

Digital Trade and Dispute Settlement in RTAs: An Evolving Standard?

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Keywords

Digital trade, regional trade agreements, trade multilateralism, free trade agreement, international economic law, enforceability, WTO, trade, liberalization, e-commerce

Abstract

There were 288 regional trade agreements in force at the end of 2018, approximately one quarter (27%) of which included digital trade provisions. These e-commerce chapters have evolved from simple statements, to more comprehensive attempts to cultivate digital trade. This article tests the hypothesis that as e-commerce chapters have become more common and more detailed, their legal enforceability has also risen. Enforceability is measured using a qualitative empirical analysis of 78 e-commerce chapters in regional trade agreements (RTAs) notified to the World Trade Organization. The first section reviews recent initiatives to map and track e-commerce provisions in RTAs. The second section uses count data and text-as-data to develop a time-sequence, process tracing examination of the relationship between e-commerce chapters and dispute settlement. The analysis emphasizes the trajectory of development, from earliest related provisions in 2001 to next-generation agreements such as the Trans-Pacific Partnership (CPTPP) and the new North American agreement, the USMCA. The conclusion provides a discussion of the consequences of this evolving relationship for the multilateral governance of trade at the WTO.

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The Trump Administration imposed tariffs on a range of industrial inputs and consumer goods from Canada, Mexico, the European Union, Japan, South Korea and China in the first half of 2018.² These actions signalled an approach to trade that emphasizes gains in zero sum terms and conceptualizes the international rule of law as a set of measures contingent upon the material benefits they afford the United States.³ In partial response to this significant policy shift, the Bertelsmann Stiftung convened a High-Level Board of Experts to examine the future of global trade governance. The resulting report identified three important features of the changing structural contours of international trade: the rise of regional trade agreements (RTAs), the rise of protectionism in the decade following the financial crisis, and the development of measures affecting e-commerce.⁴

This article addresses two of these challenging factors: the proliferation of regional trade agreements and the rapidly expanding digital economy.⁵ I analyze the development of e-commerce provisions in RTAs by looking at how these agreements

² The author would like to thank Laura Mahrenbach for helpful comments on the final draft.

³ Krueger, Anne O. "The Global Trade System Could Break Down." Project Syndicate, <https://www.project-syndicate.org/commentary/trump-attacks-on-world-trade-organization-by-anne-krueger-2018-09>.

⁴ Hoekman, Bernard, and Christian Bluth. "Revitalizing Multilateral Governance at the World Trade Organization: Report of the High-Level Board of Experts on the Future of Global Trade Governance." In *Global Economic Dynamics*. Gutersloh: Bertelsmann Stiftung, 2018; Aggarwal, Vinod K., and Simon J. Evenett. "A Fragmenting Global Economy: A Weakened WTO, Mega FTAs, and Murky Protectionism." *Swiss Political Science Review* 19, no. 4 (2013): 550-57.

⁵ Aaronson, Susan Ariel. "Information Please: A Comprehensive Approach to Digital Trade Provisions in NAFTA 2.0." In *CIGI Papers*. Waterloo, ON: Centre for International Governance Innovation, 2017.

incorporate dispute settlement, which allows for enforcement.⁶ I answer the following two questions: how has the relationship between e-commerce chapters and dispute settlement evolved over time? Concomitantly, how does the treatment of dispute settlement relate to the evolution of e-commerce chapters in RTAs? I hypothesize that the recent proliferation of comprehensive e-commerce chapters has increased the ability of trading partners to enforce the regulation of digital trade using dispute settlement provisions.⁷

The WTO's Work Programme on Electronic Commerce defines e-commerce as "the production, distribution, marketing, sale, or delivery of goods and services by electronic means."⁸ There is little published research on e-commerce chapters, although the WTO and other intergovernmental policy platforms have begun to rectify this situation.⁹ There is even less published on the relationship between e-commerce and dispute settlement in regional agreements.¹⁰ Neither of the recently released empirical

⁶ Porges, Amelia. "Designing Common but Differentiated Rules for Regional Trade Disputes." Interamerican Development Bank and International Centre for Trade and Sustainable Development, 2018.

⁷ Gibbons, Llewellyn Joseph. "No Regulation, Government Regulation, or Self-Regulation: Social Enforcement or Social Contracting for Governance in Cyberspace." *Cornell Journal of Law and Public Policy* 6, no. 3 (1996): 475-551.

⁸ WTO. "Electronic Commerce." World Trade Organization, https://www.wto.org/english/tratop_e/ecom_e/ecom_e.htm.

⁹ ICTSD. "Updating the Multilateral Rule Book on E-Commerce." International Centre for Trade and Sustainable Development, <https://www.ictsd.org/themes/services-and-digital-economy/research/updating-the-multilateral-rule-book-on-e-commerce>; Monteiro, Jose-Antonio, and Robert Teh. "Provisions on Electronic Commerce in Regional Trade Agreements." In *WTO Working Papers*. Geneva: World Trade Organization, 2017; Wu, Mark. "Digital Trade-Related Provisions in Regional Trade Agreements: Existing Models and Lessons for the Multilateral System." Geneva and Washington DC: The Inter-American Development Bank and the International Centre for Trade and Sustainable Development, 2017.

¹⁰ Primo Braga, Carlos A. "E-Commerce Regulation: New Game, New Rules?". *The Quarterly Review of Economics and Finance* 45, no. 2-3 (2005): 541-58; Burri, Mira, and Thomas Cottier, eds. *Trade Governance in the Digital Age*. Cambridge: Cambridge University Press, 2012.

studies delves into this issue despite the fact that the primary factor that elevates trade agreements beyond aspiration, is the existence of binding dispute settlement procedures.¹¹

The research below deploys a time-sequence analysis and is therefore rooted in two assumptions. First, that legal and economic institutions such as the web of regional trade agreements evolve over time; and second that change is driven by factors both internal and external to the arrangements in question. Internal factors include the evolving interests of the parties within a frame of bounded rationality.¹² External factors include the macro-economic and geopolitical environment, the changing landscape of technology, and the ongoing development of international legal regimes.¹³

Timing and sequencing analyses of legal texts are concerned with tracking change using both textual and process tracing methods.¹⁴ By means of count-data and text-as-data, I make a descriptive inferential claim about the increasing importance of e-commerce chapters to regional trade agreements.¹⁵ The first section reviews the literature on e-commerce chapters in RTA with an emphasis on empirical approaches to tracking instruments of digital trade governance. The second section develops an empirical method with which to gauge the evolution of 78 e-commerce chapters in RTAs since

¹¹ Hofmann, Claudia, Alberto Osnago, and Michele Ruta. "Horizontal Depth: A New Database on the Content of Preferential Trade Agreements." In *Policy Research Working Papers*. New York: The World Bank - Trade and Competitiveness Global Practice Group, 2017.

¹² Skovgaard Poulsen, Lauge N. "Bounded Rationality and the Diffusion of Modern Investment Treaties." *International Studies Quarterly* 58 (2014): 1-14.

¹³ Dunoff, Jeffrey L. "A New Approach to Regime Interaction." In *Regime Interaction in International Law: Facing Fragmentation*, edited by Margaret A. Young. Cambridge: Cambridge University Press, 2012; Young, Margaret A. "Introduction: The Productive Fiction between Regimes." In *Regime Interaction in International Law: Facing Fragmentation*, edited by Margaret A. Young. Cambridge: Cambridge University Press, 2012.

¹⁴ Pierson, Paul. *Politics in Time: History, Institutions, and Social Analysis*. Princeton, NJ: Princeton University Press, 2004.

¹⁵ Epstein, Lee, and Andrew D. Martin. *An Introduction to Empirical Legal Research*. Oxford: Oxford University Press, 2014.

2001. I chart the rising scale, scope, and legal enforceability of these chapters, and identify four significant trends in the regional governance of digital trade.¹⁶ E-commerce chapters began as clauses related to paperless trade facilitation and quickly became a broader attempt to come to terms with the digitization of trade flows, from digital retail sales, to the global provision of electronic services, and the development of markets for big data.¹⁷

I conclude with a brief discussion of three broad implications for the future of multilateral digital trade regulation.¹⁸ First, the study shows that despite rising levels of enforceability of e-commerce regulation, RTAs are unlikely to provide a strong foundation for the multilateralization of digital trade law at the WTO.¹⁹ Second, the pursuit of a multilateral strategy for regulation will need to take into account inconsistent, and divergent regional approaches to e-commerce regulation.²⁰ Finally, a multilateral approach may benefit from rebuilding the frames for digital trade regulation from the ground up, if only to take into account the fact that digital trade covers not only products and services delivered in new ways, but also transformative modes of social and political interaction, with unknown implications for the future of the global economy.

¹⁶ Bown, Chad P., and Bernard Hoekman. "Developing Countries and Enforcement of Trade Agreements: Why Dispute Settlement Is Not Enough." *Journal of World Trade* 42, no. 1 (2008): 177-203; de Lima-Campos, Aluisio, and Juan Antonio Gaviria. *Introduction to Trade Policy*. New York: Routledge, 2018, p. 209.

¹⁷ Ciuriak, Dan, and Maria Ptashkina. "The Digital Transformation of International Trade." Geneva: Interamerican Development Bank and International Centre for Trade and Sustainable Development, 2018.

¹⁸ Burri, Mira. "Designing Future-Oriented Multilateral Rules for Digital Trade." In *Edward Elgar Research Handbook on Trade in Services*, edited by Pierre Sauve and Martin Roy, 331-56. Cheltenham, UK: Edward Elgar, 2016.

¹⁹ Froese, Marc D. *Sovereign Rules and the Politics of International Economic Law*. New York: Routledge, 2018.

