Chapter 6

Global Trade Governance in the Digital Era

Mira Burri

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Chapter 6
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Mira Burri

1. Introduction

'Electronic commerce'[1] or 'digital trade',[2] as it is now more frequently referred to, has been one of the few areas of international economic law where one can observe a pattern 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 2 decades after the adoption of the 1998 Work Programme on Electronic Commerce by members of the World Trade Organization (WTO) (WTO, 1998), there is some actual progress. Such an assumption of a linear development would, however, be flawed, as not only the scope and the contents of the topic for negotiation but also how governments approach the digital economy as a set of regulatory questions that go beyond the mere liberalisation of pertinent services sectors and the reduction of tariff and non-tariff barriers to trade, have profoundly changed (see e.g. Evenett and Fritz, 2022).

This chapter delves into this new complexity and seeks to show the transformation of the regulatory topic from Trade Law 2.0 (as the mere trade in goods and services online) towards Trade Law 4.0 (as the regulation of the data-driven economy).[3] It further explores the dynamics of digital trade regulation in the past decade in a complex geopolitical setting by looking at some broader trends, as well as at distinct regulatory models endorsed by free trade agreements (FTAs) and the new templates of the digital economy agreements (DEAs) that also signal room for innovation in trade law. The chapter goes then back to the multilateral forum of the WTO and reveals how FTAs and DEAs have worked as regulatory laboratories and discusses whether and to what extent their results can be translated to the WTO.

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[1] The World Trade Organization (WTO) Work Programme on Electronic Commerce defined 'electronic commerce' to be 'understood to mean the production, distribution, marketing, sale or delivery of goods and services by electronic means'. See WTO, Work Programme on Electronic Commerce, WT/L/274, 30 September 1998, at para. 1.3. The WTO continues to use 'e-commerce' under the Joint Statement Initiative (see WTO, Joint Statement Initiative on Electronic Commerce, WT/L/1056, 25 January 2019) but in some later texts uses also 'digital trade' as alternative language.

[2] Whilst there is no single definition, a joint effort by the International Monetary Fund, the Organisation for Economic Co-operation and Development, the United Nations, and the World Trade Organization defines 'digital trade', for measurement purposes, as 'all international trade that is digitally ordered and/or digitally delivered'. See IMF et al. (2023), also Burri and Chander (2023).

[3] Trade Law 1.0 can be defined as analogue trade, whilst Trade Law 3.0 would correspond to the state of digital trade that already includes global value chains and advanced services trade but does not yet account for the important of data and data flows.

The chapter concludes with how the topic of digital trade, as linked to the underlying digitalisation processes, is transforming global trade law – with both strands of legal innovation and certain setbacks that are linked to geopolitical differences on the one hand and on the other hand, to the difficulties of interfacing domestic digital governance regimes with commitments in the domain of digital trade law. Understanding this broad picture, as well as the distinct trends of the last years, can be particularly helpful for ASEAN governments and trade negotiators to come up with a feasible yet future-oriented, agenda for the ASEAN Digital Community 2045.

2. From Trade 2.0 to Trade 4.0

The process of adapting trade law to digitalisation started early on, as the WTO members launched in 1998 a Work Programme on Electronic Commerce that sought to explore (without a negotiating mandate) the implications of the internet for trade in goods, trade in services, and the protection of intellectual property (IP) rights. In the 2 decades since the WTO initiative, much has changed, however. Policymakers now increasingly focus on a new set of issues, in particular around the data-driven economy (Burri, 2021a; Peng, Lin, and Streinz, 2021). There may be good reasons for this shift. First, it can well be justified by advanced digitalisation and, in particular, the critical importance of data to societies. In the context of trade policies, this has translated to ensuring data flows across borders, as data are embedded in a growing number of services and goods, and there is a critical interdependence between cross-border data flows and digital growth and innovation – for instance, in the development of artificial intelligence (AI) or the Internet of Things (IoT) (Chander, 2021). The second reason can be linked to a new set of regulatory questions that the use of data and its borderless nature have opened – in particular, those around data sovereignty and the protection of privacy, national security, and other domestic values and interests (Burri, 2021b; Chander and Schwartz, 2023). What is apparent in this context, as the chapter discusses below, is that the emerging digital trade law seeks to address these new regulatory issues that go beyond classic WTO topics – such as the reduction of tariffs or services liberalisation, and targets domestic regimes.

