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Digital trade in the EU–New Zealand Free Trade Agreement: An Appraisal

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The increasing reliance on digital technologies for cross-border economic activity has sparked the quest for adequate rules. Preferential trade agreements have become the primary platform for digital trade rulemaking and the recently signed Free Trade Agreement (FTA) between the European Union (EU) and New Zealand is one of the latest additions to these far-reaching regulatory efforts. The EU–NZ FTA is a particularly instructive case study, as it brings together two important legal entrepreneurs in the area of digital trade law that, however, have different positions in the regulatory landscape and different domestic priorities. The article seeks to reveal the points of convergence and divergence between the two parties and also shows how these could be reconciled with the concluded EU–NZ deal. In the latter context, the article evaluates the normative value and the potential impact of the agreement as well as situates it in the broader and geopolitically complex landscape of digital trade rulemaking.

Keywords: digital trade; data flows; data protection; electronic commerce; free trade agreements; European Union; New Zealand

I. INTRODUCTION: TRADE 4.0

The picture of global trade has radically changed in the past two decades and a major driving force behind this transformation has been the process of digitalization. We have moved from the plain provision of goods and services online, conceptualized as 'electronic commerce',[2] towards a new understanding of 'trade driven by data flows', or trade 4.0,[3] which has profound effects not only on trade patterns[4] but also on society as a whole. As data-driven technologies reformat the global trade in goods and services on a scale unprecedented in velocity, scope, and systemic impact,[5] the topic of digital

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[2] The WTO continues to use 'e-commerce' in recent digital trade-specific developments, such as the Joint Initiative. See WTO, *Joint Statement on Electronic Commerce* WT/L/1056 (25 January 2019).

[3] *See e.g.* Mira Burri and Anupam Chander, *What Are Digital Trade and Digital Trade Law*?, 117 AJIL Unbound 99 (2023); Mira Burri, *Trade Law 4.0: Are We There Yet?*, 26 J Int Econ Law 90 (2023). While there is no single definition, a joint effort by the IMF, OECD, UN and WTO defines 'digital trade', for measurement purposes, as 'all international trade that is digitally ordered and/or digitally delivered'. *See* IMF, OECD, UN and WTO, *Handbook on Measuring Digital Trade* (2023).

[4] For instance, over 50% of global trade in services is now digital and cross-border data flows contribute more to global GDP than trade in goods. *See* James Manyika et al., *Digital Globalization: The New Era of Global Flows* (McKinsey 2016). For updated data, *see* OECD, *Key Issues in Digital Trade* (October 2023), https://www.oecd.org/trade/OECD-key-issues-in-digital-trade.pdf.

[5] Scale, scope, and speed are termed the 'vectors of digital transformation'. *See* OECD, *Vectors of Digital Transformation*, OECD Digital Economy Paper No 273 (January 2019)*; also* Klaus Schwab, *The Fourth Industrial Revolution* 8–9 (Penguin 2017).

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trade has moved up on the agendas of both national governments and international organizations and demands their full attention. This has only been amplified by the COVID-19 pandemic,[6] as public health restrictions curbing the movement of people triggered intensified online activity,[7] rendering the internet a critical infrastructure[8] and data flows a key contributor to the post-pandemic economic recovery.[9] Data-driven trade has also had effects beyond the economic domain that policymakers need to consider, as in its flow across territorial borders, data destabilizes the jurisdictional control of sovereign states[10] and impinges on what Chander and Sun term their 'digital sovereignty'.[11] Accordingly, regulators are faced with a delicate balancing act. On the one hand, to enable cross-border data flows, to allow businesses and citizens to leverage the benefits of the data-driven economy and, on the other hand, to manage data's impact on domestic regimes and safeguard certain interests and values, notably in the areas of privacy protection and national security.

In response to the digital transformation and the governance challenges it triggers, the regulatory landscape for digital trade has profoundly changed in the last two decades, albeit in a fragmented and uneven manner. At the multilateral level, we have so far not observed any adaptation of the rules of the World Trade Organization (WTO), despite the early recognition of the internet's impact on all areas of trade with the 1998 Work Programme on Electronic Commerce[12] and the recent advancement of the Joint Initiative on Electronic Commerce.[13] This lack of adaptation has led governments to turn to preferential trade agreements (PTAs) as rulemaking venues for digital trade. A great and growing number of provisions spread out in particular in the services, intellectual property (IP) and dedicated electronic commerce PTA chapters address more or less immediately issues of the data-driven economy. Since the first inclusion of an e-commerce provision in 2000,[14] and the first dedicated e-commerce

[6] If highly unevenly, exacerbating the existing global 'digital divide' between those with internet access and those without. *See e.g.* WEF, *Covid-19 Exposed the Digital Divide. Here's How We Can Close It* (27 January 2021).

[7] Despite an overall global downturn in services and goods during the Covid-19 pandemic, the global retail share of e-commerce rose from 14% to 17% between 2019–2020. See UNCTAD, *COVID-19 and E-Commerce: A Global Review*, UNCTAD/DTL/STICT/2020/13 (11 March 2021).

[8] Andrea Renda, Making the Digital Economy 'Fit for Europe' 26 Eur Law J 345 (2020).

[9] OECD, *Leveraging Digital Trade to Fight the Consequences of Covid-19*, OECD Brief (7 July 2020); Karishma Banga & Sherillyn Raga, *Digital Trade for Post-COVID Recovery and Resilience in the Commonwealth*, Commonwealth Secretariat, International Trade Working Paper 2021/04 (7 May 2021).

[10] *See* Svetlana Yakovleva & Kristina Irion, *Pitching Trade Against Privacy: Reconciling EU Governance of Personal Data Flows with External Trade* 10 Int Data Priv Law 201, 202 (2020).

[11] *See* Anupam Chander & Haochen Sun, *Sovereignty 2.0* 55 Vanderbilt Law Rev 283 (2023); *also* Anupam Chander & Haochen Sun (eds) *Data Sovereignty along the Digital Silk Road* (Oxford University Press 2023).

[12] WTO, Work Programme on Electronic Commerce Ministerial Decision, WT/MIN(22)/32, WT/L/1143 (22 June 2022).

[13] *See* WTO, *Joint Initiative on E-commerce*, https://www.wto.org/english/tratop_e/ecom_e/joint_statement_e.htm.

[14] The first FTA with a digital trade provision to enter into force is the New Zealand–Singapore FTA on 1 January 2001. Contemporaneously, the first FTA with articles on e-commerce that are labelled as such is the US–Jordan FTA. It entered into force on 17 December 2001. *See* Mira Burri, Maria Vasquez Callo-Müller & Kholofelo Kugler, TAPED: Trade Agreement Provisions on Electronic Commerce and Data,

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chapter in 2003, digital trade-related provisions have generally, though not linearly, increased in number, depth, strength of obligation, and level of detail, ultimately becoming an essential element of modern free trade agreements (FTAs). Indeed, digital trade law has become one of the most dynamic fields of international cooperation, including also a degree of legal innovation, as revealed in recent treaties, such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), and the new generation of Digital Economy Agreements (DEAs).[15]

Against this fluid and complex backdrop, both in terms of technological and regulatory advances, this article seeks to explore the debates triggered by contemporary digital trade by focusing on one particular treaty – the FTA between the European Union (EU) and New Zealand (EU–NZ FTA). The negotiations of this agreement concluded on 30 June 2022, and it was signed on 9 July 2023.[16] The EU–NZ FTA is an instructive case study, as it brings together two important legal entrepreneurs in the area of digital trade rulemaking that, however, have different positions in the regulatory landscape and different domestic priorities. The article seeks to reveal the points of convergence and divergence between the two parties and also shows how these could be reconciled with the concluded EU–NZ deal. In the latter context, the article evaluates the normative value and the potential impact of the agreement and situates it in the broader landscape of digital trade rulemaking.

To achieve these objectives, the article first discusses the relevant provisions of the EU–NZ FTA. It then provides insights into New Zealand's and the EU's respective positions on issues of digital trade, both domestically and across international fora, with a focus on selected critical topics – namely data flows, privacy, and regulatory flexibilities. In this exercise, the spotlight is directed particularly on New Zealand, whose position, and in contrast to that of the EU,[17] has often been overlooked in the literature. These enquiries allow us, in the article's final part, to assess the implications of digital trade regulation in the EU–NZ FTA – both for the treaty parties as well as for

https://unilu.ch/taped. Unless otherwise indicated, all references to PTA statistics and details in this article are derived from TAPED.

[15] See *e.g*. Mira Burri, A WTO Agreement on Electronic Commerce: An Inquiry into Its Legal Substance and Viability, 53 Georgetown J Int Law 565 (2023).

[16] The agreement is expected to enter into force in 2024. *See* New Zealand Foreign Affairs and Trade, *New Zealand and European Union Free Trade Agreement*, https://www.mfat.govt.nz/kr/trade/free-trade-agreements/free-trade-agreements-concluded-but-not-in-force/new-zealand-european-union-free-trade-agreement/nz-eu-fta-overview-3/.

[17] *See e.g.* Nicolas Köhler-Suzuki, *Mapping the EU's Digital Trade: A Global Leader Hidden in Plain Sight?*, Jacques Delors Institute (31 July 2023), https://institutdelors.eu/en/publications/mapping-the-eus-digital-trade/; Pierre Sauvé & Marta Soprana, *The Evolution of the EU Digital Trade Policy*, *in Law and Practice of the Common Commercial Policy* (Michael Hahn & Guillaume Van der Loo eds., Brill 2021); Alasdair R. Young, *Liberalizing Trade, Not Exporting Rules: The Limits to Regulatory Co-Ordination in the EU's 'New Generation' Preferential Trade Agreements*, in *The European Union as a Global Regulator?* (Alasdair R. Young ed., Routledge 2016); Joshua P. Meltzer, *Governing Digital Trade*, 18 World Trade Rev. s25 (2019); Mira Burri, *Approaches to Digital Trade and Data Flow Regulation Across Jurisdictions: Implications for the Future ASEAN–EU Agreement*, 49 Leg. Issues Econ. Integr., 159–163 (2022); Rachel F. Fefer, *EU Digital Policy and International Trade*, United States Congressional Research Service R46732 (25 March 2021).

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the dynamics of digital trade governance unfolding in preferential venues and at the WTO.

I. DIGITAL TRADE IN THE EU–NZ FTA

The 'Digital Trade' chapter of the EU–NZ FTA[18] encompasses three sections and sixteen articles that comprehensively tackle digital trade issues. Some of the topics covered go beyond what the EU has thus far agreed upon, as we reveal in more detail in the following sections. At the same time, the chapter also contains markedly broader carve-outs for domestic regulation, especially for New Zealand's obligations to the Māori indigenous people. The structure of the digital trade chapter largely follows the standard EU approach and does not substantially deviate from the draft negotiation text.[19]

Section A of the EU–NZ FTA covers what are called 'general provisions'. Specifically, Article 12.1 defines the scope of the chapter, which 'applies to measures of a Party affecting trade enabled by electronic means' and thus subscribes to a broad definition of digital trade. There are, however, as usual for the EU approach, several carve-outs. These include audiovisual services[20] and information or related measures 'held or processed by or on behalf of a Party'.[21] These are followed by an exception dedicated to Māori rights, including some detailed clarifications.[22] Article 12.2 contains definitions of limited terms, as is common in the EU's and New Zealand's digital trade chapters and agreements. Article 12.3 still abides by the EU approach to insert a broadly defined 'right to regulate', which essentially (and not exhaustively) covers a wide range of public policy objectives that the parties wish to pursue, with an explicit mention of Māori rights for New Zealand.[23]

The digital trade chapter's Section B is dedicated to data governance issues. Article 12.4 on cross-border data flows is critical in revealing the depth of the commitments on digital trade. It ensures that no localization requirements will be imposed and thus marks a commitment to free data flows. Yet, there is a series of

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[18] Chapter 12 EU–NZ FTA.

[19] The draft included 14 articles plus a note compared to the now 16 provisions.

[20] Article 12.1(2)(a) EU–NZ FTA.

[21] Article 12.1(2)(b) EU–NZ FTA.

[22] Article 12.1(2)(c) reads: 'This Chapter shall not apply to … measures adopted or maintained by New Zealand that it deems necessary to protect or promote Māori rights, interests, duties and responsibilities* in respect of matters covered by this Chapter, including in fulfilment of New Zealand's obligations under te Tiriti o Waitangi/the Treaty of Waitangi, provided that such measures are not used as a means of arbitrary or unjustified discrimination against persons of the other Party or a disguised restriction on trade enabled by electronic means. Chapter 26 (Dispute settlement) does not apply to the interpretation of te Tiriti o Waitangi/the Treaty of Waitangi, including as to the nature of the rights and obligations arising under it'. The footnote attached clarifies that 'For greater certainty, Māori rights, interests, duties and responsibilities includes those relating mātauranga Māori'.

