REGULATION OF CROSS-BORDER DATA FLOW UNDER TRADE AGREEMENTS*

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1 It is widely acknowledged by researchers and policymakers that data is a major component of value in traded goods and services. In 2016, the McKinsey Global Institute noted that the value of data flows had overtaken the value of global trade in physical goods.[1] Governments have encouraged the flow of information across borders in the interest of commerce, education, technology and scientific progress. On the other hand, governmental authorities have sought to limit the free flow of information in pursuit of other policy objectives.

I. Evolution of data localisation laws

2 The origins of data localisation can be traced to the dawn of international telegraphy in the mid-19th century, where governments sought to reserve the right to stop the transmission of private telegrams which were deemed to be unsuitable on the grounds of security, public good or morality.[2]

3 The concept of cross-border data flows reached a level of increased global consciousness in the 1970s. This was a period marked by heated global debates about the influence of transnational corporations and the

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* Any views expressed in this article are the author's personal views only and should not be taken to represent the views of his employer. All errors remain the author's own.

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1 James Manyika *et al*, "Digital Globalization: The New Era of Global Flows" (2016) *McKinsey Global Institute* at p 1.

2 William J Drake, Background Paper for the workshop on Data Localization and Barriers to Transborder Data Flows (14-15 September 2016, World Economic Forum) at p 4.

comparative technological prowess of the US.[3] Amidst sustained campaigns by global businesses and key governments to place fewer restrictions on corporate data flows, the Organisation for Economic Co-operation and Development ("OECD") adopted its Declaration on Transborder Data Flows.[4] Notably, this document provided an avenue for countries to reach a common consensus on data flow issues.

4 These developments eventually gave rise to a trans-Atlantic axis of tension, with European governments favouring omnibus laws and the establishment of data protection bodies over the US's piecemeal and more permissive approach.[5] This chasm was compounded by the Snowden leaks of 2013, which revealed the extent of US surveillance activities targeting American and foreign citizens. Following the leaks, the governments of several countries, such as Russia and Germany, proposed to introduce requirements that their citizens' online data be hosted locally within the country.[6]

5 Although the motivations for data localisation may be attributable in part to reasons such as individual privacy and national security, some governments have been criticised for using it as a tool to increase local investment and employment opportunities.[7] Indonesia, for example, introduced wide-reaching data localisation measures in 2012 as part of the government's strategy to correct its trade deficit and improve infrastructure. Further, some states equate national sovereignty with data localisation as evidenced by aspects of China's push for "cyber-sovereignty", Russia's

3 William J Drake, Background Paper for the workshop on Data Localization and Barriers to Transborder Data Flows (14-15 September 2016, World Economic Forum) at p 5.

4 William J Drake, Background Paper for the workshop on Data Localization and Barriers to Transborder Data Flows (14-15 September 2016, World Economic Forum) at p 8.

5 William J Drake, Background Paper for the workshop on Data Localization and Barriers to Transborder Data Flows (14-15 September 2016, World Economic Forum) at p 6.

6 Bret Cohen, Britanie Hall & Charlie Wood, "Data Localization Laws and their Impact on Privacy, Data Security and the Global Economy" (2017) 32(1) *Antitrust* 107 at 110.

7 Susannah Hodson, "Applying WTO and FTA Disciplines to Data Localization Measures" (2018) *World Trade Review* 1 at 3.

approach to its "national Internet segment", and the recently announced "Iranian Internet".[8]

II. Innovative precedent set by Comprehensive and Progressive Agreement for Trans-Pacific Partnership to address data localisation laws

6 Despite the importance of global flows of data, there is currently a lack of widely agreed international regulatory standards. In the absence of meaningful progress at the multilateral level, free trade agreements ("FTAs") have developed new models to address contemporary digital trade barriers. In particular, the 2018 Comprehensive and Progressive Agreement for Trans-Pacific Partnership ("CPTPP") has set an innovative precedent for addressing data localisation matters.

