BRILL | NIJHOFF

JOURNAL OF WORLD INVESTMENT & TRADE 26 (2025) 116–155

The Journal of World Investment & Trade Law • Economics • Politics
brill.com/jwit

Digital Plurilateralism in International Economic Law

Towards Unilateral Multilateralism?

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Accepted 29 September 2024 | Published online 3 January 2025

Abstract

The rise of the digital economy has prompted states to turn to domestic law – including data localization, source code disclosure requirements, digital asset restrictions, and digital services taxes – to address its challenges. Simultaneously, states are increasingly leveraging plurilateral frameworks, such as the Indo-Pacific Economic Framework for Prosperity (IPEF), and plurilateral agreements, such as the Joint Statement Initiative (JSI) on e-commerce in the World Trade Organization (WTO), to address the economic and geoeconomic challenges posed by the digital economy. The article examines the role of plurilateralism and plurilateral agreements in regulating the digital economy. It explores plurilateralism as a regulatory strategy for digital technologies in international trade, both within and outside the WTO. It also compares digital plurilateralism with other modalities of international governance, including multilateral and regional approaches. The article concludes by underscoring the merits of plurilateralism as a form of 'unilateral multilateralism' and explores its potential to shape future international ordering in the digital economy.

Keywords

data localization – digital economy – digital trade – e-commerce – Indo-Pacific Economic Framework for Prosperity (IPEF) – Joint Statement Initiative (JSI)

Published with license by Koninklijke Brill BV | DOI:10.1163/22119000-12340354
 | ISSN: 1660-7112 (print) 2211-9000 (online)

1 Introduction

Multilateral agreements have been the backbone of international economic relations since the end of World War II; they set the stage for the proliferation of preferential trade agreements (PTAs) that, while often viewed as alternatives, complement the multilateral framework. Over the past ten years, there has been a shift towards prioritizing domestic laws and policies over international regulations; this is often a reflection of a different approach to international economic governance rather than a retreat from it.[1] The advent of digitalization presents a new challenge to the international economy. The digitalization of economic transactions has prompted various responses from states.[2] Domestic rules to regulate transnational digital transactions have surfaced, such as data localization and source code disclosure requirements, restrictions on digital assets, as well as Digital Services Taxes (DSTs); they domesticate the international economy, while fragmenting digital trade.

Given the WTO's trade negotiating stalemate, some of the action to help address some of these issues has moved to PTAs.[3] So far, recent PTAs have dealt with 'e-commerce' or 'digital trade' and related domestic barriers to the digital economy. PTAs set the broader legal framework for digital trade, such as electronic signatures and electronic payments; they regulate physical infrastructure, such as network access and information technology services; the movement of goods across borders and the transfer of data; and they also address issues pertaining to domestic regulatory systems such as personal information.[4] Data localization and source code disclosure measures are

1 Georgios Dimitropoulos, 'International Economic Law and Comparative Administrative Law' in Mariana M Prado, Peter L Lindseth, Farrah Ahmed and Blake Emerson (eds), *Comparative Administrative Law* (3rd edn, Edward Elgar forthcoming 2024). On the crisis of multilateralism see Lukasz Gruszczynski, Marcin Menkes, Veronika Bilkova and Paolo Farah (eds), *The Crisis of Multilateral Legal Order: Causes, Dynamics and Implications* (Routledge 2022); Thomas Sommerer, Hans Agné, Fariborz Zelli and Bart Bes, *Global Legitimacy Crises: Decline and Revival in Multilateral Governance* (OUP 2022).

2 Georgios Dimitropoulos, 'Law and Digital Globalization' (2022) 44 U Pa J Intl L 41.

3 Following the WTO definition, the article uses the terms Preferential Trade Agreement (PTA), Regional Trade Agreement (RTA) and regionalism interchangeably. These terms do not indicate the number of parties involved in the respective agreements, which may involve two or more parties; see WTO, 'Regional Trade Agreements and the WTO' <https://www.wto.org/english/tratop_e/region_e/scope_rta_e.htm> accessed 15 April 2024 (RTAs in the WTO refer to any reciprocal trade agreement between two or more parties, not necessarily from the same region). Technically, RTAs/PTAs function as exceptions under the WTO framework; see, for example, Article XXIV of the General Agreement on Tariffs and Trade (GATT).

4 Mark Wu, 'Digital Trade-Related Provisions in Regional Trade Agreements: Existing Models and Lessons for the Multilateral Trade System' (RTA Exchange, International Centre for

generally prohibited in most recent PTAs, whereas public policy and security exceptions are often re-introduced to justify deviations.[5]

Historically, noticeable efforts have been made to regulate e-commerce in the WTO. In 1998, the General Council adopted a work program on electronic commerce.[6] Discussions have transitioned since 2017 to so called Joint Statement Initiatives (JSIs); the first such initiative to be launched was on e-commerce. This effort aims to establish a binding agreement on digital trade rules among its participants. The JSI negotiations on e-commerce cover a broad range of issues, from more traditional trade topics, such as paperless trading, to newly emerged digital policy challenges, including cross-border data flows and localization, online consumer protection, privacy, and cybersecurity.[7] The result of the e-commerce JSI negotiations is the Agreement on Electronic Commerce, which was finalized in late July 2024.[8]

JSIs are not classical multilateral negotiations. These are plurilateral negotiations that may eventually lead to the signing of plurilateral agreements in the broader WTO context. While participating members have been intensifying their efforts to reach a significant outcome in the regulation of digital trade through a plurilateral agreement, some emerging digital powers such as India and South Africa question the legality of JSI outcomes as well as argue that the JSI process undermines consensus-based decision-making and weakens multilateralism in the WTO.[9]

Amidst all these changes in the way cross-border transactions take place, and the instruments states employ to regulate the international economy, plurilateral agreements are resurfacing as an alternative regulatory instrument in international economic ordering.[10] Plurilaterals are multi-party, sector-specific agreements adopted in the frame of an international organization or broader

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Trade and Sustainable Development (ICTSD) and Inter-American Development Bank (IDB), 2017).

5 See infra Section 3.3.

6 WTO, 'Work Programme on E-Commerce' <https://www.wto.org/english/tratop_e/ecom_e/ecom_work_programme_e.htm> accessed 15 April 2024.

7 The first consolidated draft was released in December 2020, followed by the second in September 2021, and the third in December 2022; see Joint Statement on Electronic Commerce, INF/ECOM/62.Rev1 (14 December 2020); Joint Statement on Electronic Commerce, INF/ECOM/62.Rev2 (8 September 2021).

8 Joint Statement Initiative on Electronic Commerce, INF/ECOM/87 (26 July 2024).

9 General Council, 'The Legal Status of "Joint Statement Initiatives" and their Negotiated Outcomes', WT/GC/W/819/Rev.1 (30 April 2021); see also Jane Kelsey, 'The Illegitimacy of Joint Statement Initiatives and their Systemic Implications for the WTO' (2022) 25 JIEL 2.

10 See Georgios Dimitropoulos, Richard C Chen and Julien Chaisse, 'Plurilateralism: A New Form of International Economic Ordering?' (2025) 26 JWIT 1–30 in this Special Issue; see

multilateral agreement;[11] they potentially have a narrower group of signatories compared to the overall membership of the organization or multilateral agreement.[12]

Some of the most important plurilaterals in the WTO history have been around digital technologies, notably the Information Technology Agreement (ITA) and Agreement on Basic Telecommunications (ABT). Plurilateralism is now facing a revival for the regulation of digital trade and the digital economy, both inside – such as with the JSIs – and outside the WTO. For example, the Digital Economy Partnership Agreement (DEPA) signed by Singapore, New Zealand, and Chile in 2020 is a dedicated digital trade agreement. DEPA has an open structure and allows the development of individual modules as well as admitting more members outside the original membership. Other DEAs are emerging too.[13] The Indo-Pacific Economic Framework for Prosperity (IPEF), an initiative led by the US in broader Indo-Pacific region, places a strong emphasis on digital trade in its first pillar. Similar initiatives are emerging in other regions too.[14] The leaders of the Group of 7 (G7) put forward a framework in June 2021 in Cornwall, UK for a post-Washington Consensus international order. The Cornwall Consensus proposes plurilateralism as a broad-based regulatory strategy in the digital economy.[15]

Besides the historical reasons leading to the increased adoption of plurilaterals in the area of digital technologies, the flexibility and specificity that plurilateral agreements offer, allow for tailored approaches to the unique challenges of the digital economy. Digital plurilaterals have an important role in experimenting with new legal and regulatory models – potentially serving as precursors to broader agreements. They can thus overcome deadlocks often faced in multilateral settings, especially in an era of emerging domestic frameworks for the regulation of the digital economy, offering a more dynamic route

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also WTO Plurilaterals <https://wtoplurilaterals.info/> accessed 15 April 2024 (presenting and discussing plurilaterals in the WTO).

11 Dimitropoulos, Chen and Chaisse (n 10).

12 Stephen D Krasner, 'The Tokyo Round: Particularistic Interests and Prospects for Stability in the Global Trading System' (1979) 23 International Studies Quarterly 491, 500, 515, 524.

13 World Economic Forum, 'Digital Economy Agreements Are a New Frontier for Trade – Here's Why' (24 August 2022) <https://www.weforum.org/agenda/2022/08/digital-economy-agreements-trade/> accessed 15 April 2024.

14 See infra Section 4.1.

15 G7, 'The Cornwall Consensus. Building Forward Better' (G7, 2021) (Cornwall Consensus); see also G7, 'Carbis Bay G7 Summit Communiqué' (June 13, 2021) (Carbis Bay Communiqué); G7 Panel on Economic Resilience, 'Key Policy Recommendations' (G7, 2021) (G7 Panel on Economic Resilience, Key Policy Recommendations); see all documents under <https://www.mofa.go.jp/ecm/ec/page1e_000355.html> accessed 15 April 2024.

to consensus among a willing subset of countries. Finally, they have been more inclusive towards emerging economies, especially compared to PTAs, and have proven a greater capacity to address critical issues like data privacy and cybersecurity. They facilitate faster negotiations and implementation compared to multilateral frameworks, which are key features in the rapidly evolving digital economy. The article presents and focuses on arguments in favour of plurilateralism as a middle way and compromise between the existing unilateralist tendencies and the aspirations for a multilateral regime for the regulation of the digital economy. To illustrate this role of plurilateralism in the contemporary digital economy, the term 'unilateral multilateralism' is employed.

The remainder of the article is structured as follows: Section 2 showcases the long tradition of plurilateralism as a strategy for regulating new and digital technologies in the international trade context. It presents two generations of digital plurilateralism in the WTO context. Section 3 discusses different approaches to the regulation of digital trade, ranging from domestic to multilateral, regional, and eventually, plurilateral solutions. It also presents a third generation of digital plurilateralism that operates mostly outside the WTO. Section 4 discusses the future international ordering using plurilateral agreements in the digital economy. It showcases the emergence of plurilateralism as broad-based strategy for the regulation of the digital economy both within and outside the WTO. The article concludes with the discussion of the merits of plurilateralism as a form of unilateral multilateralism considering both the status of the digital economy as well as the nature of digital technologies.

2 Digital Plurilateralism in International Trade Law

The evolution of international trade law has seen a fundamental normative redirection towards plurilateralism particularly in the regulation of emerging technologies. But plurilateralism has historically played a very prominent role in the regulation of emerging technologies – this is referred to here as 'technological plurilateralism'. This section outlines the emergence of plurilateralism as a regulatory strategy during the GATT era; it then focuses on two generations of plurilateral agreements within the WTO framework that regulate emerging and digital technologies.