²⁰ Antkiewicz, Agata, and John Whalley. "China's New Regional Trade Agreements." In *China's Integration into the World Economy*, edited by John Whalley. Singapore: World Scientific, 2011.

Recent Empirical Analysis of E-Commerce Chapters in RTAs

In 2017 world trade grew, in both value and volume, faster than it had in any other year since the financial crisis.²¹ Trade in media, entertainment, and computer services (sectors strongly reliant on digital modes of transmission) became slightly less restrictive, but there remains a near balance in cumulative trade liberalization and cumulative trade restrictions in these sectors.²² The WTO has not concluded any formal negotiations on e-commerce to date. The Work Programme on E-Commerce made incremental movement, and the membership has recently agreed to maintain the moratorium on import duties on digital transmissions. In the twenty years since the inauguration of the Work Programme, e-commerce provisions have become a common feature of RTAs, beginning with the earliest paperless trading clause in the New Zealand – Singapore FTA in 2001. Since that time, e-commerce clauses have grown significantly, and a great deal of that development has been driven by Southeast Asian and Pacific-Rim countries.²³

By the end of 2018, 78 of 275 regional trade agreements contained e-commerce provisions. RTAs are frequently analyzed in terms of their relation to the WTO, with those provisions that build on existing multilateral disciplines termed WTO-plus, and those that break ground beyond the WTO termed WTO-extra. Most recent RTAs are both WTO-plus in their treatment of tariffs, for example, and WTO-extra in that they contain

²¹ OECD. "OECD-WTO-UNCTAD Report on G20 Trade and Investment Measures." Organization for Economic Cooperation and Development, <http://www.oecd.org/daf/inv/investment-policy/19th-Report-on-G20-Trade-and-Investment-Measures.pdf>, p. 6.

²² OECD 2018, p. 74.

²³ Elms, Deborah K. "Evolving Digital and E-Commerce Trade Rules for Northeast Asia." In *Studies in Comprehensive Regional Strategies*. Sejong-si, Korea: Korea Institute for International Economic Policy, 2016; Weber, Rolf H. "Digital Trade and E-Commerce: Challenges and Opportunities of Asia-Pacific Regionalism." *Asian Journal of WTO & International Health Law and Policy* 10, no. 2 (2015): 321-48.

digital trade provisions, and the WTO agreements do not.²⁴ WTO-extra provisions have become increasingly central to the rationale for signing RTAs, especially as the digital economy increases in size and complexity. Correspondingly, RTAs “increasingly go beyond the removal of border barriers to cover matters not subject to the WTO,” such as cross-border data flows.²⁵

The WTO recently released the first comprehensive study of e-commerce provisions in RTAs. In it, Monteiro and Teh found that the 75 RTAs surveyed remain “highly heterogenous” and address a wide range of issues from paperless trading (having to do with accessing and submitting customs forms electronically), to data integrity, consumer protection, and even unsolicited electronic messages, or email spam.²⁶ One of the basic weaknesses of the RTA trade governance model is that progressive chapters designed to protect the environment or labour standards are generally not enforceable through dispute settlement, which limits their impact on national standards.²⁷ However, this is not the case for e-commerce. A majority of RTAs with e-commerce provisions do not exempt it from dispute settlement. Yet the question of the relationship between e-commerce and dispute settlement is complex because each agreement defines the relationship between e-commerce and the rest of the agreement a little differently. Further, some e-commerce provisions covered by dispute settlement are relatively comprehensive, while others contain little beyond aspirational language.²⁸

²⁴ Horn, Henrik, Petros C. Mavroidis, and Andre Sapir. "Beyond the Wto? An Anatomy of Eu and Us Preferential Trade Agreements." *The World Economy* 33, no. 11 (November 2010): 1565-88.

²⁵ Hoekman and Bluth 2018, p. 17.

²⁶ Monteiro and Teh 2017, p. 4.

²⁷ Dewan, Sabina, and Lucas Ronconi. "U.S. Free Trade Agreements and Enforcement of Labor Law in Latin America." *Industrial Relations* 57, no. 1 (2018): 35-56.

²⁸ Aaronson, Susan Ariel. "Information Please: A Comprehensive Approach to Digital Trade Provisions in Nafta 2.0." In *CIGI Papers*. Waterloo, ON: Centre for International Governance Innovation, 2017; Kim, Soo Yeon, and Tobias Hofmann. "Designing Credible Commitment: The Political Economy of Dispute

The RTA Exchange, a joint project of the Inter-American Development Bank and the International Centre for Trade and Sustainable Development (ICTSD) has also published an overview of e-commerce provisions in RTAs. Wu identified 69 agreements signed since 2001 with e-commerce provisions and that count rises to 90 if it includes agreements that reference paperless trading, digital rights management, or general promotion of cross-border digital trade. Further, associated plurilateral agreements also forward a digital regulatory agenda. Examples include market access commitments made under the Information Technology Agreement, and commitments made under the WTO's Trade Facilitation Agreement to adopt paperless processing standards for cross-border flows of goods.²⁹

Of the 164 country members of the WTO, approximately half have entered into an RTA with an e-commerce clause. The Singapore – Australia FTA (SAFTA), entered into force in 2003 as the first agreement with stand-alone e-commerce provisions. Australia, the United States, and Canada have played a particularly important role in the proliferation of RTAs that contain e-commerce chapters. Wu notes that the most common issue with dispute settlement involves RTAs in which the e-commerce chapter is excepted from dispute settlement entirely.³⁰ Others carve out certain aspects of e-commerce.³¹ Further, dispute settlement may not mean much in RTAs for which the e-

Settlement Design in PTAs." In *Understanding Mega Free Trade Agreements: The Political and Economic Governance of New Cross-Regionalism*, edited by Jean-Baptiste Velut, Louise Dalingwater, Vanessa Bouillet and Valerie Peyronel. New York: Routledge, 2017.

²⁹ Wu 2017, p. 4.

³⁰ Examples include the Australia – China FTA and the ASEAN – Australia – New Zealand FTA. For a complete list see Wu 2017, p. 26 at footnote 133.

³¹ Wu 2017, p. 26 at footnote 134.

commerce provisions “may be relatively soft commitments, relatively limited in scope, or relatively uncontroversial.”³²

Regional trade agreements can affect digital trade in other ways beyond the language used in clauses devoted to e-commerce. For example, digital trade may be regulated through market access provisions in service liberalization schedules, or through provisions related to financial services, telecommunications or intellectual property.³³ For better or for worse, and despite their variable quality, regional trade agreements have developed the rules for digital trade with regard to defining its terms, such as non-discrimination, transparency, the moratorium on customs duties, the application of WTO rules, as well as domestic regulatory issues such as electronic authentication, consumer protection, and the protection of personal information.³⁴

If the benefits of trade governance are to be shared broadly, regional achievements ought to be generalized to the multilateral trading system because “the lack of [multilateral] governance and regulation negatively affects international trade in e-commerce.”³⁵ However, the question of how to effect the shift from regional to global governance remains. For all the literature on multilateralization that has sprung up since the mid-2000s, there are few historically specific examples of legal regimes migrating from bilateral or regional fora to multilateral institutions. In the postwar period, multilateralism has been a process of coalition building and political leadership rather than bottom-up legal evolution.³⁶

³² Wu 2017, p. 27.

³³ Gao, Henry S. "Regulation of Digital Trade in US Free Trade Agreements: From Trade Regulation to Digital Regulation." *Legal Issues of Economic Integration* 45, no. 1 (2018): 47-70.

³⁴ Herman, Lior. "Multilateralizing Regionalism: The Case of E-Commerce." In *OECD Trade Policy Papers*. Paris: Organization for Economic Cooperation and Development, 2010, p. 4.

³⁵ Herman 2010, p. 8.

³⁶ Froese 2018, pp. 121-147.

The WTO, while generally in favour of multilateralization, does not offer a template for generalizing regional provisions at the multilateral level.³⁷ But a recent report does urge the trade policy community to look for constructive multilateralization strategies. The basic problem with avoiding multilateralization is that “in the absence of multilateral participation through a consensus-based process, a risk exists that a subset of the membership could shape rules from which they benefitted, but at the expense of members that were not part of the critical mass.”³⁸ Diverging paths to trade regulation with differential benefits are the obvious pitfalls of mega-regionalism and plurilateralism.³⁹ Herman argues that the multilateralization process could follow two pathways. The first is a bottom-up process in which particular provisions are extended to other parties beyond the original RTA signatories. The second is a top-down process in which the WTO concludes negotiations and implements an agreement that incorporates and extends the best-practices of RTAs.⁴⁰

Herman’s study (2010) is important because he sheds light on “where *de facto* convergence is emerging through *de jure* rulemaking in RTAs.”⁴¹ Despite some recent rhetoric to the contrary, the WTO has not been able to develop any meaningful forward momentum on e-commerce.⁴² Multilateralizing digital trade rules would be a significant

³⁷ Gasiorek, Michael, Patricia Augier, and Charles Lai-Tong. "Multilateralizing Regionalism: Lessons from the EU Experience in Relaxing Rules of Origin." In *Multilateralizing Regionalism: Challenges for the Global Trading System*, edited by Richard Baldwin and Patrick Low. Cambridge: Cambridge University Press, 2009.

³⁸ WTO. "World Trade Report 2011: The WTO and Preferential Trade Agreements: From Co-Existence to Coherence." World Trade Organization, https://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report11_e.pdf, p. 191.

³⁹ Ash, Ken, and Iza Lejarraga. "Can We Have Regionalism and Multilateralism?" International Centre for Trade and Sustainable Development, <https://www.ictsd.org/sites/default/files/downloads/2014/07/part1-5.pdf>.

