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Impact of Free Trade Agreements on Internet Policy, a Latin America Case Study

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Abstract
The question of how Free Trade Agreements (FTAs) affect internet policy is crucial for the global evolution of the internet. Although countries agree that no nations should impose restrictions on the development of the internet in other nations, FTAs are playing an important role in shaping local internet regulations. Indeed, since the implementation of the Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPS) in 1995, FTAs have commonly included international intellectual property obligations. With the evolution of cyberspace and cross-border e-commerce over the past 15 years, treaties of this type also started to incorporate internet policy regulations, such as obligations regarding countries' country-code domain name (ccTLD) systems, internet service provider (ISP) liabilities, and treatment of personal data. Through FTAs, some countries are bilaterally agreeing to obligations related to local internet operations, in exchange for more favorable trade conditions. This situation has led many countries to alter their internet systems with transplanted foreign regulations, which are frequently inadequate to meet local needs, and in the worst cases, it poses severe threats to internet users' rights. This paper analyses the landscape of FTAs that impact internet policy in Latin America. It shows how FTAs have shaped internet policy in a network of countries – in many cases, leading these countries to create regulations that have not undergone local public scrutiny.

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LATIN AMERICA AS A CASE STUDY

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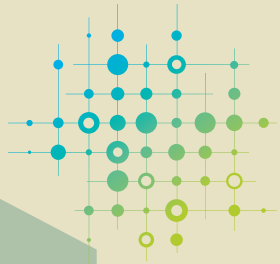

CENTER FOR GLOBAL COMMUNICATION STUDIES

IMPACT OF FREE TRADE AGREEMENTS ON INTERNET POLICY: LATIN AMERICA AS A CASE STUDY

"Countries should not be involved in decisions regarding another country's country code Top-Level Domain (ccTLD). Their legitimate interests, as expressed and defined by each country, in diverse ways, regarding decisions affecting their ccTLDs, need to be respected, upheld and addressed via a flexible and improved framework and mechanisms."

Paragraph 63, Tunis Agenda for the Information Society (2005)

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1. INTRODUCTION

The question of how Free Trade Agreements (FTAs) affect internet policy is crucial for the global evolution of the internet. Although countries agree that no nations should impose restrictions on the development of the internet in other nations, FTAs are playing an important role in shaping local internet regulations.[1]

Indeed, since the implementation of the Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPS) in 1995, FTAs have commonly included international intellectual property obligations. With the evolution of cyberspace and cross-border e-commerce over the past 15 years, treaties of this type also started to incorporate internet policy regulations, such as obligations regarding countries' country-code domain name (ccTLD) systems, internet service provider (ISP) liabilities, and treatment of personal data. Through FTAs, some countries are bilaterally agreeing to obligations related to local internet operations, in exchange for more favorable trade conditions. This situation has led many countries to alter their internet systems with transplanted foreign regulations, which are frequently inadequate to meet local needs, and in the worst cases, it poses severe threats to internet users' rights.

This paper analyses the landscape of FTAs that impact internet policy in Latin America. It shows how FTAs have shaped internet policy in a network of countries – in many cases, leading these countries to create regulations that have not undergone local public scrutiny.

In section 2, I compile a complete list of FTAs in Latin America that contain regulations with direct impact on internet policy. In section 3, I categorize their most common clauses, which include obligations on domain name management, intermediary liability, protection of personal data and promotion of e-commerce, and I show the broad coverage of these trade treaties.

In section 4, I focus on the implementation of two clauses: the adoption of local domain name dispute resolution mechanisms and of ISP liability. These two provisions are common to most FTAs and are regulated in detail in the treaties. Experiences with implementing these clauses illustrate the interesting challenges of regulating internet policy through trade treaties. While the treaties may have had a positive impact on the countries' trade relations, they have also

[1] This has been the agreement in the World Summit on the Information Society (WSIS), as is reflected in the Tunis Agenda. See, for example, Paragraphs 38 ("We call for the reinforcement of specialized regional internet resource management institutions to guarantee the national interest and rights of countries in that particular region to manage their own internet resources, while maintaining global coordination in this area."), 48 ("We note with satisfaction the increasing use of ICT by governments to serve citizens and encourage countries that have not yet done so to develop national programmes and strategies for e-government."), 64 (quoted *supra*), and 65 ("We underline the need to maximize the participation of developing countries in decisions regarding internet governance, which should reflect their interests, as well as in development and capacity building.")

locked them into internet regulations that did not take into account the national context, local needs and local legal systems.

In section 5, I recap some lessons from the Latin American experiences with negotiating and implementing FTAs. These experiences serve to highlight the importance of incorporating flexible clauses in the FTAs to allow enough space for local policy evolution. They also support the argument for allowing open debates and multistakeholder involvement during the negotiation and implementation stages of the treaties.

FTAs have been an important factor in molding Latin American internet policy, and their impact has not been analyzed yet from a regional perspective. This study aims to examine their role and provide recommendations that can support a thriving internet ecosystem in the region.

2. Network of FTAs with Impact on Internet Policy in Latin America

Currently, 16 treaties in force in Latin America have clauses that address internet policy. These treaties are the following: [2]

1. Mexico – European Union (EU) Partnership [1997][3]
2. Mexico – EU [2000][4]
3. Chile – United States (USA) [2003][5]
4. Chile – European Union (EU) [2003][6]
5. CAFTA-DR (Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua) -USA [2004][7]
6. Peru – USA [2006][8]
7. Colombia – USA [2006][9]
8. Nicaragua – Taiwan [2006][10]

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[2] We compiled this list based on the information provided by the following trade offices and institutions, which we validated with representatives from the respective countries: Organization of American States – Foreign Trade Information System (http://www.sice.oas.org/agreements_e.asp), Office of the United States Trade Representative (http://www.ustr.gov/trade-agreements/free-trade-agreements), and the European Commission Directorate General for Trade (http://ec.europa.eu/trade/policy/countries-and-regions/regions)/ We have also reviewed the Mexico – USA (Nafta) [1992] but found no internet-related provisions, probably due to the fact that the treaty was signed at a time where there was no broad public internet access.

[3] http://www.sice.oas.org/Trade/mex_eu/english/index_e.asp

[4] http://www.sice.oas.org/Trade/mexefta/MX_FTA_s.pdf

[5] http://www.sice.oas.org/Trade/chiusa_e/chiusaind_e.asp

[6] http://www.sice.oas.org/Trade/chieu_e/ChEUin_e.asp

[7] http://www.sice.oas.org/Trade/CAFTA/CAFTADR_e/CAFTADRin_e.asp

[8] http://www.sice.oas.org/Trade/PER_USA/PER_USA_e/Index_e.asp

[9] http://www.sice.oas.org/Trade/COL_USA_TPA_e/Index_e.asp

[10] http://www.sice.oas.org/Trade/NIC_TWN/NIC_TWN_e/index_e.asp

9. Panama – USA [2007][11]
10. Chile – Australia [2008][12]
11. Colombia – Canada [2008][13]
12. Peru – Canada [2008][14]
13. Peru – South Korea [2010][15]
14. Peru – Japan [2011][16]
15. Central America (Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, Panama) – EU [2012][17]
16. Andean Community (Colombia, Peru and expanding) – EU [2013][18]

There is, additionally, another treaty being negotiated now, the Trans-Pacific Partnership agreement (TPP), and the last draft on its IP chapter, dates from May 2014.[19]

The TPP is a multilateral trade treaty being negotiated by 12 countries from the Pacific Rim: Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, United States and Vietnam.[20] Due to their commercial nature, the negotiations of the TPP are secret and not subject to public consultation. As this study will discuss in more detail, the TPP is controversial because its broad scope goes beyond traditional trade issues, such as tariff-free treatment for exports of goods and services, and it also touches on digital topics, such as online protection of intellectual property. This broader reach could potentially have a negative impact on internet users' rights to free speech, privacy and due process, and could magnify the negative effects of existing treaties, as this study aims to show.[21]

The network of FTAs listed above includes 11 countries of the Latin American region – Chile, Colombia, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama and Peru – all of which are developing economies.[22] It is completed by five developed jurisdictions, with some of the world's highest GDPs (Australia, Canada, the European

[11] http://www.sice.oas.org/Trade/PAN_USA_TPA_Text0607_e/Index_e.asp
[12] http://www.sice.oas.org/Trade/CHL_AUS_Final_e/CHL_AUSind_e.asp
[13] http://www.sice.oas.org/TPD/AND_CAN/Final_Texts_CAN_COL_e/index_e.asp
[14] http://www.sice.oas.org/Trade/CAN_PER/CAN_PER_e/CAN_PER_index_e.asp
[15] http://www.sice.oas.org/Trade/PER_KOR_FTA/Texts_26JUL2011_e/PER_KOR_ToC_e.asp
[16] http://www.sice.oas.org/Trade/PER_JPN/EPA_Texts/ENG/Index_PER_JPN_e.asp
[17] http://www.sice.oas.org/TPD/CACM_EU/Text_22March2011/ENG/Index_e.asp
[18] http://ec.europa.eu/trade/policy/countries-and-regions/regions/andean-community/
[19] This last draft was last leaked on October 2014, https://www.wikileaks.org/tpp-ip2/tpp-ip2-chapter.pdf
[20] See the TPP section of the Office of the United States Trade Representative website, http://www.ustr.gov/tpp
[21] On the problems of the TPP, see the Electronic Frontier Foundation (https://www.eff.org/issues/tpp) and Public Citizen summaries (http://www.citizen.org/TPP).
[22] See the *United Nations World Economic Situation and Prospects Update*. Available at http://www.un.org/en/development/desa/policy/wesp/archive.shtml. Further to the World Bank's classification, the countries in the list are middle income economies, except for the case of Chile, which is considered a high income economy. See the World Bank, *Country and Lending Groups*, at http://data.worldbank.org/about/country-and-lending-groups.

Union, Japan and the United States), and two other developing nations (South Korea and Taiwan).[23]

Fig.1. Latin American countries affected by the FTA network

The FTAs share very similar language and contain similar provisions. The agreements never mention the word "internet" and there is no chapter specifically addressing internet issues. However, these treaties do address a growing number of issues related to the local operation of the web, including in treaty chapters on intellectual property, telecommunications, and e-commerce, as well as mention of other policies regulated under general chapters and disclaimers elsewhere.

The next section describes the typical clauses in these treaties that most commonly have a direct impact on local internet policies. These clauses relate to (a) dispute resolution mechanisms for ccTLD systems, (b) Access to an online public domain name registrant database, (c) ISP liability, (d) data protection, (e) electronic commerce, (f) telecommunications, and (f) other provisions.

[23] For theses country classifications, see *supra* note 24.

3. COMMON CLAUSES OF LATIN AMERICAN FTAS

This section of the paper categorizes and comments upon the most common clauses impacting internet regulation in Latin American FTAs. The full text of these clauses can be found in the Annex.