7 The CPTPP, a trade agreement between Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam, may be said to represent the frontier of FTA disciplines on data transfers to date.[9]

8 It is worth noting that CPTPP data rules have already been incorporated into, and influenced, other FTA negotiations which have been launched since the original framework was developed.[10] One example is the recent review of the Singapore–Australia FTA.[11]

9 The CPTPP introduced binding provisions restricting data localisation and imposing requirements on cross-border transfer of data in the Electronic Commerce chapter (Chapter 14) of the CPTPP.[12] The

8 William J Drake, Background Paper for the workshop on Data Localization and Barriers to Transborder Data Flows (14-15 September 2016, World Economic Forum) at p 8.

9 Susannah Hodson, "Applying WTO and FTA Disciplines to Data Localization Measures" (2018) *World Trade Review* 1 at 19.

10 Susannah Hodson, "Applying WTO and FTA Disciplines to Data Localization Measures" (2018) *World Trade Review* 1 at 19.

11 Susannah Hodson, "Applying WTO and FTA Disciplines to Data Localization Measures" (2018) *World Trade Review* 1 at 19.

12 Andrew D Mitchell & Jarrod Hepburn, "Don't Fence Me in: Reforming Trade and Investment Law to Better Facilitate Cross-Border Data Transfer" (2017) 19 Yale J L & Tech 182 at 207.

provisions illustrate the parties' underlying commitment to facilitating an open Internet and the free flow of e-commerce across borders.[13] This is well reflected in Art 14.2.1: "The Parties recognise the economic growth and opportunities provided by electronic commerce and the importance of frameworks that promote consumer confidence in electronic commerce and of avoiding unnecessary barriers to its use and development."[14]

10 Articles 14.11 and 14.13 of the CPTPP Electronic Commerce chapter set out a number of specific rules relating to the extent to which businesses may transfer and store data across national borders.[15]

11 Article 14.11, titled "Cross-Border Transfer of Information by Electronic Means", requires CPTPP parties to "allow the cross-border transfer of information by electronic means, including personal information, when this activity is for the conduct of the business".[16] In effect, this provision facilitates cross-border data flows by enabling service suppliers to transfer business data between the territories of CPTPP parties.[17]

12 Article 14.13, which focuses on the location where data is stored, prohibits a CPTPP party from requiring a business to "use or locate computing facilities in that Party's territory" as a condition for conducting business there.[18] This restricts data localisation measures requiring computing facilities to be stored within a party's territory.[19]

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13 Andrew D Mitchell & Jarrod Hepburn, "Don't Fence Me in: Reforming Trade and Investment Law to Better Facilitate Cross-Border Data Transfer" (2017) 19 Yale J L & Tech 182 at 207.

14 Andrew D Mitchell & Jarrod Hepburn, "Don't Fence Me In: Reforming Trade and Investment Law to Better Facilitate Cross-Border Data Transfer" (2017) 19 Yale J L & Tech 182 at 207–208.

15 Susannah Hodson, "Applying WTO and FTA Disciplines to Data Localization Measures" (2018) *World Trade Review* 1 at 21.

16 Susannah Hodson, "Applying WTO and FTA Disciplines to Data Localization Measures" (2018) *World Trade Review* 1 at 21.

17 Susannah Hodson, "Applying WTO and FTA Disciplines to Data Localization Measures" (2018) *World Trade Review* 1 at 21.

18 Susannah Hodson, "Applying WTO and FTA Disciplines to Data Localization Measures" (2018) *World Trade Review* 1 at 21.

19 Susannah Hodson, "Applying WTO and FTA Disciplines to Data Localization Measures" (2018) *World Trade Review* 1 at 21.

13 Although the CPTPP has been lauded for its broad and clear support for cross-border data flow, the agreement itself also contains significant exclusions which allow for deviation from the Chapter 14 prohibitions.[20] Should a data localisation measure be challenged under the CPTPP dispute settlement provisions, it appears the exception provisions would likely be pivotal in assessing whether the measure is permitted.

