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FINAL DRAFT VERSION

Addressing Domestic Regulation Affecting Trade in Services in CETA, CPTPP and USMCA: Revolution or Timid Steps?

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Abstract

In the last 25 years, the number of international agreements purporting to liberalise trade has increased greatly. These agreements have mainly focused on reducing protectionist measures through the imposition of general principles. More recently, the United States and the European Union, in particular, have concluded comprehensive trade agreements covering trade in goods, trade in services and foreign investment. This article inquires whether, and the extent to which, these recent agreements represent a departure from previous practice. It focuses on (a) the instruments employed to address domestic regulation affecting trade in services and (b) three specific agreements concluded between 2016 and 2018: the EU-Canada CETA, the CPTPP, and the USMCA. The article argues that, while these recent PTAs put forward novel approaches with regard to regulatory diversity affecting trade in services, it is too early to tell whether they will have any ground-breaking impact in terms of services trade liberalisation.

Words

Domestic regulation – preferential trade agreement – procedural safeguards – regulatory convergence – regulatory cooperation – trade in services

1 Introduction

Liberalisation of trade in services is a complex endeavour. First, the concept of trade in services encompasses a wide range of interactions between services producers and consumers including traditional cross-border transactions, consumption abroad, foreign direct investment and temporary movement of labour. Second, services sectors are subject to a diverse set of rules and regulations depending on the specificities of each sector as well as the public policy sensitivities of each country. Third, services trade liberalisation cannot progressively move from reducing border measures to addressing internal measures (as was the case for trade in goods liberalisation) as barriers to trade in services only take the form of internal regulations, including various standards and procedures for providing services.

Unsurprisingly, services trade liberalisation efforts have principally focused on identifying and reducing protectionist regulation. The most obvious examples of protectionism are domestic regulatory measures that formally discriminate on the basis of the origin of the service or service providers, such as for example, the case when nationality or citizenship is required for a full license to practice as a professional or when foreign services and service providers are subject to stricter requirements compared to domestic ones. More indirect forms of protectionist measures may include (a) regulation that, while facially origin-neutral, discriminates in fact between foreign and domestic services and service providers, (b) regulation imposing quantitative limitations on the provision of services, and (c) regulations that are not justified by the pursuit of a legitimate public policy.

Beyond protectionism, service trade liberalisation needs to confront regulatory diversity. Even when they are not discriminatory and are justified on legitimate public policy grounds, a host of measures imposed by the importing/host State to regulate the provision of services (for example, specific competition rules dealing with natural monopolies, licensing requirements for the provision of legal or accountancy services, or prudential regulation for financial service providers) may adversely affect trade in services. The impact is not so much because of the existence of rules, but it is because every importing/host State provides for its own set of rules. This is the issue of ‘regulatory diversity’ affecting trade in services: services provided across different jurisdictions will be subject to various set of rules, which at a minimum represent burdensome duplication.¹

The last 25 years have witnessed an intense period of liberalisation of trade in services through, in particular, international trade agreements. While the General Agreement on Trade in Services (GATS) (negotiated in the late 1980s and early 1990s) represents the pioneer agreement, much of the international treaty-making addressing trade in services in the last twenty years has occurred at the regional and bilateral level, particularly with preferential trade agreements (PTAs) such as free trade agreements (FTAs). All of these trade agreements fall in the category of so-called ‘shallow integration’ agreements, as they mainly focus on reducing protectionist measures through the imposition of general principles (such as non-discrimination, transparency, due process, and necessity). On the other hand, ‘deep integration’ agreements are much rarer, the most (perhaps only) notable example is the single market established by the European Union (EU) and aimed at integrating the markets of the various member States through *supranational* harmonisation, regulation, supervision and enforcement.²

¹ Andrew D. Mitchell and Elizabeth Sheargold, ‘The TPP and Good Regulatory Practices: An Opportunity for Regulatory Coherence to Promote Regulatory Autonomy?’ (2016) 15 *World Trade Review* 587, 590-91. More generally on regulatory diversity affecting trade in services see Panagiotis Delimatsis, *International Trade in Services and Domestic Regulation: Necessity, Transparency, and Regulatory Diversity* (OUP 2007).

² Federico Ortino, *Basic Legal Instruments for the Liberalisation of Trade: A Comparative Analysis of EC and WTO Law* (Hart, 2004) 27 et seq.

The flurry of trade agreements currently being negotiated and concluded at the bilateral and plurilateral level is impressive, as the number of trade agreements just signed or under negotiation, for example, by the European Union (EU) shows.³ These agreements are for the most part ‘comprehensive’ as they cover a wide range of areas including trade in goods, trade in services and foreign investment. The question posed by this paper is whether the approach undertaken in these recent agreements in order to deal with domestic regulation affecting trade in services represents a (dramatic?) change from the shallow integration approach adopted more than 20 years ago in the GATS, and followed for the most part by the ensuing PTAs. The article focuses in particular on three agreements concluded between 2016 and 2018: the EU-Canada Comprehensive and Economic Trade Agreement (CETA), the Comprehensive and Progressive Agreement on Trans Pacific Partnership (CPTPP), and the United States, Mexico, Canada Agreement (replacing the North American Free Trade Agreement – NAFTA). The article argues that, while these recent PTAs put forward novel approaches with regard to regulatory diversity affecting trade in services (such as imposing ‘good regulatory practices’ and strengthening ‘international regulatory cooperation’), it will take time and additional efforts before any ground-breaking impact in terms of services trade liberalisation will be felt.

The article first sets out the basic features of the GATS approach to domestic regulation (Part 2) as well as of subsequent PTAs (Part 3). Part 4 puts forward some of the key challenges in addressing regulatory diversity affecting trade in services, while Part 5 focuses on the three recent trade agreements mentioned above. Part 6 concludes.

2 The GATS Approach to Domestic Regulation

The GATS provides the current multilateral framework (and thus the baseline) for the liberalisation of trade in services (including foreign direct investment (FDI) in services).⁴

GATS liberalisation focused principally on the gradual elimination of (a) discriminatory measures (through both the Most Favoured Nation (MFN) and national treatment standards) and (b) a limited set of so-called ‘market access’ limitations, such as limitations on the number of service suppliers or service operations, or limitations on the participation of foreign capital in terms of maximum percentage or total value. Crucially, the market access and national treatment obligations (Art XVI and Art XVII) only apply to the extent that a WTO Member chooses to commit a

³ European Commission, *Overview of FTA and Other Trade Negotiations* (December 2018) available at http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf

⁴ Next to ‘cross-border supply, ‘consumption abroad’ and ‘presence of natural persons’, the GATS defines ‘trade in services’ to include ‘commercial presence’, which is in turn defined as ‘any type of business or professional establishment, including through (i) the constitution, acquisition or maintenance of a juridical person, or (ii) the creation or maintenance of a branch or a representative office within the territory of a Member for the purpose of supplying a service’. General Agreement on Trade in Services (GATS) (15 April 1994), LT/UR/A-1B/S/1, Article XXVIII(d)

specific service sector or sub-sector in its Schedule of Specific Commitments and subject to the conditions and limitations inscribed by the Member in its Schedule.⁵

The GATS, however, also provides for additional obligations going beyond non-discrimination and market access commitments: next to certain basic transparency requirements in Article III (including publication and notification requirements concerning measures of general application), the GATS includes a specific provision on Domestic Regulation (Article VI), which has various components providing different kinds of rules for different categories of domestic regulatory measures.