A. DOMAIN NAME DISPUTE RESOLUTION MECHANISMS

A provision regarding issues of domain name dispute obliges countries to establish an appropriate procedure to resolve domain name disputes. This clause appears in the Intellectual Property chapter of the treaties that include it, since it is structured as a trademark remedy against cybersquatting. Treaties with this clause were adopted extensively in the region.[24]

Through this clause, a treaty member commits to implementing a dispute resolution system in their ccTLD system, based on the Uniform Domain Name Dispute Resolution Policy (UDRP). The UDRP is a policy designed by ICANN at the global level for generic top level domains (gTLDs), but this clause mandates adopting its principles at the national level.[25]

Its basic text states that:

> *In order to address trademark cyber-piracy, each Party shall require that the management of its country-code top-level domain (ccTLD) provides an appropriate procedure for the settlement of disputes based on the principles established in the Uniform Domain-Name Dispute- Resolution Policy.*

This means that each country's ccTLD manager must provide an appropriate procedure that follows the guidelines of the UDRP. Upon execution of the FTA, the local domain institution – which is in charge of the ".co" for Colombian domains, ".pa" for Panamanian domains, and ".pe" for Peruvian domains, for example – must ensure a mechanism for dispute resolution, under the UDRP umbrella.

The "principles established in the UDRP" are not written, but it is possible to extract those principles from the experience of treaty implementation by some of these countries, for example Chile (which will be analyzed in more detail in Section 4). These principles include a domain name policy that protects trademark owners against bad faith domain registrations; an alternative dispute resolution procedure, without the involvement of local courts; expedited processes and decisions; and enforceability of the decisions by the local ccTLD manager.

As we will see in Section 4, in many cases this clause proved too onerous to implement through the creation of local dispute resolution mechanisms, and for this reason countries frequently

[24] The clause is found in seven of the eleven FTAs: Chile – USA [2003] (Article 17.3.1), CAFTA- DR - USA [2004] (Article 15.4.1), Colombia – USA [2006] (Article 16.4.1), Peru – USA [2006] (Article 16.4.1), Nicaragua – Taiwan (China) [2006] (Article 17.12), Panama – USA [2007] (Article 15.4.1), Chile – Australia [2008] (Article 17.24.1).

[25] The text of the UDRP can be found at https://www.icann.org/resources/pages/udrp-2012-02-25-en

outsourced the mechanism to the World Intellectual Property Organization (WIPO) Domain Name Dispute Resolution Center,[26] which offered a foreign but treaty-compliant system.

B. Online Public Access to a Domain Name Registrant Database

Another regulation that affects the domain name realm is a request in the treaties to allow online public access to a reliable and accurate domain registrant database (equivalent to a WHOIS database).[27] This clause seeks to facilitate access to relevant data about a domain name registrant and to discourage anonymity in unlawful activities conducted over the web.[28]

There are three different versions of this provision, each of which gives different importance to possible conflicts with local privacy law.

In the first version, the ccTLD manager *must* consider its local privacy (personal data) regulations. This appears in Chile's treaties, which establish that domain name information will be provided "in accordance with each Party's law regarding protection of personal data."[29]

In the second version, the ccTLD manager *may* give due regard to local laws protecting privacy. This is the effect of the clause included in treaties between CAFTA and Panama with the United States. The clause stipulates expressly that the local ccTLD management "may give due regard" to local privacy laws.[30]

The third version does not mention privacy issues and leaves possible conflicts between treaty obligations and national law unsolved. This is the case of Colombia and Peru's treaties with the United States.[31]

The differences between these three versions may not be simply conceptual. While, to date, there is no clear evidence that any of these versions promote higher respect for local privacy laws, the different texts may have potentially different impacts. The differences could be of

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[26] For more information WIPO's center, see http://www.wipo.int/amc/en/domains/

[27] WHOIS is a "protocol [...] that is widely used to provide information services to internet users. While originally used to provide "white pages" services and information about registered domain names, [it] covers a much broader range of information services. The protocol delivers its content in a human-readable format." See http://tools.ietf.org/html/rfc3912 and http://archive.icann.org/en/topics/whois-services/. WHOIS is mainly used with searches related to generic domain names (which are not country-specific), but the use of term can also be expanded to refer to equivalent functions in ccTLDs.

[28] "Open access to ownership information contained in the Whois database by trademark owners is necessary to locate and contact the true owners of problematic domain name registrations and web sites and swiftly institute legal action to prevent the abuse of intellectual property, internet fraud and other schemes that confuse and deceive internet consumers." See International Trademark Association, INTA Model Free Trade Agreement (2011), http://www.inta.org/Advocacy/Documents/INTAModelFreeTradeAgreement.pdf, p. 22.

[29] Chile – USA [2003] (Article 17.3.2), Chile – Australia [2008] (Article 17.24.2).

[30] CAFTA and DR (Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua) – USA [2004] (Article 15.4.2), Panama – USA [2007] (Article 15.4.2).

[31] Colombia – USA [2006] (Article 16.4.2), Peru – USA [2006] (Article 16.4.2).

special concern if, for example, foreign standards on WHOIS evolve, and with that, countries receive pressure to modify their local domain systems in a way that contradicts local privacy rules. The differences could also become relevant in the case of Colombia and Peru, for instance, if negotiators infer a lack of local interest for privacy laws from the absence of treaty text on the subject. Given the similarity of the texts across countries, their subtle differences may acquire special importance in the future.

C. Internet Service Provider (ISP) Liability

FTAs also include provisions relating to ISP liability. Like the clause on domain name registrant databases, provisions on ISP liability can also be categorized into three different types of texts, which differ in their specificity and scope. The provisions are framed in the context of copyright protection, and resemble the text of the United States Digital Millennium Copyright Act (DMCA).[32] Indeed, some have argued that free trade agreements acted as a vehicle for the United States to export its local regulations contained in the DMCA.[33]

The DMCA is a copyright law that was adopted in response to the signature of two copyright treaties, the WIPO's Copyright treaty and WIPO's Performances and Phonograms treaty. Among other novel mechanisms at the time, it included a safe harbor and a *notice-and-takedown* mechanism, by which online service providers would be protected from copyright infringement for third-party content on their site if they promptly remove the content upon notification from copyright holder or the copyright holder's agent. The system also includes a counter-notification mechanism, to protect users who maintain that the removed material is not infringing a copyright. The notice-and-takedown system is directly operated by parties, without involvement of local courts if the content is removed upon a copyright notice.

FTA provisions reflect, to different degrees of detail and complexity, an intention to embrace similar systems of *notice-and-takedown*. The first version of the clause is simple, and provides a general standard for remedies for copyright and related rights. It is only two paragraphs long, and establishes a broad guideline: under the clause, parties must provide local laws that limit ISP liability for copyright and related rights for third-party content, provided that the ISP removes the materials upon notification, and that it does not receive a financial benefit for the content that it can control.[34]

The second and third versions provide detailed rules about the scope of the liability and the procedures to be implemented, including notifications, counter-notifications and administrative or judicial procedures. They are much longer and surprisingly specific for treaty regulations, which generally contain principles and standards and leave procedural aspects to local implementation.

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[32] Pub. L. No. 105-304, 112 Stat. 2860 (Oct. 28, 1998).
[33] Tatiana Lopez Romero, Internet Service Provider's Liability for Online Copyright Infringement: The US Approach, *Vniversitas* N° 112: 193-214, July-December 2006.
[34] Chile – Australia [2008] (Article 17.40).

The second version of the text covers intermediaries that provide hosting, linking or access services. It establishes that treaty members must provide incentives for ISP copyright compliance, and that legal limitations on ISP liability should be adopted. In particular, those liability limitations should be applied to cases of transmission of information, caching, storage at the direction of a user, and linking – and only where the ISP did not initiate the transmission or select the materials or its recipients. As in the previous version, the ISP must also not receive any financial benefit from the infringing activity if it can control it.

Unlike the previous version, however, the clause establishes that the ISP must *expeditiously* remove the materials upon notification, and that there must be a publicly designated representative to receive such notifications, similarly to the DMCA's copyright agent. It also establishes that the ISP must adopt a policy for repeat infringers and for accommodating standard technical measures, and that the ISP has no obligation to monitor copyright infringement. Moreover, it establishes a counter-notification system. The treaty describes obligations that are virtually identical to the DMCA provisions.

In addition, the clause provides for the establishment of an administrative or judicial procedure enabling copyright owners who submit a copyright notice to the ISP to obtain information identifying the alleged infringers. This obligation was adopted without taking into account that, in countries such as Colombia, judicial intervention would certainly be needed before an information request of this type. Fortunately, the clause gives the option for adopting a judicial procedure in this regard.

This second version has been widely adopted, having been included in the treaties of all countries of the region except for Mexico.[35]

The third version of the clause is similar to the second one, but it departs from the basic DMCA provisions in an interesting way. This is probably because the United States is not involved in this text: the clause is found in a recent treaty involving Colombia, Peru and the EU.[36]

This version expressly accommodates the possibility of a court or administrative authority, *in accordance with the legal systems of each party*, to require the ISP to terminate or prevent an infringement. Similarly to the obligations on the online access to registrants' information in section *b*. *supra*, this version expressly takes into account the requirements of local procedures, and as such provides more flexibility for implementation. A possible explanation for the difference is is that the treaty was adopted in 2013, after Colombia had experienced its first gridlock with the implementation of the second version of the clause (in its treaty with the

[35] Chile – USA [2003] (Article 17.11.23), CAFTA and DR (Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua) – USA [2004] (Article 15.11.27), Colombia – USA [2006] (Article 16.11.29), Panama – USA [2007] (Article 15.11.27), Peru – USA [2006] (Article 16.11.29).
[36] Andean Community (Colombia, Peru and expanding) – EU [2013] http://ec.europa.eu/trade/policy/countries-and-regions/regions/andean-community/

United States from 2006), and learned from its experience of not taking into account local constitutional requirements.

D. DATA PROTECTION

Unlike the other categories of clauses, there is no unique language in these treaties about data protection, and no single specific chapter for dealing with this issue. This clause is usually contained in sections related to the content of the data or to telecommunications. Some of the clauses state, in general terms, that a treaty member may take measures necessary to ensure the security and confidentiality of telecommunication messages, and to protect the privacy of non-public personal data of subscribers to public telecommunications services – sometimes subject to non-discriminatory terms.[37]

It is worth pointing out that EU treaties tend to establish a high level of protection as compared to all other agreements. This is understandable given data protection regulations within the EU. For example, some treaties establish a system of cooperation on personal data protection.[38] Some incorporate EU guidelines and directives on data protection by reference.[39] In many EU treaties, respect for local laws and privacy rights in the transfer of personal data are mentioned expressly.[40] In contrast, data protection is not highlighted in US treaties.

The treaties also provide clauses on personal data in intellectual-property-related procedures (such as the protection of pharmaceutical data) or financial services, but these are not directly related to internet or telecommunications issues.[41]

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[37] Colombia – USA [FTA – Chapter 14 of Telecommunications], Nicaragua – Taiwan.

[38] Mexico – EU (Partnership) (Article 20), Central America (Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, Panama) - EU [FTA] (Article 34).

