ARTICLES

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

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ABSTRACT

Electronic commerce has been one of the very few areas of trade law in which 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 World Trade Organization (WTO) Joint Initiative on Electronic Commerce, which aims at concluding 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). It does so by highlighting the legal innovation in the most advanced templates of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and the United States-Mexico-Canada Agreement (USMCA), as well as those in dedicated digital economy agreements, such as the ones between the United States and Japan, and among Chile, New Zealand, and Singapore. The Article also covers the newer EU trade deals and looks at the Regional Comprehensive Economic Partnership (RCEP), the first agreement with digital trade provisions that includes China, 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.

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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.[2] On the one hand, this interest has to do with the advanced digitization and the critical importance of data to global economies;[3] on the other hand, it can be linked to the multiple new

1. The Organisation for Economic Co-operation and Development (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 & MARIE-AGNES JOUANJEAN, DIGITAL TRADE: DEVELOPING A FRAMEWORK FOR ANALYSIS 6, 10 (2017), https://doi.org/10.1787/524c8c83-en; *also* Mira Burri & Anupam Chander, *What Are Digital Trade and Digital Trade Law?*, 117 AJIL UNBOUND 99 (2023), https://doi:10.1017/aju.2023.14.

2. Since 2018, close to 40 agreements incorporating electronic commerce or digital trade provisions have been signed. This analysis is based on a dataset of all data-relevant norms in trade agreements (TAPED). *See* Mira Burri & Rodrigo Polanco, *Digital Trade Provisions in Preferential Trade Agreements: Introducing a New Dataset*, 23 J. INT. ECON. L. 187 (2020). The cut-off date for the Article's analysis is 31 December 2022. For all data, as well as updates of the dataset, *see TAPED: A Dataset on Digital Trade Provisions*, U. LUCERNE, https://unilu.ch/taped.

3. *See, e.g.*, JAMES MANYIKA ET AL., BIG DATA: THE NEXT FRONTIER FOR INNOVATION, COMPETITION, AND PRODUCTIVITY (2011); VIKTOR MAYER-SCHÖNBERGER & KENNETH CUKIER, BIG

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.[4] The multilateral forum of the World Trade Organization (WTO), despite its long-acknowledged stalemate, together with its troubles to move forward with the Doha negotiation round[5] and to secure a working dispute settlement mechanism,[6] has also become active on the topic.[7] There seems to be a broad agreement among 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 inquiries, the Article first sketches the status quo of WTO rules of pertinence for electronic commerce. It then provides 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 at the WTO, but also 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 and Japan through the Digital Trade Agreement (DTA) and among Chile, New Zealand, and Singapore

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DATA: A REVOLUTION THAT WILL TRANSFORM HOW WE LIVE, WORK, AND THINK (2013); NICOLAUS HENKE ET AL., THE AGE OF ANALYTICS: COMPETING IN A DATA-DRIVEN WORLD (2016); WORLD TRADE ORG., WORLD TRADE REPORT 2018: THE FUTURE OF WORLD TRADE: HOW DIGITAL TECHNOLOGIES ARE TRANSFORMING GLOBAL COMMERCE (2018) [hereinafter 2018 WORLD TRADE REPORT]; WORLD TRADE ORG., E-COMMERCE, TRADE AND THE COVID-19 PANDEMIC (2020) [hereinafter WTO COVID-19 REPORT]; Javier López González et al., *Of Bytes and Trade: Quantifying the Impact of Digitalisation on Trade*, OECD TRADE POLICY PAPERS No. 273 (2023), https://doi.org/10.1787/11889f2a-en.

4. *See, e.g.*, Mira Burri, *Interfacing Privacy and Trade*, 53 CASE W. RES. J. INT'L L. 35 (2021); Anupam Chander & Paul M. Schwartz, *Privacy and/or Trade*, 90 U. CHI. L. REV. 49 (2023).

5. *See, e.g.*, Robert Wolfe, *First Diagnose, Then Treat: What Ails the Doha Round?*, 14 WORLD TRADE REV. 7 (2015).

6. *See, e.g.*, Robert McDougall, *The Crisis in WTO Dispute Settlement: Fixing Birth Defects to Restore Balance*, 52 J. WORLD TRADE 867 (2018).

7. In the side lines of the Buenos Aires Ministerial Conference, 71 WTO members agreed to initiate negotiations on trade-related aspects of electronic commerce. *See Joint Initiative on E-commerce*, WTO, https://www.wto.org/english/tratop_e/ecom_e/joint_statement_e.htm.

through the Digital Economy Partnership Agreement (DEPA). The Article then covers the EU's new generation of trade deals, in particular the currently negotiated deals with Australia and Tunisia, the post-Brexit agreement with the United Kingdom (U.K.) and the recent treaty with New Zealand. The Article also looks at the Regional Comprehensive Economic Partnership (RCEP), the first agreement with digital trade provisions that includes China, to give a sense of the 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.

II. WTO Law and Electronic Commerce: The Status Quo

The WTO membership relatively early recognized the implications of digitization for trade by launching a Work Programme on Electronic Commerce in 1998,[8] 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.[9] 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.[10] 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.[11] WTO law also often tackles issues in

8. *Work Programme on Electronic Commerce*, WTO, https://www.wto.org/english/tratop_e/ecom_e/ecom_work_programme_e.html.

9. *See, e.g.*, Yasmin Ismail, E-commerce in the World Trade Organization: History and Latest Developments in the Negotiations under the Joint Statement 8 (2020).

10. *See* Mira Burri, *The International Economic Law Framework for Digital Trade*, 135 Zeitschrift für Schweizerisches Recht 10 (2015); 2018 World Trade Report, *supra* note 3, at 160.

11. Especially in the domain of IP protection. *See, e.g.*, Susan Sell, Private Power, Public Law: The Globalization of Intellectual Property Rights (2003).

a technologically neutral way—for instance, with regard to the application of the basic principles, standards, trade facilitation, subsidies, and government procurement.[12] In addition, the WTO's dispute settlement mechanism offers an important path to further legal evolution,[13] and a number of cases, in particular under General Agreement on Trade in Services (GATS),[14] have proven helpful in the digital trade domain[15] in clarifying WTO law, advancing it further, and 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 also been in recent years substantially curtailed due to geopolitical reasons, political consensus on the substance and the will to move towards new rules have been lacking.[16] A number of important issues remain unresolved and expose the disconnect between the existing WTO rules, in particular under the GATS, and digital trade practices. Good examples in this context are the critical questions of whether previously non-existing digital offerings should be classified as goods or services (and thus whether the more binding General Agreement on Tariffs and Trade [GATT 1994][17] 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

12. For a fully-fledged analysis, see TRADE GOVERNANCE IN THE DIGITAL AGE (Mira Burri & Thomas Cottier eds., 2012).

13. *See, e.g.*, THE WTO AT TEN: THE CONTRIBUTION OF THE DISPUTE SETTLEMENT SYSTEM (Giorgio Sacerdoti et al. eds., 2006). For the current crisis of the WTO dispute settlement, *see* Joost Pauwelyn, *WTO Dispute Settlement Post 2019: What to Expect?*, 22 J. INT'L ECON. L. 297 (2019).

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

15. Many major GATS cases have had a substantial Internet-related element. *See, e.g.*, Panel Report, *United States–Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc. WT/DS285/R (adopted Apr. 20, 2005); Appellate Body Report, *United States–Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc. WT/DS285/AB/R (adopted Apr. 20, 2005); Panel Report, *China–Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WTO Doc. WT/DS363/R (adopted Jan. 19, 2010); Appellate Body Report, *China–Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WTO Doc. WT/DS363/AB/R (adopted Jan. 19, 2010); Panel Report, *China–Certain Measures Affecting Electronic Payment Services (China–Electronic Payment Services)*, WTO Doc. WT/DS413/R (adopted Aug. 31, 2012).

16. *See, e.g.*, BIG DATA AND GLOBAL TRADE LAW (Mira Burri ed., 2021).

17. General Agreement on Tariffs and Trade 1994, Apr. 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].

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 audio-visual services sector (which is the least committed for sector under the GATS).[18] 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.[19] 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.[20]

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 important aspects. The significance of electronic commerce, and digital trade more broadly, as well as the centrality of data for economic processes, 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 reports[21] and underscored by the COVID-19 pandemic.[22] Datafication has, in a sense, also extended the scope of trade-related issues.[23] For instance, data protection has now turned into a key trade regulation topic as it directly links to the new

18. ROLF H. WEBER & MIRA BURRI, CLASSIFICATION OF SERVICES IN THE DIGITAL ECONOMY (2012); Shin-yi Peng, *Renegotiate the WTO Schedule of Commitments: Technological Development and Treaty Interpretation*, 45 CORNELL INT'L L.J. 403, 403–30 (2013); Burri, *supra* note 10, at 40–41; Ines Willemyns, *GATS Classification of Digital Services – Does "the Cloud" Have a Silver Lining?*, 53 J. WORLD TRADE 59, 59–82 (2019).

19. Sacha Wunsch-Vincent & Arno Hold, *Towards Coherent Rules for Digital Trade: Building on Efforts in Multilateral versus Preferential Trade Negotiations*, *in* TRADE GOVERNANCE IN THE DIGITAL AGE 179–221 (Mira Burri & Thomas Cottier eds., 2012).

20. 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* General Council, *Work Programme on Electronic Commerce: The Moratorium on Custom Duties on Electronic Transmissions: Need for Clarity on its Scope and Impact*, WTO Doc. WT/GC/W/833 (Nov. 8, 2021).

21. *See, e.g.*, MANYIKA ET AL., *supra* note 3; HENKE ET AL., *supra* note 3; 2018 WORLD TRADE REPORT, *supra* note 3; WTO COVID-19 REPORT, *supra* note 3; González et al., *supra* note 3.

22. *See, e.g.*, WTO COVID-19 REPORT, *supra* note 3; *see also* U.N. Conf. on Trade and Dev. & eTrade for All, *Covid-19 and E-Commerce: A Global Review*, U.N. Doc. NCTAD/DTL/STICT/2020/13 (2021).

23. *See, e.g.*, Mira Burri, *Digital Trade and Human Rights*, 117 AJIL UNBOUND 110 (2023), https://doi:10.1017/aju.2023.16.

underlying wish to allow unrestricted cross-border data flows.[24] This expansion is also associated with newer fields of contestation[25] and the aspiration of many countries to protect their digital sovereignty that has led to the erection of new trade barriers, such as data localization measures,[26] that seek to keep the data within the territorial boundaries of the sovereign state[27] but may seriously jeopardize the creation of a global digital economy.[28]

In this sense, the current negotiations under the Joint Initiative (JI) on Electronic Commerce can be seen as a much-welcomed reinvigoration of the WTO effort to address contemporary digital trade issues. The JI 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 provide a good sense of what is politically feasible under the JI and what the building blocks of a plurilateral treaty on electronic commerce as a result of the JI 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 384 PTAs entered into between 2000 and December 2022, 167 contain provisions relevant for electronic commerce/digital

24. *See, e.g.*, Burri, *supra* note 4; Chander & Schwartz, *supra* note 4.

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

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

27. *See, e.g.*, Digital Trade in the U.S. and Global Economies, Inv. No. 332–531, USITC Pub. 4415 (July 2013); Anupam Chander & Uyên P. Le^, *Data Nationalism*, 64 Emory L.J. 677, 677–739 (2015); U.S. Trade Representative (USTR), 2022 National Trade Estimate Report on Foreign Trade Barriers (2022).

28. *See, e.g.*, Simon J. Evenett & Johannes Fritz, Emergent Digital Fragmentation: The Perils of Unilateralism (2022).

trade and 109 have dedicated electronic commerce/digital trade chapters.[29] 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 detailed, as well as more binding, provisions on digital trade has intensified significantly over the years.[30] This regulatory push in the domain of digital trade can be explained by the increased importance of the issue over the years but also by the role played by the United States.[31]

The United States has forcefully endorsed its "Digital Agenda"[32] 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.[33] The diffusion of the U.S. template is not, however, limited to U.S. agreements,[34] and has been replicated in a number of other PTAs, such as Singapore-Australia,[35] Thailand-Australia,[36] New Zealand-Singapore,[37] and South Korea-Singapore.[38] Many smaller

29. *See* TAPED, *supra* note 2.

30. For an overview of the PTA developments and additional data, see Mira Burri, *Data Flows and Global Trade Law*, *in* BIG DATA AND GLOBAL TRADE LAW, *supra* note 16, at 11–41.

31. *See* MANFRED ELSIG & SEBASTIAN KLOTZ, *Data Flow-Related Provisions in Preferential Trade Agreements: Trends and Patterns of Diffusion*, *in* BIG DATA AND GLOBAL TRADE LAW, *supra* note 16, at 42–62.

32. Bipartisan Trade Promotion Authority Act of 2002, Pub. L. No. 107–210, 116 Stat. 933 (codified in scattered sections of 19 U.S.C.); *see also* Sacha Wunsch-Vincent, *The Digital Trade Agenda of the U.S.*, 58 AUSSENWIRTSCHAFT 7 (2003); Henry Gao, *Regulation of Digital Trade in US Free Trade Agreements: From Trade Regulation to Digital Regulation*, 45 L. ISSUES ECON. INTEGRATION 47 (2018).

33. *See* U.S.-Australia Free Trade Agreement ch. 16, Austl.-U.S., May 18, 2004, 19 U.S.C. 3805; U.S.-Bahrain Free Trade Agreement ch. 13, Bahr.-U.S., Sept. 14, 2004, T.I.A.S.; U.S.-Chile Free Trade Agreement ch. 15, Chile-U.S., June 6, 2003, T.I.A.S.; U.S.-Morocco Free Trade Agreement ch. 14, Morocco-U.S., June 15, 2004, T.I.A.S.; U.S.-Oman Free Trade Agreement ch. 14, Oman-U.S., Jan. 19, 2006, T.I.A.S. 04-707; U.S.-Peru Trade Promotion Agreement ch. 15, Peru-U.S., Apr. 12, 2006, N.P.; U.S.-Singapore Free Trade Agreement ch. 14, Sing.-U.S., May 6, 2003, T.I.A.S.; Dominican Republic-Central America-U.S. Free Trade Agreement ch. 14, Aug. 5, 2004, T.I.A.S.; U.S.-Panama Trade Promotion Agreement ch. 14, Panama-U.S., June 28, 2007, S. Rept. 112-224; U.S.-Colombia Trade Promotion Agreement ch. 15, Colom.-U.S., Nov. 22, 2006, T.I.A.S.; U.S.-Korea Free Trade Agreement ch. 15, S. Kor.-U.S. June 30, 2007, T.I.A.S.

34. ELSIG & KLOTZ, *supra* note 31.

35. *See* Singapore-Australia Free Trade Agreement (SAFTA) ch. 14, Austr.-Sing., Feb. 17, 2003, 2257 U.N.T.S. 103.