2.1 *The Genesis of Technological Plurilateralism in the GATT Era*

After World War II, multilateralism emerged as the dominant approach for structuring economic relations among nations. Regionalism has been viewed

as the primary alternative to multilateralism in international trade.[16] Besides multilateral and regional agreements, another regulatory instrument started gaining significance towards the end of the *trente glorieuses*: plurilateral trade agreements. The origins of plurilateral agreements can be traced back to the Tokyo Round (1973–1979) of multilateral trade negotiations.[17] During the Tokyo Round, tariff cuts were no longer viewed as the ultimate goal, allowing non-tariff barriers (NTBs) to gain prominence. Seen as technical rather than political, NTBs were considered easier to resolve. Their regulation occurred through new codes designed to reduce NTBs or make them more transparent.[18] Building on the same logic, the Tokyo Round departed from unconditional MFN treatment;[19] the enabling clause was also adopted during the round.[20] These deviations were permitted based on two justifications: first their sector-specific nature. The sectoral agreements were designed to supplement – not replace – multilateralism;[21] second, they would not necessarily involve all members of the GATT signatories. They would allow subsets of the membership to agree and eventually sign them.

The Tokyo Round did not escape criticism, particularly in developing countries.[22] However, most critiques were not about plurilaterals; rather, they were about the failure to provide concessions to developing nations for their own exports.[23] Signing up for the Tokyo codes signaled a certain 'willingness to limit their national economic sovereignty' among developed countries.[24]

Some of the Tokyo-era codes gave rise to agreements that eventually became part of WTO's single-undertaking package. Article II.3. of the WTO Agreement

16 Dimitropoulos, Chen and Chaisse (n 10).

17 See generally on the Tokyo Round, Krasner (n 12); Ria Kemper, 'The Tokyo Round of Multilateral Trade Negotiations: Results and Implications', World Bank Staff Working Paper No 372 (World Bank, October 1979); Mario A Kakabadse, 'The Tokyo Round and After' (1981) 37 The World Today 304–10.

18 Kemper (n 17) 7.

19 Krasner (n 12) 500.

20 Kemper (n 17) 17.

21 GATT Trade Negotiations Committee, Group "Sector Approach", 'Chairman's Summing up – Meeting of 7–9 April 1975', MTN/SEC/1 (14 April 1975). Krasner (n 12) 499–500; Barbara Fliess and Pierre Sauvé, 'Of Chips, Floppy Disks and Great Timing: Assessing the Information Technology Agreement', Institut Français des Relations Internationales and the Tokyo Club Foundation of Global Studies (1997) 46.

22 See Resolution of the Group of 77 to TOP 9B, adopted June 3, 1979 (with the criticism on behalf of developing nations to the Tokyo Round).

23 ibid II(2)(a).

24 Kemper (n 17) 31.

introduced a formal mechanism for adoption of plurilaterals that requires consensus from all WTO members.[25] They become binding only on members that have accepted them and, while part of the WTO legal framework, do not create legal obligations for members that have not accepted them.

Besides 'closed' plurilaterals, 'open plurilaterals' emerged in the history of international trade law and negotiations.[26] They have two main features: they are typically developed outside the formal framework of the WTO – hence not requiring consent from non-signatories;[27] they usually come into effect when participants, representing a critical mass of international trade – typically above 90% – accept their obligations.[28] Thus far, technological plurilaterals have mostly adopted the form of open plurilaterals.

2.2 *The First Generation of Digital Plurilaterals in the WTO Era*

The momentum from the Marrakesh agreement was quickly channeled into and leveraged for plurilateral negotiations. Plurilateralism emerged as a regulatory strategy for the regulation of digital technologies in the early WTO years. The Information Technology Agreement and the Agreement on Basic Telecommunications were the first agreements, the first plurilaterals, and the first agreements to regulate emerging digital technologies in the WTO era. They represent the first generation of digital plurilaterals in the WTO era.

2.2.1 Information Technology Agreement

In December 1996, 28 members of the WTO and acceding states and customs territories made a declaration during the Singapore Ministerial Conference that they would eliminate tariffs on information technology products once participants accounting for 90% of world trade in these products accepted the agreement.[29] Soon after, the Information Technology Agreement (ITA) entered into effect; today, the agreement covers 81 WTO members accounting for approximately 97% of world trade in information technology (IT) products.[30]

25 Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, 1867 UNTS 154, 33 ILM 1144 (1994).

26 Bernard Hoekman and Charles Sabel, 'Open Plurilateral Agreements, International Regulatory Cooperation and the WTO' (2019) 10 Global Policy 297.

27 Berger and others, 'Improving Key Functions of the WTO'.

28 ibid.

29 WTO, Ministerial Declaration on Trade in Information Technology Products, Singapore, WT/MIN(96)/16 (13 December 1996).

30 WTO, 'Information Technology Agreement – An Explanation' <https://www.wto.org/english/tratop_e/inftec_e/itaintro_e.htm> accessed 15 April 2024.

Building on the sectoral approach developed during the Tokyo Round, the ITA aimed to address issues associated with the rapid technological developments in the IT products sector during the 1990s.[31] The main product categories covered by ITA include computers, semiconductors, semiconductor manufacturing equipment, telecommunication apparatus, instruments and apparatus, data-storage media and software, and parts and accessories.[32] But deviating from Tokyo's focus on NTBs, ITA's goal was to negotiate the elimination of import duties. The ITA provided that participating countries would provide duty-free treatment to these products. The commitments on tariff elimination were incorporated into the tariff concession schedules of individual members. Although referred to as the 'ITA schedules', the concessions made under the ITA became part of broader WTO obligations; MFN-applied tariffs were reduced accordingly.

ITA is the first agreement to liberalize trade in a specific sector after the establishment of the WTO; it is also the first sectoral agreement negotiated between developed and developing countries.[33] However, no LDC has formally joined the ITA.[34]

In 2015, another plurilateral agreement in the field of IT, known as the 'Expansion of Trade in Information Technology Products', was successfully negotiated;[35] this was practically an expansion of ITA in terms of product categories. According to Gary Winslett, the 2015 ITA expansion presents one of the most significant liberalization efforts under the WTO since its inception.[36]

31 See Information Technology Agreement: Communication from the United States (4 October 1996) G/MA/W/8.

32 See generally Fliess and Sauvé (n 21) 13; Iana Dreyer and Brian Hindley, 'Trade in Information Technology Goods: Adapting the ITA to 21st Century Technological Change', ECIPE Working Paper No 6 (2008).

33 WTO, 'Information Technology Agreement' <https://www.wto.org/english/tratop_e/inftec_e/inftec_e.htm> accessed 15 April 2024.

34 WTO, '15 Years of the Information Technology Agreement: Trade, Innovation and Global Production Networks' (WTO, 2012) 49 <https://www.wto.org/english/res_e/publications_e/ita15years_2012_e.htm> accessed 15 April 2024.

35 See generally UNCTAD, 'Trade in ICT Goods and the 2015 Expansion of the WTO Information Technology Agreement', UNCTAD Technical Notes on ICT for Development N °5, TN/UNCTAD/ICT4D/05 (December 2015), <https://unctad.org/en/PublicationsLibrary/tn_unctad_ict4d05_en.pdf> accessed 15 April 2024.

36 Gary Winslett, 'Critical Mass Agreements: The Proven Template for Trade Liberalization in the WTO' (2017) 17(3) WTR 405, 405.

2.2.1 Agreement on Basic Telecommunications

For the first time in the history of trade negotiations, the Uruguay Round included trade in services on its agenda. Most of the annexes to the General Agreement on Trade in Services (GATS) concern individual service sectors such as financial services and telecommunications. One of the GATS annexes permits members a one-off chance of exempting certain measures from the MFN obligation.

The issue of the then-emerging trade in internet-based technologies had remained unresolved in the GATS; it was not fully resolved by ITA either. ITA does not cover rules for telecommunications. But telecommunications are generally seen as the 'infrastructure of the world's economy'.[37] They are moreover the foundation of any market in developed, digitized – and rapidly digitalizing – technologies.[38] Before the Marrakesh Agreement, a group of states known as the Negotiating Group on Basic Telecommunications (NGBT), which became later known as the Group on Basic Telecommunications (GBT), led the effort towards signing agreement in the area of telecommunications. The GBT agreed to modify the rules on participation in meetings so that all WTO Members had a full voice in its activities. In the beginning of 1997, WTO members concluded almost three years of negotiations on market access for basic telecommunications services.[39] Eventually, all industrialized countries became part of the ABT, which came into effect on 1 January 1998.

Building on the success of ITA, at the beginning of negotiations, participants agreed to overlook domestic definitions of telecommunications and instead negotiate on all 'basic telecommunications' services, both public and private – whether delivered over network infrastructure or through resale using private leased circuits. Hence, the agreement covers services involving the end-to-end transmission of customer-supplied information, such as the simple relay of voice or data from sender to receiver. The range of services include voice telephony, data transmission, telex, telegraph, fax, private leased circuit services,

37 Peter Cowhey and Mikhail M Klimenko, 'The WTO Agreement and Telecommunications Policy Reform', Policy Research Working Paper No 2601 (2001) 1 <https://openknowledge.worldbank.org/handle/10986/19661> accessed 15 April 2024.

38 ibid 1.

39 Agreement on Telecommunications Services (Fourth Protocol to General Agreement on Trade In Services); see generally Cowhey and Klimenko (n 37); Chantal Blouin, 'The WTO Agreement on Basic Telecommunications: A Reevaluation' (2000) 24(2) Telecommunications Policy 135–42.

fixed and mobile satellite systems and services, cellular telephony, mobile data services, paging, and personal communication systems.[40]

The ABT was more loyal to the Tokyo tradition. Beyond tariff cuts, it included further market access commitments. The market access commitments encompass not only cross-border telecommunications supply but also establishment of foreign firms or commercial presence. This includes the capacity to own and operate independent telecom network infrastructures.[41] Regulation was also part of the market access commitments:[42] the ABT includes a set of rules for regulators compiled in a document known as the 'reference paper'.[43]

The commitments on basic telecommunication services offered by ABT signatories in relevant schedules were annexed to the GATS schedules of services commitments already in force since the Uruguay Round. The ABT concessions were thus extended to all WTO members on a non-discriminatory basis through MFN treatment.[44]

2.3 *The Second Generation of Digital Plurilaterals in the WTO Era*

A second wave of plurilateral negotiations began to emerge, given the fading momentum from the Doha Development Round. The results are more mixed, especially in the regulation of (digital) services. The negotiation processes of the second generation of digital plurilaterals in the WTO era share some of the features of both closed and open plurilaterals. In the case of e-commerce, this outcome resulted from the failure to achieve progress within the formal multilateral framework. For services, which form the backbone of much of the digital economy, as discussed above, the lack of success in open negotiations led to their more formal incorporation within the WTO.

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40 Basic telecommunication services do not include 'value-added' services; these are services for which suppliers add value to the customer's information by enhancing their form or content or by providing for its storage and retrieval; some examples are on-line data processing, on-line database storage and retrieval, electronic data interchange, e-mail or voice mail. Value-added services are thus not covered under the ABT. Still, some participants included value-added services in their offers, while others had already included them in their original GATS or accession schedules. Overall, value-added services are more commonly liberalized than basic services; see generally WTO, 'Coverage of Basic Telecommunications and Value-added Services' <https://www.wto.org/english/tratop_e/serv_e/telecom_e/telecom_coverage_e.htm> accessed 15 April 2024.

41 ibid.

42 This approach is possible under art XVIII GATS.

43 Negotiating Group on Basic Telecommunications, 'Telecommunications Services: Reference Paper' (24 April 1996) <https://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm> accessed 15 April 2024.