First, Article VI requires Members to ensure that ‘all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner’ (paragraph 1). While it is limited to sectors where specific commitments have been undertaken, Article VI:1 is a typical example of a provision prescribing certain substantive standards that WTO Members are required to comply with (similar to the non-discrimination standards). However, like the similar provision in Article X GATT, Article VI:1 does not require that all measures affecting trade in services be reasonable, objective and impartial, but only the administration of measures of general application affecting trade in services.⁶ In focusing on their administration, the provision falls short of requiring that the substantive content of the measures themselves meet this standard.⁷

Second, Article VI provides for certain procedural safeguards with regard to administrative decisions affecting trade in services, including (a) the requirement to make available judicial, arbitral or administrative review against unfavourable administrative decisions (paragraph 2) and (b) the requirement to inform an applicant within a reasonable period of time of the decision concerning the authorization application (paragraph 3). While the first requirement applies with regard to any service sector, the second one applies only with regard to services on which a specific commitment has been made.

⁵ Juan Marchetti & Martin Roy, ‘Service liberalization in the WTO and in PTAs’ in Juan Marchetti & Martin Roy (eds), *Opening Markets for Trade in Services: Countries and Sectors in Bilateral and WTO Negotiations* (CUP 2009) 61, 63. For example, while the EU and its Member States have included ‘architectural services’ in their GATS schedule, Belgium, Greece, Italy and Portugal remain ‘unbound’ with regard to both market access and national treatment when it comes to the ‘cross-border’ supply of architectural services (mode 1) and Spain, Italy and Portugal restrict market access through commercial presence (mode 3) to natural persons, only. Thus, GATS schedules function as the schedules of concessions under the GATT for trade in goods.

⁶ In *EC – Selected Customs Matters*, the Appellate Body stated as follows: ‘a distinction must be made between the legal instrument being administered and the legal instrument that regulates the application or implementation of that instrument. While the substantive content of the legal instrument being administered is not challengeable under Article X:3(a), we see no reason why a legal instrument that regulates the application or implementation of that instrument cannot be examined under Article X:3(a) if it is alleged to lead to a lack of uniform, impartial, or reasonable administration of that legal instrument.’ WTO, *EC: Selected Customs Matters – Report of the Appellate Body* (13 November 2006), WT/DS315/AB/R [200].

⁷ Delimatsis (n 1) 96-103.

Third, Article VI establishes a mandate for the Council for Trade in Services to develop specific regulatory disciplines with regard to measures relating to ‘qualification requirements and procedures, technical standards and licensing requirements’. Such future disciplines shall aim to ensure that such measures are, inter alia, based on ‘objective and transparent criteria’, and ‘not more burdensome than necessary to ensure the quality of the service’ (paragraph 4). This is a rather novel approach as it envisages, within the multilateral trading system, the possibility of ‘positive integration and minimum harmonization’ with regard to qualification, technical standards and licensing.⁸ However, the only actual discipline developed since 1995 on the basis of Article VI:4 is the *Disciplines on Domestic Regulation in the Accountancy Sector*, which in effect is limited to expressly applying the various criteria listed in Article VI:4 to technical standards and qualification, licensing requirements and procedures in the accountancy sector.⁹

Furthermore, Article VII GATS (Recognition) allows a Member to recognise the education or experience obtained, requirements met, or licenses or certification granted in a particular country for purposes of the fulfilment of its standards or criteria for the authorization, licensing or certification of services suppliers.¹⁰ Crucially, however, Article VII does not actually require any WTO Member to do so.

Next to the framework agreement, the GATS also provides for several annexes addressing sector-specific issues,¹¹ as well as an Understanding on Commitments in Financial Services. These additional sectoral agreements have different functions: to limit the scope of the GATS (for example to exclude air transport services), to set out rules and a timetable for further negotiations in certain sectors (eg, maritime transport services and basic telecommunications), or to provide for additional rules and disciplines for certain sectors (eg, telecommunications, financial services).

With regard to the latter function, the two most prominent examples should be noted. First, the ‘Reference Paper’ on regulatory principles in basic telecommunications is a rare example of the ability of WTO Members to negotiate commitments with respect to measures affecting trade in services beyond those falling under market access or national treatment, including measures

⁸ Delimatsis *ibid* 113.

⁹ *Disciplines on Domestic Regulation in the Accountancy Sector* (adopted 14 December 1998), S/L/64, Council for Trade in Services. Article VI:5 makes the criteria listed in Article VI:4 provisionally applicable in order to protect WTO Members’ reasonable expectations with regard to specific commitments undertaken by any other WTO Member.

¹⁰ Such recognition may be based upon an agreement or arrangement with the country concerned or may be accorded autonomously (GATS Article VII:1). Such recognition shall not constitute a means of discrimination between countries or a disguised restriction on trade in services (GATS Article VII:3).

¹¹ See for example, Annex on Movement of Natural Persons Supplying Services under the Agreement, Annex on Air Transport Services, two Annexes on Financial Services, Annex on Negotiations on Maritime Transport Services, Annex on Telecommunications, Annex on Negotiations on Basic Telecommunications.

regarding qualifications, standards or licensing matters.¹² The Reference Paper aims to strengthen competition disciplines in telecommunication services, in particular to ensure that the market power of a former public monopoly service provider is not used to the detriment of new market entrants.

Second, the ‘Understanding on Commitments in Financial Services’ and the ‘Annex on Financial Services’ provide additional rules dealing with monopoly rights, government procurement, and commercial presence. These rules go beyond those of the general framework agreement, in terms of providing further trade liberalization disciplines. However, they also go beyond the general framework agreement in terms of granting WTO Members more leeway to restrict trade, as in the case of the additional rules dealing with domestic regulation granting Members the prerogative to take measures ‘for prudential reasons’ (the so called ‘prudential carve-out’ in the Annex on Financial Services).

3 Preferential Trade Agreements (PTAs) and Domestic Regulation

Since 1995, service trade liberalisation has also been pursued at the bilateral or regional level, principally through the negotiation of PTAs. A PTA is an agreement between different countries allowing trade on terms more favourable than under the WTO. As noted above, Article V of the GATS allows WTO Members to enter into an agreement liberalising trade in services between the parties to such an agreement provided that such an agreement (a) has substantial sectoral coverage (in terms of number of sectors, volume of trade affected and modes of supply) and (b) provides for the absence or elimination of substantially all discrimination. As of the beginning of 2017, almost 150 such economic integration agreements¹³ have been notified to the Council of Trade in Services pursuant to Article V GATS.

The general structure and content of these PTAs is very similar to the GATS. Accordingly, while the scope of application is in principle very broad including measures affecting trade in services as defined through the four modes of supply, the key obligations remain relatively limited, particularly in terms of the type of disciplines included in the PTA to tackle regulatory barriers to trade in services (such as market access, national treatment, transparency, domestic regulation, recognition).¹⁴

There are, however, certain distinctive features of services PTAs that should be highlighted. First, service obligations in PTAs are invariably part of a broader set of disciplines that, in addition to

¹² The reference paper is not *per se* binding but it has been incorporated by several WTO Members in to their GATS schedules as an ‘additional commitments’ pursuant Article XVIII GATS.

