# Navigating the Digital Divide:

## Challenges and Strategies for Latin American Countries in E-commerce and Data Governance Regulation

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# Executive Summary

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In recent years, there has been a growing concern that only a few countries and players have been accruing the benefits and wealth stemming from the digital economy, widening the gap between developed and developing countries. The development gap related to digital trade is particularly acute in Latin American countries.

There are various asymmetries fueling this gap, including data-related divides. Data is not only an enabler of trade but may also be a product in the context of dematerialized goods and services commercialized online. The US and China harbor a significant part of the infrastructure, companies, and capital that comprise the data economy, followed by the European Union. These three players historically have used different approaches to regulate data flows. Nevertheless, they are under growing pressure to exercise sovereignty over the digital economy, including over data. The US and China are also entangled in a geopolitical competition to assert leadership in the field of digital technology.

Despite structural difficulties and its low performance in the digital economy, Latin America has been one of the most active regions in terms of treaty-making on digital trade. However, Latin American countries lack their own model of digital trade regulation and tend to replicate existing ones, not only when negotiating agreements with third parties, but also within the region. So far, the US regulatory approach, as exemplified by the Comprehensive and Progressive Agreement

for Trans-Pacific Partnership (CPTPP), has had the most significant influence on Latin America.

The current scenario of growing geopolitical tensions and changes in US trade policy may put Latin American countries under additional pressure to choose from one of the existing models of digital trade regulation when negotiating with the major players. While some developing countries may stand to gain from near-shoring, the poorly defined notion of near-shoring "essential" products could easily be broadened by protectionist interests. In the field of technology, such a move could work against efforts to broaden access to technology in developing countries, especially those that fall out of politico-ideological alliances.

It is also important to consider the possibility that geopolitical tensions may create a moment of openness, in which uncertainty may facilitate envisioning alternative options. The ongoing recalibration of trade and digital policies among the three big players creates a window of opportunity for some developing countries in Latin America – especially those less bound by agreements – to question whether the predominantly liberalizing model that characterizes traditional agreements, such as the CPTPP, is worth pursuing.

A number of countries in Latin America are already embroiled in negotiations or bound by agreements from which it would be too hard or costly to defect. In this scenario, it is advisable to consider the inclusion of binding provisions within the ongoing and future digital trade negotiations, which would contribute to development. That could happen by a) incorporating provisions aimed at promoting digital inclusion and tackling inequality, and b) incorporating specific horizontal and vertical development-oriented provisions. Latin American countries can find inspiration in agreements celebrated outside the region, as they seek to mainstream development in their digital trade negotiations. This policy paper concludes with a number of recommendations, both institutional and substantive.

# Introduction

The potential of e-commerce to promote inclusive development has been debated for decades. As early as 2003, the *'E-Commerce and Development Report'*, published by UNCTAD, highlighted that e-commerce could promote economic efficiency, the integration of developing countries into the digital economy, the creation of jobs and economic growth (UNCTAD, 2003, p. xvii). In order for this potential to be realized, a concerted effort by different stakeholders should be put in place, in order to "ensure that the new opportunities for creating, transforming, applying and exchange information and value are used to improve the productivity of developing economies and their enterprises" (UNCTAD, 2003, p. xx).

In recent years, however, reports by several organizations, such as the World Bank (2016), the Internet Society (2019), the World Economic Forum (2021), and UNCTAD (2021) have shown that only a few countries and players were accruing the benefits and wealth stemming from the digital economy, generating a trend towards a widening gap between developed and developing countries.

Various asymmetries are fueling this gap, such as lack of access to infrastructure and connectivity, insufficient digital literacy and skills to take advantage of economic opportunities, barriers to accessing online intermediaries (notably e-commerce platforms) that serve as gatekeepers to the global market (ITC, 2017) as well as data-related divides (Farboodi and Veldkamp, 2021, p. 2). In Latin America, small and medium-sized companies (SMEs) face additional obstacles to engaging in cross-border e-commerce, including access to trade, finance, complex cross-border logistics, and disparate regulation, including on digital issues (Souminen, 2019, p. 15-6).

Data divides constitute an important obstacle to promoting a fairer distribution of wealth, because they are "the 'intangible asset[s]' and 'infrastructure' underlying the digitalised economy" (Mishra, 2024, p. 1), enabling not only the international trade of goods and services – especially in a context of servicification of trade (Burri, 2020) – but also the domestic development of the digital economy. Servicification refers not only to those products that were previously attached to a physical device (such as CDs in the case of music, now increasingly streamed as bits and bytes over the Internet) but also to the integration of data-intensive services in manufactured goods (Burri and Chander, 2023, p. 100), such as the apps that accompany fitness equipment.

In parallel, data is also important from a domestic industrial policy perspective. While developing countries generate large volumes of data, many face data scarcity because of the network effects in the platform economy,

specialization (which gives a comparative advantage to large firms that conduct intensive data collection), and intellectual property laws companies use to exclude third parties from accessing their data (Maciel, 2023). Low levels of access to data confine developing countries to a 'data poverty trap' (Farboodi and Veldkamp, 2021, p. 2), with lower levels of production and transactions and lower profits, hindering further data accumulation and analysis. As remarked by Chander and Sun (2023, p. 19), "developing nations fear recapitulating colonialism, specifically, of being both the raw materials (now in the form of data) and markets for Western manufacture (in the form of processed information)." Breaking this cycle is one of the goals of digital industrial policies (Maciel, 2023).

In spite of data's importance to development, UNCTAD's 2021 Digital Economy Report pointed out that datasets and data processing infrastructure are highly concentrated in the United States and China. According to a study by Nikkei Asia, cited by Mishra (2024, p. 125), "while 23 per cent and 12 per cent of the global data flows were attributable to China and the USA respectively, developing countries in Africa and Latin America were negligible contributors to global data flows". The US and China harbor 50% of the world's hyperscale data centers, and 90% of market capitalization of the largest platforms (UNCTAD, 2021, p. 2). This concentration also means that enhancing a more equitable distribution of assets in the digital economy is not only a concern for developing countries but an important goal for developed countries as well, which find themselves squeezed between the two technological giants.

Taken together, the aforementioned asymmetries and barriers help to explain why e-commerce underperforms in certain regions. Despite the pandemic-led growth in e-commerce, penetration rates remain below average in Latin America, "and the region remains largely untapped" (Access Partnership, 2022, p. 5). Apart from Africa, Latin America and the Caribbean have the lowest regional average score in the Business-to-Consumer (B2C) e-commerce index and a lower share of global online shoppers than its emerging peers (UNCTAD, 2020, p. 8).

