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Requiring the local presence of ICT companies: an international human rights law and international economic law perspective

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Requiring the local presence of ICT companies: an international human rights law and international economic law perspective*

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1. Introduction

In recent times, we have seen a proliferation[1] of laws and bills, in different parts of the world, which establish the creation of some kind of legal-commercial link or a local connection between information and communication technology (ICT) companies (mainly social media) and the country in which they provide their services. Depending on the case, the method chosen to achieve this objective requires a commercial presence, the assignment of a local representative, the location of data, or the hiring of local personnel. These initiatives have not gone unnoticed, and both the private sector and civil society have condemned it focusing on the potential economic effects and their possible impact on the exercise of freedom of expression.

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[1] Referring to state regulation, characterized by the use of legal rules backed by the jurisdictional power of the state. See: Black, Julia. Decentring regulation: Understanding the role of regulation and self-regulation in a 'post-regulatory' world, Current legal problems 54.1 (2001): 103-146 and Black, Julia, Understanding the Role of Regulation and Self Regulation in a "Post-regulatory World, 54 (2001): 103-46. Marsden, Meyer & Brown explain the distinction between regulation, co-regulation, and self-regulation. We follow this distinction in this paper. See: Platform values and democratic elections: How can the law regulate digital disinformation, Computer Law and Security Review (2020). Article 19 defined these terms: regulation: established by law and characterized by more state interference; co-regulation: defined as regulated self-regulation or self-regulatory mechanisms endorsed or promoted by law; and self-regulation: a model that depends entirely on the will of the parties. Self-regulation and hate speech on social media platforms, page 9.

[1] Elliott, Vittoria, "New Laws Requiring Social Media Platforms to Hire Local Staff Could Endanger Employees," Rest of World, 2021, retrieved from en: https://restofworld.org/2021/social-media-laws-twitter-facebook, last access: May 30, 2022.

This trend occurs in a context that, as suggested by Gonzalo Bustos Frati, Pablo Palazzi, and Silvana Rivero, is marked by "deep uncertainty and growing complexity about the future of governance of the digital economy, in general, and in terms of intermediary liability in particular."[2] But, above all, this trend is based on two different areas of international law that to some extent seem parallel and could overlap: international economic law and international human rights law.

Until now, the arguments put forward mainly by civil society and academia specializing in digital rights issues at the international level have tended to brand these requirements as hostage clauses, which are clauses designed to retain representatives and bind them through personal jurisdiction to execute and implement local orders of all kinds, including orders contrary to human rights. Likewise, civil society and specialized academia alert the governments of different countries that are considering them for the potential modeling effect of their laws on other pieces of legislation in the world that are less democratic or less respectful of human rights. Along these lines, we see complaints and warnings about how the requirement of the European Union's Digital Services Act (DSA) could create a model or validation for other governments or parliaments around the world to adopt similar regulations.[3] However, these warnings say little about the legal authority to establish such obligations or about their legal convenience from a commercial law perspective.

We intend to analyze these current legislative initiatives requiring local representation for ICTs and their possible consequences from an approach that tries to bring together two branches of international law commonly disconnected: international commercial law and international human rights law. To this end, this paper will be divided into three parts: first, we will make a brief description of the different initiatives existing to date and their main problems; the second part will delve into the legality (or lack thereof) of these requirements from the point of view of international economic law; and, finally, the third section will address the criticism made about impact on the human right to freedom of expression. This paper concludes that academic research needs to increasingly identify the interaction between these regimes to find answers to otherwise complex problems.

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[2] Bustos Fratis, Gonzalo, Palazzi, Pablo A. and Rivero, Silvana, *Responsabilidad de intermediarios de internet en América Latina: hacia una regulación inteligente de la economía digital*, Washington D.C., Banco Interamericano de Desarrollo (BID), 2021, p. 6, retrieved from https://alai.lat/wp-content/uploads/2021/05/Responsabilidad-de-intermediarios-de-internet-en-America-Latina-Hacia-una-regulacion-inteligente-de-la-economia-digital.pdf, last access: May 30, 2022.

[3] Keller, Daphne, "Who Do You Sue? State and Platform Hybrid Power over Online Speech," Aegis Series Paper No 1.902, Hoover Institution, Stanford University, 2019, retrieved from: https://www.hoover.org/research/who-do-you-sue, last access: May 30, 2022.

II. A global trend

With different arguments and generally based on legitimate concerns, many diverse legislative initiatives require a local presence or control of how ICT companies can provide their services across borders. In Latin America, we should mention the cases of Mexico and Brazil. In Mexico, although the appointment of a local representative is not required nor is it requested that the data be hosted locally, the bill,[4] which was open to public consultation and presented by Senator Ricardo Monreal Ávila, stipulates that the relevant social media sites (those that have one million or more subscribers, or users) must request authorization from the Instituto Nacional de Telecomunicaciones [National Institute of Telecommunications] to provide their service. In addition, they must present their terms and conditions to this institute, particularly concerning content moderation and the suspension or removal of accounts. The bill establishes fines for companies that violate freedom of expression.

In Brazil in 2020, a bill of law regarding freedom, liability, and transparency on the Internet[5] was presented to Congress. It establishes rules for social media companies or private messaging providers with over two million registered users, whether or not they are based in Brazil. The bill dictates that companies must, among other things, ban inauthentic accounts and automatic accounts not identified as such;[6] label advertising content; limit the number of times a message can be forwarded and the number of people in a group; save the content of mass messages for three months, etc. Senders' data could be used in criminal investigation procedures by court order.[7] The law also stipulates that social media providers must produce quarterly transparency reports in Portuguese, and post them on their websites, to notify about procedures and decisions regarding content generated by third parties in Brazil, as well as about the measures employed to comply with this law.[8] In its final provisions, the bill specifies that providers of social

[4] Senator Ricardo Monreal Ávila, "Iniciativa con proyecto de decreto por el que se reforman y adicionan diversas disposiciones de la Ley Federal de Telecomunicaciones y Radiodifusión," Senate of the Republic of the United Mexican States, Senado Morena LXIV Legislatura, 2021, retrieved from: https://ricardomonrealavila.com/wp-content/uploads/2021/02/REDES-SOCIALES-Propuesta-Iniciativa-29.01.21.pdf, last access: May 30, 2022.

[5] Chamber of Deputies of Brazil, Steering Committee, "Ley Brasileña de Libertad, Responsabilidad y Transparencia en Internet", 2020, retrieved from: https://www.camara.leg.br/proposicoesWeb/prop_mostrarintegra?codteor=1909983&filename=PL+2630/2020, last access: May 30, 2022.

[6] It also requires asking users to verify their data in case of non-compliance with the law.

[7] Chamber of Deputies of Brazil, (n 8), art. 12.

[8] *Ibid*., art. 13.

media and private messaging services must have headquarters and appoint legal representatives in Brazil, as well as maintain remote access from Brazil to their databases, which will contain information about Brazilian users and will store content in situations provided by law, especially to comply with orders from a Brazilian judicial authority.[9]

Internationally, beyond the Latin American region, several diverse initiatives include the commitment to local presence. For example, article 11 of the European Commission's Digital Services Act[10] provides that:

> Providers of intermediary services that are established in a third country and that offer services in the Union should *designate a sufficiently mandated legal representative in the Union* and provide information relating to their legal representatives to the relevant authorities and make it publicly available. […] That obligation should allow for the effective oversight and, where necessary, enforcement of this Regulation in relation to those providers. […] It should be possible for the legal representative to also function as a point of contact, provided the relevant requirements of this Regulation are complied with.[11]

The German Network Enforcement Act, or NetzDG,[12] also includes similar provisions. This 2017 law "regulates the implementation of laws on discrimination and hate speech on the Internet."[13] In addition, it sets fines for those large-scale

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9 *Ibid*., art. 32.

10 European Commission, "Questions and Answers: Digital Services Act", 2022, retrieved from: https://ec.europa.eu/commission/presscorner/detail/en/QANDA_20_2348, last access: May 30, 2022. The Digital Services Act (DSA) is a package of measures that is part of the Digital Single Market strategy of the European Union that seeks to "harmonize the conditions of Internet service providers throughout the region" by respecting fundamental human rights. The provisions of the DSA apply throughout the entire European Single Market and even to those online intermediaries not established in the European Union but who provide services there. See the analysis in Schatzky, Morena, "Desglosando la nueva regulación europea contra la difusión de contenido terrorista en línea," Legislative Observatory Blog, 2021, retrieved from: https://observatoriolegislativocele.com/desglosando-la-nueva-regulacion-europea-contra-la-difusion-de-contenido-terrorista-en-linea, last access: May 30, 2022.

11 European Commission, "Propuesta de reglamento del parlamento europeo y del consejo relativo a un mercado único de servicios digitales (Ley de Servicios Digitales) y por el que se modifica la directiva 2.000/31/CE," December 15, 2020, retrieved from: https://eur-lex.europa.eu/legal-content/ES/TXT/HTML/?uri=CELEX:52020PC0825&from=en, last access: May 30, 2022. See also art. 2.d. Emphasis added.

12 German Law Archive, "Network Enforcement Act (Netzdurchsetzunggesetz, NetzDG)," 2017, retrieved from: https://germanlawarchive.iuscomp.org/?p=1245, last access: May 30, 2022.

