

**APPROACHES TO DIGITAL TRADE AND DATA FLOW REGULATION  
ACROSS JURISDICTIONS:  
IMPLICATIONS FOR THE FUTURE EU-ASEAN AGREEMENT**

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**Abstract:**

In the last two decades the venue of free trade agreements has turned into an important platform for digital trade rule-making. Yet, the approaches of individual states differ profoundly and the emerging data governance regime is deeply fragmented. The article seeks to map these developments by looking at selected preferential trade agreements and their design. The enquiry focuses on the US and EU approaches and discusses the differing stances with regard to data flows regulation in particular, while highlighting innovative solutions found in recent trade deals, such as the CPTPP and the USMCA. The article then provides an overview of ASEAN's initiatives with respect to electronic commerce. Against this backdrop, the article evaluates the prospects of digital trade related rules in the future EU-ASEAN agreement.

**Key words:** CPTPP, electronic commerce, EU-ASEAN, data flows, digital trade, RCEP, USMCA

**1. INTRODUCTION**

With the advanced process of digitization and the critical importance of data to global economies,<sup>1</sup> digital trade has moved up on the agendas of policymakers in general and trade negotiators in particular. The Covid-19 pandemic has only strengthened this interest by highlighting the importance of the digital medium.<sup>2</sup> Notwithstanding the recent reinvigoration following the 2019 Joint Statement Initiative on Electronic Commerce,<sup>3</sup> the rules of the World Trade Organization (WTO) have not yet undergone

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<sup>1</sup> See e.g. James Manyika et al., *Big Data: The Next Frontier for Innovation, Competition, and Productivity* (McKinsey Global Institute 2011); Viktor Mayer-Schönberger and Kenneth Cukier, *Big Data: A Revolution That Will Transform How We Live, Work, and Think* (Eamon Dolan/Houghton Mifflin Harcourt 2013); Nicolaus Henke et al., *The Age of Analytics: Competing in a Data-Driven World* (McKinsey Global Institute 2016); WTO, *World Trade Report 2018: The Future of World Trade: How Digital Technologies Are Transforming Global Commerce* (World Trade Organization 2018).

<sup>2</sup> See e.g. WTO, *E-Commerce, Trade and the Covid-19 Pandemic*, Information Note by the WTO Secretariat, 4 May 2020; UNCTAD, *Covid-19 and E-Commerce: A Global Review* (UNCTAD 2021).

<sup>3</sup> WTO, *Joint Statement on Electronic Commerce*, WT/L/1056, 25 January 2019. As of 29 March 2019, 77 WTO Members support the initiative. For details, see Mira Burri, 'Towards a New Treaty on Digital Trade' (2021) 55 *Journal of World Trade* 77–100; Mira Burri, 'A WTO Agreement on Electronic Commerce: An Enquiry into its Legal Substance and Viability' (2021) *Trade Law 4.0 Working Paper* No 1.

any legal adaptation.<sup>4</sup> Consequently, many of the disruptive changes underpinning the data-driven economy have demanded regulatory solutions outside the multilateral trade forum. States around the world have used in particular the venue of preferential trade agreements (PTAs) to fill in some of the gaps in the WTO framework, clarify its application and beyond that, address the new generation of trade barriers, such as data localization measures,<sup>5</sup> in order to accommodate their striving for seamless digital trade.

Unsurprisingly for developments in preferential trade, the framework that has emerged as a result and now regulates contemporary digital trade is not coherent. It is neither evenly spread across different countries, nor otherwise coordinated. Indeed, the substantive rules and the agreements' membership are messy and fragmented. Despite this patchwork of rules, the last five years have marked the emergence of more sophisticated templates on digital trade and dedicated digital trade agreements that have created a model with distinct features and wider diffusion; one could also trace the clearer positioning of key players, such as notably the United States (US) and the European Union (EU), on issues of digital trade governance.

The article seeks to provide insights into these developments, first by briefly mapping the landscape of digital trade and data flow rules created in PTAs and second, by looking at the newly created digital trade templates and the positions of the EU and the US in this context. These enquiries provide a solid basis to discuss the prospects of an EU-ASEAN agreement and ask to what extent and how it would cover digital trade issues.

## 2. DIGITAL TRADE RULES IN PREFERENTIAL TRADE AGREEMENTS: MAPPING THE LANDSCAPE

### 1. Overview

The regulatory environment for digital trade has been shaped by PTAs. Out of the 354 PTAs entered into between 2000 and 2021, 195 contain provisions relevant for digital trade; 114 have specific electronic commerce provisions and 84 have dedicated electronic commerce chapters.<sup>6</sup> 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 move towards more and more detailed

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<sup>4</sup> See e.g. Mira Burri, 'The International Economic Law Framework for Digital Trade' (2015) 135 *Zeitschrift für Schweizerisches Recht* 10–72; Mira Burri, 'The Governance of Data and Data Flows in Trade Agreements: The Pitfalls of Legal Adaptation' (2017) 51 *UC Davies Law Review* 65–132.

<sup>5</sup> See e.g. United States International Trade Commission (USITC), *Digital Trade in the US and Global Economies*, Part 1, Investigation No 332–531 (USITC, 2013); USITC, *Digital Trade in the US and Global Economies*, Part 2, Investigation No 332–540 (USITC, 2014); Anupam Chander and Uyen P. Lê, 'Data Nationalism' (2015) 64 *Emory Law Journal* 677–739.

<sup>6</sup> This analysis is based on a dataset of all data-relevant norms in trade agreements (TAPED). See Mira Burri and Rodrigo Polanco, 'Digital Trade Provisions in Preferential Trade Agreements: Introducing a New Dataset' (2020) 23 *Journal of International Economic Law* 187–220. The cut-off date for the article analysis is 5 November 2021. For all data, as well as updates of the dataset, see <https://unilu.ch/taped>

provisions on digital trade has intensified significantly over the years.<sup>7</sup> This regulatory push in the domain of digital trade can be explained with the increased importance of the issue over the years but also with the role played by the United States.

