the Parliament had already requested the suspension of the SWIFT Agreement through a specific non-binding resolution. 2013/2831(RSP), *European Parliament resolution on the suspension of the TFTP agreement as a result of US National Security Agency surveillance*, 23 October 2013. The Commission disregarded both this request and the one for the reconsideration of the PNR arrangement on the basis that the US had provided sufficient reassurances and no violation of the agreements had taken place. See, MEMO/13/928, *Statement by Commissioner Malmström on the European Parliament's resolution on the EU-US TFTP agreement*, Brussels, 23 October 2013.
[973] 2013/2188(INI), *European Parliament resolution on the US NSA surveillance programme*, cit., paras 52-58.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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legislation cannot be deemed an 'arbitrary or unjustifiable discrimination' in the application of Article XIV of the GATS"[974].

Even if not binding *per se*, the EP resolutions prompted by the "datagate" produced indeed important consequences within the EU institutions, with the European Commission deepening the discussions on data transfers in the framework of the reform on EU data protection rules[975] initiated before the "datagate" in 2012 and, more importantly, furthering the dialogue with the US authorities on different aspects of the cross-border data transfers of personal information. Indeed an *ad hoc* EU-US Working Group on data protection was set up at the request of the European Commission in June 2013 to shed lights on the mass-surveillance activities undertaken by the NSA[976]. In the last few months, the EU and the US also extended the negotiations on high data protection standards for transatlantic law enforcement cooperation; these were finalized in September 2015 and took the form of a so-called "Umbrella Agreement" aimed at increasing and harmonizing data protection standards shared for the purpose of enforcing criminal offences, including terrorism and securing that data held by private companies in the EU are not accessed by the US authorities outside the

[974] *Ivi*, paras 72-73.

[975] The European Commission proposed a reform of the EU data protection framework in early 2012 with a specific focus on privacy in the digital age. According to former Commissioner for Justice and Consumers Viviane Reding the proposal is aimed at building "trust in online services because people will be better informed about their rights and in more control of their information. The reform will accomplish this while making life easier and less costly for businesses. A strong, clear and uniform legal framework at EU level will help to unleash the potential of the Digital Single Market and foster economic growth, innovation and job creation." See, IP/12/46, *Commission proposes a comprehensive reform of data protection rules to increase users' control of their data and to cut costs for businesses*, press release, Brussels, 25 January 2012. The reform proposed by the Commission includes a regulation to replace former directive 95/46/EC as well as a new directive defining data protection principles and rules for police and judicial cooperation in criminal matters and replacing Council Framework Decision 2008/977/JHA of November 2008, dealing with the same topic but, as a framework decision, not enforceable by the Commission. See, COM(2012) 9 final, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Safeguarding Privacy in a Connected World: A European Data Protection Framework for the 21st Century*, Brussels, 25 January 2012; COM(2012) 11 final, *Proposal for a regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation)*, Brussels, 25 January 2012; COM(2012) 10 final, *Proposal for a directive of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data*, Brussels, 25 January 2012. In June 2015, the European Parliament, the Council and the European Commission entered co-decision negotiations (trilogue) on the proposed Data Protection Regulation. The basis for the trilogue is the Commission's proposal of January 2012, the Parliament legislative resolution of 12 March 2014 and the General Approach of the Council adopted on 15 June 2015.

[976] See, *Report on the findings by the EU Co-chairs of the ad hoc EU-US Working Group on Data Protection, Brussels*, Council of the European Union, 16987/13, 27 November 2013.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
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established specific channels such as the PNR and SWIFT Agreements[977]. More importantly in the context of data transferred for commercial purposes, the Commission welcomed the European Parliament recommendations and concluded the revision of the Safe Harbour Agreement already in 2013, highlighting a series of deficiencies in the current scheme that, according to the report, were rendered even more troublesome by the fact that "web companies such as Google, Facebook, Microsoft, Apple, Yahoo have hundreds of millions of clients in Europe and transfer personal data for processing to the US on a scale inconceivable in the year 2000 when the Safe Harbour was created"[978]. However, in a parallel Communication to the Parliament and the Council, the Commission did not favoured the suspension of the Agreement but recommended instead its strengthening and committed to engage with the US authorities to discuss the shortcomings identified[979] so that, at the time of writing, no further agreement has been reached with the US authorities to improve the original Safe Harbour principles[980].

In the meantime, however, an important legal case prompted by the rejection by the Irish data protection authority of a complaint on the inadequacy of the Safe Harbour scheme have been brought forward by a private citizen in front of the High Court of Ireland and

[977] The European Commission negotiations on data protection and law enforcement were prompted by a Parliament resolution in 2009 that was followed by the proposal for a negotiating mandate by the Commission in 2010. See, *2008/2199(INI), European Parliament resolution on the state of transatlantic relations in the aftermath of the US elections*, 26 March 2009, para. 43; IP/10/609, *European Commission seeks high privacy standards in EU-US data protection agreement*, Brussels, 26 May 2010. The possibility to access to judicial redress in US Courts for EU citizens non residing in the US is still subject to the adoption of the Judicial Redress Act (H.R 1428), introduced on 18 March 20 and supported by both the Obama administration and the industry. See the letter of the TABC to the House of Representatives leaders of April 2015, available at transatlanticbusiness.org.

[978] The deficiencies identified in the Commission report relate to 1) transparency of privacy policies of Safe Harbour members, b) effective application of Privacy Principles by companies in the US, and c) effectiveness of the enforcement. COM(2013) 847 final, *Communication from the Commission to the European Parliament and the Council on the Functioning of the Safe Harbour*, cit., 17-19.

[979] According to the Commission, "given the weaknesses identified, the current implementation of Safe Harbour cannot be maintained. However, its revocation would adversely affect the interests of member companies in the EU and in the US. The Commission considers that Safe Harbour should rather be strengthened". COM(2013) 846 final, *Communication from the Commission to the European Parliament and the Council, Rebuilding Trust in EU-US Data Flows*, Brussels, 27 November 2013.

[980] This delay has been already remarked by the European Parliament in the context of the LIBE Committee where it was indicated that "the European Parliament has not received a detailed analysis or update on the developments with discussions on Safe Harbour despite the transmitted deadline of summer 2014 from the Commission. During his Parliamentary Hearing, Vice-President designate Ansip informed Members of the European Parliament that suspension of the Safe Harbour is an option considered by the Commission if there is no satisfactory solution to problems identified by the Commission". See, *Working Document on the Follow-up of the LIBE Inquiry on Electronic Mass Surveillance of EU Citizens*, Committee on Civil Liberties, Justice and Home Affairs, 19 January 2015.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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referred to the European Court of Justice for a preliminary ruling[981]. In this ground-breaking case, the Advocate General first, and the Court later on, have been of the view that, in light of the "datagate" revelations, the adequacy decision of the Commission on the "safe harbour" should be considered invalid and that, in any event, the EU privacy directive should not prevent national supervisory authorities to suspend the transfer of data with third countries even if adequacy determinations have been reached by the European Commission; the final result is that national data supervisory authorities have now the power to decide whether, pursuant to the EU privacy directive, transfer of data to the United States should be suspended on the ground that this country does not afford an adequate level of protection[982].

The ECJ preliminary ruling declaring the Commission decision on Safe Harbour invalid will certainly provide impetus to both sides of the Atlantic to revise the Safe Harbour principles[983]. More in general, and as will be discussed below, the unresolved transatlantic data protection issues and in particular those concerning data transfers for commercial purposes, although not likely to be included directly in the bilateral trade discussions, will certainly play a role in the on-going TTIP negotiations.