[39] This is also found beyond the EU in the Chile – Australia (Article 16.8), which incorporates "international standards and criteria of relevant international bodies" in local development of personal data protection standards.

[40] Central America (Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, Panama) - EU [FTA] (Article 34), Colombia and Peru – EU (Article 157).

[41] For example, the Colombia – USA FTA provides in its Chapter 14 of Telecommunications: *"Pharmaceutical Products 2. (a) If a Party requires, as a condition for approving the marketing of a pharmaceutical product that utilizes a new chemical entity, the submission of undisclosed test or other data necessary to determine whether the use of such products is safe and effective, the Party shall protect against disclosure of the data of persons making such submissions, where the origination of such data involves considerable effort, except where the disclosure is necessary to protect the public or unless steps are taken to ensure that the data are protected against unfair commercial use.[…]".* Mexico - EU (FTA) provides: "*ARTÍCULO 39 Procesamiento de datos 1. Cada Parte permitirá a los proveedores de servicios financieros de otra Parte, transferir información hacia el interior o el exterior de su territorio para su procesamiento, por vía electrónica o en otra forma cuando el mismo sea necesario para llevar a cabo las actividades ordinarias de negocios de tales proveedores de servicios financieros. 2. Por lo que respecta a la transferencia de información personal, cada Parte adoptará salvaguardas adecuadas para la protección de la privacidad, derechos fundamentales y libertad de las personas. Con este propósito, las Partes acuerdan cooperar a fin de mejorar el nivel de protección de acuerdo a los estándares adoptados por organizaciones internacionales relevantes. 3. Nada de lo dispuesto en este artículo restringe los derechos*

E. ELECTRONIC COMMERCE

Another area where there is no standard language is on the development of electronic commerce, but the topic of encouraging e-commerce as a particular type of trade is recurring. This category is more abstract and conceptual than the others, and the clauses found do not provide specific mechanisms for implementation.

This clause is not identical in all treaties, but the texts on this matter can be grouped into two versions. The first version appears in treaties with the United States, in the form of an Electronic Commerce Chapter. The clauses highlight the importance of e-commerce and of eliminating trade restrictions by expanding the legal use of e-commerce platforms, protecting users from abuse and damages, and properly taxing e-commerce as any other commercial activity. These types of texts also encourage a no-discrimination policy, the free flow of information, and cooperation in order to improve e- commerce and solve any related problems.

The second version of text on e-commerce is found in treaties that do not involve the United States.[42] This version promotes e-commerce while stressing the importance of protecting personal data and consumers. It calls for express respect for local personal data and consumer protection rules and gives special consideration to their applications in e-commerce. This approach is aligned with the other provisions analyzed for EU treaties, where express consideration of local laws was found much more frequently than in US treaties.

F. OTHER CLAUSES

The treaties generally contain a telecommunications chapter that includes both general standards and detailed rules. However, given the complexity of the subject, and its more distant relationship to internet policy, this study does not provide in-depth analysis on the telecommunications provisions.[43]

Moreover, most agreements include limits, imposed by national security, privacy or other important issues, to the rights and obligations established in the treaty. For example, FTAs of the United States include a standard limitation about security and confidentiality.[44] EU FTAs are

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de una Parte a proteger la información personal, la privacidad personal y la confidencialidad de los informes personales y cuentas, siempre y cuando ese derecho no sea utilizado para transgredir lo previsto en este Tratado."

[42] Andean Community (Colombia and Peru)- EU (Article 166), Peru – Canada [2008] (Article 1505), Chile – Australia (Article 16.5).

[43] Telecommunications provisions in FTA that may have an impact on internet policy are specifically those who deal with 1) data and protocols, 2) neutrality and 3) Regulatory bodies. The USA free trade agreements with Chile, Colombia, Panama and Peru, and the Canada agreements contain these obligations.

[44] This provision is found in FTAs between the USA, and Chile, Colombia, Peru, and Central America: "*Article 21.2: Essential Security. Nothing in this Agreement shall be construed: (a) to require a Party to*

more specific than those from the US, taking into account environment, fraud, illegal traffic and privacy issues.[45] The Canada-Colombia FTA also takes into account World Trade Organization obligations and cultural industries.[46] These clauses provide flexibility in the application of FTA covenants.

4. Implementation of Treaty Provisions

This section seeks to analyze the challenges faced by Latin American countries in implementing

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furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or (b) to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests. […] Article 21.5: Disclosure of Information Nothing in this Agreement shall be construed to require a Party to furnish or allow access to confidential information the disclosure of which would impede law enforcement, or otherwise be contrary to the public interest, or which would prejudice the legitimate commercial interests of particular enterprises, public or private."

[45] The Colombia- EU treaty provides: *"Exceptions Article 167General Exceptions1. Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between the Parties, or a disguised restriction on establishment or cross-border supply of services, nothing in this Title and Title V (Current Payments and Capital Movements) shall be construed to prevent the adoption or enforcement by any Party of measures: (a) necessary to protect public security or public morals or to maintain public order (54);(b) necessary to protect human, animal or plant life or health, including those environmental measures necessary to this effect; (c) relating to the conservation of living and non-living exhaustible natural resources, if such measures are applied in conjunction with restrictions on domestic investors or on the domestic supply or consumption of services; (d) necessary for the protection of national treasures of artistic, historic or archaeological value;(e) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Title and Title V (Current Payments and Capital Movements) (55) including those relating to:(i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on contracts; (ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts; (iii) safety. 2. The provisions of this Title, Annexes VII (List of Commitments on Establishment) and VIII (List of Commitments on Cross-border Supply of Services) and Title V (Current Payments and Movement of Capital) shall not apply to the respective social security systems of the Parties or to activities in the territory of each Party, which are connected, even occasionally, with the exercise of official authority."*

[46] The Colombia-Canada FTA provides: *"Article 2207: World Trade Organization Waivers To the extent that there are overlapping rights and obligations in this Agreement and the WTO Agreement, the Parties agree that any measures adopted by a Party in conformity with a waiver decision adopted by the WTO pursuant to Article IX:3 of the WTO Agreement shall be deemed to be also in conformity with the present Agreement, except as otherwise agreed by the Parties. Such conforming measures of either Party may not give rise to legal actions by an investor of one Party against the other under Section B of Chapter Eight (Investment - Settlement of Disputes Between an Investor and the Host Party). Article 2206: Cultural Industries Nothing in this Agreement shall be construed to apply to measures adopted or maintained by either Party with respect to cultural industries except as specifically provided in Article 203 (National Treatment and Market Access for Goods - Tariff Elimination)."*

some of the provisions described in the previous section.[47] In particular, it focuses on the implementation of domain dispute obligations and intermediary liability.

These two provisions are found in treaties with all countries except Mexico, and are regulated in detail, providing less flexibility for adapting them to local contexts. Countries faced challenges in their implementation, and these challenges seem rooted in two different sources. First, challenges arose where the country's resources did not justify implementing a local mechanism, as in the case of the domain name dispute resolution system. Implementation of a local mechanism was expensive and required the quick assembly of local expertise, arbitration rules and institutions – in many cases in countries where alternative dispute resolution mechanisms are not extensively used. For many countries, it was either impossible or unreasonable to construct their own dispute resolution mechanism. For those reasons, most of them agreed to outsource their dispute resolution to a foreign institution (such as the World Intellectual Property Organization - WIPO), which could act as a one-stop treaty-compliant mechanism provider.

Other challenges arose where the treaty provisions were contrary to fundamental principles of the local legal system, such as the case of intermediary liability rules. For example, in Colombia, the foreign mechanism was adopted without consideration of local constitutional norms of Congressional and judicial process. This resulted in a legislative gridlock that still remains, where the treaty rules were left unimplemented.

The different local implementation and outcomes in the member countries in the network of treaties provide rich ground for analysis.

A. Domain Name Dispute Resolution Mechanisms

I. New and Preexisting systems, Local and International Mechanisms

The domain name dispute resolution provision had a different impact in Latin American countries bound by FTAs. This could be because the clause reached different countries in different stages of their internet policy development: some of them already had a dispute resolution mechanism in force, developed organically by the local ccTLD manager, while others had not embraced any dispute system, and their ccTLD system might not yet have been mature enough to adopt one.

Guatemala, Peru, and Chile belong to the first group of countries, those that had a dispute resolution mechanism in place by the time the FTA was executed. Guatemala was the second country in Latin America to adopt a UDRP system for its ".gt" ccTLD in 2000, with WIPO as a dispute resolution provider, due to an early relation with WIPO. WIPO had recently issued a final

[47] This section is a product of interviews conducted in June 2014 with ccTLD representatives and actors from government and NGO's in the countries of interest, as well as of discussions maintained with experts and participants of the ICANN London meeting, from note 1 *supra*.

report with recommendations to ccTLD managers, which included the adoption of a dispute resolution mechanism.[48] WIPO also hosted a dispute resolution center, with the capacity to resolve both generic domains and ccTLD disputes. When the FTA came into force in in 2005, Guatemala already was compliant with the provision.

A similar situation unfolded in Peru, where the local ccTLD system had already implemented a dispute resolution mechanism (the *Cibertribunal Peruano*) that resembled the principles of the UDRP when the 2006 US FTA entered into force.[49] Consequently, the FTA provision did not change the existing system.

Chile's dispute resolution mechanism was also well developed by the time the FTA with the United States was being negotiated. The Chilean system was unique in that it organically designed an arbitration system with local arbiters, and that system came into effect as early as 1997.[50] The system gave parties an enforceable decision in local courts, was efficient and was widely accepted by the local community.

Interestingly, the Chilean government consulted with ccTLD managers during the negotiation process, and this had a direct impact on the treaty text. The original version of the treaty – one of the first in the world to contain dispute resolution provisions – stated that members should adopt the UDRP. However, since Chile already had a successful system, which had proven to be effective against trademark cybersquatting, the ccTLD managers proposed that the adopted dispute mechanism be "based on the *principles* established in the UDRP" and not on the UDRP directly. This provided Chile with flexibility to keep its local system, while achieving the treaty's intended goal of dealing with trademark piracy in domain names. The final text of the treaty incorporated this change, and this text seems to have become the model for subsequent United States treaties. Chile's treaty negotiation achieved enough flexibility to balance international obligations with freedom for adequate local implementation.

By contrast, in a second group of countries, the FTA provision obliged them to establish a new mechanism for dispute resolution. The issue was complex because this obligation had to be implemented by ccTLD systems, which were not always managed by the local government – but instead sometimes managed by universities or other non-governmental institutions – and in many cases had not participated in the treaty negotiations.

The FTA obligation was an interesting opportunity to address the issue of domain cybersquatting. It seems that a combination of factors led to the absence of a local dispute

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[48] Final Report of the WIPO Internet Domain Name Process (April 30, 1999), available at http://www.wipo.int/amc/en/processes/process1/report/finalreport.html.

