

The Past and Future of Electronic Commerce Agreements: A Practical Approach to the International E-Commerce Negotiating Framework, Inspired by Chilean Treaty Practice

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I. INTRODUCTION

A basic search of “Famous Latin Americans”¹ would land you to the top search result — the [topuniversities.com](https://www.topuniversities.com) page, entitled “Famous Latin Americans and Inspirational Quotes.”² Alas! The most famous Latin American is Brazilian Paulo Coelho who was quoted saying, “Be brave. Take risks. Nothing can substitute experience.”³ The famous author, whose books take in the form of philosophy that resonates with millions worldwide, must be on to something as it is applicable to all areas of life.

Risk-taking and courage were part of the ingredients that sparked the Fifth Technological Revolution. According to the eminent scholar of Venezuelan descent, Carlota Perez, it was through Intel’s introduction of the microprocessor in 1971 to a world that only knew about oil, automobiles, and mass production.⁴

Probably, at that time, Intel had doubts and faced questions from the public because no one was aware that their newfangled creation would lead

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1. Google, Google Search Landing Page, *available at* <https://www.google.com/search?channel=nrow5&client=firefox-b-d&q=Famous+latin+americans> (last accessed Jan. 30, 2022) [<https://perma.cc/D57D-G58F>].
 2. Hasna Haidar, Article, *Famous Latin Americans and Inspirational Quotes*, QS TOP UNIVERSITIES, Apr. 20, 2021, *available at* <https://www.topuniversities.com/blog/famous-latin-americans-inspirational-quotes> (last accessed Jan. 30, 2022) [<https://perma.cc/4EAH-Z46G>].
 3. Paulo Coelho, Tweet, TWITTER, Apr. 15, 2012, 7:55 p.m., *available at* <https://twitter.com/paulocoelho/status/191495023295078401?lang=en> (last accessed Jan. 30, 2022) [<https://perma.cc/M2ZY-U96D>].
 4. Five technological revolutions were identified by Perez from the 1770s to the 2000s —

The first, the Industrial Revolution, began in 1771 when Arkwright’s water-powered cotton spinning mill opened in Cromford, England. The second, in 1829, the Age of Steam and Railways, opened with the test of the Rocket steam engine for the Liverpool-Manchester railway. The third is the Age of Steel, Electricity, and Heavy Engineering, which began when Carnegie’s Bessemer plan opened in Pittsburgh in 1875. The fourth is identified as the Age of Oil, the Automobile, and Mass Production. It began in 1908 when the first Model-T rolled out of the Ford plant in Detroit.

ROBERT G. HAGSTROM, WARREN BUFFET: INSIDE THE ULTIMATE MONEY MIND 82 (2021) (citing CARLOTA PEREZ, TECHNOLOGICAL REVOLUTIONS AND FINANCIAL CAPITAL 11 (2002)).

to the proliferation of “microelectronics and computers, software, smartphones, and control systems”⁵ that created the world today. The Fifth Technological Revolution was indeed initiated through bravery and risk-taking, but it was developed and improved by experience. This can be seen in the more than three decades journey of electronic commerce (e-commerce) into the international legal consciousness, as discussed in the next Chapter.

II. DISCUSSION

A. Historical Review of E-Commerce in International Law

1. UNCITRAL-Led Instruments

E-commerce was first seen in the adoption of the Model Law on Electronic Commerce in 1996.⁶ Work on the said model law started in 1992, which contains text described by the United Nations Commission on International Trade Law (UNCITRAL), as “fundamental principles of non-discrimination, technological neutrality[,] and functional equivalence that are widely regarded as the founding elements of modern electronic commerce law.”⁷ Fittingly, this prototype for future e-commerce legislation was presented at the world’s stage during the 85th Plenary Meeting United Nations General Assembly (UNGA), stating in its resolution that the UNGA “[r]ecommends that all States give [favorable] consideration to the Model Law when they enact or revise their laws, in view of the need for uniformity of the law applicable to alternatives to paper-based methods of communication and storage of information[.]”⁸

5. *Id.* at 83.

6. Model Law on Electronic Commerce Adopted by the United Nations Commission on International Trade Law, G.A. Res. 51/162, annex, U.N. Doc. A/RES/51/162 (Dec. 16, 1996).

7. United Nations Commission on International Trade Law (UNCITRAL), UNCITRAL Model Law on Electronic Commerce (1996) with additional article 5 bis as adopted in 1998, *available at* https://uncitral.un.org/en/texts/ecommerce/modellaw/electronic_commerce (last accessed Jan. 30, 2022) [<https://perma.cc/NW3P-X5JU>] [hereinafter UNCITRAL Model Law on Electronic Commerce with Additional Article 5 bis].

8. Model Law on Electronic Commerce Adopted by the United Nations Commission on International Trade Law, *supra* note 6, at 2, ¶ 2.

The UNCITRAL Model Law on Electronic Commerce is composed of two parts: Part 1 on “Electronic Commerce in General”⁹ and Part 2 on “Electronic Commerce in Specific Areas.”¹⁰ The first part focuses on general provisions, application of legal requirements to data messages, and communication of data messages.¹¹ On the other hand, the second part focuses on carriage of goods.¹²

This Model Law’s sphere of application was clearly delineated under Article 1, which stated that “[t]his [l]aw applies to any kind of information in the form of a data message used in the context of commercial activities.”¹³ The concept of “Commercial Activities” is then clarified in the instrument’s fifth footnote —

[This] term ‘commercial’ should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail[,] or road.¹⁴

Further, Article 16 of the Model Law’s Part 2, covering carriage of goods, aptly limits its coverage to “[a]ctions related to contracts of carriage of goods.”¹⁵

Indeed, the Model Law covers the basics of e-commerce, which are specified in the UNGA Resolution. This is seen in the Resolution’s recognition of the fact that “transactions in international trade are carried out by means of electronic data interchange and other means of communication,

9. UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, UNCITRAL MODEL LAW ON ELECTRONIC COMMERCE WITH GUIDE TO ENACTMENT 1996 WITH ADDITIONAL ARTICLE 5 BIS AS ADOPTED IN 1998 3 (1999) [hereinafter UNCITRAL, Guide to Enactment].

10. *Id.* at 12.

11. *See id.* at 23-57.

12. *See id.* at 58-63.

13. Model Law on Electronic Commerce Adopted by the United Nations Commission on International Trade Law, *supra* note 6, annex, pt. 1, ch. 1, art. 1.

14. *Id.* n. 5.

15. *Id.* pt. 2, ch. 1, art. 16.

commonly referred to as ‘electronic commerce[,]’ which involve the use of alternatives to paper-based methods of communication and storage of information[.]’¹⁶ This can be considered as one of the first (if not the first) iterations of the definition of e-commerce in an international law document. The World Trade Organization (WTO), being the second to have a hand at defining the term, will be discussed later.

After the Model Law on E-Commerce, the UNCITRAL developed subsequent legal instruments that built on the former. The allied documents are the UNCITRAL Model Law on Electronic Signatures,¹⁷ United Nations Convention on the Use of Electronic Communications in International Contracts,¹⁸ and United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea.¹⁹

The UNCITRAL Model Law on Electronic Signatures was adopted by the UNGA on 5 July 2001 through a Resolution in its 85th Plenary Meeting on 12 December 2001.²⁰ This subsequent Model Law builds on the general language used in Article 7 of the Model Law on Electronic Commerce²¹ by

16. *Id.* para 2.

17. Model Law on Electronic Signatures of the United Nations Commission on International Trade Law, G.A. Res. 56/80, annex, U.N. Doc. A/RES/56/80 (Dec. 12, 2001).

18. United Nations Convention on the Use of Electronic Communications in International Contracts, *opened for signature* Nov. 23, 2005, 2898 U.N.T.S. 3.

19. United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, G.A. Res. 63/122, annex, U.N. Doc. A/RES/63/122 (Dec. 11, 2008).

20. Model Law on Electronic Signatures of the United Nations Commission on International Trade Law, *supra* note 17.

21. Model Law on Electronic Commerce Adopted by the United Nations Commission on International Trade Law, *supra* note 6, pt. I, ch. I, art. 7.

Article 7. Signature

- (1) Where the law requires a signature of a person, that requirement is met in relation to a data message if:
 - (a) A method is used to identify that person and to indicate that person’s approval of the information contained in the data message; and
 - (b) That method is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement.

introducing a technology-neutral approach. The UNCITRAL explains that “in practice[,] legislation based on this Model Law may recognize both digital signatures based on cryptography ... and electronic signatures using other technologies.”²² This Model Law contains provisions that establishes criteria for technical reliability in equal treatment for both electronic and handwritten signatures,²³ duties and liabilities for the parties involved in the process (signatory, relying party, and certification service providers),²⁴ and recognition of foreign certificates and electronic signature.²⁵ Thus, the Model Law on Electronic Signatures strengthened the earlier Model Law on Electronic Commerce by providing certainty over the legal status and treatment of electronic signatures.

The UN Convention on the Use of Electronic Communications in International Contracts, adopted by the UNGA on 23 November 2005, has 18 signatories and 15 parties.²⁶ This Convention builds on the provisions of Part I of the Model Law on Electronic Commerce through provisions that bolster electronic communications, effectively strengthening their status as paper-based equivalents. In the words of the UNCITRAL, the instrument “aims [to] facilitat[e] the use of electronic communications in international trade by assuring that contracts concluded and other communications exchanged electronically are as valid and enforceable[.]”²⁷ The Convention

(2) Paragraph 1 applies whether the requirement therein is in the form of an obligation or whether the law simply provides consequences for the absence of a signature.

(3) The provisions of this article do not apply to the following:

Id.

22. United Nations Commission on International Trade Law (UNCITRAL), UNCITRAL Model Law on Electronic Signatures (2001), available at https://uncitral.un.org/en/texts/ecommerce/modellaw/electronic_signatures (last accessed Jan. 30, 2022) [<https://perma.cc/4DCW-6UZC>].

23. See United Nations Convention on the Use of Electronic Communications in International Contracts, *supra* note 18, ch. 2, art. 3 & ch. 3, arts. 4-7.

24. See United Nations Convention on the Use of Electronic Communications in International Contracts, *supra* note 18, ch. 3, arts. 8-11.

25. See *id.* art. 12.

26. United Nations, United Nations Convention on the Use of Electronic Communications in International Contracts, available at <https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20X/X-18.en.pdf> (last accessed Jan. 30, 2022) [<https://perma.cc/2W68-5UKE>].

27. UNCITRAL, United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005), available at

reiterated the existence of functional and legal equivalence between electronic and handwritten signatures as enshrined in the Model Law on Electronic Signatures.²⁸ It went further to allow the enforceability of contracts concluded through electronic means, and contracts made through systems absent a review conducted by a natural person.²⁹ This Convention even went as far as providing remedies for input errors entered into automated message systems.³⁰ The Convention effectively reinforced the initial text found in the UNCITRAL Model Law on Electronic Commerce.

