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ORIGINAL ARTICLE

Recent Preferential Trade Agreements' Disciplines for Tackling Regulatory Divergence in Services: How Far beyond GATS?

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Abstract

The paper reviews the disciplines for tackling regulatory divergence in services included in 23 PTAs entered into by China, the EU, Japan, and the USA. It identifies a remarkable expansion in the number and extent of disciplines on regulatory transparency, regulatory coherence, and regulatory cooperation compared with GATS, which, subject to adequate implementation, will allow these agreements to deliver a degree of market integration well beyond what could be achieved simply by removing market access restrictions and discriminatory measures from the rule book. However, the paper calls for some restraint when estimating the potential impact of these disciplines, mainly because of the soft language used for phrasing some of them and the anticipated high implementation costs, particularly for countries with unsophisticated domestic legal systems.

Keywords: trade in services; transparency; regulatory coherence; regulatory cooperation

1. Introduction

When it comes to the liberalization of trade in services, reciprocal negotiations of specific commitments on market access and national treatment have a limited role to play. At best, they have contributed to consolidate applied regulatory policies.[1] But conditions for the effective integration of service markets cannot be met just by removing market access restrictions and discriminatory measures from the rule book. The regulatory intensity of service markets makes trade in services particularly vulnerable to regulatory divergence. Information asymmetries, negative externalities, or imperfect competition, and a range of public policy reasons, justify all sorts of regulatory interventions. Inevitably, the extent and modalities of such interventions vary across jurisdictions in accordance with socio-economic and political factors, cultural values, and legal traditions. As a result, the same service or service supplier remains subject to different regulations in different jurisdictions.

The need to adjust supply to non-discriminatory but different import country licenses or qualification requirements raises the cost of trade in services,[2] not to mention the additional

[1]See, e.g., B. Hoekman and A. Mattoo (2013), 'Liberalizing Trade in Services: Lessons from Regional and WTO Negotiations', EUI Working Papers, RSCAS 2013/34.

[2]See, for example, H. Kox and A. Lejour (2005), 'Regulatory Heterogeneity as Obstacle for International Services Trade', CPB Discussion Paper No. 49, CPB Netherlands Bureau for Economic Policy Analysis, The Hague, www.cpb.nl/en/publication/regulatory-heterogeneity-obstacle-international-services-trade; C. Schwellnus (2007), 'The Effects of Domestic Regulation on Services Trade Revisited', CEPII Working Paper No. 2007–2008, Paris: Centre d'Etudes Prospectives et d'Informations Internationales; H. Kox and H. K. Nordås (2007), 'Services Trade and Domestic Regulation', OECD Trade Policy Working Paper No. 49, OECD Publishing, http://dx.doi.org/10.1787/154365452587; H. Kox and H. K. Nordås (2009), 'Regulatory Harmonization and Trade in Services: Volumes and Choice of Mode', FREIT Trade Working Paper No. 040; E. Van der Marel and B. Shepherd (2013), 'Services Trade, Regulation, and Regional Integration: Evidence from

problems caused by redundant or unclear regulations and arbitrary or inefficient regulatory practices. The problem is here to stay. In fact, the extent of regulatory diversity is expected to grow due to technological reasons – the digital economy creates a whole new platform for regulation – and consumer demands – the rise of the middle class in emerging markets is accompanied by a rise of demand on stronger safety and environmental protections.[3]

Addressing the trade costs stemming from 'pure' regulatory heterogeneity of services regulations, i.e. differences that are not in any way attributable to protectionist or anti-competitive goals,[4] is a delicate task. It is uncontroversial that Preferential Trade Agreements (PTAs) must address regulatory protectionism, whether it is embedded in domestic regulations themselves, or in the way they are administered and applied.[5] But it remains debatable how far they should go in addressing trade costs stemming from strictly non-discriminatory regulatory divergences.[6] Avoiding tackling the problem altogether, for the sake of preserving the right to regulate the supply of services in pursuance of legitimate public policy objectives, would render trade agreements incapable of delivering effective market integration beyond applied regimes. Yet, opting for trade disciplines that push the quest to iron out disparities between strictly non-discriminatory regulations too far could restrict the right to regulate beyond what is politically acceptable.[7]

The drafters of the GATS opted to focus on the removal of quantitative and discriminatory restrictions, including only rudimentary tools for tackling regulatory divergence: basic transparency disciplines,[8] procedural disciplines for the application, administration and review of domestic regulations,[9] and a mandate for the negotiation of disciplines for the development of licensing requirements and procedures, qualification requirements and procedures, and technical standards.[10] Although these negotiations have recently picked up some pace,[11] this momentum has only served to highlight the profound differences that exist among WTO Members on the extent and methods for addressing trade costs stemming from non-discriminatory regulations.[12]

At the regional level, however, it appears that the pendulum is swinging in a different direction. A cursory review of the latest PTAs reveals a whole new range of disciplines designed to iron out regulatory disparities on services, ranging from the expansion of transparency disciplines to a

Sectoral Data', *World Economy*, 36(11): 1393–1405. The recently created OECD database on regulatory barriers to trade in services has the potential to make a valuable contribution on this matter, but it is still at early stages. See H. Nordås (2016), 'Services Trade Restrictiveness Index (STRI): The Trade Effect of Regulatory Differences', OECD Trade Policy Paper No. 189, Paris: OECD Publishing, http://dx.doi.org/10.1787/5jlz9z022plp-en. For professional services, see A. Mattoo and D. Mishra (2009), 'Foreign Professionals in the United States: Regulatory Impediments to Trade', *Journal of International Economic Law*, 12(2), 435–456.

[3]C. Malström (2015), 'Trade in the 21st century: The challenge of regulatory convergence', 19 March, http://trade.ec.europa.eu/doclib/docs/2015/march/tradoc_153260.pdf.

[4]A. Mattoo (2015), 'Services Trade and Regulatory Cooperation, E15 Initiative', Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum, July 2015, at 5, www.e15initiative.org/.

[5]See A. O. Sykes (1999), 'Regulatory Protectionism and the Law of International Trade', *The University of Chicago Law Review*, 66(1).

[6]For a thorough discussion of the nature of the balancing exercise at stake in the GATS context, see P. Delimatsis (2008), *International Trade in Services and Domestic Regulation*, Oxford: Oxford University Press.

[7]The BREXIT affair is an example. One of the arguments for those who supported to leave the EU was the excessive intrusion of EU law on Members' right to regulate and the need for the UK to take back control of its own laws. See Prime Minister Lancaster Speech, www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech, 17 January 2017.

[8]GATS, Article III.

[9]Ibid., Articles VI.1–VI.3 and VI.6.

[10]Ibid. Articles VI.4 and VI.5. For a thorough discussion on GATS disciplines on regulatory diversity, see Delimatsis, supra n. 6.

[11]This is reflected in the seven textual submissions tabled since September 2016: *Administration of Measures* (JOB/SERV/239/Rev.2), *Development of Measures* (JOB/SERV/250/Rev.1 and JOB/SERV/252/Rev.2), *Transparency* (JOB/SERV/251/Rev.2), *Technical Standards* (JOB/SERV/257/Rev.2), and *Gender Equality* (JOB/SERV/258/Rev.3), *Development for LDCs* (JOB/SERV/261).

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

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whole new spectrum of disciplines on regulatory coherence and regulatory cooperation.[13] These changes are part of a broader trend characterized by the increasing number of services PTAs.[14]

Before discussing the merits of this trend, there is a need to establish the facts: what are the characteristics and the extent of these new trade disciplines? Is it simply about an expansion of existing GATS provisions ('GATS plus') or do they cover matters not addressed by the multilateral agreement ('GATS extra')? Are the new disciplines legally enforceable? What are the similarities and differences between them across PTAs? Surprisingly, in spite of the increasing relevance of services PTAs, and the potential implications of these new disciplines for the right to regulate, there is relatively scant literature covering this matter. Most of the literature on services PTAs is focused on assessing the extent of their market access and national treatment preferences.[15] Few studies focus exclusively on PTAs' services rules, let alone on those rules specifically designed to tackle regulatory divergence in services.[16] Against this background, the aim of this paper is to carry out a comprehensive and comparative review of recent PTA disciplines aimed at tackling regulatory divergence in services, and to offer a preliminary assessment of the likelihood of these PTAs cutting down trade barriers beyond applied regimes.

At the outset, some clarification of the terminology used by this paper is required. Polanco and Sauvé use the term 'regulatory convergence' to refer to the 'overarching notion of reducing unnecessary regulatory incompatibilities between countries in order to facilitate trade and investment',[17] and identify different mechanisms to achieve regulatory convergence, with different nomenclatures – regulatory cooperation, coherence, improvement, coordination, or harmonization, among others.

[13]For example, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), the Comprehensive Economic and Trade Agreement between Canada and the European Union and its Member States (CETA), and the Agreement between the European Union and Japan for an Economic Partnership (EU–JPN) are among the first PTAs to include horizontal chapters on transparency, regulatory coherence, and/or regulatory cooperation.

[14]In 2000, there were 79 PTAs in force which had been notified to the WTO, out of which only eight (10%) covered trade in services. In 2008, there were 176 PTAs in force, out of which 62 (35%) covered trade in services. At the time of writing, there are 287 PTAs in force, out of which 145 (50%) cover trade in services. See http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx (accessed 22 July 2018).

[15]See, inter alia, M. Roy, J. Marchetti, and H. Lim (2007), 'Services Liberalization in the New Generation of Preferential Trade Agreements (PTAs): How Much Further than the GATS?', *World Trade Review*, 6(2): 155–192; J. Marchetti and M. Roy (2008), 'Services Liberalization in the WTO and in PTAs', in J. Marchetti and M. Roy (eds.), *Opening Markets for Trade in Services: Countries and Sectors in Bilateral and WTO Negotiations*, Cambridge: Cambridge University Press and WTO; P. Sauvé and A. Shingal (2011), 'Reflections on the Preferential Liberalization of Services Trade', *Journal of World Trade*, 45(5): 953–963; M. Roy (2014), 'Services Commitments in Preferential Trade Agreements: Surveying the Empirical Landscape', in P. Sauvé and A. Shingal (eds.), *The Preferential Liberalization of Trade in Services: Comparative Regionalism*, Cheltenham: Edward Elgar; P. Sauvé and A. Shingal (2016), 'Why Do Countries Enter into Preferential Agreements on Trade in Services? Assessing the Potential for Negotiated Regulatory Convergence in Asian Services Markets', *Asian Development Review*, 33(1): 1–18; A. Shingal, M. Roy, and P. Sauvé (2017), 'Do WTO+ Commitments in Services Trade Agreements Reflect a Quest for Optimal Regulatory Convergence? Evidence from Asia', *The World Economy* (April): 1–27; P. Lamprecht and S. Miroudot (2018), 'The Value of Market Access and National Treatment Commitments in Services Trade Agreements', OECD Trade Policy Papers 21.

