4

Data as Speech and Expression

Trade Aspects of Media Content Regulation

4.1 Introduction

Digital media content regulation represents a striking aspect of the dilemmas facing governments in the age of datafication. For decades, the audiovisual sector has traditionally been heavily regulated.[1] Given the high social and cultural importance of the sector, sector-specific audiovisual measures usually include, among others, free speech safeguards, cultural diversification screen quotas, regulations concerning the protection of minors, content controls, must-carry rules, advertising restrictions, product placement rules, public service obligations, production subsidization rules, foreign ownership limitations, and taxation policies.[2] In conjunction with the trends toward datafication and platformization, debates surrounding media policy are now shifting to the ambit of digital content governance.

Given their power to datafy a social phenomenon, digital platforms have become important gateways – and the main gateway in most places of the world – through which the public accesses and disseminates media content. How, then, can we regulate the "media sector" in a digital world? At this moment, regulators all over the world are struggling with whether to impose more responsibilities on online platforms, so as to create a fairer and safer digital space where the "new media" on the Internet can fulfill its broader democratic and cultural functions. Moreover, a closely related technologically challenging issue is how to address the jurisdiction problem and ensure that "domestic" regulation of "global" digital platforms can be effectively enforced.

[1] Communication from Switzerland, "GATS 2000; Audio-visual Services, Council for Trade in Services" S/CSS/W/74 (4 May 2001).

[2] Shin-yi Peng, "GATS and the Over-the-Top Services: A Legal Outlook" (2016) 50 (1) Journal of World Trade 21, at 40.

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This chapter focuses on two angles – speech regulation and cultural policy – to explore the interplay between digital media content regulation and international economic law. First, when "data" is regarded as "speech," the interface between domestic media regulation and international trade rules is transformed into a highly political or even sensational topic, as it involves the national constitutional discourse against disproportionately regulating "speech." In many jurisdictions, speech must be narrowly regulated, and any speech regulation will inevitably involve complex policy questions surrounding to what extent it intrudes upon freedom of expression. That said, the proliferation of cyberbullying, hate speech, misinformation/disinformation,[3] fake news, and other harmful or illegal content on social media has become a major societal concern, which has apparently been shown to impact public interests. To what extent should platforms be accountable for such "speech" generated by individuals? At the same time, how can we prevent excessive blocking of user-generated content (UGC) such as Twitter (now called X) tweets and Facebook posts? The central concern of this chapter is to explore how international trade agreements interact with domestic platform regulations that address these problems.

Second, digital media content is of cultural significance, and the "culture v. trade" debate reaches another level of controversy when "data" is regarded as "cultural expression." Traditionally, the audiovisual sector – primarily television, film, and music – has been considered a venue reflecting the cultural and social characteristics of a nation and its people, as well as a means through which to present a nation's unique identity to the rest of the world.[4] Due to its cultural components,[5] the audiovisual sector has long played an important role in shaping the identity of heritage, promoting linguistic diversity, and contributing to

[3] The terms "misinformation" and "disinformation," although frequently used interchangeably, vary in the sense of the intent of the speaker/publisher. "Misinformation" refers to a situation in which the speakers/publishers do not know for certain that the information being spread is erroneous, while "disinformation" generally refers to misleading information that the speakers/publishers intentionally and maliciously spread to deceive audiences. See Canadian Center for Cyber Security, "How to Identify Misinformation, Disinformation, and Malinformation" (February 2022) <https://cyber.gc.ca/en/guidance/how-identify-misinformation-disinformation-and-malinformation-itsap00300>.

[4] See generally Joel Richard Paul, "Cultural Resistance to Global Governance" (2000) 22 Michigan Journal of International Law 1.

[5] Council for Trade in Services, Communication from United States, "Audiovisual Services" S/C/W/78 (December 8, 1998).

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cultural diversity.[6] Today, video streaming services (VSS) are fast becoming a substitute for traditional "television" and have brought about tremendous challenges to media regulators. Policy debates include whether and to what extent VSS such as Netflix should be subject to existing television regulation, and in particular, the screen quota requirement that has been the main tool in cultural policy to guarantee market share for local content output and thus protect local culture.[7]

From the aspects of international economic law, questions regarding how a state regulates speech and promotes culture also involve a broad set of issues that may be subject to trade negotiations or dispute settlement. When data is generated as the by-product of other services, it can be a mere digital footprint; but when data communicates to affect opinions and change others' minds, it becomes speech and expression.[8] On the path toward a datafied world, currently UGC and VSS have become targets of national regulations that intend to protect free speech and culturally diverse expression. At the same time, they are at the crux of international trade negotiations that aim to promote the free flow of data.

4.2 Regulating UGC: Trade Aspects of Speech Regulation

4.2.1 Social Media Platforms: "Digital Town Square?"

UGC refers to "media content that is produced by users of that medium."[9] Today, UGC is primarily associated with the text, comments, images, and videos users have created and directly uploaded to digital platforms. Given its focus on openness and decentralization, UGC is essentially a form of self-expression, social participation, and democracy engagement,[10] which greatly differs from the "traditional" one-way

[6] See Janet Blake, *International Cultural Heritage Law* (Oxford University Press 2015), at 194–229.

[7] Peng, supra note 2, at 28.

[8] See generally Jane Bambauer, "Is Data Speech?" (2014) 66 Stanford Law Review 57.

[9] "User-Generated Content" refers to "Media content that is produced by users of that medium rather than by media professionals. Although traditional media have often included some UGC (*e.g.*, the letters page of a newspaper), the term is mainly associated with the new electronic media and embraces such phenomena as blogs, wikis, and digital video (YouTube)." Oxford Reference, "User-Generated Content" <https://www.oxfordreference.com/view/10.1093/oi/authority.20110803114939679>.

[10] Anupam Chander, "Section 230 and the International Law of Facebook" (2022) 24 Yale Journal of Law & Technology 393, at 420 (analyzing the implications of big tech on global speech).

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media structure of broadcaster/publisher to audience/reader. Nonetheless, the risks associated with defamation, mis-/disinformation, and other harmful or illegal behavior are becoming more and more challenging, as social media is now a critical component of most people's lives. The dynamic nature of UGC leads to the question of whether digital platforms, which act as "intermediaries" in facilitating user interaction, should be liable for UGC on their sites.

This question has been transformed into a matter of significant controversy in recent years, especially in the US, where social media was born and has been widely used in politics. The policy debate was fueled by Twitter's suspension of former US President Trump's account in response to his unsubstantiated tweet of election fraud. Social media's decision to deny Trump a platform was certainly a move applauded by Trump's political opponents but criticized by free speech advocates.[11] More recently, a Texas law prohibiting large social media companies from taking down UGC based on their political viewpoints went into effect after the 5th US Circuit Court of Appeals gave the Texas social media law a green light.[12] The legal battle, of course, is not over yet. The Supreme Court may still reject the Fifth Circuit's decision and strike down the Texas social media law. In any event, what's behind those sensational news headlines is the question of to what extent datafication-enabled content moderation on social media platforms counts as "censorship."

Placing these issues in the political economy context, what do we want social media platforms – today's global public square – to look like? Additionally, how have different approaches emerged in different countries? Should platform content moderation extend to "lawful but awful" UGC? If so, whose judgment holds on "awful content"? Elon Musk, in a statement about the acquisition of Twitter, described Twitter as "the digital town square, where matters vital to the future of humanity are

[11] Former US President Trump pressed Congress to completely repeal Section 230 of the US Communications Decency Act (CDA 230). He also instructed the FCC through an executive order – the legality of which was in question – to clarify whether certain behavior by social media platforms constitutes actions taken in good faith. See Administration of Donald J. Trump, "Executive Order 13925: Preventing Online Censorship" (May 28, 2020) <www.govinfo.gov/content/pkg/DCPD-202000404/pdf/DCPD-202000404.pdf>.

[12] See, for example, Jesus Vidales, "Texas Social Media 'Censorship' Law Goes Into Effect After Federal Court Lifts Block" (*The Texas Tribune*, September 16, 2022).

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debated."[13] Such an ambition to create a speech platform that allows unfettered free speech has been criticized as "a complete fantasy."[14] Social media platforms are important forums for speech, but an unregulated forum may discourage the free exchange of speech. As discussed below, Section 230 of the US Communications Decency Act (CDA 230) serves as the best example of such a dilemma.[15]

4.2.2 *Speech-Platform Liability for UGC: The Dilemma of the US CDA 230*

In most jurisdictions, "traditional media," such as newspaper publishers and television stations, can be held liable for publishing or broadcasting harmful or illegal content. The emergence of UGC in the 1990s, however, disrupted the media landscape and brought about the question of whether digital services suppliers should be liable for third-party content on their services.[16] In the US, where free speech enjoys relatively stronger constitutional protections in the world, one leading case in this regard is Stratton Oakmont v. Prodigy Services,[17] in which the court ruled that Prodigy – a digital bulletin board services supplier – could be held liable for the "speech of their users."[18] In the view of the court, Prodigy had become a "publisher" because it voluntarily deleted some users' offensive messages from its bulletin board. As a result, it was liable for other users' defamatory postings on its service, which it had failed to take

[13] See, for example, Pascale Davies, "Why does Elon Musk want Twitter?" (*Euronews*, October 28, 2022).

[14] See Jean Burgess, "The "Digital Town Square?" What Does It Mean When Billionaires Own the Online Spaces Where We Gather?" (*The Conversation*, April 27, 2022).