In a scenario of growing geopolitical rivalry for technological leadership, promoting digital trade liberalization and increasing the volume of cross-border trade – the end goals of the vast majority of free trade agreements – are increasingly seen as insufficient by developed and developing countries alike. From the perspective of developed countries, trade policy has been depicted as a way to pursue other policy objectives, such as protecting consumers and the labor force, and achieving national security goals. In this new scenario, developing countries could also seek policy space to recalibrate their expectations on international trade, especially on agreements concerning the digital economy. This recalibration includes considering a range of options, from halting their engagement in agreements promoting digital trade liberalization altogether, to engaging in liberalizing agreements with binding provisions that promote the achievement of development-oriented

goals. Developing countries could also pose the normative question of whether trade agreements should address data governance issues and if so, how (Streinz, 2019, p. 314).

Future rule-making for the digital economy "needs more flexibility and calibration" than international trade law based on the CPTPP model (Streinz, 2019, p. 314), so that developing countries can respond creatively to their needs on digital industrial policy and data regulation. The digital trade rules potentially "put handcuffs on what central, and sometimes local, governments can do in their laws, policies, and practices behind the border" (Kelsey, 2020, p. 10). The autonomy a developing country requires will depend on its domestic regulatory landscape. A country will need more space in areas in which it is uncertain about how to proceed in terms of policy and regulation (i.e., lack of factual data allowing it to take a position, lack of capacity to take the step at the moment, or no decision yet on which direction to follow).

Digital trade has the potential to play a role in achieving several Sustainable Development Goals (SDGs), from tackling poverty and promoting productive employment and decent work to fighting inequality, including gender-based inequality (Revinova, 2021, p. 3). It can be leveraged to promote the empowerment of women as entrepreneurs and traders, encourage the formalization and growth of micro, small, and medium enterprises (MSMEs) in developing countries, and promote their integration into cross-border value chains and markets (WTO; OECD, 2017). For this potential to be realized, however, development-oriented considerations should be included in digital trade discussions from the outset of the negotiating processes.

This paper is structured in four parts. Part I focuses on the three largest players in digital trade: the US, the EU, and China. Based on the premise that "the digital/data divide may translate into a development divide, wherein developing countries are forced to import foreign digital technologies from developed countries (and arguably their models of data regulation)" (Mishra, 2024, p. 124), Part I also delves into the drivers and main features of the three main approaches to data regulation in trade agreements. It explains how these approaches are undergoing important transformations, propelled by the notion of digital/data sovereignty. These changes could have an impact on the development-oriented strategies of Latin American countries in digital trade negotiations.

Part II maps out how Latin America fits into the data-driven digital economy. It provides an overview of how Latin American countries respond to digital trade regulation in light of their interests in the global economy, with examples of agreements signed within the region and with external partners, mainly through regional economic blocs. Part III analyzes how digital trade negotiations could concretely address development concerns by examining examples of provisions that could guide and inspire future negotiations involving Latin American countries. Part IV provides recommendations.

# I. Setting the scene:

## Understanding the main features and drivers of the US, EU and China's digital trade agreements

In the early days of the Internet, John Perry Barlow penned the Declaration of Independence of Cyberspace (Barlow, 1996). This anthological document, which reflected the libertarian internet culture at the time, was a push-back against governmental intervention and regulation. Now, a few decades later, governments have made a 'come-back' and re-asserted their sovereignty online (Chander and Sun, 2023). Government intervention in digital issues is sharply increasing, especially in areas such as content policy and data governance (Evenett and Fritz, 2022). While China pioneered the notion of data sovereignty, "it is now the demand of governments from Australia to Zimbabwe. The era of countries unsure whether they had the power to regulate the Internet is over" (Chander and Sun, 2023, p. 3).

Most countries are introducing an increasing number of data-related regulatory measures. Three main models of regulation embodied in the approaches taken by the US, the EU and China have emerged and are currently under dispute. The US approach has been characterized, until recently, by the deliberate use of trade agreements to regulate data flows and, to a great extent, responding to the commercial interests of US technology companies (Rethink Trade, 2023, p. 1). Europeans, on the other hand, prioritize the protection of personal data and privacy, as evidenced by the approval of domestic legislation such as Directive 95/46/EC in 1995 and the General Data Protection Regulation (GDPR) in 2018, which has an extraterritorial effect. Meanwhile, the Chinese approach initially restricted the free flow of data and information within and outside China due to national security concerns and later advocated for trade facilitation to benefit major national players like Alibaba (Aaronson and Leblond, 2018, p. 24). As we show in Part II, Latin American countries lack their own model of digital trade regulation. In the midst of geopolitical tensions, they are pressed to choose from one of the existing models when negotiating with the main digital trade players. Additionally, they tend to replicate these models when negotiating agreements within the Latin American region.

## A. The US model

Since its FTA with Jordan in 2000, the US has included e-commerce chapters in all of its free trade agreements. A long process of evolution culminated in the design of the e-commerce chapter of the Trans-Pacific Partnership (TPP).

The TPP was a pioneer in bringing together and structuring the rules that became the basis for regulating the digital economy. While its digital trade provisions can be characterized in different ways, Streinz (2019) categorized them into six distinct sets of rules: i) application and adaptation of established concepts of international trade and investment law to the digital economy; ii) encouragement of states to take advantage of digital technologies to trade facilitation and customs administration; iii) expansion and rebalance of intellectual property rights protections; iv) creation of rules to facilitate cross-border electronic commerce; v) regulation of states' involvement in the digital economy; and vi) approach of a range of Internet rights and policy issues, particularly those related to data governance issues. The provisions on cross-border data flows, data localization, access to source code and algorithms, and the prohibition on customs duties on electronic transmissions are among the main and most debated issues from the perspective of digital rights and digital industrial policies.

Following President Trump's inauguration, he withdrew the US from the TPP. The remaining eleven TPP countries signed the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). There were no substantial changes regarding the e-commerce clauses of the TPP, even though US technology companies had been the major proponents of its adoption (Streinz, 2019, p. 336). Despite changes in US trade policy, their offensive interests in digital trade regulation remained intact, including through the United States-Mexico-Canada Agreement (USMCA) (2020). The USMCA includes several e-commerce clauses from the TPP but goes further. For example, the ban on source code disclosure now extends to the algorithms expressed in that source code. Additionally, while the TPP chapter is titled "e-commerce," the USMCA refers to it as "digital trade" to reflect its broader perspective (Azmeh et al., 2020, p. 18).

However, in October 2023, the US administration reconsidered its approach to digital trade regulation. The USTR announced that it would withdraw its support for proposals on cross-border data flows, data localization, and source code (USTR, 2023). This affected not only ongoing negotiations at the WTO Joint Initiative on e-commerce[1] but also upended discussions about these issues in the Indo-Pacific Economic Framework for Prosperity (IPEF). The US justification for the shift related to preserving "enough policy

[1] At the WTO, discussions on electronic commerce are being held both in the 1998 WTO Work Program on Electronic Commerce, under a non-negotiating and exploratory nature; and in the WTO Joint Statement Initiative on Electronic Commerce (JSI). Launched in 2019, during the World Economic Forum Annual Meeting in Davos, the JSI aims to produce a binding agreement among its members on trade-related aspects of electronic commerce. As of 25 June 2024, there are 91 WTO members participating in its discussions.

space" for discussions on these issues to unfold at the domestic level (USTR, 2023). This new approach was initially linked to a growing perception that there is a need to regulate big technology companies in order to protect consumers' and workers' privacy and to strengthen competition.

