

# The regulation of trade in information and communication technology services in Chile, Colombia and Peru. A comparative analysis of the rules contained in regional trade agreements.

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## Abstract

Information and Communication Technologies (ICTs) are reshaping the dynamics of trade and investment. The services sector, which includes computer technology and related services, as well as telecommunications and audiovisual services, is particularly influenced by rapid change and innovative digital realities. Accordingly, unlike the slow development of rules at the multilateral level, Regional Trade Agreements are increasingly incorporating regulations which address the new challenges. In this context, this paper examines the current rules contained in Regional Trade Agreements (RTAs) of Chile, Colombia and Peru with the United States of America, the European Union and the Peoples' Republic of China, respectively. The question of whether relevant regulations liberalize or restrict trade in ICT services is discussed. Accordingly, this paper maps the above mentioned RTAs and concludes that substantive restrictions do not currently exist. However, the paper points to the need of further research regarding regulation and negotiation of important aspects of Intellectual Property rights protection and Data Protection regarding digital trade.

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## I. Introduction

This study aims to map and identify the legal framework for international trade in Information and Communication Technology (ICT) services as contained in representative Regional Trade Agreements (RTAs)<sup>1</sup> of Chile, Colombia and Peru, with the purpose of discussing whether they liberalize or restrict trade and investment<sup>2</sup> in ICT services. In order to determine the relevant RTAs, this research takes into account the findings of a recent report published by McKinsey revealing that Latin America main partners for data and communication exchange flows are the United States of America (US) and the European Union (EU).<sup>3</sup> Thus, the RTAs with these trading partners will be examined. Additionally, this paper evaluates the RTAs concluded with the People's Republic of China (PRC). The PRC is already one of the main trading partners in several economic areas (e.g. investment and trade in goods) and with the rapid development of ICT services in the PRC and the growing importance of its policies towards ICT, it is imperative to analyze the rules that would govern trade and investment in ICT services between the PRC and Chile, Colombia and Peru. Therefore, the set of RTAs is comprised of: US-Chile RTA<sup>4</sup>, US-Peru RTA<sup>5</sup>, US-Colombia RTA<sup>6</sup>, EU-Chile RTA<sup>7</sup>, EU-Colombia and Peru RTA<sup>8</sup>, PRC-Chile RTA<sup>9</sup> and PRC-Peru RTA<sup>10</sup>. Additionally, this study examines the non-conforming measures and limitations found in the annexes of the RTAs under review. Furthermore, it is important to state that ICT services are intrinsically related to telecommunication services, computer and related services as well as audiovisual services. Therefore, the framework of this paper is determined by the revision of the rules governing these services in the set of RTAs.

Consequently, this paper begins with a description of how the internet has influenced international trade and facilitated new possibilities for Small and Medium Size Enterprises (SMEs). Based on this background, this paper depicts the current position of Chile, Colombia and Peru in the internet economy and briefly describes the barriers that could harm trade and

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<sup>1</sup> The general denomination "RTA" is used to refer to Free Trade Agreements, Trade Promotion Agreement and Economic Association Agreements.

<sup>2</sup> This study does not analyze Investment Chapters of RTAs, but the restrictions to mode 3 (foreign commercial presence).

<sup>3</sup> Manyika, J., et al. (2014). Global flows in a digital age: How trade, finance, people, and data connect the world economy, McKinsey Global Institute, 13.

<sup>4</sup> United States-Chile Free Trade Agreement, signed 6 June, 2003 (entered into force on 1 January, 2004) (US-Chile RTA).

<sup>5</sup> United States-Peru Trade Promotion Agreement, signed April 12, 2006 (entered into force on February 1, 2009) (US-Peru RTA).

<sup>6</sup> United States-Colombia Trade Promotion Agreement, signed 22 November, 2006 (entered into force on 15 May, 2012) (US-Colombia RTA).

<sup>7</sup> Chile-European Community Association Agreement, signed 18 November, 2002 (entered into force on 1 February, 2003) (EU-Chile RTA).

<sup>8</sup> Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part, signed 26 June, 2012 (entered into force for Colombia on 1 August, 2013; and for Peru on 01 March, 2013) (EU-Colombia and Peru RTA).

<sup>9</sup> Free Trade Agreement between the Government of the Peoples Republic of China and The Government of the Republic of Chile, signed 18 November, 2005 (entered into force on 1 October, 2006) (PRC-Chile RTA); and Supplementary Agreement on Trade in Services Chile-China, signed on 20 March, 2008 (entered into force on 1 August, 2010).

<sup>10</sup> Free Trade Agreement between the Government of the Republic of Peru and The Government of the Peoples Republic of China, signed 28 April, 2009 (entered into force on 1 March, 2010) (PRC-Peru RTA).

investment in ICT services. It then proceeds to outline the present regulation of ICT services in the World Trade Organization (WTO), with special emphasis on the classification of computer and related services, telecommunication as well as audiovisual services. Then, it addresses the status of ICT services regulation in RTAs, highlighting important aspects beyond GATS commitments, such as the liability in internet service providers (ISPs). Later, it analyses the regulation of ICT services in the set of selected RTAs, detecting different levels of regulation and enforceability between the US and EU RTAs. The absence of regulations covering electronic commerce and important aspects of the digital economy in the PRC's RTAs is striking. To sum up, the paper finds that trade and investment in ICT services in Chile, Colombia and Peru has benefited from greater RTA liberalization; but lack of comprehensive regulation, especially regarding Intellectual Property (IP) rights and Data Protection related to digital trade is noticed.

## II. How the internet has shaped international trade

The preponderance of internet use in the economy, trade and in everyday life is unquestionable. The internet has re-shaped the dynamics of trade and investment by facilitating transactions, connecting suppliers to new markets and opening up vast markets for services trade. More importantly, use of the internet has enabled digitization, thereby reducing to almost zero the costs linked to access, discovery, and distribution of goods and services.<sup>11</sup> Digitization is also transforming global flows in three ways. First, tangible flows have become digital flows, with lower cost of access, transport, and marginal production. Second, it enhances physical flows, facilitating cross border electronic commerce. Third, it creates online platforms that facilitate production and cross border exchange.<sup>12</sup> Furthermore, as a benefit for both producers and consumers, not only goods associated with ICT, but also services, are thriving in the market for personal and commercial transactions. The supply of online software, cloud computing services<sup>13</sup> and the ever growing market for mobile applications are just a few examples of this trend.

On the other hand, trade liberalization can play a role in encouraging the benefits of digitization and ICT adoption by fostering competition and reducing the cost of ICT inputs. According to different OECD studies, various factors influence the levels of the diffusion of

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<sup>11</sup> Manyika, J., supra note 3, 11.

<sup>12</sup> Ibid.

<sup>13</sup> Cloud computing is the delivery of on-demand computing resources over the Internet on a pay-for-use basis. Cloud computing services may include: Cloud based applications, platform services, and infrastructure services such as networking, storage, and data center space. See: <<http://www.ibm.com/cloud-computing/us/en/what-is-cloud-computing.html>> retrieved October 8, 2014. Cloud computing is likely to be one of the ICT services of most importance in the future since it has enormous potential to reduce costs for businesses. Exports of cloud computing services were estimated to be worth approximately \$1.5bn in 2010 and the market is expected to grow by up to 600 percent by 2015. See: Berry, R. a. Reisman, M. (2012). Policy Challenges of Cross-Border Computing, 4:2 Journal of International Commerce and Economics, 9-10. Examples of cloud computing services are Amazon Simple Storage Services, Amazon Web Services, Google App Engine, Microsoft Azure Services Platform or Salesforce.com. Several internet service providers also use cloud computing as a basis for search engines, blogs and social networks, among others.

ICT. *Pilat and Delvin* (2004) found that ICT adoption is affected by the direct cost of ICT, e.g. the equipment cost, telecommunications, and the ability of a firm to absorb new technology such as ICT. *Conway et al* (2006) found that product market regulation has a detrimental impact on ICT investment and location decisions of multinational enterprises; and regulation is particularly harmful for ICT-intensive sectors. The reason is because well-functioning product markets increase the incentive and lower the cost of incorporating new technologies into production processes.<sup>14</sup> Therefore, while trade is instrumental in facilitating the introduction and use of a variety of ICTs; ICT, in turn, plays a role in facilitating international business activities. This ‘two way street’ contributes to innovation by business and the economy as a whole. In this regard, it is important to analyze the way in which both policy and legislation is being enacted. Is the ICT market unnecessarily regulated? What are the policy objectives? It is important to highlight that in the age of convergence of networks and services,<sup>15</sup> separate policies and regulation of telecom industries, media and technology can be counterproductive. In fact, international and national policies, including trade policies, should better address the issues arising from a convergent reality such as ensuring high speed reliable networks, implementing laws on consumer protection, data protection and reliable and efficient electronic payment mechanisms, and working together for cybercrime deterrence.<sup>16</sup>

Furthermore, with computer capacity increasing rapidly in many parts of the world, most services today are *information intensive*<sup>17</sup>. Indeed, internet and other carrier technologies have become an ideal means of services delivery.<sup>18</sup> This is particularly important for telecommunication services, computer and related services, and audiovisual services, which are the services most affected by the digital age<sup>19</sup> and which are the services sectors analyzed in this paper.

#### **a) The position of Chile, Colombia and Peru in the internet economy**

In global terms, the leading players in the ICT services market are found in developed economies. The McKinsey Global Institute Connectedness Index<sup>20</sup> and the BCG e-Friction index<sup>21</sup> found similar results regarding the level of development and competitiveness of several countries concerning the internet economy. In particular, the BCG e-Friction Index assesses

<sup>14</sup> Kiriya, N. (2011). Trade in Information and Communications Technology and its Contribution to Trade and Innovation: OECD Publishing, 7.

<sup>15</sup> Convergence has made it possible to provide voice, data and video services on the same infrastructure platform. This allows carriers, mobile operators, and cable operators to deliver converged video, voice, and data service across multiple networks and devices. As a result, different types of transmission systems (wire line, wireless, satellite and unlicensed) can be linked together through IP to deliver converged services anywhere and at any time. Furthermore, a single device can allow access to telephone services, video streaming or broadcasting and Internet access. See ITU (2013). Regulation and Consumer Protection in a Converging Environment, 1.

<sup>16</sup> ITU (2013). Regulation and Consumer Protection in a Converging Environment, 6-8.

<sup>17</sup> Tuthill, L. a. Roy, M. GATS Classification Issues for Information and Communication Technology Services, in Burri, M. a. Cottier, T. (2012). Trade governance in the digital age: World Trade Forum. Cambridge, Cambridge University Press, 157.

<sup>18</sup> Ibid.

<sup>19</sup> Ibid., 160.

<sup>20</sup> Manyika, J., see note 3, 7.

<sup>21</sup> Zwillenberg, P., et al. (2014). The connected world. Greasing the wheels of the internet economy, The Boston Consulting Group.

55 indicators of friction that inhibit Internet use and group them into four components: (i) *infrastructure-related friction*, associated to basic access, speed, price, traffic and architecture of the internet; (ii) *industry-related friction*, affected by the availability of physical infrastructure, labor supply, dynamic capital markets, IP and customs regulation, and the level of technology; (iii) *individual-related friction*, related to ICT literacy, availability of online and secure payment systems, and consumer confidence in how personal data will be used on the internet; and (iv) *information-related friction*, measured by the content creation, commitment to open data, filtering and press freedom indexes.<sup>22</sup>

According to the BCG e-friction index, Chile ranks 41<sup>st</sup> in the internet economy while Colombia 56<sup>th</sup> and Peru 60<sup>th</sup>. Especially in the cases of Colombia and Peru, these positions reflect low levels of connectivity<sup>23</sup> that is at the same time negatively influenced by poor infrastructure, global economic difficulties, low competition in different market segments and the challenge to bear on the incumbents.<sup>24</sup> Nevertheless, the region –albeit at its own speed– is still part of global data flows exchange and is increasingly benefiting from it, as was showcased in a recent report published by eBay.<sup>25</sup>

The eBay report reveals that more than 2 million Chileans shop online and spend over USD 400 million a year. Moreover, all commercial Chilean sellers using eBay do export; and they reach on average 28 different markets. In total, Chilean sellers export to 98 different markets.<sup>26</sup> In the case of Peru, technology has helped to overcome geographic distances. Exports over digital services networks reach many more markets than traditional exporters. For Peruvian sellers using eBay, 25 different foreign markets are reached.<sup>27</sup> As for Colombia, the government has established Vive Digital, a program with the goal to increase the level of connectivity and bring 50 percent of micro-enterprises and SMEs and 50 percent of homes to the Internet.<sup>28</sup> In each of the three cases, the rapid development of electronic commerce and participation in the digital economy has been facilitated by the rapid expansion of mobile internet solutions in the region. For instance, 70 percent of the Latin American population uses mobile phones.<sup>29</sup> Given this vibrant and promising future, US companies such as Twitter have announced plans to expand and open offices in Latin American countries.<sup>30</sup>

Furthermore, the market for startups in the three countries under analysis is relatively small, though existing. Recently, two startups from Chile (Portal Inmobiliario, worth USD 40 million;

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<sup>22</sup> Ibid, 10–15.

<sup>23</sup> ITU (2013). Study on International Internet Connectivity. Focus on Internet Connectivity in Latin America and the Caribbean, 39.

<sup>24</sup> Ibid.

<sup>25</sup> eBay (2012). Towards commerce 3.0: Roadmap for building sustainable growth in commerce.

<sup>26</sup> Ibid., 20.

<sup>27</sup> Ibid., 23.

<sup>28</sup> Molano Vega, D. (2013). Colombia's Digital Agenda: Successes and the Challenges Ahead. The Global Information Technology Report 2013: Growth and Jobs in a Hyperconnected World, World Economic Forum, 111.

<sup>29</sup> Otero, Y. et al. Mobile Internet User Experience in Latin America, available at: <<http://research.nokia.com/sites/default/files/Otero-LatinAmerica.pdf>>, retrieved November 10, 2014.