[16]See Working Party on Domestic Regulation, Overview of Regulatory Provisions in Services Economic Integration Agreements, Informal Note by the Secretariat, JOB(05)175, 14 September 2005; G. Wang (2011), 'China'S FTAs: Legal Characteristics and Implications', *The American Journal of International Law*, 105: 493–516; M. Araujo (2014), 'Regulating Services Trade Agreements: A Comparative Analysis of Regulatory Disciplines Included in EU and US Free Trade Agreements', *Trade Law and Development*, 6(2); R. Chanda (2014), 'Mapping the Universe of Services Disciplines in Asian PTAs', in P. Sauvé and A. Singhal (eds.), *Preferential Liberalization of Trade in Services*, Cheltenham: Edward Elgar; P. Latrille (2016), 'Services Rules in Regional Trade Agreements: How Diverse and How Creative as Compared to the GATS Multilateral Rules?', in R. Acharya (ed.), *Regional Trade Agreements in the Multilateral Trading System*, Cambridge Univeresity Press; M. Wu (2017), 'Digital Trade-Related Provisions in Regional Trade Agreements: Existing Models and Lessons for the Multilateral Trade System', International Centre for Trade and Sustainable Development); H. Gao (2018), 'Regulation of Digital Trade in US Free Trade Agreements: From Trade Regulation to Digital Regulation', *Legal Issues of Economic Integration*, 45: 47–70.

[17]See R. Polanco Lazo and P. Sauvé (2017), 'The Treatment of Regulatory Convergence in Preferential Trade Agreements', *World Trade Review*, 17(4): 575–607.

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They rightly note that scholars use these concepts interchangeably, without much clarification of underlying differences – if any.[18] The vocabulary found in PTAs is also inconsistent and ambiguous.

This paper will focus on three types of trade disciplines aimed at tackling regulatory divergence in services: (a) disciplines on regulatory transparency, i.e. provisions prescribing duties aimed at disseminating information about regulatory measures affecting trade in services; (b) disciplines on regulatory coherence, i.e. provisions prescribing minimum standards and principles that must be observed when developing, applying, administering, and reviewing domestic regulations; and (c) disciplines on international regulatory cooperation, i.e. provisions aimed at encouraging dialogue, exchange of information, and other forms of cooperation between domestic regulators. As with any classification of legal concepts, there are no hard boundaries between them. Further specifications are provided in the relevant sections below.[19]

The paper reviews 23 PTAs entered into by the four largest trading players in the world, i.e. China, EU, Japan, and USA, including some of the most comprehensive and innovative PTAs that have recently been signed. The sample consists of the last five PTAs signed by China and Japan, the last six PTAs signed by the USA, including the TPP,[20] and the last five PTAs signed by the EU, plus the text of the EU PTAs reflecting the outcome of the negotiations with Singapore and Vietnam, which are awaiting signature (see Table 1). Although the four of them have signed agreements covering trade in services that go back to the early 2000s, the period of analysis covers PTAs that go back to 2010 for China and EU, 2009 for Japan, and 2006 for USA. Clearly, this is not a representative sample of the universe of PTAs currently in force and no statistical inferences should be drawn from the information provided below. Notwithstanding the illustrative nature of this sample, given the relevance of these trading players[21] and the date of adoption of the agreements, it is not unreasonable to suggest that it provides a fair overview of the most recent developments of PTA disciplines on trade in services.

The article examines relevant provisions on regulatory transparency, regulatory coherence, and regulatory cooperation included in the services chapter, specific chapters on telecommunications, financial services, electronic commerce and movement of natural persons, and, where available, horizontal chapters on transparency and regulatory cooperation or regulatory coherence. It compares PTA disciplines with those of the GATS, identifying 'GATS plus', 'GATS extra', or 'GATS minus' developments, and compares similarities and differences across PTAs. In order to assess the likely impact of these provisions in tackling regulatory divergence, it also evaluates their legal enforceability.[22] The rest of the paper is organized as follows: section 2 focuses on regulatory transparency, section 3 on regulatory coherence, section 4 on regulatory cooperation, and section 5 concludes.

[18]Ibid., at 4.

[19]See sections 2.1, 3.1, and 4.1.

[20]The TPP was signed on 4 February 2016 and provides evidence of the USA position on the disciplines on trade in services up to the beginning of the Trump administration. On 23 January 2017, President Trump ordered the USTR to notify the TPP parties of the withdrawal of the United States as a signatory of the TPP and from the TPP negotiating process. On 8 March 2018, the remaining 11 TPP parties signed the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (hereinafter referred to as CPTPP). The CPTPP kept the TPP text almost unchanged, including the disciplines on trade in services.

[21]In 2016, the combined exports of China, EU, Japan, and USA accounted for 55% of world exports of commercial services, and their combined imports accounted for 52% of world imports of commercial services. See World Trade Statistical Review 2017, www.wto.org/english/res_e/statis_e/wts2017_e/wts17_toc_e.htm.

[22]Trade disciplines are classified as 'hard' or 'soft' according to the extent to which they are legally enforceable. This is a text-based classification. When the text of the provision includes an unqualified expression such as 'shall', it is regarded as 'hard'. By contrast, when the text qualifies the verb 'shall' by terms such as 'to the extent possible', or where there is an explicit textual exclusion of the said provision from the jurisdiction of the PTA enforcement mechanisms, then it is regarded as 'soft'. Such criteria are inspired by the methodology developed in H. Horn, P. C. Mavroidis, and A. Sapir (2010), 'Beyond the WTO? An Anatomy of EU and US Preferential Trade Agreements', *The World Economy*, at 1572–1573.

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Table 1. Recent preferential trade agreements from China, EU, Japan, and USA

Name	Code(!)	Date signature	Date entry into force
Free Trade Agreement between the Government of Australia and the Government of the People's Republic of China	CHN–AUS	17/06/2015	20/12/2015
Free Trade Agreement between the Government of the People's Republic of China and the Government of the Republic of Korea	CHN–KOR	15/06/2015	20/12/2015
Free Trade Agreement between the Swiss Confederation and the People's Republic of China	CHN–CHE	06/07/2013	01/07/2014
Free Trade Agreement between the Government of Iceland and the Government of the People's Republic of China	CHN–ISL	15/04/2013	01/07/2014
Free Trade Agreement between the Government of the People's Republic of China and the Government of the Republic of Costa Rica	CHN–CRC	08/04/2010	01/08/2011
Comprehensive and Progressive Agreement for Trans–Pacific Partnership*	CPTPP	08/03/2018	–
Agreement between the European Union and Japan for an Economic Partnership	EU–JPN	17/07/2018	–
Free Trade Agreement between the European Union and the Socialist Republic of Vietnam**	EU–VNM	–	–
Free Trade Agreement between the European Union and the Republic of Singapore***	EU–SGP	–	–
Comprehensive Economic and Trade Agreement between Canada and the European Union and its Member States	CETA	28/10/2016	21/09/2017
Trade Agreement between the European Union and its Member States and Colombia and Peru	EU–COL	26/06/2012	01/08/2013
Agreement establishing an Association between the European Union and its Member States and Central America	EU–CEN	29/06/2012	01/08/2013
Free Trade Agreement between the European Union and its Member States and the Republic of Korea	EU–KOR	06/10/2010	01/07/2011
Agreement between Japan and Mongolia for an Economic Partnership	JPN–MNG	10/02/2015	07/06/2016
Agreement between Japan and Australia for an Economic Partnership	JPN–AUS	08/07/2014	15/01/2015
Agreement between Japan and the Republic of Peru for an Economic Partnership	JPN–PER	31/05/2011	01/03/2012
Comprehensive Economic Partnership between the Republic of India and Japan	JPN–IND	16/02/2011	01/08/2011
Agreement on Free Trade and Economic Partnership between Japan and the Swiss Confederation	JPN–CHE	19/02/2009	01/09/2009

(*Continued*)

Table 1. (*Continued.*)

Name	Code(!)	Date signature	Date entry into force
Free Trade Agreement between the United States and the Republic of Korea	USA–KOR	30/06/2007	15/03/2012
United States Panama Trade Promotion Agreement	USA–PAN	28/06/2007	31/10/2012
United States Colombia Trade Promotion Agreement	USA–COL	22/11/2006	15/05/2012
United States Peru Trade Promotion Agreement	USA–PER	12/04/2006	01/02/2009
Agreement between the Government of the United States of America and the Government of the Sultanate of Oman on the Establishment of a Free Trade Area	USA–OMN	19/01/2006	01/01/2009

Notes: *Text signed on 8 March 2018, www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-concluded-but-not-in-force/cptpp/comprehensive-and-progressive-agreement-for-trans-pacific-partnership-text/#chapters.
**Text at the end of the negotiations as of January 2016. Subject to legal revision in order to verify the internal consistency and to ensure that the formulations of the negotiating results are legally sound. It will thereafter be transmitted to the Council of the EU and to the EP for ratification, http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437.
***Text presented by EU Commission to the Council on 18 April 2018, http://trade.ec.europa.eu/doclib/press/index.cfm?id=961.
!For ease of reference, other than CETA and CPTPP, we use country name abbreviations to refer to the PTAs based on the ISO 3166-1 alpha-3 three-letter country codes. For the European Union we use 'EU'. The partner under examination always go first.

2. Regulatory Transparency

2.1 Overview

Regulatory transparency supports informed and accountable rule-making practices. It fosters fair and effective governance, public confidence in regulatory performance, and economic efficiency.[23] Conversely, lack of transparency increases transaction costs, causes delays, fosters opaque and arbitrary decision-making practices, and increases the risk of duplications or over-regulation. From a trade perspective, regulatory transparency helps to raise awareness of the social and economic costs and benefits of domestic regulation.[24] It is an essential precondition to facilitate trade, particularly on regulatory intensive sectors, such as services. Quite sensibly, most trade agreements include disciplines on regulatory transparency.

Table 2 compares GATS and PTA disciplines on transparency applicable to services regulations, irrespective of their location within the agreement.[25] For the sake of clarity, transparency disciplines are classified into three sub-categories: duty to publish, duty to consult, and duty to inform. The table distinguishes disciplines phrased in hard terms (i.e. 'shall') from those phrased in soft terms (e.g. 'to the extent possible').[26]

2.2 Duty to Publish

GATS' duty to publish is prescribed by Article III.1. On scope, *rationae materiae,* it covers 'all relevant measures of general application which pertain to or affect the operation of this Agreement', including international agreements to which a Member is a signatory. On scope, *rationae personae*, it captures measures adopted by central governments, but not those adopted by regional and local governments and non-governmental bodies in the exercise of delegated powers.[27] Instead, it is for Members to take reasonable measures as may be available to them to ensure that these bodies publish the measures of general application they adopt.[28] Article III.1 also stipulates that the duty to publish must be discharged 'promptly' and, 'at the latest by the time of the measure enters into force', except in emergency situations. But Article III.2 softens these terms by acknowledging that there may be situations where the duty to publish may not be practicable. In such cases, the obligation is to resort to alternative means to make the information publicly available.[29] There is no specific reference to the right of interested persons to become acquainted with such measures.

As apparent from Table 2, all PTAs under examination include a hard horizontal duty to publish product and services regulations, which, in general terms, goes well beyond that of GATS. On scope, *rationae materiae,* most PTAs offer a more precise definition of the measures to be published.[30] Some PTAs even include 'judicial decisions' that may affect the operation of the Agreement within the scope of measures to be published.[31] On scope, *rationae personae*, most PTAs' duty to publish captures measures adopted by central, regional, or local governments

[23]K. Lida and J. Nielson (2003), 'Transparency in Domestic Regulation: Practices and Possibilities', in A. Mattoo and P. Sauvé (eds.), *Domestic Regulation and Services Trade Liberalization*, World Bank, at 8.