[49] See the History of the ".pe", at https://punto.pe/history.php

[50] Patricio Poblete, *Chile .CL: A Virtual Home for the Chileans Worldwide*, in ADDRESSING THE WORLD: NATIONAL IDENTITY AND INTERNET COUNTRY CODE DOMAINS, Erica Schlesinger Wass (ed.), pp. 37-39.

mechanism. Either the problem was not especially severe (because the procedures for registering a domain name were significantly costly or so administratively complex as to discourage piracy), the administrative structure of the ccTLD was small enough so that it had other priorities or no proper resources to establish such a mechanism, or there existed a combination of these factors.

In El Salvador, for example, the entry into force of the CAFTA-DR occurred in 2007, and soon after the ccTLD operator started envisioning the implementation of the dispute resolution system. However, there were, at the time, no domain name disputes, leading to a slow adoption process. When the local American Chamber of Commerce, along with the Ministry of Commerce of El Salvador, brought up the FTA provisions to the ccTLD operator, Nic.sv, the adoption process sped up. The ccTLD operator signed an agreement with the American Chamber of Commerce to designate them as an arbitration center of local domain disputes, under an almost identical UDPR system. So far, no cases have been brought to this system, and the few conflicts that have occurred have been solved privately by the parties involved.

Other countries decided to outsource their dispute resolution to WIPO's domain name dispute resolution center, and to adopt the text of ICANN's Uniform Dispute Resolution Policy (UDRP). The UDRP was created for generic domain name disputes, such as those of ".com", ".net" and ".org", but not for country-based disputes. Nonetheless, this standard solution was good enough for countries that had to comply with the FTA obligations but could not justify creating a local center or a particular policy for their local situation, either because the low number of disputes or their resources did not justify creating a local center or a particular local policy.

Such was the case for Costa Rica, the Dominican Republic, and Honduras, which designated WIPO as the official dispute resolution center and adopted the UDRP or a local, translated version with minimal differences.

But an interesting development occurred in Costa Rica. After entry into force of the CAFTA-DR treaty, Costa Rica had until January 1, 2010 to implement the domain name provisions of the treaty.[51] The ".cr" ccTLD was managed by NIC- Internet Costa Rica (NIC CR), which is subordinate to the Academia Nacional de Ciencias. During 2009, NIC CR undertook different efforts to create a local body for domain name dispute resolution. NIC CR then approached WIPO, who guided them to the adoption of the UDRP with WIPO as a dispute resolution provider in November 2009.

[51] OAS Foreign Trade Information System, at http://www.sice.oas.org/TPD/USA_CAFTA/USA_CAFTA_e.ASP

Although Costa Rica's implementation of the UDRP was compliant with the FTA, the system was not attractive to most local users, and only one company has used it since its entry into force.[52] A possible explanation is that local companies regarded WIPO's provider in Geneva as too complex or distant for the resolution of local disputes. It is believed that many companies preferred to resolve their disputes privately, or to drop their claims, rather than submitting their cases to WIPO's center in Geneva.

The system remained unchanged until 2013, when NIC CR appointed the *Colegio de Abogados de Costa Rica* (Costa Rica Bar Association) as a new dispute resolution center.[53] The UDRP proceedings are currently being adapted to the demands of national Costa Rican law. As a result, since October 2013, the Colegio de Abogados de Costa Rica has resolved domain name disputes. Collaboration with WIPO is still present through periodic training. Costa Rica is also looking to certify a WIPO expert to work with Costa Rica's local provider.

In summation, the adoption of ccTLD dispute resolution mechanisms was either consolidated or prompted in these countries by the entry into force of the respective FTAs. While domain name registrations have been growing in these countries, there is a surprisingly low number of disputes at WIPO: four for Peru, two for Guatemala, one for Costa Rica and Dominican Republic, and none for El Salvador and Honduras.[54] This evolution suggests that the UDRP/WIPO system might not be meeting local user needs, and that further work could be done to strengthen local solutions and educate users about the mechanisms available.[55] These countries' experiences also show the importance of providing enough flexibility for implementation, as well as the value of engaging relevant local stakeholders in treaty negotiation. In Chile, where there was stakeholder involvement in negotiations, their local dispute resolution mechanism is regarded as a successful option by locals.[56]

II. The TPP Drafts and the Way Forward

The TPP is an FTA that is currently being negotiated by countries of the Pacific Rim, including three members of the Latin American region: Chile, Peru and Mexico. If signed, its provisions on ccTLD disputes would have the greatest impact in Mexico, which is not yet bound by any FTA in

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[52] *See*, WIPO UDRP Domain Name Decisions, http://www.wipo.int/amc/en/domains/decisionsx/list.jsp?prefix=DCR&year=2011&seq_min=1&seq_max=199

[53] *See*, Centro de Justicia Alternativa del Colegio de Abogados de Costa Rica, http://www.abogados.or.cr/index.php?option=com_content&view=article&id=159%3Arac&catid=47&Itemid=1

[54] See WIPO ccTLD decisions at http://www.wipo.int/amc/en/domains/decisionsx/index-cctld.html

[55] Of course, other reasons could account for the low number of disputes. For example, that there are simply not many disputes in the country. Nevertheless, I believe that the adoption to local needs that I propose is worth exploring.

[56] On the success and evolution of the dispute resolution system, see Margarita Valdés, *Presentation at ICANN's Silicon Valley-San Francisco* Meeting (2011) (on file with the author).

this respect. Mexico has an operating Local Dispute Resolution Policy (or "LDRP") and has designated WIPO as its dispute resolution center since 2001.

The previous TPP draft text of November 2013 shows a more developed provision than the standard FTA clause analyzed in previous sections. The text is as follows:

> *1. In order to address the problem of trademark [VN/MX propose: geographical indication and trade name] cyber-piracy, each Party shall adopt or maintain a system for the management of its country-code top-level domain (ccTLD) that provides: (a) an appropriate procedure for the settlement of disputes, based on, or modelled along the same lines as, the principles established in the Uniform Domain-Name Dispute-Resolution Policy, or that is: (i) designed to resolve disputes expeditiously and at low cost, (ii) fair and equitable, (iii) not overly burdensome, and (iv) does not preclude resort to court litigation.*[57]

As we can see, this provision embraces the principles of the UDRP, but recognizes that local implementation needs to account for the characteristics of local disputes and resources. In this fashion, Vietnam and Mexico express interest in expanding beyond trademark disputes (as Mexico's LDRP does).[58] The text provides a more flexible relationship with the UDRP ("based on, or modelled along the same lines") and establishes new characteristics that reflect local legal systems, such as the lack of preclusion of resorting to court litigation.

The dispute resolution clause was complemented with a new kind of domain name provision, which seeks new obligations on a rapid remedy against cyber-piracy. The text resembles the text of the UDRP itself, which is curious. While the previous article allowed a looser relationship between the local ccTLD system and the UDRP, this new provision calls for the adoption of key UDRP elements in the treaty itself – including mentions of bad faith, and names that are identical or confusingly similar to a trademark:[59]

> *2. [PE/SG/CL/AU/NZ/MY/BN/CA oppose; US/VN/JP/MX propose: Each party shall provide [VN: oppose adequate and effective] [VN propose: appropriate] remedies against the registration trafficking, or use in any ccTLD, with a bad faith intent to profit, of a domain name that is identical or confusingly similar to a trademark [VN/MX propose: geographical indication or trade name].]*

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[57] Article QQ.C.12.1.a. https://wikileaks.org/tpp/static/pdf/Wikileaks-secret-TPP-treaty-IP-chapter.pdf. See also Susan Chalmers, Where policy fora collide: country-code Top-Level Domains and the Trans Pacific Partnership agreement, February 18, 2014. http://www.susanchalmers.com/writings/2014/1/30/where-policy-fora-collide-cctlds-and-the-tpp

[58] Mexico's LDRP also applies to registered commercial notices, appellations of origin and other reserved rights. See art. 1.a of the LDRP, http://www.registry.mx/jsf/static_content/domain/policies_second.jsf.

[59] Art. 4.a) of the UDRP establishes that applicable disputes are those where "(i) your domain name is identical or confusingly similar to a trademark or service mark in which the complainant has rights; and (ii) you have no rights or legitimate interests in respect of the domain name; and (iii) your domain name has been registered and is being used in bad faith. In the administrative proceeding, the complainant must prove that each of these three elements are present." The full text of the UDRP is available at https://www.icann.org/resources/pages/policy-2012-02-25-en

In the last TPP draft of May 2014, this article was consolidated:[60]

> *Domain Name Cybersquatting.*
>
> *1. In connection with each Party's system for the management of its country-code top-level domain (ccTLD) domain names, the following shall be available: (a) an appropriate procedure for the settlement of disputes, based on, or modeled along the same lines as, the principles established in the Uniform Domain- Name Dispute-Resolution Policy, or that is: (i) designed to resolve disputes expeditiously and at low cost, (ii) fair and equitable, (iii) not overly burdensome, and (iv) does not preclude resort to court litigation; and (b) online public access to a reliable and accurate database of contact information concerning domain-name registrants; in accordance with each Party's laws and, or relevant administrator policies regarding protection of privacy and personal data.*
>
> *2. In connection with each Party's system for the management of ccTLD domain names, appropriate remedies shall be available, at least in cases where a person registers or holds, with a bad faith intent to profit, a domain name that is identical or confusingly similar to a trademark.*

Unlike the standard provision of the FTAs currently in force, this text does not limit the problem to trademark cybersquatting, and it also highlights the connection of the clause "with each Party's system for the management of ccTLD domain names", acknowledging and accepting existing local mechanisms.

The development of the texts shows an increasing awareness regarding local implementation and necessary flexibility to balance local needs. Nevertheless, the new provision in Paragraph 2, transplanting concepts of the UDRP itself and adding new material standards (such as "appropriate remedies"), are unnecessary – and may prove challenging to enforce in local dispute resolution systems that are operating successfully without those elements.

B. ISP LIABILITY

I. TENSIONS BETWEEN TREATY TEXT AND FUNDAMENTAL RIGHTS

All the countries of the FTA network, except for Mexico, are bound by a very detailed ISP liability clause in their treaties with the United States.[61] To date, however, this provision has only been implemented in Chile and Costa Rica.[62] Although the text is almost identical in these treaties, the clause raised different reactions in the local systems.

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[60] Article QQ.C.12.
[61] See Section 2 *supra*.
[62] See Alberto Cerda Silva, "Limitación de responsabilidad de los prestadores de servicios de Internet por infracción a los derechos de autor en línea", Revista de Derecho de la Pontificia Universidad Católica de Valparaíso no.42 Valparaíso (July 2014), footnote 15.

Chile's intermediary liability was added as an amendment to the Copyright Law, driven by the Chile-USA FTA.[63] The bill was prepared by technical teams of different departments inside the Chilean government, without consultation with other stakeholders.[64] While the first draft mimicked the United States' DMCA, the approved proposal finally established a notice-and-takedown system by means of a prior judicial order.[65] To establish "actual knowledge" which can make a service provider liable for copyright infringement, a competent Chilean court must first intervene and determine that the content must be removed or that access be disabled.[66]

In Chile, judicial intervention was required prior to any decision on content that could affect fundamental rights in the offline world, and this scheme would also apply online. During the process of passing the bill, a debate ensued between the executive branch and Congress on the issue of judicial intervention, and it resulted in the passing of legislation that emphasized respect for due process and freedom of expression rights under the Chilean Constitution.

