CROSS-BORDER DATA FLOWS AND DATA REGULATION UNDER INTERNATIONAL TRADE LAW*

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ABSTRACT

The rise in technological developments in the 21st century has led to the proliferation of digital trade. Particularly, the onset of the COVID-19 pandemic led to businesses and sectors relying heavily on digital trade to continue their businesses. This includes the continuous movement of data across borders. Currently, international trade law and the agreements forming the World Trade Organization (WTO) do not explicitly regulate digital trade and its different aspects, including cross-border data flows and data localization. While there have been attempts to fit digital trade in the current scheme of WTO law, these are not entirely conclusive. As a result, countries have chosen to enter into Free Trade Agreements (FTAs) to regulate their relationships. However, this may result in inconsistencies between a country's domestic data regulations and its obligations under international trade law. This Article examines the current state of international trade law and cross-border data flows and compares the data-related obligations under existing WTO Agreements and the FTAs into which the Philippines has entered. It shows that the current data regulations of the Philippines are consistent with its international obligations, and even assuming they are not, the exceptions under these agreements are sufficient for compliance.

* *Cite as* Czar Matthew Gerard T. Dayday, *Cross-Border Data Flows and Data Regulation Under International Trade Law*, 96 PHIL. L.J. 33, [page cited] (2023). Myrna Feliciano Prize for Best Paper in Law and Technology (2022), University of the Philippines College of Law.

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I. INTRODUCTION

In February 2022, the Philippines was reported to have commenced the accession process to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership ("CPTPP").[1] The CPTPP is a 2018 trade agreement signed by 11 countries—Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam.[2] Among the major features of the CPTPP is a comprehensive chapter on e-commerce, which is described as "the most comprehensive template so far in the landscape of [preferential trade agreements]."[3]

The advent of modern technology and the rise of the digital economy, rapidly fueled by the COVID-19 pandemic, has put data and technology at the forefront of the legal community. Specifically, the rise of the digital economy, and the possibilities of digital trade and cross-border flows have raised several questions and challenges pertaining to international trade law. Both the global community and States, through their municipal laws, have responded in one of two ways: with the passage of new laws to regulate these new developments, or with the reinterpretation of old laws to cover these new developments. However, many criticize the current body of international trade law, composed primarily of the World Trade Organization (WTO) agreements—such as the General Agreement on Tariffs and Trade and the General Agreement on Trade in Services—as insufficient.[4] As such, States have turned to crafting Free Trade Agreements ("FTAs") to better regulate these developments.[5]

Nonetheless, despite the creation of these FTAs between States, the continuing development of trade in data still prompts discussions on how the

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[1] Bernie Cahiles-Magkilat, *PH starts accession process to CPTPP*, MANILA BULLETIN, Feb. 3, 2022, *available at* https://mb.com.ph/2022/02/03/ph-starts-accession-process-to-cptpp.

[2] Singapore Ministry of Trade and Industry, *The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)*, SINGAPORE MINISTRY OF TRADE AND INDUSTRY WEBSITE, *at* https://www.mti.gov.sg/Trade/Free-Trade-Agreements/CPTPP.

[3] Mira Burri, *Data Flows and Global Trade Law*, *in* BIG DATA AND GLOBAL TRADE LAW 11, 34 (Mira Burri ed., 2021).

[4] *See* Andrew Mitchell & Neha Mishra, *WTO Law and Cross-Border Data Flows: An Unfinished Agenda*, *in* BIG DATA AND GLOBAL TRADE LAW 83 (Mira Burri ed., 2021); Thomas Streinz, *RCEP's Contribution to Global Data Governance*, AFRONOMICSLAW, *at* https://www.afronomicslaw.org/category/analysis/rceps-contribution-global-data-governance-0.

[5] Burri, *supra* note 3, at 19; *see* Anita Gurumurthy, Amrita Vasuvedan, & Nandini Chami, *The Grand Myth of Cross-Border Data Flows in Trade Deals*, IT FOR CHANGE, Dec. 2017, *at* https://itforchange.net/grand-myth-of-cross-border-data-flows-trade-deals.

current WTO agreements may regulate, among others, trade in data and cross-border data flows.[6] These are all undertaken to lower barriers to trade and to promote free trade among different States.[7] Nevertheless, these goals present challenges to the national interests of many countries. Promoting data privacy, human rights, and other policies may conflict with the obligation to advance free trade by providing minimal restrictions on cross-border data flows.[8]

These challenges are not new. The WTO faced the same dilemma of balancing national interests with modern developments in the area of intellectual property. Eventually, in the 1994 Uruguay Round, the WTO contracting parties agreed on the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS Agreement") which led to the institutionalization of measures designed to protect intellectual property.[9] Many have criticized the move as exclusionary and designed to protect the interests of big corporations, and have cautioned against harms to national interests.[10] Recent developments, such as the continuous call for a patent waiver on COVID-19 vaccines,[11] show that these issues remain unaddressed.

In the same manner, the signing of the CPTPP or the development of new agreements regulating international digital trade—and, in effect, cross-border data flows—may come into conflict with several laws in the Philippines. A notable example is the Data Privacy Act of 2012,[12] which provides for regulations on data processing.

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[6] *See* Burri, *supra* note 3; Mitchell & Mishra, *supra* note 4.

[7] *Id.*

[8] *See* Gurumurthy et al., *supra* note 5; Mitchell & Mishra, *supra* note 4; Susan Ariel Aaronson, *What Are We Talking about When We Talk about Digital Protectionism?*, 18 WORLD TRADE REV. 541 (2019); YIHAN DAI, CROSS-BORDER DATA TRANSFERS REGULATIONS IN THE CONTEXT OF INTERNATIONAL TRADE LAW: A PRC PERSPECTIVE (2022).

[9] Antony Taubman, *Thematic review: Negotiating "trade-related aspects" of intellectual property rights*, *in* THE MAKING OF THE TRIPS AGREEMENT: PERSONAL INSIGHTS FROM THE URUGUAY ROUND NEGOTIATIONS 15, 15 (Jayashree Watal & Antony Taubman eds., 2015).

[10] *See* Donald P. Harris, *TRIPS' Rebound: An Historical Analysis of How the TRIPS Agreement Can Ricochet back against the United States*, 25 NW. J. OF INT'L. L. & BUS. 99 (2004); Martin Khor, *Why the South is Getting a Raw Deal at the WTO*, at 9, *available at* https://martinkhor.org/wp-content/uploads/2020/10/ifg-paper-on-wto.pdf; Danielle Archibugi & Andrea Filippetti, *The Globalisation of Intellectual Property Rights: Four Learned Lessons and Four Theses*, 1 GLOB. POL'Y 137, 142–44 (2010).

[11] Andrew Green, *TRIPS waiver compromise draws mixed response*, Mar. 17, 2022, DEVEX, *at* https://www.devex.com/news/trips-waiver-compromise-draws-mixed-response-102860; European Economic and Social Committee, *TRIPS waiver: end the deadlock to the COVID vaccine patents*, Dec. 9, 2021, EUROPEAN ECONOMIC AND SOCIAL COMMITTEE, *at* https://www.eesc.europa.eu/sites/default/files/files/workers_group_statement_on_covid_trips_waiver.pdf.

[12] Rep. Act No. 10173 (2012).

This Article thus aims to examine the extent to which data regulation in the Philippines may come into conflict with currently existing obligations under international trade law. To give a comprehensive background, Part II discusses how States have responded to developments in trade, specifically using as an example the TRIPS Agreement, which was a response to the trade of intangible objects like data. In Part III, the Article presents an overview of the current field of international trade law, with a particular focus on the WTO Agreements, and how digital trade fits into the regime of WTO trade law. Part IV explores the CPTPP and other similar FTAs that have been drafted in response to the current gaps in the WTO Agreements.

Part V provides an overview of the current problems and challenges in regulating cross-border data flows under existing international trade law and shows the perspectives and positions of countries regulating data flows under international trade agreements, including their current approaches to data legislation. It also gives an overview of current Philippine data legislation. Part VI attempts to provide the possible outcomes of a conflict between the foregoing national laws and the international obligations under the WTO Agreements, while Part VII concludes this Article.

II. STATE RESPONSE TO DEVELOPMENTS IN TRADE: THE 1994 URUGUAY ROUND

International trade law is the subset of international economic law[13] which deals with "rules and customs governing trade between countries."[14] The corpus of international trade law is divided into two main bodies: bilateral or regional trade agreements and multilateral trade agreements.[15] The broadest multilateral agreement is the 1994 Marrakesh Agreement Establishing the World Trade Organization, also known as the WTO Agreement,[16] which arose from the 1947 General Agreements on Tariff and Trade ("GATT").

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[13] "International economic law can be defined as […] those international rules pertaining to economic transactions and relations, as well as those pertaining to governmental regulation of economic matters." PETER VAN DEN BOSSCHE & WERNER ZDOUC, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES AND MATERIALS 159 (4th ed., 2017).

[14] *International Trade Law*, GEORGETOWN LAW, *at* https://www.law.georgetown.edu/your-life-career/career-exploration-professional-development/for-jd-students/explore-legal-careers/practice-areas/international-trade-law/.

[15] Van den Bossche & Zdouc, *supra* note 13, at 159.

[16] *Id.*; WTO Agreement: Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994).

A. History of the WTO Agreement

The 1947 GATT was born from the desire to reduce the rate of taxes and tariffs on goods traded globally.[17] Spearheaded by the United States (U.S.), countries built on existing bilateral trade agreements and envisioned an "international organization devoted to trade liberalization."[18] The contracting States had two main objectives: the reduction of tariffs and the elimination of discriminatory treatment.[19] In 1945, the U.S. proposed the creation of an International Trade Organization ("ITO") of the United Nations, which was eventually transformed into the Havana Charter.[20] However, while the U.S. was the proponent of the ITO and the Havana Charter, its congress did not approve of the same, leading to its eventual withdrawal.[21]

Simultaneous to the proposal for the creation of the ITO was a proposal for a multilateral agreement that would contain obligations to reduce tariffs and other general obligations.[22] These rules were intended to be a "stopgap measure"[23] while the ITO was still being negotiated. They were intended to take effect only after the creation of the ITO, but the contracting parties eventually agreed to provisionally implement the substantive obligations and provisions of the GATT.[24] When the ITO failed to materialize, countries continued to rely on the 1947 GATT to address their trade relations, even without a formal institution regulating international trade.[25]

While initially successful, the GATT rules eventually faced problems caused by different global developments.[26] In this regard, and with the desire to create a governing body[27] and discuss other novel subjects, a new round of negotiations began in September 1986 at Punta del Este, Uruguay ("Uruguay Round").[28]

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[17] *Id.* at 277; CRAIG VANGRASSTEK, THE HISTORY AND FUTURE OF THE WORLD TRADE ORGANIZATION 43–45 (2013).

[18] *Id.* at 43.

[19] *Id.*

[20] *Id.* at 43–44.

[21] *Id.* at 44; Van den Bossche & Zdouc, *supra* note 13, at 280.

[22] Van den Bossche & Zdouc, *supra* note 13 at 280, *citing* JOHN JACKSON, THE WORLD TRADE ORGANIZATION: CONSTITUTION AND JURISPRUDENCE 15–16 (1998).

[23] VanGrasstek, *supra* note 17, at 44.

[24] Van den Bossche & Zdouc, *supra* note 13, at 279–80.

[25] *Id.* at 280-81; VanGrasstek, *supra* note 17, at 44.

[26] Van den Bossche & Zdouc, *supra* note 13, at 281–82.

[27] VanGrasstek, *supra* note 17, at 45.

[28] *Id.*; Van den Bossche & Zdouc, *supra* note 13, at 282.

The Uruguay Round resulted in the creation of the WTO and the WTO Agreements,[29] which for the first time, regulated matters concerning intangibles such as services, investments, and intellectual property ("IP").[30] The WTO Agreement, specifically the TRIPS Agreement, resulted from the recognition that the current trading system needed revision in light of modern developments. However, despite further developments after 1994, the state of WTO law has not readily responded to the developments and challenges brought about by digitization and data.[31] The development of the TRIPS Agreement, including its history and the criticisms surrounding its creation, may prove useful in assessing the possible track of WTO law regarding data and cross-border data flows.