36. *See* Thailand-Australia Free Trade Agreement ch. 11, Austl.-Thai., May 5, 2004, 2440 U.N.T.S. 97.

37. *See* Trans-Pacific Strategic Economic Partnership Agreement ch. 9, N.Z.-Sing., July 18, 2005, 2592 U.N.T.S. 225.

38. See Korea-Singapore Free Trade Agreement ch. 14, Sing.-S. Kor., Aug. 4, 2005.

states, such as Chile,[39] have also become active in the area of data governance; Singapore has also clearly positioned itself as a legal innovator in the field. At the same time, many other countries, such as those parties to the European Free Trade Area (EFTA),[40] have not yet implemented distinct digital trade strategies.[41] 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 (also now titled as "digital trade") PTA chapters; (2) the chapters on cross-border supply of services (with particular relevance of the telecommunications, computer and related, audio-visual and financial services sectors); and (3) the IP chapters.[42] In this Article, the focus is exclusively on the electronic commerce/digital trade chapters, which, together with the recent generation of digital economy agreements, have become the source of new rule-making in the area of digital trade and thus arguably can create a fundament 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.[43] For instance, a majority of the chapters recognize the applicability of WTO rules to electronic commerce[44] and establish an express and permanent duty-free moratorium on electronic transmissions.[45] In most of the templates tailored along the U.S. model, the chapters also include a clear definition

39. Since 2002, Chile has concluded 15 PTAs with electronic commerce chapters. Chile is also party to DEPA with New Zealand and Singapore. For the relevant data, *see* TAPED, *supra* note 2.

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

41. 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.

42. For analysis of all relevant chapters, *see* Mira Burri, *The Regulation of Data Flows in Trade Agreements*, 48 GEO. J. INT'L L. 407, 408–48 (2017).

43. SACHA WUNSCH-VINCENT, THE WTO, THE INTERNET AND DIGITAL PRODUCTS: EC AND U.S. PERSPECTIVES (2006).

44. *See, e.g.*, U.S.-Australia Free Trade Agreement, *supra* note 33, art. 16.1; U.S.-Singapore Free Trade Agreement, *supra* note 33, art. 14.1.

45. *See, e.g.*, U.S.-Singapore Free Trade Agreement, *supra* note 33, art. 14.3; U.S.-Chile Free Trade Agreement, *supra* note 33, art. 15.3. For a discussion of the variety of rules on the moratorium, see Burri & Polanco, *supra* note 2, at 198.

of "digital products," which treats products delivered offline equally to those delivered online,[46] so that technological neutrality is ensured and some of the classification dilemmas of the GATS are cast aside (in particular when combined with negative commitments for services[47]). The electronic commerce chapters also include rules that have not been treated in the context of the WTO discussions—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 that 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, agreements tackling data governance are still only few (while growing in number).[48]

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 (with a closer look on the DTA and the DEPA). The Article complements this analysis with an inquiry into the EU treaties and the EU's repositioning on digital trade and data flows, and into the RCEP as the first agreement to include China. The purpose is to both highlight legal innovation in these treaties and give a sense of the positions of the major stakeholders.

B. *The Comprehensive and Progressive Agreement for Trans-Pacific Partnership*

The Comprehensive and Progressive Agreement for Trans-Pacific Partnership was agreed upon in 2017 between eleven countries in the

46. *See, e.g.*, U.S.-Singapore Free Trade Agreement, *supra* note 33, art. 14.3; U.S.-Australia Free Trade Agreement, *supra* note 33, art. 16.4.

47. Negative type of commitments differs from the standard GATS approach of positively committing for services sectors and entail commitments for all services sectors except for the specifically listed exceptions. *See, e.g.*, Mira Burri, *The Regulation of Data Flows through Trade Agreements*, 48 GEO. J. INT'L L. 407 (2017).

48. *See* Burri & Polanco, *supra* note 2, at 211; *also* Mira Burri, T*he Governance of Data and Data Flows in Trade Agreements: The Pitfalls of Legal Adaptation*, 51 U.C. DAVIS L. REV. 65, 65–132 (2017). For data, *see* TAPED, *supra* note 2.

Pacific Rim.[49] It entered into force on 30 December 2018.[50] 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.[51] 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.[52] Despite the United States having dropped out of the planned Trans-Pacific Partnership Agreement (TPP) with the start of the Trump administration, the CPTPP chapter reflects U.S. efforts to secure obligations on digital trade and is a verbatim reiteration of the TPP chapter.[53] The TPP was supposed to be a "21st century" agreement that would match contemporary global trade better than the analogue-based WTO Agreements.[54] 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 United States-South Korea Free Trade Agreement (FTA) and securing the implementation of the

49. Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam.

50. *About the Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, GOVERNMENT OF CANADA, https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/backgrounder-document_information.aspx?lang=eng.

51. Zachary Torrey, *TPP 2.0: The Deal without the U.S.: What's New about the CPTPP and What Do the Changes Mean?*, THE DIPLOMAT (Feb. 3, 2018), https://thediplomat.com/2018/02/tpp-2-0-the-deal-without-the-us/.

52. Comprehensive and Progressive Agreement for Trans-Pacific Partnership art. 14.5, .8, .12–.14, .17–.18, Mar. 8, 2018, A.T.S. 23 [hereinafter CPTPP] (incorporating the provisions from the Trans-Pacific Partnership Agreement).

53. *See also* NEW ZEALAND'S WAITANGI TRIBUNAL, REPORT ON THE COMPREHENSIVE AND PROGRESSIVE AGREEMENT FOR TRANS-PACIFIC PARTNERSHIP 8, 72 (2021), https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_178856069/CPTTP%20W.pdf (pre-publication version).

54. *See, e.g.*, Claude Barfield, *The Trans-Pacific Partnership: A Model for Twenty-First-Century Trade Agreements?*, AMERICAN ENTERPRISE INSTITUTE (July 25, 2011), https://www.aei.org/articles/the-tpp-a-model-for-21st-century-trade-agreements/; Tania Voon, *Introduction: National Regulatory Autonomy and the Trans-Pacific Partnership Agreement*, *in* TRADE LIBERALISATION AND INTERNATIONAL CO-OPERATION: A LEGAL ANALYSIS OF THE TRANS-PACIFIC PARTNERSHIP AGREEMENT 1–10 (Tania Voon ed., 2013). The USTR had various such references on its dedicated TPP website – these have been now removed.

updated "Digital 2 Dozen" agenda of the United States.[55] A 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 United States-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"[56] 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.[57] 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;[58] some additional exceptions are also specified.[59] This approach of defining the scope of the application of the provisions, and certain exceptions from it, rather than engaging in a definition of what "digital trade" is, has become common in PTAs and evades complicated and potentially contentious terminological debates.[60]

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,[61] which are defined broadly pursuant to Article 14.1.[62] Article 14.5 CPTPP is

55. *The Digital 2 Dozen*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, https://ustr.gov/about-us/policy-offices/press-office/reports-and-publications/2016/digital-2-dozen.

56. CPTPP, *supra* note 52, art. 14.2.2.

57. *Id.* art. 14.2.3. 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, *supra* note 53, at 81–83.

58. CPTPP, *supra* note 52, art. 14.2.4.

59. *Id.* art. 14.2.5–6.

60. *See* Burri & Chander, *supra* note 1.

61. 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. CPTPP, *supra* note 52, art. 14.2.3.

62. 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 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.

meant to shape the domestic electronic transactions framework by including binding obligations for the parties to follow the principles of the UNCITRAL Model Law on Electronic Commerce of 1996[63] or the United Nations Convention on the Use of Electronic Communications in International Contracts.[64] 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.[65] 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.[66] 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,[67] 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.[68]

The remainder of the provisions found in the CPTPP electronic commerce chapter can be said to belong to the second and more innovative, as well as critically important, 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. Specifically, Article 14.13(2) prohibits the parties from requiring a "covered person

63. U.N. COMM'N ON INT'L TRADE LAW, UNCITRAL MODEL LAW ON ELECTRONIC COMMERCE WITH GUIDE TO ENACTMENT, 1996: WITH ADDITIONAL ARTICLE 5 BIS, U.N. DOC. A/CN.9(092)/M622/BIS5, U.N. SALES NO. E.99.V.4 (1999) [hereinafter UNCITRAL MODEL LAW ON ELECTRONIC COMMERCE].

64. United Nations Convention on the Use of Electronic Communications in International Contracts, G.A. Res. 60/21, U.N. Doc. A/RES/60/21 (Dec. 9, 2005). *See, e.g.*, Sarah E. Smith, *The United Nations Convention on the Use of Electronic Communication in International Contracts (CUECIC): Why It Should Be Adopted and How It Will Affect International E-Contracting*, 11 SMU SCI. & TECH. L. REV. 133 (2017).

65. CPTPP, *supra* note 52, art. 14.5.2.

66. *Id.* art. 14.9.

67. *Id.* art. 14.6.1.

68. *Id.* art. 14.6.2.

to use or locate computing facilities in that Party's territory as a condition for conducting business in that territory"[69]. Second, the CPTPP replaces the soft language from the United States-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."[70] 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."[71] These non-discriminatory conditions are similar to the test formulated by Article XIV GATS and Article XX GATT 1994—a test that is intended to balance trade and non-trade interests by "excusing" certain violations but that is also extremely hard to pass, as the WTO jurisprudence has thus far revealed.[72] 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";[73] and (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."[74] The scope of the exception and how it would be interpreted if there were an actual conflict are thus unclear. This can be linked to legal uncertainty, as well as to unworkable safeguards for domestic constituencies, as recently stressed by New Zealand's Waitangi Tribunal with regard to the rights of the Māori.[75] Further, it should be noted that the ban on localization measures is softened on financial services and

69. *Id.* art. 14.13.2.

70. *Id.* art. 14.11.2 (emphasis added).

71. *Id.* art. 14.11.3.

72. *See, e.g.*, Henrik Andersen, Protection of Non-Trade Values in WTO Appellate Body Jurisprudence: Exceptions, Economic Arguments, and Eluding Questions, 18 J. INT'L ECON. L. 383–84 (2015).

73. CPTPP, *supra* note 52, art. 14.11.3.

74. See the introductory paragraphs of GATT 1994 art. XX and GATS art. XIV.

75. NEW ZEALAND'S WAITANGI TRIBUNAL, *supra* note 53, at 132–42.

institutions.[76] 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.[77] Government procurement is also excluded.[78]

The CPTPP also addresses other novel issues like source code and seeks to constrain forced technological transfer. 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.[79] The prohibition applies only to mass-market software or products containing such software.[80] This means that tailor-made products are excluded, as is software used for critical infrastructure and in commercially negotiated contracts.[81] 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.[82]

76. CPTPP, *supra* note 52, art. 14.1 (excluding a "financial institution" and a "cross-border financial service supplier" from the definition of "a covered person").

77. 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." *Id.* annex 11-b.

78. *Id.* art. 14.8.3.

79. *Id.* art. 14.17.

80. *Id.* art. 14.17.2.

81. *Id.* On the possible interpretations of the provision and the difference to including algorithms, *see* NEW ZEALAND'S WAITANGI TRIBUNAL, *supra* note 53, at 104–12.

82. This has been an issue in the context of the U.S.–China trade war and listed as China's unfair trade practices in technology transfer and IP under Section 301 of the U.S. Trade Act of 1974. The U.S., as a counterreaction, levied additional tariffs on more than half of Chinese imports, and China responded with imposing its own tariffs on U.S. imports. The U.S. was supported by the E.U. and Japan on the issue, though questions on the U.S. 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 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 of the Trilateral Meeting of the Trade Ministers of Japan, the United States and the European Union*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE (Jan. 14, 2020), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/january/joint-statement-trilateral-meeting-trade-ministers-japan-united-states-and-european-union.

These provisions illustrate an important development in the PTA rule-making because they do not merely seek the liberalization of economic sectors but effectively shape the regulatory space domestically.[83] 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."[84] 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."[85] 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."[86] Parties are also invited to promote compatibility between their data protection regimes, by essentially treating lower standards as equivalent.[87] The goal of these norms appears to be a prioritization of trade over privacy rights. This has been pushed by the United States during the TPP negotiations because the United States subscribes (still[88]) to a relatively weak and patchy protection of privacy.[89] Timewise, this push came at the phase when the United States 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-United States Safe Harbour Agreement.[90]

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83. UNCITRAL MODEL LAW ON ELECTRONIC COMMERCE, *supra* note 63, at 86.

84. CPTPP, *supra* note 52, art. 14.8.2.

85. *Id.* art. 14.8.2.

86. *Id.* art. 14.8.2 n.6.

87. *Id.* art. 14.8.5.

88. *See, e.g.*, DANIEL J. SOLOVE & PAUL M. SCHWARTZ, PRIVACY LAW FUNDAMENTALS (6th ed. 2022)

89. *See, e.g.*, James Q. Whitman, *The Two Western Cultures of Privacy: Dignity versus Liberty*, 113 YALE L.J. 1151, 1151–1221 (2004); Paul M. Schwartz & Daniel J. Solove, *Reconciling Personal Information in the United States and European Union*, 102 CAL. L. REV. 877, 877–916 (2014); *see also* Burri, *supra* note 4.

90. Case C-362/14, Schrems v. Data Protection Commissioner, ECLI:EU:C:2015:650 (Oct. 6, 2015). Maximillian 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 U.S. The plaintiff claimed that his data was not adequately protected in light of the NSA revelations and this, despite the existing agreement between the E.U. and the U.S. – the so-called "safe

Next to these important data protection provisions, the CPTPP also includes norms on consumer protection[91] and spam control,[92] as well as for the first time, rules on cybersecurity.[93] Article 14.16 is however non-binding and identifies a limited scope of activities for cooperation, in situations of "malicious intrusions" or "dissemination of malicious code," and capacity-building of governmental bodies dealing with cybersecurity incidents.[94] Net neutrality is another important digital economy topic that has been given specific attention in the CPTPP, although the created rules are non-binding.[95] 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.[96] As the obligations are unlinked to remedies for cases, 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 accession of the U.K. to the CPTPP[97] and the requests for accession voiced by China and Taiwan[98] 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

harbor" scheme. The later E.U.-U.S. Privacy Shield arrangement has been also rendered invalid by a 2020 judgment: Case C-311/18, Data Protection Commissioner v. Facebook Ireland Limited, Maximillian Schrems (Schrems II), ECLI:EU:C:2020:559 (July 16, 2020). *See, e.g.,* KRISTIN ARCHICK & RACHEL F. FEFER, CONG. RSCH. SERV., RL46917, U.S.–E.U. PRIVACY SHIELD AND TRANSATLANTIC DATA FLOWS (2021); for updates on the current negotiations on a new Transatlantic Data Privacy Framework, *see* European Commission, *Questions & Answers: E.U.-U.S. Data Privacy Framework, Draft Adequacy Decision* (Dec. 13, 2022), https://ec.europa.eu/commission/presscorner/detail/en/qanda_22_7632.

