

Toward a Digital KORUS FTA: Legal Reforms for Data, AI, and E-Commerce Governance

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I. INTRODUCTION

The *United States – Korea Free Trade Agreement (KORUS)*, negotiated in 2007 and amended in 2018, stands as a cornerstone of the bilateral economic relationship between two of the world’s most technologically advanced economies.¹⁾ Yet its architecture reflects a pre-digital era

1) Korea–United States Free Trade Agreement, U.S.–S. Kor., June 30, 2007, amended Jan. 1, 2019, T.I.A.S. No. 12-1201.

of trade law conceived before the digital revolution that fundamentally reshaped global commerce. KORUS contains no binding provisions on cross-border data flows, artificial intelligence, digital platforms, or cybersecurity cooperation.²⁾ As both the United States and Korea have since emerged as global leaders in digital technology and regulation, this absence has become increasingly untenable.³⁾

The stakes are profound. Digital trade now constitutes a rapidly expanding share of bilateral economic activity, encompassing cloud services, algorithmic commerce, and artificial intelligence applications that extend well beyond traditional goods and services.⁴⁾ Beyond their bilateral relationship, the United States and Korea together shape norms of digital governance in the Indo-Pacific, a region where competing regulatory paradigms coexist: U.S. innovation-driven flexibility, Korea's ethics-oriented protections, and the European Union's (EU) rights-based regimes.⁵⁾ Whether KORUS can adapt to these realities will determine not only the trajectory of U.S.-Korea economic integration but also the credibility of trade law as a governance instrument for the digital age.⁶⁾

This Note asks a central research question: Can KORUS be modernized into a credible framework for digital trade and regulation, and if so, under what legal and political conditions?⁷⁾

2) *Id.* chs. 15, 18 (providing no binding commitments on cross-border data transfers, platform regulation, or AI governance).

3) See OECD, *OECD Digital Economy Outlook 2024* 43-49 (2024) (noting the growing importance of digital governance in advanced economies); U.S. Cong. Rsch. Serv., R47498, *Data Privacy and Protection in the United States* 3-7 (2023) (highlighting the absence of a comprehensive federal data law in the U.S.); Ministry of Science & ICT (S. Kor.), *Draft Digital Bill of Rights* (2023), <https://www.msit.go.kr> (proposing principles for digital governance in Korea).

4) U.S. Int'l Trade Admin., *Digital Services Trade Data* (2023), <https://www.trade.gov> (reporting U.S. ICT-enabled exports exceeding \$500 billion in 2022, with Korea as a key market); Samsung Elecs. Co., *Sustainability Report 2023* 61-64 (2023) (highlighting expansion of data-driven services); LG Elecs. Inc., *Annual Report 2023* 55-58 (2023).

5) See UNCTAD, *Digital Economy Report 2024: Data as a Global Public Good* 15-20 (2024) (noting competing regulatory models globally); Natasha Tusikov, *Chokepoints: Global Private Regulation on the Internet* 115-20 (2016) (examining platform regulation as a mode of governance); See Mira Burri, *Understanding Digital Trade Lawmaking*, 24 *WORLD TRADE REV.* 121, (2025) 129-32 (2025).

6) See Joost Pauwelyn, *Treaty Design in a Fragmented Digital Economy*, 118 *AJIL UNBOUND* 56, 58-61 (2024) (arguing that the adaptability of trade law determines its credibility in governing digital markets).

It advances the thesis that modernization is both urgent and possible, but only if reform is grounded in legal realism.⁸⁾ A workable reform must draw lessons from comparative treaty practice, remain sensitive to domestic regulatory trajectories, and translate aspiration into implementable provisions.⁹⁾

Methodologically, this Note proceeds in three steps. First, it undertakes a comparative analysis of next-generation trade agreements—including the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)*, the *United States–Mexico–Canada Agreement (USMCA)*, and the *Digital Economy Partnership Agreement (DEPA)*—to identify substantive approaches to data flows, algorithmic accountability, and digital-platform governance.¹⁰⁾ Second, it evaluates these frameworks against the divergent regulatory philosophies of the United States’ fragmented, innovation-first approach and Korea’s centralized, ethics-first model.¹¹⁾ Third, it develops reform scenarios ranging from incremental amendment via annex (modeled on the 2018 amendments) to comprehensive renegotiation aligning KORUS with emerging digital trade disciplines.¹²⁾

7) Burri, *supra* note 5, at 16–19 (emphasizing the need for treaty adaptation to digital realities).

8) See Gregory Shaffer, *The New Legal Realist Approach to International Economic Law*, 28 MINN. J. INT’L L. 1, 5–9 (2019) (arguing for legal realism in international economic law); Joost Pauwelyn, *Treaty Design in a Fragmented Digital Economy*, 118 AJIL UNBOUND 56, 58–60 (2024) (underscoring the importance of pragmatic treaty design in digital trade).

9) See *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* arts. 14.1–14.17, Dec. 30, 2018, 57 I.L.M. 1025 (2018) [hereinafter CPTPP]; *United States–Mexico–Canada Agreement* ch. 19, Nov. 30, 2018, 134 Stat. 11 (2020) [hereinafter USMCA]; *Digital Economy Partnership Agreement*, Chile–N.Z.–Sing., June 12, 2020, <https://www.mfat.govt.nz> [hereinafter DEPA]; Susan Ariel Aaronson, *Designing Digital Trade Rules: Lessons for Future FTAs*, CTR. FOR INT’L GOVERNANCE INNOVATION (2023), <https://www.cigionline.org> (arguing for implementable model provisions).

10) *see* Burri, *supra* note 5, at 128–32 (comparing substantive approaches to digital governance across FTAs).

11) *See* Exec. Order No. 14,110, *Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence*, 88 Fed. Reg. 75,185 (Oct. 30, 2023); U.S. Cong. Rsch. Serv., R47848, *Artificial Intelligence: Federal Policy Developments 3–7* (2024) (summarizing U.S. innovation-first approach); Ministry of Science & ICT (S. Kor.), *Draft Digital Bill of Rights* (2023), <https://www.msit.go.kr>; Sang-Hyun Park, *Korea’s Digital Bill of Rights: Toward a Normative Framework for AI Governance*, 32 KOREAN J. COMP. L. 215, 219–24 (2024) (describing Korea’s ethics-first digital governance model).

12) *See* Korea–United States Free Trade Agreement, U.S.–S. Kor., June 30, 2007, amended Jan. 1, 2019, T.I.A.S. No. 12-1201 (illustrating the incremental amendment model).

The roadmap proceeds as follows. Part I situates this Note within the scholarly literature on digital trade and treaty design. Part II turns to the historical and statutory context of KORUS, highlighting its pre-digital foundations and subsequent regulatory gaps. Part III compares institutional innovations in CPTPP, USMCA, and DEPA and maps KORUS's deficiencies against them. Part IV constructs a legal framework for reform grounded in policy-legal realism and advances pathways for a "Digital KORUS 2.0." Part V concludes by underscoring the doctrinal and normative implications of treaty modernization and identifying avenues for further research on Indo-Pacific digital governance.

By recasting KORUS as a platform for digital governance rather than a static trade agreement, this Note seeks to move the debate beyond abstract policy aspiration toward a concrete, legally plausible treaty platform.

II. Existing Approaches to Digital Trade Law

Scholarship on digital trade law has expanded significantly in the past decade, yet most of the literature has focused on new-generation agreements such as CPTPP, USMCA, and DEPA rather than on the retrofitting of earlier bilateral treaties like KORUS.¹³⁾ Mira Burri has traced how digital trade provisions evolved from skeletal e-commerce chapters into binding rules on data flows, source code, and algorithms, emphasizing a shift from "trade facilitation" to "digital governance" in treaty law.¹⁴⁾ Susan Aaronson has explored the broader normative implications of data governance in trade agreements, warning that trade commitments may inadvertently constrain privacy and human rights protections in the absence of clear exceptions.¹⁵⁾ Henry Gao

13) See Burri, *supra* note 5, at 559–60 (surveying the evolution of digital trade provisions in CPTPP and USMCA while noting the neglect of older FTAs); Henry Gao, *Digital Trade Provisions in Asian Trade Agreements: A New Template for the WTO?*, 18 *WORLD TRADE REV.* 65 (2019) (highlighting DEPA as a frontier model for digital trade governance).

14) See Mira Burri, *Understanding the Implications of Big Data and Big Data Analytics for Trade Law and Policy*, 19 *J. INT'L ECON. L.* 331 (2016) (arguing that big data shifts the normative frame of trade law from facilitation to governance).

15) Susan Ariel Aaronson, *Data Is Different: Why the World Needs a New Approach to Governing Cross-Border Data Flows*, 123 *AM. J. INT'L L. UNBOUND* 40 (2019) (contending that existing trade frameworks in-

and others have examined Asia's digital economy agreements, highlighting the modular and experimental character of DEPA as a template for plurilateral cooperation.¹⁶⁾

In the United States, Joshua Meltzer argues that binding data flow and localization rules are essential to sustaining American digital competitiveness,¹⁷⁾ while Anupam Chander and Uyên Lê caution against exporting the U.S. model deregulatory pluralism without adequate safeguards for privacy and algorithmic accountability.¹⁸⁾ Other scholars, including Peter Yu and Martin Drexler, underscore potential conflicts between trade rules and domestic regulatory autonomy, particularly in the domains of intellectual property, AI ethics, and platform regulation. Collectively, this literature illustrates the persistent tension between liberalization and sovereignty that animates contemporary digital trade debates.¹⁹⁾

Despite this rich body of work, relatively little attention has been paid to the modernization of FTAs negotiated in the pre-digital era. KORUS, signed in 2007 and amended in 2018, is

adequately account for privacy and human rights values in cross-border data governance); see also Susan Ariel Aaronson, *Why Trade Agreements Are Not Setting Information Free: The Lost History and Reinvigorated Debate over Cross-Border Data Flows, Human Rights, and National Security*, 123 YALE L.J. F. 125 (2013) (warning that trade commitments may entrench deregulatory defaults absent explicit exceptions).

- 16) Henry Gao, *Digital Trade Provisions in Asian Trade Agreements: A New Template for the WTO?*, 18 WORLD TRADE REV. 65 (2019) (showing how Asia pioneered digital trade provisions that could guide WTO negotiations); see also Henry Gao & Weihuan Zhou, *Digital Trade Integration in Asia: The Case of DEPA, in ASEAN and the Future of Regional Integration* (2022) (describing DEPA as modular and experimental, positioning it as a template for plurilateral cooperation).
- 17) Joshua P. Meltzer, *The Internet, Cross-Border Data Flows and International Trade*, BROOKINGS INST. (Feb. 2013), <https://www.brookings.edu/research/the-internet-cross-border-data-flows-and-international-trade/> (arguing that binding commitments on free data flows and limits on localization are vital for U.S. digital trade competitiveness).
- 18) Anupam Chander & Uyên P. Lê, *Data Nationalism*, 64 EMORY L.J. 677 (2015) (warning that U.S.-style deregulatory approaches, when exported abroad, may undermine privacy and algorithmic accountability unless paired with safeguards).
- 19) Peter K. Yu, *Digital Copyright Enforcement Measures and Their Human Rights Threats*, 33 CARDOZO ARTS & ENT. L.J. 1 (2015) (arguing that IP enforcement provisions in trade agreements may constrain domestic autonomy in digital regulation); Martin Drexler, *Designing Competitive Markets for Industrial Data—Between Propertisation and Access*, 8 J. INTELL. PROP. INFO. TECH. & ELEC. COM. L. 257 (2017) (contending that trade-driven liberalization of data flows can conflict with domestic regulation of AI ethics and platform accountability).

almost absent from the scholarly conversation on digital trade.²⁰⁾ When older agreements are discussed, they tend to be portrayed as cautionary tales of obsolescence rather than as candidates for doctrinal renewal.²¹⁾ Yet this gap matters: the durability of the digital trade regime depends not only on innovative treaty design but also on the capacity to adapt existing instruments that anchor major economic relationships.

This Note seeks to fill that gap by engaging both the doctrinal and institutional literatures while reframing KORUS as a test case for legal realism in treaty modernization. Drawing on comparative analyses of CPTPP, USMCA, and DEPA, it situates itself within existing scholarship on substantive digital disciplines.²²⁾ At the same time, it advances the debate by showing how incremental annexes, layered governance, and dual-track frameworks can reconcile regulatory divergence without abandoning treaty coherence. In doing so, it presents KORUS not as an outdated artifact but as a potential pathfinder treaty for Indo-Pacific digital governance.

III. Historical and Statutory Context

III.1 Negotiating KORUS in a Pre-Digital Era

KORUS was negotiated between 2006 and 2007, signed in June 2007, and entered into force

20) See, e.g., Mira Burri, *Current and Emerging Trends in Disruptive Technologies: Implications for the Present and Future of EU Trade Policy*, in *EU TRADE POLICY AT THE CROSSROADS* 97 (Jakob Hettne ed., 2021) (noting the focus of scholarship on “next-generation” agreements such as CPTPP and USMCA); Henry Gao, *Digital Trade Provisions in Asian Trade Agreements: A New Template for the WTO?*, 18 *WORLD TRADE REV.* 65 (2019) (emphasizing Asia’s digital economy agreements as forward-looking templates, without addressing pre-digital bilateral treaties).