3. Digital Trade Rulemaking in Free Trade Agreements

3.1. Overview

The regulatory environment for digital trade has been shaped by FTAs. Of the 433 FTAs signed between January 2000 and November 2023, 214 contain provisions relevant to e-commerce/digital trade, and 122 have dedicated e-commerce/digital trade chapters,[4] with the significant jump in these commitments occurring in the past few years. Although the pertinent rules are still heterogeneous and differ as to issues covered, the level of commitments and their binding nature, it is overall evident that the trend towards more and more detailed provisions on digital trade has intensified significantly over the years.

The relevant aspects of digital trade governance are spread across the treaties and can be found in (i) the specifically dedicated electronic commerce chapters; (ii) the chapters on cross-border supply of services (with particular relevance the telecommunications, computer and related audiovisual and financial services sectors); as well as in (iii) the IP chapters.[5] This chapter's single focus is on the electronic commerce/digital trade chapters and the DEAs, which have become the source of progressive rulemaking reflecting the importance of the new data economy issues.

The electronic commerce chapters play a dual role in the landscape of trade rules in the digital era. On the one hand, they represent an attempt to compensate for the lack of progress in the WTO. 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, most of the chapters recognise the applicability of WTO rules to electronic commerce[6] and establish an express and permanent duty-free moratorium on electronic transmissions.[7] The electronic commerce chapters also include rules that have not been treated in the context of the WTO negotiations – the so-called 'WTO-extra' issues. These rules can be grouped into two broader categories: (i) rules that seek to facilitate digital trade in general by tackling issues such as paperless trading and electronic authentication; and (ii) rules that address cross-border data, new digital trade barriers, and newer issues, which can encompass questions ranging from cybersecurity to open government data. Whilst 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 fewer agreements with rules on data,[8] as well as various conditionalities attached to them.

3.2. Distinct Trends and Models in Digital Trade Rulemaking

There are different ways of mapping the landscape of digital trade rulemaking. Most of the existing enquiries follow a country-based approach and sketch the emergent models of the main stakeholders – the United States (US), the European Union (EU), and China, often looking in addition at the diffusion of these models across other agreements (Gao, 2018; Burri, 2021c, 2022a). This chapter adopts a slightly different method and starts with one basic model – that of the 2018 Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) – traces the rule frameworks, especially the most recent treaties, that are representative of the current actors' positioning. The templates may go beyond (CPTPP-plus) or diverge (CPTPP-minus).

[5] For analysis of all relevant chapters, see Burri (2017).
[6] See e.g. US–Singapore FTA, Article 14.1; US–Australia FTA, Article 16.1.
[7] See e.g. US–Singapore FTA, Article 14.3(1); US–Chile FTA, Article 15.3.
[8] Thus far only 45 FTAs have rules on data flows and 35 FTAs have rules on data localisation.

The CPTPP is a suitable starting point, as it is the first FTA with a sophisticated electronic commerce chapter;[9] it is a mega-regional treaty with multiple signatories,[10] whose impact has been augmented with the accession of the United Kingdom (UK) and pending applications by a number of countries, such as China, Taiwan, Ecuador, and Costa Rica (Schott, 2023); the final reason stems from the fact that the CPTPP digital trade model has diffused in a substantial number of subsequent agreements that bind countries to its implementation.[11]