The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, adopted by the UNGA on 11 December 2008, has 25 signatories and five parties.³¹ The Convention, like the Model Law on Electronic Commerce, considered all technological developments and improvements in commercial practices relating to maritime transport, essentially updating earlier conventions, such as the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (1924),³² its protocols,³³ and the United Nations Convention on the Carriage of Goods by Sea (1978).³⁴ This instrument easily complements the earlier Model Law on Electronic Commerce by fostering the UNGA's intention to "assist all States significantly in enhancing their legislation governing the use of

https://uncitral.un.org/en/texts/ecommerce/conventions/electronic_communications (last accessed Jan. 30, 2022) [<https://perma.cc/R2JQ-4QFM>].

28. See United Nations Convention on the Use of Electronic Communications in International Contracts, *supra* note 18, ch. 3, arts. 8–9.
29. See *id.* arts. 11–12.
30. See *id.* art. 14.
31. United Nations, United Nations Convention on Contracts For the International Carriage of Goods Wholly or Partly by Sea, *available at* <https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20XI/XI-D-8.en.pdf> (last accessed Jan. 30, 2022) [<https://perma.cc/LT8G-HG88>].
32. International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, *signed* Aug. 25, 1924, 120 L.N.T.S. 157 [hereinafter Hague Rules].
33. Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, *Signed at Brussels on 25th August 1924, signed* Feb. 23, 1968, 1412 U.N.T.S. 128 & Protocol Amending the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, 25 August 1924, as Amended by the Protocol of 23 February 1968, *signed* Dec. 21, 1979, 1412 U.N.T.S. 146.
34. United Nations Convention on the Carriage of Goods by Sea, 1978, *adopted* Mar. 31, 1978, 1695 U.N.T.S. 3.

alternatives to paper-based methods of communication and storage of information and in formulating such legislation where none currently exists[.]”³⁵ This Convention essentially provided a bridge between Parts 1 (E-Commerce) and 2 (Carriage of Goods) of the Model Law on Electronic Commerce by including the “legal framework that takes into account ... the growth of containerization, the desire for door-to-door carriage under a single contract, and the development of electronic transport documents.”³⁶

2. WTO Discussions

Two years after the UNGA Resolution recommending the UNCITRAL Model Law on Electronic Commerce was issued, the World Trade Organization (WTO) Programme on Electronic Commerce was adopted during the Second Session of the WTO Ministerial Conference.³⁷ The Ministers, through the Geneva Ministerial Declaration on Global Electronic Commerce on 25 May 1998, urged the General Council to “establish a comprehensive work program[] to examine all trade-related issues relating to global electronic commerce, taking into account the economic, financial, and development needs of developing countries[.]”³⁸ Thus, on 30 September 1998, the General Council developed the WTO Programme on Electronic Commerce wherein it placed e-commerce as a standing item on its agenda, including discussions of a cross-cutting nature, and those relating to the imposition of customs duties on electronic transmission.³⁹

The WTO Work Programme on E-Commerce also formalized a more comprehensive definition of e-commerce, as opposed to the general and concise definition by the UNGA. The WTO General Council defined e-commerce thus —

35. Model Law on Electronic Commerce adopted by the United Nations Commission on International Trade Law, *supra* note 6, annex, para. 6.

36. United Nations Commission on International Trade Law (UNCITRAL), United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (New York, 2008) (the “Rotterdam Rules”), *available at* <https://uncitral.un.org/es/node/820> (last accessed Jan. 30, 2022) [<https://perma.cc/8SFH-ZNUU>].

37. World Trade Organization, *Work Programme on Electronic Commerce*, ¶ 1.1, WTO Doc. WT/L/274 (Sept. 25, 1998).

38. *Id.*

39. *Id.* ¶ 1.2.

Exclusively for the purposes of the work program[], and without prejudice to its outcome, the term ‘electronic commerce’ is understood to mean the production, distribution, marketing, sale or delivery of goods and services by electronic means. The work program[] will also include consideration of issues relating to the development of the infrastructure for electronic commerce.⁴⁰

This definition of e-commerce focuses more on its electronic nature in all steps of the transaction, from production to delivery of goods and services. In contrast to the UNGA definition of e-commerce, or transactions “which involve the use of alternatives to paper-based methods of communication and storage of information[.]”⁴¹ The UNGA definition can be classified as a more technical, albeit general, definition of the term. This may be considered as a transition towards a broader definition of e-commerce that does not only limit its focus on how e-commerce, as a process, is made, but also includes related areas of concern; thus, paving the way to a more comprehensive understanding of e-commerce. Similarly, the WTO recognizes the relevance of allied subject matters to e-commerce, such as infrastructure development.⁴² Lastly, the importance of taking “into account the work of other intergovernmental organizations[.]”⁴³ such as the UNCITRAL Model Laws and UN Conventions, is given emphasis.

On 13 December 2017, the Joint Statement on Electronic Commerce⁴⁴ was submitted by 44 WTO Members,⁴⁵ represented by their respective

40. *Id.* ¶ 1.3.

41. Model Law on Electronic Commerce Adopted by the United Nations Commission on International Trade Law, *supra* note 6, para. 2.

42. Work Programme on Electronic Commerce, *supra* note 37, ¶ 1.3.

43. *Id.* at ¶ 1.4.

44. World Trade Organization, Joint Statement on Electronic Commerce, WTO Doc. WT/MIN(17)/60 (2017) [hereinafter Joint Statement on Electronic Commerce] & World Trade Organization, Joint Statement on Electronic Commerce, WTO Doc. WT/MIN(17)/60/Add.1 (2018).

45. Joint Statement on Electronic Commerce, *supra* note 44, para. 1.

Albania; Argentina; Australia; Bahrain; Brazil; Brunei Darussalam; Cambodia; Canada; Chile; Colombia; Costa Rica; European Union; Guatemala; Hong Kong, China; Iceland; Israel; Japan; Kazakhstan; Korea, Republic of; Kuwait; Lao PDR; Liechtenstein; the former Yugoslav Republic of Macedonia; Malaysia; Mexico; Moldova, Republic of; Montenegro; Myanmar; New Zealand; Nigeria; Norway; Panama; Paraguay; Peru; Qatar; Russian Federation; Singapore;

Ministers, before the 11th Ministerial Conference. This Joint Statement Initiative (JSI) contains the same principles as the WTO Work Programme on E-Commerce, particularly the continued discussion of trade-related aspects of e-commerce, including challenges and opportunities faced by developing countries.⁴⁶ Nevertheless, the JSI on E-Commerce highlights the members' shared "goal of advancing electronic commerce work in the WTO in order to better harness these opportunities,"⁴⁷ with an emphasis on looking into its implications on least-developed countries, and micro, small, and medium-sized enterprises.⁴⁸ The document also incorporates the basic WTO principles of "promoting open, transparent, non-discriminatory[,] and predictable regulatory environments in facilitating electronic commerce."⁴⁹ The JSI on E-Commerce would eventually lead to e-commerce negotiations at the WTO.⁵⁰

The negotiations for a possible WTO Agreement on E-Commerce commenced at the start of 2020, with Australia, Japan, and Singapore, acting as co-convenors.⁵¹ The co-convenors reported in December 2020 that "the initiative has grown to 86 WTO Members, collectively accounting for over 90 [percent] of global trade[,] and representing all major geographical regions and levels of development."⁵² Further, the consolidated negotiating text, incorporating all proposals from members, covers the following themes, namely "enabling electronic commerce; openness and e-commerce; trust and

Switzerland; Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Thailand; Turkey; Ukraine; United States; and Uruguay[.]

Id.

46. *See id.* para. 4.

47. *Id.* para. 3.

48. *Id.* para. 4.

49. *Id.* para. 5.

50. World Trade Organization, New Initiatives on Electronic Commerce, Investment Facilitation and MSMEs, *available at* https://www.wto.org/english/news_e/news17_e/minis_13dec17_e.htm (last accessed Jan. 30, 2022). [<https://perma.cc/2SUN-L2CT>].

51. World Trade Organization, WTO Joint Statement Initiative on E-commerce Statement by Ministers of Australia, Japan and Singapore, *available at* https://www.wto.org/english/news_e/news21_e/ji_ecom_minister_statement_e.pdf (last accessed Jan. 30, 2022) [<https://perma.cc/Y2X6-5ZWQ>].

52. World Trade Organization, Joint Statement Initiative On E-Commerce: Co-Convenors' Update, para. 2, *available at* https://www.wto.org/english/news_e/news20_e/ecom_14dec20_e.pdf (last accessed Jan. 30, 2022) [<https://perma.cc/W42Q-8Q3D>].

e-commerce; cross-cutting issues; telecommunications; market access; and scope and general provisions.”⁵³ As of the writing of this Article, the negotiations are still ongoing.

3. Development of International Agreements from E-Commerce Chapters in Free Trade Agreements to Digital Economy Agreements

In recent years, the international community saw the rise of comprehensive Free Trade Agreements (FTAs) with chapters specifically dealing with e-commerce, and stand-alone agreements on e-commerce and digital economies.⁵⁴ Comprehensive FTAs with chapters on e-commerce include the 2008 Agreement Establishing the Association of Southeast Asian Nations (ASEAN)–Australia–New Zealand Free Trade Area (AANZFTA);⁵⁵ the 2018 Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP),⁵⁶ the United States–Mexico–Canada Agreement (USMCA)⁵⁷ with a chapter on Digital Trade (2020), and the 2020 Regional Comprehensive Economic Partnership Agreement (RCEP).⁵⁸ On the other hand, stand-alone

53. *Id.* para. 4.

54. See Asia-Pacific Economic Cooperation (APEC) Electronic Commerce Steering Group, Impact of TPP’s E-Commerce Chapter on APEC’s E-Commerce, at 6, available at <https://www.apec.org/docs/default-source/Publications/2018/5/Impact-of-TPPs-E-commerce-Chapter-on-APECS-E-commerce/218CTIImpact-of-TPPs-ECommerce-Chapter-on-APECS-Ecommerce.pdf> (last accessed Jan. 30, 2022) [<https://perma.cc/RKS8-YR2Z>].

55. ASEAN–Australia–New Zealand Free Trade Area, ch. 10, signed Feb. 27, 2009, 2672 U.N.T.S. 3 [hereinafter AANZFTA].

56. Comprehensive and Progressive Agreement for Trans-Pacific Partnership, ch. 14, signed Mar. 8, 2018, N.Z.T.S. 2018/10 [hereinafter CPTPP].

57. Agreement Between the United States of America, the United Mexican States, and Canada, ch. 19, signed Nov. 30, 2018 (entered into force July 1, 2020) (available at <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between> (last accessed Jan. 30, 2022) [<https://perma.cc/AK8R-4EZR>]) (The relevant chapter may be found by accessing the link leading to ch. 19. Digital Trade) [hereinafter United States–Mexico–Canada Agreement — Digital Trade].