[15] Communications Decency Act of 1996 Section 230, 47 U.S.C. Section 230 (CDA 230). Section 230(c): "Protection For 'Good Samaritan' Blocking and Screening of Offensive Material. (1) Treatment of Publisher or Speaker.—No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider. (2) Civil Liability.—No provider or user of an interactive computer service shall be held liable on account of— (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in [subparagraph (A)]."

[16] Chander, supra note 10, at 406–416 (explaining how CDA 230 provides legal protection from platform liability).

[17] Stratton Oakmont v. Prodigy Servs. Co., N.Y. Sup. Ct. May 24, 1995.

[18] *Ibid.*

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down.[19] In this particular case, the fact that Prodigy moderated "some" offensive or indecent content made it a "publisher," and therefore it could be held liable for "all" content, regardless of whether or not it moderated all of its content. In other words, those services that did not screen any content risked less liability than those that screened some or all content. Against this backdrop, the US Congress enacted the CDA 230 to protect "interactive computer services" (*e.g.*, digital speech platforms) from defamation lawsuits over UGC.[20]

The protection under the CDA 230 is twofold: Digital platforms cannot be held liable if they choose not to moderate UGC and, at the same time, digital platforms cannot be held liable if they choose to moderate UGC. To illustrate, the twofold protection can be summarized as follows: First, CDA 230 grants speech platforms such as Facebook (Meta) or Twitter immunity from liability that is based on their treatment, "as the publisher or speaker," of any content posted by their users. As a result, when a user's posts or tweets defame a third party, any defamation claim against the platforms would be barred by CDA 230.[21] To a great extent, such an immunity "negates" the duty of platforms to actively monitor material on their sites and allows them to ignore hate speech, misinformation, and other dangerous or harmful content. Second, CDA 230 grants speech platforms immunity from filtering UGC that it finds "objectionable" without incurring liability for doing so. In other words, speech platforms have the freedom, through their "content moderation" process, to keep the content they see fit, as well as to remove the content they consider "unlawful conduct or harassment."[22] Users generally do not have any remedies if the platforms take down the content "in good faith."[23]

CDA 230 has incited immense controversy over the past quarter century. Many scholarly writings have explained how the US courts have stretched CDA 230's plain language and granted (over)broad, if not absolute, immunity, which is not supported by the CDA's congressional

[19] *Ibid.* See also Adam Candeub, "Reading Section 230 as Written" (2021) 1 Journal of Free Speech Law 139, at 142.

[20] 47 U.S.C. Section 230(f)(2). The CDA defines "interactive computer service" as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server."

[21] See generally Gregory M. Dickinson, "Rebooting Internet Immunity" (2021) 89 George Washington Law Review 347.

[22] See, for example, Twitter, "Terms of Service" <https://twitter.com/en/tos>.

[23] 47 U.S.C. Section 230(c)(2).

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intent of 1996.[24] By pointing out that the "benefit" of CDA 230 has been extended to mobile applications through expansive judicial interpretation, commentators have criticized the US courts for failing to consider the "outer limits" of CDA 230.[25] On the politics front, not surprisingly, CDA 230 has been a hot potato within and beyond the US, and its future at the time of this writing remains in flux. The dilemma facing policymakers is evident, as documented below.

On the one hand, opponents of CDA 230 argue that the Act allows platforms to turn a blind eye to hate speech, mis-/disinformation, and harassment on their sites. In particular, those platforms that lack the incentive to combat such activities may become breeding grounds for harmful UGC and thus threaten public interests.[26] At the same time, for those platforms that actively engage in content moderation, the Act's blanket immunity means that such platforms have broad discretion in determining whether certain speech is socially acceptable. As a result, some UGC may be prejudicially censored, including some controversial political speech that is constitutionally protected from government censorship. Critics of CDA 230 have pointed out that UGC is routinely subjected to arbitrary censorship by dominant platforms. These platforms may, when they wish, suppress users' expressions or even completely oust a user[27] – literally playing the role of "judges of truth." In fact, the scale of speech restrictions by large platforms is evident. Twitter, as an example, reported that from January to June of 2021, it removed 5,913,337 posts, among which 1,606,979 posts were deemed to constitute "hateful conduct."[28] Meta, as another example, reported that in the first quarter of 2022, it took action on 15.1 million Facebook posts and 3.4 million Instagram posts considered to constitute "hate speech" – one of its many content moderation standards.[29] Specifically, Meta alone removed 205,556 "hate speech" posts per day.[30]

[24] Michael L. Rustad and Thomas H. Koenig, "Creating a Public Health Disinformation Exception to CDA Section 230" (2021) 71 Syracuse Law Review 1255, at 1295–1299 (elaborating how the US federal court decisions have stretched the scope of CDA 230).

[25] Benjamin Edelman and Abbey Stemler, "From the Digital to the Physical: Federal Limitations on Regulating Online Marketplaces" (2019) 56 Harvard Journal on Legislation 142, at 176.

[26] Dickinson, supra note 21, at 362–364.

[27] Chander, supra note 10, at 7.

[28] Twitter, "Transparency: Rules Enforcement" (2021) <https://transparency.twitter.com/en/reports/rules-enforcement.html#2021-jan-jun>.

[29] Meta, "Transparency Center: Hate Speech" (2022) <https://transparency.fb.com/policies/community-standards/hate-speech/>.

[30] *Ibid.*

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On the other end, supporters of CDA 230 have labeled it "the law that built the Internet."[31] They have credited the Act for playing "an indispensable role in facilitating the growth of the world's largest online platforms."[32] In their view, without such a "catalyst," the digital industry would never have become what it is today. They also believe that the immunity has incentivized social media to moderate UCG, which has significantly contributed to the protection of the Internet from objectionable content. Without such a safe harbor, platforms would have undermoderated to avoid being punished for policing content.[33] Moreover, the costs of moderating UGC do not deter the growth of platforms because they are not required to police all content.

In any event, it is worth underscoring that CDA 230, together with other factors, makes the US a haven for social media. It is apparent that the Act has given a distinctive boost to digital platform services for UGC that impact the daily lives of most people. It goes without saying that big tech has repeatedly and vigorously defended CDA 230. Any efforts to narrow the broad immunity it provides will prompt significant opposition from those tech giants,[34] as evidenced by their recent strong resistance to the Texas social media law. The controversy surrounding CDA 230 is now reaching a fevered pitch, which raises the question of whether digital platforms can be immunized when they algorithmically "recommend" UGC. As Chapter 5 will further explore, when a platform's algorithmic system promotes specific UGC, is such an action of algorithmic amplification still protected by CDA 230? Indeed, the operation of CDA 230 has gone far beyond its legislative intent in creating such immunity.

4.2.3 *Exporting Speech Regulation: Immunity Abroad?*

Of course, the fire from the battle over CDA 230 is not limited to the US, as large platforms would grab any opportunity throughout the world to advance their agenda of immunity protection. It is no secret that big tech firms have attempted to influence trade negotiations. From CPTPP to USMCA to IPEF, big tech companies have been advocating for digital

[31] Susan Benkelman, "The Law That Made the Internet What It Is Today" (*The Washington Post*, April 26, 2019).

[32] Isaac Rounseville, "Drawing A Line: Legislative Proposals To Clarify the CDA, Reinforce Consumer Rights, and Establish a Uniform Policy For Online Marketplaces" (2020) 60 (4) Jurimetrics 263.

[33] *Ibid.*

[34] Edelman and Stemler, supra note 25, at 193–194.

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trade rules that "overwhelmingly favor their interests."[35] To further pursue their "digital trade agenda," big tech firms have been lobbying,[36] perhaps through "behind-the-scenes access to the trade officials," to push for trade rules that protect their interests.[37] If the allegation of Warren and other US lawmakers is true, the Office of the US Trade Representative (USTR) has been granting "insider status" to Amazon and Google lobbyists throughout the stages of international trade negotiations.

The "footprint" of CDA 230 has been extended to US-led international trade agreements, and in particular, the US–Japan Digital Trade Agreement and the USMCA.[38] Moreover, CDA 230-like immunity can be found in the consolidated negotiating text of the ongoing WTO JSI on E-Commerce.[39] More specifically, for example, Article 18(3) of the US–Japan Digital Trade Agreement mimics CDA 230(c), which protects digital platforms from liability for voluntarily removing harmful or objectionable content in good faith. Additionally, similar to CDA 230, the bilateral trade deal contains exceptions for enforcing intellectual property rights, criminal law, or other lawful orders of a law enforcement authority.[40] It should be noted, however, that the US and Japan have agreed to a side letter, in which the parties recognize that there are differences between their "respective legal systems governing the liability of interactive computer services suppliers"[41] and have therefore agreed that Japan need not "change its existing legal system, including laws,

[35] Office of Senator Elizabeth Warren, "Big Tech's Big Con: Rigging Digital Trade Rules to Block Antitrust Regulation" (May 2023) <www.warren.senate.gov/imo/media/doc/USTR%20REPORT.pdf>.

[36] *Ibid.* See also Ariel Ezrachi and Maurice Stucke, *Virtual Competition: The Promise and Perils of the Algorithm-Driven Economy* (Harvard University Press 2016), at 244–246.

[37] *Ibid.*, at 5. Big tech companies push for trade rules to "protect their interests – defending their monopolistic, self-dealing, discriminatory AI algorithms, and abuse of consumer. . . privacy" as stated by Warren's office.

