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AN ENQUIRY INTO ITS LEGAL
SUBSTANCE AND VIABILITY

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A WTO AGREEMENT ON ELECTRONIC COMMERCE: AN ENQUIRY INTO ITS LEGAL SUBSTANCE AND VIABILITY

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Electronic commerce has been one of the very few areas of trade law, where one can observe a willingness shared by the international community to move forward and actively engage in new rule-making. This is reflected in the current WTO Joint Statement Initiative on Electronic Commerce, which aims at the completion of a plurilateral agreement on this topic. The article contextualizes and explores these developments by looking at the relevant digital trade provisions in preferential trade agreements (PTAs), in particular by highlighting the legal innovation in the most advanced templates of the CPTPP and the USMCA, as well as those in dedicated digital economy agreements, such as the ones between the United States and Japan and between Chile, New Zealand and Singapore. The article also covers the newer EU trade deals and looks at the RCEP, as the first agreement with digital trade provisions that includes China, so as to give a sense of the dynamic governance environment on issues of digital trade. The article compares the PTA rule-frameworks with the WTO negotiations on electronic commerce and seeks to identify points of convergence and divergence reflected in the latest negotiation proposals tabled by WTO Members. The analytical focus here is placed on the legal substance of the future WTO deal and its viability to adequately address the practical reality of the data-driven economy.

Key words: digital trade; electronic commerce; World Trade Organization; Joint Statement Initiative; preferential trade agreements; data; cross-border data flows; CPTPP; USMCA; DTA; DEPA; RCEP; TCA

I. INTRODUCTION

‘Electronic commerce’ or ‘digital trade’,¹ as it is now more frequently referred to, is a topic that has steadily moved up on the priority list of trade negotiators. On the one hand, this interest has to do with the advanced digitization and the critical importance of data to global economies;² on the other hand, it can be linked to the multiple new

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¹ The OECD has pointed out that, while there is no single recognized and accepted definition of digital trade, there is a growing consensus that it encompasses digitally-enabled transactions of trade in goods and services that can either be digitally or physically delivered, and that involve consumers, firms, and governments. Critical is that the movement of data underpins contemporary digital trade and can also itself be traded as an asset and a means through which global value chains are organized and services delivered. See Javier López González and Marie-Agnes Jouanjean, ‘Digital Trade: Developing a Framework for Analysis’, *OECD Trade Policy Papers* 205 (2017), <https://doi.org/10.1787/524c8c83-en>

² See e.g. James Manyika et al., *Big Data: The Next Frontier for Innovation, Competition, and Productivity* (Washington, DC: McKinsey Global Institute 2011); Viktor Mayer-Schönberger and Kenneth Cukier, *Big Data: A Revolution That Will Transform How We Live, Work, and Think* (New York: Eamon Dolan/Houghton Mifflin Harcourt, 2013); Nicolaus Henke et al., *The Age of Analytics:*

issues that the data-driven economy has raised, such as those in the areas of personal data protection or national security, which demand urgent regulatory responses.³ The multilateral forum of the World Trade Organization (WTO), despite its long-acknowledged stalemate, its troubles to move forward with the Doha negotiation round and to secure a working dispute settlement mechanism, has too become active on the topic. There seems to be a broad agreement amongst the WTO Members that it is high time to finalize an agreement on electronic commerce that can address many of the so far unresolved issues of digital trade in the body of the WTO Agreements, provide a platform for cooperation and ensure legal certainty and equity. This article follows and contextualizes this development and seeks to address critical questions as to the form and substance of the new WTO treaty on electronic commerce.

To engage in these enquiries, the article first sketches the status quo of WTO rules of pertinence for electronic commerce. It provides then an in-depth analysis of the rule-making on digital trade in preferential trade agreements (PTAs), which not only compensates for the lack of developments in the WTO but effectively creates a new, albeit fragmented, governance framework for the data-driven economy. The analytical lens here is directed in particular to the newer and more advanced models, such as those under the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and the United States Mexico Canada Agreement (USMCA), as well as those endorsed by dedicated digital economy agreements, such as the ones between the United States (US) and Japan through the Digital Trade Agreement (DTA) and between Chile, New Zealand and Singapore through the Digital Economy Partnership Agreement (DEPA). The article then covers the European Union's (EU) new generation of trade deals, in particular the currently negotiated deals with Australia, New Zealand and Tunisia and the post-Brexit agreement with the United Kingdom (UK), and looks at the Regional Comprehensive Economic Partnership (RCEP), as the first agreement with digital trade provisions that includes China, so as to give a sense of dynamic governance environment on issues of digital trade. Subsequently, the article compares these PTA rule-frameworks with the WTO negotiations on electronic commerce and seeks to identify points of convergence and divergence reflected in the latest negotiation proposals tabled by WTO Members. The analytical focus is placed on the legal substance and form of the prospective WTO deal and on its viability to adequately address the practical reality (and the future) of the data-driven economy.

Competing in a Data-Driven World (Washington, DC: McKinsey Global Institute 2016); WTO, *World Trade Report 2018: The Future of World Trade: How Digital Technologies Are Transforming Global Commerce* (Geneva: World Trade Organization, 2018); WTO, *E-Commerce, Trade and the Covid-19 Pandemic*, Information Note by the WTO Secretariat, 4 May 2020.

³ See e.g. Mira Burri, 'Interfacing Privacy and Trade', *Case Western Journal of International Law* 53 (2021), 35–88; Anupam Chander and Paul M. Schwartz, 'Privacy and/or Trade', *University of Chicago Law Review* 90:1 (forthcoming 2023), available at: <http://dx.doi.org/10.2139/ssrn.4038531>

II. WTO LAW AND ELECTRONIC COMMERCE: THE STATUS QUO

The WTO membership recognized relatively early the implications of digitization for trade by launching a Work Programme on Electronic Commerce in 1998,⁴ albeit still in the young days of the Internet. This initiative to examine and, if needed, adjust the rules in the domains of trade in services, trade in goods, intellectual property (IP) protection and economic development was far-reaching in scope but due to various reasons did not bear any fruit over a period of two decades. Indeed, WTO law, despite some adjustments through the Information Technology Agreement (ITA), its update in 2015, and the Fourth Protocol on Telecommunications Services, is still very much in its pre-Internet state.⁵ Despite this lack of legal adaptation, WTO law is not irrelevant. First and foremost, WTO regulates all trade, including all services sectors and IP. Furthermore, as has been well-documented, the WTO is based on powerful principles of non-discrimination, which can potentially address technological developments even better than new made-to-measure regulatory acts that may often be adopted as a reaction to strong vested interests.⁶ WTO law also often tackles issues in a technologically neutral way – for instance, with regard to the application of the basic principles, standards, trade facilitation, subsidies, and government procurement.⁷ WTO's dispute settlement mechanism offers in addition an important path to further legal evolution,⁸ and a number of cases, in particular under General Agreement on Trade in Services (GATS)⁹ have proven helpful in the digital trade domain,¹⁰ in clarifying WTO law and advancing it further, settling some of these difficult issues upon which the 160+ WTO Members could not reach a compromise.

Despite this utility of the WTO's dispute settlement, which has been also in recent years substantially curtailed due to geopolitical reasons, political consensus on the substance and the will to move towards new rules were lacking. A number of important issues

⁴ WTO, Work Programme on Electronic Commerce, WT/L/274, 30 September 1998.

⁵ Mira Burri, 'The International Economic Law Framework for Digital Trade', *Zeitschrift für Schweizerisches Recht* 135 (2015), 10–72; WTO (2018), supra note 2.

⁶ Especially in the domain of IP protection. See e.g. Susan Sell, *Private Power, Public Law* (Cambridge: Cambridge University Press, 2003).

⁷ For a fully-fledged analysis, see Mira Burri and Thomas Cottier (eds), *Trade Governance in the Digital Age* (Cambridge: Cambridge University Press, 2012).

⁸ See e.g. Giorgio Sacerdoti et al. (eds), *The WTO at Ten: The Contribution of the Dispute Settlement System* (Cambridge: Cambridge University Press, 2006). For the current crisis of the WTO dispute settlement, see Joost Pauwelyn, 'WTO Dispute Settlement Post 2019: What to Expect?', *Journal of International Economic Law* 22 (2019), 297–321.

⁹ General Agreement on Trade in Services, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994) [hereinafter GATS].

¹⁰ Many major GATS cases have had a substantial Internet-related element. See Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services (US – Gambling)*, WT/DS285/R, adopted 10 November 2004; Appellate Body Report, *US – Gambling*, WT/DS285/AB/R, adopted 7 April 2005; Panel Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products (China – Publications and Audiovisual Products)*, WT/DS363/R, adopted 12 August 2009; Appellate Body Report, *China – Publications and Audiovisual Products*, WT/DS363/AB/R, adopted 21 December 2009; Panel Report, *China – Certain Measures Affecting Electronic Payment Services (China – Electronic Payment Services)*, WT/DS413/R, adopted 31 August 2012.

remain unresolved and expose the disconnect between the existing WTO rules, in particular under the GATS and digital trade practices. A good example in this context are the critical questions of whether previously not existing digital offerings should be classified as goods or services (and thus whether the more binding General Agreement on Tariffs and Trade [GATT 1994]¹¹ or the GATS apply), and if categorized as services, under the scope of which subsector they would fall. This classification is not trivial, as it triggers very different obligations for the WTO Members, the divergence in commitments being particularly radical between the telecommunication and the computer and related services sectors (where commitments are present and far-reaching) and the audiovisual services sectors (which is the least committed for sector).¹² The classification impasse is only one of many issues discussed in the framework of the 1998 WTO Work Programme on Electronic Commerce that have been left without a solution or clarification.¹³ There is, for instance and as a bare minimum for advancing electronic commerce, still no agreement on a permanent moratorium on customs duties on electronic transmissions and their content.¹⁴

Looking beyond these unsettled issues, it is fair to ask whether these questions, as raised some two decades ago, are still the pertinent ones. While some of them admittedly are, it is critical to acknowledge that since the launch of the WTO Work Programme in 1998, the picture has changed in many critical aspects. The significance of electronic commerce, and digital trade more broadly, as well as the centrality of data for economic processes, both in their share of the economy and contribution to economic growth and the preoccupation of governments with digital trade-related policies, have grown exponentially, as highlighted by multiple studies and policy reports¹⁵ and underscored in the times of the Covid-19 pandemic.¹⁶ Datafication has, in a sense, also extended the scope of trade-related issues – so for instance data protection has now turned into a key trade regulation topic, as it directly links to the new underlying wish to allow unrestricted cross-border data flows.¹⁷ This expansion is

¹¹ General Agreement on Tariffs and Trade 1994, 15 April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) [hereinafter GATT 1994].

¹² Rolf H. Weber and Mira Burri, *Classification of Services in the Digital Economy* (Berlin: Springer, 2012); Shin-yi Peng, 'Renegotiate the WTO Schedule of Commitments? Technological Development and Treaty Interpretation', *Cornell International Law Journal* 45 (2012), 403–430; Burri (2015), supra note 5; Ines Willems, 'GATS Classification of Digital Services – Does "the Cloud" Have a Silver Lining?', *Journal of World Trade* 53 (2019), 59–82.

¹³ Sacha Wunsch-Vincent and Arno Hold, 'Towards Coherent Rules for Digital Trade: Building on Efforts in Multilateral versus Preferential Trade Negotiations', in Mira Burri and Thomas Cottier (eds), *Trade Governance in the Digital Age* (Cambridge: Cambridge University Press, 2012), 179–221.

¹⁴ The moratorium has only been temporarily extended several times; the last time for a period of two years following a decision taken in 2019. Its scope and application remain heavily contested, with in particular India and South Africa arguing against it. See WTO, Work Programme on Electronic Commerce: The Moratorium on Custom Duties on Electronic Transmissions: Need for Clarity on its Scope and Impact, WT/GC/W/833, 8 November 2021 and below.

¹⁵ See supra note 2.

¹⁶ See WTO (2020), supra note 2; also UNCTAD and eTrade for All, *Covid-19 and E-Commerce: A Global Review* (Geneva: UNCTAD, 2021).

¹⁷ See e.g. Burri (2021); Chander and Schwarz, both supra note 3.

also associated with newer fields of contestation¹⁸ and the striving of many countries to protect their digital sovereignty that has led to the erection of new trade barriers, such as data localization measures,¹⁹ that seek to keep the data within the territorial boundaries of the sovereign state.²⁰

In this sense, the current negotiations under the Joint Statement Initiative (JSI) on Electronic Commerce can be seen as a much-welcomed reinvigoration of the WTO effort to address contemporary digital trade issues. The JSI negotiations are to be directly linked with the advanced rule-making on digital trade that has unfolded in the past two decades outside of the multilateral forum in a great number of bilateral and regional trade treaties. The next sections are devoted to the solutions found in these PTAs, which squarely deal with both the older as well as the newer issues of regulating electronic commerce. After a brief overview of the PTA developments, the article focuses on the most sophisticated PTA templates so far and sketches also the positions of the major stakeholders towards digital trade issues, which can also give us a good sense of what is politically feasible under the JSI and what the building blocks of a plurilateral treaty on electronic commerce, as a result of the JSI, may be.

III. DIGITAL TRADE RULE-MAKING IN PREFERENTIAL TRADE AGREEMENTS

A. Introduction

The regulatory environment for digital trade has been shaped by PTAs. Out of the 360 plus PTAs entered into between 2000 and 2022, 203 contain provisions relevant for digital trade and 95 have dedicated electronic commerce chapters.²¹ Although the pertinent rules remain highly heterogeneous and differ as to issues covered, the level of commitments and their binding nature, it is overall evident that the trend towards more and more detailed provisions on digital trade has intensified significantly over the years.²² This regulatory push in the domain of digital trade can be explained with the

¹⁸ See e.g. Gregory Shaffer, 'Trade Law in a Data-Driven Economy: The Need for Modesty and Resilience', in Shin-yi Peng, Chin-fu Lin and Thomas Streinz (eds), *Artificial Intelligence and International Economic Law: Disruption, Regulation, and Reconfiguration* (Cambridge: Cambridge University Press, 2021), 29–53.

¹⁹ The number of data localization measures has exponentially increased in recent years. See e.g. Francesca Casalini and Javier López González, 'Trade and Cross-Border Data Flows', *OECD Trade Policy Papers* No. 220 (2019), <https://doi.org/10.1787/b2023a47-en>

²⁰ See e.g. United States International Trade Commission (USITC), *Digital Trade in the US and Global Economies*, Investigation No 332–531 (Washington, DC: USITC, 2013); Anupam Chander and Uyên P. Lê, 'Data Nationalism', *Emory Law Journal* 64 (2015), 677–739; United States Trade Representative (USTR), *2022 National Trade Estimate Report on Foreign Trade Barriers* (Washington, DC: USTR, 2022).

²¹ This analysis is based on a dataset of all data-relevant norms in trade agreements (TAPED). See Mira Burri and Rodrigo Polanco, 'Digital Trade Provisions in Preferential Trade Agreements: Introducing a New Dataset' *Journal of International Economic Law* 23 (2020), 187–220. The cut-off date for the article analysis is 5 November 2021. For all data, as well as updates of the dataset, see <https://unilu.ch/taped>

²² For an overview of the PTA developments and additional data, see Mira Burri, 'Data Flows and Global Trade Law', in Mira Burri (ed), *Big Data and Global Trade Law* (Cambridge: Cambridge University Press, 2021), 11–41.

increased importance of the issue over the years but also with the role played by the US.²³

The US has forcefully endorsed its ‘Digital Agenda’²⁴ through the PTA channel. The agreements reached since 2002 with Australia, Bahrain, Chile, Morocco, Oman, Peru, Singapore, the Central American countries, Panama, Colombia, and South Korea, all contain critical WTO-plus and WTO-extra provisions in the broader field of digital trade. The diffusion of the US template is not however limited to US agreements²⁵ and has been replicated in a number of other PTAs as well, such as Singapore–Australia, Thailand–Australia, New Zealand–Singapore, Japan–Singapore, and South Korea–Singapore. Many, also smaller states, such as Chile, have become active in the area of data governance; at the same time many other countries, such as those parties to the European Free Trade Area (EFTA),²⁶ have not yet implemented distinct digital trade strategies.²⁷ The EU, although to be reckoned with as a major actor in international economic law and policy, has also been a rather late-comer into the digital trade rule-making domain, as the article details later on.