Indeed, the final text of the law has been praised by Frank La Rue, UN's Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, as a satisfactory solution under international standards.[67]

In Costa Rica, intermediary liability was regulated in 2011.[68] Despite receiving some criticism for being passed by a presidential decree and not by a law, the ISP liability mechanism is regarded as a balanced procedure overall by internet users and experts.[69] As with the Chilean system, Costa Rica established judicial intervention before content is taken down or ISPs are ordered to reveal information about specific users. This approach has been rejected by the International Intellectual Property Alliance (IIPA) for its "overly long time periods" of up to 45 days by which ISPs are to forward notifications sent by rights holders. IIPA says these long time periods "in

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[63] Implemented by Law N° 20.435 of May 5, 2010, amending Law No. 17.336 on Intellectual Property.

[64] Daniel Alvarez Valenzuela, "En Busca de Equilibrios Regulatorios: Chile y las Recientes Reformas al Derecho de Autor" ("In Search for Regulatory Equilibria: Chile and The Recent Reforms to the Copyright Law"), ICTSD POLICY DOCUMENT 12 (December 2011) available at http://ictsd.org/downloads/2011/12/en-busca-de-equilibrios-regulatorios-chile-y-las-recientes-reformas-al-derecho-de-autor.pdf

[65] Daniel Alvarez Valenzuela, *Id.*, 3. 2

[66] Claudio Ruiz Gallardo and Juan Carlos Lara Gálvez, "Liability of Internet Service Providers (ISPs) and the exercise of freedom of expression in Latin America" in Eduardo Bertoni (ed.), *Towards an Internet Free of Censorship: Proposals for Latin America*, (2011), in http://www.palermo.edu/cele/pdf/english/Internet-Free-of-Censorship/02-Liability_Internet_Service_Providers_exercise_freedom_expression_Latin_America_Ruiz_Gallardo_Lara_Galvez.pdf, p. 3

[67] United Nations General Assembly Report A/HRC/17/27, at 13, available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf.

[68] Decree 36,880-COMEX-JP, published in the official gazette on December 16, 2011, available at http://www.cerlalc.org/derechoenlinea/dar-TELMEX/leyes_reglamentos/Costa_Rica/Decreto36880.htm

[69] See for example, Vinicio Chacon, "Temen que decreto limite responsabilidad en Internet," en Semanario Universidad (2012), http://www.semanariouniversidad.ucr.cr/component/content/article/1527-Pa%C3%ADs/5203-temen-que-decreto-limite-actividad-en-internet.html

practical terms create a serious obstacle for the enforcement of rights in the digital environment."[70] Nevertheless, the legislation has been generally accepted by local stakeholders.

The situation was much different in Colombia, where the first ISP liability bill, known as "Ley Lleras", was introduced in April 2011.[71] The text was designed to implement several provisions of the Colombia-United States Free Trade Agreement (FTA). The bill, however, went beyond the FTA provisions: it allowed ISPs to not only take down content allegedly infringing copyright without a prior court order, but also to deactivate subscribers' internet access for alleged copyright infringement.[72] Unlike the Chilean ISP regulation, judicial involvement in Colombia would occur only when a claimant requested restoration of content that was taken down.[73]

Civil society groups reacted strongly against the "Ley Lleras", pointing out that the bill was overly restrictive of fundamental rights to free expression and access to information, among other problems. Their actions led to the formation of a new organization, RedPaTodos, which sought to stop the bill, broaden the discussion and open up the debate to society as a whole.[74]

The absence of the relevant stakeholders involved in the creation of the bill seems to have been key to its subsequent failure: despite the fact that the text of the FTA provided flexible language for proper implementation, the lack of stakeholder involvement led to the creation of restrictive legislation and a lost opportunity for proper implementation.[75] Indeed, other aspects of the FTA provisions on copyright were implemented in an urgent manner, also without public consultation (and were probably prompted by President Obama's visit to Colombia in 2012).[76]

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[70] Costa Rica International Intellectual Property Alliance (IIPA) 2013, Special 301 Report On Copyright Protection And Enforcement, p. 53. http://www.iipa.com/rbc/2013/2013SPEC301COSTARICA.PDF

[71] See "Ponencia Derechos de Autor para 1er debate en Senado" on Bill 241 (2011), available at http://www.senado.gov.co/az-legislativo/ponencias?download=490%3Aponencia-derechos-de-autor-para-1er-debate-en-senado

[72] Glushko-Samuelson Intellectual Property Clinic, in collaboration with Andrés Izquierdo and Fundación Karisma, "Intellectual Property Reform in Colombia: Future Colombian Copyright Legislation Must Not Place Overly Restrictive Burdens on Internet Service Providers that Unnecessarily Restrict Access to Information and Freedom of Expression of the People of Colombia", *PIJIP Research Paper* no. 2013-03 (2013), p. 3, available at http://digitalcommons.wcl.american.edu/research/38/.

[73] Claudio Ruiz Gallardo and Juan Carlos Lara Gálvez, *Id.*, p. 29.

[74] See RedPaTodos, ""Nosotros", at http://redpatodos.co/blog/nosotros/. RedPaTodos can be translated into English as "network for everyone."

[75] "This attempt to pass an overly restrictive ISP law reveals how the Colombian legislature has not fully considered the impact such laws could have on the fundamental rights to expression, information, privacy and due process. Public discussion and debate are necessary so that future ISP liability laws will not violate these precious rights for all Colombians". Andrés Izquierdo et. Al, p. 3.

[76] See RedPaTodos blog, "El gobierno colombiano se compromete a discutir la 'Ley Lleras IV' con la sociedad civil" (June 11, 2013), at http://redpatodos.co/blog/el-gobierno-colombiano-se-compromete-a-discutir-la-ley-lleras-iv-con-la-sociedad-civil/.

This time, the Colombian Constitutional Court struck down the law for not following the discussion procedures established in the Colombian Constitution for Congress chambers.[77]

Due to the criticism, and lack of political support, the bill was eventually archived in November 2011. However, experts estimate that a new bill will be introduced in the near future, since this aspect of the FTA implementation is still pending. This time, the discussion is expected to include public participation, based on the government's commitment to open copyright reform to public debate.[78]

Implementation is also pending in other countries. In Peru, efforts to enact the FTA provisions locally were started by the government in 2012, without broad public consultation, and this led to an outcry by civil society organizations.[79] While it remains to be seen how this provision will be implemented in the remaining countries, it seems clear that open participation of multiple stakeholders will be fundamental to achieve proper implementation: Latin American societies continue to demand balanced legislation that respects prior fundamental rights.

II. The TPP Drafts and the Long Road to Consensus

The TPP drafts also show the difficulties of regulating intermediary liability through an international treaty. The November 2013 draft contained a clause on ISP liability that drew strong divisions in opinion among different countries: the version proposed by the United States was supported only by Australia, and was opposed by Canada. The Canadian version was later supported by Chile, Brunei, New Zealand, Malaysia, Vietnam, Singapore, and Mexico (Japan and Peru were undecided).[80] The United States and Canadian versions adopted different approaches to scope and conditions of the limitations (including the possibility of subscriber service termination and content blocking, disclosure of subscriber information and ISPs requirements to monitor).[81]

The latest public draft, as of May 2014, is still very divided, with multiple opposing comments led by Australia and Canada. There is agreement, however, that copyright notification procedures may be "judicial or administrative", and that they should be "consistent with

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[77] Corte Constitucional de Colombia, Comunicado No. 01 del 23 de enero de 2013, p. 6, at http://www.corteconstitucional.gov.co/comunicados/No.%2001%20comunicado%2023%20de%20enero%20de%202013.pdf

[78] Carolina Botero, "Colombian government agrees to discuss the 'Law Lleras IV' with civil society", at http://infojustice.org/archives/29876.

[79] Miguel Morachimo, "Lessons from Peru: A tough start to regulating ISP liability," Access Now Blog (December 2012), https://www.accessnow.org/blog/2012/12/13/lessons-from-peru-a-tough-start-to-regulating-isp-liability.

[80] Michael Geist, The Trans Pacific Partnership IP Chapter Leaks: The Battle Over Internet Service Provider Liability (November 14, 2013), http://www.michaelgeist.ca/2013/11/tpp-leak-isp-liability/

[81] Article QQ.I.1, https://wikileaks.org/tpp/static/pdf/Wikileaks-secret-TPP-treaty-IP-chapter.pdf.

principles of due process and privacy."[82] The numerous opposing comments in the draft from the negotiating countries question the viability of regulating such a scheme in an FTA, and suggest that achieving a final version will take some time.

5. LESSONS FROM THE REGION

FTAs have played a key role in shaping internet policy in Latin America, by prompting the adoption of local internet policies in 11 countries of the region. In many cases, these policies were shaped without local debate.

The evidence seems to point to the assertion that FTAs are not a completely appropriate tool for internet policy adoption, given the secrecy of trade negotiations, the limited range of actors involved, and the asymmetric negotiation power between countries.[83] Nevertheless, FTAs are currently in force and it is not too late to implement them in a way that promotes flexibility and human rights online. Indeed, countries can take their existing FTAs as opportunities to adopt internet policy in a way that promotes local development, and improves future negotiations of other internet-related agreements.[84]

Two lessons emerge from the experiences of Latin American countries in dealing with internet policy through FTAs. First, countries should incorporate flexible provisions in their FTAs, and make use of such flexibility. Building on the principles of the Tunis Agenda relating to ccTLD systems, countries' decisions on internet policy should be addressed via a flexible framework

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[82] Addendum III, Section 6.

[83] Mega-regional trade negotiations: What is at stake for Latin America?, 2014, Osvaldo Rosales, Sebastián Herreros, Inter-American Dialogue. See also: The DR-CAFTA with the USA: some concerns, 2009, Sherrow o Pinder, Development in Practice, Vol. 19, No. 2 (Apr., 2009), pp. 227-232, Published by: Taylor & Francis, Ltd. on behalf of Oxfam GB. See also: Susan Chalmers, Where policy fora collide: country-code Top-Level Domains and the Trans Pacific Partnership agreement, February 18, 2014. http://www.susanchalmers.com/writings/2014/1/30/where-policy-fora-collide-cctlds-and-the-tpp, El Said, Mohammed, 2012.The Morning After: TRIPS-Plus, FTAs and Wikileaks - Fresh Insights on the Implementation and Enforcement of IP Protection in Developing Countries. PIJIP Research Paper no. 2012-03. American University Washington College of Law, Washington, D.C.