⁴⁰ Herman 2010, pp. 17-22.

⁴¹ Herman 2010 p. 22

⁴² Donnan, Shawn. "WTO Wrestles with Relevance in Age of Ecommerce." *Financial Times of London*, December 13 2017.

step forward for trade governance, especially since the recent signing of the CPTPP and the USMCA, both of which contain comprehensive and binding next-generation rules for digital trade. Inevitably, the biggest obstacle to multilateral rulemaking is political will.⁴³

One of the main sticking points that has bogged down the multilateral negotiations since the late 1990s is the question of whether digital products ought to be considered goods or services. The US prefers to consider them to be goods, and goods are more comprehensively covered by the WTO's rules than are services. The EU prefers to think of digital products as an extension of services provision. As Herman notes, "it has not gone without notice that treating digital products under GATT rules would provide for automatic extension of national treatment, which in the GATS, is a negotiated commitment."⁴⁴ Clearly digital trade is a hybrid set of practices that encompass aspects of both goods and services provision, while simultaneously being something a little different.

Ciuriak and Ptashkina use a typological approach to capturing the unique nature of data in circuits of international trade. Data has a role in the delivery of conventional goods and services and also has an intrinsic value because it is itself a factor used in the production of digital goods and services, from social media to artificial intelligence. They develop a five mode typology of digital trade. Mode One covers "digital to real" transactions in which consumers pay for digital experiences such as games, apps, online gambling, and communication services.⁴⁵ Mode Two covers "real to real" transactions in

⁴³ WTO. "World Trade Report 2018: The Future of World Trade: How Digital Technologies Are Transforming Global Commerce." World Trade Organization, https://www.wto.org/english/res_e/publications_e/world_trade_report18_e.pdf.

⁴⁴ Herman 2010, p. 9.

⁴⁵ Ciuriak and Ptashkina 2018, p. 4.

which consumer pay for real goods and services using a web interface.⁴⁶ The best example is the purchase of products on the Amazon website. Mode Three covers household to household transactions such as eBay and AirBnB. Mode Four covers household to business transactions. Examples include “platform-based providers of household services to business” such as Fiverr and the Amazon-owned Mechanical Turk marketplace for work that requires human intelligence to complete.⁴⁷

Finally, Mode Five covers “the capitalization of data flows,” which includes personal data generated by social media, the Internet of Things (IoT), and other types of financial and personal data created by online consumption.⁴⁸ Of course, data flows are not digital transactions and they do not leave a history of invoices or receipts. Even so, data interchange flows have long been a part of international exchange. But what is new is the compilation of data into databases “that are the essential capital in the age of AI.”⁴⁹ Big data and its role in the further development of digital commerce is the newest, and arguably most important emergent feature of the digital economy.

In the absence of a viable political path forward at the WTO, the major trading blocks are pushing forward aggressive agendas for the regulation of digital trade, such as the nationalist security state of China’s Great Firewall, and the approach pursued by the Obama administration for disciplining digital flows under the national treatment provisions of GATT.⁵⁰ While RTAs will continue to be the basis for trade-related digital economic governance, Ciuriak and Ptashkina note that major RTAs that are moving

⁴⁶ *ibid*

⁴⁷ *ibid*

⁴⁸ *ibid*

⁴⁹ Ciuriak and Ptashkina 2018, p. 6.

⁵⁰ Chukwumerije, Okezie. "Obama's Trade Policy: Trends, Prospects, and Portends." *U.C.-Davis Journal of International Law and Policy* 16, no. 1 (2009): 39-79.

towards completion, such as the CPTPP and the Regional Comprehensive Economic Partnership (RCEP) that includes China and India, are likely to mark the end of the major growth phase in e-commerce regulation through RTAs for reasons that have more to do with geopolitics than the capacities of this form of regulation per se.

The CPTPP represents a US-centric model even without the US signing on to the agreement.⁵¹ Conversely, the RCEP will likely skirt e-commerce regulation by developing a “minimalist e-commerce regime, with technical facilitation issues covered, but the larger issues of market access, privacy, and data flows skirted.”⁵² These two models, a more intensive regulation of digital products, and an avoidance of issues related to digital trade, leave plenty of room for other approaches, namely the focus taken by the EU to refine the balance between digital trade flows and supranational regulation. We are already seeing the EU taking a leading role in the protection of personal information for example, with the General Data Protection Regulation (GDPR) of 2016, which regulates the export of personal data outside the EU.⁵³

The Evolving Scope, Scale, and Legal Enforceability of E-Commerce Chapters

This section develops a time-sequence analysis of the relationship between e-commerce chapters and dispute settlement. I rely upon an original dataset compiled using the WTO’s Regional Trade Agreement Database and country-specific textual repositories. At the end of 2018, there were 288 RTAs in force that have been notified to the WTO. This dataset contains 78 entries – including recently completed RTAs from 2018 that were not

⁵¹ Gao, Henry S. "Regulation of Digital Trade in US Free Trade Agreements: From Trade Regulation to Digital Regulation." *Legal Issues of Economic Integration* 45, no. 1 (2018): 47-70.

⁵² Ciuriak and Ptashkina 2018, p. 15.

⁵³ Union, European. "The EU General Data Protection Regulation." European Commission, <https://eugdpr.org/>.

part of the WTO's recent study of e-commerce in RTAs.⁵⁴ I also include the Transpacific Partnership (CPTPP) and the second-generation North American agreement, the USMCA. The CPTPP entered into force on December 30, 2018 and the USMCA is expected to be ratified sometime in 2019.

The first part, (including Table One and Figures One through Three) develops a taxonomy of e-commerce clauses and show their growth in scale and scope between 2001 and 2019. The latter half (including Figures Four through Seven and Table Two) deploys a time-sequence method to examine the relationship of e-commerce clauses to regional dispute settlement mechanisms. The ultimate purpose is to show how the growth in the scale and scope of e-commerce chapters mirrors an increase in general enforceability of these clauses.⁵⁵

In a recent World Bank working paper, Hofmann, Osnago and Ruta developed a new method for studying RTAs that categorizes each agreement based on the inclusion of a range of public policy issue areas. Then they measured the overall legal enforceability of these provisions. Beyond the quantitative increase in preferential trade agreements, the authors note that the content of these agreements has evolved over time. E-commerce chapters are a primary example of what Hofmann et al refer to as 'horizontal depth,' which is the idea that trade agreements have become more detailed and comprehensive over time.⁵⁶

This research builds upon this concept of horizontal depth insofar as I have developed a dataset that categorizes the clauses in e-commerce chapters and then assesses

⁵⁴ Monteiro and Teh 2017

⁵⁵ Howse, Robert, Hélène Ruiz-Fabri, Geir Ulfstein, and Michelle Q. Zang, eds. *The Legitimacy of International Trade Courts and Tribunals*. Cambridge: Cambridge University Press, 2018.

⁵⁶ Hofmann, Osnago and Ruta 2017, p. 3.

the evolution of their legal enforceability over the previous two decades. “In general terms, an area is considered legally enforceable if the language used is sufficiently precise and committing and if it has not been excluded from dispute settlement procedures under the PTA.”⁵⁷ Precise language refers to language that lays out the obligations of parties in unambiguous terms. I refer to this as language that is specific and it is juxtaposed with e-commerce chapters that contain language that is largely aspirational, referring to future plans for engendering greater interdependence in digital trade.

Specific language uses phrases like ‘shall’ and ‘will,’ while aspirational language frames e-commerce in terms of future trade, cooperation, and planning for economic growth using language such as ‘the parties shall cooperate. . .’ or ‘dialogue shall be established. . .’⁵⁸ I categorize e-commerce chapters based upon whether they contain specific versus aspirational language. Even so, just because a chapter is covered by dispute settlement provisions does not mean that it has content that may be meaningfully litigated under the terms of the agreement. This is why Hofmann, Osnago and Ruta consider the specificity of the language used in individual clauses to be an important feature of legal enforceability.⁵⁹

I begin with discussion of range of clauses in e-commerce chapters. Figure One below arranges these in a time-series typology, in which oldest clauses appeared in the earliest e-commerce chapters, including those related to paperless trading. The Singapore-Australia RTA that came into force in 2003 ushered in a new era of