The relevant aspects of digital trade governance can be found in: (1) the specifically dedicated electronic commerce PTA chapters; (2) the chapters on cross-border supply of services (with particular relevance of the telecommunications, computer and related, audiovisual and financial services sectors); as well as in (3) the IP chapters.²⁸ In this article, the focus is exclusively on the electronic commerce/digital trade chapters, which have become the bedrock of new rule-making in the area of digital trade and thus arguably can create a basis for a future multilateral or plurilateral agreement.

The electronic commerce chapters play a dual role in the landscape of trade rules in the digital era. On the one hand, they represent an attempt to compensate for the lack of progress in the WTO and remedy the ensuing uncertainties. These chapters directly or indirectly address many of the questions of the WTO Electronic Commerce Programme that have been discussed but still remain open.²⁹ For instance, a majority of the chapters recognize the applicability of WTO rules to electronic commerce³⁰ and establish an express and permanent duty-free moratorium on electronic transmissions.³¹ In most of

²³ See Manfred Elsig and Sebastian Klotz, ‘Data Flow-Related Provisions in Preferential Trade Agreements: Trends and Patterns of Diffusion’, in Mira Burri (ed), *Big Data and Global Trade Law* (Cambridge: Cambridge University Press, 2021), 42–62.

²⁴ US Congress, Bipartisan Trade Promotion Authority Act of 2001, H. R. 3005, 3 October 2001; Sacha Wunsch-Vincent, ‘The Digital Trade Agenda of the US’, *Aussenwirtschaft* 1 (2003), 7–46; also Henry Gao, ‘Regulation of Digital Trade in US Free Trade Agreements: From Trade Regulation to Digital Regulation’, *Legal Issues of Economic Integration* 45 (2018), 47–70.

²⁵ Elsig and Klotz, *supra* note 23.

²⁶ The EFTA Members comprise Iceland, Lichtenstein, Norway and Switzerland.

²⁷ It should be noted in this context that the EFTA countries have now adopted a model electronic commerce chapter but it is yet to be implemented in a treaty text.

²⁸ For analysis of all relevant chapters, see Mira Burri, ‘The Regulation of Data Flows in Trade Agreements’, *Georgetown Journal of International Law* 48 (2017), 408–448.

²⁹ Sacha Wunsch-Vincent, *The WTO, the Internet and Digital Products: EC and US Perspectives* (Oxford: Hart, 2006).

³⁰ See e.g. US–Singapore FTA, Article 14.1; US–Australia FTA, Article 16.1.

³¹ See e.g. US–Singapore FTA, Article 14.3, para. 1; US–Chile FTA, Article 15.3. For a discussion of the variety of rules on the moratorium, see Burri and Polanco, *supra* note 21.

the templates tailored along the US model, the chapters also include a clear definition of ‘digital products’, which treats products delivered offline equally as those delivered online,³² so that technological neutrality is ensured and some of the classification dilemmas of the GATS cast aside (in particular when combined with negative committing for services³³). The electronic commerce chapters do also include rules that have not been treated in the context of the WTO negotiations – the so-called ‘WTO-extra’ issues. One can group these rules into two broader categories: (1) rules that seek to enable digital trade in general, by tackling distinct issues, such as paperless trading and electronic authentication; and (2) rules that address cross-border data, new digital trade barriers and newer issues, which can encompass questions ranging from cybersecurity to open government data. As to these categories of rules, the variety across PTAs, in terms of issues covered and the strength of the commitments can be great, and while in the first cluster of issues on the facilitation of digital trade, the number of PTAs that contain such rules is substantial, only very few agreements have rules on data.³⁴

In the following sections, the article looks at the new rules created in recent agreements through a detailed analysis of the most advanced electronic commerce chapters that we have thus far – those of the CPTPP, the USMCA, and the dedicated digital economy agreements (DTA and DEPA). We complement this analysis with an enquiry into the EU treaties and the EU’s repositioning on digital trade and data flows in particular, and into the RCEP as a first agreement to include China. The purpose is on the one hand to highlight legal innovation in these treaties and to give a sense of the positions of the major stakeholders, on the other.

B. The Comprehensive and Progressive Agreement for Transpacific Partnership

The Comprehensive and Progressive Agreement for Transpacific Partnership was agreed upon in 2017 between eleven countries in the Pacific Rim.³⁵ It entered into force on 30 December 2018. The CPTPP represents 13.4% of the global gross domestic product (USD 13.5 trillion), making it the third largest trade agreement after the North American Free Trade Agreement (NAFTA) and the single market of the EU.³⁶ The chapter on electronic commerce created the most comprehensive template in the landscape of PTAs and included a number of new features – with rules on domestic electronic transactions framework, personal information protection, Internet interconnection charge sharing, location of computing facilities, spam, source code and dispute settlement.³⁷ Despite the US having dropped out of the planned Transpacific Partnership Agreement (TPP) with the start of the Trump administration, the CPTPP

³² See e.g. US–Singapore FTA, Article 14.3; US–Australia FTA, Article 16.4.

³³ See e.g. Burri (2017), *supra* note 28.

³⁴ See Burri and Polanco, *supra* note 21; also Mira Burri, ‘The Governance of Data and Data Flows in Trade Agreements: The Pitfalls of Legal Adaptation’ *UC Davies Law Review* 51 (2017), 65–132. Presently only 36 PTAs have rules on data flows and only 20 on data localization.

³⁵ Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Viet Nam.

³⁶ Zachary Torrey, ‘TPP 2.0: The Deal Without the US: What’s New about the CPTPP and What Do the Changes Mean?’ *The Diplomat*, 3 February 2018.

³⁷ Articles 14.5, 14.8, 14.12, 14.13, 14.14, 14.17 and 14.18 CPTPP, respectively.

chapter reflects the US efforts to secure obligations on digital trade³⁸ and is a verbatim reiteration of the TPP chapter. The TPP was supposed to be a ‘21st century’ agreement that would match contemporary global trade better than the analogue-based WTO Agreements.³⁹ It was only logical in this sense that there was sizeable weight in the negotiations given to digital trade. In terms of the breadth and depth of the commitments, the United States Trade Representative (USTR) strived for substantially exceeding the ‘golden standard’ created by the earlier US–South Korea Free Trade Agreement (FTA) and secure the implementation of the updated ‘Digital 2 Dozen’ agenda of the US.⁴⁰ The closer look at the electronic commerce chapter that follows, reveals that this was in many aspects achieved.

In the first part and not unusually for US-led and other PTAs, the CPTPP electronic commerce chapter clarifies that it applies ‘to measures adopted or maintained by a Party that affect trade by electronic means’⁴¹ but excludes from this broad scope (1) government procurement and (2) information held or processed by or on behalf of a Party, or measures related to such information, including measures related to its collection.⁴² For greater certainty, measures affecting the supply of a service delivered or performed electronically are subject to the obligations contained in the relevant provisions on investment and services;⁴³ some additional exceptions are also specified.⁴⁴ The following provisions address, again as customarily, some of the leftovers of the WTO Electronic Commerce Programme and provide for the facilitation of online commerce. In this sense, Article 14.3 CPTPP bans the imposition of customs duties on electronic transmissions, including content transmitted electronically, and Article 14.4 endorses the non-discriminatory treatment of digital products,⁴⁵ which are defined broadly pursuant to Article 14.1.⁴⁶ Article 14.5 CPTPP is meant to shape the

³⁸ See also in this sense New Zealand’s Waitangi Tribunal, Report on the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (November 2021), pre-publication version, at 72 and *passim*, available at: https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_178856069/CPTTP%20W.pdf

³⁹ See e.g. Claude Barfield, ‘The Trans-Pacific Partnership: A Model for Twenty-First-Century Trade Agreements?’, *International Economic Outlook 2* (2011); Tania Voon, ‘Introduction: National Regulatory Autonomy and the Trans-Pacific Partnership Agreement’, in Tania Voon (ed), *Trade Liberalisation and International Cooperation: A Legal Analysis of the Trans-Pacific Partnership Agreement* (Cheltenham, UK: Edward Elgar, 2013), 1–10. The USTR had various such references on its dedicated TPP website – these have been now removed.

⁴⁰ See <https://ustr.gov/about-us/policy-offices/press-office/reports-and-publications/2016/digital-2-dozen>

⁴¹ Article 14.2(2) CPTPP.

⁴² Article 14.2(3) CPTPP. For the lack of guidance and the potential contentions around the scope of this exception, see the different experts’ opinions in New Zealand’s Waitangi Tribunal, Report on the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, *supra* note 38, at 81–83.

⁴³ Article 14.2(4) CPTPP.

⁴⁴ Article 14.2(5) and (6) CPTPP.

⁴⁵ The obligation does not apply to subsidies or grants, including government-supported loans, guarantees and insurance, nor to broadcasting. It can also be limited through the rights and obligations specified in the IP chapter. Article 14.2(3) CPTPP.

⁴⁶ Digital product means a computer programme, text, video, image, sound recording or other product that is digitally encoded, produced for commercial sale or distribution, and that can be transmitted electronically. Two specifications in the footnotes apply: (1) digital product does not include a digitized representation of a financial instrument, including money; and (2) the definition of digital product should

domestic electronic transactions framework by including binding obligations for the parties to follow the principles of the UNCITRAL Model Law on Electronic Commerce 1996 or the UN Convention on the Use of Electronic Communications in International Contracts. Parties must endeavour to (1) avoid any unnecessary regulatory burden on electronic transactions; and (2) facilitate input by interested persons in the development of its legal framework for electronic transactions.⁴⁷ The provisions on paperless trading and on electronic authentication and electronic signatures complement this by securing equivalence of electronic and physical forms. With regard to paperless trading, it is clarified that parties shall endeavour to make trade administration documents available to the public in electronic form and accept trade administration documents submitted electronically as the legal equivalent of the paper version.⁴⁸ The norm on electronic signatures is more binding and provides that parties shall not deny the legal validity of a signature solely on the basis that the signature is in electronic form,⁴⁹ nor shall they adopt or maintain measures that prohibit parties to an electronic transaction from mutually determining the appropriate authentication methods for that transaction; or prevent such parties from having the opportunity to establish before judicial or administrative authorities that their transaction complies with legal requirements with respect to authentication.⁵⁰

The remainder of the provisions found in the CPTPP electronic commerce chapter can be said to belong the second and more innovative category of rule-making that tackles the emergent issues of the data economy. Most importantly, the CPTPP explicitly seeks to curb data protectionism. First, it does so by including an explicit ban on the use of data localization measures. Article 14.13(2) prohibits the parties from requiring a ‘covered person to use or locate computing facilities in that Party’s territory as a condition for conducting business in that territory’. Second, the CPTPP replaces the soft language from the US–South Korea FTA on free data flows and frames it as a hard rule: ‘[e]ach Party shall allow the cross-border transfer of information by electronic means, including personal information, when this activity is for the conduct of the business of a covered person’.⁵¹ The rule has a broad scope and most data transferred over the Internet is likely to be covered, although the word ‘for’ may suggest the need for some causal link between the flow of data and the business of the covered person.

Measures restricting digital flows or implementing localization requirements are permitted only if they do not amount to ‘arbitrary or unjustifiable discrimination or a disguised restriction on trade’ and do not ‘impose restrictions on transfers of information greater than are required to achieve the objective’.⁵² These non-discriminatory conditions are similar to the strict test formulated by Article XIV GATS and Article XX GATT 1994 – a test that is supposed to balance trade and non-trade

not be understood to reflect a Party’s view on whether trade in digital products through electronic transmission should be categorized as trade in services or trade in goods.

⁴⁷ Article 14.5(2) CPTPP.

⁴⁸ Article 14.9 CPTPP.

⁴⁹ Article 14.6(1) CPTPP.

⁵⁰ Article 14.6(2) CPTPP.

⁵¹ Article 14.11(2) CPTPP.

⁵² Article 14.11(3) CPTPP.

interests by ‘excusing’ certain violations but that is also extremely hard to pass, as the WTO jurisprudence has thus far revealed.⁵³ The CPTPP test differs from the WTO norms in two significant elements: (1) while there is a list of public policy objectives in the GATT 1994 and the GATS, the CPTPP provides no such enumeration and simply speaks of a ‘legitimate public policy objective’;⁵⁴ (2) in the chapeau-like reiteration of ‘arbitrary or unjustifiable discrimination’, there is no GATT or GATS-like qualification of ‘between countries where like conditions prevail’. The scope of the exception is thus unclear – it can be linked to legal uncertainty, as well as the unworkable safeguards for domestic constituencies.⁵⁵ Further, it should be noted that the ban on localization measures is softened on financial services and institutions.⁵⁶ An annex to the Financial Services chapter has a separate data transfer requirement, whereby certain restrictions on data flows may apply for the protection of privacy or confidentiality of individual records, or for prudential reasons.⁵⁷ Government procurement is also excluded.⁵⁸

The CPTPP addresses other novel issues as well – one of them is source code. Pursuant to Article 14.17, a CPTPP Member may not require the transfer of, or access to, source code of software owned by a person of another Party as a condition for the import, distribution, sale or use of such software, or of products containing such software, in its territory. The prohibition applies only to mass-market software or products containing such software.⁵⁹ This means that tailor-made products are excluded, as well as software used for critical infrastructure and those in commercially negotiated contracts.⁶⁰ The aim of this provision is to protect software companies and address their concerns about loss of IP or cracks in the security of their proprietary code; it may also be interpreted as a reaction to China’s demands to access to source code from software producers selling in its market.⁶¹

⁵³ See e.g. Henrik Andersen, ‘Protection of Non-Trade Values in WTO Appellate Body Jurisprudence: Exceptions, Economic Arguments, and Eluding Questions’, *Journal of International Economic Law* 18 (2015), 383–405.

⁵⁴ Article 14.11(3) CPTPP.

⁵⁵ See e.g. in this sense New Zealand’s Waitangi Tribunal, Report on the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, *supra* note 38, in particular at 132–142.

⁵⁶ See the definition of ‘a covered person’ (Article 14.1 CPTPP), which excludes a ‘financial institution’ and a ‘cross-border financial service supplier’.

⁵⁷ The provision reads: ‘Each Party shall allow a financial institution of another Party to transfer information in electronic or other form, into and out of its territory, for data processing if such processing is required in the institution’s ordinary course of business’.

⁵⁸ Article 14.8(3) CPTPP.

⁵⁹ Article 14.17(2) CPTPP.

⁶⁰ *Ibid.* On the possible interpretations of the provision and difference to including algorithms, see New Zealand’s Waitangi Tribunal, Report on the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, *supra* note 38, at 104–112.

⁶¹ This has been an issue in the context of the US–China trade war and listed as China’s unfair trade practices in technology transfer and IP under Section 301 of the US Trade Act of 1974. The US, as a counterreaction, levied additional tariffs on more than half of Chinese imports, and China responded with imposing its own tariffs on US imports. The US was supported by the EU and Japan on the issue, though questions on the US approach under Section 301 were raised. The three parties issued several joint statements condemning forced technology transfer, saying that when one country engages in it, ‘it deprives other countries of the opportunity to benefit from the fair, voluntary and market-based flow of

These provisions illustrate an important development in the PTA rule-making in that, they do not merely seek the liberalization of economic sectors but effectively shape the regulatory space domestically. Particularly critical in this context are also the rules in the area of data protection.

Article 14.8(2) requires every CPTPP party to ‘adopt or maintain a legal framework that provides for the protection of the personal information of the users of electronic commerce’. Yet, there are no standards or benchmarks for the legal framework specified, except for a general requirement that CPTPP parties ‘take into account principles or guidelines of relevant international bodies’.⁶² A footnote provides some clarification in saying that: ‘... a Party may comply with the obligation in this paragraph by adopting or maintaining measures such as a comprehensive privacy, personal information or personal data protection laws, sector-specific laws covering privacy, or laws that provide for the enforcement of voluntary undertakings by enterprises relating to privacy’.⁶³ Parties are also invited to promote compatibility between their data protection regimes, by essentially treating lower standards as equivalent.⁶⁴ The goal of these norms can be interpreted as a prioritization of trade over privacy rights. This has been pushed by the US during the TPP negotiations, as the US subscribes to a relatively weak and patchy protection of privacy.⁶⁵ Timewise, this push came also at the phase, when the US was wary that it could lose the privilege of transatlantic data transfer, as a consequence of the judgment of the Court of Justice of European Union (CJEU) that struck down the EU–US Safe Harbour Agreement.⁶⁶

Next to these important data protection provisions, the CPTPP also includes norms on consumer protection⁶⁷ and spam control,⁶⁸ as well as for the first time rules on cybersecurity. Article 14.16 is however non-binding and identifies a limited scope of activities for cooperation, in situations of ‘malicious intrusions’ or ‘dissemination of

technology and innovation. These unfair practices are inconsistent with an international trading system based on market principles and undermines growth and development’. See Joint Statement on Trilateral Meeting of the Trade Ministers of the United States, Japan, and the European Union, Washington, D.C., 14 January 2020, available at: https://trade.ec.europa.eu/doclib/docs/2020/january/tradoc_158567.pdf

⁶² Article 14.8(2) CPTPP.