[38] The US–Japan Digital Trade Agreement establishes relatively high-standard rules in digital trade. For the treaty text and the Side Letter on Interactive Computer Services, see US–Japan Digital Trade Agreement <https://ustr.gov/countries-regions/japan-korea-apec/japan/us-japan-trade-agreement-negotiations/us-japan-digital-trade-agreement-text>.

[39] This book was written during 2021 fall to 2023 spring, during which the WTO JSI on E-Commerce was still under negotiations, and the negotiating results remain uncertain.

[40] US–Japan Digital Trade Agreement, Article 18.

[41] *Ibid.*, the Side Letter on Interactive Computer Services between Ambassador of Japan Mr. Sugiyama Shinsuke and US Ambassador Mr. Robert E. Lighthizer (October 7, 2019).

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regulations, and judicial decisions, governing the liability of interactive computer services suppliers,"[42] in order to comply with Article 18 of the bilateral trade deal. As a result, the side letter has literally negated Japan's treaty obligations to amend its platform liability law.

Just months after the signing of the US–Japan Digital Trade Agreement, the USTR continuously extended CDA 230 to its neighbors through Article 19.17 of the USMCA. In particular, Article 19.17(3), which is virtually identical to Article 18(3) of the US–Japan Digital Trade Agreement, once again mirrors the language of CDA 230(c)(2)(a).[43] Considering that neither Canada nor Mexico have a comparable statute in effect that covers the same grounds or provides the same protections as those afforded under the CDA 203, USMCA Article 19.17 can be seen as a tool to broaden the landscape of the CDA – "exporting" the US policy to the North and South.[44] Questions have therefore been raised regarding whether the expansion of the CDA 203 can be seen as a form of "American imperialism."[45]

Nonetheless, it is too soon to say that Canada and Mexico are now obligated to enact a CDA 230-equivalent statute at home, and that the US has successfully transplanted its controversial social media immunity abroad.[46] As a matter of fact, the real ramifications of USMCA Article 19.17(3) might be less apparent when reading other provisions together. Footnote 7 of the Digital Trade Chapter of the USMCA clarifies that a party may comply with Article 19.17 "through its laws, regulations, or

[42] *Ibid.*

[43] USMCA, Article 19.17(3): "No Party shall impose liability on a supplier or user of an interactive computer service on account of: (a) any action voluntarily taken in good faith by the supplier or user to restrict access to or availability of material that is accessible or available through its supply or use of the interactive computer services and that the supplier or user considers to be harmful or objectionable; or (b) any action taken to enable or make available the technical means that enable an information content provider or other persons to restrict access to material that it considers to be harmful or objectionable."

[44] As elaborated by the Council on Foreign Relations in the policy brief, leading US tech companies have pushed to "export Section 230 via U.S. trade deals." Anshu Siripurapu, "Trump and Section 230: What to Know, the Council on Foreign Relations" (December 2, 2020) <www.cfr.org/in-brief/trump-and-section-230-what-know>.

[45] Chander, supra note 10, at 416.

[46] Cf., Eric Goldman, "Five Things to Know about Section 230" (2021) Center for International Governance Innovation <www.cigionline.org/articles/five-things-to-know-about-section-230/>.

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application of existing legal doctrines as applied through judicial decisions." This raises the question of whether Canadian case law is sufficient for compliance with USMCA Article 19.17.[47] More importantly, it is not immediately apparent if the rulings of the Canadian courts will consistently result in broad CDA-style immunity for social media, as was the case among US judges.[48] After all, as discussed above, today's broad immunity stemming from CDA 230 is actually the product of expansive judicial interpretations of US courts. The mere fact that the US has transplanted the legislative text of the CDA 230 to the USMCA does not necessarily mean that the judicial interpretations of the US courts will guide the rulings of the Canadian courts.[49]

In conclusion, with respect to the question of whether Article 19.17 of the USMCA is a big win for big tech, the answer is: perhaps, if the seeds planted continue to increase in size and gain strength.[50] In view of this, the ongoing WTO e-commerce trade negotiations represent a key battle that could set the tone for the future of platform immunities. Currently, CDA 230-like immunity can be found in the negotiating text of the WTO JSI on E-Commerce. The US-proposed language for "interactive computer services" clearly tracks Article 18 of the US–Japan Digital Trade Agreement and Article 19.17 of the USMCA.[51] Paradoxically, the USTR continues to embrace and propagate CDA 230-like platform immunities in international trade agreements, no matter how much political controversy the Act stirs up at home.

[47] USMCA, Article 19.17, Footnote 7.

[48] Sonja Solomun et al., "Platform Responsibility and Regulation in Canada: Considerations on Transparency, Legislative Clarity, and Design" (2021) 34 Harvard Journal of Law & Technology 1, at 10 (explaining how Canada will comply with Article 19.17 of the USMCA).

[49] Vivek Krishnamurthy et al., "CDA 230 Goes North American? Examining the Impacts of the USMCA's Intermediary Liability Provisions in Canada and the United States" (2020) The Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic (examining the impact of the USMCA on the intermediary liability regimes in Canada); Amir Eftekharpour, "Demystified: USMCA"s Digital trade Provisions on ISP Liability in Canada" (arguing that ISP immunity in Canada may develop in line with current Canadian law) <www.jdsupra.com/legalnews/demystified-usmca-s-digital-trade-40676/>.

[50] Note that the US has pursued similar platform immunity provisions in trade negotiations with the United Kingdom and other countries, although negotiations had not been completed at the time of this writing.

[51] Inside US Trade, "WTO E-commerce Text: Section 230 Language, Exceptions to Data Rules" (February 12, 2021).

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4.2.4 *Platform Content Moderation: Regulatory Landscape and Trade Governance*

4.2.4.1 UGC Moderation under the DSA: The Gold Standard?

The potential for the CDA 230 to morph into a global standard for platform governance is further diminished under the EU's accelerating effort to regulate digital platforms' content moderation.[52] Aiming to establish a benchmark for platform regulation at the global level, the "rules-based" platform governance model led by the EU is now a strong power in balancing CDA-based social media self-regulation. In a nutshell, transatlantic digital fragmentation has been bolstered by the DSA. On the other side of the Atlantic, the EU's DSA has introduced a new set of obligations for online platforms. By setting high standards for effective intervention, the DSA increases the obligations of platforms and the powers of regulators, and it also empowers users to report illegal content in an easier way and challenge platforms' content moderation decisions.[53]

In particular, depending on the function and size of a digital services supplier, the DSA provides "cumulative obligations" – the larger a supplier is, and the more "critical" the services it supplies, the more obligations apply. Specifically, the DSA distinguishes between four tiers – intermediary services, hosting services, online platforms, and VLOPs – and applies asymmetric obligations to each tier.[54] Such a classification features four risk categories, and the DSA imposes increasingly severe obligations pursuant to the principle of proportionality. Accordingly, VLOPs and very large online search engines (VLOSEs), defined by the DSA as online platforms and online search engines providing more than 45 million average monthly active users in the EU (which represents

[52] The DSA is designed to provide a single, uniform legal framework across the EU. For example, Germany's Network Enforcement Act (known as NetzDG), which requires social media companies with two million users to remove "manifestly unlawful" content within 24 hours of receiving a complaint, has been criticized for forcing platforms to censor potentially lawful speech due to the short takedown periods and the heavy penalties. See Anupam Chander and Haochen Sun, "Sovereignty 2.0" (2021) Georgetown Law Faculty Publications and Other Works (2021).

[53] EU Monitor, "Explanatory Memorandum to COM (2020)825: Single Market for Digital Services (Digital Services Act)" (2020) <www.eumonitor.eu/9353000/1/j4nvhdfdk3hydzq_j9vvik7m1c3gyxp/vlenigitokp2>.

[54] EU DisinfoLab, "User-Guide to the EU Digital Services Act" (October 2022) <www.disinfo.eu/wp-content/uploads/2022/11/20221020_DSAUserGuide_Final.pdf>, at 3.

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10 percent of the 450 million users in the EU market), are subject to the most broad and stringent requirements.[55] The EU legislative documents stress that very large players are emerging as "quasi-public spaces" for the exchange of information in this digital age, which may "pose particular risks for users' rights, information flows and public participation."[56] As such, they should "take mitigating measures at the level of the overall organisation of their service" to facilitate public debate, and to influence how people obtain information online.[57]

Regarding content moderation of UGC, the DSA obliges online platforms to remove illegal content upon the receipt of an order issued by relevant authorities.[58] Online platforms are also required to put user-friendly mechanisms into place to allow any individual to notify them of any illegal content on their sites.[59] They are required to include information on "any policies, procedures, measures and tools used for the purpose of content moderation, including algorithmic decision-making and human review" in their terms and conditions.[60] Moreover, the DSA imposes transparency reporting obligations on platforms, including the publication of "easily comprehensible and detailed reports on any content moderation they engaged in during the relevant period,"[61] which includes "any use made of automatic means for the purpose of content moderation."[62] Furthermore, the DSA imposes additional obligations on VLOPs to manage risks.[63] They are required to carry out regular assessments of the systemic risks stemming from their services. When conducting risk assessments, they should take into account how their content moderation systems influence the dissemination of illegal content.[64] Further, they have an obligation to take measures to mitigate any systemic risks.[65]

[55] DSA, Article 33 (very large online platforms).
[56] European Commission, "Questions and Answers: Digital Services Act" (November 14, 2022) <https://ec.europa.eu/commission/presscorner/detail/en/QANDA_20_2348>.
[57] *Ibid.* Note that smaller social media platforms fall within the scope of "online platforms" that also have important obligations.
[58] DSA, Article 9.
[59] DSA, Article 16.
[60] DSA, Article 14.
[61] DSA, Article 15.
[62] DSA, Article 15.
[63] DSA, Section 5.
[64] DSA, Article 34.
[65] DSA, Article 35.