¹³ This is the terminology employed in Article V GATS, but for purposes of this report we will refer to FTAs (although technically speaking, it may not be the case that all EIAs are indeed FTAs).

¹⁴ See Federico Ortino, ‘Regional Trade Agreements in Trade in Services’ in Simon Lester, Bryan Mercurio & Lorand Bartels (eds), *Bilateral and Regional Trade Agreements: Commentary and Analysis* (2nd edn, CUP, 2015) 213-44.

traditional issues regarding trade in goods (such as, tariffs binding, technical standards, and subsidies) include areas that are not found in the WTO (at least not to the same extent). These are, for example, ‘investment’, ‘competition’, ‘sustainable development’.¹⁵ This extended breadth of coverage of PTAs facilitates the coordination between these various areas beyond what is achieved by the WTO (and the GATS).

Second, services PTAs provide for additional levels of market access and national treatment commitments compared to the commitments found in GATS schedules. Studies show that both the sectoral coverage and depth of market access and national treatment commitments achieved in PTAs with regard to either cross-border trade (mode 1) and commercial presence (mode 3) is on average more than double than that achieved by existing GATS commitments.¹⁶

Third, while services PTAs often include some or all of the GATS rules on domestic regulation,¹⁷ most of them do not go beyond what is provided therein.¹⁸ For example, only in very few instances does the obligation to administer domestic laws in a reasonable, objective and impartial manner apply generally and unconditionally (rather than simply with regard to sectors subject to specific commitments).¹⁹ Similarly, only a few agreements following the NAFTA model contain a chapter on ‘technical barriers to trade’ (TBT), which apply to ‘standards-related measures’ that affect both trade in goods and services,²⁰ and provide (inter alia) for mandatory necessity requirements, such

¹⁵ These are respectively chapters 8, 17 and 22 of the EU-Canada CETA, signed in 2016. Comprehensive Economic and Trade Agreement (CETA) between Canada and the EU and its Member States [2017] OJ L 11.

¹⁶ Marchetti & Roy (n 5) 81.

¹⁷ Several RTAs also include provisions on mutual recognition, which for the most part replicate Article VII GATS. A few of these PTAs include at times more detailed provisions on the recognition of professional qualifications and registration procedures. See for example, Article 4.8 of the Jordan-Singapore FTA (Agreement between the Government of the Hashemite Kingdom of Jordan and the Government of the Republic of Singapore on the Establishment of a Free Trade Area (29 April 2004) <<https://wits.worldbank.org/GPTAD/PDF/archive/Jordan-Singapore.pdf>>); Article 806 of the Thailand-Australia FTA, (1 January 2005) <<https://dfat.gov.au/trade/agreements/in-force/tafta/fta-text-and-implementation/Pages/download.aspx>>; Article 23 of the Singapore-Australia FTA (28 July 2003) <<https://dfat.gov.au/trade/agreements/in-force/safta/Pages/singapore-australia-fta.aspx>>; and higher education qualification in Annex 11.13 of the Panama-El Salvador FTA (11 April 2003) <https://www3.nd.edu/~jbergstr/DataEIAs2006/FTA5yrData_files/PDF%20Files/Latin%20America/Panama%20-%20El%20Salvador%20PTA-FTA%20%281970%29.pdf>. At times mutual recognition provisions are included in annexes dealing specifically with professional services.

¹⁸ See Delimatsis (n 1) 235. For those PTAs that do not contain rules on domestic regulation applicable generally to trade in services, see for example the 1997 EU-Mexico FTA (Economic Partnership, Political Coordination and Cooperation Agreement between the European Community and its Member States, of the one part, and the United Mexican States, of the other part [2000] OJ L 276.

¹⁹ See, e.g., the Protocol of Montevideo for the Trade in Services of Mercosur (Article 10.1).

²⁰ North American Free Trade Agreement (NAFTA) (1 January 1994), Article 901 <<https://www.nafta-sec-alena.org/Home/Texts-of-the-Agreement/North-American-Free-Trade-Agreement>>, Central America-Panama FTA (11 April 2003) Article 9.03 <www.sice.oas.org/Trade/Capan/indice.asp>, Chile-Mexico FTA (1 August 1999) Article 8-03.1; it should be noted, however, that Annex 8-01 limits the applicability of the chapter on standards-related measures de facto to computer and related services, only) <<http://www.sice.oas.org/Trade/chmefta/indice.asp>>. On the other hand, a few agreements that exclude ‘technical regulations’ from the scope of the necessity requirements do not extend the chapter on technical

as those required in the WTO TBT Agreement.²¹ Some of these latter agreements also take a stronger approach when it comes to the use of relevant international standards as they require parties to use international standards as a basis for preparing or applying their standards-related measures (similar to Art 2.4 TBT).²²

In addition, since 2013, negotiations have been ongoing among a subset of 23 WTO Members of a plurilateral agreement, the Trade in Service Agreement (TiSA).²³ While technically outside the WTO, TiSA is open for other WTO Members to join during the negotiations or after the Agreement is signed. The TiSA architecture is based on the GATS and all negotiated provisions are compatible with the GATS, such as scope, definitions, disciplines related to market access and national treatment, as well as exceptions. TiSA aims at (a) improving TiSA Parties' market access and national treatment commitments and (b) developing additional common rules and standards that apply horizontally as well as for specific sectors. Currently, there are 17 negotiating texts – so called Annexes – containing potential regulatory disciplines discussed among TiSA Parties. The horizontal annexes include those addressing transparency, domestic regulation, localisation requirements and e-commerce. Sector specific annexes provide for trade rules in specific sectors, such as telecommunications services, financial services, delivery services, professional services and transport services.

4 The GATS and 'Shallow' PTAs: Three Challenges Going Forward

barriers to trade to measures affecting trade in services. See for example, Chile-Korea FTA (1 April 2004) Article 9.3) <http://www.sice.oas.org/Trade/Chi-SKorea_e/ChiKoreaInd_e.asp#top>.

²¹ See Article 2.2 of the Agreement on Technical Barriers to Trade (TBT Agreement) (15 April 1994) LT/UR/A-1A/10: 'Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade.... Similarly, Article 9.04.2 of the Central America-Panama FTA (ibid) provides that 'No Party may prepare, adopt, maintain or apply any standards-related measures, approval procedures and metrology-related measures with the purpose or effect of creating an unnecessary obstacle to trade with the other Party.'

²² See for example, Central America-Panama FTA (n 20, Article 9.02.4), Central America-Chile FTA (15 February, 2002) Article 9.04.4 <<http://sice.oas.org/Trade/chicam/chicamin.asp>>. Other PTAs expressly provide that 'domestic regulation prepared, adopted and applied in accordance with international standards shall be rebuttably presumed to comply with the [rules on domestic regulations]'. Article 21.4 of the Agreement between New Zealand and Singapore on a Closer Economic Partnership (ANZCEP) (1 January 2001) <<https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/nz-singapore-closer-economic-partnership/cep-text/>>. See also, EFTA-Chile FTA, (1 December 2004) Article 28.6 <<https://www.efta.int/sites/default/files/documents/legal-texts/free-trade-relations/chile/EFTA-Chile%20Free%20Trade%20Agreement.pdf>>, 2002 EFTA-Singapore FTA (1 January 2003) Article 28.6 <<https://www.efta.int/media/documents/legal-texts/free-trade-relations/singapore/EFTA-Singapore%20Free%20Trade%20Agreement.pdf>>, 1998 Chile-Mexico FTA (n 20, Article 8-04.4(b)). For a weaker and more indirect use of international standards, see Article VI:5 GATS.