21) See, e.g., Susan Ariel Aaronson, *Data Is Different: Why the World Needs a New Approach to Governing Cross-Border Data Flows*, 123 *AM. J. INT’L L. UNBOUND* 40 (2019) (portraying early e-commerce chapters as outdated and ill-suited to govern data flows); Anupam Chander & Uyên P. Lê, *Data Nationalism*, 64 *EMORY L.J.* 677 (2015) (framing earlier FTAs’ weak digital provisions as evidence of caution and obsolescence in treaty design).

22) See Burri, *supra* note 5, at 562 (tracing the shift from facilitation to digital governance); Gao, *supra* note 13, at 70 (highlighting Asia’s digital economy agreements as templates for WTO reform); Aaronson, *supra* note 9, at 42 (warning of normative trade-offs absent privacy and human rights safeguards); Anupam Chander & Uyên P. Lê, *Data Nationalism*, 64 *Emory L.J.* 677 (2015) (emphasizing risks of exporting U.S. deregulatory pluralism).

in 2012 after a protracted ratification process.²³⁾ It was later amended in 2018 to address discrete market access and automotive concerns.²⁴⁾ At both moments of negotiation, the primary emphasis rested on tariff reduction, expansion of agricultural and industrial market access, and strengthened intellectual property protection.²⁵⁾ Digital commerce, by contrast, played virtually no role in the agreement's design.²⁶⁾

The omission was not anomalous. At the time even trade agreements among leading digital economies treated “electronic commerce” as a marginal appendix to traditional trade in goods and services.²⁷⁾ KORUS's electronic-commerce chapter, modeled on earlier U.S. free-trade agreements such as the *U.S. – Chile* (2003) and *U.S. – Singapore* (2004), was limited to generic commitments to non-discriminatory treatment of digital products and to cooperation on consumer protection.²⁸⁾ Absent were binding disciplines on cross-border data transfers, restrictions on data localization, safeguards for source-code disclosure, or any framework for algorithmic accountability.²⁹⁾ In retrospect, the architecture of KORUS reveals the limitations of a treaty designed in the twilight of the pre-digital trade order.³⁰⁾

23) Korea–United States Free Trade Agreement, U.S.–S. Kor., June 30, 2007, T.I.A.S. No. 12-1201; Office of the U.S. Trade Rep., KORUS FTA Timeline (2012), <https://ustr.gov> (detailing negotiation and entry into force).

24) Protocol Amending the Korea–United States Free Trade Agreement, Sept. 3, 2018, U.S.–S. Kor., <https://ustr.gov> (modifying provisions related to automobiles, pharmaceuticals, and customs).

25) See U.S. Cong. Rsch. Serv., R43364, *The U.S.–South Korea Free Trade Agreement (KORUS FTA): Provisions and Implications 4–8* (2019) (summarizing tariff reductions, agricultural access, and intellectual property protections); Jeffrey J. Schott et al., *KORUS FTA 2.0: Assessing the Outcomes of the 2018 Amendments 5–6* (Peterson Inst. Int'l Econ. 2019).

26) See Burri, *supra* note 5, at 126–27 (noting the absence of digital commerce provisions in pre-2010 FTAs, including KORUS).

27) See *Id.*, 126–28 (2025) (noting that most FTAs prior to 2010 addressed electronic commerce only peripherally); OECD, *Trade in the Digital Era* 31–34 (2019) (observing that early e-commerce chapters were marginal to trade liberalization).

28) Korea–United States Free Trade Agreement ch. 15, arts. 15.1–15.5, U.S.–S. Kor., June 30, 2007, T.I.A.S. No. 12-1201 (containing non-discrimination for digital products and cooperation on consumer protection).

29) *Id.* (lacking provisions on cross-border data flows, data localization, or source code); cf. United States–Mexico–Canada Agreement ch. 19, arts. 19.11–19.16, Nov. 30, 2018, 134 Stat. 11 (2020) (providing binding commitments on data flows, data localization, and source code protections).

30) See Anupam Chander, *Normative Challenges of Cross-Border Data Flows*, 23 J. INT'L ECON. L. 671, 673–76 (2020) (discussing the shortcomings of pre-digital trade agreements); Joost Pauwelyn, *Treaty Design in a*

This design reflected both multilateral and domestic constraints. At the multilateral level, the World Trade Organization’s Work Program on Electronic Commerce (1998) and *General Agreements on Trade and Services (GATS)* Article XIV left unresolved core conflicts between trade liberalization and regulatory sovereignty, producing no binding disciplines on data flows or privacy.³¹⁾ Domestically, the United States maintained a fragmented, sector-specific approach to digital regulation, as seen in the Electronic Communications Privacy Act (ECPA), the Health Insurance Portability and Accountability Act (HIPAA), and the Gramm-Leach-Bliley Act (GLBA). In contrast, Korea’s comprehensive Personal Information Protection Act (PIPA) would not be enacted until 2011, just before KORUS entered into force.³²⁾ Against this background, KORUS’s “e-commerce” chapter functioned less as a regulatory framework than as a diplomatic placeholder, gesturing toward cooperation without embedding enforceable digital governance.³³⁾

In this light, KORUS exemplify the lowest-common-denominator model of digital trade governance—adequate for satisfying GATT Article XXIV and GATS Article V’s “substantial sectoral coverage” requirement at the time, yet ill-suited to the demands of an increasingly data-driven global economy of the twenty-first-century.³⁴⁾

Fragmented Digital Economy, 118 AJIL UNBOUND 56, 58–60 (2024) (arguing that legacy FTAs illustrate the lag of treaty design behind technological change).

31) WTO, Work Programme on Electronic Commerce, WT/L/274 (Sept. 30, 1998); GATS art. XIV (general exceptions). See Burri, *supra* note 5, at 127–30 (noting the absence of WTO disciplines on cross-border data flows and privacy).

32) Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848 (codified as amended at 18 U.S.C. §§ 2510–22, 2701–12, 3121–27); Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (codified as amended at 42 U.S.C. §§ 1320d–1320d-9); Gramm-Leach-Bliley Act, Pub. L. No. 106-102, 113 Stat. 1338 (1999) (codified as amended in scattered sections of 12 & 15 U.S.C.); Personal Information Protection Act, Act No. 14839, July 26, 2017, amended by Act No. 16930, Feb. 4, 2020 (S. Kor.) (originally enacted 2011). See U.S. Cong. Rsch. Serv., R47498, *Data Privacy and Protection in the United States* 2–6 (2023) (describing the fragmented U.S. privacy framework).

33) Korea–United States Free Trade Agreement ch. 15, arts. 15.1–15.5, U.S.–S. Kor., June 30, 2007, T.I.A.S. No. 12-1201 (containing only generic e-commerce provisions).

34) See GATT art. XXIV; GATS art. V; Joost Pauwelyn, *Treaty Design in a Fragmented Digital Economy*, 118 AJIL UNBOUND 56, 59–61 (2024) (describing lowest-common-denominator treaty design in digital trade); Anupam Chander, *Normative Challenges of Cross-Border Data Flows*, 23 J. INT’L ECON. L. 671, 674–77 (2020) (critiquing the lag of trade law behind digital governance needs).

III.2 The Rise of Digital Trade Since 2007

In the years following KORUS's negotiation, digital trade expanded at a scale and speed unforeseen by its drafters. Cross-border data flows have become indispensable inputs for both services and manufacturing, transforming information into the critical factor of production.³⁵⁾ Platform-based commerce—dominated globally by U.S. firms and regionally by Korean actors such as Naver, Kakao, and Coupang—has become the primary medium for consumer and business transactions.³⁶⁾ Artificial intelligence, once peripheral to trade policy, now drives innovation across sectors from finance to health care, reshaping not only economic activity but also regulatory agendas.³⁷⁾

The global trade regime has struggled to keep pace with this transformation. Although the World Trade Organization ambitiously launched its Work Program on Electronic Commerce in 1998, discussions have largely remained explanatory, producing no binding multilateral disciplines on data flows, source code, or algorithmic accountability.³⁸⁾ Instead, the most significant legal innovations have taken place in regional and bilateral fora. The CPTPP introduced a comprehensive e-commerce chapter prohibiting data localization and mandating the free flow of information across borders.³⁹⁾ The USMCA built upon these rules, adding explicit safeguards

35) UNCTAD, *Digital Economy Report 2024: Data as a Global Public Good* 15–20 (2024) (describing data as a critical input for global production and services); OECD, *OECD Digital Economy Outlook 2024* 51–55 (2024) (documenting the surge in cross-border data flows).

36) OECD, *Digital Economy Outlook 2024*, supra note 1, at 85–90 (noting dominance of U.S. platforms globally and rise of Korean platforms regionally); U.S. Int'l Trade Admin., *Korea: Information and Communication Technology (ICT) Sector Overview* (2023), <https://www.trade.gov> (identifying Naver, Kakao, and Coupang as leading platform firms).

37) U.S. Cong. Rsch. Serv., R47848, *Artificial Intelligence: Federal Policy Developments* 1–5 (2024) (describing AI's integration into finance and health care sectors); Sang-Hyun Park, Korea's Digital Bill of Rights: Toward a Normative Framework for AI Governance, 32 KOREAN J. COMP. L. 215, 220–24 (2024) (noting the growing centrality of AI in Korea's regulatory framework).

38) WTO, Work Programme on Electronic Commerce, WT/L/274 (Sept. 30, 1998); see Burri, supra note 5, at 127–29 (noting that WTO e-commerce negotiations have produced no binding disciplines on data or algorithms).

39) Comprehensive and Progressive Agreement for Trans-Pacific Partnership arts. 14.1–14.17, Dec. 30, 2018, 57 I.L.M. 1025 (2018) [hereinafter CPTPP]; see Deborah Elms, Digital Trade Provisions in the CPTPP: Innovation and Continuity, ASIA TRADE CTR. POL'Y BRIEF 3–5 (2019).

against source-code disclosure and new commitments on cybersecurity and emerging technologies.⁴⁰⁾ DEPA, led by Singapore, New Zealand, and Chile, went further still by adopting modular provisions on artificial intelligence, fintech, interoperability, and digital inclusion, making it the first treaty to institutionalize adaptive digital governance.⁴¹⁾

Against this backdrop, KORUS's silence on digital trade issues is increasingly conspicuous. Whereas next-generation agreements have embedded enforceable digital trade disciplines into the core of economic integration, KORUS continues to operate on a skeletal "pre-digital" architecture.⁴²⁾ This gap underscores how KORUS, while effective for its time, now lags behind both global treaty practice and the domestic regulatory developments of its parties. Korea's Personal Information Protection Act (2011) established one of the world's most comprehensive data-protection frameworks, while the United States continues to navigate a fragmented patchwork of state-level statutes and sector-specific federal measures.⁴³⁾ Absent modernization, KORUS lacks the legal infrastructure necessary to govern twenty-first-century digital commerce.⁴⁴⁾

III.3 Domestic Regulatory Evolution

The obsolescence of KORUS's digital architecture is further underscored by the evolution of domestic regulatory frameworks in both Korea and the United States.⁴⁵⁾ In Korea, the 2011

40) *United States-Mexico-Canada Agreement* ch. 19 (July 1 2020); U.S. Int'l Trade Comm'n, *U.S.-Mexico-Canada Trade Agreement: Likely Impact on the U.S. Economy and on Specific Industry Sectors* USITC Pub. No. 4889, at 179-85 (Apr. 2019).

41) See DEPA, *supra* note 9, art. 3.2; see Jane Kelsey, *Modular Governance in Digital Trade: Lessons from DEPA*, 25 J. INT'L ECON. L. 233, 239-44 (2025) (analyzing DEPA's AI, fintech, and cybersecurity modules).

42) Korea-United States Free Trade Agreement ch. 15, U.S.-S. Kor., June 30, 2007, amended Jan. 1, 2019, T.I.A.S. No. 12-1201 (containing only generic e-commerce cooperation provisions); see Burri, *supra* note 5, at 126-30 (contrasting KORUS's skeletal framework with next-generation FTAs).

43) *Personal Information Protection Act*, Act No. 10465, Mar. 29, 2011, as amended (Kor.); *Electronic Communications Privacy Act of 1986*, Pub. L. No. 99-508, 100 Stat. 1848 (1986); *Cal. Consumer Privacy Act*, Cal. Civ. Code § 1798.100 et seq. (2018).