[24]Ibid.

[25]PTAs' disciplines on transparency applicable to services regulations are included in chapters on trade in services, chapters on specific service sectors (telecommunications and financial services), or modes of supply (electronic commerce and movement of natural persons), in stand-alone transparency chapters (e.g. USA PTAS, EU PTAS, CPTPP), in the 'General provisions' or 'Final provisions' chapter (e.g. Japanese PTAs and some Chinese ones) and in the 'Regulatory coherence' chapter (e.g. EU–JPN).

[26]See Table 2 Transparency.

[27]GATS I.3 (a).

[28]Ibid.

[29]GATS III.2

[30]See, e.g., EU–KOR, Article 12.1 and CETA, Article 27.1.

[31]CHN–CHE Article 1.5; All Japanese PTAs but JPN–AUS.

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Table 2. Transparency

	Duty to publish	Duty to provide reasonable period between publication and entry into force	Duty to publish proposed regulations	Duty to allow interested persons to comment	Duty to notify the other party	Duty to provide information upon request of the other party	Duty to provide information upon request from interested persons
GATS	H	–	–	–	H	H	–
CHN–AUS	H	–	S	S	S	H	–
CHN–KOR	H	–	S	S	H	H	–
CHN–CHE	H	–	–	–	–	H	–
CHN–ISL	H	–	–	–	H	S	–
CHN–CRC	H	S	S	S	S	H	H
CPTPP	H	S	S	S	S	H	H
JPN–MNG	H	S	–	S	–	H	–
JPN–AUS	H	–	–	S	–	H	–
JPN–PER	H	S	–	S	–	H	S
JPN–IND	H	–	–	–	–	H	H
JPN–CHE	H	S	–	–	–	H	–
EU–JPN	H	S	S	S	–	S	H
EU–VNM	H	H	S	H	–	H	S
EU–SGP	H	H	S	H	–	H	H
CETA	H	–	S	S	–	S	–
EU–COL	H	–	–	S	–	S	H
EU–CEN	H	S	–	S	–	S	H
EU–KOR	H	H	S	H	–	H	H
USA–KOR	H	S	S	S	–	H	H
USA–PAN	H	S	S	S	S	H	H
USA–COL	H	S	S	S	S	H	H
USA–PER	H	S	S	S	S	H	H
USA–OMN	H	S	S	S	–	H	H

Notes: 'H' = Hard Obligation (i.e. 'shall'); 'S' = Soft Obligation (e.g. 'shall endeavour to…'), '–' = Not Applicable.
Applicable only to the chapter on services.
Applicable only to regulatory measures as defined by Article 18.2.

and non-governmental bodies in the exercise of delegated powers in the same way, without introducing differences according to the level at which the measure has been adopted.[32]

Almost all PTAs stipulate that, if not published, the measures must be otherwise made available in such a manner as to enable not just the other Party but also 'interested persons' of the other Party to become acquainted with them. This and various other references to 'interested persons' indicated below mark a clear trend in recent trade agreements to go beyond traditional horizontal obligations, i.e. those owed by one party to the other, and include vertical obligations owed by each party to traders and other relevant stakeholders.[33] But, of course, this does not automatically entitle the interested persons to claim such protection at the international or the domestic level. Treaty enforcement remains strictly intergovernmental.

Like the GATS, the requirement to publish the relevant measures 'promptly' is also included in most PTAs, and save for CHN–CHE, JPN–CHE, and CHN–ISL there is no 'emergency situation' exception to escape from such obligation. In addition, most PTAs include some or all of the following GATS plus obligations: a duty to publish an explanation of the purpose and rationale for the regulation of measures adopted by central governments;[34] a duty to publish measures on specific outlets;[35] and a duty to confer a reasonable period of time between publication and entry into force.[36]

On a sectoral level, the GATS includes additional transparency disciplines in its Annex on Telecommunications[37] and in the Telecommunications Reference Paper (TRP) added by some WTO Members to their schedule of specific commitments.[38] These obligations are matched by all PTAs except CHN–CHE, CHN–ISL, CHN–CRC, JPN–CHE, EU–VNM, EU–COL, –EU–CEN, and EU–KOR. Some of them include an additional obligation requiring major suppliers to file all interconnection agreements to which they are party with the telecom regulatory body.[39]

On financial services, some PTAs include a 'GATS extra' obligation requiring parties to take reasonable measures to ensure that the rules of general application adopted or maintained by Self-Regulatory Organizations (SROs) are promptly published or otherwise made publicly available.[40] PTA chapters on financial services, telecommunications, and movement of natural persons also include a hard duty to publish or to ensure the public availability of licensing criteria and information relating to immigration requirements and procedures.

2.3 Duty to Consult

The duty to consult is designed to foster *ex ante* regulatory convergence. It consists of the twin obligations to publish in advance proposed measures of general application, and to provide interested persons and other parties a reasonable opportunity to comment on such proposed measures before their adoption. The duty to consult has been has been in place for some time now with respect to product regulations,[41] but it was only recently that it has been extended to regulations on services. It is, by far, the most significant innovation on regulatory transparency of services regulations.

[32]See, e.g. USA–KOR, Article 21.1.

[33]See P. Delimatsis, 'Article III', in R. Wolfrum, P.-T. Stoll, and C. Finaugle (eds.) (2008), *WTO – Trade in Services Max Plank Commentaries on World Trade Law*, Leiden, Netherlands: Martinus Nijhoff Publishers, at 98, citing *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, WT/DS155/R, para 11.76.

[34]See, e.g. USA–KOR, Article 21.1 and EU–KOR, Article 12.3.

[35]See, e.g. CHN–AUS, Article 13.2.

[36]See, e.g. CPTPP, Article 26.2.3.

[37]Para. 4A.

[38]Paras. 2.3 and 2.4.

[39]See USA–KOR, Article 14.8.

[40]CPTPP, CHN–AUS, JPN–MNG, JPN–AUS, JPN–PER, EU–JPN, and all USA PTAs.

[41]See the WTO Agreement on Technical Barriers to Trade, Article 2.9. Most PTA TBT chapters also include such a duty.

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As Table 2 indicates, 19 of the 23 agreements under examination include a horizontal duty to consult, although there are considerable variations among them on the extent of such discipline.[42] Of these, five just include a soft obligation to allow interested persons to comment,[43] 11 include soft obligations to publish proposed regulations and to allow interested persons to comment,[44] and three include a soft obligations to publish proposed regulations and a hard one to allow interested persons to comment.[45]

At its most basic, Japanese and Chinese PTAs either do not include such a duty to consult or simply include a soft obligation ('to the extent practicable') to maintain public comment procedures. At the other end of the spectrum, the USA–KOR Transparency chapter includes a provision that requires the parties to publish in advance the laws, regulations, procedures, and administrative rules of general application it plans to adopt and to provide interested persons and the other Party a reasonable opportunity to comment on such proposed measures.[46] It adds further requirements for proposed regulations of general application adopted at the central level of government, namely, that they must be published in a single official journal of national circulation and the party must encourage their distribution through additional outlets; the proposed regulations should be published not less than 40 days before the date public comments are due; and the publication must include an explanation of the purpose of, and rationale for, the proposed regulations.[47] It also imposes a duty to address comments received during the comment period and explain in specific platforms substantive revisions made to the proposed regulations.[48] The Agreement also stipulates that when the Party does not provide advance notice of, and the opportunity for comment on, regulations it proposes to adopt relating to trade in services, it should, to the extent possible, address in writing the reasons for not doing so.[49] EU–KOR includes a similar provision,[50] and defines 'interested persons' as 'any natural or legal person that may be subject to any rights or obligations under measures of general application'.[51] The definition includes foreign natural and legal persons, who are entitled to comment on proposed regulations to be adopted by the importing country.

Some PTA chapters on specific service sectors also include a duty to consult. CPTPP, USA PTAs, CHN–AUS, and CHN–KOR include a duty to consult in their chapter on telecommunications that goes beyond their horizontal duty to consult. For instance, the CPTPP and USA–KOR add the obligations to make publicly available all relevant comments filed by interested persons and to respond to all significant and relevant issues raised in comments filed.[52] On Financial Services, USA PTAs, CPTPP, CHN–KOR, CHN–CRC, CETA, EU–COL, and EU–CEN also include a specific duty to consult on proposed financial regulations that go beyond the horizontal one. The CPTPP offers the most comprehensive provision on this matter.[53]

The inclusion of a duty to consult on proposed regulations on services is a valuable addition to a PTA toolbox to tackle regulatory divergence *ex ante*. Stakeholder engagement on the rule-making process could be particularly useful on highly technical and fast-changing matters linked to the

[42]CHN–CHE, CHN–ISL, JPN–IND, and JPN–CHE do not include a duty to consult on services regulations.
[43]JPN–MNG, JPN–AUS, JPN–PER, EU–COL, and EU–CEN.
[44]CHN–AUS, CHN–KOR, CHN–CRC, USA–KOR, USA–PAN, UCA–COL, USA–PER, USA–OMN, EU–JPN, CETA, and CPTPP.
[45]EU–VNM, EU–SGP, and EU–KOR.
[46]USA–KOR, Article 21.1.2.
[47]Ibid., Article 21.1.3.
[48]Ibid., Article 21.4(c).
[49]Ibid., Article 12.8(c).
[50]EU–KOR, Article 12.3.
[51]EU–KOR, Article 12.1.
[52]CPTPP, Article 13.22 and USA–KOR, Article 21.1.
[53]See CPTPP, Annex 11-B, Section E.

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digital economy, such as online consumer protection or protection of personal information.[54] Industry representatives can identify regulatory needs and suggest smart regulatory strategies to address them. They can alert regarding proposals on matters that have already been addressed by the industry or regulated elsewhere and avoid overregulation, and they can bring ideas from other jurisdictions on how to regulate the matter at stake, fostering *ex ante* regulatory coherence.

However, the actual contribution of this new discipline to tackle regulatory divergence will depend, like all others, on its effective implementation. Due to their limited administrative capacity, public notice and comment procedures are not as widespread in developing countries as they are in some OECD members.[55] So, it is reasonable to expect that the administrative burden required to implement these new transparency disciplines will not be evenly distributed in PTAs between developed and developing country parties. This may compromise their effective implementation, precisely in those cases where regulatory disparities among the parties are expected to be higher. Ideally, PTAs should acknowledge this problem; for example, through special and differential treatment provisions. But the PTAs under examination provide no evidence for this.

Finally, it has been argued that creating avenues for stakeholder engagement can risk granting foreign corporate interests an avenue to capture the regulatory process to the detriment of the public interest.[56] This is a risk that should neither be overlooked nor overstated. It must be noted that the duty to consult is limited to give opportunities to interested persons to comment on regulatory proposals, not to take the comments on board. And the interested persons entitled to comment are not just corporations but any natural or legal persons, including NGOs, trade unions, and other civil society organizations. Rather than giving away the opportunity to hear in advance from those who will be affected by the regulations, the right antidote to regulatory capture – which may happen with or without a duty to comment – is the observance of high transparency and accountability standards.