58. Regional Comprehensive Economic Partnership Agreement, art. 17.2, signed Nov. 15, 2020 (available at <https://rcepsec.org/legal-text/> (last accessed Jan. 30, 2022) [<https://perma.cc/P8KQ-GHTY>]) (The relevant provision may be found by accessing the link leading to ch. 12 – Electronic Commerce) [hereinafter Regional Comprehensive Economic Partnership Agreement – Electronic Commerce].

agreements on e-commerce and digital economies include the ASEAN Agreement on Electronic Commerce (2018),⁵⁹ the United States–Japan Agreement Concerning Digital Trade (2019),⁶⁰ the Singapore–Australia Digital Economy Agreement (2020),⁶¹ and the Digital Economic Partnership Agreement (DEPA)⁶² among Chile, Singapore, and New Zealand (2021).

The first iteration of an FTA with a chapter on e-commerce is the AANZFTA, which was signed by the parties on 27 February 2009 by the 10 ASEAN Member States,⁶³ Australia, and New Zealand.⁶⁴ A groundbreaking agreement of its time, “the AANZFTA aims for sustainable economic growth in the region by providing a more liberal, facilitative[,] and transparent market, and investment regimes among the [12] signatories to the Agreement.”⁶⁵ Its chapter on e-commerce contains provisions clearly inspired by earlier Model Laws, allied Conventions, and instruments developed by the UNCITRAL and the WTO. The provisions also found in AANZFTA cover electronic authentication and digital certificates,⁶⁶ online consumer protection,⁶⁷ online data protection,⁶⁸ and paperless trading.⁶⁹

Another comprehensive FTA with a chapter on e-commerce concluded between negotiating parties was the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), which was signed on 8

59. ASEAN Agreement on Electronic Commerce art. 7, *signed* Jan. 22, 2019, *available at* <http://agreement.asean.org/media/download/20190306035048.pdf> (last accessed Jan. 30, 2022).

60. Agreement Between the United States of America and Japan Concerning Digital Trade, U.S.–Japan, Oct. 7, 2019, T.I.A.S. No. 20-101.1 [hereinafter U.S.–Japan Agreement Concerning Digital Trade].

61. Digital Economy Agreement, Austl.–Sing., Aug. 6, 2020, 2020 A.T.S. 13 [hereinafter Austl.–Sing. Digital Economy Agreement].

62. Digital Economy Partnership Agreement, *signed* Nov. 6, 2020, B2020-02 [hereinafter Chile–Sing.–N.Z. Digital Partnership Agreement].

63. AANZFTA, *supra* note 55, pmbli., para. 1. Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam. *Id.*

64. *Id.*

65. ASEAN, Overview: The ASEAN–Australia–New Zealand Free Trade Area (AANZFTA), *available at* <https://aanzfta.asean.org/aanzfta-overview> (last accessed Jan. 30, 2022). [<https://perma.cc/2MNE-8WCU>].

66. AANZFTA, *supra* note 55, ch.10, art. 5.

67. *Id.* art. 6.

68. *Id.* art. 7.

69. *Id.* art. 8.

March 2018 by 11 Parties.⁷⁰ To date, it has only entered into force in eight State Parties, namely Australia, Canada, Japan, Mexico, New Zealand, Singapore, Vietnam, and Peru.⁷¹ The e-commerce chapter contains the general provisions whose iterations were previously seen in the AANZFTA, UNCITRAL-led Model Laws and allied Conventions, and WTO Principles, such as those providing for electronic authentication and digital certificates,⁷² paperless trading,⁷³ online consumer protection,⁷⁴ prohibition on imposing customs duties on electronic transmissions,⁷⁵ non-discriminatory treatment of digital products,⁷⁶ and domestic electronic transactions framework.⁷⁷ This Agreement also introduced provisions that would foster further development and ease of access in the e-commerce landscape, for instance, the text on personal information protection,⁷⁸ internet interconnection charge sharing,⁷⁹ and the treatment of unsolicited commercial electronic messages (or spam).⁸⁰ It also introduced legal text that deals with the technical infrastructure used in e-commerce, such as principles on access to and use of the internet for

70. The 11 State Parties include Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, Peru, New Zealand, Singapore, and Vietnam. Department of Foreign Affairs and Trade of Australia, Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), *available at* <https://www.dfat.gov.au/trade/agreements/in-force/cptpp/comprehensive-and-progressive-agreement-for-trans-pacific-partnership> (last accessed Jan. 30, 2022) [<https://perma.cc/5W5L-SQ6U>].

71. *Id.* & Center for WTO and International Trade, Vietnam Chamber of Commerce and Industry, CPTPP Comes into Force for Peru, *available at* <https://wtocenter.vn/chuyen-de/18367-cptpp-comes-into-force-for-peru> (last accessed Jan. 30, 2022) [<https://perma.cc/7RL9-CFH6>].

72. Comprehensive and Progressive Agreement for Trans-Pacific Partnership art. 14.6, *signed* Mar. 8, 2018, 2018 A.T.S. 23.

73. *Id.* art. 14.9.

74. *Id.* art. 14.7.

75. *Id.* art. 14.3.

76. *Id.* art. 14.4.

77. *Id.* art. 14.5.

78. Comprehensive and Progressive Agreement for Trans-Pacific Partnership, *supra* note 72, art. 14.8.

79. *Id.* art. 14.12.

80. *Id.* art. 14.14.

electronic commerce,⁸¹ cross-border transfer of information by electronic means,⁸² location of computing facilities,⁸³ and source code.⁸⁴

The USMCA then entered into force on 1 July 2020, which serves as a substitute to the previous iteration of an FTA between the United States, Mexico, and Canada, otherwise known as the North American Free Trade Agreement.⁸⁵ The United States government stated that the USMCA “is a mutually beneficial win for North American workers, farmers, ranchers, and businesses.”⁸⁶ At first glance, it seems that the chapter on digital trade contains equivalent provisions as its CPTPP counterpart. It is noted that it has provisions on customs duties,⁸⁷ non-discriminatory treatment of digital products,⁸⁸ domestic electronic transactions framework,⁸⁹ electronic authentication and electronic signatures,⁹⁰ online consumer protection,⁹¹ personal information protection,⁹² paperless trading,⁹³ principles on access to and use of the internet for digital trade,⁹⁴ cross-border transfer of information

81. *Id.* art. 14.10.

82. *Id.* art. 14.11.

83. *Id.* art. 14.13.

84. Comprehensive and Progressive Agreement for Trans-Pacific Partnership, *supra* note 72, art. 14.7.

85. Canada-Mexico-United States: North American Free Trade, *opened for signature* Mar. 17, 1993, 32 I.L.M. 289.

86. Office of the United States Trade Representative, United States-Mexico-Canada Agreement, *available at* <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement> (last accessed Jan. 30, 2022). [<https://perma.cc/25NA-N6X8>].

87. United States-Mexico-Canada Agreement — Digital Trade, *supra* note 57, art. 19.3.

88. *Id.* art. 19.4.

89. *Id.* art. 19.5.

90. *Id.* art. 19.6.

91. *Id.* art. 19.7.

92. *Id.* art. 19.8.

93. United States-Mexico-Canada Agreement — Digital Trade, *supra* note 57, art. 19.9.

94. *Id.* art. 19.10.

by electronic means,⁹⁵ location of computing facilities,⁹⁶ unsolicited commercial electronic communications,⁹⁷ cooperation,⁹⁸ and source code.⁹⁹ However, a clear difference between the e-commerce related chapters of the CPTPP and USMCA is that the latter has no provision relating to internet connection charge sharing, but has new provisions relating to interconnectivity, particularly on interactive computer services,¹⁰⁰ and open government data.¹⁰¹ Another transformation seen is the iteration of cybersecurity cooperation¹⁰² from CPTPP to a more concrete provision on cybersecurity¹⁰³ in USMCA, as previously seen in the U.S.-Japan Agreement Concerning Digital Trade¹⁰⁴ that entered into force a few months earlier.

The latest comprehensive FTA with a chapter on e-commerce can be seen in the newly minted RCEP, the negotiations for which commenced early 2013 and were recently concluded in 2020, specifically on 15 November 2020, the date of its signing.¹⁰⁵ The Philippine Department of Trade and Industry dubbed this Agreement as a “mega-FTA” that “will promote greater openness, create a more business-friendly environment, encourage closer integration of economies, and provide a more stable and predictable rules[-]based system of trade”¹⁰⁶ among its contracting parties, particularly the ASEAN Member States and five of its six FTA partners, namely “Australia, People’s Republic of China, Japan, Republic of Korea[,] and New Zealand[.]”¹⁰⁷ RCEP’s

95. *Id.* art. 19.11.

96. *Id.* art. 19.12.

97. *Id.* art. 19.13.

98. *Id.* art. 19.14.

99. United States-Mexico-Canada Agreement — Digital Trade, *supra* note 57, art. 19.16.

100. *Id.* art. 19.17.

101. *Id.* art. 19.18.

102. Department of Foreign Affairs and Trade for New Zealand, *supra* note 72, art. 14.16.

103. United States-Mexico-Canada Agreement — Digital Trade, *supra* note 57, art. 19.15.

104. U.S.-Japan Agreement Concerning Digital Trade, *supra* note 60.

105. Department of Trade and Industry, Regional Comprehensive Economic Partnership (RCEP), *available at* <https://www.dti.gov.ph/rcep/> (last accessed Jan. 30, 2022) [<https://perma.cc/576S-VJUX>].

106. *Id.*

107. *Id.*

chapter on e-commerce was presented in a way that is reminiscent of the Model Law on E-Commerce, wherein the provisions were grouped according to their relevance to a particular subcategory of e-commerce. Similarly, it contains provisions previously conceptualized in earlier e-commerce instruments discussed in this Article, including CPTPP and USMCA. The chapter's section B, entitled "Trade Facilitation" contains provisions on paperless trading,¹⁰⁸ electronic authentication, and electronic signature.¹⁰⁹ Section C of the text, entitled "Creating a Conducive Environment for Electronic Commerce" contains provisions on online consumer protection,¹¹⁰ online personal information protection,¹¹¹ unsolicited commercial electronic messages,¹¹² domestic regulatory framework,¹¹³ customs duties,¹¹⁴ and cybersecurity.¹¹⁵ Further, section D, entitled "Promoting Cross-Border Electronic Commerce," contains provisions on location of computing facilities¹¹⁶ and cross-border transfer of information by electronic means.¹¹⁷ A deeper look into the text will show that the RCEP lacks a provision similar to the USMCA's principles on access to and use of the internet for digital trade.¹¹⁸ Nevertheless, any principle or provision perceived absent in this chapter's text can be remedied by the provision entitled "Dialogue on Electronic Commerce,"¹¹⁹ which expressly included in its prospective topics two established provisions in previous e-commerce instruments, such as in CPTPP and USMCA, which cover the non-discriminatory treatment of digital products and the source code.¹²⁰

108. Regional Comprehensive Economic Partnership Agreement – Electronic Commerce, *supra* note 58, art. 12.5.

109. *Id.* art. 12.6.

110. *Id.* art. 12.7.

111. *Id.* art. 12.8.

112. *Id.* art. 12.9.

113. *Id.* art. 12.10.

114. Regional Comprehensive Economic Partnership Agreement – Electronic Commerce, *supra* note 58, art. 12.11.

115. *Id.* art. 12.13.