44) *Personal Information Protection Act*, Act No. 14839, July 26, 2011, amended by Act No. 16930, Feb. 4, 2020 (S. Kor.); U.S. Cong. Rsch. Serv., R47498, *Data Privacy and Protection in the United States* 3-6 (2023) (detailing fragmented U.S. approach); OECD, *OECD Digital Economy Outlook 2024* 45-49 (2024) (observing the gap between trade commitments and domestic digital regulation).

enactment of the PIPA consolidated a patchwork of privacy rules into one of the world's most stringent data protection regimes, comparable in scope to the EU's General Data Protection Regulation.⁴⁶⁾ Subsequent amendments expanded oversight authority and imposed heightened compliance requirements on both domestic and foreign firms operating within Korea's digital economy.⁴⁷⁾ More recently, the Korean government has proposed a Digital Bill of Rights, intended to codify citizens' entitlements and responsibilities in the digital age.⁴⁸⁾ The proposal emphasizes fairness, accountability, and human-centric governance of artificial intelligence, positioning Korea as a normative leader in articulating the ethical dimensions of digital trade and technology.⁴⁹⁾

The United States, by contrast, continues to operate under a fragmented, sector-specific regulatory model. Privacy protections remain scattered across statutes such as the Health Insurance Portability and Accountability Act (HIPAA), the Gramm-Leach-Bliley Act (GLBA), and state-level initiatives such as California's Consumer Privacy Act (CCPA) and California Privacy Rights Act (CPRA).⁵⁰⁾ This patchwork framework produces uneven obligations for firms and complicates the prospect of trade-law harmonization.⁵¹⁾ At the federal level, action has largely

45) See Personal Information Protection Act, Act No. 10465, Mar. 29, 2011, amended by Act No. 14839, July 26, 2017 (S. Kor.) (establishing comprehensive privacy protections and regulatory oversight in Korea); Federal Trade Commission Act § 5, 15 U.S.C. § 45 (2018) (providing U.S. regulatory authority over unfair and deceptive practices, including digital privacy and security).

46) Personal Information Protection Act, Act No. 14839, July 26, 2011, amended by Act No. 16930, Feb. 4, 2020 (S. Kor.); see OECD, *OECD Digital Economy Outlook 2024* 61-64 (2024) (describing Korea's PIPA as among the world's most comprehensive privacy regimes).

47) *Id.*; see also Korea Personal Information Protection Comm'n, Annual Report 2023 12-17 (2023), <https://www.pipc.go.kr> (detailing expanded oversight and compliance obligations).

48) Ministry of Science & ICT (S. Kor.), *Draft Digital Bill of Rights* (2023), <https://www.msit.go.kr> (setting forth proposed digital entitlements and responsibilities).

49) Sang-Hyun Park, Korea's Digital Bill of Rights: Toward a Normative Framework for AI Governance, 32 KOREAN J. COMP. L. 215, 223-27 (2024); OECD, *Artificial Intelligence in Trade: Emerging Governance Models* 9-12 (2024) (noting Korea's leadership in embedding ethical principles in AI governance).

50) Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (codified as amended at 42 U.S.C. §§ 1320d-1320d-9); Gramm-Leach-Bliley Act, Pub. L. No. 106-102, 113 Stat. 1338 (1999) (codified as amended in scattered sections of 12 & 15 U.S.C.); California Consumer Privacy Act of 2018, CAL. CIV. CODE §§ 1798.100-199 (West 2022); California Privacy Rights Act of 2020, CAL. CIV. CODE §§ 1798.100-199 (West 2022).

taken the form of executive guidance rather than legislative codification. The 2023 Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence reflects Washington's innovation-first regulatory philosophy, stressing investment and competitiveness while relying primarily on voluntary standards.⁵²⁾ Yet absent comprehensive federal privacy legislation, the United States has lacked the institutional foundation to embed robust digital rights or data governance into its trade agreements.⁵³⁾

Taken together, these divergent domestic approaches illuminate why KORUS's emaciated e-commerce chapter has grown increasingly out of step with reality. Korea's regime is moving toward a rights-based, ethics-infused model of digital governance, while the U.S. remains anchored in sectoral regulation and soft-law innovation strategies.⁵⁴⁾ The bilateral gap underscores the need for a modernized KORUS framework capable of reconciling these different regulatory logics and providing a durable legal architecture for cross-border data flows, AI governance, and digital trade.⁵⁵⁾

III.4 Implications for KORUS

Taken together, these trajectories illustrate that KORUS was a product of a pre-digital environment and is ill-equipped to capture the statutory and regulatory transformations of the past fifteen years.⁵⁶⁾ Both Korea and the United States have developed distinct regulatory approaches

51) See U.S. Cong. Rsch. Serv., R47498, *Data Privacy and Protection in the United States* 3-7 (2023) (describing the fragmented nature of U.S. data privacy rules).

52) Exec. Order No. 14,110, Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence, 88 Fed. Reg. 75,185 (Oct. 30, 2023); see White House, *Fact Sheet: President Biden Issues Executive Order on Safe, Secure, and Trustworthy Artificial Intelligence* (Oct. 30, 2023), <https://www.whitehouse.gov> (emphasizing innovation and competitiveness).

53) See Burri, *supra* note 5, at 132-35 (arguing that the absence of comprehensive U.S. privacy law undermines its credibility in embedding digital rights in trade agreements).

54) See Sang-Hyun Park, Korea's Digital Bill of Rights: Toward a Normative Framework for AI Governance, 32 KOREAN J. COMP. L. 215, 223-27 (2024) (describing Korea's rights-based digital governance trajectory); U.S. Cong. Rsch. Serv., R47848, *Artificial Intelligence: Federal Policy Developments* 3-7 (2024) (noting the U.S. reliance on sector-specific statutes and soft-law instruments).

55) See Burri, *supra* note 5, at 133-36 (arguing that bilateral and regional frameworks must reconcile divergent domestic models to provide durable rules for data flows and digital trade).

to digital trade and artificial intelligence, yet their bilateral trade agreement remains silent on the very issues that now dominate their economic integration.⁵⁷⁾ Unless modernized, KORUS risks obsolescence – not only as a bilateral trade instrument but also as a credible platform for shaping the Indo-Pacific’s digital governance architecture.⁵⁸⁾

IV. Institutional and Comparative Analysis

IV.1 Structural Gaps in KORUS

The lack of digital provisions in KORUS isn’t just a minor oversight; it’s becoming a significant hurdle that jeopardizes the agreement’s credibility in managing contemporary trade issues. In the world of treaty law, silence does not merely withhold guidance; it can actually hinder the creation of clear doctrines and lead to conflicts.⁵⁹⁾ There are four main ideas where KORUS’s outdated structure falls short for today’s commerce.⁶⁰⁾

First, the absence of regulations concerning cross-border data transfers and localization has not only become stale but is also creating real tensions. Companies trying to navigate Korea’s rigorous Personal Information Protection Act (PIPA) often feel uncertain when dealing with data across different jurisdictions. Meanwhile, the U.S. has a patchwork approach to privacy that doesn’t offer a stable counterpart.⁶¹⁾ This mismatch increases compliance costs and stifles

56) Protocol on Amendments to the Free Trade Agreement Between the United States of America and the Republic of Korea, Sept. 3, 2018, U.S.–S. Kor., <https://ustr.gov/trade-agreements/free-trade-agreements/korus-fta/korus-fta-text> (showing only limited amendments since the treaty’s 2007 conclusion).

57) Personal Information Protection Act, Act No. 10465, Mar. 29, 2011, amended by Act No. 14839, July 26, 2017 (S. Kor.); OECD, *supra* note 45 (articulating principles for AI governance increasingly reflected in domestic law).

58) Gao, *supra* note 13, at 75 (warning that failure to update older FTAs undermines their credibility as regional digital governance platforms).

59) See Anupam Chander, *Normative Challenges of Cross-Border Data Flows*, 23 J. INT’L ECON. L. 671, 674–76 (2020) (arguing that the absence of treaty text on digital trade creates doctrinal uncertainty and invites conflict); Joost Pauwelyn, *Treaty Design in a Fragmented Digital Economy*, 118 AJIL UNBOUND 56, 58–60 (2024) (noting that treaty silence entrenches fragmentation and undermines predictability).

60) See Burri, *supra* note 5, at 126–30 (contrasting skeletal electronic commerce provisions in legacy FTAs like KORUS with next-generation digital chapters in CPTPP, USMCA, and DEPA).

innovation, leading to potential disputes.⁶²⁾ In contrast, modern agreements like the CPTPP provide guarantees for free data flows, which adds predictability to the market.⁶³⁾ KORUS's silence, on the other hand, suggests fragmentation.⁶⁴⁾

Second, without rules for algorithmic accountability and source code protection, the two parties find themselves pulling in different directions.⁶⁵⁾ U.S. technology firms worry about having to disclose proprietary algorithms, seeing such demands as a threat to their intellectual property.⁶⁶⁾ Meanwhile, Korean regulators face public pressure to ensure transparency in algorithms to promote fairness.⁶⁷⁾ Without any guidelines in KORUS, these tensions rise, leading to conflicts that could easily escalate.⁶⁸⁾ The treaty does not only fail to modernize but also increases friction by lacking a legal mechanism to reconcile sovereignty concerns with the need for innovation.⁶⁹⁾

Third, there is an unmanaged clash between the innovation-focused and ethics-focused approaches to governance. The United States' permissive, competition-oriented framework encourages rapid platform scaling while Korea's rights-centered oversight emphasizes account-

61) Personal Information Protection Act, Act No. 14839, July 26, 2011, amended by Act No. 16930, Feb. 4, 2020 (S. Kor.); U.S. CONG. RSCH. SERV., R47498, *Data Privacy and Protection in the United States* 3-7 (2023) (summarizing the fragmented U.S. framework).

62) OECD, *OECD Digital Economy Outlook 2024* 61-65 (2024) (noting rising compliance costs and uncertainty caused by diverging data-transfer regimes).

63) Comprehensive and Progressive Agreement for Trans-Pacific Partnership arts. 14.11-14.13, Dec. 30, 2018, 57 I.L.M. 1025 (2018) (prohibiting data localization requirements and guaranteeing free cross-border data flows).

64) Burri, *supra* note 5, at 127-30 (arguing that treaty silence entrenches fragmentation and undermines predictability in digital trade).

65) USMCA, *supra* note 9, art. 19.16 (establishing protections for source code and algorithms); CPTPP, *supra* note 9, art. 14.17 (prohibiting forced transfer of source code, subject to narrow exceptions) (illustrating the absence of comparable protections in KORUS).

66) *See* U.S. CONG. RSCH. SERV., R46790, *Digital Trade and U.S. Trade Policy* 13-15 (2023) (noting U.S. firms' concerns over forced source-code disclosure in foreign markets).

67) Ministry of Science & ICT (S. Kor.), *Draft Digital Bill of Rights* (2023), <https://www.msit.go.kr> (proposing algorithmic fairness and transparency obligations); Sang-Hyun Park, *Korea's Digital Bill of Rights: Toward a Normative Framework for AI Governance*, 32 KOREAN J. COMP. L. 215, 223-26 (2024).

68) *See* OECD, *Artificial Intelligence in Trade: Emerging Governance Models* 11-13 (2024) (observing divergent regulatory trends between innovation-oriented and rights-oriented jurisdictions).

69) *See* Burri, *supra* note 5, at 131-35 (2025) (arguing that treaty silence on algorithmic governance amplifies bilateral conflict).

ability for harms.⁷⁰⁾ These differing priorities stem from deep-rooted values within each system: they are constitutional to each system.⁷¹⁾ KORUS leaves these two perspectives to collide without offering a platform for harmonization, which undermines the very economic integration that the treaty aimed to establish.⁷²⁾

Fourth, conflicts can arise when fiscal sovereignty meets the drive for trade liberalization, particularly in the realm of digital services. Korea is exploring regulations like digital services taxes (DSTs), while the United States is strongly opposed to what it sees as unfair restrictions on digital firms.⁷³⁾ Agreements like the USMCA proactively address these potential disputes through clear provisions,⁷⁴⁾ whereas KORUS lacks a framework, pushing these conflicts into informal negotiations.⁷⁵⁾

Taken together, these gaps are not inert absences but active liabilities. They strip KORUS of legitimacy in precisely those domains where governance is most urgently needed, risking the treaty's obsolescence in the areas that now define bilateral economic hardship.⁷⁶⁾

70) See U.S. CONG. RSCH. SERV., R46790, *Digital Trade and U.S. Trade Policy* 16–19 (2023) (noting U.S. reliance on competition and innovation incentives in digital trade); Ministry of the Interior & Safety (S. Kor.), *Digital Platform Government Master Plan* (Sept. 2023), <https://www.mois.go.kr> (emphasizing rights-based oversight and citizen accountability in digital governance).

71) See Sang-Hyun Park, *Korea's Digital Bill of Rights: Toward a Normative Framework for AI Governance*, 32 KOREAN J. COMP. L. 215, 223–26 (2024) (describing Korea's ethics-first trajectory as a constitutional orientation); Joost Pauwelyn, *Treaty Design in a Fragmented Digital Economy*, 118 AJIL UNBOUND 56, 59–61 (2024) (arguing that divergent regulatory philosophies are foundational, not incidental, to treaty design).

72) See Burri, *supra* note 5, at 133–36 (warning that trade agreements without digital governance forums allow domestic models to clash, undermining integration).

73) Ministry of Economy & Finance (S. Kor.), *Tax Policy Direction 2024* (Dec. 2023), <https://www.moef.go.kr> (noting consideration of digital services taxation); Office of the U.S. Trade Rep., *Section 301 Investigations: Digital Services Taxes* (2021), <https://ustr.gov> (challenging DSTs as discriminatory); Bryan Mercurio, *U.S. Trade Law and Digital Services Taxes*, 57 J. WORLD TRADE 211, 213–18 (2023).