According to the US Trade Representative, Katherine Tai, the real issue was whether the private sector or the government gets "to decide or control how freely the data can flow and when it can be restricted, where it needs to be stored and when access is required to disclose source code" (Whittle, 2023). Tai's statement shows a shift in the center of gravity in US trade policy-making, especially with regard to data, from the private sector to the government, which can be at least partly explained by the geoeconomic tension between the US and China.

The US has also increasingly sought to strengthen alliances and consolidate technology markets around trusted products and services, improving the position of US providers in the digital economy. In particular, the notion of 'digital solidarity', which appeared for the first time in the US International Cyberspace & Digital Policy Strategy (2024), seeks to appeal to developing countries. The Strategy recognizes the digital divide as a strategic challenge, and seeks to position the US as a country "offer[ing] and deploy[ing] secure technologies" to the developing world. Under the banner of solidarity, the proposed areas of action include the goal to "align rights-respecting approaches to digital and data governance with international partners" while seeking to make "digital and data governance compatible across allies" and recognizing "the necessity of the domestic governance of digital and emerging technologies". In addition to making the importance of preserving policy space clear, the adversarial undertone, e.g., via references to 'allies' and 'others', creates an additional challenge for developing countries, which need to navigate political and regulatory cleavages between the three approaches while promoting digital trade and development.

## B. The European model

The European Union's approach to data is based on two pillars: promoting data flows and data sharing within the EU while establishing conditions for allowing the flow of personal data toward non-EU countries.

Until recently, the EU relied solely on the exception provided by Article XIV(c)(ii) of the General Agreement on Trade in Services (GATS) to preserve its freedom to legislate on privacy and data protection (Araujo, 2017). However, during negotiations on the Transatlantic Trade and Investment Partnership (TTIP) and the Trade in Services Agreement (TiSA), the European Parliament demanded a more robust alternative to the GATS exception. In 2018, the European Commission introduced the Horizontal Clauses for Cross-Border Data Flows and the Protection of Personal Data in EU Trade and Investment Agreements (Yakovleva and Irion, 2020, p. 19).

In effect, in light of new EU regulations on data protection, the EU has considered that only a handful of countries meet its level of protection (European Commission). Regarding international data transfers, the GDPR provides that transfers can only occur when the third country or international organization to which the data was transferred provides an equivalent level of protection to that guaranteed by the EU under the GDPR (Araujo, 2017). In Latin America, only Argentina and Uruguay have been determined by the EU as having adequate levels of data protection.

Geopolitical concerns are also influencing how the EU approaches its digital policies. Drawing on the need to build "digital sovereignty" for the EU, some leaders emphasize that "Digital sovereignty is about building on our strengths and reducing our strategic weaknesses, not about excluding others or taking a protectionist approach." (The Hinrich Foundation, 2024, p. 148). However, others argue that "[i]f we don't build our own champions in all new areas – digital, artificial intelligence – our choices . . . will be dictated by others" (The Hinrich Foundation, 2024, p. 149).

## C. The Chinese model

The regulation of digital commerce by China has been predominantly associated in the literature with the so-called Great Firewall or Digital Barrier of China, a censorship, filtering, and technological requirements system implemented by the Communist Party (Aaronson and Leblond, 201, p. 18). Within this regulatory framework, the primary goal of protecting national security is placed alongside the promotion of economic growth.

China has the largest e-commerce market in the world, with some of the top global players such as Alibaba. Bytedance's Tik-Tok has also placed China in the premier league of social media applications. Accordingly, China has a strong interest in promoting digital trade, which puts the country in permanent tension between controlling data and promoting data flows. Recently, proposals to loosen up data flows show that "pro-business voices may have the upper hand in this key area" at present (Chorzempa and Sacks, 2023). Like in the US, some private companies in China also inform the regulatory model adopted to regulate digital trade.

China's data governance regime relies predominantly on its Cybersecurity Law, which has been in effect since 2017 and is complemented by new legislation. In early 2021, the Civil Code came into effect, the first of its kind in China, specifying that personal information is protected by law, followed that same year by the approval of the Data Security Law and the Personal Information Protection Law.

Regarding China's trade policy on e-commerce, only a few of the 23 bilateral free trade agreements China signed as of 2023 address the topic. It signed two in 2015 with South Korea and Australia; one agreement with Chile was updated in 2017; and it signed two

in 2023 with Nicaragua and Ecuador. In 2021 China ratified the Regional Comprehensive Economic Partnership (RCEP), which contains an electronic commerce chapter. In these agreements, China does not adopt binding rules on the free cross-border flow of data or the prohibition of localization requirements, nor does it subject the e-commerce chapters to the dispute settlement mechanisms of these agreements. Due to concerns over competitiveness from companies like Alibaba and JD.com, these agreements have rules on e-commerce facilitation, such as cooperation in e-commerce, authentication and electronic signatures, and protection of personal information in e-commerce and "paperless trade." The RCEP includes a chapter dedicated to e-commerce, which promises to boost this type of trade between China and the Asian countries that are signatories to the agreement. Unlike the CPTPP, this chapter is not binding; has no provision on source code; allows for each party to the agreement to have its own regulations on data transfer and server localization; and allows parties to deviate from these clauses based on any measures they consider necessary to protect their security interests (RCEP, arts. 12.14(b) and 12.15(b)).

The potential of the Chinese model to influence other countries is not as clear as in the case of the US through its free trade treaties, or the EU with its strong legislation on privacy and personal data protection. Moreover, with its recent applications to formally join the CPTPP in September 2021 (Ministry of Commerce, 2021) and the Digital Economy Partnership Agreement (DEPA) (Ministry of Commerce, 2021) in November of the same year, China demonstrates flexibility in participating in existing initiatives that could lead to deeper domestic reforms.

China exercises international influence in additional ways. Some governments reproduce aspects of its "data sovereignty" concept, replicating the Chinese model even without explicit pressure from China. Furthermore, the demand for digital infrastructure, which Chinese companies supply globally, positions China in various markets (Erie and Streinz, 2021, p. 1). In this context, the "Digital Silk Road" (DSR), part of the "Belt and Road Initiative" (BRI), led by Chinese telecommunications and e-commerce companies, stands out. It is worth noting that, just like in the BRI, the DSR does not rely on formal international legal treaties with partner countries, but rather on non-binding instruments such as memoranda of understanding (MoUs) (Erie and Streinz, 2021, p. 31).

## D. Looking forward: Is the gap between data models narrowing?

Across the three data models, there is growing pressure to exercise sovereignty over digital aspects, including over data. Privacy and data protection are a key exception to free cross-border data flows in the EU, and are also providing the justification for approving Executive Orders aimed at preventing the flow of Americans' sensitive personal data and Government-related data to foreign

adversaries.[2] US measures, however, seem to be also strongly motivated by national security (keeping data out of the reach of foreign countries of concern).