44 However, some governments chose to submit MFN exemption lists.

2.3.1 Electronic Commerce: from the Work Programme on Electronic Commerce to the Joint Initiative on E-commerce

ITA and ABT negotiations prepared the groundwork for today's plurilateral initiatives in e-commerce. In the aftermath of ITA, the US put forward a proposal for inclusion of new products in the ITA package. The US had a great interest in providing for a greater liberalization for products and relevant technologies that are used for internet access.[45] This led to a new and overarching initiative on electronic commerce.[46] In May 1998, the Ministerial Conference issued a Declaration on Global Electronic Commerce,[47] which called for the adoption of a work programme on all trade-related issues relating to global electronic commerce. The 'economic, financial, and development needs' of developing countries were also to be considered.[48] The declaration included, very importantly, a commitment to the practice of not imposing customs duties on electronic transmissions.[49] The moratorium has been extended with separate agreements until the present day – renewed approximately every two years at the WTO Ministerial Conferences.[50]

In September 1998, the General Council adopted the Work Programme on Electronic Commerce (WPEC) to examine trade-related issues relating to global e-commerce.[51] The WPEC is primarily aimed at developing a deeper understanding of the trade-related aspects of global e-commerce and exploring its relationship with WTO agreements. The WTO Work Programme describes e-commerce as 'the production, distribution, marketing, sale or delivery of goods and services by electronic means'.[52] The WPEC has generally failed to produce substantial progress, except for the retention of the moratorium.

Four initiatives were spearheaded during the 11th Ministerial Conference in Buenos Aires in 2017 by four groups of WTO members, representing different

45 WTO, 15 Years of ITA (n 34) 32.

46 ibid.

47 'Declaration on Global Electronic Commerce', WT/MIN(98)/DEC/2 (25 May 1998).

48 ibid.

49 ibid.

50 See, for example, WTO document WT/L/843 (extending the moratorium for two years); the most recent extension took place during the 13th Ministerial Conference (MC13), which extended the moratorium for another two years; see WTO, 13th Ministerial Conference: Briefing Note, 'E-commerce' <https://www.wto.org/english/thewto_e/minist_e/mc13_e/briefing_notes_e/ecommerce_e.htm> accessed 15 April 2024.

51 WTO, 'Work Programme on Electronic Commerce', adopted by the General Council on 25 September 1998 <https://www.wto.org/english/tratop_e/ecom_e/wkprog_e.htm>; see also WTO, 'What is E-commerce?' <https://www.wto.org/english/tratop_e/ecom_e/ecom_work_programme_e.htm#what> both accessed 15 April 2024.

52 'Work Programme on Electronic Commerce' (n 51).

compositions of the broader membership, which initiated talks on new issues including, first, electronic commerce as well as domestic regulation in services alongside investment facilitation for development, and micro, small, and medium size enterprises (MSMEs). This marked a new era in plurilateralism.

In e-commerce, 71 WTO members started exploring anew new avenues on negotiating trade-related aspects of e-commerce beyond the WPEC stalemate. 76 WTO members eventually launched the JSI on e-commerce in January 2019.[53] The members have been negotiating on a plurilateral basis an agreement on e-commerce as part of the WTO. In 2020, 86 WTO members began negotiating a consolidated text that continued to form the basis of the negotiations. Since October 2023, more than 90 WTO members participate in the discussions – accounting for more than 90% of global trade.[54] The co-convenors are Australia, Japan and Singapore. The membership includes the US, the EU, China as well as other emerging markets, developing countries and LDCs. India and South Africa have chosen not to participate in any JSI activity.[55]

The result of the e-commerce JSI process is the Agreement on Electronic Commerce, which was finalized after five years of negotiations in late July 2024.[56] The JSI on e-commerce follows in the tradition of the Tokyo Round. The focus is not any more on tariff reduction or traditional market access. It is rather on trade facilitation and cross-border trade management. The JSI's finalized draft identifies six regulatory areas in a text that is less ambitious than its previous iterations.[57] The regulatory areas are: enabling e-commerce (section B), fostering openness (section C), cultivating trust (section D),

53 WTO, Joint Statement on Electronic Commerce, WT/L/1056 (25 January 2019). On e-commerce in the WTO see 'Joint Initiative on E-commerce' by more than 70 WTO Members at <https://www.wto.org/english/tratop_e/ecom_e/joint_statement_e.htm> accessed 15 April 2024. See also Ines Willemyns, 'Agreement Forthcoming? A Comparison of EU, US, and Chinese RTAs in Times of Plurilateral E-Commerce Negotiations' (2020) 23 JIEL 221; Henry Gao, 'Across the Great Wall: E-commerce Joint Statement Initiative Negotiation and China' in Shin-yi Peng, Chin-Fu Lin and Thomas Streinz (eds), *Artificial Intelligence and International Economic Law: Disruption, Regulation, and Reconfiguration* (CUP 2021) 295.

54 WTO, 'Joint Statement Initiative on E-commerce' <https://www.wto.org/english/tratop_e/ecom_e/joint_statement_e.htm> accessed 15 April 2024.

55 See supra Introduction.

56 WTO, 'Joint Statement Initiative on Electronic Commerce' (26 July 2024) INF/ECOM/87. Nine states did not sign the final version of the agreement, including Brazil, Taiwan and the US.

57 Compare the relevant sections with WTO, 'How Are the E-commerce JI Negotiations Conducted?' <https://www.wto.org/english/tratop_e/ecom_e/joint_statement_e.htm#how> accessed 15 April 2024.

promoting transparency, cooperation and development with a focus on LDCs (section E), and dealing with telecommunications (section F). Article 11.3 of the agreements envisages a permanent prohibition on customs duties on electronic transmissions.

This discussion brings our exploration of technological and digital plurilateralism full circle. Plurilateralism originated during the GATT era to tackle NTBs in specific sectors. The first generation of digital plurilaterals, emerging in the post-Marrakesh period, focused instead on tariff reduction – a departure from traditional plurilateralism. These efforts evolved into a broader push to regulate e-commerce. However, since the stalling of the efforts in the 1990s, there has been a more recent shift back to the original focus of plurilateralism. Second-generation digital plurilateral negotiations no longer center on tariffs but aim to address regulation and NTB-related aspects of digital trade. This is further highlighted in developments on services regulation.

2.3.2 Trade in Services: From the Trade in Services Agreement to the Joint Initiative on Services Domestic Regulation

Services-exporting countries in the North were not satisfied with the progress of services liberalization in the GATS framework. The design of the GATS allows for great discretion for WTO members in terms of providing national treatment, market access, as well as – to a lesser extent – MFN exemptions. At the same time, the Doha Round was – and remains – largely stalled. As a result, a group of these countries jumpstarted negotiations for a Trade in Services Agreement (TiSA) in early 2012 in the Tokyo and ITA/ABT tradition.[58] The perceived need to liberalize digital services was a crucial aspect of the negotiation process; but this ultimately led to the abandonment of the draft agreement.

The negotiations took place among a subset of WTO members, who referred to themselves as the Really Good Friends of Services (RGF group). The negotiations followed the 'enchilada style' of negotiations spearheaded by the chair of the Special Session of the Council on Trade in Services, Ambassador Fernando de Mateo of Mexico;[59] this was an extension of the Tokyo plurilateral approach. All negotiating meetings took place in Geneva. The EU and the US were the main proponents of the agreement, as well as eventually its main

58 Trade in Services Agreement (TiSA), Foreign Affairs, Trade and Development Canada (18 July 2013), <https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/services/tisa-acs.aspx?lang=eng> accessed 15 April 2024; see generally Shin-yi Peng, 'Is the Trade in Services Agreement (TiSA) a Stepping Stone for the Next Version of GATS?' (2013) 43 Hong Kong Law Journal 611.

59 WTO, Council for Trade in Services, Report of the Meeting Held on 1 APRIL 2014, TN/S/M/43 (4 June 2014) para 2.20.

authors. There was hope on both sides of the Atlantic about the negotiations, and then WTO Director General Pascal Lamy had endorsed the process.[60] The participating countries presented their initial offers at the end of 2013.

The TiSA negotiations eventually failed. The agreement faced criticism because of the secrecy surrounding the negotiations.[61] TiSA dealt with services digitalization too. Services form the foundation of the digital economy.[62] The draft included a series of provisions on the digital economy.[63] Digital rights advocates highlighted that the agreement contains provisions that could substantially weaken data protection regimes in signatory countries. Specifically, the agreement could outlaw protections designed to keep confidential or personally identifiable information within national borders or to prevent its transfer to countries lacking comparable data protection laws.[64]

Article 6 of the leaked TiSA agreement titled 'Transfer or Access to Source Code' provided that '[n]o Party may require the transfer of, or access to, source code of software owned by a person of another Party, as a condition of providing services related to such software in its territory'.[65] While this created a big concern outside negotiating circles, the provision, which was also embedded in the predecessor of the CPTPP, the Trans-Pacific Partnership (TPP), became the foundation for the e-commerce and digital trade chapters of PTAs that were eventually spearheaded by the US.[66]

60 See Daniela Vincenti, 'EU and "Good Friends" Weigh International Services Pact' (*Euractiv*, 9 October 2012) <https://www.euractiv.com/section/trade-society/news/eu-and-good-friends-weigh-international-services-pact/> accessed 15 April 2024.

61 Wikileaks, 'Secret Trade in Services Agreement (TISA) – Financial Services Annex' (19 June 2014).

62 OECD, Vectors of Digital Transformation OECD Digital Economy Papers No 273 (OECD Publishing, January 2019) <https://doi.org/10.1787/20716826> accessed 15 April 2024.

63 Mira Burri, 'Towards a New Treaty on Digital Trade' (2021) 55 JWT 77–100, 97–98.

64 'LEAKED: Secret Negotiations to Let Big Brother Go Global' (*Wolf Street*, 25 December 2014).

65 Patrice-Emmanuel Schmitz, 'TiSA Agreement a Threat for Open Source Procurement?' (6 August 2015) <https://joinup.ec.europa.eu/collection/eupl/news/tisa-agreement-threat-0> accessed 15 April 2024.

66 The negotiations on TiSA and TPP took place concurrently. While TiSA negotiations began in 2013, official discussions for the predecessor of the CPTPP, the Trans-Pacific Partnership (TPP), started in 2010. However, TiSA ultimately failed due to significant differences between the US and the EU on critical issues including data protection and cross-border data flows. In contrast, the TPP was successfully negotiated, even though the US later withdrew under the first Trump Administration. The success of TPP/CPTPP on data flow issues can largely be attributed to the absence of the EU from the negotiations, which has traditionally advocated for a much stricter approach to data regulation. I am very grateful to the anonymous reviewer for the insights into the relationship between TiSa and TPP.

The pivotal role of services in the digital economy is further underscored in the finalized e-commerce plurilateral agreement. This agreement addresses both goods and services, incorporating various provisions that define its relationship with the GATS.[67] Efforts towards liberalizing services were also streamlined into a JSI on Services Domestic Regulation. This was the first JSI to conclude.[68] At the same time, it is the JSI with the smaller number of participants – 72, the smallest number of developing countries, and only two LDCs, which are the two most recently acceded WTO members, Timor-Leste and Comoros. The negotiation and adoption process largely builds on the ABT example. The 'Reference Paper on Services Domestic Regulation' primarily includes provisions on services trade facilitation and non-tariff barriers (NTBs), following the tradition established by the Tokyo Round.[69] One of the key provisions for regulating the digital economy is the requirement to maintain the independence of the authorities responsible for authorizing the supply of services.[70]

2.4 *Beyond Plurilateralism: the Anti-Counterfeiting Trade Agreement*

As the two generations of digital plurilaterals were unfolding, efforts to regulate the digital economy were also taking place outside the established international trade law framework.

Negotiations on a code addressing counterfeit goods were initiated during the Tokyo Round.[71] They did not materialize in an agreement though. Decades later, a group of WTO members began negotiating the Anti-Counterfeiting Trade Agreement (ACTA). The treaty was intended to create an international legal framework enforcing intellectual property rights broadly speaking. The focus was on combating counterfeit goods, generic medicines, and copyright infringement online. By 2012, the agreement was signed by Australia, Canada, Japan, Morocco, New Zealand, Singapore, South Korea, the United States, Mexico, and the European Union and its (then) 22 member states.

67 See, for example, Agreement on Electronic Commerce, arts 10.4–10.5.

68 'Declaration on the Conclusion of Negotiations on Services Domestic Regulation', WT/L/1129 (2 December 2021).

69 Joint Initiative on Services Domestic Regulation, 'Reference Paper on Services Domestic Regulation', INF/SDR/2 (26 November 2021).

