

# Towards a New Treaty on Digital Trade

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*Digital trade is one of the very few areas of trade law, where one can observe a willingness shared by the international community to move forward and actively engage in new rule-making. The article contextualizes and explores this development by looking at the relevant e-commerce provisions in preferential agreements, in particular by highlighting the legal innovation in the most advanced templates of the Comprehensive and Progressive Agreement for Transpacific Partnership (CPTPP) and the United States Mexico Canada Agreement (USMCA), as well as in dedicated digital trade agreements, such as the ones between the United States and Japan and between Chile, New Zealand and Singapore. The article then looks at the WTO negotiations and tries to identify points of convergence and divergence reflected in the latest negotiation proposals tabled by WTO members. It is the article's objective to test these proposals, as to their potential to permit the adoption of a new treaty on digital trade and to their ability to adequately address the practical reality of the data-driven economy.*

**Keywords:** digital trade, electronic commerce, World Trade Organization, preferential trade agreements, data and data flows, CPTPP, USMCA, DEPA

## 1 INTRODUCTION

One area where the multilateral forum of the World Trade Organization (WTO) shows signs of life instead of what have now become almost chronic problems of disengagement, opposition and outright undermining of key institutions and processes of the WTO, is electronic commerce. While electronic commerce is certainly not a new item on the WTO's agenda, as this article details later on, it has received a fresh political push, a new sense of relevance and reveals a willingness to cooperate that seems to be shared by a great number of countries. This article follows and contextualizes this development and seeks to address a few critical questions – how a new treaty on digital trade may look like?; how feasible it is politically and if indeed adopted, how far removed from an 'optimal' digital trade agreement its rules would be? To enable addressing properly these questions, the article first briefly sketches the status quo of WTO rules of pertinence for digital trade. Then it engages in a more in-depth analysis of the rule-making on digital trade in preferential trade agreements (PTAs), which not only compensates for the lack of developments in the WTO but effectively creates a

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new, albeit fragmented, governance framework for the data-driven economy. The careful enquiry into this rule-making seeks to highlight legal innovation and newer trends illustrated recently by the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and the United States Mexico Canada Agreement (USMCA) models, as well as by dedicated digital trade agreements, such as the ones between the United States and Japan and between Chile, New Zealand and Singapore. The third part of the article looks at the WTO negotiations and tries to identify points of convergence and divergence reflected in the latest negotiation proposals tabled by WTO members. The article's final section wishes to test these proposals, as to their potential to permit the adoption of a new treaty on digital trade and to their ability to adequately address the practical reality of the data-driven economy.

## 2 THE STATE OF WTO LAW WITH REGARD TO DIGITAL TRADE

The WTO membership recognized early on the implications of digitization for trade by launching a Work Programme on E-commerce in 1998.<sup>1</sup> This initiative to examine and, if needed, adjust the rules in the domains of trade in services, trade in goods, intellectual property (IP) protection and economic development was far-reaching in scope but due to various reasons did not bear any fruit over a period of two decades. Indeed, WTO law, despite some adjustments through the Information Technology Agreement (ITA), its update in 2015, and the Fourth Protocol on Telecommunications Services, is still very much in its pre-Internet state.<sup>2</sup> Despite this lack of legal adaptation, WTO law is not irrelevant. 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.<sup>3</sup> WTO law also often tackles issues in a technologically neutral way – for instance, with regard to the application of the basic principles, with regard to standards, trade facilitation, subsidies, and government procurement.<sup>4</sup> Moreover, the WTO possesses the advantage of a dispute settlement mechanism that can foster legal evolution.<sup>5</sup> The path of solution-finding through the judicial arm of the WTO has worked fairly well in the digital trade

<sup>1</sup> WTO, *Work Programme on Electronic Commerce*, WT/L/274 (1998).

<sup>2</sup> Mira Burri, *The International Economic Law Framework for Digital Trade*, 135 *Zeitschrift für Schweizerisches Recht* 10–72 (2015); WTO, *World Trade Report 2018: The Future of World Trade* (Geneva: World Trade Organization 2018).

<sup>3</sup> Especially in the domain of IP protection. See e.g. Susan Sell, *Private Power, Public Law* (Cambridge: Cambridge University Press 2003).

<sup>4</sup> For a fully-fledged analysis, see *Trade Governance in the Digital Age* (Mira Burri & Thomas Cottier eds, Cambridge: Cambridge University Press 2012).

<sup>5</sup> See e.g. *The WTO at Ten: The Contribution of the Dispute Settlement System* (Giorgio Sacerdoti et al. eds, Cambridge: Cambridge University Press 2006). For the current crisis of the WTO dispute settlement,

domain,<sup>6</sup> in clarifying the WTO law and advancing it further, settling some of these difficult issues upon which the 160+ WTO Members could not reach a compromise.

Despite the utility of the WTO's dispute settlement, illustrated in a number of Internet-related cases, such as *US–Gambling* and *China–Audiovisual Products*,<sup>7</sup> the lack of political consensus on the substance could not be overcome. A number of important issues remain unresolved and expose the disconnect between the existing WTO rules, in particular under the General Agreement on Trade in Services (GATS), and digital trade practices. A good example in this context are the critical questions of whether previously not existing digital offerings should be classified as goods or services (and thus whether the more binding General Agreement on Tariffs and Trade [GATT] or the GATS apply), and if categorized as services, under the scope of which subsector they would fall. Online games, for instance, as a new type of content platform, could be potentially fitted into the discrete categories of computer and related services, value-added telecommunications services, entertainment, or audiovisual services. This classification is by no means trivial, as it triggers very different obligations for the WTO members, the divergence in commitments being particularly radical between the telecom and the media sectors.<sup>8</sup> The classification dilemma 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.<sup>9</sup> There is, for instance and as a bare minimum for advancing on the digital trade agenda, still no agreement on a permanent moratorium on customs duties on electronic transmissions and their content.<sup>10</sup>

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see Joost Pauwelyn, *WTO Dispute Settlement Post 2019: What to Expect?*, 22 *J Int'l Econ. L.* 297–321 (2019).

<sup>6</sup> Many major GATS cases have had a substantial Internet-related element. See Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services (US – Gambling)*, WT/DS285/R, adopted (10 Nov. 2004); Appellate Body Report, *US – Gambling*, WT/DS285/AB/R, adopted (7 Apr. 2005); Panel Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products (China – Publications and Audiovisual Products)*, WT/DS363/R, adopted (12 Aug. 2009); Appellate Body Report, *China – Publications and Audiovisual Products*, WT/DS363/AB/R, adopted (21 Dec. 2009); Panel Report, *China – Certain Measures Affecting Electronic Payment Services (China – Electronic Payment Services)*, WT/DS413/R, adopted (31 Aug. 2012).