⁶³ *Ibid.*, at footnote 6.

⁶⁴ Article 14.8(5) CPTPP.

⁶⁵ See e.g. James Q. Whitman, ‘The Two Western Cultures of Privacy: Dignity versus Liberty’ *The Yale Law Journal* 113 (2004), 1151–1221; Paul M. Schwartz and Daniel J. Solove, ‘Reconciling Personal Information in the United States and European Union’, *California Law Review* 102 (2014), 877–916; also Burri (2021), *supra* note 3.

⁶⁶ Case C-362/14 *Schrems*, judgment of 6 October 2015, EU:C:2015:650. Maximilian Schrems is an Austrian citizen, who filed a suit against the Irish supervisory authority, after it rejected his complaint over Facebook’s practice of storing user data in the US. The plaintiff claimed that his data was not adequately protected in light of the NSA revelations and this, despite the existing agreement between the EU and the US – the so-called ‘safe harbor’ scheme. The later EU-US ‘privacy shield’ arrangement has been also rendered invalid by a recent judgment: Case C-311/18, *Data Protection Commissioner v. Facebook Ireland Limited, Maximilian Schrems (Schrems II)*, judgment of 16 July 2020, ECLI:EU:C:2020:559. For the current state of affairs, see e.g. Kristin Archick and Rachel F. Fefer, ‘U.S.–EU Privacy Shield and Transatlantic Data Flows’, Congressional Research Service Report R46917, 22 September 2021.

⁶⁷ Article 14.17 CPTPP.

⁶⁸ Article 14.14 CPTPP.

malicious code’, and capacity-building of governmental bodies dealing with cybersecurity incidents. Net neutrality is another important digital economy topic that has been given specific attention in the CPTPP, although the so created rules are of non-binding nature.⁶⁹ The norm comes with a number of exceptions from the domestic laws of the CPTPP parties and permits deviations from undefined situations that call for ‘reasonable network management’ or exclusive services.⁷⁰ As the obligations are unlinked to remedies for situations, such as blocking, throttling, discriminating or filtering content, it is unlikely that the CPTPP would lead to uniform approach with regard to net neutrality across the CPTPP countries.

The approval for the UK to accede to the CPTPP and recent requests for accession by and China and Taiwan⁷¹ potentially expand the commercial reach and geopolitical dimension of this agreement. Next to these possibilities for an enlarged CPTPP membership, it should also be pointed out that the CPTPP model has diffused in a substantial number of other agreements, such as the 2016 Chile–Uruguay FTA, the 2016 updated Singapore–Australia FTA (SAFTA), the 2017 Argentina–Chile FTA, the 2018 Singapore–Sri Lanka FTA, the 2018 Australia–Peru FTA, the 2019 Brazil–Chile FTA, the 2019 Australia–Indonesia FTA, the 2018 USMCA, 2019 Japan–US DTA, and the 2020 DEPA between Chile, New Zealand, Singapore. The article discusses the latter three in more detail in the following sections.

C. The United States Mexico Canada Agreement and the United States–Japan Digital Trade Agreement

After the withdrawal of the United States from the TPP, there was some uncertainty as to the direction the US will follow in its trade deals in general and on matters of digital trade in particular. The renegotiated NAFTA, which is now referred to as the ‘United States Mexico Canada Agreement’ (USMCA), provides a useful confirmation of the US approach. The USMCA has a comprehensive electronic commerce chapter, which is now also properly titled ‘Digital Trade’, follows all critical lines of the CPTPP and creates an even more ambitious template. With regard to replicating the CPTPP model the USMCA follows the same broad scope of application,⁷² ban customs duties on electronic transmissions⁷³ and binds the parties for non-discriminatory treatment of digital products.⁷⁴ Furthermore, it provides for a domestic regulatory framework that facilitates online trade by enabling electronic contracts,⁷⁵ electronic authentication and signatures,⁷⁶ and paperless trading.⁷⁷

⁶⁹ Article 14.10 CPTPP.

⁷⁰ Article 14.10(a) CPTPP. Footnote 6 to this paragraph specifies that: ‘The Parties recognise that an Internet access service supplier that offers its subscribers certain content on an exclusive basis would not be acting contrary to this principle’.

⁷¹ US Congressional Research Service, ‘China and Taiwan Both Seek to Join the CPTPP’, 24 September 2021, at <https://crsreports.congress.gov/product/pdf/IN/IN11760>

⁷² Article 19.2 USMCA.

⁷³ Article 19.3 USMCA.

⁷⁴ Article 19.4 USMCA.

⁷⁵ Article 19.5 USMCA.

⁷⁶ Article 19.6 USMCA.

⁷⁷ Article 19.9 USMCA.

The USMCA follows the CPTPP model also with regard to data issues and ensures the free flow of data through a clear ban on data localization⁷⁸ and a hard rule on free information flows.⁷⁹ Article 19.11 specifies further that parties can adopt or maintain a measure inconsistent with the free flow of data provision, if this is necessary to achieve a legitimate public policy objective, provided that there is no arbitrary or unjustifiable discrimination nor a disguised restriction on trade; and the restrictions on transfers of information are not greater than necessary to achieve the objective.⁸⁰

Beyond these similarities, the USMCA introduces some novelties. The first is that the USMCA departs from the standard US approach and signals abiding to some data protection principles and guidelines of relevant international bodies. After recognizing ‘the economic and social benefits of protecting the personal information of users of digital trade and the contribution that this makes to enhancing consumer confidence in digital trade,’⁸¹ Article 19.8 requires from the parties to ‘adopt or maintain a legal framework that provides for the protection of the personal information of the users of digital trade. In the development of its legal framework for the protection of personal information, each Party should take into account principles and guidelines of relevant international bodies, such as the APEC Privacy Framework and the OECD Recommendation of the Council concerning Guidelines governing the Protection of Privacy and Transborder Flows of Personal Data (2013)’.⁸² The parties also recognize key principles of data protection, which include: limitation on collection; choice; data quality; purpose specification; use limitation; security safeguards; transparency; individual participation; and accountability,⁸³ and aim to provide remedies for any violations.⁸⁴ This is interesting because it may go beyond what the US has in its national laws on data protection (at least so far⁸⁵) and also because it reflects some of the principles the EU has advocated for in the domain of privacy protection, not only within the boundaries of the Union but also under the Council of Europe.⁸⁶ One can of course wonder whether this is a development caused by the so-called ‘Brussels effect’,

⁷⁸ Article 19.12 USMCA.

⁷⁹ Article 19.11 USMCA.

⁸⁰ Article 19.11(2) USMCA. There is a footnote attached, which clarifies: A measure does not meet the conditions of this paragraph if it accords different treatment to data transfers solely on the basis that they are cross-border in a manner that modifies the conditions of competition to the detriment of service suppliers of another Party. The footnote does not appear in the CPTPP treaty text.

⁸¹ Article 19.8(1) USMCA.

⁸² Article 19.8(2) USMCA.

⁸³ Article 19.8(3) USMCA.

⁸⁴ Article 19.8(4) and (5) USMCA.

⁸⁵ Chander and Schwarz, *supra* note 3.

⁸⁶ The Council of Europe (CoE) has played an important role in the evolution of the international regime of privacy protection by endorsing stronger and enforceable standards of human rights’ protection in its forty-seven members through the 1950 European Convention on Human Rights (ECHR), and in particular through the body of case-law developed by the European Court of Human Rights (ECtHR) on Article 8. Different aspects of data protection were further endorsed through a number of CoE resolutions and ultimately through Convention 108 for the Protection of Individuals with Regard to Automatic Processing of Personal Data, which opened for signature in 1981 and was lastly amended in 2018. The CoE is the first international instrument that established minimum standards for personal data protection in a legally binding manner. Convention 108 is open for accession also for non-CoE members – 9 countries have so far joined and others have observer status.

whereby the EU ‘exports’ its own domestic standards and they become global,⁸⁷ or whether we are seeing a shift in US privacy protection regimes as well.⁸⁸

Beyond data protection, three further innovations of the USMCA may be mentioned. The first refers to the inclusion of ‘algorithms’, the meaning of which is ‘a defined sequence of steps, taken to solve a problem or obtain a result’⁸⁹ and has become part of the ban on requirements for the transfer or access to source code in Article 19.16.⁹⁰ The second novum refers to the recognition of ‘interactive computer services’ as particularly vital to the growth of digital trade. Parties pledge in this sense not to ‘adopt or maintain measures that treat a supplier or user of an interactive computer service as an information content provider in determining liability for harms related to information stored, processed, transmitted, distributed, or made available by the service, except to the extent the supplier or user has, in whole or in part, created, or developed the information’.⁹¹ This provision is important, as it seeks to clarify the liability of intermediaries and delineate it from the liability of host providers with regard to IP rights’ infringement.⁹² It also secures the application of Section 230 of the

⁸⁷ Anu Bradford, ‘The Brussels Effect’, *Northwestern University Law Review* 107 (2012), 1–68; Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford: Oxford University Press, 2020).

⁸⁸ See Anupam Chander, Margot E. Kaminski and William McGeeveran, ‘Catalyzing Privacy Law’, *Minnesota Law Review* 105 (2021), 1733–1802.

⁸⁹ Article 19.1 USMCA.

⁹⁰ On the expansion of the scope of the source code provision, see New Zealand’s Waitangi Tribunal, Report on the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, *supra* note 38, at 104–112.

⁹¹ Article 19.17(2) USMCA. Annex 19-A creates specific rules with the regard to the application of Article 19.17 for Mexico, in essence postponing its implementation for three years. There is also a footnote to the provision, which specifies that a party may comply through ‘application of existing legal doctrines as applied through judicial decisions’. This can be interpreted as a safeguard for Canada and an implicit recognition of rulings by the British Columbia Supreme Court and the Supreme Court of Canada in the IP-related *Equustek* case (*Google Inc. v. Equustek Solutions Inc.*, judgment of 28 June 2017, 2017 SCC 34), where the Court found that Canadian courts could grant a global injunction against a non-party to litigation when the order is fair and equitable in the circumstances of the case. It should be noted however that the case is now being continued in the US, where the US District Court of Northern California granted Google a temporary injunction blocking the enforceability of the Supreme Court of Canada’s order in the United States. The California Court granted the injunction on the basis that the company was protected as a neutral intermediary under Section 230 of the Communications Decency Act 1996. It also said that ‘the Canadian order undermines the policy goals of Section 230 and threatens free speech on the global internet’; it is expected that Google will apply to make the injunction permanent. For the argument that Canada’s policy space has remained intact, see Robert Wolfe, ‘Learning about Digital Trade: Privacy and E-Commerce in CETA and TPP’, *World Trade Review* 18 (2019), s63–s84, at s78.

⁹² On intermediaries’ liability, see e.g. Sonia S. Katyal, ‘Filtering, Piracy, Surveillance and Disobedience’, *The Columbia Journal of Law and the Arts* 32 (2009), 401–426; Urs Gasser and Wolfgang Schulz (eds), *Governance of Online Intermediaries* (Cambridge, MA: Berkman Center for Internet and Society, 2015).

US Communications Decency Act,⁹³ which insulates platforms from liability⁹⁴ but has been recently under attack in many jurisdictions in the face of fake news and other negative developments related to platforms' power.⁹⁵

The third and rather liberal commitment of the USMCA parties is with regard to open government data. This is truly innovative and very relevant in the domain of domestic regimes for data governance. In Article 19.18, the parties recognize that facilitating public access to and use of government information fosters economic and social development, competitiveness, and innovation. 'To the extent that a Party chooses to make government information, including data, available to the public, it shall endeavour to ensure that the information is in a machine-readable and open format and can be searched, retrieved, used, reused, and redistributed'.⁹⁶ There is in addition an endeavour to cooperate, so as to 'expand access to and use of government information, including data, that the Party has made public, with a view to enhancing and generating business opportunities, especially for small and medium-sized enterprises'.⁹⁷ Finally, it can be mentioned that the cooperation provision of the USMCA goes beyond the CPTPP⁹⁸ and envisages an institutional setting to enable this cooperation, 'or any other matter pertaining to the operation of this chapter'.⁹⁹

The US approach towards digital trade issues has been confirmed also by the recent US–Japan DTA, signed on 7 October 2019, alongside the US–Japan Trade Agreement.¹⁰⁰ The US–Japan DTA can be said to replicate almost all provisions of the

⁹³ Section 230 reads: 'No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider' and in essence protects online intermediaries that host or republish speech.

⁹⁴ See e.g. Eric Goldman, 'Why Section 230 Is Better Than the First Amendment', *Notre Dame Law Review Reflection* 95 (2019), 33–46; Eric Goldman, 'An Overview of the United States' Section 230 Internet Immunity', in Giancarlo Frosio (ed), *The Oxford Handbook of Online Intermediary Liability* (Oxford: Oxford University Press, 2020), 155–171; Valerie C. Brannon and Eric N. Holmes, 'Section 230: An Overview', Congressional Research Service Report R46751, 7 April 2021; Tanner Bone, 'How Content Moderation May Expose Social Media Companies to Greater Defamation Liability', *Washington University Law Review* 98 (2021), 937–963.

⁹⁵ See e.g. Lauren Feine, 'Big Tech's Favorite Law Is under Fire', CNBC, 19 February 2020. For an analysis of the free speech implications of digital platforms, see Jack M. Balkin, 'Free Speech Is a Triangle', *Columbia Law Review* 118 (2018), 2011–2055; for full literature review, see Mira Burri, 'Fake News in Times of Pandemic and Beyond: An Enquiry into the Rationales for Regulating Information Platforms', in Klaus Mathis and Avishalom Tor (eds), *Law and Economics of the Coronavirus Crisis* (Berlin: Springer, forthcoming 2022).

⁹⁶ Article 19.18(2) USMCA.

⁹⁷ Article 19.8(3) USMCA.

⁹⁸ The provision envisages amongst other things linked to enabling global digital trade, exchange of information and experience on personal information protection, particularly with the view to strengthening existing international mechanisms for cooperation in the enforcement of laws protecting privacy; and cooperation on the promotion and development of mechanisms, including the APEC Cross-Border Privacy Rules, that further global interoperability of privacy regimes. See Article 19.14(1) USMCA, at paras. (a)(i) and (b) respectively.

⁹⁹ Article 19.14(2) USMCA.

¹⁰⁰ For the text of the agreements, see: <https://ustr.gov/countries-regions/japan-korea-apec/japan/us-japan-trade-agreement-negotiations/us-japan-digital-trade-agreement-text>

USMCA and the CPTPP,¹⁰¹ including the new USMCA rules on open government data,¹⁰² source code¹⁰³ and interactive computer services¹⁰⁴ but notably covering also financial and insurance services as part of the scope of agreement. A new provision has been added regarding information and communications technology (ICT) goods that use cryptography. Article 21 specifies that for such goods designed for commercial applications, neither party shall require a manufacturer or supplier of the ICT good as a condition to entering the market to: (1) transfer or provide access to any proprietary information relating to cryptography; (2) partner or otherwise cooperate with a person in the territory of the Party in the development, manufacture, sale, distribution, import, or use of the ICT good; or (3) use or integrate a particular cryptographic algorithm or cipher.¹⁰⁵ This rule is similar to Annex 8-B, Section A.3 of the CPTPP Chapter on technical barriers to trade. It is a reaction to a practice by several countries, in particular China, which impose direct bans on encrypted products or set specific technical regulations that restrict the sale of encrypted products, and caters for the growing concerns of large companies, like IBM and Microsoft, which thrive on data flows with less governmental intervention.¹⁰⁶

Other minor differences that can be noted when comparing with the USMCA are some things missing from the US–Japan DTA – such as rules on paperless trading, net neutrality and the mention of data protection principles.¹⁰⁷ A final note deserve the exceptions attached to the US–Japan DTA, which make a reference to the WTO general exception clauses of Article XIV GATS and Article XX GATT 1994, whereby the parties agree to their *mutatis mutandis* application.¹⁰⁸ Further exceptions are listed with regard to security;¹⁰⁹ prudential and monetary and exchange rate policy;¹¹⁰ and taxation,¹¹¹ which are to be linked to the expanded scope of agreement including financial and insurance services.