116. *Id.* art. 12.14.

117. *Id.* art. 12.15.

118. United States–Mexico–Canada Agreement — Digital Trade, *supra* note 57, ch. 19, art. 19.10.

119. Regional Comprehensive Economic Partnership Agreement – Electronic Commerce, *supra* note 58, art. 12.16.

120. *Id.* art. 12.16, ¶ 1 (b).

Moving on to stand-alone agreements on e-commerce, the ASEAN Agreement on E-Commerce was signed by all ASEAN Member-States on 12 November 2018,¹²¹ two years earlier than RCEP's signing. The ASEAN stated that this Agreement is "intended to facilitate the growth of e-commerce transactions in ASEAN[,] and deepening cooperation among Member States to develop and intensify the use of e-commerce, as well as to create an environment of trust and confidence in the use of e-commerce."¹²² A look into the text shows that its provisions, together with the AANZFTA, inspired RCEP's chapter on e-commerce. A curious provision is that which provides for facilitating cross-border e-commerce,¹²³ containing principles that will be subsequently translated into separate articles in its iteration in the RCEP, such as paperless trading, electronic authentication and electronic signatures, online consumer protection, cross-border transfer of information by electronic means, online personal information protection, and location of computing facilities. Other provisions found in earlier e-commerce agreements refer to domestic regulatory framework¹²⁴ and cyber security,¹²⁵ as seen in CPTPP. Provisions that are unique to this Agreement at the time cover electronic payment¹²⁶ and logistics.¹²⁷

An example of a more evolved form of a bilateral agreement on the digital economy is the U.S.-Japan Agreement Concerning Digital Trade, which entered into force for both parties on 1 January 2020,¹²⁸ a few months from the entry into force of the USMCA. The U.S.-Japan Agreement Concerning Digital Trade contains provisions that were inspired by earlier e-commerce instruments from the UNCITRAL, WTO, and later Agreements, such as the

121. Ministry of Trade and Industry of Singapore, ASEAN Agreement on Electronic Commerce, *available at* <https://www.mti.gov.sg/-/media/MTI/Newsroom/Press-Releases/2018/11/17th-AECC/Annex-A-Factsheet-on-ASEAN-Agreement-on-e-Commerce.pdf> (last accessed Jan. 30, 2022) [<https://perma.cc/48KE-GYSF>].

122. ASEAN, ASEAN E-Commerce: Overview, *available at* <https://asean.org/our-communities/economic-community/asean-e-commerce> (last accessed Jan. 30, 2022) [<https://perma.cc/X6RJ-7CB8>].

123. ASEAN Agreement on Electronic Commerce, *supra* note 59, art. 7.

124. *Id.* art. 12.

125. *Id.* art. 8.

126. *Id.* art. 9.

127. *Id.* art. 10.

128. U.S.-Japan Agreement Concerning Digital Trade, *supra* note 60.

CPTPP. The aforementioned provisions include customs duties,¹²⁹ non-discriminatory treatment of digital products,¹³⁰ domestic electronic transactions framework,¹³¹ electronic authentication and electronic signatures,¹³² cross-border transfer of information by electronic means,¹³³ location of computing facilities,¹³⁴ online consumer protection,¹³⁵ personal information protection,¹³⁶ unsolicited commercial electronic messages,¹³⁷ and source code.¹³⁸ This bilateral agreement also served as the prototype for provisions that found its way to later agreements, such as the USMCA, particularly articles on interactive computer services,¹³⁹ cybersecurity,¹⁴⁰ and open government data.¹⁴¹ Further, the agreement showcased finance-related provisions that have yet to find its way to e-commerce instruments, such as the prudential exception and monetary and exchange rate policy exception,¹⁴² (exception to) taxation,¹⁴³ and location of financial service computing facilities for covered financial service suppliers.¹⁴⁴ Lastly, in what may perhaps be the most technologically significant provision on this agreement, the world saw an international agreement that defined “cryptography”¹⁴⁵ and created a

129. *Id.* art. 7.

130. *Id.* art. 8.

131. *Id.* art. 9.

132. *Id.* art. 10.

133. *Id.* art. 11.

134. U.S.-Japan Agreement Concerning Digital Trade, *supra* note 60, art. 12.

135. *Id.* art. 14.

136. *Id.* art. 15.

137. *Id.* art. 16.

138. *Id.* art. 17.

139. *Id.* art. 18.

140. U.S.-Japan Agreement Concerning Digital Trade, *supra* note 60, art. 19.

141. *Id.* art. 20.

142. *Id.* art. 5.

143. *Id.* art. 6.

144. *Id.* art. 13.

145. *Id.* art. 21 (1) (b). Cryptography is defined as “the principles, means, or methods for the transformation of data in order to conceal or disguise its content, prevent its undetected modification, or prevent its unauthorized use; and is limited to the transformation of information using one or more secret parameters, for example, crypto variables, or associated key management[.]” U.S.-Japan Agreement Concerning Digital Trade, *supra* note 60, art. 19.

provision that addresses the treatment of information and communication technology goods that use cryptography.¹⁴⁶

The Singapore–Australia Digital Economy Agreement entered into force on 8 December 2020.¹⁴⁷ In the words of the Australian government, this agreement “upgrades the digital trade arrangements between Australia and Singapore under the Comprehensive and Progressive Agreement on the Trans–Pacific Partnership and the Singapore–Australia Free Trade Agreement, which are already among some of the most ambitious globally.”¹⁴⁸ In keeping with this description, it contains provisions already seen in early e-commerce instruments from the UNCITRAL and WTO to the latest ones, such as the AANZFTA, CPTPP, USMCA, and the U.S.–Japan Agreement Concerning Digital Trade. These provisions discuss customs duties,¹⁴⁹ non-discriminatory treatment of digital products,¹⁵⁰ information and communication technology products that use cryptography,¹⁵¹ domestic electronic transactions framework,¹⁵² electronic authentication and electronic signatures,¹⁵³ paperless trading,¹⁵⁴ online consumer protection,¹⁵⁵ personal information protection,¹⁵⁶ unsolicited commercial electronic messages,¹⁵⁷ principles on access to and use of the internet for electronic commerce,¹⁵⁸ internet interconnection charge sharing,¹⁵⁹ cross-border transfer of information by electronic means,¹⁶⁰

146. *Id.*

147. Austl.–Sing. Digital Economy Agreement, *supra* note 61.

148. Department of Foreign Affairs and Trade of Australia, Australia–Singapore Digital Economy Agreement, *available at* <https://www.dfat.gov.au/trade/services-and-digital-trade/australia-and-singapore-digital-economy-agreement> (last accessed Jan. 30, 2022) [<https://perma.cc/XXV7-MBUX>].

149. Austl.–Sing. Digital Economy Agreement, *supra* note 61, art. 5.

150. *Id.* art. 6.

151. *Id.* art. 7.

152. *Id.* art. 8.

153. *Id.* art. 9.

154. *Id.* art. 12.

155. Austl.–Sing. Digital Economy Agreement, *supra* note 61, art. 15.

156. *Id.* art. 17.

157. *Id.* art. 19.

158. *Id.* art. 20.

159. *Id.* art. 21.

160. *Id.* art. 23.

location of computing facilities,¹⁶¹ location of computing facilities for financial services,¹⁶² open government data,¹⁶³ source code,¹⁶⁴ and cybersecurity.¹⁶⁵ The agreement also introduced new provisions to the over-all e-commerce landscape, particularly on areas that improves the infrastructure and facilitation of e-commerce transactions, such as text on electronic invoicing,¹⁶⁶ electronic payments,¹⁶⁷ express shipment,¹⁶⁸ creating a safe online environment,¹⁶⁹ submarine telecommunications cable systems,¹⁷⁰ data innovation,¹⁷¹ digital identities,¹⁷² and standards and conformity assessment for digital trade.¹⁷³ Lastly, the Singapore-Australia Digital Economy Agreement included provisions dealing with up-and-coming, but nevertheless crucial, areas to the digital economy, such as cooperation on competition policy,¹⁷⁴ artificial intelligence,¹⁷⁵ FinTech and RegTech cooperation,¹⁷⁶ and small and medium enterprises.¹⁷⁷

The latest stand-alone agreement dealing with e-commerce and the digital economy is the DEPA Agreement between Chile, Singapore, and New Zealand, which for New Zealand and Singapore entered into force on 7

161. Austl.-Sing. Digital Economy Agreement, *supra* note 61, art. 24.

162. *Id.* art. 25.

163. *Id.* art. 27.

164. *Id.* art. 28.

165. *Id.* art. 34.

166. *Id.* art. 10.

167. Austl.-Sing. Digital Economy Agreement, *supra* note 61, art. 11.

168. *Id.* art. 13.

169. *Id.* art. 18.

170. *Id.* art. 22.

171. *Id.* art. 26.

172. *Id.* art. 29.

173. Austl.-Sing. Digital Economy Agreement, *supra* note 61, art. 30.

174. *Id.* art. 16.

175. *Id.* art. 31.

176. *Id.* art. 32. “‘FinTech’ means the use of technology to improve and automate the delivery and use of financial services.” While “‘RegTech’ means the use of information technology to improve and manage compliance with regulatory processes.” *Id.* art. 1 (x) & art 1 (r).

177. *Id.* art. 36.

January 2021.¹⁷⁸ This Agreement “is a first of its kind [] that establishes new approaches and collaborations in digital trade issues, promotes interoperability between different regimes[,] and addresses the new issues brought about by digitali[z]ation.”¹⁷⁹ The textual provisions are divided into modules which correspond to a subcategory of the digital economy. There is a module on “Business and Trade Facilitation” wherein provisions inspired by earlier e-commerce instruments include paperless trading,¹⁸⁰ domestic electronic transactions framework,¹⁸¹ electronic invoicing,¹⁸² express shipments,¹⁸³ and electronic payments.¹⁸⁴ A new text on the subject matter can be found in Logistics.¹⁸⁵ The next module, entitled “Treatment of Digital Products and Related Issues” has text reminiscent of past agreements, particularly on customs duties,¹⁸⁶ non-discriminatory treatment of digital products,¹⁸⁷ and information and communication technology products that use cryptography.¹⁸⁸ Similarly, the module on “Data Issues” contains provisions on personal information protection,¹⁸⁹ cross-border transfer of information by electronic means,¹⁹⁰ and location of computing facilities.¹⁹¹ The same goes with the “Business and Consumer Trust” module, which has articles on

178. New Zealand Ministry of Trade and Industry, Overview, *available at* <https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/digital-economy-partnership-agreement-depa/overview> (last accessed Jan. 30, 2022) [<https://perma.cc/69L3-X59Q>].

179. Singapore Ministry of Trade and Industry, Digital Economy Partnership Agreement (DEPA), *available at* <https://www.mti.gov.sg/-/media/MTI/Microsites/DEAs/Digital-Economy-Partnership-Agreement/Digital-Economy-Partnership-Agreement.pdf> (last accessed Jan. 30, 2022) [<https://perma.cc/Q5L8-BGKR>].