B. The Origin of the TRIPS Agreement

The TRIPS Agreement was created from the view that intellectual property rights are linked to and affect trade.[32] The relationship between these two has been characterized as such:

> The achievements in trade liberalisation […] can be greatly undermined if IP rights related to the traded goods or services are not respected in the export market or in the country of origin of imports. The possibility that traded products incorporating patents, copyrights or industrial designs will be copied, or that brand names or services marks will be used, by competitors without the consent of the creator/author creates a strong disincentive for innovation, investment and trade.[33]

One of the early calls for an agreement governing IP rights came from the United States. In the 1980s, the trade deficit in the U.S. began to rise, which was linked to IP infringement and more permissive IP regimes in foreign markets.[34] Hence, the U.S., and eventually other developed countries,[35] pushed for the creation of an agreement governing IP rights out of the concern of different corporations regarding their "longer-term competitiveness."[36]

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[29] Van den Bossche & Zdouc, *supra* note 13 at 286.
[30] VanGrasstek, *supra* note 17, at 47–48.
[31] Burri, *supra* note 3, at 3.
[32] *Id.* at 19; Van den Bossche & Zdouc, *supra* note 13, at 2275.
[33] Van den Bossche & Zdouc, *supra* note 13, at 2272.
[34] Archibugi & Filippetti, *supra* note 10, at 143.
[35] Van den Bossche & Zdouc, *supra* note 13, at 2273.
[36] Taubman, *supra* note 9, at 18.

Leading up to the Uruguay Round, the U.S. proposed the creation of an agreement specifically for IP protections.[37] As a result, in the 1986 Ministerial Declaration in Punta del Este, which launched the Uruguay Round, the contracting parties included the subject of "trade-related aspects of intellectual property rights" as part of the negotiations. This reads in part:

> In order to reduce the distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade, the negotiations shall aim to clarify GATT provisions and elaborate as appropriate new rules and disciplines.[38]

1. Support for the TRIPS Agreement

The main argument in support of the creation of such an agreement was the need to address the inadequacies of existing domestic IP regimes, such as the lack of enforcement standards and limited legal force.[39] To promote this agenda and ensure the inclusion of IP matters in the negotiations, the U.S. exerted pressure through the threat of unilateral action via its domestic laws.[40] In 1984, the U.S. enacted the Trade and Tariffs Act of 1984, which contained a provision making "inadequate or ineffective protection of IP"[41] a ground to enact trade retaliations or deny trade concessions.[42] Specifically, this authorized the U.S. to take "action to address unreasonable acts, policies[,] or practices that burdened or restricted US commerce."[43] Section 301 thereof listed the "denial of adequate and effective IP protection and enforcement"[44] as an unreasonable act, and allowed the U.S. to take restrictive trade measures when it deems IP protection inadequate.

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[37] Van den Bossche & Zdouc, *supra* note 13, at 2273.

[38] Adrian Otten, *The TRIPS negotiations: An overview*, *in* THE MAKING OF THE TRIPS AGREEMENT: PERSONAL INSIGHTS FROM THE URUGUAY ROUND NEGOTIATIONS 55, 60 (Jayashree Watal & Antony Taubman eds., 2015), *citing* GATT document MIN.DEC, Multilateral Trade Negotiations – The Uruguay Round – Ministerial Declaration on the Uruguay Round, Sept. 20, 1986.

[39] Van den Bossche & Zdouc, *supra* note 13, at 2273.

[40] Taubman, *supra* note 9, at 30; Otten, *supra* note 38, at 58; Jean-Frédéric Morin & Edward Richard Gold, *An Integrated Model of Legal Transplantation: The Diffusion of Intellectual Property Law in Developing Countries*, 58 INT'L STUD. Q. 781, 787 (2014).

[41] Otten, *supra* note 38, at 60.

[42] *Id.*; Archibugi & Filippetti, *supra* note 10, at 143.

[43] Catherine Field, *Negotiating for the United States*, *in* THE MAKING OF THE TRIPS AGREEMENT: PERSONAL INSIGHTS FROM THE URUGUAY ROUND NEGOTIATIONS 129, 132 (Jayashree Watal & Antony Taubman eds., 2015).

[44] *Id.*

Similarly, in 1988, the U.S. enacted the Omnibus Trade and Competitiveness Act of 1988.[45] The said Act also implemented the Special 301 process, which "developed a process for reviewing IP regimes of other countries and used it as a mechanism to organize and prioritize bilateral engagement on IP issues."[46] In effect, this denied countries the right to trade with the U.S. if they did not have similar standards for IP protection as the latter.[47]

These developments in the U.S. were spurred mainly by the interests of private sectors,[48] particularly the pharmaceutical industry,[49] computer industry,[50] film industry,[51] and agricultural chemicals industry.[52] In the 1980s, there was clamor from companies such as Pfizer and IBM, and associations such as the Motion Picture Association of America ("MPAA") to strengthen IP protection and call for more stringent protection in foreign countries by putting IP protection in the trade agenda.[53] These companies, along with other multinational corporations, formed the Intellectual Property Committee in 1986 to "develop international support for improving the international protection of intellectual property."[54] In coordination with corporations from other regions such as Europe and Japan, they pushed for this agenda and forwarded a proposal to the GATT Secretariat in the Uruguay Round.[55] This proposal, along with further support from developed countries (e.g., Canada, US, European Communities, and Japan),[56] continued to be influential in the negotiations of the TRIPS Agreement, even being endorsed or adopted by the negotiation states.[57]

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[45] *Id.* at 133.

[46] *Id.*

[47] *Id.*

[48] Taubman, *supra* note 9, at 30–31; SUSAN SELL, PRIVATE POWER, PUBLIC LAW: THE GLOBALIZATION OF INTELLECTUAL PROPERTY RIGHTS 75 (2003).

[49] Harris, *supra* note 10, at 137–41; Khor, *supra* note 10, at 11; Archibugi & Filippetti, *supra* note 10, at 143.

[50] Sell, *supra* note 48, at 63–64, 82.

[51] *Id.* at 71.

[52] *Id.* at 79.

[53] *Id.* at 82.

[54] *Id.* at 96.

[55] *Id.*; Thomas Cottier, *Working together towards the TRIPS*, *in* THE MAKING OF THE TRIPS AGREEMENT: PERSONAL INSIGHTS FROM THE URUGUAY ROUND NEGOTIATIONS 79, 83 (Jayashree Watal & Antony Taubman eds., 2015).

[56] Canada was the fourth member of the "Quad," or the main advocates for the TRIPS Agreement. Cottier, *supra* note 55, at 86.

[57] *Id.* at 83.

2. Opposition to the TRIPS Agreement

On the other hand, developing countries heavily opposed the incorporation of IP protection in the trade agreements,[58] while other developed countries also harbored some reservations themselves. For example, the European Communities ("EC," the precursor of the European Union) and the U.S. clashed on what subject matter should be patentable under the agreement.[59] These differences, however, related mainly to the subject matter of the agreement and not to whether there should be an agreement in the first place.[60]

An early objection to the creation of an agreement was the view that IP was not related to trade. According to this view, trade law, including the GATT and any other agreement to come out of the Uruguay Round, should be limited only to goods. It should thus exclude the "new" developments like services and IP,[61] particularly concerning the protection and enforcement of IP rights.[62] It was argued that the proper forum to discuss any agreement on IP was the World Intellectual Property Organization (WIPO), not the WTO.[63] However, IP was eventually included in the subject matter of the negotiations.

The objections by developing countries primarily arose from their domestic interests and the public policy objectives of their national IP systems.[64] While some have described developing countries as purposely wanting to have lax IP regimes to justify the "piracy" of IP and "enrich the countries in which [pirates] operate,"[65] this is not necessarily the case. Countries such as Brazil and India opposed the TRIPS not necessarily because of economic reasons, but for "public interest, [the need for] shorter patent terms, and the obligations of IP owners to 'work' their inventions in

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[58] Van den Bossche & Zdouc, *supra* note 13, at 2273;

[59] Sell, *supra* note 48, at 111; John Gero, *Why we managed to succeed in the TRIPS*, *in* THE MAKING OF THE TRIPS AGREEMENT: PERSONAL INSIGHTS FROM THE URUGUAY ROUND NEGOTIATIONS 95, 97–98 (Jayashree Watal & Antony Taubman eds., 2015).

[60] Arumugamangalam Ganesan, *Negotiating for India*, *in* THE MAKING OF THE TRIPS AGREEMENT: PERSONAL INSIGHTS FROM THE URUGUAY ROUND NEGOTIATIONS 211, 213 (Jayashree Watal & Antony Taubman eds., 2015).

[61] Piragibe dos Santos Tarragô, *Negotiating for Brazil*, *in* THE MAKING OF THE TRIPS AGREEMENT: PERSONAL INSIGHTS FROM THE URUGUAY ROUND NEGOTIATIONS 239, 241 (Jayashree Watal & Antony Taubman eds., 2015).

[62] Ganesan, *supra* note 60, at 216;

[63] *Id.* at 213; Tarragô, *supra* note 61, at 241.

[64] Otten, *supra* note 38, at 63–64; Harris, *supra* note 10, at 139.

[65] Marshall Leaffer, *Protecting United States Intellectual Protecting United States Intellectual Property Abroad: Toward a New Multilateralism*, 76 IOWA L. REV. 273, 282 (1991).

developing countries."[66] Some have viewed the creation of the TRIPS as a way for the "industrialized world to impose its hegemony on developing countries to further the interests of its multinational companies."[67] Hence, there were apprehensions that TRIPS would weaken local markets all in furtherance of "big business" and foreign interests.

One central contention lies in the pharmaceutical industry, particularly with access to medicine.[68] A member of the Indian delegation to the Uruguay Round describes that India's main opposition to the TRIPS was caused by its 1970 Indian Patents Act.[69] This law was enacted in light of unaffordable medicine prices and the need to "encourage local production of pharmaceuticals[.]"[70] The salient features of the Act are described as follows:

> First, the Act provided for only process patents, and prohibited product patents, in the food, pharmaceutical and chemicals sectors. Second, the Act provided for a term of only seven years for process patents in the food and pharmaceuticals sectors, while for process patents in the chemicals sector, and for product or process patents in all other sectors, the term was 14 years from the date of filing. Third, compulsory licences could be granted liberally under the Act, including for non-working of the patents. Fourth, the Act allowed for automatic "licences of right" in the food, pharmaceuticals and chemicals sectors, under which anyone could produce and sell such products on payment of a royalty not exceeding 4 per cent. Fifth, in the case of process patents also, the owner of the patent had to prove the alleged infringement of his or her patent in a court of law. In a nutshell, the Indian Patents Act 1970 did not allow a patent worth its salt in the food, pharmaceuticals and chemicals sectors.[71]

To India, the adoption of the Western IP regime, which has a strong patent regulatory framework, would essentially cause "a complete and radical overhaul of its Patents Act 1970."[72] It would effectively raise prices of pharmaceuticals.[73]

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[66] Sell, *supra* note 48, at 110.

[67] Ganesan, *supra* note 60, at 216; *see also* Tarragô, *supra* note 61, at 240.

[68] Tarragô, *supra* note 61, at 245.

[69] Ganesan, *supra* note 60, at 217.

[70] *Id.*

[71] *Id.*

[72] *Id.* at 218.

[73] *See* Virginia Pietromarchi, *Patently unfair: Can waivers help solve COVID vaccine inequality?*, Mar. 1, 2021, AL JAZEERA, *at* https://www.aljazeera.com/news/2021/3/1/can-a-waiver-on-ip-rights-solve-vaccine; Ganesan, *supra* note 60, at 217–18.

Other countries, such as Brazil, argued that their current IP regime was needed for the "preservation of social benefits and the creation of conditions to set up a strong industrial and technological base."[74] This was meant to show that their current level of IP protection was needed due to "socioeconomic, technological, development and public interest concerns prevailing in those countries."[75]

3. Adoption of the TRIPS Agreement

Despite their initial opposition, the developing countries eventually changed their stance and conceded to the inclusion of IP rights in the subject matter of the Uruguay Round. This change was caused by several factors, such as increasing retaliatory measures from the U.S.,[76] particularly with regard to pharmaceutical inventions.[77] The looming threat of unilateral actions under Section 301 of the US Trade and Tariffs Act and the Special 301 process exerted pressure on developing countries[78] and forced them to reconsider.[79] The U.S. resorted to the "Section 301 process to target bilaterally the developing countries that were resisting its intellectual property agenda at the GATT and playing a leadership role in the developing world on intellectual property,"[80] such as Brazil and India.[81] Other countries reconsidered their stance and acquiesced to the inclusion of TRIPS to further their own interests in other matters of negotiation, such as agriculture and textiles.[82]

Critics have noted that the WTO negotiating system, particularly during the Uruguay Round, failed to properly represent the interests of developing countries since an inner circle of developed countries controlled the negotiations.[83] The process of negotiation was described as having "a non-representational inner circle of consensus [that] was expanded to create larger circles until the goals of those in the inner circle had been met."[84] Those in the "inner circle" were the countries with more trading power, such as the

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[74] Tarragô, *supra* note 61, at 244.

