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MIRA BURRI

B.	The Comprehensive and Progressive Agreement for Trans-Paci@c Partnership	574
C.		

through the Digital Economy Partnership Agreement (DEPA). The Article then covers the EU's new generation of trade deals, in particular the currently negotiated deals with Australia and Tunisia, the post-Brexit agreement with the United Kingdom (U.K.) and the recent treaty with New Zealand. The Article also looks at the Regional Comprehensive

a technologically neutral way—for instance, with regard to the application

Members, the divergence in commitments being particularly radical between the telecommunication and the computer and related services

underlying wish to allow unrestricted cross-border data flows.²⁴ This expansion is also associated with newer fields of contestation²⁵ and the aspiration of many countries to protect their digital sovereignty that has

trade and 109 have dedicated electronic commerce/digital trade chapters.²⁹ Although the pertinent rules remain highly heterogeneous and

states, such as Chile,³⁹

of “digital products,” which treats products delivered online equally to

Pacific Rim.⁴⁹ It entered into force on 30 December 2018.⁵⁰

About the Comprehensive and Progressi

updated “Digital 2 Dozen” agenda of the United States.⁵⁵

The Digital 2 Dozen, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, <https://ustr.gov/>

meant to shape the domestic electronic transactions(to)-eframeworke by

institutions.⁷⁶ An annex to the Financial Services chapter has a separate data transfer requirement, whereby certain restrictions on data flows are excluded.⁷⁶

out that the CPTPP model has diffused in a substantial number of other

Union but also under the Council of Europe.¹¹⁴

created, or developed the information.”¹²⁰ This provision is important, as it seeks to clarify

in many jurisdictions in the face of fake news and other negative developments related to platforms' power.¹²⁵

See, e.g., Lauren Feine, Big Tech's Favorite Law Is under Fire, CNBC (Feb. 19, 2020), <https://www.cnbc.com/2020/02/19/what-is-section-230-and-why-do-some-people-want-to-change-it.html>. For an analysis of the free speech implications of digital platforms, see Jack M. Balkin, Free Speech Is a Triangle, 118 COLUM. L. REV. 2011 (2018). For literature review and analysis of the EU regulatory practice see Mira Burri, Fake News of 35.4P (aeme)1and 2ory 2 (to)-21.2 (the-2)17.2Ricatialeews For

and the CPTPP,¹³² including the new USMCA rules on open government data,¹³³ source code¹³⁴ and interactive computer services¹³⁵

Id. art. 18. A side letter

XX GATT 1994, whereby the parties agree to their mutatis mutandis application.¹⁴⁰

Economy”; Module 10 “Small and Medium Enterprises Cooperation”; and Module 11 “Digital Inclusion.”¹⁴⁹

Governance Frameworks parties would seek to follow internationally-recognized principles or guidelines, including explainability, transparency, fairness, and human-centred values.¹⁵⁷

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trade treaties and/or are not “treaty-ready”¹⁶⁶

Dan Ciuriak, Digital Economy Agreements: Where Do We Stand and Where Are We Going?

provisions concern commitments ensuring clarity, transparency, and predictability in their domestic regulatory frameworks; and interoperability, innovation, and competition in facilitating electronic commerce. The provisions also facilitate the use of electronic commerce

(GDPR).¹⁷⁸ In the aforementioned trade deals, as well as in the EU proposal for WTO rules on electronic commerce,¹⁷⁹ the EU follows a distinct model of endorsing and em3electron069 Tc 59 117.0712e /SpanW7.0712on06

application of the digital trade chapter.¹⁹³

F. The Regional Comprehensive Economic Partnership

An interesting and much anticipated development against the backdrop of the diverging EU and U.S. positions has been the recent

the JI negotiations on electronic commerce under the auspices of the WTO.