14 One such exclusion lies in para 3 of Art 14.2, which expressly carves out government procurement and government information from the scope of the CPTPP Electronic Commerce chapter.[21] Crucially, it clarifies that the provisions do not prevent a government from requiring any official information, such as critical infrastructure plans, classified policy advice, or social security information, to be stored on servers within a party's territory.[22] Furthermore, the definition of "covered persons" in Art 14.1 of the Electronic Commerce chapter provides for financial institutions an additional exclusion from the Chapter 14 prohibitions.[23]

15 Perhaps the widest exclusion lies in para 3 of Arts 14.11 and 14.13, which clarifies that the CPTPP data rules do not prevent a party from adopting or maintaining inconsistent measures in pursuit of a "legitimate public policy objective". This has the potential to significantly limit the Chapter 14 prohibitions and, by extension, the parties' commitment to facilitating the free flow of e-commerce across borders. Significantly, the article-specific exception replaces the necessity test in the General Agreement on Trade in Services ("GATS") Art XIV with an alternative qualification that a measure cannot impose restrictions "greater than are required" to achieve the policy objective.[24] Given that negotiators opted to use the term "required" rather than "necessary", a tribunal may conclude that CPTPP parties did not intend to apply a necessity standard here, which

20 Susannah Hodson, "Applying WTO and FTA Disciplines to Data Localization Measures" (2018) *World Trade Review* 1 at 22-23.

21 Susannah Hodson, "Applying WTO and FTA Disciplines to Data Localization Measures" (2018) *World Trade Review* 1 at 22.

22 Susannah Hodson, "Applying WTO and FTA Disciplines to Data Localization Measures" (2018) *World Trade Review* 1 at 22.

23 Susannah Hodson, "Applying WTO and FTA Disciplines to Data Localization Measures" (2018) *World Trade Review* 1 at 23.

24 Susannah Hodson, "Applying WTO and FTA Disciplines to Data Localization Measures" (2018) *World Trade Review* 1 at 25.

is a standard that was considered by the panel in *U.S.-Gambling*[25] to be relatively high.[26]

16 It is undeniable that the CPTPP provisions are welcome, providing a degree of greater clarity as to the obligations and principles in relation to data transfer than have previously existed under World Trade Organization ("WTO") rules or elsewhere.[27] However, the key restrictions remain subject to open-textured exclusions, just as in the WTO context.[28]

17 Ultimately, the CPTPP reflects the difficulty in making progress on these issues in a plurilateral setting, while implicitly highlighting areas that will need further work if trade law is to better support the digital economy.[29]

III. Uncertainty surrounding applicability of General Agreement on Trade in Services to data flows

18 GATS is a treaty of the WTO that extends the multilateral trading system to the service sector. It may be said to largely predate the pervasive nature of data transfers today. Parties are bound to the extent to which they accept the provisions within and the sectors the agreement applies to. Data localisation "measures relating to cross-border transfer of data are most likely to be examined under GATS, because digital data is usually

25 See World Trade Organization Dispute Settlement, "United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services" (DS285).

26 Susannah Hodson, "Applying WTO and FTA Disciplines to Data Localization Measures" (2018) *World Trade Review* 1 at 25.

27 Andrew D Mitchell & Jarrod Hepburn, "Don't Fence Me in: Reforming Trade and Investment Law to Better Facilitate Cross-Border Data Transfer" (2017) 19 Yale J L & Tech 182 at 214.

28 Andrew D Mitchell & Jarrod Hepburn, "Don't Fence Me in: Reforming Trade and Investment Law to Better Facilitate Cross-Border Data Transfer" (2017) 19 Yale J L & Tech 182 at 214.

29 Andrew D Mitchell & Jarrod Hepburn, "Don't Fence Me in: Reforming Trade and Investment Law to Better Facilitate Cross-Border Data Transfer" (2017) 19 Yale J L & Tech 182 at 214.

transferred across borders without requiring any transfer of physical commodities".[30]

19 GATS has primarily been applied to "measures affecting trade in services". GATS Art I:2 suggests that GATS applies to digital trade which may be categorised as "cross-border supply" of a service, commonly known as mode 1. Given that cross-border data flows fall under mode 1, it follows that digital services could be said to fall within the ambit of GATS.[31] This is of relevance as countries may find themselves restricted in their implementation of data localisation laws, if they are subject to market access and national treatment obligations due to digital services falling under prior services sectoral commitments.