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As a whole, the DSA represents a big move toward a rules-based cyberspace order. Contrary to the laissez-faire approach taken in the CDA 203, the DSA aims to turn the unfettered market for UGC into a more heavy-handed, regulated public square.[66] By requiring social media to carefully curb hate speech, disinformation, and other extreme and unsafe content on their sites or otherwise risk billions of dollars in fines, the DSA, to a large extent, ends the era of content moderation's self-regulation, in which speech platforms decide what content will be retained or removed based on their own unilaterally imposed policies.

4.2.4.2 Moving toward a Rules-Based Digital Order? The Elephant(s) in the Room

It should be noted that digital platforms established outside of the EU that offer their services in the EU are also subject to the obligations under the DSA. In April 2023, the EC officially designated the first batch of VLOPs and VLOSEs.[67] These big tech and other powerful firms will have to meet new EU requirements, including submitting yearly audits of systemic risks linked to their services. Needless to say, big tech firms boosted their EU lobbying in 2021–2022, during which the DSA was under discussion by the European Parliament and Council. With combined lobbyist spending of over 27 million euros in one year,[68] big tech certainly tried to influence EU policymaking on platform governance. At the end of the day, however, the EU's "unilateral global governance," as framed by Krisch,[69] "targets U.S. companies."[70] Brussels eventually put the brakes on big tech's uncontrolled power over content moderation.

[66] See Olivier Sylvain, "Platform Realism, Informational Inequality, and Section 230 Reform" (2021) 131 Yale Law Journal 475, at 486–487 (pointing out that the unregulated market for interactive computer services has promoted experimentation and innovation).

[67] European Commission, "DSA: Very Large Online Platforms and Search Engines" (April 25, 2023) <https://digital-strategy.ec.europa.eu/en/policies/dsa-vlops>. The EC designated the following platforms as VLOPs: Alibaba, Amazon, Apple, Booking, Facebook, Google Maps, Google Play, Google Shopping, Instagram, LinkedIn, Pinterest, Snapchat, TikTok, Twitter, Wikipedia, YouTube, and Zalando. The EC also designated Bing and Google Search as VLOSEs.

[68] Corporate Europe Observatory, "Big Tech's Last Minute Attempt to Tame EU Tech Rules: Lobbying in Times of Trilogues" (April 23, 2022) <https://corporateeurope.org/en/2022/04/big-techs-last-minute-attempt-tame-eu-tech-rules>.

[69] Nico Krisch, "Jurisdiction Unbound: (Extra)territorial Regulation as Global Governance" (2022) 33(2) European Journal of International Law 481, at 513.

[70] Kati Suominen, "Implications of the European Union's Digital Regulations on U.S. and EU Economic and Strategic Interests" Center for Strategic & International Studies

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What is most concerning to international economic legal order is the question surrounding to what extent speech platform governance formulated by the DSA will serve as a landmark that drives regulatory efforts beyond Europe. Under the trends of datafication, there is worldwide concern that states are no longer capable of regulating data.[71] The DSA is now serving to spur a rules-based Internet. Countries such as Singapore and Taiwan have attempted to follow the EU's example in regulating platforms with respect to UGC moderation.[72] The years to come will be critical to the global governance of digital platforms. Key indicators include whether more and more countries will adopt DSA-like regulations along the EU regulatory path, whether the implementation of the DSA will have the same global influence as the General Data Protection Regulation (GDPR) does, and whether the EU's accelerating "strategic autonomy" may effectively suppress the spread of the CDA 230 and eventually change the distribution of power in the social media ecosystem.

Of course, platform governance is not only about the US' CDA model and the EU's DSA model. The dispute between Twitter and the Indian government serves as a typical case pointing toward the bumpy road ahead for the global governance of speech platforms. India's Section 69 (A) of the Information Technology Act allows authorities to issue blocking orders to social media intermediaries.[73] Blocking orders can be issued for, among other reasons, the "public order" of India's society. Such discretionary power has been a major tool for the government of India to place pressure on big tech, as a social media services supplier can face criminal action and risk losing access to the Indian market for not complying with an order to take down certain content.[74] In July 2022, Twitter initiated legal action in the Indian administrative court for a

(November 2022) <https://csis-website-prod.s3.amazonaws.com/s3fs-public/2023–02/221122_EU_DigitalRegulations-3.pdf?VersionId=04r7zBzS2kHNhsISAqn4NkC6lGNgip7S>, at 30.

[71] European Parliament, "Digital Sovereignty for Europe" (July 2020) <www.europarl.europa.eu/RegData/etudes/BRIE/2020/651992/EPRS_BRI(2020)651992_EN.pdf>, at 4.

[72] On June 29, 2022, the National Communications Commission (NCC) of Taiwan released a draft of the Digital Intermediary Services Act, which aims to establish greater accountability for social media platforms and refers to the EU's Digital Services Act. The draft Digital Intermediary Services Act has led to polarized reactions from the public and is now on hold.

[73] Section 69 of India's Information Technology Act.

[74] Billy Perrigo, "India's New Internet Rules Are a Step Toward Digital Authoritarianism" (*Time,* March 12, 2021).

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judicial review of such orders,[75] claiming that blocking orders from the Indian government are procedurally and substantively deficient under Section 69 (A) of the Information Technology Act. Twitter alleged that Indian officials have abused their power, failed to meet the procedural requirements, and fallen short in demonstrating how the content at issue is under the purview of Section 69 (A). Additionally, Twitter argued that in many cases, the orders were "disproportionate, overbroad and arbitrary."[76]

There are other, even larger elephants in the room. Russia recently fined Google millions of USD for not deleting banned content on YouTube,[77] not to mention China's data governance regime, which has long been the key cause of the fragmentation of global data policies.[78] There are also many smaller elephants in the room, such as Vietnam and Myanmar, which have mirrored the Chinese authoritarian model of data governance.[79] Ultimately, these competing models of platform governance will use international trade instruments, most likely through e-commerce/digital trade provisions, to influence other countries' digital policies.

4.3 Regulating VSS: Trade Aspects of Cultural Policy

4.3.1 Global Dominance of the Streaming Platforms: Cut the Cord!

Now turning to the other angle of digital media content regulation – cultural expression on VSS. There are different terms used to describe broad and unique types of streaming platforms, which are often based on their business models. For the purpose of this chapter, "video streaming services," as defined by the Body of European Regulators for Electronic Communications (BEREC)[80] and the Australian Communications and Media Authority (ACMA), refers to the "streaming of video content over

[75] Karan Deep Singh and Kate Conger, "Twitter, Challenging Orders to Remove Content, Sues India's Government" (*The New York Times*, July 5, 2022).

[76] *Ibid.*

[77] "Russia Fines Google $370 Million for Repeated Content Violations" (*Reuters*, July 19, 2022).

[78] See generally Henry Gao, "Digital or Trade? The Contrasting Approaches of China and US to Digital Trade" (2018) 21(2) Journal of International Economic Law 297.

[79] See Gerard McDermott and Alice Larsson, "The Quiet Evolution of Vietnam's Digital Authoritarianism" (*The Diplomat*, November 19, 2022) (describing a new system of digital surveillance and control that has emerged in Vietnam).

[80] See generally Body of European Regulators for Electronic Communications (BEREC), "Draft BEREC Report on the Internet Ecosystem" BoR (22)87 (June 9, 2022) <www.berec.europa.eu/en>, at 29, 52.

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the public Internet," which provides "professionally produced content – either by the in-house film studios or through licensing deals, including on-demand services and/or linear content."[81] This content is subscription-based[82] and ad-supported.[83] Unlike traditional audiovisual services such as broadcasting or cable television stations, for which video transmission requires a television aerial, a satellite dish, a set-top box, or a coaxial cable to connect to the services, VSS, such as Netflix, Disney+, Amazon Prime, or iQIYI, are delivered over the public Internet. Simply put, VSS allow audiences to bypass traditional distribution and thus "cut the cord."[84]

Digital media content has changed the landscape of the television industry. The increasing availability of public Wi-Fi, faster broadband Internet speeds, and unlimited mobile data plans offered by telecommunications operators have bolstered the growth of VSS. Dominant VSS platforms such as Netflix are transforming the prospects of the audiovisual industry and are now commonly considered a ready substitute for traditional television.[85] By way of illustration, in the US, VSS have significantly cut into cable's market share, reducing the number of cable subscriptions from 85 percent of households in 2015 to 71 percent in 2021.[86] More and more people are turning to VSS for their television consumption, which had reached a US household penetration rate of 80 percent by March 2022.[87] The television landscape continues to transform, and this transformation has gone international.[88]

[81] ACMA, "Supporting Australian Stories on Our Screen-Options Paper" (March 2020) <www.infrastructure.gov.au/have-your-say/supporting-australian-stories-our-screens-options-paper>.

[82] VSS are typically provided on the basis of a catalogue of programs selected by the media services suppliers in exchange for payment, that is, subscription video streaming services such as Netflix, or are delivered in bundles of other services such as Amazon Prime Video. BEREC, "Report on Harmonized Definitions for Indicators Regarding Over-the-Top Services" BoR (21) 127 (30 September 2021).

[83] These include Hulu, Disney+, and iQIYI, China's second-largest video streaming platform.