The US has insistently endorsed its ‘Digital Agenda’<sup>8</sup> since its inception in 2001. The agreements reached since then with Australia, Bahrain, Chile, Morocco, Oman, Peru, Singapore, the Central American countries, Panama, Colombia, South Korea, and the updated NAFTA, all contain critical WTO-plus and WTO-extra provisions in the broader field of digital trade. Importantly, the diffusion of the US template is not limited to US agreements but can be found in other PTAs as well, such as Singapore-Australia, Thailand-Australia, New Zealand-Singapore, Japan-Singapore, and South Korea-Singapore – thus affecting also many of the ASEAN members. Many, also smaller states, such as Chile, have become active in the area of data governance and even countries like China have adopted, albeit with notable differences, some elements of the US template as part of the recent Regional Comprehensive Economic Partnership (RCEP); at the same time many other countries, such as those parties to the European Free Trade Area (EFTA),<sup>9</sup> have not yet developed and implemented distinct digital trade strategies. The European Union has too been cautious, and only recently started negotiating trade deals with a more advanced digital trade template, as the article explains in more detail below.

The relevant aspects of digital trade governance can be found in: (1) the chapters on dedicated e-commerce, now also often called ‘digital trade’; (2) the chapters on cross-border supply of services (with particular relevance of the provisions and commitments for the telecommunications, computer and related, audiovisual and financial services sectors); as well as in (3) the chapters on intellectual property rights protection.<sup>10</sup> In this article, the focus is exclusively on the e-commerce chapters, which have become the main source of new rule-making in the area of digital trade.

The electronic commerce chapters play a dual role in the landscape of trade rules in the digital era. On the one hand and as earlier mentioned, they represent an attempt to compensate for the lack of progress in the WTO. The chapters address in particular many of the questions of the 1998 WTO Work Programme on Electronic Commerce,<sup>11</sup> which despite their pertinence and the recognition of the WTO membership that adjustments may be needed in the face of the technological changes

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<sup>7</sup> Burri and Polanco, *ibid.*; see also Ines Willekens, ‘Agreement Forthcoming? A Comparison of EU, US, and Chinese RTAs in Times of Plurilateral E-Commerce Negotiations’ (2020) 23 *Journal of International Economic Law* 221–244. At the time of writing, the USMCA is the PTA in force with the highest number of provisions in an e-commerce chapter (19 in total), comprising 3’206 words. The new dedicated digital trade agreements go well beyond – the US-Japan Digital Trade Agreement has 5’346 words, and the DEPA between Chile, Singapore and New Zealand DEPA contains 10’887 words.

<sup>8</sup> US Congress, Bipartisan Trade Promotion Authority Act of 2001, H. R. 3005, 3 October 2001; see also Sacha Wunsch-Vincent, ‘The Digital Trade Agenda of the US’ (2003) 1 *Aussenwirtschaft* 7–46; Henry Gao, ‘Regulation of Digital Trade in US Free Trade Agreements: From Trade Regulation to Digital Regulation’ (2018) 45 *Legal Issues of Economic Integration* 47–70.

<sup>9</sup> The EFTA members are Iceland, Lichtenstein, Norway and Switzerland.

<sup>10</sup> For analysis of all relevant chapters, see Mira Burri, ‘The Regulation of Data Flows in Trade Agreements’ (2017) 48 *Georgetown Journal of International Law* 408–448.

<sup>11</sup> WTO General Council, Work Programme on Electronic Commerce, WT/L/274, 30 September 1998.

triggered by the Internet, could not be translated into action in the past two decades.<sup>12</sup> As a response, the majority of the PTA chapters recognize the applicability of WTO rules to electronic commerce<sup>13</sup> and establish an express and permanent duty-free moratorium on electronic transmissions.<sup>14</sup> In most of the templates tailored along with the US model, the chapters also include a clear definition of ‘digital products’, which treats products delivered offline equally as those delivered online, so that technological neutrality is ensured. Critically, discrimination for digital products trade is constricted through a broad application of the national treatment (NT) and the most favoured nation (MFN) obligations.<sup>15</sup> The e-commerce chapters do however include also rules that have not been treated in the context of the WTO negotiations. One can group these rules into two broader categories: (1) rules that seek to enable digital trade by addressing the promotion and facilitation of e-commerce in general and 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, such as cybersecurity or open government data. As to these categories of rules, the variety across PTAs, as to the issues covered and the strength of the commitments can be great. It is also noteworthy that while in the first cluster of issues on the facilitation of digital trade, the number of PTAs that contain such rules is substantial,<sup>16</sup> only two-dozen agreements so far have rules on data.

In the following sections, the article looks at the new rules created in recent agreements through a detailed analysis of the most advanced e-commerce chapters that we have so far – those of the CPTPP, and the follow-up trade deals of the United States, the USMCA and Digital Trade Agreement with Japan. This advanced framework is then compared with the stance of the European Union, which sets the scene for the analysis of the future EU-ASEAN rules on digital trade.

## 2. Experience Gathered in Distinct Agreements

### 2.1. The Comprehensive and Progressive Agreement for Transpacific Partnership

The Comprehensive and Progressive Agreement for Transpacific Partnership (CPTPP) was agreed upon in 2017 between eleven countries in the Pacific Rim<sup>17</sup> and entered into force on 30 December 2018. Beyond the overall economic impact of the CPTPP,<sup>18</sup> its chapter on e-commerce created the most comprehensive template in the landscape

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<sup>12</sup> Sacha Wunsch-Vincent, *The WTO, the Internet and Digital Products: EC and US Perspectives* (Hart 2006).

<sup>13</sup> See e.g. US-Singapore FTA, art 14.1; US-Australia FTA, art 16.1.

<sup>14</sup> See e.g. US-Singapore FTA, art 14.3(1); US-Chile FTA, art 15.3. For a discussion of the variety of rules on the moratorium, see Burri and Polanco, n 7.

<sup>15</sup> See e.g. US-Singapore FTA, art 14.3; US-Australia FTA, art 16.4.

<sup>16</sup> For details and listing of all relevant PTAs, see Burri and Polanco, n 7.

<sup>17</sup> Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam.