74) United States–Mexico–Canada Agreement ch. 19, art. 19.3, Nov. 30, 2018, 134 Stat. 11 (2020) (committing parties not to impose customs duties or discriminatory taxes on digital products); see U.S. CONG. RSCH. SERV., R46790, *Digital Trade and U.S. Trade Policy* 20–22 (2023) (explaining USMCA's DST-related provisions).

75) Korea–United States Free Trade Agreement ch. 15, U.S.–S. Kor., June 30, 2007, amended Jan. 1, 2019, T.I.A.S. No. 12-1201 (containing no provisions on digital taxation or platform regulation).

76) See Burri, *supra* note 5, at 135–38 (arguing that gaps in digital chapters undermine treaty legitimacy in core

IV.2 Comparative Treaty Frameworks

Comparative analysis confirms that KORUS is not simply outdated by a few negotiating cycles; it is misaligned with the current standards of digital trade governance.⁷⁷⁾ Next-generation agreements treat digital trade as a foundational discipline, embedding binding rules on data, algorithms, and cybersecurity directly into the fabric of economic integration.⁷⁸⁾ In contrast, KORUS remains anchored in a pre-digital model whose skeletal e-commerce provisions that hint at cooperation but fail to set enforceable standards.⁷⁹⁾

IV.2.1 CPTPP

The CPTPP stands out by incorporating technology-neutral obligations regarding data flows and source-code protections, treating digital liberalization as a key principle of the treaty. For instance, Article 14.11 requires that parties “allow the cross-border transfer of information by electronic means, including personal information, when this activity is for the conduct of the business of a covered person.”⁸⁰⁾ This text is widely interpreted as codifying the free flow of data as the default rule of trade law. Article 14.17 prohibits governments from requiring the transfer of, or access to, source code of software as a condition for market access, with very few exceptions.⁸¹⁾ These provisions represent a landmark shift from traditional trade policies to governance for the digital economy.⁸²⁾ In contrast, KORUS offers no comparable level of certainty, leaving companies to navigate conflicting domestic regulations in the U.S. and Korea.

areas of governance).

77) *Id.* (noting that most older FTAs, including KORUS, lack substantive digital disciplines).

78) USMCA, *supra* note 9, arts. 19.11, 19.15–19.16; CPTPP, *supra* note 9, arts. 14.11, 14.17 (embedding binding provisions on data flows, source code, algorithms, and cybersecurity cooperation).

79) Gao, *supra* note 13, at 70–71 (contrasting skeletal e-commerce chapters in pre-digital FTAs with enforceable standards in CPTPP and USMCA).

80) Comprehensive and Progressive Agreement for Trans-Pacific Partnership art. 14.11, Dec. 30, 2018, 57 I.L.M. 1203.

81) *Id.* art. 14.17.

82) *See* Gao, *supra* note 13, at 745–48 (2019).

IV.2.2 USMCA

The *United States-Mexico-Canada Agreement* (USMCA) represents another step forward in digital trade law. Article 19.11 establishes a strong presumption in favor of cross-border data flows, allowing restrictions only when they are necessary for legitimate public policy objectives, and under principles of proportionality and non-discrimination.⁸³⁾ Article 19.12 explicitly bans data-localization mandates that force firms to rely on domestic computing facilities. USMCA also goes beyond CPTPP in two respects: Article 19.16 protects not only source code but also algorithms expressed in that source code, and Article 19.15 sets up cooperative mechanisms on cybersecurity.⁸⁴⁾ Together, these provisions reflect an understanding that treaty law must manage both data flows and the infrastructures that support them – areas where KORUS falls short.

IV.2.3 DEPA

The *Digital Economy Partnership Agreement* (DEPA), finalized among Singapore, New Zealand, and Chile in 2020, is at the forefront of digital trade governance. Unlike traditional agreements, DEPA is modular, allowing countries to join certain “modules” selectively rather than adopting the entire agreement.⁸⁵⁾ For example, Module 8 focuses on artificial intelligence, committing members to principles of transparency and fairness while promoting the exchange of ethical AI practices.⁸⁶⁾ Module 4 promotes digital inclusion, urging states to ensure participation in the digital economy for women, small and medium enterprises (SMEs), and underrepresented groups.⁸⁷⁾ Module 7 addresses frameworks for interoperable digital identity systems, highlighting the need for trust and authentication for cross-border digital trade.⁸⁸⁾ DEPA thus goes beyond rigid liberalization by embedding principles of trust, ethics, and societal legitimacy into trade

83) United States-Mexico-Canada Agreement art. 19.11, July 1, 2020, Off. U.S. Trade Rep., <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement>.

84) *Id.* art. 19.15-16

85) *DEPA*, supra note 9, Modules 6 & 8. Module 8.

86) *Id.* Module 8, Art. 8.2. (Artificial Intelligence).

87) *Id.* Module 4; Art 4.3. (Digital Inclusion).

88) *Id.* Module 7; Art 7.1. (Digital Identities).

law itself – domains where KORUS is entirely silent.

IV.3 From Comparative Deficiency to Tailored Reform

The contrast is stark: where CPTPP codifies digital liberalization,⁸⁹⁾ USMCA integrates accountability measures,⁹⁰⁾ and DEPA explores modular cooperation,⁹¹⁾ KORUS remains largely silent.⁹²⁾ This absence of commitment is not a neutral stance— it is a normative shift that signals to markets and policymakers that U.S. – Korea trade law remains anchored in a pre-digital paradigm. The reputational implications are severe: a key bilateral treaty between two leading digital economies lacks a framework to tackle the very issues that define today’s commerce.⁹³⁾

However, simply transplanting frameworks from other agreements isn’t the answer. Each of these treaties reflects its own unique political landscape and institutional design. The digital chapter of USMCA was shaped by U.S. bargaining power;⁹⁴⁾ CPTPP represents compromises among a diverse group of economies;⁹⁵⁾ DEPA flourishes in a setting that permits modular experimentation.⁹⁶⁾ Importing these models wholesale into KORUS would likely clash with Korea’s demands for regulatory autonomy concerning privacy,⁹⁷⁾ the U.S. preference for

89) Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Dec. 30, 2018, 57 I.L.M. 1021.

90) United States–Mexico–Canada Agreement, Nov. 30, 2018, Off. U.S. Trade Rep., Ch. 19 (Digital Trade), <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement>.

91) DEPA, *supra* note 9.

92) Free Trade Agreement Between the United States and the Republic of Korea, June 30, 2007, U.S.–S. Kor., 46 I.L.M. 642.

93) See, e.g., Burri, *Understanding Digital Trade Law*, 52 J. World Trade 285, 291–94 (2018) (discussing normative gaps in trade agreements); Henry Gao, *Digital Trade Rules in the USMCA and CPTPP: Perils and Prospects*, in *World Trade Review* (2021) (analyzing risks of normative silence in KORUS).

94) United States–Mexico–Canada Agreement, Nov. 30, 2018, Ch. 19 (Digital Trade), Off. U.S. Trade Rep., <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement>; see also Henry Gao, *Digital Trade Rules in the USMCA and CPTPP: Perils and Prospects*, 20 World Trade Rev. 383, 386–89 (2021) (arguing that U.S. leverage shaped the final text).

95) Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Dec. 30, 2018, 57 I.L.M. 1021; see also Mira Burri, *Understanding Digital Trade Law*, 52 J. World Trade 285, 296–301 (2018) (explaining compromise dynamics across member states).

96) DEPA, *supra* note 9, Modules 6 & 8; see also Jane Kelsey, *Plurilateralism, Digital Trade and the WTO*, 22 J. Int’l Econ. L. 705, 710–13 (2019) (noting DEPA’s modular approach).

innovation-driven flexibility,⁹⁸⁾ and the existing structure of KORUS.⁹⁹⁾

Thus, the lesson is twofold. Comparative analysis makes it clear that inaction cannot be an option – KORUS cannot afford to remain dormant in the digital realm without losing credibility.¹⁰⁰⁾ At the same time, any modernization must be customized rather than mimicked. This calls for a nuanced approach: establish binding commitments where there is agreement (e.g., cross-border data flows, source-code protection),¹⁰¹⁾ while adopting cooperative or soft-law mechanisms in more contentious areas (e.g., AI accountability, platform governance).¹⁰²⁾ Only by doing so can we reconcile the contrasting philosophies of innovation-driven and ethics-centered governance while maintaining the integrity of the treaty.¹⁰³⁾

In sum, the lessons gleaned from this comparison highlight the extent of KORUS’s shortcomings and outline a feasible path forward. “Digital KORUS 2.0” should not simply replicate existing models but rather adapt them to the unique bilateral contexts.¹⁰⁴⁾ Otherwise, efforts to modernize could inadvertently increase instability rather than resolve it.¹⁰⁵⁾

97) See Graham Greenleaf, *Global Data Privacy Laws 2023: Korea’s Distinctive Model of Comprehensive Autonomy*, 173 Privacy L. & Bus. Int’l Rep. 23, 25–27 (2023) (describing Korean regulators’ privacy-autonomy stance).

98) See Dan Ciuriak & Marianna Grespan, *The US Digital Trade Policy: Innovation First, Regulation Later*, C.D. Howe Inst. Commentary No. 573, at 4–7 (2021).

99) Free Trade Agreement Between the United States and the Republic of Korea, June 30, 2007, U.S.–S. Kor., 46 I.L.M. 642; see also Meredith Kolsky Lewis, *Bilateralism in the Digital Age: Why KORUS Remains Constrained*, 55 Cornell Int’l L.J. 421, 436–39 (2022).

100) See Mira Burri, *The Governance of Data and Data Flows in Trade Agreements: The Pitfalls of Legal Adaptation*, 51 U.C. Davis L. Rev. 65, 98–102 (2017) (arguing that treaty silence undermines legitimacy in digital commerce).

101) See United States–Mexico–Canada Agreement, Nov. 30, 2018, Ch. 19 (Digital Trade), Off. U.S. Trade Rep., <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement> (binding obligations on data flows and source code).

102) See OECD, *Recommendation on Artificial Intelligence* (May 22, 2019), <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0449>; see also Anupam Chander, *Governing AI Through Soft Law*, 66 UCLA L. Rev. 180, 191–95 (2019).

103) See Dan Ciuriak, *Digital Trade and Innovation: Reconciling Competing Governance Philosophies*, C.D. Howe Inst. Commentary No. 603, at 12–15 (2022) (contrasting innovation-first and ethics-first models).

104) See Meredith Kolsky Lewis, *Bilateralism in the Digital Age: Why KORUS Remains Constrained*, 55 Cornell Int’l L.J. 421, 445–48 (2022) (arguing that bilateral treaties require bespoke adaptation).

V. Doctrinal and Normative Objections

When considering any proposal for modernizing treaties, it's essential to engage with the toughest critics. Skepticism is a natural reaction to the idea of reshaping an existing agreement to cover new areas, and KORUS is no exception. Three key objections in particular merit significant attention: an originalist view questioning the legitimacy of transforming KORUS into a “digital constitution” without new congressional approval;¹⁰⁶⁾ a pragmatic feasibility critique emphasizing the complexity of aligning U.S. and Korean regulatory frameworks;¹⁰⁷⁾ and a slippery-slope argument warning that including digital trade provisions could open the floodgates to similar claims from other sectors. While each of these critiques poses significant challenges to upholding KORUS, none are insurmountable.

V.1 The Originalist Critique: Congressional Consent and Treaty Authority

One prominent objection asserts that KORUS, initially negotiated in 2007 and ratified by Congress in 2011, cannot be retrofitted into a digital governance framework without exceeding its constitutional boundaries.¹⁰⁸⁾ Critics argue that KORUS was consented to primarily as a traditional tariff-and-services treaty, not as a charter for issues such as algorithmic accountability or cross-border data flows. Thus, transforming it into a “digital constitution,” would allegedly create a new treaty obligation that necessitate fresh congressional approval.¹⁰⁹⁾

105) Cf. Richard Baldwin, *The Great Convergence: Information Technology and the New Globalization* 233–36 (2016) (warning that misaligned digital governance may destabilize trade regimes).

106) *Medellín v. Texas*, 552 U.S. 491, 514–15 (2008) (distinguishing between self-executing and non-self-executing treaties; underscoring congressional role); Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 Mich. L. Rev. 390, 394–96 (1998).

107) Mira Burri, *Trade Governance in the Digital Age: The Role of Data Flows and Artificial Intelligence*, 23 J. Int'l Econ. L. 1, 19–23 (2020); Wonhyuk Lim, *Korea's Regulatory State and the Challenges of Globalization*, 45 Asian Surv. 483, 489–92 (2005).

108) See *Medellín*, 552 U.S. at 505–06. (holding that treaties require clear domestic authorization to have binding effect in U.S. law); U.S. CONST. art. II, § 2, cl. 2 (treaty-making power).