20 It is important to note, however, that GATS does not unequivocally apply to digital services. There is significant ambiguity regarding which sector digital services may be classified under the Services Sectoral Classification List.[32]

21 There are several key sectors applicable to digital services involving cross-border data flows: *eg*, (a) "computer and related services",[33] (b) "telecommunications services",[34] and (c) "audiovisual services".[35] It is unclear which sector in particular is applicable to digital services. Most WTO members have taken at least partial commitments for the "computer and related services" and "telecommunications services" sectors in their

30 Andrew D Mitchell & Jarrod Hepburn, "Don't Fence Me in: Reforming Trade and Investment Law to Better Facilitate Cross-Border Data Transfer" (2017) 19 Yale J L & Tech 182 at 196.

31 Joshua D Blume, "Reading the Trade Tea Leaves: A Comparative Analysis of Potential United States WTO-GATS Claims against Privacy, Localization, and Cybersecurity Laws" (2018) *Georgetown Journal of International Law* 801 at 807.

32 Andrew D Mitchell & Neha Mishra, "Data at the Docks: Modernizing International Trade Law for the Digital Economy" (2018) 20 Vand J Ent & Tech L 1073 at 1089–1091.

33 Susannah Hodson, "Applying WTO and FTA Disciplines to Data Localization Measures" (2018) *World Trade Review* 1 at 11.

34 Susannah Hodson, "Applying WTO and FTA Disciplines to Data Localization Measures" (2018) *World Trade Review* 1 at 11.

35 Mira Burri, "The Governance of Data and Data Flows in Trade Agreements: The Pitfalls of Legal Adaptation" (2017) 51 UC Davis Law Review 65 at 85.

GATS schedules.[36] However, where the sector of "audiovisual services" is concerned, almost no WTO members have made commitments and thus the members remain relatively free to sustain discriminatory measures and adopt new ones.[37]

22 Should digital services be classified under the "computer and related services" or "telecommunications services" sector, WTO members who have made sectoral commitments in these sectors may be subject to market access and national treatment obligations, which would affect the scope and efficacy of data localisation laws.

23 GATS Art XVI: Market Access stipulates that the country must provide access to foreign supplies of a particular sector to its market if it lists a particular sector on its Schedule of Specific Commitments. Footnote 8 of the original document explains that a market-access commitment made in a member's Schedule of Specific Commitments constitutes that member's commitment to the open flow of related services.[38] Thus, data localisation laws could breach a member's mode 1 market-access commitment if they effectively prohibited the cross-border delivery of digital services.[39]

24 GATS Art XVII: National Treatment, on the other hand, requires countries to provide equal market access to foreign and domestic service providers so long as the member lists the service in its Schedule of Specific Commitments.[40] Jurisprudence[41] suggests that determining whether a data localisation measure accords less favourable treatment under Art XVII

36 Susannah Hodson, "Applying WTO and FTA Disciplines to Data Localization Measures" (2018) *World Trade Review* 1 at 11.

37 Mira Burri, "The Governance of Data and Data Flows in Trade Agreements: The Pitfalls of Legal Adaptation" (2017) 51 UC Davis Law Review 65 at 85–86.

38 Joshua D Blume, "Reading the Trade Tea Leaves: A Comparative Analysis of Potential United States WTO-GATS Claims Against Privacy, Localization, and Cybersecurity Laws" (2018) *Georgetown Journal of International Law* 801 at 809.

39 Susannah Hodson, "Applying WTO and FTA Disciplines to Data Localization Measures" (2018) *World Trade Review* 1 at 13.

40 Joshua D Blume, "Reading the Trade Tea Leaves: A Comparative Analysis of Potential United States WTO-GATS Claims Against Privacy, Localization, and Cybersecurity Laws" (2018) *Georgetown Journal of International Law* 801 at 809.