[75] *Id.*

[76] Sell, *supra* note 48, at 109; Tarragô, *supra* note 61, at 242, 254.

[77] Mogens Peter Carl, *Evaluating the TRIPS negotiations: a plea for a substantial review of the Agreement, in* THE MAKING OF THE TRIPS AGREEMENT: PERSONAL INSIGHTS FROM THE URUGUAY ROUND NEGOTIATIONS 99, 104 (Jayashree Watal & Antony Taubman eds., 2015).

[78] *See* Ganesan, *supra* note 60, at 219.

[79] *Id.*; Tarragô, *supra* note 61, at 254.

[80] Peter Drahos, *Developing Countries and International Intellectual Property Standard-Setting*, 5 J. OF WORLD INTELL. PROP. 765, 774 (2005).

[81] Tarragô, *supra* note 61, at 254.

[82] *Id.*

[83] Drahos, *supra* note 80, at 770.

[84] *Id.*

U.S. and the EC. Hence, these countries had the power to leverage other countries, as they could easily move among different groups and secure concessions within smaller negotiating circles.[85] The U.S. also continued to exert pressure to disincentivize developing countries from resisting during the circles of consensus, further giving it control over the negotiations.[86] Another factor showing the imbalance between the countries is their knowledge on IP. Developed countries had a greater understanding of IP rights, enabling them to argue their stance better.[87]

In light of these factors, the TRIPS Agreement was passed and adopted as part of the WTO Agreements in the Uruguay Round. It is possible that the same circumstances that led to the linking of IP and trade, and the subsequent adoption of a multilateral agreement governing IP rights (e.g., pressure from developed countries, threats of unilateral trade sanctions, and influence from multinational corporations) can lead to the linking of data and trade, and the developments of legal instruments governing this relationship.

C. A New Development: Digital Trade

One of the first discussions in the WTO regarding cross-border data flows was in 2011, when the U.S. and EU submitted the Trade Principles for Information and Communication Technology Services ("ICT Principles") to the WTO Council for Trade in Services.[88] The principles sought to "prohibit governments from preventing cross-border electronic transfers of information [and] refrain from imposing ICT localization requirements."[89] While these principles were not adopted, they opened discussions on cross-border data flows as being trade-related aspects. This was further followed in 2013, when the WTO Committee of Ministers, in its 2013 Bali Ministerial decision, considered the protection of "confidential data, privacy, and consumer protection" as linked to trade.[90]

The drive behind this development may have been due to economic interests in private sectors in the U.S., particularly from "digital corporations" situated therein who would benefit from the free flow of data.[91] The U.S., in a 2017 communication, stated that cross-border transfer of data was part of a

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[85] *Id.* at 771–72.
[86] *Id.* at 774.
[87] Ganesan, *supra* note 60, at 214.
[88] *Id.*
[89] *Id.*
[90] *Id.* at 210.
[91] Gurumurthy et al., *supra* note 5, at 2.

standard in "safeguarding and promoting digital trade[,]"[92] which shows its interests in including cross-border data flows in the WTO agenda. The WTO held its 12th Ministerial Conference back in June 2022,[93] and one of the subjects on the agenda was e-commerce, particularly cross-border data flows.[94] However, the outcomes of the Ministerial Conference did not include any articles for an agreement regulating digital trade and cross-border data flows.[95]

Currently, one provision that seems to contemplate cross-border data is Article 5(c) of the Annex on Telecommunications of the General Agreement on Trade in Services (GATS), which reads:

> (c) Each Member shall ensure that service suppliers of any other Member may use public telecommunications transport networks and services for the movement of information within and across borders, including for intra-corporate communications of such service suppliers, and for access to information contained in data bases or otherwise stored in machine-readable form in the territory of any Member. Any new or amended measures of a Member significantly affecting such use shall be notified and shall be subject to consultation, in accordance with relevant provisions of the Agreement.[96]

While subsequent WTO jurisprudence has affirmed that the GATS continues to apply to electronically delivered services,[97] none of the agreements explicitly regulates cross-border data flows. Article 5(c) obligates

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[92] Stevlana Yakovleva & Kristina Irion, *Pitching trade against privacy: reconciling EU governance of personal data flows with external trade*, 10 INT'L DATA PRIVACY L. 201, 210 (2020).

[93] *Twelfth WTO Ministerial Conference*, WORLD TRADE ORGANIZATION, *at* https://www.wto.org/english/thewto_e/minist_e/mc12_e/mc12_e.htm.

[94] Wendy Cutler & Jenny Kai, *Moving forward at the WTO*, Jan. 25, 2022, ASIA SOCIETY POLICY INSTITUTE, *available at* https://asiasociety.org/sites/default/files/2022-03/ASPI_WTO_SummReport_fin_1.pdf.

[95] *Twelfth WTO Ministerial Conference*, *supra* note 93.

[96] General Agreement on Trade in Services [hereinafter "GATS"], Annex on Telecommunications art. 5(c), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994).

[97] Yakovleva & Irion, *supra* note 92, at 209, *citing* Appellate Body Report, *United States—Measures Affecting the Cross- Border Supply of Gambling and Betting Services*, ¶ 180ff, WTO Doc. WT/DS285/AB/R (adopted Apr. 20, 2005); Panel Report, *United States—Measures Affecting the Cross-border Supply of Gambling and Betting Services*, ¶ 6.285, WTO Doc. WT/DS285/R (adopted Apr. 20, 2005); Appellate Body Report, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, ¶ 377, WTO Doc. WT/DS363/AB/R (adopted Jan. 19, 2010); Panel Report, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, ¶¶ 7.1220, 7.1265, WTO Doc. WT/DS363/ R and Corr.1 (adopted Jan. 19, 2010).

States parties to ensure the "movement of information within and across borders" and "access to information contained in data bases or otherwise stored in machine-readable form in the territory of any Member." This notwithstanding, there is no explicit discussion as to how this is applied in the context of digital trade or trade in data, particularly with regard to cross-border data flows. Furthermore, scholars have cautioned against the application of "pre-internet" GATS to cross-border data flows, as the GATS was created during a time when these technologies and mechanisms were not yet conceived.[98]

III. THE WTO AGREEMENTS

The current corpus of international trade law consists of the results of the Uruguay Round: the Marrakesh Agreement Establishing the World Trade Organization, comprising 16 articles and multiple agreements attached as annexes.[99] These agreements and annexes have been adopted as a single undertaking, which means that they are inseparable and apply with equal force.[100] This Article provides a brief overview of the two main agreements that may be relevant in assessing cross-border data flows: the GATT and the GATS.

A. General Agreement on Tariffs and Trade (GATT)

The GATT provides for the current rules for trade in goods and is deemed the "most important […] agreement on trade in goods[.]"[101] It incorporates, through reference, the provisions of the GATT 1947,[102] the provisions of relevant instruments pursuant to the GATT 1947, as well as other Understandings the parties made in interpreting the provisions of the GATT 1947.[103] Specifically, the GATT 1994 is defined as having the following elements:

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[98] Mitchell & Mishra, *supra* note 4, at 93; Andrew Mitchell & Jarrod Hepburn, *Don't Fence Me In: Reforming Trade and Investment Law to Better Facilitate Cross-Border Data Transfer*, 19 YALE J. L. & TECH. 182, 196–98 (2017).

[99] Van den Bossche & Zdouc, *supra* note 13, at 169.

[100] *Id.*, *citing* Appellate Body Report, *Brazil—Desiccated Coconut*, ¶ 177, WTO Doc. WT/DS22/AB/R (adopted Feb. 21, 1997).

[101] *Id.* at 170.

[102] General Agreement on Tariffs and Trade 1994 [hereinafter "GATT 1994"], ¶ 1(a), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994).

[103] Van den Bossche & Zdouc, *supra* note 13, at 171.

> [T]he most obvious element is the collection of provisions of the old General Agreement on Tariffs and Trade, as adopted on 30 October 1947, but "as rectified, amended or modified" by the various legal instruments which entered into force before the WTO.
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> * * *
>
> [G]ATT 1994 is also defined as including the provisions of legal instruments setting out pre-WTO tariff agreements, the terms of accession agreements by which individual countries became signatories of the old GATT, decisions on waivers granted under Article XXV of the GATT 1947 and still in force […], and other decisions taken by the GATT contracting parties.
>
> [T]he third and fourth elements of the GATT 1994 are agreements reached in the Uruguay Round. These are, respectively, six understandings which interpret particular points in a number of the GATT articles, and the Marrakesh Protocol which incorporates the market access commitments of each WTO member.[104]

The GATT contains core principles similar to that of its 1947 predecessor. It has the following central tenets: "the most-favoured-nation (MFN) rule, the principle of reduction and binding of national tariffs, the rule of national treatment, and the prohibition—subject to defined exceptions — of protective measures other than tariffs."[105]

The two central principles of the GATT are the MFN rule and the national treatment rule. The MFN rule provides that, subject to certain exceptions, a country must unconditionally grant the same treatment to all WTO members with regard to "customs duties and charges of any kind imposed on or in connection with importation or exportation[.]"[106] In effect, this prohibits one WTO member from discriminating against other members with respect to like products[107] and ensures "equality of opportunity to import from, or to export to, other WTO members."[108] On the other hand, the national treatment rule prohibits discrimination between national products

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[104] WORLD TRADE ORGANIZATION, THE WTO AGREEMENTS SERIES: GENERAL AGREEMENT ON TARIFFS AND TRADE 4–5 (1998).

[105] *Id.*; *See also* Van den Bossche & Zdouc, *supra* note 13, at 172–73.

[106] GATT 1994, art. I:1; *see also* World Trade Organization, *supra* note 104, at 2–3.

[107] GATT 1994, art. I:1. The obligation only applies to "like" products. For a discussion on what constitutes "like" products, *see* Van den Bossche & Zdouc, *supra* note 13, at 795–800.

[108] Van den Bossche & Zdouc, *supra* note 13, at 783.

and foreign products.[109] This prohibits WTO members from enacting regulations, such as internal taxes or fees, that discriminate against foreign products in favor of like domestic products.[110]

These obligations under the GATT are by no means absolute. There are exceptions which allow members to "adopt trade-restrictive legislation or other measures that pursue the promotion and protection of other societal values and interests"[111] despite such measures being inconsistent with their trade obligations, in recognition of the priority accorded to these objectives over trade interests.[112] The general exceptions under the GATT are found in Article XX:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
>
> a) necessary to protect public morals;
> b) necessary to protect human, animal or plant life or health;
> c) relating to the importations or exportations of gold or silver;
> d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;
> e) relating to the products of prison labour;
> f) imposed for the protection of national treasures of artistic, historic or archaeological value;
> g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;
> h) undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to the Members and not

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[109] GATT 1994, art. III:1–2, 4.
[110] Van den Bossche & Zdouc, *supra* note 13, at 858.
[111] *Id.* at 1255.
[112] *Id.* at 1255–56.

> disapproved by them or which is itself so submitted and not so disapproved;
> i) involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan; Provided that such restrictions shall not operate to increase the exports of or the protection afforded to such domestic industry, and shall not depart from the provisions of this Agreement relating to non-discrimination;
> j) essential to the acquisition or distribution of products in general or local short supply[.]

These exceptions are both limited and conditional in the sense that they apply only (i) insofar as the requirements are met; and (ii) if a measure by a member was previously found to be inconsistent with its GATT obligations.[113] Moreover, contrary to the general principle that exceptions are to be interpreted narrowly, WTO jurisprudence has interpreted Article XX as being a "balancing provision" that "strikes a balance between, on the one hand, trade liberalisation, market access and non-discrimination rules and, on the other hand, other societal values and interests."[114]

B. General Agreement on Trade and Services (GATS)

The GATS was established as the "first ever multilateral agreement on trade in services."[115] It was negotiated by the Members with the objective of "establish[ing] a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade under conditions of transparency and progressive liberalization and as a means of promoting the economic growth of all trading partners and the development of developing countries[.]"[116]

Services, as used in the GATS, is defined as "any service in any sector except services supplied in the exercise of governmental authority,"[117] with the exception being "any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers."[118] The GATS

[113] *Id.* at 1260.
[114] *Id.* at 1261.
[115] *Id.* at 177.
[116] GATS, pmbl. ¶ 2.
[117] GATS, art. I:3(b).
[118] Art. I:3(c).

also covers four kinds (or "modes," as used in WTO parlance) of trade in services. These are enumerated in Article I:2:

> 2. For the purposes of this Agreement, trade in services is defined as the supply of a service:
>
> a) from the territory of one Member into the territory of any other Member;
> b) in the territory of one Member to the service consumer of any other Member;
> c) by a service supplier of one Member, through commercial presence in the territory of any other Member;
> d) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.[119]

Hence, the GATS recognizes the possibility—and certainly, the pervasiveness—of a cross-border supply of services. One example includes instances where "[u]sers in [country] A receive services from abroad through the telecommunications or postal network. Such supplies may include consultancy or market research reports, tele-medical advice, distance training, or architectural drawings."[120]

Similar to the GATT, the GATS also embodies the two fundamental principles of the WTO: the MFN rule and the national treatment rule. However, these are applied in a different manner to trade in services.[121] Moreover, unlike the GATT, the GATS operates on a system of classification. There are 12 different "core" sectors, subdivided further into a total of 160 sectors that may be included in a member's schedule of commitments.[122] The classification of the "mode" of supply of the service and the corresponding sector involved is important, as the obligations and commitments of a member may differ depending on the sector or mode involved.[123] The GATS also contains different chapters and annexes, such as annexes on e-commerce,

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[119] Art. I:2.