13 Del Campo, Agustina, "La regulación de internet y su impacto en la libertad de expresión en América Latina," Buenos Aires, Centro de Estudios en Libertad de Expresión y Acceso a la Información (CELE), 2018, p. 9, retrieved from: https://observatoriolegislativocele.com/wp-content/uploads/La-regulaci%C3%B3n-de-internet-y-su-impacto.pdf, last access: May 30, 2022.

platforms and social media sites "that do not block or remove content that is manifestly discriminatory or constitutes hate speech and grants 7 days to remove or block any other illegal content."[14] According to its section 5, those social media platforms that have more than two million users in Germany must appoint a local representative in Germany.[15]

Along the same lines, the Turkish Internet Law [16] determines that social media companies with more than one million users in Turkey should establish a commercial presence in the country and store the data of Turkish users locally. The requirement accompanies a reform which sets up obligations for social media companies to remove or block content within 24 hours when there is a court order and within 48 hours when the request comes from an individual user.[17] Companies are required to appoint a local representative, who must be a Turkish citizen or legal entity registered in Turkey and must be authorized to accept notifications or transfers of documents in compliance with Law No. 5,651.[18] The designation of the representative must be published on the website of the social media provider and communicated to the Information and Communications Technology Authority.[19] In the event of non-compliance, gradually increasing sanctions are foreseen: first, the Authority will notify the suppliers to request their designation within 30 days under penalty of an administrative fine of thirty million Turkish liras.[20] In case of continued non-compliance, within 3 months, advertisements will be banned and the Internet bandwidth of the social media platform will be reduced by 50% to 90%.

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[14] European Commission, "Act Improving Law Enforcement on Social Networks [Netzdurchführungsgesetz – NetzDG]", 2017, retrieved from: https://ec.europa.eu/growth/tools-databases/tris/en/search/?trisaction=search.detail&year=2017&num=127, last access: May 30, 2022.

[15] Elliott, (n 4).

[16] Article 19, "Turkey: Twitter Becomes Latest Company to Comply with Repressive Social Media Law," 2021, retrieved from: https://www.article19.org/resources/turkey-twitter-becomes-latest-company-to-comply-with-repressive-social-media-law, last access: May 30, 2022.

[17] Under Article 4(2), the fines for non-compliance with these removals and blocking provisions range from five to ten million Turkish liras. See Mehmet Bedii Kaya, "The Turkish Internet Law: Full Translation of the Law N° 5.651," 2021, retrieved from: https://www.mbkaya.com/turkish-internet-law, last access: May 30, 2022.

[18] Cantekin, Kayahan, "Turkey: New Rules Require Social Network Providers to Appoint Representatives in Turkey," Library of Congress, 2020, retrieved from: https://www.loc.gov/item/global-legal-monitor/2020-10-08/turkey-new-rules-require-social-network-providers-to-appoint-representatives-in-turkey, last access: May 30, 2022.

[19] Tarihi, Kabul, "Ley por la que se modifica la ley de regulación de las publicaciones realizadas por Internet y de lucha contra los delitos cometidos a través de estas publicaciones," Resmî Gazete, 2020, retrieved from: https://www.resmigazete.gov.tr/eskiler/2020/07/20200731-1.htm, last access: June 2, 2022.

[20] There may be an additional fine for the same amount if the breach continues within the following 30 days.

In February 2021, India passed the "Information Technology Rules[21] (Guidelines for Intermediaries and Digital Media Code of Ethics)."[22] The new laws require major social media companies (those with more than five million registered users in the country) to restrict a variety of topics, comply with content removal orders issued by the government and identify the source of the information shared.[23] In order to guarantee their implementation, the laws establish the obligation of local presence in the country – the requirement to constitute a grievance officer locally – and provide that, in the event of substantive non-compliance with the legislation, companies or their representatives may face legal liability. This complex grievance mechanism requires major social media companies to form a grievance remediation team[24] made up of three people with different responsibilities: 1) a Chief Compliance Officer responsible for ensuring compliance with the Information Technology Law and its measures; 2) a nodal contact person, responsible for full-time coordination with all law enforcement agencies; and 3) a resident grievance officer who can answer for these grievances.[25] All three officers must reside in India.[26] The provision drew

[21] "Reglas de tecnología de la información (pautas para intermediarios y código de ética en medios digitales)," The Gazette of India, 2021, retrieved from: https://prsindia.org/files/bills_acts/bills_parliament/2021/Intermediary_Guidelines_and_Digital_Media_Ethics_Code_Rules-2021.pdf, last access: June 2, 2022.

[22] This set of rules introduced several changes (many quite controversial and questioned by civil society and human rights organizations). In fact, three of the United Nations rapporteurs sent a letter to the Indian government to express their concern about this set of rules and its implications for freedom of expression and privacy. See Palais des Nations, "Mandates of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression; the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association and the Special Rapporteur on the Right to Privacy," 2021, retrieved from: https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=26385, last access: June 2, 2022.

Also, after its approval, we have seen an escalation of conflicts between the Government and technology companies, which led to the Twitter offices being "visited" by the Indian police after the company had labeled some tweets by the Bharatiya Janata Party (BJP, 'Indian People's Party') as manipulated media. See Singh, Manish, "Police in India Visited Twitter Offices over 'Manipulated Media' Label," Tech Crunch, 2021, retrieved from: https://techcrunch.com/2021/05/24/delhi-police-run-by-indias-central-government-raids-twitter-offices-over-manipulated-label, last access: May 30, 2022.

Twitter raised concerns about how the Indian government's actions could negatively affect freedom of expression. See Rekhi, Dia, "Penalty Cause in India's Laws Worry Twitter," The Economic Times, 2022, retrieved from: https://economictimes.indiatimes.com/tech/technology/twitter-expresses-concern-over-proposed-indian-legislation/articleshow/89704958.cms?from=mdr, last access: June 2, 2022.

[23] Corresponsal especial, "Govt Announces New Social Media Rules to Curb Tts Misuse," The Hindu, retrieved from: https://www.thehindu.com/news/national/govt-announces-new-social-media-rules/article33931290.ece, last access: May 30, 2022.

[24] Obhan, Ashima and Patodia, Vrinda, "The Social Media Furore," Obhan & Associates, 2021, retrieved from: https://www.obhanandassociates.com/blog/the-social-media-furore, last access: June 2, 2022.

[25] Obhan, Ashima and Patodia, Vrinda, "India Tightens the Noose on Intermediaries and Social Media Platforms – Part 3," Obhan & Associates, 2021, retrieved from: https://www.obhanandassociates.com/blog/india-tightens-the-noose-on-intermediaries-and-social-media-platforms-part-3, last access: May 30, 2022.

[26] Mendiratta, Raghav, "Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021," Wilmap, 2021, retrieved from: https://wilmap.stanford.edu/entries/information-technology-intermediary-guidelines-and-digital-media-ethics-code-rules-2021, last access: June 2, 2022.

criticism from the business sector, academia and civil society.[27]

The case of Pakistan is similar to that of India. In 2020, Pakistan published its "Removal and Blocking of Illegal Online Content (Procedure, Oversight and Safeguards) Rules" and as per rule 9(5), any social media company or service provider with more than five hundred thousand registered users in the country will be required to set up a permanent registered office in Pakistan and designate a contact person residing there. Rule 9(5) also compels social media companies and service providers to establish one or more database servers in Pakistan and Rule 9(7) requires them to provide the Federal Bureau of Investigation with "decrypted, readable and understandable information" under the provisions of the Prevention of Electronic Crimes Act (PECA). This has brought with it some questions regarding data security,[28] the protection of the privacy of citizens, as well as its implications for the exercise of freedom of expression (particularly concerning government censorship on the Internet for reasons of national security or defense of Islam).[29]

Likewise, in 2021, Russia passed a law that imposes obligations on foreign websites and social media platforms with over half a million daily users.[30] These obligations include registering a local entity in Russia. The purpose of this law is for local subsidiaries to take responsibility when affected companies violate

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[27] Chinmayi Arun, among others, argued, for example, that this requirement (which we could call a hostage-taking clause) makes companies become hostages to potential government requests since, in the event of any resistance to a demand, their own members of staff could go to jail. Angwin, Julia, "Defending Freedom of Expression," Hello World, 2021, retrieved from: https://www.getrevue.co/profile/themarkup/issues/defending-freedom-of-expression-661837, last access: June 2, 2022. In fact, we already have a precedent in Latin America for this type of practice with the arrest, in 2016, of the vice president of Facebook by the Brazilian authorities for not providing information in the framework of a criminal investigation. See also, Watts, Jonathan, "Brazilian Police Arrest Facebook's Latin America Vice-president," The Guardian, 2016, retrieved from: https://www.theguardian.com/technology/2016/mar/01/brazil-police-arrest-facebook-latin-america-vice-president-diego-dzodan, last access: June 2, 2022.

In the case of companies, for example, although Twitter at first resisted the implementation of the law (see Singh, Manish, "Twitter Appoints Resident Grievance Officer in India to Comply with New Internet Rules," Tech Crunch, 2021, retrieved from: https://techcrunch.com/2021/07/10/twitter-appoints-resident-grievance-officer-in-india-to-comply-with-new-internet-rules, last access: June 2, 2022), in July 2021 it ended up appointing a grievance officer after the Indian government filed a document before the courts arguing that Twitter had lost immunity from liability for content generated by users of the network (safe harbor), by not having fulfilled the requirements that we mentioned before. See Twitter Help Center, "Grievance Officer - India," retrieved from: https://help.twitter.com/en/rules-and-policies/report-twitter-abuse-india, last access: June 2, 2022.