The CPTPP contains important provisions that seek, on the one hand, to facilitate digital trade by providing a level of interoperability between domestic regulatory regimes and, on the other hand, to curb data protectionism. Illustrative of the first category are the rules on the domestic electronic transactions framework with binding obligations for the parties to follow the principles of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Commerce 1996 or the UN Convention on the Use of Electronic Communications in International Contracts.[12] The provisions on paperless trading and electronic authentication and electronic signatures complement this by securing equivalence of electronic and physical forms.[13] 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,[14] spam control,[15] net neutrality,[16] as well as on cybersecurity.[17] The CPTPP also addresses the new importance attached to data protection – yet, there seems to be a prioritisation of trade over privacy rights, as there is no reference to benchmarks, and a weaker protection scheme would suffice.[18] This reflects the US stance, as the US has (at least thus far) a fragmented privacy protection regime with relatively low standards, which has also been problematic in securing transatlantic data flows (Burri, 2021b; Chander and Schwartz, 2023).

In the second category of data-relevant rules, the CPTPP includes a clear ban on localisation measures,[19] a ban on forced technology transfer of source code,[20] , as well as a hard rule on free data flows, explicitly including personal information.[21] This is critical and may limit domestic policy space.

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[9] The chapter is identical with the negotiated electronic commerce provisions under the Transpacific Partnership Agreement (TPP), so the influence of the US negotiation position on digital trade is clearly discernible.

[10] CPTPP parties are Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Viet Nam. The US withdrew from the TPP negotiations at the start of the Trump administration.

[11] See e.g. the 2016 Chile–Uruguay FTA, the 2016 updated Singapore–Australia FTA (SAFTA), the 2017 Argentina–Chile FTA, the 2018 Singapore–Sri Lanka FTA, the 2018 Australia–Peru FTA, the 2019 Brazil–Chile FTA, the 2019 Australia–Indonesia FTA, the 2018 USMCA, 2019 Japan–US DTA, and the 2020 DEPA between Chile, New Zealand, and Singapore.

[12] Article 14.5 CPTPP.

[13] Articles 14.9 and Article 14.6 CPTPP.

[14] Article 14.17 CPTPP.

[15] Article 14.14 CPTPP.

[16] Article 14.10 CPTPP.

[17] Article 14.16 CPTPP.

[18] Article 14.8 CPTPP.

[19] Article 14.13(2) prohibits the parties from requiring a 'covered person to use or locate computing facilities in that Party's territory as a condition for conducting business in that territory'.

[20] Article 14.17 CPTPP:

[21] Article 14.11(2) CPTPP: 'Each Party shall allow the cross-border transfer of information by electronic means, including personal information, when this activity is for the conduct of the business of a covered person'.

Whilst 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',[22] the scope of the exception is unclear.[23] This can be linked to legal uncertainty, as no specific objectives are listed. New Zealand's Waitangi Tribunal (2021) showed that such uncertainty may not be reconciled with the interests of local constituencies.

The CPTPP model has been replicated and expanded by subsequent US agreements, which also confirmed the liberal US approach to digital trade, as initiated by its 2001 Digital Agenda. The renegotiated North American Free Trade Agreement, which is now referred to as the 'United States–Mexico–Canada Agreement' (USMCA), follows all critical lines of the CPTPP with regard to both the facilitation of digital trade,[24] as well as with respect to ensuring unhindered data flows.[25] 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;[26] second, by limiting the liability of interactive computer services providers for third-party content,[27] which secures the application of Section 230 of the US Communications Decency Act – a safe harbour that endorses the First Amendment for platforms but has been in recent times under attack in the face of fake news and other negative developments related to platforms' power (Burri, 2022b). The third and rather liberal commitment of the USMCA parties is with regard to open government data[28] and seeks to facilitate public access to and use of government information provided in a machine-readable and open format that can be searched, retrieved, used, reused, and redistributed.[29]

The US approach towards digital trade issues has been confirmed also by the 2019 US–Japan Digital Trade Agreement (DTA), signed alongside the US–Japan Trade Agreement. The treaty replicates almost all provisions of the USMCA and the CPTPP,[30] including the new USMCA rules on open government data,[31] source code,[32] and interactive computer services[33] but notably covering also financial and insurance services as part of its scope.

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[22] Article 14.11(3) CPTPP.