[120] Trade in Services Division, *The General Agreement on Trade in Services: An Introduction*, at 3, Jan. 31, 2013, WORLD TRADE ORGANIZATION, *available at* https://www.wto.org/english/tratop_e/serv_e/gsintr_e.pdf.

[121] *See* Van den Bossche & Zdouc, *supra* note 13, at 811, 815, 947–53.

[122] Trade in Services Division, *supra* note 120, at 4.

[123] Mitchell & Hepburn, *supra* note 98, at 197; Mira Burri, *The Regulation of Data Flows through Trade Agreements*, 48 GEORGETOWN J. INT'L. L. 407, 413–15 (2017).

telecommunication, market access, and financial services,[124] and provides for different rules for each of these areas.

Article XIV of the GATS also provides for certain exceptions that members may use to excuse themselves from complying with their obligations. These are as follows:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:
>
> (a) necessary to protect public morals or to maintain public order;
> (b) necessary to protect human, animal or plant life or health;
> (c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:
> i. the prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts;
> ii. the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts;
> iii. safety;
> (d) inconsistent with Article XVII, provided that the difference in treatment is aimed at ensuring the equitable or effective imposition or collection of direct taxes in respect of services or service suppliers of other Members;
> (e) inconsistent with Article II, provided that the difference in treatment is the result of an agreement on the avoidance of double taxation or provisions on the avoidance of double taxation in any other international agreement or arrangement by which the Member is bound.

While there are some similarities between the general exceptions in the GATT and the GATS, it is readily apparent that the exceptions provided are different. For example, the phrases "maintain public order" and "protection of privacy of individuals" appear in Article XIV of the GATS but

[124] GATS, art. XXIX.

not in Article XX of the GATT. Moreover, some of the exceptions in the GATS (i.e., Article XIV (d) and (e)) are confined to certain obligations under the GATS, whereas the exceptions under the GATT do not seem to be limited to specific obligations.

IV. BEYOND THE WTO AGREEMENTS: FREE TRADE AGREEMENTS

As discussed, many WTO members and scholars alike believe that the current WTO regime fails to properly regulate modern developments, specifically digital trade and cross-border data transfers. Hence, members have entered into FTAs (also called "preferential trade agreements" or "PTAs") to fill in the gaps in the existing WTO agreements and to address modern developments in a way that benefits their interests.[125] FTAs are those agreements that regulate the trade relationship of Members in a manner that is either different from or beyond their commitments under the WTO agreements.[126] Given the perceived importance of cross-border data flow in international trade,[127] many countries have entered into different FTAs that contain obligations related to cross-border data flow.

A dataset called "TAPED: Trade Agreement Provisions on Electronic Commerce and Data" contains a consolidation of FTAs executed within the last 20 years. It showed that 184 FTAs have provisions related to digital trade, with most of them being executed within the last eight years.[128] These agreements differ as to their definition of "data flows," the manner of providing for border rules, and the manner of regulating other aspects of data flows.[129] They also provide different provisions on other interests that may compete with trade, like privacy and data protection.[130]

The Philippines is a party to three of these FTAs with provisions related to digital trade and cross-border data flows: the Agreement between Japan and the Republic of the Philippines for an Economic Partnership ("Japan-Philippines FTA"), the Free Trade Agreement between the EFTA States and the Philippines ("EFTA-Philippines FTA"), and the Regional

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125 Mitchell & Hepburn, *supra* note 98, at 186–87; Burri, *supra* note 3, at 19.
126 *Id.*
127 *See supra* Part I.
128 Burri, *supra* note 3, at 20–21.
129 *Id.* at 24–25.
130 *Id.* at 28–35.

Comprehensive Economic Partnership ("RCEP").[131] The EFTA-Philippines FTA contains a provision obligating the contracting parties to ensure the free transfer of financial information for financial services.[132] On the other hand, the Japan-Philippines FTA contains provisions which implicitly allow the parties to enact measures that may restrict the transfer of confidential information or information about individual customers.[133] However, both of these instruments do not specifically contain provisions about cross-border data flows in general.

A. The Regional Comprehensive Economic Partnership Agreement ("RCEP")

The RCEP is a "mega-regional trade agreement"[134] between 15 States: the members of the Association of Southeast Asian Nations (Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam), Australia, China, Japan, South Korea, and New Zealand.[135] It has been described as a "new attempt to reconcile the technological potential and economic rationale for digital inter-connectivity with countries' ability to regulate their increasingly digital economies and societies."[136] It reflects the "Silicon Valley Consensus" or that "regulatory interventions that limit data mobility need to satisfy meta-regulatory rules that prohibit arbitrary and unjustifiably discriminatory measures and disguised restrictions on trade."[137] With regard to the Philippines, President Duterte ratified the RCEP on September 2, 2021,[138] and the Senate concurred in its ratification on February 21, 2023.[139]

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[131] Mira Burri et al., *Trade Agreements Provisions on Electronic-commerce and Data*, UNIVERSITY OF LUCERNE, *available at* https://www.unilu.ch/en/faculties/faculty-of-law/professorships/burri-mira/research/taped/(last modified Nov. 30, 2022).

[132] Free Trade Agreement between the EFTA states and the Philippines annex XIII, art. 7, Apr. 28, 2016, *available at* https://www.efta.int/sites/default/files/documents/legal-texts/free-trade-relations/philippines/EFTA-Philippines-Rectification-Main-Agreement.pdf.

[133] Agreement between Japan and the Republic of the Philippines for an Economic Partnership annex 5, § 2(2), Sept. 9, 2006, *available at* https://www.mofa.go.jp/region/asia-paci/philippine/epa0609/annex5.pdf.

[134] Burri, *supra* note 3, at 352.

[135] *Regional Comprehensive Economic Partnership Agreement*, THE ASEAN SECRETARIAT, *at* https://rcepsec.org/legal-text/ (last accessed Apr. 20, 2022).

[136] Streinz, *supra* note 4, at 2.

[137] *Id.* at 3.

[138] Alyssa Nicole Tan, *Senate unlikely to give nod to RCEP*, Feb. 24, 2022, BUSINESSWORLD, *available at* https://www.bworldonline.com/top-stories/2022/02/24/431989/senate-unlikely-to-give-nod-to-rcep/.

[139] *Senate concurs in ratification of RCEP agreement*, SENATE OF THE PHILS. WEBSITE, Feb. 22, 2023, *at* http://legacy.senate.gov.ph/press_release/2023/0222_prib1.asp.

Chapter 12 of the RCEP specifically deals with electronic commerce issues and provides data governance provisions.[140] Its main objective is to promote and facilitate e-commerce among the Parties, but there are also provisions dealing with data-related issues, specifically on the "location of computing facilities and cross-border transfer of information by electronic means."[141] These provisions apply to obligations regarding trade in services and investments,[142] except insofar as these measures were specified in the Party's Schedules of Non-Conforming Measures or Reservations, or the exceptions to the specific obligations apply.[143] Specifically, a "covered person" under these obligations is defined as pertaining to investments, investors, or service suppliers under the RCEP, but excludes financial institutions, financial services, and public entities.[144]

Article 12.14 of the RCEP deals with the location of computing facilities. It provides:

> 1. The Parties recognise that each Party may have its own measures regarding the use or location of computing facilities, including requirements that seek to ensure the security and confidentiality of communications.
> 2. No Party shall require a covered person to use or locate computing facilities in that Party's territory as a condition for conducting business in that Party's territory.
> 3. Nothing in this Article shall prevent a Party from adopting or maintaining:
>   a. any measure inconsistent with paragraph 2 that it considers necessary to achieve a legitimate public policy objective, provided that the measure is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade; or
>   b. any measure that it considers necessary for the protection of its essential security interests. Such measures shall not be disputed by other Parties.[145]

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[140] Regional Comprehensive Economic Partnership [hereinafter "RCEP"], ch. 12, Nov. 15, 2020, *available at* https://rcepsec.org/wp-content/uploads/2020/11/Chapter-12.pdf

[141] *Summary of the Regional Comprehensive Economic Partnership*, THE ASEAN SECRETARIAT, *at* https://rcepsec.org/wp-content/uploads/2020/11/Summary-of-the-RCEP-Agreement.pdf (last accessed Apr. 20, 2022).

[142] RCEP, art. 12.3(4).

[143] Art. 12.3(4)(a)–(c).

[144] Art. 12.1(b).

[145] Art. 12.14. (Footnotes omitted.)

"Computing facilities" are defined under the RCEP as "computer servers and storage devices for processing or storing information for commercial use,"[146] which implies that facilities are involved in the processing or storing of information specifically for commercial use. Hence, not all facilities may fall under these requirements, e.g., those that store governmental information and not used commercially. Under this requirement, despite recognizing the flexibility of the Parties to have their measures on computing facilities for public policy objectives, the RCEP generally prohibits parties from imposing localization requirements as a prerequisite for conducting business.[147]

However, the RCEP recognizes two exceptions to the prohibition: measures necessary to achieve a "legitimate public policy objective,"[148] and measures necessary for the "protection of [the Party's] essential security interest."[149] Notably, the RCEP leaves the discretion of determining the public policy objective or the essential security interest to the Party instituting the measure. Article 12.14(2) provides that parties may not question the objective pursued by the implementing Party,[150] but complaining Parties may show that the measure is arbitrary or unjustifiably discriminatory, or the measure is a disguised restriction on trade to invalidate such measure. Article 12.14(3) further explicitly states that the determination of the essential security interest shall "not be disputed by other Parties."[151] Hence, compared to the exception for public policy objectives, the claim of an essential security interest seems not to be subject to the questioning of another Party altogether.[152]

Article 12.15, on the other hand, covers the cross-border transfer of information by electronic means. It obligates parties "not [to] prevent cross-border transfer of information by electronic means where such activity is for the conduct of the business of a covered person."[153] This implies that the obligation applies only insofar as the transfer is needed for the conduct of business, and not for any other purpose. Similar to the obligation regarding the location of computing facilities, this obligation is also subject to

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[146] Art. 12.1(a).
[147] Art. 12.14(2).
[148] Art. 12.14(3)(a).
[149] Art. 12.14(3)(b).
[150] Art. 12.14(3)(a), n.12.
[151] Art. 12.14(3)(b).
[152] Streinz, *supra* note 4, at 3–4.
[153] RCEP, art. 12.15(2).

exceptions on measures for a legitimate public policy objective and measures necessary for the protection of an essential security interest.[154]

The RCEP also obligates Parties to "adopt or maintain a legal framework which ensures the protection of personal information of the users of electronic commerce"[155] and "cooperate, to the extent possible, for the protection of personal information transferred from a Party."[156] However, given the obligations under the latter provisions, this obligation must be construed to mean that data protection or privacy laws do not infringe on the requirements for the cross-border transfer of information or localization of computing facilities. Moreover, the RCEP does not provide any minimum standard for data protection or privacy laws. Hence, this implies that any kind of framework would already meet the requirements.[157]

B. The Comprehensive and Progressive Agreement for Trans-pacific Partnership (CPTPP)

The CPTPP is an FTA between 11 countries: Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam.[158] It is considered as one of the largest FTAs by gross domestic product ("GDP"), representing 13.4% of the global GDP,[159] and has been described as providing an "advanced template for digital trade" and "creat[ing] the most comprehensive template so far in the landscape of PTAs."[160] The CPTPP was signed on March 8, 2018 and entered into force on December 30, 2018 for a majority of the State Parties.[161] It incorporates by reference the provisions of the Trans-Pacific Partnership Agreement

[154] Art. 12.15(3).
[155] Art. 12.8(1).
[156] Art. 12.8(5).
[157] Streinz, *supra* note 4, at 4.
[158] Burri, *supra* note 3, at 34 n.134.
[159] *Id.*
[160] *Id.*
[161] *Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)*, AUSTRALIAN DEPARTMENT OF FOREIGN AFFAIRS AND TRADE, *at* https://www.dfat.gov.au/trade/agreements/in-force/cptpp/comprehensive-and-progressive-agreement-for-trans-pacific-partnership (last accessed Apr. 21, 2022).