[981] The case was brought in front of the Irish Data Protection Commissioner in June 2013 by an Austrian law student who was asking the national data protection body to exercise his statutory powers by prohibiting Facebook Ireland from transferring his personal data to its servers located in the United States. See, *Maximillian Schrems v Data Protection* Commissioner, The High Court Judicial Review, Record No. 2013/765 JR, 26 April 2014.

[982] C-362/14, *Maximillian Schrems v Data Protection Commissioner*, Opinion of the Advocate General Bot delivered on 23 September 2015, Request for a preliminary ruling from the High Court (Ireland), para. 237. In particular, in its judgment the ECJ pointed out that the adequacy of the US Safe Harbour principles are to be put into question because such principles are "applicable solely to self-certified United States organisations receiving personal data from the European Union, and United States public authorities are not required to comply with them". C-362/14, *Maximillian Schrems v Data Protection Commissioner*, Judgment of the Court, Grand Chamber, 6 October 2015, para. 82 and paras 99-106.

[983] See, the remarks of the Commission Vice President Timmermans in the aftermath of the Court ruling pointing out that "in the light of the ruling, we will continue this work towards a renewed and safe framework for the transfer of personal data across the Atlantic". See, *First Vice-President Timmermans and Commissioner Jourová 's press conference on Safe Harbour following the Court ruling in case C-362/14 (Schrems)*, STATEMENT/15/5782, Strasbourg, 6 October 2015.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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5.4 - What role for the TTIP in fostering the liberalization of electronic services?

5.4.1 Distant e-commerce and e-services trade agendas

Although the data protection debate will certainly play a role in shaping the debate on cross-border services negotiations, one should not forget that bilateral trade talks are first and foremost driven by interests stemming from individual trade agendas, and the TTIP is no exception. Even if, as we have seen in the previous paragraphs, the EU and the US seem to share the objective of increasing the level of liberalization of e-commerce and trade in cross-border and electronic services, and have abundantly made their shared position crystal clear also in the WTO context[984], current templates in the e-commerce chapters as well as different policy choices in the field of trade in services still place the two sides in a distant position under many aspects[985]. Among those, four areas seem to be more outstanding ones:

- The most important diverging point is certainly the *audio-visual carve-out* so far demanded and obtained by the EU in all trade negotiations. As we have abundantly discussed, with increasingly significant convergence among technologies and services, the desire from the EU to isolate each and every form of audio and video content from trade liberalization risks having an increasing impact on the liberalization of services making use of internet and new technologies but at the same time delivering "content". At this point in time, the conceptual divergence between the two parties in the interpretation of ICT services liberalization, carefully designed also at the WTO level to support different policy objectives, seems hardly reconcilable[986].

- Another significant divergence, this time inspired by the US e-commerce template, is the existence of the specific *"digital content products"* category, whose status in terms of applicable obligations has never been fully clarified. The "audio-visual"

[984] As discussed above, in the context of the TEC, the EU and the US agreed on the European Union-United States Trade Principles for Information and Communication Technology Services. *Infra,* para. 5.2.2 and Annex I.
[985] The main divergences between the US and EU FTAs templates on e-commerce and electronic services are discussed in details in the paragraphs above. See, in particular, *Infra*, paras 3.2 and 3.3 (US template) and 4.2 (EU template).
[986] The rationale at the basis of the EU position on audio-visual services in the WTO is discussed in Chapter I, paras 4.2.2 and 4.2.3.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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significance of this specific point originating by the deliberate attempt to blur the boundaries between trade in goods and service disciplines has always made the EU side particularly suspicious and certainly not inclined to embrace this policy option in its own negotiating template[987]. On the other side, the willingness for the US to reiterate this position in forthcoming trade negotiations is yet to be understood. This is because, being now content directly accessed through streaming services, trade in "digital products" as defined in previous agreements might not be first in line anymore in the priorities of the ICT and US content industries.

- Other technicalities, probably more easily reconcilable but currently diverging in the US and EU templates are related mainly to *the structure of the services commitments*, with the US side unequivocally favouring the negative list approach and the EU not fully endorsing this choice yet. As we have discussed, the adoption of a negative list approach can be helpful in reducing the space for misunderstandings when new services are at issue[988]. Although at the moment the preferred policy option for listing services commitments in the TTIP is unknown, the CETA agreement recently concluded between the EU and Canada - and endorsing for the first time the negative list approach - have probably paved the way for a similar solution in the TTIP[989].

- Finally, as mentioned above, completely different positions exist with regard to the need to frame the *debate on data protection* within or outside the trade dimension of the TTIP regardless of how the "adequacy" of the US data protection system will be assessed[990]. Indeed, as far as trade in services and e-commerce are concerned, the trade relevance of data protection lies, on one side, in the strong stance from the US in favour of the lifting of data storage requirements and free flow of information

[987] The main preoccupation of the EU lies in the definition of the non-discriminatory treatment of "digital products" transmitted electronically *vs* those encoded in a physical carrier medium and the fact that, if this principle had to be implemented, the former would fall as well within the GATT realm, hence automatically gaining full liberalization. *Infra*, para. 4.2.1.
[988] The advantages of a negative list approach for electronic services have been discussed above. See, *Infra,* para. 3.2.3.
[989] The CETA Agreement between EU and Canada has been signed in August 2014 but not yet ratified. For the first time in the history of EU FTAs, it provides a negative approach for the listing specific commitments in trade in services. *Infra,* para. 4.2.2.
[990] *Infra*, para. 5.3.2.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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obstacles in general[991] and, on the other side, on the willingness of the EU to leave positive commitments on data protection outside the scope of the trade agreement while maintaining data protection as a reason to derogate from trade commitments as it is currently the case for the GATS Agreement. Although, as we have seen, "regulatory" provisions, albeit most of the times only in the form of cooperation pledges, have been increasingly inserted in the general domestic regulation in services section as well as in the specific e-commerce chapter[992], for the above-mentioned reasons it is difficult to anticipate meaningful and revolutionary solutions arising out of the TTIP.

The issues listed above are probably the thorniest ones for the Commission and the USTR trade officers now in the process of negotiating trade provisions for digital age. At the time of writing, however, not many official documents have been made publicly available to confirm these hypotheses and to provide information on the current status of negotiations. Admittedly, the EU has been certainly so far more inclined to disclose the negotiating proposals in many of the sectors as well as the Council mandate and the initial positions so that the public opinion and the interested stakeholders have been able to at least appreciate the starting point of the discussions[993]. On the other side, no significant disclosure have been so far undertaken by the US side[994].

In the next and final paragraph below we will then analyse what so far made available, albeit only on the EU side, in order to draw some tentative and preliminary conclusions on the possible outcomes of the negotiations on e-commerce and electronic services.

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[991] This is explicit in the list of objectives prepared by the USTR in the letter sent in 2013 to the US Congress where, as far as electronic commerce is concerned, the USTR committed to "seek to include provisions that facilitate the movement of cross-border data flows". See, *Letter by Ambassador Demetrios Marantis, Acting United States Trade Representative to the Honorable John Boehner, Speaker of the United States House of Representatives*, cit., 4.

[992] *Infra*, para. 4.2.3.

[993] *Infra,* para. 5.4.2.