91. CPTPP, *supra* note 52, art. 14.17.

92. *Id.* art. 14.14.

93. *Id.* art. 14.16.

94. *Id.* art. 14.16(a)–(b).

95. *Id.* art. 14.10.

96. *Id.* art.14.8(2). Footnote 7 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.' *Id.* art.14.8(2) n.7.

97. Negotiations on accession of the U.K. were completed on March 31, 2023. *See, e.g.*, U.K. DEP'T FOR BUSINESS & TRADE & U.K. DEP'T FOR INT'L TRADE, COMPREHENSIVE AND PROGRESSIVE AGREEMENT FOR TRANS-PACIFIC PARTNERSHIP (CPTPP): CONCLUSION OF NEGOTIATIONS (2023), https://www.gov.uk/government/publications/comprehensive-and-progressive-agreement-for-trans-pacific-partnershipcptpp-conclusion-of-negotiations; Emily Jones et al., *The UK and Digital Trade: Which Way forward?* 4 (Blavatnik Sch. of Gov't Working Paper No. 038, 2021), https://doi.org/10.35489/BSG-WP-2021/038.

98. CONG. RSCH. SERV., IN11760, CHINA AND TAIWAN BOTH SEEK TO JOIN THE CPTPP (2021), https://crsreports.congress.gov/product/pdf/IN/IN11760.

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-United States DTA, and the 2020 DEPA among Chile, New Zealand, and 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 United States withdrew from the TPP, there was some uncertainty as to the direction the United States would follow in its trade deals in general and on matters of digital trade in particular.[99] The renegotiated NAFTA, which is now referred to as the "United States-Mexico-Canada Agreement" (USMCA), provides a useful confirmation of the U.S. approach. The USMCA's 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 and comprehensive template. With regard to replicating the CPTPP model, the USMCA adopts the same broad scope of application,[100] bans customs duties on electronic transmissions,[101] and binds the parties to non-discriminatory treatment of digital products.[102] Furthermore, it provides for a domestic regulatory framework that facilitates online trade by enabling electronic contracts,[103] electronic authentication and signatures,[104] and paperless trading.[105]

The USMCA also follows the CPTPP template with regard to data governance issues. It ensures the free flow of data through a clear ban on data localization[106] and provides a hard rule on free information flows.[107] Article 19.11 specifies further that parties can adopt or maintain a

99. Neha Mishra, *The Role of the Trans-Pacific Partnership Agreement in the Internet Ecosystem: Uneasy Liaison or Synergistic Alliance?*, 20 J. INT'L ECON. L. 31, 33 (2017).

100. United States-Mexico-Canada Agreement art. 19.2, Nov. 30, 2018, OFF. OF THE U.S. TRADE REPRESENTATIVE [hereinafter USMCA], https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement.

101. *Id.* art. 19.3.

102. *Id.* art. 19.4.

103. *Id.* art. 19.5.

104. *Id.* art. 19.6.

105. *Id.* art. 19.7.

106. *Id.* art. 19.12.

107. *Id.* art. 19.11.

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—which replicated the CPTPP exceptions' model with a slight modification.[108]

Beyond these similarities, the USMCA introduces some novelties. The first is that the USMCA departs from the standard U.S. 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,"[109] 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 this legal framework, 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)."[110] 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;[111] and aim to provide remedies for any violations.[112] This is interesting because it may go beyond what the United States has in its national laws on data protection (at least so far[113]) 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

108. *Id.* art. 19.11.2. 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. *Id.* art. 19.11.2 n.5.

109. *Id.* art. 19.8.1.

110. *Id.* art. 19.8.2. *See also* CONG. RSCH. SERV., R45584, DATA FLOWS, ONLINE PRIVACY, AND TRADE POLICY 18 (2020), https://sgp.fas.org/crs/misc/R45584.pdf.

111. USMCA, *supra* note 99, art. 19.8.3.

112. *Id.* art. 19.8.4–5.

113. *See* Chander & Schwartz, *supra* note 4, at 85; SOLOVE & SCHWARTZ, *supra* note 88, at 20; Graham Greenleaf, *Proposed US Federal Data Privacy Law Offers Strong Protections But Only to US Residents*, 179 Privacy Laws & Business International Report 1 (2022), http://dx.doi.org/10.2139/ssrn.4342518.

Union but also under the Council of Europe.[114] One can of course wonder whether this is a development caused by the so-called "Brussels effect," whereby the EU "exports" its own domestic standards and they become global,[115] or whether we are also seeing a shift in U.S. privacy protection regimes[116]—which can be linked to increasing commonalities across jurisdictions.

Beyond data protection, three further novelties under 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,"[117] and has become part of the ban on requirements for the transfer or access to source code in Article 19.16.[118] The second novum refers to the recognition of "interactive computer services" as particularly vital to the growth of digital trade.[119] 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,

114. 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 ("Convention 108+"). Convention 108 is the first international instrument that established minimum standards for personal data protection in a legally binding manner. The Convention is open for accession also for non-CoE members – 9 countries have so far joined and others have observer status. See COUNCIL OF EUROPE, *Convention 108 +: Convention for the Protection of Individuals with Regard to the Processing of Personal Data* (2018), https://rm.coe.int/convention-108-convention-for-the-protection-of-individuals-with-regar/16808b36f1.

115. Anu Bradford, *The Brussels Effect*, 107 NW. U. L. REV. 1, 1–68 (2012); ANU BRADFORD, THE BRUSSELS EFFECT: HOW THE EUROPEAN UNION RULES THE WORLD (2020).

116. *See* Anupam Chander et al., *Catalyzing Privacy Law*, 105 MINN. L. REV. 1733, 1733–1802 (2021).

117. USMCA, *supra* note 99, art. 19.

118. On the expansion of the scope of the source code provision, see NEW ZEALAND'S WAITANGI TRIBUNAL, *supra* note 53, at 104–12.

119. *See, e.g.*, Patrick Leblond, *Uploading CPTPP and USMCA Provisions to the WTO's Digital Trade Negotiations Poses Challenges for National Data Regulation: Example from Canada*, *in* BIG DATA AND GLOBAL TRADE LAW 301, 310 (Mira Burri ed., 2021).

created, or developed the information."[120] 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.[121] It also secures the application of Section 230 of the United States Communications Decency Act,[122] which insulates platforms from liability[123] but has been recently under attack (even in the United States[124]) and is being constrained through regulatory action

120. USMCA, *supra* note 99, art. 19.17.2. 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. *Id.* Annex 19-A. 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." *Id.* art. 19.17.2 n.7. 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., 2017 S.C.R. 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 U.S., where the U.S. 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 of 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*, 18 WORLD TRADE REV. 63, 78 (2019).

121. On intermediaries' liability, *see, e.g.*, Sonia S. Katyal, *Filtering, Piracy, Surveillance and Disobedience*, 32 COLUM. J.L. & ARTS 401 (2009); GOVERNANCE OF ONLINE INTERMEDIARIES (Urs Gasser & Wolfgang Schulz eds., 2015).

122. 47 U.S.C. § 230. 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." 47 U.S.C. § 230(c)(1).

123. *See, e.g.*, Eric Goldman, *Why Section 230 Is Better Than the First Amendment*, 95 NOTRE DAME L. REV. REFLECTION 33 (2019); Eric Goldman, *An Overview of the United States' Section 230 Internet Immunity*, *in* THE OXFORD HANDBOOK OF ONLINE INTERMEDIARY LIABILITY (Giancarlo Frosio ed., 2020); VALERIE C. BRANNON & ERIC N. HOLMES, CONG. RSCH. SERV., R46751, SECTION 230: AN OVERVIEW (2021); Tanner Bone, *How Content Moderation May Expose Social Media Companies to Greater Defamation Liability*, 98 WASH. U.L. REV. 937 (2021).

124. *See, e.g.*, *Gonzalez v. Google LLC*, 598 U.S. ____ (2023) and *Twitter Inc. v. Taamneh*, 598 U.S. ____ (2023). In May 2023, the U.S. Supreme Court ruled unanimously in the *Twitter* case that the charges against the social media companies were not permissible under antiterrorism law. *Gonzalez* was sent back to lower courts on a *per curiam* decision with instructions to consider the Court's decision in *Twitter*.

in many jurisdictions in the face of fake news and other negative developments related to platforms' power.[125]

The third and rather liberal commitment of the USMCA parties is related 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.[126] "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."[127] There is also 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 (SMEs)."[128] Finally, it can be mentioned that the cooperation provision of the USMCA goes beyond the CPTPP[129] and envisages an institutional setting to enable this cooperation, "or any other matter pertaining to the operation of this chapter."[130]

The U.S. approach towards digital trade issues has been confirmed also by the United States-Japan DTA, signed on 7 October 2019, alongside the United States-Japan Trade Agreement.[131] The United States-Japan DTA can be said to replicate almost all provisions of the USMCA

125. *See, e.g.*, Lauren Feine, *Big Tech's Favorite Law Is under Fire*, CNBC (Feb. 19, 2020), https://www.cnbc.com/2020/02/19/what-is-section-230-and-why-do-some-people-want-to-change-it.html. For an analysis of the free speech implications of digital platforms, *see* Jack M. Balkin, *Free Speech Is a Triangle*, 118 COLUM. L. REV. 2011 (2018). For literature review and analysis of the EU regulatory practice *see* Mira Burri, *Fake News in Times of Pandemic and Beyond: An Enquiry into the Rationales for Regulating Information Platforms*, *in* LAW AND ECONOMICS OF THE CORONAVIRUS CRISIS 31 (Klaus Mathis & Avishalom Tor eds., 2022).

126. USMCA, *supra* note 99, art. 19.18.1.

127. *Id.* art. 19.18.2.

128. *Id.* art. 19.18.3.

129. The provision envisages among 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 id.* art. 19.14.1(a)(i), 14.1(b).

130. *Id.* art. 19.14.2.

131. Agreement Between the United States of America and Japan Concerning Digital Trade, Japan-U.S., Oct. 7, 2019, T.I.A.S. No. 20-101.1 [hereinafter U.S.-Japan DTA], https://ustr.gov/countries-regions/japan-korea-apec/japan/us-japan-trade-agreement-negotiations/us-japan-digital-trade-agreement-text.

and the CPTPP,[132] including the new USMCA rules on open government data,[133] source code[134] and interactive computer services[135] 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.[136] This rule is similar to Annex 8-B, Section A.3 of the CPTPP Chapter on technical barriers to trade.[137] 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.[138]

Other minor differences that can be noted when comparing with the USMCA are some things missing from the United States-Japan DTA—such as rules on paperless trading, net neutrality, and the mention of data protection principles.[139] A final note deserves the exceptions attached to the United States-Japan DTA, which make a reference to the WTO general exception clauses of Article XIV GATS and Article

132. *Id.* art. 7–12.

133. *Id.* art. 20.

134. *Id.* art. 17.

135. *Id.* art. 18. A side letter recognizes the differences between the U.S. 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. U.S.-Japan Digital Trade Agreement: Side Letter on Interactive Computer Services (Oct. 7, 2019), *in* OFF. OF THE U.S. TRADE REPRESENTATIVE, https://ustr.gov/countries-regions/japan-korea-apec/japan/us-japan-trade-agreement-negotiations/us-japan-digital-trade-agreement-text.

136. U.S.-Japan DTA, *supra* note 131, art. 21.3.

137. CPTPP, *supra* note 52, annex 8-B.

138. *See* Han-Wei Liu, *Inside the Black Box: Political Economy of the Trans-Pacific Partnership's Encryption Clause*, 51 J. WORLD TRADE 309 (2017).

139. U.S.-Japan DTA, *supra* note 131, art. 15. 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 protections . . . , including how: (a) natural persons can pursue remedies; and (b) an enterprise can comply with any legal requirements." *Id.* art. 15.2.

XX GATT 1994, whereby the parties agree to their *mutatis mutandis* application.[140] Further exceptions are listed with regard to security;[141] prudential and monetary and exchange rate policy;[142] and taxation,[143] which are to be linked to the expanded scope of agreement that includes financial and insurance services.

D. *The Digital Economy Partnership Agreement*

The 2020 Digital Economy Partnership Agreement (DEPA) among Chile, New Zealand, and Singapore,[144] all parties also to the CPTPP, is not conceptualized as a purely trade deal but one that is meant to address the broader issues of the digital economy. In this sense, the agreement's scope is wide, open and flexible, and covers several emergent issues, such as those in the areas of artificial intelligence (AI) and digital inclusion.[145] The agreement is also not a closed deal but one that is open to other countries[146] 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.[147] 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.[148] 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

140. *Id.* art. 3.

141. *Id.* art. 4.

142. *Id.* art. 5.

143. *Id.* art. 6.

144. For details and the text of the DEPA, *see* NEW ZEALAND FOREIGN AFF. & TRADE, DIGITAL ECONOMY PARTNERSHIP AGREEMENT (DEPA), https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/digital-economy-partnership-agreement-depa/.

145. Digital Economy Partnership Agreement, Chile-N.Z.-Sing., art. 8.2, 11.1, June 11, 2020 [hereinafter DEPA]. *See also* Marta Soprana, *The Digital Economy Partnership Agreement (DEPA): Assessing the Significance of the New Trade Agreement on the Block*, 13 TRADE L. & DEV. 143, 153 (2021).

146. *Id.* art. 16.2.

147. *Id.* art. 10.4.3.

148. James Bacchus, *The Digital Decide: How to Agree on WTO Rules for Digital Trade*, CENTRE FOR INTERNATIONAL GOVERNANCE INNOVATION 8 (2021), https://www.cigionline.org/publications/the-digital-decide-how-to-agree-on-wto-rules-for-digital-trade/.

Economy"; Module 10 "Small and Medium Enterprises Cooperation"; and Module 11 "Digital Inclusion.[149]" 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).[150]

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 data[151] (but not source code), and some of the United States-Japan DTA provisions, such as the one on ICT goods using cryptography,[152] 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,[153] 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."[154] Parties 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).[155] 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.[156] 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

149. *See* DEPA, *supra* note 144, art. 1–11.

150. *See id.* art. 12–16.

151. *See id.* art. 9.5.

152. *See id.* art. 3.4. The Article also provides detailed definitions of cryptography, encryption, and cryptographic algorithm and cipher.

153. *Id.* art. 2.2 governs "Paperless Trading"; art. 2.3 establishes the "Domestic Electronic Transactions Framework."

154. *Id.* art. 2.2.5. "Single window" is defined as "a facility that allows persons 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." *Id.* art. 2.1.

155. *See id.* art. 2.4–2.7.

156. *Id.* art. 8.1–8.2.