<sup>18</sup> 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. See e.g. Zachary Torrey, ‘TPP 2.0: The Deal Without the US: What’s New about the CPTPP and What Do the Changes Mean?’ *The Diplomat*, 3 February 2018.

of PTAs and included several new features. Despite the fact that US has dropped out of the agreement with the start of the Trump administration, the chapter still reflects the US efforts to secure obligations on digital trade and is a verbatim reiteration of the electronic commerce chapter of the Transpacific Partnership Agreement (TPP). The TPP was supposed to be a ‘21st century’ agreement that would match contemporary global trade better than the analog WTO Agreements.<sup>19</sup> The final text of the TPP and now the CPTPP creates indeed a new model, which albeit imperfect, has moved the regulation of digital trade onto a new level, as detailed in the next section.

In its first part and not unusually for US-led and other PTAs, the CPTPP e-commerce chapter clarifies that it applies ‘to measures adopted or maintained by a Party that affect trade by electronic means’<sup>20</sup> but excludes from this broad scope (a) government procurement and (b) information held or processed by or on behalf of a Party, or measures related to such information, including measures related to its collection.<sup>21</sup> 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;<sup>22</sup> some additional exceptions are also specified.<sup>23</sup> The following provisions address, again as customarily, some of the leftovers of the WTO E-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,<sup>24</sup> which are defined broadly pursuant to Article 14.1.<sup>25</sup> Article 14.5 CPTPP is 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 1996 or the UN Convention on the Use of Electronic Communications in International Contracts. Parties must endeavor to (a) avoid any unnecessary regulatory burden on electronic transactions; and (b) facilitate input by interested persons in the development of its legal framework for electronic transactions.<sup>26</sup> The provisions on paperless trading and electronic authentication and electronic signatures complement this by securing the equivalence of electronic and physical forms. Turning to the issue on paperless trading,

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<sup>19</sup> See e.g. Tania Voon, ‘Introduction: National Regulatory Autonomy and the Trans-Pacific Partnership Agreement’, in Tania Voon (ed) *Trade Liberalisation and International Cooperation: A Legal Analysis of the Trans-Pacific Partnership Agreement* (Edward Elgar 2013), 1–10.

<sup>20</sup> Art 14.2(2) CPTPP.

<sup>21</sup> Art 14.2(3) CPTPP.

<sup>22</sup> Art 14.2(4) CPTPP.

<sup>23</sup> Art 14.2(5) and (6) CPTPP.

<sup>24</sup> 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. Art 14.2(3) CPTPP.

<sup>25</sup> 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.

<sup>26</sup> Art 14.5(2) CPTPP.

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.<sup>27</sup> 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,<sup>28</sup> 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.<sup>29</sup>

The remainder of the provisions found in the CPTPP e-commerce chapter can be said to belong the second and more innovative category of rule-making that tackles the emergent issues of the data economy. Importantly, the CPTPP explicitly seeks to restrict the use of data localization measures. Article 14.13(2) prohibits the parties from requiring a ‘covered person to use or locate computing facilities in that Party’s territory as a condition for conducting business in that territory’. The soft language from US-South Korea FTA on free data flows is now framed 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’.<sup>30</sup> The rule has clearly 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 causality between the flow of data and the business of the covered person; the explicit mentioning of personal data is also noteworthy.

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’.<sup>31</sup> These non-discriminatory conditions are similar to the strict test formulated by Article XIV GATS and Article XX GATT 1994 – a test that is aimed at balancing trade and non-trade interests by ‘excusing’ certain violations (but is also extremely hard to pass, as we know from existing WTO jurisprudence).<sup>32</sup> The CPTPP test differs from the WTO norms in one significant element: while there is a list of public policy objectives in the GATT and the GATS, the CPTPP provides no such enumeration and speaks merely of a ‘legitimate public policy objective’.<sup>33</sup> This permits more regulatory autonomy for the CPTPP signatories; it may be linked however to legal uncertainty.<sup>34</sup> Further, it should

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<sup>27</sup> Art 14.9 CPTPP.

<sup>28</sup> Art 14.6(1) CPTPP.

<sup>29</sup> Art 14.6(2) CPTPP.

<sup>30</sup> Art 14.11(2) CPTPP (emphasis added).

<sup>31</sup> Art 14.11(3) CPTPP.

<sup>32</sup> See e.g. Henrik Andersen, ‘Protection of Non-Trade Values in WTO Appellate Body Jurisprudence: Exceptions, Economic Arguments, and Eluding Questions’ (2015) 18 *Journal of International Economic Law* 383–405.

<sup>33</sup> Art 14.11(3) CPTPP.

<sup>34</sup> For a discussion in this sense, see New Zealand’s Waitangi Tribunal, Report on the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (November 2021).

be noted that the ban on localization measures is softened with regard to financial services and institutions.<sup>35</sup> 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.<sup>36</sup> Government procurement is also excluded.<sup>37</sup> Both exclusions are typical for all PTAs.

The CPTPP addresses other novel issues as well – one of them is source code. Pursuant to Article 14.17, a CPTPP Member may not require the transfer of, or access to, source code of software owned by a person of another Party as a condition for the import, distribution, sale or use of such software, or of products containing such software, in its territory. The prohibition applies only to mass-market software or products containing such software.<sup>38</sup> This means that tailor-made products are excluded, as well as software used for critical infrastructure and those in commercially negotiated contracts.<sup>39</sup> This provision aims to protect software companies and address their concerns about loss of intellectual property or cracks in the security of their proprietary code; it may also be interpreted as a reaction to China's demands for access to source code from software producers selling in its market.

Overall, these provisions illustrate a critical development in digital trade rule-making, which does any longer simply serve the function of liberalizing markets and but is intended to shape the regulatory space domestically. An important rule in this regard is in the area of privacy and data protection. Article 14.8(2) requires every CPTPP party to 'adopt or maintain a legal framework that provides for the protection of the personal information of the users of electronic commerce'. Yet, there are no standards or benchmarks for the legal framework specified, except for a general requirement that CPTPP parties 'take into account principles or guidelines of relevant international bodies'.<sup>40</sup> 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 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'.<sup>41</sup> Parties are also invited to promote compatibility between their data protection regimes, by essentially treating lower standards as equivalent.<sup>42</sup> The goal of these norms can be interpreted as a prioritization of trade over privacy rights. This has been pushed by the

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<sup>35</sup> See the definition of 'a covered person' (art 14.1 CPTPP), which excludes a 'financial institution' and a 'cross-border financial service supplier'.