70 ibid, at section II, discipline 12 (generally on services domestic regulation); section III, alternative discipline 10 (on services domestic regulation for financial services).

71 Kemper (n 17) 2.

ACTA was one of the first efforts to regulate certain aspects of the digital economy in a more overarching way.[72] Section 5 was dedicated to the 'Enforcement of Intellectual Property Rights in the Digital Environment' with its sole Article 27 on 'Enforcement in the Digital Environment'. This article attracted intense criticism for permitting enforcement beyond conventional legal frameworks, sparking widespread outcry on both sides of the Atlantic. The signing of ACTA by the EU and many member states incited protests across Europe, prompting the European Parliament rapporteur to resign. His successor advised against ACTA, citing threats to civil liberties. In July 2012, the overwhelming majority in the European Parliament decided not to approve ACTA. On the other side of the Atlantic, a group of over 75 law professors had signed a letter to President Obama demanding that ACTA be halted and changed.[73] ACTA never saw the light of day.

ACTA is often discussed as a plurilateral agreement.[74] The agreement was rather freestanding, though, and thus falls outside the definition adopted for present purposes.[75] It also aimed to establish a new governing body, the ACTA committee, separate and outside of existing organizations such as the WTO or WIPO.[76] Therefore, it is more accurately described as a more traditional PTA for regulation of the digital economy than a plurilateral agreement.

3 Regulating the Digital Economy: from Unilateralism to (Third-Generation) Plurilateralism

The international economy is experiencing its most significant transformation since WWII, driven by digitalization, which is reshaping traditional business practices. However, governments are still searching for effective ways to regulate the digital economy. This section of the article examines efforts to regulate the digital economy at various levels of governance. It outlines domestic

72 Anti-Counterfeiting Trade Agreement (15 April 2012) <https://www.mofa.go.jp/policy/economy/i_property/pdfs/acta1105_en.pdf>; Anti-Counterfeiting Trade Agreement (ACTA): FACT SHEET <https://www.mofa.go.jp/policy/economy/i_property/acta_fact sheet.pdf> both accessed 15 April 2024.

73 'Over 75 law profs call for halt of ACTA, Program on Information Justice and Intellectual Property (28 October 2010).

74 See Meredith Kolsky Lewis, 'The Origins of Plurilateralism in International Trade Law' (2021) 20 JWIT 633; see also Meredith Kolsky Lewis, 'Plurilateralism and Regional Trade Agreements' (2025) 26 JWIT 82–115, in this Special Issue.

75 Dimitropoulos, Chen and Chaisse (n 10).

76 Article 36 of the draft.

approaches to regulating digital trade and explores multilateral aspirations. The discussion then shifts to how these efforts materialized in PTAs, and concludes with an analysis of the third generation of plurilateralism and plurilateral agreements.

3.1 *Digital Unilateralism*

Economic unilateralism is resurging, reintroducing domestic policies as a key layer in the overall structure of the international economic order. Withdrawals from international agreements have become more common.[77] Domestic legal frameworks governing foreign trade and investment are also on the rise: special jurisdictions,[78] domestic investment laws,[79] and industrial laws[80] are proliferating to regulate cross-border economic transactions. This trend in economic unilateralism does not necessarily imply the desire for economic isolation. Domestic rules sometimes replace international rules, but at other times they simply complement them.

The rise of the digital economy has prompted states to increasingly rely on domestic law to tackle its challenges. Countries now often develop new barriers to cross-border trade relating to the digital economy. Data localization requirements are becoming very common.[81] These are measures restricting the flow of data across borders via the internet. They can take various forms.

77 See Georgios Dimitropoulos, 'National Sovereignty and International Investment Law: Sovereignty Reassertion and Prospects of Reform' (2020) 21 JWIT 71 (discussing examples from Latin American countries, as well as India, Indonesia and others).

78 See Julien Chaisse and Georgios Dimitropoulos, 'SEZs in International Economic Law: Towards Unilateral Economic Law' (2021) 24 JIEL 229 (on special economic zones); Georgios Dimitropoulos, 'International Commercial Courts in the "Modern Law of Nature": Adjudicatory Unilateralism in Special Economic Zones' (2021) 24 JIEL 361; Stavros Brekoulakis and Georgios Dimitropoulos (eds), *International Commercial Courts: The Future of Transnational Adjudication* (2022) (both on international commercial courts).

79 Julien Chaisse and Georgios Dimitropoulos, 'Domestic Investment Laws and International Economic Law in the Liberal International Order' (2023) 22 WTR 1; Georgios Dimitropoulos, 'The Right to Hospitality in International Economic Law: Domestic Investment Laws and the Right to Invest' 2023 (22) WTR 90.

80 UNCTAD, 'World Investment Report 2018: Investment and New Industrial Policies' (2018); Georgios Dimitropoulos, 'Industrial Policy and the New Internationalism: Beyond the Liberal International Order' (forthcoming 2024) Cornell International Law Journal.

81 Dan Svantesson, 'Data Localisation Trends and Challenges: Considerations for the Review of the Privacy Guidelines' (OECD 2020) 8 <https://www.oecd-ilibrary.org/science-and-technology/data-localisation-trends-and-challenges_7fbaed62-en>; Martina F Ferracane, 'Restrictions on Cross-Border Data Flows: A Taxonomy', ECIPE Working Paper No 1/2017 <https://ecipe.org/publications/restrictions-to-cross-border-data-flows-a-taxonomy/> both accessed 15 April 2024.

They may take the form of mandating local data storage, such as the use of local data centers, or other restrictions or even outright bans on the transfer of data abroad. Moreover, mandatory transfer of technology rules may require companies to reveal the elements of a technology, such as the source code of software.[82] Domestic regulatory measures are extremely common in the area of regulation of cryptocurrencies and other cryptoassets.[83]

Additionally, DSTs represent a significant innovation in taxing the digital economy, aiming to tax the revenue of multinational tech firms that operate globally without a physical presence.[84] They were first proposed by the European Commission and have been adopted by various nations mainly targeting US-based tech giants. By taxing digital services such as online advertising, marketplaces, and data sales, the DST offers a domestic solution aimed at addressing the challenge of taxing digital companies that operate globally in the digital realm; this situation that has sparked debates about potential trade retaliations.[85] Article 11.4 of the Agreement on Electronic Commerce allows signatories to impose internal taxes, fees, or other charges on electronic transmissions, as long as they are consistent with the WTO Agreement.

Overall, states are reasserting their 'data' or 'digital' sovereignty.[86] Emerging economies and developing countries are often accused of engaging in 'digital

82 Andrea Andrenelli, Julien Gourdon and Evdokia Moïsé, 'International Technology Transfer Policies' (2019) 222 OECD Trade Policy Papers.

83 See generally Georgios Dimitropoulos, 'The Law of Blockchain' (2020) 95 Washington Law Review 1117. Digital assets are rapidly transforming financial systems and could significantly impact cross-border trade and investment; see, for example, Julien Chaisse, 'The Digital Currency Uprising is a Game Changer for Investment' (*fDI Intelligence Magazine*, 20 February 2024) <https://www.fdiintelligence.com/content/opinion/opinion-the-digital-currency-uprising-is-a-game-changer-for-investment-83342> accessed 15 April 2024.

84 Julien Chaisse, 'Toward a Big Bang for the Taxation of the Digitalized Economy: a Business Retrospective, Perspective, and Prospective' (2022) 41 Virginia Tax Review 345–89 (explaining that DST diverges from conventional tax principles, which necessitate a physical presence for imposing tax duties; this is done by recognizing the distinct ways digital enterprises generate value. DST aims to distribute the tax proceeds from such activities more fairly. This adjustment in tax rationale reshapes the traditional business model for 'establishment', influencing tax planning and optimization strategies, data localization requirements, the hurdles of establishing a commercial presence, as well as access to talent and workers); see also Alice Pirlot and Henri Culot, 'When International Trade Law Meets Tax Policy: The Example of Digital Services Taxes' (2021) 55 JWT 895–920.

85 Chris Moonan and Victoria Plekhanova, 'Digital Services Tax: Lessons from the Section 301 Investigation' (2021) British Tax Review 83.

86 See generally Anupam Chander and Haochen Sun (eds), *Data Sovereignty: From the Digital Silk Road to the Return of the State* (OUP 2023); Julia Pohle and Thorsten Thiel, 'Digital Sovereignty' (2020) 9 Internet Policy Review <https://doi.org/10.14763/2020.4.1532> accessed 15 April 2024.

nationalism' and 'digital protectionism' when they introduce such measures.[87] At the same time, these measures safeguard domestically produced data as the most important input in the digital economy.[88] If the rules allowed the transfer of or easy access to domestically produced data, developing states and emerging markets would be forfeiting a comparative advantage enjoyed by their economic actors.[89]

3.2 *Digital Multilateralism?*

Multilateralism has generally been the preferred approach of structuring economic relationships among states in the aftermath of World War II. Multilateralism is currently facing criticism, partly as a broader backlash against economic globalization and global governance.[90] The WTO Director General Ngozi Okonjo-Iweala recently defended multilateralism anew. According to Okonjo-Iweala, the impact of new competitors, rising inequality within countries, the global financial crisis, the pandemic and the war in Ukraine 'have led many to conclude that global trade and multilateralism – two pillars of the WTO – are more threat than opportunity. They argue we should retreat into ourselves, make as much as we can ourselves, grow as much as we can ourselves'.[91] Reversing global trade integration would lead, according to the DG, to a global GDP drop of approximately 5% due to less specialization and technology spill-overs.[92]

At the same time, the international trade law regime was designed to serve tangible goods, and only much later – and in a less comprehensive way – services. It is unclear whether domestic measures in the digital economy fall within the scope of WTO disciplines. For example, it is not clear whether digital products, including data, should be classified as goods or services.[93] The WTO

87 Anupam Chander and Uyên P Lê, 'Data Nationalism' (2015) 64 Emory Law Journal 677; Susan A Aaronson, 'What Are We Talking about When We Talk about Digital Protectionism?' (2019) 18 WTR 541 (offering a balanced view).

88 Gregory Shaffer, 'Trade Law in a Data-Driven Economy: The Need for Modesty and Resilience' (2021) 20 WTR 259–81, 269.

89 Susan A Aaronson and Patrick Leblond, 'Another Digital Divide: The Rise of Data Realms and Its Implications for the WTO' (2018) 21 JIEL 245, 262 (discussing the size of the digital economy in China).

90 See supra Introduction.

91 'National Foreign Trade Council: Strengthening the WTO and the Global Trading System: Remarks by DG Okonjo-Iweala' <https://www.wto.org/english/news_e/spno_e/spno25_e.htm> accessed 15 April 2024.

92 ibid.

93 Mira Burri, 'The Regulation of Data Flows through Trade Agreements' (2017) 48 Georgetown Journal of International Law 407, 413–14; see generally Rolf H Weber and Mira Burri, *Classification of Services in the Digital Economy* (Springer 2012).

Appellate Body established in *US – Gambling* that WTO commitments, and particularly the GATS, apply to services delivered electronically.[94] However, new digital products such as cryptoassets or property in the metaverse blur these distinctions further. Moreover, the introduction of regulatory measures in the digital economy may be justified by a broader set of reasons, including those under the GATS, such as public order, public morals, national security, consumer protection, and privacy protection.[95]

For this reason, policymakers and scholars argue that the appropriate response to the rise of the digital economy is international regulation through multilateral rules.[96] There are two ways to achieve 'digital multilateralism':[97] first, reform and adapt traditional institutions – such as the WTO – to accommodate the digital economy. According to the WTO DG, there is a need to reform the WTO and make it more fair, as well as more up to date to address today's challenges. The first example of a revamped multilateral framework

94 *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, Report of the Appellate Body, WT/DS285/AB/R (7 April 2005); see generally Sacha Wunsch-Vincent, 'The Internet, Cross-Border Trade in Services, and the GATS: Lessons from US – Gambling' (2006) 5 WTR 319–55.

