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Gaël Le Roux*

TTIP negotiations, policy convergence, and the transatlantic digital economy

Abstract: The Transatlantic Trade and Investment Partnership (TTIP) has the potential to be a landmark treaty on many grounds. According to European and American officials, one of the main features that should differentiate the TTIP from other bilateral free trade agreements is, beyond its unprecedented scale, the ambition of its regulatory dimension. On both sides of the Atlantic there is a strong incentive to mitigate the impacts of "behind-the-border" obstacles that mostly stem from existing divergences between laws and regulations applied in Europe and in the United States. To do this, trade negotiators, together with policymakers and regulators, attempt, when possible and desirable, to facilitate the convergence of the policies that frame the European and the American markets. This paper analyzes how convergence may be reached with regards to the regulation of the digital economy, a relatively new area of interest in the field of trade law and policy studies, that seems to deserve a specific attention considering the growing importance it has taken at the domestic level and in the context of trade negotiations.

Keywords: TTIP, digital economy, policy convergence, digital trade

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1. Introduction

The Transatlantic Trade and investment Partnership (TTIP) is expected to be a landmark treaty on many grounds. According to European and American officials, one of the main features that should differentiate the TTIP from other bilateral free trade agreements is, beyond its unprecedented scale, the ambition of its regulatory dimension. Indeed, the average custom tariff applied between the European Union

***Corresponding author: Gaël Le Roux**, Ph.D Candidate in Law, Université libre de Bruxelles - Institut d'Etudes Européennes/Faculté de Droit et de Criminologie - Centre de droit européen & Aix-Marseille Université / CNRS - Unité Mixte de Recherche Droit International Comparé et Européen - Centre d'Etudes et de Recherches Internationales et Communautaires, CERIC, Espace Cassin, 3 avenue Robert Schuman - 13628 Aix-en-Provence Cedex 1, France, email: gael.LE-ROUX@univ-amu.fr

and the United States is below 2 percent.[1] Some impact assessments estimates point that eighty percent of the economic gains of the agreement should come from the reduction of non-tariff barriers.[2] On both sides, there is therefore a strong incentive to mitigate the impact of "behind-the-border" obstacles that mostly stem from existing divergences between laws and regulations applied in Europe and in the United states. To do this, trade negotiators, together with policy-makers and regulators attempt, when possible and desirable, to facilitate the convergence of the policies that frame the European and the American markets.

1.1 Analyzing the TTIP through the lenses of policy convergence theory

Policy convergence is defined as "an increase in the similarity between one or more characteristics of a certain policy (policy objectives, policy instruments, policy settings) across a given set of political jurisdiction (supranational institutions, states, regions, local authorities) over a given period of time."[3] Often approached from a technical perspective as a practice seeking to immediately approximate specific technical regulations and standards, convergence may also be understood as a broader policy process aiming, in the long term, at bringing closer the procedures and outcomes of rule-making between separate, yet interconnected legal systems. The underlying objective of convergence is the alignment of the legal and regulatory frameworks governing relations between like-minded actors.

When analyzing a policy convergence process, we may start by looking at its *causes*. Policy convergence can be considered as a passive process, that comes from a natural tendency for legislators and regulators to act similarly in alike situations. It nonetheless most often appears to be the result of a proactive approach, aiming primarily at tackling transnational issues through the setting of a common base of rules and standards.[4] International agreements and international organizations, either multilateral or bilateral, have been major tools for proactively pursuing convergence.[5] Lately, bilateral trade agreements have to a great extent been considered by the United States and by the European Union as major tools used to set rules and standards that could facilitate or accelerate convergence processes.[6]

1 European Commission (2015vi).
2 François et al. (2013).
3 Knill and Holzinger (2005), 768.
4 Rabu (2008), 337.
5 Knill and Holzinger (2005), 781.
6 Young (2015), 1,255.

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They have mostly been conceived as complementary instruments to existing multilateral frameworks.

Policy convergence analysis also requires that its *object* is taken into consideration. Regulatory convergence, a sub-theme of policy convergence that concerns the implementation level of policy making (i.e., technical regulations, standards, conformity assessment, etc.), is probably the one that has attracted the most attention. It has directly been pursued in many trade agreements, mostly in chapters relating to technical barriers to trade (TBT). Its technical dimension fits well in the context of supranational treaties that are negotiated and concluded within the framework of mandates, usually granted to the executive branch of governments, that make it difficult for negotiators to address more fundamental principles included in legislation. Yet, in recent agreements, we can observe a tendency to tackle more substantial legal issues. This tendency is coupled with an apparent willingness to frame the elaboration and the implementation processes for those common rules. This translates into the creation of institutional settings (regulatory cooperation bodies) and jurisdictional mechanisms (dispute settlement systems) that aim at taking convergence a step further by tackling differences upstream (i.e., during the policy-making process) and down-stream (i.e., when legislation is interpreted by courts). General aspects of legislation are thus also more likely to be addressed in recent treaties through the use of those instruments. For this reason, we consider convergence in this paper as a comprehensive policy process, covering a wide range of legal instruments and not as a mere technical regulatory one.

Policy convergence analysis should finally take into consideration its *outcome*. In this paper, we chose to differentiate between three different levels of convergence outcomes. The first and most basic one is coherence and compatibility. It does not require similarity between policy approaches, but only entails that different laws and regulations do not interact negatively with each other. The second and more far-reaching level of convergence is mutual recognition. It takes the form of a general policy framework that allows recognition that the rules applied in another jurisdiction can be accepted as essentially equivalent to domestic ones. It usually does so by setting "the conditions governing the recognition of the validity of foreign law, regulations, standards and certification procedures among states in order to assure host country regulatory officials and citizens that their application within their borders is "compatible" with their own, and that incoming products and services are safe."[7] The third, and certainly the highest level of convergence, is harmonization. It consists of a general and substantial approximation of laws, rules, and standards between two separate jurisdictions. At least two

7 Nikolaïdis and Shaffer (2005), 4.

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ways exist to achieve it: The most straightforward one is to directly apply identical rules—such as those conveyed in international treaties—in separate legal orders. A less direct method, but with similar effect, is to link domestic legal orders to common binding international regimes or jurisdictional instruments.

