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Digital trade in Free Trade Agreements

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'Electronic commerce' or 'digital trade',[1] as it is now more frequently referred to, has been one of the few areas of international economic law where one can observe patterns of regulatory cooperation and new rulemaking across different venues. It could be argued that electronic commerce is an old trade negotiation topic, and it is only natural that now, over two decades after the adoption of the 1998 Work Programme on Electronic Commerce by members of the World Trade Organization (WTO), there is actual progress. Such an assumption of a linear development would however be flawed, as not only the scope and the contents of the topic, but also how governments approach the digital economy as a set of regulatory questions that go beyond the mere liberalization of pertinent services sectors and the reduction of tariff and non-tariff barriers to trade, have changed profoundly. Against this backdrop, this entry analyzes the landscape of digital trade regulation that has evolved in the past decade. It pays particular attention to the regulatory models endorsed by free trade agreements (FTAs) and the new generation of Digital Economy Agreements (DEAs).

FTAs as venues of digital trade regulation

The regulatory environment for digital trade has been shaped by FTAs. Of the 433 FTAs signed between January 2000 and November 2023, 214 contain relevant provisions and 122 have dedicated digital trade chapters,[2] with the significant jump in these commitments in the past few years. Although the pertinent rules are still heterogeneous, it is evident that the trend towards more, more detailed and binding provisions on digital trade has intensified. Provisions on digital trade can be found specifically in: (1) the dedicated chapters; (2) the chapters on cross-border supply of services; as well as in (3) the chapters on intellectual property protection. This entry focuses on the FTA digital trade chapters and the DEAs, which have become the source of expansive rulemaking.

The digital trade chapters play a dual role. On the one hand, they represent an attempt to compensate for the lack of progress in the WTO. In this sense, these chapters address many of the questions of the WTO Electronic Commerce Programme that have been discussed but only inconclusively so. For instance, a majority of the chapters recognize the applicability of WTO rules to electronic commerce and establish a permanent moratorium on customs duties on electronic transmissions. They also include rules that have not been treated in the context of the WTO – the so-called 'WTO-extra' issues. One can group these into two broad categories: (1) rules that seek to facilitate digital trade; and (2) rules on data governance. While in the first cluster of issues the number of FTAs that contain such rules is substantial, there is a greater variety in the second cluster, with few agreements with rules on data, as well as various conditionalities attached to them.

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[1] 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*, 2nd edn. (2023); also M. Burri and A. Chander, 'What Are Digital Trade and Digital Trade Law?', *AJIL Unbound* 117 (2023), 99–103.

[2] This analysis is based on the TAPED dataset administered by the University of Lucerne. For all data, see https://unilu.ch/taped.

An appropriate starting point for the discussions of contemporary digital trade rulemaking is the 2018 Comprehensive and Progressive Agreement for Transpacific Partnership (CPTPP). Beyond its sizeable economic impact, this megaregional was the first with a sophisticated electronic commerce chapter; in addition, its model has diffused in a substantial number of subsequent agreements. The CPTPP contains important provisions that seek, on the one hand, to facilitate digital trade by providing a level of interoperability between domestic regimes and on the other, to constrain data protectionism. Illustrative of the first category are the rules on the domestic electronic transactions framework; on paperless trading and on electronic authentication and electronic signatures. Furthermore, in terms of conditioning the domestic regulatory environment, the CPTTP e-commerce chapter includes provisions, albeit in a soft law form, on consumer protection, spam control, net neutrality, as well as on cybersecurity. The CPTPP addresses also the new importance attached to data protection – yet, there seems to be a prioritization of trade over privacy rights, as there is no reference to benchmarks and weaker protection schemes suffice.

In the second category of data-relevant rules, the CPTPP includes a clear ban on localization measures, a ban on forced technology transfer of source code, as well as a hard rule on free data flows, explicitly including personal information. This is critical and may limit substantially domestic policy space. While certain restrictions are permitted if they do not amount to 'arbitrary or unjustifiable discrimination or a disguised restriction on trade' and 'impose restrictions on transfers of information greater than are required to achieve the objective', the scope of the exception is unclear, as there is no reference to specific legitimate objectives.

The CPTPP model has been replicated and expanded by subsequent US agreements. The renegotiated NAFTA, the 'United States–Mexico–Canada Agreement' (USMCA), follows the lines of the CPTPP with regard to both the facilitation of digital trade as well as with respect to ensuring unhindered data flows. Beyond these similarities, the USMCA goes 'CPTPP-plus' in some respects: first, by including 'algorithms' in the ban on requirements for the transfer or access to source code; second, by limiting the liability of 'interactive computer services' providers for third party content; and third, by furthering the use and re-use of open government data.

