

SYMPOSIUM ON DIGITAL TRADE AND INTERNATIONAL LAW

DIGITAL TRADE LAW AND HUMAN RIGHTS

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Trade and human rights have had a complex and contentious relationship. While trade experts assume that human rights and trade law are mutually supportive,¹ human rights lawyers have seldom shared this opinion. Rather, they argue that across different contexts, such as climate change, culture, and development, the hard rules of international trade law focus almost exclusively on economic values and sideline human rights.² This essay seeks to shed more light on these interfaces, focusing particularly on the tensions between trade law and the first generation of human rights, like privacy and free speech, that have been rarely discussed so far.³ It also addresses a gap in the literature on international economic law and human rights with respect to the impact of digitization.⁴ In particular, the essay focuses on the human rights implications of digital trade rulemaking, as a relatively new and dynamic subset of international trade law.

Key in the context of digital trade has been the new dependence on data as intrinsic to the development of data-driven economies and societies.⁵ This dependence has revived older questions about sovereignty and international cooperation, as data's intangibility and pervasiveness pose challenges in determining where data is located, since bits of data, even those associated with a single transaction or online activity, can be located anywhere.⁶ The dependence on data has also triggered new risks, in particular in the area of privacy protection—that this essay discusses—but also in other domains, such as national security.⁷ These risks and the interlinked jurisdictional issues have led governments to install new controls—specifically through measures that “localize” the data, its storage, or its suppliers, so as to keep the data within their sovereign space.⁸ Yet, such interventions create barriers to trade,

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¹ See, e.g., Maya Hertig Randall, *Human Rights Within a Multilateral Constitution: The Example of Freedom of Expression and the WTO*, 16 MAX PLANCK UN Y.B. 183, 186–87 (2012). Ernst-Ulrich Petersmann has emphasized this positive dialogue (see, e.g., Ernst-Ulrich Petersmann, *Human Rights, International Economic Law and Constitutional Justice*, 19 EUR. J. INT'L L. 769 (2008)).

² Hertig Randall, *supra* note 1, at 188.

³ *Id.* at 189 (pointing out that this may be because first generation rights, apart from the right to property, were considered irrelevant for international trade).

⁴ See, e.g., WTO, *World Trade Report 2018: The Future of World Trade: How Digital Technologies Are Transforming Global Commerce* (2018); *BIG DATA AND GLOBAL TRADE LAW* (Mira Burri ed., 2021).

⁵ See, e.g., James Manyika et al., *Big Data: The Next Frontier for Innovation, Competition, and Productivity*, MCKINSEY DIGITAL (May 1, 2011).

⁶ See, e.g., Kristen E. Eichensehr, *Data Extraterritoriality*, 95 TEX. L. REV. 145 (2017); Jennifer Daskal, *The Un-territoriality of Data*, 125 YALE L.J. 326 (2015).

⁷ See Shin-yi Peng, *Digital Trade and National Security: Contextualizing Cybersecurity-Related Exceptions*, 117 AJIL UNBOUND 122 (2023).

⁸ See, e.g., Simon J. Evenett & Johannes Fritz, *Emergent Digital Fragmentation: The Perils of Unilateralism*, Joint Report of the Digital Policy Alert and Global Trade Alert 5 (2022).

potentially endangering the realization of a vibrant data economy.⁹ This renders the balancing exercise between the economic rationale to free data and the protection of public policy objectives and fundamental freedoms particularly intricate.