<sup>30</sup> See: Twitter plans to expand in Latin America, 1 October 2014, available at: <<http://www.telecompaper.com/news/twitter-plans-to-expand-in-latin-america--1040278>>, retrieved October 15, 2014.

and Zappedi, worth USD 10 million), three startups from Colombia (.Co, worth USD 109 million; BunnyInc, worth USD 50 million; and Pagos Online, worth USD 10 million) and three startups from Peru (Plaza Points, worth USD 4 million; Cine Papaya, worth USD 3 million and Idakoos, worth USD 1 million) were included in a list of startups with a value of more than 1 million US Dollars compiled by The Economist.<sup>31</sup>

#### **b) New possibilities for SMEs**

ICTs provide new possibilities for SMEs. According to the BCG, SMEs benefit from the adoption and use of internet and online tools, especially in terms of revenue growth. SMEs that are heavy web users grow faster than their counterparts. Moreover, the internet helps SMEs to both sell and buy goods and services more widely, furthering SMEs integration into their national and global economies. However, there is one issue to remark upon: the biggest single concern for SMEs is the protection of consumer data online.<sup>32</sup> This global concern has been recently addressed in electronic commerce chapters in many RTAs. Other issues for SMEs relate to secure online payments and regulations that affect online sales.<sup>33</sup>

#### **c) Barriers that could potentially harm trade and investment in ICT services**

The barriers that could potentially harm the development of the digital economy and the speed at which it advances were thoroughly analyzed by the United States International Trade Commission (USITC). The USITC has recently published a report on international trade in products and services which are delivered via the internet and has included deliveries over both fixed-line and mobile networks under the umbrella of digital trade.<sup>34</sup> However, this definition excludes commerce in physical goods, as for instance, goods ordered online. According to the USITC, trade barriers which could potentially disrupt international digital trade include:<sup>35</sup>

- *Localization requirements*: This includes government measures that favor domestic digital industries, products or services over those produced abroad (e.g. requirements that data servers or other infrastructure be located in-country, requirements that firms use a certain amount of local content in order to qualify for government procurement preferences and subsidies, and requirements to comply with country specific standards rather than internationally accepted standards);
- *Market access limitations*: This includes government measures that limit the access to local markets (e.g. restrictions on investment, trading rights, distribution rights, or other core business functions);
- *Data privacy and protection requirements*: This includes government measures that regulate the movement of personal data or other sensitive information across borders;

<sup>31</sup> See: <[http://www.economist.com/blogs/graphicdetail/2014/07/daily-chart-6?fsrc=scn%2Ftw\\_ec%2Fstart\\_me\\_up](http://www.economist.com/blogs/graphicdetail/2014/07/daily-chart-6?fsrc=scn%2Ftw_ec%2Fstart_me_up)>, retrieved October 15, 2014.

<sup>32</sup> Zwillenberg, P., see note 21, 19.

<sup>33</sup> Ibid., 20.

<sup>34</sup> USITC (2013). Digital Trade in the U.S. and Global Economies, Part 1. Washington DC, USA.

<sup>35</sup> USITC (2014). Digital Trade in the U.S. and Global Economies, Part 2. Washington DC, USA, 80.

- *IP rights infringement*: This includes the infringement of IP rights associated with digital products or services, including copyright, patent, trademark, or trade secret infringement;
- *Uncertain legal liabilities*: This includes unclear laws governing the legal obligations of firms involved in digital trade, including the responsibilities of internet services providers (ISPs) for the activities of others;
- *Censorship*: This included government measures or practices that suppress information which can be accessed or viewed on the internet;
- *Customs measures*: This includes unclear or overly complicated customs measures.

### III. Current state of ICT services regulation at the WTO

The rules governing ICT services in the context of the WTO are mainly limited to the General Agreement of Trade in Services (GATS), the GATS Annex on Telecommunications, the Reference Paper on Basic Telecommunications, and the Information Technology Agreement (ITA) of 1996. The latter two contain disciplines originally designed for liberalizing voice communication rather than data and to ‘lock in’ telecom deregulations during the 1990s.<sup>36</sup> Articles 5b and 5c of the GATS Annex on Telecommunications provide for Most Favoured Nation (MFN) treatment and non-discrimination for the use of public networks for interconnection and movement of information.<sup>37</sup> However, the new barriers and concerns that emerge today are not properly addressed by these documents, but to some degree have been addressed by the WTO dispute resolution system.

While the findings are only applicable to the Parties of the dispute, interpretative elements found in the WTO Appellate Body reports help to discern some issues related to ICT services. For instance, in US-Gambling<sup>38</sup>, the statements of the Parties as well as the rulings of the Panel and the Appellate Body indicate that the GATS mode 1 (cross border supply) commitments are applicable to the delivery of electronic services and that WTO rules are

<sup>36</sup> Lee-Makiyama, H. Cross-Border Data Flows in the Post Bali Agenda, in Evennet, S. a. Jara, A (2013). Building on Bali: A Work Programme for the WTO: Centre for Economic Policy Research, 164.

<sup>37</sup> GATS Annex on telecommunications:

“5. Access to and use of Public Telecommunications Transport Networks and Services:

(...)

(c) Each Member shall ensure that service suppliers of any other Member may use public telecommunications transport networks and services for the movement of information within and across borders, including for intra-corporate communications of such service suppliers, and for access to information contained in data bases or otherwise stored in machine-readable form in the territory of any Member. Any new or amended measures of a Member significantly affecting such use shall be notified and shall be subject to consultation, in accordance with relevant provisions of the Agreement.

(d) Notwithstanding the preceding paragraph, a Member may take such measures as are necessary to ensure the security and confidentiality of messages, subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade in services. (...)”

<sup>38</sup> WTO Panel report, United States-Measures Affecting the Cross Border Supply of Gambling and Betting Services (US-Gambling), WT/DS285/R, adopted 19 November 2004, para. 3.29 a. WTO Appellate Body Report, US-Gambling, WT/DS285/AB/R, adopted 7 April 2005, para. 215.



applicable to electronic commerce and electronically supplied services.<sup>39</sup> Likewise, in China–Audiovisuals<sup>40</sup> the Appellate Body confirmed the applicability of WTO rules to electronic commerce. However, other issues, such as determining whether online trade is a good or a service have not yet been resolved. Additionally, the GATS define services by the mode of supply.<sup>41</sup> Even so, one could easily argue that while the internet can be classified as a service sector, nowadays, it is a service mode of supply in itself since nearly every type of service under the GATS can eventually be offered over the TCP/IP protocol.<sup>42</sup>

#### **a) ICT services in the Services Sectoral Classification List**

Another difficult aspect of ICT services regulation at the WTO is related to their classification. In the WTO context, services liberalization is subject to the commitments which WTO members have made. These commitments are based on Services Sectoral Classification List (Document MTN.GNS/W/120), hereinafter “W/120 list”. The W/120 list contains, for almost all services sectors, correspondence with categories of the United Nations Provisional Central Product Classification<sup>43</sup> (CPC). However, a quick scan through the W/120 list shows that nowadays many services can be supplied by electronic means, for example, professional services, financial services, education and health services, among others.<sup>44</sup> Therefore, there exists a gap between the technological and trade reality of ICT services and the W/120 list. Furthermore, WTO members schedule their commitments with a positive approach where only the services explicitly committed are liberalized, subject to horizontal exceptions included in their schedules.

Regarding the services under analysis, following is the classification provided by the W/120 list:

#### **i) Computer and related services**

This subcategory within Business Services includes: consultancy services related to the installation of computer hardware (CPC 841), software implementation services (CPC 842), data processing services (CPC 843), data base services (CPC 844) and other services (CPCs 845 y 849). For more information, please see the Background Note by the Secretariat on Computer-Related Services.<sup>45</sup>

<sup>39</sup> Wunsch–Vincent, S. and Hold, A. Trade Rules for the Digital Age, in Burri, M. a. Cottier, T. (2012). Trade governance in the digital age: World Trade Forum. Cambridge, Cambridge University Press, 505.

<sup>40</sup> WTO Appellate Body Report, China–Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products (China–Publications and Audiovisual Products), WT/DS363/AB/R, adopted 21 December 2009, paras 363–365.

<sup>41</sup> Article I, Paragraph 2 of the GATS defines trade in services as the supply of a service through any of four modes of supply.

<sup>42</sup> Wu, T. (2006) The world trade law of censorship and internet filtering, Chicago Journal of International Law 7(1), 266–267.

<sup>43</sup> Statistical Office of the United Nations, Statistical Papers, Series M, N° 77, Central Products Classification CPC prov. 1991.

<sup>44</sup> This complex issue is not discussed in this paper.

<sup>45</sup> WTO, Council for Trade in Services, Computer and Related Services: Background Note by the Secretariat S/C/W/45, 14 July 1998.

A valuable classification issue worth noting consists of the activities covered by telecommunication services and their relationship to the creation and supply of computer software.<sup>46</sup>

## ii) Telecommunication services

In the W/120 List, telecommunication services are a sub category of communication services. They include: voice telephone services (CPC 7521), packet-switched data transmission services (CPC 7523), circuit-switched data transmission services (CPC 7523), telex services (CPC 7523), telegraph services (CPC 7522), facsimile services (CPC 7521 + CPC 7529), private leased circuit services (CPC 7522 + CPC 7523), electronic mail (CPC 7523), voice mail (CPC 7523), on-line information and data base retrieval (CPC 7523), electronic data interchange (CPC 7523), enhanced/value-added facsimile services, including store and forward, store and retrieve (CPC 7523), code and protocol conversion (n. a.), on-line information and/or data processing , including transaction processing (CPC 843), and other services.

Commitments regarding telecommunication services were first made during the Uruguay Round (1986-1994), mostly in value-added services. In the post-Uruguay Round negotiations (1994-1997), WTO members negotiated on basic telecommunication services, with positive side effects for domestic telecom markets. Since then, commitments have been made by new members, upon accession to the WTO, or unilaterally at any time. For example, in the case of fixed public voice telephony, most of the countries examined in this paper have made commitments at the WTO in all market segments (local services, domestic long distance, and international long distance), at least on a facilities-basis but sometimes also on a resale basis: China (with foreign equity limitations); EC (with foreign equity limitations in France and Portugal); Peru and the US (with foreign equity limitation for radio licenses). Others have left one or more market segments unbound or subject to a monopoly, such as Chile for local services and Colombia, for national and international long distance services.

One significant aspect is that some telecom services in the W/120 List are no longer relevant to the digital economy. This is the case of Value added facsimile services and Telex and telegraph services. On the contrary, other aspects are not properly classified or might overlap with other computer and related services. For example, on-line information and data base retrieval (CPC 7523) is closely related to data processing services (CPC 843).<sup>47</sup>

## iii) Audiovisual services

Audiovisual services are a subcategory of communication services. They include: motion picture and video tape production and distribution services (CPC 9611), motion picture projection service (CPC 9612), radio and television services (CPC 9613), radio and television transmission services (CPC 7524), and sound recording and other services. The convergence

<sup>46</sup> Tuthill, see note 17, 164.

<sup>47</sup> Peng, S. (2007). Trade in Telecommunications Services: Doha and Beyond. *Journal of World Trade*, 41(2): 293-317, 297.

technologies have enabled many “traditional” telecom service providers to offer digitized audiovisual services (e.g. on demand multimedia channels). Therefore, there could also be an overlap between the classification of audiovisual services and telecommunication services.

#### **b) WTO Work Programme on Electronic Commerce and the Post Bali Agenda**

The latest Draft Ministerial Decision on the Work Programme on Electronic Commerce<sup>48</sup> has not moved the discussion forward regarding relevant issues of the digital economy, such as the classification of ICT services. Moreover, no result has been achieved on a permanent and clear duty-free moratorium on electronic transmissions. The duty free moratorium was simply extended. Likewise, no result has been achieved on confirming the applicability of WTO commitments to electronically traded services (even when many RTAs regulate this issue).

Given this level of development, it is no surprise that no progress has been recorded on the fiscal implications of electronic commerce, relationship (and possible substitution effects) between electronic commerce and traditional forms of commerce, imposition of custom duties on electronic transmissions, free flow of information, competition, jurisdiction and applicable law and other legal issues.

Nevertheless, the Draft Ministerial Decision mandated to continue the Work Programme in order to examine its trade related aspects, for instance, enhancing internet connectivity and access to information and telecommunications technologies and public internet sites, the growth of mobile telephony, electronically delivered software, cloud computing, the protection of confidential data, privacy and consumer protection.

#### **IV. ICT services in RTAs**

RTAs tend to be innovative with regard to the incorporation of elements of the digital economy in the cross-border supply of services and IP chapters. Some RTAs go a step further and include a chapter on electronic commerce. Still, many of the provisions included in these RTAs do not contain adequate language to make them enforceable.<sup>49</sup> This is the reason why some authors consider that no further progress on the liberalization of ICT services has been achieved by negotiation of RTAs.<sup>50</sup> However, according to others, bilateral and regional RTAs have at least partly led to a market opening in services beyond the existing multilateral GATS components<sup>51</sup> and GATS+ commitments.<sup>52</sup> This paper supports this approach since the liberalization extends in several directions, as for example, to the broader scope of services

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<sup>48</sup> Work Programme on Electronic Commerce, Draft Ministerial Decision, WT/MIN(13)/W/3, adopted 28 November 2013.

<sup>49</sup> For a detailed study of the legal enforceability of the provisions contained in RTAs, see: Horn, H., et al. (2009). Beyond the WTO? An anatomy of the EU and US preferential trade agreements, Bruegel Blueprint Series, Bruegel.

<sup>50</sup> Wunsch-Vincent, S., see note 39, 501–505.

<sup>51</sup> Weber, R. H. and Burri, M. (2013). Classification of services in the digital economy. Heidelberg, Springer, 10.

<sup>52</sup> Roy, M. (2011). Services commitments in preferential trade agreements: An expanded dataset. World Trade Organization: Staff Working Paper ERSD–2011–18.

(extension of the classification list) or to the assumption of the negative list approach<sup>53</sup> instead of the positive list approach (as of the GATS).

Similar to the GATS, the chapters of cross-border supply of services of many RTAs usually adopt a vague definition of trade in services. However, there is a progressive recognition of the limitations of the W/120 List. As for computer and related services, telecommunication services and audiovisual services, all are subject to different liberalization approaches depending on the trading partner.

Similarly, different approaches to internet regulation in a set of RTAs derive from different domestic policies such as those taken by the EU and the US, whose position towards different aspects of internet regulation, such as IP rights and data privacy (see next section) directly influence the way their respective RTAs are drafted. Furthermore, such approaches directly influence other countries, and might as well influence the way Chile, Colombia and Peru regulate similar issues at a national level. As Burri<sup>54</sup> points out, since 2004 the US has established a template with its different trading partners and at the same time, this template has been replicated in other non-US agreements, such as Australia-Singapore, Chile-Australia and Korea-Singapore. Accordingly, since RTAs are a product of asymmetrical negotiations, developing countries might be at a disadvantage when adopting commitments which forward US interests instead of favoring regulatory space in key areas.<sup>55</sup>

US RTAs tend to have an organized structure and rarely deviate one from another. In most cases, they contain rules on: (1) introduction of the concept of digital products and electronic delivery and transmission; (2) recognition of the applicability of WTO trade rules to electronic supply services; (3) recognition of the applicability of WTO trade rules to electronic demand of services; and (4) non-discriminatory treatment obligation for digital products. Additionally, the following substantive aspects are noteworthy: (1) the use of a negative list approach; (2) the dropping of local presence requirements, (3) the non-exclusion of audiovisual services from the scope and coverage of the cross border supply of services chapter, and (4) the dropping of MFN exemptions.<sup>56</sup>

The structure of EU RTAs tends to be less strict. However, most are rapidly incorporating an electronic commerce chapter (see EU-Colombia and Peru RTA) and an understanding on computer services. Substantive aspects to note are: (1) the use of a positive list approach, (2) the incorporation of general cooperation pledges, especially in data protection, (3)

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<sup>53</sup> Agreements using a negative list approach typically include a ratchet mechanism whereby any future liberalization is automatically locked in unless otherwise indicated through lists of reservations. Reservations are typically for existing non-conforming measures (Annex 1) and for future measures (Annex 2). These agreements provide a high degree of transparency because the actual level of openness is spelled out, along with an indication of the legal/regulatory framework in place.