<sup>7</sup> Both *ibid.*

<sup>8</sup> Rolf H. Weber & Mira Burri, *Classification of Services in the Digital Economy* (Bern: Stämpfli 2012); Shin-yi Peng, *Renegotiate the WTO Schedule of Commitments? Technological Development and Treaty Interpretation*, 45 *Cornell Int'l L. J.* 403–430 (2012); Ines Willemyns, *GATS Classification of Digital Services – Does ‘the Cloud’ Have a Silver Lining?*, 53 *J. World Trade* 59–82 (2019).

<sup>9</sup> 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, Cambridge: Cambridge University Press 2012).

<sup>10</sup> The moratorium has only been temporarily extended several times; the last time for a period of two years following a decision taken in 2019.

Ultimately, it should be stressed that addressing the issues raised by the Work Programme on E-Commerce may simply be now insufficient, as since the Programme was launched in 1998, the picture has changed in many critical aspects. The significance of digital trade and in particular the centrality of data for economic processes, both in their 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.<sup>11</sup> A number of new topics, such as privacy and data protection, and a number of new trade barriers, such as data localization, have gained in the meantime importance and moved up on the negotiation agendas.<sup>12</sup>

Overall, while it can be maintained that the WTO Agreements have fairly comprehensive rules and that digital trade can be subsumed under the law of the WTO, against the backdrop of the ailing multilateral trade forum and the lack of deliberate action, the WTO has been somewhat left behind. In the course of the past two decades, countries have shifted forums and utilized preferential trade venues to address the pertinent digital trade issues and provide for a level of legal certainty for their businesses. The next sections are devoted to the solutions found in preferential trade agreements (PTAs), which, on the one hand, compensate for the failed adaptation of the WTO and on the other hand, provide some deliberate responses to the new challenges triggered by the data-driven economy. This article seeks to understand the origins of some discrete digital trade rules as well as their evolution towards the most recent and sophisticated PTA templates and agreements specifically dedicated to digital trade.

### 3 EXPERIENCE GATHERED IN PREFERENTIAL TRADE AGREEMENTS: MAPPING THE LANDSCAPE AND THE NEW RULE-MAKING ON DIGITAL TRADE

#### 3.1 INTRODUCTION

The regulatory environment for digital trade has been shaped by PTAs. Out of the 348 PTAs entered into between 2000 and 2020, 185 contain provisions relevant for digital trade; 110 have specific e-commerce provisions and 80 have dedicated

<sup>11</sup> See e.g. James Manyika et al., *Big Data: The Next Frontier for Innovation, Competition, and Productivity* (Washington, DC: McKinsey Global Institute 2011); Viktor Mayer-Schönberger & Kenneth Cukier, *Big Data: A Revolution That Will Transform How We Live, Work, and Think* (New York: Eamon Dolan/Houghton Mifflin Harcourt 2013); Nicolaus Henke et al., *The Age of Analytics: Competing in a Data-Driven World* (Washington, DC: McKinsey Global Institute 2016).

<sup>12</sup> See e.g. United States International Trade Commission (USITC), *Digital Trade in the US and Global Economies*, Investigation No 332–531 (Washington, DC: USITC 2013); Anupam Chander & Uyên P. Lê, *Data Nationalism*, 64 *Emory L. J.* 677–739 (2015).

e-commerce chapters.<sup>13</sup> Although the pertinent rules remain highly heterogeneous and differ as to issues covered, the level of commitments and the extent of their binding nature, it is overall evident that the move towards more and more detailed provisions on digital trade has intensified significantly over the years. Presently, digital trade provisions are, on average, included in more than 53% of all PTAs that were concluded in the said period, with an average of 2527 words found in e-commerce chapters and side agreements in 2019.<sup>14</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 forcefully endorsed its 'Digital Agenda'<sup>15</sup> 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. 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. Many, also smaller states, such as Colombia, have become active in the area of data governance; at the same time many other countries, such as those parties to the European Free Trade Area (EFTA), have not yet developed and implemented distinct digital trade strategies.<sup>16</sup> The European Union (EU) has too been cautious and in general mirrored in its PTAs the level of commitments under the GATS including only few and mostly cooperation-type of provisions in the area of digital trade. It is only recently with the 2018 EU–Japan EPA and the update of the EU–Mexico Trade Agreement<sup>17</sup> that the EU has addressed data issues, and again rather guardedly.<sup>18</sup>

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<sup>13</sup> 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'l Econ. L. 187–220 (2020) and, <https://unilu.ch/taped>

<sup>14</sup> *Ibid.*; also Ines Willemyns, *Agreement Forthcoming? A Comparison of EU, US, and Chinese RTAs in Times of Plurilateral E-Commerce Negotiations*, 23 J. Int'l Econ. L. 221–244 (2020).

<sup>15</sup> US Congress, Bipartisan Trade Promotion Authority Act of 2001, H. R. 3005, 3 Oct. 2001; Sacha Wunsch-Vincent, *The Digital Trade Agenda of the US*, 1 *Aussenwirtschaft* 7–46 (2003); also Henry Gao, *Regulation of Digital Trade in US Free Trade Agreements: From Trade Regulation to Digital Regulation*, 45 *Legal Issues of Econ. Integration* 47–70 (2018).

<sup>16</sup> It should be noted in this context that the EFTA countries are currently discussing a model e-commerce chapter, so some changes may be in store.

<sup>17</sup> The modernized EU–Mexico Trade Agreement will be part of a modernized EU–Mexico Global Agreement, for which an agreement in principle was reached in Apr. 2018.

<sup>18</sup> The parties pledge 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 (Art. 8.81 EU–Japan EPA). For details on the EU stance, see Mira Burri, *The Regulation of Data Flows in Trade Agreements*, 48 *Geo. J. Int'l L.* 408–448 (2017); Jan A. Micallef, *Digital Trade in EU FTAs: Are EU FTAs Allowing Cross Border Digital Trade to Reach Its Full Potential?*, 53 *J. World Trade* 855–870 (2019). The EU's currently negotiated deals with Australia, New Zealand and Tunisia do include in their draft form norms on the free flow of data and data localization bans.

The relevant aspects of digital trade governance can be found in: (1) the specifically dedicated e-commerce PTA chapters; (2) the chapters on cross-border supply of services (in particular in the telecommunications, computer and related, audiovisual, financial services sectors); as well as in (3) the IP chapters.<sup>19</sup> In this article, the focus is exclusively on the e-commerce chapters, which have become the bedrock of new rule-making in the area of digital trade and thus arguably can create a basis for a future multilateral 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 E-Commerce Programme<sup>20</sup> that have been discussed but still remain open.<sup>21</sup> A majority of the chapters recognize the applicability of WTO rules to electronic commerce<sup>22</sup> and establish an express and permanent duty-free moratorium on electronic transmissions.<sup>23</sup> In most of the templates tailored along the US model, the chapters also include a clear definition of 'digital products', which treats products delivered offline equally as those delivered online, so that technological neutrality is ensured. Critically, both most-favoured nation (MFN) and national treatment (NT) treatment for digital products trade is ensured and discrimination is banned on the basis that digital products are 'created, produced, published, stored, transmitted, contracted for, commissioned, or first made available on commercial terms outside the country's territory' or 'whose author, performer, producer, developer, or distributor is a person of another party or a non-party'.<sup>24</sup> Overall, these rules built upon and in a way endorse the effect of WTO law, by providing also for a level of legal certainty that is important for businesses.