[23] This Article reads: 'The Parties reaffirm the right to regulate within their territories to achieve legitimate policy objectives, such as the protection of human, animal or plant life or health, social services, public education, safety, the environment including climate change, public morals, social or consumer protection, animal welfare, privacy and data protection, the promotion and protection of cultural diversity, and in the case of New Zealand the promotion or protection of the rights, duties, interests and responsibilities of Māori'.

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safeguards and clauses that may significantly reduce the scope of the commitments made. First, there is a confirmation that the general exceptions (Article 25.1 EU–NZ FTA) do apply to data flows as well with an interesting add-on that these, 'for the purpose of this Article, shall be interpreted, where relevant, in a manner that takes into account the evolutionary nature of the digital technologies'.[24] In addition, there is a review clause that permits the parties to monitor the impact of the free data flow conditions and propose changes to the regime.[25] This clause did not appear in the draft agreement but was introduced by the EU in its post-Brexit Trade and Cooperation Agreement (TCA) with the United Kingdom (UK), in tandem with an adequacy decision on data protection pursuant to the EU General Data Protection Regulation (GDPR).[26] Given that New Zealand's GDPR adequacy decision came up for review in 2020,[27] the TCA approach appears to have been neatly adapted into the EU–NZ FTA. It is widely commented that New Zealand's 2020 Privacy Act upgrade is more compliant with the GDPR than its 1993 counterpart,[28] ostensibly, to avoid being deprived adequacy by the EU. The 2021 EU Indo-Pacific Strategy has also sent positive signals regarding New Zealand's renewed adequacy status.[29] Yet, some doubts remain, especially about the Privacy Act's lack of rights on automated profiling and significantly lower than the GDPR fines, which could hamper the 'essential element'

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[24] Article 12.4(3) EU–NZ FTA.

[25] Article 12.4(4) EU–NZ FTA.

[26] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation), OJ L (2016) 119, 1–88. Article 45.3 GDPR provides that adequacy decisions will be reviewed every four years.

[27] New Zealand was originally granted adequacy in 2012, which was reviewed and amended in 2016. At the time of publication, although the adequacy decision is still valid, no decision on the review has been published. See Commission Implementing Decision of 19 December 2012 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequate protection of personal data by New Zealand, OJ L (2013) 28, 12–14, as amended by Commission Implementing Decision (EU) 2016/2295 of 16 December 2016 amending Decisions 2000/518/EC, 2002/2/EC, 2003/490/EC, 2003/821/EC, 2004/411/EC, 2008/393/EC, 2010/146/EU, 2010/625/EU, 2011/61/EU and Implementing Decisions 2012/484/EU, 2013/65/EU on the adequate protection of personal data by certain countries, pursuant to Article 25(6) of Directive 95/46/EC of the European Parliament and of the Council, OJ L (2016) 344, 83–91.

[28] Brian Daigle & Mahnaz Khan, *Australia and New Zealand's New Privacy Laws and Enforcement Measures in an Era of Digital Growth*, United States Trade Commission, Executive Briefing on Trade (June 2021); Tyrilly Csillag & Andrew McDonald, *Privacy Act 2020 – New Zealand Lifts its Privacy Standard*, Thomson Reuters (9 December 2020); Michael Anthony C. Dizon & Philip James McHugh, *Encryption laws and regulations in one of the Five Eyes: the Case of New Zealand* 31 Information & Communications Technology Law 233 (2022) .

[29] European Commission, *The EU Strategy for Cooperation in The Indo-Pacific* JOIN(2021) 24 final (16 September 2021). A review of the initial Working Party report on New Zealand that underpinned the 2012 adequacy finding noted that 'There is some advantage to be gained for […] the EU […] in proclaiming New Zealand adequate at this juncture: it sends a signal to APEC and its member governments that the EU adequacy apparatus, despite being cumbersome and slow, is still operating and ready to play ball with the "good guys" in the region'. In light of the sentiments of the Indo-Pacific Strategy, the same can be said to hold true today. See Graeme Greenleaf & Lee Bygrave, *Not Entirely Adequate but Far Away: Lessons from How Europe Sees New Zealand Data Protection* 111 Privacy Laws & Business International Report 8–9 (2011).

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of 'appropriate redress' required for adequacy.[30] A further problematic issue could be mass surveillance and New Zealand's membership of the Five Eyes network,[31] whose collective surveillance has long raised the ire of the EU,[32] and could become intolerable after the *Schrems* judgments.[33] Finally, and in response to the 2021 Report Wai 2522[34] of the Waitangi Tribunal,[35] which found that the CPTPP may endanger the data governance of the Māori, there is a commitment to take the exercise of their rights and interests into account, both under the review clause and beyond it.[36]

The subsequent provision on personal data protection can again be considered as a conditionality to the free data flow regime, as it basically provides an exception for policy space for both parties to 'adopt and maintain the measures it deems appropriate to ensure the protection of personal data and privacy, including through the adoption and application of rules for the cross- border transfer of personal data'.[37] We also have reaffirmation that the protection of personal data and privacy is a fundamental right and a commitment to high standards of protection,[38] including provisions on transparency.[39] The latter commitment of the parties to publish information on the practical implications of personal data protection, including compliance requirements and guidance on seeking remedies was added during the negotiations and was not part of the initial draft.

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[30] See Sara Leonor Duque de Carvalho, Key GDPR Elements in Adequacy Findings of Countries That Have Ratified Convention 108, 5 Eur. Data Prot. L. Rev. 54, 62 (2019).

[31] Data processing obligations for New Zealand's intelligence and security agencies were tightened following a 2016 independent review that brought an end to their exemption from certain Privacy Act obligations. Yet, information sharing continues on a systematic basis. *See* New Zealand Office of the Privacy Commissioner, *Intelligence and Security Act Amendments to Privacy Act: FAQs* (28 September 2017) https://www.privacy.org.nz/publications/guidance-resources/intelligence-and-security-act-amendments-to-privacy-act-faqs/; *also* Austin Gee & Robert G Patman *Small State or Minor Power? New Zealand's Five Eyes Membership, Intelligence Reforms, and Wellington's Response to China's Growing Pacific Role,* 36 Intell. National Secur. 34, 34–50 (2021).

[32] *See* e.g. Mark Smith, *Will Schrems II Cause Five Eyes to Blink?*, Bloomberg Law (16 November 2020); Maria Tzanou, *Schrems I and Schrems II: Assessing the Case for the Extraterritoriality of EU Fundamental Rights* in *Data Protection Beyond Borders: Transatlantic Perspectives on Extraterritoriality and Sovereignty* (Federico Fabbrini, Edoardo Celeste & John Quinn eds., Hart 2021).

[33] C-362/14, Maximillian Schrems v. Data Protection Commissioner (Schrems I), judgment of 6 October 2015, ECLI:EU:C:2015:650; Case C-311/18, Data Protection Commissioner v. Facebook Ireland Limited, Maximillian Schrems (Shrems II), judgment of 16 July 2020, ECLI:EU:C:2020:559.

[34] Waitangi Tribunal, Report on the CPTPP (Wai 2522) of 19 December 2021, https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_195473606/Report%20on%20the%20CPTPP%20W.pdf.

[35] The Waitangi Tribunal governs the application of the Treaty of Waitangi and has jurisdiction to investigate claims of non-compliance and make recommendations, albeit non-binding. *See* Treaty of Waitangi Act 1975, Preamble; Treaty of Waitangi Amendment Act 1985, s 3. *See* Amokura Kawharu, The Treaty of Waitangi Exception in New Zealand's Free Trade Agreements in Indigenous Peoples and International Trade: Building Equitable and Inclusive International Trade and Investment Agreements, 274–294 (John Borrows & Risa Schwartz eds., Cambridge University Press 2020).

[36] Article 12.4(5) EU–NZ FTA. *See also* the section on exceptions and limitations below.

[37] Article 12.5(2) EU–NZ FTA.

[38] Article 12.5(1) EU–NZ FTA.

[39] Article 12.5(3) and 12.5(4) EU–NZ FTA.

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The rest of the digital trade chapter, Section C, lays out the essential components common to contemporary digital trade agreements in 11 areas, which either address some of the issues that have been left unclarified in the WTO discussions or seek to facilitate digital trade by cutting red tape. Regarding the former, we find a permanent ban on customs duties on electronic transmissions.[40] For the latter, there is a commitment to endeavouring not to impose prior authorization,[41] to taking measures against spam[42] and giving legal effect to electronic contracts,[43] electronic authorization,[44] electronic invoicing[45] and paperless trading.[46] The legal bindingness of the commitments varies, with the one on electronic authorization being the strongest. Further, Article 12.11 prohibits Parties from mandating access to or the transfer of source code as a hard commitment, which is however subject to multiple exceptions.[47] In Article 12.12, a firm commitment to provide an equivalent level of protection for consumers making electronic transactions is bookended by soft commitments to improve consumer trust within digital trade.[48] The draft article on cooperation on regulatory issues on digital trade has been expanded with two further focus areas – namely, e-commerce challenges specifically facing small- and medium-sized enterprises (SMEs), e-government, and a catch-all of ‘other matters relevant’ to digital trade’s development.[49] Another provision that was not in the draft, but has frequently appeared in New Zealand’s recent agreements, commits the parties to ensuring open internet access.[50]

Overall, the difference between the EU-proposed draft chapter on which negotiations commenced and the final chapter exhibits the parties’ respective appetites for regulatory coherence on the basis of prior alignments and their desire for a comprehensive yet balanced digital trade agreement. Simultaneously, the text provides ample room for the parties to protect their respective sensitivities, including a substantially extended clause preserving New Zealand’s ability to protect and promote Māori interests, including in relation to digital trade. As mentioned earlier, this is designed in response to the Waitangi Tribunal’s Wai 2522 report and longstanding criticisms to replace the previously narrower Te Tiriti carve-out clause. As the language is still fuzzy, including soft commitments like ‘intention to engage’ and ‘reaffirms its continued ability to support’, it remains to be seen whether this clause will be implemented domestically by engaging the established Māori-led advisory boards,

[40] Article 12.6 EU–NZ FTA.
[41] Article 12.7 EU–NZ FTA.
[42] Article 12.13 EU–NZ FTA.
[43] Article 12.8 EU–NZ FTA. The agreed upon article has been simplified from the original draft, which included a host of exceptions including broadcasting services, gambling services, and legal services. These have been removed from the article, and a new catch-all sub-section (c) has been added: ‘no other obstacles are maintained or created to the use of electronic contracts’.
[44] Article 12.9 EU–NZ FTA.
[45] Article 12.10 EU–NZ FTA.
[46] Article 12.15 EU–NZ FTA.
[47] Article 12.11(4) EU–NZ FTA.
[48] Article 12.12 EU–NZ FTA.
[49] *See, respectively,* Articles 12.14(d), (e) and (f) EU–NZ FTA.
[50] Article 12.16 EU–NZ FTA.

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stakeholders, and *rangatira* (leaders) of *iwi* (tribes) and *hapū* (sub-tribes). Ultimately, the EU–NZ FTA chapter on digital trade is a compromise on both sides between the enablement of data-driven trade and the protection of domestic interests and objectives. The implications and value of these can only be understood if placed in the context of the respective EU and New Zealand policies and their positioning so far on the international scene in digital trade regulation. The next sections seek to discuss this context with a brief background on New Zealand's and the EU's general approaches, zooming in on data flows, personal data protection, and the reserved policy space through exceptions and limitations.

II. New Zealand's approach to digital trade regulation

1. *Introduction*

Smallness and geographic remoteness have shaped New Zealand's approach to trade negotiations, which has developed over recent decades along the axes of 'open concerted plurilateralism'.[51] To supplement the 'quiet revolution' of the country's domestic liberalization during the 1980s and early 1990s, and to compensate for its international 'power deficit'[52] and relative lack of resources,[53] New Zealand's trade lawmakers embarked on a strategy centred on the endorsement and expansion of the 'spirit' of multilateralism, supplementing WTO inaction with a policy of 'open regionalism'.[54] This involved four related pillars: (i) multilateralism (the transfer of WTO values to regional, sub-regional, and bilateral domains); (ii) pragmatism (designing FTAs with both Australia and in the Asia-Pacific to be 'trade-creating without being trade-diverting'); [55] (iii) incrementalism [56] (promoting 'liberal multilateralism from the bottom-up' through 'outward-looking' model FTAs); and (iv) persistence (consistency in policy over the decades, insulated from politics).[57] New Zealand advances FTA negotiations on the basis of a flexible and pragmatic principles-based framework focused on non-discrimination, transparency, accountability, comprehensiveness, neutral rules of origin, and procedural fairness in the case of a sanction or remedy. [58] New Zealand-framed FTA provisions generally reflect a

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[51] Stephanie Honey, *Asia-Pacific Digital Trade Policy Innovation* in *Addressing Impediments to Digital Trade* 217, 235 (Ingo Borchert & L. Alan Winters eds., CEPR Press 2021).
[52] Tom Long, *Small States, Great Power? Gaining Influence Through Intrinsic, Derivative, and Collective Power* 19 Int Stud Rev 185 (2017).
[53] John Leslie, New Zealand Trade Strategy and Evolving Asia-Pacific Regional Economic Architecture, Asia New Zealand Foundation Report 1 (January 2015).
[54] *Ibid.*, 19.
[55] Ibid.
[56] *Ibid.*, 11: 'A New Zealand strategy of incremental regime-building confronts these approaches by holding that: (i) powerful states will permit the rules of international institutions to bind them, and (ii) larger states will comply with rules and institutions constructed by smaller states'.
[57] New Zealand Ministry of Foreign Affairs & Trade, New Zealand Trade Policy, Implications and Directions: A Multi-Track Approach (1993).
[58] New Zealand Ministry of Foreign Affairs & Trade, *About Free Trade Agreements* https://www.mfat.govt.nz/en/trade/free-trade-agreements/about-free-trade-agreements/. *See also* Hosuk Lee-Makiyama, *New Zealand: The EU's Asia-Pacific Partnership and the Case for a Next Generation FTA*, ECIPE Policy Brief No. 7/2015 (July 2015).