95 Article XIV(a) GATS that may find application in the provision of digital services is broader than its sister art XX(a) GATT covering both measures necessary to protect public morals and measures necessary to maintain public order. Article XIV(c)(iii) GATS makes explicit reference to privacy and data protection of individuals as well as protection of confidentiality. Article XIV(d) allows consumer protection measures. See fn 6 to art XIV(d) GATS; see generally Francesca Casalini and Javier López González, 'Trade and Cross-Border Data Flows', OECD Trade Policy Papers, No 220 (OECD Publishing 2019) 25–27.

96 Meagan Nicholson, 'Cross-Border Data Flows: Their Importance, and The Need for a Global Framework' (ICLR Blog, 12 April 2018) <https://international-and-comparative-law-review.law.miami.edu/cross-border-data-flows-importance-global-framework/>; Andrew D Mitchell and Neha Mishra, 'Data at the Docks: Modernizing International Trade Law for the Digital Economy' (2018) 20 Vanderbilt Journal of Entertainment and Technology Law 1073; Joshua P Meltzer, 'A WTO Reform Agenda: Data Flows and International Regulatory Cooperation', Global Economy & Development Working Paper 130 (The Brookings Institution, Washington, DC, 2019), <https://www.brookings.edu/wp-content/uploads/2019/09/WTO-Reform-Agenda_final.pdf> both accessed 15 April 2024; Nivedita Sen, 'Understanding the Role of the WTO in International Data Flows: Taking the Liberalization or the Regulatory Autonomy Path?' (2018) 21 JIEL 323–48; see also Merit E Janow and Petros Mavroidis, 'Digital Trade, E-Commerce, the WTO and Regional Frameworks' (2019) 18(S1) WTR <https://doi.org/10.1017/S1474745618000526> accessed 14 November 2024 (explaining the reasons why there has been no international legal framework so far in response to the rise of digital trade).

97 See for a use of the term Bocar Ba, 'Digital Multilateralism: Driving Progress on the UN Sustainable Development Goals' (World Economic Forum, 17 October 2023) <https://www.weforum.org/agenda/2023/10/digital-multilateralism-progress-sustainable-development-goals/> accessed 15 April 2024.

mentioned by the DG is digital trade; the organization's future is digital, according to Okonjo-Iweala – as well as green and in the field of services.[98]

The second way of thinking about regulating the digital economy is to adopt completely new sets of international agreements, rules, and institutions. ACTA attempted to do that and failed, but left a lasting legacy in the area of the regulation of the digital economy. Since reforming the WTO has proved impossible and establishing classic multilateral agreements outside the WTO extremely challenging, efforts have shifted to forums outside the WTO. So far, the predominant response has been to regulate the digital economy through PTAs.[99]

3.3 *Digital Regionalism*

Besides multilaterals, post-war international trade law has also relied on regional or preferential agreements to regulate cross-border economic activity. PTAs have been perceived as an alternative to multilateralism. But even regionalism is also historically closely connected to multilateralism.[100] The structuring of economic relations along regional lines has mostly been resorted to in years of stasis and stagnation of multilateral trade negotiations. Their proliferation has caused many economists to worry that they undermine the multilateral trading system.[101]

PTAs liberalize trade and discriminate against WTO members. Economists consider discriminatory trade liberalization beneficial when it is 'trade-creating', that is, when it promotes a shift of resources from inefficient domestic suppliers to more efficient producers within the region. This is not the case when an agreement creates 'trade diversion', i.e. a shift of resources from efficient external producers to inefficient producers within the region. Empirical studies suggest that PTAs are generally trade creating.[102]

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98 'National Foreign Trade Council: Strengthening the WTO and the Global Trading System: Remarks by DG Okonjo-Iweala' <https://www.wto.org/english/news_e/spno_e/spno25_e.htm>; see also G20 Ministerial Statement on Trade and Digital Economy, Tsubuka, Ibaraki, Japan (9 June 2019) paras 54–63 <http://www.g20.utoronto.ca/2019/2019-g20-trade.html> both accessed 15 April 2024.

99 See Georgios Dimitropoulos, 'The WTO New National Security Challenge' in Julien Chaisse and Cristián Rodríguez-Chiffelle (eds), *The Elgar Companion to the World Trade Organization* (Edward Elgar 2023) 619.

100 See also Dimitropoulos, Chen and Chaisse (n 10).

101 Nuno Limao, 'Preferential Trade Agreements as Stumbling Blocks for Multilateral Trade Liberalization: Evidence for the US' (2006) 96 American Economic Review 896–914; see generally Caroline Freund and Emanuel Ornelas, 'Regional Trade Agreements' (2010) 2 Annual Review of Economics 139.

102 See, for example, Scott Baier and Jeffrey Bergstrand, 'Economic Determinants of Free Trade Agreements' (2004) 64 Journal of International Economics 29–63. Often, countries

Trade creation may not be a sufficient justification for PTAs, though. Economists argue that one reason for the stagnation of multilateral trade negotiations is the spread of PTAs. Officials busy negotiating RTAs do not have the capacity to focus on multilateral negotiations. RTAs are rather 'termites' that undermine multilateralism.[103] Other economists suggest that RTAs help trade officials develop their expertise and capacity to negotiate and implement international trade agreements, which can then be applied to WTO negotiations. The argument goes that liberalization leads to more liberalization.[104]

Overall, the counterfactual nature of the question does not allow a definitive response whether PTAs promote or endanger multilateralism. But they remain a fact. The answer on their desirability will have to be traced outside their economic impact, and 'efficiency' considerations. This discussion takes a different turn when viewed through a different lens: the juxtaposition between developing and developed nations, or between large and small countries and economies.[105] The only way for (economically and/or politically) weaker countries to survive in the international economy is through their participation in the multilateral trading system. This is another version of the well-rehearsed argument that the only way of escaping the law of the jungle is to resort to the rule of law. But this also assumes that the rule of law will be one that is fair to the ones in need. The same must apply to international economic law too. The arguments are also well articulated here.[106]

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that form a PTA, reduce tariffs not only vis-à-vis their PTA partners, but also on imports from countries outside the bloc; see Antoni Estevadeordal, Caroline Freund, and Emanuel Ornelas, 'Does Regionalism Affect Trade Liberalization towards Non-members?' (2008) 123 Q J Econ 1531 (analyzing Latin America in the 1990s).

103 Jagdish N Bhagwati, *Termites in the Trading System: How Preferential Agreements Undermine Free Trade* (2008).

104 Richard Baldwin, *Towards an Integrated Europe* (CEPR 1994) Chapter 2.

105 See recently Daniel Gay and Kevin Gallagher, 'For the Least Developed Countries, Revitalising Multilateralism is Life or Death – Op-Ed' (Sustainable Development Blog, 29 August 2019) <https://www.un.org/sustainabledevelopment/blog/2019/08/least-developed-countries-revitalising-multilateralism-is-life-or-death/>; see also 'Multilateral Trading System: "No Alternative", Says UNCTAD Secretary-General', UNCTAD/PRESS/PR/2003/101, <https://unctad.org/press-material/multilateral-trading-system-no-alternative-says-unctad-secretary-general>; Anne O Krueger, 'An Enduring Need: The Importance of Multilateralism in the 21st Century, Remarks by Anne O Krueger', 2006 Annual Meetings of the International Monetary Fund and the World Bank (19 September 2006) <https://www.imf.org/en/News/Articles/2015/09/28/04/53/sp091906a> all accessed 15 April 2024; see generally T N Srinivasan, *Developing Countries and the Multilateral Trading System: From GATT to the Uruguay Round and the Future* (Routledge 1998).

106 See Quinn Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (HUP 2018), especially chs 4 and 6.

The difficulties in implementing changes within the multilateral trading system have prompted states to resort to PTAs for the regulation of digital trade.[107] Recent PTAs such as the United States-Mexico-Canada Agreement (USMCA), the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), the EU-UK Trade and Cooperation Agreement (TCA) and the Regional Comprehensive Economic Partnership (RCEP) address domestic measures pertaining to the digital economy. Almost all contain chapters on 'e-commerce' and 'digital trade'.[108]

Domestic data localization requirements are generally prohibited in these PTAs;[109] the same applies to source code disclosure measures.[110] At the same time, the restrictions on domestic measures within the agreements are typically subject to two qualifications: first, the prohibition is frequently implemented following an acknowledgment of the broad regulatory latitude afforded to the parties to enact domestic measures;[111] second, broad exceptions are included to permit deviations from the prohibitions. These exceptions reaffirm the right to regulate in the digital economy to achieve legitimate policy objectives. The USMCA is the most liberal PTA in digital trade; it does not include an outright exception clause in the prohibition of data-localization requirements.[112] RCEP, which has been spearheaded and signed by China, also has a digital trade chapter. The chapter includes provisions on the location of computing facilities[113] and the cross-border transfer of information by electronic means.[114]

107 See Mira Burri, 'Creating Data Flow Rules through Preferential Trade Agreements' in Anupam Chander and Haochen Sun (eds), *Data Sovereignty: From the Digital Silk Road to the Return of the State* (OUP 2023); see generally Shin-yi Peng, Han-Wei Liu and Ching-Fu Lin (eds), *Governing Science and Technology under the International Economic Order: Regulatory Divergence and Convergence in the Age of Megaregionals* (Edward Elgar 2018).

108 The relevant chapter of the CPTPPs has the title 'electronic commerce'. Most later PTAs adopt the term 'digital trade'.

109 USMCA art 19.12; CPTPP art 14.13; EU-UK TCA art 201. See generally Shin-yi Peng and Han-Wei Liu, 'The Legality of Data Residency Requirements: How Can the Trans-Pacific Partnership Help?' (2017) 51 JWT 183–204.

110 USMCA art 19.16; CPTPP art 14.17; EU-UK TCA art 207.

111 See, for example, CPTPP art 14.13(1) (regarding data localization requirements). USMCA arts 19.11 and 19.12 do not include the right to regulate in the same way as the CPTPP; this potentially suggests that the flow of data should be even more unrestricted in the context of this agreement.

112 USMCA art 19.12.

113 RCEP art 12.14.

114 ibid art 12.15.

But the exceptions in favour of domestic measures are much more assertive than in other agreements.[115]

Newer types of regional agreements besides traditional PTAs are also forged. In September 2021, the US and the EU announced the establishment of the new EU-US Trade and Technology Council (TTC) with the aim of addressing issues pertaining to trade in digital technologies.[116] The EU-US TTC is structured around 10 working groups. Traditional trade questions, such as tariffs, do not form part of the core of the work of the council.

3.4 *Digital Plurilateralism: towards a Third Generation*

Besides digital trade chapters in PTAs, new international agreements have developed to facilitate specifically the digital economy. They form part of an emerging third variety of digital plurilateralism. Digital Economy Agreements (DEAs) are on the rise, largely spearheaded by emerging digital economy powers such as Singapore.[117] The Digital Economy Partnership Agreement (DEPA) signed in June 2020 by Chile, New Zealand, and Singapore is the first agreement dedicated to digital trade. DEPA aims to establish a cross-border digital trade policy based on free data flows, non-discrimination of digital products, and non-forced location of computing facilities.[118] At the same time, it acknowledges an 'inherent right to regulate' in cross-border digital trade;[119] this right does not only cover traditional areas of public interest protection,

115 ibid art 12.13(1) and (3). RCEP's exceptions in arts 12.14 and 12.15 are much more assertive compared to the CPTPP and USMCA, as this agreement allows for both 'public policy exceptions' and 'essential security exceptions'. RCEP art 12.17 also suggests that the e-commerce chapter is not currently subject to state-state dispute settlement.

116 EU-US Trade and Technology Council Inaugural Joint Statement (29 September 2021) <https://ec.europa.eu/commission/presscorner/detail/en/statement_21_4951> accessed 15 April 2024; see Chad P Bown and Cecilia Malmstrom, 'What is the US-EU Trade and Technology Council? Five Things you Need to Know' (Peterson Institute for International Economics, 24 September 2021).

