

## Commercial Presence under International Trade Law and EU Law

Unity in Diversity?

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# **Commercial Presence under International Trade Law and EU Law Unity in Diversity?**

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# **Commercial Presence under International Trade Law and EU Law Unity in Diversity?**

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Writing a PhD is an academic and intellectual journey, yet it is also a quiet, inward passage, one measured not only in chapters and arguments, but in patience learned, doubts endured, and faith sustained. No one reaches its end by walking alone. A journey of this kind unfolds through preparation, companionship, guidance, and grace.

At the heart of this journey lies my Islamic faith, a guiding light that inspires the pursuit of knowledge as both a sacred duty and a source of enlightenment. It is this faith that reminds me that seeking understanding is not merely an intellectual endeavour, but an act of devotion, a path through which the soul grows in humility, patience, and reflection. I am deeply grateful to Allah, the All-Knowing and All-Wise, the Most Merciful Whose wisdom encompasses all things and Whose mercy lights even the darkest paths. Every step taken, every obstacle overcome, and every success achieved ultimately comes from Him. In times of ease and in times of struggle, His guidance, mercy and blessings sustained me. Whatever success this work represents belongs first to Him.

Long before this journey began, my parents prepared me for it in the best possible way. Through their words, and more importantly through their lives, they taught me that learning is a responsibility as much as a privilege, and that an academic journey is sustained by discipline, humility, and perseverance. They showed me that education opens not only doors, but horizons, shaping how one understands the world and one's place within it. Their sacrifices were many and often unseen. They gave love, time, comfort, and certainty so that I might pursue questions whose answers were not immediate and paths whose outcomes were uncertain. This work stands firmly on foundations they laid long before I knew where the road would lead.

That foundation was carried forward by my brother and sister. Throughout this journey, they stood beside me with quiet constancy, trust, and practical support when it mattered most. Especially in the final stages, they assumed responsibilities that allowed me the space and focus needed to bring this work to completion. By helping to carry the weight of everyday life, particularly in caring for my children, they made it possible for me to reach the end of this journey with clarity and peace of mind. Their support was an extension of the values we were raised with, lived out in action.

As the journey lengthened and its demands deepened, there were moments when the road grew heavy and the horizon seemed far away. In those moments, what one needs most is not instruction, but belief. My wife became the steady presence that made continuation possible. Through her love, patience, and unwavering support, she shared the weight of this journey, giving not only her time, but also her strength and trust. Her faith in me became a shelter in uncertain moments, carrying me forward when the path felt too steep to walk alone.

No long journey can be sustained without moments of rest, pauses that restore perspective and return the traveller to life itself. My sons, Aminullah and Sediqullah, were those pauses made tangible. In their laughter, curiosity, and presence, they gently interrupted abstraction and seriousness, grounding me in joy and reminding me why the journey mattered.

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**Part I. Conceptualising the framework of analyses**





## 1. International Trade Law and EU Law: Problem setting

This research aims to analyse the fragmentation of international trade rules governing the supply of services through commercial presence, as well as to assess the extent to which these trade rules are inconsistent with EU free movement law. In particular, it examines whether the coexistence of multiple international trade agreements and EU internal market rules governing the supply of services through commercial presence, leads to legal inconsistencies, regulatory overlap, and/or uncertainty for service suppliers and regulators.

At the international level, the World Trade Organization (WTO) is the organisation dealing with multilateral trade. WTO law offers uniform rules and a centralised dispute resolution mechanism to facilitate international trade. However, a process of fragmentation is ongoing in international law. In 1953, Jenks was the first who drew attention to the phenomenon of fragmentation. He noted that '[i]n the absence of a world legislature with a general mandate, law-making treaties are tending to develop in a number of historical, functional and regional groups which are separate from each other and whose mutual relationships are in some respects analogous to those of separate systems of municipal law'.<sup>1</sup> More than fifty years later, during its fifty-second session in 2000, the International Law Commission (ILC) included the issue of fragmentation to its work programme. In 2002, a Study Group was established by the ILC to extensively study the fragmentation of the international legal system. In its report, the Study Group noted that '[...] a well-known paradox of globalization [is] that, while it has led to increasing uniformization in the life of societies around the world, it has also led to the increasing fragmentation thereof – that is, to the emergence of specialized and relatively autonomous spheres of social action and structure'.<sup>2</sup>