Human Rights Implications of Digital Trade Law

Faced with the multiple implications of digital transformation, trade law has undergone significant adaptation in recent years. The changes have been channeled primarily through bilateral and regional trade agreements, as the multilateral forum of the World Trade Organization (WTO) has struggled to respond in a timely manner.¹⁰ The new domain of digital trade law includes at times far-reaching and largely economically driven provisions. Yet, the changes that they trigger in domestic regulatory regimes have significant human rights implications. First, because these digital trade rules directly address certain fundamental rights, such as personal data protection. Second, because they delimit the policy space that states have to protect these rights at home. Some of these tensions have not gone unnoticed and there is a vibrant discussion, in both policy and academic circles, on the repercussions of digital trade regulation for the right to privacy.¹¹ However, other human rights, such as free speech, have been largely disconnected from the digital trade policy discussion. Before addressing these debates, it is critical to first understand the scope and reach of some existing digital trade provisions, especially those created under the most advanced preferential trade agreement templates.¹²

Trade Law Goes Digital

Preferential trade agreements of the past two decades increasingly regulate digital trade, or “electronic commerce” as it was initially termed.¹³ Out of the 384 agreements signed between 2000 and 2022, 167 contain provisions on digital trade and 109 have dedicated digital trade chapters.¹⁴ The latter, together with a new type of treaties—the so-called “Digital Economy Agreements”—have become a critical source of new rulemaking that goes beyond conventional trade law’s aspirations to reduce trade barriers and liberalize economic sectors. The new rules differ in their aims and can be clustered into two categories: (1) rules that seek to facilitate digital trade; and (2) data governance rules.

With regard to the first category, the relatively robust framework developed through preferential trade agreements (PTAs) converges to some extent on the scope and substance of the provisions, even among stakeholders with very different geopolitical positioning, although treaty language may still vary. For example, the 2018 Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP),¹⁵ which provided one of the first advanced digital trade templates, includes rules on: electronic contracts with binding obligations for

⁹ See, e.g., Martina F. Ferracane, *The Costs of Data Protectionism*, in *BIG DATA AND GLOBAL TRADE LAW*, *supra* note 4.

¹⁰ See, e.g., *BIG DATA AND GLOBAL TRADE LAW*, *supra* note 4; *ARTIFICIAL INTELLIGENCE AND INTERNATIONAL ECONOMIC LAW: DISRUPTION, REGULATION, AND RECONFIGURATION* (Shin-yi Peng, Ching-Fu Lin & Thomas Streinz eds., 2021).

¹¹ See, e.g., Mira Burri, *Interfacing Privacy and Trade*, 53 CASE W. RES. J. INT’L L. 35 (2021); Anupam Chander & Paul M. Schwartz, *Privacy and/or Trade*, 90 U. CHI. L. REV. 49 (2023).

¹² For a full analysis, see Mira Burri, *A WTO Agreement on Electronic Commerce: An Enquiry into Its Substance and Viability*, 53 GEO. WASH. INT’L L. REV. 110 (forthcoming 2023).

¹³ See Mira Burri & Anupam Chander, *What Are Digital Trade and Digital Trade Law?*, 117 AJIL UNBOUND 99 (2023).

¹⁴ This analysis is based on the *TAPED* dataset.

¹⁵ *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, ATS 23 (entered into force Dec. 30, 2018) [hereinafter CPTPP].

the parties to follow existing UN models; paperless trading, and electronic authentication and signatures, securing equivalence of electronic and physical forms.¹⁶ Furthermore, the CPTTP e-commerce chapter contains provisions, albeit in the form of soft law, on consumer protection, spam control, and net neutrality.¹⁷ Subsequent agreements that have largely followed the CPTTP model¹⁸ include additional provisions on electronic invoicing, express shipments and clearance times, logistics, and electronic payments,¹⁹ which aim to cut red tape and enable digital transactions, while also strengthening business trust. These digital trade facilitation rules, one could argue, have few immediate human rights implications and can largely support the claim of trade experts that the freer the trade, the better for human rights.

Digital Trade Law and Privacy Protection

Data governance provisions, which cover cross-border data flows, data localization measures, and personal data protection have been among the most contentious issues in trade negotiations. They are also the source of observed divergences among stakeholders (with marked disparities between the United States, the European Union, and China), as they share different stances on the interfaces between trade commitments, domestic regulatory regimes, and the protection of fundamental rights through these regimes.