Chapter 12 of the RCEP includes the relevant electronic commerce rules. In a similar fashion to the CPTPP, it clarifies its application “to measures adopted or maintained by a Party that affect trade by electronic means” but excludes from this broad scope (1) government procurement

(b) of Article 12.14.3 says that the provision does not prevent a party from taking “any measure that it considers necessary for the protection of its essential security interests. Such measures shall not be disputed by other Parties.”

goods, trade in services, IP protection and economic development. Four WTO bodies were accordingly charged with the responsibility of carrying out the programme: (1) the Council for Trade in Services; (2) the Council for Trade in Goods; (3) the Council for TRIPS (Agreement on Trade-Related Aspects of Intellectual Property Rights)²³²; and (4) the Committee on Trade and Development. The General Council has also played a key role and has continuously reviewed the Work Programme.²³³ After the 2001 Doha Ministerial Declaration, the General Council agreed to hold “dedicated” discussions on cross-cutting issues, the relevance of which affects all agreements of the multilateral system. So far, ®ve such dedicated discussions have been held under the General Council's auspices.²³⁴

For all relevant information, see Electronic Commerce, WTO,

the willingness to create new rules or rather adhere to existing commitments, and between the willingness to address trade barriers or rather preserve policy space.²³⁹ In fact, the reports of the Chairs of the Council for Trade in Services and of the Council for Trade in Goods indicated a lack of agreement on fundamental issues,²⁴⁰ and the TRIPS Council Chair reported that there had been “

electronic commerce in the WTO.²⁴⁵

Osaka Declaration on Digital Economy, WTO, https://www.wto.org/english/news_e/news19_e

Internet, together with relevant payment and logistics services, while paying attention to the digitization trend of trade in services.²⁵⁴

individual background paper on provisions that it considers “represent the highest standard in safeguarding and promoting digital trade”²⁷⁹ and a proposal on digital trade disciplines.

a joint proposal on access to online platforms/competition,²⁸⁶ the content of which is restricted, however. Similarly, a communication from Japan, Mexico, and other countries on source code is restricted.

Regarding the prospective article on consumer protection, Members would be required to adopt or maintain measures, laws, or regulations that protect consumers “to proscribe misleading, fraudulent, and deceptive

years, either domestically, in specialized venues, or in the PTAs. For instance, in the case of consumer protection, 76 JI participants already have rules on consumer protection as part of the PTAs.³⁰¹

Taku Nemoto & Javier López González, Digital Trade Inventory: Rules, Standards and

sovereignty.³⁰⁸ Unsurprisingly, the Russian Federation has abstained from submitting a proposal on this issue.³⁰⁹

The depth of market access commitments on critical for electronic commerce services sectors were and continue to be in the “uncertain” category.³¹⁰

See, e.g., Kerneis, *supra* note 306, at 5; Jane Drake-Brockman et al., *Digital Trade and the WTO: Negotiation Priorities for Cross-Border Data Flows and Online Trade in Services* (TIISA Network Working Paper No. 2021-11, Sept. 2021), <https://cadmus.eui.eu/bitstream/handle/1814/.09>

interesting outcome of the MC12 was the interruption of the humdrum of previous statements to continue the work under the Work

payments; (5) single windows data exchange and system interoperability/unique consignment reference numbers; (6) non-discriminatory treatment of digital products; (7) access to online platforms/competition; (8) domestic regulation; (9) electronic commerce-related network

agreement on what the “flow of data” entails³²⁴ and the way forward, as shown by the recent small group talks. It should also be noted that further important nuances regarding the various types of data are absent in the current state of the

The latter condition—

D. The Legal Architecture of a WTO Electronic Commerce Agreement

An important aspect that will follow the outcome of an agreement in the context of the JI negotiations on

multilateral agreements nor plurilateral.”³³⁹ They maintain that these

should support the multilateral trading system and the existing WTO

may, however, include qualifications, standards and licensing matters,
25 additionally be, 25 other

digital products and that the provision of services in electronic commerce

lost.³⁷⁰ In the latter sense, the very systemic risks for the multilateral system that India and South Africa claim as an argument against a plurilateral deal on electronic commerce could become a reality.

V. TOWARDS

manifest and create a serious impediment to a deep agreement that adequately reflects contemporary digital trade practices and addresses the associated concerns of businesses and states. The topic of cross-border data flows, as well as the related provisions on data localization and non-discrimination of digital products, remain the most contentious, as they have a direct impact on the data sovereignty of states and the policy space available to them to adopt a variety of measures, particularly in the areas of national security and privacy protection, as highlighted by the positions

also need time for experimentation and accordingly a certain level of humility and perseverance of policy-makers, as rightly stressed by Shaffer.³⁷⁸ As we see from the PTA landscape, with the U.K. and New Zealand, we have actors positioned across digital trade regimes, so the experimentation in interfacing these is ongoing.³⁷⁹ In this sense, a WTO Agreement on Electronic Commerce “light” should not necessarily be viewed as a lost opportunity but rather as a step in the right direction.essar-by13 569sar-