Overall, those three elements will have implications for one or the other. For example, the level of convergence that can be reached (its outcome) very often depends on the type of rules concerned (the object of convergence). Following that logic, we observe on the one hand that harmonization and mutual recognition will mostly concern standards and technical regulations. On the other hand, when legislative measures bring into play more complex and sensitive legal concepts, compatibility is likely to be the level of convergence that will be pursued. Similarly, the mechanism or instrument used to generate convergence (its causes) will often relate to what kind of object is concerned and what kind of outcome may be reached. For example, a mutual recognition agreement will concern mostly specific technical regulation and will aim at reaching that specific level of convergence. A deep and comprehensive trade agreement may on the other hand include provisions that address more general policy issues, and as such, it might aim for convergence at a more modest compatibility level.

The heated debate about policy convergence has been at the center of the TTIP negotiations. It raises many different issues that can be addressed from various perspectives. The economical aspect might question the costs entailed or the benefits to be reaped from the reduction of non-tariff barriers, as well as the redistribution of those costs and benefits between both partners and within their respective economic structures. The political debate may address the legitimacy of seeking policy convergence between the European Union and the United States, taking into consideration legitimacy or accountability issues as well as the natural differences between their respective political and legal cultures. Finally, the legal approach might question the mechanics of convergence, as well as the potential and limitations inherent to the use of bilateral trade agreements to pursue it.

Generally speaking, economic stakeholders expect significant gains from the convergence of the separate legal frameworks in which they operate. They argue that convergence would allow them to operate in a more homogenous and predictable market and would boost cross-border trade in both goods and services sectors.[8] Policy-makers and regulators are also generally favorable to policy convergence. They believe that it will allow them to use their jurisdiction's "market power" to project their domestic rules and standards on the global scene and as a result, strengthen their regulatory authority.[9] Nevertheless, many non-

8 Akhtar (2014).

9 Damro (2012).

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governmental organizations strongly oppose convergence. They generally denounce the threats posed by policy convergence processes supported by trade deals. They mostly underline the lack of legitimacy stemming from the establishment of a global regime of regulatory governance based on trade law.[10] They also point at the immediate risk of a race-to-the-bottom phenomenon that they fear could be encouraged in convergence processes by the establishment of a level playing field aligned on the lowest common denominator between separate legal systems. While keeping this debate in mind, this paper will not directly engage in it. It will mainly focus on the mechanics of convergence and leave to further work the task of addressing the normative issues related to the legitimacy of this process.

Studying the impact of the TTIP as a tool for policy convergence can be done by focusing on a variety of issue areas. This paper will do so by analyzing a policy topic that we believe deserves a particular attention in recent trade negotiations: the digital economy.

1.2 Our case study: the digital economy

The digital economy is a relatively new area of interest in the field of trade law and policy studies. Traditional economic sectors tend to occupy a more central place in existing research. Attention has in the past mostly been directed towards manufacturing industries such as chemicals, textile, vehicles, cosmetics, or pharmaceuticals. The non-tariff barriers that have been analyzed in those studies are mostly technical regulations that are nested in environmental law, health regulation, or product safety standards, to cite a few. Some attention has also been devoted in the past to several services sectors such as financial services, regulated professions, transport, or postal services. This has led commentators to focus on a broad range of policy areas such as competition legislation, financial regulation, or public procurement rules. The digital economy, which encompasses both goods and services industries, and which is equally impacted by general and technical regulations, has nonetheless progressively started to attract more and more attention.[11] This has been encouraged by a growing number of provisions concerning the digital economy that have been included in recent trade agreements.

We can underline at least three general reasons that explain why the "digital component"[12] of trade agreements is expected to attract more and more attention

10 Larik (2015).

11 Renda and Yoo (2015).

12 Ibid., 1.

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and deserves a specific study: Firstly, the digital economy has gained considerable weight in major industrialized regions, especially in the European Union and in the United States. This economic development does not only concern the Information and Communications Technology (ICT) sector but affects the way most (if not all) traditional goods and services industries function. Secondly, the exponential development of the digital economy is coupled with a fast and considerable legislative and regulatory production in most jurisdictions, especially in advanced industrialized economies. Out of thirty-five countries member of the Organisation for Economic Cooperation and Development (OECD), twenty-seven are currently implementing a national digital strategy which generally includes an important legal reform dimension.[13] Thirdly, the issues that are addressed by digital policies and regulations are becoming more and more transnational because of the "inherent globalness" of the digital environment.[14] This poses challenges to the traditional nation-state level of rule-making. Supporters of agreements such as the TTIP argue that trade deals could contribute to overcome the problems of global legislative and regulatory fragmentation in the digital economy, notably because of their ability to generate convergence.[15] Opponents on the other hand fear that by doing so, they would threaten the fragile domestic equilibrium that policy makers are still in the process of securing through the adoption of laws and regulations concerning key digital issues at national or regional levels.[16]

Laws and regulations affecting the digital economy are very diverse in nature and tackle a wide range of issues. They can typically concern rules attempting to strike a fair balance between contradictory interests in the digital world (for example, those concerning the rights and obligations of data controllers and data subjects in the field of data protection law or those regarding the relationship between end users and internet service providers in the context of the "net neutrality" debate). Legislation may also aim at adapting existing rules and principles that can no longer face the challenges raised by the spread of new technologies (such as intellectual property rights or competition rules for companies operating online). At a more technical level, regulation may aim at setting standards that allow the digital economy to grow (for example, by promoting interoperability to facilitate access to telecommunication networks and services). The non-tariff measures that affect global trade in the digital economy appear because of divergent legal and regulatory answers to political, economic, and technical questions raised by

13 Organisation for Economic Cooperation and Development (2015).
14 Burri (2015), 3.
15 DigitalEurope (2015).
16 Irion, Yakovleva, and Bartl (2016).

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the development of digital technologies.[17] Legislative and regulatory answers to these may vary depending on the social, political, institutional, legal, and economic context in which they are adopted. Those variations may affect the basic orientations or the fundamental conceptions of the framework principles guiding the elaboration of the laws and regulations. They may also only differ in terms of form while remaining congruent concerning fundamental, underlying values. Depending on the situation, convergence may be more or less achievable or desirable.