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, which can

<sup>19</sup> For analysis of all relevant chapters, see Burri, *supra* n. 18.

<sup>20</sup> WTO General Council, Work Programme on Electronic Commerce, WT/L/274 (1998).

<sup>21</sup> Sacha Wunsch-Vincent, *The WTO, the Internet and Digital Products: EC and US Perspectives* (Oxford: Hart 2006).

<sup>22</sup> See e.g. US–Singapore FTA, Art. 14.1; US–Australia FTA, Art. 16.1.

<sup>23</sup> See e.g. US–Singapore FTA, Art. 14.3, para. 1; US–Chile FTA, Art. 15.3. For a discussion of the variety of rules on the moratorium, see Burri & Polanco, *supra* n. 13.

<sup>24</sup> See e.g. US–Singapore FTA, Art. 14.3; US–Australia FTA, Art. 16.4.

encompass questions ranging from cybersecurity to 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, and while in the first cluster of issues on the facilitation of digital trade, the number of PTAs that contain such rules is substantial,<sup>25</sup> only very few agreements have rules on data.<sup>26</sup>

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 USMCA, and the dedicated digital trade agreements between the US and Japan and between Chile, New Zealand and Singapore. The purpose is to highlight in particular the legal innovation of these treaties.

### 3.2 THE COMPREHENSIVE AND PROGRESSIVE AGREEMENT FOR TRANSPACIFIC PARTNERSHIP

The CPTPP, also known as the TPP11 or TPP 2.0, was agreed upon in 2017 between eleven countries in the Pacific Rim.<sup>27</sup> It entered into force on 30 December 2018. The CPTPP represents 13.4% of the global gross domestic product (USD 13.5 trillion), making it the third largest trade agreement after the North American Free Trade Agreement (NAFTA) and the single market of the European Union.<sup>28</sup> The chapter on e-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.<sup>29</sup> Despite the US having dropped out of the agreement with the start of the Trump administration, the chapter reflects the US efforts to secure obligations on digital trade and is a verbatim reiteration of the Transpacific Partnership (TPP) chapter. The TPP was supposed to be a ‘twenty-first century’ agreement that would match contemporary global trade better than the analogue WTO Agreements.<sup>30</sup> It was

<sup>25</sup> For instance, forty-seven PTAs have e-commerce chapters that include provisions to facilitate e-commerce; forty-five treaties have specific norms on addressing the needs of SMEs; fifty-six treaties have norms on paperless trading; sixty-eight PTAs on electronic authentication. For details and listing of all relevant PTAs, see Burri & Polanco, *supra* n. 13.

<sup>26</sup> Only twelve PTAs have binding rules on data flows. Burri & Polanco, *supra* n. 13; also Mira Burri, *The Governance of Data and Data Flows in Trade Agreements: The Pitfalls of Legal Adaptation*, 51 UC Davies L. Rev. 65–132 (2017).

<sup>27</sup> Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam.

<sup>28</sup> 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 Feb. 2018).

<sup>29</sup> Articles 14.5, 14.8, 14.12, 14.13, 14.14, 14.17 and 14.18 CPTPP respectively.

<sup>30</sup> See e.g. Claude Barfield, *The Trans-Pacific Partnership: A Model for Twenty-First-Century Trade Agreements?*, 2 Int'l Econ. Outlook (2011); Tania Voon, *Introduction: National Regulatory Autonomy*

only logical in this sense that there was sizeable weight in the negotiations given to digital trade. In terms of the breadth and depth of the commitments, the United States Trade Representative (USTR) strived for substantially exceeding the ‘golden standard’ created by the earlier US–South Korea Free Trade Agreement (KORUS). The final text of the TPP and now the CPTPP entails notable successes in this regard, as well as some failings. A closer look at the CPTPP e-commerce chapter follows.

In the 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>31</sup> 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.<sup>32</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>33</sup>; some additional exceptions are also specified.<sup>34</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>35</sup> which are defined broadly pursuant to Article 14.1.<sup>36</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 United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Commerce 1996 or the UN Convention on the Use of Electronic Communications in International Contracts. Parties must endeavour to (1) avoid any unnecessary regulatory burden on electronic transactions; and (2) facilitate

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and the *Trans-Pacific Partnership Agreement*, in *Trade Liberalisation and International Cooperation: A Legal Analysis of the Trans-Pacific Partnership Agreement* 1–10 (Tania Voon ed., Cheltenham, UK: Edward Elgar 2013). The USTR had various such references on its dedicated TPP website – these have been now removed.

<sup>31</sup> Article 14.2(2) CPTPP.

<sup>32</sup> Article 14.2(3) CPTPP.

<sup>33</sup> Article 14.2(4) CPTPP.

<sup>34</sup> Article 14.2(5) and (6) CPTPP.

<sup>35</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>36</sup> Digital product means a computer programme, text, video, image, sound recording or other product i.e. 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.

input by interested persons in the development of its legal framework for electronic transactions.<sup>37</sup> 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.<sup>38</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>39</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>40</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, previously unaddressed under the WTO framework. Most 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>41</sup> 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 causality 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'.<sup>42</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 supposed to balance trade and non-trade interests by 'excusing' certain violations but is also extremely hard to

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<sup>37</sup> Article 14.5(2) CPTPP.

<sup>38</sup> Article 14.9 CPTPP.

<sup>39</sup> Article 14.6(1) CPTPP.

<sup>40</sup> Article 14.6(2) CPTPP.

<sup>41</sup> Article 14.11(2) CPTPP.

<sup>42</sup> Article 14.11(3) CPTPP.

pass.<sup>43</sup> The CPTPP test differs from the WTO norms in one significant element: while there is a list of public policy objectives in GATT and GATS, the CPTPP provides no such enumeration and simply speaks of a 'legitimate public policy objective'.<sup>44</sup> This permits more regulatory autonomy for the CPTPP signatories; it may be linked however to legal uncertainty. Further, it should be noted that the ban on localization measures is softened with regard to financial services and institutions.<sup>45</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>46</sup> Government procurement is also excluded.<sup>47</sup>

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>48</sup> This means that tailor-made products are excluded, as well as software used for critical infrastructure and those in commercially negotiated contracts.<sup>49</sup> 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.

Overall, these provisions illustrate an interesting development because it is evident that they do not simply entail a clarification of existing bans on discrimination, nor do they merely set higher standards, as is anticipated from trade agreements. Rather, they 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

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<sup>43</sup> 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. 383–405 (2015).

<sup>44</sup> Article 14.11(3) CPTPP.

<sup>45</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>46</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>47</sup> Article 14.8(3) CPTPP.