[994] The US confidentiality procedures for the TTIP negotiations are outlined in a letter from Daniel Mullaney, Assistant United States Trade Representative to Ignacio Garcia Bercero, EU Chief Negotiator for the TTIP of July 2013 available at keionline.org. The lack of improvements in transparency from the US side has raised general criticism both from the national and the European ends with both US Congress and the European Parliament calling for more disclosure from the USTR. See 2014/2228(INI), *European Parliament resolution containing the European Parliament's recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP)*, 8 July 2015, para. 2(e)(ii). On the US side see, for instance, the letter from Senator Bernand Sanders to Ambassador Michael Froman of 5 January 2015, available at sanders.senate.gov.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
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5.4.2 What to expect? A preliminary overview on the possible TTIP outcomes for digital trade

It is probably safe to say that the scale of the EU-US trade relations, coupled with the political pressure originating from many EU governments and fuelled by the public opinion, has made the TTIP negotiations the more vastly publicised in the history of free trade agreements. This has resulted, at least from the EU side, in an unprecedented level of disclosure with some of the working documents been made publicly accessible directly from the European Commission website[995]. Particularly, for the purpose of this study, and apart from the publication of the Council negotiating mandate mentioned above, the Commission has made available the initial services offers as well as the text proposal for services, investment and e-commerce[996]. In parallel, the work of the European Parliament has been carried out in an open fashion and has been centred mostly, but not only, on the data protection related aspects of the TTIP[997]. Although far from being definitive and reliable, the documents so far made available, as well as the clear directions issued by the Parliament on the most sensitive issues, allow for a preliminary analysis of the practical problems likely to arise in the areas relevant for this study and listed in the paragraph above.

First of all, the *audio-visual* carve-out, a major defensive interest of the EU so far entrenched in almost all EU trade arrangements[998], is unlikely to be scratched by the, albeit

[995] The disclosure of TTIP negotiating texts and other documents has been prompted by a Commission Communication on transparency issued in 2014 "to ensure that the general public has accurate and full information of the EU's intentions in the negotiations, to address the concerns and to evacuate misperceptions" in particular through "a more extensive access to TTIP documents, notably by making public all the EU negotiating texts that the Commission already shares with Member States and Parliament (e.g. formal negotiating proposals on the "rules" part of the trade agreement)". See, *Communication to the Commission concerning transparency in TTIP negotiations*, C(2014) 9052 final, Strasbourg, 25 November 2014, 2-3. More recently, this commitment has been more broadly reaffirmed in the 2015 Commission Trade Strategy". See, COM(2015) 497 final, *Trade for All, Towards a more responsible trade and investment policy*, cit., paras 3.1- 3.2.

[996] See, *Transatlantic Trade and Investment Partnership, Trade in Services, Investment and E-Commerce*, tabled for discussion with the US in the negotiating round of 12 -17 July 2015 and made public on 31 July 2015, (hereinafter "EU Negotiating Proposal") and *Transatlantic Trade and Investment Partnership, Services and Investment Offer of the European Union*, tabled for discussion with the US in the negotiating round of 12 -17 July 2015 and made public on 31 July 2015 (hereinafter "EU Services Offer"). Both documents are available at ec.europa.eu/trade.

[997] 2014/2228(INI), *European Parliament resolution containing the European Parliament's recommendations to the European Commission*, cit.

[998] In a couple of FTAs the EU has instead agreed to allow non-EU companies to provide audio-visual services in specific circumstances (the FTAs with South Korea and with CARIFORUM). In these agreements the EU put in place so-called Cultural Cooperation Protocols that provides safeguards whereby the EU allows non-EU

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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powerful, US negotiating power. This has been confirmed directly by the European Commission through a preliminary policy paper, predating the kick-off of the negotiations. In the document, the Commission recognized that "the US has a strong interest in gaining access to markets for services related to films and television – so-called audio-visual services" but also pointed out that "the TTIP negotiating mandate the EU Member States (meeting as the Council) gave the European Commission expressly excluded the opening of the European audio-visual sector to competition from US firms. This means the Commission is not allowed to negotiate commitments in the sector and that TTIP will clearly exclude audio-visual services from any provisions granting access to EU markets"[999]. Not surprisingly this position, strongly supported also by the European Parliament[1000], is clearly outlined in the EU negotiating proposal excluding audio-visual services not only from the cross-border trade chapter but also, significantly, from the e-commerce one, hence making clear that the audio-visual exception permeates the whole agreement, independently from the type of technology used for the supply of content[1001].

Strictly related to the audio-visual debate is the issue of the characterization of digital products and electronic transmissions. As we have abundantly discussed above, due to its important connection vis-à-vis the goods *vs* services debate, the EU has never endorsed the concept of digital products, traditionally supported instead by the US[1002]. Although probably more relevant in the past than now, the US has kept the same wording in the e-commerce chapters of its more recent negotiations even if, most of the times, the final text has also clarified that this set of rules was without prejudice of each party treatment of such products

companies to be treated the same as EU firms but only in very narrow circumstances. See, *EU-CARIFORUM FTA*, cit., Protocol III on cultural cooperation; *EU-Korea FTA,* cit., Protocol on Cultural Cooperation.

[999] See, *TTIP and Culture*, *The EU Position in the Negotiations*, 15 July 2014. Available at ec.europa.eu.

[1000] Beside reaffirming the need for the Commission to carve out audio-visual services from the negotiations in accordance with the Council mandate, the Parliament recommendation also specifies that the Commission should "reserve their right to adopt or maintain any measure (in particularly those of a regulatory and/or financial nature) with respect to the protection or promotion of cultural and linguistic diversity, in line with the relevant Articles as established in the Treaty on the Functioning of the European Union, as well as media freedom and media pluralism, *irrespective of the technology or distribution platform used*". See, 2014/2228(INI), *European Parliament resolution containing the European Parliament's recommendations*, cit., para 2.xii. (emphasis added)

[1001] See, *EU Negotiating Proposal*, Arts 3.1.2 and 6.1.3. For e-commerce, the EU proposal states that "the provisions in this chapter shall not apply to gambling services, *broadcasting services, audio-visual services*, services of notaries or equivalent professions and legal representation services." (emphasis added).

[1002] *Infra*, para. 3.2.2.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
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as goods or services[1003]. In the TPA 2015, the reference to "electronic goods and services" is still emphasised, probably signalling that the US content industry has not yet given up on this particular policy position. On the other side, the EU has always and indisputably favoured the classification of digital trade to fall within the services realm in line with its historical interpretative solution that differentiate between the "electronic transmissions" and the content transmitted through it. Not surprisingly, in line with the traditional position, the EU initial proposal for an e-commerce chapter in the TTIP does not mention the "digital products" category but, on the contrary, it reaffirms that "electronic transmissions shall be considered as the provision of services, within the meaning of Chapter III (cross-border supply of services)"[1004].

From the above it is clear that the positions on the exact arrangement of digital products within the legal framework of US and EU FTAs are far from being aligned. In particular, from an EU perspective, to maintain this category within the agreement – even if with all the specifications provided already in the US agreement with Chile and Australia – would mean to exacerbate the risk of non-compliance already explained above and defined as the carve-in/carve-out issue. In other words, if audio-visual products transmitted electronically are considered services, they certainly will be discriminated against the ones traded on physical carrier medium, hence creating a disconnection between the e-commerce and the trade in services disciplines[1005]. With these premises, it is difficult to imagine how the EU could accept a similar wording; on the other side, given the diminishing interest on this type of trade, the US might be more easily convinced to abandon its position.