<sup>54</sup> Burri, M. (2013). Should There Be New Multilateral Rules for Digital Trade? Think piece for the E15 Expert Group on Trade and Innovation, 6.

<sup>55</sup> Ibid.

<sup>56</sup> Weber, R. H., see note 51, 10.

increased specificity in some areas such as electronic signatures and IP rights, and (4) low stringent provisions on the liability of IPSs (contrary to the US RTAs).<sup>57</sup>

PRC's RTAs do not contain an electronic commerce chapter. However, important aspects to remark upon include, (1) the regulation of the cross border supply of services and the inclusion of liberalization commitments in computer related services, telecommunication services and audiovisual services, (2) the use of a positive list approach, and (3) limited provisions regarding the protection of IP rights.

## **V. Aspects beyond the GATS welcomed in RTAs: IP and data protection aspects of ICT services<sup>58</sup>**

As mentioned earlier, two aspects increasingly regulated in RTAs include stronger IP commitments relating to copyright infringement and in-depth provisions on data protection. Both aspects are of high importance for Chile, Colombia and Peru and were incorporated in the RTAs with the EU and the US.

### **a) IP aspects of ICT services**

The provisions regarding IP rights, negotiated in the context of the WTO, are contained in the TRIPS agreement.<sup>59</sup> The TRIPS agreement was introduced as part of the Marrakesh agreement establishing the WTO in 1994, as a way to put more “order and predictability” into trade rules for IP and as a means for more systematic dispute resolution. The TRIPS establishes the minimum level of protection governments need to provide in order to ensure IP rights protection. For instance, the TRIPS agreement does not cover obligations commonly found in US and EU RTAs such as codified program-carrying satellite signals, provisions on internet domain names or measures against technological circumvention. These provisions were included by various WTO members in their respective RTAs to raise the level of protection afforded by the TRIPS agreement.

However, the core agreements related to IP rights in the digital economy were developed in the context of the World Intellectual Property Organization (WIPO) in 1996. These agreements (often called “the Internet Treaties”), are the WIPO Copyright Treaty (WCT)<sup>60</sup> and the WIPO Performances and Phonograms Treaty (WPPT)<sup>61</sup>. They grant a number of new rights beyond existing international instruments such as the Berne Convention for

<sup>57</sup> Wunsch-Vincent, S., see note 39, 202–204.

<sup>58</sup> Horn, Mavroidis and Sapir classified as WTO-X areas new issues such as personal data protection and IP aspects that go beyond the TRIPS agreement. See: Horn, H., et al. (2009). Beyond the WTO? An anatomy of the EU and US preferential trade agreements, Bruegel Blueprint Series, Bruegel.

<sup>59</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, 15 April 1994, 33 ILM 1197 (1994), Available at: <[http://www.wto.org/english/tratop\\_e/trips\\_e/t\\_agm0\\_e.html](http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.html)>, retrieved November 20, 2014.

<sup>60</sup> WIPO Copyright Treaty, 20 December 1996, 36 ILM 65 (1997), Available at: <[http://www.wipo.int/treaties/en/ip/wct/trtdocs\\_wo033.html](http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html)>, retrieved November 20, 2014.

<sup>61</sup> WIPO Performers and Phonograms Treaty, 20 December 1996, 36 ILM 76 (1997), available at: <[http://www.wipo.int/treaties/en/ip/wppt/trtdocs\\_wo034.html](http://www.wipo.int/treaties/en/ip/wppt/trtdocs_wo034.html)>, retrieved November 20, 2014.

Protection of Literary and Artistic Works and the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting organizations.<sup>62</sup>

Both the WCT and the WPPT contain provisions on Digital Rights Management (DRMs), or often referred to as Technological Protection Measures (TPMs). TPMs or DRMs are technologies (such as licenses agreements and encryption methods) used by rights holders to control the use of their works in the digital market. Provisions on TPMs on the WCT (article 11) and WPPT (article 18) require contracting Parties to provide an adequate level of protection and effective legal remedies against the circumvention of effective technological measures. Since these provisions lack a definition of key terms, the level of protection and remedies are defined at a national level and can include civil remedies as well as criminal penalties. The US and the EU were among the first to implement these treaties when, for instance, the US enacted the Digital Millennium Copyright Act (DMCA) in 1998. Likewise, in 2001, the EU issued a Directive on the Harmonization of certain aspects of copyright and related rights.<sup>63</sup>

The WCT and the WPPT include controversial provisions limiting access to information by consumers. The concerns reflect the tension between access to knowledge and the protection of IP rights, which is of special relevance for developing countries. In fact, during 2004 and 2005, Chile submitted two proposals to WIPO on the Analysis of Exceptions and Limitations for purposes of public interest.<sup>64</sup> Chile has stated that in certain cases, it seemed clear that the application of technological measures of protection represented a threat regarding the legitimate exercise of limitations and exceptions in favor of users and consumers.<sup>65</sup> Moreover, there are some concerns that the DRMs will be used for anti-competitive purposes. For instance, DRMs can be used to create platforms, content and products that are incompatible with others.<sup>66</sup>

The EU and US RTAs contain provisions that recommend or even mandate the adherence and ratification of the WCT and WPPT. Nevertheless, US RTAs also include the use of exceptions for the circumvention of technological measures.

#### **b) Data protection aspects of ICT services**

Consumers will provide personal data online, such as when making credit card purchases, when there is a guarantee that personal information is secure and will not be used by third parties without their approval. However, the digital economy poses challenges to the protection of personal data. For instance, a company from country A might collect data in country B and store it in country C. Today, it is common that servers are located in low cost or low

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<sup>62</sup> Latif, A. From consensus to controversy: The WIPO Internet Treaties and lessons for Intellectual property norm setting in the digital age, in Burri, M. a. Cottier, T. (2012). Trade governance in the digital age: World Trade Forum. Cambridge, Cambridge University Press, 368.

<sup>63</sup> Elkin-Koren, N. a. Salzberger, E. (2012). The Law and Economics of Intellectual Property in the Digital Age: Routledge Research in Intellectual Property, Routledge, 193.

<sup>64</sup> WIPO (2004). Proposal by Chile on the Subject of Exceptions and Limitations to Copyright and Related Rights, SCCR/12/3 and WIPO (2005). Proposal by Chile on the Analysis of Exceptions and Limitations, SCCR/13/5.

<sup>65</sup> Latif, A., see note 62, 376.

<sup>66</sup> Ibid., 205.

regulation jurisdictions. For this reason, data privacy is increasingly being incorporated into RTAs, and especially in EU RTAs.

Indeed, with the aim of limiting cross-border transfer of personal information to jurisdictions without similar personal data protection laws, EU Directive (EC) 95/46/EC<sup>67</sup> prevents the export of data to countries with less stringent data privacy laws. This directive was introduced to address the different levels of data protection within the EU but also applies to the transfer of personal data to third countries. In 2012, the EU decided to further modify Directive/95/46/EC with regard to the processing of personal data and on the free movement of such data. The purpose of the reform is to boost consumer confidence in online services and to adapt to new technological challenges. The proposal also includes the regulation for the “right to be forgotten”.<sup>68</sup>

Moreover, with the rise of cloud computing business opportunities and the possible enabler impact on SMEs, the protection of personal data is crucial. For this reason, the EU and the Economic Commission for Latin America (ECLAC) have incorporated this aspect in the EU-ECLAC working group on Cloud Computing.<sup>69</sup> Without a doubt, cloud computing will challenge data protection laws, which are based on the premise that it is always clear where personal data is located, by whom it is processed and who is responsible for data processing. However, in a cloud computing dominated world it will be difficult to determine who is processing the data and which authorities are responsible for ensuring compliance with data protection laws. This issue is particularly relevant for the growing ICT services market in Latin America and should be carefully regulated in RTAs. According to a market report by Nokia, major drawbacks for expanded mobile internet transactions in Latin America are widespread consumer distrust of network performance and reliability.<sup>70</sup>

Contrary to the EU, the US lacks a comprehensive law regulating the use of personal data and only has fragmented and sectorial legislation on this issue. In this context, one of the most important pieces of legislation is the Federal Trade Commission Act, which prohibits unfair or deceptive acts or practices that influence consumer personal information.<sup>71</sup> Other US laws, such as the DCMA, provide limited protection of the privacy of consumer data. Under the DMCA, consumers are permitted to circumvent a technological measure that collects or disseminates personally identifying information (article 120 (i)). However, in the absence of

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<sup>67</sup> Directive (EC) 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the Protection of individuals with regard to the processing of personal data and on the free movement of such data.

<sup>68</sup> See: Press Release: “Commission proposes a comprehensive reform of data protection rules to increase users’ control of their data and to cut costs for businesses”. Available at: <[http://europa.eu/rapid/press-release\\_IP-12-46\\_en.htm?locale=en](http://europa.eu/rapid/press-release_IP-12-46_en.htm?locale=en)>, retrieved October 29, 2014.

<sup>69</sup> See: Proposal UE-ECLAC “Facing challenges together: Collaboration between Europe and Latin America on Cloud Computing”, available at: <<http://ec.europa.eu/digital-agenda/en/news/facing-challenges-together-collaboration-between-europe-and-latin-america-cloud-computing>>, retrieved October 29, 2014.

<sup>70</sup> See: Ericsson Consumerlab: M-Commerce in Latin America 2013, 9. Available at: <<http://www.ericsson.com/res/docs/2013/consumerlab/m-commerce-in-latam.pdf>>, retrieved October 29, 2014.

<sup>71</sup> For a detailed overview of US data protection framework, see: Jolly, I. (2014). Data protection in the United States: overview. Association of corporate counsel. Available at: <<http://uk.practicallaw.com/6-502-0467#>>, retrieved October 29, 2014.

available devices and without a similar exception which applies to the manufacture of such circumventing devices, this exemption only benefits consumers who are technologically savvy.<sup>72</sup>

Given the divergent EU and US regulatory approaches, the US Department of Commerce in consultation with the EU has developed the US-EU Safe Harbor Framework<sup>73</sup>, which includes principles that US companies must follow in order to comply with the EU directive 95/46/EC.<sup>74</sup> Chile, Colombia and Peru must be careful when regulating this issue, especially considering the nascent state of their markets.

When taking the above into account, the following question may be posed: what is the current regulatory approach for ICT services in the RTAs signed by Chile, Colombia and Peru with their main trading partners? This paper aims to answer this question and to clarify the level of commitments that these countries have already undertaken. The importance of this clarification will assist to analyze the level of attractiveness of the region for trade and FDI in ICT services.

## VI. Approaches to trade rules for ICT services in Chile, Colombia and Peru's RTAs

### a) Agreements with the US

Firstly, it is important to note that the US economy is a service economy where more than two-thirds of the GDP is composed of services output and three-quarters of its employment base is provided by the service industries.<sup>75</sup> Electronic commerce is not only a key component of the US economy, but is increasingly becoming an area where US firms have a competitive advantage, given an open and non-discriminatory access to other markets, in part as a first mover advantage.

For the US, three industries within the ICT sector are of particular interest: (i) software publishing; (ii) motion picture and sound recording; and (iii) internet, data processing and other information services.<sup>76</sup> It was forecast that during 2010–2013, Greenfield FDI would increase in sectors such as cloud computing and social media. As the USITC reports remark, “Greenfield FDI projects in cloud computing are expected to triple in 2015, compared with

<sup>72</sup> Elkin-Koren, N., see note 63, 202–203.

<sup>73</sup> Available at: <[http://www.export.gov/safeharbor/eu/eg\\_main\\_018476.asp](http://www.export.gov/safeharbor/eu/eg_main_018476.asp)>, retrieved November 10, 2014.

<sup>74</sup> The principles are:

- Notice: Individuals must be informed that their data is being collected and about how it will be used.
- Choice: Individuals must have the option to opt out of the collection and forward transfer of the data to third parties.
- Onward Transfer: Transfers of data to third parties may only occur to other organizations that follow adequate data protection principles.
- Security: Reasonable efforts must be made to prevent loss of collected information.
- Data Integrity: Data must be relevant and reliable for the purpose it was collected for.
- Access: Individuals must be able to access information held about them, and correct or delete it if it is inaccurate.
- Enforcement: There must be effective means of enforcing these rules.

<sup>75</sup> See: <<http://www.ustr.gov/trade-topics/services-investment/services>>, retrieved October 25, 2014.

<sup>76</sup> USITC, see note 34, 4:14.



2010, and social media projects are expected to nearly double in that same period. Cloud computing is expected to account for 12 per cent of all Greenfield FDI projects in the broader software and IT industry in 2015.”<sup>77</sup> Indeed, cloud computing is a vibrant sector where US companies such as Amazon, Savvis, Salesforce.com and Rackspace currently comprise the majority of revenue on the world market.<sup>78</sup> Furthermore, it is predicted that the greatest growth for cloud demand will come from emerging markets<sup>79</sup> which is why companies such as Amazon, Autodesk, Google, IBM, Microsoft, Oracle and Yahoo are among the most active investors abroad.

The US has concluded RTAs with Chile<sup>80</sup>, Colombia<sup>81</sup> and Peru<sup>82</sup>. The three RTAs include a chapter on electronic commerce and have followed the same model where possible. All selected US RTAs follow a negative list approach style of liberalization, have chapters on investment, cross-border trade in services, telecommunications, financial services, and on the temporary entry for business persons. There are few variations among the examined RTAs. However, these derive from the different dates of the negotiations.

#### **i) US-Chile RTA**

The US-Chile RTA was signed in 2003 and is the first comprehensive agreement between the US and a Latin American country. It is important since it eliminates custom duties for US digital products and tariffs on physical media carriers that carry content. For the US, this is of special relevance since Chile is still not part of the ITA agreement. The US, Chile, Colombia and Peru have made commitments in computer and related services, telecommunication services and audiovisual services, both in Market Access and NT.

In the RTA, Chile applies a larger number of non-conforming measures to the cross-border supply of services than does the US, but tends to do this on a sectorial basis. For instance, Chile has reserved the right to adopt or maintain measures related to cross border trade in one-way satellite broadcasting, cultural industries and the provision of local basic telecommunication services and networks and national or international long distance telecommunication services. Conversely, the US applies relatively few but uniform non-conforming measures at the sectorial level.

At a horizontal level, Chile and the US have reserved the right to adopt or maintain any existing measure that accords differential treatment to countries under any bilateral or multilateral international agreement.

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<sup>77</sup> Ibid., 4:17.

<sup>78</sup> Comments of Computer & Communications Industry Association, Document N. USTR-2013-0019, Available at: <<http://www.cciainet.org/wp-content/uploads/2013/09/CCIA-TTIP-Comments-2013.pdf>>, retrieved October 25, 2014.

<sup>79</sup> IDC Press Release, “IDC Forecasts Public IT Cloud Services Spending Will Approach \$100 Billion in 2016, Generating 41% of Growth in Five Key IT Categories.” 11 September 2012, Available at: <<http://www.idc.com/getdoc.jsp?containerId=prUS23684912#.USzjZ-s5x8M>>, retrieved October 25, 2014.

<sup>80</sup> US-Chile RTA, see note 4.

<sup>81</sup> US-Colombia RTA, see note 6.