In the EU "the notion of 'technological' or 'digital sovereignty' has recently emerged as a means of promoting the notion of European leadership and strategic autonomy in the digital field" (Madiega, 2020, p. 1). The European Data Strategy (2020) aims, among other things, to strengthen Europe's technological sovereignty, especially in "key enabling technologies and infrastructures for the data economy" (European Commission, 2020, p. 5). The goal would be to foster a data-driven ecosystem, underpinned by data flows and data sharing within the EU, supported by the legal certainty provided by data protection and competition laws. In parallel to regulatory initiatives, there are efforts to build a European cloud and data infrastructure to strengthen Europe's data sovereignty.

China has always advocated sovereignty over the digital space, and several norms embodying this understanding remain in place. Nevertheless, the country is under conflicting pressures to control and to liberalize data. For China, economic security is related to ensuring that its digital sector continues to develop, including its champions in the e-commerce sector, and this may require softening data localization and other requirements. As sovereignty starts to be a major rationale for policy action in the digital space, governments have entered an era of "regulatory overdrive" (Evenett and Fritz, 2022, p. 5). Regulatory heterogeneity is growing, posing an ever-greater risk of digital fragmentation.

In order to counter perceived vulnerabilities stemming from choke points in global value chains, countries have sought to re-shore, near-shore, or friend-shore production of critical products, especially critical technologies.

The 2023 WTO World Trade Report noted that Sino-American tensions are not only contributing to these fragmentation trends but are also leading to a reorientation of trade along geopolitical lines. This finding is particularly concerning due to the central position occupied by the United States and China in the global economy, creating pressure for their trade partners – many of them located in Latin America – to position themselves along the fault lines.

Some developing countries may stand to gain from near-shoring: Mexico recently became the main US trading partner partly due to the US's nearshoring goals. Nevertheless, the poorly defined notion of nearshoring "essential" products could easily be broadened by protectionist interests. The move could go against the intent to broaden access to technology to developing countries, especially those that fall geographically and politically out of politico-ideological alliances.

[2] See, in particular, EO 14034 (2021) on Protecting Americans' Sensitive Data From Foreign Adversaries and EO 14117 (2024) on Preventing Access to Americans' Bulk Sensitive Personal Data and United States Government-Related Data by Countries of Concern.

# II. Latin American Countries and Digital Trade Commitments

## Converging around the CPTPP template as a development trap for the region?

Latin America lacks a more significant presence in software and hardware markets or leadership in any tech-related industry. With only a marginal market share of the global digital economy, Latin American countries are at a deeper disadvantage. The technology that currently dominates the region is mostly imported from the US, China, and other Asian and European countries. There is market potential in some countries in the region, with start-up epicenters and some consolidated digital platforms with regional reach, such as Mercado Libre. However, the regional industry typically follows data practices similar to those of the global big techs, especially US ones, and depends on a dynamic specific to Silicon Valley and its basic structure (UNCTAD, 2021, p. 82; Ávila, 2021, p. 6).

Within the region, differences are striking. Brazil, Mexico, and Argentina account for around 70% of all regional e-commerce transactions by value (E-commerce Foundation, 2016, p. 94). Together with Chile and Colombia, they encompass 92% of the online shoppers and 97% of B2C sales (UNCTAD, 2020, p. 13) in a business sector dominated by MSMEs (OECD et al, 2019, p. 46). The growth of cross-border electronic commerce in the region faces issues that restrain its expansion, from problems in infrastructure and electronic transactions to overall fiscal, regulatory, logistical, and language challenges (Obando; Mulder and Ferencz, 2022, p. 15; ECLAC, 2018, p. 18).

Despite structural difficulties and its low performance in the digital economy, Latin America as a region has seen some of the most intense treaty-making on digital trade. The 2001 Canada–Costa Rica FTA, which included a Joint Statement on Global Electronic Commerce, was the first arrangement involving a Latin American country with an e-commerce provision, while the 2002 Chile–US FTA was the first PTA concluded in the region with a dedicated e-commerce chapter. Since then, not only has the number of trade agreements with digital trade provisions increased, but so has their level of detail. According to Polanco (2021,

p. 271), out of the total number of PTAs with e-commerce and data flow provisions, Latin American countries have concluded 53%. Of this subset, 47% have been concluded with developed countries and 53% with other developing countries, most of them also from Latin America.

Compared to Europe and Asia, for example, Latin America has less structured and uniform initiatives governing digital trade (Aguerre, 2019, p. 5). In terms of agreements with substantive provisions on digital trade, Herreros (2019, p. 29) broke down participation in the region into two groups of countries. The first includes countries that have already signed several agreements with electronic commerce chapters, mainly with developed countries and among themselves, composed of the members of the Pacific Alliance – Chile, Colombia, Mexico, and Peru – and the Central American countries – Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, Panama, and the Dominican Republic. The second group includes the four original State-Parties to Mercosur (Argentina, Brazil, Paraguay, and Uruguay), Bolivia, Cuba, Ecuador, Venezuela, and the members of the Caribbean Community (CARICOM), which were initially more resistant to the negotiations on electronic commerce. Some of these countries – Bolivia, Cuba, and Venezuela – have not yet participated in any trade or economic integration agreement that specifically addresses electronic commerce.

## Digital Trade Agreements between Latin American countries and third countries

Latin American countries are mostly rule-takers in the digital economy. The content of its provisions fundamentally reflects the approaches developed by extra-regional partners with which they negotiate, such as the US, several Asian countries, and the EU. The absence of a mature domestic digital economy could partly explain the lack of articulation of defensive interests in the domestic trade policy discourse (Streinz, 2019, p. 340), as could, in some cases, the lack of technical capacity to design and implement digital trade policies that reflect the needs of these countries.

Chile, Mexico, and Peru participated in the CPTPP with the expectation of boosting their exports, improving their capacity to attract foreign direct investment, and strengthening their participation in global value chains. This decision was perceived as the consolidation of their strategies to embrace trade liberalization through free trade agreements. Particularly, the electronic commerce provisions in the CPTPP were presented with the promise of promoting a common legal framework in digital trade policies and encouraging cooperation in digital technologies. The agreement immediately served as a blueprint for new negotiations between CPTPP members and third parties in the region. Such FTA patterns were easily replicated once countries signed the CPTPP.

Under the hype surrounding digital trade among the trade community, gradually, more countries began to adhere to the CPTPP approach, which ensured free cross-border data flows, banned data localization measures, and only stipulated non-binding commitments on personal data protection rules (Burri and Chander, 2023, p. 102). Within the continent, Chile, Colombia, Mexico, Peru, and Panama have been important vectors for the inclusion of these e-commerce and data rules in PTAs, diffusing the new rulemaking (Polanco, 2021, p. 269).