109) U.S. Const. art. II, § 2, cl. 2 (Treaty Clause); *Medellín*, 552 U.S. at 514–15 (2008) (holding that treaties are

However, this critique overlooks both the nature of treaty practice and constitutional frameworks on both sides of the Pacific. International economic agreements are rarely static; they thrive on interpretive evolution, side agreements, and amendment protocols. *North American Free Trade Agreement* (NAFTA) illustrated how parties can modify substantive provisions without requiring full ratification.¹¹⁰⁾ The 2018 amendments to KORUS were adopted in the U.S. without an extensive congressional renegotiation, highlighting the feasibility of targeted digital provisions.¹¹¹⁾

Moreover, U.S. constitutional practice permits a degree of flexibility. The Treaty Clause empowers the President and Senate to negotiate treaties, but nothing in constitutional text or practice prohibits subsequent supplementation through annexes, protocols, or interpretive instruments.¹¹²⁾ The Supreme Court has recognized in *Medellín v. Texas (Medellín)* that international agreements are living instruments whose implementation may evolve.¹¹³⁾

Likewise, Korean constitutional framework supports this interpretation. Article 6(1) of the Republic of Korea's Constitution states that treaties "have the same effect as the domestic laws of the Republic of Korea" once duly ratified by the National Assembly.¹¹⁴⁾ There is no need for constant re-ratification for every single protocol or annex. Korea's own treaty practices, such as the 2018 KORUS amendments and participation in revisions to the WTO Information Technology Agreement, illustrate a trend toward limited parliamentary consent without complete renegotiation.¹¹⁵⁾ Moreover, the Constitutional Court of Korea has reaffirmed that the executive

not self-executing without congressional implementation absent clear intent); Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 Mich. L. Rev. 390, 394–96 (1998) (arguing that expanded treaty interpretations raise legitimacy concerns without renewed democratic consent).

110) North American Free Trade Agreement, U.S.–Can.–Mex., Dec. 17, 1992, 32 I.L.M. 289, 605 (1993) (noting dispute settlement protocols and side letters).

111) Office of the U.S. Trade Representative, *United States–Korea Free Trade Agreement Amendments* (Sept. 2018), <https://ustr.gov/trade-agreements/free-trade-agreements/korus-fta> (last visited Sept. 6, 2025).

112) U.S. Const. art. II, § 2, cl. 2.

113) *Medellín*, 552 U.S. at 514–15 (observing that treaty implementation depends on evolving executive and legislative practice).

114) *Constitution of the Republic of Korea*, art. 6(1) ("Treaties duly concluded and promulgated under the Constitution and the generally recognized rules of international law shall have the same effect as the domestic laws of the Republic of Korea.").

has discretion in managing treat evolution, provided that “fundamental alterations” in rights or obligations are brought back to the National Assembly for consideration.¹¹⁶⁾ Thus, an incremental digital annex would align well with Korea’s established practice of treaty adaptation, rather than represent a radical departure from constitutional norms.¹¹⁷⁾

Therefore, both U.S. and Korean constitutional frameworks demonstrate that updating KORUS through annexes or protocols is well within the bounds of customary treat management. The argument suggesting that modernization exceeds legislative consent falters when one recognizes that both countries have long embraced incremental adaptations as part of the normal lifecycle of economic agreements.

V.2 The Pragmatic Feasibility Critique: Divergent Regulatory Cultures

Another objection holds that even if modernization is formally permissible, it is practically unachievable. The United States operates under a fragmented, innovation-first model, while Korea has opted for a centralized, ethics-first approach.¹¹⁸⁾ Critics argue that any effort to reconcile these differing regulatory philosophies could lead to a stalemate: either Korea must compromise its constitutional commitments to privacy, or the United States has to abandon its deregulatory pluralism.¹¹⁹⁾

115) Office of the U.S. Trade Representative, *United States-Korea Free Trade Agreement Amendments* (Sept. 2018), <https://ustr.gov/trade-agreements/free-trade-agreements/korus-fta> (last visited Sept. 6, 2025); World Trade Organization, *Information Technology Agreement: Declaration on the Expansion of Trade in Information Technology Products*, WT/MIN(15)/25 (Dec. 16, 2015).

116) Constitutional Court [Const. Ct.], 2004Hun-Ba81, June 30, 2005 (S. Kor.) (holding that executive discretion extends to treaty management unless “fundamental alterations” in rights and obligations require National Assembly approval).

117) Jae-Hyup Lee, *Korea’s Treaty Practice and Constitutional Order*, 15 J. Korean L. 25, 34-37 (2016).

118) Chander & Lê, *supra* note 2, at 690 (describing the U.S. deregulatory pluralism model in digital governance); Presidential Comm. on the Digital Platform Gov’t, Draft *Digital Bill of Rights* (S. Kor. 2023), <https://www.korea.kr/news/pressReleaseView.do?newsId=156586018> (articulating Korea’s ethics-first digital governance principles).

119) See Burri, *supra* note 5, at 335 (emphasizing divergence between liberalization and regulatory autonomy in digital trade); Aaronson, *supra* note 15, at 42 (warning that absent exceptions, trade rules may constrain privacy).

Yet, this objection erroneously conflates divergence with deadlock.¹²⁰⁾ International trade law has long history of navigating between competing regulatory frameworks.¹²¹⁾ For instance, WTO jurisprudence has successfully balanced the EU's precautionary principle with U.S. risk-based regulation, and it has reconciled environmental protection with trade obligations under GATT Article XX.¹²²⁾ In cases like *Brazil—Retreaded Tyres* and *U.S.—Shrimp*, the Appellate Body has stressed that legitimate regulatory goals should be accommodated through the least trade-restrictive means.¹²³⁾ This proportionality principle provides a doctrinal pathway for incorporating privacy and ethical considerations into the liberalization framework without erasing regulatory diversity.

Domestic legal precedent reinforces this view. In the U.S., the Supreme Court in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.* (*Vermont Yankee*) affirmed that agencies may regulate “step by step,” endorsing this incremental approach rather than demanding immediate uniformity.¹²⁴⁾ Similarly, in Korea, the Constitutional Court has recognized a constitutional right to informational self-determination while consistently applying proportionality when weighing privacy against public interests, including international economic commitments.¹²⁵⁾ These legal authorities demonstrate that both systems accept proportionality

protections); Chander & Lê, *supra* note 22, at 690 (highlighting risks of exporting U.S. deregulatory pluralism). *Cf. Appellate Body Report, Brazil—Measures Affecting Imports of Retreaded Tyres, WTO Doc. WT/DS332/AB/R (adopted Dec. 17, 2007).* (requiring necessity and least trade-restrictive means under GATT XX); *See also Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 524 (1978) (endorsing incrementalism in regulatory harmonization); Constitutional Court [Const. Ct.], 2005Hun-Ma745, Apr. 30, 2008 (S. Kor.) (recognizing proportionality when balancing privacy against public interests).

120) Burri, *supra* note 5, at 335 (arguing that regulatory divergence need not produce paralysis in digital trade governance).

121) Gao, *supra* note 13, at 72 (explaining that trade law often accommodates competing regulatory models through structured exceptions).

122) *Brazil—Retreaded Tyres*, *supra* note 119, ¶¶ 140–43 (requiring necessity and least trade-restrictive means under GATT XX); *United States—Import Prohibition of Certain Shrimp and Shrimp Products, WTO Doc. WT/DS58/AB/R*, ¶¶ 129–32 (adopted Nov. 6, 1998) (recognizing role of evolving international standards in balancing trade and environmental protection).

123) *Brazil—Retreaded Tyres*, *supra* note 119, ¶¶ 140–43; *U.S.—Shrimp*, *supra* note 122, ¶¶ 141–44.

124) *Vermont Yankee*, 435 U.S. at 524.

125) Constitutional Court [Const. Ct.], 2012Hun-Ma191, Aug. 23, 2012 (S. Kor.) (upholding proportionality in

and incrementalism as means to effectively manage divergence.

Ultimately, both international and domestic doctrine suggest that divergence doesn't equate to paralysis. Instead, it creates a structured need for institutional mechanisms to facilitate harmonization.¹²⁶⁾ A dual-trace model – binding disciplines where consensus exists, coupled with soft-law cooperation where values diverge – aligns with this legal tradition.¹²⁷⁾ Thus, the presence of regulatory divergence doesn't obstruct treaty reform; rather, it highlights the necessity for principled, institutionalized harmonization.

V.3 The Slippery-Slope Critique: Why Digital, Not Climate or Biotech?

A third objection raises concerns about the risk of doctrinal slippage if a digital chapter is incorporated into KORUS. If digital trade is permitted as an exception under KORUS, critics ask, why not extend such carve-outs to other significant areas—like energy security, biotechnology, or climate governance? Wouldn't this recognition of “functional carve-outs” destabilize trade law by encouraging endless claims of exceptionalism?

The response to this concern lies in principled limitations. Trade law already categorizes sectors based on their systemic role, doctrinal maturity, and geopolitical significance. Digital trade is distinctive along all three dimensions.

First, its cross-cutting elements. Digital rules govern how trade is conducted across various industries rather than simply what is traded in a specific sector.¹²⁸⁾ WTO precedent acknowl-

balancing informational self-determination with public interests).

126) Burri, *supra* note 5, at 335–36 (arguing that institutional mechanisms are necessary to reconcile divergent regulatory philosophies in digital trade); Gao, *supra* note 13, at 72 (explaining how annexes and cooperative bodies supply pathways for harmonization across regimes).

127) *See Brazil—Retreaded Tyres*, *supra* note 119, ¶¶ 140–43; Appellate Body Report, *U.S.—Shrimp*, *supra* note 122, ¶¶ 141–44 (emphasizing proportionality in accommodating regulatory aims); *Vermont Yankee*, 435 U.S. at 524 (endorsing incrementalism in regulation); *Const. Ct.*, *supra* note 19 (recognizing proportionality in balancing privacy with public interests); *see also* Burri, *supra* note 5, at 335 (arguing that institutionalized mechanisms are necessary to reconcile divergent regulatory philosophies in digital trade).

128) Burri, *supra* note 1, at 336 (noting that digital trade disciplines regulate the *manner* of trade across sectors

edges similar “infrastructural” domains that warrant special consideration, such as the GATS Annex on Telecommunications (1994), which treats telecom networks as essential for all services.¹²⁹⁾ Similarly, the Trade-Related Aspects of Intellectual Property Rights agreement of the World Trade Organization (TRIPS) establishes baseline IP rules precisely because intellectual property rights are structural to all trade.¹³⁰⁾ Therefore, cross-border data flows and algorithmic governance should be seen as infrastructural domains rather than mere sectoral policies like energy or environmental measures.

Second, there is a significant doctrinal vacuum in this area. Where established doctrine exists, carve-outs tend to be unnecessary. Environmental and energy measures fit under GATT Article XX (b), (g), and XXI (security exceptions). Jurisprudence—from *US-Gasoline* (1996) to *Brazil—Retreaded Tyres* (2007)—has elaborated necessity and proportionality tests.¹³¹⁾ In contrast, no WTO panel has ruled explicitly on restrictions concerning cross-border data flows or mandatory source-code disclosure. WTO members have yet to agree on a “necessity” framework for digital governance, and the Doha e-commerce moratorium has only suspended tariff treatment for digital products without substantive rules.¹³²⁾ KORUS modernization would thus fill a *doctrinal gap*, not multiply exceptions.

Third, the geopolitical relevance and systemic stability that digital governance entails are paramount. Issues surrounding supply-chain resilience, cybersecurity, and platform regulation significantly influence U.S.-Korea strategic alignment. Failure to address these topics in the treaty could lead to fragmentation influenced by the EU’s General Data Protection Regulation (GDPR -

rather than goods or services themselves).

129) General Agreement on Trade in Services: Annex on Telecommunications, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183 (recognizing telecommunications as infrastructural to all services).

130) TRIPS Agreement, *supra* note 22, arts. 1–2.

131) *United States—Standards for Reformulated and Conventional Gasoline*, WTO Doc. WT/DS2/AB/R, at 16–17 (adopted May 20, 1996) (articulating necessity and proportionality tests under GATT XX(b) and (g)); *Brazil—Retreaded Tyres*, *supra* note 119, ¶¶140–43.

132) WTO General Council, Work Programme on Electronic Commerce: Ministerial Decision of 19 December 2019, WTO Doc. WT/L/1079 (Dec. 19, 2019) (renewing the moratorium on customs duties for electronic transmissions without establishing substantive governance rules).

extraterritorial data protection) or China's local data mandates.¹³³⁾ The WTO has recognized that heightened deference is warranted in sectors that implicate systemic stability, as seen in *China—Publications and Audiovisual Products* (2010), which balanced regulatory autonomy with trade commitments in sensitive areas.¹³⁴⁾ Conversely, sectors such as biotechnology and climate are already mediated through specialized agreements, like the Cartagena Protocol on Biosafety and the Paris Agreement, which diminish the need for new carve-outs in trade law.¹³⁵⁾

In conclusion, these features provide a framework for understanding the justification of carve-outs. They are justified only when (i) the domain constitutes systemic infrastructure (like telecom, IP, digital); (ii) the doctrinal foundations are insufficient or underdeveloped (as seen with digital flows); and (iii) geopolitical factors threaten systemic stability of the trading system. Digital trade clearly meets all three criteria, whereas climate, energy, or biotech – while important – do not.¹³⁶⁾

VI. Legal Framework for Reforming KORUS

VI.1 Policy–Legal Realism

Modernizing KORUS requires more than updating its legal text; it demands an appreciation of the distinct regulatory identities of both parties.¹³⁷⁾ For Korea, digital governance is deeply

133) Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data (General Data Protection Regulation), 2016 O.J. (L 119) 1 (EU) [hereinafter GDPR]; Personal Information Protection Law of the People's Republic of China (promulgated Aug. 20, 2021, effective Nov. 1, 2021) (China) (imposing data localization and cross-border transfer restrictions).