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preference for cooperation and coordination in trade lawmaking (termed 'comply or explain'),[59] which it has succeeded in furthering within the Association of Southeast Asian Nations (ASEAN).[60]

On the basis of this framework, New Zealand has used FTAs as an 'additional avenue'[61] to further its interests at the WTO level and in regional fora such as ASEAN.[62] It has emphasized within both platforms the importance of open and competitive markets[63] while deploying a broad and progressive range of 'WTO-plus' and 'WTO-extra' provisions as strategic tools towards policy and regulatory cooperation development.[64] The cumulative effect is a highly open digital trade environment.[65] The Ministry of Foreign Affairs and Trade (MFAT) considers the goal of its digital trade chapters as laying out the 'core obligations that allow businesses and consumers to connect and transact online with freedom and confidence'.[66] Its five focus areas to this end are (i) upholding the WTO customs duties moratorium on electronic transactions; (ii) enabling electronic authentication (while noting that certain classes of transactions, such as the sale of land, prohibit e-signatures); (iii) ensuring that trading partners' domestic regulatory frameworks for electronic transactions are consistent with the internationally developed best-practice models; (iv) keeping spam to a minimum; and (v) enhancing consumer protection.[67]

Since 2000, New Zealand FTAs have increased their 'scale and speed of the integration aspirations', including on digital trade issues.[68] The country's close cooperation with the 'digital entrepôt' of Singapore[69] has been crucial to this evolution. In fact, its Closer Economic Partnership Agreement with Singapore was the first PTA

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[59] *Ibid.*, 9.

[60] *See* Derek Gill & Edo Setyadi, *Under the Radar: International Regulatory Cooperation in ASEAN and New Zealand*, Working Paper PB-2020-08 (2020).

[61] New Zealand Ministry of Foreign Affairs & Trade, *supra* n. 58.

[62] Ibid.

[63] Ruth Nichols, Competition and Preferential Trade Agreements: Observations on New Zealand's Approach, 19 Int'l Trade & Bus L Rev 269, 269 (2016).

[64] *Ibid.*, 286.

[65] ECIPE's 2018 Digital Trade Restrictiveness Index (DTRI) ranked New Zealand the most open country to digital trade (of 64 OECD and emerging economies), based on an analysis of digital economy-inhibiting policy restrictions, including 'tariffs on digital products, restrictions on digital services and investments, restrictions on the movement of data, and restrictions on e-commerce'. *See* Martina F Ferracane, Hosuk Lee-Makiyama & Erik van der Marel, *Digital Trade Restrictiveness Index,* European Centre for International Political Economy 9 (2018).

[66] New Zealand Ministry of Foreign Affairs & Trade, *EU–NZ Free Trade Agreement: New Zealand and EU Approaches to Electronic Commerce*, https://www.mfat.govt.nz/assets/Trade-agreements/EU-NZ-FTA/Information-package/New-Zealand-and-EU-approaches-to-electronic-commerce.pdf: 'Our existing electronic commerce chapters have been based on core obligations that allow businesses and consumers to connect and transact online with freedom and confidence'.

[67] Ibid.

[68] Leslie, *supra* n. 53, 35.

[69] *Ibid.*, 36. *See also* John Austin, *New Zealand–Singapore Relations: Opening Address* in *Southeast Asia–New Zealand Dialogue* (Institute of Southeast Asian Studies, ISEAS Publishing 2007). As far back as 1999, the partners began to negotiate a comprehensive WTO-plus and WTO-extra agreement, resulting in the 2001 New Zealand–Singapore Closer Economic Partnership (CEP), which was designed to expand as eventually it did, together with Chile and Brunei Darussalam in the separate Trans-Pacific Strategic Economic Partnership (TPSEP, or P4).

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with e-commerce provisions to enter into force. Building on this cooperation, in 2021, Chile, New Zealand, and Singapore signed the world's first digital-focused agreement, the Digital Economy Partnership Agreement (DEPA).[70] By August 2023, New Zealand was party to 14 FTAs that are in force, largely across the Asia-Pacific region. It has bilateral agreements with Australia (Closer Economic Relations (CER)); China (including an Upgrade ratified on 7 April 2022); Hong Kong; Malaysia; Singapore; South Korea; Thailand; and the UK. Its plurilateral agreements comprise the ASEAN–Australia–New Zealand FTA (AANZFTA); CPTPP; DEPA; the Pacific Agreement on Closer Economic Relations (PACER) Plus; the Regional Comprehensive Economic Partnership (RCEP); and the Trans-Pacific Strategic Economic Partnership (P4).[71] As previously mentioned, the EU–NZ FTA is added to this list but is not yet in force.[72] Negotiations in five FTAs are ongoing.[73]

Overall, New Zealand's impressive portfolio includes one of the global trading system's most comprehensive and liberalizing bilateral agreements (CER); the mega-regional deal of the CPTPP; and the frontrunner for data economy-specific agreements, the DEPA.[74]

2. *Data flows in New Zealand's FTAs*

New Zealand considers the purpose of its digital trade lawmaking as establishing the 'core obligations' that 'enable businesses and consumers to connect and transact online with freedom and confidence'.[75] Public confidence in cross-border data flows is recognized as an essential precondition for its meaningful participation in international markets.[76] The European Centre for International Political Economy (ECIPE) Digital Trade Restrictiveness Index[77] ranked New Zealand as the most open state to digital trade globally, identifying only two restrictions: the Inland Revenue Act, which requires companies to physically store business records in local data centres, and the

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[70] New Zealand Ministry of Foreign Affairs & Trade, *Digital Economy Partnership Agreement (DEPA)*, https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/digital-economy-partnership-agreement-depa/depa-modules/.

[71] New Zealand Ministry of Foreign Affairs & Trade, *Free Trade Agreements in Force*, https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/.

[72] *UK 'Closing In' on Free Trade Agreement with New Zealand*, Reuters (31 July 2021) https://www.reuters.com/world/uk/uks-truss-says-closing-in-free-trade-agreement-with-new-zealand-sky-news-2021-07-31/.

[73] Namely, AANZFTA upgrade, the FTA with India, the Indo-Pacific Economic Framework for Prosperity, the New Zealand-Pacific Alliance, and the New Zealand-Gulf Cooperation Council FTA. *See* New Zealand Ministry of Foreign Affairs & Trade, *Free Trade Agreements Under Negotiation* https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-under-negotiation/.

[74] New Zealand Ministry of Foreign Affairs & Trade, *supra* n. 70.

[75] New Zealand Ministry of Foreign Affairs & Trade, *supra* n. 66. MFAT's five focus areas to this end are (i) upholding the WTO customs duties moratorium on electronic transactions; (ii) enabling electronic authentication (while noting that certain classes of transactions, such as the sale of land, prohibit e-signatures); (iii) ensuring that trading partners' domestic regulatory frameworks for electronic transactions are consistent with the internationally developed best-practice models; (iv) keeping spam to a minimum; and (v) enhancing consumer protection.

[76] New Zealand Ministry of Justice Cabinet Social Policy Committee, *Reforming the Privacy Act* 2 https://www.justice.govt.nz/assets/Documents/Publications/cabinet-paper-reforming-the-privacy-act-1993.pdf.

[77] ECIPE, *supra* n. 65.

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Privacy Act provisions on cross-border data flows under Information Privacy Principle 12 (IPP 12) of its 2020 Privacy Act.[78] These and other domestic policy space issues will be discussed in the section on 'Exceptions and Limitations' below. A breakdown of data flow provisions in Table 1 illustrates the extent to which New Zealand's approach operates in practice across its key FTAs.

Table 1

Data flow provisions in key New Zealand FTAs since 2010

Provision	AANZ FTA	Hong Kong-NZ FTA	South Korea-NZ FTA	CPTPP	DEPA	RCEP	China-NZ FTA Upgrade	NZ-Singapore CET Upgrade	NZ-UK FTA	NZ–EU FTA
(2.2.1. [data_free_flow_prov] Does the e-commerce/digital trade chapter include a provision on the free movement of data?) **Free movement of data addressed in e-commerce chapter**	No	Yes (S)	No	Yes (H)	Yes (H)	Yes (H)	Yes (S)	Yes (H)	Yes (H)	Yes (H)
(2.2.2. [data_flow_mech_barrier] Does the e-commerce chapter contain a mechanism to address barriers to data flows?) **Mechanism to address barriers to data flows addressed in e-commerce chapter**	No	No	No	No	Yes (S)	No	No	No	No	No
(2.2.3 [data_flow_proh_loc] Does the e-commerce chapter contain a provision banning or limiting data localization requirements?) **Data localization requirements banned or limited in e-commerce chapter**	No	No	No	Yes (H)	Yes (H)	Yes (H)	No	Yes (H)	Yes (H)	Yes (H)

[78] Martina F Ferracane, *Restrictions on Cross-Border Data Flows: A Taxonomy*, ECIPE Working Paper No 1/2017 25 (2017).

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Provision	AANZ FTA	Hong Kong-NZ FTA	South Korea-NZ FTA	CPTPP	DEPA	RCEP	China-NZ FTA Upgrade	NZ-Singapore CET Upgrade	NZ-UK FTA	NZ–EU FTA
(2.2.4. [data_flow_fut_agreement] Does the agreement contain a provision on a future discussion / provisions or agreement on the free flow of data?) **Future discussion on provisions on the free flow of data addressed in agreement**	No	No	No	No	No	No	No	No	No	Yes (H)
(2.5.1. [data_egov_prov] Does the agreement include provisions on e-government) **E-government addressed in agreement**	No	Yes (S)	No	Yes (S)	No	No	No	Yes (S)	No	Yes (S)
(2.5.2 [data_egov_open_data] Does the agreement include a provision on open government data or open data?) **Open government or open data addressed in agreement**	No	No	No	No	Yes (S)	No	No	No	Yes (S)	No
(2.6.1. [data_innovation] Does the agreement contain a provision referring to data innovation, allowing data to be shared and reused?) **Data innovation / data sharing and re-use addressed in agreement**	No	No	No	No	Yes (S)	No	No	No	Yes (S)	No

S = soft commitments
H = hard commitments

Source: Burri, Vásquez Callo-Müller and Kugler, TAPED

Table 1 sets out six bilateral agreements, including the EU–NZ FTA, next to the four mega-deals of AANZFTA, CPTPP, DEPA, and RCEP. Since 2010, New Zealand has concluded eight PTAs with provisions on data governance, with varying levels of legal bindingness. This means that during that period, New Zealand concluded only two agreements (the AANZFTA and the South Korea–New Zealand FTA) without provisions on data governance. In fact, the South Korea–New Zealand FTA does not have a digital trade chapter at all. Eight out of 10 of New Zealand's PTAs include a

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core provision upholding the free movement of data.[79] Of those, six are binding, although with exceptions. The corollary provision of banning or limiting data localization requirements appears in the three mega-regional deals (CPTPP, DEPA, and RCEP) and three bilateral PTAs (New Zealand–Singapore CET, EU-NZ FTA, and the New Zealand–UK FTA). Of these, solely DEPA stipulates a mechanism to address such barriers. The EU–NZ FTA is the only agreement that includes a provision on the future discussion of free data flows.