[84] Some scholars have also argued that FTAs may have a positive effect on internet freedom at a global scale. In a geopolitical heterogeneous world with barriers of all sorts, bilateral or multilateral FTAs are able to open roads for the free flow of information and commerce, which in turn can spread democratic rights and stimulate global trade that improves both the evolution of the internet and general welfare. *See* Milton Mueller, John Mathiason and Hans Klein, The Internet and Global Governance Principles and Norms for a New Regime, Global Governance, Vol. 13, No. 2 (April–June 2007), pp. 237-254, Published by: Lynne Rienner Publishers; Anupam Chander, International Trade and Internet Freedom, Proceedings of the Annual Meeting (American Society of International Law), Vol. 102, (April 9-12, 2008), pp. 37-49. See also Regulation and Internet Use in Developing Countries, Scott Wallsten, Economic Development and Cultural Change, Vol. 53, No. 2 (January 2005), pp. 501-523, Published by: The University of Chicago Press. See also Susan Ariel Aaronson, Can trade policy set information free? at http://www.voxeu.org/article/trade-agreements-global-internet-governance.

and mechanisms.[85] In much the same way that developing countries have implemented TRIPS to regulate intellectual property, countries need to incorporate flexibility in treaties to favor local adaptation and development.[86]

The second lesson is that, due to the nature of internet issues, it is very important to integrate open policy development processes in treaty negotiation and implementation. Civil society organizations have long argued for more openness, and the experience with FTAs in Latin America supports this reasoning.

A. IMPORTANCE OF FLEXIBILITY

Flexible clauses are always important in international negotiations, to handle tensions between the applicable international norms and the preexistent local systems. However, they are especially crucial for internet policy regulations, where the evolving nature of the issue demands enough room for countries to implement solutions that can accommodate local needs and remain current over time. This need for flexibility was recognized in the Tunis agenda with respect to ccTLD systems, and it should be expanded to all topics of internet policy where the country's "legitimate interests, as expressed and defined by each country," are involved.[87]

This means that FTAs should stay away from detailed rules that prescribe procedural details of implementation. These types of rules will likely prove too restrictive to succeed at the national level. Colombia's experience with implementing ISP liability is an example of this kind of situation, in which the international requirements clashed with users' rights and went contrary to civil society's expectations.

FTAs clauses should instead be designed on the basis of flexible standards, which provide enough room for harmonizing the treaty text and the local context. Clauses may be "imported" from foreign or international regimes, insofar as they are also capable of addressing local problems adequately. The experience with the domain name dispute resolution system suggests that countries should only commit to mechanisms that may be capable of helping to address local needs effectively, not just adopting systems because they have been successful abroad in a different internet policy and legal contexts.

Flexible standards also allow treaties to be sustainable over time in the dynamic space of internet policy. FTA clauses related to online public access to registrants' databases have accommodated local privacy and personal data laws. However, they have not taken into account that global standards on information access may evolve: this is what is happening today with the

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[85] See the Paragraph 63 of the Tunis Agenda, opening quote and supra note 2.
[86] This resembles the treaty flexibilities provided in TRIPS for Least Developed Countries. On the importance of such flexibilities, see Carolyn Deere, The Implementation Game: The TRIPS Agreement and the Global Politics of Intellectual Property reform in developing countries" (2009).
[87] *Supra* note 98.

global WHOIS system.[88] It is not clear that current FTA members have the flexibility they will need in the future to modify their local systems, something that they might want to do if global WHOIS standards change. FTAs have not provided enough flexibility to adopt new policies in the future, and this is something especially important for countries like Mexico, under the current TPP negotiations.

It should be underlined that countries need to take advantage of the flexibilities in treaty texts in the implementation stage, not only during negotiations. As we have seen, Chile has been successful in implementing tailor-made solutions under its FTA umbrella. In contrast, Colombia has been criticized for not "taking advantage of the flexibility afforded by the FTA in a way that maximized the benefits for all Colombians." [89] As they have already done with the implementation of TRIPS treaties on intellectual property, countries should use flexibilities to fulfill their treaty obligations in a way that enables them to pursue their own public policies and support development.[90]

B. Value of Open Multistakeholder Processes

Global internet governance characteristically includes open, multistakeholder processes. The increasing involvement of civil society in local internet policy development indicates that users are also starting to demand similar processes on the national level.

The secret nature of FTA negotiations is still very different from global internet debates, and FTAs would benefit enormously from disclosing their mechanisms to affected stakeholders. Organizations such as Wikileaks[91] and academics working with internet policy issues have been calling for openness in FTA negotiations as a means to achieve fair policies,[92] and the experience in Latin America with FTA implementation supports their argument.

Consider Chile's implementation of FTA obligations: in Chile, both treaty negotiation and implementation incorporated different government branches that were closest to the issues under debate (such as Nic Chile for domain name regulation), and this helped to develop satisfactory mechanisms for the local community, which respected the preexisting systems.

By contrast, Colombia's "Ley Lleras" bill encountered several difficulties, in great part because it did not include civil society in local implementation. These difficulties are gradually being resolved with a more inclusive debate, which gives a voice to user organizations in the matter. Similar conclusions can be drawn from Peru's timid discussions on implementing intermediary liability obligations to date.

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[88] See the proposed changes by ICANN's Final Report from the Expert Working Group on gTLD Directory Services (June 6, 2014) at https://www.icann.org/en/system/files/files/final-report-06jun14-en.pdf
[89] Glushko-Samuelson Intellectual Property Clinic et. al, supra note 78.
[90] See also WIPO, Advice on Flexibilities under the TRIPS Agreement, at http://www.wipo.int/ip-development/en/legislative_assistance/advice_trips.html
[91] See https://wikileaks.org/
[92] See, for example, http://infojustice.org/tpp

Openness to multiple stakeholders is essential in internet policy. Taking into account the wide scope of actors affected and the evolving nature of the issues, policies that have passed a prior public debate will not only be welcomed by the community, but will also bring solutions that are better suited to deal with local problems.

Open multistakeholder debates should not only take place locally, but also regionally. Countries would benefit from sharing their experiences and learning from each other to develop internal policies. These exchanges would also serve to lever their negotiation power for future foreign agreements.

6. CONCLUSION

FTAs have played an important role in shaping internet policy in Latin America. Since the first treaties of Mexico and Chile in the early 2000s, FTAs have molded internet laws in 11 countries of the region. These treaties have consolidated common mechanisms for countries' (ccTLD) systems, regulation of ISP liability, personal data and e-commerce protection, among other areas. In this process, FTAs have also led these countries to adopt foreign mechanisms, without taking into account how these mechanisms would be integrated into national systems. In many of these countries, the low use of ccTLD dispute resolution mechanisms and the difficulties encountered in implementing intermediary liability suggest that many of the FTAs obligations were not always appropriate for local internet policy.

Today, the ongoing TPP negotiations show more consideration of the national contexts. Nonetheless, the challenges in reaching a unified text for intermediary liability illustrate the difficulties in regulating these one-size-fits-all internet policy clauses through FTAs.

The experiences in Latin America with FTA implementation draw attention to the importance of flexible agreements and open multistakeholder debates in the adoption and implementation of those agreements. FTAs make regulating internet issues more difficult, and developing countries should avoid dealing with internet policy through treaty channels where possible. It is not too late for those countries that have already entered into treaty commitments to use them as opportunities to promote positive local internet policies with multistakeholder involvement – and to create a flourishing internet ecosystem in the region.

ANNEX: RELEVANT TREATY PROVISIONS

A. DOMAIN NAME DISPUTE RESOLUTION MECHANISMS

In order to address trademark cyber-piracy, each Party shall require that the management of its country-code top-level domain (ccTLD) provides an appropriate procedure for the settlement of disputes based on the principles established in the Uniform Domain-Name Dispute- Resolution Policy.

Found in:
* Chile – USA [2003][93]
* CAFTA- DR - USA [2004][94]
* Colombia – USA [2006][95]
* Peru – USA [2006][96]
* Nicaragua – Taiwan (China) [2006][97]
* Panama – USA [2007][98]
* Chile – Australia [2008][99]

B. ONLINE PUBLIC ACCESS TO A DOMAIN NAME REGISTRANT DATABASE

1) First version

Each Party shall, in addition, require that the management of its respective ccTLD provide online public access to a reliable and accurate database of contact information for domain-name registrants, in accordance with each Party's law regarding protection of personal data.

Found in:
* Chile – USA [2003][100]
* Chile – Australia [2008][101]

2) Second version

Each Party shall require that the management of its ccTLD provides on-line public access to a reliable and accurate database of contact information for domain-name registrants. In determining the appropriate contact information, the management of a Party's ccTLD may give

[93] Article 17.3.1
[94] Article 15.4.1
[95] Article 16.4.1
[96] Article 16.4.1
[97] Article 17.12
[98] Article 15.4.1
[99] Article 17.24.1
[100] Article 17.3.2
[101] Article 17.24.2

due regard to the Party's laws protecting the privacy of its nationals.

Found in:
* CAFTA and DR (Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua) – USA [2004][102]
* Panama – USA [2007][103]

3) Third version:

Each Party shall require that the management of its ccTLD provide online public access to a reliable and accurate database of contact information concerning domain-name registrants.

Found in:
* Colombia – USA [2006][104]
* Peru – USA [2006][105]

C. Internet Service Provider (ISP) Liability

1) First version:

1. Each Party shall provide for a legislative scheme to limit remedies that may be available against service providers for infringement of copyright or related rights that they do not control, initiate or direct and that take place through their systems or networks.

2. The scheme in paragraph 1 will only apply if a service provider meets conditions, including:

(a) Removing or disabling access to infringing material upon notification from the rights owner through a procedure established by each Party; and

(b) No financial benefit is received by the service provider for the infringing activity in circumstances where it has the right and ability to control such activity.

Found in:
* Chile – Australia [2008][106]

2) Second version[107]

[102] Article 15.4.2
[103] Article 15.4.2
[104] Article 16.4.2
[105] Article 16.4.2
[106] Article 17.40

For the purpose of providing enforcement procedures that permit effective action against any act of infringement of copyright covered under this Chapter, including expeditious remedies to prevent infringements, and criminal and civil remedies that constitute a deterrent to further infringements, each Party shall provide, consistent with the framework set out in this Article:

(a) Legal incentives for service providers to cooperate with copyright owners in deterring the unauthorized storage and transmission of copyrighted materials; and

(b) limitations in its law regarding the scope of remedies available against service providers for copyright infringements that they do not control, initiate or direct, and that take place through systems or networks controlled or operated by them or on their behalf, as set out in this subparagraph.

> *(i) These limitations shall preclude monetary relief and provide reasonable restrictions on court-ordered relief to compel or restrain certain actions for the following functions and shall be confined to those functions:*
>
> > *(A) Transmitting, routing, or providing connections for material without modification of its content, or the intermediate and transient storage of such material in the course thereof;*
> >
> > *(B) Caching carried out through an automatic process;*
> >
> > *(C) Storage at the direction of a user of material residing on a system or network controlled or operated by or for the service provider; and*
> >
> > *(D) Referring or linking users to an on-line location by using information location tools, including hyperlinks and directories.*
>
> *(ii) These limitations shall apply only where the service provider does not initiate the chain of transmission of the material and does not select the material or its recipients (except to the extent that a function described in clause (i)(D) in itself entails some form of selection).*
>
> *(iii) Qualification by a service provider for the limitations as to each function in clauses (i)(A) through (D) shall be considered separately from qualification for the limitations as to each other function, in accordance with the conditions for qualification set forth in clauses (iv) through (vii).*
>
> *(iv) With respect to the function referred to in clause (i)(B), the limitations shall be conditioned on the service provider:*
>
> > *(A) permitting access to cached material in significant part only to users of its system or network who have met conditions on user access to that material;*

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[107] The treaties have minimal variations that do not impact the main structure and substance of the text, and for this reason, I only provide one version here.