<sup>36</sup> 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'.

<sup>37</sup> Art 14.8(3) CPTPP.

<sup>38</sup> Art 14.17(2) CPTPP.

<sup>39</sup> *Ibid.*

<sup>40</sup> Art 14.8(2) CPTPP.

<sup>41</sup> *Ibid.*, at footnote 6.

<sup>42</sup> Art 14.8(5) CPTPP.

US during the TPP negotiations, as the US subscribes to relatively weak and patchy protection of privacy.<sup>43</sup>

Next to the data protection norms, the CPTPP includes also provisions on consumer protection<sup>44</sup> and spam control.<sup>45</sup> These are however fairly weak. The same is true for the newly introduced rules on cybersecurity. Article 14.16 is 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. Net neutrality is another important digital economy topic that has been given specific attention in the CPTPP, although the so created rules are of non-binding nature.<sup>46</sup> 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.<sup>47</sup> As the obligations are not linked to remedies for situations, such as blocking, throttling, discriminating or filtering content, it is unlikely that the CPTPP would lead to uniform approach with regard to net neutrality across the CPTPP countries.

The approval for the UK to accede to the CPTPP and recent requests for accession by and China and Taiwan<sup>48</sup> potentially expand the commercial reach and geopolitical dimension of this agreement. Next to these possibilities for an enlarged CPTPP membership, it should also be pointed out that the CPTPP model has diffused in a substantial number of other agreements, such as the 2016 Chile-Uruguay FTA, the 2016 updated Singapore-Australia FTA (SAFTA), the 2017 Argentina-Chile FTA, the 2018 Singapore-Sri Lanka FTA, the 2018 Australia-Peru FTA, the 2019 Brazil-Chile FTA, the 2019 Australia-Indonesia FTA, the 2018 USMCA, 2019 Japan-US Digital Trade Agreement, and the 2020 Digital Economy Partnership Agreement (DEPA) between Chile, New Zealand, Singapore. The next section briefly examines the US approach, while the DEPA is examined in detail in another article in this special issue.

## 2.2. The United States Mexico Canada Agreement

After the withdrawal of the United States from the TPP, there was some uncertainty as to the direction the US will follow in its trade deals in general and on matters of digital trade in particular. The renegotiated NAFTA, which is now referred to as the ‘United States Mexico Canada Agreement’ (USMCA), casts the doubts aside. The USMCA has

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<sup>43</sup> See e.g. James Q. Whitman, ‘The Two Western Cultures of Privacy: Dignity versus Liberty’ (2004) 113 *The Yale Law Journal* 1151–1221; Paul M. Schwartz and Daniel J. Solove, ‘Reconciling Personal Information in the United States and European Union’ (2014) 102 *California Law Review* 877–916; Mira Burri, ‘Interfacing Privacy and Trade’ (2021) 53 *Case Western Journal of International Law*, 35–88.

<sup>44</sup> Art 14.17 CPTPP.

<sup>45</sup> Art 14.14 CPTPP.

<sup>46</sup> Art 14.10 CPTPP.

<sup>47</sup> Art 14.10(a) CPTPP. Footnote 6 to this paragraph specifies that: ‘The Parties recognise that an Internet access service supplier that offers its subscribers certain content on an exclusive basis would not be acting contrary to this principle’.

<sup>48</sup> US Congressional Research Service, ‘China and Taiwan Both Seek to Join the CPTPP’, 24 September 2021, at <https://crsreports.congress.gov/product/pdf/IN/IN11760>

a comprehensive e-commerce chapter, which is now also properly titled ‘Digital Trade’ and follows all critical lines of the CPTPP and goes beyond it.

With regard to replicating the CPTPP model the USMCA follows the same broad scope of application,<sup>49</sup> banning customs duties on electronic transmissions<sup>50</sup> and binds the parties for non-discriminatory treatment of digital products.<sup>51</sup> Furthermore, it provides for a domestic regulatory framework that facilitates online trade by enabling electronic contracts,<sup>52</sup> electronic authentication and signatures,<sup>53</sup> and paperless trading.<sup>54</sup> The USMCA adheres to the CPTPP model also with regard to data issues and ensures the free flow of data through a clear ban on data localization<sup>55</sup> and incorporates a hard rule on free information flows.<sup>56</sup> Article 19.11 specifies further that parties can adopt or maintain a measure inconsistent with the free flow of data provision, if this is necessary to achieve a legitimate public policy objective, provided that there is no arbitrary or unjustifiable discrimination nor a disguised restriction on trade; and the restrictions on transfers of information are not greater than necessary to achieve the objective.<sup>57</sup>

Beyond these similarities, the USMCA introduces some novelties. 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’<sup>58</sup> and has become part of the ban on requirements for the transfer or access to source code in Article 19.16. The second novum refers to ‘interactive computer services’. Parties pledge in this regard not to ‘adopt or maintain measures that treat a supplier or user of an interactive computer service as an information content provider in determining liability for harms related to information stored, processed, transmitted, distributed, or made available by the service, except to the extent the supplier or user has, in whole or in part, created, or developed the information’.<sup>59</sup> 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. It also secures the application of Section 230 of the US Communications Decency Act, which insulates platforms from liability but has been recently under attack in many jurisdictions in the face of fake news and other negative developments related to platforms’ power.<sup>60</sup>

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<sup>49</sup> Art 19.2 USMCA.

<sup>50</sup> Art 19.3 USMCA.

<sup>51</sup> Art 19.4 USMCA.

<sup>52</sup> Art 19.5 USMCA.

<sup>53</sup> Art 19.6 USMCA.

<sup>54</sup> Art 19.9 USMCA.

<sup>55</sup> Art 19.12 USMCA.

<sup>56</sup> Art 19.11 USMCA.