The European Union and the United States' negotiators are generally, positively inclined concerning the convergence of the laws and regulations ruling their digital economy. Both partners consider that, while some of the obstacles created by their domestic legal and regulatory measures are by no means possible to repeal for political, economic, and legal reasons, some others may be unnecessary and could be overcome without threatening the balanced framework those laws and regulations may provide to consumers, businesses, and citizens. In some instances, it could even enhance the efficiency of those rules by overcoming the shortcomings of the fragmented global, legal regime ruling the digital economy.

In this paper, we will assess if, indeed, the TTIP could play a major role in the collective regulatory answer that the development of the global digital economy seems to require or if, on the contrary, it is likely to fail to reach this goal and ultimately threaten the protection of some fundamental interests better safeguarded at the domestic or regional level. To do this, it will analyze the provisions of the TTIP that affect the digital economy (i.e., the digital component of the agreement). To delineate the scope of our study, we will rely on Burri's definition of what constitutes the digital component of a trade agreement: this encompasses all provisions that affect "the free flow of information in the digital networked environment."[18] This concretely covers provisions included in chapters on telecommunications, services, e-commerce, and intellectual property rights.

1.3 Approach and methodology

At this stage of negotiations, there are two apparent ways of studying the issue of how the TTIP could impact policy convergence for the digital economy. Because negotiations are not yet concluded, we cannot rely on any final and legally binding TTIP text from which we would analyze the provisions impacting digital policy convergence. Hence, one approach could consist of evaluating the room for

17 European Centre for International Political Economy (2016).

18 Burri (2015), 2.

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policy convergence on the basis of a comparison of how digital markets are regulated on both sides of the Atlantic. This is the approach proposed by Renda and Yoo that identify legal issues in the field of digital policy where convergence is achievable and those where convergence would be more difficult to reach between the European Union and the United States.[19] Nevertheless, this approach voluntarily ignores the agreement's textual content (although it takes into consideration the general context of the negotiations). As such, it does not demonstrate the direct link between the TTIP's potential features and the convergence it may bring to the regulation of the transatlantic digital market. Our approach will consist of analyzing the publically available (yet not legally binding) documents concerning the TTIP negotiations. By focusing on its draft content, we can attempt to assess the potential as well as the limits of the TTIP as an instrument that fosters policy convergence in the digital economy. In order to overcome the difficulty caused by the absence of a final TTIP text to rely on, we will analyze aspects of existing agreements that the European Union and the United States are engaged in and link these analyses with the numerous TTIP documents that have already been made public.

Having set the context, the definitions, the objectives, and the methodology of this study, this paper will now proceed in two steps. It will start by studying the contents of existing trade agreements to which the European Union and the United States are parties and will analyze how they have been drafted to encourage policy convergence concerning digital issues (section 2). It will continue by prospectively assessing the provisional content of the TTIP's digital component (section 3). It will finally conclude by evaluating the overall potential and limits of TTIP induced convergence between the United States and the European Union concerning digital issues (section 4).

2. The existing global framework within which the European Union and the United States adopt their digital policies

This section will focus on the instruments that are included in trade agreements already concluded by the European Union and the United States and that are potential vectors of policy convergence for the digital economy that both actors are likely to replicate and elaborate in the TTIP.

19 Renda and Yoo (2015).

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2.1 The basic framework: the WTO multilateral agreements and related programs

The WTO agreements set the general, multilateral framework under which trade in goods and services (including digital ones) is regulated. Within the framework of the WTO, the agreement that most significantly impacted policy convergence in digital matters was certainly the General Agreement on Trade in Services (GATS). Under this agreement, members committed to adopt rules that open key markets for the digital economy (that remain mostly service based) to foreign firms. They did so mostly for telecommunications by the adoption of the Annex on Telecommunications in 1994 and by the subsequent conclusion of the fourth protocol (also known as "the agreement on basic telecommunications") and its reference paper in 1998. These texts have had a significant impact on policy convergence mainly by committing members to reshaping their domestic telecommunications' legal frameworks on issues such as competition, interconnection, universal service, licensing, independence of regulators, or management of scarce resources.[20] Telecommunication laws of the European Union and of the United States such as the United States' Telecommunications Act of 1996[21] or the European Union's 1998 and 2002 telecommunications packages largely took on board some of the major features promoted under this framework.[22] Overall, the WTO has allowed for the creation of a global telecommunications level playing field between those countries concerning both general and technical levels of legislation and regulation. It can also be viewed as having reached convergence on a compatibility level as many rules have remained different, due mostly to the specificities of each actor's telecommunication market structures, but there are far fewer rules now that forbid foreign actors to operate within their partner's market.

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) has also had a significant impact on the convergence of laws and regulations concerning important legal matters for the digital economy. It addresses intellectual property issues that are crucial for the IT and online economy, such as patents and copyright. It sets, for example, the basic principles for the protection of copyrighted content applied on the internet and that should be implemented into the signatories' domestic laws.[23] It also requires WTO members to protect computer programs and compiled data as copyrighted material.[24] It more

20 Burri (2015), 23; Burri (2007), 853.
21 Telecommunications Act (1996).
22 Burri (2007); Meinsner (1998).
23 TRIPS (1994), section I.
24 Ibid., article 10.

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generally supports an innovation based economy through the commitment of signatories to adopt common approaches regarding IP law within their jurisdiction. Most of those legal obligations and general principles have been translated to a great extent into U.S. and E.U. law. In the United States, a major illustration of the domestic influence of the TRIPS agreement is the adoption of the Digital Millennium Copyright Act in 1998.[25] Similarly, in the European Union, major elements of the copyright directives adopted in the 2000s can be identified as being a direct implementation of the European Union's commitments under the TRIPS agreement.[26] Here again, convergence can be considered as having affected major elements of both actor's domestic digital copyright law and policy. The implementation of the TRIPS agreement has resulted in the incremental construction of a compatible set of rules between the European Union and the United States over two decades. Yet some discrepancies remain between the two legal orders due to historical differences concerning distinct visions on the appropriate balancing of interests regarding IPR regimes. Here again, convergence seems to have addressed general legal issues that have been made broadly compatible rather than fully identical.