[23] Whilst this language appears familiar to trade lawyers in reference to the general exception clauses of Article XIV GATS and Article XX GATT 1994, the CPTPP does not, in contrast to the WTO provisions, provide an exhaustive list of public policy objectives and simply speaks of a 'legitimate public policy objective'. In addition, there is no GATT or GATS-like qualification of 'between countries where like conditions prevail'. For fully-fledged analysis, see Burri and Kugler (2024).

[24] The USMCA follows the same broad scope of application (Article 19.2), bans customs duties on electronic transmissions / Article 19.3) and binds the parties for non-discriminatory treatment of digital products (Article 19.4). Furthermore, it provides for a domestic regulatory framework that facilitates online trade by enabling electronic contracts (Article 19.5), electronic authentication and signatures (Article 19.6) and paperless trading (Article 19.9).

[25] Articles 19.11 and 19.12 USMCA.

[26] Article 19.16 USMCA. On the expansion of the scope of the source code provision, see New Zealand's Waitangi Tribunal (2021), at 104–112.

[27] Article 19.17(2) USMCA.

[28] Article 19.18 USMCA.

[29] Article 19.18(2) USMCA.

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

[31] Article 20 US–Japan DTA.

[32] Article 17 US–Japan DTA.

[33] Article 18 US–Japan DTA.

It also adds a new provision regarding information and communication technology (ICT) goods that use cryptography, again in an effort to curb forced technology transfer.[34]

3.3. Digital Economy Agreements: Innovation in Digital Trade Rulemaking

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 on: the aforementioned 2019 Japan–US DTA; the 2020 Singapore–Australia DEA; the 2020 Digital Economy Partnership Agreement (DEPA) between Chile, New Zealand, and Singapore; and as of 2024, the Republic of Korea;[35] the 2021 Korea–Singapore DEA, and the 2022 UK–Singapore DEA.[36] 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[37] (but not source code); some of the US–Japan DTA provisions, such as the one on ICT goods using cryptography,[38] have been included too. On the other hand, there are many other rules previously unknown to trade agreements that try to facilitate the functioning of the digital economy and enhance cooperation on key issues.[39] So, for instance, the DEPA's Module 2 on business and trade facilitation includes, next to the standard CPTPP-like norms,[40] 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'.[41] 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.[42] Module 8 of the DEPA on emerging trends and technologies is also interesting to mention, as it highlights a range of key topics that demand attention by policymakers, such as in the areas of financial technology and AI, and discusses the adoption of ethical and governance frameworks that support the trusted, safe, and responsible use of AI technologies.[43] Again, going beyond economic issues, the DEPA also deals with the importance of a rich and accessible public domain[44] and digital inclusion.[45] Above all, DEAs provide a flexible platform for cooperation on a number of issues pertinent to the data-driven economy, including also matters that are not necessarily treaty-ready.

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[34] Article 21 US–Japan DTA. This rule is similar to Annex 8-B, Section A.3 of the CPTPP Chapter on technical barriers to trade.
[35] With Canada and China seeking to join.
[36] It should be noted that the DEAs are in most cases linked to an existing or in parallel adopted trade agreement; only in the case of the DEPA, we have a stand-alone agreement.
[37] Article 9.4 DEPA.
[38] Article 3.4 DEPA.
[39] For a comparison of the DEPA with existing PTAs, see Soprana (2021).
[40] See e.g. Article 2.2: Paperless Trading; Article 2.3: Domestic Electronic Transactions Framework.
[41] Article 2.2(5) DEPA.
[42] Respectively Articles 2.5, 2.6, 2.4 and 2.7 DEPA.
[43] Article 8.2(2) and (3) DEPA.
[44] Article 9.2 DEPA.
[45] Article 11.2 DEPA.

