

## BOOK REVIEWS

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# Neha Mishra, *International Trade Law and Global Data Governance: Aligning Perspectives and Practices*

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The digitalization of the global economy has propelled a profound reconfiguration of global trade, wherein data have emerged as the catalyzing factor. Central to maximizing the benefits of our ‘datafied’ economy is the facilitation of cross-border data flows, a key driver of economic growth and innovation. However, and despite concerted efforts to measure and underscore the economic value of the seamless movement of bits,<sup>1</sup> the complexities of governing data across borders continue to challenge countries and policymakers. A spectrum of concerns ranging from the protection of privacy to national security and data sovereignty are often presented as rationales for measures restricting data flows. The interface between those measures (collectively known as data-restrictive measures) across five different legal and societal domains – privacy, cybersecurity, governmental access to data, the digital data divide, and competition law – and international trade law is at the core of Neha Mishra’s compelling book *International Trade Law and Global Data Governance: Aligning Perspectives and Practices*.

Within the subject areas she has chosen to study, Mishra’s book is dedicated to illuminate two fundamental aspects. The first aspect is to analytically untangle the legality of data-restrictive measures under the applicable international trade agreements. After the careful examination of data-restrictive measures, against, among others, the exceptions contemplated in WTO instruments, the author contends that, data-restrictive measures are often at odds with international trade law. Hence, the source of the conflict. The second aspect that the book investigates is the potential contribution of international trade law to the international governance of data. The author is quite clear in emphasizing that this potential contribution rests on the adaptation of the former (i.e., trade law) to the polycentric dynamic of the latter (i.e., global data governance). This polycentric dynamic, according to the author, comprises domestic laws and policies, soft law, best practices, international treaties, technical standards, and informal understandings, which stand in sharp contrast to the (mainly) treaty-based characteristics of international trade law. Both of these overarching aspects are investigated thoughtfully in 242 pages of thoroughly researched legal and scientific analysis.

The book is divided into seven chapters. It begins by contextualizing the significance of cross-border data flows for global trade and delineates the hurdles posed by data-restrictive measures in this context. What follows in the next five chapters is the deep analysis of data-restrictive measures across the topical areas chosen by the author. The analysis presented in each of the book’s chapters is a careful dissection of the compliance of data-restrictive measures with trade law, each of which could form the basis of separate scholarly works. The book’s closing chapter wraps up the previous discussion to expand on the author’s novel proposal – a multi-layered approach to the data governance and trade law conundrum with emphasis on fostering digital trust, promoting regulatory interoperability, and integrating global best practices and

<sup>1</sup>See IMF, OECD, UN, and WB (2023) *Handbook on Measuring Digital Trade* (2nd edn, OECD Publishing).

standards. This proposal emerges from the deficiencies that the author identifies in existing international trade rules, which, in their current form, are unfit to keep up with dynamic nature of data governance.

It is within this latter aspect that the book particularly adds, in my view, considerable value and usefully complements recent publications in the fields of digital trade and data governance. It also underscores the acute awareness of the importance of narratives and of building new ones. Mishra introduces the novel narrative of a multilayered framework, of which, one key aspect is trust. This proposition comes at a crucial juncture marked by ongoing regulatory fragmentation, where the strategic value of data, along with access and control over it, holds considerable geopolitical significance. Furthermore, the author brings new perspectives to the digital trade literature, some of which has portrayed data governance and trade law as conflicting subjects, one as a problem to the other, and vice-versa. The book also rethinks the arguments that countries should unavoidably follow the regulatory leaders in the data governance field (as a result, for instance, of the 'Brussel's effect'<sup>2</sup> of EU regulations). Mishra's proposal is one of interoperability of regulatory frameworks, representing a nuanced approach to addressing the complexities of the current data governance landscape.

The evolving landscape, evidenced by the increasing integration of data protection and other data-related provisions into FTAs and Digital Economy Agreements (DEAs), suggests a growing inclination towards cooperation rather than conflict between trade and data governance agendas.<sup>3</sup> These treaties are also an attestation that, despite legal and policy differences, some countries are eager to agree to rules that will help their economies to profit from the benefits – and in some cases, untapped potential – of digital trade, where data play a pivotal role. For instance, we see evidence that one of the author's proposals to promote interoperability of data protection domestic frameworks through reference to international standards, such as the OECD and APEC privacy frameworks, is already occurring in the context of FTAs and DEAs. The author's other propositions are also likely to find a receptive environment within these agreements. But while FTAs and DEAs can be more adaptable, Mishra also advocates for the relaxation of WTO instruments to support cross-border data flows. Some may argue that this is too much of an optimistic perspective. However, the concrete proposals that she offers are necessary examples to illuminate how to revitalize – or even leverage – WTO instruments to contribute to data governance.