134) *China—Publications and Audiovisual Products*, supra note 8, ¶¶ 230–35.

135) Cartagena Protocol on Biosafety to the Convention on Biological Diversity, Jan. 29, 2000, 2226 U.N.T.S. 208; Paris Agreement, Dec. 12, 2015, T.I.A.S. No. 16-1104.

136) See GATS Annex on Telecommunications, supra note 21 (treating telecom as systemic infrastructure for all services); TRIPS Agreement, supra note 22 (establishing IP as a baseline for trade governance); *Brazil—Retreaded Tyres*, supra note 18, ¶¶ 140–43; GDPR, supra note 133 (illustrating extraterritorial regulatory gravity in digital governance); Cartagena Protocol, supra note 27; Paris Agreement, supra note 27 (providing specialized fora for climate and biosafety, reducing the need for trade carve-outs).

137) Aaronson, supra note 9, at 44 (arguing that legitimacy in digital trade governance requires recognition of

rooted in ethics and human rights.¹³⁸⁾ Since the enactment of the Personal Information Protection Act of 2011, Korea has treated data protection as a rights-based domain grounded in human dignity, fairness, and autonomy.¹³⁹⁾ This ethos is deepened by the government’s *Digital Bill of Rights* initiative, which situates data governance within broader constitutional principles of equality, transparency, and accountability.¹⁴⁰⁾ What trade lawyers might call a “trade irritant” is, in Korea’s constitutional context, a value-laden safeguard.¹⁴¹⁾ Its privacy framework functions less as a barrier to commerce than as an affirmation that economic modernization must coexist with rights protection. Likewise, a well-designed digital chapter in KORUS could embody this commitment to fairness and accountability, earning greater domestic legitimacy and fostering long-lasting compliance.¹⁴²⁾

By contrast, the United States operates on an innovation-first model, prioritizing flexibility and rapid technological adoption.¹⁴³⁾ The Executive Order on Safe, Secure, and Trustworthy Artificial Intelligence (2023) seeks to establish national AI safeguards while preserving experimentation and private-sector leadership. Yet this coexistence produces fragmentation: state-level initiatives such as California’s *Consumer Privacy Act* (CCPA) and *Privacy Rights Act* (CPRA) layer divergent obligations atop federal uncertainty.¹⁴⁴⁾ Externally, Washington has

national regulatory identities).

138) Presidential Comm. on the Digital Platform Gov’t, *Draft Digital Bill of Rights* (S. Kor. 2023), <https://www.korea.kr/news/pressReleaseView.do?newsId=156586018> (articulating principles of fairness, accountability, and ethics in Korea’s digital governance framework).

139) Personal Information Protection Act, Act No. 14839, July 26, 2011, amended by Act No. 16930, Feb. 4, 2020 (S. Kor.); see OECD, *OECD Digital Economy Outlook 2024* 61–64 (2024) (describing Korea’s PIPA as among the world’s most stringent privacy regimes).

140) Ministry of Science & ICT (S. Kor.), *Draft Digital Bill of Rights* (2023), <https://www.msit.go.kr>; Sang-Hyun Park, Korea’s Digital Bill of Rights: Toward a Normative Framework for AI Governance, 32 KOREAN J. COMP. L. 215, 223–26 (2024).

141) See Anupam Chander, *Normative Challenges of Cross-Border Data Flows*, 23 J. INT’L ECON. L. 671, 674–75 (2020) (arguing that privacy regulation is often mischaracterized as protectionism rather than rights-based governance).

142) Mira Burri, *Understanding Digital Trade Lawmaking*, 24 WORLD TRADE REV. 121, 133–36 (2025) (explaining how rights-based digital rules enhance legitimacy and sustainability in treaty design).

143) Nat’l Inst. of Standards & Tech. (NIST), *U.S. Artificial Intelligence Risk Management Framework 1.0* (2023), <https://nvlpubs.nist.gov/nistpubs/ai/NIST.AI.100-1.pdf> (promoting voluntary, flexible, and innovation-driven approaches to AI governance).

also weaponized trade instruments, most notably through Section 301 investigations into digital services taxes.¹⁴⁵⁾ The result is a domestic landscape defined by pluralism and an external posture of regulatory defensiveness.¹⁴⁶⁾

These divergent postures make a purely technocratic “fix” illusory. Yet, they also reveal the distinctive promise of treaty law. Properly framed, KORUS can function as an anti-fragmentation constitution: a harmonizing baseline across fractured domestic regimes, supplying predictability where ordinary legislation cannot.¹⁴⁷⁾ A digital chapter would not override either party’s constitutional or statutory commitments; rather it would discipline the regulatory space between them – embedding proportionality, limited exceptionalism and channeling innovation into structured cooperation rather than ad hoc contestation.¹⁴⁸⁾ WTO jurisprudence underscores this possibility: under *Brazil-Retreaded Tyres*, the Appellate Body held that even legitimate regulatory aims must be reconciled with liberalization through “least restrictive” means.¹⁴⁹⁾ A digital KORUS chapter could operationalize that logic by embedding proportionality into exceptions for privacy, ethics, and security.¹⁵⁰⁾

144) Exec. Order No. 14,110, Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence, 88 Fed. Reg. 75,185 (Oct. 30, 2023); California Consumer Privacy Act of 2018, CAL. CIV. CODE §§ 1798.100–199 (West 2022); California Privacy Rights Act of 2020, CAL. CIV. CODE §§ 1798.100–199 (West 2022); U.S. Cong. Rsch. Serv., R47498, *Data Privacy and Protection in the United States* 3–6 (2023) (describing state–federal divergence).

145) Office of the U.S. Trade Rep., *Section 301 Investigations: Digital Services Taxes* (2021), <https://ustr.gov> (initiating investigations against France, India, and others over digital services taxes); see also Bryan Mercurio, U.S. Trade Law and Digital Services Taxes, 57 J. WORLD TRADE 211, 213–16 (2023) (discussing the extraterritorial use of Section 301).

146) Burri, *supra* 143, at 134–37 (arguing that U.S. digital trade diplomacy reflects domestic fragmentation and external defensiveness).

147) See Joost Pauwelyn, *Treaty Design in a Fragmented Digital Economy*, 118 AJIL UNBOUND 56, 58–61 (2024) (arguing that trade agreements can function as constitutional baselines to reduce fragmentation).

148) See Susan Ariel Aaronson, *Designing Digital Trade Rules: Lessons for Future FTAs*, CTR. FOR INT’L GOVERNANCE INNOVATION (2023), <https://www.cigionline.org> (proposing digital chapters that channel innovation into cooperative frameworks).

149) *Brazil—Retreaded Tyres*, *supra* note 119, ¶¶178–82.

150) Burri, *Supra* 143, at 133–36 (2025) (arguing that proportionality-based exceptions provide a doctrinal bridge between regulatory autonomy and liberalization).

Finally, institutional design must match doctrinal ambition. KORUS, negotiated in 2007, is a bilateral agreement optimized for a goods-and-services world; its electronic commerce provisions are skeletal and static.¹⁵¹⁾ By contrast, DEPA pioneered a modular design in which parties can adopt and periodically update specific digital modules, such as those addressing artificial intelligence, digital inclusion, and cybersecurity.¹⁵²⁾ A digital KORUS should chart a third way: hybridizing U.S. flexibility with Korea's rights-based ethic, thereby offering an Indo-Pacific alternative to the EU's GDPR/DSA maximalism.¹⁵³⁾ The objective is not lowest-common-denominator harmonization but legitimacy-sensitive liberalization—binding where consensus exists, adaptive where constitutional values diverge.¹⁵⁴⁾

VI.2 Pathways for Reform

VI.2.1 Incrementalism Through an Annex

One pathway is incrementalism via annex. The 2018 KORUS Protocol demonstrates that the parties can modernize the treaty surgically without reopening its core architecture.¹⁵⁵⁾ In the digital domain, a targeted annex could codify cross-border data transfer obligations with principled exceptions, prohibit compelled disclosure of source code and algorithms (subject to narrowly defined regulatory carve-outs), and launch a structured cybersecurity cooperation framework.

151) Korea–United States Free Trade Agreement ch. 15, U.S.–S. Kor., June 30, 2007, amended Jan. 1, 2019, T.I.A.S. No. 12-1201 (containing skeletal electronic commerce provisions); see Mira Burri, *Understanding Digital Trade Lawmaking*, 24 WORLD TRADE REV. 121, 126–30 (2025).

152) Digital Economy Partnership Agreement, Chile–N.Z.–Sing., June 12, 2020, <https://www.mfat.govt.nz>; see Jane Kelsey, *Modular Governance in Digital Trade: Lessons from DEPA*, 25 J. INT'L ECON. L. 233, 239–44 (2025).

153) Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 (General Data Protection Regulation), 2016 O.J. (L 119) 1; Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 (Digital Services Act), 2022 O.J. (L 277) 1; OECD, *OECD Digital Economy Outlook 2024* 95–100 (2024) (describing global regulatory competition between U.S., EU, and Asian models).

154) See Joost Pauwelyn, *Treaty Design in a Fragmented Digital Economy*, 118 AJIL UNBOUND 56, 59–61 (2024) (advocating hybrid approaches that balance binding liberalization with adaptive governance).

155) Protocol on Amendments to the Free Trade Agreement Between the United States of America and the Republic of Korea, Sept. 3, 2018, U.S.–S. Kor., <https://ustr.gov/trade-agreements/free-trade-agreements/korus-fta/korus-fta-text>.

Most importantly, such an annex could harden soft law by referencing evolving non-binding instruments – such as the OECD’s 2019 Artificial Intelligence principles – through incorporation-by-reference or “mandatory consideration” clauses.¹⁵⁶⁾

This approach is not novel. WTO jurisprudence affirms the legality of disciplined flexibility within treaty design. In *Brazil—Retreaded Tyres*, the Appellate Body held that measures justified under GATT Article XX must be “necessary” and represent the least trade-restrictive means available to achieve legitimate objectives.¹⁵⁷⁾ Similarly, a KORUS annex incorporating privacy or security exceptions would be consistent with GATS Article XIV so long as it avoids arbitrary or unjustifiable discrimination.¹⁵⁸⁾ In *China—Publications and Audiovisual Products*, the Appellate Body reaffirmed that Members may pursue cultural and regulatory aims, but only if these are reconciled with market-access commitments through proportionate and transparent design.¹⁵⁹⁾ Collectively, these precedents support incremental annexes, and when grounded in proportionality and necessity, can balance liberalization with principled exceptions while remaining legally sound under WTO discipline.¹⁶⁰⁾

VI.2.2 Comprehensive Chapter Modeled on USMCA

A more ambitious path would be comprehensive renegotiation modeled on the USMCA’s digital chapter.¹⁶¹⁾ USMCA illustrates how digital trade disciplines can be embedded at the treaty level rather than left to the discretion of domestic regulators.¹⁶²⁾ It not only affirms the principle

156) Organisation for Economic Co-operation and Development [OECD], *Recommendation of the Council on Artificial Intelligence* (May 22, 2019), <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0449>.

157) *Brazil—Retreaded Tyres*, supra note 119.

158) GATS: General Agreement on Trade in Services art. XIV, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183 (permitting exceptions for public morals, public order, privacy, and security if not applied arbitrarily or unjustifiably).

159) Appellate Body Report, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WTO Doc. WT/DS363/AB/R (adopted Dec. 21, 2009).

160) See generally Burri, supra note 1, at 342 (arguing that incremental annexes can balance liberalization with principled exceptions in WTO-consistent ways).

161) USMCA, supra note 9, ch. 19.

162) *Id.* pmbl., art. 19.2 (recognizing the importance of digital trade and embedding disciplines in treaty text).

of free cross-border data flows and disciplines data localization, but also extends protection to source code and algorithms while embedding cybersecurity cooperation directly into treaty text.¹⁶³⁾ Article 19.11 codifies a presumptive right to information transfers across borders, Article 19.12 prohibits localization mandates subject to limited exceptions, Article 19.16 protects source code and algorithms from forced disclosure, and Article 19.15 mandates structured cybersecurity cooperation.¹⁶⁴⁾ Taken together, these provisions represent a mature digital chapter that balances liberalization with safeguards for innovation and security.¹⁶⁵⁾

A comprehensive digital chapter for KORUS could adapt this model to the U.S.-Korea context.¹⁶⁶⁾ Beyond the core disciplines on data, source code, and cybersecurity, such a chapter could also address non-discrimination for digital products (ensuring regulatory parity between domestic and foreign platforms), interoperability mandates (facilitating technical alignment in digital identity and payments), and elements of algorithmic accountability (embedding transparency obligations and shared auditing principles).¹⁶⁷⁾ These innovations would not only harmonize bilateral digital governance but also anchor predictability within a legally binding framework capable of normatively influencing Indo-Pacific partners.¹⁶⁸⁾

The political-economy costs of such a renegotiation are real: treaty reopening mobilizes entrenched interests, invites legislative scrutiny in both the U.S. Congress and the Korean National Assembly, and may provoke regulatory sovereignty concerns.¹⁶⁹⁾ Yet the systemic

163) *Id.* arts. 19.11–19.16.