<sup>48</sup> Article 14.17(2) CPTPP.

<sup>49</sup> *Ibid.*

‘take into account principles or guidelines of relevant international bodies’.<sup>50</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 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.<sup>51</sup>

Parties are also invited to promote compatibility between their data protection regimes, by essentially treating lower standards as equivalent.<sup>52</sup> The goal of these norms can be interpreted as a prioritization of trade over privacy rights. This has been pushed by the US during the TPP negotiations, as the US subscribes to a relatively weak and patchy protection of privacy.<sup>53</sup> Timewise, this push came also at the phase, when the US was wary that it could lose the privilege of transatlantic data transfer, as a consequence of the judgment of the Court of Justice of the European Union (CJEU) that struck down the EU–US Safe Harbour Agreement.<sup>54</sup>

While the attention is commonly and understandably focused on data flows and data protection, it should be noted that the CPTPP includes also provisions on consumer protection<sup>55</sup> and spam control.<sup>56</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>57</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>58</sup> As the obligations are

<sup>50</sup> Article 14.8(2) CPTPP.

<sup>51</sup> *Ibid.*, at fn. 6.

<sup>52</sup> Article 14.8(5) CPTPP.

<sup>53</sup> See e.g. James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 Yale L. J. 1151–1221 (2004); Paul M. Schwartz & Daniel J. Solove, *Reconciling Personal Information in the United States and European Union*, 102 Cal. L. Rev. 877–916 (2014).

<sup>54</sup> Case C-362/14 *Schrems*, judgment of 6 Oct. 2015, EU:C:2015:650. Maximilian Schrems is an Austrian citizen, who filed a suit against the Irish supervisory authority, after it rejected his complaint over Facebook’s practice of storing user data in the US. The plaintiff claimed that his data was not adequately protected in light of the NSA revelations and this, despite the existing agreement between the EU and the US – the so-called ‘safe harbour’ scheme. The later EU-US ‘privacy shield’ arrangement has been also rendered invalid by a recent judgment: Case C-311/18, *Data Protection Commissioner v. Facebook Ireland Limited, Maximilian Schrems (Schrems II)*, judgment of 16 July 2020, ECLI:EU:C:2020:559.

<sup>55</sup> Article 14.17 CPTPP.

<sup>56</sup> Article 14.14 CPTPP.

<sup>57</sup> Article 14.10 CPTPP.

<sup>58</sup> Article 14.10(a) CPTPP. fn. 6 to this paragraph specifies that: ‘The Parties recognize that an Internet access service supplier that offers its subscribers certain content on an exclusive basis would not be acting contrary to this principle’.

unlinked to remedies for situations, such as blocking, throttling, discriminating or filtering content, it is unlikely that the CPTPP would lead to uniform approach with regard to net neutrality across the CPTPP countries.

### 3.3 THE UNITED STATES MEXICO CANADA AGREEMENT AND THE UNITED STATES–JAPAN DIGITAL TRADE AGREEMENT

After the withdrawal of the United States from the TPP, there was some uncertainty as to the direction the US will follow in its trade deals in general and on matters of digital trade in particular. The renegotiated NAFTA, which is now referred to as the ‘USMCA’, casts the doubts aside. The USMCA has a comprehensive e-commerce chapter, which is now also properly titled ‘Digital Trade’ and follows all critical lines of the CPTPP and creates an even more ambitious template.

With regard to replicating the CPTPP model the USMCA follows the same broad scope of application,<sup>59</sup> ban customs duties on electronic transmissions<sup>60</sup> and binds the parties for non-discriminatory treatment of digital products.<sup>61</sup> Furthermore, it provides for a domestic regulatory framework that facilitates online trade by enabling electronic contracts,<sup>62</sup> electronic authentication and signatures,<sup>63</sup> and paperless trading.<sup>64</sup>

The USMCA follows the CPTPP model also with regard to data issues and ensures the free flow of data through a clear ban on data localization<sup>65</sup> and a hard rule on free information flows.<sup>66</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>67</sup> Beyond these similarities, the USMCA introduces some novelties. The first one is that the USMCA departs from the standard US approach and signals abiding to some data protection principles and guidelines of relevant

<sup>59</sup> Article 19.2 USMCA.

<sup>60</sup> Article 19.3 USMCA.

<sup>61</sup> Article 19.4 USMCA.

<sup>62</sup> Article 19.5 USMCA.

<sup>63</sup> Article 19.6 USMCA.

<sup>64</sup> Article 19.9 USMCA.

<sup>65</sup> Article 19.12 USMCA.

<sup>66</sup> Article 19.11 USMCA.

<sup>67</sup> Article 19.11(2) USMCA. There is a footnote attached, which clarifies: A measure does not meet the conditions of this paragraph if it accords different treatment to data transfers solely on the basis that they are cross-border in a manner that modifies the conditions of competition to the detriment of service suppliers of another Party. The footnote does not appear in the CPTPP treaty text.

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’,<sup>68</sup> Article 19.8 requires from the parties to:

adopt or maintain a legal framework that provides for the protection of the personal information of the users of digital trade. In the development of its legal framework for the protection of personal information, each Party should take into account principles and guidelines of relevant international bodies, such as the APEC Privacy Framework and the OECD Recommendation of the Council concerning Guidelines governing the Protection of Privacy and Transborder Flows of Personal Data (2013).<sup>69</sup>

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,<sup>70</sup> and aim to provide remedies for any violations.<sup>71</sup> This is interesting because it goes beyond what the US may have in its national laws on data protection and also because it reflects some of the principles the European Union has advocated for in the domain of privacy protection. One can of course wonder whether this is a development caused by the ‘Brussels effect’, whereby the EU ‘exports’ its own domestic standards and they become global,<sup>72</sup> or whether we are seeing a shift in US privacy protection regimes as well.<sup>73</sup>

Beyond data protection, three further innovations of the USMCA may be mentioned. The first refers to the inclusion of ‘algorithms’, the meaning of which is ‘a defined sequence of steps, taken to solve a problem or obtain a result’<sup>74</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 the recognition of ‘interactive computer services’ as particularly vital to the growth of digital trade. Parties pledge in this sense not to:

adopt or maintain measures that treat a supplier or user of an interactive computer service as an information content provider in determining liability for harms related to information stored, processed, transmitted, distributed, or made available by the service, except to the extent the supplier or user has, in whole or in part, created, or developed the information.<sup>75</sup>

<sup>68</sup> Article 19.8(1) USMCA.

<sup>69</sup> Article 19.8(2) USMCA.

<sup>70</sup> Article 19.8(3) USMCA.

<sup>71</sup> Article 19.8(4) and (5) USMCA.

<sup>72</sup> Anu Bradford, *The Brussels Effect*, 107 Nw. U. L. Rev. 1-68 (2012); Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford: Oxford University Press 2020).

<sup>73</sup> See Anupam Chander et al., *Catalyzing Privacy Law*, University of Colorado Law Legal Studies Research Paper No 19-25 (2019).