Governance Frameworks parties would seek to follow internationally-recognized principles or guidelines, including explainability, transparency, fairness, and human-centred values.[157] 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.[158] 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 domain[159] 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.[160]

Overall, the DEPA is an ingenious project[161] 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.[162] Its allure as a form of enhanced, but also flexible, cooperation on issues of the data-driven economy has been confirmed by Canada's[163] and South Korea's[164] interest to join it. The DEPA's modular approach has also been followed in the Australia-Singapore Digital Economy Agreement, which is however still linked to the trade deal between the parties.[165] The channel of digital economy agreements (DEAs) as a mix of hard and soft law provisions has become increasingly used as states see the need to tackle diverse "WTO-extra" issues that do not squarely fit into conventional

157. *Id.* art. 8.2.2–3.

158. *Id.* art. 8.3–8.4.

159. *See id.* art. 9.2.

160. *Id.* art. 11.1.2.

161. For a comparison of the DEPA with existing PTAs, *see* Soprana, *supra* note 144.

162. *See, e.g.*, Burri, *supra* note 4; Svetlana Yakovleva & Joris Van Hoboken, *The Algorithmic Learning Deficit*, *in* BIG DATA AND GLOBAL TRADE LAW 212 (Mira Burri ed., 2021).

163. *See Global Affairs, Background: Canada's Possible Accession to the Digital Economy Partnership Agreement*, GOVERNMENT OF CANADA (Aug. 25, 2022), https://www.international.gc.ca/trade-commerce/consultations/depa-apen/background-information.aspx?lang=eng.

164. *See S. Korea starts process to join DEPA*, YONHAP NEWS AGENCY (Oct. 6, 2021), https://en.yna.co.kr/view/PYH20211006124000325.

165. The DEA, which entered into force on 8 December 2020, amends the Singapore-Australia FTA and replaces its Electronic Commerce chapter. *See Australia-Singapore Digital Economy Agreement*, AUSTRALIAN GOVERNMENT DEPARTMENT OF FOREIGN AFFAIRS AND TRADE, https://www.dfat.gov.au/trade/services-and-digital-trade/australia-and-singapore-digital-economy-agreement.

trade treaties and/or are not "treaty-ready"[166] but demand regulatory attention and inter-state coordination. The follow-up DEAs, the 2022 UK-Singapore DEA and the 2023 Korea-Singapore DEA, attest to this need, as well as showcase that legal innovation on digital trade has been more recently driven by Singapore rather than the U.S.

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 FTAs, such as the 2002 agreement with Chile, did include provisions on electronic commerce, the language tended to be cautious and limited to soft cooperation pledges in the services chapter[167] and in the fields of information technology, information society, and telecommunications.[168] In more recent agreements, such as the 2009 EU-South Korea FTA, the treaty language is somewhat more detailed and binding, imitating some of the U.S. 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.[169] The EU, as particularly insistent on data protection policies, has also sought commitment from its FTA partners to comply with the international standards of data protection.[170]

The 2016 EU agreement with Canada—the Comprehensive Economic and Trade Agreement (CETA)[171]—goes a step further. The CETA

166. Dan Ciuriak, *Digital Economy Agreements: Where Do We Stand and Where Are We Going?* (July 30, 2022), http://dx.doi.org/10.2139/ssrn.4217903.

167. Agreement Establishing an Association Between the European Community and its Member States, of the One Part, and the Republic of Chile, of the Other Part, Chile-E.U., art. 104 n. 1, Dec. 30, 2002 [hereinafter E.U.-Chile FTA] ("The inclusion of this provision in this Chapter is made without prejudice of the Chilean position on the question of whether or not electronic commerce should be considered as a supply of services.").

168. *Id.* art. 37.

169. Free Trade Agreement Between the European Union and its Member States, of the One Part, and the Republic of Korea, of the Other Part, E.U.-S. Kor., art. 7.49, Oct. 15, 2009 [hereinafter E.U.-South Korea FTA].

170. *Id.* art. 7.48.

171. Comprehensive Economic and Trade Agreement Between Canada, of the One Part, and the European Union and Its Member States, of the Other Part, Can.-E.U., art 16.5, *opened for signature* Oct. 30, 2016, Eur. Comm'n [hereinafter CETA].

provisions concern commitments ensuring clarity, transparency, and predictability in their domestic regulatory frameworks; and interoperability, innovation, and competition in facilitating electronic commerce. The provisions also facilitate the use of electronic commerce by small- and medium-sized enterprises (SMEs).[172] 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.[173] Yet, there are no deep commitments on digital trade, nor are there any rules on data and data flows.[174]

Only recently did the EU make a step towards such rules, whereby parties agreed to consider commitments related to cross-border flow of information in future negotiations. Such a clause is found in the 2018 EU-Japan Economic Partnership Agreement (EPA),[175] and in the 2018 EU-Mexico Association Agreement.[176] 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, and such update negotiations are currently ongoing with Japan.

This was the start of a process of repositioning of the EU on the issue of data flows, which is now fully endorsed in the post-Brexit agreement with the U.K., the recently signed agreements with New Zealand and with Chile, and EU's currently negotiated deals with Australia and Tunisia. These treaties include in their digital trade chapters norms that ensure the free flow of data. These newer commitments are however also linked with high levels of data protection.[177]

The EU permits in this sense data flows only if coupled with the high data protection standards of its General Data Protection Regulation

172. *Id.* art. 16.5.

173. *Id.* art. 16.4.

174. *See, e.g.*, Wolfe, *supra* note 120.

175. Agreement Between the European Union and Japan for an Economic Partnership, E.U.-Japan, art. 8.81, July 17, 2018, Eur. Comm'n [hereinafter E.U.-Japan EPA].

176. Modernisation of the Trade Part of the EU-Mexico Global Agreement, E.U.-Mex., Chapter on Digital Trade art. XX, announced Apr. 21, 2018, Eur. Parl.

177. *See Horizontal Provisions for Cross-Border Data Flows and for Personal Data Protection (In EU Trade and Investment Agreements)*, EUR. COMM'N (Feb. 2018), https://ec.europa.eu/newsroom/just/items/627665/en.

(GDPR).[178] In the aforementioned trade deals, as well as in the EU proposal for WTO rules on electronic commerce,[179] 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 (without an explicit CPTPP-like hard rule on free data flows); on the other hand, these commitments are conditioned in many aspects. First, by a dedicated article on data protection, which clearly states that "[e]ach 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."[180] Second, by a paragraph on data sovereignty that states: "[e]ach 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."[181] The paragraph also makes clear that "[n]othing in this agreement shall affect the protection of personal data and privacy afforded by the Parties' respective safeguards."[182] 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.[183] 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

178. *See* Regulation (EU) 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), 2016 O.J. (L119) 1 [hereinafter GDPR].

179. Joint Statement on Electronic Commerce, E.U. Proposal for WTO Disciplines and Commitments Relating to Electronic Commerce, Communication from the European Union, WTO Doc. INF/ECOM/22, 26 April 2019 [hereinafter EU's April 2019 JI Communication].

180. E.U. Proposal for E.U.-Australia Free Trade Agreement, Austl.-E.U., art. 6(1), Oct. 10, 2018 (emphasis added). The same wording is found in the E.U.-New Zealand, the E.U.-Chile, and the draft E.U. -Tunisia FTAs.

181. *Id.* art. 6(2). The same wording is found in the E.U-New Zealand, the E.U.-Chile, and the draft E.U.-Tunisia FTAs.

182. *Id.* art. 6(2). The same wording is found in the E.U-New Zealand, the E.U.-Chile, and the draft E.U.-Tunisia FTAs.

183. *See, e.g.*, *id.* art. 6(2). The same wording is found in the E.U.-New Zealand, the E.U.-Chile, and the draft E.U.-Tunisia FTAs.

protection of cultural diversity."[184] The EU thus reserves ample regulatory leeway for its current and future data protection measures, as well as potentially any other public policy measure—considering that provision's listing is not exhaustive but merely illustrative. 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.[185]

The new EU approach was first endorsed by the 2020 Trade and Cooperation Agreement (TCA) with the United Kingdom[186] that replicates all the above provisions, except for the explicit mentioning of data protection as a fundamental right—which can, however, be presumed, since the U.K. incorporates the European Convention on Human Rights (ECHR) through the Human Rights Act of 1998 into its domestic law (although the U.K. may be shifting away from the Strasbourg model post-Brexit[187]). The rest of the EU digital trade template seems to include the issues covered by the CPTPP/USMCA model, such as software source code,[188] facilitation of electronic commerce,[189] online consumer protection,[190] spam,[191] and open government data,[192] not including, however, a provision on non-discrimination of digital products, and excluding audio-visual services from the scope of the

184. *Id.* art. 2. The same wording is found in the E.U.-New Zealand, the E.U.-Chile, and the draft E.U.-Tunisia FTAs.

185. Svetlana Yakovleva, *Privacy Protection(ism): The Latest Wave of Trade Constraints on Regulatory Autonomy*, 74 U. MIAMI L. REV. 416, 496 (2020).

186. 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, Dec. 30, 2020 [hereinafter TCA].

187. *See Human Rights Act Reform: A Modern Bill of Rights – Consultation*, U.K. MINISTRY OF JUSTICE (July 12, 2022), https://www.gov.uk/government/consultations/human-rights-act-reform-a-modern-bill-of-rights/human-rights-act-reform-a-modern-bill-of-rights-consultation; *see also* Conor Gearty, *The Human Rights Act Comes of Age*, 2 EUR. COMM'N H.R. L. REV. 117, 117–26 (2022).

188. *See* TCA, *supra* note 186, art. 207. Again, with notable safeguards, specified in ¶¶ 2 and 3 of art. 207, including the general exceptions, security exceptions and a 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.

189. *See id.* art. 205, 206.

190. *See id.* art. 208.

191. *See id.* art. 209.

192. *See id.* art. 210.

application of the digital trade chapter.[193] It should also be underscored that the EU secures an essentially equivalent level of data protection in its PTA partners through the channel of adequacy decisions adopted unilaterally by the European Commission that are subject to monitoring and can be revoked in case that their requirements are not met.[194]

Despite the confirmation of the EU's approach through the TCA and the 2022 FTAs with New Zealand and Chile, it could be that the EU would tailor its template depending on the trade partner. For instance, the agreement with Vietnam, which entered into force on 1 August 2020, has few cooperation provisions on electronic commerce as part of the services chapter, no dedicated chapter and importantly no reference to either data or privacy protection is made.[195] So while there is some certainty that in the deals with Australia and Tunisia, there will be digital trade provisions along the lines of the TCA, as well as in the FTA with Chile, there is ambiguity as to the currently negotiated deals with India, Indonesia and the Association of Southeast Asian Nations (ASEAN). This uncertainty can be in particular linked to the fact that these countries have data protection law frameworks that diverge from the standards of the GDPR. In this sense, the negotiations of FTA provisions on data flows and data protection, as well as the unilateral finding of the European Commission that these countries satisfy the stringent requirements for an adequacy decision under Article 45 GDPR[196] can be seriously encumbered.[197]

193. *See id.* art. 197.2.

194. The European Commission has so far recognized Andorra, Argentina, Canada, Faroe Islands, Guernsey, Israel, Isle of Man, Japan, Jersey, New Zealand, Republic of Korea, Switzerland, the U.K. and Uruguay as providing adequate protection. With the exception of the U.K., these adequacy decisions do not cover data exchanges in the law enforcement sector. *See* European Commission, *Adequacy Decisions*, https://commission.europa.eu/law/law-topic/data-protection/international-dimension-data-protection/adequacy-decisions_en; *see also* Christopher Kuner, Article 45 Transfers on the Basis of an Adequacy Decision, *in* THE EU GENERAL DATA PROTECTION REGULATION (GDPR): A COMMENTARY, 771–96 (Christopher Kuner et al., eds. 2020), https://doi.org/10.1093/oso/9780198826491.003.0085; Anastasia Choromidou, *EU Data Protection under the TCA: The UK Adequacy Decision and the Twin GDPRs*, 11 INT'L DATA PRIV. L. 388 (2021), https://doi.org/10.1093/idpl/ipab021.

195. *See* Free Trade Agreement Between the European Union and the Socialist Republic of Viet Nam, E.U.-Viet., Mar. 30, 2020, 2020 O.J. (L 186) 63, https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/vietnam/eu-vietnam-agreement/texts-agreements_en [hereinafter E.U.-Vietnam FTA].

196. *See* E.U.-Vietnam FTA, *supra* note 195.

197. It is interesting to point out in this context that one of the E.U. FTA partners, namely Chile, does not have an adequacy decision adopted.

F. *The Regional Comprehensive Economic Partnership*

An interesting and much anticipated development against the backdrop of the diverging EU and U.S. positions has been the recent Regional Comprehensive Economic Partnership (RCEP)[198] signed on 15 November 2020 between the ASEAN Members,[199] China, Japan, South Korea, Australia, and New Zealand, and expected to enter into force on 1 January 2022.[200] To put the economic value of RCEP into context, it is the world's largest free trade agreement by members' GDP covering over 30% of the global GDP, with this figure expected to reach 50% by 2030.[201] In comparative terms, RCEP is significantly larger than the CPTPP, mainly due to China's membership.[202] 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 electronic commerce/digital trade provisions."[203] 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,[204] and in this sense would need to go substantially above the RCEP commitments.[205] Beyond China, the RCEP rules on digital trade are important as a test for other RCEP Members, such as Vietnam, that are currently not taking part of

198. *See* Regional Comprehensive Economic Partnership, Jan. 1, 2022, https://rcepsec.org/legal-text/ [hereinafter RCEP].

199. Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Vietnam.

200. RCEP entered into force on January 1, 2022 for ten original parties: Australia, Brunei Darussalam, Cambodia, China, Japan, Laos, New Zealand, Singapore, Thailand and Vietnam. RCEP then entered into force for the Republic of Korea on February 1, 2022, for Malaysia on March 18, 2022, and for Indonesia on January 2, 2023. It will enter into force on 2 June 2023 for the Philippines.

201. Frederic Neumann & Shanella Rajanayagam, *Asian Nations Sign New Trade Deal*, HSBC RSCH. DEP'T (Nov. 16, 2020), https://www.hsbc.com/insight/topics/asian-nations-sign-new-trade-deal.

202. *See, e.g.*, Cyn-Young Park et al., *Economic Implications of the Regional Comprehensive Economic Partnership for Asia and the Pacific* 21 (ASIAN DEV. BANK, Econ. Working Paper No. 639, Oct. 2021), https://www.adb.org/sites/default/files/publication/740991/ewp-639-regional-comprehensive-economic-partnership.pdf.

203. Patrick Leblond, *Digital Trade: Is RCEP the WTO's Future?*, CENTRE FOR INT'L GOVERNANCE INNOVATION (Nov. 23, 2020), https://www.cigionline.org/articles/digital-trade-rcep-wtos-future/.

204. *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*, S. CHINA MORNING POST (Nov. 5, 2021), https://www.scmp.com/economy/china-economy/article/3154887/chinas-interest-depa-digital-trade-pact-raises-questions.