<sup>82</sup> US-Peru RTA, see note 5.

**ii) US-Peru RTA**

The US-Peru RTA entered into force in 2009. It provides for expanded market access for computer and related services, telecommunication services and audiovisual services. Additionally, Peru has agreed to eliminate measures that require US firms to hire nationals rather than US professionals (in contrast with the earlier provisions of the US-Chile RTA) and measures requiring the purchase of local goods.

As for the non-conforming measures, Peru can request the granting of concession and licenses prior to the provision of some telecommunication services, according to its national legislation. Regarding audiovisual services, Peru reserves the right to adopt reciprocity measures in the audiovisual, publishing and music sectors.

The US-Peru RTA, similar to the US-Chile RTA, incorporates standards that are consistent with US standards of protection and enforcement of IP rights. Those provisions include protection for software, music, text, and video; stronger protection for patents, trademarks and test data, including an electronic system for the registration and maintenance of trademarks; and additional deterrence of piracy and counterfeiting. This strong protection of IP rights is the natural result of the interest of US firms in protecting the film, music and software industry. The RTA also requires a system to resolve disputes about trademarks used in internet domain names, and applies the principle of “first-in-time, first-in-right”, so that the first person who acquires a right to a trademark is the person who has the right to use it. Furthermore, copyright owners maintain rights over temporary copies of their works on computers, establishing that only authors, composers and other copyright owners have the right to make their work available on-line. Finally, the RTA includes a provision stating that internet service providers are liable for unauthorized storage and transmission of copyright materials. An aspect to highlight is that the US-Peru RTA goes a step further than the US-Chile RTA by requesting the ratification of the WIPO internet treaties.

**iii) US-Colombia RTA**

The US-Colombia RTA was negotiated at the same time as the US-Peru RTA but entered into force in 2012. Its structure is identical to the US-Peru RTA. The cross border supply of services, electronic commerce and IP chapters are identical to the corresponding chapters in the US-Peru RTA. However, one important feature is that by means of this RTA, Colombia joined the ITA, removing trade barriers to ICT products.

As for the non-conforming measures, Colombia has set additional limitations to free to air television and broadcasting transmission requiring a percentage of local content. As for measures affecting investment in all sectors, Colombia has reserved the right to adopt measures that protect public order in accordance with the Colombian Constitution. No similar measure was established in the US-Peru RTA.

Aspects to highlight regarding the selected US RTAs are: (1) all include exceptions to copyright infringement as contained in the US Digital Millennium Copyright Act (DMCA).<sup>83</sup> These exceptions apply to non-profit libraries, archive, educational intuitions or public noncommercial broadcasting entities, non-infringing reverse engineering, non-infringing good faith activities carried out by qualified researchers, technology used to avoid access to minors, measures used to protect identifiable information and security testing and lawfully authorized investigative, protective information security or intelligence activity carried out by government employees agents and contractors; (2) unlike Chile; Colombia and Peru have not established relevant limitations for the temporary movement of business persons and professionals. However, the US has only opened its market to professionals of the engineering sector; (3) all US RTAs contain a definition of digital products that excludes digitized representations of financial instruments, including money. Additionally, the US-Chile RTA remarks that the definition of digital products is without prejudice to the on-going WTO discussions on whether trade in digital products transmitted electronically is a good or a service. Yet, this aspect was dropped in the cases of the US-Peru and US-Colombia RTAs.<sup>84</sup>

The following charts summarize the relevant provisions adopted in the RTAs under analysis.

**Table 1**

ICT relevant provisions on Cross - Border Trade in Services Chapters in selected US RTAs (Part 1)			
	US-Chile	US-Peru	US-Colombia
Date of notification to the WTO	16/12/2003	03/02/2009	08/05/2012
Date of entry into force	01/01/2004	01/02/2009	15/05/2012
Liberalization approach	Negative List	Negative List	Negative List
ICT related services sectors excluded from the scope of application	Financial Services and Air Services (Computer reservation system services).	Financial Services and Air Services (Computer reservation system services).	Financial Services and Air Services (Computer reservation system services).
ICT related services sectors with separate chapters or sections	<ul style="list-style-type: none"> <li>• Telecommunications (Chapter)</li> <li>• Electronic commerce (Chapter)</li> </ul>	<ul style="list-style-type: none"> <li>• Telecommunications (Chapter)</li> <li>• Electronic commerce (Chapter)</li> </ul>	<ul style="list-style-type: none"> <li>• Telecommunications (Chapter)</li> <li>• Electronic commerce (Chapter)</li> </ul>
Prohibition of local presence requirement	Yes	Yes	Yes
NT	Yes	Yes	Yes
MFN	Yes	Yes	Yes

<sup>83</sup> Article 1201 of the United States of America Digital Millennium Copyright Act, Public Law 105-304, 28 October 1998. Available at: <<http://www.gpo.gov/fdsys/pkg/PLAW-105publ304/pdf/PLAW-105publ304.pdf>>, retrieved November 10, 2014.

<sup>84</sup> The Peru-Singapore and the Colombia-Honduras, El Salvador, Guatemala RTAs take the same approach and does not mention the on-going WTO discussions on whether trade in digital products transmitted electronically is a good or a service. See: Article 13.3 (i) of the Peru-Singapore RTA and Article 14.1 of the Colombia-Honduras, El Salvador, and Guatemala RTA.

ICT relevant provisions on Cross - Border Trade in Services Chapters in selected US RTAs ( Part 2 )			
	US-Chile	US-Peru	US-Colombia
Relevant US horizontal non-conforming measures ( See: Annex I of this paper )	<p>Limitations on Market access, in accordance with US commitments under Article XVI of the GATS.</p> <p>Limitations on NT, MFN and Local Presence for all existing non-conforming measures of the US.</p> <p>The US reserves the right to adopt or maintain any measures that accord differential treatment to countries under any bilateral or multilateral international Agreement in force or signed prior to the date of entry into force of the RTA.</p>	Same as US-Chile.	Same as US-Chile.
Relevant US sector specific non-conforming measures ( See: Annex I of this paper )	The US reserves the right to adopt or maintain any measure that accords differential treatment to persons of other countries due to application of reciprocity measures or through international agreements involving sharing of the radio spectrum, guaranteeing market access, or national treatment with respect to the one-way satellite transmission of direct-to-home (DTH) and direct broadcasting satellite (DBS) television services and digital audio services.	Same as US-Chile.	Same as US-Chile.

ICT relevant provisions on Cross - Border Trade in Services Chapters in selected US RTAs ( Part 3 )			
	US-Chile	US-Peru	US-Colombia
Relevant partner country horizontal non-conforming measures ( See: Annex I of this paper )	<p>Chile reserves the right to adopt or maintain any measures that accord differential treatment to countries under any bilateral or multilateral international Agreement in force or signed prior to the date of entry into force of the RTA.</p> <p>Chile requires that a minimum of 85 percent of employees who work for the same Chilean employer ( in a firm of more than 25 employees ) must be Chilean natural persons.</p>	<p>Peru reserves the right to adopt or maintain any measure that accords differential treatment to countries under any bilateral or multilateral international agreement in force or signed prior to the date of entry into the RTA.</p>	<p>A juridical person organized under the laws of another country, and with its principal domicile in another country, must establish as a branch or other juridical form in Colombia in order to develop a concession obtained from the Colombian State.</p> <p>Colombia may impose restrictions on NT for investment in all sectors for reasons of public order pursuant to Article 100 Colombian Constitution.</p>
Relevant partner country Sector Specific non-conforming measures ( See: Annex I of this paper )	<p>Chile reserves the right to adopt or maintain any measure that accords differential treatment to countries under any existing or future bilateral or multilateral international agreement with respect to cultural industries, such as audiovisual cooperation agreements. Chile reserves the right to adopt or maintain any measure affecting Market Access with respect to various sub-sectors and four modes of service supply. There are no scheduled measures regarding computer and related services, except for mode 4. Concessions apply for national or international long-distance telecommunications services; local basic telecommunication services and networks. Chile reserves the right to adopt any measure related to cross border trade in one way satellite broadcasting.</p>	<p>Same as Chile regarding audiovisual cooperation agreements.</p> <p>Additionally, Peru may adopt or maintain any measure that affords a person of another Party the treatment that is afforded by that other Party to Peruvian persons in the audiovisual, publishing, and music sectors.</p>	<p>Restrictions on Market Access, Local Presence and Performance requirements regarding Subscription Television and Audio-visual Production Services.</p> <p>Restrictions on NT and setting of Performance Requirements for interactive audio and video services</p>

Table 2

Provisions on Electronic Commerce in selected US RTAs (Part 1)			
	US-Chile	US-Peru	US-Colombia
Chapter on electronic commerce	Yes	Yes	Yes
Applicability of WTO rules to electronic commerce	Not mentioned	Yes	Yes
Definition of digital products	Yes	Yes	Yes
NT for digital products	Yes	Yes	Yes
MFN for digital products	Yes	Yes	Yes
Definition of electronic transmissions	Yes	Yes	Yes
Definition of carrier medium	Not mentioned	Yes	Yes
Likeness determination for application of MFN and/or NT	Yes	Yes	Yes
Classification and scheduling of new services arising in the context of electronic commerce	Not mentioned	Not mentioned	Not mentioned
Classification of digital trade as a good or as a service	Not mentioned (Footnote on current state of WTO discussion on whether digital products are good or services).	Not mentioned	Not mentioned
Regulation of the treatment of downloadable products	Not mentioned	Not mentioned	Not mentioned
Duty-free moratorium on electronic transmissions and their content	Yes	Yes	Yes
Application of GATS Article XIV (general exceptions)	Yes	Yes	Yes
Cyber security commitments or exceptions	Only cooperation	Not mentioned	Not mentioned
Free cross border information flows commitments	Only cooperation	Not mentioned	Not mentioned
Data protection commitments	Only cooperation	Not mentioned	Not mentioned
Consumer protection commitments	Only cooperation	Only recognition of importance.	Only recognition of importance.
Paperless trade administration commitments	Only cooperation	Yes	Yes
Transparency commitments	Not mentioned	Yes	Yes

Provisions on Electronic Commerce in selected US RTAs (Part 2)			
	US-Chile	US-Peru	US-Colombia
Electronic Authentication commitments	Only cooperation	Yes	Yes
Software secure code commitments	Not mentioned	Not mentioned	Not mentioned
Relationship with chapter of cross border trade in services	Yes (services supplied using electronic means fall within the scope of the relevant provisions of the other chapter and its non-conforming measures).	Yes (services delivered or performed electronically fall within the scope of the relevant provisions of the other chapter and its non-conforming measures).	Yes (services delivered or performed electronically fall within the scope of the relevant provisions of the other chapter and its non-conforming measures).
Relationship with chapter of trade in goods	Not mentioned	Not mentioned	Not mentioned
Relationship with investment chapter	Yes (services supplied using electronic means fall within the scope of the relevant provisions of the other chapter and its non-conforming measures).	Yes (services delivered or performed electronically fall within the scope of the relevant provisions of the other chapter and its non-conforming measures).	Yes (services delivered or performed electronically fall within the scope of the relevant provisions of the other chapter and its non-conforming measures).
Relationship with financial services chapter	Yes (services supplied using electronic means fall within the scope of the relevant provisions of the other chapter and its non-conforming measures).	Yes (services delivered or performed electronically fall within the scope of the relevant provisions of the other chapter and its non-conforming measures).	Yes (services delivered or performed electronically fall within the scope of the relevant provisions of the other chapter and its non-conforming measures).
Exclusion of electronic money of the scope of the chapter	Yes	Yes	Yes

Table 3

ICT relevant provisions on Intellectual Property Chapters in selected US RTAs (Part 1)			
	US-Chile	US-Peru	US-Colombia
Obligation to ratify the WIPO Copyright Treaty	Not mentioned	Yes	Yes
Obligation to ratify the WIPO Performances and Phonograms Treaty	Not mentioned	Yes	Yes
Inclusion of TRIPS commitments	Yes	Yes	Yes
Recognition or Pledge to maintain balance between the rights of IP holders and the interest of the public, and information and technology transfer.	Not mentioned	Not mentioned	Not mentioned

ICT relevant provisions on Intellectual Property Chapters in selected US RTAs ( Part 2 )			
	US-Chile	US-Peru	US-Colombia
Regulation of TPMs and/or DRMs	Yes	Yes	Yes
Exceptions to violations regarding circumvention of technological measures	Yes	Yes	Yes
Liability of ISPs	Yes	Yes	Yes
Internet domain names	Yes	Yes	Yes
Protection of encrypted satellite signals	Yes	Yes	Yes
Enforcement	Yes	Yes	Yes

## b) Agreements with the EU

The EU has been gradually adapting and modifying the content of its RTAs. The EU-Chile RTA<sup>85</sup> and the later EU-Colombia and Peru RTA<sup>86</sup> reflect this tendency to incorporate new elements addressing issues of the digital reality.

### i) EU-Chile RTA

The chapter on cross border supply of services of the EU-Chile RTA entered into force in 2005 and follows the EU approach of services negotiations at the WTO. It is extremely limited with regard to its electronic commerce provisions, which are almost non-existent. It only recognizes the importance of electronic commerce in the trade agenda of both the EU and Chile, but it does not include a binding provision on this topic.

Both the EU and Chile have made commitments in computer and related services as well as telecommunication services. The EU has left unbound mode 3 and mode 4 for computer and related services. As for telecommunications services, the schedule of commitments of both the EU and Chile include a clarification stating that telecommunications services are the transport of electro-magnetic signals –sound, data image and any combinations thereof– excluding broadcasting. Therefore, the scheduled commitments do not cover the economic activity consisting of content provision which require telecommunications services for its transport. The provision of that content, transported via a telecommunications service, is subject to the specific commitments undertaken in other relevant sectors.

### ii) EU-Colombia and Peru RTA

The EU-Colombia and Peru RTA entered into force in 2013 and includes a chapter on electronic commerce. Furthermore, the RTA includes an understanding on computer services.<sup>87</sup> Although the understanding is not mandatory, it reflects the current debate on many issues

<sup>85</sup> EU-Chile RTA, see note 7.

<sup>86</sup> EU-Colombia and Peru RTA, see note 8.

<sup>87</sup> EU-Colombia and Peru RTA, see note 8, Article 132.



regarding the digital economy. For instance, Article 122 (a) of the RTA recognizes that the W/20 list does not fully reflect all the services that can be provided by electronic means. Indeed, the CPC 84 code for describing computer and related services covers the basic functions used to provide all computer and related services; but technological developments have led to the increasing offering of these services as a bundle or package of related services that can include some or all of the basic functions covered by the CPC 84 code. The RTA also clarifies the distinction between computer related services and the services enabled by computer related services (e.g. banking), providing that for these services the CPC 84 code is not applicable. The EU-Colombia and Peru RTA relies on the use of the UN Central Products Classification provisional of 1991<sup>88</sup> and the UN Central Products Classification version 1.0 of 1998 for scheduling their commitments.<sup>89</sup>

Furthermore, with the aim to further clarify the overlap between telecommunication and computer services, the EU, Colombia and Peru schedules establishes the understanding that telecommunication services do not include on-line information and/or data processing (including transaction processing) (part of CPC 843) which is to be found under 1.B. Computer services.<sup>90</sup> This explanation is important since, as was mentioned in section III of this paper, there is an overlap between telecommunication and computer and related services.