("TPP"),[162] a previous agreement being negotiated by the CPTPP State parties and the U.S. back in 2016.[163]

However, as one of his first acts as president, former US president Donald Trump withdrew from the TPP.[164] As a result, the TPP did not enter into force, but the remaining parties agreed to revive it as the CPTPP.[165] The withdrawal of the U.S. from the agreement made the possible global impact of the agreement more minimal, but also allowed for the parties to reach agreements that the U.S. opposed.[166] While the U.S. is not a party to the CPTPP, the provisions of the CPTPP on e-commerce were mostly adopted from the TPP, and hence, "reflects the efforts of the United States in the domain of digital trade rule-making."[167]

Similar to the RCEP, the CPTPP contains provisions for the localization of computing facilities and cross-border transfer of information. These extend to covered persons, which are similarly defined as extending to investments, investors, and service suppliers, except for financial investors or financial institutions.[168] With regard to the localization of computing facilities, Article 14.13 of the CPTPP provides that "[n]o Party shall require a covered person to use or locate computing facilities in that Party's territory as a condition for conducting business in that territory."[169] The definition of "computing facilities" under the CPTPP is the same as that under the RCEP, which implies that requirements on localization may be allowed for non-commercial use. However, with regard to cross-border transfer of information, the obligation under the CPTPP is worded differently. Article 14.11 of the CPTPP provides:

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[162] Comprehensive and Progressive Agreement for Trans-Pacific Partnership [hereinafter "CPTPP"], art. 1, Mar. 8, 2018, *available at* https://www.dfat.gov.au/sites/default/files/tpp-11-treaty-text.pdf.

[163] Cheang Ming, *Global trade just had a 'one step forward, one step back' day*, Mar. 9, 2018, CNBC, *available at* https://www.cnbc.com/2018/03/09/tpp-11-countries-sign-trade-agreement-as-trump-implements-tariffs.html.

[164] Zachary Torrey, *TPP 2.0: The Deal Without the US: What's new about the CPTPP and what do the changes mean?*, Feb. 3, 2018, THE DIPLOMAT, *available at* https://thediplomat.com/2018/02/tpp-2-0-the-deal-without-the-us/.

[165] *Id.*

[166] *Id.*

[167] Burri, *supra* note 3, at 34.

[168] CPTPP, arts. 14.1(1), 14.2(5).

[169] Art. 14.13(2).

> Article 14.11: Cross-Border Transfer of Information by Electronic Means
>
> 1. The Parties recognise that each Party may have its own regulatory requirements concerning the transfer of information by electronic means.
>
> 2. 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.[170]

Other than the language being couched in a positive obligation (i.e. "shall allow" compared to the use of "shall not prevent" in the RCEP),[171] the CPTPP includes the phrase "including personal information." This explicitly includes personal information among the kinds of information that each State Party to the CPTPP must allow for cross-border transfer. Under the RCEP, it could be argued that personal information may be excluded as not related to the conduct of business, but under the CPTPP, the phrase "conduct of business" would necessarily include the personal information of individuals. However, the use of the word "for" "may suggest the need for some causality between the flow of data and the business of the covered person."[172]

The exceptions under the CPTPP are also narrower. There are three common requirements that a State Party must meet for its measures to be exempt from the obligations discussed:

> 3. Nothing in this Article shall prevent a Party from adopting or maintaining measures inconsistent with paragraph 2 to achieve a legitimate public policy objective, provided that the measure:
>
> a. is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade; and
>
> b. does not impose restrictions […] greater than are required to achieve the objective.[173]

First, the measure must be in pursuit of a "legitimate public policy objective." Contrary to the RCEP, the CPTPP does not prohibit members from questioning the necessity of the objective proposed. Second, the measure must not be a disguised restriction on trade or constitute arbitrary or

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[170] Art. 14.11. (Emphasis supplied.)
[171] RCEP, art. 12.15(2).
[172] Burri, *supra* note 3, at 35.
[173] CPTPP, arts. 14.11(3), 14.13(3).

unjustifiable discrimination. This is akin to the exception found in the RCEP. Third, the measure must also not impose restrictions which are greater than required to achieve the objective. This element, which reflects the balancing test under the GATT and GATS,[174] is not present under the RCEP. In effect, the measure must be the least trade-restrictive means available to achieve the public policy being pursued. The use of the word "and"[175] also indicates that these requirements are cumulative, which means a party must show that the public policy measure is both the least trade-restrictive measure available and that it is non-arbitrary or non-discriminatory. Furthermore, unlike the RCEP, the CPTPP does not allow for measures for "essential security interests." However, given the broad character of "legitimate public policy objective," any essential security interest of a Party may be considered as a public policy objective to trigger the application of the two-part test.

The CPTPP also requires State Parties to "adopt or maintain a legal framework that provides for the protection of the personal information of the users of electronic commerce."[176] This is similar to the language used in the RCEP, which seems to imply that any form of framework protecting data and personal information is allowed. However, the CPTPP recognizes that "Parties may take different legal approaches to protecting personal information,"[177] and thus obligates parties to "encourage the development of mechanisms to promote compatibility between these different regimes."[178] This recognizes that the priority of the CPTPP is to allow the facilitation of trade between the parties and not necessarily privacy or data protection.[179]

V. CROSS-BORDER DATA TRANSFERS: PROBLEMS AND PERSPECTIVES

In the area of trade, cross-border data flows are present when two elements concur:

(i) where there are bits of information (data) as part of the provision of a service or a product, and
(ii) where this data crosses borders, although the data flows do not neatly coincide with one commercial transaction and the

[174] Burri, *supra* note 3, at 35.
[175] CPTPP, arts. 14.11(3)(a), 14.13(3)(a).
[176] Art. 14.8(2).
[177] Art. 14.8(5).
[178] Art. 14.8(5).
[179] Burri, *supra* note 3, at 36.

> provision of certain service may relate to multiple flows of data.[180]

The link between international trade and cross-border data flows is explained by the "increased digitalization of organizations, driven by the rapid adoption of technologies such as cloud computing and data analytics."[181] The growth of digital information and reliance on the Internet has allowed businesses and the economy to expand as well, leading to increased value and reduced costs.[182] Furthermore, given the increasingly global character of business, corporations rely on liberal cross-border data flows to communicate with their foreign counterparts, ensure the transfer of resources, and provide their services.[183] Not only do data flows allow "economic responses," but they also provide for "societal responses" which make them more valuable and important.[184] The importance of data transfers in international trade has been explained as such:

> The transfer of data across national borders drives today's global economy. The Internet grants companies the ability to access billions of potential customers beyond their borders. Even small enterprises and companies are capable of competing based on the quality of their offerings, free from geographic limitations. The proper function of international trade currently needs reliable and continuous access to data, wherever they are located. International trade activities especially international service trade activities

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[180] *Id.* at 25.

[181] Nigel Cory, *Cross-Border Data Flows: Where Are the Barriers, and What Do They Cost?*, May 2017, INFORMATION TECHNOLOGY & INNOVATION FOUNDATION, *available at* https://www2.itif.org/2017-cross-border-data-flows.pdf.

[182] *Id.* at 1–2; Mitchell & Hepburn, *supra* note 98, at 185–86; Joshua Meltzer, *The Internet, Cross-Border Data Flows and International Trade*, 2 ASIA & THE PACIFIC POL'Y STUD. 90, 91–92 (2013).

[183] Francesca Casalini & Javier López González, *Trade and Cross-Border Data Flows*, at 8, Jan. 23, 2019, OECD TRADE POLICY PAPERS, *available at* https://www.oecd-ilibrary.org/docserver/b2023a47-en.pdf?expires=1650549140&id=id&accname=guest&checksum=E48D0676C90C4C74F3AD9EED92FBBC3C; *Multi-Industry Statement on Cross-Border Data Transfers and Data Localization Disciplines in WTO Negotiations on E-Commerce* [hereinafter "Multi-Industry Statement"], Jan. 26, 2021, INTERNATIONAL CHAMBER OF COMMERCE, *at* https://iccwbo.org/content/uploads/sites/3/2021/01/multi-industry-statement-on-crossborder-data-transfers-and-data-localization.pdf; Dai, *supra* note 8, at 9; Yakovleva & Irion, *supra* note 92, at 204.

[184] Nigel Cory & Luke Dascoli, *How Barriers to Cross-Border Data Flows Are Spreading Globally, What They Cost, and How to Address Them*, July 19, 2021, INFORMATION TECHNOLOGY & INNOVATION FOUNDATION, *available at* https://itif.org/publications/2021/07/19/how-barriers-cross-border-data-flows-are-spreading-globally-what-they-cost.

> require cross-border data transfers from service providers to customers and others located around the world.[185]

On the other hand, the United Nations Conference on Trade and Development ("UNCTAD") has previously cautioned against the regulation of cross-border data flows primarily through trade agreements.[186] In its 2021 Digital Economy Report, the UNCTAD stated:

> There are concerns that regulating the issue of cross-border data flows through trade agreements makes it difficult to take into account the multidimensional nature of data, and to ensure full participation of all stakeholders potentially affected. In view of the relatively weak market power of most developing countries, there is also the risk that any outcome of the negotiations will mainly reflect the interests of companies in more advanced economies, which are currently the best positioned to capture value from the expansion of data flows. While this could reduce the uncertainty with regard to cross-border data flows, it would also reaffirm and reinforce existing imbalances in the data-driven digital economy.[187]

Nevertheless, despite these concerns of the UNCTAD, many scholars have called for the regulation of cross-border data flows through trade agreements.[188] Indeed, the rise of FTAs regulating data flows shows that countries have also adopted the view that data flows are best intertwined with trade issues.[189] Several industries have also issued a joint statement calling on negotiators to include the issue of cross-border flows in the WTO Negotiations on E-Commerce, which is part of the WTO Ministerial Conference.[190] This is in light of the recognition that the current WTO framework is insufficient to deal with the issues of cross-border data flows. Nevertheless, it has also been recognized that not *all* areas of cross-border data flows need to be regulated through trade and that issues such as "online consumer protection, cybersecurity and privacy […] are necessary to ensure a stable regulatory framework for digital trade."[191]

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[185] Dai, *supra* note 8, at 37. (Citations omitted.)

[186] UNCTAD, *Digital Economy Report 2021: Cross-border data flows and development: For whom the data flow* [hereinafter "Digital Economy Report"], at 144, UNITED NATIONS, *available at* https://unctad.org/system/files/official-document/der2021_en.pdf.

[187] *Id.* at 145.

[188] *See supra* nn.179–82.

[189] *See supra* Part IV.

[190] *Multi-Industry Statement*, *supra* note 183.

[191] Mitchell & Mishra, *supra* note 4, at 92.

A. Cross-Border Flows under the WTO Agreements

The problem with applying the current WTO agreements to cross-border data flows concerns two main factors: first, the context in which the agreements were adopted, and second, the nature of data.

The first problem refers to the nature of the WTO agreements as "pre-internet" agreements. The WTO agreements were negotiated and adopted in 1994 after the Uruguay Round.[192] Despite future developments, these agreements are still substantially the same and are still within the "pre-Internet state," leading to a problem with their specific applications.[193] This has been framed as the "problem of interpretative technological translation,"[194] described as applying the WTO agreement to "technologies not envisioned at the time these rules were framed."[195] The difficulty primarily lies with how the WTO agreements are structured. The main division between the GATT and GATS is that the former regulates trade in goods while the latter regulates trade in services.[196] However, the rise of the internet also led to what Dai has termed the "convergence phenomenon."[197] This refers to the combination of "features selected from a variety of products, possibly from different departments or categories, into a unique, modular product,"[198] which results in the difficulty of determining whether a product is a good or service based on the WTO classifications. In one of its cases, the WTO has recognized that "[o]verlaps between the subject matter of disciplines in GATT 1994 and in GATS are inevitable, and [these] will further increase with the progress of technology and the globalization of economic activities."[199]

This directly ties in with the second problem of applying the WTO agreements to cross-border data flows: the nature of data. Cross-border data flows may involve both trade in goods and trade in services.[200] Modern technology, e.g., the Internet of things, contains elements of both services and goods,[201] which makes difficult the determination of which WTO agreements

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[192] *See supra* Parts II–III.

[193] Burri, *supra* note 3, at 16; Aaronson, *supra* note 8, at 12.