<sup>57</sup> Art 19.11(2) USMCA. There is a footnote attached, which clarifies: A measure does not meet the conditions of this paragraph if it accords different treatment to data transfers solely on the basis that they are cross-border in a manner that modifies the conditions of competition to the detriment of service suppliers of another Party. The footnote does not appear in the CPTPP treaty text.

<sup>58</sup> Art 19.1 USMCA.

<sup>59</sup> Art 19.17(2) USMCA.

<sup>60</sup> See e.g. Lauren Feine, ‘Big Tech’s Favorite Law Is under Fire’, CNBC, 19 February 2020. For an analysis of the free speech implications of digital platforms, see Jack M. Balkin, ‘Free Speech Is a

The third and rather liberal commitment of the USMCA parties regards open government data. This is truly innovative and very relevant in the domain of domestic regimes for data governance. In Article 19.18, the parties recognize that facilitating public access to and use of government information fosters economic and social development, competitiveness, and innovation. ‘To the extent that a Party chooses to make government information, including data, available to the public, it shall endeavor to ensure that the information is in a machine-readable and open format and can be searched, retrieved, used, reused, and redistributed’.<sup>61</sup> There is in addition an endeavour to cooperate, so as to ‘expand access to and use of government information, including data, that the Party has made public, with a view to enhancing and generating business opportunities, especially for small and medium-sized enterprises’.<sup>62</sup>

The US approach towards digital trade issues has been confirmed also by the recent US-Japan Digital Trade Agreement (DTA), signed on 7 October 2019, alongside the US-Japan Trade Agreement.<sup>63</sup> The US-Japan DTA can be said to replicate almost all provisions of the USMCA and the CPTPP,<sup>64</sup> including the new USMCA rules on open government data,<sup>65</sup> source code<sup>66</sup> and interactive computer services<sup>67</sup> but notably covering also financial and insurance services as part of the scope of agreement, thereby rendering its impact much broader.

### 2.3. The Digital Trade Agreements of the European Union

Apart from the generic differences between the EU and the US approaches to PTAs, the EU template with regard to digital trade is not as coherent as that of the United States.<sup>68</sup> It has also developed and changed over time. This can be explained by the EU’s newly put stress on digital technologies as part of its innovation and growth

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Triangle’ (2018) 118 *Columbia Law Review* 2011–2055; Kate Klonick, ‘The New Governors: The People, Rules, and Processes Governing Online Speech’ (2018) 131 *Harvard Law Review* 1598–1670; for a full literature review, see Mira Burri, ‘Fake News in Times of Pandemic and Beyond: An Enquiry into the Rationales for Regulating Information Platforms’, in Klaus Mathis and Avishalom Tor (eds), *Law and Economics of the Coronavirus Crisis* (Springer, 2022).

<sup>61</sup> Art 19.18(2) USMCA.

<sup>62</sup> Art 19.8(3) USMCA.

<sup>63</sup> For the text of the agreements, see: <https://ustr.gov/countries-regions/japan-korea-apcc/japan/us-japan-trade-agreement-negotiations/us-japan-digital-trade-agreement-text>

<sup>64</sup> Art 7: Customs Duties; art 8: Non-Discriminatory Treatment of Digital Products; art 9: Domestic Electronic Transactions Framework; art 10: Electronic Authentication and Electronic Signatures; art 14: Online Consumer Protection; art 11: Cross-Border Transfer of Information; art 12: Location of Computing Facilities; art 16: Unsolicited Commercial Electronic Messages; art 19: Cybersecurity US–Japan DTA.

<sup>65</sup> Art 20 US-Japan DTA.

<sup>66</sup> Art 17 US-Japan DTA.

<sup>67</sup> Art 18 US-Japan DTA. A side letter recognizes the differences between the US and Japan’s systems governing the liability of interactive computer services suppliers and parties agree that Japan need not change its existing legal system to comply with art 18.

<sup>68</sup> EU PTAs tend, for instance, to cover more WTO-plus areas but have less liberal commitments. For detailed analysis, see Henrik Horn, Petros C. Mavroidis and André Sapir, *Beyond the WTO? An Anatomy of EU and US Preferential Trade Agreements* (Bruegel Print 2009).

strategy and with its new foreign policy orientation subsequent to the Lisbon Treaty, which includes PTAs as an essential strategic element.<sup>69</sup>

The agreement with Chile (signed in 2002) was the first to include substantial e-commerce provisions but the language was still cautious and limited to soft cooperation pledges in the services chapter<sup>70</sup> and in the fields of information technology, information society and telecommunications.<sup>71</sup> In more recent agreements, such as the EU-South Korea FTA (signed in 2009), the language is much more concrete and binding. It imitates some of the US template provisions and confirms the applicability of the WTO Agreements to measures affecting electronic commerce, as well as subscribes to a permanent duty-free moratorium on electronic transmissions. The EU, as particularly insistent on data protection policies, has also sought commitment of its FTA partners to compatibility with the international standards of data protection.<sup>72</sup> 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.<sup>73</sup>

The 2016 EU agreement with Canada – the Comprehensive Economic and Trade Agreement (CETA) – goes a step further. The CETA provisions concern commitments ensuring (a) clarity, transparency and predictability in their domestic regulatory frameworks; (b) interoperability, innovation and competition in facilitating electronic commerce; as well as (c) facilitating the use of electronic commerce by small and medium sized enterprises.<sup>74</sup> 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.<sup>75</sup> Yet, there are no deep commitments on digital trade; nor there are any rules on data and data flows.

Overall, the European Union has been cautious when inserting rules on data in its free trade deals and presently none of its treaties has such rules of binding nature. It is only recently that the EU has made a step towards such rules, whereby Parties have agreed to consider in future negotiations commitments related to cross-border flow of information. Such a clause is found in the 2018 EU-Japan EPA,<sup>76</sup> and in the modernization of the trade part of the EU-Mexico Global Agreement. In the latter two agreements, the Parties commit to 'reassess' within three years of the entry into force of the agreement, the need for inclusion of provisions on the free flow of data into the treaty. This signalled a repositioning of the EU on the issue of data flows, which is now

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<sup>69</sup> David Kleimann (ed) *EU Preferential Trade Agreements: Commerce, Foreign Policy, and Development Aspects* (European University Institute 2013).