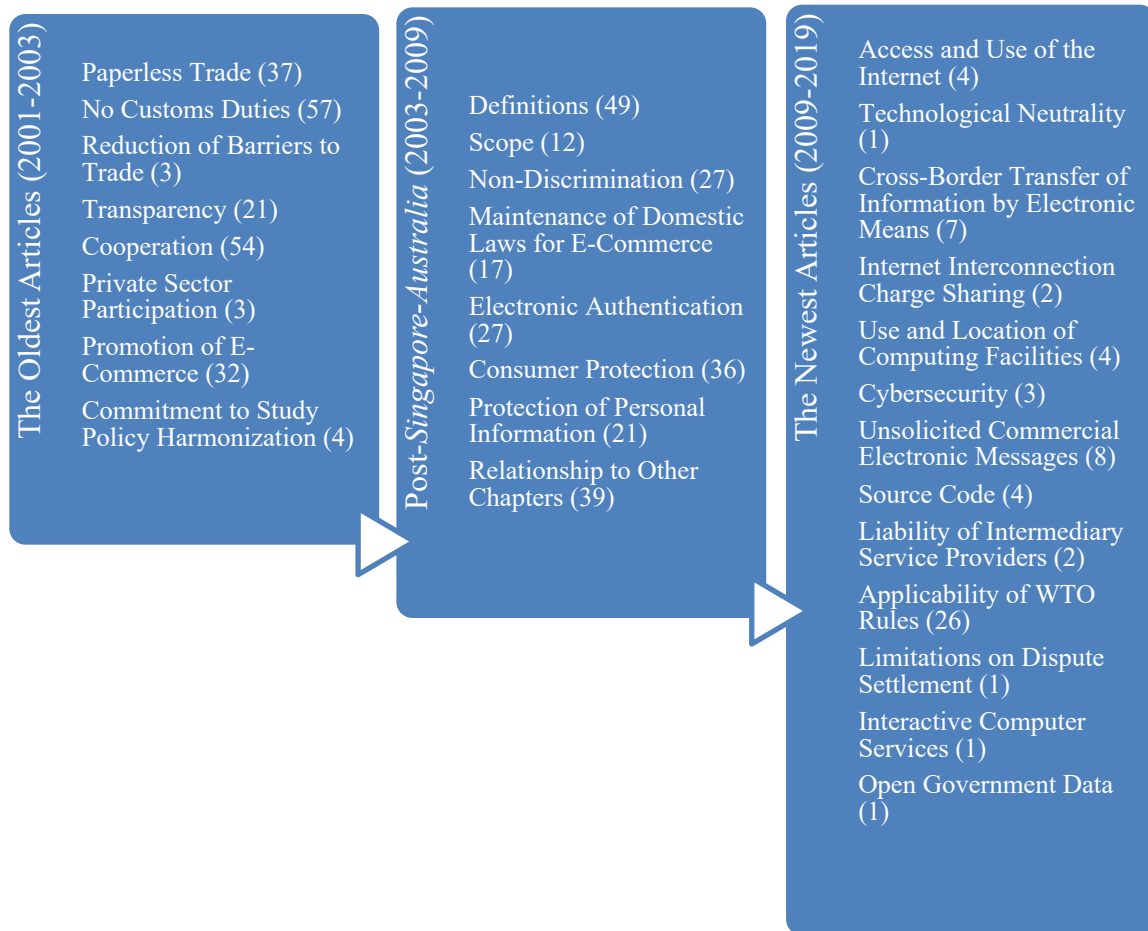
⁵⁷ Hofmann, Osnago, and Ruta 2017, p. 7.

⁵⁸ Horn, Mavroidis, and Sapir 2010, pp. 1570-72.

⁵⁹ Hofmann, Osnago, and Ruta 2017, p. 10.

comprehensive e-commerce chapters. Newer clauses were almost invariably first used in this RTA. The number in parentheses following each article in Figure One represents the number of times that article is deployed in the e-commerce chapter of an RTA.

Table 1: A Typology of Articles in E-Commerce Chapters



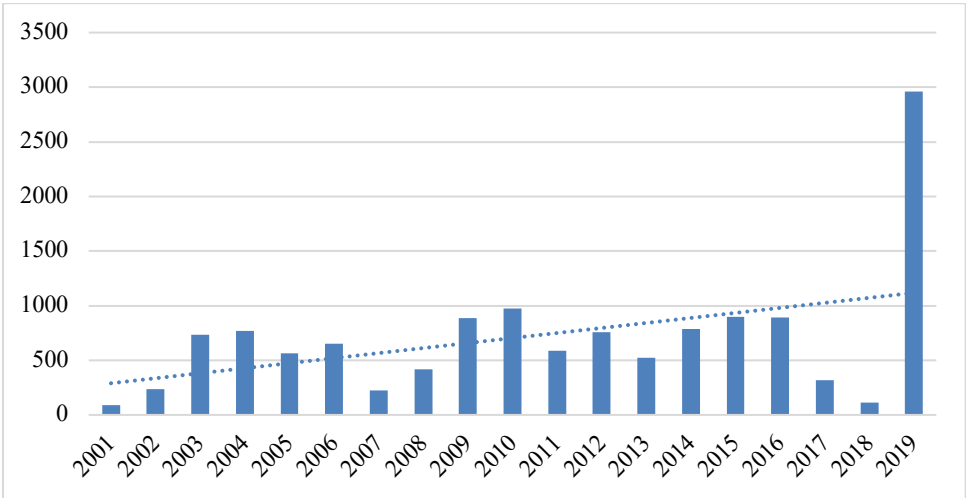
Source: Original dataset and WTO RTA Database

Despite the progression of clause development, there has been little standardization of how clauses deal with basic issues related to digital trade. For example, the count of ‘relation to other chapters’ clauses includes articles that in some way refer the issue of electronic service provision back to service and/or investment chapters, as well as those clauses that explicitly state that the enforcement of e-commerce chapters is subordinate to the enforcement of services, finance and investment chapters.

We should also note that chapter articles that speak to the scope of the agreement cover much of the same territory. Likewise, in some chapters, general exceptions are covered within the scope of the agreement and in other agreements general exceptions are covered in a separate article.

Figure One below shows average number of words in e-commerce chapters broken down by year. Most e-commerce chapters contain less than one thousand words, although the chapters negotiated by the US, the EU and Canada vary, between 800 and 1600 words, with some notable exceptions such as the Canada – Jordan FTA, where the e-commerce chapter contains only 81 words. There are three very long and detailed chapters, that have created a new standard. The first is the Singapore – Australia FTA, that comes in at 3049 words across 19 articles. But the comprehensiveness of this chapter would not be repeated for more than a decade, until the Transpacific Partnership of eleven Pacific Rim countries (CPTPP) and the second-generation North American agreement (USMCA) adopted this comprehensive model in e-commerce chapters that are 2685 words and 3236 words across 18 articles, respectively. However, even without taking the two newest RTAs into consideration, we still see an upward trajectory for average number of words in an e-commerce chapter.

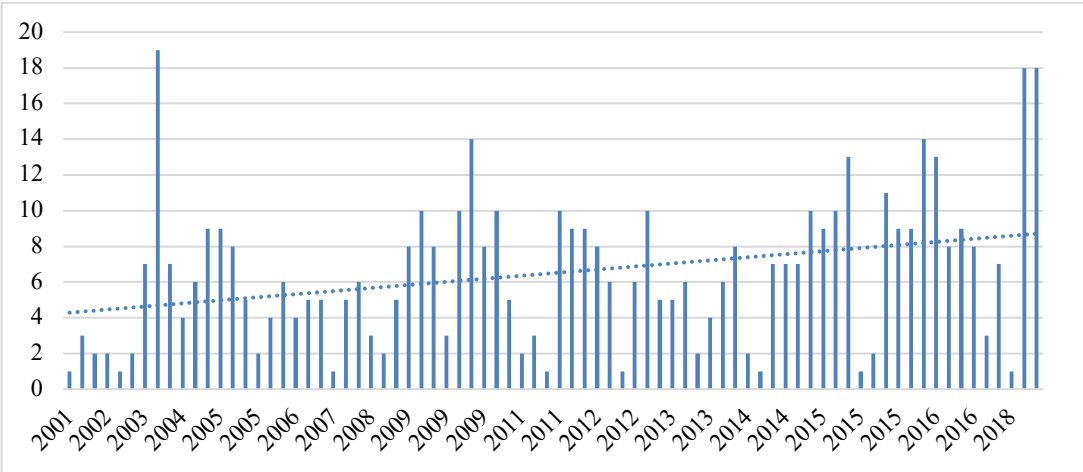
Figure 1: The Rising Scale of E-Commerce Chapters



Source: Original dataset and WTO RTA Database

Counting the number of clauses per chapter is another way to show growth in e-commerce chapters. More importantly, the count of total number of clauses per e-commerce chapter give use some sense of the horizontal depth of these chapters, to borrow a term from Hoffman, Osnago and Ruta. Figure Two below charts the number of clauses in each e-commerce chapter signed between 2001 and 2018. Overall, the chapters are becoming more comprehensive, evidenced by the increasing number of issues dealt with, and the relatively modest standardization process underway. For example, most e-commerce chapters negotiated in the past five years contains a definitions clause that defines digital trade terms. Standouts include Singapore-Australia in 2003 with 19 articles mentioned above, as well as Japan-Switzerland in 2009 with fourteen articles, and the not-yet-ratified CPTPP and USMCA with 18 articles each.

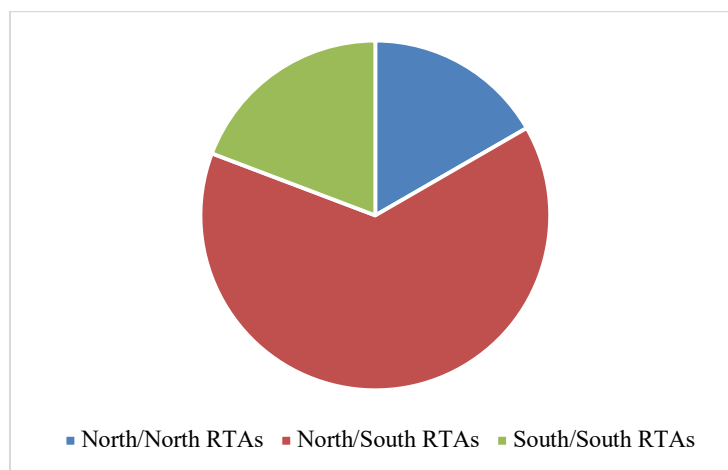
Figure 2: The Expanding Scope of E-commerce Chapters



Source: Original dataset and WTO RTA Database

The marked similarities between SAFTA in 2003 and the USMCA in 2018 suggests the concretization of a basic structure for the e-commerce chapter. However, despite the similarities between certain well-developed chapters, a vast majority of the e-commerce chapters exhibit very little standardization. Many relatively basic issues, such as defining the scope of the chapter, are dealt with in different ways, as I noted above. In general, developed economies tend to prefer more complex and detailed e-commerce chapters. However, a strong majority of RTAs with e-commerce chapters have been signed between industrialized and industrializing countries (50), and 80% of North/South RTAs with e-commerce chapters allow digital trade to be covered by dispute settlement provisions (see Figure Three). North/North RTAs only account for 13 of the total, and South/South RTAs, mostly clustered in Asia, account for the rest (15).