New Zealand has also, unsurprisingly, included progressive elements in its PTAs. E-government is addressed in the FTAs with the EU, Hong Kong, Singapore, as well as in the CPTPP, while DEPA and the UK–New Zealand FTA address open government/open data, and data innovation, sharing, and re-use. The absence of a clear trajectory or template in data flow provisions in FTAs to which New Zealand is a party reflects the highly variegated nature of the agreements, particularly, the geopolitical contexts of the two major plurilaterals – CPTPP and RCEP.[80] Cross-border data flows were recognized as far back as 2011 when the NZ–Hong Kong FTA entered into force. However, a substantial broadening of supplementary provisions to enable them was not evident until the 2018 CPTPP, which includes a binding ban on data localization measures. Nevertheless, in all of New Zealand's subsequent agreements,[81] the strict ban is buffeted with exceptions, noting that each Party 'may have its own regulatory requirements', whilst allowing Parties to adopt inconsistent measures on the grounds of legitimate and justifiable public policy objectives.[82] The harmonization in wording on cross-border transfer provisions in New Zealand's agreements underscores the global recognition of the importance of data flows, while recognizing the State's right to regulate in the public interest.[83]

3. *Privacy protection in New Zealand's FTAs*

The data protection provisions in New Zealand's FTAs indicate that it seeks robust privacy protection from its trading partners. This is commensurate with its own principles-based approach to informational privacy as enshrined in the Privacy Act. The Act's 2020 update was designed for the 'middle-ground' of the global spectrum of legal data protection architecture.[84] The breakdown of data protection provisions across

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[79] The Hong Kong–New Zealand FTA and the China-New Zealand FTA Upgrade include cooperation provisions on data flows at Articles 2.1 and 12, respectively.

[80] The binding CPTPP data flow provision states that '[e]ach party shall allow the cross-border transfer of information by electronic means, including personal information', while accommodating regulation on legitimate public policy objectives. Although it was highly debated when first drafted for the Trans-Pacific Partnership (TPP) in 2015, it set a precedent for PTA design, which is reflected in most subsequent PTAs that have provisions on cross-border data flows.

[81] Except for the Upgrade FTA with China, which only includes a cooperation provision on cross-border data flows in Article 12.3(b).

[82] *See* Article 4.3 DEPA, Article 12.15 RCEP, Article 9.10 NZ–Singapore FTA Upgrade, Article 15.15 NZ–UK FTA, and Article 12.4 EU–NZ FTA.

[83] See Yik-Chan Chin & Jingwu Zhao, *Governing Cross-Border Data Flows: International Trade Agreements and Their Limits* 11 Laws Special Issue 'International Law as a Driver of Internet Governance', 15 (2022).

[84] Privacy Act 2020, s 22, IPP 12(1)(a)–(f). The Act's framework for cross-border data flows was considerably strengthened in the 2020 update. Per Information Privacy Principle (IPP) 12, A 'disclosing

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a sample of New Zealand's FTAs (Table 2) reveals the external dimension of New Zealand's approach to privacy and data protection.

Table 2

Data protection provisions in key New Zealand FTAs since 2010

Provisions	AANZFTA	NZ-Hong Kong	South Korea-NZ	CPTPP	DEPA	RCEP	NZ-China FTA Upgrade	NZ-Singapore CET Upgrade	NZ-UK	NZ–EU
(2.1.1. [data_prot_prov] Does the agreement include provisions on data protection?) **Data protection addressed in agreement**	Yes (S)	Yes (S)	No	Yes (H)	Yes (H)	Yes (H)	Yes (H)	Yes (H)	Yes (H)	Yes (S)
(2.1.3 [data_prot_domestic_law] Does the agreement include provisions on data protection according to domestic law?) **Data protection according to domestic law addressed in agreement**	No	No	No	No	No	No	No	No	No	No
(2.1.4. [data_prot_princ] Does the agreement include provisions on data protection recognizing certain key principles?) **Data protection recognizing certain key principles addressed in agreement**	No	No	No	Yes (S)	Yes (S)	Yes (S)	Yes (S)	Yes (S)	Yes (S)	No
(2.1.5. [data_prot_int_standards] Does the agreement include	Yes (S)	No	No	No	No	Yes (S)	Yes (S)	No	No	No

agency' is prevented from transferring information unless one of six grounds applies: (a) express and informed consent of the individual; (b) the recipient carries out business in New Zealand and the sender reasonably believes the former is bound by the Privacy Act; (c) the sender reasonably believes the recipient is bound by a privacy framework comparable to the Privacy Act; (d) the sender reasonably believes the importer is subject to a 'prescribed binding scheme'; (e) the sender reasonably believes the importer is bound by the laws of a 'prescribed country'; or (f) the sender reasonably believes the importer is bound to protect the information in question in a way that is comparable with the Act. Per section 193, the Commissioner may prevent onward transfer if she has reasonable grounds to believe the information will not be protected to the same level, taking into consideration the effects of the transfer on individuals; the 'general desirability of facilitating the free flow of information between New Zealand and other countries'; and relevant international guidelines (section 193(2)). Prevention is implemented through the issuance of a transfer prohibition notice that specifies the information in question, the nature of, and the rationale for the prohibition. Appeals may be directed to the Human Rights Review Tribunal. The penalty for failure to comply with a notice is up to NZ$10,000. *See* Privacy Act 2020 part 5, subpart 3, section 133(3).

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Provisions	AANZFTA	NZ-Hong Kong	South Korea-NZ	CPTPP	DEPA	RCEP	NZ-China FTA Upgrade	NZ-Singapore CET Upgrade	NZ-UK	NZ–EU
provisions on data protection recognizing certain international standards?) **Data protection recognizing certain international standards addressed in agreement**										

Source: Burri, Vásquez Callo-Müller and Kugler, TAPED

The data in Table 2 shows that apart from the outlier South Korea–New Zealand FTA, which does not have a dedicated digital trade chapter, all of New Zealand's PTAs address data protection in a substantially similar manner. Six of them (CPTPP, DEPA, RCEP, NZ–China FTA Upgrade, NZ–Singapore CET Upgrade, and NZ–UK FTA) reference certain key data protection principles, and only three (AANZFTA, DEPA, and NZ–China FTA Upgrade) reference international standards. Overall, the mega-regional deals exhibit a broader scope of commitments, while the UK–New Zealand FTA introduces a raft of inaugural provisions, including specific recognition of the principles of a 'robust personal information protection framework',[85] the adoption of non-discriminatory practices to protect infringements of personal information protection within the Parties' jurisdictions;[86] the publication of information on compliance and remedies;[87] and the 'development of mechanisms to promote compatibility and interoperability', referencing both 'mutual agreement' and 'broader international frameworks'.[88] The UK–New Zealand data protection provision, which must be assessed in the context of close ideological, legislative, and regulatory alignments, exemplifies the full application of New Zealand's preference for language geared towards interoperability and coherence.

The EU–NZ FTA's data protection provision is different. It recognizes personal data protection and privacy as a fundamental human right. The Parties' obligation is rather framed as an exception and does not reference international data protection principles and standards. The high variance in trading partners and the differences in provision type reveal a willingness to conclude agreements with a divergent range of partners, requiring a flexible and pragmatic approach to digital trade lawmaking. This reflects New Zealand's aforementioned domestic pragmatism, as evidenced in the globally 'middle-ground' approach to its 2020 overhaul of its privacy law regime, which operates on a principles-based, rights-balancing framework.[89]

[85] Article 15.13(3) UK–NZ FTA.
[86] Article 15.13(4) UK–NZ FTA.
[87] Article 15.13(5) UK–NZ FTA.
[88] Article 15.13(6) UK–NZ FTA.
[89] Dizon &McHugh, *supra* n. 28, at 232–234.

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4. Exceptions and limitations

Two notable and linked exceptions and limitations stand out amidst a trade agenda that has generally been characterized as lacking the 'defensive' nature exhibited by many jurisdictions:[90] Te Tiriti o Waitangi/Treaty of Waitangi exception clause (te Tiriti clause) and Investor-State Dispute Settlement (ISDS). Pertinent to New Zealand's identity as a colonized nation grappling with decolonization, Te Tiriti clause[91] is an intended safeguard for the government's obligations to the country's Indigenous Māori population under Te Tiriti o Waitangi/Treaty of Waitangi.[92] The clause, which enables the New Zealand government (as represented by the Crown) to take actions 'it deems necessary to accord more favourable treatment of Māori'[93] was introduced for New Zealand's FTA with Singapore in 2000[94] and features in all its 14 FTAs that are currently in force, except the CER that was signed in 1983 with Australia.

The precise nature and scope of this obligation in the context of FTAs is highly contested.[95] Its origins trace back to textual inconsistencies between the Māori and English versions of Te Tiriti/the Treaty.[96] Contention surrounding the exception clause peaked in 2015 during the negotiations of the Trans-Pacific Partnership (TPP). From June to December 2015, nine claims questioning the efficacy of the exception clause were filed with the Waitangi Tribunal.[97] The claims included the adverse effects of TPP

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[90] Lee-Makiyama, *supra* n. 58, at 12.

[91] The exception clause is worded as follows in the CPTPP: Article 29.6: Treaty of Waitangi / 1. Provided that such measures are not used as a means of arbitrary or unjustified discrimination against persons of the other Parties or as a disguised restriction on trade in goods, trade in services and investment, nothing in this Agreement shall preclude the adoption by New Zealand of measures it deems necessary to accord more favourable treatment to Māori in respect of matters covered by this Agreement, including in fulfilment of its obligations under the Treaty of Waitangi. 2. The Parties agree that the interpretation of the Treaty of Waitangi, including as to the nature of the rights and obligations arising under it, shall not be subject to the dispute settlement provisions of this Agreement. Chapter 28 (Dispute Settlement) shall otherwise apply to this Article. A panel established under Article 28.7 (Establishment of a Panel) may be requested to determine only whether any measure referred to in paragraph 1 is inconsistent with a Party's rights under this Agreement.

[92] *See* New Zealand Ministry of Foreign Affairs & Trade, *Preserving our Right to Regulate: Treaty of Waitangi Exception Clause* https://www.mfat.govt.nz/en/trade/nz-trade-policy/preserving-our-right-to-regulate/.

[93] Waitangi Tribunal, *TPPA Treaty Clause Not a Breach, Tribunal Says*, https://waitangitribunal.govt.nz/news/tppa-treaty-clause-not-a-breach-tribunal-says/.

[94] Carwyn Jones et al., *Māori Rights, Te Tiriti o Waitangi and the Trans-Pacific Partnership Agreement*, Expert Paper No. 3 (2016) https://tpplegal.files.wordpress.com/2015/12/ep3-tiriti-paper.pdf.

[95] Kawharu, *supra* n. 35.

[96] The Māori and English versions have different meanings. The Māori version, signed by 503 chiefs as compared to 39 who signed the English version does not cede Māori sovereignty and, indeed, the whole of New Zealand, to the Crown in the manner that the English version does. *See e.g.* Dominic O'Sullivan et al., *A Critical Review of the Cabinet Circular on Te Tiriti o Waitangi and the Treaty of Waitangi Advice to Ministers* 21 Ethnicities 1093 (2021); Claire Charters & Tracey Whare, *Shaky Foundations: The Fundamental Flaw at the Heart of a 'Model' Treaty Involving New Zealand and the Indigenous Māori Community* 34 World Policy Journal 11 (2017/2018); Judith Pryor, *The Treaty of Waitangi and the Justice of Cultural Translation* in *Betwixt and Between: Place and Cultural Translation* 147–157 (David Johnston & Stephen Kelly eds., Cambridge Scholars Publishing 2007).

[97] Dr Papaarangi Reid and Others (Wai 2522); Natalie Baker and Others on Behalf of Hapū o Ngāpuhi (Wai 2523); Rīhari Dargaville on Behalf of Te Tai Tokerau District Māori Council (Wai 2530); Waimarie Bruce-Kīngi and Others (Wai 2531); Titewhai Harawira on Behalf of Team Patuone (Wai

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clauses on Māori interests – from political rights, intellectual property and preservation of cultural knowledge to environmental protection; the 'chilling effect' of ISDS on the Crown's ability to meet its Treaty obligations; and the quality of the Crown's consultation process Māori in the pre-TPP process.[98] The Tribunal heard the claims on an urgent basis, and, in 2016, released an initial report finding that the exception clause was not a breach of the government's treaty obligations.[99] However, it raised concerns on the implications of permitting foreign investors to bring claims against the government via ISDS,[100] recommending further dialogue on the issue between Māori and the Crown. While New Zealand conceded to ISDS in the TPP's successor, the CPTPP, which excluded some of the more controversial ISDS provisions in the TPP,[101] the government added exclusionary side letters with five co-signatories shortly thereafter,[102] and the sensitivity has since galvanized into a firm exclusion of ISDS in New Zealand's trade agreements.[103]

Further questions raised by the claims were reserved for later stages of the Tribunal's enquiry, notably the impact of e-commerce/digital trade provisions in the CPTPP on data sovereignty and mātauranga Māori (Māori knowledge).[104] The Tribunal's 2021 report on this question,[105] found that the CPTPP's e-commerce provisions posed significant risks to Māori interests, and the government's 'passive' reliance on mitigatory exclusions and exceptions breached the requisite standard of active protection required by Te Tiriti.[106] The Tribunal considered the significant implications of the 'digital domain' on the taonga (treasured possession) of mātauranga Māori, which constitutes the core of Māori identity and is accordingly not open for bargaining or negotiation.[107] While noting a need for a comprehensive review of the country's broader policy context for digital trade, the Tribunal stopped short of recommending the suspension of further digital trade negotiations until an appropriate regime was in place, emphasizing the need for Māori-Crown dialogue on this matter.[108]

1427); Cletus Maanu Paul and Others on Behalf of the New Zealand Māori Council (Wai 2532); Tīmoti Flavell and Others on Behalf of Ngāti Kahu (Wai 2533); Cletus Maanu Paul on Behalf of Ngā Kaiāwhina a (Wai 262) and the Mataatua District Māori Council (Wai 2535); and Deirdre Nehua, Te Kerei Tiatoa, Violet Nathan, and Others (Wai 2551). *See* Waitangi Tribunal, *Report on the Trans-Pacific Partnership Agreement (WAI 2522)*, Waitangi Tribunal Report 2016, https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_104833137/Report%20on%20the%20Trans-Pacific%20Partnership%20Agreement%20W.pdf.