180. Chile-Sing.-N.Z. Digital Partnership Agreement, *supra* note 62, art. 2.2.

181. *Id.* art. 2.3.

182. *Id.* art. 2.5.

183. *Id.* art. 2.6.

184. *Id.* art. 2.7.

185. *Id.* art. 2.4.

186. Chile-Sing.-N.Z. Digital Partnership Agreement, *supra* note 62, art. 3.2.

187. *Id.* art. 3.3.

188. *Id.* art. 3.4.

189. *Id.* art. 4.2.

190. *Id.* art. 4.3.

191. *Id.* art. 4.4.

unsolicited commercial electronic messages,¹⁹² online consumer protection,¹⁹³ and principles on access to and use of the internet.¹⁹⁴ The “Wider Trust Environment” module contains text on cybersecurity cooperation,¹⁹⁵ a reversion to the CPTPP text, and online safety and security,¹⁹⁶ which is a version of the Singapore–Australia Digital Economy Agreement text on creating a safe online environment. The DEPA also seems to have upgraded versions of digital identities,¹⁹⁷ and small and medium enterprises,¹⁹⁸ from mere articles¹⁹⁹ in the Singapore–Australia Digital Economy Agreement to modules in the current Agreement. The module entitled “Emerging Trends and Technologies” contains iterations of previously seen articles on financial technology cooperation,²⁰⁰ artificial intelligence,²⁰¹ and cooperation on competition policy.²⁰² Further, this module introduced another essential allied area of study for digital economy, that is, government procurement.²⁰³ The module on “Innovation and the Digital Economy” has familiar provisions, namely data innovation,²⁰⁴ and open government data.²⁰⁵ A new provision on public domain²⁰⁶ can also be seen in this module. A new text was introduced in the DEPA through the module on “Digital Inclusion” as well.²⁰⁷ Additionally, it is worth mentioning that taxation,²⁰⁸ previously seen in the

192. Chile–Sing.–N.Z. Digital Partnership Agreement, *supra* note 62, art. 6.2.

193. *Id.* art. 6.3.

194. *Id.* art. 6.4.

195. *Id.* art. 5.1.

196. *Id.* art. 5.2.

197. *Id.* art. 7.1.

198. Chile–Sing.–N.Z. Digital Partnership Agreement, *supra* note 62, arts. 10.1–10.4.

199. Austl.–Sing Digital Economy Agreement, *supra* note 61, annex A, ch. 14, arts. 29 & 36.

200. Chile–Sing.–N.Z. Digital Partnership Agreement, *supra* note 62, art. 8.1.

201. *Id.* art. 8.2.

202. *Id.* art. 8.4.

203. *Id.* art. 8.3.

204. *Id.* art. 9.4.

205. *Id.* art. 9.5.

206. Chile–Sing.–N.Z. Digital Partnership Agreement, *supra* note 62, art. 9.3.

207. *Id.* art. 11.1.

208. U.S.–Japan Agreement Concerning Digital Trade, *supra* note 60, art. 6.

U.S.-Japan Agreement Concerning Digital Trade, was included in the Exception module, specifically as an article on taxation exception.²⁰⁹

The development from mere provisions to modules show a maturation of the States' understanding of e-commerce. This can be seen through the categorization of provisions, which started as independent units, into modules that emphasized the former's place in a broader subcategory of e-commerce.

B. What is Next for E-Commerce and Key Policy Areas for the Further Development of E-Commerce Agreements?

As seen in the previous Section, international legal consciousness on e-commerce developed from subject-specific instruments to full-fledged agreements relating to digital economy. Indeed, the legal narrative on e-commerce just grows at a faster pace with every new iteration. With this in mind, a look into the Organisation for Economic Co-operation and Development's (OECD) identification of five key policy areas that will directly affect the development of e-commerce is in order.²¹⁰ The areas identified are explained thus —

Consumer protection has become more complex in the digital era, including for vulnerable consumers (e.g.[.] children). At the same time, new issues have emerged, for example[.] in relation to online apps and services offered for 'free' in exchange for gaining access to the user's personal data. More generally, cross-border e-commerce challenges the enforcement of national and regional consumer protection regimes, particularly for product safety and recalls.

Tax policy challenges have moved to the top of the global agenda, especially with respect to the taxation of intangible assets, as new digital business models, including for e-commerce, have raised issues around how and where value is created, particularly through emerging opportunities for data collection and user engagement. As intangible assets are highly mobile, new e-commerce business models further test existing income taxation systems, which are based predominantly on physical factors to determine a taxable presence and allocate profits (e.g.[.] the definition of permanent establishment).

Competition policy also comes to the fore with respect to e-commerce. A range of different competition dynamics have emerged for online sellers as well as other actors in the brick-and-mortar space, including for online platforms.

209. Chile-Sing.-N.Z. Digital Partnership Agreement, *supra* note 62, art. 15.5.

210. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD), UNPACKING E-COMMERCE: BUSINESS MODELS, TRENDS AND POLICIES 25 (2019).

Issues around whether traditional antitrust enforcement mechanisms are fit for the digital age have become more important, including with respect to possible horizontal collusion. The role that algorithms may play in facilitating such collusion has also been raised in competition policy circles.

Trade policy represents another important e-commerce policy area. As more trade occurs in digitally-enabled services and bundles of goods and services, the blurring of boundaries between goods and services can result in legal and regulatory uncertainties for firms participating in cross-border e-commerce under existing multilateral and bilateral trade agreements that rely on rules based on the traditional distinction between goods and services. Rules regarding cross-border data flows also impact e-commerce.

Environmental policy may also affect e-commerce, although the net effect is not clear-cut. On the one hand, e-commerce can reduce transportation use (and the associated negative environmental effects) to brick-and-mortar stores, as well as decrease pressure on physical infrastructures (e.g., lower electricity use). On the other hand, increased residential deliveries do not benefit from the same scale effects as professional bulk purchases, reducing transportation efficiency, while increased e-commerce may also increase e-waste. E-commerce can also raise issues with national, regional, and local environmental protection policy regimes.²¹¹

The development of consumer protection as a key area in e-commerce can be seen in the prior Section's discussion on the presence of related provisions throughout the history of e-commerce and digital economy instruments. It can be observed that consumer protection and product safety are present in almost all e-commerce instruments. Online consumer protection provisions can be found in eight instruments: (1) the AANZFTA's chapter on e-commerce,²¹² (2) CPTPP's chapter on e-commerce;²¹³ (3) USMCA's chapter on digital trade;²¹⁴ (4) RCEP's chapter on e-commerce;²¹⁵ (5) ASEAN Agreement on e-commerce's article on facilitating cross-border e-commerce,²¹⁶ which includes a paragraph on online consumer protection; (6) U.S.-Japan Agreement Concerning Digital Trade;²¹⁷ (7) Singapore-

211. *Id.*

212. AANZFTA, *supra* note 55, ch. 10, art. 6.

213. CPTPP, *supra* note 56, art. 14.7.

214. United States-Mexico-Canada Agreement — Digital Trade, *supra* note 57, art. 19.7.

215. Regional Comprehensive Economic Partnership Agreement — Electronic Commerce, *supra* note 58, art. 12.7.

216. ASEAN Agreement on Electronic Commerce, *supra* note 59, art. 7.

217. U.S.-Japan Agreement Concerning Digital Trade, *supra* note 60, art. 14.

Australia Digital Economy Agreement;²¹⁸ and (8) the DEPA’s “Business and Consumer Trust” module.²¹⁹ Personal data protection, a subject that is considered by the OECD as emerging has been present as early as 2009 and has found its way to eight agreements, namely: (1) AANZFTA’s chapter on e-commerce;²²⁰ (2) CPTPP’s chapter on e-commerce;²²¹ (3) USCMA’s chapter on digital trade;²²² (4) RCEP’s chapter on e-commerce;²²³ (5) ASEAN Agreement on E-Commerce’s article on facilitating cross-border e-commerce²²⁴ with a provision on online personal information protection; (6) U.S.-Japan Agreement Concerning Digital Trade,²²⁵ (7) Singapore–Australia Digital Economy Agreement,²²⁶ (8) and the DEPA’s module on “Data Issues,” which contains text on personal information protection.²²⁷ An important subject matter that only found its way into e-commerce instruments in 2020 is legal text that aims to create a safe online environment. This provision can be seen only in the latest e-commerce agreements, particularly the Singapore–Australia Digital Economy Agreement’s article on Creating a Safe Online Environment²²⁸ and DEPA Agreement’s “Wider Trust Environment” module containing text on online safety and security.²²⁹

Another key area identified is taxation. Indeed, the Supreme Court of the United States, as early as 1830, has stated that taxation “is essential to the existence of the government[.]”²³⁰ A State’s power to tax is exhaustive²³¹ and “reaches every subject[] and may be exercised at discretion.”²³² Thus, new

218. Austl.-Sing. Digital Economy Agreement, *supra* note 61, art. 15.

219. Chile-Sing.-N.Z. Digital Partnership Agreement, *supra* note 62, art. 6.3.

220. AANZFTA, *supra* note 55, ch. 10, art. 7.

221. CPTPP, *supra* note 56, art. 14.8.

222. United States-Mexico-Canada Agreement — Digital Trade, *supra* note 57, art. 19.8.

223. The Regional Comprehensive Economic Partnership Agreement, *supra* note 58, art. 12.8.

224. ASEAN Agreement on Electronic Commerce, *supra* note 59, art. 7.

225. U.S.-Japan Agreement Concerning Digital Trade, *supra* note 60, art. 15.

226. Austl.-Sing. Digital Economy Agreement, *supra* note 61, art. 17.

227. Chile-Sing.-N.Z. Digital Partnership Agreement, *supra* note 62, art. 4.2.

228. Austl.-Sing. Digital Economy Agreement, *supra* note 61, art. 18.

229. Chile-Sing.-N.Z. Digital Partnership Agreement, *supra* note 62, art. 5.2.

230. *Providence Bank v. Billings*, 29 U.S. 514, 514 (1830).

231. *Brushaber v. Union Pacific Railroad Co.*, 240 U.S. 1, 12 (1916).

232. *License Tax Cases*, 72 U.S. 462, 471 (1866).

digital business models, and intangible assets form part of the discussion on possible areas for taxation. The e-commerce and digital economy instruments have not included taxation within their text until 2020 with the U.S.-Japan Agreement Concerning Digital Trade, specifically its article on taxation. Article 6 of the agreement states that

- (1) Except as provided in this Article, nothing in this Agreement shall apply to taxation measures.
- (2) *Nothing in this Agreement shall affect the rights and obligations of either Party under any tax convention. In the event of any inconsistency between this Agreement and any such tax convention, that convention shall prevail to the extent of the inconsistency.*
- (3) *Subject to paragraph 2:*
 - (a) *Article 8 shall apply to all taxation measures, other than those on income, on capital gains, on the taxable capital of corporations, on the value of an investment or property (but not on the transfer of that investment or property), or taxes on estates, inheritances, gifts, and generation-skipping transfers; and*
 - (b) *Article 8 shall apply to taxation measures on income, on capital gains, on the taxable capital of corporations, or on the value of an investment or property (but not on the transfer of that investment or property), that relate to the purchase or consumption of particular digital products, except that nothing in this subparagraph shall prevent a Party from conditioning the receipt or continued receipt of an advantage relating to the purchase or consumption of particular digital products on requirements to provide the digital product in its territory[.]*²³³

It is observed that despite the general rule that “nothing in this Agreement shall apply to taxation measures,”²³⁴ paragraph 3 states that “Article 8 shall apply to all taxation measures[.]”²³⁵ Article 8 covers digital products.²³⁶

233. U.S.-Japan Agreement Concerning Digital Trade, *supra* note 60, art. 6 (emphases supplied).

234. *Id.* art. 6, ¶ 1.