²³ Australia, Canada, Chile, Chinese Taipei, Colombia, Costa Rica, the EU, Hong Kong China, Iceland, Israel, Japan, Korea, Liechtenstein, Mauritius, Mexico, New Zealand, Norway, Pakistan, Panama, Peru, Switzerland, Turkey, the United States.

In the debate about improving the level of liberalisation of trade in services, policy makers face several challenges.²⁴ We discuss three here, which we find key. First, there exists an inevitable tension between service trade liberalisation and national market regulation. As noted above, services liberalisation requires regulatory integration; that is, overcoming often complex and cumbersome differences in domestic regulation. The WTO implicitly recognises this as PTAs on services (as opposed to PTAs on goods) are classified as ‘economic integration agreements’ (EIAs) under Article V GATS. Yet, at the same time, WTO Members have made clear that GATS tolerates regulatory diversity. This finds expression and assurance in the GATS Preamble: ‘recognizing 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...’. Thus, the GATS and early PTAs reveal that countries wish to maintain ample ability to safeguard these national policy objectives.

Second, the early focus (in particular in the context of the Working Party on Domestic Regulation) on developing horizontal legal principles, such as the requirement that licensing and authorization requirements and procedures ‘not be more burdensome than necessary’ (the so called ‘necessity’ principle), highlighted the controversy of relying on general substantive standards. As clearly shown in the cases of the general standards developed with regard to trade in goods (such as ‘national treatment’ and ‘necessity’), such standards require an adjudicator, in this case the WTO dispute settlement bodies, to give meaning to them. In economic parlance, they constitute ‘incomplete contracts’ whose standards of behaviour are subject to interpretation on a case-by-case basis.²⁵ In the GATS context, growing reluctance to develop such substantive standards was linked to concerns about the lack of certainty and predictability of such standards and the related potential unduly impact on States’ regulatory autonomy.²⁶ While general substantive standards may perhaps require less political capital to negotiate and are more flexible in application, they lack certainty and predictability, and their determination is often left to a dispute settlement body.²⁷ For example, introducing a cross-cutting standard that regulation must not constitute an unnecessary barrier to trade raises the question: what constitutes ‘necessary’? In the context of WTO obligations on trade in goods, most notably Article XX GATT and Article 2.2 TBT, the interpretation of the concept of ‘necessity’ has required the Appellate Body to complete the contract by evaluating a regulation in dispute. Whilst the non-discrimination analysis differs slightly, in both cases this involves determining whether the means by which a particular regulatory

²⁴ Bernard Hoekman, ‘Liberalizing Trade in Services: A Survey’ (2006) *World Bank Policy Research Working Paper 4030*; Aaditya Mattoo, ‘Services Trade and Regulatory Cooperation’ (2015) *E15 Initiative – Think Piece*; Petros Mavroidis, ‘Regulatory Cooperation: Lessons from the WTO and the World Trade Regime’ (2016) *E15 Initiative – Policy Options*.

²⁵ ‘[National Treatment], the means to combat protection, is the response to an informational problem, and the basic problem for its implementation is to distinguish cases where differential taxation has protectionist motives from those where they are legitimate...’. Henrik Horn and Petros Mavroidis, ‘Still hazy after all these years: The interpretation of national treatment in the GATT/WTO case law on non-discrimination’, (2004) 15 *EJIL* 39, 56.

²⁶ Delimatsis (n 1) 166-67.

²⁷ See early WTO discussions on necessity in the context of Article VI.4 disciplines.

objective is met is excessively trade restrictive. As discussed throughout, national regulators for services industries would be extremely reluctant to provide WTO panels this ability to rule against domestic policy strategies.²⁸

A third challenge revolves around the involvement of domestic service regulators in the multilateral and bilateral trade regimes. As service liberalisation requires regulatory integration across a number of different and complex sectors, involvement of domestic regulators with the relevant sectoral expertise seems indispensable. However, direct involvement of domestic service regulators in the working of the WTO, for example, has traditionally been marginal.²⁹ This does not mean that domestic regulators have not had any influence on the content of the positions taken by the competent trade ministers/negotiators. In fact, some have argued that deference to the expertise of such domestic regulators (in particular, financial services regulators) can explain the tendency for service negotiations to be characterised by ‘strong doses of regulatory precaution’.³⁰ There are several reasons explaining such alleged regulators’ precaution. It may be based on legitimate regulatory concerns, such as the inability of the third country regulators to monitor the activities of their service suppliers operating abroad. It may be based on domestic regulators’ distrust in the ability of the competent trade negotiator to protect national regulatory autonomy. It may be based on the fact that domestic regulators are subject to significant pressures of regulatory capture by the specific industries that they regulate. Whatever the reason underlying such regulatory precaution, getting national regulators more directly involved in order to achieve greater service trade liberalisation is clearly a promising approach to overcoming regulatory diversity.

5 Domestic Regulation in Recent PTAs

In the last few years, bilateral and regional trade negotiation has witnessed an acceleration in the number of negotiations launched (and agreements being concluded), particularly in terms of the sizes of the participating economies. We now live in the era of the so-called ‘mega-regionals’, such as the Comprehensive and Progressive TPP (CPTPP) and the Regional Comprehensive Economic Partnership (RCEP). The number of trade agreements just signed by the European Union with some of the larger economies (see for example the CETA concluded with Canada, discussed further below, and the Japan-EU Economic Partnership Agreement) also offers a telling example of such a general trend.

²⁸ See Don Regan, ‘The meaning of “necessary” in GATT Article XX and GATS Article XIV: the myth of cost-benefit balancing’ (2007) *World Trade Review* 347; Panos Delimatsis, ‘Determining the Necessity of Domestic Regulations in Services: The Best is Yet to Come’ (2008) 19 *JIEL* 365.

²⁹ *Ibid* 397.

³⁰ Pierre Sauvé, ‘Been There, Not [Quite] [Yet] Done That: Lessons and Challenges in Services Trade’ (2006) NCCR Trade Regulation Working Paper n. 18, 7.

This section examines whether there have been any changes in the way that recent PTAs have addressed regulatory barriers to trade in services, when compared with the approach followed by the GATS and existing services PTAs. In particular, this section examines whether, and if so to what extent, recent PTAs have advanced on previous ‘Domestic Regulation’ disciplines.³¹ The present examination will focus on the following three recent trade agreements: the 2016 EU-Canada Comprehensive and Economic Trade Agreement (CETA), the 2018 Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)³² and the 2018 United States-Mexico-Canada Agreement (USMCA, replacing the 1993 NAFTA). The selection is driven in part by the fact that these agreements have been referred to as representing the ‘cutting-edge’ in terms of achieving trade or economic integration and in part because, among the contracting parties of these trade agreements, one can identify the countries that have been the strongest supporters of service trade liberalisation (such as the United States, the European Union, Japan and Canada).