[98] *Ibid.*, 2 & 50.

[99] *Ibid.*, 44–45.

[100] *Ibid*.

[101] Annexes 2 and 4(A) CPTPP.

[102] Government of New Zealand, *New Zealand Signs Side Letters Curbing Investor-State Dispute Settlement*, https://www.beehive.govt.nz/release/new-zealand-signs-side-letters-curbing-investor-state-dispute-settlement.

[103] New Zealand has committed to ISDS in 14 PTAs prior to its firm exclusionary stance.

[104] Waitangi Tribunal Report Wai 2522 of 2021, *supra* n. 34, 4–5 & 142–143. The issues of Crown-Māori engagement and secrecy were also reserved, but eventually addressed in mediation. *Ibid.*, 9.

[105] The question investigated by the report was: 'What (if any) aspects of the e-commerce chapter of the CPTPP are inconsistent with the Crown's obligations under te Tiriti/the Treaty?'. *Ibid.*, 4.

[106] *Ibid.*, 183.

[107] *Ibid.*, 33–64.

[108] *Ibid.*, 191.

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It noted the government's policy efforts since the claims were lodged, including consultation with Māori advisory board Te Taumata,[109] and the establishment of a Māori claimant-led trade body, Ngā Toki Whakarururanga.[110] The application of these reform efforts appears in the New Zealand–UK Free Trade Agreement, which entered into force on 31 May 2023 and dedicates an entire chapter (Chapter 26) to Māori Trade and Economic Cooperation. However, commentators have argued that the ostensibly 'inclusive' approach distracts from the agreement's lack of meaningful protection of Māori interests.[111] A similarly titled chapter is included as Chapter 20 of the EU–NZ FTA.

5. *Beyond digital trade: DEPA and New Zealand as an innovative legal entrepreneur*

While national discourse continues on the contested boundaries of domestic regulation and trade law, New Zealand's approach of flexible pragmatism has gained traction outside its borders and outside the traditional confines of FTAs. In its role as a leader and mediator within the Asia-Pacific region, New Zealand has been increasingly active in regional digital trade partnerships and initiatives. As a member of Asia-Pacific Economic Cooperation (APEC), and the only country to have concluded FTAs with the ASEAN, China, Hong Kong, Taiwan, and South Korea (in addition to being party to the CPTPP, RCEP and DEPA), its involvement in initiatives, such as the APEC's Digital Economy Steering Group,[112] has been deepened and evolved in the 2021 Aotearoa Plan of Action, which foregrounds Innovation and Digitalisation as key policy focus areas.[113] New Zealand is also a strategic partner to the ASEAN, whose ten members, on the back of a strong track record of digital trade rule development,

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[109] *Ibid*. The advisory board was established in response to the Tribunal's first report in 2016. *See ibid.*, 98 & 190.

[110] Which resulted from the mediation processes on engagement and secrecy. New Zealand Ministry of Foreign Affairs & Trade, *Joint Press Release by Waitangi Tribunal Claimants and the Ministry of Foreign Affairs and Trade* (21 December 2020), https://www.mfat.govt.nz/en/media-and-resources/joint-press-release-by-waitangi-tribunal-claimants-and-the-ministry-of-foreign-affairs-and-trade/. In addition to noting the prioritization of Māori interests in its updated 'Trade for All' agenda, New Zealand is further party to a host of indigenous trade initiatives, including the Inclusive Trade Action Group (ITAG) and the Australia and Aotearoa-New Zealand Indigenous Collaboration Arrangement. For more context, *see* Rino Tirikatene, *Supporting Māori to Succeed in Trade* (Speech), International Inter-Tribal Trade and Investment Organization (IITIO) (Virtual) Event (17 February 2021), https://www.beehive.govt.nz/speech/supporting-māori-succeed-trade-international-inter-tribal-trade-and-investment-organization.

[111] Kelsey points out: 'The preamble and the Māori trade chapter "note" the UK was the original signatory to Te Tiriti o Waitangi, but eschew any ongoing obligations. The UK rejects any inference that it recognises Māori genetic resources and traditional knowledge as forms of intellectual property, or that these affect the UK's laws.' *See* Jane Kelsey, *Behind the 'Inclusive' Window Dressing, the NZ-UK Free Trade Deal Disappoints Politically and Economically*, The Conversation (4 March 2022), https://www.rnz.co.nz/news/on-the-inside/462842/behind-the-inclusive-facade-nz-uk-free-trade-deal-disappoints-politically-and-economically.

[112] APEC, Digital Economy Steering Group, Work Program for the Implementation of the APEC Internet and Digital Economy Roadmap (Endorsed), 2020/CSOM/019, session 5.5 (13 November 2020).

[113] APEC, *Innovation and Digitalisation*, http://aotearoaplanofaction.apec.org/innovation-and-digitalisation.html.

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announced plans to develop a digital trade pact by 2025 as part of their Digital Economy Framework Agreement (DEFA).[114] These governance ecosystems across Asia-Pacific fora attest to the region's status as a digital trade powerhouse on the cusp of a golden age for data-driven trade.

Against a backdrop of recalibration of its relationship with China,[115] motivated by a perceived need to alleviate its long-standing trade dependency on the hegemon,[116] New Zealand has continued to build bridges in innovative formats. The DEPA, signed in June 2020 with Singapore and Chile[117] is a clear sign of these developments. This unprecedented digital-only agreement departs from the norms of traditional PTA design to offer a more experimental 'platform' for the co-development of digital economy best practices.[118] Based on 16 'modules', each addressing a specific digital economy issue, the DEPA is structured around three main goals: (i) 'Facilitat[ing] end-to-end digital trade' (through digital identities, e-invoicing, paperless trading, and fintech and e-payments); (ii) 'Enabl[ing] trusted data flows' (through personal data protection, open government data, cross-border data flows, and data innovation sandboxes); and (iii) 'Build[ing] trust in digital systems and facilitat[ing] opportunities for participation in the digital economy' (through artificial intelligence (AI), SME cooperation, online consumer protection, and digital inclusivity).[119]

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[114] ASEAN, 53rd ASEAN Economic Ministers (AEM) Meeting, *Joint Media Statement* (8–9 September 2021) 3 https://asean.org/wp-content/uploads/2021/09/AEM-53-JMS_FINAL_ADOPTED.pdf. While recent analysis by research institute New Zealand Institute of Economic Research (NZIER) estimates the region stands to gain $18 billion from digital trade liberalisation over the coming decade, free trade critics such as Kelsey argue the gains will not only be unevenly distributed, but their facilitation will also disproportionately harm emerging economies and indigenous populations. *See* Chris Nixon, *Digital Trade is the Way Forward for New Zealand: A Preliminary Assessment of the Costs and Benefits of Digital Trade* 23 (December 2021) https://www.nzier.org.nz/hubfs/Public%20Publications/Client%20reports/nzier_report_-_digital_trade_is_the_way_forward_for_new_zealand.pdf. *Cf* Jane Kelsey, *The Risks for ASEAN of New Mega-Agreements that Promote the Wrong Model of E-Commerce*, ERIA Discussion Paper Series, ERIA-DP-2017-10 (October 2017), https://www.eria.org/ERIA-DP-2017-10.pdf.

[115] Iati, China's Impact on New Zealand Foreign Policy in the Pacific: The Pacific Reset in The China Alternative: Changing Regional Order in the Pacific Islands 143-166 (Graeme Smith & Terence Wesley-Smith, Australian National University Press 2021).

[116] Sense Partners, *How Many Eggs, In How Many Baskets? An Update On NZ-China Trade Patterns*, Report Commissioned by The New Zealand-China Council (2020), https://nzchinacouncil.org.nz/wp-content/uploads/2020/08/How-many-eggs-in-how-many-baskets.-An-update-on-NZ-China-trade-patterns.pdf.

[117] Digital Economy Partnership Agreement, Chile–N.Z.–Sing., 11 June 2020, [2020] NZTS. *See* New Zealand Ministry of Foreign Affairs & Trade, *DEPA Overview*, https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/digital-economy-partnership-agreement-depa/overview/. Though DEPA's three founding members New Zealand, Chile, and Singapore have low mutual trade volumes, they share both similar approaches to FTA development and regulatory cooperation. The countries also constituted three of the four initial members of the TPP-turned-CPTPP. Amy Borrett, *A Landmark Agreement is Toppling Barriers to Global Digital Trade*, TechMonitor (16 April 2021).

[118] Marta Soprana, The Digital Economy Partnership Agreement (DEPA): Assessing the Significance of the New Trade Agreement on the Block 13 Trade, Law and Development 143, 153 (2021).

[119] Singapore Ministry of Trade & Industry, *Digital Economy Partnership Agreement*, https://www.mti.gov.sg/Improving-Trade/Digital-Economy-Agreements/The-Digital-Economy-Partnership-Agreement.

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DEPA exhibits a progressive approach to issues at the intersection of digital trade and data governance. Taking an integrated approach to both, the signatories affirm their commitment to digital inclusion, including cultural diversity, indigenous rights, gender equality, environmental protection and sustainable development.[120] Commitments to engage in dialogue and regulatory cooperation in a range of emerging 'greenfield' topics,[121] such as digital identities, furthering international standards in the digital arena, and open governance, AI, and fintech, also feature.[122] DEPA's remit is broader than that of traditional PTAs, explicitly acknowledging the importance of taking a 'multi-stakeholder approach' to issues, such as online safety and security issues.[123] DEPA does not address services market access, technical barriers to trade, or intellectual property rights. Though these issues are already covered in agreements to which the DEPA signatories are party, and therefore conceivably not necessary to reiterate in an agreement that is largely characterized by soft commitments.[124]

In addition to the precedent of its holistic focus on data economy issues and its cooperative, sandbox-focused format, DEPA's significance is considered to derive from its 'demonstration effect' to more powerful states within the global economic system.[125] Singapore swiftly concluded a similar bilateral agreement with Australia, the Singapore-Australia Digital Economy Agreement (SADEA) in December 2020.[126] By November 2023, it had signed DEAs with the UK and South Korea and has DEAs under negotiation with the European Free Trade Association (EFTA) members and Vietnam. DEPA's open membership policy[127] has attracted interest from Canada, South Korea, as well as China.[128] The latter move has raised questions about China's ability to meet DEPA's high standards, given its conservative approach to digital trade rules, notably on transparency, privacy, and national security.[129] Yet, interest from states who are traditionally tricky negotiation partners in multilaterals in joining DEPA is precisely the intended aim of the agreement. According to MFAT, DEPA is intended to foster cohesion and regulatory cooperation,[130] which can increase the chances of

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[120] Soprana, *supra* n. 118, at 162.
[121] Gill & Setyadi, *supra* n. 60, at 64.
[122] Module 8 DEPA.
[123] Article 5.2(2) DEPA.
[124] Honey notes that as DEPA opens up its membership, the exclusion of these rules may need to be reassessed to uphold the alleviation of trade barriers in the DEPA area. *See* Honey, *supra* n. 51.
[125] Honey, *supra* n. 51, at 235.
[126] Australian Department of Foreign Affairs & Trade, *Australia–Singapore Digital Economy Agreement* https://www.dfat.gov.au/trade/services-and-digital-trade/australia-and-singapore-digital-economy-agreement.
[127] Article 16.4 DEPA.
[128] Dan Ciuriak & Robert Fay, *The Digital Economy Partnership Agreement: Should Canada Join?*, Centre for International Governance Innovation Policy Brief No. 171 (January 2022).
[129] See e.g. Su-Lin Tan, China's Interest in DEPA Digital Trade Pact Raises Questions about 'Domestic Reforms' and What Could be the Next Big Multilateral Deal, South China Morning Post (4 November 2021), https://www.scmp.com/economy/china-economy/article/3154887/chinas-interest-depa-digital-trade-pact-raises-questions.
[130] According to the New Zealand government, 'generat[ing] new ideas and approaches that can be used by members in the WTO negotiations, and by other countries negotiating free trade agreements or engaging in international digital economy or digital trade work'. *See* Government of New Zealand, *Canadian interest in the Digital Economy Partnership Agreement Welcomed* (17 December 2020)

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bridging ideological divides that in more rigid, formal trade lawmaking channels, are insurmountable. In doing so, it attests to the influence potential of soft power in the digital trade arena, the fast-evolving technological and economic trajectories of which require more agile, experimental, and conciliatory approaches to rulemaking. Whether or not these 'soft' approaches can be leveraged to harder obligations, however, remains to be seen. Critics have noted that these approaches fail to address the criticism leveraged against the CPTPP, reinforcing its skew towards corporate interests without meaningful steps towards the inclusion it purports to champion.[131] This said, the appeal of the DEPA approach remains and has been confirmed by the generated interest in this more flexible platform for cooperation in a fluid technological and geopolitical environment.