Regarding the IP chapters of the EU-Chile and EU-Colombia and Peru RTAs, there is a clear tendency of the EU to include provisions that strengthen the protection of IP rights. However, in contrast with the US RTAs, all the examined EU RTAs establish a narrow liability of internet services providers (ISPs). Therefore, ISPs are not responsible in cases of mere conduit or when they do not have knowledge of the illegal activity. The EU-Colombia and Peru RTA also includes an interesting non-mandatory provision that recognizes the necessity of maintaining the balance between the rights of IP holders and the interest of the public, and information and technology transfer. This provision, however, was not included in the EU-Chile RTA.

The EU-Colombia and Peru RTA also includes provisions on data protection but they are not mandatory. However, Article 167(e) (ii) of the RTA establishes a list of general exceptions to the trade in services, establishment and electronic commerce. One of these exceptions is the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection and confidentiality of individual records and amounts. This provision mirrors the EU policy towards data protection and contrasts the position taken by the US which only incorporates Article XIV of the GATS to the article of general exceptions applicable to cross-border supply of services, telecommunications and electronic commerce.

Common features regarding cross-border supply of services and electronic commerce in the examined EU RTAs are: (1) liberalization through a positive list approach, (2) exclusion of

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<sup>88</sup> Statistical Office of the United Nations, Statistical Papers, Series M, N° 77, Central Products Classification CPC prov., 1991.

<sup>89</sup> Statistical Office of the United Nations, Statistical Papers, Series M, N° 77, Central Products Classification CPC ver. 1.0, 1998.

<sup>90</sup> EU-Colombia and Peru RTA, see note 8, Annex VIII, 90.

the audiovisual sector from the scope and coverage of the chapter of cross-border supply in services, and (3) lack of MFN commitments.

The following charts summarize the relevant provisions adopted in the RTAs under analysis.

**Table 4**

<b>ICT relevant issues on Cross - Border Trade in Services chapters in selected EU RTAs (Part 1)</b>		
	<b>EU-Chile</b>	<b>EU-Colombia and Peru</b>
Date of notification to the WTO	03/02/2004 (Goods) 28/10/2005 (Services)	26/02/2013
Date of entry into force	01/02/2003 (Goods) 01/03/2005 (Services)	01/03/2013 (Provisionally applied for Peru) 01/08/2013 (Provisionally applied for Colombia)
Liberalization approach	Positive list	Positive list
ICT related services sectors excluded from the scope of application	Financial, audiovisual and computer reservation system services.	Audiovisual and computer reservation system services.
ICT related services sectors with separate chapters or section	<ul style="list-style-type: none"> <li>• Telecommunications (chapter)</li> <li>• Financial services (chapter)</li> </ul>	<ul style="list-style-type: none"> <li>• Electronic commerce (chapter).</li> <li>• Telecommunication services (section).</li> <li>• Computer services (section). Recognizes the content of CPC 84 code (computer and related services) but goes beyond to recognize the content of ICT enabled services (i.e. in banking) and states that the content or core of those services is not covered by CPC 84 code.</li> <li>• Financial services (section).</li> </ul>
Prohibition of local presence requirements	Not mentioned	Not mentioned
NT	Yes	Yes
MFN	Not mentioned	Not mentioned
Relevant EU horizontal limitations to Market Access and NT (See: Annex II of this paper)	Public utilities may be subject to monopolies. Restrictions to extend privileges to subsidiaries of companies' branches. Unbound in Market Access and NT concerning movement of natural persons, except for specific categories.	Restrictions for mode 1 for certain sectors and subsectors that might be subject to the existence of public monopolies and exclusive rights. Commitments do not include measures concerning subsidies granted by the Parties.
Relevant EU sector specific limitations (See: Annex II of this paper)	The EU is unbound in mode 4 for computer and related services and telecommunication services.	Same as EU-Chile.

ICT relevant issues on Cross - Border Trade in Services chapters in selected EU RTAs (Part 2)		
	EU-Chile	EU-Colombia and Peru
Relevant partner country horizontal limitations to Market Access and NT (See: Annex II of this paper)	Unbound for the movement of natural persons, except limited cases.	<i>For Colombia:</i> The same as the EU in addition to measures relating to the granting of concession from Colombian State prior the offer of some services. <i>For Peru:</i> The same as the EU, in addition to the possibility of adopting and maintaining any pre-existing measure at a local level of government that limits the Market Access.
Relevant partner Country Sector Specific Limitations (See: Annex II of this paper)	For telecommunication services, licenses requirements may apply.	<i>For Colombia:</i> Unbound for mode 3 and 4 for computer and related services and telecommunication services. <i>For Peru:</i> Unbound for mode 3 and 4 for computer and related services.

Table 5

Provisions on Electronic Commerce in selected EU RTAs (Part 1)		
	EU-Chile	EU-Colombia and Peru
Chapter on electronic commerce	No (However, in the Services Chapter, Art. 104 recognizes the importance of E-commerce. Footnote 7 remarks that the inclusion of this provision in this Chapter is made without prejudice of the Chilean position on the question of whether or not electronic commerce should be considered as a supply of a service).	Yes
Applicability of WTO rules to e-commerce	Not mentioned	Not mentioned
Definition of digital products	Not mentioned	Not mentioned
NT for digital products	Not mentioned	Yes
MFN for digital products	Not mentioned	Not mentioned
Definition of electronic transmissions	Not mentioned	Not mentioned
Definition of carrier medium	Not mentioned	Not mentioned
Likeness determination for application of MFN and/or NT	Not mentioned	Yes
Classification and scheduling of new services arising in the context of electronic commerce	Not mentioned	Not mentioned

Provisions on Electronic Commerce in selected EU RTAs (Part 2)		
	EU-Chile	EU-Colombia and Peru
Classification of digital trade as a good or a service	Not mentioned. (Footnote 7 to Art. 104 remarks that the inclusion of this provision in this Chapter is made without prejudice of the Chilean position on the question of whether or not electronic commerce should be considered as a supply of services).	Yes. It is stated that the delivery by electronic means shall be considered as a provision of a service, within the meaning of chapter 3 (cross border supply of services).
Regulation of the treatment of downloadable products	Not mentioned	Not mentioned
Duty-free moratorium on electronic transmissions and their content	Not mentioned	Yes
Application of GATS Article XIV (general exceptions)	Not mentioned	Yes, for the protection of personal data.
Cyber security commitments or exceptions	Not mentioned However, the protection of personal data is included within the general exceptions to trade in services and establishment.	Not mentioned
Free cross border information flows commitments	Not mentioned	Only in financial services
Data protection commitments regarding electronic commerce	Only cooperation.	Pledge to develop or maintain regulations. (In the telecommunications section, article 149 provides for the confidentiality of telecommunications and related traffic data. In the Financial services section, Article 157 regulates data processing for financial service suppliers and for safeguard to address the right to privacy with regard to the transfer of personal data).
Consumer protection commitments	Only cooperation.	Recognition of importance and pledge to maintain dialogue.
Paperless trade administration commitments	Only in Public Procurement.	Pledge to maintain dialogue.
Transparency commitments	Not mentioned	Partial. As part of paperless trade.
Electronic authentication commitments	Not mentioned	Pledge to maintain dialogue.
Software secure code commitments	Not mentioned	Not mentioned
Liability of ISPs (with respect to transmission or storage of information).	Not mentioned	Pledge to maintain dialogue.

Provisions on Electronic Commerce in selected EU RTAs ( Part 3 )		
	EU-Chile	EU-Colombia and Peru
Relationship with the chapter of cross border trade in services	Article 104 is included within this chapter.	Yes
Relationship with the chapter of trade in goods	Not mentioned	Not mentioned
Relationship with the investment chapter	Not mentioned	Footnote 22 to Article 111 ( Scope of application to trade in services, establishment and electronic commerce chapter ) states that the obligations set out in this chapter do not cover provisions on investment protection, such as Fair and Equitable Treatment, nor does it cover Investor State Dispute Settlement procedures.
Relationship with the financial services chapter	Not mentioned	Not mentioned
Exclusion of electronic money of the scope of the chapter	Not mentioned	Not mentioned

Table 6

ICT relevant provisions on Intellectual Property Chapters in selected EU RTAs ( Part 1 )		
	EU-Chile	EU-Colombia and Peru
Obligation to ratify the WIPO Copyright Treaty	Yes	Yes
Obligation to ratify the WIPO Performances and Phonograms Treaty	Yes	Yes
Inclusion of TRIPS commitments	Yes	Yes
Recognition or pledge to maintain balance between the rights of IP holders and the interest of the public, and information and technology transfer.	Not mentioned	Yes
Regulation of TPMs and/or DRMs	Not mentioned	As for TPM: Yes (As provided by Art. 11 of WCT and Art. 18 of WPPT). As for DRM: Yes (As provided by Art. 12 of WCT and Art. 19 of WPPT).
Exceptions to violations regarding circumvention of technological measures	Not mentioned	Not mentioned
Liability of ISPs	Not mentioned	Yes (Very detailed. Liability for (i) use of services of intermediaries, (ii) mere conduit, (iii) caching and (iv) hosting. Additionally, establishment of article about no general obligation to monitor).

ICT relevant provisions on Intellectual Property Chapters in selected EU RTAs (Part 2)		
	EU-Chile	EU-Colombia and Peru
Internet domain names	Not mentioned	Not mentioned
Protection of encrypted satellite signals	Not mentioned	Not mentioned
Enforcement	Not mentioned	Not mentioned

### c) Agreements with the PRC

Both Chile and Peru have concluded RTAs with the PRC. The supplementary agreement on services trade between the PRC and Chile entered into force in August, 2010.<sup>91</sup> The PRC-Peru RTA<sup>92</sup> entered into force in March of the same year. Neither of these agreements have chapters on electronic commerce. The liberalization approach to services sectors follows a positive list approach based on the numerical references of the United Nations Provisional Central Products Classification (CPC).

#### i) PRC-Chile RTA

The PRC-Chile RTA does not contain a chapter on electronic commerce, telecommunications nor IP rights<sup>93</sup>. However, the supplementary agreement on services provides for Market Access and NT for the services inscribed in the RTA Parties' schedule. These include computer and related services and telecommunication services. It is interesting to notice that while the supplementary agreement on services does not exclude audiovisual services from its scope of coverage, neither Party have made commitments in this area. Additionally, in contrast with the US and EU agreements, the PRC-Chile RTA does not include a provision on the prohibition of local requirements.

As for the horizontal limitations contained in the Parties' schedule, the most relevant are the ones regarding commercial presence (mode 3) and the presence of natural persons (mode 4). From a sectorial perspective, the PRC has set few restrictions regarding market access and NT for computer and related services. Furthermore, while the PRC has always had general restrictions towards FDI (or commercial presence), it has set no restrictions for wholly foreign-owned enterprises regarding market access in software implementation services (CPC 842), data processing services (CPC 843), input preparation services (CPC 8431) and maintenance and repair services of office machinery and equipment including computers (CPC 845). The PRC has not scheduled commitments in telecommunication services. Unlike the PRC, Chile has opened its market for basic telecommunication and value added telecommunication services, with certain exceptions. For instance, for the case of value added telecommunication services, it has left unbound mode 2, both in market access and NT. In the case of basic telecommunication services and value added telecommunication services, the

<sup>91</sup> PRC-Chile RTA, see note 9.

<sup>92</sup> PRC-Peru RTA, see note 10.

<sup>93</sup> Article 111 of the PRC-Chile RTA contains a provision regarding cooperation on IP issues without specific mention of Copyright, TRM or DRMs, or liability of ISPs.

PRC's companies with commercial presence in Chile can offer their services subject to concessions, licenses or permits. Chile has also established full commitments for computer and related services both in Market access and NT. For both, computer and related services and telecommunication services, Chile has left unbound mode 4.

## ii) **PRC-Peru RTA**

The PRC-Peru RTA contains chapters in Trade in Services and IP. The Trade in Services chapter also incorporates the provisions of the GATS Annex on Telecommunications and the GATS Reference Paper on Basic Telecommunications, but does not include provisions on electronic commerce. However, both Peru and the PRC have made commitments in Computer and Related services. Peru has totally opened its market for computer and related services without any limitation except for mode 4. The PRC has done the same, even allowing wholly foreign enterprises to invest in the PRC and provide software implementation services and data processing services.

For the case of telecommunication services, Peru has also established full commitments except for the general measure of not allowing call back practices, prohibiting interconnection among private services and reaffirming the obligation of Chinese investors to obtain concessions in order to provide telecommunication services.

The PRC has made commitments in the telecommunication sector and in the audiovisual sector, establishing the usual caveats of entering in joint ventures with Chinese companies in order to benefit from commercial presence. Additionally, in the case of audiovisual services (including entertainment software and sound recording distribution services), the PRC has established the right to examine the content of audio and video products. However, mode 4 is unbound for those services except as indicated in the horizontal commitments.

There are no provisions for the protection of IP rights regarding the digital economy. The IP chapter simply reaffirms the obligations of the Parties under the TRIPS agreement but does not include the obligation to ratify or implement the WIPO internet treaties.

The following tables summarize the relevant provisions adopted in the RTAs under analysis.

Table 7

ICT relevant issues on Cross - Border Trade in Services chapters in selected PRC RTAs		
	PRC-Chile (Supplementary Agreement on Services Trade)	PRC-Peru
Date of notification to the WTO	18/11/2010	03/03/2010
Date of entry into force	01/08/2010	01/03/2010
Liberalization approach	Positive List	Positive List
ICT Sectors excluded from coverage	Financial services and Air services (computer reservation systems).	Financial services and Air services (computer reservation systems).
ICT related Sectors with separate chapters or sections	Not mentioned	Not mentioned
Prohibition of local presence requirements	Not mentioned	Not mentioned
NT	Yes	Yes
MFN	Not mentioned	Not mentioned
Relevant PRC horizontal limitations to Market Access and NT (See: Annex III of this paper)	Limitations mainly in mode 3 and mode 4.	No
Relevant PRC sector specific limitations (See: Annex III of this paper)	Unbound in mode 4 for computer and related services, telecommunication services, and audiovisual services.	Limitations in the audiovisual sector. For instance, the PRC has the right to examine the content.
Relevant partner country horizontal limitations to Market Access and NT (See: Annex III of this paper)	No	Unbound in mode 4.
Relevant partner Country sector specific limitations (See: Annex III of this paper)	Unbound in mode 4 for value added telecommunication services. For basic telecommunication services, licenses and concessions apply.	Limited restrictions in the telecommunication services.