41 World Trade Organization Dispute Settlement: "China–Electronic Payment Services" (DS413) and "Korea–Various Measures on Beef" (DS161).

requires close analysis of the effect and trade impact of the measure.[42] A far-reaching data localisation measure which impedes international trade and is motivated by protectionist impulses is more likely to fall foul of the national treatment obligation than a narrower data localisation measure which targets a legitimate regulatory objective and has a more limited impact on trade.[43]

25 Nevertheless, GATS Art XIV: General Exceptions and Art XIV bis: Security Exceptions may apply.

26 Subparagraphs (a) and (c)(ii) of Art XIV are arguably the most relevant, for they relate to measures necessary to protect "public morals or to maintain public order" and the "privacy of individuals", respectively. It is not difficult to imagine how members may choose to invoke these exceptions to justify data localisation. Nevertheless, the ambit of Art XIV is qualified by a proportionality requirement that a measure must be "necessary" to fulfil the objective of protecting public morals. [44] Given that industry analysts have argued that data security is better achieved through data management and not the storage location of data, it is conceivable that a data localisation measure which does not of itself improve data security could potentially fall short of the necessity test in Art XIV.[45]

27 Further, Art XIV bis may be invoked to defend data localisation on national security grounds.[46] The exception is generally considered to be subjective and self-defining as endorsed by one of the first GATT panel reports, the Panel Report in US–Export Restrictions (Czechoslovakia), which stated that "every country must have the last resort on questions

42 Susannah Hodson, "Applying WTO and FTA Disciplines to Data Localization Measures" (2018) *World Trade Review* 1 at 14.

43 Susannah Hodson, "Applying WTO and FTA Disciplines to Data Localization Measures" (2018) *World Trade Review* 1 at 14.

44 Susannah Hodson, "Applying WTO and FTA Disciplines to Data Localization Measures" (2018) *World Trade Review* 1 at 16.

45 Susannah Hodson, "Applying WTO and FTA Disciplines to Data Localization Measures" (2018) *World Trade Review* 1 at 17.

46 Susannah Hodson, "Applying WTO and FTA Disciplines to Data Localization Measures" (2018) *World Trade Review* 1 at 17.

relating to its own security".[47] Nevertheless, members may exercise caution in invoking this exception for fear of establishing unhelpful jurisprudence on the scope of the security exception, or subjecting their national security interests to scrutiny.[48]

28 Fundamentally, the lack of specific provisions addressing data transfers means significant ambiguity prevails with regard to how the existing rules under GATS might be applied to data localisation measures in the event of a dispute.[49]

IV. EU and US divergent approaches to data flows

29 The difficulty in reaching a consistent international regulatory standard and the stalling of negotiations on a multilateral level have led to individual entities seeking to progress negotiations through FTAs.[50] This approach has led to fragmentation of the global consensus towards cross-border data flows. Although both the European Union ("EU") and the US have led worldwide efforts to encourage global information flows, they have adopted fundamentally different approaches to the issue.[51]

30 The EU places greater importance on privacy as a non-negotiable, fundamental human and consumer right under Art 8 of the EU Charter of Fundamental Rights which must be protected by governments.[52] European

47 World Trade Organization, "GATT, United States: Export Restrictions (Czechoslovakia)" (8 June 1949) (Report of the Panel, GATT Doc CP3/SR22 - II/28) at p 3.

48 Susannah Hodson, "Applying WTO and FTA Disciplines to Data Localization Measures" (2018) *World Trade Review* 1 at 18.

49 Susannah Hodson, "Applying WTO and FTA Disciplines to Data Localization Measures" (2018) *World Trade Review* 1 at 5.

50 John Selby, "Data Localization Laws: Trade Barriers or Legitimate Responses to Cybersecurity Risks, or Both?" (2017) 25(3) *International Journal of Law and Information Technology* 213 at 218.

51 Susan Aaronson, "Why Trade Agreements are Not Setting Information Free: The Lost History and Reinvigorated Debate over Cross-Border Data Flows, Human Rights and National Security", (2015) 14(4) *World Trade Review* 671 at 675.