[28] Digital Rights Foundation, "Removal and Blocking of Unlawful Online Content (Procedure, Oversight and Safeguards) Rules, 2020: Legal Analysis," 2020, retrieved from: https://digitalrightsfoundation.pk/wp-content/uploads/2020/12/Removal-and-Blocking-of-Unlawful-Online-Content-Procedure-Oversight-and-Safeguards-Rules-2020_-Legal-Analysis.pdf, last access: June 2, 2022.

[29] Hashim, Asad, "Pakistan to 'Review' Controversial Internet Censorship Rules," Aljazeera, 2021, retrieved from: https://www.aljazeera.com/news/2021/1/26/pakistani-government-says-will-review-internet-censorship-rules, last access: June 2, 2022.

[30] Link to the law: http://publication.pravo.gov.ru/Document/View/0001202107010014, last access: June 2, 2022.

Russian law, to interact with local state agencies, and to limit the dissemination of information that violates Russian law in the Russian Federation.[31] Of course, companies that do not comply with these requirements could face unintended consequences and sanctions, for example, the restriction of access to the service provided by the platform.

Vietnam follows the lead of the previous examples, with some differences.[32] Social media providers must register with the Commercial Registry Office and, in addition, they must obtain a license to operate from the Ministry of Information and Communications.[33] To obtain the license, the company must demonstrate that it has qualified personnel, an approved domain name, meets certain technical requirements and that it has implemented measures to protect the security, protection, and administration of the social network. Furthermore, the 2019 cybersecurity law requires platforms to establish offices in the country and to store user data locally within its borders. The operating licenses may be suspended for up to two years if the companies do not block the content denounced by the authorities.[34]

In Nigeria, on June 4, 2021, in response to Twitter's removal of President Muhammadu Buhari's tweets threatening to punish regional secessionists, the Nigerian government decided to suspend the company's activities indefinitely. Days later, the information minister announced that social media companies that want to operate in the country will need to register a local entity and obtain a license from the broadcasting commission.[35] Organizations and activists argue that this trend could spread to Uganda, where the government decided to cut off Internet

[31] Runet Echo, "What Does Russia's New 'Hostage-Taking' Law Mean for Social Media Companies?," Global Voices, 2022, retrieved from: https://globalvoices.org/2022/02/21/what-does-russias-new-hostage-taking-law-mean-for-social-media-companies, last access: June 2, 2022.

[32] On the one hand, according to different media outlets, several scandals have occurred in the country around alleged government pressure to censor certain online publications. See Dan, Lihn, "Vietnam Pressures Social Media Platforms to Censor," Voice of America, 2021, retrieved from: https://www.voanews.com/press-freedom/vietnam-pressures-social-media-platforms-censor, last access: June 2, 2022.

In addition, in 2018, the government introduced a social media code of conduct that urges users to promote the beauty of Vietnam's landscape, people, and culture, and to spread "good stories about good people." See Nguyen, Phuong, and Pearson, James, "Vietnam Introduces Nationwide Code of Conduct for Social Media," Reuters, 2021, retrieved from: https://www.reuters.com/world/asia-pacific/vietnam-introduces-nationwide-code-conduct-social-media-2021-06-18, last access: June 2, 2022.

[33] Vietnamese Law Blog, "Social Networks in Vietnam," Indochine Counsel, 2021, retrieved from: https://www.vietnamese-lawblog.com/social-networks-in-vietnam, last access: June 2, 2022.

[34] Dan (n 32).

[35] Carsten, Paul, "Nigeria Demands Social Media Firms Get Local Licence," Reuters, 2021, retrieved from: https://www.reuters.com/technology/nigeria-demands-social-media-firms-get-local-licence-2021-06-09, last access: June 2, 2022. The law with the requirements is still unpublished.

access due to conflicts with the moderation of online content by companies.[36]

Furthermore, in 2021, Australia introduced an anti-trolling bill[37] that also includes a requirement that any provider of a social media service that is a foreign body corporate with at least 250,000 Australian account holders must have a nominated entity in Australia. That is, this entity must be an agent of the provider, be based in Australia and have offices in the country.[38] It should also have access to relevant contact details for users of the service who have posted content to its Australian sites; the capacity to access the country location data of end users of the service who have published it; and, in conjunction with the statutory grievance mechanism, it shall have the authority to receive, on behalf of the supplier, complaints and requests made by Australian individuals.[39] Social media services that do not meet these requirements are subject to fines.

Finally, in May 2022, Kazakhstan passed a law[40] that will require social media companies to establish local offices and register in the country to operate. This law amends the National Law on the Rights of Boys and Girls intending to combat cyberbullying.[41] Companies with more than one hundred thousand users per month will have six months to register and open offices in the country. This law was criticized by civil society organizations and human rights defenders, arguing that the government can use it to restrict freedom of expression.[42]

These are just some of the current cases, in different regions of the world.[43] Notwithstanding the substantive rules that accompany the requirement to guarantee local presence – or their compatibility with human rights – it is clear that there is a common concern regarding the need to give effective implementation to national legislation. Virtually all of the aforementioned initiatives expressly link the local presence requirement to the need to enforce their legislation on freedom of expression or privacy.

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[36] Madung, Odanga, "In Africa, Content Moderation Is a Dangerous Game," Wired, 2021, retrieved from: https://www.wired.com/story/opinion-in-africa-content-moderation-is-a-dangerous-game, last access: June 2, 2022.

[37] The Parliament of the Commonwealth of Australia, House of Representatives, "Social Media (Anti-Trolling) Bill 2022," 2022, retrieved from: https://www.legislation.gov.au/Details/C2022B00015, last access: June 2, 2022.

[38] *Ibid*.

[39] *Ibid*.

[40] Link to the law: https://online.zakon.kz/Document/?doc_id=38610814&pos=207;-2#pos=207;-2, last access: June 2, 2022.

[41] RFE & RL's Kazakh Service, "Kazakh President Signs Bill Allowing Social Media to Be Shut Down," Radio Free Europe Radio Liberty, 2022, retrieved from: https://www.rferl.org/a/kazakhstan-law-social-media/31832653.html, last access: June 2, 2022.

[42] Putz, Catherina, "Kazakh President Signs Controversial Law Aiming to Control Social Media Companies," The Diplomat, 2022, retrieved from: https://thediplomat.com/2022/05/kazakh-president-signs-controversial-law-aiming-to-control-social-media-companies, last access: June 2, 2022.

[43] See, for example, Australian Government, Attorney-General's Department, "Social Media (Anti-Trolling) Bill," 2022, retrieved from: https://www.ag.gov.au/legal-system/social-media-anti-trolling-bill, last access: June 8, 2022.

III. Analysis of the measures from an international trade law perspective

Although the supply of a service (such as digital services provided by social media) may take place in the internal market of a country and be regulated by its national rules when the service is provided by foreign companies, laws for international trade in services also apply. We can find these laws in free trade agreements, as well as in the rules of the World Trade Organization (WTO) that regulate the economic relationship between the signatory countries, which undertake binding rules by signing said agreements.[44]

As we will address in this section, interpreting international treaties, despite being difficult, becomes essential to guarantee compliance with their provisions[45] and, in the case of our object of study, to determine how and what a country can regulate regarding certain international services. This requires analyzing international trade agreements concerning services signed by the country whose regulation is to be interpreted and also studying the specific regulations for each sector or activity issued by government agencies to regulate the use, consumption, or provision of a service in its territory [46] (and their compliance with the aforementioned agreements). In fact, international trade agreements on services contemplate that governments maintain some degree of regulatory power as long as they are not regulations applied in a discriminatory manner or constitute an unjustified barrier to trade.[47]

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[44] Trejos, Alberto, "Instrumentos para la evaluación del impacto de acuerdos comerciales internacionales: aplicaciones para países pequeños en América Latina," in: *Serie Estudios y Perspectivas*, No 110, Cepal, México D.F., 2009, retrieved from: https://www.cepal.org/sites/default/files/publication/files/4895/S2009441_es.pdf, last access: June 2, 2022.

[45] Novak Talavera, Fabián, "Los criterios para la interpretación de los tratados," in: *Themis Revista de Derecho*, No 63, Lima, 2013.

[46] For example, those mentioned in the previous section.

[47] This can be seen clearly stipulated in art. VI of "El acuerdo general sobre el comercio de servicios" of the World Trade Organization which states: "In sectors where specific commitments are undertaken, each Member shall ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner." World Trade Organization (WTO), "El acuerdo general sobre el comercio de servicios (AGCS): objetivos, alcance y disciplinas," retrieved from: https://www.wto.org/spanish/tratop_s/serv_s/gatsqa_s.htm, last access: June 2, 2022.

Under this rule, some services (for example, professional services) have specific national regulations that require, among other things, licenses to provide them. See Laurel, Terry, "The Revised Handbook about the GATS. General Agreement on Trade in Services," International Bar Association, 1998, p. 8, retrieved from: https://www.ibanet.org/MediaHandler?id=9e1e0915-f3a5-4f0f-bd1c-3dac5b2480b8, last access: June 2, 2022.

This is also true of the transportation sector.

For example, art. 7.a. of Law No 24.653 Ley de Transporte Automotor de Cargas de Argentina establishes that to provide services in the country, companies must have their legal seat of administration located in the territory of the Argentine Republic, in addition to requiring the matriculation and registration of vehicles.

This is also present in the land transport reservation made by Canada in the Canada-United States-Mexico Agreement (CUSMA). "Only a person of Canada using Canadian-registered and either Canadian-built or duty-paid trucks or buses, may

Carrying out this exercise with each country whose new legislation (or draft legislation) concerns us would be very challenging, so an attempt will be made to describe the general concepts of international trade in services, covered both in the most relevant regional trade agreements and in the framework of the World Trade Organization. Likewise, we will try to elucidate how these concepts could be related to the demands of local representation of ICT companies that arise from these new legislations.