Table 8

ICT relevant provisions on Intellectual Property Chapters in selected PRC RTAs (Part 1)		
	PRC-Chile	PRC-Peru
Obligation to ratify the WIPO Copyright Treaty	Not mentioned	Not mentioned
Obligation to ratify the WIPO Performances and Phonograms Treaty	Not mentioned	Not mentioned
Inclusion of TRIPS commitments	Yes	Yes
Recognition or Pledge to maintain balance between the rights of IP holders and the interest of the public, and information and technology transfer.	Yes	Yes
Regulation of TPMs and/or DRMs	Not mentioned	Not mentioned



ICT relevant provisions on Intellectual Property Chapters in selected PRC RTAs (Part 2)		
	PRC-Chile	PRC-Peru
Exceptions to violations regarding circumvention of technological measures	Not mentioned	Not mentioned
Liability of ISPs	Not mentioned	Not mentioned
Internet domain names	Not mentioned	Not mentioned
New elements of penal system	Not mentioned	Not mentioned
Protection of encrypted satellite signals	Not mentioned	Not mentioned
Enforcement	Not mentioned	Not mentioned

## VII. Comparative Analysis of the provisions contained in the RTAs

This section will analyze the common aspects found in the set of RTAs reviewed in this paper. Overall, with regard to electronic commerce many aspects included in US and EU RTAs' show increasing convergence.<sup>94</sup> However, there is less similarity in IP and Data Protection provisions. US RTAs tend to incorporate mandatory provisions, while EU RTAs mainly contain cooperation initiatives. For instance, the protection of personal data constitutes a general exception to the commitments undertaken in the trade in services and electronic commerce chapter in EU RTAs, while the US RTAs only adopt the exceptions contained in GATS Article XIV. With regard to the PRC RTAs, the situation is quite different. Generally, they do not regulate electronic commerce, nor include innovative provisions on the protection of IP rights. Yet, both computer and related services and telecommunication services are part of the schedule of commitments. The following summarizes the common aspects on ICT services regulation in the selected RTAs:

### *Common aspects of the selected US RTAs with Chile, Colombia and Peru:*

- Generally, the examined US RTAs have the same chapters, the same overall structure and the same liberalization mechanism (negative list approach). The chapter on cross-border trade in services relates to modes 1, 2 and 4, with mode 3 being treated in a separate chapter (investment chapter for goods and services);
- Audiovisual services are covered by the cross-border trade in services chapter;
- There is a detailed regulation of IP rights relating to the digital economy. This regulation resembles the provisions of the DCMA;
- All the selected US RTAs include the exceptions included in the DMCA;
- Data protection provisions are minimal.

<sup>94</sup> This level of convergence resembles the proposal on Trade Principles for Information and Communication Technology services submitted by the EU and US. See: WTO (2013), Communication from the European Union and the United States: Contribution to the Work Programme on Electronic Commerce, S/C/W/338.

*Common aspects of the EU agreements with Chile, Colombia and Peru:*

- The examined RTAs show an evolving approach towards the regulation of aspects of the digital economy. While the EU–Chile RTA only contains a provision that recognizes the importance of electronic commerce; the EU–Colombia and Peru include non-mandatory but detailed provisions on electronic commerce and computer services;
- The Parties to the RTAs have undertaken commitments in computer and related services as well as telecommunication services. In the case of the EU–Colombia and Peru RTA, the Parties have left unbound mode 3 and mode 4;
- Generally, audiovisual services are excluded from the scope of coverage of trade in services chapters;
- The IP provisions are less stringent than the ones contained in US RTAs. However, they address the same issues. The examined EU RTAs do not include exceptions for the circumvention of technological measures;
- The EU RTAs include broader –albeit non mandatory– data protection provisions.

*Common aspects of the PRC's RTAs with Chile and Peru include the following:*

- The PRC's RTAs do not include rules on electronic commerce or specific provisions on telecommunication services.
- The IP chapters of the PRC's RTAs are also limited with respect to IP rights in the digital economy. They do not contain provisions on internet domain names, liability of ISPs or circumvention of technological measures.
- The PRC's RTAs do not contain provisions regarding data protection.

Additionally, it is important to highlight the following aspects with regard to trade in services, electronic commerce, and IP protection corresponding to the complete set of studied RTAs:

*On services:*

- *In many RTAs, the different modes of supply are dealt with in different chapters.* This means, disciplines for modes 1, 2 and 4 are included in a chapter on cross-border supply of services and disciplines relating to mode 3 are part of a chapter on investment. Further provisions on temporary movement of natural persons are also typically found in an additional chapter.
- *Financial services are excluded from the coverage of the cross-border supply of services chapter.* While there are innovative provisions towards classification issues and data protection in the financial services chapter of the EU, this paper has not covered them since financial services are generally regulated separately. In this regard, further research on the interaction of financial and ICT services is needed.
- The liberalization approach diverges among US RTAs and EU RTAs.
- *The general dropping of local presence requirements facilitates FDI and can provide a boost for cloud computing services.* This is not the case with the PRC, where joint ventures are often the rule.
- General application of NT.

*On electronic commerce:*

- *The applicability of WTO rules is not general for the examined RTAs.* Only in the case of US style RTAs is the applicability of the WTO Agreement to measures affecting electronic commerce clearly stated.
- *General lack of provisions ensuring the free flow of information.* None of the selected US RTAs contain a provision on free flow of information, which differs from the approach taken in the US-Korea RTA<sup>95</sup>. In the case of the selected EU RTAs, a provision on the free flow of information is also absent. Nevertheless, EU style RTAs include provisions on the free flow of information in financial services where usual caveats regarding protection of personal information apply;
- The definition of digital products is only seen in US RTAs;
- Generally, dispute Settlement provisions apply to cross border trade in services and electronic commerce.

*On IP rights:*

- *IP rights are generally well covered by the US and EU RTAs.* Some differences were found in the degree of liability of ISP. The PRC RTAs do not offer the same level of specificity and rarely go beyond the multilateral commitments (e.g. TRIPS);
- The EU-Chile, Peru FTA as well as the Chinese FTAs include an interesting understanding on the need to maintain a balance between the rights of IP holders and the interest of the public, and information and technology transfer. *All US RTAs include the exceptions to copyright infringement included in the DMCA.*

*Other issues:*

- All the examined RTAs contain very little progress on the liberalization of mode 4, except for some specific categories.

**VIII. Conclusions**

The main observations concerning the set of RTAs under analysis are found in section VII of this paper. They reveal that both the EU and the US have a significant number of common obligations with undertakings in areas covered by the current WTO mandate (e.g. trade in services and TRIPS). Beyond the WTO mandate, as Horn et al observe,<sup>96</sup> US RTAs have considerably more provisions and are more legally enforceable than EU RTAs. The latter seems to be advanced and innovative in many aspects; however, once the provisions are closely examined, they are found to be neither legally enforceable nor recognizable as soft law, as they mainly consist of pledges for cooperation. As for the PRC's RTAs, the situation is outstandingly different. PRC's RTAs do not contain a chapter on electronic commerce, do not incorporate these issues on the trade in services chapter and do not have substantive provisions on IP protection in the digital age.

<sup>95</sup> Article 15.8, United States-Korea Free Trade Agreement, signed June 30, 2007 (not in force) (Korea-US RTA).

<sup>96</sup> Horn, H., see note 56, 6.

For example, the US and EU RTAs address similar issues regarding electronic commerce. However, the main differences are found in substantive topics, such as the liberalization approach, the adoption of MNF obligations, the applicability of WTO trade rules to electronic commerce and the prohibition of local presence requirements. By the comprehensive regulation of these issues, the US objective is to leave the least possible restrictions to trade and investment in electronic commerce. On the contrary, the EU approach is less stringent.

Likewise, concerning IP protection, the latest EU and US RTAs contain obligations providing for the ratification of the WIPO internet treaties. However, the US RTAs are far reaching. They include additional provisions regarding internet domain names, the protection of encrypted satellite signals and enforcement mechanisms. In the PRC's RTAs none of the mentioned obligations is addressed.

Hence, to answer to the central question of this paper concerning the barriers which could appear and potentially disrupt trade and investment for ICT services in Chile, Colombia and Peru, the following aspects should be considered:

- Localization requirements were only ruled out in the case of US RTAs, not in EU or PRC's RTAs;
- While excessive regulation of data privacy or other sensitive information may discourage investment in ICT services, the contrary was found in the examined RTAs. Data privacy regulation is not properly regulated; except for the EU approach as reflect of its domestic regulation. Market research studies have found that this is a sensitive topic for Latin American consumers; thus, data privacy protection should be better addressed in Chile, Colombia and Peru's RTAs;
- The liability of IPSS and IP issues are well covered in benefit of business involved in ICT services; however, it is advisable to include exceptions, as seen in US RTAs, regarding the circumvention of technological measures and provisions favoring a balance between the rights of IP holders and the interest of the public (which are the moment are only cooperation pledges). IP provisions limit access to information and could unnecessarily restrict access to knowledge and dissemination of information;
- With regard to the services sectors examined in this paper, there is some uniformity on the liberalization of computer and related services and telecommunication services in the cases of Chile, Colombia and Peru's schedules of commitments. In the case of telecommunications, there are some improvements that go beyond multilateral commitments. For example, Chile has allowed US suppliers access to its market for local basic services. On the other hand, audiovisual services were liberalized in all the examined US RTAs but not in EU or PRC RTAs. In this regard, Chile, Colombia and Peru have established limitations requiring a small percentage of local content;
- The three countries under analysis have undertaken Market Access and NT commitments (at least in mode 1 and 2) for trade in value added telecommunications services, data processing and data base services, the latter two being the services subsectors in which cloud computing services can be classified. This is a positive sign for the development of cloud computing business in Chile, Colombia and Peru.

In conclusion, disconcerting divergences in the content of the provisions regulating ICT services in the examined RTAs were not found. That said, US RTAs contain more comprehensive and enforceable regulations than EU RTAs, with the latter classified as innovative rather than enforceable. Striking is the lack of regulations addressing electronic commerce, IP and data protection in PRC PTAs. Yet, the mapping suggests that most RTAs go well beyond GATS offers in terms of sector coverage and levels of commitments in comparison with the GATS schedules, therefore, offering a better prospect for trade and investment in ICT services in Chile, Colombia and Peru.

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### **Regional Trade Agreements**

Chile–European Community Association Agreement, signed 18 November, 2002 (entered into force on 1 February, 2003) (EU–Chile RTA).

Free Trade Agreement between the Government of the Peoples Republic of China and The Government of the Republic of Chile, signed 18 November, 2005 (entered into force on 1 October, 2006) (PRC–Chile RTA); and Supplementary Agreement on Trade in Services Chile–China, signed on 20 March, 2008 (entered into force on 01 August, 2010).

Free Trade Agreement between the Government of the Republic of Peru and The Government of the Peoples Republic of China, signed 28 April, 2009 (entered into force on 01 March, 2010) (PRC–Peru RTA).



Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part, signed 26 June, 2012 (entered into force for Colombia on 1 August, 2013; and for Peru on 01 March, 2013) (EU-Colombia and Peru RTA).

United States-Chile Free Trade Agreement, signed 6 June, 2003 (entered into force on 1 January, 2004) (US-Chile RTA).

United States-Colombia Trade Promotion Agreement, signed 22 November, 2006 (entered into force on 15 May, 2012) (US-Colombia RTA).

United States-Korea Free Trade Agreement, signed June 30, 2007 (not in force) (Korea-US RTA).

United States-Peru Trade Promotion Agreement, signed April 12, 2006 (entered into force on February 1, 2009) (US-Peru RTA).

## Annexes

## Annex I

Non-Conforming Measures in US RTAs		
Horizontal Non-Conforming Measures		
US-Chile RTA	US-Peru RTA	US-Colombia RTA
For the US:		
<p>Sector: All  Obligation concerned: Market Access  Description: Investment and Cross-Border Services  <i>“The United States reserves the right to adopt or maintain any measure that is not inconsistent with the United States’ obligations under Article XVI of the GATS”.</i>  (See: US Annex II. Services/Investment Non-conforming measures, p.7)</p> <p>Sector: All  Obligations Concerned: MFN  Description: Investment and Cross-Border Services  <i>“The United States reserves the right to adopt or maintain any measure that accords differential treatment to countries under any bilateral or multilateral international agreement in force or signed prior to the date of entry into force of this Agreement (...)”.</i>  (See: US Annex II. Services/Investment Non-conforming measures, p.8)</p>		
For Chile:	For Peru:	For Colombia:
<p>Sector: All  Obligations Concerned: MFN  Description: Investment and Cross-Border Services  <i>“Chile reserves the right to adopt or maintain any measure that accords differential treatment to countries under any bilateral or multilateral international agreement in force or signed prior to the date of entry into force of this Agreement”.</i>  (See: Chile Annex II. Services/Investment Non-conforming measures, p.3)</p>	<p>Sector: All  Obligations Concerned MFN  Description Investment and Cross-Border Services  <i>“Peru reserves the right to adopt or maintain any measure that accords differential treatment to countries under any bilateral or multilateral international agreement in force or signed prior to the date of entry into force of this Agreement (...)”.</i>  (See: Peru Annex II. Services/Investment Non-conforming measures, p.1)</p>	<p>Sector: All  Obligations Concerned: NT  Description: Investment  <i>“Colombia reserves the right to adopt any measure for reasons of public order pursuant to Article 100 of the Constitución Política de Colombia (1991), provided that Colombia promptly provides written notice to each other Party that it has adopted the measure and that the measure:  (a) is applied in accordance with the procedural requirements set out in the Constitución Política de Colombia (1991) and its implementing legislation, such as the</i></p>

<p>Sector: All</p> <p>Obligations Concerned: NT; Local Presence</p> <p>Description: Cross-Border Services</p> <p><i>“A minimum of 85 percent of employees who work for the same Chilean employer shall be Chilean natural persons. This rule applies to employers with more than 25 employees under a contract of employment. Specialized technical personnel who cannot be replaced by national personnel shall not be subject to this provision (...). Article 20 of the Código del Trabajo shall be understood to mean that the personnel that an investor of the United States that has made an investment under Chapter Ten (Investments) requires for starting up in Chile will be treated, for a period of 18 months from the date of start up, as specialized technical personnel that cannot be replaced by national personnel. For greater certainty, a contrato de trabajo is not mandatory for the supply of cross-border trade in services”.</i></p> <p>(See: Chile Annex I. Services/Investment Non-conforming measures, p.2)</p>		<p><i>requirements set out in Articles 213, 214, and 215 of the Constitución Política de Colombia (1991) and in Ley 137 de 1994;</i></p> <p><i>(b) is adopted or maintained only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society;</i></p> <p><i>(c) is not applied in an arbitrary or unjustifiable manner;</i></p> <p><i>(d) does not constitute a disguised restriction on investment; and</i></p> <p><i>(e) is necessary and proportional to the objective it seeks to achieve.”</i></p> <p>(See: Colombia Annex II. Services/Investment Non-conforming measures, p.1)</p> <p>Sector: All</p> <p>Obligations Concerned: Local Presence</p> <p>Description: Investment and Cross-Border Services</p> <p><i>“A juridical person organized under the laws of another country, and with its principal domicile in another country, must establish as a branch or other juridical form in Colombia in order to develop a concession obtained from the Colombian State.”</i></p> <p>(See: Colombia Annex I. Services/Investment Non-conforming measures, p.1)</p> <p>Sector: All</p> <p>Obligations Concerned: MFN (Articles 10.4 and 11.3)</p> <p>Description: Investment and Cross-Border Services</p> <p><i>“Colombia reserves the right to adopt or maintain any measure that accords differential treatment to countries under any bilateral or multilateral international agreement in force or signed prior to the date of entry into force of this Agreement”.</i></p> <p>(See: Colombia Annex II. Services/Investment Non-conforming measures, p.4)</p>
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Sector Specific Non-Conforming Measures		
Business Services		
US-Chile RTA	US-Peru RTA	US-Colombia RTA
For the US:		
<p>Sector: All  Obligations Concerned: NT , Local Presence  Description: Cross-Border Services</p> <p><i>“With some limited exceptions, exports and reexports of commodities, software, and technology subject to the Export Administration Regulations require a license from the Bureau of Industry and Security, U.S. Department of Commerce (BIS).</i></p> <p><i>Certain activities of U.S. persons, wherever located, also require a license from BIS. An application for a license must be made by a person in the United States.</i></p> <p><i>In addition, release of controlled technology to a foreign national in the United States is deemed to be an export to the home country of the foreign national and requires the same written authorization from BIS as an export from the territory of the United States”.</i></p> <p>( See: US Annex I. Services/Investment Non-conforming measures, p.3 )</p>		
US-Chile RTA	US-Peru RTA	US-Colombia RTA
For Chile:	For Peru:	For Colombia:
<p>Sector: <b>Computer Related Services</b>  Obligations Concerned: Market Access  Description: Investment and Cross-Border Services  Chile reserves the right to adopt or maintain any measure relating to article 11.4, except for the following sectors and sub-sectors subject to the limitations and conditions listed below:</p> <p><i>Computer and Related Services:</i> For (a), (b), and (c): None. For (d): No commitments, except as indicated in Labor Code restriction.</p> <p>( See: Chile’s Annex II. Services/Investment Non-conforming measures, p.4 )</p>	None	None