Since then, a vast body of literature emerged on the fragmentation of international law. The fragmentation of general international law is therefore a well-described phenomenon. Broadly speaking, this fragmentation comes in one of two forms. The first one is substantive fragmentation, whereby the substantive norms of general international law are fragmented. The question here is which substantive norms apply in a particular case. The second form concerns institutional fragmentation. Here the issue is not what substantive norms apply, but rather who makes and interprets these norms.<sup>3</sup>

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1 Clarence W Jenks, 'The Conflict of Law-making Treaties' (1953) 30 *British Yearbook of International Law* 401, 403.

2 *Ibid.*

3 Tomer Brudde, 'The Principles of Normative Integration and the Allocation of International Authority: The WTO, the Vienna Convention on the Law of the Treaties, and the Rio Declaration' (2008) 6 *Loyola University Chicago International Law Review* 173, 177.

Recently, fragmentation has also received increasing attention in the international trade law literature,<sup>4</sup> a development closely linked to the growing number of alternative Free Trade Agreements (FTAs). As a consequence of the increasing number of FTAs, the multilateral trading system is now flanked by a complex network of bilateral and regional trade agreements.<sup>5</sup> FTAs can cover vast parts of global trade. Some of the agreements currently being negotiated are referred to as super-regional trade agreements, as they encompass regions covering a quarter or more of global trade in goods and services.<sup>6</sup> FTAs essentially follow the WTO approach in relation to the legal rules that apply to trade liberalisation, copying both the mechanisms and the text of the WTO provisions. However, FTAs tend, often for obvious reasons, to introduce substantive changes or additions to the existing WTO rules. Variations in language are also frequent, as well as explanatory statements by the signatory states. While some of these changes clarify, modernise or categorise existing trade rules, additions and modifications are increasingly adopted. In other words, FTAs tend to differ from WTO rules, and from each other to a lesser or greater extent.<sup>7</sup> This contributes to a fragmented legal landscape in which multiple, overlapping trade regimes coexist.

The effects of diversity in trade rules should not be underestimated, as these agreements have moved far beyond the reduction of tariffs in relation to goods but also now include trade in services.<sup>8</sup> Adding trade in services to such agreements means that a broad range of legislation is now affected by international law, as many services are heavily regulated.<sup>9</sup> The consequence of the expansion of the scope of FTAs is that they influence various policies, ranging from telecommunication networks and foreign direct investment to migration law

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4 Delimatsis writes on the topic in 2010, indicating that fragmentation of international trade law '[...] is a rather new issue that drew little attention in academic literature to date'. See Panagiotis Delimatsis, 'The Fragmentation of International Trade Law', (2011) 45 *Journal of World Trade* 87, 95.

5 See for the fragmentation in international trade law due to this increase in FTAs Peter T Stoll, 'Mega-regionals: Challenges, Opportunities and Research Questions' in Thilo Rensmann (ed), *Mega-regional Trade Agreements* (Springer 2017).

6 The most-encompassing mega-regional trade agreements would be the Trans-Pacific Partnership (TPP, 25% of global trade and FDI, involving 12 countries around the Pacific) and the Transatlantic Trade and Investment Partnership (TTIP, 40% of global trade and FDI, EU and US). Negotiations are currently stalled due to the US withdrawing from both of them.

7 Simon Tans, 'Trade Commitments in GATS, EU-CARIFORUM and CETA, and the Inclusion of Blanket References to Entry, Stay, Work and Social Security Measures' in Sergio Carrera and others (eds), *Pathways Toward Legal Migration into the EU* (Centre for European Policy Studies 2017) 152-154.

8 See eg Leonardo Baccini, 'The Economics and Politics of Preferential Trade Agreements' (2019) 22 *Annual Review of Political Science* 22, 75.

9 Panagiotis Delimatsis, 'Article III GATS' in Rudiger Wolfrum, Peter T Stoll and Clemens Feinäugle (eds), *WTO – Trade in Services* (Martinus Nijhoff Publishers 2008) 93-95; GATS preamble, para 2.