Figure 3: E-Commerce Chapters, by Development Status



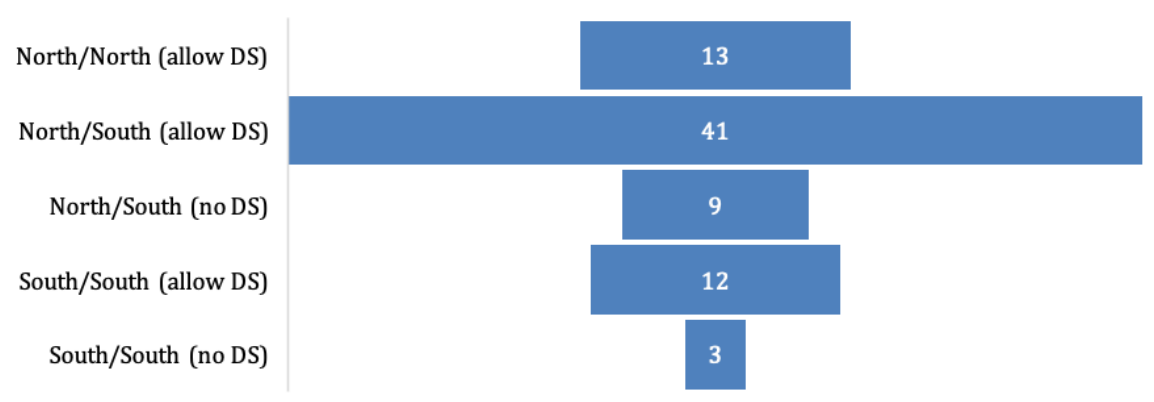
Source: Original dataset and WTO RTA Database

Up to this point I have been developing an overview of e-commerce chapters with an emphasis on their development over time. Now we move to a closer discussion of their relationship to dispute settlement.⁶⁰ Figure Four below shows the extent to which e-commerce chapters are covered by regional dispute settlement procedures. Of the 76 active RTAs (plus TPCPP and USMCA) with e-commerce provisions, 12 (about 15%) exempt the chapter from dispute settlement provisions. There is no clear pattern that allows us to generalize about how dispute settlement provisions reflect the geopolitics of partnership (north/south, etc). None of the e-commerce chapters in agreements signed exclusively between industrialized economies opt out of dispute settlement, but beyond that, it is impossible to generalize on development status alone. Nor can we generalize based on the specificity of legal language. For example, we cannot say with any certainty that agreements with short and undetailed chapters, or agreements with chapters that are framed in aspirational language, exempt it from dispute settlement. In fact, it appears that

⁶⁰ Bown, Chad P. and Bernard Hoekman. "Developing Countries and Enforcement of Trade Agreements: Why Dispute Settlement Is Not Enough." *Journal of World Trade* 42, no. 1 (2008): 177-203.

while some e-commerce chapters are exempted from dispute settlement because they contain commitments that one of the parties does not want to bind through potential arbitration, others are likely included under dispute settlement provisions despite or perhaps because they offer nothing meaningful to arbitrate (the Canada – Ukraine FTA is a good example).⁶¹

Figure 4: Allowing and Disallowing Dispute Settlement for E-commerce Chapters



Source: Original dataset and WTO RTA Database

A majority of RTAs with e-commerce provisions are classified as north/south because they are agreements between industrialized and industrializing countries. Approximately twenty percent of these disallow dispute settlement for e-commerce. The rate of disallowance of dispute settlement for e-commerce in south/south agreements is similar. The only clear pattern to the disallowance of dispute settlement for e-commerce is that that all of these agreements originate in Australasia and/or Southeast Asia, and six of them involve China, Hong Kong, or Taiwan; five involve Australia or New Zealand. The geopolitics of trade in Southeast Asia seems to favour incomplete contracting around

⁶¹ Horn, Henrik, Giovanni Maggi, and Robert W. Staiger. "Trade Agreements as Endogenously Incomplete Contracts." *American Economic Review* 100, no. 1 (2010): 394-419.

the digital economy. The picture becomes a little more complex when we turn to the issue of legally enforceable language.

Figure Five below shows that 59 out of 78 e-commerce chapters (76%) use specific language to describe the obligations of parties vis-à-vis digital trade. Of these 59, seven do not allow dispute settlement, despite using language that denotes specific obligations. A further 19 chapters have been coded as containing aspirational language. Despite their use of less-specific language, a majority (fourteen) still allow dispute settlement, and only five disallow dispute settlement. This is interesting because we would expect chapters that use specific language to be more likely to allow dispute settlement than chapters that use aspirational language.⁶² And while this holds true in a general sense, in a minority of chapters the type of language used is not indicative of whether dispute settlement is allowed.

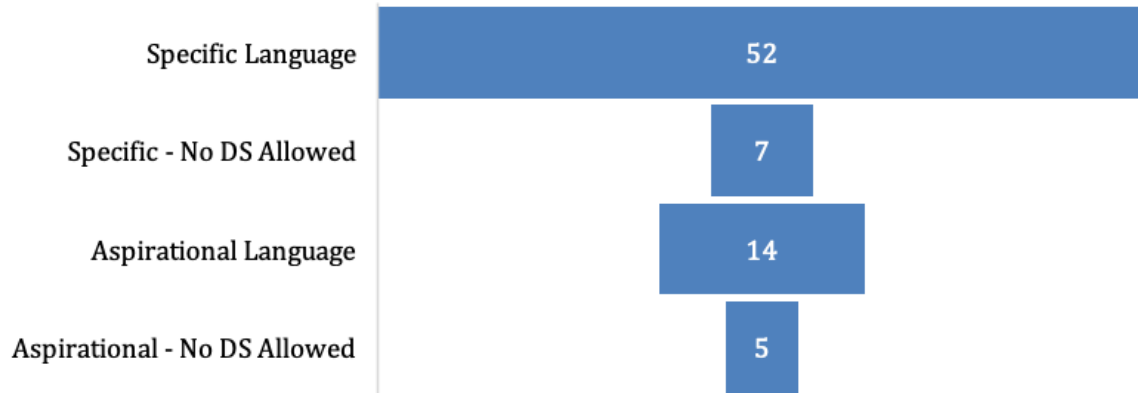
Of the chapters with specific language that do not allow dispute settlement, all are north/south agreements. Further, all e-commerce chapters with specific language that nevertheless do not allow dispute settlement are found in agreements between nations in Southeast Asia and Oceania.⁶³ In the category of e-commerce chapters with aspirational language that do not allow dispute settlement, one chapter comes from a north/north agreement (Hong Kong, China – New Zealand), one comes from a north/south agreement (China – Hong Kong, China), and three come from south/south agreements (China – Macau, Turkey – Malaysia, and Chile - Thailand). Again, all aspirational e-commerce

⁶² Chase, Claude, and Alan Yanovich, Crawford, Jo-Ann, Ugaz, Pamela. "Mapping Dispute Settlement Mechanisms in Regional Trade Agreements: Innovative or Variations on a Theme?" In *WTO Economic Research and Statistics Division, Staff Working Papers*: World Trade Organization, 2013.

⁶³ These north/south agreements involve one or more of the following states and/or trade blocs: Australia, New Zealand, Thailand, Malaysia, Chinese Taipei, China, Korea, and the ASEAN.

chapters that do not allow dispute settlement have at least one party from Southeast Asia, suggesting a geopolitical rationale for disallowing dispute settlement in e-commerce, rather than the content of the chapter itself predicting whether it will allow dispute settlement.⁶⁴

Figure 5: Specific vs. Aspirational Language and the Relation to Dispute Settlement



Source: Original dataset and WTO RTA Database

The e-commerce chapters in southeast Asian RTAs may be notable for the number that do not allow dispute settlement, but several also stand out for the ground they break on digital regulation. The first is the Singapore – Australia Free Trade Agreement (SAFTA) of 2003. SAFTA was a pioneer agreement that developed the template for e-commerce later largely adopted by the CPTPP and USMCA. It was also the first Asian RTA with a dedicated e-commerce chapter, rather than a chapter on paperless trade. The second is the Japan – Mongolia Economic Partnership Agreement of 2016 that introduced a prohibition on the use of local servers as well as provisions on unsolicited electronic communications (spam) and source code.⁶⁵

⁶⁴ Wang, Jianguy. "China's Regional Trade Agreements: The Law, Geopolitics, and the Impact on the Multilateral Trading System." *Singapore Year Book of International Law* 8 (2004): 119-47.