As for the negative *vs* positive listing of services commitments, the positions appear again distant; although the TPA 2015 and the US objectives for the TTIP do not mention the negative list approach specifically, this has always been the preferred policy option in all the most recent US bilaterals. Moreover, as we have discussed, the negative list solution structurally allows for a more liberal approach *vis-à-vis* new services as it requires specific non-conforming measures to be manifestly outlined. Such approach would then fit well with the favourable US stance in favour of digital trade, especially in light of the further

[1003] See, for instance, *US-Chile FTA*, Art. 15.6 and *US-Australia FTA*, Art. 16.8(4), *Infra*, para. 3.2.2.
[1004] See, *EU Negotiating Proposal*, Art. 6.3.
[1005] The interplay between the definition of digital products and the EU defensive interest on audio-visual services is discussed above. *Infra*, para. 4.2.1.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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specification made in the digital trade section of the TPA 2015, calling negotiators to take into account not only existing but also new technologies[1006].

On the other side, the EU position toward the listing of services commitments appear less clear, with an evolutionary approach being adopted starting from an initial strict GATS-like solution both in the structure of the service chapter and the listing of commitments to a solution more similar to the one traditionally endorsed by the US and accepted by the EU already in the CETA[1007]. Similarly to the US negotiating objectives for the TTIP, the European Council mandate did not provide any preference for one listing technique over the other; a specific suggestion is instead put forward by the European Parliament. In particular, the Parliament resolution suggests an "hybrid" approach, that is to say a positive listing for market access – with then an automatic exclusion of new services - and a negative one for national treatment obligations[1008]. The initial Commission offer has indeed welcomed this latter orientation, with a division in the approaches for market access and national treatment commitments, the first being listed explicitly with reservations[1009] and the latter being intended as granted if not mentioned in the specific annex on reservation[1010]. Curiously, and very important for the purpose of this study, the Annex on national treatment proposed by the EU currently contains an important and specific reservation on services enabled by new technologies excluding them from the automatic liberalization mechanism enabled by the negative listing[1011]. Needless to say that, if maintained, this reservation would render all the considerations on the beneficial effects of the negative listing approach moot.

[1006] "to ensure that (…) (ii) the classification of such goods and services ensures the most liberal trade treatment possible, fully encompassing *both existing and new trade*." See, *BCTPA*, cit., section 2(b)6(B)(ii). (emphasis added)

[1007] *Infra*, para. 4.2.2.

[1008] In one of its recommendations the European Parliament suggests to the Commission "to increase market access for services according to a "hybrid list approach", *using for market access "positive lists*", whereby services that are to be opened up to foreign companies are explicitly mentioned and new services are excluded while ensuring that possible stand-still and ratchet clauses only apply to non-discrimination provisions and allow for enough flexibility to bring services of general economic interest back into public control as well as to take into account the emergence of new and innovative services *and using "negative list approach" for national treatment"*. See, 2014/2228(INI), *European Parliament resolution containing the European Parliament's recommendations*, cit., para. 2(b)(v). (emphasis added)

[1009] See, *EU Services Offer*, cit., Annex III - Reservations and Specific Liberalization Commitments related to Market Access.

[1010] *Ivi*, Annex I - Reservations for Existing Measures and Annex II - Reservations for Future Measures. The negative list approach applies not only to national treatments but also to other principles such as performance requirements, principles applying to senior management and board of directors, and most favoured nation treatment.

[1011] *Ivi*, Annex II - Reservations for Future Measures, reservation 26 whereby "the EU reserves the right to adopt or maintain any measure with respect the following:(i) New services. The EU with respect to new services other than those classified in the United Nations Provisional Central Product Classification (CPC), 1991.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
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Given the above scenario from the EU side, already evolving toward a solution partially similar to what provided for in US FTAs, but maintaining a general carve-out for audio-visuals and foreseeing an important reservation for "new services", it is possible to argue that the European Commission might eventually decide to accommodate the US interests by adopting the same listing approach, a solution, as we have seen, already provided in the Agreement with Canada[1012].

Finally, as far data flows are concerned, the main argument in the trade context will certainly be based, as discussed, on the willingness on one side to obtain guarantees and commitments in favour of the free flow of information and, on the other side, to isolate the whole issue from the trade discipline.

As far as the United States are concerned, the position in favour of more liberalization is evident. Indeed, the goal to include in the TTIP "provisions that facilitates the movement of cross-border data flows" already clearly outlined in the USTR letter to the US Congress[1013] has been also openly reaffirmed in the TPA 2015, requiring the executive power, when negotiating with third parties, "to ensure that governments refrain from implementing trade-related measures that impede digital trade in goods and services, restrict cross-border data flows, or require local storage or processing of data"[1014]. In light of the above there is no reason to believe that the US negotiators will refrain to pursue this objective. Moreover, evidence pointing at this direction is surfacing, although only unofficially, also from the negotiations currently undergoing for a Plurilateral Trade Agreement on Services (TiSA)[1015]. In this context the - very preliminary - US wording included in the leaked e-commerce

[1012] *Infra*, para. 4.2.2. Despite the adoption of the negative listing approach, the CETA accommodates the EU preoccupation regarding the liberalization of new services through an understanding annexed to the cross-border services chapter. In particular, the Parties recognize that market access, domestic regulation, national treatment and MFN Chapters of the CETA "do not apply in respect to any measure relating to a new service that cannot be classified in the United Nations Provisional Central Product Classification (CPC), 1991. See, *CETA*, Chapter 11, Understanding on New Services, para. 1.

[1013] See, *Letter by Ambassador Demetrios Marantis*, cit., 4.

[1014] See, *BCTPA*, cit., Section 3(c)(6)(C).

[1015] The TiSA negotiations originate from the recognition of the stalemate of the Doha Negotiations and the need to proceed with further liberalization for trade in services detached from the "single undertaking" principle. Although not officially taking place within the perimeter of the WTO, the kick-off of the negotiations has been prompted by a group of 22 "like-minded" WTO Members known as "the really good friends of services" with the aim to conclude an agreement that is compatible with the General Agreement on Trade in Services, (GATS), which would attract broad participation from other WTO Members. See, *Negotiations for a Plurilateral Agreement on Trade in services*, European Commission Memo, Brussels, 15 February 2013. For a critique of the TiSA negotiating approach see, Sauvè P., *A Plurilateral Agenda for Services? Assessing the case for a Trade in Services Agreement (TISA)*, NCCR Trade Regulation, Working Paper No 2013/29, May 2013.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
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chapter shows, again, an important stance of the US in favour of the free flow of data with the proposed text providing that "no Party may prevent a service supplier of another Party or consumers of those suppliers, from transferring, [accessing, processing or storing] information, including personal information, within or outside the Party's territory, where such activity is carried out in connection with the conduct of the service supplier's business.][1016]".

On the other side, the position of the EU over data flows in the trade deal with the US is certainly more conservative although not completely uniform. Indeed, the message currently arising from the European Parliament points at a complete refusal within the TTIP of any discussion on positive regulation over the treatment of personal data and favours instead the incorporation within the Agreement of a horizontal provision based on GATS Article XIV general exception[1017]. This position, already maintained in the 2013 Communication to the European Parliament and the Council[1018], seems to have been embraced in the negotiating proposal initially put forward by European Commission on services and e-commerce where mandatory provisions on free flows of data and localization of data storage are not mentioned and privacy issues are addressed only in the negative, GATS-like, general exception provision[1019].