The following provides a helpful overview of the common features of the main substantive provisions in all DEAs thus far:

- They substantially exclude government procurement and government data.[46]
- They have codified the WTO moratorium on customs duties on electronic transmissions, made it permanent, and provide a carve-out for the imposition of internal taxes.[47]
- The Parties have undertaken to adopt the UNCITRAL Model Law on Electronic Commerce 1996 in the provisions on domestic electronic transaction frameworks.[48]
- The Parties undertake not to prohibit cross-border data flows. However, the provisions include exceptions for legitimate public policy reasons and adopt the necessity test under Article XX of the GATT 1994 or Article XIV of the GATS.[49]
- They all prohibit data localisation requirements as a condition for market access or conducting business in the territory of the other party/parties.[50]
- They all require the adoption of laws protecting personal information.[51]
- They all have provisions requiring the adoption of consumer protection laws.[52]
- They all require the adoption of measures to control unsolicited commercial electronic messages (spam).[53]
- They all prohibit the disclosure of proprietary information relating to cryptography for ICT as a condition for market access or doing business in the territory of the other party/parties.[54]
- They all have cooperation undertakings to address cybersecurity threats.[55]
- They all have provisions on open government data, generally requiring that it is anonymised, has descriptive metadata, is machine-readable and is in an open format that allows it to be searched, retrieved, used, reused, and redistributed. [56]

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[46] Article 2 US–Japan DTA; Article 2 Singapore–Australia DEA; Article 1.1 DEPA; Article 8.58(4) UK–Singapore DEA; and Article 14.2 Korea–Singapore DEA.

[47] Articles 6 and 7 US–Japan DTA; Article 5 Singapore–Australia DEA; Article 3.2 DEPA; Article 8.59 UK–Singapore DEA; and Article 14.5 Korea–Singapore DEA.

[48] Article 9 US–Japan DTA; Article 8.2 Singapore–Australia DEA; Article 2.3 DEPA; Article 8.60 UK–Singapore DEA; and Article 14.7 Korea–Singapore DEA.

[49] This means that cross-border data restrictions must not be applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised trade restriction. See Article 11 US–Japan DTA; Article 23 Singapore–Australia DEA; Article 4.3 DEPA; Article 8.61-F UK–Singapore DEA; and Article 14.14 Korea–Singapore DEA.

[50] Article 12 US–Japan DTA; Articles 24 and 25 Singapore–Australia DEA; Article 4.4 DEPA; Article 8.61-G UK–Singapore DEA; and Article 14.5 Korea–Singapore DEA.

[51] Article 15 US–Japan DTA; Article 17 Singapore–Australia DEA; Article 4.2 DEPA; Article 8.61-E UK–Singapore DEA; and Article 14.7 Korea–Singapore DEA.

[52] Article 14 US–Japan DTA; Article 15 of Singapore–Australia DEA; Article 6.3 of DEPA; Article 8.61-M UK–Singapore DEA; and Article 14.21 Korea–Singapore DEA.

[53] Article 16 US–Japan DTA; Article 19 Singapore–Australia DEA; Article 6.2 DEPA; Article 8.61-N UK–Singapore DEA; and Article 14.20 Korea–Singapore DEA.

[54] Article 21.3 US–Japan DTA; Article 7.3 Singapore–Australia DEA; Article 3.4 DEPA; Article 8.61-J UK–Singapore DEA; and Article 14.18 Korea–Singapore DEA.

[55] Article 19 US–Japan DTA; Article 34 Singapore–Australia DEA; Article 5.1 DEPA; Article 8.61-L UK–Singapore DEA; and Article 14.22 Korea–Singapore DEA.

[56] Article 20 US–Japan DTA; Article 27 Singapore–Australia DEA; Article 9.5 DEPA; Article 8.61-H UK–Singapore DEA; and Article 14.26 Korea–Singapore DEA.