117 Ministry of Trade and Industry Singapore, 'What are Digital Economy Agreements (DEAs)?' <https://www.mti.gov.sg/Trade/Digital-Economy-Agreements> accessed 15 April 2024.

118 Deborah Elms, 'Unpacking the Digital Economy Partnership Agreement (DEPA)' (Asian Trade Center, 28 January 2020) <http://asiantradecentre.org/talkingtrade/unpacking-the-digital-economy-partnership-agreement-depa> accessed 15 April 2024; see also Julien Chaisse, '"The Black Pit:" Power and Pitfalls of Digital FDI and Cross-Border Data Flows' (2023) 22 WTR 73–89, at 86 (explaining that by emphasizing these principles, DEPA plays a vital role in attracting FDI to the digital sector, establishing a predictable and open legal framework that fosters innovation and cross-border economic activity).

119 See Preamble to Digital Economy Partnership Agreement (DEPA) <www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/digital-economy-partnership-agreement-depa/> accessed 14 April 2024.

but also further areas including the promotion of corporate social responsibility, cultural identity and diversity, environmental protection and conservation, gender equality, indigenous rights, labor rights, as well as more broadly, inclusive trade, sustainable development and traditional knowledge.[120]

DEPA is not a classic trade agreement. It has been characterized as a 'living agreement'. It operates based on a 'modular design'. The work is structured under several modules, where progress can be made in a stand-alone way.[121] These modules follow the Tokyo style and are mostly about facilitating digital trade rather than liberalizing through tariff reductions. Moreover, in addition to original signatories, it allows more states to join.[122]

DEPA has features like those of IPEF.[123] Following the IPEF, a comparable initiative for the Americas, the Americas Partnership for Economic Prosperity (APEP), was launched in June 2022.[124] Both frameworks, have similar legal nature and share similar areas of focus including on the digital economy and the development of digital infrastructure.[125] In September 2023, another IPEF-style framework was established: the India-Middle East-Europe Economic Corridor (IMEC). IMEC was presented at the G20 summit in New Delhi in September 2023. Saudi Arabia, the EU, India, the United Arab Emirates (UAE), France, Germany, Italy, and the United States signed a Memorandum

120 ibid.

121 The modules are the following: Business and Trade Facilitation; Treatment of Digital Products and Related Issues; Data Issues; Wider Trust Environment; Business and Consumer Trust; Digital Identities; Emerging Trends and Technologies; Innovation and the Digital Economy; Small and Medium Enterprises Cooperation; Digital Inclusion; Exceptions; Transparency; Dispute Settlement.

122 New membership requests were filed by South Korea and China, while Canada had previously expressed interest in participating; see New Zealand Ministry of Foreign Affairs & Trade, 'Digital Economy Partnership Agreement, Overview' <https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/digital-economy-partnership-agreement-depa/overview/> accessed 15 April 2024. South Korea became a member of DEPA in May 2024. Other DEAs, such as the Korea-Singapore Digital Partnership Agreement (KSDPA) have a more traditional PTA-like structure. Nonetheless, in terms of content, the KSDPA aligns with the new style agreements discussed below.

123 See infra Section 4.1.

124 The White House, 'FACT SHEET: President Biden Announces the Americas Partnership for Economic Prosperity' (8 June 2022) <https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/08/fact-sheet-president-biden-announces-the-americas-partnership-for-economic-prosperity/> accessed 15 April 2024. Besides the US, Barbados, Canada, Chile, Colombia, Costa Rica, the Dominican Republic, Ecuador, Mexico, Panama, Peru and Uruguay have joined APEC.

125 Joint Declaration on the Americas Partnership for Economic Prosperity (27 January 2023) para 6 <https://www.state.gov/wp-content/uploads/2023/01/APEP-Joint-Declaration-English-FINAL.pdf> accessed 15 April 2024.

of Understanding making a commitment to advance the corridor.[126] The plan is to build further trade connections and promote economic integration, also through digital connectivity, in the broader regions of South Asia, the Gulf, and Europe.[127]

All the aforementioned agreements are plurilateral framework agreements. They are focused on targeted cooperation and facilitate sector-specific (plurilateral) agreements within a smaller cohort of countries.[128] Third-generation digital plurilaterals are crafted outside the WTO framework. This approach is increasingly prevalent in new agreements related to digital trade and governance. Such a shift indicates a broader trend in the regulation of the digital economy, a topic the article explores in further detail in its last section.

4 Future Digital Ordering Using Plurilateral Agreements

The digital economy emerged when a multilateral framework was already established for the regulation of international trade. Domestic regulation of digital phenomena does not straightforwardly fit within WTO (or IIA) disciplines. There is uncertainty regarding the application of the traditional international frameworks. This results in a shift towards PTAs with specialized chapters on digital trade. At the same time, the global nature of the digital economy suggests the need for international coordination.[129] In the face of a stagnated Doha Development Round and challenges to the WTO's dispute resolution mechanisms and broader legitimacy, plurilateralism and plurilateral agreements have gained prominence as a pragmatic solution to the complexities of the digital economy. At the same time, plurilateralism facilitates quicker adaptation to technological advancements. The final section of the article discusses plurilateralism as a form of unilateral multilateralism, as well as the potential for future international ordering using plurilateral agreements in the digital economy.

126 The White House, 'Memorandum of Understanding on the Principles of an India–Middle East–Europe Economic Corridor' (9 September 2023) <https://www.whitehouse.gov/briefing-room/statements-releases/2023/09/09/memorandum-of-understanding-on-the-principles-of-an-india-middle-east-europe-economic-corridor/> accessed 15 April 2024.

127 See Abdul Moiz Khan, 'The India-Middle East-Europe Economic Corridor (IMEC): Too Little, Too Late?' (Carnegie Endowment for Peace, 12 December 2023) <https://carnegieendowment.org/sada/91214> accessed 15 April 2024.

128 Dimitropoulos, Chen and Chaisse (n 10).

129 Joshua P Meltzer, 'Governing Digital Trade' (2019) 18(S1) WTR S23–S48.

4.1 *Broad-Based Digital Plurilateralism?*

The Cornwall Consensus emphasizes a balanced approach to governance, integrating domestic and international rules to enhance economic resilience.[130] The new consensus also recognizes both the significant societal potential and the related risks of digital technologies.[131] Cyberspace is acknowledged as a frontier of the future.[132] Overall, the digital domain has been raised to the status of one of the four key themes critical for economic resilience.[133] This new governance framework proposes a more agile WTO that accommodates plurilateral agreements more broadly, especially in the digital economy.[134] Plurilateral agreements are deemed crucial for adapting to the rapid evolution and significant impact of digital technologies on global commerce, suggesting a strategic pivot to address digital economy challenges effectively.

In response to current economic and geoeconomic challenges, particularly in the digital economy, US officials advocated for a shift from traditional trade measures to a strategy focusing on plurilateral trade agreements and industrial rejuvenation.[135] The IPEF emerged as a manifestation of this approach as well as the Cornwall consensus, offering a platform for future negotiations, and shaping global economic frameworks, especially in digital trade, without binding commitments. IPEF is a framework that allows the negotiation of plurilateral agreements. IPEF is based on four pillars. The first pillar is dedicated to agreements in the 'connected', that is digital, economy.[136]

IPEF's structure seems – and to some extent is – novel, but less so if one understands IPEF as a framework agreement which allows the signing of plurilateral agreements within its context. This is how the WTO also operates. The four pillars demonstrate open language and flexibility in commitment. They only set a foundational framework for future agreements and the states' intentions for further negotiations and collaboration. The agreements within the IPEF framework imply a range of legal effects, some binding and others

130 Dimitropoulos, Chen and Chaisse (n 10).

131 Carbis Bay Communiqué (n 15) para 31.

132 ibid para 31.

133 See G7 Panel on Economic Resilience, Key Policy Recommendations; see also Dimitropoulos, Chen and Chaisse (n 10).

134 Carbis Bay Communiqué (n 15) para 28.

135 Dimitropoulos, Chen and Chaisse (n 10).

136 The other three pillars pertain to a resilient, clean economy and fair economy; see The White House, 'Statement on Indo-Pacific Economic Framework for Prosperity' (23 May 2022) <https://www.whitehouse.gov/briefing-room/statements-releases/2022/05/23/statement-on-indo-pacific-economic-framework-for-prosperity/> accessed 15 April 2024.

not. IPEF lends itself thus to the formation of open plurilateral agreements.[137] Following the announcement of IPEF, informal ministerial negotiations took place to define the objectives of each pillar of the framework.

Within the first pillar of the connected economy, ministers expressed the intention to 'craft high-standard, inclusive, free, fair, and open trade commitments that build upon the rules-based multilateral trading system'.[138] However, there are two challenges to further progress in this pillar: first, binding provisions have already been made in PTAs. It has been suggested that some Southeast Asian states may reevaluate their involvement in the trade pillar if it fails to sufficiently address market access in the digital trade sector.[139] Second, India decided not to participate in the pillar. This did not happen because of its digital trade dimension though, but rather because of its links with environmental and labour rights.[140]

Overall, these developments showcase a trend towards the use of plurilateralism as a broad-based and overarching strategy for the regulation of the digital economy. The next subsection offers an explanation and justification for this trend.

4.2 *Towards Unilateral Multilateralism in the Digital Economy*

To illustrate the role of plurilateralism in the contemporary digital economy, the article uses the paradoxical term 'unilateral multilateralism,' aiming to highlight how plurilateralism can bridge the unilateralist tendencies discussed above with the goals of a multilateral regime for the digital economy. Support for plurilateralism as a regulatory strategy in the digital economy stems first from the nature of the contemporary international order, and second from the inherent characteristics of digital technologies.

137 Rahul Mishra and Peter Wang, 'IPEF Introduces Institutional Reality to Indo-Pacific Region' (*Asia Times*, 30 May 2022) <https://asiatimes.com/2022/05/ipef-introduces-institutional-reality-to-indo-pacific-region/> accessed 15 April 2024.

138 IPEF, 'Ministerial Text for Trade Pillar of the Indo-Pacific Economic Framework for Prosperity', <https://ustr.gov/sites/default/files/2022-09/IPEF%20Pillar%201%20Ministerial%20Text%20(Trade%20Pillar)_FOR%20PUBLIC%20RELEASE%20(1).pdf> accessed 15 April 2024.

139 Andreyka Natalegawa and Gregory B Poling, 'The Indo-Pacific Economic Framework & Digital Trade in Southeast Asia', Center for Strategic and International Studies (CSIS) (May 2022) 3.

140 'The United States Launches the Indo-Pacific Economic Framework for Prosperity and the Americas Partnership for Economic Prosperity' (2022) 116(4) AJIL 868, 871.