## 1. Introduction

This chapter will describe the key concepts and methodological choices of the present research. As this research explores the trade rules aimed at liberalising commercial presence through the lens of trade in services, the next section will discuss the notion of services (section 2). There are numerous trade agreements that contain provisions addressing trade in services. Section 3 will describe in more detail than in the previous chapter which agreements are chosen for the purpose of this study in order to generate representative results. Trade agreements usually contain many provisions dealing with services, for example on market access, non-discrimination and transparency. Section 4 will explain which provisions from the selected agreements will be discussed. Parties to trade agreements can use different techniques in order to commit themselves to certain obligations flowing from the provisions. Section 5 will elaborate on these techniques and explain which techniques are adopted in the selected agreements. In order to provide an answer to the main question, it is necessary to interpret the selected provisions from the selected agreements. Section 6 will be focused on the rules of interpretation and how the (provisions of the) selected agreements will be interpreted. In section 7, the concept of commercial presence will be discussed while section 8 will discuss the concept of fragmentation. Section 9 will discuss the status of international (trade) agreements within the EU legal order. In section 10, the notion of inconsistency will be explored. Finally, section 11 will serve as the conclusion.

## 2. The notion of services

International trade law aims at liberalising *inter alia* the trade in goods and services. The focus of the present research is on the rules addressing the trade in services. In the past couple of decades, a vast amount of both economic and legal literature has emerged attempting to define the notion of services, explore the differences between services and goods and investigate the consequences of these differences for the application of the neo-classical economic theory of comparative advantage for the trade in services. In order to conceptualise the framework of trade in services, theories developed for trade in goods were often applied by analogy.<sup>26</sup> The differences between goods and services are relevant to the extent that these differences are often used to define services as consequence of the lack of a definition of the concept of services, which is needed to create a theoretical framework for the trade in services.<sup>27</sup>

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26 Gary P Sampson and Richard H Snape, 'Identifying the Issues in Trade in Services' (1985) 8 *The World Economy* 171. See further eg Jagdish N Bhagwati, 'International Trade in Services and its Relevance for Economic Development', in Jagdish N Bhagwati and Douglas A Irwin (eds), *Political Economy and International Economics* (Massachusetts Institute of Technology Press 1991) ch 14.

27 Michael Trebilcock, Robert Howse and Antonia Eliason, *The Regulation of International Trade* (4th edn, Routledge 2013) 474.

In the 1930s, the economist Fisher was one of the first who divided economic activities into three sectors.<sup>28</sup> In this three-sector model, the primary sector is concerned with economic activities that extract or harvest natural resources from the earth. Examples of such economic activities concern *inter alia* agriculture, fisheries and mining. In the secondary sector, the natural resources obtained from the primary sector are processed and transformed into tradable goods. Finally, the tertiary sector encompasses all the economic activities that are not covered by the primary or the secondary sector. Accordingly, economic activities falling under the tertiary sector are considered to be services.<sup>29</sup>

While dividing economic activities into three sectors might be helpful, it raises at least three issues. The first issue is related to the fact that the economic activities belonging to tertiary sector are negatively defined: if an economic activity does not fall within the primary or secondary sector, it is covered by the tertiary sector.<sup>30</sup> This negative definition is the result of a lack of substantive criteria for services. The consequence of this negative definition is that the tertiary sector becomes a catch-all for economic activities that are not easily classifiable, thereby blurring the notion of services. The second issue is that by using the three-sector model, certain economic activities are not considered services because they are within the production process of goods and are covered by the secondary sector. Examples of such economic activities are the maintenance or repair of machines that are used to produce goods. Finally, the three-sector model is also problematic because it does not properly address technological services.<sup>31</sup> Take for example cloud storage services such Google Drive and Dropbox. These services clearly do not fall within the first or second sector. However, it is also questionable whether they can fall within the third sector because they are software driven with minimum human involvement.