The convergence of technical regulations concerning digital equipment has also been favored through the adoption of the technical barriers to trade agreement (TBT). The TBT agreement indeed provides a strong legal incentive for WTO members to adopt common technical standards related to digital products, thus encouraging the convergence of their technical regulations, which are essential for the digital economy, whose dependence on technical groundings goes without saying. The TBT agreement does so by recognizing that domestic standards which are adopted in line with globally agreed upon ones (approved within structures such as, among others, the International Telecommunications Union, the International Organization for Standardization, and the International Electro Technical Commission) are presumed not to be technical obstacles to trade.[27] The TBT agreement is thus a major driver for the standardization of digital products, which is key for the development of networks and hardware confection. As such it can be considered a driver of technical regulatory convergence and can be perceived as having contributed to convergence on a harmonization or at least, a mutual recognition level concerning digital products' regulations and standards.

The WTO also provides a policy convergence instrument regarding the development of e-commerce. Rather than through a strict legal commitment, it has

25 Digital Millennium Copyright Act (1998).
26 Infosoc Directive (2001).
27 TBT (1994) article 2.5.

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addressed this issue through the adoption and the implementation of a work program that was launched in 1998. This program aims at supporting the development of e-commerce "understood to mean the production, distribution, marketing, sale or delivery of goods and services by electronic means."[28] The program works as a forum where virtually all issues concerning digital trade, ranging from telecommunications' infrastructure to online copyright, are discussed by dedicated committees.[29] The effectiveness of this program as a trade policy coordination and facilitation instrument between WTO members has been questioned by many.[30] Indeed, its ability to support convergence does not come from legal obligations entailed by international treaties, such as GATS or TRIPS. As such, its influence is harder to measure. Yet the e-commerce work program may still have had an important impact in terms of policy diffusion between the European Union and the United States by setting an institutional framework favoring knowledge sharing and regulatory dialogue on digital economy issues between both actors. It was notably used by the European Union and the United States in 2011 as a platform to promote a number of principles on e-commerce ranging from "open networks" to "cross-border information flows."[31] What makes this program interesting is that it addresses the roots of some of the major differences between the participants' legal systems concerning e-commerce. Even if it does so with a soft approach, its potential, alongside hard law instruments, is not to be overlooked, although it is certainly underexploited.

We will now pursue this analysis in the next section by focusing on more advanced and sector based instruments involving a more limited number of participants.

2.2 The way forward: plurilateral agreements

Plurilaterals are agreements concluded between a limited number of members willing to cooperate together on specific issues. A specific plurilateral agreement concerning digital goods was concluded in 1996 and revised in 2015: The Information Technology Agreement (ITA). In its initial version, it aimed at facilitating trade for technology products by cutting tariffs. It was reviewed in July 2015 and expanded its membership. It now counts eighty-one members, and signatories boast that they represent 97 percent of world trade in IT products.[32] The new

28 WTO (1998), article 1.3.
29 Ibid., article 2.1 ; article 3.1 ; article 4.1 ; article 5.1.
30 Wunsch-Vincent and Hold (2012), 181.
31 WTO (2011).
32 WTO (2015i).

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version of the ITA has drawn lessons from criticisms addressed to its former one, mainly by including new commitments to tackle non-tariff barriers in addition to tariffs. The eighty-one ITA participants have indeed committed to intensify their work on the convergence of technical regulation and standards regarding IT products.[33] Within the framework of a work program on non-tariff measures, signatories have discussed principles that all parties should apply when adopting regulations and standards for IT products. These principles are: transparency in standard setting, mutual recognition of conformity assessment procedures, flexible conformity declaration systems (such as "self-declaration of conformity"), generalization of e-labelling, etc. These common understandings are a step towards a procedural convergence which may result in making those countries produce more compatible technical regulations for their IT products, thus enhancing the trust each party places in the others' set of rules. The European Union and the United States that have been leading participants in the ITA are more likely to draw the lessons from the shortcomings of ITA 1 and promote the same procedural instruments in the TTIP than they have in ITA 2. This would allow them to aim at technical regulation convergence on a mutual recognition or harmonization basis.

Another plurilateral agreement, the Trade in Services Agreement (TiSA) currently being negotiated between twenty-three members of the WTO including the United States and the European Union, could address some issues that have so far not been tackled in the GATS. When/if concluded and ratified, it might also be a breakthrough deal concerning trade in digital services which covers the bulk of digital trade. It is expected to adopt GATS-plus provisions regarding, notably, telecommunication services. According to some leaked drafts, it could also address key GATS-extra topics such as cross-border data flows and forced data localization, online consumer protection, or forced technology transfers.[34] Because of the sensitivity of those issues and the complexity of current negotiation dynamics, convergence will likely only be pursued under TiSA at a very minimalist compatibility level between the European Union, the United States, and the other twenty-one participants.

In the following section, we will analyze how the European Union and the United States have attempted to take the process of convergence further in the (theoretically) more flexible setting provided by the negotiation of bilateral and regional trade agreements.

33 WTO (2015ii).

34 Wikileaks (2015).

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2.3 E.U. and U.S. bilateral and regional agreements: templates for the TTIP?

Bilateral and regional agreements are certainly the treaties in which the European Union and the United States have had the most freedom to include far-reaching provisions favoring convergence of laws and regulations impacting the digital economy. This is due to their limited membership which makes compromise easier to reach, as well as to the frequent asymmetry between the European Union or the United States and the parties with whom they negotiate. More generally, the deadlock faced by WTO negotiations since the launch of the Doha round in 2001 and the limited success of plurilateral agreements, has had significant consequences on the urgent need for an update of the international legal framework for digital issues. In the following sections, we will undergo an analysis of the provisions included in some key bilateral agreements concluded by the European Union and the United States. We will focus on titles, chapters, articles, and annexes of those agreements identified as having an impact on the digital economy and that may be helpful indicators of what type of instruments are likely to be included by both partners in the treaty they attempt to conclude together.

2.3.1 The European Union and the United States' agreements with South-Korea: the blueprints for both actor's new generation of trade agreements

The first agreements that will be assessed concern a country with which both the European Union and the United States have separately yet simultaneously addressed digital issues with in a substantial way. The Republic of Korea, once portrayed as the "most connected country in the world," concluded bilateral trade agreements with the European Union (known as the KOREU agreement) and the United States (known as the KORUS agreement) in 2011. Many similarities in the instruments used to foster policy convergence in the digital area appear in those two deals.