(B) complying with rules concerning the refreshing, reloading, or other updating of the cached material when specified by the person making the material available on-line in accordance with a generally accepted industry standard data communications protocol for the system or network through which that person makes the material available;

(C) not interfering with technology consistent with industry standards accepted in the Party's territory used at the originating site to obtain information about the use of the material, and not modifying its content in transmission to subsequent users; and

(D) expeditiously removing or disabling access, on receipt of an effective notification of claimed infringement, to cached material that has been removed or access to which has been disabled at the originating site.

(v) With respect to functions referred to in clauses (i)(C) and (D), the limitations shall be conditioned on the service provider:

(A) not receiving a financial benefit directly attributable to the infringing activity, in circumstances where it has the right and ability to control such activity;

(B) expeditiously removing or disabling access to the material residing on its system or network on obtaining actual knowledge of the infringement or becoming aware of facts or circumstances from which the infringement was apparent, such as through effective notifications of claimed infringement in accordance with clause (ix); and

(C) publicly designating a representative to receive such notifications.

(vi) Eligibility for the limitations in this subparagraph shall be conditioned on the service provider:

(A) adopting and reasonably implementing a policy that provides for termination in appropriate circumstances of the accounts of repeat infringers; and

(B) accommodating and not interfering with standard technical measures accepted in the Party's territory that protect and identify copyrighted material, that are developed through an open, voluntary process by a broad consensus of copyright owners and service providers, that are available on reasonable and nondiscriminatory terms, and that do not impose substantial costs on service providers or substantial burdens on their systems or networks.

(vii) Eligibility for the limitations in this subparagraph may not be conditioned on the service provider monitoring its service, or affirmatively seeking facts indicating infringing activity, except to the extent consistent with such technical measures.

(viii) If the service provider qualifies for the limitations with respect to the function referred to in clause (i)(A), court-ordered relief to compel or restrain certain actions shall be limited to terminating specified accounts, or to taking reasonable steps to block access to a specific, non-domestic on-line location. If the service provider qualifies for the limitations with respect to any other function in clause (i), court-ordered relief to compel or restrain certain actions shall be limited to removing or disabling access to the infringing material, terminating specified accounts, and other remedies that a court may find necessary provided that such other remedies are the least burdensome to the service provider among comparably effective forms of relief. Each Party shall provide that any such relief shall be issued with due regard for the relative burden to the service provider and harm to the copyright owner, the technical feasibility and effectiveness of the remedy and whether less burdensome, comparably effective enforcement methods are available. Except for orders ensuring the preservation of evidence, or other orders having no material adverse effect on the operation of the service provider's communications network, each Party shall provide that such relief shall be available only where the service provider has received notice and an opportunity to appear before the Party's judicial authority.

*(ix) For purposes of the notice and take down process for the functions referred to in clauses (i)(C) and (D), each Party shall establish appropriate procedures for effective notifications of claimed infringement, and effective counter-notifications by those whose material is removed or disabled through mistake or misidentification. [*Chile-USA; CAFTA-DR-USA, Panama-USA add*: At a minimum, each Party shall require that an effective notification of claimed infringement be a written communication, physically or electronically signed by a person who represents, under penalty of perjury or other criminal penalty, that he is an authorized representative of a right holder in the material that is claimed to have been infringed, and containing information that is reasonably sufficient to enable the service provider to identify and locate material that the complaining party claims in good faith to be infringing and to contact that complaining party. At a minimum, each Party shall require that an effective counter-notification contain the same information, mutatis mutandis, as a notification of claimed infringement, and contain a statement that the subscriber making the counter-notification consents to the jurisdiction of the courts of the Party.] Each Party shall also provide for monetary remedies against any person who makes a knowing material misrepresentation in a notification or counter-notification that causes injury to any interested party as a result of a service provider relying on the misrepresentation.*

(x) If the service provider removes or disables access to material in good faith based on claimed or apparent infringement, each Party shall provide that the service provider shall be exempted from liability for any resulting claims, provided that, in the case of material residing on its system or network, it takes reasonable steps promptly to notify the person making the material available on its system or network that it has done so and, if such person makes an effective counter-notification and is subject to jurisdiction in an infringement suit, to restore the material on-line unless the person giving the original effective notification seeks judicial relief within a reasonable time.

(xi) Each Party shall establish an administrative or judicial procedure enabling copyright owners who have given effective notification of claimed infringement to obtain expeditiously from a service provider information in its possession identifying the alleged infringer.

(xii) Service provider means:

(A) for purposes of the function referred to in clause (i)(A), a provider of transmission, routing, or connections for digital on-line communications without modification of their content between or among points specified by the user of material of the user's choosing; and

(B) for purposes of the functions referred to in clause (i)(B) through (D), a provider or operator of facilities for on-line services or network access.

Found in:
* Chile – USA [2003][108]
* CAFTA and DR (Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua) – USA [2004][109]
* Colombia – USA [2006][110]
* Panama – USA [2007][111]
* Peru – USA [2006][112]

3) Third version[113]

Use of Services of Intermediaries

The Parties recognize that the services of intermediaries may be used by third parties for infringing activities. To ensure the free movement of information services and, at the same time, to enforce copyright and related rights in the digital environment, each Party shall provide for the measures set out in this Section for intermediary service providers where they are in no way involved with the information transmitted.

Article 251
Liability of Intermediary Service Providers: 'mere conduit'

1. Where the service that is provided consists of the trans mission in a communication network of information provided by a recipient of the service, or the provision of access to a communication

[108] Article 17.11.23
[109] Article 15.11.27.
[110] Article 16.11.29.
[111] Article 15.11.27.
[112] Article 16.11.29
[113] As with the previous clause, the treaties have minimal variations that do not impact the main structure and substance of the text, and for this reason, I only provide one version here.

network, each Party shall ensure that the service provider is not liable for the information transmitted, on condition that such provider does not:

(a) initiate the transmission;

(b) select the receiver of the transmission; and

(c) select or modify the information contained in the transmission.

2. The acts of transmission and provision of access referred to in paragraph 1 include the automatic, intermediate and transient storage of the information transmitted in so far as this takes place for the sole purpose of carrying out the transmission in the communication network, and provided that the information is not stored for a period longer than is reasonably necessary for the transmission.

3. This Section shall not affect the possibility for a court or administrative authority, in accordance with the legal system of each Party, of requiring the service provider to terminate or prevent an infringement.

Article 252
Liability of Intermediary Service Providers: 'caching'

1. Where the service that is provided consists of the transmission in a communication network of information provided by a recipient of the service, each Party shall ensure that the service provider is not liable for the automatic, intermediate and temporary storage of that information, performed for the sole purpose of making more efficient the onward transmission of the information to other recipients of the service upon their request, on condition that such provider

(a) does not modify the information;

(b) complies with conditions on access to the information;

(c) complies with rules regarding the updating of the information, specified in a manner widely recognised and used by industry;

(d) does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information; and

(e) acts expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement.

2. This Section shall not affect the possibility for a court or administrative authority, in accordance with the legal systems of each Party, of requiring the service provider to terminate or prevent an infringement.

Article 253
Liability of Intermediary Service Providers: 'hosting'

1. Where the service that is provided consists of the storage of information provided by a recipient of the service, each Party shall ensure that the service provider is not liable for the information stored upon request of a recipient of the service, on condition that such provider:

(a) does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or

(b) acts expeditiously to remove or to disable access to the information, upon obtaining such knowledge or awareness.

2. Paragraph 1 shall not apply when the recipient of the service is acting under the authority or the control of the provider.

3. This Section shall not affect the possibility for a court or administrative authority, in accordance with the legal system of each Party, of requiring the service provider to terminate or prevent an infringement, nor does it affect the possibility for a Party to establish procedures governing the removal or disabling of access to information.

Article 254
No General Obligation to Monitor

1. A Party shall not impose a general obligation on service providers, when providing the services covered by Articles 251, 252 and 253, to monitor the information which they transmit or store, nor a general obligation to actively seek for facts or circumstances indicating illegal activities.

2. The Parties may establish obligations for service providers to promptly inform the competent public authorities of alleged illegal activities undertaken or of information provided by recipients of their service, or obligations to communicate to the competent authorities, upon request of such authorities, information enabling the identification of recipients of their service with whom they have storage agreements.

Found in:
* Andean Community (Colombia, Peru and expanding) – EU [2013][114]

D. DATA PROTECTION

* Colombia – USA [FTA – Chapter 14 of Telecommunications]

"Notwithstanding paragraph 3, a Party may take such measures as are necessary to:

(a) ensure the security and confidentiality of messages; or

[114] http://ec.europa.eu/trade/policy/countries-and-regions/regions/andean-community/

(b) protect the privacy of non-public personal data of subscribers to public telecommunications services

* Nicaragua – Taiwan

4. Not with standing paragraph 3, a Party may take such measures as are necessary to:

a) ensure the security and confidentiality of messages; or

b) protect the privacy of non-public personal data of subscribers to public telecommunications services, subject to the requirement that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination or disguised restriction on trade in services.

* Mexico – EU (Partnership)

Article 20
The information society
1. The Parties recognize that information and communication technologies are key elements of modern life and of vital importance to economic and social development.
2. Cooperation in this area shall focus in particular on:
[...]
(h) the reciprocal access to data bases according to terms to be agreed upon.
[...]

Article 41
Cooperation on data protection
1. on the protection of personal data in order to improve the level of protection and avoid obstacles to trade that requires transfers of personal data.
2. Cooperation on personal data protection may include technical assistance in the form of exchanges of information and experts and the establishment of joint programs and projects.
[...]

Article 51
Data protection
1. The Parties agree to accord a high level of protection to the processing of personal and other data, in accordance with the standards adopted by the relevant international organizations and the Community.
2. To this end they shall take account of the standards referred to in the Annex, which shall form an integral part of this Agreement.
[...]
PROTECTION OF PERSONAL DATA REFERRED TO IN ARTICLE 51
— Guidelines for the regulation of computerized personal data files, modified by the General Assembly of the United Nations on 20 November 1990.

— Recommendation of the OECD Council concerning guidelines governing the protection of privacy and trans-border flows of personal data of 23 September 1980.
— Council of Europe Convention for the protection of individuals with regard to automatic processing of personal data of 28 January 1981.
— Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data."

* Colombia and Peru - EU

Article 157
Data Processing

1. Each Party shall permit a financial service supplier of another Party to transfer information in electronic or other form, into and out of its territory, for data processing where such processing is required in the ordinary course of business of such financial service supplier.

2. Each Party shall adopt adequate safeguards for the protection of the right to privacy and the freedom from interference with the privacy, family, home or correspondence of individuals, in particular with regard to the transfer of personal data.