In addition to the already existing network of agreements, Mexico and Chile have deepened the liberalization of digital trade through the negotiation of new international treaties, such as the USMCA and the Chilean agreements with the EU and Canada. Chile went even further with the Digital Economy Partnership Agreement (DEPA), signed in June 2020 with Singapore and New Zealand, the first trade agreement entirely dedicated to the digital economy. The issues that these new treaties address often go beyond conventional digital trade commitments and exceptions under the CPTTP structure (Burri and Chander, 2023, p. 103). DEPA includes new issues on emerging technologies, including competition in the digital economy, promotion of financial technology (FinTech), and the development of frameworks to support the safe and responsible use of AI technologies. Some of these provisions would be replicated later in Chile's FTA with Paraguay, signed a year after, in 2021, such as open government data, data innovation, cooperation on SMEs, digital SME dialogue, and digital inclusion.

China's law-making influence in the region is not yet evident through trade commitments, despite the increasing influence and market share of Chinese technology giants, such as Huawei and ZTE, in Latin America. Chile was the first country in the region to include electronic commerce provisions in its agreement with China, under the 2017 Protocol to amend the FTA originally signed in 2005. Later, Ecuador, in May 2023, and Nicaragua, in September 2023, also signed FTAs with China containing chapters, respectively, on "e-commerce" and on the "digital economy", while Peru is currently negotiating similar rules under the upgrading of the China-Peru FTA. More detailed than the Chilean and Nicaraguan chapters, the Ecuadorian one included, in addition to the basic framework, provisions on network equipment, cybersecurity cooperation, data innovation, SMEs, and start-ups. All of these agreements exclude recourse to dispute settlement regarding e-commerce rules.

Finally, the influence of the EU approach to digital trade remains limited, despite a long-standing tradition of trade regulation between the EU and Latin American countries. Treaties between the EU and countries or groupings in the region contain at least one article related to electronic commerce, except for the agreement signed with Mexico in 1997. In general, the approach is less restrictive for digital policies and with fewer substantive provisions than those negotiated between the US and Latin American countries. But the agreement reached between the EU and Mexico in April 2018, updating their previous one, signals

a change in the European approach and presents the largest number of substantive provisions on electronic commerce in a trade agreement between the EU and any other country in the region (Herreros, 2019, p. 30). Considering the influence of Europe's GDPR in data protection laws in Latin America, Latin American countries should take advantage of this proximity with the EU and demand the inclusion of exceptions related to data protection in negotiations on free data flows.

The EU-Mercosur Association Agreement presents its own set of problems for participating Latin American countries, as it introduces topics related to the regulation of telecommunications and e-commerce. Subsection 6 on e-commerce of the Chapter on 'Trade in Services and Establishment' presents a set of rules that apply to all industries, including binding provisions that prohibit the imposition of customs duties on electronic transmissions. Article 51 of the subsection on e-commerce adopts the "understanding of computer services", which as part of a general EU policy, subtly expands the classification of computer services in agreements on trade in services. Adherence to this open EU definition guarantees virtually unrestricted access to digital infrastructure companies and operating rights with very limited regulation. Full commitments to market access rules and national treatment obligations would deepen this framework and hamper the development of local competitors. In the words of J. Kelsey, the "understanding" can act as a "Trojan horse" for e-commerce rules that some developing countries still resist in trade agreements (Kelsey, 2019, p. 49).

## Digital Trade Agreements within Latin American countries

Several Latin American countries have adopted approaches closer to the CPTPP, even in agreements between themselves in the region (bilateral, regional, or plurilateral). Like in the CPTPP, Chile, Argentina, Peru, Mexico, and Brazil have been proposing a strict rule on data flows in their trade negotiations (Polanco, 2021, p. 281). The most recent trade agreements in the region have also added provisions that reflect regulatory novelties promoted through the USMCA and the DEPA.

The Central American Common Market has a basic regulatory framework for electronic commerce. The electronic commerce chapter in the Dominican Republic-Central America FTA (CAFTA-DR), signed in August 2004 between the US, Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and the Dominican Republic, precedes that of the Pacific Alliance by a decade. Its only substantive provisions establish the non-imposition of tariffs on digital products transmitted electronically and grant national treatment and MFN treatment to digital products.

The Pacific Alliance is characterized as the "most dynamic bloc in Latin America for provisions related to digital trade and cross-border data flows" (UNCTAD, 2021, p. 156). The Additional Protocol to the Framework

Agreement, signed in February 2014, includes a chapter on electronic commerce, negotiated in parallel to the TPP and influenced by it (Burri and Polanco, 2020, p. 213). After being amended in July 2015 by the First Modifying Protocol, the chapter contains obligations on custom duties, non-discriminatory treatment of digital products, cross-border transfer of information by electronic means, and location of computing facilities. In general terms, the rules related to electronic commerce in the PAAM resemble those of the CPTPP, although the latter develops some topics in greater depth and considers topics missing from the PAAM, such as source code, cybersecurity, and dispute resolution mechanisms (OEAP, 2017, p. 22).

Chile plays a particular role in the region by disseminating the CPTPP model among Mercosur countries through a network of bilateral agreements, first with Uruguay in 2016, then with Argentina in 2017, Brazil in 2018, and Paraguay in 2020. The chapters on electronic commerce in the agreements negotiated by Chile with the States Parties of Mercosur also closely follow the structure of the respective chapter of the Additional Protocol of the Pacific Alliance, in turn very similar to the CPTPP model, but with important variations between their content (Herreros, 2019, p 33). Chile showcases one of the most open regulatory environments for digital trade in Latin America and remains very proactive in adhering to trade agreements with commitments that support digital trade (Ferracane et al., 2024, p. 35).

Until recently, Mercosur had shown little progress in terms of specific regulations on electronic commerce, and especially on cross-border data flows. However, in April 2021, the Mercosur Agreement on Electronic Commerce was signed in Montevideo. Presented by the Brazilian Ministry of Foreign Affairs as the "most ambitious agreement ever signed by Brazil in terms of e-commerce", the general structure of the Agreement and the content of its clauses reveal a CPTPP-inspired framework. The Agreement reveals a liberal turn in the Brazilian trade policy under the administrations of Michel Temer (2016-2018) and Jair Bolsonaro (2019-2022). Brazil moved from a defensive position during the negotiation of new rules on e-commerce to a position closer to an e-commerce agenda that follows the US-inspired template (Tasquetto et al., 2023, p. 86).

In sum, the rules on electronic commerce in the region are converging around the CPTPP template. The European and Chinese models have little influence in Latin America. Latin American countries have not replicated their electronic commerce rules beyond their bilateral agreements with the EU and China. The adoption of approaches from developed countries potentially represents a development trap for Latin America in the digital economy, since it lays restrictions on how technology can be used by developing countries and restrains their policy space for industrial digital policies.