235. *Id.* art. 6, ¶ 3 (a).

236. *Id.* art. 8. The provision reads —

Article 8. Non-Discriminatory Treatment of Digital Products:

- (1) Neither Party shall accord less favorable treatment to a digital product created, produced, published, contracted for, commissioned, or first made available on commercial terms in the territory of the other Party, or to a digital product of which the

Taxation would then be included in the DEPA, particularly on its article on taxation exception,²³⁷ which provides for a venue for settling inconsistencies between the said agreement and a tax convention between two or more parties.²³⁸ Article 15.5, paragraph 4 of the said instrument states —

In the case of a tax convention between two or more Parties, if an issue arises as to whether any inconsistency exists between this Agreement and the tax convention, the issue shall be referred to the designated authorities of the Parties in question. The designated authorities of those Parties shall have six months from the date of referral of the issue to make a determination as to the existence and extent of any inconsistency. If those designated authorities agree, the period may be extended up to 12 months from the date of referral of the issue. No procedures concerning the measure giving rise to the issue may be initiated under Module 14 (Dispute Settlement) until the expiry of the six-month period, or any other period as may have been agreed by the designated authorities. An arbitral tribunal established to consider a dispute related to a taxation measure shall accept as binding a determination of the designated authorities of the Parties made under this paragraph.²³⁹

This provision effectively made a recourse for a possible dispute related to potential inconsistencies between a digital economy instrument and a tax convention, effectively providing ease on the settlement of such a dispute. Further, the text identified designated authorities²⁴⁰ for each State Party

author, performer, producer, developer, or owner is a person of the other Party, than it accords to other like digital products.

- (2) This Article does not apply to subsidies or grants provided by a Party, including government-supported loans, guarantees, and insurance.
- (3) For greater certainty, nothing in this Article prevents a Party from adopting or maintaining measures that limit the level of foreign capital participation in an enterprise engaged in the supply of broadcasting.
- (4) With respect to intellectual property rights, paragraph 1 shall not apply to the extent of any inconsistency with the rights and obligations in any bilateral agreement between the Parties with respect to intellectual property or, if no such bilateral agreement exists, with the rights and obligations in any international agreement with respect to intellectual property to which both Parties are party.

Id.

237. Chile-Sing.-N.Z. Digital Partnership Agreement, *supra* note 62, art. 15.5, ¶ 4.

238. *Id.*

239. *Id.*

240. *Id.* art. 15.5, ¶ 1. The provision states —

concerned. It can be said that tax policy, as an e-commerce policy area has more room for improvement.

Competition policy is also considered as a key area for discussion on e-commerce and digital economy agreements. The OECD recognized that the e-commerce landscape has actors, such as online platforms that tend to exhibit competition dynamics specific to such space, including the role that algorithms may play.²⁴¹ Despite the importance as earlier identified, competition policy remains to be included on a “cooperation” basis, and only to three instruments, specifically the ASEAN Agreement on E-Commerce,²⁴² Singapore–Australia Digital Economy Agreement–Cooperation on Competition Policy,²⁴³ and DEPA’s module entitled “Emerging Trends and Technologies.”²⁴⁴

The next key development area for e-commerce is trade policy, which is essential to international trade. This was supposed to be brought about by the blurring of boundaries between goods and services, which is said to be common in the digital economy.²⁴⁵ In the early days of e-commerce instruments, goods and services have been mentioned in such texts, particularly in the UNCITRAL Model Law on Electronic Commerce’s definition of “Commercial Activities,”²⁴⁶ and the WTO General Council’s

Article 15.5: Taxation Exception —

(1) For the purposes of this Article:

designated authorities means:

- (a) for Chile, the Undersecretary of the Ministry of Finance;
- (b) for New Zealand, the Commissioner of Inland Revenue or an authori[z]ed representative of the Commissioner; and
- (c) for Singapore, the Chief Tax Policy Officer, Ministry of Finance, or any successor of these designated authorities as notified to the other Parties;

Id.

241. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD), *supra* note 210.

242. ASEAN Agreement on Electronic Commerce, *supra* note 59, art. 6, ¶ 1 (i).

243. Austl.-Sing Digital Economy Agreement, *supra* note 61, art. 16.

244. Chile-Sing.-N.Z. Digital Partnership Agreement, *supra* note 62, art. 8.4.

245. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD), *supra* note 210.

246. UNCITRAL Model Law on Electronic Commerce, *supra* note 7, art. 1, n. 4. UNCITRAL Model Law on Electronic Commerce defined the term Commercial Activities —

Work Programme on E-Commerce.²⁴⁷ On the other hand, provisions on non-discriminatory treatment of digital products are found in eight e-commerce and digital economy instruments, specifically the UNCITRAL Model Law on Electronic Commerce, Part 2 on Carriage of Goods,²⁴⁸ the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea,²⁴⁹ CPTPP's chapter on e-commerce,²⁵⁰ USMCA's chapter on digital trade,²⁵¹ RCEP's chapter on e-commerce whose text on "Dialogue on Electronic Commerce"²⁵² includes the non-discriminatory treatment of digital products, U.S.-Japan Agreement Concerning Digital Trade,²⁵³ Singapore-Australia Digital Economy

The term 'commercial' should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail[,] or road.

Id.

247. Work Programme on Electronic Commerce, *supra* note 37, ¶ 1.3. The WTO General Council defined e-commerce, thus —

Exclusively for the purposes of the work program[], and without prejudice to its outcome, the term "electronic commerce" is understood to mean the production, distribution, marketing, sale or delivery of goods and services by electronic means. The work program[] will also include consideration of issues relating to the development of the infrastructure for electronic commerce.

Id.

248. UNCITRAL Model Law on Electronic Commerce with Additional Article 5, *supra* note 7.

249. United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, *supra* note 19.

250. CPTPP, *supra* note 56, art. 14.4.

251. United States-Mexico-Canada Agreement — Digital Trade, *supra* note 57, art. 19.4.

252. Regional Comprehensive Economic Partnership Agreement — Electronic Commerce, *supra* note 58, art. 12.16.

253. U.S.-Japan Agreement Concerning Digital Trade, *supra* note 60, art. 8.

Agreement,²⁵⁴ and the DEPA's module entitled "Treatment of Digital Products and Related Issues," which includes an articles on customs duties,²⁵⁵ non-discriminatory treatment of digital products,²⁵⁶ and information and communication technology products that use cryptography.²⁵⁷ Provisions on services can be found in three instruments, particularly the USMCA's chapter on Digital Trade, which has an article on interactive computer services,²⁵⁸ U.S.-Japan Agreement Concerning Digital Trade, which has provisions on interactive computer services²⁵⁹ and location of financial service computing facilities for covered financial service suppliers,²⁶⁰ and Singapore-Australia Digital Economy Agreement, which has an article on location of computing facilities for financial services.²⁶¹ Further, cross-border data flow, another area identified that is impactful to trade policy on e-commerce, can be found in seven agreements, which include articles on cross-border transfer of information by electronic means in CPTPP's chapter on e-commerce,²⁶² USMCA's chapter on digital trade,²⁶³ RCEP's chapter on e-commerce, section D entitled "Promoting Cross-Border Electronic Commerce," which contains said provision,²⁶⁴ ASEAN Agreement on E-Commerce's provision on facilitating cross-border e-commerce,²⁶⁵ which covers cross-border transfer of information by electronic means, U.S.-Japan Agreement Concerning

254. Austl.-Sing. Digital Economy Agreement, *supra* note 61, art. 6.

255. Chile-Sing.-N.Z. Digital Partnership Agreement, *supra* note 62, art. 3.2.

256. *Id.* art. 3.3.

257. *Id.* art. 3.4.

258. United States-Mexico-Canada Agreement — Digital Trade, *supra* note 57, art. 19.17.

259. U.S.-Japan Agreement Concerning Digital Trade, *supra* note 60, art. 18.

260. *Id.* art. 13.

261. Austl.-Sing. Digital Economy Agreement, *supra* note 61, art. 25.

262. CPTPP, *supra* note 56, art. 14.11.

263. United States-Mexico-Canada Agreement — Digital Trade, *supra* note 57, art. 19.11.

264. Regional Comprehensive Economic Partnership Agreement – Electronic Commerce, *supra* note 58, art. 12.15.

265. ASEAN Agreement on Electronic Commerce, *supra* note 59, art. 7.

Digital Trade,²⁶⁶ Singapore–Australia Digital Economy Agreement,²⁶⁷ and DEPA.²⁶⁸

Lastly, environmental policy is an emerging key area for development as well. As mentioned by the OECD, e-commerce has both positive implications, such as reduction of logistical costs to brick-and-mortar stores, and negative effects, such as increased residential deliveries,²⁶⁹ to the environment. Despite its perceived effects, text addressing the connection between e-commerce and its effects on the environment are limited to the common practice in said agreements²⁷⁰ to include the General Exceptions to the General Agreement on Tariffs and Trade, particularly Article XX (b)²⁷¹

266. U.S.-Japan Agreement Concerning Digital Trade, *supra* note 60, art. 11.

267. Austl.-Sing. Digital Economy Agreement, *supra* note 61, art. 23.

268. Chile-Sing.-N.Z. Digital Partnership Agreement, *supra* note 62, art. 4.3.

269. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD), *supra* note 210.

270. AANZFTA, *supra* note 55, ch. 15, art. 1; CPTPP, *supra* note 56, ch. 29, art. 29.1; Agreement Between the United States of America, the United Mexican States, and Canada, art. 32.1, *signed* Nov. 30, 2018 (entered into force July 1, 2020) (*available at* <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between> (last accessed Jan. 30, 2022) [<https://perma.cc/AK8R-4EZR>]) (The relevant provision may be found by accessing the link leading to ch. 32. Exceptions and General Provisions); Regional Comprehensive Economic Partnership Agreement, art. 17.2, *signed* Nov. 15, 2020 (*available at* <https://rcepsec.org/legal-text> (last accessed Jan. 30, 2022) [<https://perma.cc/P8KQ-GHTY>]) (The relevant provision may be found by accessing the link leading to ch. 17 – General Provisions and Exceptions); ASEAN Agreement on Electronic Commerce, *supra* note 59, art. 14; U.S.-Japan Agreement Concerning Digital Trade, *supra* note 60, art. 3; Austl.-Sing. Digital Economy Agreement, *supra* note 61, art. 3; & Chile-Sing.-N.Z. Digital Partnership Agreement, *supra* note 62, art. 15.1.