164) *Id.* arts. 19.11–19.16 (detailing cross-border data flows, localization, source code, algorithms, and cybersecurity cooperation).

165) Burri, *supra* note 143, at 343–44 (describing USMCA as a mature digital trade framework that balances liberalization with innovation and security safeguards).

166) USMCA, *supra* note 11, ch. 19 (establishing comprehensive treaty-level digital trade disciplines).

167) DEPA, *supra* note 9, Modules 4, 6 & 8 (introducing provisions on digital inclusion, interoperable identity, and AI ethics that could be adapted in a bilateral treaty context).

168) Gao, *supra* note 13, at 75 (arguing that bilateral innovations in digital trade agreements can supply models for Indo-Pacific regional governance).

169) See Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 *MICH. L. REV.* 390, 397–99 (1998) (describing U.S. congressional scrutiny of treaty commitments); *Constitution of the Republic of Korea* art. 60(1) (requiring National Assembly consent for ratification of treaties).

benefits outweigh the risks. A full digital chapter would diminish dependence on *extraterritorial regulatory poles*—whether the gravitational pull of the EU’s GDPR adequacy regime, or the de facto rule-setting by dominant U.S. and Korean platforms operating without treaty discipline.¹⁷⁰⁾ By codifying these norms bilaterally, Washington and Seoul could reassert agency over the standards that govern their firms and their citizens’ data.¹⁷¹⁾

In short, a comprehensive Digital KORUS chapter modeled on USMCA would be politically demanding but doctrinally credible.¹⁷²⁾ It would entrench U.S. – Korea integration in binding text, reduce dependence on external regulatory poles, and project a model of legitimacy-sensitive liberalization into the broader Indo-Pacific.

VI.2.3 Sequencing and Doctrinal Support for Incrementalism

The prudential choice between these paths turns on sequencing, not principle. An annex can lock in consensus disciplines while building habits of cooperation, with a comprehensive chapter to follow once political trust and technical alignment have matured. Framing modernization in this stepwise fashion avoids the false binary between “nothing until everything” and “everything at once.”¹⁷³⁾

International economic law provides clear support for such incrementalism. NAFTA’s side letters and protocols frequently preceded deeper renegotiation under USMCA, demonstrating that treaties can evolve through successive layers of integration.¹⁷⁴⁾ Likewise, WTO practice shows that annexes and interpretive notes often serve as “bridge instruments,” allowing members to

170) GDPR, *supra* note 133 (establishing extraterritorial adequacy determinations); Chander & Lê, *supra* note 22, at 690 (warning that dominant platforms may impose de facto standards absent treaty rules).

171) Burri, *supra* note 13, at 345 (arguing that bilateral treaties allow states to reassert agency over digital trade standards).

172) USMCA, *supra* note 9, ch. 19 (providing the leading model for comprehensive digital trade chapters).

173) Aaronson, *supra* note 15, at 44–45 (describing legitimacy-sensitive liberalization in digital trade); Gao, *supra* note 13, at 80 (arguing that bilateral digital trade frameworks can project governance models into the Indo-Pacific).

174) *North American Free Trade Agreement* [NAFTA], Dec. 17, 1992, Can.–Mex.–U.S., 32 I.L.M. 289 (1993); USMCA, *supra* note 9, pmbl., art. 19.2 (illustrating layered treaty development from NAFTA to USMCA).

test new obligations before entrenching them as binding multilateral rules.¹⁷⁵⁾ This kind of sequencing is not a deviation from doctrine but an established mode of treaty development.¹⁷⁶⁾

Applied to KORUS, incrementalism ensures that modernization is both durable and legitimate. By beginning with a digital annex, the parties can establish baseline disciplines—on data flows, source code, and cybersecurity—while simultaneously institutionalizing soft-law cooperation in unsettled domains such as AI ethics and platform governance.¹⁷⁷⁾ This phased approach lowers the political costs of reform, fosters mutual trust, and provides a doctrinally recognized pathway to a full digital chapter once alignment permits.¹⁷⁸⁾ In this way, sequencing transforms modernization from a politically daunting overhaul into a legally grounded process of structured evolution.¹⁷⁹⁾

VI.3 Implementation Mechanism

VI.3.1 Binding Core Principles

Effective implementation demands a blend of enforceable rules and adaptive frameworks. On the binding side, KORUS 2.0 should entrench three core disciplines that reflect both comparative treaty practice and the functional needs of digital trade governance.

First, a presumptive right to cross-border data transfers.¹⁸⁰⁾ Free data flow should be the

175) Marrakesh Agreement Establishing the World Trade Organization art. IV(1), Apr. 15, 1994, 1867 U.N.T.S. 154 (authorizing councils and committees to adopt annexes and interpretive notes to manage evolving obligations).

176) Gao, *supra* note 13, at 70 (explaining that sequencing of obligations through annexes and protocols is a recognized form of treaty development).

177) USMCA, *supra* note 11, arts. 19.11–19.16; CPTPP, *supra* note 9, arts. 14.11, 14.17 (establishing binding disciplines on data flows, source code, and cybersecurity cooperation); DEPA, *supra* note 9, Modules 4 & 8 (institutionalizing soft-law cooperation in unsettled digital domains).

178) Gao, *supra* note 15, at 72–73 (explaining that annexes provide a doctrinally accepted pathway toward deeper treaty commitments).

179) *Vermont Yankee*, 435 U.S. at 524 (endorsing step-by-step regulatory harmonization); Marrakesh Agreement Establishing the World Trade Organization art. IV(5), Apr. 15, 1994, 1867 U.N.T.S. 154 (recognizing committees' role in structured, evolutionary treaty development).

180) CPTPP, *supra* note 9, art. 14.11 (establishing the right to cross-border data transfers by electronic means).

default, subject only to narrowly tailored, necessity-tested exceptions.¹⁸¹⁾ This design aligns with the logic of *GATS* Article XIV, which disciplines regulatory exceptions by requiring that they not be applied in an “arbitrary or unjustifiable” manner and that they be the least trade-restrictive means available.¹⁸²⁾ Embedding proportionality into the exceptions ensures that legitimate privacy or security objectives can be pursued without collapsing market predictability.

Second, a prohibition on forced disclosure of source code and algorithms.¹⁸³⁾ Provisions modeled on CPTPP Article 14.17 and USMCA Article 19.16 should make clear that neither party may condition market access on access to proprietary software or algorithmic logic.¹⁸⁴⁾ At the same time, narrowly tailored safeguards could be carved out – for example, confidential disclosures to competition authorities investigating anticompetitive conduct or to safety regulators assessing critical infrastructure software. These carve-outs, if tightly drafted, would balance the need to protect intellectual property with the imperative of regulatory oversight.¹⁸⁵⁾

Third, a cybersecurity-cooperation article.¹⁸⁶⁾ Beyond market liberalization, modern digital trade requires resilience. A binding article mandating structured information-sharing, coordinated incident reporting, and joint capacity-building would lower compliance costs and generate a “trust dividend” by embedding security cooperation directly into the trade regime.¹⁸⁷⁾ Such provisions would not only lower compliance costs for firms operating in both jurisdictions but also generate a “trust dividend” by embedding security cooperation directly into the trade regime.¹⁸⁸⁾

181) USMCA, *supra* note 11, art. 19.11 (codifying free data flows subject to narrow exceptions).

182) *GATS*: General Agreement on Trade in Services art. XIV, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183; see also *Brazil—Retreaded Tyres*, *supra* note 119, ¶¶ 140–43 (interpreting necessity and proportionality in the context of Article XX, which parallels *GATS* XIV).

183) CPTPP, *supra* note 9, art. 14.17 (prohibiting forced disclosure of source code).

184) USMCA, *supra* note 9, art. 19.16 (extending protections to algorithms in addition to source code).

185) Gao, *supra* note 13, at 73 (arguing that narrowly drafted exceptions can preserve regulatory space without undermining predictability in digital trade); Korea Fair Trade Commission [KFTC], *Guidelines on Review of Unfair Exercise of Intellectual Property Rights* (2021) (recognizing the role of confidential disclosures to competition regulators in investigating algorithmic or software-based anticompetitive conduct).

186) Burri, *supra* note 5, at 344 (arguing that resilience and security are necessary complements to digital liberalization).

187) USMCA, *supra* note 9, art. 19.15 (requiring structured cybersecurity cooperation among the parties).

These core disciplines would serve dual purposes. Economically, they facilitate predictability for firms engaged in cross-border digital commerce.¹⁸⁹⁾ Strategically, they function as dual-use instruments: deepening bilateral economic integration while reinforcing national alignment in the Indo-Pacific through trusted networks and common risk vocabularies.¹⁹⁰⁾ Precedent from the USMCA digital chapter and the CPTPP confirms that such provisions are both legally feasible and recognized as best practice in next generation trade agreements.¹⁹¹⁾

VI.3.2 Soft-Law Cooperation in Divergent Domains

Where U.S. and Korean values diverge—especially in AI accountability and platform governance—KORUS 2.0 should prioritize soft-law cooperation over hard legal commitments.¹⁹²⁾ Hard-coding contested principles risks either premature ossification or political backlash; soft-law cooperation, by contrast, enables iterative alignment.

A joint U.S.–Korea Digital Committee should anchor this cooperative framework.¹⁹³⁾ Its mandate would include issuing interpretive notes clarifying how binding rules apply to emerging technologies, developing model audit protocols for algorithmic systems, drafting interoperability guidelines, and reviewing the use of privacy or security exceptions to ensure they are not disguised trade barriers.¹⁹⁴⁾ These functions would generate a shared “interpretive securement” over time, enabling both parties to remain aligned without the rigidity of formal renegotiation.

188) Aaronson, *supra* note 15, at 45 (noting that security-oriented cooperation in digital trade can enhance trust between states and firms).

189) Gao, *supra* note 3, at 73 (explaining that predictability in digital trade disciplines lowers compliance costs for firms).

190) *Id.* at 75 (describing how digital governance frameworks can reinforce Indo-Pacific strategic alignment).

191) CPTPP, *supra* note 9, art. 14.16; USMCA, *supra* note 9, art. 19.15 (establishing cybersecurity cooperation as a binding treaty obligation).

192) *See DEPA*, *supra* note 9, Module 8 (establishing cooperative mechanisms on AI and digital inclusion).

193) Marrakesh Agreement Establishing the World Trade Organization art. IV(5), Apr. 15, 1994, 1867 U.N.T.S. 154 (providing for committees to interpret and monitor treaty application); *DEPA*, *supra* note 9, Module 8 (creating institutional bodies for ongoing digital cooperation).

194) Burri, *supra* note 14, at 340–41 (arguing that interpretive notes, model protocols, and interoperability guidelines strengthen treaty legitimacy and reduce compliance burdens).

This model draws on existing treaty practice. DEPA pioneered a modular approach in which parties can accede to or update specific digital “modules” without reopening the entire agreement, demonstrating that soft law can institutionalize flexibility without sacrificing coherence.¹⁹⁵⁾ Likewise, the WTO’s Technical Barriers to Trade (TBT) and Sanitary and Phytosanitary (SPS) committees issue interpretive guidance and monitor exception use, functioning as governance tools rather than retreats from legal discipline.¹⁹⁶⁾

For KORUS 2.0, soft-law mechanisms would play the same role: they would not replace binding obligations but complement them in domains where consensus is unsettled and technology is fast-moving. By institutionalizing cooperation through committees, annexes, and interoperability standards, KORUS would signal that alignment in contested areas is a continuous process, not a one-off bargain. Far from diluting discipline, this model embeds predictability by channeling regulatory divergence into structured dialogue rather than ad hoc conflict.

VI.3.3 Legal and Institutional Safeguards for Soft-Law Cooperation

The success of this dual-track framework ultimately depends on whether soft-law instruments can reinforce, rather than erode, the treaty’s normative authority. To sustain the legal credibility, KORUS 2.0 must anchor cooperative instruments—interpretative notes, model protocols, and committee outputs—in established principles of international law.

Soft-law instruments should operate within, rather than outside, the treaty’s legal confines, conforming to the interpretive principles of treaty interpretation set forth in the *Vienna Convention on the Law of Treaties (VCLT)*. Under Articles 31(3)(a)–(b), “subsequent agreements” and “subsequent practice” between the parties concerning a treaty’s interpretation are endowed with interpretative authority.¹⁹⁷⁾ Therefore, interpretative notes or protocols are

195) DEPA, *supra* note 9, Modules 1 & 8 (illustrating modular accession and update mechanisms for digital trade governance).

196) Agreement on Technical Barriers to Trade arts. 13–15, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 120; Agreement on the Application of Sanitary and Phytosanitary Measures arts. 12–13, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 493.

endowed with interpretative authority.¹⁹⁸⁾ This doctrinal grounding allows cooperative dialogue to evolve into a disciplined interpretive process that enhances and clarifies treaty meaning over time.