III. EU'S APPROACH TO DIGITAL TRADE REGULATION

1. Introduction

In the early 2010s, as efforts towards multilateralism faltered together with the languishing Doha round, the EU began to shift its focus to bi- and plurilateral agreements to implement its trade strategy, including for digital trade.[132] From 2006, a 'second generation' of agreements placed renewed emphasis on digital trade issues, including 'WTO-plus' and 'WTO-extra' measures.[133] The European Commission's 2015 trade and investment policy further sharpened the focus on digital trade within the EU's FTAs, committing to seek rules for e-commerce and cross-border data flows and counter digital protectionism while safeguarding its data protection framework.[134] After negotiations towards the so-called 'mega-regional' trade deals of the Trans-Atlantic Trade and Investment Partnership (TTIP) between the EU and the United States and the 23-party Trade in Services Agreement (TiSA), which had formed the backdrop to the policy, stalled shortly thereafter,[135] the EU pivoted back to bilateral

https://www.beehive.govt.nz/release/canadian-interest-digital-economy-partnership-agreement-welcomed.

[131] Jane Kelsey, *DEPA Lacks Added Value*, East Asia Forum (10 April 2020), https://www.eastasiaforum.org/2020/04/10/depa-lacks-added-value/.

[132] Shamel Azmeh, Christopher Foster & Jaime Echavarri, *The International Trade Regime and the Quest for Free Digital Trade* 22(3) Int'l Stud Rev 671 (2020), Boris Rigod, *Global Europe: The EU's New Trade Policy in its Legal Context* 18(2) Colum J Eur L 277 (2012).

[133] The EU's trade agreements can be broadly categorised into four types: (i) 'first generation' agreements (pre-2006); (ii) development-focused economic partnerships; (iii) 'deep and comprehensive free trade areas', and (iv) 'second generation' agreements (post-2006). *See* Patricia Wruuck, *What Future for EU Trade Policy and Free Trade Agreements?* in *Perspectives on the Soft Power of EU Trade Policy* (San Bilal and Bernard Hoekman eds., Vox EU 2019) 47, 48.

[134] European Commission, *Trade for All: Towards A More Responsible Trade and Investment Policy*, COM(2015) 497 final (14 October 2015); Alasdair R Young, *Liberalizing Trade, Not Exporting Rules: The Limits to Regulatory Co-Ordination in the EU's 'New Generation' Preferential Trade Agreements* 22(9) J. Eur. Public Policy1253, 1253–1275 (2015).

[135] *See, in general, CETA, TTIP, and TiSA: New Trends in International Economic Law*, in *Mega-regional Trade Agreements: CETA, TTIP, and TiSA: New Orientations for EU External Economic Relations* (Stefan Griller, Walter Obwexer & Erich Vranes, Oxford University Press 2017); Hanns Günther Hilpert, *Trans-Pacific Partnership (TPP) Agreement: Increased Pressure on European Trade Policy*, 51 SWP Comment (2015).

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agreements. It concluded agreements with Canada (2016), Mexico (2018); Japan (2018); Singapore (2018); Vietnam (2019); Mercosur (2019); post-Brexit, the UK (2020), and Chile (2022). Moreover, negotiations with Australia, China, India, Indonesia, and the Philippines are ongoing.[136] These deals form part of the EU's network of 41 PTAs with 72 countries – according to the European Commission, the world's largest.[137]

2. *Data flows in EU FTAs*

The EU has generally taken a 'cautious' approach to digital trade, traditionally following the approach of the WTO's General Agreement on Trade in Service (GATS) of listing positive commitments.[138] It is thus unsurprising that the first EU agreement in which cross-border data transfers appeared was in the context of financial services in the European Communities (EC)–Chile Association Agreement, which entered into force in 2003.[139] The EU's reticence is directly tethered to privacy and data protection, which the EU has a 'positive duty' to uphold as fundamental rights under its foundational human rights instruments,[140] as discussed further below. The first EU FTA that linked data protection to cross-border data flows was the EC–Algeria Association Agreement, which entered into force in 2005. In this agreement, the parties undertook 'to adopt appropriate measures to ensure the protection of personal data to eliminate barriers to the free movement of such data between the Parties'.[141] This agreement and the previously mentioned EC–Chile Association Agreement, predate the inclusion of 'e-commerce' provisions in the EU's FTAs. Standalone e-commerce undertakings featured for the first time in the EC–CARIFORUM Economic Partnership Agreement, which entered into force in 2008.

The EU's slow uptake of cross-border digital trade norms is nonetheless juxtaposed against its prolific regulation of the digital economy within its borders[142]

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[136] European Commission, *Negotiations and Agreements*, https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/negotiations-and-agreements_en.

[137] European Council, *Global Europe: The Value of Free and Fair Trade*, https://www.consilium.europa.eu/en/eu-free-trade/ and European Commission, *Access2Markets: Trade Agreements*, https://trade.ec.europa.eu/access-to-markets/en/content/trade-agreements-0#:~:text=At%20present%2C%20the%20EU%20has,EU%20and%20its%20outside%20partners.

[138] Mira Burri, *The Governance of Data and Data Flows in Trade Agreements: The Pitfalls of Legal Adaptation*, 51 U.C. Davis L. Rev. 65, 106–108 (2017).

[139] Article 122.2 EC–Chile Association Agreement.

[140] *See* European Court of Human Rights, *Refah Partisi and others v. Turkey,* App Nos. 41340/98, 41342/98, 41343/98, and 41344/98, Grand chamber judgment of 13 February 2003. *See also* Article 8 of the Council of Europe's European Convention on Human Rights; Article 8 of the Charter of Fundamental Rights of the European Union OJ C [2010] 83/2; Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data (the "Data Protection Directive", DPD), [1995], Official Journal L 281/31. *Additionally, see,* Mira Burri and Rahel Schär, *The Reform of the EU Data Protection Framework: Outlining Key Changes and Assessing Their Fitness for a Data-Driven Economy* 6 J. Inf. Policy 479, 481 (2016); Kristina Irion, Svetlana Yakovleva & Marija Bartl, *Trade and Privacy: Complicated Bedfellows? How to Achieve Data Protection-Proof Free Trade Agreements* (University of Amsterdam Institute for Information Law 2016), 3–10.

[141] Article 45 EC–Algeria Association Agreement.

[142] *See* Kai Zenner, J. Scott Marcus & Kamil Sekut, *A Dataset on EU Legislation for the Digital World*, Bruegel (20 July 2023).

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with a great and growing number of initiatives that seek to promote the EU digital single market while effectively regulating online platforms.[143] Against a backdrop of mounting international pressure to commit to enabling cross-border data flows within its FTAs,[144] the EU included its first provisions on data flows in the digital trade-related sections of the EU–Japan and the updated EU–Mexico agreements,[145] reflecting the aforementioned 2015 trade policy's positioning of cross-border flows as an offensive interest. As consensus on the reconciliation between data flows and data protection had not yet been reached at the time of signing, a three-year review clause was included in both FTAs, allowing time for the Commission to settle its position in its agreement with Japan.[146] Meanwhile, data flow provisions did not feature in the EU–Singapore nor the EU–Vietnam FTAs, but reappeared as binding obligations in the EU–UK TCA, the EU–NZ FTA, and the EU–Chile FTA.[147] The trajectory of the EU's data flow provisions is delineated in Table 3 below.

Table 3

Data flow provisions in key EU FTAs since 2010

Provision	**EU–South Korea**	**EU–Canada**	**EU–Japan**	**EU–Singapore**	**EU–Mexico**	**EU–Vietnam**	**EU–UK**	**NZ–EU**
(2.2.1. [data_free_flow_prov] Does the e-commerce/digital trade chapter include a provision on the free movement of data?) **Free movement of data addressed in e-commerce chapter**	No	No	Yes (S)	No	Yes (S)	No	Yes (H)	Yes (H)
(2.2.2. [data_flow_mech_barrier] Does the e-commerce chapter contain a mechanism to address barriers to data flows?) **Mechanism to address barriers to**	No	No	Yes (S)	No	No	No	No	No

[143] *See generally* European Commission, A Digital Single Market Strategy for Europe, COM(2015) 192 final. See also Anu Bradford, D*igital Empires: The Global Battle to Regulate Technology* (Oxford University Press 2023).
[144] This was intensified during the unsuccessful TTIP and TiSA negotiations. *See* Burri, *supra* n. 138, at 109 and Hilpert, *supra* n. 135.
[145] Article 8.81 EU–Japan EPA; Article XX EU–Mexico. *See* Emily Jones et al., *The UK and Digital Trade: Which Way Forward?*, BSG-WP-2021/038 (February 2021),.
[146] Susan Ariel Aaronson and Patrick Leblond, *Another Digital Divide: The Rise of Data Realms and its Implications for the WTO*, 21 J. Int. Econ. Law 245, 261 (2018). In the meantime, the granting of adequacy—the first granted under the GDPR —smoothed over the question to some extent. The same placeholder was adopted in the EU–Mexico Modernisation Agreement.
[147] Along with the draft negotiating texts in EU–Australia and EU–Indonesia. *See also* European Commission, *Horizontal Provisions on Cross-Border Data Flows and Personal Data Protection*, Newsroom (18 May 2018), https://ec.europa.eu/newsroom/just/items/627665/en.

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Provision	**EU–South Korea**	**EU–Canada**	**EU–Japan**	**EU–Singapore**	**EU–Mexico**	**EU–Vietnam**	**EU–UK**	**NZ–EU**
data flows addressed in e-commerce chapter								
(2.2.3 [data_flow_proh_loc] Does the e-commerce chapter contain a provision banning or limiting data localisation requirements?) **Data localization requirements banned or limited in e-commerce chapter**	No	No	No	No	No	No	Yes (H)	Yes (H)
(2.2.4. [data_flow_fut_agreement] Does the agreement contain a provision on a future discussion / provisions or agreement on the free flow of data?) **Future discussion on provisions on the free flow of data addressed in agreement**	No	No	Yes (H)	No	Yes (H)	No	Yes (H)	Yes (H)
(2.5.1. [data_egov_prov] Does the agreement include provisions on e-government) **E-government addressed in agreement**	No	No	No	No	No	No	No	Yes (S)
(2.5.2 [data_egov_open_data] Does the agreement include a provision on open government data or open data?) **Open government or open data addressed in agreement**	No	No	No	No	No	No	Yes (S)	No
(2.6.1. [data_innovation] Does the agreement contain a provision referring to data innovation, allowing data to be shared and reused?) **Data innovation / data sharing and re-use addressed in agreement**	No	No	No	No	No	No	No	No

Source: Burri, Vásquez Callo-Müller and Kugler, TAPED

The above breakdown evidences the EU's conservative yet evolving approach to data flows provisions. Beyond addressing the free movement of data, generally through hard and soft commitments, further clauses do not feature, except for a soft provision on mechanisms to address barriers in EU–Japan Economic Partnership Agreement (EU–Japan EPA). The outlier EU–UK TCA (and subsequently the EU–NZ FTA), breaks the EU's silence on data flows/data localization in its trade agreements

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by including binding commitments. The digital trade chapter of the agreement, which demands interpretation in the context of the UK's former Union membership and adequacy agreement on the basis of the UK GDPR, can be read as representing the full contours of the EU's stance on data flow provisions, given the strength of both economies and their similar economic interests. Yet, the EU's appetite for these deeper commitments to enabling flows is preconditioned on strict protections for personal data, as shown in the next section.