In the era of Big Data, the right to personal data protection is widely acknowledged to be particularly affected by pervasive data collection and use by both companies and governments.²⁰ In the national context, this acknowledgement triggered the reform of data protection laws around the world, best exemplified by the EU General Data Protection Regulation (GDPR).²¹ In the trade law context, an increasing number of PTAs prescribe the adoption of data protection frameworks and compliance with existing international standards.²² However, as privacy protection has been regulated differently across countries, with important variations even between constitutional democracies such as the United States and the European Union,²³ the approaches in digital trade law, too, have been divergent. The European Union endorses personal data protection as a fundamental right and ensures a host of safeguards in place to protect its policy space, including a broadly defined “right to regulate”; a provision on data sovereignty; and a clause that permits adjustments to data commitments after the treaty’s entry into force.²⁴ In contrast, the United States and a number of countries in the Asian-Pacific region, such as the those that are parties to the CPTTP and the United States-Mexico-Canada Agreement (USMCA),²⁵ have chosen to prioritize trade over privacy and only adopted softer provisions on personal data protection.

¹⁶ Respectively, *id.* Art. 14.5, 14.9, 14.6.

¹⁷ Respectively, *id.* Art. 14.17, 14.14, 14.10.

¹⁸ For post-CPTTP developments, see, e.g., Mira Burri, *Trade Law 4.0: Are We There Yet?*, 26 J. INT’L ECON. L. 90 (2023).

¹⁹ See, e.g., [2020 Digital Economy Partnership Agreement Between Chile, New Zealand, Singapore](#), Art. 2.4–2.7 (June 11, 2020) [hereinafter DEPA].

²⁰ See, e.g., Burri, *supra* note 11; Chander & Schwartz, *supra* note 11; Svetlana Yakovleva, *Privacy Protection(ism): The Latest Wave of Trade Constraints on Regulatory Autonomy*, 74 U. MIAMI L. REV. 416 (2020).

²¹ [Regulation 2016/679 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](#), 2016 OJ (L 119/1) [hereinafter GDPR].

²² Burri, *supra* note 11.

²³ See, e.g., Burri, *supra* note 11; Chander & Schwartz, *supra* note 11; Anupam Chander, Margot E. Kaminski & William McGeeveran, *Catalyzing Privacy Law*, 105 MINN. L. REV. 1733 (2021).

²⁴ See, e.g., [EU–New Zealand Free Trade Agreement](#), Art. 12.3–12.5, June 30, 2022 [hereinafter EU–NZ FTA].

²⁵ [Agreement Between the United States of America, Mexico, and Canada](#), Nov. 30, 2018 [hereinafter USMCA].

These divergences in turn translate into differential PTA rules on data flows. Under the U.S. model, cross-border flows of data, including personal information, must be allowed and no data localization measures are permitted. Under the EU conditional model, data can flow only if certain requirements, notably compliance with the high standards of the GDPR, are satisfied. For reasons that have to do less with the protection of fundamental rights, China too applies a conditional, albeit much more stringent and opaque regime. While the brevity of this essay does not permit a detailed discussion of the interface of data flows and data protection, two important points that deserve further thinking can be made: (1) while data localization has so far been framed as an obstruction to digital trade and data-driven innovation,²⁶ data localization can in fact arguably work both ways. It can serve to limit liberties—e.g. by leading to censorship with privacy and free speech implications—but it can also serve as a means for protecting fundamental freedoms; (2) the existing models for reconciling economic and noneconomic objectives found in the general exception clauses under WTO law²⁷ and in modified versions under PTAs²⁸ are of uncertain value. First, since no relevant case law exists—under the WTO or elsewhere; and second, since under the preferential agreement models, the scope of the exceptions remains unclear—for example, the CPTPP and the USMCA refer to “a legitimate public policy objective”²⁹ without any enumeration of such objectives. This leads to legal uncertainty and may also fail to provide workable safeguards for domestic constituencies, as pointed out by New Zealand’s Waitangi Tribunal with regard to Māori rights.³⁰ In this context, it has been discussed whether providing minimal safeguards, in particular with regard to privacy, at the international level can also provide useful references for trade forums.³¹ Others argue in contrast that data privacy should not be put in trade law at all.³²