For example, one of Mishra's proposals involves meaningfully using the transparency mechanisms under WTO law, with the aim of increasing information about data-restrictive measures. This proposal, it is argued, could be adapted in line with the guidelines of GATS Article III or the notification of Specific Trade Concerns by the Technical Barriers to Trade (TBT) committee. Transparency plays a crucial role in understanding the degree of fragmentation in data policies, a topic extensively discussed in both policy and academic circles. However, it is noteworthy that despite a significant increase in data-related laws and regulations, only a limited number of them are notified to the WTO, potentially due to capacity constraints faced by certain governments in complying with WTO transparency requirements. Enhancing transparency serves as the initial step in gathering evidence regarding the types of data-restrictive measures being implemented, and how they might pose challenges to international trade rules.

Another significant aspect pertains to revitalizing Special and Differential Treatment (SDT) for developing countries and LDCs as a mechanism to alleviate the data divide. Well-crafted and implemented SDT provisions, within both multilateral and regional contexts, can help to alleviate the skepticism in negotiating innovative rules on data, particularly as countries grapple with the lack of clarity of what are the trade-offs for engaging in such rules. SDT provisions can also help to counteract the perception that by liberalizing data markets, developing countries and LDCs are repeating old patterns of natural resource extractivism, wherein data are the new

<sup>2</sup>A. Bradford (2020) *The Brussels Effect: How the European Union Rules the World*. Oxford University Press.

<sup>3</sup>M. Burri, M.V. Callo-Müller, and K. Kugler (2024) 'The Evolution of Digital Trade Law: Insights from TAPED', *World Trade Review* 1.

commodity to be exported to developed countries. The recognition of the value of SDT policies is increasingly evident in the negotiations towards a WTO Joint Initiative on E-commerce and has been also observed in some FTAs, highlighting again that Mishra's concrete proposals are in line with current thought in digital trade rulemaking.

Although the contents of the book are superbly well-rounded, there is perhaps an opportunity to deepen the book's analysis by delving into the nexus between global data governance and intellectual property (IP) rights, especially given the author's dedication of a chapter to discussing competition challenges in digital markets. It is noteworthy that IP and competition law represent complementary facets of regulatory mechanisms, both having an impact on market dynamics and the promotion of innovation. IP rights foster innovation and creativity by granting exclusive rights – especially evident in data contexts through copyright and trade secrets. But IP rights can also impede competition in data markets, underscoring the importance of data access and sharing mechanisms, as examined in Mishra's work. Despite this intersection, there is a gap in the digital trade literature analyzing this aspect. However, if one of the objectives of facilitating cross-border data flows is to stimulate innovation, and hence growth, scholarly attention should also be directed towards assessing whether existing IP rules, such as those set out in the TRIPS Agreement or FTAs, align with the progressive landscape of current digital trade rulemaking or if they inadvertently may hinder progress.<sup>4</sup>

Overall, Mishra's book is a much-welcomed scientific analysis of an issue prone to politicization, making it an excellent source for anyone seeking to understand the complexities, but also possibilities, of interfacing global data law with international trade law. Moreover, the book's significance transcends its thorough legal analysis as it presents compelling possibilities that warrant thoughtful consideration in the ongoing discussions surrounding trusted data transfers, for instance, in the context of the G7 and other fora. The book also starts an important conversation on how to operationalize each of the author's proposals, and whether they could in fact deliver the intended benefits – a key aspect since we are far from a harmonious transnational regulatory framework.

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## Alan W. Wolff, *Revitalizing the World Trading System*

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Readers of this journal know well that these are difficult times for the World Trade Organization (WTO) – interesting times even, in the words of the old blessing/curse. Of course, many of the problems faced by the WTO are simply the broader problems of the world washing up – not always gently – on the shores of Lac Léman. The WTO cannot solve the broader problems of

<sup>4</sup>See for example, M. Burri and M. Vásquez Callo-Müller (2024) 'Charting the Course: TRIPs-Plus Agreements and the Intersection of Intellectual Property with Digital Trade', *American University Law Review* 73, 101 (forthcoming).