205. *See The Regional Comprehensive Economic Partnership Agreement: A New Paradigm in Asian Regional Cooperation?*, ASIAN DEV. BANK (May 2022), https://www.adb.org/sites/default/files/publication/792516/rcep-agreement-new-paradigm-asian-cooperation.pdf.

the JI 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) 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.[206] 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;[207] (2) creation of a conducive environment for electronic commerce;[208] (3) promotion of cross-border electronic commerce;[209] and (4) others.[210]

With regard to trade facilitation, RCEP includes provisions on paperless trading,[211] on electronic authentication, and on electronic signatures.[212] On paperless trading, the RCEP Members avoid entering into binding commitments. They, instead, commit to "work toward," "endeavour," or "cooperate."[213] 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 to prevail in case of inconsistency.[214] Regarding commitments to create a conductive environment for electronic commerce, the inclusion of provisions on online personal information protection[215] and cybersecurity[216] is remarkable. On the former, RCEP Members establish that they shall adopt or maintain a legal framework, which ensures the protection of personal information.[217] Unsurprisingly, RCEP does not provide one method that parties must adopt to comply with this

206. RCEP, *supra* note 198, art. 12.3.
207. *Id.* at Sec. B.
208. *Id.* at Sec. C.
209. *Id.* at Sec. D.
210. *Id.* at Sec. E.
211. *Id.* art. 12.5.
212. *Id.* art. 12.6.
213. *Id.* art. 12.5.
214. *Id.* art. 12.6.
215. *Id.* art. 12.8.
216. *Id.* art. 12.13.
217. *Id.* art. 12.8.

obligation, deferring to each party and its own preferences or domestic laws, and footnote 8 of Article 12.8 gives examples of different ways through which parties can comply.[218] 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.[219] The RCEP Members also commit to adopt or maintain laws or regulations regarding online consumer protection,[220] unsolicited commercial electronic messages,[221] and a framework governing electronic transactions that takes into account international instruments,[222] as well as commit to transparency.[223]

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 a data protectionist nature. So, while the RCEP electronic commerce chapter includes a ban on localization measures,[224] as well as a commitment to free data flows,[225] 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 and a footnote to Article 12.14.3(a), which says that: "[f]or 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."[226] This essentially goes against any exceptions assessment as we know it under WTO law,[227] and triggers a self-judging mechanism. In addition, subparagraph

218. *Id.* art. 12.8. n. 6 ("For greater certainty, a Party may comply with the obligation under this paragraph by adopting or maintaining measures such as comprehensive privacy or personal information protection laws and regulations, sector-specific laws and regulations covering the protection of personal information, or laws and regulations that provide for the enforcement of contractual obligations assumed by juridical persons relating to the protection of personal information.").

219. *Id.* art. 12.13.

220. *Id.* art. 12.7.

221. *Id.* art. 12.9.

222. *Id.* art. 12.10.

223. *Id.* art. 12.12.

224. *Id.* art. 12.14.

225. *Id.* art. 12.15.

226. *Id.* art. 12.14.3 n. 12 (emphases added).

227. Under WTO law, the otherwise inconsistent measure itself must be considered "necessary" for it to pass muster under the exceptions, for example GATT 1994 art. XX(b). The necessity behind the implementation of the public policy is not examined. *See, e.g.*, Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, at 16, WTO Doc. WT/DS2/AB/R (adopted May 20, 1996).

(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."[228] 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 Vietnam, 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 commerce[229] and a provision on dispute settlement,[230] which is separate from the general RCEP's dispute settlement (Chapter 12).[231]

Noteworthy are some things missing from the RCEP. In comparison to the CPTPP, RCEP does not include provisions on custom duties for electronic transmissions, 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 JI negotiations on electronic commerce and to which China will need to agree to if admitted to the CPTPP club. Yet, 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 JI 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 number of issues have been discussed in all areas of trade, including trade in

228. RCEP, *supra* note 198, art. 12.14.3 (emphasis added).

229. *Id.* art. 12.16.

230. *Id.* art. 12.17.

231. There is a possibility for this to change after a review of the chapter. *See id.* art. 12.17.3.

goods, trade in services, IP protection and economic development. 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 (Agreement on Trade-Related Aspects of Intellectual Property Rights)[232]; and (4) the Committee on Trade and Development. The General Council has also played a key role and has continuously reviewed the Work Programme.[233] After the 2001 Doha Ministerial Declaration, the General Council agreed to hold "dedicated" discussions on cross-cutting issues, the relevance of which affects all agreements of the multilateral system. So far, five such dedicated discussions have been held under the General Council's auspices.[234] The issues discussed have 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.[235] 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.[236]

In 2016 and 2017, there was reinvigorated interest in matters of electronic commerce.[237] 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.[238] Nevertheless, the statements made 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

232. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 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].

233. SUSAN AARONSON & THOMAS STRUETT, DATA IS DIVISIVE: A HISTORY OF PUBLIC COMMUNICATIONS ON E-COMMERCE, CENTRE FOR INT'L GOVERNANCE INNOVATION, CIGI PAPERS NO. 247, 1998–2020 4 (Dec. 14, 2020).

234. For all relevant information, *see Electronic Commerce*, WTO, https://www.wto.org/english/tratop_e/ecom_e/ecom_e.htm.

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

236. *See, e.g.*, AARONSON & STRUETT, *supra* note 233, at 4–7.

237. *Id.*

238. *Joint Statement on Electronic Commerce*, WTO Doc. WT/MIN/(17)/60 (Dec. 13, 2017).

the willingness to create new rules or rather adhere to existing commitments, and between the willingness to address trade barriers or rather preserve policy space.[239] In fact, the reports of the Chairs of the Council for Trade in Services and of the Council for Trade in Goods indicated a lack of agreement on fundamental issues,[240] and the TRIPS Council Chair reported that there had been "no appetite among delegations to discuss the Work Programme."[241] Even on seemingly less controversial matters at the time, such as the customs duty moratorium on electronic transmissions, while many countries support making it permanent, there has been a push by India and South Africa to rethink its scope, definition and impact.[242] By the end of 2019, Members merely agreed again to reinvigorate the work under the Electronic Commerce Programme based on the existing mandate. This was reiterated in the communications of November 2021 whereby WTO Members instructed the General Council to hold periodic reviews in 2022 and 2023.[243]

At the beginning of 2019, 76 WTO Members embarked on a new effort to move towards a digital trade agreement[244]—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

239. *See, e.g.*, Work Programme on E-Commerce, *Non-Paper from the United States of 1 July 2016*, WTO Doc. JOB/GC/94 (July 1, 2016); Work Programme on E-Commerce, *Non-Paper from Brazil of 20 July 2016*, WTO Doc. JOB/GC/98 (July 20, 2016); *Ministerial Declaration of 13 December 2017*, WTO Doc. WTO/MIN/(17)60 (Dec. 13, 2017).

240. Council for Trade in Services, *Rep. of the Chairman of the Council for Trade in Services to the General Council*, WTO Doc. S/C/57 (July 11, 2019); Council for Trade in Services, *Rep. by the Chairman of the Council for Trade in Goods to the General Council*, WTO Doc. G/C/65 (July 18, 2019).

241. General Council, *Rep. by the Chairperson of the Work Programme on Electronic Commerce*, WTO Doc. WT/GC/W/780 (July 25, 2019).

242. *Id.*; *see also* General Council, *supra* note 20. 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.

243. Work Programme on Electronic Commerce, *General Council Decision*, WTO Doc. WT/L/1079, (adopted Dec. 11, 2019); Work Programme on Electronic Commerce, *Draft Ministerial Decision of 18 November 2021*, WTO Doc. WT/GC/831/Rev. 3 (Nov. 18, 2021); Work Programme on Electronic Commerce, *Draft Ministerial Decision of 18 November 2021*, WTO Doc. WT/GC/W/838 (Nov. 18, 2021).

244. Joint Statement on Electronic Commerce, WTO Doc. WT/L/1056, (Jan. 25, 2019). For an overview of all proposals and the state of negotiations in 2022. For JI negotiations' update *see* YASMIN ISMAIL, IISD & CUTS INT'L, GENEVA, THE EVOLVING CONTEXT AND DYNAMICS OF THE WTO JOINT INITIATIVE ON E-COMMERCE: THE FIFTH-YEAR STOCKTAKE AND PROSPECTS FOR 2023 (Mar. 2023).

electronic commerce in the WTO.[245] The negotiations under what is called the "JI on Electronic Commerce" (previously also known as "Joint State Initiative on Electronic Commerce" [JSI]) are co-convened by Australia, Japan, and Singapore.[246] They have been conducted through a series of rounds of talks, plenary and small group meetings in Geneva, and virtually during the height of the COVID-19 pandemic.[247] Currently, 89 WTO Members representing over 90% of global trade, all major geographical regions and levels of development are participating in these negotiations.[248]

Diverse WTO Members participating in the JI negotiations have submitted proposals and communications.[249] Submissions have been made by all the major players, the United States, the EU, and China, as well as by several developing countries and some least-developed countries (LDCs).[250] Interestingly, China has been one of the most active participants of the JI negotiations thus far and has established its positions in six submissions and a revision[251] that outline China's four priority areas as (1) definition and clarification of terms and rules; (2) trade facilitation;[252] (3) safety and security; and (4) development cooperation.[253] 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

245. *Osaka Declaration on Digital Economy*, WTO, https://www.wto.org/english/news_e/news19_e/osaka_declration_on_digital_economy_e.pdf.

246. *See Joint Initiative on E-commerce*, *supra* note 7.

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.*

251. Joint Statement on Electronic Commerce, *Communication from China*, WTO Doc. INF/ECOM/19 (Apr. 24, 2019) [hereinafter China's April 2019 JI Communication]; Joint Statement on Electronic Commerce, *Communication from China*, WTO Doc. INF/ECOM/32 (May 9, 2019); Joint Statement on Electronic Commerce, *Communication from China*, WTO Doc. INF/ECOM/40 (Sept. 23, 2019); Joint Statement on Electronic Commerce, *Communication from China*, WTO Doc. INF/ECOM/60 (Oct. 28, 2020); Joint Statement on Electronic Commerce, *Communication from China*, WTO Doc. INF/ECOM/60.Rev1 (July 26, 2022); Joint Statement on Electronic Commerce, *Communication from China*, WTO Doc. INF/ECOM/69 (Oct. 24, 2022); and Joint Statement on Electronic Commerce, *Communication from China*, WTO Doc. INF/ECOM/72 (Nov. 28, 2022). All except the first submission are restricted.

252. Its third and sixth submissions focused almost exclusively on trade facilitation measures. *See* Henry Gao, *Across the Great Wall: E-Commerce Joint Statement Initiative Negotiation and China, in* ARTIFICIAL INTELLIGENCE AND INTERNATIONAL ECONOMIC LAW: DISRUPTION, REGULATION, AND RECONFIGURATION 295–318 (Shin-yi Peng, Chin-fu Lin & Thomas Streinz eds., 2021) (on the third submission).

253. China's April 2019 JI Communication, *supra* note 251, at section 3.

Internet, together with relevant payment and logistics services, while paying attention to the digitization trend of trade in services.[254] Beyond trade in goods, China's efforts have not been very far-reaching, and seek to explore the ways to develop international rules for electronic commerce focusing on a sound transaction environment and a safe and trustworthy market environment.[255] China 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.[256] Other domains in which China considers that Members should take action include clarifying the trade-related aspects of electronic commerce, the extension of the customs duties moratorium (without making it permanent however), online consumer protection, personal information protection, spam, cybersecurity and transparency.[257] Yet, the level of commitment suggested by China remains relatively low. For instance, regarding 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."[258] 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,"[259] 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.[260] On data flows, China is unwilling to engage. Nor does China commit to ban 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.[261] 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

254. Gao, *supra* note 252, at 310.
255. *Id.*
256. Gao, *supra* note 252, at 311–12.
257. China's April 2019 JI Communication, *supra* note 251, at section 3.
258. *Id.*
259. *Id.*
260. Gao, *supra* note 252, at 310.
261. China's April 2019 JI Communication, *supra* note 251, at section 4.

related challenges and opportunities."[262] The question that can be raised against the backdrop of China's JI communications is to what extent can one expect changes towards deeper commitments and regulatory cooperation, especially on the hard issues of data flows. On the one hand, given the domestic framework[263] and China's preoccupation with national security issues,[264] a change of heart may appear unlikely; on the other hand, China's recent calls to join the CPTPP and DEPA may reveal a willingness for domestic reforms.[265]

The EU has stated that it is "fully committed to ongoing WTO negotiations on electronic 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."[266] Thus far, it has circulated six submissions: four on its own and two with co-sponsors.[267] Its submissions can be divided into: (1)

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262. *Id.*

263. China has recently adopted Shùjù ānquán faō (数据安全法) [Data Security Law] (Promulgated by the Standing Comm. Nat'l People's Cong., June 10, 2021, effective Sept. 1, 2021, Gèrén xìnxī baōohù faō (个人信息保护法) [Personal Information Protection Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 20, 2021, effective Nov. 1, 2021), and previously, Waōngluò ānquán faō (网络安全法) [Cybersecurity Law] (promulgated by the Standing Comm. Nat'l People's Cong., Nov. 7, 2017, effective June 1, 2017). For a detailed analysis of China's domestic framework, *see* Henry Gao, *Data Regulation with Chinese Characteristics*, in BIG DATA AND GLOBAL TRADE LAW 245–267 (Mira Burri ed., 2021); YIHAN DAI, CROSS-BORDER DATA TRANSFERS REGULATIONS IN THE CONTEXT OF INTERNATIONAL TRADE LAW: A PRC PERSPECTIVE (2022).

264. On the likelihood of changes in China's position, see GARY CLYDE HUFBAUER & ZHIYAO LU, GLOBAL E-COMMERCE TALKS STUMBLE ON DATA ISSUES, PRIVACY, AND MORE 3–4 (Peterson Institute for International Economics, 2019); *see also* Gao, *supra* note 252; Henry Gao, *Digital or Trade? The Contrasting Approaches of China and US to Digital Trade*, 21 J. INT'L ECON. L. 297 (2018).