[194] Mitchell & Mishra, *supra* note 4, at 93, *citing* Tim Wu, *The World Trade Law of Censorship and Internet Filtering*, 7 CHICAGO J. INT'L. L. 263, 264 (2006).

[195] *Id.*

[196] *See supra* Part III.

[197] Dai, *supra* note 8, at 45.

[198] *Id.*

[199] Panel Report, *Canada–Certain Measures Concerning Periodicals*, ¶¶ 3.24 & 3.26, WTO Doc. WT/DS31/R (adopted Mar. 14, 1997) *as cited in* Dai, *supra* note 8, at 46.

[200] Mitchell & Mishra, *supra* note 4, at 93.

[201] *Id.*

to apply. It has been recognized that data, by themselves, may be considered as both goods and services. On one hand, data, as having value—through being viewed as an asset—and as being interchangeable with other similar goods, is a tradeable commodity under the contemplation of the GATT.[202] For example, digital content, defined as "data […] produced and supplied in digital form," is a tradeable commodity that can be supplied either in tangible or intangible forms.[203] On the other hand, data may also be considered as services in the form of data-based services. For example, location-based services or data-collection services use data to deliver their respective services to clients, which involve cross-border data flows.[204] Indeed, scholars and experts have often evaluated cross-border data flows under the GATS as part of trade in services.[205] In any event, any restriction on cross-border data flows may still impact trade even if data, by themselves, are not the subject of the transaction. For example, the provision of a service or a good to a foreign country, such as computer software or movies, would necessarily include the transfer of data. Any restriction on cross-border transfers would be applicable in this transaction, even if the data are not the subjects of the transaction.

As discussed, the GATS contemplates four modes of supply of services.[206] Each of these four modes results in different legal implications and rules, necessitating an accurate determination or classification of which mode applies. Dai describes the problem in classifying cross-border data flows into these modes as follows:

> For example, an Englishman got sick when he came to the [People's Republic of China ("PRC")], so he went to a hospital located in the PRC for treatment (Mode 2). This hospital, established in the PRC, was actually owned by a Japanese business group (Mode 3) and employed foreign doctors and nurses (Mode 4). Patients in this hospital can receive medical advice through the Internet from Japan-based specialists (Mode 1). Clarifying which modes are actually involved in business under certain circumstances is not simple. The classification difficulty happened in international e-commerce as well, it is a challenge to decide whether a service is provided from overseas into member's domestic (mode 1) or, vice

[202] Dai, *supra* note 8, at 40–42.

[203] *Id.* at 42–43.

[204] *Id.* at 43.

[205] *See* Aaronson, *supra* note 8; Mitchell & Hepburn, *supra* note 98, at 196–97; Dai, *supra* note 8, at 46; Yakovleva & Irion, *supra* note 92, at 209–10; Mitchell & Mishra, *supra* note 4, at 92–93.

[206] *See supra* Part III.B.

> versa, whether consumers domestically have "moved abroad" via the Internet (mode 2).[207]

Another aspect of applying the GATS is determining which service sector is involved. WTO members have different commitments depending on the sector involved, which results in different obligations applying per sector.[208] Many countries use the United Nations Central Product Classification as a way to classify services, but this has failed to consider modern developments.[209] For example, services such as cloud computing do not fall under existing classifications or may be covered by more than one category.[210] Moreover, the content of the data being transferred, not necessarily the transfer itself, may also affect the relevant sector involved.[211] The uncertainty of applying the GATS led countries to enter FTAs and negotiate on extending the corpus of WTO law to cover these new developments.

B. Positions of Countries on Cross-Border Data Flows

Around the world, different countries have different approaches to their data regulations, particularly with regard to cross-border data flows and data localization. Francesca Casalini and Javier López González have classified data legislation into three broad classifications: "free-flow" legislation which allows for the transfer of data freely, "flow conditional on safeguards" which only allows for transfer if certain safeguards are met, and "flow conditional on ad-hoc authorisation" which allows data transfer upon consent or authorization.[212] The second category ("flow conditional on safeguards") restricts data transfers on certain grounds, such as the finding of "adequacy" or "equivalence." The two terms are explained as follows:

> [The determination of adequacy or equivalence] can take the form of a unilateral recognition, when one country certifies the adequacy of another and data can flow unimpeded in one direction. Or it can take the form of a mutual recognition of data protection measures: when two countries choose to recognise each other's systems. In this instance, once established, the free flow of data in both

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[207] Dai, *supra* note 8, at 48.
[208] *See supra* Part III.B.
[209] Dai, *supra* note 8, at 49–50; Mitchell & Hepburn, *supra* note 98, at 198.
[210] Mitchell & Hepburn, *supra* note 98, at 198.
[211] *Id.* at 198–99.
[212] Casalini & González, *supra* note 183, at 17–18.

> directions is assured (for example the recent mutual adequacy findings by the European Union and Japan).
>
> * * *
>
> Equivalence implies the assessment of a level of objective similarity between two regulations, both in terms of the tools used and the objectives or outcomes of the regulation. Adequacy, in turn, can be more flexible as it implies agreeing on a common outcome but allowing for different tools to be used to meet this outcome.[213]

On the other hand, the third category involves instances in which consent or approval of the regulatory authority is needed before data transfer may be allowed.[214] Similarly, data localization requirements also differ based on their restrictiveness, with some countries having no data localization requirement and others prohibiting data flows and requiring data to be stored and/or processed locally.[215] Given these, it is not surprising that different countries have different positions on the creation of international law rules which may require them to modify their domestic legislation.

Many developed countries support the linking of international trade and data regulation. For example, one of the countries leading the call for agreements regarding cross-border data flows is Japan. In 2019, Japan called for world leaders to develop a "Data Free Flow with Trust," a set of "international rules fit for the digital age that carefully protect sensitive data but allow productive data to flow across borders."[216] With Japan at the helm, the G20[217] crafted the "Osaka Leaders' Declaration" which recognized that "cross-border flow of data, information, ideas and knowledge generates higher productivity, greater innovation, and improved sustainable development."[218] The declaration also affirms their support of the linking of

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[213] *Id.* at 18.

[214] *Id.* at 21–22.

[215] *Id.* at 23–24.

[216] *Data Free Flow with Trust (DFFT): Paths towards Free and Trusted Data Flows*, at 7, May 2020, WORLD ECONOMIC FORUM (May 2020), *at* https://www3.weforum.org/docs/WEF_Paths_Towards_Free_and_Trusted_Data%20_Flows_2020.pdf.

[217] "Group of Twenty" consists of 19 countries and the European Union. The membership of the G20 include Argentina, Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Italy, Japan, Republic of Korea, Mexico, Russia, Saudi Arabia, South Africa, Turkey, the United Kingdom, the United States, and the European Union. *See About the G20*, G20.ORG, *at* https://www.g20.org/en/about-g20/#members (last modified Dec. 28, 2022).

[218] G20 Osaka Leader's Declaration, June 28–29, 2019, ¶ 11, JAPAN MINISTRY OF FOREIGN AFFAIRS WEBSITE, *available at*

trade and the digital economy, calling on the WTO to work on their electronic commerce program.[219]

Similarly, the U.S. has also taken the position that data protection laws may be considered damaging to global trade.[220] In 2016, it forwarded a proposal that advocated for trade rules that would "combat discriminatory barriers to free flow of data."[221] More specifically, the U.S. argues that data localization requirements entail additional barriers and costs, preventing the free flow of data to the detriment of the economy and trade.[222] It argues that such requirements would unduly discriminate and heavily impede the services of foreign service suppliers.[223] Other countries supporting this call include Mexico, Indonesia, South Korea, Turkey, Australia, Canada, and Singapore.[224] They followed the proposal of the U.S. with a statement calling on the WTO to discuss data flows and data localization in the digital trade agenda.

The Philippines is one of these countries that support the creation of rules on digital trade. In a communication sent to the WTO, the Philippines stated that it will "join the initiative to actively participate and contribute to the focused group discussions towards a high standard outcome on trade-related aspects of electronic commerce."[225] It further recognized the need to create rules on e-commerce to better facilitate trade and reap its benefits.[226]

On the other hand, countries such as China, Russia, and India oppose the linking of trade and data regulation. For example, China's Network Security Law restricts cross-border data transfers and provides data localization requirements for public policy objectives such as consistency with public morals and support for domestic business.[227] These countries argue that these rules would limit the capacity of developing countries to grow and develop their economies and technologies by adopting data policies suited to

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https://www.mofa.go.jp/policy/economy/g20_summit/osaka19/en/documents/final_g20_osaka_leaders_declaration.html.

[219] *Id.* at ¶ 11.

[220] Dai, *supra* note 8, at 36.

[221] *Digital Economy Report*, *supra* note 186, at 149.

[222] *Id.* at 148–49.

[223] *Id.*; Dai, *supra* note 8, at 36.

[224] *Digital Economy Report*, *supra* note 184, at 149; Gurumurthy et al., *supra* note 5, at 8.

[225] World Trade Organization, Joint Statement on Electronic Commerce: Communication from the Philippines, WTO Doc. INF/ECOM/50 (Feb. 3, 2020), *available at* https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/INF/ECOM/50.pdf&Open=True.

[226] *Id.*

[227] Dai, *supra* note 8, at 38.

their needs.[228] The African Group, in particular, has argued that the free flow of data, resulting in the rise of foreign digital companies who deliver foreign goods, would "deprive developing economies of substantial tariff revenues […] and threaten their domestic services industry as more services are traded online."[229] Further to this, the entry of developing digital corporations would threaten rising businesses. In many developing countries, small businesses either do not have a website or do not even have internet access,[230] threatening their existence once developed digital corporations enter the market.

Other developed countries have also opposed the liberalization of data flows. While the European Union (EU) is generally in favor of the creation of new rules on cross-border data flows, some European countries have expressed concerns about such rules.[231] Moreover, the European approach to global data flows, embodied in the 2016 General Data Protection Regulation ("GDPR") is one of the strictest regulations concerning data and data privacy.[232] The GDPR is precisely the kind of legislation that many of the developed countries are fighting against, claiming that the GDPR's provisions on data flow are trade-restrictive.[233] Hence, the European economy is not entirely on the board with implementing trade rules in the WTO as this development may also affect the GDPR.

However, applying the lessons learned from the TRIPS Agreement,[234] it is possible that the opposing developing countries may eventually succumb to the pressure from developed countries. This happened when countries with strong trading powers eventually imposed unilateral trade sanctions on those who oppose their agenda. It is not improbable for countries such as the U.S. to impose trade sanctions or limit trade relationships with countries that have stringent data localization or restrictive data flow measures. While countries such as China and Russia, and to some extent the EU, may continue to oppose these, they may do possible because of their strong trading power. Other developing countries, such as African countries, may not survive the sanctions that could be imposed on them, leading them to withdraw their objections in furtherance of their other economic goals.

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[228] Kirtika Suneja, *India not in position to accept uninhibited cross border data flows: Piyush Goyal*, THE ECONOMIC TIMES, Sept. 22, 2020, *available at* https://economictimes.indiatimes.com/news/economy/foreign-trade/india-not-in-position-to-accept-uninhibited-cross-border-data-flows-piyush-goyal/articleshow/78259646.cms; *Digital Economy Report*, *supra* note 186, at 149.

[229] *Digital Economy Report*, *supra* note 186, at 149.

[230] Gurumurthy et al., *supra* note 5, at 5.

[231] *Digital Economy Report*, *supra* note 186, at 149.

[232] Yakovleva & Irion, *supra* note 92, at 202.

[233] *Id.* at 202–04.

[234] *See supra* Part II.B.

C. Philippine Data Legislation and Regulations

The primary legislation governing data in the Philippines is Republic Act No. 10173 or the Data Privacy Act of 2012 ("DPA"). The DPA was enacted to push the country's policy for data privacy and protection and "(i) to protect the fundamental right of privacy of data subjects, and (ii) to ensure the free flow of information necessary to promote innovation and growth."[235] Among others, the DPA created the National Privacy Commission to, among others, "monitor and ensure compliance of the country with international standards set for data protection."[236]

The DPA protects all types of "personal information," which is defined as "any information whether recorded in a material form or not, from which the identity of an individual is apparent or can be reasonably and directly ascertained by the entity holding the information or when put together with other information would directly and certainly identify an individual."[237] Its provisions apply to all entities engaged in the processing of personal information within the Philippines, as well as those who are involved in processing personal information who, while outside the country, either use equipment in the Philippines or maintain offices therein.[238]

However, the applicability of the DPA is also subject to certain exceptions.[239] For instance, the DPA will not apply to personal information regarding the position or function of an individual who is (or was) working under a government institution or any personal information relating to the contract or terms of service of that individual.[240] The DPA also does not apply to personal information used for "journalistic, artistic, literary or research purposes" or information necessary for public authorities or financial institutions to carry out their functions or comply with their legal mandates.[241]

In general, the DPA imposes restrictions on the processing of personal information, requiring processors to meet the principles of transparency, legitimate purpose, and proportionality.[242] Moreover, the DPA also provides for obligations pertaining to the security of personal

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[235] Aiken Lariza Serzo, *Cross-border Data Regulation for Digital Platforms: Data Privacy and Security*, at 7, PHIL. INST. FOR DEV. STUDIES (Dec. 2020), *available at* https://pidswebs.pids.gov.ph/CDN/PUBLICATIONS/pidsdps2047.pdf.