<sup>74</sup> Article 19.1 USMCA.

<sup>75</sup> Article 19.17(2) USMCA. Annex 19-A creates specific rules with the regard to the application of Art. 19.17 for Mexico, in essence postponing its implementation for three years.

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.<sup>76</sup> It also secures the application of section 230 of the US Communications Decency Act,<sup>77</sup> 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>78</sup>

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 endeavour to ensure that the information is in a machine-readable and open format and can be searched, retrieved, used, reused, and redistributed'.<sup>79</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>80</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>81</sup> The US–Japan DTA can be said to replicate almost all provisions of the USMCA and the CPTPP,<sup>82</sup> including the new USMCA rules on open government data,<sup>83</sup> source code<sup>84</sup> and interactive computer services<sup>85</sup>

<sup>76</sup> On intermediaries' liability, see e.g. Sonia S. Katyal, *Filtering, Piracy, Surveillance and Disobedience*, 32 Col. J. L. & Arts 401–426 (2009); *Governance of Online Intermediaries* (Urs Gasser & Wolfgang Schulz eds, Cambridge, MA: Berkman Centre for Internet and Society 2015).

<sup>77</sup> 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.

<sup>78</sup> See e.g. Lauren Feine, *Big Tech's Favorite Law Is Under Fire*, CNBC (19 Feb. 2020). For an analysis of the free speech implications of digital platforms, see Jack M. Balkin, *Free Speech Is a Triangle*, 118 Col. L. Rev. 2011–2055 (2018).

<sup>79</sup> Article 19.18(2) USMCA.

<sup>80</sup> Article 19.8(3) USMCA.

<sup>81</sup> For the text of the agreements, see, <https://ustr.gov/countries-regions/japan-korea-apec/japan/us-japan-trade-agreement-negotiations/us-japan-digital-trade-agreement-text> (accessed 7 Dec. 2020).

<sup>82</sup> Article 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>83</sup> Article 20 US–Japan DTA.

<sup>84</sup> Article 17 US–Japan DTA.

<sup>85</sup> Article 18 US–Japan DTA. A side letter recognizes the differences between the US and Japan's systems governing the liability of interactive computer services suppliers and parties agree that Japan need not change its existing legal system to comply with Art. 18.

but notably covering also financial and insurance services as part of the scope of agreement. A new provision has been added with regard to Information and Communication 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.<sup>86</sup> This rule is similar to Annex 8-B, Section A.3 of the CPTPP Chapter on technical barriers to trade. It is a reaction to a practice by several countries, in particular China, that 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, that thrive on data flows with less governmental intervention.<sup>87</sup>

Other minor differences that can be noted when comparing with the USMCA are some things missing in the US–Japan DTA – such as rules on paperless trading, net neutrality and the mention of data protection principles.<sup>88</sup> A final note deserve the exceptions attached to the US–Japan DTA, which make a reference to the WTO general exception clauses of Article XIV GATS and Article XX GATT 1994, whereby the parties agree to their *mutatis mutandis* application.<sup>89</sup> Further exceptions are listed with regard to security<sup>90</sup>; prudential and monetary and exchange rate policy<sup>91</sup>; and taxation.<sup>92</sup>

### 3.4 THE DIGITAL ECONOMY PARTNERSHIP AGREEMENT

The 2020 Digital Economy Partnership Agreement (DEPA) between Chile, New Zealand, and Singapore,<sup>93</sup> all parties also to the CPTPP, is not conceptualized as a purely trade agreement but one that is meant to address the broader issues of the digital economy. In this sense, its scope is wide, open and flexible and covers a

<sup>86</sup> Article 21.3 US–Japan DTA.

<sup>87</sup> See Han-Wei Liu, *Inside the Black Box: Political Economy of the Trans-Pacific Partnership's Encryption Clause*, 51 J. World Trade 309–334 (2017).

<sup>88</sup> Article 15 merely stipulates that parties shall adopt or maintain a legal framework that provides for the protection of the personal information of the users of digital trade and publish information on the personal information protection, including how: (1) natural persons can pursue remedies; and (2) an enterprise can comply with any legal requirements.

<sup>89</sup> Article 3 US–Japan DTA.

<sup>90</sup> Article 4 US–Japan DTA.

<sup>91</sup> Article 5 US–Japan DTA.

<sup>92</sup> Article 6 US–Japan DTA.

<sup>93</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/> (accessed 7 Dec. 2020)

number of emergent issues, such as those in the areas of artificial intelligence (AI) and digital inclusion. The agreement is also not a closed deal but one that is open to other countries<sup>94</sup> and the DEPA is meant to complement the WTO negotiations on e-commerce and build upon the digital economy work underway within the Asia-Pacific Economic Cooperation (APEC), the Organization for Economic Co-operation and Development (OECD) and other international forums. To enable flexibility and cover a wide range of issues, the DEPA follows a modular approach. After Module 1, specifying general definitions and initial provisions, Module 2 focuses on ‘Business and Trade Facilitation’; Module 3 covers ‘Treatment of Digital Products and Related Issues’; Module 4 ‘Data Issues’; Module 5 ‘Wider Trust Environment’; Module 6 ‘Business and Consumer Trust’; Module 7 ‘Digital Identities’; Module 8 ‘Emerging Trends and Technologies’; Module 9 ‘Innovation and the Digital Economy’; Module 10 ‘Small and Medium Enterprises Cooperation’; and Module 11 ‘Digital Inclusion’. The rest of the modules deal with the operationalization and implementation of the DEPA and cover common institutions (Module 12); exceptions (Module 13); transparency (Module 14); dispute settlement (Module 15); and some final provisions with regard to amendments, entry into force, accession and withdrawal (Module 16).

The type of rules varies across the different modules. On the one hand, all rules of the CPTPP are replicated, some of the USMCA rules, such as the one on open government data<sup>95</sup> (but not source code), and some of the US–Japan DTA provisions, such as the one on ICT goods using cryptography,<sup>96</sup> have been included too. On the other hand, there are many other so far unknown to trade agreements rules 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,<sup>97</sup> 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: (1) sanitary and phytosanitary certificates and (2) import and export data’.<sup>98</sup> 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). Module 8 on emerging trends and technologies is also particularly interesting to mention, as it

<sup>94</sup> Article 16.2 DEPA.

<sup>95</sup> Article 9.4 DEPA.

<sup>96</sup> Article 3.4 DEPA. The article also provides detailed definitions of cryptography, encryption, and cryptographic algorithm and cipher.

<sup>97</sup> Article 2.2: Paperless Trading; Art. 2.3: Domestic Electronic Transactions Framework.