Concerning telecommunications, both KOREU[35] and KORUS[36] include dedicated chapters that are broadly similar and very much inspired by the WTO framework. Nevertheless the scope of the KORUS agreement is slightly larger as it includes value-added telecommunication services,[37] while the KOREU agreement remains limited to basic telecommunication services.[38] Both chapters similarly

35 KOREU (2011), chapter 7, sub-section D.
36 KORUS (2011), chapter 14.
37 Ibid., article 14 (1) § 1(d).
38 KOREU (2011), article 7 (27) § 1.

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address regulatory issues such as access and use of telecommunication networks and services, public and universal services, competitive safeguards on major suppliers, interconnection, portability, licensing, independence of regulatory authority, and allocation of scarce resources. These are WTO-plus provisions that provide similar yet more detailed elements on how to implement general reforms conducted since the WTO agreements and related telecommunication annexes were adopted. The fact that both the European Union and the United States promote more or less the same principles with their Korean partner confirms the degree of convergence they already both enjoy together.

Concerning e-commerce, both the KOREU and the KORUS agreements take on board and consolidate into binding international law many elements of the WTO work program. They confirm "the applicability of the WTO agreements to measures affecting e-commerce."[39] Many of the principles that the European Union and the United States had formulated in 2011 in the context of the work program are also included in the agreements.[40] Important differences nonetheless remain. While both KOREU and KORUS refer to e-commerce as "delivery by electronic means,"[41] the United States added in its deal with Korea a definition of "digital products."[42] These are defined as "computer programs, text, video, images, sound recordings and other products that are digitally encoded and produced for commercial sale or distribution, regardless of whether they are fixed on a carrier medium or transmitted electronically."[43] This broad definition, despite its inability to tackle the issue of the qualification of digital products as goods or services, is an important step taken by the United States in setting a common regulatory approach on digital trade with South-Korea. The absence of a similar definition in the European Union's agreement with Korea is a point of divergence that may be difficult to overcome considering that the terminology used in the European Union's major piece of internal legislation, the e-commerce directive of 2000, refers to "information society services" rather than "digital products."[44]

Another major difference between the KOREU and KORUS' e-commerce chapters concerns data flows. KORUS explicitly forbids signatories from restraining those information flows.[45] KOREU does not mention such flows and places a strong emphasis on the necessity to maintain a high level of data protection

39 KOREU (2011), chapter 7, section F; KORUS (2011), chapter 15.
40 WTO (2011).
41 KOREU (2011), chapter 7, section F, article 7(48) § 3; KORUS (2011), article 15(2).
42 KORUS (2011), article 15(3).
43 Ibid., article 15(9).
44 Electronic Commerce Directive (2000).
45 KORUS (2011), article 15(8).

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rules in both legal orders.[46] This topic is a highly contentious one between the European Union and the United States.[47] The fundamental differences in the way both actors have addressed the issue of data protection regulation internally leave little hope for an agreement on this issue in the TTIP.[48] Indeed, rather than enshrining data flows in a binding international law instrument, the European Union and the United States are more likely to keep relying for transatlantic data transfers on the more flexible adequacy framework provided by the so-called "privacy shield."[49] This system, rather than promoting common international rules for privacy, unilaterally ensures that data transfers can occur between different legal systems as long as those provide an "essentially equivalent" level of privacy protection.[50]

The chapters dealing with intellectual property rights (IPR) in KOREU and KORUS are also very similar. They promote a global harmonized framework by securing compliance with the same international agreements, including the World Intellectual Property Organization's so-called "internet treaties."[51] They both address similarly issues regarding copyright and related rights. KORUS is nonetheless much more prolific on the matter.[52] It interestingly includes an article on domain names on the internet[53] and one on the protection of encrypted program-carrying satellites and cables.[54] Both agreements also contain provisions on the liability (and limitations thereof) of internet service providers (ISPs).[55] KOREU is the first example of an E.U. trade agreement that does so. It limits the liability of ISPs when they are not directly involved in a copyright infringement, that is in three situations: mere conduit, caching, and hosting.[56] KORUS foresees the same kind of framework with the same three limitations to liability, yet it adds a fourth one which is linking.[57] With very similar approaches projected by the European Union and the United States in their respective agreements with Korea, it can be expected that comparable provisions will be included in the TTIP. This should, in effect, reinforce the already strong convergence concerning

46 KOREU (2011), chapter 7, section F, article 7 (48) § 2.
47 Greenpeace (2016).
48 Van Eecke (2016).
49 European Commission (2016ii).
50 Court of Justice of the European Union (2015).
51 KORUS (2011), article 18(1).3; KOREU (2011), chapter 10, section B, article 10(5).
52 Webb (2013).
53 KORUS (2011), article 18(3).
54 Ibid., article 18(7).
55 KOREU (2011), chapter 10, section C, sub-section C ; KORUS (2011), article 18(10) § 30.
56 KOREU (2011), article 10(63); 10(64) and 10(65).
57 KORUS (2011), article 18(10) § 30(b).

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IPR policies (and more specifically their copyright enforcement regimes) between the European Union and the United States concerning the digital sector.

Overall, the KORUS and KOREU agreements can provide interesting and direct insights into the approaches both actors might favor concerning the treatment of major aspects of their digital policies in trade agreements. As we have seen, the European Union and the United States have already converged to a great extent on a lot of issues. Concerning others, Garcia commented that, some of "the differences in E.U. and U.S. free trade agreements represent those issues which decades of E.U.-U.S. cooperation have failed to resolve and the most challenging issues for TTIP."[58] To investigate to what extent Garcia's claim still stands today, we will now move toward the analysis of two agreements concluded more recently by the European Union and by the United States.

2.3.2 The Comprehensive Economic and Trade Agreement: the evolution of the European Union's position on digital trade

The negotiations of a Comprehensive Trade and Economic Agreement between the European Union and Canada (CETA) were concluded in August 2014. It was approved and signed by Canada and by the European Union on 30 October 2016.[59] Due to intricate political and legal issues at the European level, the complete ratification process is likely to take several years. In the meantime, most of the agreement could be provisionally applied, including the chapters relevant to digital trade which will be analyzed in the following section.

The growing importance of the content of the e-commerce chapter in this treaty can be seen both as an illustration of the increasing relevance of this topic in trade deals and as a move from the European Union towards a more U.S.-like approach.[60] Considering the later point, it is notable that, while KOREU only defined e-commerce as a "delivery by electronic means," CETA also defines the object of this delivery which can be: "a computer program, text, video, image, sound recording or other delivery that is digitally encoded."[61] Although not borrowing the appellation "electronic product" used by the United States, the European Union and Canada have still copied most of its definition and applied it to other terminology. The result is an obvious convergence between the European Union and the United States in their definition of a central aspect of digital trade law.