One should however take into consideration the fact that this strict stance against the inclusion of data flow provisions in the TTIP might however be overcome during the negotiations; indeed, in other circumstances, the Commission has already publicly made clear that, as long as sufficient room is maintained to guarantee the protection of EU citizens personal data, provisions on free flow of information and the horizontal liberalization of data storage could - and should - be included in EU trade deals to secure a smooth and competitive

[1016] See, *Trade in Services Agreement (TiSA) Annex on [Electronic Commerce]*, Provisional Article 2.1, Movement of Information/Cross-border Information Flows. The negotiating text dated April 2015, although classified, has been leaked and is now currently available at wikileaks.org/tisa.
[1017] 2014/2228(INI), *European Parliament resolution containing the European Parliament's recommendations to the European Commission*, cit.,
[1018] In the Communication, the European Commission stressed that "the standard of protection of personal data must be addressed in its proper context, without affecting other dimensions of EU-US relations, including the on-going negotiations for a Transatlantic Trade and Investment Partnership. For this reason, data protection standards will not be negotiated within the Transatlantic Trade and Investment Partnership, which will fully respect the data protection rules". COM(2013) 846 final, *Communication from the Commission to the European Parliament and the Council, Rebuilding Trust in EU-US Data Flows*, cit.
[1019] See, *Transatlantic Trade and Investment Partnership, Trade in Services, Investment and E-Commerce*, cit., General exception, Art. 7-1(e)(ii).

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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environment to the numerous European ICT companies exporting data[1020]. This has also been reaffirmed officially in the new "Trade for All" strategy issued by the Commission in October 2015[1021].

In this regard, the Commission itself has publicly maintained that an acceptable solution could be the extension of the information transfer provision already drafted and commonly accepted at multilateral level since 1994, but only in the context of the Understanding of Commitment on Financial Services[1022]. Interestingly, the wording elaborated in the financial services context provides that although "no Member shall take measures that prevent transfers of information or the processing of financial information, including transfers of data by electronic means, or that, subject to importation rules consistent with international agreements, prevent transfers of equipment, where such transfers of information, processing of financial information or transfers of equipment are necessary for the conduct of the ordinary business of a financial service supplier", nothing should "restricts the right of a Member to protect personal data, personal privacy and the confidentiality of individual records and accounts so long as such right is not used to circumvent the provisions of the Agreement"[1023].

If worded in this way and extended to digital trade in general, this free flow of information provision might as well constitute an acceptable compromise since it will leave

[1020] See, speech of Ignacio Iruarrizaga Diez, Acting Head of Unit for Trade in Services and Investment at DGTrade, at the Committee on Civil Liberties, Justice and Home Affairs meeting of 16 June 2015, available at europarl.europa.eu. A similar position has been maintained in the context of the thirteen EU-US Information Society Dialogue held in April 2015 where the EU and US officials declared that "data flows are of fundamental importance to the modern global economy, and that an appropriate balance must be struck between ICT's ability to spur economic growth, innovation, and cost savings with concerns about privacy and security. Both the United States and the European Union are committed to a robust trans-Atlantic digital marketplace that sparks innovation, fuels economic growth, and allows for the freedom of expression and the free flow of information across borders." See, *Joint Press Statement for the 2015 U.S.-European Union Information Society Dialogue,* 14 April 2015, available at state.gov.

[1021] See, COM(2015) 497 final, *Trade for All, Towards a more responsible trade and investment policy*, cit., para. 2.1.2 stating that "the Commission will seek to use FTAs and the TiSA to set rules for e-commerce and cross-border data flows and tackle new forms of digital protectionism, in full compliance with and without prejudice to the EU's data protection and data privacy rules".

[1022] Contrary to the Annex on Financial Services, the Understanding on Commitments in Financial Services is not part of the GATS Agreement but is instead "appended" to the Final Act of the Uruguay Round. It contains an alternative approach made available to WTO Members to list specific commitments on financial services. See, LT/UR/U/1, *Understanding on Commitments on Financial Services*, 15 April 1994.

[1023] *Ivi*, para. 8. A similar wording is included in the FTAs recently signed by the EU with South Korea and Canada, See, *EU-Korea FTA*, Art. 7.43 and *CETA*, Art. 15.14. Significantly, the provision in the CETA specifies that, as far as protection of personal data is concerned, "where the provision and transfer of financial information and financial data processing involves personal information, the treatment of such personal information shall be subject to the legislation governing the protection of personal information of the territory of *the Party where the transfer has originated*". (emphasis added)

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
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enough leeway for the Commission to justify possible restrictions on information flow on privacy grounds. At the time of writing, this position seems more likely to be accepted by the EU in the context of the TiSA agreement, where the Council mandate has explicitly called the Commission to look for similar provisions in the final text[1024] and the same wording of the WTO understanding is already mirrored in the EU proposal for a TiSA Annex in Financial Services[1025]. The situation is somehow different on the TTIP side where, due to the extreme level of political scrutiny originated by the "datagate", the same wording has been difficult to obtain because neither the Council mandate nor the European Parliament recommendation has suggested a similar objective.

In this tense scenario, and with a limited number of text proposals available to the public, it is difficult to predict the final outcome. What is at the moment possible to anticipate is that the Commission will have to pick a side and decide whether they feel enough confident to accept a similar wording in the TTIP – hence risking to irritate the Parliament – or they are more confortable in keeping any binding commitment on data flows as a redline, hence antagonising businesses at both sides of the Atlantic that have been expressing joint support for this position[1026].

[1024] *Draft Directives for the negotiation of a plurilateral agreement on trade in services*, 6891/13 ADD 1 EU RESTRICTED, Brussels, 8 March 2013, declassified on 10 March 2015. Available at consilium.europa.eu. Paragraph B.7 of the Council mandate maintains that "the negotiations should aim at including *inter alia* regulatory disciplines concerning transparency, domestic regulation, state-owned enterprises, telecommunication services, computer related services, *e-commerce, cross-border data transfers*, financial services, postal and courier services, international maritime transport services, government procurement for services and subsidies". (emphasis added)

[1025] See, *EU proposal for an Annex on Financial Services*, Art. 14, available at trade.ec.europa.eu.

[1026] Already in 2014, the Transatlantic Business Council (TABC) – the advisory body representing the business interests of both sides of the Atlantic - outlined its position on cross-border data flow follows: "TABC supports the development of horizontal and binding commitments on all of the following principles related to the free flow of data: 1. We support the cross border free flow of data, which is essential across all industries to enhance economic growth, job creation and social prosperity. 2. With the objective of enhancing trust of users and certainty of companies, and thus trade in goods and services, it is essential that businesses comply with all applicable laws and regulations related to data protection and data security. 3. Restrictions on data flows and associated infrastructure create risks for global business that must be recognized by governments, and their effects should be minimized by policymakers in trade agreements, legislation and regulatory proceedings. Restrictions on data flows must be consistent with the provisions set forth in GATS Article 14". See, *TABC Position Statement on Cross-Border Data Flows*, Trans-Atlantic Business Council, 30 May 2014, available at transatlanticbusiness.org.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
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La tesi è tutelata dalla normativa sul diritto d'autore(Legge 22 aprile 1941, n.633 e successive integrazioni e modifiche).
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6 Conclusions: a positive impetus of bilateralism in stimulating further discipline for digital trade and data flows

The purpose of this Chapter was to outline the possible alternative approaches to the WTO developed bilaterally by the main trading players and pertaining to digital trade. For reasons of brevity the focus had to be restricted to the policy approaches emerged from the two sides of the Atlantic, considered however as the more significant not only in terms of meaningful developments but also of diverging vested interests and policy positions in this area.

In general, the analysis has revealed, first of all, that the lack of a formal recognition of internet-enabled trade as a stand-alone category in the multilateral framework, and the impasse reached in the working programme on e-commerce, did not end the crave for further specifications in this area so that the main protagonists – pioneered by the US - felt the need to secure specific "safeguards" for this nascent type of trade in their bilateral arrangements by means of *ad hoc* discipline or specific clarifications. Generally speaking, however, the EU and US models have recognized the applicability of the classic WTO system to regulate internet services, with the bilateral discipline developed "on top" of the current WTO framework for trade in cross-border services.