<sup>98</sup> Article 2.2(5) DEPA. ‘Single window’ is defined as a facility that allows Parties involved in a trade transaction to electronically lodge data and documents with a single-entry point to fulfil all import, export and transit regulatory requirements (Art. 2.1 DEPA).

highlights a range of key topics that demand attention by policymakers, such as in the areas of fintech and AI. In the latter domain, the parties agree to promote the adoption of ethical and governance frameworks that support the trusted, safe, and responsible use of AI technologies, and in adopting these AI Governance Frameworks parties would seek to follow internationally-recognized principles or guidelines, including explainability, transparency, fairness, and human-centred values.<sup>99</sup> 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.<sup>100</sup> 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<sup>101</sup> 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.<sup>102</sup>

Overall, the DEPA is an ingenuine project 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.

Keeping in mind these far-reaching rule-frameworks created through recent treaties, the following section offers an overview of the current state of affairs of the electronic commerce negotiations under the umbrella of the WTO. It also briefly summarizes the results of the previous negotiations under the Trade in Services Agreement (TiSA), which may also offer hints as to the political feasibility of some approaches towards digital trade rules.

#### 4 STATE OF AFFAIRS IN THE MULTILATERAL AND PLURILATERAL NEGOTIATIONS ON DIGITAL TRADE

##### 4.1 STATE OF AFFAIRS IN THE ONGOING WTO E-COMMERCE NEGOTIATIONS

Since the launch of the Work Programme on Electronic Commerce in 1998 and as noted at the outset of this article, a great deal of issues has been discussed in all areas of trade, including trade in goods, trade in services, IP protection and economic development, and four WTO bodies were accordingly charged with the responsibility of carrying out the programme: the Council for Trade in Services; the

<sup>99</sup> Article 8.2(2) and (3) DEPA.

<sup>100</sup> Articles 8.3 and 8.4 DEPA.

<sup>101</sup> Article 9.2 DEPA.

<sup>102</sup> Article 11.2 DEPA.

Council for Trade in Goods; the Council for TRIPS (Agreement on Trade-Related Aspects of Intellectual Property Rights); and the Committee on Trade and Development. The General Council has too played a key role and continuously reviewed the Work Programme. After the 2001 Doha Ministerial Declaration, the General Council also agreed to hold ‘dedicated’ discussions on cross-cutting issues whose relevance affect all agreements of the multilateral system and there have been five such dedicated discussions so far held under General Council’s auspices.<sup>103</sup> The issues discussed included: classification of the content of certain electronic transmissions; development-related issues; fiscal implications of electronic commerce; relationship (and possible substitution effects) between e-commerce and traditional forms of commerce; imposition of customs duties on electronic transmissions; competition; jurisdiction/applicable law and other legal issues.<sup>104</sup> Neither under the designated council debates, nor in the dedicated discussions have there been any definitive conclusions or results so far, and participants have largely held the view that further work is needed. 2016 and 2017 were years of reinvigorated interest towards matters of electronic commerce but the statements by the WTO Members did not yet point towards a clear negotiating mandate but again exposed some of the ‘old’ divides – between the willingness to create new rules or rather adhere to existing commitments; between the willingness to address trade barriers or rather preserve policy space.<sup>105</sup>

In the beginning of 2019, 76 WTO Members embarked on a new effort to move towards a digital trade agreement<sup>106</sup> – 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 e-commerce in the WTO.<sup>107</sup> Work continued in the different councils and a new round of communications was sent by diverse WTO members – this time all the major players, the US, the EU and even China, as well as a number of developing countries and some least-developed countries (LDCs), seemed to be on board. A careful look at the submitted documents, while substantially improved in comparison to previous developments under the E-Commerce Work Programme, does not however necessarily reflect an agreement on the key issues.

<sup>103</sup> For all relevant information, see, [https://www.wto.org/english/tratop\\_e/ecom\\_e/ecom\\_e.htm](https://www.wto.org/english/tratop_e/ecom_e/ecom_e.htm) (accessed 7 Dec. 2020).

<sup>104</sup> WTO, *Dedicated Discussion on Electronic Commerce Under the Auspices of the General Council, Summary by the Secretariat of the Issues Raised*, WT/GC/W/436, 6 July 2001.

<sup>105</sup> See e.g. WTO, *Work Programme on E-Commerce, Non-Paper from the United States*, JOB/GC/94 (2016); WTO, *Work Programme on E-Commerce, Non-Paper from Brazil*, JOB/GC/98 (2016); WTO, *Joint Statement on Electronic Commerce, Buenos Aires Ministerial Conference*, WTO/MIN/(17)60, 15 Dec. 2017.

<sup>106</sup> WTO, *Joint Statement on Electronic Commerce*, WT/L/1056, 25 Jan. 2019. There had been changes in the membership between the 2017 and 2019 Joint Statements. Cambodia and Guatemala dropped out in 2019, while China, El Salvador, Georgia, Honduras, Mongolia, Nicaragua, Thailand and the United Arab Emirates joined. Benin joined on 29 Mar. 2019, raising the number of participants to seventy-seven. Presently there 86 members.

<sup>107</sup> *Osaka Declaration on Digital Economy*, [https://www.wto.org/english/news\\_e/news19\\_e/osaka\\_declaration\\_on\\_digital\\_economy\\_e.pdf](https://www.wto.org/english/news_e/news19_e/osaka_declaration_on_digital_economy_e.pdf) (accessed 7 December 2020).

On the one hand, the discussions in the special councils reveal this. The reports of the Chairs of the Council for Trade in Services and of the Council for Trade in Goods give an overview of the discussions barely showing agreement on fundamental issues,<sup>108</sup> and the TRIPS Council Chair reported that there has been ‘no appetite among delegations to discuss the Work Programme’.<sup>109</sup> Even on less controversial matters, such as the customs moratorium on electronic transmissions, while most countries have supported making it permanent, there has been a push by India and South Africa to rethink its scope, definition and impact.<sup>110</sup> By the end of 2019, Members merely agreed again to reinvigorate the work under the E-Commerce Programme based on the existing mandate, including structured discussions in early 2020 on all trade-related topics brought forward by members.<sup>111</sup>

On the other hand, the sheer variety of topics proposed by different WTO members and the divergence evident on some of the fundamental issues of digital trade between the major players are a proof of the impediments to moving forward. The most common issues that have been raised include trade facilitation, customs duties, privacy and online security, infrastructure for digital trade, electronic payments and paperless trading, IP protection, data localization, the interests of developing and least-developed countries, inclusion of women and micro – , small – and medium-sized enterprises (MSMEs), as well as the need for cooperation and more clarity on jurisdictional issues.<sup>112</sup> Overall, there seems to be some agreement on less contentious topics, such as ensuring the validity of electronic contracts, fostering paperless trading, protecting online consumers from fraudulent or deceptive commercial practices and spam.<sup>113</sup> Yet, there are some notable divergences amongst the members and especially between the key players of the EU, US and China. China in particular subscribes to a very narrow definition of digital trade and argues that the negotiation should focus on the discussion of cross-border trade *in goods* enabled by the Internet, together with relevant payment and logistics services while paying attention to the digitization trend of trade in services.<sup>114</sup> Beyond trade in goods, China’s efforts are not very far-reaching and seek to explore the ways to develop international rules for electronic commerce

<sup>108</sup> WTO, *Work Programme on Electronic Commerce, Report by the Chairman of the Council for Trade in Services to the General Council*, S/C/57 (11 July 2019); WTO, *Work Programme on Electronic Commerce, Report by the Chairman of the Council for Trade in Goods to the General Council*, G/C/65 (18 July 2019).