58 Garcia (2014).
59 Council of the European Union (2016).
60 CETA (2016), chapter 16
61 Ibid., article 16(1).

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The intellectual property rights chapter in CETA is close to identical to the one agreed between the European Union and Korea in 2011 and is very similar to the approach proposed by the United States in its own deals. What is noticeable is that the approach concerning ISP liability that the European Union and Korea had agreed upon (and that the United States also used) has been maintained in the CETA,[62] despite Canada's internal rules on this issue being very different from those in place in the European Union.[63] The European Union thus seems to have successfully asserted its legal model on this issue. As such, CETA can certainly be acknowledged as a vector for policy convergence at a harmonization level between the European Union and Canada, concerning a major aspect of online copyright law. It does so in line with the American approach which can be seen as a step further made by the European Union and the United States on the convergence of their intellectual property rights policies.

Other aspects of the CETA nonetheless remain very different from what is included in U.S. trade treaties. It is still to be seen how those will be dealt with in the TTIP. To cite a few, these differences concern: the audiovisual carve-out maintained by the European Union with Canada,[64] the insistence on personal data protection, and the related absence of a specific clause concerning data flows,[65] or the exclusion of so called "new services" (those not listed under the UN CPC84 code) from the schedule of specific commitments in the services' annex. Those differences may appear to be even greater with regards to the content of the latest trade agreement drafted, by the United States and eleven other American and Asia-Pacific countries.

2.4 The Trans-Pacific Partnership: the United States' gold standard for digital trade

Released in November 2015, the Trans-Pacific Partnership (TPP) text included many provisions concerning the digital economy. It found its roots in President Obama's administration's digital trade agenda which sought to achieve an "ambitious and visionary internet trade agreement."[66] Shortly after the election of President Trump, the United States pulled out of the treaty. Despite this, the TPP text can still be analyzed as the draft version of the most ambitious digital

62 Ibid. article 20(11).
63 Husovec (2014).
64 CETA (2016), article 9(2) § 2(b).
65 Ibid., article 16(4).
66 United States Trade Representative (2015ii).

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trade agreement promoted by the United States and some of its key partners. As such, it can still offer interesting insight into the future design of trade deals, especially for issues concerning the digital economy.

The main novelties concerning the digital sector were to be found in the e-commerce chapter of the agreement. First, the TPP recalled a number of key definitions including those of "digital products," "electronic transmission," and "personal information"[67]; it also added an interesting definition of "computing facilities" which covered data centers and other computer servers that are essential for the development of the cloud based economy.[68] Among the main features of this chapter were also general provisions supporting the development of e-commerce, such as commitments to support the use of electronic transactions,[69] electronic authentication, and electronic signatures.[70] A great emphasis was also placed in this chapter on consumer protection by encouraging the adoption of a legal framework allowing for judicial redress concerning e-commerce litigations and by securing the adoption of effective data protection legislation in the jurisdictions of each of the signatory parties.[71] While promoting common approaches, notably by encouraging convergence around international standards, the provisions on data protection were nonetheless explicitly aimed at reaching convergence at a compatibility level.[72] One of the means to achieve this was by setting "compatibility mechanisms" such as the "recognition of regulatory outcomes," which, in other words, could be qualified as mutual recognition framework.[73] Non-discriminatory treatment of online goods and service providers was also touched upon in the TPP text. In an article on the access and use of the internet for e-commerce, "reasonable network management" was mentioned as a legitimate exception.[74] This resonated with the regulation on "net neutrality" adopted by the Federal Communications Commission in its 2015 Open Internet Order.[75] Last but not least, the e-commerce chapter of the TPP secured the free flow of information and data between all twelve signatories.[76] It listed four exceptions to this: public interest regulation, preventing spam, protecting privacy, and fighting cybercrime. This went together with the limitations imposed on signatory states on

67 TPP (2015) – article 14(1).
68 Ibid. – chapter 14, article 14(1).
69 Ibid. – chapter 14, article 14(5).
70 Ibid. – chapter 14, article 14(6).
71 Ibid. – chapter 14, article 14(7).
72 Ibid. – chapter 14, article 14(8).
73 Ibid. – chapter 14, article 14(8) § 5.
74 Ibid. – chapter 14, article 14(10).
75 United States Federal Communications Commission (2015).
76 TPP (2015) – chapter 14, article 14(11).

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forced data localization requirements.[77] All of those extremely detailed provisions and the strong obligations they conveyed could have had a major impact in terms of policy convergence between the twelve signatory countries. It may have secured convergence on a harmonization level for technical topics and on a mutual recognition or compatibility one for the more fundamental issues such as consumer protection and data flows.

The intellectual property rights (IPR) chapter of the TPP was also extremely comprehensive and far reaching, yet did not particularly go any further than what had already been agreed upon by the United States and Korea in 2011. The USTR underlined that the IP rules included in the TPP "reflect the appropriately strong copyright protection and enforcement that (exist) in U.S. law" and at the same time guaranteed that the TPP didn't go beyond U.S. law.[78] In other words, it was a fairly straightforward projection of the United States' Digital Millennium Copyright Act with unprecedented geographical coverage.

The services chapter of the TPP also placed a great emphasis on those types of services that had developed in the digital economy. It emphasized the need to address the liberalization of "new services" such as internet based services reliant on the legitimate distribution of content *via* platforms.[79]

The telecommunications chapter was also one that very much focused on digital means of communication. It was extremely comprehensive and classically promoted the U.S. competition based model. Yet, compared to other trade deals, it significantly elaborated on the usual, basic telecommunications approach by explicitly including commercial mobile services.[80] Regarding this, it envisaged original measures concerning roaming rates.[81] These included mechanisms to encourage the reduction of roaming tariffs[82] but also an obligation to minimize the restrictions on the use of roaming alternatives or over-the-top services (e.g., connecting a device to a Wi-Fi network to use alternative communication means).[83]

By rapidly concluding this agreement and by emphasizing within it the importance of digital trade, the United States benefited from a first mover's advantage in the Latin American and Pacific regions vis à vis the European Union. The key definitions they had secured in the TPP, the legal framework they had agreed to develop with their partners on topics addressed for the first time (at least in that

77 Ibid. – chapter 14, article 14(13).
78 United States Trade Representative (2015iii).
79 TPP (2015) – chapter 10, Introduction.
80 Ibid. – chapter 13, article 13(2), c.
81 Ibid. –chapter, article 13(6)
82 Ibid. – chapter 13, article 13(6) § 3.
83 Ibid.– chapter 13, article 13(6) § 2, b.