The General Agreement on Trade in Services (GATS) was the first multilateral agreement on the matter and is the fundamental framework for understanding the powers and limitations of the state when regulating international trade in services.[48] The agreement, signed within the framework of the WTO in 1994, establishes obligations that apply to all member states.[49] Among them is providing access to the market and national treatment (non-discrimination) to suppliers and services in the sectors, terms and modes of provision specified in its list of commitments (called "positive lists").[50]

The GATS proposes four modes of service supply: 1) cross-border trade; 2) consumption abroad; 3) commercial presence;[51] and 4) the presence of natural persons.[52] One country may make commitments concerning a particular sector (for example, maritime transport), and not others. Two countries may also open up the same service in different ways. For example, in the case of educational services, most countries made more commitments in modes 1 and 2 than in modes 3 and 4.[53] For this paper, we are particularly interested in modes 1 and 3. Although

provide truck or bus services between points in the territory of Canada," Canada-United States-Mexico Agreement (CUSMA), Annex I, Schedule of Canada, Reservation I-C-20, Motor Vehicle Transport Act, R.S.C. 1985, c. 29 (3rd supp.), as amended by S.C. 2001, c. 13; Canada Transportation Act, S.C. 1996, c. 10; Customs Tariff, S.C. 1997, c. 36, retrieved from: https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/text-texte/a1_canada.aspx?lang=eng, last access: June 2, 2022.

48 World Trade Organization (WTO), "Services: Rules for Growth and Investment," retrieved from: https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm6_e.htm, last access: June 2, 2022.

49 For example, the well-known article II referred to the principle of the most favored nation (MFN). See Organisation for Economic Co-operation and Development (OECD) & Centre for Educational Research and Innovation (CERI), "Current Commitments under the GATS in Educational Services," 2002, retrieved from: https://www.oecd.org/education/skills-beyond-school/2088471.pdf, last access: June 2, 2022.

50 See WTO, "Guide to Reading the GATS Schedules of Specific Commitments and the List of Article II (MFN) Exemptions," retrieved from: https://www.wto.org/english/tratop_e/serv_e/guide1_e.htm, last access: June 2, 2022.

51 We should make a methodological explanation: for the analysis of this section, requiring a local representative (as it appears in several of the collected laws) will be taken as synonymous with the GATS concept of commercial presence.

52 For this paper, we are particularly interested in modes 1 and 3.

53 OECD & CERI, (n 52) p. 2. OMC, "Guía para la lectura de las listas de compromisos específicos y de las listas de exenciones del artículo II (NMF)," retrieved from: https://www.wto.org/spanish/tratop_s/serv_s/guide1_s.htm, last access: June 2, 2022

there are discussions about whether "digital services or Internet services" can be classified as mode 2, we will not delve into this discussion at the moment.[54] Likewise, mode 4 (that is, entry and "temporary" stay in the territory of a state offered to foreign individuals to provide a service) will not be considered since the requirement of local presence that is being analyzed in this work is more oriented to the establishment of a commercial office or a representative with permanent residence –not temporary– in the country where the service is provided.

It should be noted that, in general terms, both the GATS services liberalization model and the model incorporated in the North American Free Trade Agreement (NAFTA) –which we will explain later– have served as the basis for many trade agreements on services that were negotiated subsequently[55] (even in a hybrid manner). Although the objective of these agreements was to open up the trade in services between countries, this liberalization was not absolute since some leeway was maintained so that the states could regulate the access of foreign suppliers to their markets.[56] In this article, we have decided to put special focus on the model provided by the GATS and mention some elements of NAFTA.

In the case of the GATS, the new regulations that require local representation must be compatible with their commitments schedules[57] so that they conform to the commitments assumed internationally (where they can incorporate exceptions to the most-favored-nation treatment, national treatment, and access to markets or directly not committing some sectors), or fall within the exceptions found in the agreements (such as Articles XIV and XIV bis of the GATS).[58]

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[54] See Ahmed, Usman, Bieron, Brian and Horlick, Gary, "Mode 1, Mode 2, or Mode 10: How Should Internet Services Be Classified in the Global Agreement on Trade in Service?," School of Law International Law Journal, 2015, retrieved from: https://www.bu.edu/ilj/2015/11/24/mode-1-mode-2-or-mode-10-how-should-internet-services-be-classified-in-the-global-agreement-on-trade-in-service, last access: June 2, 2022.

[55] Cordero, Martha, *El comercio de servicios en la integración económica centroamericana*, Mexico D.F., CEPAL, 2018, p. 22, retrieved from: https://repositorio.cepal.org/bitstream/handle/11362/43933/1/S1800758_es.pdf, last access: June 2, 2022.

[56] OMC, "Finalidad y conceptos básicos," retrieved from: https://www.wto.org/spanish/tratop_s/serv_s/cbt_course_s/c1s1p1_s.htm, last access: June 2, 2022.

[57] OMC, (n 56).

[58] "Article XIV:

General Exceptions

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent any Member to adopt or enforce measures:

(a) necessary to protect public morals or to maintain public order;

(b) necessary to protect human, animal or plant life or health;

Due to the power that states maintain to regulate, even when assuming commitments in international agreements, providers in any modality must comply with the regulations of the country in which they want to provide a service.[59] In other words, a digital services company that wants to access consumers in a country may do so under the terms of the national legal framework.[60] For example, the EU Digital Services Act affects all companies or digital service providers that want to work in the European Union.[61]

(c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:

(i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts;

(ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts;

(iii) safety;

(d) inconsistent with Article XVII, provided that the difference in treatment is aimed at ensuring the equitable or effective(6) imposition or collection of direct taxes in respect of services or service suppliers of other Members;

(e) inconsistent with Article II, provided that the difference in treatment is the result of an agreement on the avoidance of double taxation or provisions on the avoidance of double taxation in any other international agreement or arrangement by which the Member is bound.

Article XIV bis:

Security Exceptions

1. Nothing in this Agreement shall be construed:

(a) to require any Member to furnish any information, the disclosure of which it considers contrary to its essential security interests; or

(b) to prevent any Member from taking any action which it considers necessary for the protection of its essential security interests:

(i) relating to the supply of services as carried out directly or indirectly for the purpose of provisioning a military establishment;

(ii) relating to fissionable and fusionable materials or the materials from which they are derived;

(iii) taken in time of war or other emergency in international relations; or

(c) to prevent any Member from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

2. The Council for Trade in Services shall be informed to the fullest extent possible of measures taken under paragraphs 1(b) and (c) and of their termination." OMC, "Anexo 1B.Acuerdo general sobre comercio de servicios," retrieved from: https://www.wto.org/spanish/docs_s/legal_s/26-gats.pdf, last access: June 2, 2022.

[59] See art. VI of the GATS on domestic regulation.

[60] Of course, domestic regulation must not constitute an unnecessary barrier to trade in services and must be rational, objective, and impartial. See Article VI. WTO, "General Agreement on Trade in Services," retrieved from: https://www.wto.org/english/docs_e/legal_e/26-gats_01_e.htm, last access: June 2, 2022.

[61] For example, see European Commission, (n 14), art. 11.

1. Digital services under the GATS

Are digital services, such as social media, covered by the GATS? This key question does not yet have a conclusive answer. Although the GATS did not include in its obligations a mention of electronic commerce (still incipient at the time of signing) and the supply of digital services, many assert that the agreement must be interpreted under the principle of "technological neutrality." In this sense, the ACGS Council issued a report in 1999 where it stated that:

> the electronic supply of services falls within the scope of the GATS, as this Agreement applies to all services, regardless of the means of supply used, and electronic supply can take place in any of the four modes of supply. Measures affecting the electronic supply of services are measures affecting trade in services and are therefore covered by GATS obligations.
>
> The technological neutrality of the Agreement also means that the specific commitments allow for the electronic supply of services, unless otherwise indicated in the corresponding Schedule.
>
> All GATS provisions, both those relating to general obligations (for example, MFN treatment, transparency, domestic regulation, competition, payments and transfer, etc.) and those relating to specific commitments (market access, national treatment or additional commitments), are applicable to the provision of services by electronic means.[62]

Some authors[63] interpret that this principle is underlying in some of the decisions of the WTO Dispute Settlement Understanding (DSU), in particular, in the cases DS285 "United States. Measures Affecting the Cross-Border Supply of Gambling and Betting Services" and DS363 "China. Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products."[64] These decisions demonstrate that, following the DSU line of reasoning, the GATS commitments for "traditional" services could also apply to digital services.

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[62] See WTO, Council for Trade in Services, "Work Programme on Electronic Commerce," 1999, retrieved from: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/S/C/8.pdf&Open=True, last access: June 2, 2022.

[63] Kwak, Dongchul, "No More Strategical Neutrality on Technological Neutrality: Technological Neutrality as a Bridge between the Analogue Trading Regime and Digital Trade," in *World Trade Review*, Vol. 21, No 1, Cambridge, 2021, p. 5.

[64] OMC, "DS285: Estados Unidos. Medidas que afectan al suministro transfronterizo de servicios de juegos de azar y apuestas," 2013, retrieved from: https://www.wto.org/spanish/tratop_s/dispu_s/casess/ds285s.htm, last access: June 2, 2022.