[84] Cord-cutting refers to consumers cancelling their traditional cable services and switching to VSS. See generally Bastiaan Baccarne et al., "The Television Struggle: An Assessment of Over-the-Top Television Evolutions in a Cable Dominant Market" (2013) 92(4) Communications & Strategies 43.

[85] Shin-yi Peng, supra note 2, at 24–25.

[86] The Henry Fund Research, "Video Streaming Service Industry" (February 9, 2022).

[87] Insider Intelligence, "Top OTT Video Streaming Services in 2022 by Viewer Count and Growth" (March 18, 2022).

[88] See, for example, The UK's Department for Digital, Culture, Media & Sport, "Consultation Outcome Audience Protection Standards on Video-on-Demand Services" (April 28, 2022) <www.gov.uk/government/consultations/audience-protec

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Cord-cutting is becoming the norm in the Asian-Pacific region. In South Korea, Netflix alone had more than 5 million subscribers by June 2022.[89] In Japan, the VSS market, primarily offered by Amazon Prime Video, Netflix, and Disney+, had a total of 44 million subscribers as of the end of August 2021.[90] In Australia, approximately 71 percent of Australian adults had at least one subscription streaming service in their household in 2020.[91]

The trend of cord-cutting brought about new regulatory challenges for national media regulators. Television has traditionally played a major role in forming public opinion, shaping cultural identities, and promoting linguistic diversity, thus contributing significantly to social inclusion. Within the domestic legal framework, the sector has been heavily regulated.[92] The justification for such heavy regulation of television content, however, has been weakened, because viewers of "traditional" television services also watch streaming content, which generally is not subject to the same regulation.[93] To illustrate, in most jurisdictions, there is a major dichotomy between (traditional) regulated television and (modern) unregulated video streaming services. In other words, although facing a looming regulatory storm, to a large extent, VSS remain totally unregulated, existing in a "regulation-free zone."[94] Because VSS are steadily becoming a substitute for traditional television, policymakers are struggling over whether and how to eliminate regulatory distinctions that have left traditional television services suppliers handicapped in the face of streaming services. Should existing media regulations be extended to manage streaming services? Here, an important consideration that further complicates this regulatory issue is the reality that for most countries – probably only except the US and China, where the dominant streaming services are run by domestic rather than foreign companies – such a regulatory dichotomy is literally about whether "foreign-owned"

tion-standards-on-video-on-demand-services/audience-protection-standards-on-video-on-demand-services#changing-landscape>.

[89] See, for example, Shirley Zhao and Lucas Shaw, "Netflix Needs New Subscribers" (*Business Standard*, January 14, 2022).

[90] See, for example, Patrick Brzeski, "Amazon Leads Netflix, Disney+ in Japan's Expanding Streaming Market" (*The Hollywood Reporter*, October 4, 2021).

[91] ACMA, supra note 81.

[92] Peng, supra note 2, at 40.

[93] CASBAA, "A Titled Playing Field: Asia-Pacific Pay TV and OTT" (2012) <www.casbaa.com/publication/a-tilted-playing-field-asia-pacific-pay-tv-and-ott/> (pointing out that viewers of cable television also watch streaming content).

[94] *Ibid.*, at 8.

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VSS should be subject to the same regulations as local broadcasters and cable channels. Admittedly, there has been unequal competition between "foreign" streaming platforms and "domestic" television legacies. To translate this phenomenon into WTO language, most WTO members are the "importing countries" of VSS. However, VSS fall outside the scope of these countries' domestic media law. As a result, local broadcasters and cable channels are at a significant business disadvantage compared to foreign VSS suppliers in terms of local bureaucracy, legal compliance costs, and other content regulations. The tension is sharp.[95]

4.3.2 *Leveling the Playing Field: Regulating Up or Down?*

Traditional media services suppliers have been calling for a "level playing field," or fair conditions between competitors in the media industry. On the one hand, it is a commonly shared regulatory principle to "treat like services alike" and refrain from using regulations as a means of choosing technological winners. Media regulators should not discriminate against different business models or technological features. Unequal and differential regulatory treatment in favor of the streaming platforms may mean that the regulators inevitably choose winners in the media industry. The business environment is that VSS gain "unfair" advantages by bypassing existing media content regulations.[96] It can be said that the asymmetric regulation has impeded the ability of broadcasters and cable channels to compete with their online competitors. This raises the question of whether the same requirements should be imposed on all services suppliers competing in the audiovisual sector, no matter whether the services are supplied via a traditional or a platform-based method.[97]

Trade associations such as the Cable and Satellite Broadcasting Association of Asia (CASBAA) advocate that VSS should be categorized as television services and thus be subject to traditional broadcasting and/or cable rules. The association stresses that national regulators should "reduce regulatory asymmetries and foster competition" by "extending

[95] For a more detailed discussion, see Peng, supra note 2, at 40–41.

[96] Vanessa Katz, "Regulating the Sharing Economy" (2015) 30 Berkeley Technology Law Journal 1067, at 1072–1081.

[97] See generally Telecommunications Management Group, "Trends and Issues in Online Video Regulation in the Americas" (June 2021) <www.tmgtelecom.com/wp-content/uploads/2021/06/TMG-Trends-and-issues-in-online-video-regulation-in-the-Americas-June-2021.pdf>.

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traditional regulation to online video services."[98] To promote the concept of a "level playing field,"[99] the British Broadcasting Corporation's (BBC) director-general has publicly stated that "TV-like" streaming services should be regulated to the same extent as the UK's traditional TV so as to promote British content and preserve cultural heritage.[100] Conversely, the VSS groups emphasize that traditional television and video streaming has "inherent technical and functional differences."[101] They argue that different viewer experiences are a key consideration in distinguishing streaming platforms from their offline analogues. Some believe that the even-handed approach is not only unnecessary, but also infeasible. Additionally, extending old regulations to new media platforms could potentially harm business innovation, which in the long run may cause the decline of "media pluralism."[102] The primary position is that regulators should not interfere with new services in order to protect "old" services.[103]

The question of whether the two types of services at issue should be required to meet the same standards involves the assessments of sector-specific policy objectives and market conditions under which legacy suppliers and digital platforms compete. In this regard, the Canadian Radio-television and Telecommunications Commission, while recognizing the need for a level playing field, ultimately decided that the two types of services at issue are "fundamentally different and warrant different regulatory treatment."[104] Similarly, the ACMA also decided not to expand legacy media regulations to online players. Alternatively, however, the government reduced several general regulatory obligations for the broadcasters so as to level the playing field.[105] In other words, instead of "regulating up," the Australian government reflected on the traditional

[98] CASBAA, supra note 93, at 9.

[99] Here, New Zealand represents an extreme case in that the same regulatory framework applies to both traditional television and VSS in a "technology-neutral" and "even-handed" manner. Asia Video Industry Association (AVIA), "OTT TV Policies in Asia" (2018) <https://avia.org/wp-content/uploads/2018/08/PUB-OTT-TV-Policies-in-Asia-2018.pdf>, at 19.

[100] See, for example, Michael Savage, "BBC Chief Says TV Streaming Services Squeeze Out British Culture" (*The Guardian*, March 15, 2020).

[101] Telecommunications Management Group, supra note 97, at 15.

[102] *Ibid.*, at 17. See generally Henry Allen et al., "Media Pluralism: What Matters for Governance and Regulation?" (2017) 30(2) Journal of Media Economics 47.

[103] Telecommunications Management Group, supra note 97, at 15.

[104] *Ibid.*

[105] *Ibid.*, at 25.

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media regulations and pursued regulatory parity by "deregulating down" the requirements imposed on incumbents.

4.3.3 *Local Content Requirements on Netflix: Cultural Expression*

Nevertheless, there is a legislative trend across various jurisdictions to issue new regulations to impose local content and local investment requirements on video streaming platforms. In other words, although many countries have decided that existing media law should not be applied across the board to all, they have opted to impose local content requirements on digital platforms. In Europe, the amended Audiovisual Media Services Directive (AVMSD) requires member states to ensure that VSS maintain at least a 30 percent quota of "European works" in their catalogues, with an emphasis on "the prominence of those works."[106] In addition, the amended AVMSD permits member states to adopt measures to financially support European works, including direct investment in local content and contributions to national funds. Such financial contributions can only be based on the revenues earned in that member state and must consider other financial contributions levied by other member states.[107] Put simply, VSS, such as Netflix, Disney+, and Amazon Prime Video, must ensure that at least 30 percent of their libraries are dedicated to local content in the EU, either through production or licensing.[108] Moreover, they may be required to invest, directly or indirectly, in local content. As stressed in the background papers of the Directive amendment,[109] video streaming platforms directly compete with broadcasters but have circumvented the local content requirement. By imposing a minimum 30 percent quota on VSS, "European expression" and cultural diversity will be promoted. At the same time, by increasing the investment in original European content, local employment in the media industry will likely surge.[110]

[106] Audiovisual Media Services Directive (AVMSD 2018), Directive (EU) 2018/1808 of the European Parliament and of the Council of November 14, 2018, Article 13.1.

[107] AVMSD 2018, Articles 13.2 and 13.3.

[108] Arguably, in order to meet the quota, streaming platforms can simply reduce the size of their catalogues by limiting the content the viewers can access in Europe in order to decrease the denominator. The platforms can also add outdated local reruns by acquiring existing content from local producers.

[109] European Commission, "Shaping Europe's Digital Future: Audiovisual and Media Services" <https://digital-strategy.ec.europa.eu/en/policies/audiovisual-and-media-services>.