Against this backdrop, given recent changes in the US digital trade policy, there could be a window of opportunity for Latin American countries to rethink their engagement with digital trade regulation and to seek regulatory alternatives for their development. The fact that most Latin American countries are not legally bound by digital trade commitments with the major digital players – China and the US (since the US withdrew from TPP) – on provisions regarding cross-border data flows, data localization, access to source code, and the prohibition of customs duties on electronic transmissions, gives those countries extra room to pursue different and more development-oriented strategies.

# III. Infusing development in global digital trade negotiations:

## Opportunities to be seized by Latin American countries

Digital trade negotiations at the WTO and preferential trade agreements signed among some key states are relevant for developing countries, even if developing countries do not directly take part in such regulatory arrangements. The economic and political weight of certain major players in the digital economy – such as the US, the EU, China, and, increasingly, Australia, Japan and Singapore – generates a center of gravity around the legal frameworks they embrace, turning them into a de facto legal benchmark for other countries. A future agreement on e-commerce in the WTO Joint Initiative, for example, "will be seen by most as the global standard" (Rockwell, 2024).

This is one of the reasons why some developing countries choose to take part in digital trade negotiations, even if they do not have yet a fully developed digital sector at the domestic level. On the one hand, there is hope that participation in these frameworks will help to better integrate them into global markets and value chains, and strengthen provisions targeted at enabling development (such as e-payments and e-signatures). On the other hand, there is an expectation that by taking part in these negotiations, they will be able to influence the terms of the final agreement from within, notably by infusing development-oriented concerns and concrete provisions.

As discussed in Part I, the geopolitical considerations fostering the re-calibration of trade and digital policies among the US, the EU, and China create a window of opportunity for developing countries to question whether the predominantly liberalizing model that characterizes traditional agreements, such as the CPTPP is worth pursuing. Nevertheless, as discussed in Part II, some Latin American countries are already embroiled in negotiations or bound by agreements from which it would be too hard or costly to defect. In this scenario, it is possible to consider the inclusion of provisions in ongoing and future digital trade negotiations which would contribute to development. That could happen by: a) incorporating provisions aimed at promoting digital inclusion and tackling inequality; and b) incorporating specific development-oriented provisions.

## A. Digital inclusion and inequality: gaps in the agenda

In e-commerce and digital trade negotiations, little consideration is given to the persistent divide that separates developed and developing countries. Issues that could have a positive impact on reducing digital inequality "have received scant attention and lack concrete commitments from developed countries" (Agarwal and Mishra 2022, p. 282), and are not part of most FTAs.

According to a survey conducted by Agarwal and Mishra (2022) using the 'Trade Agreement Provisions on Electronic-commerce and Data' (TAPED), a dataset developed by researchers at the University of Lucerne, only five out of 379 FTAs surveyed had provisions regarding digital inclusion. The UK-New Zealand FTA is the only FTA with an extensive clause on digital inclusion (article 15.20), which not only requires parties to "cooperate on matters relating to digital inclusion", but also provides suggestions on how to achieve cooperation, such as enhancing people-to-people links, identifying and addressing access barriers, improving digital skills, sharing methods and procedures for developing datasets, and conducting analysis to identify barriers and trends. DEPA also includes a provision with similar language and suggestions (article 11.1). Other FTAs include a general recommendation that encompasses the goal of promoting digital inclusion (Agarwal and Mishra, 2022, p. 276).

Countries in Latin America could establish the practice of including specific provisions on digital inclusion in the FTAs they negotiate with third parties, especially with developed countries. Such provisions could build upon the language from the UK-New Zealand FTA and DEPA, and incorporate aspects considered a priority in the region, such as strengthening digital skills, tackling the gender gap and providing support to remote and indigenous communities to take advantage of online commerce.

Another aspect that could have a positive impact on promoting digital inclusion and tackling inequality is support for MSMEs. Negotiating support for MSMEs should be a key concern, as they are the backbone of the digital economy. In general, while MSMEs represent only 25% of total production, they dominate the business sector in Latin American countries, accounting for 99.5% of all firms, and 61% of formal employment (OECD et al., 2019, p. 104).

Supporting MSMEs is essential in a context in which the provisions contained in digital trade agreements often raise the complexity and cost of compliance. For example, consider the increasing references to high standards of data protection found in contemporary agreements. Failing to include commitments to assist MSMEs with compliance means that competition between large and small companies – especially MSMEs in developing countries – will be increasingly harder.

Despite the importance of supporting MSMEs, only 57 FTAs in the TAPED database contain such provisions (Agarwal & Mishra, 2022, p. 275). A specific provision supporting MSMEs is notably absent from the CPTPP, for example, despite the participation of developing members in the agreement. Since Latin American countries, by and large, follow the CPTPP model, provisions supporting MSMEs are also absent in their agreements. Countries in Latin America should consider including binding provisions on supporting MSMEs in the agreements they negotiate. Most of the FTAs with specific provisions on MSMEs in digital trade are soft in nature and have no obligatory requirements. This is the case with the RCEP (article 12.4), which merely proposes cooperation, "to assist small and medium enterprises to overcome obstacles in the use of electronic commerce."

Among existing agreements, DEPA represents an exception because it encompasses specific commitments for parties to mandatorily cooperate to support MSMEs in specific areas, such as access to credit and to procurement processes, and to help them in terms of regulatory compliance (articles 10.1 to 10.4). DEPA also foresees the Digital SME Dialogue, a forum for regular discussions on how to better support MSMEs.

Although DEPA provides a positive example, several issues related to fostering MSMEs' competitiveness in global trade remain unaddressed by FTAs. The International Trade Center points out that most of the potential benefits of the digital economy will be inaccessible to MSMEs if they are not connected to physical and digital infrastructures, including to the platform economy (ITC, 2017). Making this change requires not only building trust and capacity among MSMEs so that they are encouraged to engage in digital trade, but also strengthening the links between trade and competition policy on the one hand, and between these two areas and data governance, on the other. Massive data collection by large companies provides a new kind of asset. If the current path of data accumulation remains unchanged, MSMEs will find it harder to compete. Latin American countries could spearhead initiatives to include competition-related provisions aimed at benefiting SMEs in FTAs.

## B. Development-oriented provisions

In digital trade negotiations, sections on development often include provisions on cooperation and special and differential treatment (SDT) to developing countries and LDCs. SDTs are often related to capacity development, technical assistance, and exemptions and derogations regarding the implementation of certain provisions. They may present a horizontal scope, a vertical scope, or a combination of the two.

### Horizontal provisions

Horizontal SDT provisions apply across the agreement. Discussions often focus on the specific types of SDTs that should be

incorporated, as well as on the strength of SDT provisions (i.e., binding or non-binding). In digital trade negotiations, SDTs often put emphasis on provisions that grant derogations. The aim is to seek a postponement of the implementation of specific provisions by developing countries and LDCs, granting them more time to adapt and prepare themselves for full implementation. Negotiations taking place at the WTO Joint Initiative on e-commerce offer examples. Guatemala, Ecuador, and Paraguay jointly proposed a section on longer "implementation Periods for developing and least developed country Members" to be added as horizontal provisions on development (WTO, 2023).