3. *Privacy in EU FTAs*

The EU's strong stance on privacy and personal data protection in its PTAs long predates the entry into force of the GDPR in 2016. The right to privacy and family life is expressly protected as a fundamental right under Article 8 of the Council of Europe's Convention on Human Rights (ECHR). Building upon the ECHR, the Charter of Fundamental Rights of the European Union (CFREU)[148] distinguishes between the right of respect for private and family life in Article 7 and the right to protection of personal data, which is explicitly enshrined in Article 8.[149] These rights form an integral part of EU constitutional law. In this sense, privacy and personal data protection have come to build the backbone of the EU's approach to digital trade policy, and they are safeguarded as a precondition for cross-border data flows, explicitly and under the Union's right to regulate.[150]

In 2016, the EU was faced with a delicate balancing act between upholding its internal *acquis* and its international trade law obligations. The alarm was raised by EU civil society organizations (CSOs), who feared that the conclusion of TTIP with the US would facilitate the transfer of EU citizens' data to US big tech companies and lead to a subsequent loss of the strong privacy and data protection they enjoyed under EU law.[151] Consequently, the CSOs requested an independent study to assess how much privacy/data protection policy space the EU had ceded under its international trade obligations, including in the GATS, the EU–Canada Comprehensive Economic and Trade Agreement (CETA), and within the ongoing negotiations under the aegis of TTIP and the TiSA.[152] Endorsing the European Parliament's recommendation,[153] the study recommended a more 'robust' version of the GATS Article XIV exception for privacy.

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[148] Charter of Fundamental Rights of the European Union, OJ C [2010] 83/2.

[149] Article 8 'Protection of personal data' reads: 1. Everyone has the right to the protection of personal data concerning him or her; 2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified; 3. Compliance with these rules shall be subject to control by an independent authority.

[150] Mira Burri, *Data Flows versus Data Protection: Mapping Existing Reconciliation Models in Global Trade Law* in Law and Economics of Regulation, 129–158 (Klaus Mathis & Avishalom Tor eds., Springer 2021); Mira Burri, *Interfacing Privacy and Trade*, 53 Case Western Journal of International Law 35 (2021).

[151] *EU Data Protection Rights at Risk Through Trade Agreements, New Study Shows*, Transatlantic Consumer Dialogue (13 July 2016), https://tacd.org/new-study-eu-data-protection-rights-at-risk/.

[152] Irion, Yakovleva & Bartl, *supra* n. 140, at V-VI.

[153] European Parliament, Resolution of 3 February 2016 Containing the European Parliament's Recommendations to the Commission on the Negotiations for the Trade in Services Agreement (TiSA) (2015/2233(INI) Q1(c)(iii), http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2016-0041+0+DOC+XML+V0//EN.

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It stated that in light of the GATS exception mechanism under which privacy and data protection rules may be justified, clauses on cross-border data flows in EU trade agreements should always be coupled with provisions upholding the EU's right to regulate on data protection, and they must be free of qualitative conditions.[154]

Heated institutional dialogue, bookended by a 2017 Commission Communication on data flows[155] and the Parliament's 'Towards a Digital Trade Strategy' resolution,[156] eventually gave way to the European Commission's announcement of its 'data flow/protection position' in January 2018.[157] It is comprised of two pillars: (a) enabling data's free cross-border flow through the prohibition of data localization measures; and (b) a horizontal 'right to regulate' caveat protecting the EU's personal data protection regulation from dispute in regulatory dialogues or ISDS processes.[158] In practice, while achieving 'internal consistency',[159] the 'right to regulate' provision effectively overlays the GDPR's condition of adequacy agreements and other Chapter 5 legal mechanisms on the EU's data-related undertakings in its PTAs. The 'data protection/flows position' has been carried forward into the Council's 'New Strategic Agenda 2020–2024'[160] to form the basis of the EU's template for cross-border flows within which exceptions for privacy and data protection are spelt out to counterbalance any risks that emerge from international trade liberalization.[161] The EU's evolving treatment of data protection within digital trade provisions before and after its 2018 repositioning is captured in Table 4.

[154] '…a comprehensive, unambiguous, horizontal, self-standing and legally binding provision based on GATS Article XIV which fully exempts the existing and future EU legal framework for the protection of personal data from the scope of this agreement, without any conditions that it must be consistent with other parts of the [agreement]'. *Ibid.*

[155] European Commission, Communication from the Commission to the European Parliament and the Council: Exchanging and Protecting Personal Data in a Globalised World, COM(2017) 7 final.

[156] European Parliament, Resolution on 'Towards a Digital Trade Strategy', (2017/2065(INI)) (2017).

[157] European Commission, *European Commission Endorses Provisions for Data Flows and Data Protection in EU Trade Agreements*, Daily News (31 January 2018), https://ec.europa.eu/commission/presscorner/detail/en/MEX_18_546.

[158] European Commission, *Horizontal Provisions for Cross-border Data Flows and for Personal Data Protection (in EU Trade and Investment Agreements)*, https://www.politico.eu/wp-content/uploads/2018/02/Data-flow-provisions-POLITICO.pdf. *See also* Aaronson & Leblond, *supra* n. 146, at 261–262.

[159] Yakovleva & Irion, *supra* n. 10, at 219.

[160] European Commission DG Trade, *Strategic Plan 2020–2024* (29 October 2020), https://commission.europa.eu/publications/strategic-plan-2020-2024-trade_en.

[161] Yakovleva & Irion, *supra* n. 10, at 220.

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Table 4

Data protection provisions in key EU FTAs since 2010

Provisions	EU–South Korea	EU–Canada	EU–Japan	EU–Singapore	EU–Mexico	EU–Vietnam	EU–UK	NZ–EU
(2.1.1. [data_prot_prov] Does the agreement include provisions on data protection?) **Data protection addressed in agreement**	Yes (H)	Yes (S)	Yes (S)	Yes (H)	Yes (S)[162]	Yes (S)	Yes (S)	Yes (S)
(2.1.2. [data_prot_no_qualifications][163] Does the agreement include provisions on data protection with no qualifications?) **Data protection with no qualifications addressed in agreement**	No	No	No	No	No	No	No	No
(2.1.3 [data_prot_domestic_law] Does the agreement include provisions on data protection according to domestic law?) **Data protection according to domestic law addressed in agreement**	No	No	Yes (S)	No	No	No	No	No
(2.1.4. [data_prot_princ] Does the agreement include provisions on data protection recognizing certain key principles?) **Data protection recognizing certain key principles addressed in agreement**	No	No	No	No	No	No	No	No
(2.1.5. [data_prot_int_standards] Does the agreement include provisions on data protection recognizing certain international standards?) **Data protection recognizing certain international standards addressed in agreement**	Yes (H)	Yes (H)	No	Yes (H)	No	No	No	No
*(2.1.6. [data_prot_least_rest_meas] Does the agreement include provisions on data protection as a least restrictive measure?***)**	Yes (H)	Yes (H)	Yes (H	Yes (H)	No	Yes (H)	Yes (H)	No

[162] Data protection is recognized as falling under the right to regulate in Article 1.2 (scope).

[163] This item was coded until the end of 2021.

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Provisions	EU–South Korea	EU–Canada	EU–Japan	EU–Singapore	EU–Mexico	EU–Vietnam	EU–UK	NZ–EU
Data protection as a least restrictive measure addressed in agreement[164]								

Source: Burri, Vásquez Callo-Müller and Kugler, TAPED

The EU has patchily but progressively included data protection in its PTAs with e-commerce/digital trade provisions. Nevertheless, the evolution of the EU's approach to protection data protection in its PTAs deserves further elaboration. The EU has included privacy and data protection undertakings in its PTAs as early as the early 2000s, before it started negotiating and concluding PTAs with specific e-commerce/digital trade commitments. These clauses were included primarily in its Stabilization and Association Agreements (SAA) with Balkan states and Association Agreements with primarily North African countries. In these early agreements, provisions on data protection were typically included in the Protocols on mutual assistance between administrative authorities in customs matters.[165] These were generally positive and hard undertakings in which the parties undertook to protect personal data.

The divergent approach is more apparent in its PTAs that have digital trade provisions, as indicated in Table 4 above. It is not surprising that data protection is mentioned in some way in all the eight agreements analyzed. However, it is only in the EU–UK TCA that the EU extensively regulates data protection.[166] The EU's earlier treaties indicate its testing-the-waters approach in regulating digital trade,[167] including data protection, an area in which it has made extensive regulatory strides through the GDPR.

In the EU–South Korea FTA (KOREU) and the EU–Singapore FTA, the EU adopted hard and positive obligations on data protection similar to those included in its pre-digital trade agreements.[168] While the data protection commitments in these two PTAs are binding, they are provided for under the objectives provisions of the agreements, which could be interpreted as conferring aspirational status to data protection in e-commerce. In CETA[169] and the EU–Japan EPA,[170] however, data protection is couched in soft, best endeavour language. In CETA, particularly, mention

[164] This item was coded until June 2022.
[165] These are typically in the EU's Association Agreements. *See e.g.* Articles 10 and 13 of the Protocol 5 on Mutual Assistance Between Administrative Authorities in Customs Matters of the EC–North Macedonia Stabilization and Association Agreement (SAA); EC–Egypt Association Agreement; and the EC–Bosnia Herzegovina SAA.
[166] Coincidentally, that agreement is also the first agreement in which the EU had standalone digital trade chapters (separate from the trade in services and investment chapters) and changed the title from 'e-commerce' 'digital trade'.
[167] Burri, *supra* n. 138, at 106–108.
[168] Article 7.48 KOREU and Article 8.57(4) EU–Singapore FTA.
[169] Article 16.4 CETA.
[170] Article 8.78(3) EU–Japan EPA.

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is made in hortatory terms under the trust and confidence in the e-commerce section of the agreement. In the remaining EU PTAs, data protection is asserted as a public policy imperative. In the EU–UK TCA, data protection is provided for in the right to regulate[171] as well as a specific exception in the data protection sections of the digital trade chapters. The EU–NZ FTA takes a similar approach as the TCA,[172] with an additional clause permitting the parties to adopt or maintain measures to protect privacy and personal data.[173] The difference between the TCA and the EU–NZ FTA is the explicit endorsement of personal data protection as a fundamental right – a provision that has become an integral part of the new EU digital trade template but was omitted in the TCA, as the UK incorporates the ECHR via the Human Rights Act of 1998 into its domestic law.[174] An anomaly in the EU's later PTAs is the EU–Vietnam FTA, which entered into force in 2020. This agreement does not mention data protection in the e-commerce provisions but privacy is expressly protected in the immediately following general exceptions clause.[175] The reason for this anomaly is in the few and largely cooperation-like norms on electronic commerce that do not cover data flows at all. All EU PTAs except the EU–UK TCA and the EU–NZ FTA also address data protection as a GATS-like justification in the general exceptions' provisions outside the e-commerce provisions.

Beyond the broad commitments on personal data protection, no recent EU agreement addresses privacy through the lens of upholding particular key principles. Some of the earlier agreements (with South Korea,[176] Canada,[177] and Singapore[178]), however, refer to international standards in general, without mentioning specific ones, possibly in consideration of the Council of Europe's ECHR and Convention 108. This could be in tandem with the move from protecting privacy or personal data as a positive obligation to asserting it as a public policy prerogative.

Taking a broader view of the progression of data protection provisions in the EU's PTAs, we observe a general tendency to include data protection in some way in all EU agreements. However, depending on the time the agreement was negotiated (and, ostensibly, the trade partner), the commitments differ. Nevertheless, a clear trend is emerging whereby the EU upholds data protection as a fundamental right and an imperative through its general right to regulate and through exceptions from its data flows obligations. In this way, the EU carves out unfettered policy space to apply its high privacy/data protection standards under EU constitutional law and the GDPR.

4. Exceptions and limitations

In addition to privacy/data protection, the EU excludes two notable topics in its PTAs to guard its policy space and ensure that it can assert its right to regulate. These are the

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[171] Article 198 TCA.
[172] Article 12.3 (the right to regulate) and Article 12.5(2) second sentence EU–NZ FTA.
[173] Article 12.5(2) first sentence EU–NZ FTA.
[174] See Kristina Irion & Mira Burri, *Digital Trade*, in *EU–UK Trade and Cooperation Agreement: A Commentary*, 255–275 (ed. by Gesa Kübek, Christian J. Tams & Jörg P. Terhechte, Nomos 2023).
[175] Article 8.53 EU–Vietnam FTA.
[176] Article 7.48(2) KOREU.
[177] Article 16.4 CETA.
[178] Article 8.57(4) EU–Singapore FTA.

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carve-outs of audio-visual services and, like New Zealand, ISDS. Within the context of a liberal yet highly regulated economy, these assertions of flexibility are part and parcel of the EU's economic and regulatory regime.