Digital Trade Law and Free Speech

Digital trade law, and the accompanying scholarship, can generally be criticized for having focused solely on privacy protection, while downplaying other fundamental rights and freedoms, such as freedom from discrimination, equality, minority rights, and free speech. With regard to free speech, some important early studies explored the utility of trade rules to address censorship cases, as these may qualify as violations of WTO law and as the WTO framework provides stronger enforcement mechanisms than those available under international human rights law.³³ However, this discussion has not been updated to account for the profound changes in either digital trade law or the digital media space characterized by platformization and private power alongside widespread hate speech and disinformation.³⁴

²⁶ See, e.g., Ferracane, *supra* note 9.

²⁷ [General Agreement on Tariffs and Trade 1994](#), Art. XX, Apr. 15, 1994, 1867 UNTS 187 [hereinafter GATT]; [General Agreement on Trade in Services](#), Art. XIV, Apr. 15, 1994, 1869 UNTS 183 [hereinafter GATS].

²⁸ For a discussion, see Burri, *supra* note 11.

²⁹ [CPTPP](#), *supra* note 15, Art. 14.11(3); [USMCA](#), *supra* note 25, Art. 19.11(2).

³⁰ Waitangi Tribunal, [Report on the Comprehensive and Progressive Agreement for Trans-Pacific Partnership](#), 132–142 (2021).

³¹ [Chander & Schwartz](#), *supra* note 11.

³² Kristina Irion, Margot E. Kaminski & Svetlana Yakovleva, [Privacy Peg, Trade Hole: Why We \(Still\) Shouldn't Put Data Privacy in Trade Law](#), U. CHI. L. REV. ONLINE (2023).

³³ See, e.g., Tim Wu, [The World Trade Law of Censorship and Internet Filtering](#), 7 CHI. J. INT'L L. 263 (2006); Henry Gao, [Googling for the Trade—Human Rights Nexus in China: Can the WTO Help?](#), in [TRADE GOVERNANCE IN THE DIGITAL AGE](#) (Mira Burri & Thomas Cottier eds., 2012).

³⁴ Kate Klonick, [The New Governors: The People, Rules, and Processes Governing Online Speech](#), 131 HARV. L. REV. 1598 (2018); Mira Burri, [Fake News in Times of Pandemic and Beyond: Exploring of the Rationales for Regulating Information Platforms](#), in [LAW AND ECONOMICS OF THE CORONAVIRUS CRISIS](#) (Klaus Mathis & Avishalom Tor eds., 2022).

Scattered provisions in the newer generation of PTAs do touch on these issues. First and on the positive side, these treaties include provisions on open government data;³⁵ on digital inclusion with focus on women, rural, and low socioeconomic groups;³⁶ and recognize the importance of a rich and accessible public domain.³⁷ From a less positive perspective, one can also observe a considerable shrinking of the policy space through digital trade commitments that may be driven by the interests of the powerful players and may constrain public interest-oriented regulatory action going forward.³⁸ Two distinct types of rules are worth highlighting in this context. The first category covers the now increasingly common provisions on source code.³⁹ These seek in essence to ban access to source code as an essential element of software, and thus prevent forced technological transfer, which has been imposed in countries like China as a condition for entering the market. Whereas the broadly defined bans on source code transfer, which now often include algorithms,⁴⁰ foster business trust, the attached exceptions are comparatively narrow. They do not cover the multitude of reasons why public authorities might legitimately want access to source code, e.g. to ensure equality, privacy, and consumer protection.⁴¹ The second type of rules on “interactive computer services,” found so far exclusively in U.S. deals,⁴² limit the liability of intermediaries for third party content.⁴³ They secure in essence the application of Section 230 of the U.S. Communications Decency Act⁴⁴—a liability safe harbor for platforms, which is critical for the practice of free speech online. However, this limited liability has been recently under attack (even in the United States⁴⁵) and is being constrained through regulatory action in many jurisdictions in the face of fake news and other negative developments related to platforms’ power.⁴⁶