Our analysis finds four sets of changes in these three recent PTAs. First, they expand in terms of details and coverage the ‘procedural safeguards’ relating to authorization or licensing procedures, which are only embryonically provided for in the GATS. Second, they rely less on ‘substantive standards’ in order to discipline the content of general service regulation. Third, two of the three PTAs adopt a novel strategy by encouraging State parties to follow certain ‘good regulatory practices’ in the development of domestic regulation affecting services (for example, coordination among domestic regulatory agency and regulatory impact assessments). Fourth, all three PTAs adopt a further novel strategy that focuses on encouraging various forms of ‘regulatory cooperation’ between the contracting parties (such as exchange of information, mutual recognition agreements, and joint sector specific committees composed of domestic regulators).

5.1 Strengthening Procedural Safeguards

All three agreements under review include more detailed disciplines imposing various procedural (i.e., due process) requirements with regard to authorization, licensing and qualification procedures compared to those found in the GATS and in many subsequent services PTAs. While these disciplines are normally framed in mandatory language (‘shall’), in two of the three agreements, the language is at times softened somewhat by the phrase ‘to the extent practicable’.

One underlying goal of such procedural safeguards is to preclude competent authorities from exercising their power of assessment in an arbitrary manner.³³ In terms of safeguards, Chapter 12

³¹ Accordingly, provisions on National Treatment, Market Access, MFN Treatment will not be examined.

³² When the 2016 TPP was abandoned after the United States decided to pull out, the remaining 11 contracting parties have signed the 2018 CPTPP. The latter agreement is for the most part identical to the 2016 TPP agreement minus a list of provisions which have been expressly suspended. Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) (30 December 2018) <<https://www.mfat.govt.nz/assets/CPTPP/Comprehensive-and-Progressive-Agreement-for-Trans-Pacific-Partnership-CPTPP-English.pdf>>

³³ See for example, Article 12.3.1 CETA (n 15).

on Domestic Regulation of CETA, for example, provides several procedural standards, including, inter alia, obligations (a) to inform, upon request, about the status of an application, (b) to provide an opportunity to correct minor errors and omissions in the application, (c) to set any fee charged for processing applications at a reasonable level, (d) to process application within a reasonable timeframe, (e) to inform the applicant of the reasons why an application has been rejected.³⁴

Article 10.8 CPTPP provides for a similar series of additional procedural safeguards with regard to authorization applications.³⁵ However, in contrast with the provisions in Article 12.3 CETA, Article 10.8 qualifies these procedural safeguards with the phrase ‘to the extent practicable’. This has likely the effect of softening such requirements.³⁶ Also, these various requirements do not apply to measures that are not subject to National Treatment and Market Access obligations as provided for in a party’s relevant schedule.

With regard to USMCA, Article 15.8 (paragraphs 2-8) provides many of the same procedural safeguards as those found in Article 10.8 CPTPP applicable where a party requires an authorization for the supply of a service. Like CPTPP, these requirements are often softened by the phrase ‘to the extent practicable’ and do not apply to measures listed in a party’s schedule.

In terms of facilitating the international provision of services, the strengthening of procedural safeguards for the direct benefit of service providers is certainly a positive development. Since the provision of many services is often made conditional on obtaining a license or authorization, making sure that licensing and authorization procedures comply with certain minimum due process standards will certainly make them more efficient and predictable and thus increase the confidence of foreign service suppliers to trade. Suppliers’ confidence will be even stronger when such standards are cast in strict, binding language and subject to dispute settlement.

5.2 Less Reliance on Substantive Standards

Aside from extending the procedural safeguards, all three PTAs rely much less on imposing general substantive principles with regard to the content of domestic regulations as a tool to liberalise trade in services. While some of the less controversial standards contained in the GATS (and subsequent PTAs) are still present,³⁷ the three recent agreements make no direct reference to the potentially

³⁴ Article 12.3.5-16 CETA (n 15). Similar provisions are also included in the Chapter 13 of CETA on financial services, see Art 13.11.4.

³⁵ See paragraphs 4-6 of Article 10.8 CPTPP (n 32).

³⁶ A similar approach can be seen with regard to transparency and procedural safeguards provided for in Chapter 11 of CPTPP on Financial services: while they go beyond, at least in details, the requirements provided in the GATS, the language is often softened by the qualifier ‘to the extent possible’. See Article 11.13 CPTPP (n 32).

³⁷ For example, Article 15.8 USMCA on Development and Administration of Measures requires each party to ensure that licensing and qualification requirements and procedures are ‘based on criteria that are objective and transparent’ including ‘competence and ability to supply a service or potential health or environmental impacts of an authorization’. Agreement Between the United States of America, the United

more intrusive requirement that domestic regulation ‘do not constitute unnecessary barriers to trade in services’.³⁸

An exception to this general trend of avoiding substantive standards may perhaps be found in the so-called ‘prudential carve-out’ with regard to the financial service sector. At least Chapter 13 on Financial Services of CETA appears to have tightened the ‘prudential carve-out’ somewhat, by subjecting the use of prudential measures to the ‘reasonableness’ standard. Article 13.6.1 expressly permits a Party to adopt or maintain measures for prudential reasons as long as these measures are ‘reasonable’. It should nevertheless be highlighted that this may not represent a dramatic change from WTO law. While the adjective ‘reasonable’ is not included in the prudential carve-out contained in the GATS Annex on Financial Services, the Panel Report in *Argentina – Financial Services* appears to have interpreted the provision as requiring a similar reasonableness-based review in order to determine whether the measure at issue relates to one of the permitted grounds for prudential measure.³⁹ However, both the prudential carve-out in Article 11.11 CPTPP as well as in Art 17.11 USMCA do not follow the CETA path and are instead drafted very similarly to the GATS Annex on Financial Services, in the sense that there are no explicit obligations of ‘reasonableness’ or ‘necessity’.⁴⁰

This move away from general substantive standards, particularly the necessity test, shows a growing scepticism in pursuing liberalisation of trade in services by imposing general standards that limit the content of future regulatory measures of general application (also referred to as ‘content-based’ standards). First, there are still profound divisions among WTO Members with regard to the negotiation of horizontal substantive disciplines on domestic regulation pursuant to Article VI:4 GATS. Some Members, particularly developing and least developed countries, are still expressing ‘growing preoccupation’ concerning the potential adoption of disciplines (such as those imposing that regulation be ‘objective’ or not be ‘the least burdensome’) that are highly intrusive in the domestic domain. They are concerned that such obligations will require trade considerations

Mexican States, and Canada (USMCA) (signed 30 November, 2018) <<https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between>> This language is taken almost verbatim from Article VI:4(a) GATS.

³⁸ There is no reference to a ‘necessity’ requirement in the Domestic Regulation chapter in CETA (n 15), and an indirect one in Article 10.8.2 on Domestic Regulation in CPTPP (n 32).

³⁹ WTO, *Argentina: Measures Relating to Trade in Goods and Services – Report of the Panel*, (30 Sept 2015) WT/DS453/R; the panel held that for a measure to be taken ‘for’ prudential reasons, there must ‘be a rational relationship of cause and effect between the measure and the reason for it’ in fact. Ibid. para. 7.889. Interestingly, the CETA provision does not go as far, in terms of disciplining government action, as its equivalent in other EU agreements, such as the EU-Korea and EU-Singapore FTAs, which include a ‘not more burdensome than necessary’ requirement. See Art 8.50.2, EU-Singapore Trade and Investment Agreements (signed 19 October 2018) <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=961>>.