A second general conclusion that can be drawn is that, far from establishing a discipline aiming at excluding the non-participant players, the e-commerce chapters in bilateral agreements attempt to institute a framework applicable *erga omnes,* to keep internet trade free from barriers. For this reason, they cannot then be considered as "stumbling blocks" to multilateralism; on the contrary, they can be seen as an effort by the US and the EU to establish their (different) regulatory approaches to digital trade in an international context and to spread such models to as many trade partners as possible.

Thirdly, lacking a multilateral coordination such as the one provided in the WTO context, the approaches on digital trade in US and EU FTAs have evolved in diverging directions with the two parties managing to impose their preferred templates in their bilateral negotiations, leveraging on their strong negotiating power. Prior to the launch of the TTIP

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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negotiations, the challenges to the two different templates have been limited, and so the scope of the discussions around it. With greater sensitiveness, especially from the EU side, on subjects of significant interest for the US counterpart such as the protection of content-based products and services extended to the internet realm and the accrued significance of data protection for trade, the two parties will eventually have a first chance of direct and non-mediated confrontation.

Finally, it is clear that, similarly to many other trade areas where diverging positions between the US and the EU exist, the TTIP negotiations represent an important crossroad for digital trade as well. However, in light of the analysis undertaken above and notwithstanding the shared interests from both sides in developing a global digital environment free from unnecessary trade restrictions, at the current status to expect full convergence on all the issues identified arising out from the TTIP text would be naïf. Although certain important divergences – such as the definition of "digital products" and the concept of "electronic transmissions" as well as the more technical decision regarding the positive *vs* negative listing solution – will have to be eventually addressed, significant innovations on other outstanding and broader points, such as the protection of personal data and the audio-visual services carve-out are unlikely to arise or be resolved. The resulting provisions will then most likely be framed carefully to avoid important trade irritants and redlines to be raised, especially from the EU side.

Regardless of the final outcome, the TTIP - still in its embryonic status - had already the merit to finally draw the public attention on the trade-related significance of data flows and the increasingly substantial negative effects of any – albeit legitimate – restriction. As discussed in Chapter II, this is something the WTO has so far addressed only negatively through a specific general exception on privacy[1027]. In terms of pure trade discipline, the TTIP discussions on data flows might then be the pivotal starting point to extend later on the scope of these debates at the multilateral level, with the TiSA being probably the perfect vehicle for this. More broadly, the harsh confrontation among supporters *vs* opponents of free data flows within the EU and the US might as well lead to the recognition that a global framework (and

[1027] See, Chapter II, para. 5.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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maybe a global standard setting body?) is needed to identify balanced and broadly accepted standards and best practices, ultimately to be referred to by trade negotiators as well.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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Overall Conclusions

The debate over internet technologies and international trade has been filling trade negotiators' agendas for quite some time. Yet, in contrast with other WTO-relevant issues, no attempt to set up a framework aiming at broadly regulating the use of internet in international trade practices has ever emerged at multilateral level. On the other side, although innovating in some respects, even more recent preferential deals have struggled – and are still struggling – to craft sets of overarching rules capable of ensuring a fair level of predictability for the use of internet technologies in trade. The reasons why the internet and digital trade are not only "intangible" but also elusive subjects have been discussed throughout this work. Significantly, although trying to frame the debate around one specific aspect of internet trade - the electronic supply of services - the analysis had to inevitably expand its scope to other spheres of international trade law, from trade in goods, to telecommunications and audiovisual services.

Aside from the recognition of the inherent multidisciplinary nature of internet trade matters and the difficulties to capture them within an all-encompassing discipline, this study has also shown how the role of international trade law in unleashing the potential of the internet – and of internet-delivered services – lies on two main vectors. On one hand, classification and definition issues are crucial in identifying clear-cut boundaries upon which specific commitments can be undertaken. On the other hand, although conceived and perceived as free from obstacles and boundaries, the internet, and the trade enabled by it, are not immune from the same protectionist tensions embedded in traditional trade practices. In both circumstances, this study has highlighted how significant interpretative obstacles and regulatory barriers can – voluntarily or involuntarily – prevent or at least delay the development of the extraordinary potential of internet technologies for trade.

Classification and characterization issues naturally surface when new services, such as the ones enabled by internet technologies, are created. In this case, the main issue for the liberalization of internet services originates from the difficulties in identifying how these can fit within the rigid commitment listing architecture of the GATS agreement, based on a positive approach. As we have seen, this system could yield relatively straightforward results for internet services only when a similar *offline* service already exists so that the principle of technological neutrality, now commonly established in international trade practices, can find

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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application. However, even when a parallel between traditional and online products or services cannot be drawn, this study has suggested that an interpretation focusing on the main *function* of the service at stake can help reducing the uncertainties. Certainly, lacking at the moment a common policy understanding at multilateral level, this approach can be commonly accepted only if reiterated through jurisprudential interpretations. To this end, at the end of Chapter I, we have stretched the interpretation of an old Appellate Body decision, the famous *EC-Bananas* ruling, to suggest that a similar reasoning, although applied in a different context, will not be a novelty in WTO jurisprudence.

In the course of the study, however, we have also stressed how the mere adoption of a negative listing approach for services commitments, a solution prompted by the US in its bilateral deals, can permanently overcome the interpretative issues surrounding the exact level of commitments to be granted to new services, provided that specific waivers are not introduced[1028]. Unfortunately at the moment such approach, although increasingly adopted in preferential deals, is not yet embraced at multilateral level.

Aside for technical classification issues, regulatory barriers remain certainly the most significant and possibly disruptive trait for internet trade in general and electronic services in particular. Lack of transparency in national regulations as well as different treatments applied to foreign *vs* domestic providers of services can indeed result in significant obstacles, especially for small service providers trying to take advantage of internet technologies to increase exponentially their consumer's base. On one hand, the unfinished status of the domestic regulation discipline at multilateral level is certainly not facilitating the development of good domestic regulatory practices that are intrinsically non-discriminatory but might be overly burdensome. This is true for all types of regulatory policies related to services, whether or not pertaining to internet trade. On the other hand, as far as discriminatory practices are concerned, multilateral rules – coupled with their copious jurisprudential interpretations – seem instead sufficiently equipped to at least prevent the emergence of trade disruptions disproportionately damaging trade flows, also in the internet sphere. At multilateral level discriminatory barriers pertaining to trade in services are still dealt with in a "negative" fashion, through balanced interpretations of general exception clauses. Regulatory

[1028] As discussed above when examining the liberalization prospects for electronic services in the TTIP, the initial services offer from the European Commission includes a reservation from the negative listing approach for services enabled though new technologies. See, Chapter III, para. 5.4.2.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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developments framed in a more "positive" way are instead emerging from preferential deals; this is true also in the specific context of internet trade, where "deep" digital regulatory rules, ranging from consumer protection, frauds preventions and transparency, are now recurrent and considered as necessary tools to increase consumer trust in internet enabled trade, although most of the times only in the form of cooperation pledges.

Among all the possible barriers pertaining to digital trade, the most impactful are certainly those touching upon the free flow of data, usually prompted by privacy and, to a lesser extent, public morality concerns; in this area, however, the approach in trade agreements seems to be evolving too. Indeed, aside from the classic "negative" solutions originating from the traditional GATS exception clauses and now virtually included in all trade agreements, preferential deals are increasingly dealing with these matters in a more detailed manner. Despite the inevitable concerns from privacy advocates, the pressing need to secure predictability for data flows in trade is slowly leading to the positive framing of specific regulatory provisions aimed at striking a balance between data protection and the free flow of information. The TPP has already yielded partial results in this sense and, in light of their mandate, the on-going TTIP and TiSA negotiations will have, in a way or another, to consider similar approaches. Yet, at the moment, the solutions so far agreed or under discussion do not seem to be ambitious and widespread enough to guarantee the ideal level of predictability to an increasingly relevant fraction of the international trade value. This, however, does not necessarily mean that the path is not the right one.