265. EU's April 2019 JI Communication, *supra* note 179, at ¶ 1.1.

266. *Id.*

267. Joint Statement on Electronic Commerce, Communication from the European Union, WTO Doc. INF/ECOM/13 (Mar. 25, 2019); Joint Statement on Electronic Commerce, Establishing an Enabling Environment for Electronic Commerce, Communication from the European Union, WTO Doc. INF/ECOM/10 (Mar. 25, 2019); EU's April 2019 JI Communication, supra note 179; Joint Statement on Electronic Commerce, EU Proposal for WTO Disciplines and Commitments Relating to Electronic Commerce: Revision of Disciplines Relating to Telecommunications Services, Communication from the European Union, WTO Doc. INF/ECOM/43 (Oct. 15, 2019); Joint Statement on Electronic Commerce, Joint Proposal on the Information Technology Agreement and its Expansion, Communication by Canada and the European Union, WTO Doc. INF/ECOM/63 (Mar. 15 2021) [hereinafter EU's March 2021 JI Joint Communication]; and Joint Statement on Electronic Commerce, Joint Text Proposal for the Disciplines Relating to Telecommunications Services, Communication by the European Union, Norway, Ukraine and the United Kingdom, WTO Doc. INF/ECOM/64 (Apr. 14, 2021) [hereinafter EU's April 2021 JI Joint Communication]. All of the EU's communications are unrestricted.

concrete provisions on digital trade and, above all, its facilitation; (2) a revision of the WTO Reference Paper on Basic Telecommunication Services (Telecom 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 Information Technology Agreement (ITA) and its 2015 expansion. In the first category, unsurprisingly, one can find provisions on electronic contracts,[268] electronic authentication and signatures,[269] consumer protection,[270] spam,[271] and the ban on customs duties on electronic transmissions.[272] More surprising in this category are the rules included on source code,[273] open Internet access,[274] and cross-border data flows,[275] which, as earlier discussed, are only very recent elements of the EU model and do follow the U.S.-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 substantial carve-outs of the EU model, as explained earlier.[276] Regarding commitments in the computer-related and the telecommunications services sectors, the EU requests commitments from the WTO Members that reflect its slightly GATS-plus level of commitments in its own PTAs,[277] but also signal a willingness to look at the broader issues of digital trade affecting services.

The United States has to date circulated four submissions[278]—two alone and two with co-sponsors. In March 2019, the U.S. submitted an

268. EU's April 2019 JI Communication, *supra* note 179, ¶ 2.1.

269. *Id.* ¶ 2.2.

270. *Id.* ¶ 2.3.

271. *Id.* ¶ 2.4.

272. *Id.* ¶ 2.5

273. *Id.* ¶ 2.6.

274. *Id.* ¶ 2.9.

275. *Id.* ¶ 2.7.

276. *Id.*

277. For a detailed analysis, *see* Mira Burri, *Telecommunications and Media Services in Preferential Trade Agreements: Path Dependencies Still Matter*, *in* EUROPEAN YEARBOOK OF INTERNATIONAL ECONOMIC LAW: COHERENCE AND DIVERGENCE IN AGREEMENTS ON TRADE IN SERVICES 169 (Markus Krajewski & Rhea Hoffmann eds., 2020).

278. Joint Statement on Electronic Commerce, *Communication from the United States*, WTO Doc. INF/ECOM/5 (Mar. 25, 2019) [hereinafter US' March 2019 JI Communication]; Joint Statement on Electronic Commerce, *Communication from the United States*, WTO Doc. INF/ECOM/23 (Apr. 26, 2019) [hereinafter US' April 2019 JI Communication]; Joint Statement on Electronic Commerce, *Joint Proposal on Source Code; Communication by Canada*; *Japan; Mexico; the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Ukraine and the United States*, WTO Doc. INF/ECOM/54 (July 1, 2020); and Joint Statement on Electronic Commerce, *Joint Proposal on*

individual background paper on provisions that it considers "represent the highest standard in safeguarding and promoting digital trade"[279] and a proposal on digital trade disciplines.[280] This proposal is the most far-reaching of all submitted proposals and is a compilation of the USMCA digital trade chapter and the United States-Japan DTA. It thus, in essence, creates the U.S.s' most ambitious trade agreement template, and includes of financial and insurance services (as under the United States-Japan DTA). The strong commitment to the free flow of data is evident and follows the language of Article 19.11 USMCA, coupled with an outright ban on localization measures in Article 19.12. Source code, interactive computer services, and open government data are also included.[281] The text on personal information protection reiterates the language of the United States-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.[282] Unlike the USMCA, there is no reference to international standards, nor is there a mention of the essential data protection principles.

Other countries have expressed their support for advancing negotiations on a wide range of issues. Norway, Ukraine, and the U.K. have cosponsored a proposal with the EU on updating the Telecom Reference Paper, which incorporates new definitions and includes disciplines on essential facilities, dispute resolution, and transparency.[283] Canada and the EU have submitted a proposal seeking the expansion in the number of WTO Members participating in the ITA.[284] 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.[285] Brazil and South Korea have submitted

Cross-Border Transfer of Information by Electronic Means / Cross-Border Data Flows, Communication from the United States, WTO Doc. INF/ECOM/5 at 2 (Mar. 25, 2019). All except the first submission are restricted.

279. US' March 2019 JI Communication, *supra* note 278, at section 2.

280. US' April 2019 JI Communication, *supra* note 278.

281. *Id.* at 6–7.

282. *Id.* at 4.

283. EU's April 2021 JI Joint Communication, *supra* note 267.

284. EU's March 2021 JI Joint Communication, *supra* note 267.

285. Joint Statement on Electronic Commerce, *Communication from Canada, Additional Text Proposal, Personal Information Protection*, WTO Doc. INF/ECOM/58 (Oct. 19, 2020). This was followed by the recent Joint Statement on Electronic Commerce, *Communication from Canada, Fact Sheet: Canada's Privacy Proposal at the WTO JSI on E-Commerce*, WTO Doc. INF/ECOM/74 (Feb. 10,

a joint proposal on access to online platforms/competition,[286] the content of which is restricted, however. Similarly, a communication from Japan, Mexico, and other countries on source code is restricted.[287] In this regard, it is worth highlighting that New Zealand and Canada have stressed the importance of ensuring a certain level of transparency regarding the content of the JI negotiations on electronic commerce, albeit without too much success so far.[288]

Overall, while one can observe some important 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 that the Article addresses is how far the experiences gathered in PTAs, which have been differently reflected in the JI communications, have translated in the actual JI negotiations moving towards a new WTO Agreement on Electronic Commerce. The analysis follows a chronological line, as matters have changed over time.

B. *Progress Made Across Issues*

On December 14, 2020, the participants to the JI negotiations circulated the first consolidated negotiating text based on the Members' proposals and the progress made in the negotiation during 2020.[289] Subsequent texts were circulated on September 8, 2021, capturing the progress made in 2021[290] and on December 22, 2022, for the strides made in 2022.[291] Access to these texts has not been easy and while Bilaterals.org published the December 2020 and September 2021 negotiating texts, the most recent ones are still publicly unavailable.

2023). All Canada's individual submissions and the ones that it has co-sponsored with the EU and New Zealand (10 in total) are unrestricted but two it has co-sponsored with the U.S. are restricted.

286. Joint Statement on Electronic Commerce, *Communication from Brazil and the Republic of Korea*, WTO Doc. INF/ECOM/67 (July 20, 2021). This communication is restricted. However, Brazil's other seven submissions are unrestricted.

287. Joint Statement on Electronic Commerce, *Communication by Canada, Japan, Mexico, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, Ukraine and the United States*, WTO Doc. INF/ECOM/54 (July 1, 2020).

288. Joint Statement on Electronic Commerce, *Communication from New Zealand and Canada*, WTO Doc. INF/ECOM/42/Rev.1 (Nov. 18, 2019). This communication is unrestricted.

289. Electronic Commerce Negotiations, *Consolidated Negotiating Text*, WTO Doc. INF/ECOM/62/Rev.1 (Dec. 14, 2020) [hereinafter Consolidated Negotiating Text of December 14, 2020].

290. Electronic Commerce Negotiations, *Updated Consolidated Negotiating Text September 2021 Revision*, WTO Doc. INF/ECOM/62/Rev.2 (Sept. 8, 2021) [hereinafter Consolidated Negotiating Text of September 8, 2021].

291. Electronic Commerce Negotiations, *Updated Consolidated Negotiating Text December 2022 Revision*, WTO Doc. INF/ECOM/62/Rev.3 (Dec. 22, 2022).

The Consolidated Negotiating Text of September 8, 2021 (the latest publicly available one) 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.[292] The text further contains Annex 1, which sets out the scope and general provisions.

Working in small negotiations groups has proven to be effective.[293] In May 2021, the JI co-convenors communicated that a clean text on open government data, e-contracts, online consumer protection, and paperless trading was within reach. A public communication regarding the meeting of September 13, 2021 revealed the extent of some of these commitments.[294] More recently, in December 2021, after the circulation of Consolidated Negotiating Text of September 8, 2021, the co-convenors announced that agreement had been reached on eight articles. These covered online consumer protection, electronic signatures and authentication, unsolicited commercial electronic messages, open government data, electronic contracts, transparency, paperless trading, and open Internet access. They also reported the consolidation of text proposals on areas including customs duties moratorium, cross-border data flows, data localization, source code, electronic transactions frameworks, cybersecurity, electronic invoicing, as well as advanced discussions on market access. Finally, they stated that in the light of the "strong progress" made up to that point, they hoped to secure convergence on major issues by the end of 2022.[295]

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292. *See id.*; 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, domestic regulation, and cooperation, 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.

293. 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. In May 2022, small groups on privacy and telecommunications were established. *See Co-convenors update participants on latest progress in e-commerce discussions*, WTO (May 19, 2022), https://www.wto.org/english/news_e/news22_e/ecom_20may22_e.htm.

294. *E-Commerce Negotiations Advance, Delve Deeper into Data Issues*, WTO (May 20, 2021), https://www.wto.org/english/news_e/news21_e/jsec_20may21_e.htm.

295. *Id.*

Regarding the prospective article on consumer protection, Members would be required to adopt or maintain measures, laws, or regulations that protect consumers "to proscribe misleading, fraudulent, and deceptive commercial activities that cause harm, or potential harm, to consumers engaged in electronic commerce" or other online commercial activities.[296] Members would also expected to adopt or maintain measures that seek to ensure that suppliers of goods and services: (a) deal fairly and honestly with consumers; (b) give consumers complete, accurate, and transparent information, together with the terms of the contract, on the goods and services; and (c) ensure the safety of goods and services during "normal or reasonably foreseeable use".[297] The Article also requires Members to "promote access to, and awareness of, consumer redress or recourse mechanisms, including for consumers transacting cross-border".[298] It is important to note that in comparison to the Consolidated Negotiating Text of December 14, 2020, there is a notable weakening of the consumer protection provisions.

In the same context, JI participants have agreed to an open government data provision, whereby Members recognize the benefit of making government data digitally available for public access and use.[299] To facilitate public access and use of government data, this data must be (a) in a searchable, machine-readable, and open format; (b) "updated, as applicable, in a timely manner"; and (c) accompanied by metadata that is, to the extent possible, based on commonly used formats that allow the user to understand and manipulate the data.[300] Again, the provisions on open government data have been watered down as compared to the Consolidated Negotiating Text of December 14, 2020; notably, the requirement to publish government data has been replaced with more deferential language.

Despite this softening of certain provisions, the progress made under the JI negotiations on electronic commerce is in many aspects impressive and shows the mobilization of the 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, 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

296. Consolidated Negotiating Text of September 8, 2021, *supra* note 290, art. C.1.(1)(2).
297. *Id.* art. C.1.(1)(3).
298. *Id.* art. C.1.(1)(3)(c).
299. *Id.* art. B.2.(1)(1)(b).
300. *Id.* art. B.2.(1)(3).

years, either domestically, in specialized venues, or in the PTAs. For instance, in the case of consumer protection, 76 JI participants already have rules on consumer protection as part of the PTAs.[301] Similarly, with regard to open government data, different JI participants already have open government data portals and many subscribe to international efforts to facilitate open data, such as the Open Government Partnership,[302] the Open Data Charter,[303] or the OECD Recommendation on Public Sector Information.[304] Even China has recently adopted an Open Government Information Regulation.[305] In this sense, the provisions that are likely to be agreed upon are not necessarily disruptive but merely reflect changes in domestic regimes and corresponding commitments in PTAs.

Outstanding issues in the JI discussions that still fall under the category of "doable," although with varying levels of normative value, include e-invoicing, cybersecurity, and electronic transaction framework.[306] Some of these "doable" issues not only enable electronic commerce in the narrow sense, but also touch upon broader policy issues that could accordingly face a significant level of resistance before any text could be adopted. For instance, the proposals on cybersecurity—mostly of a cooperative nature—would be significant for the future development of a safe digital trade environment amidst growing number of cyberattacks[307] and have been supported by the United States, the U.K., and Japan, among others. Yet, China submitted a proposal noting that discussions on cybersecurity should respect a country's Internet

301. Taku Nemoto & Javier López González, *Digital Trade Inventory: Rules, Standards and Principles*, OECD TRADE POLICY PAPERS NO. 251,

14 (2021), https://doi.org/10.1787/9a9821e0-en.

302. *Members*, OPEN GOVERNMENT P'SHIP, https://www.opengovpartnership.org/our-members/.

303. *Government adopters*, OPEN DATA CHARTER, https://opendatacharter.net/government-adopters/.

304. OECD, C(2008)36, OECD RECOMMENDATION OF THE COUNCIL FOR ENHANCED ACCESS AND MORE EFFECTIVE USE OF PUBLIC SECTOR INFORMATION (2008), https://www.oecd.org/sti/44384673.pdf.

305. Guowuyuan Gongbao (中华人民共和国政府信息公开条例) [Regulations of the People's Republic of China on the Disclosure of Government Information] (promulgated by the St. Council of the People's Republic of China, April 15, 2019, effective May 15, 2019) St. Council Gaz., April 15, 2019, http://www.gov.cn/zhengce/content/2019-04/15/content_5382991.htm.

306. Pascal Kerneis, *The Landing Zone in Trade Agreements for Cross-Border Data Flows* 4 (TIISA Working Paper No. 2021–12, Sept. 2021), https://iit.adelaide.edu.au/ua/media/1581/final-p-kerneis-wp-2021-12.-updated-v6.pdf.

307. Chuck Brooks, *Alarming Cyber Statistics for Mid-Year 2022 That You Need to Know*, FORBES (June 3, 2022), https://www.forbes.com/sites/chuckbrooks/2022/06/03/alarming-cyber-statistics-for-mid-year-2022-that-you-need-to-know/?sh=508d018a7864.

sovereignty.[308] Unsurprisingly, the Russian Federation has abstained from submitting a proposal on this issue.[309]

The depth of market access commitments on critical for electronic commerce services sectors were and continue to be in the "uncertain" category.[310] 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.[311] China stands out as a JI participant that has not submitted any proposal regarding the non-disclosure of source code.[312]

Overall, the participants sought to secure a package of 10–12 agreed articles for the future electronic commerce agreement by the WTO's 12th Ministerial Conference (MC12), which was planned to be held in Geneva on November 30 to December 3, 2021 but, in light of the pandemic, was only held in June 2022.[313] The participants acknowledged that the agreement would not be completed by MC12 and undertook to complete negotiations by the end of 2022,[314] which evidently was not a promise kept, as the negotiations were still ongoing in May 2023.