Besides the principle of technological neutrality, another fundamental element that signals if digital services are included is the classification used, i.e. the "nomenclature" through which a commitment is assumed in a particular sector or activity.[65] Under the GATS, the WTO Secretariat drafted a classification of services by sector in order to ensure the compatibility and homogeneity of commitments made by countries (MTN.GNS/W/120).[66] This sectoral classification, in turn, linked each subsector to more detailed categories of the United Nations Central Product Classification (CPC).[67] The CPC, at that time in its provisional version, provided a brief description of the activities included in each sector and subsector and added clarity on the scope of the commitments undertaken. Neither the original classification nor the original version of the CPC[68] included descriptions of digital services, which gives grounds for their exclusion. The most recent versions of the CPC, however, do explicitly contain activities covered by digital services or electronic commerce.[69]

In short, either by applying the principle of technological neutrality or by interpreting the nomenclature, today it seems clear that the GATS applies to digital services. Likewise, beyond the aforementioned technological neutrality, as technology and its trade in services evolved, trade agreements negotiated by states, both bilaterally, regionally, and multilaterally, began to add specific clauses that contemplate new rules regarding the supply of digital services such as the non-localization of servers; the protection of personal data; source code protection; and the cross-border transfer of data; among others.[70] These new clauses

[65] Zhang, Ruosi, "Covered or not Covered: That is the Question. Services Classification and its Implications for Specific Commitments under the GATS," No ERSD-2015-11, WTO, Economic Research and Statistics Division, 2015, p. 6, retrieved from: https://www.wto.org/english/res_e/reser_e/ersd201511_e.htm, last access: June 2, 2022.

[66] Multilateral Trade Negotiations, The Uruguay Round, "Services Sectoral Classification List," doc No 91-0074, MTN.GNS/W/120, 1991, retrieved from: https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=179576&CurrentCatalogueIdInd%20ex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True, last access: June 2, 2022.

[67] UN Central Product Classification. WTO, "Estadísticas y clasificaciones de servicios pertinentes," retrieved from: https://www.wto.org/spanish/tratop_s/serv_s/cbt_course_s/a2s1p1_s.htm, last access: June 2, 2022. After that classification, new classifications were made, such as 2.1. United Nations, Department of Economic and Social Affairs, Statistics Division, "Central Product Classification (CPC). Version 2.1," Series M, No 77, 2015, retrieved from: https://unstats.un.org/unsd/classifications/unsdclassifications/cpcv21.pdf, last access: June 2, 2022.

[68] See Mattos, José Carlos, "Los desafíos de la clasificación de los servicios y su importancia para las negociaciones comerciales," in Serie Comercio Internacional, No 16, Cepal, Santiago de Chile, 2001, retrieved from: https://repositorio.cepal.org/bitstream/handle/11362/4359/1/S2001711_es.pdf, last access: June 2, 2022.

[69] See United Nations, Department of Economic and Social Affairs, Statistics Division, (n 68), 83.159 "Other Hosting and IT Infrastructure Provisioning Services."

[70] Like the Brazil-Chile, Argentina-Chile, Mercosur-European Union, Pacific Alliance, CPTPP, T-MEC, Digital Economy Partnership Agreement, Mercosur Electronic Commerce Protocol, CHAFTA, and SAFTA (DEA) agreements.

are intended to regulate aspects that were left unaddressed, even when accepting the application of the GATS under the principle of technological neutrality.

The following subsection offers a brief description of some of the concepts contemplated in the framework of trade agreements that are used today in regulatory initiatives in many countries around the world to try to understand the compatibility of these new rules with preexisting agreements in international economic law.

2. Key concepts in international agreements on trade in services

2.1. Commercial presence and cross-border trade in services

The GATS cover both commercial presence and cross-border trade. Commercial presence came to be recognized and understood by all the member countries of the WTO as one of the ways in which a service can be provided in another country.[71] In GATS terms, "commercial presence" means any type of commercial or professional establishment, including:

i) the constitution, acquisition or maintenance of a legal person; or

ii) the creation or maintenance of a branch or representative office, within the territory of a Member for the purpose of supplying a service.[72]

In the trade agreements that follow the structure of[73] 1994 NAFTA, renewed in 2020 as USMCA,[74] commercial presence is addressed directly in the investment chapters.[75] This type of agreement differs from the GATS due to their format, which includes negative lists. This implies that unlike the GATS, where we find

[71] See art. I.2.c of the GATS, (n 61).

[72] See art. XVIII d, OMC, "Anexo 1B: acuerdo general sobre el comercio de servicios," retrieved from: https://www.wto.org/spanish/docs_s/legal_s/26-gats_02_s.htm#ArticleXXVIII, last access: June 2, 2022.

[73] See North American Free Trade Agreement (NAFTA), "The U.S.-Mexico-Canada Agreement (USMCA) Entered into Force on July 1, 2020, Replacing the North American Free Trade Agreement (NAFTA)," retrieved from: https://www.trade.gov/north-american-free-trade-agreement-nafta, last access: June 2, 2022.

[74] See United States-Mexico-Canada Agreement (USMCA), retrieved from: https://www.trade.gov/usmca, last access: June 2, 2022.

[75] Like in several of the aforementioned legislations or bills (Brazil, Kazakhstan, among others). To review the rules in NAFTA, see Foreign Trade Information System, "North American Free Trade Agreement (NAFTA)," part 5, chapter 11, retrieved from: http://www.sice.oas.org/Trade/NAFTA/NAFTATCE.ASP, last access: June 2, 2022; and for USMCA, see Sistema de Información sobre Comercio Exterior, "Tratado entre México, Estados Unidos y Canadá (T-MEC)," chapter 14, retrieved from: http://www.sice.oas.org/Trade/USMCA/USMCA_ToC_PDF_s.asp, last access: June 2, 2022.

lists of commitments (or positive lists), each country stipulates in a list on which sectors and with what limitations it will assume commitments. In NAFTA-type agreements, all sectors and all activities are bound by general obligations unless a reservation is expressed. This type of agreement, such as the USMCA, contains a local presence clause that establishes a prohibition on requiring, as a condition for the provision of a cross-border service, the establishment of a representative office or some form of local presence or being a resident in the country where the service is to be provided[76] (unless it is excepted in the reservations clauses).[77] Consequently unless some reservation has been made, in principle, a country could not require from a company from another Member country that provides services cross-border a representative office as required by some legislations. Likewise, new legislation that requires some type of local presence could be more easily challenged as contrary to the obligation that is specifically determined in the agreement, unless the country has made a reservation in that sector at the time of signing the agreement. Notwithstanding the aforementioned prohibition, it should be noted that local presence, understood as a form of foreign investment,[78] is promoted through trade agreements because it is considered to contribute to the development of the country where the service will be provided, among other factors due to the movement of capital, employment, and related services said presence entails.[79]

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[76] "Art. 15:6. No Party shall require a service supplier of another Party to establish or maintain a representative office or an enterprise, or to be resident, in its territory as a condition for the cross-border supply of a service." See Gobierno de Canadá, "Canada-United States-Mexico Agreement (CUSMA). Chapter 15. Cross-Border Trade in Services," retrieved from: https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/text-texte/15.aspx?lang=eng, last access: June 2, 2022.

Another good example is the agreement between Australia and Peru (PAFTA), article 9.6 in "Capítulo de Servicios Transfronterizos" states: "Local Presence. Neither Party shall require a service supplier of the other Party to establish or maintain a representative office or any form of enterprise, or to be resident, in its territory as a condition for the cross-border supply of a service." Foreign Trade Information System, "Peru-Australia Free Trade Agreement," chapter 9, art. 9.6 "Presencia local," retrieved from: http://www.sice.oas.org/Trade/PER_AUS/PER_AUS_Text_e.asp#C9_A6, last access: June 9, 2022.

[77] Asia-Pacific Economic Cooperation (APEC), "Negotiating Service Chapters: A Negative List Approach: Cross-Border Trade in Services," 2016, retrieved from: http://mddb.apec.org/Documents/2016/GOS/WKSP1/16_gos_wksp1_003.pdf, last access: June 2, 2022.

[78] WTO, "Mode 3. Commercial Presence," doc No 10-1811, S/C/W/314, 2010, retrieved from: https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=98186,73970,108652,45709,45545,64978,72342,39101,11943,30124&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True, last access: June 2, 2022.

[79] Gligo, Nicolo S., "Políticas activas para atraer inversión extranjera directa en América Latina y el Caribe," in: Serie Desarrollo Productivo, No 175, Cepal, Santiago de Chile, 2007, retrieved from: https://www.cepal.org/sites/default/files/publication/files/4572/S0700049_es.pdf, last access: June 2, 2022. Tres, Joaquim and Detchou, Yannick, "¿Por qué las empresas invierten en el extranjero y qué impacto tienen en el desarrollo?," BID, 2018, retrieved from: https://blogs.iadb.org/integracion-comercio/es/por-que-las-empresas-invierten-en-el-extranjero-y-que-impacto-tienen-en-el-desarrollo, last access: June 2, 2022.

The alternative to commercial presence would be, under the GATS, the provision of cross-border service, i.e., providing a service from one territory to another without a physical local representative. With the advantages of technological progress and the boom in digital services, especially since the pandemic unleashed by COVID-19, this mode of cross-border supply of services could gain prevalence.[80] Cross-border trade has become progressively easier, and global exports of cross-border ICT services more than doubled between 2005 and 2017.[81] In this scenario and when looking at ICT services from this perspective and trend, some restrictions linked to the local presence to provide a service in a certain country could be considered by some, if only *de facto*, as an obstacle to trade.[82] However, since there is no specific clause in the GATS text, the country alleging the breach should prove that the requirement effectively prevents cross-border trade, that it is applied in a discriminatory or unjustified manner, etc.