Time alone, however, may be insufficient to place a developing country in a position to implement an agreement in a way that contributes to, rather than undermines, its development. Capacity building and technical assistance also have important roles to play and should be duly considered in the arsenal of SDTs. Capacity building could, for example, assist suppliers of developing countries and LDCs to meet requirements in export markets, enabling them to benefit from market access commitments. Provisions on technical assistance could support the creation of data-sharing infrastructures and services, such as public clouds, which could serve as enablers of open data initiatives.

In parallel, SDTs are often criticized for being 'best-effort' and non-enforceable endeavors. Meaningful commitments on regulatory, technical, and capacity building assistance are often absent (Agarwal and Mishra, 2022). It is difficult for developing countries to seek SDT enforcement at the WTO, and there are no specific dedicated provisions on providing technical assistance or capacity-building support to developing countries in PTAs involving developing economies (Mishra, 2024).

In this context, a proposal on SDTs for developing countries and LDCs formulated by Côte d'Ivoire – with additions from Indonesia and China – in the WTO Joint Initiative on e-commerce was a breath of fresh air. The proposal sought to introduce enforceable provisions on capacity building and technical assistance for developing countries and LDCs, largely inspired by development provisions in the Trade Facilitation Agreement (TFA).

The TFA is relevant in the present discussion because it foresees enforceable capacity building and technical assistance provisions. It allows for self-designated transitional implementation periods, and for the implementation of some commitments to be linked and dependent on the provision of technical and capacity-building assistance. According to article 13 of the TFA, the extent and the timing of implementation of provisions should be related to the capacities of developing and least-developed country Members. If a developing Member continues to lack the necessary capacity, implementation will not be required. Moreover, LDCs are only required to undertake commitments to the extent consistent with their development.

As formulated by Côte d'Ivoire, the proposal allowed developing countries and LDCs to place the provisions of a future Joint Initiative on e-commerce agreement in three categories: those that the country commits to implement upon entry into force of the agreement, provisions that the country commits to implement after a transitional period, and those in which implementation is dependent on the provision of assistance and capacity development.

Seeking to condition implementation to adequate capacity building and technical assistance was a positive move, considering the predominantly weak nature of development provisions. Nevertheless, in the latest text published by the chairs and co-conveners of the Joint Initiative – Australia, Japan and Singapore - in March 2024, the section on development had been weakened.

The 'chairs' text' aims to propose a way forward on issues under discussion, based on the chairs' understanding about where the landing zone of potential agreement could be. The goal of the co-conveners is to seek acceptance of the chairs' text as the basis for negotiations. Regarding development provisions, the chairs' text does not provide the possibility of conditioning implementation on technical assistance. In addition, if a country concludes that it would benefit from technical assistance (to be provided on a voluntary basis), it should indicate the provisions where technical assistance is required at the moment of entry into force of the agreement, and not after one year, as foreseen in a previous negotiating document (WTO, 2023). This means that developing countries and LDCs will have little time to seek support in order to identify capacity building needs, especially considering that all documents related to negotiations remain restricted.

According to the chairs' text, "Developed country Parties, and developing country Parties declaring themselves in a position to do so, are encouraged to provide developing and least-developed country Parties with support to conduct or update their needs assessment to identify gaps in capacity to implement this Agreement". In order to be able to engage in this discussion, developing countries and LDCs need to be supported by trusted parties, which can help them close the asymmetry in knowledge, as well as formulate and advance their development-related needs. Without this, capacity development could become a bargaining chip, used to pressure developing countries into accepting the agreement.

## Vertical provisions: the example of a development-oriented proposal on data flows in the WTO Joint Initiative on e-commerce

In addition to horizontal cross-cutting provisions on development, there is also the possibility of including development-related SDT provisions vertically on specific topics. Guatemala and Ecuador are two Latin American countries that have made use of this possibility in WTO negotiations on

e-commerce. The countries state that they support proposals on restricting unsolicited commercial messages (spam) as well as on consumer protection, as long as they are allowed a longer implementation period (WTO, 2023). In the process of negotiations, Nigeria also introduced a proposal on a vertical SDT to benefit developing countries and LDCs under the section on cross-border flows of information.

Introducing exceptions to a general provision on free data flows provides a way to safeguard the public interest, either through a broad formulation, e.g., as a 'legitimate public policy objective', or in a more specific way, such as an exception related to privacy and security. In digital trade agreements, relevant exceptions to free data flows can be found: a) in the section dedicated to cross-border flow of information (specific vertical exceptions applying to data flows); b) under 'general exceptions' and 'security exceptions', which are horizontal exceptions applying to the whole agreement or specifically to the e-commerce chapter, where provisions on data flows are comprised. Trade agreements have also often made direct reference to the applicability of GATS general exceptions (art. XIV) and security exceptions (art. XIV bis).

When it comes to promoting development, general exceptions are insufficient. Brazil once sought to justify measures aimed at addressing the digital divide under the general exception contained in the General Agreement on Tariffs and Trade (GATT), Article XX. The country argued that tax incentives to domestically manufactured ICTs were necessary in order to protect public morals related to digital inclusion. In the context of a dispute, the WTO panel accepted the broad interpretation of public morals provided by Brazil but found that the specific Brazilian domestic program did not meet the other requirements of the necessity test that should be present to justify a general exception (Brazil Taxation Panel Report).

While many trade agreements have vertically included privacy and security-related exceptions to free cross-border data flows, exceptions that could provide support for digital industrialization or tackle the problem of concentration in the data economy discussed in Part I have only recently come under discussion.

In the Joint Initiative, it is possible to infer this intention from a proposal tabled by Nigeria on the topic of cross-border data flows. Nigeria is one of the few developing countries to have presented text proposals on data flows in the Joint Initiative. Developed countries have formulated most proposals; see Table 1.

| | Countries | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|
| **Issues** | **Brazil** | **Canada** | **Chinese Taipei** | **EU** | **Japan** | **Nigeria** | **South Korea** | **Singapore** | **United Kindom** | **United States** | **Ukraine** |
| **Flow of information** | | | | | | | | | | | |
| **Cross-border data flows** | X | X | X | X | X | X | X | X | X | X | |
| **Location of computer facilities** | | X | | | X | X | X | X | X | X | X |

| |
|---|
| Exceptions related to archieving 'legitimate public policy objective' |
| Exceptions related to archieving 'legitimate public policy objective' and security exceptions |
| Specific rules on cross-border data transfer may apply to personal data |
| Exceptions related to special and differential treatment to developing countries and LDCs |
| Text proposal without clear exceptions |

Table 1. Countries that have made text proposals on cross-border data flows and location of computer facilities (WTO, 2023)

Nigeria's proposal sought to introduce an SDT that would allow developing countries and LDCs to adopt any measures regulating cross-border data flows that the country considers appropriate. Some important points make Nigeria's proposal unique. First, no specific exception on cross-border data flows aiming to benefit developing countries and LDCs had yet been introduced in the Joint Initiative or in FTAs. Secondly, the proposal goes beyond the main policy justifications that usually motivate exceptions to free data flows – legitimate public policy objectives, privacy, and security – by allowing developing countries and LDCs to adopt any measures they consider necessary. This could include, for instance, measures aimed at digital industrialization. Finally, the proposal innovates by introducing a self-judging exception to free data flows.