<sup>70</sup> Art 102 EU-Chile FTA.

<sup>71</sup> Art 37 EU-Chile FTA.

<sup>72</sup> Art 7.48 EU-South Korea FTA.

<sup>73</sup> Art 7.49 EU-South Korea FTA.

<sup>74</sup> Art 16.5 CETA.

<sup>75</sup> Art 16.4 CETA.

<sup>76</sup> Art 8.81 EU-Japan EPA.

fully endorsed in the EU's currently negotiated deals with Australia,<sup>77</sup> New Zealand<sup>78</sup> and Tunisia,<sup>79</sup> which include in their draft digital trade chapters norms on the free flow of data and data localization bans. This repositioning and newer commitments are however also linked with high levels of data protection.<sup>80</sup>

The EU wishes to permit data flows only if coupled with the high data protection standards of its General Data Protection Regulation (GDPR).<sup>81</sup> In its currently negotiated trade deals, as well as in the EU proposal for WTO rules on electronic commerce,<sup>82</sup> the EU follows a distinct model of endorsing and protecting privacy as a fundamental right. On the one hand, the EU and its partners seek to ban data localization measures and subscribe to a free data flow but on the other hand, these commitments are conditioned: first, by a dedicated article on data protection, which clearly states that: 'Each Party recognises that the protection of personal data and privacy is a *fundamental right* and that high standards in this regard contribute to trust in the digital economy and to the development of trade',<sup>83</sup> followed by a paragraph on data sovereignty: 'Each Party may adopt and maintain the safeguards it deems appropriate to ensure the protection of personal data and privacy, including through the adoption and application of rules for the cross-border transfer of personal data. Nothing in this agreement shall affect the protection of personal data and privacy afforded by the Parties' respective safeguards'.<sup>84</sup>

The EU also wishes to retain the right to see how the implementation of the FTA with regard to data flows impacts the conditions of privacy protection, so there is a review possibility within 3 years of the entry into force of the agreement and parties remain free to propose to review the list of restrictions at any time.<sup>85</sup> 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

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<sup>77</sup> Draft text available at: [https://trade.ec.europa.eu/doclib/docs/2018/december/tradoc\\_157570.pdf](https://trade.ec.europa.eu/doclib/docs/2018/december/tradoc_157570.pdf)

<sup>78</sup> Draft text available at: [https://trade.ec.europa.eu/doclib/docs/2018/december/tradoc\\_157581.pdf](https://trade.ec.europa.eu/doclib/docs/2018/december/tradoc_157581.pdf)

<sup>79</sup> Draft text available at: [https://trade.ec.europa.eu/doclib/docs/2019/january/tradoc\\_157660.%20ALECA%202019%20-%20texte%20commerce%20numerique.pdf](https://trade.ec.europa.eu/doclib/docs/2019/january/tradoc_157660.%20ALECA%202019%20-%20texte%20commerce%20numerique.pdf) (original text in French).

<sup>80</sup> See European Commission, Horizontal Provisions for Cross-Border Data Flows and for Personal Data Protection in EU Trade and Investment Agreements, February 2018, available at: [https://trade.ec.europa.eu/doclib/docs/2018/may/tradoc\\_156884.pdf](https://trade.ec.europa.eu/doclib/docs/2018/may/tradoc_156884.pdf)

<sup>81</sup> Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ 2016 L 119/1.

<sup>82</sup> WTO, Joint Statement on Electronic Commerce, EU Proposal for WTO Disciplines and Commitments Relating to Electronic Commerce, Communication from the European Union, INF/ECOM/22, 26 April 2019.

<sup>83</sup> See e.g. art 6(1) draft EU-Australia FTA (emphasis added). The same wording is found in the draft EU-New Zealand and the EU-Tunisia FTAs.

<sup>84</sup> See e.g. art 6(2) draft EU-Australia FTA. The same wording is found in the draft EU-New Zealand and the EU-Tunisia FTAs.

<sup>85</sup> See e.g. art 5(2) draft EU-Australia FTA. The same wording is found in the draft EU-New Zealand and the EU-Tunisia FTAs.

promotion and protection of cultural diversity'.<sup>86</sup> The EU thus reserves ample regulatory leeway for its current and future data protection measures. The exception is also fundamentally different than the objective necessity test under the CPTPP and the USMCA, or that under WTO law, because it is subjective and safeguards the EU's right to regulate.<sup>87</sup> The rest of the EU digital trade template seems to be including the issues covered by the CPTPP/USMCA model, such as software source code,<sup>88</sup> facilitation of electronic commerce,<sup>89</sup> online consumer protection,<sup>90</sup> spam<sup>91</sup> and open government data;<sup>92</sup> not including however a provision on non-discrimination of digital products and excluding audiovisual services from the scope of the application of the digital trade chapter.<sup>93</sup>

While the new EU approach has been confirmed by the recently adopted post-Brexit Trade and Cooperation Agreement (TCA)<sup>94</sup> with the United Kingdom, the European Union appears also likely to tailor its template depending on the trade partner – so, the currently negotiated agreement with Chile has, at least so far, no provisions on data flows and data protection,<sup>95</sup> while the negotiated deal with Indonesia includes merely a place-holder for rules on data flows.<sup>96</sup> This calibration is evident also from some recently completed deals. In this context, the EU-Singapore FTA,<sup>97</sup> which entered into force on 21 November 2019, contains a very thin e-commerce part that covers merely the ban on customs duties on electronic transmissions<sup>98</sup>; electronic signatures<sup>99</sup> and a provision on regulatory cooperation on electronic commerce.<sup>100</sup> The agreement with Vietnam,<sup>101</sup> which entered into force on 1 August 2020, has similarly only few provisions on electronic commerce as part of the services chapter (including only the customs duty band and a pledge for cooperation<sup>102</sup>). Neither of these treaties makes a reference to either data or privacy protection.