⁴⁰ Paragraph 1 of Article 11.11 on Exceptions provides as follows: ‘Notwithstanding any other provisions of this Chapter ..., a Party shall not be prevented from adopting or maintaining measures for prudential reasons, including for the protection of investors, depositors, policy holders, or persons to whom a fiduciary duty is owed by a financial institution or cross-border financial service supplier, or to ensure the integrity and stability of the financial system.’

to prevail over legitimate policy objectives of domestic regulation such as access to public services, employment considerations, macro-economic motivations and social and cultural considerations. According to these views, these disciplines could seriously constrain the capacity of States to effectively regulate services.⁴¹

There are also concerns with regard to the soundness of developing horizontal (non-sector-specific) disciplines imposing substantive standards on measures of general application in light of the considerable diversity of service sectors and the various objectives underlying domestic regulation.⁴² The open-ended nature of such general standards and thus the inevitable reliance on an adjudicator for their interpretation and application amplifies such concerns.

Interestingly, and in line with the more recent concerns with the way general substantive standards are implemented, the CPTPP (Article 11.22) introduces a novel procedure when, in the context of an investor-State dispute (under Chapter 9 on Investment), the respondent invokes the prudential carve-out as a defence. According to this procedure, the issue of whether and to what extent the prudential carve out is a valid defence to the specific claim, is left to the binding, joint determination by the financial regulatory authorities of the respondent and the Party of the claimant. In other words, this procedure confirms the recent uneasiness of attributing to dispute settlement panels the task of giving meaning to open-ended general standards and instead the contracting parties attribute an important role to national regulators in determining the existence of a prudential measure.

5.3 A Turn to ‘Good Regulatory Practices’

In contrast to the lesser emphasis on substantive standards, one of the key innovations of the CPTPP and USMCA (which applies to both trade in goods and services) is the emphasis on ‘good regulatory practices’, which is found respectively in Chapter 25 on Regulatory Coherence and Chapter 28 on Good Regulatory Practices. The express aim of these provisions is to improve the quality of the contracting parties’ domestic regulation by identifying and encouraging best practices ‘in the process of planning, designing, issuing, implementing and reviewing regulatory measures’.⁴³ Accordingly, rather than imposing general standards on the content of domestic regulation, these chapters focus on prescribing the regulatory processes that should be undertaken in developing regulation. In other words, rather than relying on content-based (or output-oriented) standards, the CPTPP and USMCA demonstrate a turn to process-based (or input-oriented) standards.⁴⁴

⁴¹ See Working Party on Domestic Regulation, Report of the Meeting held on 7 and 8 November 2017, S/WPDR/M/73 [1.66].

⁴² Delimatis (n 1) 115.

⁴³ Article 25.2 CPTPP (n 32).

⁴⁴ See generally Ching-Fu Lin & Han-Wei Liu, ‘Regulatory Rationalisation Clauses in FTAs: A Complete Survey of the US, EU and China’ (2018) 19 Melbourne Journal of International Law 149.

The underlying premise (or assumption), expressly acknowledged by the two chapters, is that the implementation of such practices will in turn facilitate international trade, investment and economic growth as well as strengthen each Party's ability to achieve its public policy objectives, including health, safety and environmental goals (a so-called win-win situation).⁴⁵ In other words, good regulatory practices (which represent the key component of the United States' lead chapter on 'regulatory coherence') promise to address the adverse effects of domestic regulations on international trade without overly interfering with an individual state's right to regulate.

While the link between 'good regulatory practices' and trade liberalisation that these PTAs establish is as yet untested, it also raises concerns. One set of concerns revolves around the fear that exporting US style regulatory practices affording privileges to corporate interests may render regulatory agencies more vulnerable to capture and thus ultimately limit the States' right to regulate in the public interest.⁴⁶ Another (opposite) set of concerns is that elevating Western-style good regulatory practices to an international obligation might (a) represent a rather heavy financial and technical burden for some (in particular developing) countries⁴⁷ and (b) undercut domestic policy choice to reject or limit the application of concepts such as transparency or stakeholder participation for other (in particular non-Western) countries.⁴⁸

It is not surprising that, while in principle, Chapter 25 CPTTP and Chapter 28 USMCA apply to any measure of general application related to any matter covered in the agreement (including measures affecting trade in services),⁴⁹ both chapters provide for certain limitations with regard to their scope. Article 25.1 CPTTP limits the scope of the chapter to 'covered regulatory measures', which each party shall notify no later than one year after the date of entry into force of the agreement. While Article 25.3 provides that 'each Party should aim to achieve significant coverage', it is not clear whether the actual coverage of the chapter will be substantial. It is worth pointing out that, in an annex to Chapter 28 USMCA, the parties have identified certain measures and certain entities that, for purposes of this chapter, are not considered 'regulations' and 'regulatory authorities', respectively.⁵⁰ This shows that both chapters grant contracting parties the ability to reduce the scope of application of good regulatory practices.

⁴⁵ See Article 28.2, paragraph 1 USMCA and Article 25.2 paragraph 1 CPTTP (n 32).

⁴⁶ See Markus Wagner, 'The Future of Sanitary and Phytosanitary Governance: SPS-Plus or SPS-Minus?' (2017) 51 *Journal of World Trade* 445, 465.

⁴⁷ Gabriel Gari, 'Recent Preferential Trade Agreements' Disciplines for Tackling Regulatory Divergence in Services' (forthcoming 2019) *World Trade Review*, 23. See also UNCTAD 'Transparency' (2012) UNCTAD Series on Issues in International Investment Agreements II, 23.

⁴⁸ Lin & Liu (n 44) 176.

⁴⁹ See Article 25.1 CPTTP (n 32) and Article 28.1 USMCA (n 37).

⁵⁰ For the United States, a measure concerning (i) a military or foreign affairs function of the US, (ii) agency management, personnel, public property, loans, grants, benefits, or contracts, (iii) agency organization, procedure, or practice, or (iv) financial services or anti-money laundering measures. For the United States, the only entity excluded is 'the President' (n 37).

Substantively, several ‘good regulatory practices’ are indeed identified in both chapters. For example, Article 25.4 CPTPP on ‘Coordination and Review Processes or Mechanisms’ encourages each CPTPP Party to establish internal processes or mechanisms to facilitate the effective interagency coordination and review of proposed regulatory measures. These processes and mechanisms should generally have the ability to (a) review proposed covered regulatory measures to determine the extent to which the development of such measures adheres to good regulatory practices and (b) strengthen consultation and cooperation among domestic agencies so as to identify potential overlap and duplication (Article 25.4, paragraph 2).

Moreover, Article 25.5 CPTPP on ‘Implementation of Core Good Regulatory Practices’ is aimed particularly at encouraging relevant regulatory agencies to conduct regulatory impact assessments when developing proposed regulatory measures. These impact assessments should, among other things, (a) assess the need for a regulatory proposal, (b) examine feasible alternatives, (c) explain the grounds for selecting a specific alternative, and (d) rely on the best reasonably obtainable existing information (Article 25.5, paragraph 2). Article 25.5 specifies other good regulatory practices such as ensuring that (i) regulations are clearly and concisely written; (ii) the public has access to information on new regulatory measures, if possible online; (iii) existing regulatory measures are periodically reviewed to determine if they remain the most effective means of achieving the desired objective; and (iv) CPTPP governments provide public notice annually of all regulatory measures they expect to take the following year.⁵¹

Chapter 28 of USMCA includes many of the same good regulatory practices found in the CPTPP including (1) adopting internal processes or mechanisms providing for consultation, coordination and review in the development of regulations (Article 28.4 USMCA) (2) encouraging the use of regulatory impact assessments when developing proposed regulations (Article 28.11) and (3) ensuring that those regulation are clear, concise and easy for the public to understand (Article 28.8).