[110] *Ibid*. See also Piero Papp, "The Promotion of European Works: An Analysis on Quotas for European Audiovisual Works and their Effect on Culture and Industry" (2020) Stanford – Vienna Transatlantic Technology Law Forum Working Papers No. 50.

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Under the mandate, some EU countries have introduced tailored legislation to implement AVMSD, while others are in the midst of transposing the AVMSD onto the domestic legal framework. For example, Spain requires VSS to reserve 30 percent of their catalogues for European works, and half of them must be spoken in the language of Spain.[111] The government of Portugal imposes an annual fee that levies 1 percent of VSS income to support Portuguese language film productions.[112] The French decree implementing the AVMSD obliges services suppliers of video streaming platforms to invest 20–25 percent of their revenue earned in France in local content. Similar requirements have been adopted in other EU member states, such as Italy and Switzerland.[113]

Outside of Europe, local content requirements for VSS have been carried out or are being considered by many countries, including Australia, Argentina, Canada, Mexico, and Taiwan, to name just a few.[114] In its policy consultation paper, the Australian media regulator pointed out that the ecosystem which supports domestic content is fading. Australian programs represent only 1.7 percent of titles for Netflix's entire catalogue. In spite of this, Australian viewers are increasingly ditching local broadcasters that rely on advertising revenue to survive. Without regulatory intervention, local broadcasters will soon become unable to produce Australian content to meet quota requirements.[115] The government is therefore aware of the urgent need to require VSS to make or source "quality Australian stories" that help Australians to "understand each other."[116]

In brief, more and more national media laws are deciding to impose local content requirements on streaming platforms, ranging from including a certain amount of local content in their catalogues, displaying a minimum percentage of content in the local language, producing a certain amount of media content locally, and making financial contributions to local content production.[117] Such a legislative trend, however,

[111] Joan Faus, "Spain to Force Streaming Platforms to Air Shows in Regional Languages" (*Reuters*, November 24, 2021).
[112] Branislav Pekic, "Portugal: SVoD Platforms to Pay 1% Annual Tax" (*Advanced Television*, August 26, 2021).
[113] John Revill, "Swiss Voters Approve "Lex Netflix" TV Streaming Funding Law" (*Reuters*, May 17, 2022).
[114] Telecommunications Management Group, supra note 97, at 29, 39.
[115] ACMA, supra note 81.
[116] *Ibid.*
[117] Telecommunications Management Group, supra note 97, at 14–20.

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has been labeled a potential "trade barrier" by the US – the dominant "exporting country" of VSS – as it may impose an unnecessary compliance burden on digital platforms and limit global market access of VSS. This raises the question of whether the local content requirements placed on digital platforms violate obligations under international trade agreements, especially in the FTA context.[118]

4.3.4 "Foreign" and "Domestic" Streaming Content: Definitions, Likeness, and Exceptions

4.3.4.1 Performance Requirement: "Domestic" Streaming Content

First, a preliminary issue is how to define "domestic content" on video streaming platforms. How can we determine the "origin" of a streaming TV show or film? Indeed, the definition of "domestic content" becomes even more complicated when considering the winds of coproduction and outsourcing. Netflix, among other streamers, has extensively grown its coproduction partnerships in recent years.[119] The industry reality is that digital media content is comprised of sophisticated inputs from multiple sources. Should the Netflix TV show series "Emily in Paris" be considered European content due to that fact that it was filmed in Europe (*i.e.*, Paris)? Or should it be deemed non-European content because it was produced by an American company (*i.e.*, Netflix) and it starred a British and American actress (*i.e.*, Lily Collins) as the eponymous Emily? Will "cultural identity" be a factor in deciding the "nationality" of a TV show? Will it be a consideration if many French critics condemned the show for stereotyping Parisians and misrepresenting French culture? All of these questions lead us to rethink issues of cultural diversity in the digital context.[120]

In this regard, the nationality assessment under the AVMSD serves as a proper illustration. The question of whether a TV show is a "European work" under the meaning of Article 13 of the AVMSD is determined

[118] USTR, "National Trade Estimate Report on Foreign Trade Barriers" (2022), at 36–37 (Australia); 82 (Canada); 212 (France); 213 (Portugal); 214 (Spain); 323 (Korea); 352 (Mexico); 375 (Nigeria); 435 (Russia); 498 (Turkey).

[119] See generally Adelaida Afilipoaie et al., "The 'Netflix Original' and What It Means for the Production of European Television Content" (2021) 16(3) Critical Studies in Television: The International Journal of Television Studies 304.

[120] Mira Burri, "EU External Trade Policy in the Digital Age: Has Culture Been Left Behind?" (2022) Trade Law 4.0 Working Paper Series University of Lucerne, at 21.

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according to the criteria provided in Article 1. To be qualified as "European works," the works must originate in EU member states or from European third-country states that are parties to the European Convention on Transfrontier Television (ECTT)[121] and must also fulfill certain conditions set out in the AVMSD.[122] Alternatively, the works must be coproduced within the framework of agreements related to the audiovisual sector concluded between the EU and third countries and must fulfill the conditions set out in those agreements.[123] Overall,[124] key considerations provided by the AVMSD include the place of residence of authors and employees of a work, the place of establishment of the producers, and the financial contributions of coproduction costs.[125] In other words, whether streaming content can be qualified as a European work must be assessed based on relevant information and evidence proving the percentage of European authors, workers, producers, and fiscal sponsors in a specific TV show.

Such an exercise, however, may constitute performance requirements for investment in services. Most FTAs lay out general rules for the treatment of investors and investments. Local content requirements – whether they involve hiring a certain proportion of local "TV people" or increasing investment in local production facilities – must be considered with respect to their potential violation of international economic law. For example, Article 14.10 of the USMCA prohibits the parties from imposing any requirement to "purchase a service from a person in its territory,"[126] or to "achieve a given level or percentage of domestic content." [127] Such a provision, on its face, serves as a protection against

[121] The European Convention on Transfrontier Television of the Council of Europe (AVMSD 2010), Directive 2010/13/EU of the European Parliament and of the Council, March 10, 2010.

[122] AVMSD 2010, Article 1 (a)(b).

[123] AVMSD 2010, Article 1 (c).

[124] AVMSD 2010, Article 1(3): "The works referred to in points (n)(i) and (ii) of paragraph 1 are works mainly made with authors and workers residing in one or more of the States referred to in those provisions provided that they comply with one of the following three conditions: (i) they are made by one or more producers established in one or more of those States; (ii) the production of the works is supervised and actually controlled by one or more producers established in one or more of those States; (iii) the contribution of co-producers of those States to the total co-production costs is preponderant and the co-production is not controlled by one or more producers established outside those States."

[125] *Ibid.*

[126] USMCA, Article 14.10 (c).

[127] USMCA, Article 14.10 (b).

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local content requirements on digital platforms.[128] Based on that, the US has been "actively monitoring" whether Mexico's audiovisual reform bill, which calls for local content requirements on VSS, is consistent with the USMCA obligations.[129]

4.3.4.2 Nondiscrimination: "Like Digital Products"

Another important issue is discrimination. Let us continue the analysis in the FTA context using the USMCA as an example. Article 19.4 of the USMCA requires parties to ensure "non-discriminatory treatment of digital products" by according no "less favorable treatment" to "like digital products."[130] A USMCA party may not discriminate against digital products originating in another party, either because they were "produced in another party" or because they were "produced by a person of another party."[131] According to Article 19.1, "digital products" include a video that is "digitally encoded, produced for commercial sale or distribution, and that can be transmitted electronically."[132] It is worth mentioning that a similar provision can be found in Article 14.4 of the CPTPP, with an additional subparagraph clarifying that the provision shall not apply to broadcasting.[133] In any event, taking the example of Mexico' s audiovisual reform bill from above, a Mexican law imposing local content quotas on VSS may be considered as treating US TV shows less favorably than Mexican TV shows on digital platforms. Here, a violation could be found by comparing US and Mexican TV shows. If they are "like TV shows," the adverse treatment of the US TV shows under the Mexican measure may be considered discrimination.

At the core of the question is how to determine "likeness" when the products at issue are those directly associated with cultural expression. The tension between the liberalization of the audiovisual trade and the preservation of cultural identity is an old "trade v. culture" debate. The

[128] It should be noted that the obligation does not apply to the performance requirements a party has set out in Annexes I and II. See Section 3.4.2.

[129] USTR, supra note 118, at 352.

[130] USMCA, Article 19.4 (1).

[131] Note that a subsidy or grant provided by a party is not subject to the nondiscriminatory obligations. USMCA, Article 19.4(2). The carve-out is important because these cultural measures, by their very nature, are applied in a discriminatory fashion, that is, they are available to local but not foreign services suppliers. In practice, governmental financial support is often provided to ensure the viability of certain domestic production and distribution of audiovisual services so as to sustain the availability of local content.

[132] USMCA, Article 19.1.

[133] CPTPP, Article 14.4(4).

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production and distribution of television programs typically fall under the definition of "core cultural products" within the meaning of the United Nations Educational, Scientific and Cultural Organization's (UNESCO) Cultural Diversity Convention.[134] Now, the streaming technologies put the old wine into new bottles: Can the difference in cultural perspectives be taken into account when assessing the likeness of digital media content?