[236] Rep. Act No. 10173 (2012), § 7.

[237] § 3(g).

[238] § 4.

[239] § 4.

[240] §§ 4(a)–(b).

[241] §§ 4(d)–(f)

[242] §§ 11–12.

information, such as requiring personal information controllers to implement measures for protecting personal information and preventing unlawful access thereto.[243]

Notably, the DPA does not contain any explicit provisions on cross-border data flows or any requirement for data localization. In fact, it even contemplates the enforcement of data privacy protection extraterritorially.[244] However, while no specific provision exists in the DPA, certain provisions may imply a restriction on data transfers. Section 21 of the DPA, which contains the principle of accountability, provides:

> SEC. 21. Principle of Accountability. – Each personal information controller is responsible for personal information under its control or custody, *including information that have been transferred to a third party for processing, whether domestically or internationally, subject to cross-border arrangement and cooperation.*
>
> (a) The personal information controller is accountable for complying with the requirements of this Act and *shall use contractual or other reasonable means to provide a comparable level of protection while the information are being processed by a third party.*
>
> (b) The personal information controller shall designate an individual or individuals who are accountable for the organization's compliance with this Act. The identity of the individual(s) so designated shall be made known to any data subject upon request.[245]

Under this provision, personal information controllers are required to ensure that "a comparable level of protection" exists when they transfer data to a third party, including cross-border transfers. The absence of a "comparable level of protection"—for example, the lack of standards for the lawful processing of personal information—may lead to a violation of the provisions of the DPA on the requirements for lawful processing. Any violation would then render the Philippine personal information controller liable under this principle.

This principle, therefore, implies that the country wherein the recipient of such data transfer is located must have data protection safeguards and principles that are sufficient to constitute a "comparable level of

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[243] §§ 20, 22–23.
[244] Serzo, *supra* note 235, at 12.
[245] Rep. Act No. 10173 (2012), § 21. (Emphasis supplied.)

protection."[246] In effect, this constitutes a "flow conditional on safeguards" under the categories defined by Casalini and González.[247]

However, while the DPA itself does not explicitly prohibit or impose restrictions on cross-border transfers or require localization, other regulations may impose such requirements. For example, government data is processed pursuant to the Cloud First Policy of the Department of Information and Communications Technology through Department Circular No. 2017-002, as amended in 2020 by Department Circular No. 010, series of 2020.[248] The policy requires government data to be stored locally or in servers under Philippine control or jurisdiction if the government data is classified as "above-sensitive government data" or "highly-sensitive government data."[249] "Above-sensitive government data" pertains to data classified as "confidential," which may include plans for government infrastructures, intelligence reports, and certain personnel records.[250] On the other hand, "highly-sensitive government data" includes political documents, new governmental schemes, and documents pertaining to national security.[251]

Financial data is also subject to a different scheme of regulation. The Bangko Sentral ng Pilipinas (BSP) prohibits the outsourcing of some data for banks and other BSP-supervised financial institutions.[252] For example, the BSP prohibits the outsourcing of "inherent banking functions"[253] and restricts offshore outsourcing to countries that uphold confidentiality principles.[254] Moreover, it requires the entity to allow the BSP examiners access to the data transferred to the foreign entity.[255]

Hence, despite the lack of explicit provisions on regulating data flows and imposing data localization requirements, the Philippines impliedly provides for some restrictions through the DPA and other sector-specific regulations. These regulations, which may be seen as creating barriers to trade,

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[246] *See* Serzo, *supra* note 235, at 11; *Enabling Cross-Border Flow: ASEAN and Beyond*, at 19, UNITED NATIONS DEVELOPMENT PROGRAMME (2021), *available at* https://www.undp.org/sites/g/files/zskgke326/files/2021-10/enabling-cross-border-data-flow-asean-and-beyond-report.pdf.

[247] Casalini & González, *supra* note 183, at 17–18.

[248] Department of Info. & Comm. Tech'y (DICT) Circ. No. 2017-002 (2017), *as amended by* Circ. No. 010, s. 2020.

[249] § 12.2.

[250] DICT Circ. No. 2017-002 (2017), *as amended by* Circ. No. 010, s. 2020, ann. B.

[251] *Id.*

[252] Serzo, *supra* note 235, at 12.

[253] BSP Circ. No. 899 (2016).

[254] *Id.*

[255] *Id.*

would then need to be assessed in light of the FTAs and the WTO Agreements to which the Philippines is a party.

VI. PHILIPPINE DATA REGULATION VIS- À -VIS INTERNATIONAL TRADE AGREEMENTS

The analysis of whether Philippine data regulation laws are in conformity with international trade agreements requires the establishment of certain premises. First, regardless of whether data or personal information is the subject of the transaction, there may still be a finding of trade-restrictive effects if there are prohibitions or restrictions on cross-border flows or provisions for data localization. As discussed, cross-border data flows may be included in the delivery of goods or services even if the data are not traded.[256] Second, it is established that there is no singular approach to measuring the economic implications or contributions of cross-border data flows.[257] Hence, an analysis of conformity with the trade agreements will assume that there are trade restrictive effects because of these regulations. Third, as discussed, there is a problem with the classification of cross-border data flows under the GATS with regard to the mode of supply and the service sectors affected.[258] Thus, this analysis will not attempt to dwell on the issue of classification or commitments pertaining to specific sectors; it will only discuss the obligations in a general manner. Lastly, the obligations under the WTO Agreements, the CPTPP, and the RCEP—while somewhat similar—are all different. Conformity with the obligations under one agreement does not necessarily mean conformity with the other agreements.

A. Pertinent Obligations under International Trade Agreements

1. Most Favored Nation Treatment Obligation

The MFN rule under the GATS requires a country to "accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country."[259] Both the RCEP and the CPTPP also incorporate the MFN rule,[260] showing the essential character of this rule

[256] *See supra* Part V.A.
[257] Yakovleva & Irion, *supra* note 92, at 205–06.
[258] *See supra* Part V.A.
[259] GATS, art. II:1.
[260] RCEP, art. 8.5(1); CPTPP, art. 10.4.

under international trade law. A violation of this rule requires the presence of two elements: first, like services and service suppliers, and second, treatment less favorable being accorded by the measure of the State involved.[261] Moreover, the rule covers both *de jure* and *de facto* discrimination; hence, even if a measure does not, on its face, discriminate between different countries, it is nevertheless prohibited if the effect of the measure's application constitutes favorable treatment.[262]

The principle of accountability under Section 21 of the DPA requires personal information controllers to ensure that the rights provided by the DPA are observed by third-party transferees. As discussed, this implies that the country in which a foreign entity transferee is located must have laws or obligations similar to or equal to that of DPA.[263] Absent any such measure, the transfer is not necessarily prohibited, but would open the personal information controller to liability. According to the UNCTAD, only about 137 out of 194 countries have data privacy laws.[264] Hence, any cross-border data transfer to the countries without data privacy legislation would go against the principle of accountability and open the personal information controller to possible liability. As such, this may be seen as a form of *de facto* favored treatment which violates MFN obligations. Similar adequacy mechanisms under other data privacy instruments, particularly that under the GDPR, have also been questioned with regard to their compliance with MFN obligations.[265]

However, it must also be noted that Section 21 of the DPA allows personal information controllers to establish such safeguards through contractual stipulation.[266] Hence, a possible interpretation of this obligation is that cross-border data transfers are still allowed to countries without data privacy legislation if the contract or agreement between the parties

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[261] *See* Appellate Body Report, *Argentina—Financial Services*, WTO Doc. WT/DS453/AB/R (adopted Apr. 14, 2016).

[262] *Id.* at ¶ 6.105, *citing* Appellate Body Report, *EC—Bananas III*, ¶ 233, WTO Doc. WT/DS27/AB/R (adopted Sept. 25, 1997).

[263] *See supra* Part V.C.

[264] *Data Privacy and Protection Worldwide*, UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, Dec. 14, 2021, *at* https://unctad.org/page/data-protection-and-privacy-legislation-worldwide.

[265] *See* Yakovleva & Irion, *supra* note 92, at 218; Mitchell & Hepburn, *supra* note 98, at 199; Federico Velli, *The Issue of Data Protection in EU Trade Commitments: Cross-border Data Transfers in GATS and Bilateral Free Trade Agreements*, 4 EUR. PAPERS 881, 884–85 (2019).

[266] Rep. Act No. 10173 (2012), § 21. "(a) The personal information controller is accountable for complying with the requirements of this Act and shall use *contractual or other reasonable means* to provide a comparable level of protection while the information are being processed by a third party." (Emphasis supplied.)

incorporates the provisions under the DPA regarding the protection of data. However, it is unclear whether this interpretation would negate the element that the DPA accords less favorable treatment to other countries.

2. Digital Protectionism

In general, the term "digital protectionism" refers to "a wide range of barriers both to e-commerce and to cross-border data flows."[267] In particular, this would include a prohibition or restriction on cross-border data flows and requirements for data localization. As discussed, both the RCEP and the CPTPP contain obligations to enable cross-border data flow and prohibit data localization requirements.[268]

Under the DPA, there is no explicit prohibition on cross-border data flows. The principle of accountability may restrict the parties to data transfers, but it does not explicitly prohibit such flows. Similarly, the DPA does not mandate data localization. Hence, there is no possible violation of these requirements under the CPTPP. Indeed, the RCEP and CPTPP both recognize that cross-border data flows must still meet the principles of data privacy and obligate states to implement data privacy regulations.[269] Hence, the DPA can be seen as a valid exercise of the power granted under the RCEP and CPTPP.

However, some sector-specific regulations may be in conflict. For example, the DICT policy and the BSP regulations, as discussed,[270] prohibit cross-border data transfers for certain types of data, such as highly sensitive government data and data relating to inherent banking functions. Whether these restrictions violate the RCEP and CPTPP would depend on the applicability of the exceptions under these instruments.

3. Compliance Costs

Concerns have been raised as to the increase in compliance costs and risk due to the DPA, which may disincentivize digital platforms from entering the Philippine market.[271] The increase in compliance costs as a result of data privacy measures may be seen as a possible violation of the obligation under

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[267] Aaronson, *supra* note 8, at 3.

[268] *See supra* Part IV.

[269] RCEP, art. 12.8; CPTPP, art. 14.8.

[270] *See supra* Part. V.C.

[271] Serzo*, supra* note 235, at 20. For discussions on increased compliance costs due to other data privacy measures, *see* Meltzer, *supra* note 182, at 95; Mitchell & Hepburn, *supra* note 98, at 199–200; Yakovleva & Irion, *supra* note 92, at 206.

Article VI of the GATS to ensure that requirements and standards must not be "more burdensome than necessary to ensure the quality of service."[272] It has been posited that measures relating to the processing and transfer of data, such as the requirement to obtain consent, "may be complicated when information involving a range of actors is relevant to a particular application or device."[273] In this instance, the requirements for processing personal information under the DPA and the requirement of consent for the transfer of data may be considered as being "more burdensome than necessary."

However, there have also been arguments against considering compliance costs as trade restrictive. Yakovleva and Irion argue:

> Compliance costs cannot be in themselves an argument against regulation imposing them, as long as they serve an important public policy interest, such as data privacy. On the contrary, these compliance costs could spur innovation by prompting the development and wider use of technologies based on anonymization and differential privacy algorithms, so that less personal data are involved in international transfers.[274]

In any event, the requirement under Article VI of the GATS is that the measure must not be "more burdensome than necessary to ensure the quality of the service." This implies that some restriction or burden is reasonable as long as it is needed. It is submitted that the requirement of consent and the limitations under the DPA are not more burdensome than necessary to ensure the proper delivery of services that may require personal information. The requirement of consent is not unduly burdensome, as it may be complied with immediately before the personal information of the individual concerned is obtained. Obtaining consent through this manner would not require increased compliance costs on the part of the business involved, as they would not be required in any way to modify their services. For example, such consent may be obtained through the Terms and Conditions or Privacy Policy of the service being offered.