4.2.1 The Status of the International Economic Order

The debate over choosing between multilateralism and plurilateralism reflects past discussions contrasting multilateralism with regionalism. Criticisms of plurilaterals focus on their potential to weaken the multilateral trading system. Instead of 'termites', the metaphor of the 'slope' has been employed to describe this effect. There are concerns that plurilateral agreements represent a 'slippery slope' away from openness and toward protectionism, potentially leading to retaliation by affected countries. This viewpoint was first introduced after the Tokyo Round.[141]

On the other hand, it is suggested that plurilaterals may serve as a 'stepping stone' towards multilateralism. Following the Tokyo Round, a World Bank publication described the codes as 'important first steps' in addressing the challenges of the international economy.[142] 'Plurilateral negotiations among a sub-group of WTO members on issue areas where there is a convergence of interests and a willingness to take steps towards deeper integration', according to a G20 report 'may help revive negotiations within the WTO too'.[143] The report suggests that plurilateral agreements could propel multilateral liberalization forward. This dynamic emerges when a lack of consensus within the WTO stalls multilateral trade negotiations. It occurs in situations where many members share a common approach, but a few dissenters obstruct consensus.[144]

Others present 'last resort' arguments in favor of plurilaterals. Tokyo Round agreements were also said to 'may be important not so much for what they will accomplish as for what they will prevent'.[145] The European Commission has issued a concept paper on WTO reform that proposes pursuing plurilateral agreements as a last resort, namely when 'multilateral consensus is unattainable'.[146]

The historical development of plurilateralism, especially in the context of new and digital technologies, demonstrates that plurilaterals were created with two key objectives: First, they aimed to preserve and build upon progress already made in international trade and coordination. Second, they were designed to accommodate the preferences and specific conditions of the

141 Krasner (n 12) 526.
142 Kemper (n 17) 30.
143 Berger and others (n 27).
144 ibid.
145 Kemper (n 17) 30.
146 European Commission, 'WTO Modernisation: Future EU Proposals', EC Concept Paper (2018) <http://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157331.pdf> accessed 1 February 2024.

negotiating parties.[147] This dual purpose allowed plurilaterals to maintain momentum while providing flexibility for diverse interests. At the same time, this approach has enabled progress beyond a sole focus on liberalization while preserving the advantages of operating within a multilateral framework.[148]

The aforementioned World Bank study suggested that developing nations would be hurting their interests by not signing the Tokyo Round agreements. Not signing would lead to the abandonment of the opportunity to participate in the active management of the future world trade regime. In addition, they would lose the material benefits provided for signatories under plurilateral codes.[149] LDCs have traditionally rejected the idea that all states should be treated in the same manner.[150] A less recognized aspect of plurilaterals is their adoption alongside Special & Differential Treatment (SDT) provisions for developing countries.[151] In the Nineties, and under conditions of advanced harmonization, scholars had already started questioning whether harmonization and multilateral disciplines on regulatory principles within member states should be negotiated alongside trade liberalization. The argument is familiar and goes back to the origins of free trade theory: free trade is most efficient when industries looking to specialize can leverage differences among countries.[152] Plurilateralism allows developing and least developed nations to remain within the multilateral framework without requiring their participation in all agreements or binding them to all disciplines.

Historically, some plurilaterals have been regarded as efforts to manage PTAs. For instance, during the TiSA negotiations, a Swiss trade negotiator explained that '[m]ost participants have already concluded several trade agreements covering services. The new initiative will allow to pool, revamp and improve what has been achieved so far as well as to enhance the coherence of the regimes governing global trade in services'.[153] Contemporary broad-based plurilateralism emphasizes this approach in a broader context by proposing to integrate

147 See USTR's Robert Strauss, quoted from E Drew, 'Profiles, Equations' (*The New Yorker*, 7 May 1979) 79.

148 Kakabadse (n 17) 308–09.

149 Kemper (n 17) iii.

150 Krasner (n 12) 527–28.

151 See Kemper (n 17) 28.

152 Jagdish Bhagwat, 'Free Trade: Old and New Challenges' (1994) 104 The Economic Journal 231; see generally Jagdish N Bhagwati and Robert E Hudec (eds), *Fair Trade and Harmonization: Economic Analysis* (MIT Press 1996).

153 'Swiss Negotiator: Regional Trade Deals Are Good for Multilateralism' (*Euractiv*, 9 October 2012) <https://www.euractiv.com/section/trade-society/news/eu-and-good-friends-weigh-international-services-pact/> accessed 15 April 2024.

PTAs within the WTO or other international institutions. Plurilaterals in the digital economy may better support the multilateral trading system than recent developments that have shifted regulatory efforts toward PTAs. They could be viewed as an effort to consolidate previously adopted (chapters in) PTAs in the digital economy.

Overall, plurilateralism can reconcile the demands for international coordination within a multilateral context with the need for domestic differentiation. It adapts to a concept of international trade that eschews uniform rules. In an era characterized by economic unilateralism in digital trade and beyond, plurilaterals represent the pursuit of free trade without harmonized regulations. This is a unilateral multilateralist approach.

The above arguments emphasize plurilateralism's position as a middle ground in international economic governance. The following section reinforces this perspective, drawing on the inherent characteristics of digital technologies.

4.2.2 The Nature of Digital Technologies

Digital industries are inherently global, with digital technologies crossing borders by design and creating significant interdependence among actors. This feature of digital technologies suggests that an international framework for coordination may be more crucial for digital technologies than for other sectors.

Quantitatively, IT and digital products comprise a substantial proportion of overall international trade.[154] At the time ITA was signed, the IT sector was already the world's fastest-growing industry.[155] World exports of IT products almost tripled in value between 1996 and 2010.[156] Over the same period, IT products became one of the most important product categories in world trade.[157] This had given rise to the ITA Expansion. Over the past two decades, data-driven services have increased from almost one-quarter to about half of the total service exports.[158]

154 Fliess and Sauvé (n 21) 4.

155 ibid 6.

156 WTO, 15 Years of ITA (n 34) 50.

157 ibid.

158 World Bank Group, 'World Development Report 2021: Data for Better Lives' (World Bank 2021) 237–38 <https://www.worldbank.org/en/publication/wdr2021#:~:text=World%20Development%20Report%202021%3A%20Data%20for%20Better%20Lives%20explores%20the,individuals%2C%20businesses%2C%20and%20societies> accessed 15 April 2024.

The digital economy also differs significantly in qualitative terms.[159] The digital economy is inherently global, operating in a borderless and often peer-to-peer manner, with buyers and sellers directly engaging outside traditional national or international frameworks.[160] The sharing and platform economy are the most notable examples,[161] as well as the cryptoeconomy of the blockchain,[162] and the economy of the metaverse.[163]

In addition, digital sector liberalization can help deliver economy-wide benefits. IT and digital products have an intermediary nature as they serve as inputs for other products: access to cheap IT inputs can help bring about benefits to the overall economy.[164] Few industries exist where their products and services are essential to the functioning of all other goods- and service-producing sectors as IT products.[165] Moreover, because of the general-purpose nature of digital technologies,[166] digital products have economy-wide positive externalities; they can thus can bring about organizational and technological innovation in the overall economy.[167]

In addition, the market for IT and digital products is globally integrated. Global-value chains are at the heart of digital products.[168] Manufacturers

159 See generally WTO, 'World Trade Report 2018: The Future of World Trade: How Digital Technologies are Transforming Global Commerce' (3 October 2018) 8 <wto.org/english/res_e/publications_e/world_trade_report18_e_under_embargo.pdf> accessed 15 April 2024. Dan Ciuriak and Maria Ptashkina suggest a classification of transactions based on delivery mode and the nature of the parties to the transaction. All modes of cross-border transaction involve household level participation in cross-border transactions. But especially Modes 3 and 4 involve the direct participation of the household in international trade. Dan Ciuriak and Maria Ptashkina 'The Digital Transformation and the Transformation of International Trade', International Center for Trade and Sustainable Development Issue Paper (Geneva, 2018).

160 Joshua Meltzer, 'The Internet, Cross-Border Data Flows and International Trade' (2013) 22 Issues in Technology Innovation 1.

161 Tom Slee, *What's Yours Is Mine: Against the Sharing Economy* (OR Books 2016).

162 Eric Voskuil and James Chiang, *Cryptoeconomics: Fundamental Principles of Bitcoin* (2020).

163 Michel Kilzi, 'The New Virtual Economy of the Metaverse' (*Forbes*, 20 May 2022) <https://www.forbes.com/sites/forbesbusinesscouncil/2022/05/20/the-new-virtual-economy-of-the-metaverse/?sh=198217946d83> accessed 15 April 2024.

164 Fliess and Sauvé (n 21) 4.

165 ibid 3.

166 See generally Timothy F Bresnahan and Manuel Trajtenberg, 'General Purpose Technologies "Engines of Growth?"' (1995) 65 Journal of Econometrics 83.

167 WTO, 15 Years of ITA (n 34) 65.

168 United States International Trade Commission, 'Advice Concerning an Information Technology Agreement and Modification of Duties on Distilled Spirits: Report to the President on Investigation No. 332–380', Publication 3031 final (April 1997).

depend on internationally sourced components, such as semiconductors, alongside with foreign production and sales facilities. According to Flies and Sauvé,

> The convergence of information, communication and computer technologies differs from previous technological revolutions, both in the speed of transformation it allows and the pervasiveness of its impact, not only on manufacturing but, for the first time in economic development, on many service industries (including governments).[169]

As the last sentence of the quote suggests, IT and digital technology is widely recognized as crucial for the growth and development of nations.[170] At the same time, developing countries have been since the Nineties leading exporters as well as importers of IT and digital tech products.[171] The largest importer of IT products is often the largest exporter in the IT sector.[172] The typical import/export pattern involves developing countries importing semiconductors and other capital-intensive components. These microelectronics are then converted into various intermediate and, frequently, final products that are distributed globally.[173]

In the digital economy, a multilaterally coordinated framework that respects domestic specificities is crucial, potentially more so than in many other areas of international trade.

4.3 *Features of Successful Digital Plurilateralism*

Overall, regulation of the digital economy has increasingly taken a plurilateral approach, both within and outside the WTO. The article presented three generations of digital plurilaterals. The table below summarizes them based on their nature as either closed or open – referring to the mode of participation of the different parties, and their regulatory objectives. For comparison, it also includes the features of Tokyo plurilateralism.

169 Fliess and Sauvé (n 21) 9–10.
170 ibid.
171 ibid 7–9; WTO, 15 Years of ITA (n 34) 52.
172 ibid 52.
173 ibid 53.

Generations of plurilaterals	Mode of participation	Regulatory objectives
Tokyo plurilaterals	closed	NTBs, trade facilitation and management
1st generation digital plurilaterals	*ITA*: open	tariff reduction
	ABT: open	tariff reduction (and some NTBs/market access)
2nd generation digital plurilaterals	*JSI on electronic commerce*: unclear	NTBs, trade facilitation and management
	JSI on services domestic regulation: open	
3rd generation digital plurilaterals	*DEPA:* open	NTBs, trade facilitation and management
	IPEF/APEP/IMEC digital economy pillars/aspects: open	

SOURCE: AUTHOR BASED ON THE ANALYSIS UNDER SECTIONS 2, 3.4 AND 4.1.

Not all digital plurilateral efforts have been equally successful. The success of the ITA negotiations has been attributed to four main factors: first, a narrow scope outside the single undertaking approach; second, involvement of a negotiating group with the participation of a considerable number but not all WTO members; third, a focus on tariffs rather than non-tariff barriers; finally, avoiding a nationalistic opposition.[174] The G20 report mentioned above outlines core principles intended to guide negotiations among members of a plurilateral subgroup within the WTO. These principles aim to establish open plurilateral agreements as a viable alternative to multilateral rulemaking:[175] (i) inclusiveness is essential both at the initial and later stages of the negotiations, as well as after the conclusion of the agreement; (ii) transparency requires openness regarding both processes and outcomes, as well as both to non-participants and the general public; (iv) development-friendliness is key too. The negotiations should consider the unique circumstances of each

174 Winslett (n 36) 417–23.
175 Berger and others (n 27).

country, ensuring the process remains developmentally inclusive; (iv) non-discrimination, as an overarching principle of international economic law, requires that members that did not initially join are not to be discriminated against when and if they seek to become part of the agreement later; (v) equally, the benefits of the agreement are to be extended to all WTO members, regardless of their participation in the plurilateral agreement; (vi) finally, consistency and compliance require that the agreement maintains overall alignment with the broader WTO framework and adheres to fundamental WTO rules, such as the MFN principle.[176]

Plurilateralism, understood as unilateral multilateralism, along with historical experience and recent academic and policy commentary, suggests four key success factors for digital plurilaterals: sectoralism; inclusivity; identifying appropriate regulatory objectives; and, clearly defining the mode of participation.

The first key factor is the sectoral nature of negotiations. While in the traditional trade context sectoral negotiations are often seen as more prone to capture and protectionism,[177] successful plurilaterals are truly sectoral; ITA, for instance, initially covered a relatively limited range of IT products, which were expanded later, while the ABT was limited to 'basic' telecommunications. This may also at least partly explain the failure of TiSA. TiSA was not really sectoral.[178] It tried to replicate the GATS, while services are very broad and diverse. It was thus rather a generic agreement dressed up in a plurilateral form. On the other hand, the services JSI focused on a relatively limited set of aspects of domestic regulation. Sectoralism allows for domestic differentiation on issues critical to the relevant state, while advancing matters that are ready for multi-party coordination.