¹⁰¹ Article 7: Customs Duties; Article 8: Non-Discriminatory Treatment of Digital Products; Article 9: Domestic Electronic Transactions Framework; Article 10: Electronic Authentication and Electronic Signatures; Article 14: Online Consumer Protection; Article 11: Cross-Border Transfer of Information; Article 12: Location of Computing Facilities; Article 16: Unsolicited Commercial Electronic Messages; Article 19: Cybersecurity US–Japan DTA.

¹⁰² Article 20 US–Japan DTA.

¹⁰³ Article 17 US–Japan DTA.

¹⁰⁴ Article 18 US–Japan DTA. A side letter recognizes the differences between the US and Japan's systems governing the liability of interactive computer services suppliers and parties agree that Japan need not change its existing legal system to comply with Article 18.

¹⁰⁵ Article 21.3 US–Japan DTA.

¹⁰⁶ See Han-Wei Liu, 'Inside the Black Box: Political Economy of the Trans-Pacific Partnership's Encryption Clause', *Journal of World Trade* 51 (2017), 309–334.

¹⁰⁷ Article 15 merely stipulates that parties shall adopt or maintain a legal framework that provides for the protection of the personal information of the users of digital trade and publish information on the personal information protection, including how: (a) natural persons can pursue remedies; and (b) an enterprise can comply with any legal requirements.

¹⁰⁸ Article 3 US–Japan DTA.

¹⁰⁹ Article 4 US–Japan DTA.

¹¹⁰ Article 5 US–Japan DTA.

¹¹¹ Article 6 US–Japan DTA.

D. *The Digital Economy Partnership Agreement*

The 2020 Digital Economy Partnership Agreement (DEPA) between Chile, New Zealand, and Singapore,¹¹² all parties also to the CPTPP, is not conceptualized as a purely trade agreement but one that is meant to address the broader issues of the digital economy. In this sense, its scope is wide, open and flexible and covers several emergent issues, such as those in the areas of artificial intelligence (AI) and digital inclusion. The agreement is also not a closed deal but one that is open to other countries¹¹³ and the DEPA is meant to complement the WTO negotiations on electronic commerce and build upon the digital economy work underway within APEC, the OECD and other international forums. To enable flexibility and cover a wide range of issues, the DEPA follows a modular approach that provides countries with more options to pick-and-choose and is very different from the ‘all-or-nothing’ approach of conventional trade treaties.¹¹⁴ After Module 1, specifying general definitions and initial provisions, Module 2 focuses on ‘Business and Trade Facilitation’; Module 3 covers ‘Treatment of Digital Products and Related Issues’; Module 4 ‘Data Issues’; Module 5 ‘Wider Trust Environment’; Module 6 ‘Business and Consumer Trust’; Module 7 ‘Digital Identities’; Module 8 ‘Emerging Trends and Technologies’; Module 9 ‘Innovation and the Digital Economy’; Module 10 ‘Small and Medium Enterprises Cooperation’; and Module 11 ‘Digital Inclusion’. The rest of the modules deal with the operationalization and implementation of the DEPA and cover common institutions (Module 12); exceptions (Module 13); transparency (Module 14); dispute settlement (Module 15); and some final provisions on amendments, entry into force, accession and withdrawal (Module 16).

The type of rules varies across the different modules. On the one hand, all rules of the CPTPP are replicated, some of the USMCA rules, such as the one on open government data¹¹⁵ (but not source code), and some of the US–Japan DTA provisions, such as the one on ICT goods using cryptography,¹¹⁶ have been included too. On the other hand, there are many other rules – so far unknown to trade agreements – that try to facilitate the functioning of the digital economy and enhance cooperation on key issues. So, for instance, Module 2 on business and trade facilitation includes next to the standard CPTPP-like norms,¹¹⁷ additional efforts ‘to establish or maintain a seamless, trusted, high-availability and secure interconnection of each Party’s single window to facilitate the exchange of data relating to trade administration documents, which may include: (a) sanitary and phytosanitary certificates and (b) import and export data’.¹¹⁸ Parties

¹¹² For details and the text of the DEPA, see: <https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-concluded-but-not-in-force/digital-economy-partnership-agreement/>

¹¹³ Article 16.2 DEPA.

¹¹⁴ James Bacchus, *The Digital Decide: How to Agree on WTO Rules for Digital Trade*, Special Report (Waterloo, ON: Centre for International Governance Innovation, 2021), at 8.

¹¹⁵ Article 9.4 DEPA.

¹¹⁶ Article 3.4 DEPA. The article also provides detailed definitions of cryptography, encryption, and cryptographic algorithm and cipher.

¹¹⁷ Article 2.2: Paperless Trading; Article 2.3: Domestic Electronic Transactions Framework.

¹¹⁸ Article 2.2(5) DEPA. ‘Single window’ is defined as a facility that allows Parties involved in a trade transaction to electronically lodge data and documents with a single-entry point to fulfil all import, export and transit regulatory requirements (Article 2.1 DEPA).

have also touched upon other important issues around digital trade facilitation, such as electronic invoicing (Article 2.5); express shipments and clearance times (Article 2.6); logistics (Article 2.4) and electronic payments (Article 2.7). Module 8 on emerging trends and technologies is also particularly interesting to mention, as it highlights a range of key topics that demand attention by policymakers, such as in the areas of fintech and AI. In the latter domain, the parties agree to promote the adoption of ethical and governance frameworks that support the trusted, safe, and responsible use of AI technologies, and in adopting these AI Governance Frameworks parties would seek to follow internationally-recognized principles or guidelines, including explainability, transparency, fairness, and human-centred values.¹¹⁹ The DEPA parties also recognize the interfaces between the digital economy and government procurement and broader competition policy and agree to actively cooperate on these issues.¹²⁰ Along this line of covering broader policy matters in order to create an enabling environment that is also not solely focused on and driven by economic interests, DEPA deals with the importance of a rich and accessible public domain¹²¹ and digital inclusion, which can cover enhancing cultural and people-to-people links, including between Indigenous Peoples, and improving access for women, rural populations, and low socio-economic groups.¹²²

Overall, the DEPA is an ingenuine project¹²³ that covers well the broad range of issues that the digital economy impinges upon and offers a good basis for harmonization and interoperability of domestic frameworks and international cooperation that adequately takes into account the complex challenges of contemporary data governance that has essential trade but also non-trade elements. Its attractiveness as a form of enhanced, but also flexible, cooperation on issues of the data-driven economy has been confirmed by Canada's¹²⁴ and South Korea's¹²⁵ interest to join it. The DEPA's modular approach has been also followed in the Australia-Singapore Digital Economy Agreement, which is however still linked to the trade deal between the parties.¹²⁶

E. EU's Approach to Digital Trade

The EU has been a relatively late mover on digital trade issues and for a long time had not developed a distinct strategy. Although EU's FTAs did include provisions on

¹¹⁹ Article 8.2(2) and (3) DEPA.

¹²⁰ Articles 8.3 and 8.4 DEPA.

¹²¹ Article 9.2 DEPA.

¹²² Article 11.2 DEPA.

¹²³ For a comparison of the DEPA with existing PTAs, see Marta Soprana, 'The Digital Economy Partnership Agreement (DEPA): Assessing the Significance of the New Trade Agreement on the Block', *Trade, Law and Development* 13 (2021), 143–169.

¹²⁴ Government of Canada, Global Affairs, Background: Canada's Possible Accession to the Digital Economy Partnership Agreement, 18 March 2021, available at: <https://www.international.gc.ca/trade-commerce/consultations/depa-apen/background-information.aspx?lang=eng>

¹²⁵ 'South Korea Starts Process to Join DEPA', 6 October 2021, available at: <https://en.yna.co.kr/view/PYH20211006124000325>

¹²⁶ The DEA, which entered into force on 8 December 2020, amends the Singapore–Australia FTA and replaces its Electronic Commerce chapter. See Australian Government, Department of Foreign Affairs and Trade, <https://www.dfat.gov.au/trade/services-and-digital-trade/australia-and-singapore-digital-economy-agreement>

electronic commerce, such as the 2002 agreement with Chile, the language tended to be cautious and limited to soft cooperation pledges in the services chapter¹²⁷ and in the fields of information technology, information society and telecommunications.¹²⁸ In more recent agreements, such as the EU–South Korea FTA (signed in 2009), the language is more concrete and binding, imitating some of the US template provisions – for instance, by confirming the applicability of the WTO Agreements to measures affecting electronic commerce and subscribing to a permanent duty-free moratorium on electronic transmissions. Cooperation is also increasingly framed in more concrete terms and includes mutual recognition of electronic signatures certificates, coordination on Internet service providers’ liability, consumer protection, and paperless trading.¹²⁹ The EU, as particularly insistent on data protection policies, has also sought commitment from its FTA partners to compatibility with the international standards of data protection.¹³⁰

The 2016 EU agreement with Canada – the Comprehensive Economic and Trade Agreement (CETA) – goes a step further. The CETA provisions concern commitments ensuring (a) clarity, transparency and predictability in their domestic regulatory frameworks; (b) interoperability, innovation and competition in facilitating electronic commerce; as well as (c) facilitating the use of electronic commerce by small and medium sized enterprises.¹³¹ The EU has succeeded in deepening the privacy commitments and the CETA has a specific norm on trust and confidence in electronic commerce, which obliges the parties to adopt or maintain laws, regulations or administrative measures for the protection of personal information of users engaged in electronic commerce in consideration of international data protection standards.¹³² Yet, there are no deep commitments on digital trade; nor there are any rules on data and data flows.¹³³

Only recently did the EU make a step towards such rules, whereby Parties agreed to consider in future negotiations commitments related to cross-border flow of information. Such a clause is found in the 2018 EU–Japan Economic Partnership Agreement (EPA),¹³⁴ and in the modernization of the trade part of the EU–Mexico Global Agreement. In the latter two agreements, the Parties commit to ‘reassess’ within three years of the entry into force of the agreement, the need for inclusion of provisions on the free flow of data into the treaty. This was the start of the process of EU’s repositioning on the issue of data flows, which is now fully endorsed in the EU’s

¹²⁷ Article 102 EU–Chile FTA. The agreement states that ‘[t]he inclusion of this provision in this Chapter is made without prejudice of the Chilean position on the question of whether or not electronic commerce should be considered as a supply of services’.

¹²⁸ Article 37 EU–Chile FTA.

¹²⁹ Article 7.49 EU–South Korea FTA.

¹³⁰ Article 7.48 EU–South Korea FTA.

¹³¹ Article 16.5 CETA.

¹³² Article 16.4 CETA.

¹³³ See e.g. Wolfe, *supra* note 91.

¹³⁴ Article 8.81 EU–Japan EPA.

currently negotiated deals with Australia,¹³⁵ New Zealand¹³⁶ and Tunisia,¹³⁷ which include in their draft digital trade chapters norms on the free flow of data and data localization bans. This repositioning and newer commitments are however also linked with high levels of data protection.¹³⁸

The EU wishes to permit data flows only if coupled with the high data protection standards of its General Data Protection Regulation (GDPR).¹³⁹ In its currently negotiated trade deals, as well as in the EU proposal for WTO rules on electronic commerce,¹⁴⁰ the EU follows a distinct model of endorsing and protecting privacy as a fundamental right. On the one hand, the EU and its partners seek to ban data localization measures and subscribe to a free data flow but on the other hand, these commitments are conditioned: first, by a dedicated article on data protection, which clearly states that: ‘Each Party recognises that the protection of personal data and privacy is a *fundamental right* and that high standards in this regard contribute to trust in the digital economy and to the development of trade’,¹⁴¹ followed by a paragraph on data sovereignty: ‘Each Party may adopt and maintain the safeguards it deems appropriate to ensure the protection of personal data and privacy, including through the adoption and application of rules for the cross-border transfer of personal data. Nothing in this agreement shall affect the protection of personal data and privacy afforded by the Parties’ respective safeguards’.¹⁴² The EU also wishes to retain the right to see how the implementation of the provisions on data flows impact the conditions of privacy protection, so there is a review possibility within three years of the entry into force of the agreement, and parties remain free to propose to review the list of restrictions at any time.¹⁴³ In addition, there is a broad carve-out, in the sense that: ‘The Parties reaffirm the right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, social services, public education, safety, the environment including climate change, public morals, social or consumer protection, privacy and data protection, or the promotion and protection of cultural

¹³⁵ Draft text available at: https://trade.ec.europa.eu/doclib/docs/2018/december/tradoc_157570.pdf

¹³⁶ Draft text available at: https://trade.ec.europa.eu/doclib/docs/2018/december/tradoc_157581.pdf

¹³⁷ Draft text available at: https://trade.ec.europa.eu/doclib/docs/2019/january/tradoc_157660.%20ALECA%202019%20-%20texte%20commerce%20numerique.pdf (original text in French).

¹³⁸ See European Commission, Horizontal Provisions for Cross-Border Data Flows and for Personal Data Protection in EU Trade and Investment Agreements, February 2018, available at: https://trade.ec.europa.eu/doclib/docs/2018/may/tradoc_156884.pdf

¹³⁹ Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ 2016 L 119/1 [hereinafter GDPR].

¹⁴⁰ WTO, Joint Statement on Electronic Commerce, EU Proposal for WTO Disciplines and Commitments Relating to Electronic Commerce, Communication from the European Union, INF/ECOM/22, 26 April 2019.

¹⁴¹ See e.g. Article 6(1) draft EU–Australia FTA (emphasis added). The same wording is found in the draft EU–New Zealand and the EU–Tunisia FTAs.

¹⁴² See e.g. Article 6(2) draft EU–Australia FTA. The same wording is found in the draft EU–New Zealand and the EU–Tunisia FTAs.

¹⁴³ See e.g. Article 5(2) draft EU–Australia FTA. The same wording is found in the draft EU–New Zealand and the EU–Tunisia FTAs.

diversity'.¹⁴⁴ The EU thus reserves ample regulatory leeway for its current and future data protection measures. The exception is also fundamentally different than the objective necessity test under the CPTPP and the USMCA, or that under WTO law, because it is subjective and safeguards the EU's right to regulate.¹⁴⁵

The new EU approach has been confirmed by the recently adopted post-Brexit Trade and Cooperation Agreement (TCA) with the United Kingdom,¹⁴⁶ which replicates all the above provisions, except for the explicit mentioning of data protection as a fundamental right – which can be however presumed, since the UK incorporates the European Convention on Human Rights (ECHR) through the Human Rights Act of 1998 into its domestic law. The rest of the EU digital trade template seems to be including the issues covered by the CPTPP/USMCA model, such as software source code,¹⁴⁷ facilitation of electronic commerce,¹⁴⁸ online consumer protection,¹⁴⁹ spam¹⁵⁰ and open government data;¹⁵¹ not including however a provision on non-discrimination of digital products and excluding audiovisual services from the scope of the application of the digital trade chapter.¹⁵²

Despite the confirmation of the EU's approach through the TCA, it appears also likely that EU would tailor its template depending on the trade partner – so, the currently negotiated agreement with Chile has, at least so far, no provisions on data flows and data protection,¹⁵³ while the negotiated deal with Indonesia includes merely a placeholder for rules on data flows.¹⁵⁴ The recently signed agreement with Viet Nam, which entered into force on 1 August 2020, has only few cooperation provisions on electronic commerce as part of the services chapter and no reference to either data or privacy protection is made.¹⁵⁵ One should note that neither of these three countries has comprehensive data protections laws with standards similar to the GDPR, which would facilitate the negotiation of FTA provisions on data flows and data protection. In the

¹⁴⁴ See e.g. Article 2 draft EU–Australia FTA. The same wording is found in the draft EU–New Zealand and the EU–Tunisia FTAs.

¹⁴⁵ Svetlana Yakovleva, 'Privacy Protection(ism): The Latest Wave of Trade Constraints on Regulatory Autonomy' *University of Miami Law Review* 74 (2020), 416–519, at 496.

¹⁴⁶ Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, OJ L [2020] 444/14.