271. General Agreement on Tariffs and Trade, art. XX, para. 1 (b), *signed* Oct. 30, 1947, 55 U.N.T.S. 187. Article XX. General Exceptions —

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

...

(b) necessary to protect human, animal or plant life[,] or health;

and (g),²⁷² and the General Agreement on Trade in Services, specifically Article XIV (b)²⁷³ to the general provisions of the Agreement, whether of the comprehensive or stand-alone kind. Thus, measures that are necessary to protect human, animal, or plant life or health that violate the e-commerce and digital economy instruments relating to goods and services are exempted from the rules of the instrument.²⁷⁴ Similarly, measures that are related to the conservation of living and non-living exhaustible natural resources affecting goods are covered.²⁷⁵

C. Chilean Experience on Using Free Trade Commissions in Future Proofing Free Trade Agreements

A key strategy employed by Chile that must be adopted in negotiations of future e-commerce and digital economy trade agreements is the inclusion of a mechanism that would ensure the agreement's "Progressive Integration." Mr. Felipe Tagle of the *Subsecretaria de Relaciones Economicas Internacionales* described "Progressive Integration" as a requirement that a treaty should have mechanisms to ensure that its provisions would be adaptive to future economic innovations which might not necessarily have materialized yet during the

...

Id.

272. *Id.* para. 1 (g). "[R]elating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption[.]" *Id.*

273. General Agreement on Trade in Services, art XIV, para 1 (b), signed Apr. 15, 1994, 1869 U.N.T.S. 183. Article XIV: General Exceptions —

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:

...

(b) necessary to protect human, animal or plant life[,] or health[.]

Id.

274. See General Agreement on Tariffs and Trade, *supra* note 271, art. XX, para. 1 (b) & General Agreement on Trade in Services, *supra* note 273, art. XIV, para. 1 (b).

275. See General Agreement on Tariffs and Trade, *supra* note 271, art. XX, para. 1 (g).

drafting of the treaty.²⁷⁶ Thus, this will enable FTAs that “are usually dynamic treaties[, which are] drafted in a way to foster trade and economic integration.”²⁷⁷

It should be emphasized that the employment of the aforementioned Chilean strategy is supported by the said country’s success on its FTAs. Chilean development strategy and phases of Chile’s trade policy since 1990 have always been geared towards the use of its FTAs with its current and potential trade partners.²⁷⁸ As of April 2021, Chile’s FTA network is composed of 30 Agreements, which effectively connects 65 economies. It involves more than five billion people (65% of the world population), and is equivalent to 88% of the world’s gross domestic product (GDP).²⁷⁹ As a result, Chile has the FTA network with the greatest access to world GDP.²⁸⁰ Therefore, the use and success of Chile’s FTA strategy is something to aim for.

A specific provision developed by Chile to ensure progressive integration is the creation of a “Free Trade Commission.”²⁸¹ The significance of a Free Trade Commission is its function to make decisions that would enable the FTA’s provisions to satisfy the requirements of progressive integration.²⁸² An early iteration of such text can be found in the Chile-European Community Association Agreement,²⁸³ which entered into force on 1 February 1999. This Agreement introduced the concept of an “Association Council” which is described as follows:

- (1) An Association Council is hereby established, which shall supervise the implementation of this Agreement. The Association Council shall meet at ministerial level at regular intervals, not exceeding a period of two

276. Felipe Tagle, *Legal Aspects Of The Network Of Free Trade Agreements: Negotiation And Implementation*, Address at the Chile-Thailand International Workshop on Trade Policy for ASEAN Members (Apr. 19-30, 2021).

277. *Id.*

278. Cristobal Tabilo, *Trade Policy: Chilean Results*, Address at the Chile-Thailand International Workshop on Trade Policy for ASEAN Members (Apr. 19-30, 2021).

279. *Id.*

280. *See id.*

281. *See* Agreement Establishing an Association Between the European Community and its Member States, of the One Part, and the Republic of Chile, of the Other Part, signed on June 21, 1996, 2002 O.J. (L 352) 3 [hereinafter Chile-European Community Association Agreement].

282. Felipe Tagle, *supra* note 276.

283. Chile-European Community Association Agreement, *supra* note 281.

years, and extraordinarily whenever circumstances so require, if the Parties so agree.

- (2) The Association Council shall examine any major issue arising within the framework of this Agreement, as well as any other bilateral, multilateral[,] or international question of common interest.
- (3) The Association Council shall also examine proposals and recommendations from the Parties for the improvement of this Agreement.²⁸⁴

The basic elements covering a Free Trade Commission can be seen in this early iteration. These are the body's powers, duties, and procedural rules.²⁸⁵ In subsequent Chilean FTAs,²⁸⁶ the term "Free Trade Commission" is used to describe such a body.

The first element relates to the Commission's powers. Perhaps the most comprehensive iteration of which can be found in the Trans-Pacific Strategic

284. *Id.* tit. II. art. 3.

285. *See id.* tit. II.

286. Free Trade Agreement Between the Government of The Republic of Korea and the Government of the Republic of Chile, S. Kor.-Chile, art. 18.1, *signed* Feb. 15, 2003, *available* at https://www.fta.go.kr/webmodule/_PSD_FTA/cl/1/Text_of_Agreement_eng.pdf (last accessed Jan. 30, 2022) [<https://perma.cc/5ZGK-7CTK>] [hereinafter China-Chile Free Trade Agreement]; Agreement Between Japan and the Republic of Chile for a Strategic Economic Partnership, art. 190, *signed* Mar. 27, 2007, *available* at <https://www.mofa.go.jp/region/latin/chile/jointo703/agreement.pdf> (last accessed Jan. 30, 2022) [<https://perma.cc/4CYT-9HND>]; Chile-Vietnam Free Trade Agreement, Chile-Viet., art. 11.1, *signed*, Nov. 12, 2011, *available* at http://www.sice.oas.org/Trade/CHL_VNM/CHL_VNM_e/CHL_VNM_text_e.asp (last accessed Jan. 30, 2022) [<https://perma.cc/Y7GQ-7BDH>]; Free Trade Agreement Between the Government of the Republic of Chile and the Government of the Kingdom of Thailand, Chile-Thai., art. 13.1 *signed* Oct. 4, 2013, *available* at http://www.sice.oas.org/Trade/CHL_THA_Final/CHL_THA_FTA_Full_Version_PDF_e.pdf (last accessed Jan. 30, 2022) [<https://perma.cc/P7FZ-JJJ3>]. [hereinafter Chile-Thailand Free Trade Agreement]; & Indonesia-Chile Comprehensive Economic Partnership Agreement (IC-CEPA), Indon.-Chile, art. 11.1 (4), *signed* Dec. 14, 2017, *available* at https://ditjenppi.kemendag.go.id/assets/files/publikasi/doc_20190319_perjanjian-kemitraan-ekonomi-komprehensif-indonesia-chile-indonesia-chile-cepa.pdf (last accessed Jan. 30, 2022) [<https://perma.cc/29PZ-UUF8>].

Economic Partnership Agreement between Chile, Brunei, Singapore, and New Zealand, which entered into force on 1 May 2006. The provision states:

- (1) The Commission may:
 - (a) establish committees and working groups, refer matters to any committee or working group for advice, and consider matters raised by any committee or working group;
 - (b) further the implementation of the Agreement's objectives by approving any modifications¹ of, inter alia:
 - (i) the Schedules contained in Annex I (Elimination of Customs Duties), by accelerating the elimination of customs duties;
 - (ii) the rules of origin established in Annex II (Specific Rules of Origin); or
 - (iii) the lists of entities and covered goods and services and thresholds contained in Annexes 11.A and 11.C of the Chapter 11 (Government Procurement).
 - (b) further the implementation of the Agreement's objectives through Implementing Arrangements;
 - (c) seek to resolve differences or disputes that may arise regarding the interpretation or application of this Agreement;
 - (d) seek the advice of non-governmental persons or groups on any matter falling within its responsibilities where this would help the Commission make an informed decision; and
 - (e) take such other action in the exercise of its functions as the Parties may agree.²⁸⁷

This provision is composed of six initiatives that the Commission may act upon, namely:

- (1) establishment of committees and working groups;
- (2) implementation of the agreement's objectives by approving any modifications thereon;
- (3) implementation of the agreement's objectives through implementing arrangements;

287. Trans-Pacific Strategic Economic Partnership Agreement, *supra* note 286, art. 17.2 (2).

- (4) resolve differences or disputes regarding the interpretation or application of the agreement;
- (5) seek advice of the private sector in aid of making an informed decision; and
- (6) other actions in the exercise of their functions.

The power of the Commission to establish committees, subcommittees, working groups, ad hoc or standing committees, or expert groups and to delegate tasks to any of the latter is found in all Chilean FTAs with Free Trade Commission provisions.²⁸⁸ Modification of certain parts of the agreement in furtherance of the implementation of its objectives are limited to accelerating the elimination of customs duties or tariffs,²⁸⁹ rules of origin,²⁹⁰ uniform regulations,²⁹¹ government procurement,²⁹² competent government authorities,²⁹³ and geographical indications.²⁹⁴ The power to enter into Implementing Arrangements, on the other hand, is only found in the earlier quoted Trans-Pacific Strategic Economic Partnership Agreement.²⁹⁵ Further, the Commission is sanctioned to resolve differences or disputes regarding the interpretation or application of the agreement in two FTAs, namely the Trans-

288. Free Trade Agreement Between the Government of the Republic of Korea and the Government of the Republic of Chile, *supra* note 286, art. 18.1; Trans-Pacific Strategic Economic Partnership Agreement, *supra* note 286, art. 17.2; Free Trade Agreement Between the Government of the People's Republic of China and the Government of the Republic of Chile, *supra* note 286, art. 97; Agreement Between Japan and the Republic of Chile for a Strategic Economic Partnership, *supra* note 286, art. 190; Chile-Vietnam Free Trade Agreement, *supra* note 286, art. 11.1; Free Trade Agreement Between The Government of the Republic of Chile and the Government of the Kingdom of Thailand, *supra* note 286, art. 13.1; & Indonesia-Chile Comprehensive Economic Partnership Agreement (IC-CEPA), *supra* note 286, art. 11.1 (4).

289. *Id.*

290. *Id.*

291. Chile-Korea Free Trade Agreement, *supra* note 286, art. 5.12.

292. *Id.* pt. IV. ch. 15 & Trans-Pacific Strategic Economic Partnership Agreement, *supra* note 286, ch. 11.

293. Chile-China Free Trade Agreement, *supra* note 286.

294. Chile-Thailand Free Trade Agreement, *supra* note 286, art. 11.9; & Indonesia-Chile Comprehensive Economic Partnership Agreement (IC-CEPA), *supra* note 286.