More than once in the course of this work parallels have been drawn between the regulatory needs of internet trade and the long established and well-functioning mechanisms – such as the ones originating from the TBT and SPS Agreements - developed to regulate certain technical aspects of trade in goods. In doing so it was recognized that WTO Members never envisioned a similar regulatory agreement for services, let alone those delivered through internet technologies; nor they ever proposed to identify or set up a standard setting body – such as the Codex Alimentarius for the SPS Agreement - capable to advise about appropriate practices to minimize the trade distorting effects of domestic regulation on internet services. Interestingly enough, however, concepts such as mutual recognition, typical and abundantly employed in the TBT and SPS realms, are now for the first time explicitly surfacing also in the context of e-commerce chapters, albeit only in the form of simple cooperation pledges. The TPP, for instance is now calling for "the recognition of regulatory

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outcomes, whether accorded autonomously or by mutual arrangement, or broader international frameworks"[1029] for privacy and protection of personal information. Obviously, at the current state of play, to imagine a simple cooperation pledge negotiated in a regional trade agreement evolving into a "SPS-like" multilateral mechanism capable of centralizing the discussions over regulatory concerns on the provision of internet services is probably a too far-reaching exercise. Yet, in the late Eighties, policymakers beginning to advocate for an SPS agreement might have thought the same.

[1029] See, *TPP*, Art. 14.8.5.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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Annex I

MTN.GNS/W/120,
Note by the Secretariat,
10 July 1991

SERVICES SECTORAL CLASSIFICATION LIST

SECTORS AND SUB-SECTORS		CORRESPONDING CPC
1.	BUSINESS SERVICES	Section B
A.	Professional Services	
a.	Legal Services	
b.	Accounting, auditing and bookeeping services	862
c.	Taxation Services	863
d.	Architectural services	8671
e.	Engineering services	8672
f.	Integrated engineering services	8673
g.	Urban planning and landscape architectural services	8674
h.	Medical and dental services	9312
i.	Veterinary services	932
j.	Services provided by midwives, nurses, physiotherapists and para-medical personnel	93191
k.	Other	
B.	Computer and Related Services	
a.	Consultancy services related to the installation of computer hardware	841
b.	Software implementation services	842
c.	Data processing services	843
d.	Data base services	844
e.	Other	845+849
C.	Research and Development Services	
a.	R&D services on natural sciences	851
b.	R&D services on social sciences and humanities	852
c.	Interdisciplinary R&D services	853
D.	Real Estate Services	
a.	Involving own or leased property	821
b.	On a fee or contract basis	822
E.	Rental/Leasing Services without Operators	
a.	Relating to ships	83103
b.	Relating to aircraft	83104
c.	Relating to other transport equipment	83101+83102+
d.	Relating to other machinery and equipment	83106-83109
e.	Other	832

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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F.	Other Business Services	
a.	Advertising services	871
b.	Market research and public opinion polling services	864
c.	Management consulting service	865
d.	Services related to man. consulting	866
e.	Technical testing and analysis serv.	8676
f.	Services incidental to agriculture, hunting and forestry	881
g.	Services incidental to fishing	882
h.	Services incidental to mining	883+5115
i.	Services incidental to manufacturing	884+885 (except for 88442)
j.	Services incidental to energy distribution	887
k.	Placement and supply services of Personnel	872
l.	Investigation and security	873
m.	Related scientific and technical consulting services	8675
n.	Maintenance and repair of equipment (not including maritime vessels, aircraft or other transport equipment)	633+ 8861-8866
o.	Building-cleaning services	874
p.	Photographic services	875
q.	Packaging services	876
r.	Printing, publishing	88442
s.	Convention services	87909*
t.	Other	8790
2.	COMMUNICATION SERVICES	
A.	Postal services	7511
B.	Courier services	7512
C.	Telecommunication services	
a.	Voice telephone services	7521
b.	Packet-switched data transmission services	7523**
c.	Circuit-switched data transmission services	7523**
d.	Telex services	7523**
e.	Telegraph services	7522
f.	Facsimile services	7521**+7529**
g.	Private leased circuit services	7522**+7523**
h.	Electronic mail	7523**
i.	Voice mail	7523**
j.	On-line information and data base retrieval	7523**

*The (*) indicates that the service specified is a component of a more aggregated CPC item specified elsewhere in this classification list.

** The (**) indicates that the service specified constitutes only a part of the total range of activities covered by the CPC concordance (e.g. voice mail is only a component of CPC item 7523).

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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k.	electronic data interchange (EDI)	7523**
l.	enhanced/value-added facsimile services, incl. store and forward, store and retrieve	7523**
m.	code and protocol conversion	n.a.
n.	on-line information and/or data processing (incl.transaction processing)	843**
o.	other	
D.	Audiovisual services	
a.	Motion picture and video tape production and distribution services	9611
b.	Motion picture projection service	9612
c.	Radio and television services	9613
d.	Radio and television transmission services	7524
e.	Sound recording	n.a.
f.	Other	
E.	Other	
3.	CONSTRUCTION AND RELATED ENGINEERING SERVICES	
A.	General construction work for buildings	512
B.	General construction work for civil engineering	513
C.	Installation and assembly work	514+516
D.	Building completion and finishing work	517
E.	Other	511+515+518
4.	DISTRIBUTION SERVICES	
A.	Commission agents' services	621
B.	Wholesale trade services	622
C.	Retailing services	631+632 6111+6113+6121
D.	Franchising	8929
E.	Other	
5.	EDUCATIONAL SERVICES	
A.	Primary education services	921
B.	Secondary education services	922

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

C.	Higher education services	923
D.	Adult education	924
E.	Other education services	929
6.	ENVIRONMENTAL SERVICES	
A.	Sewage services	9401
B.	Refuse disposal services	9402
C.	Sanitation and similar services	9403
D.	Other	
7.	FINANCIAL SERVICES	
A.	All insurance and insurance-related services	812**
a.	Life, accident and health insurance services	8121
b.	Non-life insurance services	8129
c.	Reinsurance and retrocession	81299*
d.	Services auxiliary to insurance (including broking and agency services)	8140
B.	Banking and other financial services (excl. insurance)	
a.	Acceptance of deposits and other repayable funds from the public	81115-81119
b.	Lending of all types, incl., inter alia, consumer credit, mortgage credit, factoring and financing of commercial transaction	8113
c.	Financial leasing	8112
d.	All payment and money transmission services	81339**
e.	Guarantees and commitments	81199**
f.	Trading for own account or for account of customers, whether on an exchange, in an over-the-counter market or otherwise, the following:	
	- money market instruments (cheques, bills, certificate of deposits, etc.)	81339**
	- foreign exchange	81333
	- derivative products incl., but not limited to, futures and options	81339**
	- exchange rate and interest rate instruments, inclu. products such as swaps, forward rate agreements, etc.	81339**
	- transferable securities	81321*
	- other negotiable instruments and financial assets, incl. bullion	81339**
g.	Participation in issues of all kinds of securities, incl. under-writing and placement as agent (whether publicly or privately) and	8132