¹⁴⁷ Article 207 TCA. Again with notable safeguards, specified in paras. 2 and 3 of Article 207, including the general exceptions, security exceptions and prudential carve-out in the context of a certification procedure; voluntary transfer of source code on a commercial basis, a requirement by a court or administrative tribunal, or a requirement by a competition authority pursuant to a Party's competition law to prevent or remedy a restriction or a distortion of competition; a requirement by a regulatory body pursuant to a Party's laws or regulations related to the protection of public safety with regard to users online; the protection and enforcement of IP; and government procurement related measures.

¹⁴⁸ Articles 205 and 206 TCA.

¹⁴⁹ Article 208 TCA.

¹⁵⁰ Article 209 TCA.

¹⁵¹ Article 210 TCA.

¹⁵² Article 197(2) TCA.

¹⁵³ Draft text available at: https://trade.ec.europa.eu/doclib/docs/2018/february/tradoc_156582.pdf

¹⁵⁴ Draft text available at: https://trade.ec.europa.eu/doclib/docs/2017/september/tradoc_156106.pdf

¹⁵⁵ The full text of the agreement is available at: <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437>

case of Viet Nam, moreover, the cross-border transfer of personal data may be impeded by the country's 2019 Cybersecurity Law and the linked localization requirements.¹⁵⁶

F. *The Regional Comprehensive Economic Partnership*

An interesting and much anticipated development against the backdrop of the diverging EU and US positions has been the recent Regional Comprehensive Economic Partnership (RCEP) signed on 15 November 2020 between the ASEAN Members,¹⁵⁷ China, Japan, South Korea, Australia and New Zealand and expected to enter into force on 1 January 2022.¹⁵⁸ To put the potential economic value of RCEP into context, the block covers over 30% of world GDP, with this figure expected to reach 50% by 2030.¹⁵⁹ In comparative terms, RCEP is significantly larger than the CPTPP, mainly due to China's membership. The RCEP is particularly important in the digital trade context, as 'it showcases what China, the RCEP's dominant member state, is willing to accept in terms of e-commerce/digital trade provisions'.¹⁶⁰ Yet, this statement may need to be re-evaluated, as China has voiced its willingness to join the CPTPP and now more recently, the DEPA,¹⁶¹ and in this sense would need to go beyond the RCEP commitments. Beyond China, the RCEP rules on digital trade are important as a test for other RCEP Members, such as notably Viet Nam, that are currently not taking part of the JSI negotiations on electronic commerce under the auspices of the WTO.

Chapter 12 of the RCEP includes the relevant electronic commerce rules. In a similar fashion to the CPTPP, it clarifies its application 'to measures adopted or maintained by a Party that affect trade by electronic means' but excludes from this broad scope (1)

¹⁵⁶ In the case of Chile, Law 19,628/1999 on data protection is expected to be undergoing changes amidst a legislative proposal tabled by Chile's executive, which include the regulation of cross-border data flows and the creation of a specialized regulatory body, see <https://www.senado.cl/appsenado/templates/tramitacion/index.php?#>. In the case of Indonesia, the country has not yet a comprehensive data protection law. Currently, the Indonesian House of Representatives is expected to examine the draft of a comprehensive Personal Data Protection Act, see <https://aptika.kominfo.go.id/wp-content/uploads/2019/09/RUU-PDP..pdf>. Finally, in the case of Viet Nam, while the country is currently considering the adoption of a personal data protection decree, it has already adopted a Cybersecurity Law (2019), which may restrict cross-border flows of data, see <https://www.economica.vn/Content/files/LAW%20%26%20REG/Law%20on%20Cyber%20Security%202018.pdf>

¹⁵⁷ Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand and Viet Nam.

¹⁵⁸ Following the ratification of six ASEAN Member States (Brunei, Cambodia, Laos, Singapore, Thailand, Viet Nam) and four non-ASEAN Member States (China, Japan, New Zealand and Australia), RCEP is expected to enter into force on 1 January 2022. For the details and the text of RCEP, see <https://rcepsec.org/legal-text/>

¹⁵⁹ Frederic Neumann und Shanella Rajanayagam, 'Asian Nations Sign New Trade Deal', HSBC Research Department, 16 November 2020, available at: <https://www.hsbc.com/insight/topics/asian-nations-sign-new-trade-deal>

¹⁶⁰ Patrick Leblond, 'Digital Trade: Is RCEP the WTO's Future?', Centre for International Governance Innovation, 23 November 2020, available at: <https://www.cigionline.org/articles/digital-trade-rcep-wtos-future/>

¹⁶¹ See e.g. Su-Lin Tan, 'China's Interest in DEPA Digital Trade Pact Raises Questions about "Domestic Reforms" and What Could Be the Next Big Multilateral Deal', *South China Morning Post*, 5 November 2021, available at: <https://www.scmp.com/economy/china-economy/article/3154887/chinas-interest-depa-digital-trade-pact-raises-questions>

government procurement and (2) information held or processed by or on behalf of a Party, or measures related to such information, including measures related to its collection. In addition, key provisions on the location of computing facilities and the cross-border transfer of information by electronic means apply in conformity with obligations established in the chapters on trade in services (Chapter 8) and on investment (Chapter 10). The RCEP electronic commerce chapter rules are grouped into four areas: (1) trade facilitation; (2) creation of a conducive environment for electronic commerce; (3) promotion of cross-border electronic commerce; and (4) others.

With regard to trade facilitation, RCEP includes provisions on paperless trading,¹⁶² on electronic authentication and electronic signatures.¹⁶³ On paperless trading, the RCEP Members avoid entering into binding commitments. They, instead, commit to ‘works toward’, ‘endeavour’, or ‘cooperate’.¹⁶⁴ The norms on accepting the validity of electronic signatures are more binding but in contrast to the CPTPP and USMCA, permit for domestic laws and regulations to provide otherwise and prevail in case of inconsistency. Regarding commitments to create a conducive environment for electronic commerce, the inclusion of provisions on online personal information protection¹⁶⁵ and cybersecurity¹⁶⁶ is remarkable. On the former, RCEP Members establish that they shall adopt or maintain a legal framework, which ensures the protection of personal information. Unsurprisingly, RCEP is not prescriptive as to how parties may comply with this obligation. In fact, footnote 8 of Article 12.8, gives examples of different ways through which parties can comply. As for the latter aspect on cybersecurity, the parties do not establish a binding provision but recognize the importance of building capabilities and using existing collaboration mechanisms to cooperate. The RCEP Members also commit to adopt or maintain laws or regulations regarding online consumer protection,¹⁶⁷ unsolicited commercial electronic messages,¹⁶⁸ and a framework governing electronic transactions that takes into account international instruments,¹⁶⁹ as well as commit to transparency.¹⁷⁰

The next grouping of RCEP provisions is critical, as it deals with cross-border data flows. In essence, the RCEP provides only for conditional data flows, while preserving room for domestic policies, which well may be of data protectionist nature. So, while the RCEP electronic commerce chapter includes a ban on localization measures,¹⁷¹ as well as a commitment to free data flows,¹⁷² there are clarifications that give RCEP Members a lot of policy space and essentially undermine the impact of the made commitments. In this line, there is an exception possible for legitimate public policies

¹⁶² Article 12.5 RCEP.

¹⁶³ Article 12.6 RCEP.

¹⁶⁴ Article 12.5 RCEP.

¹⁶⁵ Article 12.8 RCEP.

¹⁶⁶ Article 12.13 RCEP.

¹⁶⁷ Article 12.7 RCEP.

¹⁶⁸ Article 12.9 RCEP.

¹⁶⁹ Article 12.10 RCEP.

¹⁷⁰ Article 12.12 RCEP.

¹⁷¹ Article 12.14 RCEP.

¹⁷² Article 12.15 RCEP.

and a footnote to Article 12.14.3(a), which says that: ‘For the purposes of this subparagraph, the Parties affirm that the *necessity* behind the implementation of such legitimate public policy *shall be decided by the implementing Party*’. This essentially goes against any exceptions assessment, as we know it under WTO law, and triggers a self-judging mechanism. In addition, subparagraph (b) of Article 12.14.3 says that the provision does not prevent a party from taking ‘any measure that it considers necessary for the protection of its *essential security interests*. Such measures shall not be disputed by other Parties’.¹⁷³ Article 12.15 on cross-border transfer of information follows the same language and thus secures plenty of policy space, for countries like China or Viet Nam, to control data flows without further justification. Finally, other provisions contained in the RCEP electronic commerce chapter include the establishment of a dialogue on electronic commerce¹⁷⁴ and a provision on dispute settlement,¹⁷⁵ which is separate from the general RCEP’s dispute settlement (Chapter 12).¹⁷⁶

Noteworthy are some things missing from the RCEP. In comparison to the CPTPP, RCEP does not include provisions on custom duties, non-discriminatory treatment of digital products, source code, principles on access to and use of the Internet for electronic commerce and Internet interconnection charge sharing. These are aspects that have been discussed in the context of the JSI negotiations on electronic commerce and to which China will need to agree to if admitted to the CPTPP club. Yet, particularly the provisions on non-disclosure of source code and net neutrality may be hard to swallow, considering the current levels of state intervention. Overall, in terms of norms for the data-driven economy, the RCEP is certainly a less ambitious effort than the CPTPP and the USMCA, or the dedicated digital economy agreements, but still brings about significant changes to the regulatory environment and in particular to China’s commitments in the area of digital trade.

Keeping in mind these PTA rule-frameworks, the following section offers an overview of the current state of affairs of the JSI negotiations on electronic commerce under the umbrella of the WTO, which will help us identify the overlaps and the mismatches between the different rule-making venues.

IV. STATE OF AFFAIRS IN THE WTO NEGOTIATIONS ON ELECTRONIC COMMERCE

A. Introduction

Since the launch of the Work Programme on Electronic Commerce in 1998 and as noted at the outset of this article, a great deal of issues have been discussed in all areas of trade, including trade in goods, trade in services, IP protection and economic development, and four WTO bodies were accordingly charged with the responsibility of carrying out the programme: (1) the Council for Trade in Services; (2) the Council for Trade in Goods; (3) the Council for TRIPS; and (4) the Committee on Trade and Development. The General Council has too played a key role and has continuously

¹⁷³ Emphasis added. The ‘essential security interest’ language has been endorsed by China also in the framework of the WTO electronic commerce negotiations.

¹⁷⁴ Article 12.16 RCEP.

¹⁷⁵ Article 12.17 RCEP.

¹⁷⁶ There is a possibility for this to change after a review of the chapter. See Article 12.17.3 RCEP.

reviewed the Work Programme. After the 2001 Doha Ministerial Declaration, the General Council also agreed to hold ‘dedicated’ discussions on cross-cutting issues whose relevance affect all agreements of the multilateral system and there have been five such dedicated discussions so far held under General Council’s auspices.¹⁷⁷ The issues discussed included: classification of the content of certain electronic transmissions; development-related issues; fiscal implications of electronic commerce; relationship (and possible substitution effects) between electronic commerce and traditional forms of commerce; imposition of customs duties on electronic transmissions; competition; jurisdiction/applicable law and other legal issues.¹⁷⁸ Neither the designated council debates, nor the dedicated discussions have yielded any definitive conclusions or results so far, and participants have largely held the view that further work is needed.

In 2016 and 2017, there was reinvigorated interest towards matters of electronic commerce. On the side lines of the 11th Ministerial Conference in Buenos Aires, 71 WTO Members committed to initiating exploratory work towards future WTO negotiations on trade-related aspects of electronic commerce, with participation open to all WTO Members.¹⁷⁹ Nevertheless, the statements by WTO Members in the various negotiating forums did not yet point towards a clear negotiating mandate but again exposed some of the ‘old’ divides – between the willingness to create new rules or rather adhere to existing commitments; between the willingness to address trade barriers or rather preserve policy space.¹⁸⁰ In fact, the reports of the Chairs of the Council for Trade in Services and of the Council for Trade in Goods indicate a lack of agreement on fundamental issues,¹⁸¹ and the TRIPS Council Chair reported that there has been ‘no appetite among delegations to discuss the Work Programme’.¹⁸² Even on seemingly less controversial matters, such as the customs duty moratorium on electronic transmissions, while most countries support making it permanent, there has been a push by India and South Africa to rethink its scope, definition and impact.¹⁸³ By the end of 2019, Members merely agreed again to reinvigorate the work under the Electronic Commerce Programme based on the existing mandate, aspect that was.

¹⁷⁷ For all relevant information, see: https://www.wto.org/english/tratop_e/ecom_e/ecom_e.htm

¹⁷⁸ WTO, Dedicated Discussion on Electronic Commerce under the Auspices of the General Council, Summary by the Secretariat of the Issues Raised, WT/GC/W/436, 6 July 2001.

¹⁷⁹ WTO, Joint Statement on Electronic Commerce, WT/MIN(17)/60, 13 December 2017.

¹⁸⁰ See e.g. WTO, Work Programme on E-Commerce, Non-Paper from the United States, JOB/GC/94 (2016); WTO Work Programme on E-Commerce, Non-Paper from Brazil, JOB/GC/98 (2016); WTO, Joint Statement on Electronic Commerce, Buenos Aires Ministerial Conference, WTO/MIN/(17)60, 15 December 2017.

¹⁸¹ WTO, Work Programme on Electronic Commerce, Report by the Chairman of the Council for Trade in Services to the General Council, S/C/57, 11 July 2019; WTO, Work Programme on Electronic Commerce, Report by the Chairman of the Council for Trade in Goods to the General Council, G/C/65, 18 July 2019.

¹⁸² WTO, Work Programme on Electronic Commerce – Review of Progress, Report by the Chairperson, WT/GC/W/780, 25 July 2019.

¹⁸³ *Ibid.* See also WTO, *supra* note 14. As expressed in this recent communication, the main points of disagreement are the definition of electronic transmissions, consensus on the scope of the moratorium and an understanding on the impact of the moratorium on the policy space of developing countries.

reiterated in recent communications of November 2021, whereby WTO Members instruct the General Council to hold periodic reviews in 2022 and 2023.¹⁸⁴

At the beginning of 2019, 76 WTO Members embarked on a new effort to move towards a digital trade agreement¹⁸⁵ – a project that was later boosted by the G20 meeting in June 2019 in Japan that launched the ‘Osaka Track’ to formulate rules on trade-related aspects of electronic commerce in the WTO.¹⁸⁶ The negotiations under what is called the ‘JSI on Electronic Commerce’ are co-convened by Australia, Japan and Singapore. They have been conducted through a series of rounds of talks, plenary and small group meetings in Geneva and virtually since the onset of the COVID-19 pandemic. Currently, 86 WTO Members representing over 90% of global trade, all major geographical regions and levels of development are participating in these negotiations.¹⁸⁷

Diverse WTO Members participating in the JSI negotiations have submitted proposals and communications. Submissions have been made by all the major players, the US, the EU and China, as well as by several developing countries and some least-developed countries (LDCs). Interestingly, China has been one of the most active participants of the JSI negotiations thus far and has established its positions in four discrete submissions that outline China’s four priority areas as (1) definition and clarification of terms and rules; (2) trade facilitation;¹⁸⁸ (3) safety and security; and (4) development cooperation.¹⁸⁹ It is critical to highlight that China has a preference for a very narrow definition of digital trade and has argued that the negotiations should focus on the discussion of cross-border trade *in goods* enabled by the Internet, together with relevant payment and logistics services, while paying attention to the digitization trend of trade in services.¹⁹⁰ Beyond trade in goods, China’s efforts have not been very far-reaching

¹⁸⁴ WTO, Work Programme on Electronic Commerce, General Council Decision, WT/L/1079, 11 December 2019; WTO, Work Programme on Electronic Commerce, WT/GC/831/Rev. 3, 18 November 2021; WTO, Work Programme on Electronic Commerce: Communication from India, WT/GC/W/838, 18 November 2021.

¹⁸⁵ WTO, Joint Statement on Electronic Commerce, WT/L/1056, 25 January 2019. There had been changes in the membership between the 2017 and 2019 Joint Statements. Cambodia and Guatemala dropped out in 2019, while China, El Salvador, Georgia, Honduras, Mongolia, Nicaragua, Thailand and the United Arab Emirates joined. Benin joined on 29 March 2019, raising the number of participants to 77. At the [end of October 2021], 86 WTO Members were taking part in the negotiations. For an overview of all proposals and the state of negotiations in 2019, see Katya Garcia-Israel and Julien Grollier, *Electronic Commerce Joint Statement: Issues in the Negotiation Phase* (Geneva: CUTS International, 2019).