Truly innovative in the landscape of digital trade rulemaking and going substantially 'CPTPP-plus' has been the new generation of DEAs. So far five such agreements have been agreed upon: the 2019 Japan–US DTA; the 2020 Singapore–Australia DEA; the 2020 Digital Economy Partnership Agreement (DEPA) between Chile, New Zealand and Singapore; the 2021 Korea–Singapore DEA and the 2022 UK–Singapore DEA. Despite some variations, the DEAs can be said to share a common template. On the one hand and taking here the example of the DEPA, the DEAs tend to include all rules of the CPTPP and some of the USMCA, such as the one on open government data (but not source code). On the other hand, there are novel rules, atypical for trade agreements, that try to facilitate the functioning of the digital economy and enhance cooperation on key issues. So, for instance, DEPA's Module 2 on business and trade facilitation includes additional efforts 'to establish or maintain a seamless, trusted, high-availability and secure interconnection of each Party's single window to facilitate the exchange of data relating to trade administration documents'. Parties have also touched upon other important issues around digital trade facilitation, such as electronic invoicing; express shipments and clearance times; logistics and electronic payments. Module 8 of the DEPA on emerging trends and technologies is also interesting to mention, as it highlights a range of topics that demand attention by policymakers – such as in the areas of fintech and artificial intelligence (AI). The DEPA also deals with the importance of a rich and accessible public domain and digital inclusion.

Such far-reaching CPTPP-plus developments have not been adopted by all stakeholders. The EU, for instance, and despite its proactive and comprehensive domestic rulemaking, has been a relatively late mover on digital trade issues. Its new template, endorsed by the EU–UK Trade and Cooperation Agreement and the EU–New Zealand FTA, also differs in important aspects. On the one hand, the EU digital trade chapters converge with the CPTPP/USMCA model to cover issues such as software source code, facilitation of electronic commerce, online consumer protection, spam and open government data. On the other hand, they do not include provisions on non-

discrimination of digital products and, in reflection of the EU stance on trade and culture, exclude audiovisual services from the scope of the application of the digital trade chapter. Beyond this and critically for the regulation of the data-driven economy, the EU is willing to permit data flows only if coupled with the high data protection standards of its General Data Protection Regulation (GDPR). So, EU's data commitments are conditioned: first, by a dedicated article on data protection, which recognizes that the protection of personal data and privacy as a fundamental right, followed by a paragraph on data sovereignty. A number of other safeguards are included too – such as a review possibility that can be linked to new restrictions, as well as a broadly defined 'right to regulate'.

Despite the fact that selected Asian countries are also members of western-led initiatives, such as the CPTPP, and that Singapore has become the most prominent legal entrepreneur in digital trade governance with the DEAs, the Asian regionalism model of digital trade rulemaking comes with some specificities. In particular, if one looks carefully at the Regional Comprehensive Economic Partnership (RCEP) and the ASEAN E-Commerce Agreement, one sees a more flexible and pragmatic framework. For instance, although the RCEP includes many of the issues around the facilitation of digital trade, its language is more cautious on data governance issues. While the RCEP electronic commerce chapter includes a ban on localization measures, as well as a commitment to free data flows, there are clarifications that protect the RCEP parties' policy space. For instance, the necessity of the implementation of a legitimate public policy measure is to be decided by the implementing party. In addition, a party can take 'any measure that it considers necessary for the protection of its essential security interests' and these cannot by disputed by other parties. This approach can be criticized for its protectionism and lack of legal certainty; others have argued conversely that its pragmatism addresses well the existing variations in digital development levels across countries and thus enables long-term engagement in the area of digital regulation.[3]

Concluding remarks and outlook

The last decade has witnessed the emergence of discrete domain of digital trade law. The achievements made in some FTAs and the DEAs are remarkable and there is a strand of legal innovation that seeks to tackle not only the 'old' issues raised under the WTO Electronic Commerce Programme but also the newer issues in the context of a global data-driven economy. Yet, although all major stakeholders have become active in digital trade rulemaking, there are different approaches across stakeholders. The issues around cross-border data flows remain contentious, as they impact states' policy space. In this context, the venues of FTAs and in particular the more flexible model of the DEAs provide a good platform for experimentation and evidence-gathering. The coming years will test the willingness for international cooperation, as well as to what extent the achievements made in preferential forums can be translated to the WTO.

Key literature:

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H. Gao, 'Digital or Trade? The Contrasting Approaches of China and US to Digital Trade', *Journal of International Economic Law* 21 (2018), 297–321

[3] N. Mishra and A. M. Palacio Valencia, 'Digital Services and Digital Trade in the Asia Pacific: An Alternative Model for Digital Integration?', *Asia Pacific Law Review* 31 (2023), 489–513.