52 EU provisions on *Cross-border data flows and protection of personal data and privacy* in the Digital Trade Title of EU trade agreements – explanatory note

(*continued on next page*)

citizens and policymakers support the prohibition of barriers to cross-border data flows to the extent that the EU may maintain its data protection and privacy rules. In the EU, the Snowden leaks triggered memories of communist-era state surveillance.[53] The EU has thus far tried to avoid offering any commitments regarding cross-border information flows or prohibition of localisation provisions in its FTAs.[54] The US, on the other hand, enjoys technological dominance[55] and favours a stronger prohibition on barriers to cross-border data flows in line with its ideals of freedom and liberty.[56] The US Congress, businesses, human rights groups, and many non-governmental organisations ("NGOs") generally support efforts to advance Internet freedom and facilitate the free flow of information.[57]

31 Both the EU and US have sought to promote their respective ideologies through negotiations with their trading partners.

32 The EU, for example, is particularly insistent on retaining regulations which promote privacy and personal data protections. The bilateral EU-Canada Comprehensive Economic and Trade Agreement, for example, includes language in its e-commerce section that "calls for respect of privacy laws, both for the private and public sectors, as well as privacy as a

(5th Round of Trade Negotiations between the European Union and Indonesia) (2018).

53 Susannah Hodson, "Applying WTO and FTA Disciplines to Data Localization Measures" (2018) *World Trade Review* 1 at 3.

54 The 2002 EU-Chile free trade agreement ("FTA") limited itself to soft cooperation pledges in the services chapter, and the EU-Korea FTA does not include language on the free flow of information in the e-commerce chapter.

55 John Selby, "Data Localization Laws: Trade Barriers or Legitimate Responses to Cybersecurity Risks, or Both?" (2017) 25(3) *International Journal of Law and Information Technology* 213 at 215.

56 Susan Aaronson, "Why Trade Agreements are Not Setting Information Free: The Lost History and Reinvigorated Debate over Cross-Border Data Flows, Human Rights and National Security", (2015) 14(4) *World Trade Review* 671 at 687.

57 Susan Aaronson, "Why Trade Agreements are Not Setting Information Free: The Lost History and Reinvigorated Debate over Cross-Border Data Flows, Human Rights and National Security", (2015) 14(4) *World Trade Review* 671 at 675.

fundamental right".[58] Nevertheless, the EU appears to be open to future commitments to cross-border information flows, as reflected, for example, by Art 8.81 of the EU-Japan Economic Partnership.[59]

33 In negotiating FTAs, the US typically proposes rules that would allow data, as a default, to flow freely across borders.[60] Notably, the separate US-led FTAs with Chile, Singapore, Peru, and Columbia state that signatories should avoid erecting new trade barriers to digital trade, and that neither party may include local presence requirements.[61] Significantly, the US was a participant in the first FTA to include a provision specifically addressing cross-border data flows. This US-Korea FTA contained a soft "best endeavour" style clause for the participating countries to refrain from imposing barriers to information flows.[62] It should be noted that although the US subsequently withdrew from the CPTPP, the binding and substantive provisions relating to data flows within the CPTPP were originally championed by the US.

34 Trade negotiations involving both parties have been plagued by conflict, in part due to their ideological differences with respect to data flows. In 2011, the EU and the US proposed joint language relating to provisions on the free flow of information as part of the negotiations for the

58 Joshua D Blume, "Reading the Trade Tea Leaves: A Comparative Analysis of Potential United States WTO-GATS Claims against Privacy, Localization, and Cybersecurity Laws" (2018) *Georgetown Journal of International Law* 801 at 836.

59 Article 8.81 of the EU-Japan Economic Partnership states that "The Parties shall reassess within three years of the date of entry into force of this Agreement the need for inclusion of provisions on the free flow of data into this Agreement".

60 Susan Aaronson, "Why Trade Agreements are Not Setting Information Free: The Lost History and Reinvigorated Debate over Cross-Border Data Flows, Human Rights and National Security", (2015) 14(4) *World Trade Review* 671 at 687–688.

61 Susan Aaronson, "Why Trade Agreements are Not Setting Information Free: The Lost History and Reinvigorated Debate over Cross-Border Data Flows, Human Rights and National Security", (2015) 14(4) *World Trade Review* 671 at 684.

62 Article 15.8 of the agreement says "the Parties shall endeavour to refrain from imposing or maintaining unnecessary barriers to electronic information flows across borders".