Instead of a complete text, MC12 showcased the progress made to stakeholders and provided an opportunity for ministerial involvement to maintain the negotiation's momentum and to provide guidance towards resolving some or all of the discussed issues.[315] In addition, an E-commerce Capacity Building Framework was launched "to strengthen digital inclusion and to help developing and least developed countries harness the opportunities of digital trade".[316] The most

308. Joint Statement on Electronic Commerce, *supra* note 244, at 3.

309. Consolidated Negotiating Text of September 8, 2021, *supra* note 290, at art. C.3.(1).

310. *See, e.g.*, Kerneis, *supra* note 306, at 5; Jane Drake-Brockman et al., *Digital Trade and the WTO: Negotiation Priorities for Cross-Border Data Flows and Online Trade in Services* (TIISA Network Working Paper No. 2021-11, Sept. 2021), https://cadmus.eui.eu/bitstream/handle/1814/72564/WP_2021_11.pdf?sequence=1&isAllowed=y.

311. Consolidated Negotiating Text of September 8, 2021, *supra* note 290, at 48.

312. *Id.*

313. *Twelfth WTO Ministerial Conference*, *Ministerial Conferences*, WTO (June 12, 2022), https://www.wto.org/english/thewto_e/minist_e/mc12_e/mc12_e.htm.

314. *WTO Joint Statement Initiative on E-commerce: Statement by Ministers of Australia, Japan and Singapore*, WTO (June 2022), https://www.wto.org/english/news_e/news22_e/jsec_13jun22_e.pdf.

315. *E-Commerce Negotiations: Co-convenors Urge Members to Intensify Efforts Ahead of MC12*, WTO (Oct. 13, 2021), https://www.wto.org/english/news_e/news21_e/ecom_18oct21_e.htm.

316. *Co-Convenors Welcome Good Progress in E-Commerce Talks, Launch Capacity-Building Framework*, WTO (June 13, 2022), https://www.wto.org/english/news_e/news22_e/jsec_13jun22_e.htm.

interesting outcome of the MC12 was the interruption of the humdrum of previous statements to continue the work under the Work Programme on Electronic Commerce. Members also undertook to intensify discussions on the customs duty moratorium and hold periodic reviews to, essentially, address India's and South Africa's concerns. Specifically, Members also undertook to maintain the customs duty moratorium until the 13th Ministerial Conference (MC13), which should ordinarily take place in December 2023. But, if MC13 is delayed beyond March 31, 2024, the customs duty moratorium will lapse on that date, unless it is extended.[317] While this undertaking was not in the context of the JI, the lapse of the customs duty moratorium could result in a conflict of laws if the JI participants agreed to make it permanent. It is thus likely that the multilateral elimination of the practice, albeit not contained in a WTO Agreement, would trump the agreement concluded by the participants in the JI.

There has been considerable progress made in the negotiations in 2022, although no final agreement has been reached. Fortunately, agreement on (1) access to and use of Internet for [electronic commerce/digital trade]; (2) electronic transactions frameworks; and (3) cybersecurity is there. Small group negotiations are still ongoing on: (1) electronic invoicing; (2) the customs duty moratorium; (3) personal data protection; (4) source code; (5) ICT products that use cryptography; and (6) the update of the WTO Reference Paper on Telecommunications.[318] There is some divergence of approaches on these topics but the participants hope to reach some agreement during the course of 2023.

It should also be noted that the structure of the negotiation text of December 22, 2022, which is not public, has been somewhat changed. While most of the previous sections that bundle different issues together were preserved,[319] the section on market access does not appear. An interesting development is also the appearance of an Annex in the Consolidated Negotiating Text of December 2022. This Annex comprises the following: (1) logistics services; (2) enhanced trade facilitation for cross-border e-commerce; (3) use of technology for the release and clearance of goods; (4) electronic payments services/electronic

317. Ministerial Conference Twelfth Session, *Ministerial Decision*, WTO Doc. WT/MIN(22)/32, WT/L/1143 (adopted June 17, 2022).

318. Ismail, *supra* note 244, at 13–16.

319. Section A: Enabling Electronic Commerce; Section B: Openness and Electronic Commerce; Section C: Trust and Electronic Commerce; Section D: Cross-Cutting Issues; Section E: Telecommunications and a unnumbered Section on Scope and General Provisions.

payments; (5) single windows data exchange and system interoperability/unique consignment reference numbers; (6) non-discriminatory treatment of digital products; (7) access to online platforms/competition; (8) domestic regulation; (9) electronic commerce-related network products; (10) services market access; (11) temporary entry and stay of electronic commerce-related business persons; and (12) goods market access. One may wonder what the purpose of this Annex in the ultimately agreed treaty could be. The fate of the article on "services market access" may provide some clues to answer such a question. The article was namely assigned to a small group in 2020 and the reporting progress was halted in 2021 due to challenges in continuing the negotiations without agreeing on the legal architecture of the future electronic commerce agreement. In this sense, it appears that the Annex can be seen as a catching net for provisions that might affect participating members' obligations under existing WTO Agreements. The addition of these would require consensus and the application of the most favoured nation (MFN) principle—two requirements that are close to impossible to achieve in the JI negotiations.[320] In this sense, it might just be that the Annex is the "graveyard" to provisions that are not agreed upon and would be ultimately eliminated once all the other sections are concluded.

C. *Issues Less Likely to Be Agreed Upon: The Data Governance Dilemma*

Cross-border data flows remain a highly contentious issue, as illustrated by the inability to even start any real discussion on the subject for a long period of time.[321] While there are a number of countries that align with Japan's proposal for data flows with trust[322] 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, which at its core entails the critical issues of free data flows and the interlinked protection of personal data, vary widely among the JI participants.[323] Moreover, there is no

320. *Id.* at 10; *see also infra* Section I.

321. Kerneis, *supra* note 306, at 4.

322. Group of Twenty [G20], *G20 Osaka Leaders' Declaration* (June 28, 2019), https://www.gov.br/cgu/pt-br/assuntos/articulacao-internacional/arquivos/g20/declaracao-dos-lideres/2019_g20_declaracao-dos-lideres-cupula-de-osaka.pdf; Dep't for Int'l Trade & Rt. Hon. Anne-Marie Trevelyan MP, *G7 Trade Ministers' Digital Trade Principles*, GOV'T DIGIT. SERV. (Oct. 22, 2021), https://www.gov.uk/government/news/g7-trade-ministers-digital-trade-principles.

323. *See, e.g.*, Ines Willemyns, *Agreement Forthcoming? A Comparison of E.U., U.S., and Chinese RTAs in Times of Plurilateral E-Commerce Negotiations*, 23 J. INT'L ECON. L. 221 (2020).

agreement on what the "flow of data" entails[324] and the way forward, as shown by the recent small group talks. It should also be noted that further important nuances regarding the various types of data are absent in the current state of the JI negotiations.[325] Proposals by various JI participants tend to deal with all data, including personal (yet again, with very different approaches reflecting the developments in PTAs),[326] as well as with the less contentious provision on open government data. Yet, discussions regarding other types of proprietary data and/or data sharing are currently absent in the discussions, as they have not been sufficiently covered by PTAs' rule-making either.[327] 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.[328] The December 2022, while showing some positive developments, also contains a number of alternative texts without a common denominator. At the same time, the JI co-convenors have clearly 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.[329]

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324. U.N. Conference on Trade and Development, *What Is at Stake for Developing Countries in Trade Negotiations on E-Commerce?*, at 28-29, U.N. Doc. UNCTAD/DITC/TNCD/2020/5 (Oct. 3, 2021).

325. *See* Consolidated Negotiating Text of September 8, 2021, *supra* note 290, at 26.

326. On the definition of data flows across PTAs, *see* BURRI, *supra* note 30.

327. 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?*, 21 J. INT'L ECON. L. 323, 343–46 (2018). 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 & Patrick Leblond, *Another Digital Divide: The Rise of Data Realms and Its Implications for the WTO*, 21 J. INT'L ECON. L. 245, 250 (2018). The OECD has also tried to break the data into different categories. *See* OECD, DATA IN THE DIGITAL AGE (2019), https://www.oecd.org/digital/ieconomy/data-in-the-digital-age.pdf.

328. Consolidated Negotiating Text of September 8, 2021, *supra* note 290.

329. *Id.*

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 well as for its normative effect. In the Consolidated Negotiating Text of September 8, 2021, several WTO Members participating in the JI "have noted that they would expect security, general, and prudential exceptions to apply."[330] Some of the carve-outs, such as the ones that the EU and China would prefer, are in essence unilateral self-judging exemptions. The legal tests of the general exceptions (Articles XX GATT 1994 and XIV GATS) and the security exceptions (Articles XXI GATT, XIV*bis* GATS and 73 TRIPS) 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.[331] In addition, commitments are unlikely to cover government procurement, information held by or on behalf of a Party, or measures related to such information, including measured related to its collection.[332] It appears from the negotiations thus far and drawing upon the standing PTA practice that these exceptions could be cross-cutting to several issues or to the potential agreement as a whole. The formulation of meaningful personal data protection provisions remains a further and hard to face challenge.

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 digital trade. Particularly in the context of privacy protection, there is clearly 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 trustmark or certification frameworks; or (4) other ways of securing transfer of personal information between the Parties.[333] Unfortunately, these paths have been so far not explored in any meaningful way.

330. Consolidated Negotiating Text of December 14, 2020, *supra* note 289; Consolidated Negotiating Text of September 8, 2021, *supra* note 290, at 1.

331. For instance, with regard to the privacy protection justifications under Article XIV GATS. There has been a discussion in the literature that E.U. data protection law, especially the high standards and extraterritorial effects of the 2018 E.U. General Data Protection Regulation, might fail the Article XIV GATS test. For an overview of the debates, see Burri, *supra* note 4, at 66.

332. Consolidated Negotiating Text of September 8, 2021, *supra* note 290, at 1.

333. These have been the recommendations made to the G20. *See* Drake-Brockman et al., *supra* note 310. On the problems around implementing such mechanisms, see Burri (2021), *supra* note 4, at 83; Chander & Schwartz, *supra* note 4.

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 JI negotiations on electronic commerce is the legal nature and means of incorporation of such an agreement into WTO law.[334] Although India and South Africa do not participate in any of the JI activities, which have become an important channel to overcome the WTO decision-making deadlock and to move ahead on some issues among certain like-minded Members since 11th Ministerial Conference held in Buenos Aires in 2017,[335] they have expressed strong opposition to their negotiation at the WTO in, among others, a paper submitted in February 2021.[336] The two Members opine that the JI negotiations are 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."[337] The two WTO Members consider the JIs inconsistent with the fundamental principles of the WTO, even if the participants offer the negotiated concessions on a most-favoured-nation (MFN) basis and unilaterally include them in their individual schedules.[338] Specifically, India and South Africa consider that the JI proponents intend "to create a new set of Agreements, which are neither

334. *See, e.g.*, Bernard Hoekman & Petros Mavroidis, *WTO "a la carte" or "menu du jour"? Assessing the Case for More Plurilateral Agreements*, 26 EUR. J. INT'L ECON. L. 319 (2015). On the first page of the Consolidated Negotiating Text of September 8, 2021, the negotiating Members have declared that: "[t]his working document does not prejudge the final legal framework which will give legal effect to each provision."

335. Currently, next to the JI on Electronic Commerce, other JIs underway are initiatives 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). *See, e.g.*, *Informal Working Group on Micro, Small and Medium-sized Enterprises (MSMEs)*, WTO (Oct. 12, 2022), https://www.wto.org/english/tratop_e/msmes_e/msmes_e.htm.; *Joint Initiative on Services Domestic Regulation*, WTO (Dec. 2, 2021), https://www.wto.org/english/tratop_e/serv_e/jsdomreg_e.htm.; *Structured discussions on investment facilitation for development move into negotiating mode*, WTO (Sept. 25, 2020), https://www.wto.org/english/news_e/news20_e/infac_25sep20_e.htm. The idea of a "variable geometry" to overcome stalemates in WTO decision-making has been long discussed. *See, e.g.*, WARWICK COMM'N, U. WARWICK, THE MULTILATERAL TRADE REGIME: WHICH WAY FORWARD? (2007); Craig VanGrasstek & Pierre Sauvé, *The Consistency of the WTO Rules: Can the Single Undertaking be Squared with Variable Geometry?*, 9 J. INT'L ECON. L. 837, 837–64 (2006).

336. General Council, *Communication from India and South Africa, The Legal Status of "Joint Statement Initiatives" and Their Negotiated Outcomes*, WTO Doc. WT/GC/W/819 (Feb. 19, 2021).

337. *Id.* at 1 (emphasis in original).

338. *Id.* at 6.

multilateral agreements nor plurilateral."[339] 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.[340] In their argumentation, India and South Africa distinguish between sectoral negotiations, like the ITA and the JIs.[341] They consider the ITA WTO consistent, as it did not amend WTO rules, as the JIs purport to. They debunk the suggestion that the Telecom 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 negotiation mandate, despite being finalized after the conclusion of the Round in 1996.[342] Specifically on the JI negotiations on electronic commerce, India and South Africa consider that the JI proponents are "subverting the exploratory and non-negotiating multilateral mandate of the 1998 Work Programme on Electronic Commerce which has regularly been reaffirmed by all WTO Members,"[343] and they question how the proponents intend to bring the new disciplines into the WTO framework.[344] They note that the JI negotiations on electronic commerce contain cross-cutting issues governed under the GATT 1994, the Agreement on Trade-Related Investment Measures (TRIMS),[345] the TRIPS and the Trade Facilitation Agreement that go beyond the GATS and therefore, the outcomes of the JI negotiations on electronic commerce cannot merely be inscribed into WTO rules through the GATS schedules.[346] India and South Africa are not alone in questioning the way forward for the JI outcomes—for instance, China has also issued a call to clarify the relationship between the future electronic commerce rules and the existing WTO Agreements,[347] and its overall position is that the JI

339. *Id.* at 2.

340. *Id.* at 2–3.

341. *Id.* at 6.

342. *Id.* at 6–78.

343. *Id.* at 8.

344. *Id.*

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

346. Communication from India and South Africa, *supra* note 336, at 8.

347. Joint Statement on Electronic Commerce, *supra* note 244, at 2.

should support the multilateral trading system and the existing WTO rules must prevail in the event of a conflict.[348]

Indeed, the legal nature and means of incorporation of any agreement emanating from the JI 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.[349] However, while India and South Africa may make some valid legal points, others are up for discussion or conflate WTO law with WTO practice. These issues can be discussed through the lens of the four options[350] available to the JI participants for implementation.