3.4. A Look at the European Union

Whilst the above enquiries do point to substantial CPTPP-plus developments, this is not true for all stakeholders involved. The EU, for instance, and despite its proactive and comprehensive domestic rulemaking, has been a relatively late mover on digital trade issues,[57] and now that it has defined its template,[58] this differs in important aspects from the provisions described above. On the one hand, the EU digital trade chapters converge with the CPTPP/USMCA model to cover issues such as software source code,[59] facilitation of electronic commerce,[60] online consumer protection,[61] spam,[62] and open government data.[63] 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, consistently exclude audiovisual services from the scope of the application of the digital trade chapter.[64] 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).[65] So, whilst the EU and its partners subscribe to a ban on data localisation measures, these commitments are conditioned: first, by a dedicated article on data protection, which clearly states that: 'Each Party recognises that the protection of personal data and privacy is a *fundamental right* and that high standards in this regard contribute to trust in the digital economy and to the development of trade',[66] followed by a paragraph on data sovereignty, which would permit restrictions on data flows for the protection of personal data.[67] A number of other safeguards are included too – such as a review possibility that can be linked to new restrictions,[68] as well as a broadly defined 'right to regulate', which asserts the EU's leeway to restrict data flows 'to achieve legitimate policy objectives, such as the protection of public health, social services, public education, safety, the environment including climate change, public morals, social or consumer protection, privacy and data protection, or the promotion and protection of cultural diversity'.[69]

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[57] For overview of this development, see e.g. Burri, 2017, 2022).

[58] Representative of the new EU approach are the adopted agreements with the United Kingdom (Trade and Cooperation Agreement, TCA), the FTA with New Zealand, the updated EU–Japan FTA, as well as the draft digital trade chapters of the currently negotiated deals with Australia and Tunisia.

[59] See e.g. Article 207 EU–UK TCA. The commitment comes with a number of exceptions.

[60] See e.g. Articles 205 and 206 EU–UK TCA.

[61] See e.g. Article 208 EU–UK TCA.

[62] See e.g. Article 209 EU–UK TCA.

[63] See e.g. Article 210 EU–UK TCA. The FTA with New Zealand curiously has no provision on open government data.

[64] See e.g. Article 197(2) TCA.

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

[66] See e.g. Article 6(1) draft EU–Australia FTA (emphasis added). The same wording is found in the EU–New Zealand FTA. The EU–UK TCA does not however refer to privacy as fundamental right; this can be however presumed, since the UK incorporates the European Convention on Human Rights (ECHR) through the Human Rights Act of 1998 into its domestic law.

[67] See e.g. Article 6(2) draft EU–Australia FTA. The same wording is found in the EU–New Zealand FTA and the EU–UK TCA. The amended in 2023 EU–Japan FTA provides the most elaborate thus far text in the EU template, both with regard to privacy protection and the legitimate public policy objectives exceptions.

[68] See e.g. Article 5(2) draft EU–Australia FTA. The same wording is found in the EU–New Zealand FTA and the EU–UK TCA.

[69] See e.g. Article 2 draft EU-–Australia FTA. The same wording is found in the EU–New Zealand and the EU–UK TCA.

3.5. The Asian Regionalism Model of Digital Trade Rulemaking

Despite the fact that selected Asian countries are also members of Western-led initiatives, such as the CPTPP and, more recently, the Indo-Pacific Economic Framework, 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 that allows developments at different speeds that well reflect varieties and sensibilities across the different countries (Mishra and Palacio Valencia, 2023). For instance, whilst the RCEP includes many of the issues around the facilitation of digital trade, its language is more cautious on data governance issues. Whilst the RCEP electronic commerce chapter includes a ban on localisation measures,[70] as well as a commitment to free data flows,[71] 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.[72] In addition, a party can take 'any measure that it considers necessary for the protection of its essential security interests. Such measures shall not be disputed by other Parties.[73] In this sense, the RCEP reflects better domestic policy preferences whilst opening up for digital trade. It has been argued that this pragmatic and incremental approach should not be viewed as inferior but rather as one that addresses well the existing variations in digital development levels across countries, 'eventually leading to meaningful consensus-building and long-term engagement in complex areas of digital regulation' (Mishra and Palacio Valencia, 2023).

Keeping in mind these advanced FTA rule-frameworks, as well as their specificities, the following section asks whether we can go (back) to the multilateral forum of the WTO.

[70] Article 12.14 RCEP.
[71] Article 12.15 RCEP.
[72] Article 12.14.3(a) RCEP.
[73] Article 12.14.3(b) RCEP.