Communication Services:		
US-Chile RTA	US-Peru RTA	US-Colombia RTA
For the US:		
<p>Sector: All Obligations concerned: MFN</p> <p><i>“The United States reserves the right to adopt or maintain any measure that accords differential treatment to persons of other countries due to application of reciprocity measures or through international agreements involving sharing of the radio spectrum, guaranteeing market access, or national treatment with respect to the one-way satellite transmission of direct-to-home (DTH) and direct broadcasting satellite (DBS) television services and digital audio services.”</i></p> <p>(See: US Annex II. Services/Investment Non-conforming measures, p.1)</p> <p>Sector: Communications, Radiocommunications Obligations Concerned: National Treatment (Article 10.2) Description: Investment</p> <p><i>“The United States reserves the right to restrict ownership of radio licenses in accordance with the above statutory and regulatory provisions. Radiocommunications consists of all communications by radio, including broadcasting.”</i></p> <p>(See: US Annex I. Services/Investment Non-conforming measures, p.11; p. 12)</p>		
For Chile:	For Peru:	For Colombia:
<p>Sector: <b>Communications</b> Obligations Concerned: NT, MFN and Local Presence Description: Cross-Border Services</p> <p><i>“Chile reserves the right to adopt or maintain any measure related to cross-border trade in one-way satellite broadcasting of digital telecommunication services, whether these involve direct home television broadcasting, direct broadcasting of television services, or direct audio broadcasting, and supplementary telecommunication services.”</i></p> <p>(See: Chile’s Annex II. Services/Investment Non-conforming measures, p.4)</p> <p>Sector: <b>Communications</b> Obligations Concerned: NT, MFN and Performance Requirements and Senior Management and Board of Directors.</p>	<p>Sector: <b>Audio-visual industry</b> Obligations Concerned: NT, MFN Description: Investment and Cross-Border Services</p> <p><i>“Peru may adopt or maintain any measure that affords a person of another Party the treatment that is afforded by that other Party to Peruvian persons in the audiovisual, publishing, and music sectors”.</i></p> <p>(See: Peru’s Annex II. Services/Investment Non-conforming measures, p.9)</p> <p>Sector: <b>Cultural Industries</b> Obligations Concerned: MFN (Articles 10.4 and 11.3) Description: Investment and Cross-Border Services</p> <p><i>“For purposes of this entry, the term “cultural industries” means:</i></p> <p><i>(a) Publication, distribution, or sale of books, magazines,</i></p>	<p>Sector: <b>Telecommunication Services</b> Obligations Concerned: NT, Local Presence Description: Cross-Border Trade in Services</p> <p><i>“Only enterprises organized under Colombian law may receive concessions for the supply of telecommunications services within Colombia.</i></p> <p><i>Until July 31, 2007, concessions for the routing of long distance international traffic shall be granted only to facilities-based suppliers.</i></p> <p><i>Colombia may grant licenses to enterprises to provide long distance basic switched telecommunications services on less favorable terms, with respect only to payment and duration, than those provided to Colombia Telecomunicaciones S.A. E.S.P. under article 2 of Decreto 2542 de 1997, articles 13 and 16 of Decreto 1616 de 2003 and Decreto 2926 de 2005”.</i></p>

<p>Description: Investment</p> <p><i>Chile reserves the right to adopt or maintain any measure related to the investors or to the investments of investors of the United States in one-way satellite broadcasting of digital telecommunication services, whether these involve direct home television broadcasting, direct broadcasting of television services, or direct audio broadcasting, and supplementary telecommunication services</i></p> <p>(See: Chile's Annex II. Services/Investment Non-conforming measures, p.5)</p> <p><b>Sector: Cultural Industries</b></p> <p>Obligations Concerned: MFN</p> <p>Description: Investment and Cross-Border Services</p> <p><i>"Chile reserves the right to adopt or maintain any measure that accords differential treatment to countries under any existing or future bilateral or multilateral international agreement with respect to cultural industries, such as audiovisual cooperation agreements.</i></p> <p><i>For greater certainty, government supported subsidy programs for the promotion of cultural activities are not subject to the limitations or obligations of this Agreement.</i></p> <p><i>Cultural industries means persons engaged in any of the following activities:</i></p> <p><i>(a) Publication, distribution, or sale of books, magazines, periodical publications, or printed or electronic newspapers, excluding the printing and typesetting of any of the foregoing;</i></p> <p><i>(b) Production, distribution, sale, or display of recordings of movies or videos;</i></p> <p><i>(c) Production, distribution, sale, or display of music recordings in audio or video format;</i></p> <p><i>(d) Production, distribution, or sale of printed music scores or scores readable by machines; or</i></p> <p><i>(e) Radiobroadcasts aimed at the public in general, as well as all radio, television and cable television-related activities, satellite programming services, and broadcasting networks".</i></p> <p>(See: Chile's Annex II. Services/Investment Non-conforming</p>	<p><i>periodical publications, or printed or electronic newspapers, excluding the printing and typesetting of any of the foregoing; (...)</i></p> <p><i>(c) Production, distribution, sale, or display of music recordings in audio or video format; (...)</i></p> <p><i>(h) Radiobroadcasts aimed at the public in general, as well as all radio, television, and cable television-related activities, satellite programming services, and broadcasting networks.</i></p> <p><i>Peru reserves the right to adopt or maintain any measure giving preferential treatment to persons of other countries pursuant to any existing or future bilateral or multilateral international agreement between Peru and any such country containing specific commitments regarding cultural cooperation or co-production by cultural industries, including audio-visual cooperation agreements.</i></p> <p><i>For greater certainty, Articles 10.3 and 10.4 and Chapter Eleven do not apply to government support for the promotion of cultural industries".</i></p> <p>(See: Peru Annex II. Services/Investment Non-conforming measures, p.4-5 )</p>	<p>(See: Colombian Annex I. Services/Investment Non-conforming measures, p.18 )</p> <p><b>Sector: Subscription Television, Audio-visual Production Services</b></p> <p>Obligations Concerned: Market Access, Local Presence and Performance requirements.</p> <p>Description: Investment and Cross-Border Trade in Services</p> <p><i>Only juridical persons organized under Colombian law may supply subscription television services. Such juridical persons must make available to subscribers, at no additional cost, those free-to-air Colombian national, regional, and municipal television channels available in the authorized area of coverage. The transmission of regional and municipal channels will be subject to the technical capacity of the subscription television operator.</i></p> <p><i>Suppliers of satellite subscription television only have the obligation of including in their basic programming the transmission of the public interest channels of the Colombian State. When rebroadcasting free-to-air programming subject to a domestic content quota, a subscription television provider may not modify the content of the original signal.</i></p> <p>(See: Colombian Annex I. Services/Investment Non-conforming measures, p.23 )</p> <p><b>Sector: Cultural Industries and Activities</b></p> <p>Obligations Concerned: NT and MFN</p> <p>Description: Investment and Cross-Border Services</p> <p><i>"For purposes of this entry, the term "cultural industries and activities" means:</i></p> <p><i>(a) publication, distribution, or sale of books, magazines, periodical publications, or printed or electronic newspapers, excluding the printing and typesetting of any of the foregoing;</i></p> <p><i>(...)</i></p> <p><i>(c) production, distribution, sale, or display of music recordings in audio or video format; (...)</i></p> <p><i>(g) design, production, distribution, and sale of handicrafts; or</i></p>
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<p>measures, p.11)</p> <p><b>Sector: Telecommunications</b></p> <p>Obligations Concerned: Market Access</p> <p>Description: Investment and Cross-Border Services</p> <p>Chile reserves the right to adopt or maintain any measure relating to article 11.4, except for the following sectors and sub-sectors subject to the limitations and conditions listed below:</p> <p><i>National or international long-distance telecommunications services:</i> For (a), (b), (c), and (d): Chile reserves the right to adopt or maintain any measure that is not inconsistent with Chile's obligations under Article XVI of GATS.</p> <p><i>Local basic telecommunication services and networks, intermediate telecommunications services, supplementary telecommunications services, and limited telecommunications services:</i> For (a), (b), and (c): a concession granted by means of a Decreto Supremo issued by the Ministerio de Transportes y Telecomunicaciones shall be required for the installation, operation, and exploitation of public and intermediary telecommunications services in Chilean territory. Only juridical persons organized under the Chilean law shall be eligible for such concessions.</p> <p>(See: Chile's Annex II. Services/Investment Non-conforming measures, p.17)</p>		<p>(h) radiobroadcasts aimed at the public in general, as well as all radio, television, and cable television-related activities; satellite programming services; and broadcasting networks.</p> <p>Colombia reserves the right to adopt or maintain any measure according preferential treatment to persons of any other country pursuant to any agreement between Colombia and such other country containing specific commitments regarding cultural cooperation or co-production in cultural industries and activities".</p> <p>(Colombia Annex II. Services/Investment Non-conforming measures, p.7)</p> <p><b>Sector: Interactive Audio and Video Services</b></p> <p>Obligations Concerned: NT, Performance Requirements</p> <p>Description: Investment and Cross-Border Services</p> <p>"1. Subject to paragraphs 2 and 3, Colombia reserves the right to adopt or maintain measures to ensure that, upon a finding by the Government of Colombia that Colombian audiovisual content is not readily available to Colombian consumers, access to Colombian audiovisual programming through interactive audio and/or video services is not unreasonably denied to Colombian consumers.</p> <p>2. Colombia shall publish in advance any measure that it proposes to adopt addressing the unreasonable denial of access to Colombian consumers of Colombian audiovisual content through interactive audio and/or video services and shall provide interested persons a reasonable opportunity to comment on the proposed measure. At least 90 days before any proposed measure is adopted, Colombia shall notify the other Parties of the proposed measure. The notification shall provide information with respect to the proposed measure, including information that forms the basis for the Government of Colombia's finding that Colombian audiovisual content is not readily available to Colombian consumers and a description of the proposed measure. Such measures must be consistent with Colombia's obligations under the GATS.</p> <p>3. A Party may request consultations with Colombia regarding the proposed measure.(...)Colombia may exercise its right under paragraph 1 only if, as a result of these</p>
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		<p><i>consultations: (i) the requesting Party agrees that Colombian audiovisual content is not readily available to Colombian consumers and that the proposed measure is based on objective criteria and has the least trade-restrictive impact possible; (ii) Colombia agrees that the measure would be applied only to a service supplied in Colombia by a company established in Colombia; and (iii) the requesting Party and Colombia agree on trade-liberalizing compensation in the interactive audio and video services sector".</i></p> <p>(See: Colombian Annex II. Services/Investment Non-conforming measures, p.14)</p>
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## Annex II

Limitations of specific commitments in EU RTAs		
Limitations applying to all sectors		
EU–Chile RTA	EU–Peru RTA	EU–Colombia RTA
For the EU:	For the EU:	For the EU:
<p>Obligation concerned: Market Access  <i>In all Member States, services considered as public utilities at national or local level may be subject to public monopolies or to exclusive rights granted to private operators.</i>  <i>Several regulations on Law on Foreign Companies' Branches</i></p> <p>Obligation concerned: NT  <i>Restrictions to extend privileges granted to subsidiaries to companies branches.</i></p> <p>(See: EU–Chile FTA Annex VII–EU schedule, p.3–6)</p>	<p>Obligation concerned: Market Access  <i>In all Member States, services considered as public utilities at national or local level may be subject to public monopolies or to exclusive rights. The lists of commitments do not include measures concerning subsidies.</i></p> <p>(See: EU–Colombia, Peru FTA Annex VIII–EU schedule, p.79.)</p>	<p>Obligation concerned: Market Access  <i>In all Member States, services considered as public utilities at national or local level may be subject to public monopolies or to exclusive rights. The lists of commitments do not include measures concerning subsidies.</i></p> <p>(See: EU–Colombia, Peru FTA Annex VIII–EU schedule, p.79.)</p>
For Chile:	For Peru:	For Colombia:
<p>Sector: <b>All</b>  Obligations concerned: Market Access, NT  <i>Unbound for the movement of natural persons, except for specific cases.</i></p> <p>(See: EU–Chile RTA Annex VII–Chilean schedule, p.2–3 )</p>	<p>Sector: <b>All</b>  <i>Peru reserves the right to adopt or maintain any measure at a local level of government, in force at the date of subscription of the RTA, which limits the Market Access.</i>  (See: EU–Colombia, Peru RTA Annex VIII–Peru's Schedule, p.112.)</p>	<p>Sector: <i>All</i>  Obligations concerned: Market Access, NT  <b>Modes 1 and 2:</b> A juridical person organized under the laws of another country, and with its principle domicile in another country, must establish a branch in Colombia in order to develop a concession obtained from the Colombian State. Only a juridical person with their main office in the free port of San Andres, Providencia and Santa Catalina may supply services in this region.</p> <p>(See: EU–Colombia, Peru RTA Annex VIII–Colombian Schedule.)</p>