2.4 Duty to Inform

The duty to inform includes the duty to notify measures to the other party and the duty to provide information, upon request, to the other party, and, where applicable, to interested persons. With respect to the former, Article III.3 of GATS requires Members to notify the Council of Trade in Services of the introduction of any new, or any changes to existing, laws, regulations, or administrative guidelines which significantly affect trade in services covered by their specific commitments. The obligation is due only when the Member in question considers that the measure 'significantly' affects trade in services, but Article III.5 confers other Members the right of reverse notification when they believe that the Member in question has failed to notify relevant measures.

As Table 2 shows, most PTAs under examination do not include a duty to notify like the GATS. Only eight out of the 23 agreements do. In CHN–KOR and CHN–ISL, the provision is included in the services chapter and phrased in hard terms, like GATS Article III.3.[57] In CHN–AUS, CHN–CRC, USA–PAN, USA–COL, USA–PER, and CPTPP, the duty to notify is included in the stand-alone transparency chapter and it is phrased in soft terms ('to the extent possible'). At the sectoral level, EU–JPN includes a soft provision in the chapter on the movement

[54]For further details on how the duty to consult could facilitate trade in services, see OECD (2000), Trade in Services: Transparency in Domestic Regulation: Prior Consultation, TD/TC/WP(2000)31/FINAL, at 4.

[55]See OECD studies of domestic regulatory practices covering OECD members and selected developing countries See www.oecd.org/ech for additional information, cited by Lida and Nielson, supra n. 23, at 12.

[56]The African Group of Countries have highlighted this issue as a matter of particular concern. See *Disciplines on Domestic Regulation: African Group Elements for Ministerial Decision*, WT/MIN(17)/8, 4/12/17, para. 2.1. See also *Analysis of the Tisa 'Annex on Transparency'* (version dated 14 September 2016), Greenpeace, November 2016.

[57]CHN–KOR, Article 8 and CHN–ISL, Article 86.

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of natural persons that requires parties to inform each other of the introduction of new requirements relating to immigration formalities.[58]

With respect to the duty to provide information upon request, GATS Article III.4 requires Members to respond promptly to all requests by any other Member for specific information on any of its measures of general application. It also requires Members to establish one or more enquiry points to provide specific information to other Members, upon request, on all such matters. Both obligations are limited to requests from the other Party. Paradoxically, service suppliers and other non-state actors, who are the ones directly affected by the measures, are not entitled to file requests for information.[59]

Table 2 reveals that all PTAs include a horizontal duty to provide information upon request to the other Party which, in most cases, contains 'GATS plus' elements. For example, in the CPTPP and USA PTAs the duty to inform covers actual or proposed measures that the requesting Party considers might affect the operation of the Agreement, and some PTAs specify a time limit to respond.[60] But perhaps the most significant improvement *vis-a-vis* the GATS includes extending the duty to inform not just to the other party but also to interested persons. Fifteen PTAs include a duty to provide information upon request from interested persons either in the stand-alone transparency chapter or in the services chapter.[61]

EU–KOR stands out for including a duty that goes beyond the mere provision of information. It requires the parties to create enquiry points for interested persons of the other party 'with the task of seeking to effectively resolve problems for them that may arise from the application of measures of general application'.[62] It further stipulates that such processes should be 'easily accessible, time-bound, result-oriented, and transparent'.[63]

In sum, transparency disciplines applicable to services regulations included in PTAs go well beyond those prescribed by GATS. The findings provide evidence of 'GATS plus' disciplines on the duty to publish and the duty to inform and 'GATS extra' disciplines with respect to the duty to consult. There are, however, significant differences across PTAs. EU and US PTAs have more comprehensive transparency disciplines than Chinese and Japanese PTAs, but for the duty to notify the other party where the Chinese PTAs stand out. With respect to their legal enforceability, however, the picture is mixed. While the duties to publish and the duty to inform tend to rest on hard provisions, the duty to consult is, predominately, phrased in soft terms.

3. Regulatory Coherence

3.1 Overview

Disciplines on regulatory coherence prescribe minimum standards and principles that must be observed when *developing, applying, administering, and reviewing* domestic regulations. Their aim is to tackle regulatory divergence by fostering minimum common quality standards across jurisdictions for the entire regulatory cycle, and to combat arbitrary, unreasonable, and inconsistent administrative practices. It is assumed that by observing minimum common quality standards throughout the regulatory cycle, domestic regulators from different jurisdictions will end up developing, applying, administering, and reviewing domestic regulations in ways that are more similar and compatible. For the purpose of this paper, disciplines on regulatory coherence include substantive disciplines for the development of specific domestic regulations, procedural

[58]Chapter 8, Section D, 'Entry and Temporary Stay of Natural Persons', Article 3.3.
[59]Delimatsis, supra n. 33, at 102.
[60]CHN–KOR (Article 18.2) and CHN–CHE (Article 1.5) refer to a period of 30 days following the receipt of the request.
[61]See Table 2 Transparency.
[62]EU–KOR, Article 12.4.
[63]Ibid.

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disciplines for the administration and review of regulations (section 3.2 below) and good regulatory practice standards (section 3.3 below).

3.2 Domestic Regulation

This section covers substantive disciplines for the development of specific domestic regulations on services (qualification requirements and procedures, licensing requirements and procedures, and technical standards) and procedural disciplines for authorization, administration, and review of measures affecting trade in services. Substantive disciplines prescribe general principles that should be met by a measure's content, for example, being based on objective criteria or not being more burdensome than necessary, but falling short of prescribing any kind of specific content. Procedural disciplines refer not to the measures themselves but to their application, administration, and review.[64]

3.2.1 Substantive Disciplines

At the time of its drafting, GATS Members acknowledged that qualification requirements and procedures, licensing requirements and procedures, and technical standards could create unnecessary barriers to trade in services, but failed to agree on substantive disciplines for their development. Instead, they opted for including a mandate to negotiate such disciplines within certain guidelines; namely, to ensure that the regulations are based on objective and transparent criteria, which are not more burdensome than necessary to ensure the quality of the service, and, in the case of licences procedures, are not in themselves a restriction on the supply of the service.[65] They also agreed to a temporary obligation, pending the adoption of the disciplines, not to apply such measures in a way that nullifies or impairs their specific commitments.[66] So far, members have only managed to adopt disciplines on domestic regulation for the accountancy sector, but they have not yet entered into force.[67] As mentioned, the negotiations for horizontal disciplines on domestic regulation have recently gained traction, but profound divisions among Members remain.[68]

As Table 3 shows, the PTAs under examination offer a mix of 'GATS plus' and 'GATS minus' evidence on this matter.[69] The EU–CEN does not even refer to substantive disciplines on domestic regulation. Three Chinese PTAs, one EU, and one Japanese PTA simply include a duty to review the results of the GATS negotiations, with a view to their incorporation in the Agreement plus a temporary obligation, pending the conclusion of such negotiations, similar to GATS VI.5.[70] The remaining 17 PTAs include final disciplines on domestic regulation, i.e. not subject to further negotiations.[71] Of these, only seven – JPN–MNG, JPN–PER, JPN–CHE,

[64]On the distinction between substantive and procedural disciplines, see *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R, para. 6.432, cited by Markus Krajewski (2008), 'Article VI GATS', in R. Wolfrum, P.-T. Stoll, and C. Finaugle (eds.), *WTO – Trade in Services Max Plank Commentaries on World Trade Law*, Leiden: Martinus Nijhoff Publishers, at 167.

[65]Article VI.4.

[66]Article VI.5.

[67]See Decision adopted by the Council for Trade in Services on 14 December 1998, WTO Document S/L/63.

[68]See above n. 12.

[69]See Table 3 Substantive disciplines on domestic regulation.

[70]CHN–AUS, CHN–KOR, CHNIS, JPN–IND, and EU–COL.

[71]Five PTAs include a duty to review the results of the GATS negotiations, with a view to their incorporation in the Agreement plus a temporary obligation pending the conclusion of such negotiations, similar to GATS VI.5 (CHN–AUS, CHN–KOR, CHNIS, JPN–IND, and EU–COL). One PTA does not refer to substantive disciplines on domestic regulation at all (EU–CEN).

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EU–JPN, EU–VNM, EU–SGP, and CETA – use hard language to phrase the disciplines (i.e. 'shall'), while the other ten use soft language (e.g. 'shall endeavour to', 'shall aim to ensure').[72]

Table 3 also reveals that in terms of their scope *rationae materiae*, most PTA disciplines cover qualification requirements and procedures, licensing requirements and procedures, and technical standards. JPN–MNG and JPN–AUS also cover 'authorization'. However, EU PTA disciplines (other than EU–KOR and EU–JPN) do not cover technical standards. Considering the increasing relevance of technical standards on services and their potential impact on trade, this is a noticeable handicap.[73] In 14 out of these 17 PTAs, the obligation applies to all sectors or to all sectors minus non-conforming measures included in the Annexes. In the remaining three PTAs – JPN–PER, JPN–CHE, and EU–SGP – the obligation only applies in sectors where specific commitments have been made.

With respect to their content, all substantive disciplines on domestic regulations require covered measures to be based on objective and transparent criteria, and licensing procedures not to be a restriction on the supply of services. The most controversial standard – not more burdensome than necessary to ensure the quality of the service[74] – is included only in ten PTAs, and within them, only three PTAs – JPN–MNG, JPN–CHE, and JPN–PER – phrase the obligation in hard terms.[75] Neither the CPTPP nor the EU PTA disciplines on domestic regulation include the so-called necessity test. However, some EU PTAs include additional criteria such as 'clarity', 'advance public availability', and 'accessibility'.[76]

Substantive disciplines differ on the role assigned to international standards. The CPTPP, CHN–CHE, and JPN–CHE recognize the relevance of a party's application of international standards in determining whether the party is in conformity with its obligation. JPN–CHE goes even further, requiring the parties to base their technical standards on international standards when available and provided they do not undermine the fulfilment of legitimate objectives.[77] The substantive disciplines on domestic regulation included in the remaining PTAs do not refer to international standards.[78]

As the findings displayed by Table 3 suggest, Japan is the keenest in embracing substantive disciplines on domestic regulation. Most Japanese PTAs include a necessity standard. In JPN–AUS, the parties also committed to implement WTO disciplines on the accountancy sector and to encourage non-governmental bodies to comply with substantive disciplines.[79] In EU–JPN, the parties committed to encourage its competent authorities to adopt technical standards through open and transparent processes, and to encourage anybody designated to develop technical standards to do the same.[80] JPN–CHE's Annex on Domestic Regulation includes the most ambitious substantive disciplines on domestic regulation.

[72]All five USA PTAs, CPTPP, CHN–CHE, CHN–CRC, JPN–AUS, and EU–KOR. Article 2.2 of the Annex on Trade in Services of CHN–CHE uses hard language only for licensing requirements and procedures.

[73]See G. Gari (2016), 'Is the WTO's Approach to International Standards on Services Outdated?', *Journal of International Economic Law*, 19(3): 589–605.

[74]In the context of the multilateral negotiations pursuant to GATS Article VI.4, the proposal for adopting this standard has been fiercely resisted by many WTO Members. The 2011 Chairman's progress report refers to it as 'one of the most difficult subjects in these negotiations' (WTO Document S/WPDR/W/45, 14 April 2011, para. 14).