The Union's traditional key defensive interest on its trade agenda is a so-called 'cultural exception' for audio-visual services.[179] Drafted to ensure technological neutrality, it enables both the EU and its partners to adopt cultural policies that favour their own audio-visual services, regardless of their medium (traditional and digital), WTO or other agreements notwithstanding.[180] As Hanania has noted, this exemption has not stopped the EU from pursuing cultural diversity through other forms of international cooperation and exchange[181] but has also meant that digital trade and cultural policies have become largely disconnected.[182]

The exclusion of ISDS is a more recent occurrence. The EU's remit to conclude PTAs on behalf of its Member States is limited by institutional constraints. Post-2009, the Lisbon Treaty conferred on the EU the 'exclusive external competence' for the Common Commercial Policy (CCP), including all facets of trade in services, the commercial aspects of intellectual property protection, and foreign direct investment (FDI).[183] For a matter to fall within the CCP, it must have a 'specific link with trade'.[184] Agreements going beyond this link must be negotiated as 'mixed agreements', requiring the additional approval of all Member States.[185] Questions on the threshold between exclusive and mixed agreements following the Lisbon Treaty's expansion of

[179] Lilian Richieri Hanania, *Trade, Culture and the European Union Cultural Exception*, 25 Int. J. Cult. Policy, 568, 568–581 (2019); Mira Burri, *EU External Trade Policy in The Digital Age: Has Culture Been Left Behind?*, Trade Law 4.0 Working Paper No. 2/2022.

[180] Burri, *ibid*. For a critique of the EU's audio-visual exception, *see e.g.* Mira Burri, *Trade versus Culture in the Digital Environment: An Old Conflict in Need of a New Definition,* 12 J Int Econ Law 17 (2009); Bregt Natens, *Chronicle of a Death Foretold? The Cultural Exception for Audio-Visual Services in EU Trade Negotiations*, 41 Leg. Issues Econ. Integration, 367, 367–388 (2014).

[181] Richieri Hanania*, supra* n. 179.

[182] Burri, *supra* n. 179.

[183] *Ibid.*, at Articles 3(1)(e), 207 TFEU. The EU also has exclusive competence for personal data protection. See *Ibid.*, at Article 16(2).

[184] Irion, Yakovleva & Bartl, *supra* n. 140**Fehler! Textmarke nicht definiert.**, at 14.

[185] European Commission, *International Agreements and the EU's External Competences* (last update 8 April 2020), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=legissum:ai0034. See also Christian Riffel, *Squaring the Circle: High-Quality, Deep FTAs with Australia and New Zealand without the EU Member States' Approval?* 44 EL Rev 694 (2019). Trade agreements under the CCP are negotiated by the Commission (DG Trade) according to Council-adopted negotiating directives and the 'decision to conclude' is adopted by the Council upon consent from Parliament. Both exclusive and mixed agreements are binding on EU bodies and Member States. Within the EU law hierarchy, international trade agreements are ranked below EU primary law (and fundamental rights within it) and above EU secondary law. Cases of contradiction between trade agreements and secondary law are resolved according to the doctrine of parallel interpretation, and the principle of autonomy of the EU order, as confirmed in the Judgment of the Court (Grand Chamber) of 3 September 2008, Joined cases C-402/05 P and C-415/05 P, Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities, ECLI:EU:C:2008:461. International trade agreements generally do not have 'direct effect', and require legislative implementation. TFEU Article 218(11) enables the Commission to request an opinion from the CJEU under an 'advisory opinion procedure', the outcome of which may block an agreement's entry into force. This mechanism, along with article 263 TFEU's review procedure for the legality of EU acts, is frequently invoked to invalidate agreements involving the transfer of personal data to external countries.

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the CCP's scope arose in relation to CETA,[186] when Member States disputed President Juncker's concerted framing of the agreement as one falling under the exclusive competence of the EU.[187] Ultimately, CETA was declared a 'mixed' agreement.[188] In 2014, before the resolution of the CETA competence debate, the Commission sought clarification from the Court of Justice of the European Union (CJEU) on its competence to ratify the PTA it had concluded with Singapore.[189] In 2016, the CJEU held that the EU had exclusive competence on all matters except for non-direct foreign investment (NDFI) and ISDS, both of which were 'shared competences'.[190] The effect of the Court's opinion was that ISDS (and NDFI) have since been excluded from the EU's trade agreements, and are negotiated in parallel, if at all.[191] This opinion thwarted the inclusion of ISDS in the TTIP negotiations and other trade and investment treaties since then.[192]

In the middle of these contestations, in 2015, the Commission proposed the Investment Court System (ICS) as an alternative to ISDS. ICS is a two-tier investment dispute settlement system, which is modelled after the WTO's dispute settlement mechanism.[193] Through this dispute settlement system, the EU also seeks to improve upon the touted weaknesses of ISDS, including high costs and the lack of transparency, legitimacy, consistency, and sufficient review of the arbitral tribunals' decisions. The compatibility of the ICS with EU law (in particular, the principle of autonomy of the EU legal order) was confirmed by the CJEU in its Opinion 1/17 delivered on 30 April 2019.[194] Provisions for this type of investment court system can be found in CETA (Chapter 8), the EU–Vietnam Investment Protection Agreement (Chapter 3); the EU–Singapore Investment Protection Agreement (Chapter 3); and under the investment chapter of the EU–Mexico Modernization Agreement. The EU has further proposed the development of a Multilateral Investment Court, which it has supported through the

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[186] Reinhard Quick & Attila Gerhäuser, *The Ratification of CETA and other Trade Policy Challenges After Opinion 2/15* 4 ZEuS 506, 507 (2019).

[187] *Ibid*.

[188] *Ibid*. As of December 2022, CETA still awaits ratification by 10 Member States, and is accordingly only in force as regards its chapters of exclusive EU competence, evidencing the potentially drawn-out nature of mixed agreements. *See* Jake Rooke, *CETA Ratification Tracker*, https://carleton.ca/tradenetwork/research-publications/ceta-ratification-tracker/.

[189] European Commission, *Singapore: The Commission to Request a Court of Justice Opinion on the Trade Deal*, Press release (30 October 2014), https://ec.europa.eu/commission/presscorner/detail/en/IP_14_1235.

[190] *EU–Singapore Free Trade Agreement* (Opinion 2/15) [2017] https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62015CV0002(01)&from=EN. Accordingly, EUSFTA was split to move these provisions into a separate, mixed-competence 'EU-Singapore Investment Protection Agreement', while keeping the original, amended agreement within the exclusive competence of the EU.

[191] *Ibid.*

[192] Billy Melo Araujo, Regulating through Trade: The Contestation and Recalibration of EU 'Deep and Comprehensive' FTAs, 31 Pace Int'l L. Rev., 414-417 (2019).

[193] Jin Woo Kim & Lucy M. Winnington-Ingram, Investment Court System under EU Trade and Investment Agreements: Addressing Criticisms of ISDS and Creating New Challenges, 16 Glob. Trade Cust. J., 182 (2021).

[194] ECLI:EU:C:2019:341.

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UNCITRAL Working Group III on Investor-State Dispute Settlement Reform, to further limit the undesirable impacts of ISDS, including limiting its right to regulate.[195]

It is apparent that the EU has used its treaty exclusions to protect its own policy space. In the case of ISDS as well as in the case of personal data protection, the EU has also sought to export its values to the rest of the world, playing an influential role in ISDS reform and in setting global privacy protection standards, respectively – thus making the 'Brussels effect' real.[196]

IV. Comparing the EU and New Zealand's respective digital trade stances

Overall, the EU and New Zealand's high level of compatibility across ideological, regulatory, economic, and digital development axes,[197] has resulted in a progressive digital trade chapter that clarifies the contours of data governance in trade agreements. Free of the 'mismatches in level of ambition, economic development, or conflicts of political structure that have hampered prior FTAs',[198] the Parties began negotiations with a broad foundational mandate to further their regulatory cooperation and signal the possibilities that might be available for the development of 'WTO-plus' and 'WTO-extra' issues within a pre-existing mutual environment of trust, ensured by data protection frameworks of general compatibility.

Nevertheless, as evident from above and summarized in Table 5 below, the Parties diverge in some areas of (digital) trade regulation, including in their approach to governing data.

Table 5

Comparison of EU and New Zealand FTAs

	New Zealand	**EU**
Number of key FTAs since 2010	10	8
Number of bilateral FTAs	6	8
Number of plurilateral FTAs	4	0

[195] *See* Melo Araujo, supra n. 192, at 416–417 and UNCTAD, *International Investment Agreements, Reforming Investment Dispute Settlement: A Stocktaking*, IIA Issues Note No. 1, 19–20 (2019), https://unctad.org/system/files/official-document/diaepcbinf2019d3_en.pdf.

[196] See Anu Bradford, *The Brussels Effect*, 107 Northwestern University Law Review 1 (2012); Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford University Press 2020).

[197] European Commission, *EU and New Zealand Launch Trade Negotiations*, Press Release (21 June 2018) https://ec.europa.eu/commission/presscorner/detail/en/IP_18_4165.

[198] Lee-Makiyama, *supra* n. 58, at 12.

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Number of FTAs with data flows provisions	8	4
Number of FTAs with hard commitments on data flows	6	2
Number of FTAs prohibiting data localization	6	2
Number of FTAs with review provision on data flows	1	1
Number of FTAs with data protection provisions	9	8
Number of FTAs with hard commitments on data protection	6	2
Specific data-related exception(s) in digital trade chapters/provisions	Privacy/data protection	Privacy/data protection
Specific carve-outs	ISDS	Audio-visual services & ISDS

The comparison above shows New Zealand as the party seeking out more PTAs, with a higher number and diversity of parties to secure its economic interests in its immediate region and further abroad. It is also apparent that New Zealand places a higher value on cross-border data flows, with eight of its 10 agreements including provisions on the topic as compared to four of the EU's eight. Another area of clear divergence is that the majority of New Zealand's agreements have data flows/data localization provisions as hard obligations (six agreements), whereas the EU's late start to regulating these topics has resulted in only two PTAs with hard undertakings that have also been conditioned through various safeguards.

Arguably, the main difference in approach is how the two countries regulate privacy/personal data protection in their PTAs. While both have a high number of agreements that regulate this subject (nine out of 10 for New Zealand and eight out of eight for the EU), the way in which these subjects are included in their PTAs has differed. Initially, New Zealand included them as positive (and hard) obligations (in six PTAs). It is only in the EU–NZ FTA where data protection is couched as falling within the right to regulate and as an exception, with a specific mention of its indigenous Māori peoples. The EU's approach has been almost the reverse. It only has two FTAs with positive (and binding) commitments on data protection, two with non-binding (soft) obligations, one with no positive obligations at all, and three couched as exceptions or within its right to regulate. Aside from the data-specific provisions, both parties carve out ISDS from their PTAs and the EU additionally excludes audio-visual services.

Overall, New Zealand has been markedly more innovative than the EU, leveraging its nimbleness to apply its four-pronged trade policy strategy across deep bilaterals, mega-regionals with diverse trading partners, and a precedent-setting digital-first agreement (DEPA) that diverges from the standard PTA format in its flexibility

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and experimental nature that reflect the fluid nature of the data-driven societies. The rapid uptake and interest by other states in DEPA's format indicate that it might mark a way forward in the future of digital trade lawmaking. In contrast, the inherently constrained EU has become more rigid in its digital trade chapter design following the confirmation of its 2018 'data flow/protection' template, which secures the application of the GDPR within the international trade context.[199] It was exported as the starting point template for its negotiations with New Zealand. Nevertheless, the EU's rigid data protection stance in this instance coincided with New Zealand's domestic obligations to protect, inter alia, the personal data of its domestic constituencies, notably, the Māori, as a result of the 2021 Waitangi Tribunal's Report.

V. CONCLUDING REMARKS

The significance of the EU–NZ FTA to the regulation of digital trade and FTA practice in this area cannot be gainsaid. It has granted an opportunity for like-minded trading partners, the EU and New Zealand, to expand and solidify their approaches to digital trade regulation. Especially, it has provided additional insights as to what is becoming the EU's digital trade template: the inclusion of most of the traditional digital trade topics; a definitive stance on data protection by insisting on carving out policy space from the hard liberalization commitments on data, and, so far, a reluctance to venture into any newer areas of regulation, like AI, fintech or data innovation. For New Zealand, the digital trade chapter of the EU–NZ FTA has cemented its place as a legal innovator in expressing domestic responsibilities in international trade instruments. Concretely, it has succeeded in carving out policy space, through various provisions in the FTA, to fulfil its obligations under the Treaty of Waitaingi to protect or promote Māori rights, interests, duties and responsibilities. The treaty has thus been an avenue for both countries to crystalize their domestic priorities in a cross-border digital trade regulation instrument. It can also viewed as an experiment in interfacing different digital trade regulatory models, as New Zealand is also a party to the DEPA, RCEP as well as the CPTPP – the latter two models in particular being shaped by different ideologies and policy priorities.[200] This is important for future trade deals of both parties but also critical for the wider geopolitical battles in the regulation of the data-driven economy,[201] as well as for the fate of the plurilateral agreement under the umbrella of the WTO.[202]

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[199] Aaronson & Leblond, *supra* n. 146, at 262, Yakovleva & Irion, *supra* n. 10, at 220.
[200] *See e.g.* Burri, *supra* n. 15.
[201] *See e.g.* Bradford, *supra* n. 143.
[202] *See e.g.* Burri, *supra* n. 15.

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