However, Chapter 28 USMCA seems to expand, at least in terms of details, on the good regulatory practices referred to in CPTPP, for example with regard to the information underlying regulatory authorities’ action (Art 28.5), the publication of future regulations (Art 28.6),⁵² the ability of interested parties to comment on envisaged regulation (Art 28.9) and the establishment of procedures for retrospective review of regulation (Art 28.13).

There is a crucial difference between the CPTPP and USMCA when it comes to the legal strength of the chapter on ‘good regulatory practices’. While in the former all the provisions referring to such practices are cast in soft language (‘should’ rather than ‘shall’), in the latter most of them are

⁵¹ See Art 25.5, paragraphs 4-7 CPTPP (n 32).

⁵² Compare with the shorter provision in Article 25.5 paragraph 7 CPTPP (n 32).

drafted in stricter language.⁵³ This difference is reflected in the relationship of these provisions with their respective dispute settlement processes. While Article 25.11 CPTPP excludes the application of the (State-State) dispute settlement mechanism (in Chapter 28) for any matter arising under chapter 25, Article 28.20 USMCA extends the application of the (State-State) dispute settlement mechanism (in Chapter 31) to the chapter on good regulatory practices. However, Article 28.20, paragraph 3, limits recourse to dispute settlement for a matter arising under the good regulatory practice chapter ‘to address a sustained and recurring course of action or inaction that is inconsistent with a provision of this chapter.’ The difference in legal strength and enforceability of the provisions on good regulatory practices in the two trade agreements may be seen as a function of the level of comfort with such practices of the various contracting parties involved. While politically and financially USMCA parties may be more comfortable with good regulatory practices, this may not be the case with regard to several of the CPTPP parties.

5.4 Envisaging International Regulatory Cooperation

Another key innovation in all three PTAs revolves around regulatory cooperation between the contracting parties. While reliance on procedural safeguards and good regulatory practices focus on the quality of the domestic regulatory processes, regulatory cooperation implies an international element.⁵⁴ Like the focus on good regulatory practices, international regulatory cooperation represents a novel approach in addressing regulatory diversity for purposes of liberalisation trade in services.

Chapter 21 of CETA on Regulatory Cooperation is perhaps one of the most innovative chapters in the EU-Canada agreement. The overall objective of the chapter seems to be to address ‘regulatory diversity’, which represents one of the key challenges in achieving further liberalisation (both in trade in goods and services). In particular, the chapter expressly focuses on building trust and mutual understanding, minimising administrative costs, reducing duplicative regulatory requirements, and encouraging compatible regulatory approaches.⁵⁵ A Regulatory Cooperation Forum (RCF) is established in order ‘to facilitate and promote regulatory cooperation between the Parties in accordance with this Chapter.’⁵⁶

The Chapter provides for an indicative list of regulatory cooperation activities that the parties are encouraged to undertake including, among others, bilateral discussion on regulatory governance, consultation and exchange of information, sharing proposed technical regulations, examining opportunities to minimise unnecessary divergences in regulations, conducting post-

⁵³ For example, Article 28.6 on Early Planning, Article 28.9 on Transparent Development of Regulations, Article 28.11 on Regulatory Impact Assessment, Article 28.13 on Retrospective Review and Article 28.15 on Information about Regulatory Processes (n 37).

⁵⁴ Gari (n 47) 23.

⁵⁵ See Article 21.2 on Principles and Article 21.3 on Objectives of Regulatory Cooperation of CETA(n 32).

⁵⁶ See Article 21.6 CETA (n 15).

implementation reviews of regulations or policies, and identifying the appropriate approach to reduce adverse effects of existing regulatory differences on bilateral trade and investment in sectors identified by a Party, including through greater convergence, mutual recognition, minimising the use of trade and investment distorting regulatory instruments, and the use of international standards.⁵⁷

Chapter 21 also prescribes a few specific requirements aimed at enhancing regulatory convergence between the contracting parties. For example, Article 21.5 CETA provides that ‘with a view to enhancing convergence and compatibility between the regulatory measures of the Parties, each Party shall, when appropriate, consider the regulatory measures or initiatives of the other Party on the same or related topics.’ Furthermore, Article 21.7 requires the parties to ‘periodically exchange information of ongoing or planned regulatory projects in their areas of responsibility’, including information on ‘new technical regulations and amendments to existing technical regulations that are likely to be proposed or adopted.’

Overall, the scope of the regulatory cooperation activities envisaged in Chapter 21 CETA is quite broad as it goes from mere ‘exchanges of information’ up to ‘mutual recognition’ and ‘use of international standards’. However, for the most part, this chapter does not contain provisions that, strictly speaking, oblige the contracting parties to undertake any of these activities, as these are merely ‘encouraged’.

A similar soft, best-endeavour approach to regulatory cooperation is also employed in the CPTPP. Chapter 25 CPTPP on Regulatory Coherence also covers regulatory cooperation as Article 25.2 CPTPP defines ‘regulatory coherence’ also to include ‘efforts across governments to enhance regulatory cooperation’ with the aim of promoting ‘international trade and investment, economic growth and employment’.

In terms of institutions, Article 25.6 CPTPP establishes the ‘Committee on Regulatory Coherence’, composed of government representatives of the Parties, with the task of facilitating the implementation and operation of the chapter, including identifying future potential sectoral initiatives and cooperative activities. With regard to the possible regulatory cooperation activities envisaged in the CPTPP, Chapter 25 is certainly much less ambitious than Chapter 21 CETA. Article 25.7 CPTPP on Cooperation identifies the following possible cooperation activities: ‘(a) information exchanges, dialogues or meetings with other Parties; (b) information exchanges, dialogues or meetings with interested persons, including with SMEs, of other Parties; (c) training programmes, seminars and other relevant assistance; (d) strengthening cooperation and other relevant activities between regulatory agencies; and (e) other activities that Parties may agree.’

⁵⁷ Article 21.4 CETA (n 15).

Another noteworthy feature is the way that domestic regulators are brought in when it comes to international cooperation. For example, CPTPP Annex 10-A on Professional Services is aimed at encouraging cooperation between the relevant regulatory bodies of each contracting parties. In particular, the Annex identifies certain General Provisions envisaging consultation among relevant national bodies aimed at establishing dialogues among such bodies with a view to recognising professional qualifications and facilitating licensing procedures. The Annex also envisages a party implementing a temporary or project specific licensing regime based on a foreign supplier's home license.⁵⁸ When it comes to financial services, Article 11.19 establishes a Committee on Financial Services and provides that the 'principal representative of each Party shall be an official of the Party's authority responsible for financial services' rather than just a government representative. While involvement of domestic regulators is provided expressly only with regard to these two sectors, it is certainly an important development for two reasons. It shows that further level of integration may need to be pursued on a sector-specific basis, first, and through the involvement of domestic regulators, second.