One could argue that the interfaces between trade rules and free speech are not as pertinent as those between the former and the right to privacy in the digital age, and that states retain their authority to adopt measures they deem appropriate for the protection of their citizenry. However, one should not underestimate the pervasiveness of the hard commitments made in trade treaties, especially the abovementioned rather technical provisions, and the lack of checks and balances. As digital trade law evolves further, often behind closed doors with little to no transparency or multistakeholder participation, human rights lawyers should be vigilant. Trade policymakers too should broaden their perspective and start paying attention to critical developments with human rights implications,

³⁵ See, e.g., [USMCA](#), *supra* note 25; [DEPA](#), *supra* note 19; [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](#), 2021 OJ (L 149/10) [hereinafter TCA].

³⁶ See, e.g., [DEPA](#), *supra* note 19, Art. 11.1.

³⁷ See, e.g., *id.* Art. 9.3.

³⁸ For an outspoken view, see Deborah James, [Digital Trade Rules: A Disastrous New Constitution for the Global Economy, by and for Big Tech](#), ROSA-LUXEMBURG-STIFTUNG (2020).

³⁹ See, e.g., [CPTPP](#), *supra* note 15; [USMCA](#), *supra* note 25; [U.S.–Japan Digital Trade Agreement](#), Oct. 7, 2019 [hereinafter U.S.–Japan DTA]; [DEPA](#), *supra* note 19; [EU–UK Trade and Cooperation Agreement](#), Apr. 30, 2021.

⁴⁰ See, e.g., [USMCA](#), *supra* note 25; [U.S.–Japan DTA](#), *supra* note 39.

⁴¹ [James](#), *supra* note 38; Cosmina Dorobantu, Florian Ostmann & Christina Hitrova, *Source Code Disclosure: A Primer for Trade Negotiators*, in [ADDRESSING IMPEDIMENTS TO DIGITAL TRADE](#) (Ingo Borchert & L. Alan Winters eds., 2021).

⁴² [USMCA](#), *supra* note 25; [U.S.–Japan DTA](#), *supra* note 39.

⁴³ [USMCA](#), *supra* note 25, Art. 19.17(2).

⁴⁴ See, e.g., Eric Goldman, *Why Section 230 Is Better Than the First Amendment*, 95 N.D. L. REV. REFLECTION 33 (2019).

⁴⁵ See, e.g., [Gonzalez v. Google LLC](#) (Docket 21–1333) and [Twitter Inc. v. Taamneh](#) (Docket 21–1496), currently before the U.S. Supreme Court.

⁴⁶ See, e.g., [Burri](#), *supra* note 34.

such as data-sharing, algorithmic decision making, censorship and internet shutdowns, disinformation, and private power, which are currently unaddressed in trade rulemaking.⁴⁷

Concluding Remarks

This essay offered an insight into the implications of digital trade law for human rights. Even against this somewhat limited backdrop, it appears essential that the discussions on these linkages must be intensified. At the same time, there is also room for regulatory experimentation in the direction of more balanced rules, as the new strand of digital economy agreements that squarely address noneconomic objectives exemplifies.

⁴⁷ See, e.g., Susan A. Aaronson, *The Difficult Past and Troubled Future of Digital Protectionism*, in [ADDRESSING IMPEDIMENTS TO DIGITAL TRADE](#), *supra* note 41; Svetlana Yakovleva & Joris van Hoboken, *The Algorithmic Learning Deficit: Artificial Intelligence, Data Protection and Trade*, in [BIG DATA AND GLOBAL TRADE LAW](#), *supra* note 4.