[75]The remaining seven PTAs – PNAUS, CHN–CHE, CHN–CRC, and all USA PTAs (but USA–KOR) – use soft language.

[76]See, e.g., EU–JPN, Article 8.30.

[77]JPN–CHE, Article III, Annex IV Disciplines on Domestic Regulation in Services.

[78]This observation refers to licensing requirements and procedures, qualification requirements and procedures, and technical standards only. Many PTAs do refer to international standards when disciplining other types of domestic regulations, such as financial regulations or regulations on data protection.

[79]JPN–AUS, Articles 9.8.8 and 9.8.9.

[80]EU–JPN, Article 8.32.

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Table 3. Substantive disciplines on domestic regulation

	Includes final disciplines on DR	Enforcement	Measures covered	Sectors Covered	Objective and transparent criteria	Licensing procedures not a restriction	Not more burdensome than necessary	Additional criteria	Relevance of intl' standards	Duty to review results of GATS VI:4 negotiations
GATS	–	–	–	–	–	–	–	–	–	–
CHN–AUS	–	–	–	–	–	–	–	–	–	Y
CHN–KOR	–	–	–	–	–	–	–	–	–	Y
CHN–CHE	Y	S	G	HR	Y	Y	Y	N	Y	N
CHN–ISL	–	–	–	–	–	–	–	–	–	Y
CHN–CRC	Y	S	G	HR	Y	Y	Y	N	N	Y
CPTPP	Y	S	G	HR–	Y	Y	N	N	Y	Y
EU–JPN	Y	H	G–	HR–	Y	Y	N	Y	N	N
EU–VNM	Y	H	G–	SS	Y	Y	N	Y	N	N
EU–SGP	Y	H	G–	SS	Y	Y	N	Y	N	N
CETA	Y	H	G–	HR–	Y	Y	N	Y	N	N
EU–COL	–	–	–	–	–	–	–	–	–	Y
EU–CEN	–	–	–	–	–	–	–	–	–	N
EU–KOR	Y	S	G	HR	Y	Y	N	N	N	Y
JPN–MNG	Y	H	G+	HR	Y	Y	Y	N	N	N
JPN–AUS	Y	S	G+	HR	Y	Y	Y	N	N	Y
JPN–PER	Y	H	G	SS	Y	Y	Y	N	N	Y
JPN–IND	–	–	–	–	–	–	–	–	–	Y

(*Continued*)

Table 3. (*Continued.*)

	Includes final disciplines on DR	Enforcement	Measures covered	Sectors Covered	Objective and transparent criteria	Licensing procedures not a restriction	Not more burdensome than necessary	Additional criteria	Relevance of intl' standards	Duty to review results of GATS VI:4 negotiations
JPN–CHE	Y	H	G	SS	Y	Y	Y	Y	Y	Y
USA–KOR	Y	S	G	HR	Y	Y	N	N	N	Y
USA–PAN	Y	S	G	HR	Y	Y	Y	N	N	Y
USA–COL	Y	S	G	HR	Y	Y	Y	N	N	Y
USA–PER	Y	S	G	HR	Y	Y	Y	N	N	Y
USA–OMN	Y	S	G	HR	Y	Y	Y	N	N	Y

Notes: Enforcement: 'H' = Hard Obligation (i.e. 'shall'); 'S' = Soft Obligation (e.g. 'shall endeavour to…'), '–' = Not Applicable.
Measures covered: 'G' = Licensing requirements and procedures, qualification requirements and procedures and technical standards. 'G+' = the previous five plus 'Authorisation'; 'G–' = does not include technical standards.
Sectors covered: 'HR' = applicable across all sectors; 'HR–' = applicable across all sectors but for measures included in annexes of non-conforming measures, 'SS': applicable only in sectors where specific commitments have been made.
Objective and transparent criteria: 'Y' = Yes, 'N' = No; '–' = Not Applicable.
Licensing procedures not a restriction on the supply of services: 'Y' = Yes, 'N' = No; '–' = Not Applicable.
Additional criteria: 'Y' = Yes, 'N' = No; '–' = Not Applicable.
Relevance of international standards for determining conformity with obligation: 'Y' = Yes, 'N' = No; '–' = Not Applicable.
Duty to review results of GATS VI:4 negotiations with a view to bring them into effect, as appropriate, under the agreement: 'Y' = Yes, 'N' = No; '–' = Not Applicable.

3.2.2 Authorization Processes

Authorization to supply services. In many sectors, suppliers must apply for a licence in order to supply their services. Lack of information and differences in licensing criteria across jurisdictions, delays, or arbitrary handling of the application process restrict trade. Minimum due process requirements have made their way into trade agreements to address this problem.

The GATS prescribes minimum due process obligations for processing applications for authorization to supply services.[81] The provision presupposes the existence of a mandatory authorization requirement for the supply of the service and the submission of an application for authorization by a prospective supplier.[82] It imposes three hard procedural obligations relating to the authorization process: (a) duty to take a decision within a reasonable period of time, (b) duty to inform the applicant of the decision within a reasonable period of time after a complete submission of an application; and (c) duty to provide, at the request of the applicant, information concerning the status of the application.[83] The scope of application of these obligations is limited to sectors where specific commitments have been made.[84]

Table 4 shows that all PTAs include procedural disciplines that at least match or go beyond GATS.[85] CPTPP, CHN–AUS, CHN–CHE, JPN–AUS, EU–JPN, EU–VNM, EU–SGP, and CETA contain 'GATS plus' disciplines. For example, some or all of them include a duty to inform the applicant, upon request, the reasons for the denial of an application; a duty to ensure that fees are reasonable, transparent, and not in themselves a restriction on the supply of the service; a duty to accept authenticated copies of documents or accept applications in electronic format and, in case of incomplete applications, a duty to provide the applicant with an opportunity to correct minor errors and omissions. Some of these additional disciplines are couched in a soft language.[86]

Table 4 also reveals 'GATS plus' evidence with respect to the scope of application of these procedural disciplines. While in 13 PTAs they apply only in sectors where the parties have undertaken specific commitments[87], in the other ten they apply horizontally across all sectors except for measures included in annexes of non-conforming measures.[88]

CHN–CHE, CPTPP, EU–JPN, EU–VNM, EU–SGP, and CETA are the ones that impose the highest due process standards for processing applications for authorization to supply services. In addition to the matters referred to above, they call, inter alia, for the simplification of procedures, and to observe standards of impartiality and independence in the decision-making process.[89] CETA provisions stand out for defining the terms 'authorization', 'competent authority', 'licensing procedures', 'licensing requirements', 'qualification procedures', and 'qualification requirements'.[90] CHN–CHE further stipulates that when the application is approved, the licence or approval must enable the applicant to start the commercial operations upon registration of the commercial presence and that such registration must be completed, as a rule, within two months of the submission of a complete application.[91]

Authorization to supply telecommunications services. At the multilateral level, the Telecommunications Reference Paper (TRP) requires to guarantee minimum transparency and due process

[81]Article VI.3.
[82]Ibid.
[83]Ibid.
[84]Ibid.
[85]See Table 4 Disciplines on authorization to supply services.
[86]See, e.g. EU–SNG, Article 8.20.6 and CETA, Article 12.3.12.
[87]All Chinese PTAs, JPN–IND, JPN–CHE, and all EU PTAs but CETA and EU–JPN and CPTPP.
[88]All USA PTAs, CETA, EU–JPN, JPN–MNG, JPN–AUS, and JPN–PER.
[89]See, e.g. CETA, Article 12.3.
[90]CETA, Article 12.1.
[91]CHN–CHE Annex on Trade in Services, Article 2.2(i).

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Table 4. Disciplines on authorization to supply services

	Duty to process applications within a reasonable timeframe	Duty to inform, at request, about status of application	Duty to provide opportunity to correct minor errors and omissions	Duty to inform applicant of the decision concerning the application	Duty to inform, upon request, reasons for denial of application	Duty to ensure that fees are reasonable and not in themselves restrict the supply of the service	Duty to accept authenticated copies and/or duty to accept applications in electronic format	Sectors covered
GATS	H	H	–	H	–	–	–	SS
CHN–AUS	–	H	H	S	S	–	–	SS
CHN–KOR	H	H	–	H	–	–	–	SS
CHN–CHE	H	H	H	H	H	H	–	SS
CHN–ISL	H	H	–	H	–	–	–	SS
CHN–CRC	H	H	–	H	–	–	–	SS
CPTPP	H	H	S	H	H	H	S	HR–
EU–JPN	H	–	H	H	H	S	S	HR–
EU–VNM	H	–	H	H	H	S	S	SS
EU–SGP	H	–	H	H	H	S	S	SS
CETA	H	H	H	H	H	H	S	HR–
EU–COL	H	H	–	H	–	–	–	SS
EU–CEN	H	H	–	H	–	–	–	SS
EU–KOR	H	H	–	H	–	–	–	SS
JPN–MNG	H	H	–	H	–	–	–	HR
JPN–AUS	H	H	S	H	H	–	–	HR
JPN–PER	H	H	–	H	–	–	–	HR
JPN–IND	H	H	–	H	–	–	–	SS
JPN–CHE	H	H	–	H	–	–	–	SS
USA–KOR	H	H	–	H	–	–	–	HR–
USA–PAN	H	H	–	H	–	–	–	HR–
USA–COL	H	H	–	H	–	–	–	HR–
USA–PER	H	H	–	H	–	–	–	HR–
USA–OMN	H	H	–	H	–	–	–	HR–

Notes: 'H' = Hard Obligation (i.e. 'shall'); 'S' = Soft Obligation (e.g. 'shall endeavour to…'), '–' = Not Applicable.
Sectors covered: 'HR' = applicable across all sectors; 'HR–' = applicable across all sectors but for measures included in annexes of non–conforming measures, 'SS': applicable only in sectors where specific commitments have been made.

standards when a licence is required for the supply of telecommunication services.[92] On due process, it requires to inform the applicant, upon request, the reasons for the denial of an application.[93]

At the PTA level, all the agreements examined, but CHN–CRC, include disciplines on the authorization process to provide telecommunication services,[94] which at least match the TRP standards. The CPTPP and CHN–KOR go further by requiring the authority to inform the applicant, on request, about the reasons of its decision, not just when it denies an application, but also when it imposes specific conditions for the supply of the service, or when it refuses to renew the licence. Japan PTAs (other than JPN–IND) and EU–JPN impose a duty to notify the applicant of the outcome of its application – whatever its content – without undue delay and without the need to wait for a request from the applicant. EU PTAs also guarantee the applicant's right to seek recourse before an appeal body when a licence has been denied, and require that fees must be commensurate with the administrative costs of the regulatory authority and do not in themselves restrict the supply of the service.

CHN–AUS includes a hard obligation to ensure that licensing requirements for suppliers of telecommunications networks or services are applied in the least restrictive manner and are not more burdensome than necessary.[95] CETA and EU–CEN require that the authorization to supply telecommunications services, wherever possible, should be based upon a simple notification procedure. EU–COL and EU–KOR include a soft obligation ('shall endeavour') to apply simplified procedures in authorizing the provision of telecommunication services. EU–JPN includes one of the most thorough provisions on this matter.[96]

Authorization to supply financial services. The GATS does not prescribe minimum due process obligations specifically focused on the authorization to supply financial services, but most PTAs do.[97] A basic component of such disciplines includes a duty to make publicly available the requirements for completing an application relating to the supply of financial services. Beyond this obligation, the extent of 'due process' disciplines varies extensively across PTAs.