Regarding self-judging clauses, states retain their right to escape or derogate from an international obligation based on unilateral considerations and based on their subjective appreciation of whether to make use of and invoke the clause vis-à-vis other states or international organizations. Self-judging clauses also have important consequences when it comes to dispute resolution. When a country applies an exception – for example by introducing a national measure that restricts trade in order to achieve a legitimate public policy objective – another member can contest this measure by initiating a dispute before the dispute settlement system. Article XX of GATT and Article XIV of GATS, which are dedicated to general exceptions, have only ever been successfully employed to

defend a challenged measure in one of 40 attempts. This indicates that, within the WTO, exceptions provide few effective safeguards for domestic policies.

It is possible to imagine that, if a plurilateral agreement on e-commerce comes to existence, it would be hard for its members to invoke exceptions in order to justify limitations to data flows. In such an unfavorable context, the self-judging nature of the exception on data flows introduced by Nigeria would probably constitute the most plausible chance that developing countries and LDCs would have to apply any exception successfully.

The exception to free data flows proposed by Nigeria preserved significant policy space for developing countries and LDCs around introducing limitations to cross-border data flows. Since negotiations on data flows have been upended in the Joint Initiative on e-commerce, following the US's decision to withdraw its support for proposals on data flows, it is not possible to know for sure what would have been the outcome of a proposal like Nigeria's. Nevertheless, the fact that countries as diverse as Nigeria and China could both be included under "developing countries" allows us to imagine that broad exceptions to benefit developing countries would face resistance from developed members of the Joint Initiative.

In Latin America, the importance of development-oriented exceptions to provisions on data flows is likely to vary from country to country. Countries that are more advanced in their digital development, and those that have already committed to PTAs with narrow exceptions to the principle of free cross-border data flows would likely be less interested in seeking exceptions. Nevertheless, even in this context, the growing importance of data for industrial policy and for national security and geopolitics, accompanied by significant changes in the US position towards data flows, could entice them to explore further exceptions. Other Latin American countries, less constrained by CPTPP-like liberalizing agreements, may be interested in preserving their policy space and capacity to domestically regulate issues related to data and data flows, including with the aim of fostering digital development.

Across the board, there is an opportunity for developing countries to further explore the inclusion of SDTs in capacity building and technical assistance. In future negotiations on cross-border data flows involving developing countries, vertical SDT provisions could aim to support the training of the labor force to work in the data economy sectors, as well as provide technology transfer targeted to customizing digital technologies to local needs and characteristics, an increasingly relevant concern in the context of data-driven bias within AI systems, for example.

# IV. Conclusion

Latin America is a heterogeneous region, in which one-size-fits-all approaches are hardly feasible or advisable. Different levels of digital trade liberalization and different attitudes towards new commitments make it difficult to tackle common challenges in a similar manner. While some countries followed the US regulatory approach, as exemplified by the CPTPP, others are less bound by liberalizing commitments.

The geopolitical considerations that are fostering a recalibration of trade and digital policies among the three big players – the US, the EU, and China – create a window of opportunity for some developing countries in Latin America – especially those less bound by agreements – to question whether the predominantly liberalizing model that characterizes traditional agreements like the CPTPP is worth pursuing.

If Latin American countries decide to negotiate new digital trade agreements, they should advocate for the inclusion of binding provisions in ongoing and future digital trade negotiations, which would more effectively contribute to their development needs. Provisions encompassing commitments to fostering digital inclusion and to supporting MSMEs are important to tackle inequality. Moreover, developing countries, in general, should put less emphasis on development provisions aiming at the derogation of obligations and focus on developing a clear-eyed assessment of their capacity-building and technical assistance needs, while seeking to make SDT provisions binding in the agreements they negotiate.

# V. Recomendations

## Institutional recommendation:

To create permanent working groups to discuss data governance in a holistic way, taking into consideration the importance of data to a myriad of policy areas, from trade to human rights and development, within the existing structures of regional agreements.

## Substantive recommendations:

Latin American countries that are not yet bound by CPTPP-inspired digital trade commitments should refrain from doing so, in order to safeguard their digital policy space.

Recently, the US has reconsidered its digital trade policy, which at one point culminated in the TPP (now CPTPP) approach. Provided that Latin American countries, by and large follow the CPTPP approach, they should also embark on their own journey to recalibrate their engagement with digital trade regulation to take account of their interests.

Include mandatory provisions to support MSMEs in specific areas, such as access to credit, procurement and regulatory compliance. Latin American countries could also spearhead initiatives to include competition-related provisions aimed at benefiting SMEs in FTAs.

Establish the practice of including specific provisions on digital inclusion in the FTAs Latin American countries sign with third parties, including aspects considered a priority in the region, such as strengthening digital skills, tackling the gender gap and providing particular support to remote and indigenous communities to take advantage of e-commerce.

Condition the implementation of certain provisions by developing countries and LDCs on receiving adequate capacity building, technical assistance, and technology transfer (along the lines of the TFA). Introduce metrics in such provisions, in order to assess whether capacity building and assistance have been successfully implemented.

Reconceptualize the move towards a national/economic security way of framing digital sovereignty with a development-oriented approach to sovereignty, which is "grounded in the idea that any entity (not only state) can be digitally sovereign when they are able to understand the technology and use it for their own benefit" (Belli, 2023), leading to empowerment.

Developing countries should coordinate their development-oriented demands in digital trade negotiations. In the context of the JSI

on e-commerce, Nigeria and Cote d'Ivoire proposed the introduction of vertical and horizontal development-oriented provisions that could have informed the negotiation tactics of other like-minded countries.

Seek an alliance with the EU in order to include an explicit exception related to data protection in multilateral/plurilateral negotiations on free data flows, considering the influence exerted by the GDPR in data protection regulations in force in Latin America.

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[i] At the WTO, discussions on electronic commerce are being held both in the 1998 WTO Work Program on Electronic Commerce, under a non-negotiating and exploratory nature; and in the WTO Joint Statement Initiative on Electronic Commerce (JSI). Launched in 2019, during the World Economic Forum Annual Meeting in Davos, the JSI aims to produce a binding agreement among its members on trade-related aspects of electronic commerce. As of 25 June 2024, there are 91 WTO members participating in its discussions.

[ii] See, in particular, EO 14034 (2021) on Protecting Americans' Sensitive Data From Foreign Adversaries and EO 14117 (2024) on Preventing Access to Americans' Bulk Sensitive Personal Data and United States Government-Related Data by Countries of Concern.


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