Trade in Services Agreement of the WTO.[63] However, as negotiations proceeded, the US disagreed with the EU on specifics: the US wanted an absolute right to transfer information while the EU wanted transfers to be subject to data protection and privacy rules.[64] In spite of strong pressure from the US, the EU has exhibited reluctance to change its position. The parties failed to reach an agreement on data flows, despite signals of the willingness of the US to tolerate the exclusion of audiovisual media services from the scope of the trade deal.[65]

35 Despite both parties' drive to encourage data flows in their own ways, the policies adopted by the US and the EU have arguably made it more challenging for countries to reach a global consensus on the scope of data localisation laws.

V. Other possible mechanisms for the regulation of cross-border data flows

36 Given the concerns with respect to closed intergovernmental processes when negotiating trade agreements, future regulations of cross-border data flows will likely see an increase in multi-stakeholder agreements seeking to promote Internet openness and influence related trade agreements.[66] These multi-stakeholder agreements often feature signatories from many different companies and coalitions that may have the capacity to influence their

63 Susan Aaronson, "Why Trade Agreements are Not Setting Information Free: The Lost History and Reinvigorated Debate over Cross-Border Data Flows, Human Rights and National Security", (2015) 14(4) *World Trade Review* 671 at 690.

64 Susan Aaronson, "Why Trade Agreements are Not Setting Information Free: The Lost History and Reinvigorated Debate over Cross-Border Data Flows, Human Rights and National Security", (2015) 14(4) *World Trade Review* 671 at 690.

65 Mira Burri, "The Governance of Data and Data Flows in Trade Agreements: The Pitfalls of Legal Adaptation" (2017) 51 UC Davis Law Review 65 at 121.

66 William J Drake, Background Paper for the workshop on Data Localization and Barriers to Transborder Data Flows (14-15 September 2016, World Economic Forum) at pp 17-18.

governments on these issues.[67] One example is the multi-stakeholder Open Digital Trade Network spearheaded by a coalition comprising over 80 Internet businesses, including leading service providers such as Afilias and Google.[68]

37 Countries may also pursue intergovernmental "soft law" agreements in parallel with their trade agreements to promote cross-border data flows.[69] These agreements are normative frameworks which do not impose sanctions, and actors comply for reasons other than legal constraint.[70] For example, countries at the 2016 G20 summit in China agreed on the need to "develop provisions to discourage local data storage requirements".[71]

38 Finally, countries will likely develop their own national data plans for how public and personal data is to be used and exchanged across borders.[72] The UK, Canada and Australia are all in the process of developing their own data strategies to match their digital trade strategies, and the 99 members of the Open Government Partnership have pledged to develop plans to make public data open to all.[73]

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67 William J Drake, Background Paper for the workshop on Data Localization and Barriers to Transborder Data Flows (14-15 September 2016, World Economic Forum) at p 18.

68 William J Drake, Background Paper for the workshop on Data Localization and Barriers to Transborder Data Flows (14-15 September 2016, World Economic Forum) at p 18.

69 William J Drake, Background Paper for the workshop on Data Localization and Barriers to Transborder Data Flows (14-15 September 2016, World Economic Forum) at p 19.

70 William J Drake, Background Paper for the workshop on Data Localization and Barriers to Transborder Data Flows (14-15 September 2016, World Economic Forum) at p 19.

71 William J Drake, Background Paper for the workshop on Data Localization and Barriers to Transborder Data Flows (14-15 September 2016, World Economic Forum) at p 19.

72 Susan Ariel Aaronson, "Data Is Different: Why the World Needs a New Approach to Governing Cross-border Data Flows" *Centre for International Governance Innovation* Paper No 197 (November 2018) at p 13.

73 Susan Ariel Aaronson, "Data Is Different: Why the World Needs a New Approach to Governing Cross-Border Data Flows" *Centre for International Governance Innovation* Paper No 197 (November 2018) at p 14.

39 In sum, the cross-border flow of data is vital in today's world. Disciplines at the WTO and FTA level exist but are relatively nascent and contain ambiguous exceptions. It is likely, nonetheless, that such provisions will apply in more agreements over time, and in addition measures such as those noted above will continue to be used.