⁶⁵ Weber, Rolf H. "The Expansion of E-Commerce in Asia-Pacific Trade Agreements." International Centre for Trade and Sustainable Development, <https://www.ictsd.org/opinion/the-expansion-of-e-commerce-in-asia->

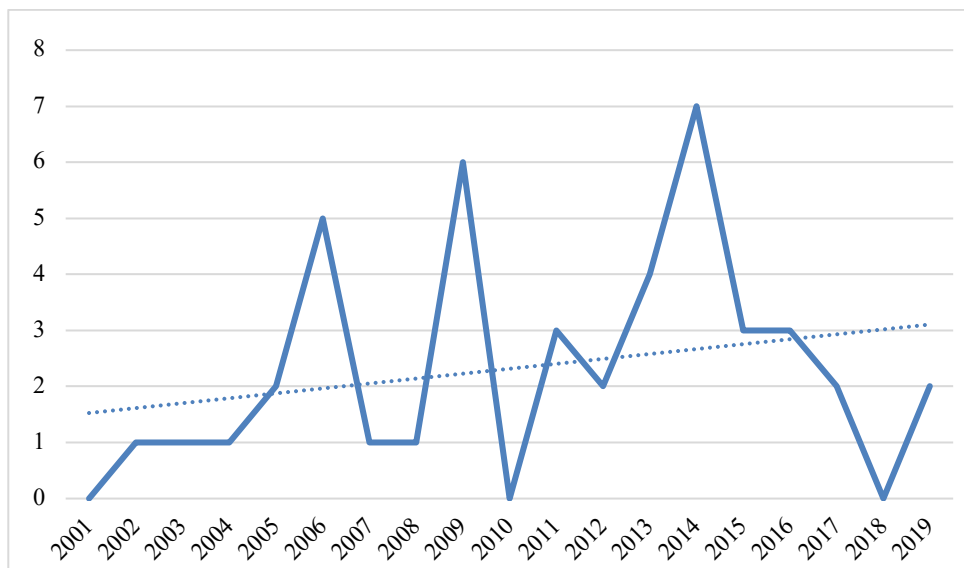
Next we turn to the issue of how dispute settlement rules interact with the clauses of the e-commerce chapter. How do e-commerce chapters that allow dispute settlement, treat it? Most allow it without reservations, likely for two reasons. Either it is a well-constructed chapter that potentially creates trade between the partners, or it is a vague and/or brief chapter that promises future cooperation for the development of the sector.⁶⁶ We can see this quite clearly in Figure Five above, where about three quarters (14 out of 19) e-commerce chapters that contain aspirational language nevertheless allow dispute settlement.

Of the 78 agreements with e-commerce chapters, twelve do not allow dispute settlement (shown above), leaving 66 that do, plus one that incorporates both general exceptions and the non-application of dispute settlement (Australia – China in 2015). Of these, 23 do not contain any general exceptions, likely because they are relatively brief or aspirational chapters. Forty-four chapters contain some formulation of GATT and/or GATS general exceptions. Figure Six below charts the rise of General Exceptions in e-commerce chapters over time. The use of general exceptions dates back to the earliest days of e-commerce chapters, with the first mention of GATT Art. XX being incorporated into e-commerce provisions in the Canada – Costa Rica FTA that entered into force in November 2002.

[pacific-trade-agreements](#).

⁶⁶ Petersen, Bent, and Kim Ostergaard. "Reconciling Contracts and Relational Governance through Strategic Contracting." *Journal of Business and Industrial Marketing* 33, no. 3 (2018): 265-76.

Figure 6: General Exceptions in E-Commerce Chapters



Source: Original dataset and WTO RTA Database

Significantly, the newest agreements, CPTPP and USMCA, have not incorporated the GATT and GATS general exceptions language *mutatis mutandis*. Rather they rely upon a ‘Scope and General Provisions’ article that exempts the chapter from government procurement while laying out its specific relationship to chapters on services, investment, and financial services. This is an evolutionary step forward because it is less repetitive in the context of the entire text of the agreement. However, it is not an entirely new development. The Singapore – Australia Free Trade Agreement (SAFTA) that entered into force in 2003 pioneered this specified approach to exceptions. The structural similarities between this agreement and the two newest RTAs will be discussed below.

But first there is one other issue relating to dispute settlement that arises in a significant number of e-commerce chapters. Fourteen e-commerce chapters, beginning with Canada – Peru in 2009, contain a clause titled ‘Relation to Other Chapters.’ Each of these clauses contains a short statement declaring, “in the event of an inconsistency

between this Chapter and another Chapter, the other Chapter shall prevail to the extent of the inconsistency” (Canada – Peru Art. 1509).⁶⁷ With a single sentence, e-commerce becomes subordinate to every other chapter of the agreement for the purposes of dispute settlement.

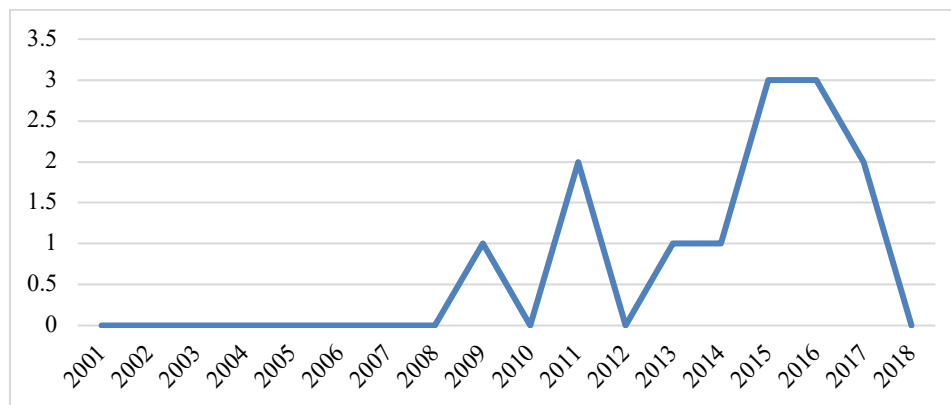
The purpose of such a statement is to recognize the primacy of chapters relating to goods and services, but it may also be a way to recognize the growing relevance of e-commerce regulation, without needing to fully explore the implications of digital trade regulation in the negotiation of the agreement. In that regard, these clauses may be part of an incomplete contracting strategy.⁶⁸ As Figure Seven below shows, it is difficult to generalize about governments which use these clauses because they include Canada, Mexico, the European Union, China, and Japan to name only some of signatories. While there has been an upward trend in the use of relation-to-other-chapter clauses in e-commerce chapters, the clause does not appear in either the CPTPP or the USMCA.⁶⁹

⁶⁷ Access full text of the Canada – Peru Free Trade Agreement (2009) at <http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/peru-perou/fta-ale/index.aspx?lang=eng>

⁶⁸ Cooley, Alexander, and Hendrik Spruyt. *Contracting States: Sovereign Transfers in International Relations*. Princeton, NJ: Princeton University Press, 2009.

⁶⁹ There is also the issue of two agreements signed by Canada that include nullification or impairment language in conjunction with e-commerce and dispute settlement. Nullification or impairment clauses protect signatories against situations where the expected benefits of the agreement are nullified or impaired by actions taken by the other party that are not inconsistent with the agreement. Art. 14.2 Paragraph C of Canada – Jordan mentions e-commerce in a list of chapters for which dispute settlement may be the remedy if a country’s expected benefits are nullified or impaired (and this despite the fact that the entire e-commerce chapter is 81 words). Likewise, Annex 17-A of the Canada – Ukraine Free Trade Agreement also references nullification or impairment. Again, this is a very short e-commerce chapter of three articles and 132 words that basically waives customs duties on products delivered electronically.

Figure 7: Incomplete Contract – The Rise of ‘Relation to Other Chapters’ Articles



Source: Original dataset and WTO RTA Database

Finally, we must consider the genealogy of two of the most recent RTAs, the Transpacific Partnership (CPTPP) and the North American free trade agreement, the USMCA, both of which are likely to enter into force in 2019. The e-commerce chapters of these agreements stand out because of their comprehensive drafting. However, while they may represent a move towards more comprehensive e-commerce chapters, they are not a new species of e-commerce chapter because their structures owe a very substantial debt to the first comprehensive e-commerce chapter contained in the Singapore-Australia Free Trade Agreement (SAFTA) from 2003.⁷⁰

The structure of SAFTA's e-commerce chapter is mirrored in the CPTPP and USMCA, and it is almost certain that the chain of causation passes from SAFTA, through the CPTPP of which Australia is also a signatory, to the USMCA, which drew part of its inspiration from the original Transpacific Partnership from which the Trump Administration withdrew in 2017. Only two articles of SAFTA's e-commerce chapter

⁷⁰ Hamanaka, Shintaro. "The Future Impact of TPP's Rule-Making Achievements: The Case Study of E-Commerce." *The World Economy* forthcoming (2018).