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

	provision of service related to such issues		
h.	Money broking		81339**
i.	Asset management, such as cash or portfolio management, all forms of collective investment management, pension fund management, custodial depository and trust services		8119+** 81323*
j.	Settlement and clearing services for financial assets, incl. securities, derivative products, and other negotiable instruments	or	81339** 81319**
k.	Advisory and other auxiliary financial services on all the activities listed in Article 1B of MTN.TNC/W/50, incl. credit reference and analysis, investment and portfolio research and advice, advice on acquisitions and on corporate restructuring and strategy	or	8131 8133
l.	Provision and transfer of financial information, and financial data processing and related software by providers of other financial services		8131
C.	Other		
8.	HEALTH RELATED AND SOCIAL SERVICES (other than those listed under 1.A.h-j.)		
A.	Hospital services		9311
B.	Other Human Health Services		9319 (other than 93191)
C.	Social Services		933
D.	Other		
9.	TOURISM AND TRAVEL RELATED SERVICES		
A.	Hotels and restaurants (incl. catering)		641-643
B.	Travel agencies and tour operators services		7471
C.	Tourist guides services		7472
D.	Other		
10.	RECREATIONAL, CULTURAL AND SPORTING SERVICES (other than audiovisual services)		
A.	Entertainment services (including theatre, live bands and circus services)		9619
B.	News agency services		962

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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Sono comunque fatti salvi i diritti dell'università Commerciale Luigi Bocconi di riproduzione per scopi di ricerca e didattici, con citazione della fonte.

C.	Libraries, archives, museums and other cultural services	963
D.	Sporting and other recreational services	964
E.	Other	
11.	TRANSPORT SERVICES	
A.	Maritime Transport Services	
a.	Passenger transportation	7211
b.	Freight transportation	7212
c.	Rental of vessels with crew	7213
d.	Maintenance and repair of vessels	8868**
e.	Pushing and towing services	7214
f.	Supporting services for maritime transport	745**
B.	Internal Waterways Transport	
a.	Passenger transportation	7221
b.	Freight transportation	7222
c.	Rental of vessels with crew	7223
d.	Maintenance and repair of vessels	8868**
e.	Pushing and towing services	7224
f.	Supporting services for internal waterway transport	745**
C.	Air Transport Services	
a.	Passenger transportation	731
b.	Freight transportation	732
c.	Rental of aircraft with crew	734
d.	Maintenance and repair of aircraft	8868**
e.	Supporting services for air transport	746
D.	Space Transport	733
E.	Rail Transport Services	
a.	Passenger transportation	7111
b.	Freight transportation	7112
c.	Pushing and towing services	7113
d.	Maintenance and repair of rail transport equipment	8868**
e.	Supporting services for rail transport services	743
F.	Road Transport Services	
a.	Passenger transportation	7121+7122
b.	Freight transportation	7123
c.	Rental of commercial vehicles with operator	7124
d.	Maintenance and repair of road transport equipment	6112+8867
e.	Supporting services for road transport services	744
G.	Pipeline Transport	
a.	Transportation of fuels	7131

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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b.	Transportation of other goods	7139
H.	Services auxiliary to all modes of transport	
a.	Cargo-handling services	741
b.	Storage and warehouse services	742
c.	Freight transport agency services	748
d.	Other	749
I.	Other Transport Services	
12.	OTHER SERVICES NOT INCLUDED ELSEWHERE	95+97+98+99

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Annex II

April 4, 2011

European Union-United States Trade Principles for Information and Communication Technology Services

The European Union and the United States have jointly developed the following set of trade-related principles for the information and communication technology (ICT) services sector and intend to promote the implementation of these principles within their bilateral economic relationship and in their trade negotiations with third countries.

These principles are without prejudice to governments' rights and obligations under the Marrakesh Agreement Establishing the World Trade Organization (WTO), and to the exceptions contained in the WTO General Agreement on Trade in Services (GATS). They are also without prejudice to the policy objectives and legislation of the European Union and the United States in areas such as the protection of intellectual property, the protection of privacy and of the confidentiality of personal and commercial data, and the enhancement of cultural diversity (including through public funding and assistance). These principles are not intended to apply to financial services.

The European Union and the United States intend to cooperate with third countries to enhance national regulatory capacity and support the expansion of ICT networks and services, which are powerful tools for promoting economic development. The European Union and the United States intend to review these principles biannually, with a view to discussing their implementation and use and to further refining and expanding them, as appropriate.

Governments seeking to enhance their national regulatory capacity and support the development of ICT networks and services should embrace the following principles and, as appropriate, work to integrate them, in a technologically neutral manner, into bilateral and multilateral trade disciplines:

1. Transparency: Governments should ensure that all laws, regulations, procedures, and administrative rulings of general application affecting ICT and trade in ICT services are published or otherwise made available, and, to the extent practicable, are subject to public notice and comment procedures.

2. Open Networks, Network Access and Use: Governments, preferably through their regulators, should promote the ability of consumers legitimately to access and distribute information and run applications and services of their choice. Governments should not restrict the ability of suppliers to supply services over the Internet on a cross-border and technologically neutral basis, and should promote the interoperability of services and technologies, where appropriate.

3. Cross-Border Information Flows: Governments should not prevent service suppliers of other countries, or customers of those suppliers, from electronically transferring information internally or across borders, accessing publicly available information, or accessing their own information stored in other countries.

Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
di BARASSI MARCO
discussa presso Università Commerciale Luigi Bocconi-Milano nell'anno 2016
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4. Local Infrastructure: Governments should not require ICT service suppliers to use local infrastructure, or establish a local presence, as a condition of supplying services. In addition, governments should not give priority or preferential treatment to national suppliers of ICT services in the use of local infrastructure, national spectrum, or orbital resources.

5. Foreign Ownership: Governments should allow full foreign participation in their ICT services sectors, through establishment or other means.

6. Use of Spectrum: Governments should maximize the availability and use of spectrum by working to ensure that it is managed effectively and efficiently, and, where appropriate, in accordance with applicable International Telecommunication Union Radiocommunication Sector (ITU-R) recommendations. The allocation of spectrum for commercial purposes should be carried out in an objective, timely, transparent, and non-discriminatory manner, with the aim of fostering competition and innovation. Governments are encouraged to empower regulators with impartial, market-oriented means, including auctions, to assign terrestrial spectrum to commercial users.

7. Regulatory Authorities: Governments should ensure that the regulatory authorities that oversee ICT services sectors are legally distinct and functionally independent from all service providers, and have sufficient legal authority and adequate resources to perform their functions effectively. Regulatory decisions and procedures should be impartial with respect to all market participants. Regulatory decisions regarding ICT services, and the results of appellate proceedings regarding such decisions, should be publicly available.

8. Authorizations and Licenses: Governments should authorize the provision of competitive telecommunications services, wherever possible, on simple notification by a service provider, and should not require legal establishment as a condition of supplying a service. Licenses should be restricted in number only for the purpose of addressing a limited set of specified regulatory issues, such as the assignment of frequencies.

9. Interconnection: Consistent with the GATS Telecommunications Annex's access and use provisions, governments should ensure that public telecommunications service suppliers have the right and the obligation to negotiate and to provide interconnection on commercial terms with other providers for access to publicly available telecommunications networks and services. In addition, in accordance with the GATS Reference Paper on Basic Telecommunications, countries should ensure that public telecommunications service suppliers are able to negotiate and obtain interconnection with major suppliers at cost-oriented, non-discriminatory, and transparent rates.

10. International Cooperation: Governments should cooperate with each other to increase the level of digital literacy globally and reduce the "digital divide".

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Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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Tesi di dottorato "Electronic Supply of Services and International Trade Law: Liberalization and Regulation Challenges in the Digital Era"
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