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level of detail) in trade agreements, and the access they would have gained in their digital markets would have been clear advantages for U.S. digital economy actors and regulators.

2.5 Interim observations on the existing global framework for transatlantic digital trade

The above analysis has shed light on how the WTO framework, specific plurilateral treaties, and bilateral and regional agreements have already quite comprehensively addressed many policy issues related to the digital economy. The policies that seem to have mostly converged in the European Union and in the United States since the mid 1990s are related to telecommunications and intellectual property. Indeed, both issue-areas have been addressed with hard international law instruments adopted as early as the mid-1990s within the WTO framework and refined in more recent bilateral and regional treaties. They seem to have generally achieved convergence on a compatibility level as some rules remain specific to the European Union and the United States, while most of them do not seem to interact negatively. This has been done relatively smoothly considering the noncontroversial nature of both topics for the two partners. Yet, by mainly limiting itself to those issues, the progress made through the WTO and consolidated in other legal instruments did not satisfactorily provide the fully effective framework required to address the challenges posed by modern digital trade. Bilateral and regional agreements have been used by the European Union and the United States to bring trade-related policy convergence to another level concerning either more contentious or simply emerging issues, principally relating to e-commerce and new forms of services. Starting with Korea in 2011, the endeavor has culminated in 2015 and 2016 by the conclusion of the CETA and the TPP, which illustrate both actors' continued interest in favor of policy convergence. These agreements reveal the potential bridges as well as the unavoidable red lines that are likely to taint the efforts toward the creation of a comprehensive digital trade regime for the transatlantic digital economy.

3. The draft transatlantic trade and investment partnership agreement

The draft chapters addressing digital economy issues in the TTIP will be analyzed on the basis of the initial position papers and the textual proposals that the European Commission has made public at this stage of the negotiations. These

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documents, tabled for negotiation rounds, are not legally binding, but they provide an interesting insight into the future text of the TTIP. Some provisional elements provided by the United States Trade Representative will also be put under scrutiny.[84] These will altogether be examined while bearing in mind the elements studied in the agreements formerly concluded by the European Union and the United States and analyzed above.

3.1 The digital component of the draft TTIP agreement

At least five chapters and annexes foreseen in TTIP would impact policy convergence between the European Union and the United States. Those are the ones concerning services, telecommunications, e-commerce, intellectual property rights and an ICT annex.

A comprehensive and advanced initial proposal on services has been made publicly available. The European Union's proposal consists of two main elements: text and a number of annexes (or schedules of specific commitments)[85]. While covering all types of services, these documents interestingly underline the necessity to tackle barriers in services sectors that "are key enablers of the economy and boost the digital economy, such as computer and telecommunication services."[86] This services chapter aims at tackling the regulatory barriers to the supply of services in sectors where both parties are willing to undertake commitments. Beyond some general obligations and definitions impacting all services included in Chapter V under the "Regulatory dimension"[87] heading, the chapter also includes specific provisions concerning major subjects for the digital economy.

First, this draft chapter includes a section on "computer services," which provides a mutual understanding on what computer services encompass. The European Union still bases its proposal on the United Nations CPC Code (84).[88] There is thus so far no mention of "new services" which illustrates that the gap between the European Union's favored approach and the one the United States has promoted in the TPP. Second, a section on "electronic communications networks and services" is also provided. This one provides a number of crucial definitions related to telecommunications.[89] For example, the E.U. proposal includes

84 United States Trade Representative (2015ii).
85 European Commission (2015ii).
86 European Commission (2015iv).
87 Ibid., chapter V.
88 Ibid., chapter V, section III.
89 Ibid., section V, articles 5–19,

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definitions of "essential facility"[90] or "major suppliers"[91] which may have implications concerning the convergence of competition rules in the telecommunications sector. This section also includes a number of principles concerning telecommunication regulatory authorities, such as independence, autonomy, transparency, and the existence of an appeal mechanism.[92] The section also includes a number of principles for the allocation of scarce resources (such as some specific bands on the radio spectrum).[93] Clear obligations for the liberalization of networks are also included. They concern, for example, an obligation to grant access and interconnection on the basis of a commercial negotiations.[94] The role of major suppliers and their control over major facilities is also addressed with a view to limit their influence over a network or a set of ancillary services.[95] Generally speaking, anti-competitive practices are addressed.[96] Universal services are protected yet also strictly circumscribed.[97] General obligations on portability and confidentiality protection are included.[98] A specific dispute resolution procedure for this section involving regulatory authorities is also given.[99] Overall, this chapter reaffirms with more detailed elements, commitments previously included by the European Union and the United States in their multilateral and bilateral trade agreements' commitments. It consolidates further the convergence of European and American telecommunications network and services' regulation that has been taking place since the 1990s.

The proposal on services comes with three important annexes which address "sector by sector—the commitments and exceptions to these commitments (i.e., reservations) that the European Union intends to undertake as part of the agreement."[100] Exceptions and reservations to national treatment and most favored national obligations (that come under the form of a so called "negative list") impacting the digital market are included in annex I and annex II.[101] There is a general commitment for the liberalization of telecommunication services defined as the "activities concerning the conveyance of a signal" on a network

90 Ibid., article 5–19, g.)
91 Ibid., article 5–19, i.)
92 European Commission (2015iv), section V, article 5–20.
93 Ibid., article 5–22.
94 Ibid., article 5–23, § 1 & 2.
95 Ibid., article 5–23, § 4.
96 Ibid., article 5–24.
97 Ibid., section V, article 5–25.
98 Ibid., section V, article 5–26 and 5–27.
99 European Commission (2015iii), annexes xx, section V, article 5–28.
100 Ibid., annexes xx.
101 European Commission (2015iv), chapter 3, article 3–1, § 1; chapter 3, article 3–5.