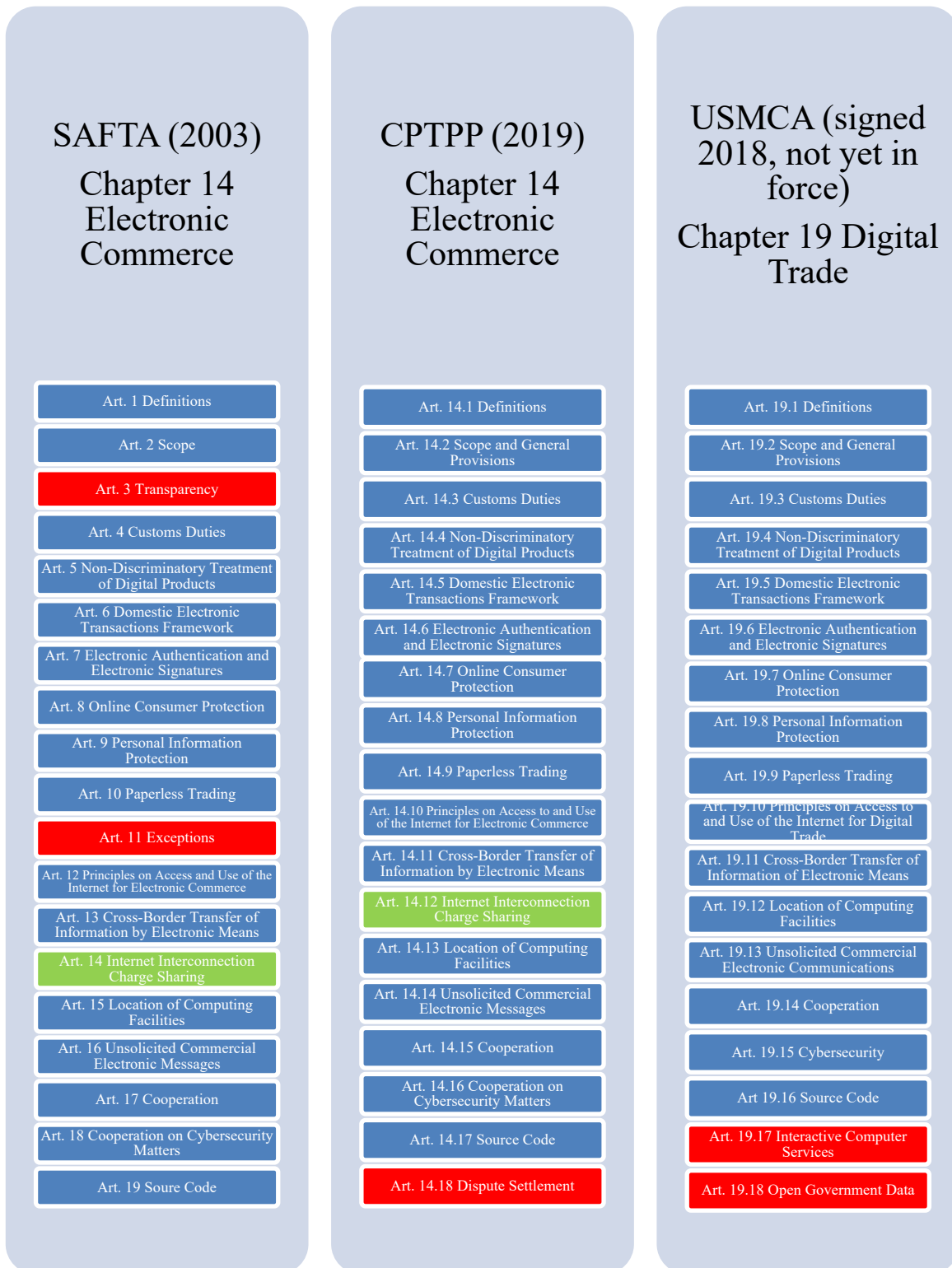
did not make it into CPTPP or the USMCA (Art. 3 Transparency and Art. 11 Exceptions). Both of these articles are nevertheless common in contemporaneous and subsequent e-commerce chapters of RTAs. Twenty-one e-commerce chapters have transparency clauses and 44 make mention of the general exceptions found in GATT Art. XX and/or GATS Art. XIV(b). However, in these next-generation chapters, the legal significance of these articles has been overtaken Scope and General Provisions articles that lay out the relationship between e-commerce and other chapters, as discussed above.

Seventeen of SAFTA's nineteen articles have been included, in some form, in one or the other of the newest trade agreements. For example, seventeen of the eighteen articles in Chapter 14 of the CPTPP are substantially similar to those included in SAFTA. The only unique article that appears in the Transpacific Partnership, is its last article that suspends the right of signatories to apply dispute settlement obligations to Malaysia and Viet Nam with regard to certain aspects of the e-commerce chapter for two years after the date of entry into force. Similarly, sixteen of the eighteen articles of the USMCA's e-commerce chapter are shared (in general terms of agreement structure if not legal interpretation) with SAFTA and CPTPP.

The articles unique to the USMCA are Art. 19.17 Interactive Computer Services and Art. 19.18 Open Government Data, both of which appear to break new ground in the trade-related regulation of digital trade by supporting and promoting social media and the marketization of public-sector data. Table Two below shows the structure of the SAFTA, CPTPP, and USMCA e-commerce chapters. Articles in red are unique to their context, and the two green articles are shared by SAFTA and CPTPP, but not by the USMCA. I

make no claims about the substantive differences of the texts of these clauses because a textual comparison is beyond the scope of this study.

Table 2 Back to the Future? The Structure of E-Commerce Chapters in SAFTA, CPTPP, and USMCA



Source: Original dataset and WTO RTA Database

Overall, there are four trends that emerge from the data presented above.

Trend One: A gradual turn towards more comprehensive e-commerce chapters

The evolutionary shift from SAFTA to CPTPP and USMCA is one that reflects a shift in the digital economy that has become more pronounced over the past fifteen years – a move towards monetizing big data in the services of social media advertising and artificial intelligence. The newest clauses in the TPP and USMCA are designed to facilitate the compilation and monetization of big data, with an emphasis on social media and the internet of things. The best example comes from the USMCA, Art. 19.17 Interactive Computer Services that protects both suppliers and users of ‘interactive computer services’ from liability for “harms related to information stored, processed, transmitted, distributed, or made available by the service, except to the extent the supplier or user has, in whole or in part, created, or developed the information.”⁷¹

Comprehensiveness is not a simple narrative of RTAs building from strength to strength. Rather it follows a punctuated equilibrium pattern, with certain agreements standing above the rest. For example, between 2001 and 2008, only one agreement was signed in which the e-commerce chapter contained more than ten clauses (SAFTA). In 2009, three such agreements were signed. And the period from 2009 to 2018, a total of 14 e-commerce chapters contained ten or more clauses. The trend is decidedly towards greater comprehensiveness, but the movement is evolutionary, rather than revolutionary, as has also been the case with other aspects of recent RTAs.⁷²

Trend Two: A measured increase in the general enforceability of e-commerce chapters

⁷¹ USTR. "United States - Mexico - Canada Agreement Text." Office of the United States Trade Representative, <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/united-states-mexico>. See p. 19.9.

⁷² Vogt, Jeffrey S. "The Evolution of Labor Rights and Trade - a Transatlantic Comparison and Lessons for the Transatlantic Trade and Investment Partnership." *Journal of International Economic Law* 18, no. 4 (2015): 827-60.

The number of commitments made by RTA partners relating to e-commerce varies widely, as I showed in the growth in the number of articles in e-commerce chapters in Figure Two. The use of legally enforceable language also varies. Rather than stating that we see a clear trend towards greater enforceability, it is more accurate to say that rising levels of enforceability are the result of the increasing sophistication of e-commerce chapters, rather than a shift away from exceptions per se. Furthermore, while a significant majority of agreements allow arbitration under dispute settlement provisions, whether there is something there to form the basis of a dispute is another issue entirely. In general terms of enforceability, obligations for the most part include a commitment to maintain the moratorium on customs duties on digitally delivered products.

Singapore – Australia was the first agreement to implement clauses on non-discrimination in digital trade, the maintenance of domestic legal frameworks for e-commerce, consumer protection, protection of personal information, location and use of computing facilities, cybersecurity, spam, and source code, plus several others. These new obligations rise in importance when we consider their uniqueness in relation to WTO obligations. One of the most important features of the enforcement of WTO-extra chapters such as e-commerce is that they cannot be litigated at the WTO, or at least not under an agreement covering digital trade because the WTO's exclusive jurisdiction does not cover the issues in these chapters because they are not yet part of the multilateral system. So, in the case of e-commerce, any disputes that arise are more likely to come to the regional dispute settlement mechanism, all things being equal.⁷³

⁷³ Marceau, Gabrielle. "The Primacy of the WTO Dispute Settlement System." *QIL, Zoom-in* 23 (2015): 3-13.

Trend Three: E-commerce continues to be an issue area where there are few substantive regulatory distinctions based on development status.

There is no clear distinction between developed and developing countries in how e-commerce relates to dispute settlement in RTAs. We do not see a particular model of e-commerce chapter in RTAs between industrialized countries, and another in north/south agreements. Rather, we see that most RTAs, regardless of the status of partners, allow e-commerce to be included in dispute settlement provisions. If there is a trend away from the inclusion of dispute settlement provisions, it is in certain agreements between parties in Southeast Asia. For example, of the nine agreements RTAs with e-commerce chapters that include China, Hong Kong, or Taiwan (Chinese Taipei) as a partner, six do not include e-commerce in dispute settlement provisions. Cuiyak and Ptashkina are correct to describe this process as a blocification of regional approaches to regulating digital trade. The Chinese Communist Party prefers a minimalist approach to digital trade regulation in order to maintain maximum latitude for domestic regulation.

Further, there is a new practice of delaying dispute settlement applicability in Art. 14.18 of the CPTPP. Malaysia and Viet Nam opted out dispute settlement for a period of two years after the agreement enters into force with regards to non-discriminatory treatment of digital products, cross-border transfer of information by electronic means, and in the case of Viet Nam, location of computing facilities. It is impossible to say whether we will see more of these adjustment periods regarding dispute settlement, but it is an indicative measure of the potential importance of dispute settlement in agreements that are clearly WTO-extra, and substantively progressive in their attempt to maintain the liberalization of digital trade.

Trend Four: An ambivalence remains about the place of e-commerce in RTAs

Most e-commerce chapters allow dispute settlement, but about 20% of them use aspirational language, and even among those that contain legally specific language, most contain fewer than six articles, suggesting that the parties have agreed to maintain a relatively unstructured approach to the regulation of digital trade. Furthermore, the chapters remain highly heterogenous, with little agreement on the overall structure of an e-commerce chapter. The newest agreements are an exception to this rule, but CPTPP and USMCA look back to an e-commerce agreement that is already sixteen years old for guidance. SAFTA was drafted before the existence of Facebook and the iPhone. The fact that the two most comprehensive e-commerce chapters ever drafted make only incremental improvement on a chapter that is already old, suggests that even economies that rely upon digital trade are unprepared to tackle the challenge of redeveloping trade agreements for new digital realities.⁷⁴

At the WTO's eleventh Ministerial conference in 2017, ministers agreed to a Joint Statement on Electronic Commerce, with the goal of future negotiations on the trade related aspects of e-commerce.⁷⁵ They also agreed to extend the long-standing moratorium on customs duties on electronic transmissions. However, four months later in April of 2018 the government of Indonesia notified the WTO of its intent to impose import tariffs on certain digital goods.⁷⁶ Further, it appears that the consensus around the moratorium may be fraying in other places. On July 12, 2018, India and South Africa

⁷⁴ Meltzer, Joshua Paul. "The Internet, Cross-Border Data Flows and International Trade." *Asia and the Pacific Policy Studies* 2, no. 1 (2014): 90-102.