The *Canada – Periodicals* dispute, in which the confrontation between trade and culture is best demonstrated, can be used as an apt source in answering this question.[135] Aiming to protect the Canadian publications industry, the Canadian Parliament amended the Excise Tax Act and imposed an advertising tax on split-run editions of foreign periodicals, targeting popular US magazines such as *Time*.[136] According to the official statement from Canada, the measures were intended to "foster conditions in which indigenous magazines can be published, distributed and sold in Canada on a commercial basis,"[137] thus, to "maintain an environment in which Canadian magazines can exist in Canada alongside imported magazines."[138] The US brought the case to the WTO, claiming that Canada's discriminatory measures violated GATT Article III on national treatment. The panel basically agreed with the US position that the "cultural products" at issue, namely the US split-run magazine and the Canadian magazine, were "like products" in terms of relevant factors, including the magazines' end uses in the Canadian market, consumers' tastes and habits, and the magazines' properties, natures, and qualities.[139] The Appellate Body took a different approach and found that the imported US split-run periodicals were "directly competitive or substitutable" with domestic Canadian non-split-run periodicals in the Canadian market.[140]

The arguments put forth in *Canada – Periodicals,* now more than two decades old, still echo today's cultural concerns. Throughout the litigation, Canada argued that the two products in dispute were not "like products" within the meaning of Article III:2 of the GATT. Canada

[134] UNESCO, "Universal Declaration on Cultural Diversity" (November 2, 2001).
[135] Panel Report, *Canada – Certain Measures Concerning Periodicals (Canada - Periodicals),* WT/DS31/R, March 14, 1997; Appellate Body Report, WT/DS31/AB/R, June 30, 1997.
[136] Panel Report, *Canada – Periodicals*, para. 5.12–5.45.
[137] *Ibid.*, para. 3.31.
[138] *Ibid.*, para. 3.140.
[139] *Ibid.*, para. 5.22.
[140] Appellate Body Report, *Canada - Periodicals,* at 25–29.

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stressed that the split-runs substantially reproduced foreign editorial material, whereas the local magazines were developed for the Canadian market.[141] Canada further pointed out that the nature of the magazines was for intellectual consumption, which differed from normal goods in terms of physical use and physical consumption.[142] It followed that the "prime characteristic" of cultural goods should be their "intellectual content" rather than the criteria for noncultural goods, such as a bicycle or canned tuna fish.[143] Nevertheless, both the panel and the Appellate Body rejected Canada's "cultural claims" because "cultural identity was not at issue in the present case."[144] The former USTR Mickey Kantor even called the Canadian "cultural identity claim" an "excuse to protect the economic viability of the Canadian (cultural) industry."[145]

The *Canada – Periodicals* dispute demonstrates the status of "culture" in the determination of "likeness." Turning back to the scenario above, if we follow WTO jurisprudence, there is little room for a trade tribunal to rule that US TV shows and Mexican TV shows on streaming platforms contain different cultural elements and are therefore "unlike digital products." Local content requirements for VSS may therefore violate the obligations of nondiscriminatory treatment of digital products under the Digital Trade/E-Commerce Chapter of the FTAs, simply because the domestic regulation treats "like TV shows" unlike.

4.3.4.3 "Digital Cultural Exemption" and Side Letter

The ultimate question is therefore whether the local content requirements, if found to be inconsistent with international trade or investment rules, can be justified under the exceptions. Looking back to the WTO negotiating history, "cultural exceptions" had been proposed during the Uruguay Round Negotiations but were eventually dropped from the

[141] Panel Report, para. 5.24.
[142] Panel Report, para. 3.61.
[143] *Ibid.*
[144] *Ibid.*, paras. 3.84, 5.45. The panel pointed out the following: "Many products, as diverse as works of art, designer clothing, phonograph records and cinematographic films contain intellectual or cultural content. Like magazines, these products were in widespread use prior to the adoption of GATT 1947. But of all these products, only cinematographic films were accorded special treatment in GATT 1947. Had the drafters of GATT 1947 sought to treat other intellectual or cultural products differently from products in general, they would have done so."
[145] Joseph Devlin, "Canada and International Trade in Culture: Beyond National Interests" (2005) 14(1) Minnesota Journal of International Law 177, at 180.

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negotiating texts.[146] As a result, neither GATT nor GATS explicitly provides for any "cultural exception" to WTO law.[147] Although the media landscape has gone through a digital transformation since then, little progress has been made within the WTO in this regard.[148] The question of how to adequately preserve cultural policy space for members has not been properly addressed in the WTO since the conclusion of the Uruguay Round. The debate, to a large extent, has been shifted to the arena of the FTAs. For example, the screen quota issue was at the heart of the controversy of US–South Korea FTA (KOURS) negotiations in the late 2000s, but South Korea decided not to seek a cultural exception under the KOURS.[149]

The concept of "cultural exceptions" has been at least partially realized in recent FTAs through mechanisms such as exemptions or side letters. In particular, Chapter 32 of the USMCA[150] – Exceptions and General Provisions – contains a far-reaching exemption to protect Canada's cultural industry, including the cultural content of digital platforms. To further clarify, Canada's cultural industry exemption from NAFTA has been continued in Article 32.6 of the USMCA to allow Canada to protect its "cultural industries," in particular, the production and distribution of television, video recordings, and film.[151] It should be noted, however, that additional text on retaliation in Article 32.6 has been added to allow the US and Mexico to take measures toward "equivalent commercial effect" in response to any action taken by Canada to protect its cultural industry.[152] Nevertheless, Article 32.6 of the USMCA effectively safeguards Canada's regulatory autonomy over cultural industries. Accordingly, cultural measures on VSS, including local content requirements, are subject to the "cultural carve-out."

[146] See generally Paul, supra note 4.
[147] See generally Chi Carmody, "When Cultural Identity Was Not at Issue: Thinking About Canada – Certain Measures Concerning Periodicals" (1999) 30 Law & Policy of International Business 231 (proposing a waiver to the WTO Agreement with an aim of bringing WTO practice into closer conformity with international law); Tania Voon, *Cultural Products and the World Trade Organization* (Cambridge University Press 2007).
[148] See generally Burri, supra note 120.
[149] See, for example, Park Moo-jong, "Dispute over Screen Quota" (*The Korean Times*, May 2, 2019).
[150] USMCA, Articles 32.1, 32.2.
[151] USMCA, Article 32.6 (1).
[152] USMCA, Article 32.6 (4).

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A less comprehensive and somehow more straightforward approach has been taken in the CPTPP. Canada has concluded bilateral agreements with all other CPTPP parties via the exchange of side letters to "ensure Canada's ability to adopt programs and policies that support its cultural sector, including in the digital environment."[153] In the side letters, CPTPP parties agree that Canada has the discretion to define "Canadian content," to protect its online content, and to maintain full policy flexibility to protect its cultural sector.[154] Although its civil society criticized the side letters, contending they do not constitute a broad cultural exemption to ensure the production of high-quality Canadian content in the digital environment, the CPTPP side instruments leave the door open for the Canadian government to regulate VSS in line with its cultural policy. In fact, at the time of this writing, Canada's parliament had just passed the Online Streaming Act to impose local content requirements on streaming platforms.[155] By requiring foreign streaming giants like Netflix and Spotify to feature a certain amount of Canadian content, the Act aims to "ensure Canadian stories . . . are widely available on streaming platforms," and to "reinvest in future generations of artists and creators in Canada."[156]

To conclude, the "trade v. culture" history has a new chapter: the protection of local culture in global digital platforms. For decades, trade policy debates surrounding the audiovisual sector have been prominent, given that the sector is closely concerned with cultural activities. The same holds true in the twenty-first century, where certain digital media content can be seen as the manifestation of a culture. Some TV shows on streaming platforms can be described as a way to reflect the social characteristics of a country and its people, as well as a venue by which to present a country's cultural identity to the rest of the world.[157] When VSS stream such content, they convey and expand certain cultural

[153] Government of Canada, "What Does the CPTPP Mean for Canadian Culture?" (2018) <www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/sectors-secteurs/culture.aspx?lang=eng>.

[154] See, for example, CPTPP, Singapore – Side Instruments, <www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/text-texte/sl_la-singapore-singapour.aspx?lang=eng#1>.

[155] Government of Canada, "Online Streaming Act receives Royal Assent" (April 27, 2023) <www.canada.ca/en/canadian-heritage/news/2023/04/online-streaming-act-receives-royal-assent.html>.

[156] *Ibid.*

[157] See Chris Barker, *Television, Globalization and Cultural Identities* (Open University Press 2000), at 31–32.

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expressions to their audiences. Notwithstanding, the audiovisual sector is also an economically significant sector that shares commercial characteristics common to other services sectors. The argument that a certain portion of digital media content is more entertaining than cultural characters and they are therefore in no way different from any other commercial product is convincing and hard to rebut.[158] From Hollywood to Silicon Valley, international trade agreements have been struggling to play a more prominent role in mitigating the collision between commercial and cultural interests. As Burri pointed out, there are many paths open to improve the approaches to cultural diversity in the trade context.[159] Amid the hype over the Metaverse, the media landscape is now developing into a collective space created by VR technologies that allow users to interact with one another through avatars.[160] Cultural diversity in the VR space will be even more challenging and multifaceted to policymakers when it comes to avatars. The "trade v. culture" clash in international economic law will continue, and it will also become much more complex in a datafied world.