This dimension might also explain why, despite the initial momentum, the final draft of the Agreement on Electronic Commerce covers fewer areas than those originally negotiated in the JSI.[179] It could also shed light on why nego-

176 Additionally, the report recommends establishing new procedural and organizational rules for open plurilateral negotiations and agreements, with the aim of eventual multilateralization. It also proposes creating a platform for sharing experiences in the negotiation and implementation of plurilaterals; see Berger and others, Improving Key Functions of the WTO (n 27).

177 Krasner (n 12) 501. In plurilaterals, capture and protectionism can be mitigated due to the voluntary nature of participation.

178 See generally Harold Godsoe, 'The Depth of the Trade in Services Agreement' (2014) 10 BYU International Law & Management Review 1.

179 The United States Trade Representative (USTR) had already announced in an October 2023 statement that it was reconsidering the US stance on data localization and source code;

tiations in the new plurilateral frameworks may have stalled. The postulate of sectoralism calls for a reevaluation of the current scope of digital economy negotiations in third generation plurilaterals. Considering that the digital economy can cover a broad spectrum, negotiating states may benefit from narrowing the thematic focus of their negotiations. A more targeted approach could involve concentrating on specific sectors such as the Internet of Things, digital platforms, artificial intelligence, cryptoassets, and cross-border data flows.[180]

The second key factor influencing the success or failure of plurilaterals is inclusivity, particularly in relation to developing countries, emerging economies, and LDCs. For example, unlike the ITA, the failed TiSA excluded developing nations from the initial group of negotiating countries.[181] The JSI on domestic services regulation has been more inclusive. Plurilateral negotiations should be open, transparent and inclusive, engaging developing, emerging, least developed as well as developed countries. In fact, given the crucial position emerging economies have in digital economy and trade, they should have the driver's seat in the negotiations for the new digital order. As discussed above, several major digital economy players, such as the US, China, and the EU, work together in the e-commerce JSI. However, emerging digital markets like India and South Africa are not involved. The IPEF is inherently exclusionary towards China, yet it does include many emerging markets and developing nations. However, India has chosen not to participate in the

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see USTR, 'USTR Statement on WTO E-Commerce Negotiations' (24 October 2023) <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2023/october/ustr-statement-wto-e-commerce-negotiations> accessed 15 April 2024; see also (n 56) and accompanying text.

180 The most pressing sector to address would arguably be trade and AI; see generally Han-Wei Liu and Ching-Fu Lin, 'Artificial Intelligence and Global Trade Governance: A Pluralist Agenda' (2020) 61 Harvard International Law Journal 407–50. Blockchain-related questions seem a little broader than what a plurilateral agenda could possibly handle today; on one of the uses of blockchain in the cross-border trade in food see Ching-Fu Lin, 'Blockchainizing Food Law? Promises and Perils of Incorporating Distributed Ledger Technologies into Food Safety, Traceability, and Sustainability Governance' (2020) 74(4) Food and Drug Law Journal 586–612. The same approach could also involve dispute settlement in specific areas, such as cross-border data flows; see, for example, Julien Chaisse, 'Arbitration in Cross-Border Data Protection Disputes' (2024) JIDS <https://doi.org/10.1093/jnlids/idae018> accessed 14 November 2024.

181 Pascal Lamy noted in 2011 about ITA that '[t]his landmark agreement demonstrates not only that developed and developing countries can work together in a mutually beneficial manner, but also that the WTO could serve as an effective forum to promote trade opening beyond what was achieved during the Uruguay Round'; Pascal Lamy, 'Foreword', in WTO, 15 Years of ITA (n 34) 3.

negotiations under the relevant pillar of this framework.[182] This freedom not to participate contributes to inclusivity, as it typically allows states to engage with the plurilateral framework without committing to specific agreements or components of the framework. This contrasts with PTAs, which have often been used to advance geopolitical and geoeconomic goals, frequently pressuring politically or economically weaker states into participation.[183] This is particularly important in an area of such intense geoeconomic tension as digital technology. It remains to be seen how the use of plurilateral frameworks such as the IPEF for geoeconomic purposes will unfold.

Digital economy plurilaterals should strive to address the existing and emerging digital divides more effectively; digital divides are one of the greatest challenges of our century.[184] If not addressed, digital globalization could replicate the inequalities of economic globalization and potentially exclude developing countries from opportunities to enhance their economic conditions through digitalization.[185] The digital economy may even lead to new economic divides.[186] International organizations such as UNCTAD are heavily involved in a future without digital divides.[187] New plurilateral frameworks introduce, for the first time in such a prominent way, concepts like fairness

182 See supra Section 4.1.

183 See generally Melissa K Griffith, Richard H Steinberg and John Zysman, 'From Great Power Politics to a Strategic Vacuum: Origins and Consequences of the TPP and TTIP' (2017) 19 (Special Issue 4) Business and Politics 573.

184 See generally Neha Mishra, *International Trade Law and Global Data Governance: Aligning Perspectives and Practices* (Bloomsbury 2024) ch 5.

185 See Paul Collier, *The Bottom Billion: Why the Poorest Countries Are Failing and What Can Be Done About It* (OUP 2007) 118; James B Pick and Rasool Azari, 'Global Digital Divide: Influence of Socioeconomic, Governmental, and Accessibility Factors on Information Technology' (2008) 14 Information Technology for Development 91; Maarten Smeets (ed), *Adapting to the Digital Trade Era: Challenges and Opportunities* (WTO Chairs Programme 2021). Crises, such as the COVID-19 pandemic, have further accentuated digital divides; see UNCTAD, 'COVID-19 Crisis: Accentuating the Need to Bridge Digital Divides' (UNCTAD/DTL/INF/2020/1) <https://unctad.org/en/PublicationsLibrary/dtlinf2020d1_en.pdf>.

186 Ali Parry and others, 'Are Digital Advances and Inclusive Growth Compatible Goals? Implications for Trade Policy in Developing Countries', in Maarten Smeets (ed), *Adapting to the Digital Trade Era: Challenges and Opportunities* (WTO Chairs Programme 2021) 280, 289–91.

187 See UNCTAD, 'Digital Economy Report 2021: Cross-Border Data Flows and Development: For Whom the Data Flow' (29 September 2021); UNCTAD, 'Technology and Innovation Report' (2023) <https://unctad.org/tir2023>; see also The Bridgetown Covenant: From Inequality and Vulnerability to Prosperity for All (Fifteenth session, Virtual Barbados 3–7 October 2021) <https://unctad.org/system/files/official-document/td-l-435_en.pdf> both accessed 15 April 2024.

in international trade. IPEF's last pillar aims at developing a 'fair economy'. APEP, besides the now common references to a resilient digital economy, aims at 'foster[ing] an inclusive digital economy by taking concerted steps to close the digital divide, promote digital-enabling skills, and leverage digital tools, digital literacy, and technology to meet our goals'.[188]

The third point is the objective and purpose of regulation through plurilaterals. Historically, plurilaterals were created to tackle NTBs. However, the most successful digital plurilaterals – of the second generation – have primarily focused on reducing tariffs. More recent plurilateral negotiations, both within (second generation) and outside (third generation) the WTO,[189] echo the Tokyo example and are not primarily concerned with tariffs or traditional market access; instead, they focus on institutional trade governance – see again the above table. An overarching agreement for IPEF was reached during the IPEF Leaders' Meeting in San Francisco in November 2023.[190] This establishes an IPEF Council, and provides for meetings for Heads of States. In a similar way, the IPEF Supply Chain Agreement,[191] the first plurilateral agreement arising out of IPEF, introduces a new mode of managing supply chains: the establishment of governance mechanisms, such as the IPEF Supply Chain Council, the IPEF Supply Chain Crisis Response Network, and the IPEF Labor Rights Advisory Board. These bodies include representatives from all signatories and function as the administrators of the relevant issues under the agreement. The final goal is trade management and facilitation rather than market liberalization. Overall, the scope of the agreement and the nature of the regulated sector will be a key factor in determining whether tariff reductions should be included in plurilaterals, or whether plurilaterals should only focus on NTBs broadly speaking, including management of the relevant economic sector and facilitation of the relevant economic activity.[192] Historical coincidence also

188 Joint Declaration on the APEP (n 117) para 6.

189 See, for example on the IPEF, 'Joe Biden Waters Down Indo-Pacific Economic Framework to Win More Support' (*Financial Times*, 20 May 2022) (discussing IPEF).

190 US Department of Commerce, Joint Statement from Indo-Pacific Economic Framework For Prosperity Partner Nations (16 November 2023) <https://www.commerce.gov/news/press-releases/2023/11/joint-statement-indo-pacific-economic-framework-prosperity-partner> accessed 15 April 2024.

191 US Department of Commerce, 'Indo-Pacific Economic Framework for Prosperity Agreement Relating to Supply Chain Resilience' (31 January 2024) <https://www.commerce.gov/news/press-releases/2024/01/us-department-commerce-announcesupcoming-entry-force-ipef-supply-chain> accessed 24 October 2024.

192 But see Berger and others (n 27) ('The ITA as well as the Expansion Agreement are [...] limited to the objective of eliminating tariffs. However, participants also agreed on a set of regulatory guidelines for telecommunications. It has thus been demonstrated that open

plays a significant role. Given the current state of the international economy and geoeconomic tensions, the focus on NTBs, facilitation, and management of the digital economy seems more appropriate.

Finally, as a fourth consideration, much depends on the mode of participation. As analyzed above, plurilaterals can be either closed or open. Contemporary digital plurilaterals are often negotiated as open in new plurilateral frameworks and as closed within some JSIs of the WTO. Most successful digital plurilaterals tend to be open, as they allow for the multilateral extension of concessions that were initially decided unilaterally and later agreed upon plurilaterally. The silence of the e-commerce JSI on this issue is noteworthy. A unilateral multilateralist perspective suggests that the WTO remains receptive to the idea of open plurilateralism.

5 Conclusion

Amidst the evolving nature of cross-border transactions and the tools states use to regulate the international economy, plurilateral agreements are reemerging as an alternative regulatory instrument in international economic governance. The article identified three generations of plurilaterals, and explored arguments supporting plurilateralism as a compromise between unilateralist tendencies and the aspirations for a multilateral framework regulating the digital economy. To depict this role of plurilateralism in contemporary digital economy, the paradoxical term 'unilateral multilateralism' has been used. Digital plurilateralism could bridge gaps between differing national regulations and foster a more cohesive approach to digital trade and the broader digital economy. Additionally, it could ensure inclusivity and fairness among all participating nations, particularly developing countries.

To address future digital challenges effectively, plurilateral agreements could be designed to be more adaptable and responsive, incorporating flexible mechanisms that allow for updates as digital technologies advance and new issues arise. They could also promote deeper collaboration among a diverse set of stakeholders, including tech companies, civil society, and governments, to

plurilaterals can be used by WTO members […] for agreements on allied matters such as regulatory guidelines, at least in services. The use of open plurilateral agreements is appropriate for market access and regulatory guidelines when majority of the members are in agreement'). The G20 report further clarifies that open plurilaterals are not suitable for areas where there is significant divergence among members about the way forward, such as traditional market access in agriculture; see ibid.

ensure a broad range of perspectives and expertise is considered. Additionally, enhancing transparency and increasing engagement with non-participating countries could mitigate concerns about exclusivity and the digital divide. This approach would help to ensure that plurilateralism and plurilateral agreements not only address the needs of the digital economy but also contribute to a more inclusive and equitable global digital governance framework.

Acknowledgements

I would like to thank participants at the Research Forum of the 2022 American Society of International Law Midyear Meeting, 10–12 November 2022, Miami, Florida for excellent comments. I am very grateful to Julien Chaisse, Rich Chen, all contributors to the Special Issue, as well as the three anonymous reviewers for excellent comments.