295. Trans-Pacific Strategic Economic Partnership Agreement, *supra* note 286, art. 17.2, ¶ 2 (c).

Pacific Strategic Economic Partnership Agreement,²⁹⁶ and the Free Trade Agreement between Chile and Thailand, which entered into force on 5 November 2015.²⁹⁷ Private-sector engagement for purposes of arriving at an informed decision were found in four Chilean FTAs.²⁹⁸ Lastly, a catch-all provision added to include other areas in aid of the Commission's functions, and as agreed by the parties, are found in majority of Chilean FTAs²⁹⁹ with Free Trade Commission articles.

The second element seen in the quoted prototype for a Free Trade Commission is the said body's duties. An example of such text that resonates the most with other Chilean FTAs with the same provision is the Indonesia-Chile Comprehensive Economic Partnership Agreement (IC-CEPA), which has an article on establishing the IC-CEPA Joint Commission. The text provides:

- (3) The Commission shall:
 - (a) consider any matter relating to the implementation or operation of this Agreement;
 - (b) review, consider and, as appropriate, decide on the specific matters related to the operation or implementation of this Agreement, including matters reported by the committees established under this Agreement;
 - (c) review this Agreement, in accordance with Article 14.5 (General Review of the Agreement);
 - (d) supervise and coordinate the work of committees established under this Agreement; and

296. *Id.* art. 17.2, ¶ 2 (d).

297. Chile-Thailand Free Trade Agreement, *supra* note 286, art. 17.2, ¶ 3 (d).

298. Chile-Korea Free Trade Agreement, *supra* note 286; Trans-Pacific Strategic Economic Partnership Agreement, *supra* note 286, art. 16.2, ¶ 2 (b); Chile-China Free Trade Agreement, *supra* note 286, art. 172; & Chile-Thailand Free Trade Agreement, *supra* note 286, art. 11.1, ¶ 2 (c).

299. Chile-European Community Association Agreement, *supra* note 281, art. 3; Chile-Korea Free Trade Agreement, *supra* note 286, art. 3.13, ¶ 2; Trans-Pacific Strategic Economic Partnership Agreement, *supra* note 286, art. 3.14, ¶ 2 (a); Chile-China Free Trade Agreement, *supra* note 286, art. 3; Agreement Between Japan and the Republic of Chile for a Strategic Economic Partnership, *supra* note 286, art. 27, ¶ 2 (d); Chile-Vietnam Free Trade Agreement, *supra* note 286, art. 3.12, ¶ 4 (d); & Indonesia-Chile Comprehensive Economic Partnership Agreement (IC-CEPA), *supra* note 286, art. 3.11, ¶ 3 (g).

(e) take such other actions as the Parties may agree.³⁰⁰

While the quoted provision does not provide a comprehensive list of all duties, it provides a listing of well-represented Commission's duties, as found in other Chilean FTAs. The duty to supervise the implementation or operation of the agreement can be found in all FTAs³⁰¹ with a Free Trade Commission provision. The requirements for the Commission to review, consider, and decide on matters related to the implementation of the agreement³⁰² and to conduct a general review of the agreement and consider any amendments thereto³⁰³ are each found in at least four Chilean FTAs. On the other hand, the supervision of all the works of committees and working groups created through the agreement are found in all Chilean FTAs identified with Free Trade Commission provisions.³⁰⁴ The same also goes for a catch-all provision making reference to other matters that may affect and/or be agreed

300. Indonesia-Chile Comprehensive Economic Partnership Agreement (IC-CEPA), *supra* note 286, art. 11.1.

301. Chile-Korea Free Trade Agreement, *supra* note 286, art. 18.1, ¶ 2 (a); Trans-Pacific Strategic Economic Partnership Agreement, *supra* note 286, art. 17.2, ¶ 1 (c); Chile-China Free Trade Agreement, *supra* note 286, art. 97, ¶ 2 (a); Agreement Between Japan and the Republic of Chile for a Strategic Economic Partnership, *supra* note 286, art. 190, ¶ 1 (c); Chile-Vietnam Free Trade Agreement, *supra* note 286, art. 11.1, ¶ 3 (c); & Indonesia-Chile Comprehensive Economic Partnership Agreement (IC-CEPA), *supra* note 286, art. 11.1, ¶ 3 (d).

302. Chile-China Free Trade Agreement, *supra* note 286, art. 97; Chile-Vietnam Free Trade Agreement, *supra* note 286, art. 3.12; Chile-Thailand Free Trade Agreement, *supra* note 286, art. 3.9; & Indonesia-Chile Comprehensive Economic Partnership Agreement (IC-CEPA), *supra* note 286, ch. 11.

303. Chile-European Community Association Agreement, *supra* note 281, art. 3; Chile-Korea Free Trade Agreement, *supra* note 286, art. 3.13, ¶ 3 (a); Trans-Pacific Strategic Economic Partnership Agreement, *supra* note 286, art. 3.14, ¶ 2 (a); Chile-China Free Trade Agreement, *supra* note 286, art. 114, ¶ 2 (d); Agreement Between Japan and the Republic of Chile for a Strategic Economic Partnership, *supra* note 286, art. 190, ¶ 1 (a); & Indonesia-Chile Comprehensive Economic Partnership Agreement (IC-CEPA), *supra* note 286, art. 11.1, ¶ 3 (b).

304. Chile-Korea Free Trade Agreement, *supra* note 286, art. 18.1, ¶ 2 (a); Trans-Pacific Strategic Economic Partnership Agreement, *supra* note 286, art. 17.2, ¶ 1 (c); Chile-China Free Trade Agreement, *supra* note 286, art. 97, ¶ 2 (a); Agreement Between Japan and the Republic of Chile for a Strategic Economic Partnership, *supra* note 286, art. 190, ¶ 1 (c); Chile-Vietnam Free Trade Agreement, *supra* note 286, art. 11.1, ¶ 3 (c); & Indonesia-Chile Comprehensive Economic Partnership Agreement (IC-CEPA), *supra* note 286, art. 11.1, ¶ 3 (d).

upon by the parties.³⁰⁵ Finally, other identified Free Trade Commission duties that are specific to certain FTAs include the evaluation of the results obtained in the course of the agreement's application,³⁰⁶ ensure parties' protection from measures distorting trade in goods or services by public enterprises,³⁰⁷ explore measures for further expansion of trade and investment among parties,³⁰⁸ and establish amounts of remuneration and expenses paid to panelists.³⁰⁹

The third identified element of a Free Trade Commission refers to its Procedural Rules. The Chile-Korea FTA that entered into force on 1 April 2004 introduced three areas of this element:

- (1) The Parties hereby establish the Free Trade Commission, comprising officials referred to in Annex 18.1.1 or their designees.
- ...
- (4) The Commission shall establish its rules and procedures. All decisions of the Commission shall be adopted by mutual agreement between the Parties.
- (5) The Commission shall convene at least once a year in regular session. Regular sessions of the Commission shall be chaired alternately by each Party.³¹⁰

The areas identified through this provision are: (1) the composition of the Free Trade Commission; (2) the Commission's rules and procedures in decision-making; and (3) its meeting schedule. The composition is usually specified within the agreement, particularly key officials identified in the FTA or their designees and/or co-chairs,³¹¹ including the specific ministry or

305. Chile-European Community Association Agreement, *supra* note 281, art. 3; Chile-Korea Free Trade Agreement, *supra* note 286, art. 3.13, ¶ 2; Trans-Pacific Strategic Economic Partnership Agreement, *supra* note 286, art. 3.14, ¶ 2 (a); Chile-China Free Trade Agreement, *supra* note 286, art. 3; Agreement Between Japan and the Republic of Chile for a Strategic Economic Partnership, *supra* note 286, art. 27, ¶ 2 (d); Chile-Vietnam Free Trade Agreement, *supra* note 286, art. 3.12, ¶ 4 (d); & Indonesia-Chile Comprehensive Economic Partnership Agreement (IC-CEPA), *supra* note 286, art. 3.11, ¶ 3 (g).

306. Chile-Korea Free Trade Agreement, *supra* note 286, art. 18.1, ¶ 2 (b).

307. *Id.* art. 18.1, ¶ 2 (d).

308. Trans-Pacific Strategic Economic Partnership Agreement, *supra* note 286, art. 17.2, ¶ 1 (d).

309. Chile-China Free Trade Agreement, *supra* note 286, art. 97, ¶ 2 (e).

310. Chile-Korea Free Trade Agreement, *supra* note 286, art. 18.1.

311. Chile-Korea Free Trade Agreement, *supra* note 286, art. 18.2, annex 18.1.1; & Chile-Vietnam Free Trade Agreement, *supra* note 286, art. 11.1, ¶ 2.

government office involved,³¹² or the specific rank of the Commission's member within their respective governments.³¹³ The Commission's rules and procedures in decision-making are presented either as a directive for the body to establish its rules and procedures,³¹⁴ or specifically identified in the FTA's text.³¹⁵ Lastly, the meeting schedule is either specified³¹⁶ or devolved to the rule-making function of the Commission.

III. KEY FINDINGS

As seen in the historical review of e-commerce in international law, it is a subject matter that has been getting a high traction in terms of international negotiations and newly minted agreements. It was shown that the five key developmental areas identified by OECD for e-commerce are present in the agreements but at various degrees of transformation. Thus, further progress is to be expected in the areas of consumer protection, tax policy, competition policy, trade policy, environmental policy, and more.

The Chilean experience shows how international trade agreements can be made adaptable to changes and developments in the fast-paced world of the Fifth Technological Revolution. A key provision that could be employed by future e-commerce and digital trade agreements is the inclusion of a provision that creates a Free Trade Commission, which will enable the progressive integration of the agreement. This is done through the Commission's decision-making capacity that will ensure the agreement's provisions will adapt to technological changes in e-commerce and digital trade, an area wherein innovations happen daily. This will lessen the need for the tedious undertaking of reopening the text for negotiation, a process which could hinder the purpose of a truly dynamic and effective International E-Commerce Negotiating Framework.

312. Chile-China Free Trade Agreement, *supra* note 286, art. 97, ¶ 1.

313. Chile-Thailand Free Trade Agreement, *supra* note 286, art. 13.1, ¶ 2.

314. Chile-Korea Free Trade Agreement, *supra* note 286, art. 18.1, ¶ 4; Chile-China Free Trade Agreement, *supra* note 286, art. 97, ¶ 4; & Chile-Vietnam Free Trade Agreement, *supra* note 286, art. 11.2.

315. Agreement Between Japan and The Republic of Chile for a Strategic Economic Partnership, *supra* note 286, art. 52; & Chile-Thailand Free Trade Agreement, *supra* note 286, art. 13.2.

316. Chile-Korea Free Trade Agreement, *supra* note 286, art. 18.1, ¶ 4; Chile-Thailand Free Trade Agreement, *supra* note 286, art. 13.2; & Chile-China Free Trade Agreement, *supra* note 286, art. 97, ¶ 5.

Indeed, the rest of the world has a lot to learn from Latin America, may it be an important life philosophy on how risk-taking and courage, coupled with enough experience, would lead to an improved quality of life for humankind as Brazil's Mr. Coelho teaches, or a key text used to ensure progressive integration in international trade agreements from Chile's treaty practice.