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<sup>86</sup> See e.g. art 2 draft EU-Australia FTA. The same wording is found in the draft EU-New Zealand and the EU-Tunisia FTAs.

<sup>87</sup> Svetlana Yakovleva, 'Privacy Protection(ism): The Latest Wave of Trade Constraints on Regulatory Autonomy' (2020) 74 *University of Miami Law Review* 416–519, 496.

<sup>88</sup> Art 207 TCA.

<sup>89</sup> Arts 205 and 206 TCA.

<sup>90</sup> Art 208 TCA.

<sup>91</sup> Art 209 TCA.

<sup>92</sup> Art 210 TCA.

<sup>93</sup> Art 197(2) TCA.

<sup>94</sup> Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, OJ L [2020] 444/14.

<sup>95</sup> Draft text available at: [https://trade.ec.europa.eu/doclib/docs/2018/february/tradoc\\_156582.pdf](https://trade.ec.europa.eu/doclib/docs/2018/february/tradoc_156582.pdf)

<sup>96</sup> Draft text available at: [https://trade.ec.europa.eu/doclib/docs/2017/september/tradoc\\_156106.pdf](https://trade.ec.europa.eu/doclib/docs/2017/september/tradoc_156106.pdf)

<sup>97</sup> The full text of the agreement is available at: <https://trade.ec.europa.eu/doclib/press/index.cfm?id=961>

<sup>98</sup> Art 8.58 EU-Singapore FTA.

<sup>99</sup> Art 8.60 EU-Singapore FTA.

<sup>100</sup> Art 8.61 EU-Singapore FTA.

<sup>101</sup> The full text of the agreement is available at: <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437>

<sup>102</sup> Arts 8.51 and 8.52 respectively.

### 3. THE PROSPECTS OF DIGITAL TRADE RULES IN A FUTURE EU-ASEAN FTA

The above sections revealed the dynamic field of digital trade governance, as driven by developments in PTAs. The new rule-making is detailed and far-reaching at times, as well as shaped by the positions of key stakeholders, which do however differ in their approaches in particular with regard to the conditions attached to the free flow of data and the requirements for domestic data protection regimes. The CPTPP model, which, as discussed earlier, has found broad diffusion, applies directly also to a number of the ASEAN members – in particular Brunei, Singapore, Vietnam and Malaysia. Moreover, Singapore is a signatory to two of the most far-reaching and innovative digital agreements adopted so far.<sup>103</sup> The 2020 DEPA together with Chile and New Zealand,<sup>104</sup> which as discussed elsewhere in this special issue, is a unique modular agreement that goes beyond the CPTPP and is meant to address the broader issues of the digital economy, covering also emergent areas, such as artificial intelligence (AI) and digital inclusion. The 2020 Digital Economy Agreement (DEA) with Australia follows a similar to DEPA modular approach and enhances regulatory cooperation in the digital trade domain (in contrast to DEPA remains however linked to the trade deal between Singapore and Australia).<sup>105</sup> Thus, the digital trade commitments of individual ASEAN states tend to follow the US template and may be deemed in conflict with the EU's approach, in particular with respect to data flows.

The other agreements of ASEAN as a whole vary with regard to the inclusion of provisions on digital trade, also because some of the FTAs have been agreed upon years ago. Agreements, such as the 2005 ASEAN-China Free Trade Area, the 2007 ASEAN-Korea Free Trade, 2008 ASEAN-Japan Comprehensive Economic Partnership (AJCEP), and the 2010 ASEAN-India Free Trade Area barely have any rules of relevance for digital trade. The situation is somewhat different with the 2010 ASEAN-Australia-New Zealand Free Trade Area (AANZFTA), which does include an e-commerce chapter with provisions on transparency,<sup>106</sup> domestic regulatory frameworks,<sup>107</sup> electronic authentication and digital certificates,<sup>108</sup> paperless trading,<sup>109</sup> online consumer and data protection,<sup>110</sup> and cooperation on electronic commerce<sup>111</sup> but remains soft in legal nature and does not address issues of cross-

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<sup>103</sup> Singapore has also completed talks on digital economy agreements with South Korea and with the UK. See respectively: <https://www.straitstimes.com/business/economy/singapore-south-korea-agree-on-first-digital-trade-deal-between-two-asian-nations> and <https://www.gov.uk/government/publications/uk-singapore-digital-economy-agreement-agreement-in-principle-explainer/uk-singapore-digital-economy-agreement-agreement-in-principle-explainer>. The texts of the agreements have not yet been made available.

<sup>104</sup> For details and the text of the DEPA, see: <https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-concluded-but-not-in-force/digital-economy-partnership-agreement/>

<sup>105</sup> For details and the text of the DEA, see <https://www.dfat.gov.au/trade/services-and-digital-trade/australia-and-singapore-digital-economy-agreement>

<sup>106</sup> Chapter 10, art 3 AANZFTA.

<sup>107</sup> Chapter 10, art 4 AANZFTA.

<sup>108</sup> Chapter 10, art 5 AANZFTA.

<sup>109</sup> Chapter 10, art 8 AANZFTA.

<sup>110</sup> Chapter 10, arts 6 and 7 AANZFTA.

<sup>111</sup> Chapter 10, art 9 AANZFTA.