¹⁸⁶ ‘Osaka Declaration on Digital Economy’, at: https://www.wto.org/english/news_e/news19_e/osaka_declaration_on_digital_economy_e.pdf

¹⁸⁷ WTO, Joint Statement Initiative on E-Commerce: Co-Conveners’ Update, December 2020, at https://www.wto.org/english/news_e/news20_e/ecom_14dec20_e.pdf

¹⁸⁸ Its third submission focused almost exclusively on trade facilitation measures. See Henry Gao, ‘Across the Great Wall: E-commerce Joint Statement Initiative Negotiation and China’, in Shin-yi Peng, Chin-fu Lin and Thomas Streinz (eds), *Artificial Intelligence and International Economic Law: Disruption, Regulation, and Reconfiguration* (Cambridge: Cambridge University Press, 2021), 295–318, at 311.

¹⁸⁹ WTO, Joint Statement on Electronic Commerce, Communication from China, INF/ECOM/19, 24 April 2019, at section 3 (China Communication 1).

¹⁹⁰ *Ibid.*, at para. 2.5.

and seek to explore the ways to develop international rules for electronic commerce centering on a sound transaction environment and a safe and trustworthy market environment.¹⁹¹ It has also suggested that Members facilitate the temporary entry and stay of electronic commerce-related personnel – so as to allow personnel from Chinese firms to set up, maintain and repair electronic solutions on platform, logistics and payment, particularly in developing countries.¹⁹² Other domains in which China considers that Members should take action include clarifying the trade-related aspects of electronic commerce, trade facilitation, extension of the customs duties moratorium (without making it permanent however), online consumer protection, personal information protection, spam, cybersecurity and transparency.¹⁹³ Yet, the level of commitment suggested by China remains relatively low: so, for instance, with regard to personal information protection, China has simply noted that, ‘Members should adopt measures that they consider appropriate and necessary to protect the personal information of electronic commerce users’.¹⁹⁴ The language on cybersecurity, data safety and privacy is equally non-committal. China considers that ‘to advance negotiation, differences in Members’ respective industry development conditions, historical and cultural traditions as well as legal systems need to be fully understood’,¹⁹⁵ while at the same time fully endorsing the applicability of the general and security exceptions of the GATT 1994 and the GATS to the future electronic commerce disciplines.¹⁹⁶ On data flows, China is unwilling to engage, nor does it commit to a ban on data localization measures; it acknowledges the importance of data to trade development but considers that data flows should be subject to security, in compliance with each Member’s laws and regulations.¹⁹⁷ Ultimately, China’s position is that ‘more exploratory discussions are needed before bringing such issues to the WTO negotiation, so as to allow Members to fully understand their implications and impacts, as well as related challenges and opportunities’.¹⁹⁸ The question that can be raised against the backdrop of China’s JSI communications is to what extent one can expect changes towards deeper commitments and regulatory cooperation, especially on the hard issues of data flows. On the one hand, given the domestic framework¹⁹⁹ and China’s preoccupation with national security issues,²⁰⁰ a change of heart may appear unlikely;

¹⁹¹ Ibid.

¹⁹² Gao, *supra* note 176, at 311–312.

¹⁹³ China Communication 1, *supra* note 189, at section 3.

¹⁹⁴ Ibid., at para. 3.9.

¹⁹⁵ Ibid., at para. 4.1.

¹⁹⁶ Gao, *supra* note 176, at 310.

¹⁹⁷ China Communication 1, *supra* note 189, at para. 4.3.

¹⁹⁸ Ibid., at para. 4.2.

¹⁹⁹ China has recently adopted a Data Security Law (2021), a Personal Information Protection Law (2021) and previously, a Cybersecurity Law (2017). For a detailed analysis of China’s domestic framework, see Henry Gao, ‘Data Regulation with Chinese Characteristics’, in Mira Burri (ed), *Big Data and Global Trade Law* (Cambridge: Cambridge University Press, 2021), 245–267; Yihan Dai, *Cross-Border Data Transfers Regulations in the Context of International Trade Law: A PRC Perspective* (Berlin: Springer, 2022).

²⁰⁰ On the likeliness of changes in China’s position, see Gary Clyde Hufbauer and Zhiyao Lu, ‘Global E-Commerce Talks Stumble on Data Issues, Privacy, and More’, *Peterson Institute for International Economics Policy Brief* 19-4, October 2019, at 3–4; also Gao, *supra* note 188; Henry Gao, ‘Digital or

on the other hand, China's recent calls to join the CPTPP and DEPA may reveal willingness for domestic reforms.²⁰¹

The EU has stated that it is 'fully committed to ongoing WTO negotiations on e-commerce. In this context, it will seek to negotiate a comprehensive and ambitious set of WTO disciplines and commitments, to be endorsed by as many WTO Members as possible'.²⁰² Thus far, it has circulated five submissions: three on its own and two with co-sponsors.²⁰³ Its submissions can be divided into: (1) concrete provisions on digital trade and above all its facilitation; (2) a revision of the WTO Reference Paper on Basic Telecommunication Services (Telecoms Reference Paper), requesting market access commitments in services sectors of relevance for digital trade; and (3) a proposal for all participants of the electronic commerce agreement to join the ITA and its 2015 expansion. In the first category and unsurprisingly, one can find provisions on electronic contracts,²⁰⁴ electronic authentication and signatures,²⁰⁵ consumer protection,²⁰⁶ spam,²⁰⁷ and the ban on customs duties on electronic transmissions.²⁰⁸ More surprising in this category are the rules included on source code,²⁰⁹ open Internet access,²¹⁰ and cross-border data flows,²¹¹ which as earlier discussed are only very recent elements of the EU model and do follow the US-led templates on digital trade. The EU commitment to data flows and the ban on localization measures is however coupled with the protection of personal data and privacy as a fundamental right, and subject to the carve-outs of the EU model, as earlier sketched.²¹² With regard to commitments in the computer and related and the telecommunications services sectors, the EU is seeking to achieve commitments by the WTO Members that reflect its slightly

Trade? The Contrasting Approaches of China and US to Digital Trade', *Journal of International Economic Law* 21 (2018), 297–321.

²⁰¹ See Tan, *supra* note 161.

²⁰² WTO, Joint Statement on Electronic Commerce, EU Proposal for WTO Disciplines and Commitments Relating to Electronic Commerce, Communication from the European Union, INF/ECOM/22, 26 April 2019 (April 2019 Submission), at para. 1.1.

²⁰³ WTO, Joint Statement on Electronic Commerce, Communication from the European Union, INF/ECOM/13, 25 March 2019; WTO, Joint Statement on Electronic Commerce, Communication from the European Union, EU proposal for WTO disciplines and commitments relating to electronic commerce: Revision of disciplines relating to Telecommunications Services, INF/ECOM/43, 15 October 2019; WTO, Joint Statement on Electronic Commerce, Communication by Canada and the European Union, Joint Proposal on the Information Technology Agreement and its Expansion, INF/ECOM/63, 15 March 2021; WTO, Joint Statement on Electronic Commerce, Communication by the European Union, Norway, Ukraine and the United Kingdom, Joint text proposal for the disciplines relating to Telecommunications Services, INF/ECOM/64, 14 April 2021.

²⁰⁴ WTO, Joint Statement on Electronic Commerce, Communication from the European Union, INF/ECOM/13, 25 March 2019, at para. 2.1.

²⁰⁵ *Ibid.*, at para. 2.2.

²⁰⁶ *Ibid.*, at para. 2.3.

²⁰⁷ *Ibid.*, at para. 2.4.

²⁰⁸ *Ibid.*, at para. 2.5.

²⁰⁹ *Ibid.*, at para. 2.6.

²¹⁰ *Ibid.*, at para. 2.9.

²¹¹ *Ibid.*, at para. 2.7.

²¹² *Ibid.*, at para. 2.8.

higher than the GATS level of commitments in its own PTAs,²¹³ but also signal willingness to look at the broader issues of digital trade affecting services.

The US has to date circulated two submissions: a background paper on provisions that it considers ‘represent the highest standard in safeguarding and promoting digital trade’²¹⁴ and a proposal on digital trade disciplines.²¹⁵ The US proposal is the most far-reaching of all submitted proposals and is essentially a compilation of the USMCA digital trade chapter and the US–Japan DTA – thus in essence creating the US most ambitious trade agreement template with an inclusion of financial and insurance services. The strong commitment to free flow of data is evident and follows the language of the USMCA in Article 8 coupled with the ban on localization measures in Article 9. Source code, interactive computer services and open government data are also included.²¹⁶ The text on personal information protection reiterates the language of the US–Japan DTA and while obliging the parties to adopt or maintain a legal framework for data protection, ensures policy space for a variety countries’ approaches, including voluntary schemes. Unlike the USMCA, there is no reference to international standards, nor there is a mention of the essential data protection principles.²¹⁷

Other countries have expressed their support for advancing negotiations on a wide range of issues. Norway, Ukraine and the UK, have co-sponsored a recent proposal with the EU on the update of the Telecoms Reference Paper, which incorporates new definitions and includes disciplines on essential facilities, dispute resolution and transparency.²¹⁸ Canada and the EU have submitted a proposal seeking the expansion in the number of WTO Members participating in the ITA.²¹⁹ Canada submitted a separate proposal on governments committing to not using personal information obtained from private organizations for the purposes of discriminating against or persecuting natural persons, which goes beyond the proposals regarding the protection of personal data submitted by other WTO Members.²²⁰ Brazil and South Korea have submitted a joint proposal on access to online platforms/competition,²²¹ whose content is however restricted. Similarly, a communication from Japan, Mexico, and other

²¹³ For a detailed analysis, see Mira Burri, ‘Telecommunications and Media Services in Preferential Trade Agreements: Path Dependences Still Matter’, in Rhea Hoffmann and Markus Krajewski (eds), *European Yearbook of International Economic Law* (Berlin: Springer, 2020), 169–192.

²¹⁴ WTO, Joint Statement on Electronic Commerce, Communication from the United States, INF/ECOM/5, 25 March 2019, at para. 1.2.

²¹⁵ WTO, Joint Statement on Electronic Commerce, Communication from the United States, INF/ECOM/23, 26 April 2019.

²¹⁶ *Ibid.*, Articles 12, 13 and 14 respectively.

²¹⁷ *Ibid.*, Article 7.

²¹⁸ WTO, Joint Statement on Electronic Commerce: Communication by the European Union, Norway, Ukraine and the United Kingdom, INF/ECOM/64, 14 April 2021.

²¹⁹ WTO, Joint Statement on Electronic Commerce – Communication by Canada and the European Union – Joint proposal on the Information Technology Agreement and its expansion, INF/ECOM/63, 15 March 2021.

²²⁰ WTO, Joint Statement on Electronic Commerce: Communication from Canada – Additional Text Proposal – Personal Information Protection, INF/ECOM/58, 19 October 2020.

²²¹ WTO, Joint Statement on Electronic Commerce – Communication from Brazil and the Republic of Korea – Joint proposal on access to online platforms / competition, INF/ECOM/67, 20 July 2021.

countries on source code is of restricted access.²²² In this regard, it is worth to highlight that New Zealand and Canada have stressed the importance of ensuring certain level of transparency regarding the content of the JSI negotiations on electronic commerce, albeit without too much success so far.²²³

Overall, while one can observe some lines of convergence on the facilitation of digital trade, there are also major points of divergence, in particular on the critical issues of cross-border data flows. The next question we address is in how far the experiences gathered in PTAs, which have been differently reflected in the JSI communications, have translated in the actual JSI negotiations moving towards a new WTO Agreement on Electronic Commerce.

B. Issues Where Agreement Is Possible

On 14 December 2020, the participants to the JSI negotiations circulated a consolidated negotiating text based on the Members' proposals and the progress made in the negotiation during 2020.²²⁴ The text comprises six sections that mirror the main themes advanced in the various proposals submitted: (A) enabling electronic commerce; (B) openness and electronic commerce; (C) trust and electronic commerce; (D) cross-cutting issues; (E) telecommunications; and (F) market access.²²⁵ The text further contains Annex 1, which sets out the scope and general provisions. Working in small negotiations groups²²⁶ has proven to be effective and agreement has been reached on a number of issues, moving towards clean articles on spam, electronic signatures and electronic authentication.²²⁷ In May 2021, the JSI co-convenors communicated that a clean text on open government data, e-contracts, online consumer protection and

²²² WTO, Joint Statement on Electronic Commerce – Communication by Canada, Japan, Mexico, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, Ukraine, Joint proposal on Source Code, INF/ECOM/54, 1 July 2020.

²²³ WTO, Joint Statement on Electronic Commerce – Communication from New Zealand and Canada, Non-paper: Transparency in WTO negotiations and application to the JSI E-commerce Negotiation, INF/ECOM/42/Rev. 1, 18 November 2019.

²²⁴ WTO, WTO Electronic Commerce Negotiations, Consolidated Negotiating Text, INF/ECOM/62/Rev.1, 14 December 2020. A more recent consolidated negotiating text was circulated on 8 September 2021; however, it is not public.

²²⁵ The six topics are further subdivided as follows: A.1 Facilitating electronic transactions and A.2 Digital trade facilitation and logistics; B.1 Non-discrimination and liability, B.2 Flow of information, B.3 Customs duties on electronic transmissions and B.4 Access to Internet and data; C.1 Consumer protection, C.2 Privacy and C.3 Business trust; D.1 Transparency, D.2 Cybersecurity and D.3 Capacity building; E.1 Updating the WTO Reference Paper on telecommunications service and E.2 Network equipment and products.

²²⁶ Ten small groups have been established to fast-track progress on specific issues where progress has been made. These 10 groups are devoted to: (1) consumer protection; (2) spam; (3) e-signatures and electronic authentication; (4) paperless trading; (5) digital trade facilitation; (6) source code; (7) open government data; (8) market access; (9) customs duties on electronic transmissions; and (10) open Internet access.

²²⁷ WTO, 'E-Commerce Negotiations Advance, Delve Deeper into Data Issues', WTO news item, 20 May 2021, https://www.wto.org/english/news_e/news21_e/jsec_20may21_e.htm

paperless trading was within reach.²²⁸ A public communication regarding the meeting of 13 September 2021 reveals the extent of some of these commitments.²²⁹

Regarding the prospective article on consumer protection, Members are required to ‘adopt or maintain measures that proscribe misleading, fraudulent and deceptive commercial activities that cause harm, or potential harm, to consumers engaged in electronic commerce’. Members are also ‘required to endeavour to adopt or maintain measures that aim to ensure suppliers deal fairly and honestly with consumers and provide complete and accurate information on goods and services and to ensure the safety of goods and, where applicable, services during normal or reasonably foreseeable use’. The article also ‘requires members to promote consumer redress or recourse mechanisms’.²³⁰ Furthermore, JSI participants have agreed to an open data provision, whereby Members are ‘required to endeavour, to the extent practicable, to ensure that government data they choose to make digitally and publicly available meets particular data characteristics, and to endeavour to avoid imposing certain conditions on such data’.²³¹

The progressed made under the JSI negotiations on Electronic Commerce is in many aspects impressive and shows the mobilization of JSI participating Members to move ahead towards an agreement. On the other hand, the so far agreed upon provisions, while certainly being welcome proposals for facilitating global electronic commerce, do reveal that, at the moment, any legal text will mainly include rules seeking to bring to the global level aspects that have already been subject to regulatory discussion over the past years, either domestically, in specialized venues or in the PTAs. For instance, in the case of consumer protection, 76 JSI participants already have rules on consumer protection as part of the PTAs.²³² Similarly, with regard to open data, different JSI participants already have open government data portals and many subscribe to international efforts to facilitate open data, such as the Open Government Partnership,²³³ the Open Data Charter²³⁴ or the OECD Recommendation on Public Sector Information.²³⁵ Even China has recently adopted an Open Government Information Regulation.²³⁶ In this sense, the provisions that are likely to be agreed upon are not disruptive nor do they bring elements of legal innovation.