The first, is, in fact, a valid legal point made by India and South Africa. This regards the conclusion of a plurilateral agreement, within the meaning of Article II:3 of the WTO Agreement.[351] The same provision underscores that plurilateral agreements are binding only on those Members that have accepted them and do not create rights or obligations for other Members. An example of such a WTO plurilateral agreement is the Agreement on Government Procurement.[352] Plurilateral agreements are incorporated into WTO law pursuant to Article X:9 of the WTO Agreement. This provision stipulates that the Ministerial Conference, upon the request of parties to the agreement, "may decide exclusively by consensus to add that agreement to Annex 4."[353] Due to the current stasis in WTO negotiations, it is unlikely that any WTO Agreement on electronic commerce would take the form of an Annex 4 agreement because its incorporation is likely to be opposed (not in the least by India and South Africa).

India and South Africa seem to conflate or ignore the legal nature of Annex 4 plurilateral agreements with other agreements that are "colloquially referred to as 'plurilateral agreements.'"[354] Indeed, these agreements have been adopted by less than the entire WTO membership and they were incorporated into the WTO legal framework *after* the conclusion of the Uruguay Round. The most notable agreements

348. Gao, *supra* note 252, at 309.

349. Drake-Brockman et al., *supra* note 310.

350. For more options, *see* Fiama Angeles et al., Shifting from Consensus Decision-Making to Joint Statement Initiatives: Opportunities and Challenges (2020) (on file with Geneva, Graduate Institute of International and Development Studies).

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

352. Agreement on Government Procurement, 1981, 258 U.N.T.S. 1235.

353. WTO Agreement, *supra* note 351, art. X.

354. On these open plurilateral agreements, *see* Hoekman & Mavroidis, *supra* note 334.

of this type are the ITA (discussed further below), the GATS Fourth Protocol (Telecommunications);[355] the Telecom Reference Paper; the GATS Fifth Protocol (Financial Services); [356] and the Understanding on Commitments in Financial Services (Understanding). In fact, the Understanding is not an integral part of the GATS, although it was concluded during the Uruguay Round.[357]

The above category of agreements leads to the second option for the incorporation of the JI into WTO law, which is adopting an electronic commerce agreement by means of a critical mass agreement (CMA), like the ITA.[358] In contrast to an Annex 4 plurilateral agreement, this CMA would accord obligations only to signatories and rights to all WTO Members (signatories and non-signatories). In other words, it would be applied on an MFN basis to all WTO Members. Contrary to India and South Africa's assertions, the legal form of the CMA could include changes to Members' GATT and GATS schedules. This is legally feasible under the 2000 Decision on Procedures for the Certification of Rectifications or Improvements to Schedules of Specific Commitments,[359] which provides Members considerable leeway in adopting changes in their schedules without multilateral consensus.[360] 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. As specified in Article XVIII GATS such commitments may not be subject to scheduling under the market access and national treatment columns. They

355. Trade in Services, *Fourth Protocol to the General Agreement on Trade in Services*, WTO Doc. S/L/20 (Apr. 30, 1996).

356. Trade in Services, *Fifth Protocol to the General Agreement on Trade in Services*, WTO Doc. S/L/45 (Dec. 3, 1997).

357. Rudolf Adlung & Hamid Mamdouh, *Plurilateral Trade Agreements: An Escape Route for the WTO?* 14–16 (WTO, Working Paper ERSD-2017-03, 2017).

358. *See, e.g.*, Manfred Elsig, *WTO Decision-Making: Can We Get a Little Help from the Secretariat and the Critical Mass?*, *in* REDESIGNING THE WORLD TRADE ORGANIZATION FOR THE TWENTY-FIRST CENTURY, 67–90 (Debra Steger ed., 2010); Manfred Elsig & Thomas Cottier, *Reforming the WTO: the Decision-Making Triangle Revisited*, *in* GOVERNING THE WORLD TRADE ORGANIZATION, 289–312 (Thomas Cottier & Manfred Elsig eds., 2011); Bernard Hoekman & Charles Sabel, *Plurilateral Cooperation as an Alternative to Trade Agreements: Innovating One Domain at a Time*, 12 GLOBAL POL'Y 49, 49–60 (2021).

359. Council for Trade in Services, *Procedures for the Certification of Rectifications or Improvements to Schedules of Specific Commitments*, WTO Doc. S/L/84 (Apr. 18, 2000).

360. 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 Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, ¶¶ 34–35, WTO Doc. WT/DS27/AB/RW2/ECU, WTO Doc. WT/DS27/AB/RW/USA (adopted Dec. 11, 2008).

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.[361] The Telecom Reference Paper has proven this approach workable. Yet, it appears unlikely that the Telecom Reference Paper itself could be amended to include all the proposed rules under the JI 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. The participating Members could incorporate the GATT and GATS-related aspects of the JI outcome through their respective schedules. In addition, a complementary "Digital Economy Agreement", which covers the regulatory WTO-extra issues,[362] could be added in the form of a Reference Paper.[363]

As a third option, the participants of the JI negotiations on electronic commerce could consider concluding a PTA that covers both trade in goods and services. Yet, in order to be consistent with WTO law, this PTA must comply with the requirements to liberalize "substantially all the trade" under Article XXIV:8(b) GATT 1994[364] and have "substantial sectoral coverage" and eliminate discrimination in the sense of national treatment between Parties under Article V:1(a) and (b) GATS. Under the requirement of "substantially all the trade,"[365] it is generally agreed that there is a high quantitative or qualitative threshold.[366] Whether a dedicated digital trade PTA satisfies these criteria is up for discussion, considering, on the one hand, that not all products are

361. Trade in Services, *Guidelines for the Scheduling of Specific Commitments under the General Agreement on Trade in Services (GATS)*, WTO Doc. S/L/92 at 7 (Mar. 28, 2001).

362. *See, e.g.*, Drake-Brockman et al., *supra* note 310.

363. The Joint Initiative on Services Domestic Regulation was incorporated through a reference paper. *See Reference Paper on Services Domestic Regulation, Joint Initiative on Services Domestic Regulation*, WTO Doc. INF/SDR/2 (Nov. 26, 2021).

364. *See* Appellate Body Report, *Turkey – Restrictions on Imports of Textile and Clothing Products*, WTO Doc. WT/DS34/AB/R (adopted Oct. 22, 1999); *see also* Nicolas Lockhart & Andrew Mitchell, *Regional Trade Agreements under GATT 1994: An Exception and Its Limits*, *in* CHALLENGES AND PROSPECTS FOR THE WTO, 217–52 (Andrew Mitchell ed., 2005).

365. 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." GATS art. V(1)(a) n.1.

366. *See, e.g.*, Gabrielle Marceau & Cornelis Reiman, *When and How is a Regional Trade Agreement Compatible with the WTO?*, 28 LEGAL ISSUES ECON. INTEGRATION 297, 316 (2001).

digital products and that the provision of services in electronic commerce tends to fall under mode 1.[367] On the other hand, we already have a number of agreements, like the DEAs, discussed in Section D above, which create a specific e-commerce/digital trade regime with or without a linkage to a trade deal.

Thus, as an alternative, and fourth option, WTO Members could amend Article XXIV of the GATT 1994 and Article V of the GATS to include sectoral PTAs.[368] However, this would entail an amendment of provisions of multilateral agreements, as provided under Article X:1 of the WTO Agreement, read with Articles X:3 (for GATT 1994) and X:5 (for GATS). Pursuant to Article XI:1 of the WTO Agreement, the adoption of these amendments should be decided by consensus. Failing which, in contrast to Annex 4 plurilateral agreements, the agreement may be incorporated by a *two-thirds majority vote*. In other words, about 108 WTO Members would have to agree to adopt the JI (that is, approximately 20 more than those currently engaged in the negotiations). However, WTO *practice* indicates an aversion to decision-making by voting.[369] This practice, rather than WTO legal provisions as India and South Africa maintain, is seemingly the main obstacle to amending the current WTO agreements or adopting new ones.

However, taking the PTA path, which has been contemplated in the context of the previously negotiated Trade in Service Agreement (TiSA), would mean that the agreement is outside of the forum of the WTO and many of the therewith associated benefits, such as links to the dispute settlement mechanism and striving for global equity, will be

367. *See, e.g.*, Panel Report, *United States–Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc WT/DS285/R (adopted Nov. 10, 2004); Appellate Body Report, *United States–Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc. WT/DS285/AB/R (adopted Apr. 7, 2005); *see also* WEBER & BURRI, *supra* note 18.

368. Angeles et al., *supra* note 350, at 25–26.

369. For a discussion, *see, e.g.*, John H. Jackson, *The Puzzle of GATT: Legal Aspects of a Surprising Institution*, 1 J. WORLD TRADE L. 131, 140–41 (1967); Claude Barfield, *Free Trade, Sovereignty, Democracy: the Future of the World Trade Organization*, 2 CHI. J. INT'L. L. 403, 412 (2001); Joost Pauwelyn, *The Transformation of World Trade,* 104 MICH. L. REV. 1, 16–20 (2005); Jaime Tijmes-Lhl, *Consensus and Majority Voting in the WTO*, 8 WORLD TRADE REV. 417, 418 (2009); Thomas Cottier & Satoko Takenoshita, *The Balance of Power in WTO Decision-Making: Towards Weighted Voting in Legislative Response*, 58 AUSSENWIRTSCHAFT 169, 173–74 (2003); Thomas Cottier & Satoto Takenoshita, *Decision-making and the Balance of Powers in WTO Negotiations: Towards Supplementary Weighted Voting, in* AT THE CROSSROADS: THE WORLD TRADING SYSTEM AND THE DOHA ROUND 181, 187 (Stefan Griller ed., 2008); Elsig & Cottier, *supra* note 358.

lost.[370] 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 could become a reality.

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 it and to 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, particularly 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 digital trade are a handful and the number of states involved proactively in data governance still low. Indeed, if one takes into account the entire universe of PTAs and despite the ongoing diffusion processes, the heterogeneity of approaches and depth of commitments is still striking. Only on very few issues, such as the ban on customs duties on electronic transmissions (at least in PTAs), 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 digital trade, with an outright opposition by some WTO Members that question the desirability of far-reaching rules on digital trade, especially for developing countries,[371] 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 United States are

370. *See, e.g.*, Jane Kelsey, *The Illegitimacy of Joint Statement Initiatives and Their Systemic Implications for the WTO*, 25 J. Int'l Econ. L. 1, 23 (2022).

371. 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)*, 21 J. Int'l Econ. L. 273 (2018).

manifest and create a serious impediment to a deep agreement that adequately reflects contemporary digital trade practices and addresses the associated 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.[372]

Against this contentious political backdrop, it appears, at least at this point in time, that the future WTO agreement on electronic commerce will not entail a 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 the benefits, if any, of such a relatively "thin" deal are. Arguably, there can be a number of advantages: 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 for 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, 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.[373] One could also argue that indeed reaching a thinner deal, more narrowly focused on trade facilitation and trade in services 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

372. 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* NEW ZEALAND'S WAITANGI TRIBUNAL, REPORT ON THE COMPREHENSIVE AND PROGRESSIVE AGREEMENT FOR TRANS-PACIFIC PARTNERSHIP, *supra* note 53. *See also* Burri, *supra* note 23.

373. Wolfe, *supra* note 120, at 78–79; *see also* Gregory Shaffer et al., *Can Informal Law Discipline Subsidies*, 18 J. INT'L ECON. L. 711 (2015); *see generally* INFORMAL INTERNATIONAL LAWMAKING (Joost Pauwelyn, Ramses Wessel & Jan Wouters ed., 2012).

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. Here too we do not yet know much about 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.[374] This question is separate 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 that remains opaque, state-centric, and top-down with no proper stakeholder participation[375] but lobbyist influence, is probably not the case.[376] Approaching the challenges of the fluid and complex data environment will demand the mobilization of different governance toolkits, including possibly technology itself,[377] and a proper interfacing of international and national regimes, which will

374. *See* Chander & Le, *supra* note 27; NEW ZEALAND'S WAITANGI TRIBUNAL, REPORT ON THE COMPREHENSIVE AND PROGRESSIVE AGREEMENT FOR TRANS-PACIFIC PARTNERSHIP, *supra* note 53 (concluding that the risks to Māori interests arising from the electronic commerce provisions of the CPTPP are significant, and that reliance on the exceptions and exclusions to mitigate that risk falls short of the Crown's duty of active protection). Scholars have also argued that privacy protection and other rights-based issues should be completely excluded from trade deals. *See, e.g.*, Kristina Irion et al., *Privacy Peg, Trade Hole: Why We (Still) Shouldn't Put Data Privacy in Trade Law*, U. CHI. L. REV. ONLINE (Mar. 27, 2023), https://lawreviewblog.uchicago.edu/2023/03/27/irion-kaminski-yakovleva/. For a particularly outspoken view, *see* DEBORAH JAMES, ROSA-LUXEMBURG-STIFTUNG, DIGITAL TRADE RULES: A DISASTROUS NEW CONSTITUTION FOR THE GLOBAL ECONOMY, BY AND FOR BIG TECH (2020).

375. 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*, 52 VAND. J. TRANSACTIONAL L. 463 (2019).

376. The discussion on the boundaries of the WTO and trade law in general is not new. *See, e.g.*, José E. Alvarez, *Symposium: The Boundaries of the WTO*, 96 AM. J. INT'L L. 1 (2002); Anu Bradford, *When the WTO Works, and How It Fails*, 51 VA. J. INT'L L. 1, 15–16 (2010); Sungjoon Cho & Claire R. Kelly, *Are World Trading Rules Passé?*, 53 VA. J. INT'L L. 623, 626 (2019); *see also,* TRADE FOR ALL ADVISORY BOARD, REPORT OF THE TRADE FOR ALL ADVISORY REPORT 43, 53 (Nov. 2019), https://www.tradeforalladvisoryboard.org.nz/ (N.Z.).

377. *See, e.g.*, Lisa Toohey, *Trade Law Architecture after the Fourth Industrial Revolution*, *in* ARTIFICIAL INTELLIGENCE AND INTERNATIONAL ECONOMIC LAW: DISRUPTION, REGULATION, AND RECONFIGURATION 337–352 (Shin-yi Peng, Chin-fu Lin & Thomas Streinz eds., 2021); Emmanuelle Ganne, *Blockchain's Practical and Legal Implications for Global Trade and Global Trade Law*, *in* BIG DATA AND GLOBAL TRADE LAW 128 (Mira Burri ed., 2021).

also need time for experimentation and accordingly a certain level of humility and perseverance of policy-makers, as rightly stressed by Shaffer.[378] As we see from the PTA landscape, with the U.K. and New Zealand, we have actors positioned across digital trade regimes, so the experimentation in interfacing these is ongoing.[379] In this sense, a WTO Agreement on Electronic Commerce "light" should not necessarily be viewed as a lost opportunity but rather as a step in the right direction. Critical for achieving a level of equity and inclusiveness will also be the lowering the threshold for participation of more developing and least developed countries and integrating them into the data-driven economy and its regulation.

378. Shaffer, *supra* note 25.

379. Notably, both the U.K. and New Zealand are signatories to the CPTPP, while having deals with the EU. New Zealand is additionally a party to both the RCEP and the DEPA.