border data flows. The most recent Regional Comprehensive Economic Partnership (RCEP) signed on 15 November 2020 between the ASEAN members, China, Japan, South Korea, Australia and New Zealand<sup>112</sup> includes electronic commerce rules that can be deemed to go beyond the AANZFTA. In a similar fashion to the CPTPP, the RCEP 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. With regard to trade facilitation, RCEP includes provisions on paperless trading,<sup>113</sup> on electronic authentication and electronic signatures.<sup>114</sup> Regarding commitments to create a conducive environment for electronic commerce, the inclusion of provisions on online personal information protection<sup>115</sup> and cybersecurity<sup>116</sup> is remarkable. On the former, RCEP members establish that they shall adopt or maintain a legal framework, which ensures the protection of personal information. Unsurprisingly, RCEP is not prescriptive as to how parties may comply with this obligation. As for the latter aspect on cybersecurity, the parties also simply recognize the importance of building capabilities and using existing mechanisms to cooperate. The RCEP members also commit to adopt or maintain laws or regulations regarding online consumer protection,<sup>117</sup> unsolicited commercial electronic messages,<sup>118</sup> and a framework governing electronic transactions that takes into account international instruments,<sup>119</sup> as well as subscribe to transparency.<sup>120</sup> With respect to cross-border data flows, the RCEP provides essentially for conditional data flows, while preserving room for domestic policies. So, while the RCEP electronic commerce chapter includes a ban on localization measures,<sup>121</sup> as well as a commitment to free data flows,<sup>122</sup> 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: ‘For the purposes of this subparagraph, the Parties affirm that the *necessity* behind the implementation of such legitimate public policy *shall be decided* by the implementing Party’.<sup>123</sup> This essentially goes against any exceptions assessment, as we know it under WTO law, and triggers a self-judging mechanism. In addition, subparagraph (b) of

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<sup>112</sup> RCEP is expected to enter into force on 1 January 2022 following the ratification of six ASEAN Member States (Brunei, Cambodia, Laos, Singapore, Thailand, Vietnam) and four non-ASEAN Member States (China, Japan, New Zealand and Australia), For the details and the text of RCEP, see <https://rcepsec.org/legal-text/>

<sup>113</sup> Art 12.5 RCEP.

<sup>114</sup> Art 12.6 RCEP.

<sup>115</sup> Art 12.8 RCEP.

<sup>116</sup> Art 12.13 RCEP.

<sup>117</sup> Art 12.7 RCEP.

<sup>118</sup> Art 12.9 RCEP.

<sup>119</sup> Art 12.10 RCEP.

<sup>120</sup> Art 12.12 RCEP.

<sup>121</sup> Art 12.14 RCEP.

<sup>122</sup> Art 12.15 RCEP.

<sup>123</sup> Emphasis added.

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’.<sup>124</sup> Article 12.15 on cross-border transfer of information follows the same language and thus secures plenty of policy space to control data flows without further justification.

Noteworthy are some things missing from the RCEP. In comparison to the CPTPP, RCEP does not include provisions on custom duties, non-discriminatory treatment of digital products, source code, principles on access to and use of the Internet for electronic commerce and Internet interconnection charge sharing. 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 in the area of digital trade for its signatories, including the ASEAN countries.

The ASEAN own electronic commerce agreement,<sup>125</sup> which officially entered into force on 2 December 2021, although using different language than the RCEP, is similar in its impact. In particular with regard to data flows, the ASEAN Agreement on Electronic Commerce recognizes their importance but there is only a soft provision on facilitating data flows ‘subject to appropriate safeguards to ensure security and confidentiality of information, and when other legitimate public policy objectives so dictate’.<sup>126</sup> The ban on localization measures is equally weak, as being subject to the respective law and regulations of the ASEAN members, which may subscribe domestic location of computing facilities.<sup>127</sup> The ASEAN members are however committed to enhance their regulatory cooperation in the domain of digital trade, as recently announced during the 20<sup>th</sup> ASEAN Economic Community Council Meeting on 18 October 2021, which envisaged, amongst other things, a digital transformation agenda and the adoption of an ASEAN Digital Economy Framework Agreement (DEFA).<sup>128</sup>

These developments in the ASEAN combined with the changed but also calibrated position of the EU open a number of questions as to the extent digital trade issues will be taken on a board in a future EU-ASEAN trade deal and the concrete substance of the provisions. Some of the questions raised come from the nature of the EU-ASEAN FTA as a region-to-region agreement,<sup>129</sup> since, as shown above, members of the ASEAN have developed their digital trade policies at different speeds and some countries, in particular Singapore, have engaged in far-reaching commitments that largely follow the US liberal approach. It remains to be seen whether the EU will permit some flexibility with regard to its high standards of data protection under the GDPR

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<sup>124</sup> Emphasis added. The ‘essential security interest’ language has been endorsed by China also in the framework of the WTO electronic commerce negotiations.

<sup>125</sup> The text of the ASEAN Agreement on Electronic Commerce is available at: <http://agreement.asean.org/media/download/20190306035048.pdf>

<sup>126</sup> Art 4 ASEAN Agreement on Electronic Commerce.

<sup>127</sup> Art 6 ASEAN Agreement on Electronic Commerce.

<sup>128</sup> See <https://asean.org/20th-asean-economic-community-council-meeting-accelerating-the-regions-economic-recovery-and-digital-economy-transformation/>

<sup>129</sup> The EU has bilateral FTAs with Singapore and Vietnam and is negotiating with Indonesia, Thailand and the Philippines. The EU-ASEAN relationship has been as of 1 December 2020 upgraded to a strategic partnership.

and the first test to this may be recently announced enhanced digital cooperation between Singapore and the EU.<sup>130</sup> As this appears at this point of time unlikely, the data flow provisions, which are fundamental to a robust agreement meant to address the challenges of the data-driven economy, are then to be formulated only as soft commitments accompanied with multiple carve-outs.

Some light on the possibility of interfacing different templates may soon be shed by UK's attempt to join to CPTPP, as well as its engagement on data economy issues with Singapore and the rest of the ASEAN countries, while having a comprehensive chapter on digital trade with the EU under the Brexit agreement and the need to comply with the data protection adequacy agreement with the Union.<sup>131</sup> Another path of finding common ground, albeit perhaps less fruitful, may be the plurilateral discussions under the WTO's Joint Statement Initiative on Electronic Commerce.<sup>132</sup>

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<sup>130</sup> See 'Joint Statement: EU and Singapore agree to strengthen bilateral partnership on digital trade', Brussels, 7 December 2021, available at: <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2337>

<sup>131</sup> See Commission Implementing Decision pursuant to Regulation (EU) 2016/679 of the European Parliament and of the Council on the adequate protection of personal data by the United Kingdom, C(2021) 4800 final, 28 June 2021. Failing to negotiate such an agreement or failing its terms may lead to the suspension of the entire treaty (see art LAW.OTHER.137: Suspension TCA).

<sup>132</sup> See Burri, n 3.