²²⁸ WTO, *ibid.*; see also Pascal Kerneis, ‘The Landing Zone in Trade Agreements for Cross-Border Data Flows’, Jean Monnet Network TIISA Working Paper No. 2021-12 (2021), at 4, available at: <https://iit.adelaide.edu.au/ua/media/1581/final-p-kerneis-wp-2021-12.-updated-v6.pdf>

²²⁹ WTO, ‘E-Commerce Talks: Two “Foundational” Articles Cleaned; Development Issues Discussed’, WTO news item, 13 September 2021, available at: https://www.wto.org/english/news_e/news21_e/jsec_12sep21_e.htm

²³⁰ *Ibid.*

²³¹ *Ibid.*

²³² OECD, ‘Digital Trade Inventory: Rules, Standards and Principles’, *OECD Trade Policy Paper* No. 225 (2021), at 14.

²³³ Open Government Partnership, ‘Members’, <https://www.opengovpartnership.org/our-members/>

²³⁴ Open Data Charter, ‘National Governments’, <https://opendatacharter.net/government-adopters/>

²³⁵ OECD, OECD Recommendation of the Council for Enhanced Access and More Effective Use of Public Sector Information, C(2008)36, <https://www.oecd.org/sti/44384673.pdf>

²³⁶ People’s Republic of China, Order No. 711 of the State Council of the People’s Republic of China, 2019, http://www.gov.cn/zhengce/content/2019-04/15/content_5382991.htm

Outstanding issues in the JSI discussions that still fall under the category of ‘doable’, although with varying levels of normative value, include e-invoicing, cybersecurity, open Internet access, paperless trading and electronic transaction framework.²³⁷ Some of these ‘doable’ issues not only enable electronic commerce in the narrow sense but touch upon broader policy issues that will accordingly face a significant level of resistance before any text could be adopted. This is the case of rules on open Internet access, which pursuant to the latest JSI consolidated text of December 2020 would cover access to Internet services and applications, albeit subject to network management rules.²³⁸ Notably, neither China nor the Russian Federation have submitted proposals on this aspect. The proposals on cybersecurity – mostly of a cooperative nature – are similarly significant for the future development of a safe digital trade environment amidst growing number of cyberattacks and have been supported by the US, the UK, Japan, amongst others. China has submitted a proposal noting that discussions on cybersecurity should respect a country’s Internet sovereignty. The Russian Federation has unsurprisingly abstained from submitting a proposal on this issue.²³⁹

The depth of market access commitments on critical for electronic commerce services sectors are in the ‘uncertain’ category.²⁴⁰ Similarly uncertain is whether an agreement regarding the non-disclosure of source code can be achieved. So far, pursuant to the latest consolidated negotiating text, proposals on access to source code have been submitted by developed and developing countries, including those that are Parties to PTAs where this topic has been addressed. China stands out as a JSI participant that has not submitted any proposal regarding the non-disclosure of source code.²⁴¹ Overall, the participants sought to secure a package of 10–12 agreed articles for the future electronic commerce agreement by the 12th Ministerial Conference (MC12), which was planned to be held in Geneva on 30 November to 3 December 2021 but has in light of the pandemic been postponed for until June 2022. The participants had however acknowledged that the agreement would not be completed by MC12. Rather, the event would serve to showcase the progress made to stakeholders and provide an opportunity for subsequent ministerial involvement to maintain the negotiation’s momentum and to provide guidance towards resolving some or all of the discussed issues.²⁴² It remains to be seen whether these intentions can be fulfilled considering the likely predominant topic of the war in Ukraine and the opposition to Russia’s participation in WTO initiatives.

²³⁷ Kerneis, supra note 216, at 4.

²³⁸ Consolidated Negotiating Text of 14 December 2020, supra note 212, at 39.

²³⁹ Ibid., at 58.

²⁴⁰ See e.g. Kerneis, supra note 216, at 4; Jane Drake-Brockman et al., ‘Digital Trade and the WTO: Negotiation Priorities for Cross-Border Data Flows and Online Trade in Services’, *Jean Monnet TIIISA Network Working Paper* No. 11-2021 (2021), available at: https://cadmus.eui.eu/bitstream/handle/1814/72564/WP_2021_11.pdf?sequence=1&isAllowed=y

²⁴¹ Consolidated Negotiating Text of 14 December 2020, supra note 212, at 48–49.

²⁴² WTO, ‘E-commerce Negotiations: Co-convenors Urge Members to Intensify Efforts Ahead of MC12’, WTO news item, 13 October 2021, https://www.wto.org/english/news_e/news21_e/ecom_18oct21_e.htm

C. Issues Less Likely to Be Agreed upon

Cross-border data flows remain a highly contentious issue, as illustrated by the inability to even start any real discussion on the subject.²⁴³ While there is a number of countries that align with Japan's proposal for data flows with trust,²⁴⁴ and Members acknowledge the importance of the free flow of data across borders as an enabler for business activity and a facilitator of digital trade, the political choices regarding data governance vary widely amongst the JSI participants.²⁴⁵ Moreover, there is no agreement on what the 'flow of data' entails.²⁴⁶ Further important nuances regarding various types of data are absent in the current state of the JSI negotiations. Proposals by various JSI participants tend to only deal with all data, including personal (yet again, with very different approaches reflecting the developments in PTAs),²⁴⁷ as well as the less contentious provision on open data, but discussions regarding other types of proprietary data are currently absent in the discussions.²⁴⁸ Matters that have been inconclusively discussed so far include proposals on cross-border data flows and localization of computing facilities, as well as text proposals on the location of financial computing facilities for covered financial service suppliers.²⁴⁹ The JSI co-convenors have warned that a provision on enabling and promoting data flows is 'key to an ambitious and commercially meaningful outcome', and suggested that both the development aspect, such as the digital divide and capacity building needs, as well as leaving some policy space that can accommodate the different circumstances of the participating Members, are important in securing the adoption of such a provision.²⁵⁰

The latter condition, that is the inclusion and definition of carve-outs and escape clauses, is critical for the viability of a WTO Agreement on Electronic Commerce, as

²⁴³ Kerneis, *supra* note 228, at 4.

²⁴⁴ G20 Osaka Leaders' Declaration, available at: https://www.gov.br/cgu/pt-br/assuntos/articulacao-internacional/arquivos/g20/declaracao-dos-lideres/2019_g20_declaracao-dos-lideres-cupula-de-osaka.pdf; and more recently, G7, G7 Trade Ministers' Digital Trade Principles, <https://www.gov.uk/government/news/g7-trade-ministers-digital-trade-principles>

²⁴⁵ As shown above; see also in the same sense, Ines Willemys, 'Agreement Forthcoming? A Comparison of EU, US, and Chinese RTAs in Times of Plurilateral E-Commerce Negotiations', *Journal of International Economic Law* 23 (2020), 221–244.

²⁴⁶ UNCTAD, *What Is at Stake for Developing Countries in Trade Negotiations on E-Commerce?* (Geneva: UNCTAD, 2021)

²⁴⁷ On the definition of data flows across PTAs, see Burri (2021), *supra* note 22.

²⁴⁸ For the possibilities to define different types of data, there have been different ideas in the literature. Sen for instance classifies data into personal data referring to data related to individuals; company data referring to data flowing between corporations; business data referring to digitized content such as software and audiovisual content; and social data referring to behavioural patterns determined using personal data (see Nivedita Sen, 'Understanding the Role of the WTO in International Data Flows: Taking the Liberalization or the Regulatory Autonomy Path?', *Journal of International Economic Law* 21 (2018), 323–348, at 343–346). Aaronson and Leblond categorize data into personal data, public data, confidential business data, machine-to-machine data and metadata, although they do not specifically define each of these terms (see Susan A. Aaronson and Patrick Leblond, 'Another Digital Divide: The Rise of Data Realms and Its Implications for the WTO', *Journal of International Economic Law* 21 (2018), 245–272). The OECD has also tried to break the data into different categories. See OECD, 'Data in the Digital Age', *Policy Brief*, March 2019.

²⁴⁹ WTO, *supra* note 227.

²⁵⁰ *Ibid.*

well as to its normative effect. Pursuant to the latest consolidated negotiating text of December 2020, several WTO Members participating in the JSI have noted that they would expect security, general and prudential exceptions to apply.²⁵¹ Some of the carve-outs, such as the ones that the EU would prefer, are in essence unilateral self-judging exemptions. The legal tests of the general exceptions and the security exceptions (under Articles XX GATT and XIV GATS; Articles XXI GATT and XIVbis GATS) while subject to objective requirements, still permit a lot of leeway (especially under the security test) and not all elements of the legal tests have been clarified in the WTO jurisprudence.²⁵²

In addition, commitments are unlikely to cover government procurement, or information held by or on behalf of a Party, or measures related to such information, including measures related to its collection.²⁵³ It appears from the negotiations thus far and drawing upon the standing PTA practice that these exceptions could be cross-cutting to a number of issues or to the potential agreement as a whole. Such a situation triggers the important question of the actual possibility to enforce any provision of the agreement and may seriously compromise the otherwise voiced objective of striving for legal certainty and seamless electronic commerce. In particular in the context of privacy protection, there is clearly a room for enhanced regulatory cooperation that can build upon the experience gathered in PTAs and move towards certain compatibility mechanisms, such as: (1) mutual recognition agreements; (2) reliance on international standards; (3) recognition of comparable protection afforded by domestic legal frameworks' national trademark or certification frameworks; or (4) other ways of securing transfer of personal information between the Parties.²⁵⁴

D. The Legal Architecture of a WTO Electronic Commerce Agreement

An important aspect that will follow the outcome of an agreement in the context of the JSI negotiations on electronic commerce is the legal nature and means of incorporation of such an agreement into WTO law. Although India and South Africa do not participate in any of the JSI activities, which have become an important channel to overcome the WTO decision-making deadlock and to move ahead on some issues amongst certain like-minded Members since 11th Ministerial Conference held in Buenos Aires in 2017,²⁵⁵ they have expressed strong opposition to their negotiation at

²⁵¹ Consolidated Negotiating Text of 14 December 2020, *supra* note 224, at 1.

²⁵² For instance, with regard to the privacy protection justifications under Article XIV GATS. There has been a discussion in the literature that the EU data protection law, especially the high standards and extraterritorial effects of the 2018 EU General Data Protection Regulation might fail the Article XIV test. For an overview of the debates, see Burri (2021), *supra* note 3.

²⁵³ Consolidated Negotiating Text of 14 December 2020, *supra* note 224, at 1.

²⁵⁴ These have been the recommendations made to the G20. See Drake-Brockman et al., *supra* note 240. On the problems around implementing such mechanisms, see Burri (2021), *supra* note 3.

²⁵⁵ Currently, next to the JSI on Electronic Commerce, other JSI underway are initiative on Micro, Small and Medium-Sized Enterprises (coordinated by Uruguay); Initiative on Services Domestic Regulation (coordinated by Costa Rica) and the Structured Discussions on Investment Facilitation for Development (coordinated by Chile). The idea of a 'variable geometry' to overcome stalemates in WTO decision-making has been long discussed; see e.g. Warwick Commission, *The Multilateral Trade Regime: Which Way Forward?* (Coventry: University of Warwick, 2007); Craig VanGrasstek, Craig and Pierre Sauvé,

the WTO. In a paper submitted in February 2021,²⁵⁶ the two Members opined that the JSI negotiations are indeed inconsistent with WTO law, stating that while any group of WTO Members may discuss any issue informally, they believe that the negotiated outcome of any plurilateral agreement under the WTO legal framework must be adopted by the Ministerial Conference ‘*exclusively by consensus*’.²⁵⁷ The two WTO Members consider the JSIs inconsistent with the fundamental principles of the WTO, even if the participants offer the negotiated concessions on an most-favoured-nation (MFN) basis and unilaterally include them in their individual schedules. Specifically, India and South Africa consider that the JSI proponents intend ‘to create a new set of Agreements, which are neither multilateral agreements nor plurilateral’.²⁵⁸ They maintain that these negotiations violate the procedures for amending the WTO Agreements, as well as go against the multilateral underpinnings of the WTO and its intrinsic consensus-based decision-making, potentially having broader systemic implications for the integrity of the rules-based multilateral trading system.²⁵⁹ In their argumentation, India and South Africa distinguish between sectoral negotiations, like the ITA and the JSIs. They consider the ITA WTO consistent, as it did not amend WTO rules, as the JSIs purport to. They debunk the suggestion that the Telecoms Reference Paper, which was inscribed in the Members’ schedules as a specific commitment under Article XVIII GATS, justifies the circumvention of the consensus principle, since, as their argument goes, the telecommunications negotiations were part and parcel of the Uruguay Round and obtained a formal mandate, despite being finalized after the conclusion of the Round.²⁶⁰ Specifically on the JSI negotiations on electronic commerce, India and South Africa consider that the JSI proponents are ‘subverting the exploratory and non-negotiating multilateral mandate of the 1998 Work Programme on E-Commerce which has regularly been re-affirmed by all WTO Members’,²⁶¹ and question how the proponents intend to bring the new disciplines into the WTO framework. They note that the JSI negotiations on electronic commerce contains cross-cutting issues governed under the GATT 1994, the Agreement on Trade-Related Investment Measures (TRIMS),²⁶² the TRIPS²⁶³ and the Trade Facilitation Agreement (TFA) that go beyond the GATS and therefore, the outcomes of the JSI negotiations on electronic commerce cannot merely be inscribed into WTO rules through the GATS schedules.²⁶⁴ India and South Africa are not alone in questioning the way forward for

‘The Consistency of the WTO Rules: Can the Single Undertaking be Squared with Variable Geometry?’, *Journal of International Economic Law* 9 (2006), 837–864.

²⁵⁶ WTO, Legal Status of Joint Statement Initiatives and Their Negotiated Outcomes, WT/GC/W/819, 19 February 2021 (India/SA Paper).

²⁵⁷ *Ibid.*, at para. 2 (emphasis in the original).

²⁵⁸ *Ibid.*, at para. 7.

²⁵⁹ *Ibid.*, at paras. 5–11.

²⁶⁰ *Ibid.*, at paras. 19–20 and 23–28.

²⁶¹ *Ibid.*, at para. 34.

²⁶² Agreement on Trade-Related Investment Measures, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 186 [hereinafter TRIMS].

²⁶³ Agreement on Trade-Related Aspects of Intellectual Property Rights, 15 April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter TRIPS].

²⁶⁴ *Ibid.*, at paras. 35 and 37.

the JSI outcomes – for instance, China has also issued a call to clarify the relationship between the future electronic commerce rules and the existing WTO Agreements,²⁶⁵ and its overall position is that the JSI should support the multilateral trading system and the existing WTO rules must prevail in the event of a conflict.²⁶⁶

Indeed, the legal nature and means of incorporation of any agreement emanating from the JSI on Electronic Commerce are far from clear, and the current negotiations have evolved so far as in an ‘open plurilateral’ format without discussing this matter directly, so as not to obstruct the substantive debates.²⁶⁷ However, while India and South Africa may make some valid legal points, others are up for discussion or even flawed, as conflating WTO law with WTO practice. These issues can be discussed through the lens of three options²⁶⁸ available to the JSI participants for implementation.

The first, which is often taken for granted, is the conclusion of a plurilateral agreement, within the meaning of Article II:3 of the WTO Agreement.²⁶⁹ Such agreements are binding only on those Members that have accepted them and do not create rights or obligations for other Members. An example of a WTO plurilateral agreement is the Government Procurement Agreement. Pursuant to Article X:9 of the WTO Agreement, the Ministerial Conference, upon the request of parties to a trade agreement, ‘*may* decide exclusively by consensus to add that agreement to Annex 4’.²⁷⁰ While some authors have ascertained that Annex 4 agreements must be adopted by consensus,²⁷¹ the use of ‘*may*’ suggests that, the consensus principle is, legally, not the only way to adopt a plurilateral agreement. Article X:1 of the WTO Agreement expressly mentions that Annex 1 agreements (agreements on goods, the GATS, and the TRIPS) could be amended through voting (with two-thirds majority), if consensus is not reached. Moreover, Article X:3 of the WTO Agreement stipulates that an Annex 1 agreement can be incorporated into WTO law by acceptance by two-thirds of Members (as was the case with the Trade Facilitation Agreement). The only provisions that require consensus before adoption are amendments to Articles X and IX of the WTO Agreement, Articles I and II GATT 1994, Article II:1 GATS and Article 4 TRIPS. Similarly, pursuant to Article X:8 of the WTO Agreement, the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU)²⁷² must be amended by consensus. Thus, the flexibility of Article X:9 of the WTO Agreement, coupled with

²⁶⁵ China Communication 1, *supra* note 189, at para. 3.2.

²⁶⁶ Gao, *supra* note 188, at 309.