For instance, USA PTA disciplines on the authorization of financial services include the obligation to process the application within a specific time limit (120 days), the duty to notify the applicant when additional information is required and, when the application is denied, to inform the applicant, to the extent practicable, of the reasons for the denial. By contrast, EU PTAs include only basic references to the authorization process for the supply of financial services, but very demanding disciplines for the general licensing and qualification requirements and procedures. The CPTPP pattern is different from both USA and EU PTAs because it includes strong due process disciplines both for the authorization to supply financial services and for the authorization to supply services in general. However, it is JPN–CHE that includes the highest procedural standards for processing of applications for the supply of financial services.[98]

Finally, all USA PTAs and the CPTPP include a provision aimed at expediting the offering of insurance services by licensed suppliers. For example, the CPTPP prohibits the requirement of product approval or authorization of insurance lines for insurance other than insurance sold to individuals or on compulsory license, not imposing limitations on the number or frequency of product introductions.[99]

[92]TRP, para. 4.
[93]TRP, para. 4.
[94]CHN–CRC also include commitments on telecommunications, but only the Chinese schedules include the TRP by reference.
[95]CHN–AUS, Article 8.19.2.
[96]EU–JPN, Article 8.51.
[97]The exceptions are CHN–CRC, CHN–CHE, CHN–ISL, CHN–CRC, JPN–IND, EU–SGP, and EU–KOR.
[98]JPN–CHE, Article V, Annex VI Domestic Regulation in Services.
[99]CPTPP, Article 11.16.

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Application for immigration formalities. The GATS includes an annex on movement of natural persons supplying services, but its content is mostly concerned with carving out measures regarding citizenship, residence, or employment on a permanent basis from the agreement's scope of application. At the PTA level, however, there is plenty of evidence of 'GATS extra' disciplines. China and Japan PTAs, EU–JPN, CETA, and the CPTPP contain a separate chapter with specific disciplines on the movement of natural persons.[100] Such disciplines include, among others, transparency prescriptions covering information relating to procedures and requirements for visas and temporary entries, and disciplines on application procedures for immigration formalities such as visas, permits, and other documents granting temporary entry.

Procedural disciplines are aimed at guaranteeing the right of the applicants to a fair application process. At a minimum, they cover the typical due process standards prescribed by GATS VI.3, either in soft[101] or hard[102] language. Some PTAs include additional procedural disciplines, such as the obligation to process applications within strict time limits.[103] Many include a duty to ensure that fees charged for processing applications must be reasonable and must not in themselves represent an unjustifiable impediment to the movement of natural persons. Other due process disciplines include, inter alia, a hard obligation to inform, upon request, about status of application; a duty to provide opportunity to correct minor errors and omissions in the application, and a soft commitment to accept and process applications in electronic format.[104]

EU–JPN offers the most comprehensive set of due process requirements relating to applications for immigration formalities.[105] In addition, some PTAs include a soft commitment to take measures to simplify the immigration requirements and facilitate the application procedures for immigration formalities.[106] However, the potential impact of these disciplines is limited by their restricted enforceability. All PTAs except for CHN–CHE, CHN–ISL, JPN–CHE, EU–JPN, and CETA, condition the application of the dispute settlement mechanism to the chapter on the movement of natural persons to situations where the matter involves a pattern of practice and subject to the prior exhaustion of domestic administrative remedies.[107]

3.2.3 Administration and Review of Measures

Frequently, discriminatory treatment against foreign suppliers is not written into published laws and regulations but it is a matter of official practice.[108] The higher degree of state intervention on service markets and, in particular, the intense and ongoing relationship between regulators and industry operators increases the risk of discriminatory administrative practices against foreign suppliers. Observance of minimum standards for the administration and review of administrative measures and holding those who exercise administrative power over service suppliers to account contribute to an open and non-discriminatory regulatory environment.

Administration of measures. The GATS prescribes that measures of general application affecting trade in services must be administered in a reasonable, objective, and impartial manner.[109]

[100]The USA PTAs do not include a separate chapter on the movement of natural persons, while the EU PTAs (other than EU–JPN and CETA) include a separate chapter, but its content is limited to the provision of definitions for specific categories of natural persons supplying services (e.g. Key personnel and graduate trainees, business service sellers, contractual service suppliers and independent professionals, short-term visitors for business purposes).

[101]CPTPP, JPN–CHE, and EU–JPN.

[102]CHN–AUS, CHN–CHE, and CHN–ISL.

[103]Examples include 20 working days (JPN–PER), 45 working days (CHN–CHE), and 90 days (EU–JPN).

[104]CHN–AUS and EU–JPN.

[105]See EU–JPN, Annex 8-C, 'Understanding on the Movement of Natural Persons'.

[106]CHN–KOR and all Japan PTAs but JPN–CHE.

[107]See, e.g. CPTPP, Article 12.10; CHN–AUS, Article 10.7, and JPN–MNG, Article 8.7.

[108]See Price Waterhouse's survey cited by G. Feketekuty (1988), *International Trade in Services. An Overview and Blueprint for Negotiations*, Cambridge, MA: American Enterprise Institute and Ballinger, at 141.

[109]GATS, Article VI.1.

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The obligation, phrased in hard terms, applies to measures of general application affecting trade in services, but only in sectors where specific commitments have been made.[110]

At the PTA level, 12 out of the 23 agreements under examination include a provision in their services chapter that matches GATS Article VI.1. That is the case for the CPTPP, all Chinese PTAs, all Japanese PTAs (but JPN–PER), and two EU PTAs (EU–JPN and EU–COL). In JPN–MNG and JPN–AUS, the scope of application of the discipline is not limited to those sectors where specific commitments are undertaken.[111]

USA PTAs and the rest of the EU PTAs (EU–VNM, EU–SGP, CETA, –EU–CEN, and EU–KOR) do not include a provision to tackle arbitrary administrative practices in their services chapter, but they include a similar one in their stand-alone 'Transparency' chapter, applicable to administrative practices on any matter covered by the agreement.[112] Like GATS Article VI.1, a typical horizontal provision requires a party to administer measures of general application in a 'consistent (instead of objective), impartial and reasonable manner'. In addition, it goes beyond GATS, by prescribing a series of due process guarantees that must be observed to meet such standards, including the duty to provide directly affected persons of the other Party with reasonable notice of the initiation of administrative proceedings, afford them a reasonable opportunity to present facts and arguments in support of their position prior to any final administrative action, and ensuring that such proceedings are in accordance with the Party's law.[113]

Review of administrative decisions. GATS Article VI.2 requires WTO members to offer service suppliers a guarantee for the independent review of administrative decisions affecting trade in services and, where justified, for the provision of remedies. The obligation is watered down by the use of soft language ('as soon as practicable'). Moreover, paragraph VI.2(b) includes a 'constitutional safeguard clause' that offers extra flexibility, allowing Members not to institute such tribunals or procedures where this would be inconsistent with their constitutional structure.[114]

At the PTA level, 15 out of the 23 agreements under examination include in their services chapter a provision akin to GATS Article VI.2. That is the case for all Chinese and EU PTAs, JPN–AUS, JPN–CHE, and JPN–IND.[115] Generally speaking, the wording calls for institutional requirements which at least match those required by GATS Article VI.2. In some PTAs, the provision goes further, either by dropping GATS' qualifying language ('as soon as practicable') or by avoiding the constitutional safeguard clause.[116]

By contrast, none of the USA PTAs, the CPTPP, JPN–MNG, and JPN–PER includes in their services chapter a provision on administrative remedies akin to GATS VI.2. However, they include a horizontal provision on review and appeal in their stand-alone 'Transparency' chapter, which further specifies due process guarantees for the parties to the proceedings, including a reasonable opportunity to support or defend their respective positions and the right to a decision based on the evidence and submissions of the record.[117] The provision also requires that the decision subject to review must be implemented and govern the practice of the authority with respect to the administrative action at issue.[118]

[110]Ibid.

[111]JPN–MNG, Article 7.8.1 and JPN–AUS, Article 9.8.1.

[112]CPTPP, CHN–AUS, CHN–KOR, CHN–CRC, JPN–MNG, JPN–AUS, JPN–IND, EU–JPN, and EU–COL include disciplines on administration of measures of general application both in the services chapter and on their transparency chapter.

[113]See, e.g. USA–KOR, Article 21.3.

[114]Krajewski, supra n. 64, at 175.

[115]CHN–CHE, CHN–ISL, and JPN–CHE do not include horizontal provisions on administrative proceedings and remedies. JPN–PER only includes a provision on remedies but not one on administrative proceedings.

[116]See CHN–CRC, JPN–CHE, EU–JPN, CETA, EU–COL, EU–CEN, and EU–KOR.

[117]See, e.g. CPTPP, Article 26.4.

[118]Ibid.

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3.3 Good Regulatory Practices

In addition to substantive disciplines for the development of regulations on services of a specific type as well as procedural disciplines for their application and review, the quest to iron out regulatory disparities is also pursued by prescribing minimum standards for the development of regulations in general known as 'good regulatory practices'.[119] The underlying assumption is that the observance of these standards contributes to enhance the quality of regulatory outputs, avoiding unnecessary, duplicative, or inefficient regulations. Ultimately, the observance of common rulemaking practices by regulators from different jurisdictions should contribute to mitigate regulatory divergence and foster regulatory compatibility.

Two of the PTAs under examination – EU–JPN and CPTPP – include detailed disciplines on good regulatory practices. In EU–JPN, such disciplines are included in a stand-alone chapter on 'Good Regulatory Practices and Regulatory Cooperation' applicable to regulatory measures with respect to any matter covered by the agreement.[120] The duties to be observed during the rulemaking process are specified in very detailed and comprehensive terms. They include, inter alia, duties to maintain internal coordination processes or mechanisms;[121] provide information to the public of prospective regulatory measures;[122] consult the public, provide reasonable opportunities for any person to provide comments and consider the comments received;[123] carry out an impact assessment of proposed regulatory measures;[124] and conduct periodic retrospective evaluations of regulatory measures in force.[125] Although the duties are phrased in hard terms, they are not enforceable through the dispute settlement mechanism.[126]

In the CPTPP, the disciplines on good regulatory practices are also included in a stand-alone chapter on 'Regulatory Coherence'. But in this case, it is for each party to determine the scope of the covered regulatory measures[127]. The required standards are similar to those prescribed by EU–JPN. In addition to the duties mentioned above, the CPTPP good regulatory practices also require the Parties to ensure that proposed regulatory measures are plainly written, clear, concise, and easy to understand[128] and to consider regulatory measures in other Parties as well as relevant developments in international, regional, and other fora when planning covered regulatory measures.[129] Like in EU–JPN, parties are prevented from having recourse to dispute settlement for any matter arising under this chapter.[130]

In sum, the PTAs under examination offer plenty of evidence of 'GATS plus' and 'GATS extra' disciplines on regulatory coherence, including substantive disciplines for the development of domestic regulations, higher due process standards for authorization processes and administration of measures, more effective remedies against administrative decisions and disciplines on good regulatory practices. With respect to their legal enforceability, only a minority of PTAs include hard substantive disciplines on domestic regulations. However, for a large majority of PTAs, most of the procedural disciplines applicable to authorization, administration, and review of administrative measures are phrased in hard terms.