Sector specific limitations		
Business Services		
EU-Chile RTA	EU-Peru RTA	EU-Colombia RTA
For the EU:	For the EU:	For the EU:
<p>Subsector: <b>Computer and related services:</b> Obligations concerned: Market Access, NT <b>Mode 4: Unbound</b></p> <p>(See: EU-Chile RTA Annex VII-EU schedule, p.25-26.)</p>	<p>Subsector: <b>Computer and related services (CPC 84):</b> Obligations concerned: Market Access, NT <b>Mode 3: Unbound</b> <b>Mode 4: Unbound</b></p> <p>(See: EU-Colombia, Peru RTA Annex VIII-EU schedule, p.83.)</p>	<p>Subsector: <b>Computer and related services (CPC 84):</b> Obligations concerned: Market Access, NT <b>Mode 3: Unbound</b> <b>Mode 4: Unbound</b></p> <p>(See: EU-Colombia, Peru RTA Annex VIII-EU schedule, p.83.)</p>
For Chile:	For Peru:	For Colombia:
<p>Subsector: <b>Computer and related services (CPC841,842,843 and 844):</b> Obligations concerned: Market Access, NT <b>Mode 4: Unbound for the movement of natural persons, except for specific cases as indicated in horizontal commitments.</b></p> <p>(See: EU-Chile RTA Annex VII-Chile Schedule, p.7 )</p>	<p>Subsector: <b>Computer and related services:</b> Obligations concerned: Market Access and NT <b>Mode 3: Unbound</b> <b>Mode 4: Unbound</b></p> <p>(See: EU-Colombia, Peru RTA Annex VIII-Peru Schedule, p.116.)</p>	<p>Subsector: <b>Computer and related services:</b> Obligations concerned: Market Access and NT <b>Mode 1:</b> Full commitments (except as indicated in horizontal non-conforming measures). <b>Mode 2:</b> Full commitments for CPC 841, 842, 843 and 844 and 845+849 (except as indicated in the horizontal non-conforming measures). <b>Mode 3:</b> Unbound <b>Mode 4:</b> Unbound</p> <p>(See: EU-Colombia and Peru RTA Annex VIII-Colombian Schedule, p.9.)</p>

Communication Services		
EU-Chile RTA	EU-Peru RTA	EU-Colombia RTA
For the EU:	For the EU:	For the EU:
<p>Subsector: <b>Telecommunication services, excluding broadcasting</b></p> <p>Obligations concerned: Market Access, NT</p> <p><b>Mode 1:</b> Full commitments*</p> <p><b>Mode 2:</b> Full commitments*</p> <p><b>Mode 3:</b> Full commitments*</p> <p><b>Mode 4:</b> Unbound</p> <p>* Licensing requirements may apply.</p> <p>(See: EU-Chile FTA Annex VII-EU schedule, p. 41-43)</p>	<p>Subsector: <b>Telecommunication services</b> (These services do not cover the economic activity consisting of the provision of content which requires telecommunications services for its transport).</p> <p>Obligations concerned: Market Access, NT</p> <p><b>Mode 1 and 2:</b> Full commitments, All services consisting of the transmission and reception of signals by any electromagnetic means, excluding broadcasting.</p> <p>except that for Satellite Broadcast Transmission services, the EU reserves the right that service providers in this sector may be subject to obligations to safeguard general interest objectives related to the conveyance of content though their network in line with the European Union regulatory framework for electronic communications. Belgium is unbound to any obligation in this sub sector.</p> <p>(See: EU-Colombia, Peru RTA Annex VIII-EU schedule, p. 90-91)</p>	<p>Subsector: <b>Telecommunication services</b> (These services do not cover the economic activity consisting of the provision of content which requires telecommunications services for its transport).</p> <p>Obligations concerned: Market Access, NT</p> <p><b>Mode 1 and 2:</b> Full commitments, All services consisting of the transmission and reception of signals by any electromagnetic means, excluding broadcasting.</p> <p>except that for Satellite Broadcast Transmission services, the EU reserves the right that service providers in this sector may be subject to obligations to safeguard general interest objectives related to the conveyance of content though their network in line with the European Union regulatory framework for electronic communications. Belgium is unbound to any obligation in this sub sector.</p> <p>(See: EU-Colombia, Peru RTA, Annex VIII-EU schedule, p. 90-91)</p>
For Chile:	For Peru:	For Colombia:
<p>Subsector: <b>Telecommunication services</b></p> <p>In the case of private services whose object is to satisfy specific telecommunications needs of particular companies, entities or persons by prior agreement, the supply of these services does not give access to traffic from or to the users of the public telecommunication networks.</p> <p><b>Mode 3:</b> Licenses or permits granted by the Sub-Secretariat of Telecommunications are required. Additionally, a supplier providing long-distance national or international telephone services must be constituted as a public open corporation.</p> <p><b>Mode 4:</b> Unbound for Market Access and NT</p>	<p>Subsector: <b>Telecommunication services</b></p> <p>Obligations concerned: Market Access, NT</p> <p><b>Mode 1.</b> For Market Access (i) Call Back is prohibited (However, this restriction does not apply to the value added and or information services), (ii) supply of the service for national and international long-distance communications must use the carrier</p> <p>(See: EU-Colombia and Peru FTA Annex VIII-Peru Schedule, p.127)</p>	<p>Subsector: <b>Telecommunication services</b> (All services consisting of the transmission and reception of signals by any electromagnetic means and Satellite broadcast transmission services)*</p> <p>Obligations concerned: Market Access, NT</p> <p><b>Mode 1:</b> Full commitments*</p> <p><b>Mode 2:</b> Full commitments*</p> <p><b>Mode 3: and Mode 4:</b> Unbound</p> <p>*Horizontal Non-Conforming measures apply.</p> <p>(See: EU-Colombia, Peru FTA Annex VIII-Colombia Schedule, p.29)</p>

<p>Subsector: <b>Value Added Telecommunication services</b></p> <p>Obligations concerned: Market Access, NT</p> <p><b>Mode 1:</b> Full commitments, subject to an intercarrier traffic exchange agreement with an international services concessionaire.</p> <p>(See: EU-Chile FTA Annex VII-Chile Schedule, p.16-17)</p>		
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## Annex III

Limitations to specific commitments in the PRC's RTAs	
Horizontal Limitations	
PRC-Chile RTA	PRC-Peru RTA
For the PRC:	For the PRC:
<p>Sector: All</p> <p>Obligation concerned: Market Access</p> <p><b>Mode 3:</b> Restrictions on the proportion of foreign investment in an equity joint venture. Establishment of branches by foreign enterprises is unbound, unless otherwise indicated. Representative offices of foreign enterprises shall not engage in any profit making activities. Land is State-owned. Use of land by enterprises and individuals is subject to maximum term limitations.</p> <p><b>Mode 4:</b> Unbound, except for limited cases.</p> <p>Obligation concerned: NT</p> <p><b>Mode 3:</b> Unbound for all the existing subsidies to domestic services suppliers in the audio-visual sectors.</p> <p>Unbound for all the existing subsidies to domestic services suppliers in the sectors listed in China-Chile FTA Services commitments.</p> <p>Unbound for all the subsidies to domestic services suppliers in any new sector and sub-sector scheduled in the future services negotiations after signing China-Chile FTA Services Agreement.</p> <p><b>Mode 4:</b> Unbound, except for the measures concerning the entry and temporary stay of natural persons who fall into the categories referred to in the market access column.</p> <p>(See: PRC-Chile RTA, Annex II-PRC's schedule of specific commitments, p. 2-3 )</p>	<p>Sector: All</p> <p>Obligation concerned: Market Access</p> <p><b>Mode 3:</b> Restrictions on the proportion of foreign investment in an equity joint venture. Establishment of branches by foreign enterprises is unbound, unless otherwise indicated. Representative offices of foreign enterprises shall not engage in any profit making activities. Land is State-owned. Use of land by enterprises and individuals is subject to maximum term limitations.</p> <p>Obligation concerned: Market Access, NT</p> <p><b>Mode 4:</b> Unbound. Although, provisions of Chapter 9 (Temporary Entry of Business Persons) apply.</p> <p>(See: PRC-Peru RTA, Annex 6, Section A: PRC's schedule of specific commitments, p. 2-3 )</p>
For Chile:	For Peru:
<p>Sector: All</p> <p>Obligations concerned: Market Access, NT</p> <p>Unbound for the movement of natural persons, except Senior and Specialized personnel under specific circumstances.</p>	<p>Sector: All</p> <p>Obligations concerned: Market Access</p> <p>Unbound for the movement of natural persons, except for measures relating to the entry and temporary stay of natural persons in the categories included in Chapter 9 (Temporary entry</p>

<p>(See: Peru–Chile RTA (services), Annex II. Chilean schedule of specific commitments, p. 1–4)</p>	<p><i>of business persons</i>). Employers may request waivers for the percentages related to the number of foreign employees and their share in the company's payroll in the case of specialized/technical personnel and directors and management staff.</p> <p>(See: PRC–Peru FTA, Annex 6, Section B: Peru's schedule of specific commitments, p. 2–3)</p>
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Sector Specific Non-Conforming Measures	
Business Services	
PRC-Chile RTA	PRC-Peru RTA
For the PRC:	For the PRC:
<p>Subsector: <b>Computer and related services</b>(excluding the provision of content services which require computer and related services as means of supply):</p> <p>Obligation concerned: Market Access and NT</p> <p><b>Mode 4:</b> Unbound for Market Access. For NT, professional qualifications apply.</p> <p>Obligation concerned: Market Access</p> <p><b>Mode 3:</b> Wholly foreign-owned subsidiaries are permitted in <i>Maintenance and repair services of office machinery and equipment including computers</i> (CPC845), <i>Software implementation services</i> (CPC 842), <i>Data processing services</i> (CPC 843) and <i>Input preparation services</i> (CPC 8431).</p> <p>(See: PRC-Chile FTA (services) Annex II. PRC's schedule of specific commitments)</p>	<p>Subsector: <b>Computer and related services</b> (excluding the provision of content services which require computer and related services as means of supply):</p> <p>Obligation concerned: Market Access and NT</p> <p><b>Full commitments in mode 1, 2 and 3 for:</b> <i>Consultancy services related to the installation of computer hardware</i> (CPC 841), <i>Data processing and tabulation services</i> (CPC 8432) and <i>Time Sharing services</i> (CPC 8433): <b>Unbound in mode 4</b>, subject to horizontal commitments and qualification requirements.</p> <p>For <i>Software implementation services</i> (CPC 842), <i>Data processing services</i> (CPC 843) and <i>input preparation services</i> (CPC 8431), same as above, except that for mode 3 wholly foreign owned enterprises are allowed.</p> <p>(See: PRC-Peru RTA, Annex 6, Section B: PRC's schedule of specific commitments p. 9-10)</p>
For Chile:	For Peru:
<p>Subsector: <b>Computer and related services:</b></p> <p>Obligation concerned: Market Access and NT</p> <p><b>Full commitments in modes 1, 2 and 3 for:</b> <i>Consultancy services related to the installation of computer hardware</i> (CPC841), <i>Software implementation services</i> (CPC842), <i>Data processing services</i> (CPC 843, for the purposes of the entire section, other than data-processing services for financial services), and <i>Maintenance and repair services of office machinery and equipment including computers</i> (CPC845). Unbound in mode 4.</p> <p>(See: PRC-Chile RTA (services), Annex II. Chilean schedule of specific commitments, p. 8)</p>	<p>Subsector: <b>Computer and related services:</b></p> <p>Obligation concerned: Market Access and NT</p> <p><b>Mode 4:</b> Unbound.</p> <p>(See: PRC-Peru RTA, Annex 6, Section B: Peru's schedule of specific commitments, p.6-7)</p>

Sector Specific Non-Conforming Measures	
Communication Services	
PRC-Chile RTA	PRC-Peru RTA
For the PRC:	For the PRC:
No commitments in Telecommunication services	<p>Obligation concerned: Market Access</p> <p><b>Subsector: Basic Telecommunication Services and Value Added Telecommunication Services</b> (electronic mail, voice mail, on-line information and database retrieval, electronic data interchange, enhance/value added facsimile services, code and protocol conversion, online information and data processing -including transaction processing).</p> <p><b>Mode 1 and 3:</b> Foreign service suppliers will be permitted to establish joint venture enterprises and foreign investment in joint ventures shall be no more than 50 per cent.</p> <p><b>Mode 4:</b> Unbound</p> <p><b>Subsector: Mobile Voice and Data Services</b> (analogue, digital, cellular services and personal communication services); <b>Domestic Services</b> (Voice services, packet-switched data transmission services, circuit-switched data transmission services, facsimile services and domestic private leased circuit services) and <b>International Services</b> (Voice services, packet-switched data transmission services, circuit-switched data transmission services, facsimile services and international closed user group voice and data services).</p> <p><b>Mode 1 and 3:</b> Foreign service suppliers will be permitted to establish joint venture enterprises without quantitative restrictions and foreign investment in joint ventures shall be no more than 49 per cent.</p> <p><b>Mode 4:</b> Unbound</p> <p><b>Subsector: Audiovisual Services</b> (videos, including entertainment software -CPC83202-, distribution services and sound recording distribution services):</p> <p>Mode 1 and 3: Foreign service suppliers will be permitted to establish joint venture enterprises with Chinese partners without prejudice to China's right to examine the content of audio and video products. <b>Mode 4:</b> Unbound</p> <p><b>For all the above services:</b></p> <p>Obligation concerned: NT</p> <p>Unbound for mode 4.</p> <p>(See: PRC-Peru RTA, Annex 6, Section B, PRC's schedule of specific commitments, p.19-23)</p>



For Chile:	For Peru:
<p>Obligation concerned: Market Access and NT  Subsector: <b>Basic Telecommunication Services</b>  <b>Mode 3:</b> Full commitments (subject to a concession)  <b>Mode 4:</b> Unbound</p> <p>Subsector: <b>Value Added Telecommunication Services</b>  <b>Mode 1:</b> Full commitments (subject to a correspondent agreement with an international services concessionaire)  <b>Mode 3:</b> Full commitments (subject to a permit)  <b>Mode 4:</b> Unbound</p> <p>Subsector: <b>Private Leased Circuits (Voice telephone service, Data transmission and Electronic mail).</b>  <b>Mode 1:</b> Unbound  <b>Mode 2:</b> Unbound  <b>Mode 3:</b> Full commitments (subject to granting of limited service)  <b>Mode 4:</b> Unbound</p> <p>(See: PRC-Chile TA (services) Annex II. Chilean schedule of specific commitments, p. 16-18)</p>	<p>Obligation concerned: Market Access  Subsector: <b>Telecommunication Services (Voice telephone services, packet-switched data transmission services, circuit -switched data transmission services, Telex and Telegraph services, facsimile services, private leased circuit services and others - analogue, digital, cellular services and personal communication services, paging services, mobile data services and trunking services)</b>  <b>Mode 1 and 3:</b> Full commitments, except for the obligation of obtaining a concession, authorization or registry though a juridical person constituted under Peruvian law. Call-Back is prohibited and international traffic should be routed through the facilities of a company holding a concession or permission for operation granted by the Ministry of Transport and Communications.</p> <p>Subsector: <b>Value Added Telecommunication Services (electronic mail, voice mail, on-line information and database retrieval, electronic data interchange; enhance/value added facsimile services, code and protocol conversion, online information and data processing -including transaction processing).</b>  <b>Mode 1 and 3:</b> The Ministry of Transportation and Communications reserves the right to determine in the future the cases that will require a concession or authorization for the provision of value added services.  <b>Mode 4:</b> Unbound</p> <p><b>For all the above services:</b>  Obligation concerned: National Treatment  Unbound for mode 4.  (See: PRC-Peru RTA, Annex 6, Section B: Peru's schedule of specific commitments, p. 14-17)</p>