To address *inter alia* these issues, a first attempt was made to define services positively by the International Standard Industry Classification (ISIC). The ISIC classification labels the ‘products’ of certain sectors, professions and enterprises as services. The ISIC lists sectors, professions and enterprises such as infrastructure, trade and business. In each of these sectors, the economic activities are considered to be services, ie electricity, gas, water, hotels and insurance services. Analysing the existing classification lists, it is argued that ‘[...] the services

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28 Allan GB Fisher, ‘Capital and the Growth of Knowledge’ (1933) 43 *The Economic Journal* 379, 379 and Allan GB Fisher, ‘Production, Primary, Secondary, Tertiary’ (1939) 15 *Economic Record* 24, 24.

29 Before Fisher, some economists discussed and distinguished between economic activities which could be considered precursors the Modern notion of services. See *inter alia*: Richard Cantillon, *Essai sur la nature du commerce en général* (Essay on the nature of commerce in general) (1730) and Jean-Baptiste Say, *Traité d’économie politique* (A treatise on political economy) (1803).

30 The ordinary meaning of the term ‘services’ is also identified negatively. The Oxford Learner’s Dictionary for instance defines services as ‘a business whose work involves doing something for customers but not producing goods’.

31 David Collins, ‘Article I GATS – Scope and Definition’ in Laura Wanner and others (eds), *Commentaries on World Trade Law – Volume 5* (Brill 2022) para 13.

sector tends to be defined as industries that provide time and place and form utility, while bring about a change in or for the recipient of the service'.<sup>32</sup>

In addition to the ISIC classification, in the literature some abstract characteristics of services are identified which give, albeit to a certain extent, an idea of the notion of services. The starting point is that services are considered to be 'immaterial goods'.<sup>33</sup> These 'immaterial goods' possess qualities such as intangibility, invisibility, the lack of suitability for storage, the lack of transportability and the coincidence of production and consumption.<sup>34</sup> However, these characteristics have certain limitations and are not always and, in every case, useful to identify services. Services are for instance typically intangible in nature since they are not physically embodied in concrete objects. However, services can involve tangible objects when for instance machines are repaired. Moreover, there are services that are embodied in objects that can be traded such as computer programmes which are inscribed as software on a data carrier or memory medium. In the literature, this is called the 'disembodiment of services'. The same is true for the invisibility characteristic: services are considered as invisible in general because they have no physical manifestations in tangible objects. Accordingly, services cannot easily be detected or controlled through standard border regulations. However, there are services with visible manifestation, such as the arrival of an attorney in the country where legal advice is to be provided. The lack of storage and transportability can also not be used as a decisive or determinative characteristic of services since certain services are embodied in tangible objects, allowing for storage and transportability. Examples are expert opinion written on a paper and software programmes stored on USB flash drivers.<sup>35</sup>

Considering these challenges that are associated with defining services based on immateriality and other characteristics, it is argued to refrain from providing a specific definition for the term 'services'. Consequently, during the

32 Ibid, para 16, where reference is made to additional literature.

33 Simon N Lester and Bryan Mercurio, *World Trade Law: Text, Materials and Commentary* (Hart Publishing 2008) 690. A legal definition provided by a law dictionary emphasises also this immateriality quality. Black's Law Dictionary (12th edn, MN Thomson Reuters 2024) defines services as '[t]hings purchased by consumers that do not have physical characteristics'. At the same time, one should be aware that immateriality is not decisive. Electricity has for instance no physical characteristics but is nevertheless considered in general as a good rather than a service.

34 These characteristics are mentioned by Simon Tans, *Service Provision and Migration: EU and WTO Service Trade Liberalization and their Impact on Dutch and UK Immigration Rules* (Brill Nijhoff 2017). In footnote 161 on page 52, Tans notes that these characteristics were summarised by Jagdish N Bhagwati, 'Splintering and Disembodiment of Services and Developing Nations' (1984) 7 *The World Economy* 133, 135-136. Michael Trebilcock, Robert Howse and Antonia Eliason, *The Regulation of International Trade* (4th edn, Routledge 2013) 474 do mention some of these characteristics.

35 This section is based on David Collins, 'Article I GATS – Scope and Definition' in Laura Wanner and others (eds), *Commentaries on World Trade Law – Volume 5* (Brill 2022) paras 17-19. See also the literature referred to here.