Regulatory cooperation is also envisaged in USMCA, as part of the chapter on Good Regulatory Practices. The chapter is premised on the similar assumption that dialogue between the parties' respective regulatory authorities will promote regulatory cooperation, which will in turn facilitate trade and investment and achieve regulatory objectives.⁵⁹ In terms of the mechanisms that can help minimize unnecessary regulatory differences and facilitate trade or investment, Article 28.17 provides for a slightly more elaborated list of potential regulatory cooperation activities (compared to the one in CPTPP) including 'early state formal or informal exchange of information', 'exploring possible common approaches', 'seeking to collaborate in relevant international fora', 'co-funding of research in support of regulations', 'facilitating the greater use of relevant international standards', 'coordinating in the implementation of regulations and sharing compliance information'.⁶⁰

Despite the fact that regulatory cooperation envisaged in USMCA is in principle subject to the general dispute settlement mechanism, such cooperation remains a soft obligation as the relevant provisions are casted in non-mandatory language ('each Party should encourage', 'The Parties recognize that a broad range of mechanisms ... exists'). This suggests that international regulatory cooperation in the context of USMCA, as well as CETA and CPTPP, will actually take place only if, and to the extent, the contracting parties are willing to pursue it.

⁵⁸ Within the same Annex on Professional Services, there are specific sections for engineering, architectural and legal services aimed at facilitating/encouraging similar cooperation. Furthermore, the Annex establishes a Professional Services Working Group to facilitate such cooperation.

⁵⁹ Article 28.17, n 37.

⁶⁰ Similar to CETA and CPTPP, USMCA establishes a Committee on Good Regulatory Practices composed of government representatives for each Party with the aim to enhance the communication and collaboration among the parties in matters relating to this chapter, including encouragement of regulatory compatibility and regulatory cooperation. Article 28.18, n 37.

In many ways, it is not surprising that international regulatory cooperation is envisaged in these recent PTAs as an entirely voluntary endeavour. Such cooperation may in fact raise some of the same issues that have been at the source of the scepticism with regard to general substantive standards. These revolve around the tension between the cooperative aims of eliminating burdensome and unnecessarily discriminatory or duplicative regulatory obstacles to services trade and the competitive motivation of the EU and US to consolidate their geopolitical influence and ‘export’ the regulatory system that most benefits their domestic industries. In this sense, process-based obligations such as transparency, stakeholder involvement and impact assessment (examined in the previous section on ‘good regulatory practices’) differ markedly from obligations for regulatory cooperation; whilst the former promote information exchange, the latter can lead to countries being pressurized into adopting lowered standards to avoid competitive disadvantages.⁶¹ The development of such obligations in these large PTAs thus provides a potential challenge for developing countries, in particular, for whom negotiating inequalities are more stark, as the United States and EU attempt to introduce these approaches more widely.⁶² As has been examined in the chapter on Sanitary and Phytosanitary Standards (SPS) of the CPTPP,⁶³ substantive convergence is far from the only means by which countries can exert influence over each other’s regulation. Mandating particular regulatory approvals processes and approaches can also constitute a powerful means for exerting control over trade partners’ regulation, as conformity with such obligations may require deep structural reform in governmental decision-making.

6 Concluding Remarks

Compared to the GATS (as well as most PTAs concluded thereafter), the three PTAs under review (CETA, CPTTP and USMCA) demonstrate a noteworthy level of further elaboration and innovation in addressing regulatory impediments to trade in services.

Our examination shows that the approach is marked, on one hand, by a continued standstill in the development of horizontal legal standards such as to avoid unnecessary barriers to trade in services and, on the other, by a new focus on process-based standards and regulatory cooperation. In other words, while these PTAs do not complete the unfinished business of the GATS when it comes to domestic regulation, they contain what Bull describes as a ‘flourishing of innovations’,⁶⁴ particularly in areas we have categorised as good regulatory practices and international regulatory cooperation. These proscribe behavioural norms, but for the most part are cast in soft or aspirational terms, and in some cases function as modes of ongoing negotiation and cooperation, allowing for a ‘living agreement’. In this sense, rather than constituting ‘deep’ integration, these

⁶¹ Reeve T. Bull, et al. ‘New approaches to international regulatory cooperation: the challenges of TTIP, TPP and Mega-Regional Trade Agreements’ (2015) 78 *Law and Contemporary Problems* 1, 25.

⁶² Billy Melo Araujo, ‘Regulating Services Through Trade Agreements – A Comparative Analysis of Regulatory Disciplines included in EU and US Trade Agreements’ (2014) 6(2) *Trade Law and Development* 394, 415.

⁶³ Wagner (n 46).

⁶⁴ Bull (n 61) 29.

agreements merely extend the emphasis of the GATS and early PTAs on procedural obligations for transparency and notification coupled with continued negotiation to bring about deeper sectoral cooperation. They maintain movement toward regulatory integration through ongoing communication between the Parties to the PTA (and importantly their regulatory agencies) through a cooperative rather than adversarial approach to resolving regulatory diversity (though it does not eliminate negotiating inequalities, an issue examined further below). In so doing, they de-emphasise the role and importance of the adjudicator in interpreting the incomplete contract, avoiding the sovereignty problem created by a cross-cutting ‘necessity’ test, which retains ample room for interpretation.

However, given their non-binding/best endeavour nature, the new strategy’s success will depend on the strength of the contracting parties’ political will to undertake such regulatory changes and pursue such international cooperation, including the willingness of national regulators and domestic industries to take part in such developments. Similarly, it is difficult to predict *the extent of* the take up and accordingly any trade liberalisation effect stemming from these various chapters. For example, CETA regulatory cooperation envisages in principle various techniques for international regulatory cooperation including mutual recognition, convergence, harmonisation, and international standards.⁶⁵ However, the extent of the trade liberalisation impact will depend on the content and scope of such techniques. Crucially, any of those techniques comes with complex technical (and political) issues, which will need to be addressed in the future.⁶⁶

The novelty of a turn to good regulatory practices and regulatory cooperation highlights the need and difficulty in finding a compromise between achieving further trade liberalisation and safeguarding States’ regulatory power, the overarching challenge identified above. In this regard, it has been suggested that the focus on good regulatory practices and international cooperation is ‘about helping regulators become more efficient and effective in achieving their goals, and not primarily about removing or reducing ‘non-tariff barriers to trade’.’⁶⁷ However, even assuming that the new strategy will eventually have beneficial effect in terms of liberalising trade in services, a strategy based on good regulatory practices and international regulatory cooperation brings its own challenges to domestic policy and regulatory space, particularly, but not exclusively, of developing countries, that should not be underestimated.

⁶⁵ Art 21.4 (r) (n 15) includes among the possible activities to be undertaken the following: ‘identifying the appropriate approach to reduce adverse effects of existing regulatory differences on bilateral trade and investment in sectors identified by a Party, including, when appropriate, through greater convergence, mutual recognition, minimising the use of trade and investment distorting regulatory instruments, and the use of international standards, including standards and guides for conformity assessment’. See further OECD *International Regulatory Co-operation: Addressing Global Challenges* (2013).

⁶⁶ See Bull (n 60); Alberto Alemanno, ‘The Regulatory Cooperation Chapter of the Transatlantic Trade and Investment Partnership: Institutional Structures and Democratic Consequences’ (2015) 18 *JIEL* 625; Mavroidis (n 24).

⁶⁷ Peter Chase & Jacques Pelkmans, ‘This time it’s different: Turbo-charging regulatory cooperation in TTIP’ (June 2015) CEPS-CTR, 1.