* Central America (Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, Panama) - EU [FTA]

TITLE II

JUSTICE, FREEDOM AND SECURITY

ARTICLE 34
Personal Data Protection

1. The Parties agree to cooperate in order to improve the level of protection of personal data to the highest international standards, such as the Guidelines for the Regulation of Computerized Personal Data Files, modified by the General Assembly of the United Nations on December 14th 1990, and to work towards the free movement of personal data between the Parties, with due regard to their domestic legislation.

2. Cooperation on protection of personal data may include, inter alia, technical assistance in the form of exchange of information and expertise taking into account the laws and regulations of the Parties.

* Chile - Australia

Article 16.8: Online Personal Data Protection

Each Party shall adopt or maintain a domestic legal framework, which ensures the protection of the personal data of the users of electronic commerce. In the development of personal data protection standards, each Party shall take into account the international standards and criteria of relevant international bodies.

E. ELECTRONIC COMMERCE

1) First version

Chapter X

Electronic Commerce

Article 15.1: General Provisions
1. The Parties recognize the economic growth and opportunity provided by electronic commerce and the importance of avoiding unnecessary barriers to its use and development.

2. Nothing in this Chapter shall be construed to prevent a Party from imposing internal taxes, directly or indirectly, on digital products, provided they are imposed in a manner consistent with this Agreement.

3. This Chapter is subject to any other relevant provisions, exceptions, or non- conforming measures set forth in other Chapters or Annexes of this Agreement.

Article 15.2: Electronic Supply of Services
The Parties recognize that the supply of a service using electronic means falls within the scope of the obligations contained in the relevant provisions of Chapter Eleven (Cross- Border Trade in Services) and Chapter Twelve (Financial Services), subject to any non-conforming measures or exceptions applicable to such obligations.[1]

Article 15.3: Customs Duties on Digital Products
Neither Party may apply customs duties on digital products of the other Party.

Article 15.4: Non-Discrimination for Digital Products
1. A Party shall not accord less favorable treatment to a digital product than it accords to other like digital products, on the basis that:

> *(a) the digital product receiving less favorable treatment is created, produced, published, stored, transmitted, contracted for, commissioned, or first made available on commercial terms in the territory of the other Party; or*
>
> *(b) the author, performer, producer, developer, or distributor of such digital products is a person of the other Party.*[2]

2. (a) A Party shall not accord less favorable treatment to a digital product created, produced, published, stored, transmitted, contracted for, commissioned, or first made available on commercial terms in the territory of the other Party than it accords to a like digital product created, produced, published, stored, transmitted, contracted for, commissioned, or first made

available on commercial terms in the territory of a non-Party.

(b) A Party shall not accord less favorable treatment to digital products whose author, performer, producer, developer, or distributor is a person of the other Party than it accords to like digital products whose author, performer, producer, developer, or distributor is a person of a non-Party.

3. A Party may maintain an existing measure that does not conform with paragraph 1 or 2 for one year after the date of entry into force of this Agreement. A Party may maintain the measure thereafter, if the treatment the Party accords under the measure is no less favorable than the treatment the Party accorded under the measure on the date of entry into force of this Agreement, and the Party has set out the measure in its Schedule to Annex 15.4. A Party may amend such a measure only to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with paragraphs 1 and 2.

Article 15.5: Cooperation
Having in mind the global nature of electronic commerce, the Parties recognize the importance of:

> *(a) working together to overcome obstacles encountered by small and medium enterprises in the use of electronic commerce;*
>
> *(b) sharing information and experiences on regulations, laws, and programs in the sphere of electronic commerce, including those related to data privacy, consumer confidence, cyber-security, electronic signatures, intellectual property rights, and electronic government;*
>
> *(c) working to maintain cross-border flows of information as an essential element for a vibrant electronic commerce environment;*
>
> *(d) encouraging the development by the private sector of methods of self- regulation, including codes of conduct, model contracts, guidelines, and enforcement mechanisms that foster electronic commerce; and*
>
> *(e) actively participating in international fora, at both a hemispheric and multilateral level, with the purpose of promoting the development of electronic commerce.*

Article 15.6:
Definitions

For purposes of this Chapter:

Digital products means computer programs, text, video, images, sound recordings, and other products that are digitally encoded and transmitted electronically, regardless of whether a Party treats such products as a good or a service under its domestic law;[3]

Electronic means means employing computer processing; and electronic transmission or Transmitted electronically means the transfer of digital

Products using any electromagnetic or photonic means.

Annex 15.4 Non-Discrimination for Digital Products

The Schedule of a Party sets out the non-conforming measures maintained by that Party pursuant to Article 15.4(3).

Found in:
* Chile – USA [2003][115]
* CAFTA-DR -USA [2004][116]
* Colombia – USA [2006][117]
* Panama – USA [2007][118]
* Peru – USA [2006][119]

2) Second versions

* Colombia and Peru (Andean community) - EU [2013]

Electronic commerce

Article 162
Objective and Principles

1. The Parties, recognising that electronic commerce increases trade opportunities in many sectors, agree to promote the development of electronic commerce between them, in particular by cooperating on issues arising from electronic commerce under the provisions of this Title.

2. The Parties agree that the development of electronic commerce shall be consistent with the international standards of data protection, in order to ensure the confidence of users of electronic commerce.

3. The Parties agree that a delivery by electronic means shall be considered as a provision of services, within the meaning of Chapter 3 (Cross-border Supply of Services), and shall not be subject to customs duties.

Article 163
Regulatory Aspects of Electronic Commerce

1. The Parties shall maintain a dialogue on regulatory issues arising from electronic commerce which shall inter alia address the following issues

[115] Article 15.
[116] Article 15.
[117] Article 14.
[118] Article 14.
[119] Article 15.

(a) the recognition of certificates of electronic signatures issued to the public and the facilitation of cross-border certification services;

(b) the liability of intermediary service providers with respect to the transmission, or storage of information;

(c) the treatment of unsolicited electronic commercial communications;

(d) the protection of consumers in the field of electronic commerce from, among others, fraudulent and misleading commercial practices in the cross border context;

(e) the protection of personal data;

(f) the promotion of paperless trading; and

(g) any other issue relevant for the development of electronic commerce.

2. The Parties shall conduct such cooperation, inter alia, by exchanging information regarding their respective relevant legislation and jurisprudence, as well as on the implementation of such legislation.

Article 164
Protection of Personal Data

The Parties shall endeavour, insofar as possible, and within their respective competences, to develop or maintain, as the case may be, regulations for the protection of personal data.

Article 165
Management of Paperless Trading

The Parties shall endeavour, insofar as possible, and within their respective competences, to:

(a) make trade management documents available to the public in electronic form; and

(b) accept trade administration documents (53) submitted electronically as the legal equivalent of their paper version.

Article 166
Consumer Protection

1. The Parties recognise the importance of maintaining and adopting transparent and effective measures to protect consumers from fraudulent and misleading commercial practices when consumers engage in electronic commerce transactions.

2. The Parties recognise the importance of reinforcing consumer protection and of cooperation among domestic consumer protection authorities, in activities relating to electronic commerce."

* Peru – Canada [2008]

CHAPTER FIFTEEN

ELECTRONIC COMMERCE

[...]

Article 1505: Consumer Protection
1. The Parties recognize the importance of maintaining and adopting transparent and effective measures to protect consumers from fraudulent and deceptive commercial practices in electronic commerce.

2. To this end, the Parties should exchange information and experiences on national approaches for the protection of consumers engaging in electronic commerce.

Article 1506: Paperless Trade Administration
1. Each Party shall endeavour to make trade administration documents available to the public in electronic form.

2. Each Party shall endeavour to accept trade administration documents submitted electronically as the legal equivalent of the paper version of such documents.

Article 1507: Protection of Personal Information
1. The Parties recognize the importance of the protection of personal information in the on-line environment.

2. To this end, each Party should:

> *A. adopt or maintain legal, regulatory and administrative measures for the protection of personal information of users engaged in electronic commerce; and*
>
> *B. exchange information and experiences regarding their domestic regimes on the protection of personal information.*

* Chile - Australia:

Article 16.5: Domestic Electronic Transactions Frameworks
1. Each Party shall adopt or maintain measures regulating electronic transactions based on the following principles:

> *(a) a transaction including a contract shall not be denied legal effect, validity or enforceability solely on the grounds that it is in the form of an electronic communication; and*
>
> *(b) laws should not discriminate arbitrarily between different forms of technology.*

2. Nothing in paragraph 1 prevents the Parties from making exceptions in their domestic laws to the general principles outlined in that paragraph.

3. Each Party shall:

> *(a) minimise the regulatory burden on electronic commerce; and*
>
> *(b) ensure that its measures regulating electronic commerce support industry-led development of electronic commerce.*

Article 16.6:
Electronic Authentication

1. The Parties recognise that electronic authentication represents an element that facilitates trade.

2. The Parties shall work towards the mutual recognition of digital certificates and electronic signatures at governmental level, based on internationally accepted standards.

3. Each Party shall adopt or maintain measures regulating electronic authentication that:

> *(a) permit parties who take part in a transaction or contract by electronic means to determine the appropriate authentication technologies and implementation models, and do not limit the recognition of such technologies and implementation models, unless there is a domestic or international legal requirement to the contrary; and*
>
> *(b) permit parties who take part in a transaction or contract by electronic means to have the opportunity to prove in court that their electronic transactions comply with any legal requirement.*

4. The Parties shall encourage the use of interoperable electronic authentication.

Article 16.7: Online Consumer Protection
1. Each Party shall, to the extent possible and in a manner considered appropriate, adopt or maintain measures which provide protection for consumers using electronic commerce that is at least equivalent to measures which provide protection for consumers of other forms of commerce.

2. Each Party shall adopt or maintain measures regulating consumer protection where:

> *(a) consumers who participate in electronic commerce should be afforded transparent and effective consumer protection that is not less than the level of protection afforded in other forms of commerce; and*
>
> *(b) businesses engaged in electronic commerce should pay due regard to the interests of consumers and act in accordance with fair business, advertising and marketing practices.*

3. Each Party shall encourage business to adopt the following fair business practices where business engages in electronic commerce with consumers:

(a) businesses should provide accurate, clear and easily accessible information about themselves, the goods or services offered, and about the terms, conditions and costs associated with a transaction to enable consumers to make an informed decision about whether to enter into the transaction;

(b) to avoid ambiguity concerning the consumer's intent to make a purchase, the consumer should be able, before concluding the purchase, to identify precisely the goods or services he or she wishes to purchase; identify and correct any errors or modify the order; express an informed and deliberate consent to the purchase; and retain a complete and accurate record of the transaction;

(c) consumers should be provided with easy-to-use, secure payment mechanisms and information on the level of security such mechanisms afford.

Article 16.8: Online Personal Data Protection

Each Party shall adopt or maintain a domestic legal framework which ensures the protection of the personal data of the users of electronic commerce. In the development of personal data protection standards, each Party shall take into account the international standards and criteria of relevant international bodies.