4. Can Digital Trade Law be Multilateralised?

Despite a long period of stalemate at the WTO, the Joint Statement Initiative (JSI) on Electronic Commerce [74] has been seen as a much-welcomed reinvigoration of the WTO negotiation arm in general and, in particular, of its effort to address contemporary digital trade issues.[75] The JSI negotiations can be directly linked to the advanced rulemaking on digital trade in FTAs. This comes with both advantages and a number of setbacks. In the former sense, it appears that FTAs, as well as the DEAs, have worked as regulatory laboratories – not only in terms of mapping the relevant issues but also in terms of treaty language. Yet, the stakeholder positioning, as reflected in the discussed treaties, has also been translated in the JSI negotiations. This has been helpful with regard to agreeing on multiple digital trade facilitation issues, and progress has been made in particular on open government data, electronic contracts, online consumer protection; e-invoicing; cybersecurity; open internet access and paperless trading, although with varying levels of normative value (Burri, 2023). Whilst these developments hint at some important lines of convergence as to the creation of an enabling environment for digital trade, there are also points of divergence, in particular on the critical issues of cross-border data flows. In the latter context, whilst a number of countries align with Japan's proposal for data flows with trust, [76] and members acknowledge the importance of the free flow of data across borders, the policy choices regarding data governance vary widely amongst the JSI participants. In October 2023, the United States rather surprisingly announced that it would not further pursue provisions on data flows, data localisation and source code so as to safeguard 'policy space' for a digital trade rethink (Dupont, 2023). Considering this shift in the negotiation position of one of the most proactive data flow supporters, the future plurilateral agreement on electronic commerce is unlikely to address these important issues of the data economy. On the positive side, removing these contentious issues from the scope of negotiations may allow speedier adoption of the agreement as well as reduce the threshold for more WTO members to join, in particular considering the inclusion of provisions on special and differential treatment, capacity building and extended implementation periods for developing and least developed countries. The current stabilised JSI treaty text[77] is a reflection of these developments and can be viewed both as a success but also as a failure to deliver. On the positive side, over the 5 years of JSI negotiations, the participation of WTO membership has increased and now covers 91 members, accounting for more than 90% of global trade, all major geographical regions, and levels of development.

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[74] See WTO, Joint Statement on Electronic Commerce, WT/MIN(17)/60, 13 December 2017; WTO, Joint Statement on Electronic Commerce, WT/L/1056, 25 January 2019. The JSI negotiations are co-convened by Australia, Japan, and Singapore.

[75] On the development of the JSI negotiations, see e.g. Burri (2023) and Ismail (2023).

[76] G20 Osaka Leaders' Declaration. https://www.gov.br/cgu/pt-br/assuntos/articulacao-internacional/arquivos/g20/declaracao-dos-lideres/2019_g20_declaracao-dos-lideres-cupula-de-osaka.pdfG7 Trade Ministers' Digital Trade Principles. https://www.gov.uk/government/news/g7-trade-ministers-digital-trade-principles.

[77] WTO, Joint Statement Initiative on Electronic Commerce, INF/ECOM/87, 26 July 2024.

5 .Concluding Remarks

This chapter reveals the critical importance of digital trade as a negotiation topic in both preferential and multilateral forums and the substantial efforts made, in particular in recent years, to create an adequate rule-framework. The achievements made in some FTAs and 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 especially contentious, as they impact states' policy space and the ability to adopt a variety of measures, particularly in the areas of national security and privacy protection. 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 on the economic but also, and perhaps more importantly, on the broader societal effects of such commitments. They also illustrate that there is a distinct need for enhanced regulatory cooperation in the striving to attain a seamless global data-driven economy and reap its economic benefits. As countries move at different speeds, there also ought to be, however, a consideration of the varying levels of development and regulatory capacities across countries. The ASEAN negotiations of a Digital Economy Framework Agreement (DEFA) can certainly benefit from the experience gathered across countries thus far and create a future-oriented agreement that reflects the specificities of the region whilst at the same time giving it a competitive regulatory edge.

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