3. Compatibility of the ICT local representation requirement with the obligations assumed in the GATS

Unfortunately, to date, no decisions under the DSU have assessed the compatibility of this type of local presence requirement with the obligations assumed by a state under the GATS. However, we can attempt an approximation by following the analysis that the DSU bodies generally apply in these cases, as we will see later.

First, it would be necessary to analyze whether this type of measure violates a substantive obligation under the GATS. To this end, there are two ways to carry out the legality analysis of the local presence requirement: 1) observing the violation of a "specific commitment;" or 2) observing the violation of a "general obligation."[83] In the first case, the analysis will focus on identifying whether the

[80] WTO, "WTO Report Looks at Impact of COVID-19 Pandemic on Services Trade," 2020, retrieved from: https://www.wto.org/english/news_e/news20_e/serv_29may20_e.htm, last access: June 2, 2022.

[81] OMC, "El comercio de servicios en el futuro," World trade report, 2019, retrieved from: https://www.wto.org/spanish/res_s/booksp_s/05_wtr19_4_s.pdf, last access: June 2, 2022. However, it is relevant to highlight that the pandemic unleashed by COVID-19 affected this trend and caused a drop in world trade in services in general, which in the third quarter of 2020 fell by 24% compared to the same period of 2019. WTO, "Services Trade Recovery not yet in Sight," 2021, retrieved from: https://www.wto.org/english/news_e/news21_e/serv_26jan21_e.htm, last access: June 2, 2022.

[82] Khachaturian, Tamar and Oliver, Sarah, "The Role of 'Mode Switching' in Services Trade," working paper ID-071, Office of Industries, U.S. International Trade Commission (USITC), 2021, p. 1, retrieved from: https://www.usitc.gov/publications/332/working_papers/id_20_71_wp_the_role_of_mode_switching_in_services_trade_final_022421-compliant.pd, last access: June 2, 2022.

[83] Rotenberg, Julian, "Privacy before Trade: Assessing the WTO-Consistency of Privacy-Based Cross-Border Data Flows Restrictions," in *University of Miami International & Comparative Law Review*, No 91, 2020, p. 19.

measure complies with the commitments and exceptions established in the list of specific commitments that the state has signed.[84] For example if the state has assumed commitments without limitations for the ICT sector in the cross-border mode and then imposes a commercial presence requirement to provide that service in the same modality, then it is breaching its commitments and is restricting access to the market in that sector. In the second case, we will no longer look at the list of specific commitments, but we will have to analyze whether the measure does in fact constitute a violation of a "general obligation"[85] and, if it does, whether it is justified. In both cases, however, the text of the agreement takes precedence.

Even if there is a violation of an obligation established in the treaty, the state could still regulate a restriction based on a general exception. These are found in Article XIV and include those necessary to protect morals, maintain public order, and secure compliance with laws and regulations inconsistent with GATS provisions. States may regulate according to three additional objectives: i) the prevention of deceptive and fraudulent practices or having the means of coping with the effects of breach of service contracts; ii) protecting privacy concerning the processing and dissemination of personal data and the protection of the confidential nature of individual records and accounts, and iii) security. In the case at hand, the state should demonstrate that maintaining a commercial presence has a sufficient connection with the objective pursued, i.e., protecting public morals or public order (which are not synonymous) with the prevention of fraudulent practices, the protection of privacy and the dissemination of personal data or security.

The measures adopted must also satisfy criteria of necessity and proportionality.[86] At this point, the state must demonstrate that the requirement to maintain a local representative contributes to the end sought and that this contribution is more significant than the trade restriction created by the measure. This implies that the local presence has to cooperate with the objectives pursued, for example,

[84] *Ibid*., p. 20.

[85] In the particular case of the most favored nation clause, the exception established in the agreement is found in Article V, which decrees that: "This Agreement shall not prevent any of its Members from being a party to or entering into an agreement liberalizing trade in services between or among the parties to such an agreement, provided that such an agreement: a) has substantial sectoral coverage."

[86] OMC, "Estados Unidos. Medidas que afectan al suministro transfronterizo de servicios de juegos de azar y apuestas," report from the Appellate Body, WT/DS285/AB/R, 2005, p. 118, §§ 306 and 307, retrieved from: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=S:/WT/DS/285ABR.pdf&Open=True, last access: June 8, 2022. Regarding the issue of necessity, the appellate body, in the aforementioned case "Estados Unidos. Juegos de azar," stated that when carrying out the test of necessity, it is necessary to: a) weigh the contribution of the measure to achieve the aims it pursues and the restrictive repercussion of the measure on international trade; and b) make a comparison between the challenged measure and the possible alternatives (that are compatible with the agreement).

that it is somehow "necessary" to protect public morals. It will also need to show that there is no possible alternative to the measure taken (and that it is compatible with GATS) as long as it is feasible and reasonable. Finally, even if the state manages to demonstrate the two previous points, it must also prove that the measure in its implementation –which is equivalent to saying "in practice"–[87] does not cause any of the three undesired effects.[88] For example, the state must demonstrate that the requirement to maintain a local presence is imposed in a non-discriminatory and justified manner on all countries and national suppliers and that it does not constitute a covert restriction on trade in services. Along these lines, if a state establishes this requirement for only some countries (based on an evaluation of the consumer protection regime or personal data that it offers), it must prove that the implementation of the measure was not carried out in an arbitrary or unjustified manner.

Finally, the measures must not be applied in a way that constitutes a means of arbitrary or unjustifiable discrimination between countries where similar conditions prevail or with a covert restriction on trade in services.[89]

4. Interplay of local representation requirements and agreements on electronic or digital commerce

As we mentioned before when talking about the principle of technological neutrality, although the GATS also applies to new modes of service supply, such as digital services, the agreement does not include specific disciplines in this subject, which led some countries to negotiate new clauses in different bilateral or regional agreements.[90] At the multilateral level, within the framework of the WTO, the rules that will guide electronic commerce have not yet been established, but there has been progress within the framework of certain forums and groups on some definitions.[91]

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[87] OMC, "Estados Unidos. Medidas que afectan al suministro transfronterizo de servicios de juegos de azar y apuestas," Special Group Report, WT/DS285/R, 2004, Estados Unidos Panel, § 6.570, retrieved from: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=S:/WT/DS/285R-00.pdf&Open=True, last access: June 12, 2022.

[88] *Ibid*., Estados Unidos Panel, § 6.581.

[89] AGCS, art. XIV. OMC, "Acuerdo general sobre el comercio de servicios," retrieved from: https://www.wto.org/spanish/docs_s/legal_s/26-gats_01_s.htm, last access: June 2, 2022.

[90] See note 60.

[91] See WTO, "E-Commerce Negotiations: Members Finalise 'Clean Text' on Unsolicited Commercial Messages," 2021, retrieved from: https://www.wto.org/english/news_e/news21_e/ecom_05feb21_e.htm, last access: June 2, 2022. For example, the Organization for Economic Co-operation and Development (OECD) defines electronic commerce (e-commerce) as any transaction for selling goods or services carried out through computer networks, using methods specifically designed to receive or place

Regarding the aforementioned growth of international digital commerce, the latest international trade agreements incorporate specific sections to standardize criteria about the regulation of electronic commerce between countries.[92]

These new disciplines regulate aspects that arose from the use and development of digital commerce, such as protecting personal data belonging to the consumers of said services. However, access to a country's market or the national treatment that will be given to services or suppliers in a given country, in some cases continues to be regulated within the framework of the agreements by the chapters on services, investments, and trade in goods, depending on the nature of the transaction.[93] In the case of digital services, to analyze whether a standard complies with the international commitments assumed by a country, one must observe, on the one hand, the clauses negotiated within the framework of the electronic commerce chapter (for example, not prevent the flow of data cross-border) and, on the other hand, the commitments and exceptions that have been made in the framework of the services chapter (for example, see if a sector is committed to mode 1 of cross-border trade without limiting market access).

Having explained how agreements on trade in services are regulated, in this subsection we will try to address some of the content of the new chapters on electronic commerce and their relationship with the measures taken or which could be taken by countries in this regard, as described in Section 1. The chapters on electronic commerce usually cover, among others, clauses on the free flow of data,[94] the defense of consumers, the protection of personal data,[95] the non-requirement of server location[96] and the principle of not requiring disclosure of source

orders. By this definition, a streaming service like Netflix is part of e-commerce. Organization for Economic Co-operation and Development (OECD), "Panorama del comercio electrónico: políticas, tendencias y modelos de negocio," 2020, p. 17, retrieved from: https://www.oecd.org/sti/Panorama-del-comercio-electro%CC%81nico.pdf, last access: June 2, 2022.

92 See note 60.

93 For example, the USMCA digital trade chapter, article 19.2.4 says: "For greater certainty, a measure that affects the supply of a service delivered or performed electronically is subject to Chapter 14 (Investment), Chapter 15 (Cross-Border Trade in Services), and Chapter 17 (Financial Services), including any exception or non-conforming measure set out in this Agreement that applies to the obligations contained in those Chapters." Government of Mexico, USMCA, "Capítulo 19. Comercio digital," retrieved from: https://www.gob.mx/cms/uploads/attachment/file/465801/19ESPComercioDigital.pdf, last access: June 2, 2022. See also arts. 1.1.2 and 1.2 of the Digital Economy Partnership Agreement (DEPA), 2020, retrieved from: https://www.mfat.govt.nz/assets/Trade-agreements/DEPA/DEPA-Signing-Text-11-June-2020-GMT-v3.pdf, last access: June 8, 2022.