B. Exceptions under the GATS, CPTPP, and RCEP

Assuming that the DPA or other sector-specific regulations are not in conformity with the obligations under international trade agreements, this does not necessarily mean that there is a violation. The GATS, CPTPP, and

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[272] GATS, art. VI:4.

[273] Mitchell & Hepburn, *supra* note 98, at 200.

[274] Yakovleva & Irion, *supra* note 92, at 206–07.

RCEP all provide for exceptions or justifications for non-compliance with the obligations in the instruments. Meeting the requirements under these exceptions would justify the measures' non-compliance with the State's trade obligations.

1. Exceptions under the GATS

Article XIV of the GATS provides for the exceptions that members may avail of in case their measures are found to be inconsistent with their commitments. However, for the exceptions under Article XIV of the GATS to apply, certain elements must be present. First, there must be compliance with the *chapeau* or introductory paragraph of Article XIV. This requires that the measure is not a means of arbitrary or unjustifiable discrimination between countries and that the measure does not constitute a disguised restriction on trade in services. Once this test is met, then the specific exceptions under Article XIV may be scrutinized. In analyzing the *chapeau* of Article XX of the GATT, which the WTO has previously held to be substantially similar to that under Article XIV of the GATS,[275] WTO tribunals have held that these two elements are substantially similar and may be analyzed as a whole.[276]

Of relevant note is Article XIV(c)(ii), which contains an exception for measures necessary to protect the "privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts[.]"[277] For this exception to apply, the State must show that the measures are designed to secure compliance with laws and regulations under the country, that such laws and regulations are not themselves inconsistent with the GATS, and lastly, that the measures are necessary to secure compliance with the law or regulation concerned.[278]

In a previous case, the WTO Appellate Body ruled that the provisions that are contested to be inconsistent with the GATS may be found in the same law or regulation implemented or that is found to be inconsistent.[279] Moreover, the Appellate Body also held that there is a presumption of

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[275] Panel Report, *Argentina—Measures Relating to Trade in Goods and Services*, ¶ 7.745, WTO Doc. WT/DS453/R (adopted May 19, 2016).

[276] Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, at 25, WTO Doc. WT/DS2/AB/R (adopted May 20, 1996).

[277] GATS, art. XIV(c)(ii).

[278] Appellate Body Report, *Argentina—Measures Relating to Trade in Goods and Services*, ¶ 6.202, WTO Doc. WT/DS453/AB/R (adopted May 19, 2016).

[279] *Id.*

consistency with WTO agreements.[280] Hence, applying these standards to the principle of accountability under the DPA, the "law or regulation" that it complies with is the DPA itself.

Another possibly applicable exception is Article XIV(a), which exempts measures necessary to protect public morals or maintain public order. The WTO has interpreted "public order" to refer to the "preservation of the fundamental interests of a society, as reflected in public policy and law."[281] On the other hand, "public morals" are those "standards of right and wrong maintained by or on behalf of a community or nation."[282] The WTO Panels and Appellate Body usually give a margin of appreciation to the States concerned to identify the public morals or public order being forwarded by their measures. In the case of data privacy legislation, there is certainly a matter of public order or public morals being forwarded. The policy of protecting the privacy of individuals and confidentiality of personal information is in line with public morals.

In both exceptions, the State must show that the measure meets the test of necessity. Under WTO jurisprudence, the test of necessity involves a weighing and balancing of several factors: the relative importance of the interest forwarded, the measure's contribution to such objective, the restrictive impact of the measure, and whether less trade-restrictive measures are reasonably available.[283] While the first factor may easily be met, there are difficulties with ascertaining the weight given to the three other factors.

In the case of the DPA and the principle of accountability, it must be shown how the principle of accountability directly contributes to the public policy objective of the DPA. It may also be argued that the principle of accountability is the least trade-restrictive measure available, since it does not necessarily prohibit transfers to foreign countries but merely holds liable the personal information controller for any violation. For example, this is less trade-restrictive than an outright prohibition or a country-by-country adequacy approach, similar to that under the GDPR. In a previous study analyzing the possible compliance of the GDPR with the GATS, it has been stated that a less trade-restrictive measure to the GDPR would be the

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[280] *Id.*

[281] Appellate Body Report, *United States—Measures Affecting the Cross- Border Supply of Gambling and Betting Services* [hereinafter "US—Measures Affecting Supply of Gambling and Betting Services"], ¶ 296, WTO Doc. WT/DS285/AB/R (adopted Apr. 20, 2005).

[282] *Id.*

[283] *Id.* at ¶¶ 306–08.

adoption of the principle of accountability,[284] similar to that under the DPA. Moreover, given the lack of prohibition on the part of the principle of accountability, and the possibility of contractual stipulations, any trade-restrictive effect is minimal compared to its contribution to the public policy objectives of the DPA.

2. Exceptions under the CPTPP

The CPTPP provides for exceptions under the obligations to allow the free flow of data and prohibit data localization. In both instances, the State invoking the measure must show that it is "applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade" and that the measure "does not impose restrictions […] greater than are required to achieve the objective."[285] Moreover, for the measure to be considered an exception, it must be in pursuit of a "legitimate public policy objective."[286]

As discussed above, the principle of accountability under the DPA may meet the requirements for the application of this exception. The elements under the CPTPP are similar to that of an exception under Article XIV of the GATS. In both cases, the protection of privacy and personal information is a legitimate public policy objective and is considered in pursuit of public morals and public order. The same necessity analysis under the GATS would also be applicable, and this would likely lead to the conclusion that the principle of accountability does not impose restrictions greater than that required to protect privacy and personal information.

However, a different analysis is needed for sector-specific regulations that restrict data flows and require local storage of data, particularly highly sensitive government data, and data pertaining to inherent banking functions. These regulations easily pass the first prong: any restriction needs to fulfill a legitimate public policy objective. Evidently, national security is a public policy objective that every nation must strive to protect. Similarly, the integrity and security of financial institutions is a legitimate public policy objective. Compromising the stability of financial institutions would result in detrimental effects to State's economy and public order. Applying the

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[284] Svetlana Yakovleva & Kristina Irion, *The Best of Both Worlds? Free Trade in Services and EU Law on Privacy and Data Protection*, 2 EUR. DATA PROTECTION L. REV. 191, 206–07 (2016).

[285] CPTPP, arts. 14.11, 14.13.

[286] *Id.*

definition of "public order" under WTO jurisprudence,[287] these objectives be in pursuit of the fundamental values of society and may thus be considered as in pursuit of a "legitimate public policy objective."

These regulations may also fulfill the second requisite, which is that they do not constitute arbitrary or unjustifiable discrimination or a disguised restriction on trade. Preliminarily, it is hard to conceptualize highly sensitive government data being involved in commercial trade. At this point alone, it cannot be said that prohibiting the transfer of such data would constitute a barrier to trade or a disguised restriction on trade. In any event, the requirements of the DICT apply uniformly to every other country; there is no arbitrary or unjust discrimination because no other country is favored over another. Similarly, the prohibition on outsourcing of inherent banking functions also follows the same principles. No discrimination or disguised restriction on trade exists because the prohibition applies uniformly to all other States. Moreover, the same prohibition also applies to domestic controllers, as the processing of data related to banking functions cannot be outsourced whatsoever. This means that both domestic and foreign parties cannot be transacted with, negating any discrimination or disguised restriction on trade.

However, there may be questions as to whether the last element is met. Under the CPTPP, the restriction must not be greater than that required by the objective, which is substantially similar to the standard fixed for the WTO Agreements. There is presently no case of a country invoking the exceptions under the CPTPP, and hence, it is unknown whether the interpretation of this standard would follow the necessity analysis under the GATT and the GATS. On the assumption that the same necessity analysis is followed, there may be difficulties with demonstrating that these measures are the least trade-restrictive means available. For example, data localization has been shown to possibly make data more vulnerable as they increase susceptibility to cyberattacks.[288] It may also be raised that the principle of accountability, such as that contained under the DPA, is less trade-restrictive than an outright prohibition on transfers and a requirement for data localization. Thus, these matters may be considered by a possible tribunal in ruling whether the exceptions under the CPTPP may apply.

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[287] US—Measures Affecting Supply of Gambling and Betting Services, *supra* note 281.

[288] *See* Mitchell & Hepburn, *supra* note 98, at 203–04.

3. Exceptions under the RCEP

The RCEP has two exceptions for compliance with its obligations. The first refers to measures deemed necessary to achieve a "legitimate public policy objective" as long as "provided that the measure is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade."[289] The language in this exception is similar to that of the exception under the CPTPP. However, there are stark differences between the two[290] that may change the appreciation of whether the measures are justified or not. One primary distinction is that, under the RCEP, it is the State party that will determine whether the measure is necessary to achieve the legitimate public policy objective. Footnotes 12 and 14 of Chapter 12 of the RCEP both provide that "the necessity behind the implementation of such legitimate public policy shall be decided by the implementing Party."[291] Hence, the necessity analysis under the GATS (and possibly the CPTPP) does not apply because the RCEP already presumes that the measure is necessary. As discussed, the Philippine regulations do not constitute arbitrary or unjustifiable discrimination or a disguised restriction on trade. It can thus be concluded that the first exception under the RCEP will likely be applicable.

Moreover, the second exception under the RCEP may also apply. This exempts any measure from complying with the obligations if the measure is for the protection of essential security interests. Notably, the RCEP explicitly states that "[s]uch measures shall not be disputed by other Parties." This implies that a unilateral declaration that the measure is for essential security interests, such as that of protecting government data or ensuring the stability of the banking industry, is already sufficient for this exception to apply. It bears noting that the RCEP does not provide a definition for "essential security interests," which gives the Parties leeway in determining what they consider as an essential security interest for the application of this exception. Hence, under this exception, the measures would be justified if the Philippines were to consider them as protecting essential security interests.

VII. CONCLUSION

The last decade alone has seen a rapid increase in the pace of technological development. While development, progress, and growth are

[289] RCEP, arts. 12.14(3)(a) & 12.15(3)(a).
[290] *See supra* Part IV.
[291] RCEP, arts. 12.14(3)(a) n.12 & 12.15(3)(a) n.14.

certainly welcome, these bring about uncertainties that may affect established institutions and principles. One example is the rise of digital trade and data transfers, which could affect—and be affected by—international trade agreements. However, because technology is continuously in flux, it is impossible to accurately assess the impact of cross-border data flows on trade without knowing the future developments in technology and because of the "pre-internet" trade agreements in place. This Article has shown how, historically, the development of "new" concepts (i.e., intellectual property rights) eventually became linked with international trade and became regulated through trade agreements. The recent rise of FTAs including provisions on cross-border data flows shows a similar trend, being promulgated in light of the insufficiency of the current WTO agreements.

However, other countries have expressed their apprehensions and objections on linking international trade and cross-border data flows, arguing that data privacy and security may be compromised. Consequently, a "one size fits all" international trade agreement may not be viable, especially considering the circumstances of different countries and their levels of development. But as history has shown, the interests of developed countries and their corporations, which can utilize their strong position in the market and exert pressure on developing countries, may lead to the crafting of an international trade agreement governing digital trade that would compromise the interests of the minority. Hence, developing countries should also form a unified position to effectively combat unilateral sanctions imposed by developed countries and assert their positions. More importantly, policy coherence regarding data flows and data localization is recommended to strengthen their positions and facilitate trade between countries. Similar policies on data will reduce transaction and compliance costs for entities that will enter the market of different countries.

The interests of data privacy and security on the one hand, and international trade on the other hand, may be balanced through carefully crafted international agreements which consider the different circumstances of countries. The rise of the new FTAs shows that countries can negotiate their positions and come up with policies that may be beneficial for them. The differences between these FTAs—such as the more relaxed standard for exceptions under the RCEP compared to the CPTPP—show the variance among the countries' positions and allow for more leeway for them to promote their interests. By including more specific provisions in future FTAs, such agreements may pave the way for developing policies and agreements that would reflect a balance between international trade liberalization and privacy and security. But as of the present, the current and existing

international agreements may not be enough to sufficiently regulate cross-border flows.

This Article has shown that a possible challenge against Philippine data regulation may result in a finding that these are compliant with its international obligations. However, any legal conclusion arising from this analysis may not be entirely accurate because of the inherent flaws in applying the standards under the WTO agreements, the lack of standards for analyzing the obligations under FTAs, and the lack of scientific evidence establishing the link between data flows and trade outcomes. As such, there is a need to qualitatively and/or quantitatively study the economic outcomes and effects of cross-border data flows to both domestic and international trade.

While many have argued that a link between trade and data flows exists, the exact relationship between these two is still unclear. The notion of cross-border data flow, although becoming increasingly pervasive, is still relatively young. Bodies such as the WTO must adapt to this new development, considering different national interests, in order to better facilitate and regulate international trade.

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