4.4 Media Platformization and Local Presence

4.4.1 Jurisdiction and Law Enforcement Problems

In any event, media platformization brings about issues surrounding jurisdiction. No matter how carefully crafted, both angles of this chapter – speech regulation on UGC and cultural policy on VSS – must face enforceable reality. Given the global access of the digital platform services, the platforms regulations discussed above – whether content moderation obligations or local content requirements – should ideally be evenly enforced, both onshore and offshore. In this regard, a survey conducted by the EU when the DSA was being introduced revealed that 83 percent of the stakeholders believed that the territorial scope of the Act should be expanded to "digital services established outside the EU when they provide services to the EU users."[161] However, technically

[158] WTO, "Background Note by the Secretariat, Advertising Services" S/C/W/47 (July 9, 1998); WTO, "Joint Statement on the Negotiations on Audiovisual Service" TN/S/W/49 (June 30, 2005).

[159] Burri, supra note 120, at 22.

[160] See Section 6.4.1.

[161] European Commission Staff Working Document, "Impact Assessment Report Annexes Accompanying the Document Proposal for a Regulation of the European Parliament

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speaking, digital platforms that house their servers outside a country's territory are largely out of regulatory reach in terms of law enforcement.[162] How, then, can we govern services suppliers based in other jurisdictions?

In the age of the platform economy, if offshore services suppliers can easily escape the same level of regulation, such a law enforcement problem will create a misalignment of incentives for their media market to be served from overseas. For example, Singapore's Content Code for Over-The-Top (OTT) Services (the Content Code) applies to both local and offshore OTT TV services suppliers.[163] Even so, although "the law in the books" makes no distinction between onshore and offshore services suppliers, "the law in action" might be quite different, simply because it is much more difficult for its media regulator – the Infocomm Media Development Authority (IMDA) – to compel offshore OTT TV services suppliers to comply with the Content Code.[164] Such an uneven enforcement of law can effectively force local suppliers to relocate and hollow out the local industry.

Placing this problem in WTO language, the legal question here is how to evenly enforce domestic regulation on services suppliers of cross-border services trade (Mode 1) and commercial presence (Mode 3). In this regard, a notable example is Turkey's Regulation on the Transmission of Radio, Television, and On-Demand Services on the Internet (Turkey's Internet Regulation), which requires streaming services suppliers to comply with a comprehensive licensing scheme and to establish a commercial presence in Turkey[165] – virtually restricting digital platforms from supplying services merely on a cross-border basis without establishing a physical presence in Turkey.

In a similar vein, a relatively soft requirement has been adopted in the DSA. Article 13 of the DSA requires digital platforms that offer services in any of the EU member states but do not have an establishment therein to designate "a legal or natural person as their legal representative" within the EU. Such a legal or natural person should be mandated by the platform companies to cooperate with the relevant authorities and

and the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive" 2000/31/EC, 15.12.2020, SWD(2020) 348 final PART 2/2, at 22.

[162] See CASBAA, supra note 93, at 27.

[163] AVIA, supra note 99, at 7.

[164] *Ibid.* (Pointing out that the resulting lighter regulation on overseas competitors creates incentives for home market to be served from overseas.)

[165] USTR, supra note 118, at 498.

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comply with the DSA. The same Article further states that "the designated legal representative can be held liable for non-compliance with obligations" under the DSA, without prejudice to the liability and legal actions that could be initiated against the platform company.[166] It should be noted, however, that unlike the "commercial presence requirements" under Turkey's Internet Regulation above, the DSA explicitly states that the designation of a legal representative within the meaning of Article 13 shall not amount to an establishment in the EU.[167] It may be presumed from the preparatory documents of the DSA that Article 13 is a dedicated drafted provision that is designed, on the one hand, to ensure similar supervision regardless of the place of establishment of the digital platforms, and on the other hand, to comply with the EU's market access commitments undertaken in the GATS.[168]

4.4.2 *Local Presence as a Condition for Digital Platform Services*

From the above, and in the light of media platformization, jurisdiction and law enforcement problems, among others, can be addressed through requirements for commercial presence (as stipulated in Turkey's Internet Regulation) or legal representatives (as required by the DSA). At any rate, local presence requirements have long been identified by the US as a trade barrier for cross-border services trade.[169] The US efforts to prevent the spread of local presence requirements can be traced back to the US-led trade deals in the early 2010s.[170] A typical provision can also be found in the Annex on E-commerce of the Trade in Services Agreement (TiSA) negotiating text.[171] Such a provision has become a "template" for the services chapter in several subsequent FTAs.[172] For example, Article 10.6 of the CPTPP states the following:

[166] DSA, Article 13(3).
[167] DSA, Article 13(1).
[168] European Commission Staff Working Document, supra note 161, at 22.
[169] Communication by the United States, "Work Programme on Electronic Commerce" S/C/W/359, December 17 (2014), para. 4.1 (Information Flow and Localization Requirements).
[170] See, for example, US–Japan Trade Principles for ICT Services. See also US–EU Trade Principles on Information, Communication Technology <https://ustr.gov/issue-areas/services-investment/telecom-e-commerce/information-and-communication-technology-ict>.
[171] Peng, supra note 2, at 42.
[172] See, for example, RECP, Article 8.11 (Local Presence); CPTPP, Article 10.6 (Local Presence).

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> **Article 10.6: Local Presence**
> No Party shall require a service supplier of another Party to establish or maintain a representative office or any form of enterprise, or to be resident, in its territory *as a condition* for the cross-border supply of a service (emphasis added).[173]

Nevertheless, this obligation may be subject to a reservation in a party's schedule. For example, the nonconforming measures maintained by Australia, as set out in its Schedule of the CPTPP Annex II, reserve the country's right to adopt or maintain any local presence measures with respect to audiovisual services transmitted electronically.[174] It is surprising to note, however, that the reservation of a local presence on digital media services is, to date, rarely used in international trade agreements.

All in all, international trade rules that ban local presence requirements enable platform companies to supply services without establishing a local presence, which may have significant implications for the ability of governments to regulate and enforce platform regulations. From the perspective of law enforcement, governments have many reasons to introduce local presence requirements as a condition for foreign digital platforms to supply services on a cross-border basis, as it is virtually a prerequisite for a government to ensure that domestic regulation can be effectively applied and thus enforced. In countries where there is no requirement to maintain a local presence, digital platform operations may circumvent regulatory obligations.[175] As advocated by civil society, "without a local presence of companies, there is no entity to sue and the ability of domestic courts to enforce [local] standards . . . is fundamentally challenged."[176] Said another way entirely, a platform company with a locally registered entity would render the authority's law enforcement much easier, in that the companies can be legally compelled by the local authority to engage with the administrative process, submit information,

[173] CPTPP, Article 10.6.

[174] CPTPP, Annex II (Non-Conforming Measures) – Australia-9 (Broadcasting and Audiovisual Services, Advertising Services, and Live Performance).

[175] International Trade Union Confederation, "E-Commerce, Free Trade Agreements, Digital Chapters and the Impact on Labor" (2019) < www.ituc-csi.org/IMG/pdf/digital_chapters_and_the_impact_on_labour_en.pdf >, at 24–25.

[176] Australian Fair Trade & Investment Network, "Submission to the Department of Foreign Affairs and Trade on the Plurilateral Negotiations on Trade-Related Aspects of Electronic Commerce" (February 2020) <www.dfat.gov.au/sites/default/files/digital-trade-submission-aftinet.pdf>, at 18.

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and thus comply with domestic regulation.[177] In the case of digital media content regulation, a local presence requirement helps to ensure that the regulators maintain their ability to enforce UGC content moderation as appropriate. Digital speech platforms with a local presence can be sued for breaches of domestic regulations, brought to the local court, and held accountable for a legal remedy to address illegal content. Similarly, in the case of a local content requirement, local presence also means that cultural policies and court judgments against VSS can be more effectively enforced.

The challenges of holding digital platform companies accountable without a local presence are evident. In view of this, international trade rules prohibiting local presence requirements constrain a state's policy space to address free speech and cultural expression. To conclude, international trade agreements in the age of datafication now face this dilemma. At one end of the spectrum, a state's sovereignty to enforce regulations against platforms might be compromised without their local presence. At the other end of the spectrum, cross-border digital trade without a local presence in other countries may be the most efficient business model for many platforms, especially SMEs. Requiring a digital platform supplying services from offshore to have a local presence in the country may inevitably add operational costs and thus constitute a market access barrier to cross-border services trade.

4.5 Conclusion

In this chapter, we have examined the interplay between digital media content regulation and international economic law. To better explain their interactions, this chapter spotlights two policy areas – UGC moderation and VSS screen quota – as windows for exploration. When data becomes speech and expression, data governance requires perspectives that extend well beyond technological and economic factors. Both the UGC and VSS regulations analyzed in this chapter are prime examples demonstrating the need to regulate content moderation, to alter the power distribution in the Internet ecosystem, and to protect noneconomic values such as cultural diversity in global digital platforms. The

[177] Australian Council of Trade Unions (ACTU), "Australia-Singapore Digital Economy Agreement, Submission by the Australian Council of Trade Unions to the Joint Standing Committee on Treaties" (September 25, 2020) <www.actu.org.au/media/1449300/d49-actu-submission-australia-singapore-digital-economy-agreement.pdf>, at 7.

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findings from this chapter extend beyond issue-specific contexts to identify the contradictions between, on the one hand, the free trade and global expansion path offered by the international trade regime and, on the other hand, the public policy objectives pursued by national media law and policy. It goes without saying that the excessive market concentration of social media platforms, acting as "gatekeepers" of the flow of digital media content, may systematically discriminate against certain "speech" in datafication-enabled content moderation or promote extremist speech through algorithmic amplification. It is equally obvious that the overwhelming global market share of the dominant streaming platforms may work against the goals of media pluralism and cultural diversity. This "competition" angle is our focus in Chapter 5.

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