[119]The origin of this practices can be traced back to the APEC–OECD Integrated Checklist on Regulatory Reform (2005), a voluntary tool to evaluate regulatory reforms.

[120]EU–JPN, article 18.2 defines regulatory measures as follows: for EU regulations and directives and implementing and delegated acts; for Japan laws, cabinet orders and ministerial ordinance (18.2).

[121]Ibid., Article 18.4.

[122]Ibid., Article 18.6.

[123]Ibid., Article 18.7.

[124]Ibid., Article 18.8.

[125]Ibid., Article 18.9.

[126]Ibid., Article 18.19.

[127]CPTPP, Article 25.3.

[128]Ibid., Article 25.5.4.

[129]Ibid., Article 25.5.8.

[130]Ibid., Article 25.11.

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Arguably, these substantive, procedural, and 'good regulatory practices' disciplines have a huge potential to address regulatory disparities. But, like the transparency disciplines, much will depend on their effective implementation. And again, the disparate administrative capacities between developed and developing country members open a question mark in this respect. For the most part, developed countries' domestic legal systems already feature the requirements demanded by these international disciplines.[131] Many developing countries, however, would need to undertake profound domestic reforms in order to align their domestic legal systems with these international obligations. Ideally, to ensure their effective implementation, and realize the expected trade gains PTAs are meant to generate, trade obligations should be complemented with international assistance for domestic regulatory reforms.[132] Nothing of this sort is included in the PTAs under examination.

4. Regulatory Cooperation

4.1 Overview

Another mechanism to tackle regulatory divergence is through international regulatory cooperation. Unlike regulatory coherence, which is concerned with the quality of the domestic regulatory process, regulatory cooperation denotes the presence of an international element.[133] In a review of state practice on this matter, the OECD illustrates how the extent of such cooperation spans through different degrees of complexity and levels of engagement, from non-binding and loose mechanisms such as exchange of information among regulatory bodies at the bottom, to binding agreements at the top.[134] At a minimum, non-binding dialogue and exchange of information can contribute to build trust and mutual understanding between domestic regulators and avoid unnecessary divergences in future regulation, all the way up to mutual recognition agreements on licenses, qualification requirements or technical standards, and binding arrangements on the supervision and enforcement of existing regulation.

The inclusion of disciplines on regulatory cooperation on services in trade agreements is relatively recent. As Table 5 shows, it is of an entirely 'GATS extra' nature. Only three of the PTAs under examination include stand-alone chapters on regulatory cooperation on any matters covered by the agreement, and a few additional ones include disciplines on regulatory cooperation on specific service sectors (telecommunications and financial services) or modes of supply (movement of natural persons and e-commerce).[135] The former are examined in section 4.2 and the latter in section 4.3 below.

4.2 Regulatory Cooperation on Any Matters

Only three PTAs – EU–JPN, CPTPP, and CETA – include stand-alone chapters on regulatory cooperation on any matter covered by the agreement, including services.[136]

EU–JPN defines the aim of regulatory cooperation broadly: to enhance bilateral trade and investment by '(a) promoting an effective, transparent and predictable regulatory environment;

[131]See country reviews conducted under the OECD Regulatory Reform Project.

[132]This idea has been advocated by B. Hoekman and A. Mattoo (2007), 'Regulatory Cooperation, Aid for Trade and the General Agreement on Trade in Services', WB Policy Research Working Paper 4451, 2007, and (2011), 'Services Trade Liberalization and Regulatory Reform: Re-invigorating International Cooperation', WB Policy Research Working Paper 5517.

[133]P. C. Mavroidis (2016), 'Regulatory Cooperation: Lessons from the WTO and the World Trade Regime', E15 Task Force on Regulatory Systems Coherence, Policy Options Paper, E15 Initiative, Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum, at 8.

[134]OECD (2013), International Regulatory Co-operation Addressing Global Challenges (accessed 24 May 2018).

[135]See Table 5 Regulatory Cooperation.

[136]In addition, the following EU PTAs refer to regulatory cooperation but through a single provision and on very general terms: EU–KOR, Chapter 12 Transparency, Article 12.7; EU–SNG Chapter 13 Transparency, Article 13.7 and EU–VNM Chapter on Transparency, Article 7.

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Table 5. Regulatory cooperation

	Regulatory cooperation on any matter	Regulatory cooperation on financial services	Regulatory cooperation on e-commerce	Regulatory cooperation on telecommunications	Regulatory cooperation on movement of natural persons
GATS	–	–	–	–	–
CHN–AUS		S	S		
CHN–KOR		S	S		
CHN–CHE		S			S
CHN–ISL					S
CHN–CRC					
CPTPP	S	S	S	S	S
EU–JPN	S	S	S		S
EU–VNM			S	S	
EU–SGP			S	S	
CETA	S	S	S		
EU–COL			S	S	
EU–CEN			S		
EU–KOR			S		
JPN–MNG			S		
JPN–AUS		S	S	S	
JPN–PER					
JPN–IND		S			
JPN–CHE		S	S	S	
USA–KOR		S	S		
USA–PAN		S	S		
USA–COL		S	S		
USA–PER		S	S		
USAOM		S			

Note: S: Soft obligation.

(b) promoting compatible regulatory approaches and reducing unnecessarily burdensome, duplicative or divergent regulatory requirements; (c) discussing regulatory measures, practices or approaches of a Party, including how to enhance their efficient application; and (d) reinforcing bilateral cooperation between the Parties in international fora.'[137] But, at the same time, the agreement expressly stipulates that regulatory cooperation shall not affect the right of a Party to define or regulate its own levels of protection in pursuit or furtherance of its public policy objectives.[138]

Regulatory cooperation activities are entrusted to a Committee on Regulatory Cooperation composed of representatives of the Parties.[139] In spite of the Committee's intergovernmental composition, the chapter opens the door for non-state actors' participation. Interested persons

[137]EU–JPN, Article 18.1.1.
[138]Ibid., Article 18.1.2.
[139]Ibid., Article 22.3.

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may submit proposals of regulatory cooperation activities to the Committee[140] and the Committee may invite them to participate in its meetings.[141] The chapter provides some examples of an open-ended list of regulatory cooperation activities,[142] including, among others, exchange of information on planned or existing regulatory measures,[143] exchange of information on good regulatory practices,[144] and bilateral cooperation and cooperation with third countries in relevant international fora.[145] The committee must 'discuss', 'promote', 'support', and 'encourage' these types of activities[146], but it has no binding decision-making power. The whole regulatory cooperation mechanism is embedded in a soft law framework.[147]

The CPTPP chapter on regulatory coherence is very similar to the EU–JPN one, albeit less detailed and with additional flexibilities. It covers both good regulatory practices (examined above) and regulatory cooperation,[148] and it also expressly protects the parties' right to regulate.[149] It establishes an intergovernmental Committee to carry out the regulatory cooperation activities[150] but, like the EU–JPN, it also opens participation mechanisms for non-state actors.[151] The list of regulatory cooperation activities is also open-ended, including information exchanges, dialogues, meetings, and other relevant activities between regulatory agencies.[152] And, like the EU–JPN, regulatory cooperation is strictly voluntary, with no resort to dispute settlement.[153] Moreover, it is for each party to define the scope of the covered regulatory measures subject to these disciplines.[154]

The CETA chapter is focused on regulatory cooperation only, with no reference to regulatory coherence or good regulatory practices.[155] The objectives and principles, scope, subjects, institutional framework, and non-binding character of regulatory cooperation are similar to those defined by the relevant EU–JPN and CPTPP chapters. However, the CETA chapter contains a few distinctive features which are worth highlighting.

First, when it comes to defining the objectives of regulatory cooperation, in addition to the facilitation of bilateral trade and investment, the agreement also refers to the objective to ensure high levels of protection of human life, health or safety, animal or plant life or health and the environment, improve the quality of regulations, and contribute to the improvement of competitiveness and efficiency of industry.[156] While this could be seen as a useful antidote against a regulatory race to the bottom, it also raises serious questions about the competence of trade agreements. To what extent should improvement in the quality of regulations *per se*, irrespective of their trade effects, fall within the mandate of trade agreements? This type of obligation sits uncomfortably in a context where political support for trade agreements that constrain domestic policy discretion outside strictly trade policy instruments is dwindling. It would have been preferable to limit the expansion of new trade disciplines to those whose contribution to trade liberalization is clear, direct, and, where possible, fact-based.

[140]Ibid., Article 18.12(b).
[141]Ibid., Article 18.14.2.
[142]Ibid., Article 18.12.
[143]Ibid., Article 18.16.
[144]Ibid., Article 18.11.
[145]Ibid., Article 18.13.
[146]Ibid., Article 18.14.3.
[147]Article 18.12.6 expressly stipulates the non-binding character of the regulatory cooperation activities, and Article 18.19 carves out the provisions of this chapter from the dispute settlement mechanism's jurisdiction.
[148]CPTPP, Article 25.2.1.
[149]Ibid., Article 25.2.2 (b).
[150]Ibid., Article 25.6.1.
[151]Ibid., Articles 25.2.2(d), 25.7.1(b), and 25.8.
[152]Ibid., Article 25.7.1.
[153]Ibid., Article 25.11.
[154]Ibid., Article 25.3.
[155]CETA Chapter 21, Regulatory Cooperation.
[156]Ibid., Articles 21.2.2 and 21.3.

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Second, general terms such as 'dialogue' and 'exchange of regulatory experiences' are spelled out at a granular level. For example, the chapter requires the parties to consult with each other and exchange information throughout the regulatory development process, share non-public information to the extent that the laws of the Parties allow for this, compare data collection practices, conduct cooperative research agendas, and conduct post-implementation reviews of regulations and policies, to name but a few.[157] The chapter also requires each party to consider the regulatory measures or initiatives of the other party on the same or related topics.[158]

4.3 Regulatory Cooperation on Specific Matters

On financial services, disciplines on regulatory cooperation are gaining relevance but, as the PTAs under examination show, the extent of such cooperation varies significantly across the agreements. Table 5 reals that nine PTAs contain no express reference to regulatory cooperation on financial services.[159] The remaining 14 do include disciplines on this matter, although the prescribed terms for cooperation vary significantly among them. At the bottom end, some PTAs simply envisage the possibility of exchanging views on issues relating to financial services or exchanging information, upon request, on regulations on financial services, but falling short of establishing a specific institutional body to this effect.[160]

Another group goes a step further, establishing specific committees on financial services composed of financial regulators rather than simply government representatives, entrusted with a broad range of tasks, including the supervision and implementation of the agreement and the consideration of regulatory issues regarding financial services.[161] Still a non-binding talking forum, but among sector-specific regulators, and with a specific role in the governance of the agreement.