²⁶⁷ Drake-Brockman et al., *supra* note 240.

²⁶⁸ For more options, see Fiama Angeles, Riya Roy and Yulia Yarina, *Shifting from Consensus Decision-Making to Joint Statement Initiatives: Opportunities and Challenges* (Geneva: Graduate Institute Geneva, 2020).

²⁶⁹ Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994) [hereinafter Marrakesh Agreement or WTO Agreement].

²⁷⁰ Emphasis added.

²⁷¹ See e.g. Jane Kelsey, ‘The Illegitimacy of Joint Statement Initiatives and Their Systemic Implications for the WTO’, *Journal of International Economic Law* 25 (2022), 1–23; Americo B. Zampetti, Patrick Low and Petros C. Mavroidis, ‘Consensus Decision-Making and Legislative Inertia at the WTO: Can International Law Help’, *Journal of World Trade* 56 (2022), 1–26.

²⁷² Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994) [hereinafter DSU].

the lack of express guidance on voting, may suggest that WTO Members can adopt a plurilateral agreement through less than consensus. And if a two-thirds majority is used as a benchmark, about 108 WTO Members would have to agree to its adoption – this is approximately 22 more than those currently engaged in the JSI negotiations on electronic commerce. However, WTO practice does indicate an aversion to decision-making by voting.²⁷³ This practice, rather than WTO legal provisions as South Africa and India maintain, appears the main obstacle to amending the current WTO agreements or adopting new ones. Scholars have suggested in this context that inter se plurilateral deals that do not create either obligations or rights for Members that have not accepted them²⁷⁴ and do not relate to a provision the derogation from which would run counter to the object and purpose of the multilateral treaty should be permitted,²⁷⁵ as they such inter se agreements are conventional permitted under international law.²⁷⁶ Second, the participating JSI Members could consider adopting an electronic commerce agreement by means of a critical mass agreement (CMA), like the ITA.²⁷⁷ Similarly to a plurilateral agreement, the CMA would only apply to signatories. However, the CMA would be applied on an MFN basis to all WTO Members, including non-signatories. The legal form of the CMA could ostensibly include changes to Members' GATT and GATS schedules, and this is legally feasible under the 2000 Decision on Procedures for the Certification of Rectifications or Improvements to Schedules of Specific Commitments,²⁷⁸ which provides Members considerable leeway

²⁷³ For a discussion, see e.g. John H. Jackson, 'The Puzzle of GATT: Legal Aspects of a Surprising Institution', *Journal of World Trade Law* 1 (1967), 131–161; Claude Barfield, *Free Trade, Sovereignty, Democracy: the Future of the World Trade Organization* (Washington, DC: AEI Press, 2001); Joost Pauwelyn, 'The Transformation of World Trade', *Michigan Law Review* 104 (2005), 1–65; Jaime Tijmes-Lhl, 'Consensus and Majority Voting in the WTO', *World Trade Review* 8 (2009), 417–437; Thomas Cottier and Satoko Takenoshita, 'The Balance of Power in WTO Decision-Making: Towards Weighted Voting in Legislative Response', *Aussenwirtschaft* 59 (2003), 171–214; Thomas Cottier and Satoto Takenoshita, 'Decision-Making and the Balance of power in WTO Negotiations: Towards Supplementary Weighted Voting', in Stefan Griller (ed), *At the Crossroads: The World Trading System and the Doha Round* (New York: Springer, 2008), 181–230; Manfred Elsig and Thomas Cottier, 'Reforming the WTO: the Decision-Making Triangle Revisited', in Thomas Cottier and Manfred Elsig (eds), *Governing the World Trade Organization* (Cambridge: Cambridge University Press, 2011), 289–312.

²⁷⁴ As per Article II:3 WTO Agreement.

²⁷⁵ Zampetti et al., supra note 271, especially at 18–20.

²⁷⁶ Bear however in mind that the Appellate Body has stated, with reference to Articles IX and X of the WTO Agreement, that 'the WTO agreements contain specific provisions addressing amendments, waivers, or exceptions for regional trade agreements, which prevail over the general provisions of the Vienna Convention, such as Article 41'. See Appellate Body Report, *Peru — Additional Duty on Imports of Certain Agricultural Products (Peru — Agricultural Products)*, WT/DS457/AB/R, adopted on 31 July 2015, at para. 5.112.

²⁷⁷ See e.g. Manfred Elsig, 'WTO Decision-Making: Can We Get a Little Help from the Secretariat and the Critical Mass?', in Debra Steger (ed), *Redesigning the World Trade Organization for the Twenty-First Century* (Waterloo: Wilfrid Laurier University Press, 2010), 67–90; Elsig and Cottier, supra note 273; Bernard Hoekman and Charles Sabel, 'Plurilateral Cooperation as an Alternative to Trade Agreements: Innovating One Domain at a Time', *Global Policy* 12 (2021), 49–60, at 51.

²⁷⁸ S/L/84, 18 April 2000.

in adopting changes in their schedules without multilateral consensus.²⁷⁹ For services sectors, it is possible for Members to adopt commitments in the fourth column of their services schedules through ‘additional commitments’ under Article XVIII GATS. Such commitments may not be subject to scheduling under the market access and national treatment (NT) columns. They may, however, include qualifications, standards and licensing matters, as well as other domestic regulations that are consistent with Article VI GATS. These additional commitments must be expressed in the form of undertakings and not limitations.²⁸⁰ The Telecoms Reference Paper has proven this approach workable. Yet, it appears unlikely that the Telecoms Reference Paper itself could be amended to include all the proposed rules under the JSI on Electronic Commerce. It is equally unlikely that provisions that include changes in rights and obligations of WTO Members can be incorporated through a simple schedule modification. This may suggest moving towards a hybrid outcome, whereby participating Members can enshrine the GATT and GATS-related aspects of the JSI outcome through their respective schedules, in addition to a complementary ‘Digital Economy Agreement’, which covers the regulatory WTO-extra issues.²⁸¹

Finally, as a third option, the participants of the JSI negotiations on electronic commerce could consider concluding a PTA that covers both trade in goods and services. Yet, in order to be permissible, such a PTA must comply with the requirements to liberalize ‘substantially all the trade’ under Article XXIV:8(b) of the GATT 1994²⁸² and have ‘substantial sectoral coverage’ and eliminate discrimination in the sense of ‘national treatment between Parties under Article V:1(a) and (b) of the GATS. Under the requirement of ‘substantially all the trade’,²⁸³ it is generally agreed that there is a high quantitative or qualitative threshold.²⁸⁴ Whether a dedicated digital trade PTA satisfies these criteria is up for discussion, considering on the one hand that not all products are digital products and that the provision of services in electronic

²⁷⁹ In *EC – Bananas III*, the Appellate Body confirmed that the modification of schedules ‘does not require formal amendment’ pursuant to Article X of the WTO Agreement, and is not subject to the ‘formal acceptance process’ provided for in Article X:7. See Appellate Body Reports, European Communities — Regime for the Importation, Sale and Distribution of Bananas (*EC – Bananas III*) (*Art. 21.5 – Ecuador II*) / *EC – Bananas III* (*Art. 21.5 – US*), adopted on 11 December 2008, at paras. 384–385.

²⁸⁰ WTO, Guidelines for the Scheduling of Specific Commitments under the General Agreement on Trade in Services (GATS), S/L/92, 28 March 2001, at para. 19.

²⁸¹ See in this sense Drake-Brockman et al., *supra* note 240.

²⁸² See Appellate Body Report, *Turkey – Restrictions on Imports of Textile and Clothing Products* (*Turkey – Textiles*), WT/DS34/AB/R, adopted 22 October 1999; see also Nicolas Lockhart and Andrew Mitchell, ‘Regional Trade Agreements under GATT 1994: An Exception and Its Limits’, in Andrew Mitchell (ed), *Challenges and Prospects for the WTO* (London: Cameron May, 2005), 217–252.

²⁸³ Footnote 1 to Article V:1(a) GATS clarifies that: ‘This condition is understood in terms of number of sectors, volume of trade affected and modes of supply. In order to meet this condition, agreements should not provide for the a priori exclusion of any mode of supply’.

²⁸⁴ See e.g. Gabrielle Zoe Marceau and Cornelis Reiman, ‘When and How Is a Regional Trade Agreement Compatible with the WTO?’, *Legal Issues of Economic Integration* 28 (2001), 297–336, at 316.

commerce tends to fall under mode 1;²⁸⁵ on the other hand, we have already a number of agreements, especially the dedicated digital economy agreements, that create a specific regime with or without a linkage to a trade deal. Taking this path, which has been contemplated in the context of the previously negotiated Trade in Service Agreement (TiSA) would however mean that the agreement is outside of the forum of the WTO and many of the therewith associated benefits, such as for instance links to the dispute settlement mechanism and the striving for global equity, will be lost. In the latter sense, the very systemic risks for the multilateral system that India and South Africa claim as an argument against a plurilateral deal on electronic commerce will become real.

V. TOWARDS A WTO AGREEMENT ON ELECTRONIC COMMERCE: SUBSTANCE AND VIABILITY

The above analysis of the developments in preferential and multilateral forums reveals the critical importance of digital trade as a negotiation topic and the substantial efforts made, in particular in recent years, to address this topic and create an adequate rule-framework. The achievements made in some PTAs and the discrete digital trade agreements, as analyzed above, are quite impressive and there is a clear strand of legal innovation that seeks to tackle not only the ‘old’ issues raised under the WTO Electronic Commerce Programme but also the newer issues in the context of a global data-driven economy, in particular with regard to the free flow of information and in expression of the wish to curtail digital protectionism. Yet, it should be underscored that these sophisticated and far-reaching treaties on electronic commerce and digital trade are only a handful and the number of states involved proactively in data governance still quite low. Indeed, if one takes into account the universe of PTAs, the heterogeneity of approaches and depth of commitments is striking and only on very few issues, such as the ban on customs duties on electronic transmissions, electronic contracts and signatures, and paperless trading, do we have some level of convergence, with some newer issues, like source code and open government data, gaining traction. The developments in the current WTO talks on electronic commerce, while a very welcome revitalization of the WTO’s negotiation arm, also expose the divergences between countries and their varying willingness to truly engage in a new agreement on electronic commerce, with a right-out opposition by some WTO Members that question the desirability of far-reaching rules on digital trade, especially for developing countries,²⁸⁶ and the legitimacy of plurilateral initiatives under the umbrella of the WTO. As the article revealed, although all major stakeholders have become proactive in digital trade rule-making, the different approaches followed by China, the EU and the US are manifest and create a serious impediment to a deep agreement that adequately reflects contemporary digital trade practices and addresses the associated

²⁸⁵ See e.g. Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services (US – Gambling)*, WT/DS285/R, adopted 10 November 2004; Appellate Body Report, *US – Gambling*, WT/DS285/AB/R, adopted 7 April 2005; see also Weber and Burri, *supra* note 12.

²⁸⁶ In support of such a position, see e.g. Jane Kelsey, ‘How a TPP-Style E-commerce Outcome in the WTO would Endanger the Development Dimension of the GATS *Acquis* (and Potentially the WTO)’, *Journal of International Economic Law* 21 (2018), 273–295.

concerns of businesses and states. The topic of cross-border data flows, as well as the related provisions on data localization and non-discrimination of digital products, remain the most contentious, as they have a direct impact on the data sovereignty of states and the policy space available to them to adopt a variety of measures, particularly in the areas of national security and privacy protection, as highlighted by the positions of China and the EU respectively, but also in other domestic policy domains and particular citizenry values.²⁸⁷

Against this contentious political backdrop, it appears, at least at this point of time, that the future WTO agreement on electronic commerce will not entail any major overhaul adding substantial new rights and obligations. Excluding many of the ‘difficult’ issues, it would strive to facilitate electronic commerce, possibly including a clarification of the applicability of existing rules and hopefully deeper commitments in the relevant services sectors. A logical question one might raise in this context is what are the benefits, if any, of such a relatively ‘thin’ deal? First and rather at a basic level, it is better to have an agreement at least on some issues than none at all – this does provide legal certainty for many of the countries and their businesses involved in digital trade; second, it gives an important signal that the WTO can deliver and that the WTO membership has the political motivation and the legal means to move forward and address the pertinent issues in the area of global trade. Third and this may be a less direct benefit, as Robert Wolfe has argued, in policy-making labelling of issues is critical. It is part of the process of learning and experimenting and in this adaptation even softer commitments should not be plainly discarded as unimportant.²⁸⁸ One could also argue that indeed reaching a thinner, more narrowly focused on trade facilitation and trade in services deal without substantial WTO-extra issues is better than a club-driven CPTPP/USMCA-tailored type of an agreement. Such an argument can be well substantiated by the lack of full understanding of the impact of many of the current far-reaching rules on data flows, which expand the scope of trade deals substantially, while also reducing states’ flexibility in the area of data governance. The venues of PTAs provide a good platform for experimentation and evidence-gathering on the economic but also, and perhaps more importantly, on the broader societal effects of such commitments. Whereas enhanced regulatory cooperation in the striving to attain a seamless global data-driven economy is clearly needed, there must be sufficient safeguards for the protection of non-economic interests and values, and here too we do not know much yet on how the existing reconciliation mechanisms work on the ground and whether they are adequately designed to tread the fine line between curbing data protectionism and protecting legitimate public interests.²⁸⁹ This question is separate

²⁸⁷ As highlighted by the New Zealand’s Waitangi Tribunal, Report on the Comprehensive and Progressive Agreement for Trans-Pacific Partnership with regard to Māori interests (see supra note 38).

²⁸⁸ Wolfe, supra note 91, at s78–s79, also referring to Gregory Shaffer, Robert Wolfe and Vinhcent Le, ‘Can Informal Law Discipline Subsidies’, *Journal of International Economic Law* 18 (2015), 711–741. See also Joost Pauwelyn, Ramses Wessel and Jan Wouters (eds), *Informal International Lawmaking* (Oxford: Oxford University Press, 2012).

²⁸⁹ See in this sense Chander and Lê, supra note 20; New Zealand’s Waitangi Tribunal, Report on the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, supra note 38 (the report concluded that the risks to Māori interests arising from the e-commerce provisions of the CPTPP are

from the discussion on whether trade venues are in the first place suitable to capture and regulate all issues of data governance, which considering some of the drawbacks of trade law-making, which remains opaque, state-centric, top-down with no proper stakeholder participation²⁹⁰ but lobbyist influence, is probably not the case.²⁹¹ Approaching the challenges of the fluid and complex data environment will demand the mobilization of different governance toolkits, including possibly technology itself,²⁹² and a proper interfacing of international and national regimes, which will also need time for experimentation and accordingly a certain level of modesty and humility of policy-makers, as rightly stressed by Shaffer.²⁹³ In this sense, a narrow WTO Agreement on Electronic Commerce should not necessarily be viewed as a lost opportunity but perhaps as a step in the right direction.

significant, and that reliance on the exceptions and exclusions to mitigate that risk falls short of the Crown's duty of active protection).

²⁹⁰ For suggestions for broader stakeholder involvement and alignment with the principles of Internet Governance, see Neha Mishra, 'Building Bridges: International Trade Law, Internet Governance and the Regulation of Data Flows', *Vanderbilt Journal of Transnational Law* 52 (2019), 463–509.

²⁹¹ The discussion on the boundaries of the WTO and trade law in general is not new. See e.g. Symposium: The Boundaries of the WTO, *American Journal of International Law* 96 (2002); Anu Bradford, 'When the WTO Works, and How It Fails', *Virginia Journal of International Law* 51 (2010), 1–56; Sungjoon Cho and Claire R. Kelly, 'Are World Trading Rules Passé?', *Virginia Journal of International Law* 53 (2013), 623–666; also New Zealand's Trade for All Advisory Board Report (2019), available at: <https://www.tradeforalladvisoryboard.org.nz/>

²⁹² See e.g. Lisa Toohey, 'Trade Law Architecture after the Fourth Industrial Revolution', in Shin-yi Peng, Chin-fu Lin and Thomas Streinz (eds), *Artificial Intelligence and International Economic Law: Disruption, Regulation, and Reconfiguration* (Cambridge: Cambridge University Press, 2021), 337–352; Emmanuelle Ganne, 'Blockchain's Practical and Legal Implications for Global Trade and Global Trade Law', in Mira Burri (ed), *Big Data and Global Trade Law* (Cambridge: Cambridge University Press, 2021), 126–159.

²⁹³ Shaffer, *supra* note 18.