94 These compel countries not to prohibit or restrict the transfer of personal data or information across borders. Exceptions to this principle vary by agreement.

95 In general terms, the clauses on this topic encourage countries to take measures to protect the personal information of users of digital commerce.

96 This type of clause establishes the prohibition of ordering, as a condition for doing business in a territory, the requirement to install computer servers locally or to use those available in that territory.

code.[97] This type of obligation seeks that when countries regulate local activities included in electronic commerce –as is the case of digital services– they do so respecting these principles that facilitate trade between countries. However, as we observed, in the most recent legislation on digital services, not all the guiding principles of electronic commerce seem to be respected. Similarly, if a chapter on electronic commerce forbids requiring the location of servers (with exceptions) or includes the obligation to allow the cross-border transfer of data (with exceptions), it would be very difficult for that country to demand the forced location of data on a local server without violating the provisions of the agreement (of course, we could also carry out an analysis of the legality of these measures in light of the GATS, but it is beyond the scope of this article). On the other hand, in addition to constituting an obstacle to trade, this measure could increase the costs of service providers (which would mainly harm smaller ones).[98]

At the beginning of 2016, when the European Union adopted its new regulation on the protection of personal data (the General Data Protection Regulation or GDPR), it sparked a debate in the international community regarding how to make the free circulation of data, which is generally promoted in commercial agreements, compatible with higher standards of personal data protection.[99] To be consistent with its new legislation, the new trade agreements of the European Union veered from the classic GATS position –in which only exceptions are mentioned for reasons of personal data protection (a "negative" position)– towards agreements which contain clauses that compel countries to adopt measures to ensure adequate data protection, which condition the transfer of data so that the original data protection regulations are respected.[100]

Many companies regard the European Union's protection of personal data and privacy (through the GDPR and its trade agreements) as an obstacle to trade, particularly because of the costs involved in adapting to the new legislation to operate in the region.[101] In this sense, some authors believe that the impacts of the decision of the

[97] We can mention the following examples: Pacific Alliance; Treaty between Mexico, the United States and Canada (USMCA); Trans-Pacific Partnership (TPP); the new E-Commerce chapter of the South Asian Free Trade Area (SAFTA); and the Digital Economy Partnership Agreement (DEPA).

[98] Axel Network, "Why the Data Localization Movement is Misguided," 2021, retrieved from: https://www.axel.org/2021/02/19/why-the-data-localization-movement-is-misguided, last access: June 2, 2022.

[99] Velli, Federica, "The Issue of Data Protection in EU Trade Commitments: Cross-Border Data Transfers in GATS and Bilateral Free Trade Agreements," in European Papers, Vol. 4, No 3, 2019.

[100] *Ibid*.

[101] Ross, Wilbur, "EU Data Privacy Laws Are Likely to Create Barriers to Trade," Financial Times, 2018, retrieved from: https://www.ft.com/content/9d261f44-6255-11e8-bdd1-cc0534df682c, last access: June 6, 2022; Peukert, Christian, et al.

Court of Justice of the European Union in the "Schrems II" case make the GDPR the largest *de facto* data localization framework in the world.[102] This is so because, given the uncertainty about being able to transfer the personal data of Europeans abroad, some companies choose to locate, store and process the data in the European Union.[103]

On the other hand, the United States has embodied this debate in its trade agreements differently. It promoted clauses that in principle ensure the free circulation of data, except when it is prevented for "legitimate public policy objectives," provided that it is not a barrier, that it is not applied in a discriminatory manner, and that it is transparent.[104] Although we will not expand on this point, there are those who suggest that the measures pursued by the United States tend to privilege companies established in their country to the detriment of others or *newcomers*,[105] which could constitute a violation of the general principle of non-discrimination.

In this way, laws that demand an extremely high level of data protection or that require computer servers to be installed in the country (particularly for companies whose services can be provided cross-border) could be considered an obstacle to trade (or, at least, against the spirit of liberalization of the GATS concerning mode 1 and the promotion of electronic commerce), and against the obligations assumed both in their trade agreements and in the framework of the GATS. The compatibility of these measures with trade agreements must be specifically analyzed within the framework of the obligations assumed by each country.

IV. Impact on the right to freedom of expression

Having analyzed the measures from the perspective of international commercial law, let us now move on to studying them through the prism of international human rights law. Until now, the majority of criticism leveled against these clauses is

"Regulatory Export and Spillovers: How GDPR Affects Global Markets for Data," Vox EU CEPR, 2020, retrieved from: https://voxeu.org/article/how-gdpr-affects-global-markets-data, last access: June 6, 2022.

[102] Cory, Nigel, "How 'Schrems II' Has Accelerated Europe's Slide Toward a De Facto Data Localization Regime," Information Technology & Innovation Foundation (ITIF), 2021, retrieved from: https://itif.org/publications/2021/07/08/how-schrems-ii-has-accelerated-europes-slide-toward-de-facto-data, last access: June 6, 2022.

[103] *Ibid*.

[104] Congressional Research Service (CRS) Report, "Data Flows, Online Privacy, and Trade Policy," 2020, pp. 15 and 16, retrieved from: https://sgp.fas.org/crs/misc/R45584.pdf, last access: June 6, 2022.

[105] Omino, Melissa and Rutenberg, Isaac, "Why the US-Kenya Free Trade Agreement Negotiations Set a Bad Precedent for Data Policy," Center for Global Development (CGD), 2020, retrieved from: https://www.cgdev.org/blog/why-us-kenya-free-trade-agreement-negotiations-set-bad-precedent-data-policy, last access: June 6, 2022.

that they could be used to detain the workers of the social media platforms, if they refused to implement local regulations that they consider to violate human rights.[106] The obligatory nature of a local presence when it entails certain liabilities, including criminal ones, on the representatives could constitute a fundamental incentive for companies to limit access to information and freedom of expression on their platforms, that is, it could encourage what is called a chilling effect.[107] This is what is happening in India, for example, where activists and experts condemn state pressure on companies to block content critical of the current government, the definition of which is ambiguous, or even openly incompatible with national and international human rights. The same situation was reported in Turkey, Russia, Brazil, and Pakistan, among others, as we explained above.[108]

In terms of human rights and when analyzing the measure from the perspective of freedom of expression, the requirement of a local representative must also pass the three-part test of the universal human rights system, namely: the measure must be clearly established in a law, in a formal and material sense; it must be necessary, that is, be in accordance with the objectives outlined in the International Covenant on Civil and Political Rights; and be suitable, adequate and proportionate, that is, the measure must be the least harmful to the right to freedom of expression.

Regarding the objectives, the arguments used by the states to require the presence of a local representative are concentrated around the protection of personal data; the liability of the company regarding the activities it carries out in its territories; as well as the duty to respond to requests from administrative and judicial authorities, among others. In this line, the requirement of a local representative could serve so that the state can exercise its jurisdiction over the activities and services the company provides to its citizens. A good example is the importance of Google establishing in Spain in the Costeja case for the construction of the argument of jurisdiction over the activities of the company made by the Court of Justice of the European Union.[109] As is the case with the requirement of local representation in other services or sectors, the presence of a legal representative locally would help both users and different state agencies to

[106] Elliott, (n 4).

[107] See Askin, Frank, "Chilling Effect," The First Amendment Encyclopedia, retrieved from: https://www.mtsu.edu/first-amendment/article/897/chilling-effect#:~:text=Chilling%20effect%20is%20the%20concept,that%20appear%20to%20target%20expression, last access: June 6, 2022.

[108] See section "II. A global trend," in this paper.

[109] Court of Justice of the European Union (CJEU), "Caso Costeja vs. Google Spain," judgment of May 13, 2014, Grand Chamber, case C-131/12, § 60, retrieved from: https://curia.europa.eu/juris/document/document.jsf?docid=152065&doclang=ES, last access: June 6, 2022.

maintain a more effective communication channel that allows asserting their rights and demanding compliance with local regulations.[110]

Regarding necessity and proportionality, the measure seems more suitable in some cases than others to achieve its intended results. Some regulations establish the specific powers that will be required of the representatives, while others do not. In some cases, the laws require the location of the servers, in others they do not, and when they do, the grounds vary –generally, they are deficient in explaining why this measure is the least harmful to the rights of the company and users. When evaluating the measure and its necessity, local representation is not the only existing mechanism to deal with the problems of international companies implementing local laws. For example, in criminal matters, many countries have cooperation agreements or Mutual Legal Assistance Treaty (MLAT) in force.[111]

However, we should remember the WhatsApp case in Brazil and the entire debate around jurisdiction (or attempt to exercise it) over the company in that country and the frequent blocking of the application by the courts.[112] WhatsApp Inc. is incorporated and headquartered in the United States and at the time had no legal presence in Brazil.[113] However, based on the Brazilian Civil Rights Framework for the Internet (MCI), the Brazilian court claimed to have jurisdiction over the company, particularly as conveyed in Articles 10 and 11, which provide that Internet application providers that participate in any form of data processing within the territory of Brazil must comply with Brazilian law, when they offer services to the Brazilian public or when at least one member of the same economic group is established in Brazil, no matter if the provider is based abroad.[114]

Similarly, the Brazilian justice system understood that Facebook Serviços Online

[110] For example, a local representative could mean having a person in charge who can respond to various legal requirements (i.e., access to specific information regarding one of its users), as is the case of the DSA or the Indian regulation. It could also make companies have to respond to non-compliance with demands from their users concerning their content moderation. And there are more similar cases.