Finally, a few PTAs provide for more advanced forms of regulatory cooperation that go beyond dialogue and exchange of information. CHN–KOR and USA–KOR include soft commitments to cooperate on the supervision and enforcement of existing regulation on matters relating to cross-border activities.[162] In its turn, the EU and Japan agreed, wherever possible, to rely on each other's rules and supervision. To this end, the parties committed to keep each other informed on how they provide for effective supervision and enforcement of rules,[163] in particular in the areas where one of the Parties relies on the regulatory and supervisory framework of the other Party.[164]

Table 5 shows that 17 PTAs include soft disciplines on regulatory cooperation on e-commerce, encouraging the parties to share information, experiences, and best practices on the regulation of the interface between e-commerce and a number of cross-cutting public policy issues, such as consumer protection, cyber-security, public morals, protection of intellectual property, personal data protection, and the fight against unsolicited commercial electronic messages.[165] Cooperation remains voluntary and no specific committees are established for this purpose but, given the fact that the regulation of e-commerce is still in its infancy, the potential of this type of provisions to minimize future regulatory divergence should not be underestimated.

In a limited number of PTAs, the extent of regulatory cooperation goes beyond dialogue and exchange of information and covers enforcement. Within this group, some PTAs expressly

[157]Ibid., Article 21.4.
[158]Ibid., Article 21.5
[159]CHN–ISL, CHN–CRC, JPN–MNG, JPN–PER, EU–VNM, EU–SGP, EU–COL, EU–CEN, and EU–KOR.
[160]JPN–IND, Article 7, Annex 4 and CHN–CHE, Article 13, Annex VI.
[161]CPTPP, CETA, CHN–AUS, JPN–AUS, JPN–CHE, and all USA PTAs but USA–KOR.
[162]CHN–KOR, Annex 9-A Specific Commitments and USKOR, Annex 13-B Specific Commitments Section G Supervisory Cooperation.
[163]EU–JPN, Annex 8-A, para. 8.
[164]Ibid., para. 9.
[165]USA–PAN and all EU PTAs but for EU–JPN and EU–COL.

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recognize the importance of cooperation, in order to enhance consumer welfare, between their respective national consumer protection agencies or other relevant bodies on activities related to cross-border electronic commerce.[166] Others go further by imposing a soft obligation to cooperate, in appropriate cases of mutual concern, in the enforcement of laws against fraudulent and deceptive commercial practices in electronic commerce, subject to their respective laws and regulations.[167]

On telecommunications, disciplines on regulatory cooperation are far less common than in the previous two sectors. Table 5 indicates that just six of the 23 agreements examined include disciplines on this matter.[168] In JPN–CHE, the parties simply agreed to 'exchange information related to telecommunications services, including information on legislative processes, recent developments, regulatory frameworks, and respective activities of the Parties in international fora'.[169] The EU–SGP telecom chapter lists areas for cooperation, which include the 'exchange of views on policy issues such as the regulatory framework for high-speed broadband networks and the reduction of international mobile roaming charges'.[170] Only the CPTPP and JPN–AUS establish a committee composed of government representatives, with the functions, inter alia, to discuss any issues relevant to the telecommunications sector as may be decided by the Parties.[171] On enforcement, some EU PTAs call the regulatory authorities of the Parties to coordinate their efforts to resolve cross-border disputes arising between suppliers of telecommunications networks.[172]

Finally, on the movement of natural persons, some PTAs call for cooperation between relevant authorities for streamlining immigration procedures to facilitate the movement of natural persons in certain areas.[173]

In sum, the review identifies a number of emerging disciplines on regulatory cooperation. The majority of the regulatory cooperation mechanisms are conceived as non-binding forums for dialogue and exchange of information between sector-specific regulators. It remains to be seen how effective these fledging regulatory cooperation mechanisms will be in addressing regulatory disparities and furthering the liberalization of trade in services. In principle, however, there are reasons to believe in their potential to do so.

First, despite the fact that they operate on an entirely voluntary basis, the creation of institutional mechanisms for regulatory cooperation within the governance structure of a trade agreement offers regulators the opportunity to get to know each other, understand their regulatory practices, and build the mutual trust necessary for paving the way for further market integration. One PTA even envisages the possibility to exchange regulatory officials.[174] It can also be a useful tool particularly for tackling regulatory divergence in areas that are yet to be regulated.

Second, it can be a first step for addressing the 'hold back' problem caused by regulatory externalities. Mattoo notes that countries are reluctant to undertake market access commitments when regulators in the jurisdiction of the service exporter are either not capable or not inclined to take into account the consequences of market failure for consumers in the jurisdiction of the service importer.[175] For example, inadequate financial regulation in the exporting country affecting

[166]CHN–AUS, CHN–KOR, CPTPP, JPN–MNG, JPN–AUS, JPN–CHE, USA–KOR, USA–COL, USA–PER, EU–JPN, and EU–COL.

[167]JPN–AUS, Article 13.10.5 and USKOR, Article 15.5.3.

[168]JPN–AUS, JPN–CHE, EU–VNM, EU–SGP, EU–COL, and CPTPP.

[169]JPN–CHE, Annex 7, para. 10.

[170]EU–SGP, Article 8.48.3(b).

[171]CPTPP, Article 13.26 and JPN–AUS, Article 10.22.

[172]EU–COL, Article 150.2; EU–VNM, Article on Resolution of telecommunications disputes (number still unavailable).

[173]For example, some Chinese PTAs establish a working group with the task of exploring the possibility of streamlining procedures for certified Chinese natural persons to work in the other party in fields with Chinese characteristics, such as Traditional Chinese Medicine practitioners. See CHN–ISL, para. 5, Annex VIII and CHN–CHE, Article 14.2, Annex VI.

[174]CETA, Article 21.7.2.

[175]See A. Mattoo, supra n. 4 at 6.

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consumers and financial stability in the country to which its financial institutions export services, weak data protection in a country that exports data-processing services compromising the privacy of citizens of the country that imports such services, or imperfect policing and emigration checks in a country whose individuals travel abroad to provide consultancy services, undermining law and order in the country that hosts the service suppliers.[176]

Mattoo suggests that when a country is assured that imported services are adequately regulated, such a country will be more forthcoming to undertake greater market opening and commitments.[177] He, therefore, advocates for regulatory cooperation mechanisms, including exporting countries' commitments to minimize their regulatory externalities.[178]

The PTAs under examination offer some evidence in this direction. For example, in the CPTPP, the parties agreed to allow the cross-border transfer of information by electronic means, including personal information,[179] in return for obligations to protect consumers engaged in online commercial activities[180] and to protect the personal information of the users of electronic commerce.[181,182] Similarly, in EU–JPN, in order to enhance the movement of natural persons, more ambitious commitments on their movement (relative to other PTAs) sit alongside a provision that expressly acknowledges the need for full cooperation on return and readmission of natural persons staying in the territory of a Party in contravention of its rules for entry and temporary stay.[183]

5. Conclusions

The paper reviewed the disciplines for tackling regulatory divergence in services included in the most recent PTAs entered into by the four largest trading players in the world: China, EU, Japan, and USA. The study identified a remarkable expansion in the number and extent of disciplines on regulatory transparency, regulatory coherence, and regulatory cooperation compared with the GATS.

On regulatory transparency, the study identified 'GATS plus' disciplines on the duty to publish and the duty to inform and one significant 'GATS extra' discipline, namely, the duty to consult, consisting of the twin obligations to publish proposed regulations and to give interested stakeholders (not just the other party) an opportunity to comment on them. On regulatory coherence, the significant expansion of minimum due process standards for processing applications for the supply of services and, more generally, for administering and reviewing administrative decisions affecting trade in services stand out. Both developments denote a clear trend in recent PTAs to complement traditional horizontal obligations, i.e. those owed by one party to the other, with vertical obligations owed by each party to traders and other relevant stakeholders. Finally, the most innovative development compared with GATS is the incorporation of disciplines on regulatory cooperation on services. While still very basic and not yet widely spread across PTAs, the adoption of disciplines on regulatory cooperation and the creation of institutional bodies within the governance structure of trade agreements, where sector specific regulators (rather than trade diplomats) meet, deserve to be highlighted. They constitute an interesting departure from the hitherto strictly intergovernmental character of PTAs.

The study also identified some common patterns within each of the four trading actors' PTAs, but nothing close to identical traits. On the contrary, the findings confirmed that each PTA has its own

[176]Ibid., at 6.
[177]Ibid., at 1.
[178]Ibid., at 6.
[179]CPTPP, Article 14.11.
[180]Ibid., Article 14.7.
[181]Ibid., Article 14.8.
[182]This observation was made by Aaditya Mattoo in a Public Lecture at the WTO on 25 April 2018. PPT file on record.
[183]EU–JPN, Annex 8 C, para. 7.

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particularities. It appears that no trading actor, regardless of its negotiating power, is capable of imposing the exact same PTA template on each and every one of its trading partners.

In principle, this new set of tools place recent PTAs in a much better position than the GATS to tackle the trade restrictive effects caused by regulatory divergence in services and to combat arbitrary, unreasonable, and inconsistent administrative practices. However, the extent to which they will be able to deliver a degree of market integration beyond what could be achieved simply by removing market access restrictions and discriminatory measures from the rule book, is contingent on their effective implementation. Although it is difficult to anticipate what will actually happen, there are at least two known factors that will condition implementation.

The first one relates to the legal enforceability of these new disciplines. The study has shown that two of the most innovative disciplines – the duty to consult and regulatory cooperation – are phrased predominately in soft terms. The fact that their observance rests on the willingness of the parties, calls for some restraint when estimating the potential impact of these PTAs in tackling regulatory divergence.

The fact that the duty to consult, and a number of minimum due process provisions confer to 'interested persons' clearly defined and self-executable rights, could potentially pave the way for domestic courts to play a role in enforcing the agreement. But this is contingent on domestic courts' interpretation of treaties. Moreover, some treaties have expressly forbidden to construe the agreements as conferring rights or imposing obligations on persons other than the parties.[184]

The second factor relates to the implementation costs. The observance of broad and encompassing disciplines on the development, administration, application, and review of domestic regulations requires having in place a highly sophisticated domestic institutional framework for the governance of service markets. Now, while in most developed countries the existence of these institutions may be taken for granted, for most developing countries this may not necessarily be the case. When the parties to a PTA have very different regulatory infrastructures, government resources, and institutional capabilities, implementation costs will not be evenly distributed among them and this may compromise the effective implementation of the agreement. For example, that could be the case in JPN–MNG, EU–VNM, or USA–PAN. Special and differential treatment provisions and/or the provision of technical assistance for domestic regulatory reforms could contribute to address this problem. But the PTAs under examination include none of them.

Last, but not least, a word of caution. Notwithstanding the fact that regulatory disparities raise trade costs, this renewed impetus to address regulatory divergence in services should not attempt to override regulatory diversity altogether. In spite of an increasingly globalized and interconnected world, deep differences among countries remain in terms of local preferences, policy choices, legal traditions, degrees of development, regulatory needs, regulatory capacity, and, ultimately, regulatory outputs. These variances are compounded by the idiosyncratic nature of services. In other words, there is an inevitable degree of divergence that parties to a PTA should accept as a natural consequence of the exercise of the right to regulate the supply of services in different contexts and with different capacities and priorities. Moreover, pushing the goal to iron out regulatory disparities of services regulations too far may exacerbate concerns relating to the undue degree of intrusion of PTAs on the right to regulate, further undermining the increasingly feeble political support for these agreements.

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[184]See CPTPP, Article 28.22 and CETA, Article 30.6.

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