⁷⁵ WTO. "New Initiatives on Electronic Commerce, Investment Facilitation and MSMEs." World Trade Organization, https://www.wto.org/english/news_e/news17_e/minis_13dec17_e.htm.

⁷⁶ OECD 2018, p. 102.

circulated a letter through the Work Programme on Electronic Commerce calling for a reconsideration of the moratorium because the costs of maintaining it fall disproportionately on developing countries. Their rationale was that developing countries maintain higher average tariff rates that are more greatly impacted by the increasing digitization of production – from e-books to the instructions for 3D printed products. More products cross borders as duty-free digital transmissions without contributing to government revenue streams.⁷⁷

One of the biggest questions when considering the future of trade-related regulation of the digital economy is, ought members to end the moratorium on the application of customs duties on electronic transmissions and negotiate tariffs, or should they work to extend the moratorium as part of the efforts to develop the digital economy?⁷⁸ The stakes are revenues generated for national governments versus potential gains from open markets. The revenues are particularly attractive to members in the global south because duties from electronic payments could be automated to provide a secure revenue source. However, tariffs are also a regressive form of consumption tax that might benefit the state, but certainly at a cost to national consumers.⁷⁹

Duty free electronic transmissions also benefit producers of electronic goods and services, primarily in the global north, but increasingly also in the global south. The moratorium could also be a tool for the growth of global value chains.⁸⁰ But if members

⁷⁷ Communication from India and South Africa. "Moratorium on Customs Duties on Electronic Transmissions: Need for a Re-Think." In *WTO Documents Online*. Geneva: World Trade Organization, 2018.

⁷⁸ Gao, Henry S. "Digital or Trade? The Contrasting Approaches of China and the US to Digital Trade." *Journal of International Economic Law* 21, no. 2 (2018): 297-321.

⁷⁹ Hansen, John Mark. "Taxation and the Political Economy of the Tariff." *International Organization* 44, no. 4 (1990): 527-51.

⁸⁰ Mahadevan, B. "Business Models for Internet-Based E-Commerce: An Anatomy." *California Management Review* 42, no. 4 (2000): 55-69.

wish to use the moratorium to best effect, they ought to use the lessons learned from the ongoing evolution of e-commerce regulation in RTAs to better integrate e-commerce into the multilateral system. These four trends about the relationship of e-commerce to dispute settlement suggest at least three significant implications for ongoing efforts to develop a multilateral model of digital trade governance.

Conclusion: Implications for the Multilateral Governance of Digital Trade

This article has offered a time-series analysis of the evolution of e-commerce clauses, with emphasis placed on their relationship to dispute settlement. I showed that not only have e-commerce chapters become incrementally more comprehensive, they have also become more enforceable to the extent that parties make substantive commitments. Below, I turn to the implications of the evolving relationship between e-commerce provisions and dispute settlement for the multilateral governance of trade. There are three main implications to discuss.

First, despite the trend towards legal enforceability, e-commerce chapters in RTAs are unlikely, as they are currently conceptualized, to become the basis for the multilateralization of digital trade regulation.⁸¹ While RTAs have been hailed as a baseline from which to multilateralize trade-related aspects of the digital economy, most RTAs have underdeveloped e-commerce chapters. The real story of progress is in mega-regional agreements, but even there, we see new e-commerce chapters that break very little ground beyond the great leap forward that was SAFTA in 2003. Whatever comes

⁸¹ Mann, Catherine, and Xuepeng Liu. "The Information Technology Agreement: Sui Generis or Model Stepping Stone?". In *Multilateralizing Regionalism: Challenges for the Global Trading System*, edited by Richard Baldwin and Patrick Low, 182-216. Cambridge: Cambridge University Press, 2009.

next will incorporate the main principles demonstrated in the regional approach to digital trade.⁸² However, the evolving relationship between political legitimacy and legal authority demands an approach to the regulation of digital trade that bridges global digital divides while simultaneously recognizing that digital trade is not one feature among many in the global economy. Rather, it is quickly becoming a defining feature of global trade.⁸³

Second, A multilateral regulatory strategy at the WTO will need to consider the realities of different regional strategies for trade-related digital regulation. As Aaronson, Ciuriak and Ptashkina, and others have shown, the regionalization of e-commerce regulation is quickly becoming a blocification of digital trade regulation, an evolutionary process that took a big step forward (or backwards) when the Trump Administration withdrew from the Transpacific Partnership.⁸⁴ Anglo-American, European, and Chinese trade agreements approach the question of how to balance the rights of individuals in the digital economy against the rights of businesses to compile and sell data, very differently. This blocification increases the urgency of the question of how to manage the multilateral balancing act required for the crafting of substantially open markets. None of this is to say that the question of how to balance public obligation and market opportunity is new. In fact it is perhaps most appropriate to suggest that recent events require that scholars and practitioners return to the basic question of 20th century economic development and

⁸² Bown, Chad P. "Mega-Regional Trade Agreements and the Future of the WTO." *Global Policy* 8, no. 1 (2017): 107-12.

⁸³ Brody, Paul, and Veena Pureswaran. "The Next Digital Gold Rush: How the Internet of Things Will Create Liquid, Transparent Markets." *Strategy and Leadership* 43, no. 1 (2015): 36-41.

⁸⁴ Aaronson, Susan Ariel. "The Digital Trade Imbalance and Its Implications for Internet Governance." Global Commission on Internet Governance, 2016.

ask, how ought we to draw the compromise of embedded liberalism in the digital context?⁸⁵

Finally, A multilateral approach needs to take into account the fact that the digital economy is not only a new way to deliver goods and services, but also transforms social and political interaction in unforeseen ways. Digital trade is a hybrid practice composed of new modes of delivery for goods and services and new forms of social activity that are capitalized upon in novel ways to develop entirely new categories of economic activity.⁸⁶ Perhaps a key reason that digital trade regulation is stalled is because the digital economy has so quickly become enmeshed with our social worlds that any attempt to regulate it at the multilateral level is bound to run up against issues relating to social inclusion, development, poverty reduction, gender, and individual rights and freedoms.⁸⁷ Add to that the rise of national strategies to control the internet, and the multilateral regulation of digital trade may be a non-starter for the foreseeable future.⁸⁸

Even so, digital trade regulation is increasingly important as a tool for the economic empowerment of women. Gender-based inclusion is migrating from the margins to the centre of concern at the WTO. The Buenos Aires Declaration on Trade and Women's Economic Empowerment was signed by 122 members and observers who represent 75% of world trade. The ITC has argued that raising female labour force participation and entrepreneurship to male levels worldwide would raise global GDP by

⁸⁵ Ruggie, John Gerard. "Trade, Protectionism and the Future of Welfare Capitalism." *Journal of International Affairs* 48, no. 1 (1994).

⁸⁶ Chander, Anupam. *The Electronic Silk Road: How the Web Binds the World Together in Commerce*. New Haven, Conn: Yale University Press, 2013.

⁸⁷ Muhleisen, Martin. "The Long and Short of the Digital Revolution." *Finance and Development* 55, no. 2 (2018).

⁸⁸ Ensafi, Roya, Philipp Winter, Abdullah Mueen, and Jediaiah R. Crandall. "Analyzing the Great Firewall of China over Space and Time." *Proceedings on Privacy Enhancing Technologies* 2015, no. 1 (2015): 61-76.

15 to 27%.⁸⁹ Digital trade is an important component because female owned export companies report more procedural obstacles to trade than male owned companies.⁹⁰ Not only does digitizing more of the interactions between entrepreneurs and state bureaucracies facilitate trade flows, it also makes them a little bit more gender neutral. Further, in general terms, while women in emerging economies are more likely to invest the gains from entrepreneurship in health, education, and other social goods that benefit their families, women are still 6% less likely to have access to the internet.⁹¹ Digital solutions help women overcome traditional obstacles to accessing bank accounts, personal and business lines of credit. Also, electronic payment systems help women to track business revenue in order to secure better access to banking and lines of credit.

Due to both the trajectory of legal development and the political vicissitudes of the present, multilateral governance of e-commerce is likely to take some of the contours of the most recent RTAs, if only because the significant similarities between the Singapore-Australia Free Trade Agreement (SAFTA) of 2003, and the CPTPP and USMCA signed in 2016 and 2018 respectively, suggest at least a basic convergence across regions and over time around what a digital trade chapter ought to include.⁹² However, given the many ongoing political and regulatory challenges facing the multilateral trading order, the WTO may benefit from a reconsideration of the conceptual foundations of digital trade. The current crop of e-commerce chapters offers a schema, albeit a slim one, for what the future multilateral regulation of digital trade might offer.

⁸⁹ OECD 2018, p. 68.

⁹⁰ ITC. "Identifying Obstacles to Trade Faced by Women." International Trade Centre, <http://www.intracen.org/news/Identifying-obstacles-to-trade-faced-by-women/>.

⁹¹ OECD 2018, p. 68.

⁹² Ahmed, Usman, and Anupam Chander. "Information Goes Global: Protecting Privacy, Security, and the New Economy in a World of Cross-Border Data Flows." International Centre for Trade and Sustainable Development and the World Economic Forum, <https://ssrn.com/abstract=2731888>.