<sup>109</sup> WTO, *Work Programme on Electronic Commerce – Review of Progress, Report by the Chairperson*, WT/GC/W/780 (25 July 2019).

<sup>110</sup> *Ibid.*

<sup>111</sup> WTO, *Work Programme on Electronic Commerce, General Council Decision*, WT/L/1079 (11 Dec. 2019).

<sup>112</sup> For an overview of all proposals and the state of negotiations, see Katya Garcia-Israel & Julien Grollier, *Electronic Commerce Joint Statement: Issues in the Negotiation Phase* (Geneva: CUTS International 2019).

<sup>113</sup> *Ibid.*

<sup>114</sup> WTO, *Joint Statement on Electronic Commerce, Communication from China*, INF/ECOM/19 (24 Apr. 2019), at 2.4.

centering on a sound transaction environment and a safe and trustworthy market environment.<sup>115</sup> Domains in which China thinks that members should take action include clarification of trade-related aspects of e-commerce, trade facilitation, extension of the customs duties moratorium (without making it permanent however), online consumer protection, personal information protection, spam, cybersecurity, and transparency.<sup>116</sup> With regard to personal information protection, China simply notes that ‘Members should adopt measures that they consider appropriate and necessary to protect the personal information of electronic commerce users’.<sup>117</sup> The Chinese proposal does not explicitly address data flows, nor does it commit to a ban on data localization measures, and a change in the Chinese position is unlikely given the domestic framework and China’s preoccupation with national security issues.<sup>118</sup> The Chinese communication notes in addition that with issues, such as cyber security, data safety and privacy, ‘to advance negotiation, differences in Members’ respective industry development conditions, historical and cultural traditions as well as legal systems need to be fully understood’.<sup>119</sup>

The EU states that it is ‘fully committed to ongoing WTO negotiations on e-commerce. In this context, it will seek to negotiate a comprehensive and ambitious set of WTO disciplines and commitments, to be endorsed by as many WTO Members as possible’.<sup>120</sup> The EU proposal has two distinct goals – it includes on the one hand concrete provisions on digital trade and above all on its facilitation, and on the other hand proposes a revision of the WTO Reference Paper on basic telecommunication services and requests market access commitments in services sectors of relevance for digital trade. In the former category and unsurprisingly, one can find provisions on electronic contracts,<sup>121</sup> electronic authentication and signatures,<sup>122</sup> consumer protection,<sup>123</sup> spam,<sup>124</sup> and the ban on customs duties on electronic transmissions.<sup>125</sup> More surprising in this category are the rules included on source code,<sup>126</sup> open internet access,<sup>127</sup> and cross-border data

<sup>115</sup> *Ibid.*

<sup>116</sup> *Ibid.*, at s. 3.

<sup>117</sup> *Ibid.*, para. 3.9.

<sup>118</sup> On the likeliness of changes in China’s position, see Gary Clyde Hufbauer & Zhiyao Lu, *Global E-Commerce Talks Stumble on Data Issues, Privacy, and More*, Peterson Institute for International Economics Policy Brief 19–14 3–4 (Oct. 2019).

<sup>119</sup> *Ibid.*, para. 4.1.

<sup>120</sup> WTO, *Joint Statement on Electronic Commerce, EU Proposal for WTO Disciplines and Commitments Relating to Electronic Commerce*, INF/ECOM/22 (26 Apr. 2019), para. 1.1.

<sup>121</sup> *Ibid.*, para. 2.1.

<sup>122</sup> *Ibid.*, para. 2.2.

<sup>123</sup> *Ibid.*, para. 2.3.

<sup>124</sup> *Ibid.*, para. 2.4.

<sup>125</sup> *Ibid.*, para. 2.5.

<sup>126</sup> *Ibid.*, para. 2.6.

<sup>127</sup> *Ibid.*, para. 2.9.

flows,<sup>128</sup> which are not typical to the existing EU PTAs, have only been recently taken up in the ongoing negotiations with Australia, New Zealand and Tunisia, and make a nod to the more advanced US-led templates on digital trade. The EU commitment to data flows and the ban on localization measures, while signaling a shift in the EU position on data, now also demand coupling with the high standards of data protection that the EU endorses and underscore that the protection of personal data and privacy is a fundamental right.<sup>129</sup> With regard to commitments in the computer and related and the telecommunications services sectors, the EU is trying to achieve commitments by the WTO Members that reflect its slightly higher than the GATS level of commitments in its own PTAs.<sup>130</sup>

The US proposal is the most far-reaching of all submitted proposals and is essentially a compilation of the USMCA Digital Trade chapter and the US–Japan DTA – thus in essence creating the US most ambitious trade agreement template with an inclusion of financial services.<sup>131</sup> The strong commitment to free flow of data is evident and follows the language of the USMCA in Article 8 coupled with the ban on localization measures in Article 9. Source code, interactive computer services and open government data are also included.<sup>132</sup> The text on personal information protection reiterates the language of the US–Japan DTA and while obliging the parties to adopt or maintain a legal framework for data protection, ensures policy space for a variety of countries’ approaches, including voluntary schemes. Unlike the USMCA, there is no reference to international standards, nor there is a mention of the essential data protection principles.<sup>133</sup>

Overall, the divergence on the critical issues of data flows is manifest, when reading the proposals of the major players and does not prompt a move towards any sort of reconciliation of the positions, at least at this point of time and possibly also in the future.<sup>134</sup>

#### 4.2 EXPERIENCE GATHERED IN OTHER PLURILATERAL NEGOTIATIONS

Other negotiations, which may offer us hints as to the viability of a Digital Trade Treaty are the ones on the TiSA, which has been after a substantial progress currently put on ice. The TiSA was launched in early 2013 and meant to provide deeper market

<sup>128</sup> *Ibid.*, para. 2.7.

<sup>129</sup> *Ibid.*, para. 2.8.

<sup>130</sup> For a detailed analysis, see Mira Burri, *Telecommunications and Media Services in Preferential Trade Agreements: Path Dependences Still Matter*, in *European Yearbook of International Economic Law* (Markus Krajewski & Rhea Hoffmann eds, Berlin: Springer 2020).

<sup>131</sup> WTO, *Joint Statement on Electronic Commerce, Communication from the United States*, INF/ECOM/23 (26 Apr. 2019).

<sup>132</sup> *Ibid.*, Arts 12, 13 and 14 respectively.

<sup>133</sup> *Ibid.*, Art. 7.