[111] United Nations Office on Drugs and Crime, "Mutual Legal Assistance (MLA)," retrieved from: https://www.unodc.org/e4j/zh/organized-crime/module-11/key-issues/mutual-legal-assistance.html#:~:text=resource%20for%20lecturers-,Mutual%20legal%20assistance%20(MLA),for%20use%20in%20criminal%20cases, last access: June 6, 2022.

[112] Reuters, "Why Facebook's WhatsApp Has Been Blocked in Brazil again," Fortune, 2016, retrieved from: https://fortune.com/2016/07/19/whatsapp-brazil-block, last access: June 6, 2022.

[113] Since 2022, WhatsApp appointed its first director for operations in Brazil, located in São Paulo. See Mari, Angelica, "WhatsApp Appoints First Director for Brazil Operations," ZD Net, 2022, retrieved from: https://www.zdnet.com/article/whatsapp-appoints-first-director-for-brazil-operations, last access: June 6, 2022.

[114] De Souza Abreu, Jacqueline, "From Jurisdictional Battles to Crypto Wars: Brazilian Courts v. WhatsApp," BTLJ Blog, Berkeley Technology Law Journal, 2017, https://btlj.org/2017/02/from-jurisdictional-battles-to-crypto-wars-brazilian-courts-v-whatsapp, last access: June 6, 2022.

do Brasil Ltda. was the legal representative in Brazil of WhatsApp Inc. considering that both were members of the same economic group.[115] Facebook rejected this interpretation and argued that both companies were separate legal entities and that it had no control over WhatsApp's activities.[116] For its part, WhatsApp explained that it could not comply with the orders of the Brazilian Judiciary without violating the law in the United States (since there was no order issued by the US Judiciary). This is so because the US Stored Communications Act prohibits providers of electronic communications services subject to the jurisdiction of the United States to disclose conversations of their users.[117] Along the same lines, the company stated that the only solution for the Brazilian authorities was to resort to the MLAT between the United States and Brazil, to access the data of WhatsApp users.[118] MLATs are cooperation treaties between countries to collect and exchange information, as well as allowing officials of one country to request and provide evidence located outside their territories to assist in criminal investigations in another country. In this particular case, since there was an MLAT in force between the two countries, the company could give rise to the judicial request made by the Brazilian authorities without violating United States law. As Internet Lab explains in this *amicus curiae* brief in the case "United States of America v. Microsoft Corporation:"

> The existence of these treaties demonstrates official recognition by the United States of the extraterritorial application of any effort by the United States to seize items held in those countries. That official recognition should not be disregarded when considering the extraterritorial application of warrants such as the one used in this case, despite the concerns expressed by the United States regarding the efficacy of the MLAT process.[119]

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[115] Reuters, "TRF reduz valor de multa a Facebook e WhatsApp de R$2 bi para R$23 mi," 2019, retrieved from: https://www.reuters.com/article/tech-faceboook-multabrasil-idBRKCN1TQ2V2-OBRIN, last access: June 6, 2022. In this case, it was understood that Facebook had to comply with the legal demands in a criminal proceeding for being a subsidiary of WhatsApp Inc. See Internet Lab, "Judicial Branch, Rio de Janeiro State, 2nd Criminal Division, Duque de Caxias County," IP 062-00164, 2016, retrieved from: https://www.internetlab.org.br/wp-content/uploads/2016/07/duque-whatsapp.pdf, last access: June 6, 2022.

[116] See Moraes Pitombo Advogados, retrieved from: https://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=580856877#69%2520-%2520Presta%25E7%25E3o%2520de%2520esclarecimentos%2520%2520(49472/2016)%2520-%2520Presta%25E7%25E3o%2520de%2520esclarecimentos%2520, last access: June 6, 2022.

[117] Legal Information Institute (LII), "18 U.S. Code Chapter 121 - Stored Wire and Electronic Communications and Transactional Records Access," retrieved from: https://www.law.cornell.edu/uscode/text/18/part-I/chapter-121, last access: June 6, 2022.

[118] Equipe IRIS-BH, "Why is WhatsApp Blocked again?," Blog, Institute for Research on Internet and Society, 2016, retrieved from: https://irisbh.com.br/en/why-is-whatsapp-blocked-again, last access: June 6, 2022.

[119] Supreme Court of the United States, Internet Lab Amicus Curiae, "United States of America v. Microsoft Corporation," On Writ of Certiorari to the Second Circuit Court of Appeals, No 17-2, retrieved from: https://www.supremecourt.gov/DocketPDF/17/17-2/28382/20180118203851162_17-2%20bsac%20Internetlab%20Law%20and%20Technology%20Center.pdf, last access: June 6, 2022.

Although in some cases the courts rejected the need to use an MLAT to carry out their orders in cases against WhatsApp,[120] they seem to be the most suitable way to guarantee proper cooperation in criminal matters, especially when there is an overlap with local laws that would prevent collaboration between authorities, as occurred in this case. Finally, in relation to proportionality, the measure in some cases seems excessive in terms of costs and risks, especially when the laws establish possible criminal liabilities for local representatives in case of inadequacies of the representation or the company's actions with local regulations.

V. Conclusion

As we have explained throughout this paper, discussions about the legality of local presence take place as if we were facing two (or more) self-contained frameworks or spheres of international law.[121] To date, this has prevented studies to analyze the legality of these measures –not only under the light of international human rights law, but also under international commercial law or criminal law–, or that, at least, demonstrate this interaction, which is not minor and often underlies some of the arguments put forward against them. We should ask ourselves: can these measures be legal from an international trade law perspective, but not from the international human rights law framework? Could the opposite be true? What mechanisms do we have to resolve this contradiction?

From the perspective of international law, the analysis of the legality of the measures always depends on a "case by case" study and is related to the specific

[120] De Souza Abreu, (n 117).

[121] As early as its 52nd session in 2002, the United Nations International Law Commission (ILC) identified the fragmentation of international law as a problem that required attention and established a group chaired by Martti Koskenniemi. In 2006, the ILC published a report called "Fragmentación del derecho internacional: dificultades derivadas de la diversificación y expansión del derecho internacional." The report explains that, in the last 50 years, the scope of international law has increased significantly, but in an uncoordinated manner (both at the national, regional, and multilateral levels, also due to specific problems), which has caused a growing fragmentation. This fragmentation consists of "the emergence of specialized and (relatively) autonomous rules or sets of rules, legal institutions, and spheres of legal practice. What used to appear governed by 'general international law' has become a field of operations for specialized systems such as 'commercial law,' 'human rights law,' 'environmental law,' 'law of the sea,' 'European law,' and even highly specialized knowledge such as 'investment law' or 'international refugee law,' etc., each of which has its own principles and institutions." ILC, "Fragmentación del derecho internacional: dificultades derivadas de la diversificación y expansión del derecho internacional," Chapter XII, Vol. II, second part 1, 2006, § 243, retrieved from: https://legal.un.org/ilc/reports/2006/spanish/chp12.pdf, last access: June 12, 2022.

This fragmentation is institutional (i.e., linked to jurisdiction and competence) and substantive (i.e., the division of international law into extremely specialized and autonomous spheres, or self-contained, which would be independent of each other and from general law). However, one of the main problems or risks of fragmentation identified by the ILC is linked to the possibility of incompatible institutional rules and practices.

agreements that each state has made. However, what has been analyzed in this paper leads us to reflect on whether, even under the influence of international commercial law, it is reasonable to apply rules (transversally and equally) to all services regardless of whether they are linked to the exercise of a fundamental human right, such as freedom of expression. In this sense, we could think that the communication services or the services provided by social media platforms need to overcome this division between two different regimes in order to find solutions that better serve the promotion of standards that are respectful of both freedom of expression and commercial commitments.

To this end, academic research must begin to identify the interaction between these self-contained regimes to find answers to otherwise complex problems. Consequently, we will move away from "simplistic" solutions or arguments that replicate phrases without much questioning, such as the one that says that all obligations related to the requirement of a local representative imply a hostage-taking clause.

However, not everything is negative. Increasingly, we see that the discussions around regulating the digital space begin to incorporate new dimensions. For example, discussions about the regulation of social media have expanded to include: human rights; privacy; competition; consumer defense; intellectual property; and the regulation of telecommunications, among others. This seems key to moving towards a less fragmented approach to law.

1. Final thoughts

Most of the legislations that are currently under debate express the difficulty states face to promote policies that successfully combine the protection of the rights of consumers of digital services and the protection of personal data, with the respect and protection of freedom of expression and the guarantees and freedoms that social media companies need to carry out their activities. Likewise, from the point of view of international commercial law, the same issue puts into question the balance between taking measures that promote cross-border trade and regulating the provision of services in a territory to guarantee that the rights of users, the rules, or national development interests are not undermined. Furthermore, we have to add the growing demands from certain sectors of society to regulate the activities carried out by ISPs or intermediaries, as well as the responses that they give to said demands. Likewise, we should incorporate into our analysis the

requests and warnings made by various organizations of society and academia concerning the aforementioned demands and the state responses that seek to give effect to them.[122]

Although each standard requires individual analysis to assess that it is not undermining an international trade commitment, it is important to bring these issues to the forefront to understand their implications and limitations. Commerce and freedom of expression impact the lives of all people and, therefore, are not and should not be separated.

[122] Keller, (n 6), p. 28.