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and excluding those activities that involve content management. Nevertheless, the Commission sets two important limits. The first one is that "the provision on broadcast transmission services is subject to reciprocity."[102] This technically means that the European Union conditions the openness (via a national treatment obligation) of its broadcast transmission services to a reciprocal one from the United States. If agreed upon during the negotiations, this could be an important step in terms of regulatory convergence between the European Union and the United States concerning broadcast network regulation. The second condition is that "the transmission of broadcasting signal may be subject to non-discriminatory obligations to safeguard general interest objectives related to the conveyance of content through networks, in line with the European Union's regulatory framework for electronic communication."[103] That would mean that a certain level of content conveyance management might be authorized under E.U. law, but that it should not affect in a discriminatory way, American companies. There is also a positive list included in annex III (market access obligation) that displays that there are no restrictions in commitments for market access for: computer and related services,[104] telecommunications equipment rental services,[105] telecommunications consulting service.[106] This may prevent future divergence between European and American legislation, for example concerning potential qualification or licensing obligations for computer and related services.

The Commission also published an initial proposal for a chapter on e-commerce. This one aims at tackling online barriers to trade, such as custom duties on electronic transmission.[107] It also promotes e-commerce enabling technologies and legal frameworks recognizing the value of e-contracts and e-signatures.[108] It finally promotes cooperation on regulatory issues in e-commerce that should primarily focus on "interoperable cross-border electronic trust and authentication services; the treatment of direct marketing communications; the protection of consumers using e-commerce."[109] The USTR includes an essential element that is still not addressed by the European Commission in its initial proposal, which is cross-border data flows. The United States thus remains very offensive on the matter and reproduced what they have already pushed through in the KORUS and the TPP texts. The European Union on the other hand remains very cautious and continues

102 European Commission (2015iii), 81.
103 Ibid., 149.
104 Ibid., 137.
105 Ibid., 140.
106 Ibid., 148.
107 European Commission (2015iv), chapter 6, article 6 § 3.
108 Ibid., article 6 § 5.
109 Ibid., article 6 § 8.

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to favor provisions calling for a strengthened personal data protection framework to be adopted by its partners, rather than one where data flows by default.

The last two important, sectoral chapters on information and communication technology (ICT) and IPR have yet to be drafted in more detail. The one concerning the ICT sector should address technical topics for electronic products. It may reproduce to some extent the elements of the ITA II agreement concerning non-tariff barriers and complement the TTIP TBT chapter concerning, for instance, e-labelling or conformity assessment procedures in ICT. It also may address issues with specific relevance to the ICT sector, such as technology neutrality.[110] It could also address the issue of trade of encrypted products, which is a great challenge in terms of balancing security and free movement of ICT goods.[111] E-accessibility, which refers to "initiatives taken to ensure that all citizens have access to Information Society services" may also be included here.[112] It should overall be an uncontroversial support to technical regulatory convergence on a harmonization level by promoting common standards in the ICT goods industry.

The chapter on intellectual property rights only includes, so far, the traditional list of international agreements to which the European Union and the United States have already committed to comply with. Concerning the substance of the rules to be included in such a chapter, the degree of convergence already reached between the European Union and the United States in their previous trade agreements and internally concerning their major copyright laws allows for a level of convergence aiming at harmonization. This is likely to be reasonably well reflected internally as both partners are in the process of reforming their copyright regime with the Commission having proposed a revision of its main copyright directive in 2016[113] and the United States undergoing a revision of its major copyright law since 2013.[114]

3.2 The unlikely inclusion of a digital economy chapter

The idea of including a digital economy chapter has surfaced several times during the negotiations but seems to have been ruled out in the end. It was first raised during the sixth round of negotiations that took place in July 2014.[115] It has since then been repeatedly requested by some digital economy stakeholders. This type of

110 DigitalEurope and Information Technology Industry Council (2015).
111 Ibid.
112 European Commission (2005).
113 European Commission (2016i).
114 Department of Commerce (2013).
115 Euractiv (2014).

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chapter could fall under the "rules" heading, alongside other thematic chapters, such as one on "sustainable development" or on "SMEs." Its impact would thus be quite broad but consequently probably also quite shallow. It could nonetheless manage to secure some framework principles such as the ones promoted by the European Commission in its Digital Single Market strategy[116] or those promoted by the USTR in its "Digital Dozen" trade strategy.[117]

4. Conclusion

This paper has attempted to shed light on what types of provisions may be included in the TTIP in order to promote policy convergence that would support the growth of the transatlantic digital economy. The main findings are that the TTIP may rely on a number of legal provisions concerning key topics for the digital economy that both partners have already included in many of their previous trade deals. These are likely to be repeated and upgraded and would, as such, become additional powerful instruments to support an ongoing trend of convergence promoted at different decision-making levels and concerning various aspects of E.U. and U.S. digital policies. What remains to be seen is how in the future the European Union and the United States will address some of their major remaining differences concerning important yet contentious issues such as data flows, classification of digital products or trade in audiovisual services (that has so far been left out of the European Union's negotiation mandate).

What should be kept in mind is that there have always been "many different sources of non-tariff barriers and thus removing them may require constitutional changes, unrealistic legislative changes, or unrealistic technical changes. Removing non-tariff barriers may also be difficult politically, e.g., because there is a lack of sufficient economic benefit to support the effort; because the set of regulations is too broad; because of consumer preferences, language and geography; or due to other political sensitivities."[118] What is thus more likely is that the TTIP will focus on reinforcing rules concerning issues on which the European Union and the United States have already converged and maybe seek enhanced convergence on technical ones. By doing so, they would be preparing for the more political topics to be addressed in the future or in other fora that could eventually, in a way or another, be linked to the TTIP. They should, in any event, avoid tackling

116 European Commission (2015i).

117 United States Trade Representative (2015i).

118 François et. al. (2013), 27.

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those too directly as this would run the risk of annihilating the last chances for survival of the whole agreement by sparking strong political debates.

A current assessment of the TTIP as a potential tool supporting policy convergence between the European Union and the United States regarding digital policy thus leads to mixed conclusions. The potential is undeniable and many of the needed instruments are already available. Yet some major obstacles that stand in the path of policy convergence make this endeavor difficult and politically risky. This leads us to ask ourselves whether trade agreements, which already faces much opposition *de principe,* are the most relevant instruments to set global standards on such sensitive issues regarding the digital economy and that have implications that go much further than mere economic ones.

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