<sup>134</sup> Hufbauer & Lu, *supra* n. 118; also Henry Gao, *Digital or Trade? The Contrasting Approaches of China and US to Digital Trade*, 21 J. Int’l Econ. L. 297–321 (2018).

access in the services sectors, where liberalization is still quite low, as well as some far-reaching regulatory arrangements for services.<sup>135</sup> TiSA had been supported by the US, EU, Japan, and other countries part of the group ‘Really good friends of services’ (not including China however).<sup>136</sup>

Regarding digital trade, TiSA wished to curb digital protectionism. Expressions of this willingness were evident in the texts of the Annex on Telecommunications, as well as in the Chapter on Electronic Commerce and the Annex on Localization Measures. The Chapter on Electronic Commerce had a broad scope and applied to measures affecting trade in services using or enabled by electronic means. Financial services and government procurement were likely to be excluded, although the US was pushing for a softer language in this respect. There was much contestation on the article on the movement of information. The US, together with Japan and Canada, suggested that ‘[n]o Party may prevent a service supplier of another Party from transferring, accessing processing or storing information, including personal information, within or outside the Party’s territory, where such activity is carried out in connection with the conduct of the service supplier’s business’.<sup>137</sup> Many countries considered however exceptions or conditions to this ban, so as to allow more flexibility.<sup>138</sup> The diverging approaches of the TiSA parties with regard to data protection were further exposed in the provisions on online consumer protection and personal information protection.<sup>139</sup> Yet, there seemed to be some agreement on the prohibition of custom duties on electronic transactions (Article 10), as well as on electronic authentication and signatures (Article 9). The provisions on open networks, network access and use, and on location of computing facilities, although contentious, also revealed an effort towards more binding rules.<sup>140</sup>

An important breakthrough in the TiSA negotiations with regard to digital trade had been the Annex on Localization Measures. The Annex sought to ban local presence, local content, and other performance requirements. To allow such commitments, the Annex provided for a ‘grandfathering’ clause for those localization measures inscribed in the schedules of specific commitments, as well as for exceptions on security grounds, for financial services and government procurement.<sup>141</sup>

<sup>135</sup> Juan A. Marchetti & Martin Roy, *The TiSA Initiative: An Overview of Market Access Issues*, WTO Staff Working Paper ERSD-2013-11 (2013).

<sup>136</sup> Negotiating parties included: Australia, Canada, Chile, Chinese Taipei, Colombia, Costa Rica, Hong Kong, Iceland, Israel, Japan, Liechtenstein, Mexico, New Zealand, Norway, Pakistan, Panama, Paraguay, Peru, South Korea, Switzerland, Turkey, the US and the EU.

<sup>137</sup> Article 2.1 TiSA Chapter on Electronic Commerce.

<sup>138</sup> Article 2.2 TiSA Chapter on Electronic Commerce; also Submission by Switzerland: Provisions on Trade-related Principles for Information and Communication Technology Services, Really Good Friends – Meeting of 18 Mar. 2013.

<sup>139</sup> Articles 3 and 4 TiSA Chapter on Electronic Commerce.

<sup>140</sup> Articles 7 and 8 TiSA Chapter on Electronic Commerce.

<sup>141</sup> Articles X.4 and X.5 TiSA Annex on Localization Measures.

## 5 MOVING TOWARDS A NEW TREATY ON DIGITAL TRADE?

The above analysis of the developments in preferential, plurilateral and multilateral forums reveals the critical importance of digital trade as a negotiation topic and the substantial efforts made, in particular in recent years, to address this topic and create an adequate rule-framework. The achievements made in some PTAs and the discrete digital trade agreements, as analysed 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 E-Commerce Programme but also the newer issues in the context of a global data-driven economy, in particular with regard to the free flow of information and in expression of the wish to curtail digital protectionism. Yet, it should be underscored that these sophisticated and far-reaching treaties on digital trade are only a handful and the number of states involved proactively in data governance still quite low. Indeed, if one takes into account the broader landscape of PTAs, the heterogeneity of approaches and depth of commitments is striking and only on very few issues, such as the ban on customs duties on electronic transmissions, electronic contracts and signatures, and paperless trading, do we have some level of convergence.<sup>142</sup> The developments in the current WTO negotiations on e-commerce, while a 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. Here in particular the different approaches followed by China, the EU and the US are manifest and create a serious impediment to a deep agreement that adequately reflects contemporary digital trade practices and addresses the associated concerns of businesses and states.

Against this contentious political backdrop, one can imagine two solutions. The first is helpful yet rather unambitious and calls for narrowing down of the scope of the e-commerce negotiations, which would exclude all 'difficult' issues, so that some basic agreement on the facilitation of digital trade, possibly including a clarification of the applicability of existing rules, becomes feasible.<sup>143</sup> It appears now nearing the end of 2020 that it is the option that has gained some traction, as members under the leadership of the co-conveners of Australia, Japan and Singapore, move towards a clean text including provisions on spam, source code, open government data, trade facilitation in goods, services market access, electronic signatures and authentication, and online consumer protection. The second avenue is to pursue some sort of a flexible, club solution, which involves a smaller number of countries and permits some tailoring of the commitments that

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<sup>142</sup> Burri & Polanco, *supra* n. 13.

<sup>143</sup> Willemyns, *supra* n. 14.

also deal with the hard questions around data. Here one can think of addressing cross-border data issues horizontally and across sectors. There are various ways to do this – for instance, as part of the horizontal commitments of the services schedules; in the form of a reference paper attached to the schedules as an additional commitment under Article XVIII GATS; or as part of a dedicated plurilateral digital trade agreement – which can either work on a MFN-basis (like the Information Technology Agreement) or benefit only the signatories on a non-MFN basis (like the Government Procurement Agreement). Having larger clubs of countries under the CPTPP, the DEPA and the US-led agreements, as well as taking into consideration the shift in the EU position to admit norms on a data localization ban, data flows, source code and open Internet access, may provide a fruitful basis for such an approach. To accommodate more countries, it may be critical in this context to provide working mechanisms that may counter-balance the free information flows and the non-economic concerns that cross-border transfer of data raise, notably with regard to personal data protection.<sup>144</sup> While such a club-solution is only a second-best option if compared to a multi-lateral agreement on digital trade, it may create a model that countries will later on be willing to join or replicate in other trade venues.

There is some urgency attached to a move forward, as we have been recently reminded of the critical role of the Internet in the context of the global crisis triggered by the COVID-19 pandemic, which on the one hand underscored that digital trade can be an important tool for consumers in times of crisis and a key economic driver, including for small businesses. On the other hand, the pandemic also highlighted certain vulnerabilities across the world that need to be addressed, possibly in trade forums.<sup>145</sup>

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<sup>144</sup> Mira Burri, *Privacy and Data Protection*, in *The Oxford Handbook on International Trade Law* (Daniel Bethlehem et al. eds, 2d ed., Oxford: Oxford University Press, forthcoming 2021; on file with the author).

<sup>145</sup> WTO, *E-Commerce, Trade and the Covid-19 Pandemic*, Information Note by the WTO Secretariat (4 May 2020).