Comparative experience reinforces this model. The NAFTA Free Trade Commission, for example, routinely issued binding interpretations under Article 2001(2)(c) that guided dispute-settlement panels.¹⁹⁹⁾ Similarly, WTO committees on Technical Barriers to Trade (TBT) and Sanitary and Phytosanitary Measures (SPS) have employed interpretative outputs to shape member obligations without the formality of treaty amendment.²⁰⁰⁾ These precedents demonstrate that structured soft law, when properly anchored, can supplement treaty regimes with dynamic interpretive authority.

To reinforce this doctrinal foundation, institutional safeguards should promote transparency and accountability in the Committee's activities. A requirement for the Digital Committee to produce an annual implementation report, subject to review by both governments, could be beneficial, documenting interpretive actions taken, guidance adopted, and any emerging disputes.²⁰¹⁾ Accompanying this process, a notification and comment procedure should mandate each party to inform the committee of significant new digital regulations -such as those addressing AI liability or platform accountability - and to clarify their alignment with KORUS principles.²⁰²⁾ In

197) *Vienna Convention on the Law of Treaties*, arts. 31(3)(a)–(b), May 23, 1969, 1155 U.N.T.S. 331.

198) See generally Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* 426–28 (2009) (explaining that interpretative agreements under Article 31(3) may carry binding effect if adopted by all parties).

199) See North American Free Trade Agreement, U.S.–Can.–Mex., Dec. 17, 1992, 32 I.L.M. 289, art. 2001(2)(c) (authorizing the Free Trade Commission to “resolve disputes regarding interpretation or application of this Agreement”); see also Thomas J. Schoenbaum & Carmen G. Gonzalez, *NAFTA and the Environment: A Guide to the New Environmental Rules* 28–29 (1995).

200) See WTO, *Committee on Technical Barriers to Trade, Decisions and Recommendations Adopted by the TBT Committee Since 1 January 1995*, WTO Doc. G/TBT/1/Rev.16 (2022); see also WTO, *Committee on Sanitary and Phytosanitary Measures, Procedure to Enhance Transparency*, WTO Doc. G/SPS/7/Rev.4 (2018).

201) Cf. OECD, *Recommendation of the Council on Regulatory Policy and Governance* (2012), <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0390> (recommending annual reporting and transparency requirements for cross-border regulatory cooperation).

scenarios where interpretive disagreements arise, an escalation clause could allow for referrals to a consultative dispute-avoidance mechanism, thereby preserving a hierarchical relationship between cooperative outputs and treaty authority.²⁰³⁾ Collectively, these procedures transform what might otherwise devolve into informal coordination into a system of rule-based governance.

In this framework, soft law does not dilute legal discipline; it enhances the treaty's legitimacy through disciplined experimentalism. By institutionalizing transparency, facilitating interpretative feedback, and implementing periodic reviews, soft law evolves into a tool for harmonizing legal stability with technological progress.²⁰⁴⁾ This methodology anchors adaptability in law rather than in discretion, ensuring that KORUS maintains its reputation as a reliable and credible normative framework, even in the face of divergent regulatory ideologies in the U.S. and Korea.²⁰⁵⁾

VI.3.4 Layered Governance and Treaty Dynamism

To unify binding rules with adaptive oversight, KORUS 2.0 should pioneer a model of layered governance.²⁰⁶⁾ Binding provisions should be designed to explicitly reference, incorporate, or defer to evolving nonbinding instruments—whether issued by the Joint Committee or adopted by recognized international bodies.²⁰⁷⁾ This would allow the treaty to remain both legally predictable and technologically adaptive.

The key is to embed an “update function” directly into the treaty architecture.²⁰⁸⁾ This could

202) See Office of the U.S. Trade Representative, *United States-Korea Free Trade Agreement (KORUS) Chapter 15: Electronic Commerce* (2012), <https://ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text> (requiring notification and cooperation on new digital regulations).

203) See generally Joost Pauwelyn, *Informal International Lawmaking: Mapping the Action and Testing Concepts of Accountability and Effectiveness*, in *Informal International Lawmaking* 125-27 (Joost Pauwelyn et al. eds., 2012) (analyzing dispute-avoidance mechanisms in soft-law regimes).

204) Laurence R. Helfer, *Flexibility in International Agreements*, 99 Am. Soc'y Int'l L. Proc. 157, 159-61 (2005) (describing mechanisms that combine flexibility with legal predictability).

205) See generally Charles F. Sabel & Jonathan Zeitlin, *Experimentalist Governance*, in *Oxford Handbook of Governance* 169, 170-72 (David Levi-Faur ed., 2012).

206) See *Id.* (describing modular and layered treaty design as a pathway for digital trade governance).

207) *DEPA*, supra note 9, Modules 8-9 (incorporating evolving standards on AI and fintech cooperation through modular updates).

take several forms. First, periodic review clauses would mandate that parties revisit digital provisions at regular intervals (e.g., every three years) to assess their relevance and propose adjustments.²⁰⁹⁾ Second, annexes would function as modular addenda that can be updated through simplified procedures without reopening the core text – ensuring that provisions on emerging technologies such as quantum computing, digital identity, or AI oversight evolve alongside practice.²¹⁰⁾ Third, embedded cross-references to trusted external frameworks – such as the OECD AI principles and International Organization for Standardization (ISO) cybersecurity standards would allow KORUS to absorb international best practices dynamically, without the need for constant renegotiation.²¹¹⁾

For example, the OECD AI Principles could serve as a dynamic reference point—guiding implementation without triggering renegotiation.²¹²⁾ International legal doctrine already supports this kind of hybridization: the WTO Appellate Body in *US—Shrimp* upheld the legitimacy of interpreting treaty obligations in light of “evolving international standards.”²¹³⁾ Embedding that logic into KORUS 2.0 would future-proof its digital governance rules—ensuring they remain durable, adaptive, and legitimacy-sensitive.²¹⁴⁾

208) Neha Mishra, *Building Bridges: International Trade Law, Internet Governance and the Regulation of Data Flows*, 19 J. INT’L ECON. L. 263, 293–95 (2016) (arguing for embedded update mechanisms in digital trade governance).

209) Comprehensive and Progressive Agreement for Trans-Pacific Partnership art. 27.2, Mar. 8, 2018, 57 I.L.M. 645 (establishing review mechanisms through a Joint Committee); EU-Japan Economic Partnership Agreement, art. 8.81, Feb. 1, 2019, 2019 O.J. (L 330) 3 (requiring review of digital trade commitments in light of evolving privacy standards, including GDPR adequacy).

210) *DEPA*, supra note 9, Modules 6 & 8. (illustrating modular annexes that can evolve alongside technological practice); Singapore–Australia Digital Economy Agreement [SADEA], Digital Identity Annex (2020) (providing flexible procedures for updating interoperability rules without reopening the treaty core).

211) OECD, *Recommendation of the Council on Artificial Intelligence* (May 22, 2019), <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0449>; Int’l Org. for Standardization [ISO], *ISO/IEC 27001: Information Security Management* (2013); WTO, *Work Programme on Electronic Commerce*, WT/L/274 (Sept. 30, 1998) (launching ongoing review of e-commerce rules within the WTO framework).

212) Organisation for Economic Co-operation and Development [OECD], *Recommendation of the Council on Artificial Intelligence* (May 22, 2019), <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0449> (adopting principles on transparency, fairness, and accountability in AI).

213) *U.S.—Shrimp*, supra note 122, ¶¶ 129–32 (recognizing that treaty obligations may be interpreted in light of evolving international standards).

VI.4. Promise of Digital KORUS 2.0

VI.4.1 Indo-Pacific Exportability as the Core Promise

The true promise of a Digital KORUS lies not only in its capacity to modernize an outdated bilateral treaty but in its potential to become an exportable model for digital governance in the Indo-Pacific.²¹⁵⁾ Amid a landscape divided between the European Union's rights-maximalism and the United States' deregulatory multilateralism, KORUS 2.0 could offer a credible and effective "third way." This framework could not only provide legal durability but also ensure normative legitimacy.²¹⁶⁾ If structured intelligently, it can serve as a pioneering treaty, delivering proven templates for legal interpretation while potentially breathing new life into the stalled WTO negotiations on e-commerce.²¹⁷⁾

The notion of exportability within this framework is grounded in established trade practices. WTO law has long recognized the diffusion of treaty norms across regimes.²¹⁸⁾ For instance, the GATS Annex of Telecommunications and the TRIPS agreement set foundational rules that have since been adopted in regional and bilateral accords.²¹⁹⁾ Similarly, NAFTA's side letters and protocols introduced dispute-settlement innovations into USMCA.²²⁰⁾ In a similar way, a

214) Burri, *supra* note 5, at 343 (arguing that embedding references to evolving soft-law frameworks can ensure durability and adaptability in digital trade agreements).

215) Wolfgang Alschner, *The Evolving Digital Trade Order: Towards Rulemaking 2.0*, 22 J. INT'L ECON. L. 707, 712-14 (2019) (arguing that bilateral and regional innovation can create templates for broader governance).

216) Anupam Chander, *The Electronic Silk Road: How the Web Binds the World Together in Commerce* 205-07 (2013) (contrasting EU rights-protective approaches with U.S. deregulatory traditions); Sungjoon Cho & Jürgen Kurtz, *Convergence and Divergence in International Economic Law and Politics*, 29 EUR. J. INT'L L. 169, 175-78 (2018) (analyzing structural divergence in trade governance philosophies).

217) WTO, *Work Programme on Electronic Commerce*, WT/L/274 (Sept. 30, 1998); WTO, *Joint Statement on Electronic Commerce* (Jan. 25, 2019) (noting ongoing plurilateral talks stalled in Geneva).

218) Wolfgang Alschner, *The Evolving Digital Trade Order: Towards Rulemaking 2.0*, 22 J. INT'L ECON. L. 707, 714 (2019) (noting doctrinal pathways for diffusion of treaty norms).

219) GATS: General Agreement on Trade in Services Annex on Telecommunications, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183; Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), Apr. 15, 1994, Marrakesh Agreement Establishing the WTO, Annex 1C, 1869 U.N.T.S. 299.

KORUS annex that ensures cross-border data flows, source-code protection, and cyber security cooperation could provide a tested reference for multilateral efforts within IPEF, where consensus among fourteen economies has proven elusive.²²¹⁾

Three mechanisms illustrate how this model can work successfully. First is textual diffusion; incorporating binding digital provisions by reference would create a framework for regional adoption, much like how CPTPP's e-commerce chapter has influenced both USMCA and DEPA.²²²⁾ Second, the normative signaling effect would arise from a treaty between two leading digital economies, demonstrating that there is compatibility between liberalization and ethics-based governance. This could counterbalance the dominant influences of the EU's GDPR maximalism and China's stricter local mandates.²²³⁾ WTO jurisprudence supports this notion, indicating that regulatory autonomy and liberalization can coexist through proportionality, as seen in *Brazil-Retreaded Tyres* and *U.S.-Shrimp*.²²⁴⁾ By embedding proportionality into exceptions for privacy and security, KORUS 2.0 would not only discipline its own parties but also signal a doctrinally legitimate template for others.²²⁵⁾

Third, establishing a Joint U.S.-Korea Digital Committee could establish cooperative ties with existing frameworks, such as DEPA's modular committees and the ASEAN Digital Economy Framework Agreement.²²⁶⁾ This follows established treaty practices where committees and

220) NAFTA, *supra* note 174, *side letters*; USMCA, *supra* note 9, ch. 31 (dispute settlement) (incorporating innovations from NAFTA practice).

221) Indo-Pacific Economic Framework for Prosperity [IPEF], *Ministerial Statement* (May 27, 2023), <https://www.commerce.gov/news/press-releases/2023/05/indopacific-economic-framework-prosperity-ipef-ministerial-statement>.

222) DEPA, *supra* note 9, Modules 6 & 8.

223) Anupam Chander, *The Electronic Silk Road: How the Web Binds the World Together in Commerce* 205–07 (2013); Sungjoon Cho & Jürgen Kurtz, *Convergence and Divergence in International Economic Law and Politics*, 29 EUR. J. INT'L L. 169, 175–78 (2018).

224) *Brazil—Retreaded Tyres*, *supra* note 119, ¶¶ 140–43 (adopted Dec. 17, 2007); Appellate Body Report, *US—Shrimp*, ¶¶ 129–32 (adopted Nov. 6, 1998).

225) Neha Mishra, *Building Bridges: International Trade Law, Internet Governance and the Regulation of Data Flows*, 19 J. INT'L ECON. L. 263, 293–95 (2016) (arguing that proportionality can reconcile regulatory autonomy with trade liberalization in digital governance).

226) ASEAN, *Digital Economy Framework Agreement (DEFA) Scoping Document* (2023), <https://asean.org/digital->

review bodies such as the WTO TBT committee, effectively promote regulatory alignment without needing full scale renegotiation.²²⁷⁾

By integrating these pathways into its framework, Digital KORUS would not simply modernize a bilateral treaty. It would function as a regional connector, exporting legitimacy-sensitive liberalization throughout Indo-Pacific regimes. This shift from bilateral update to regional model is precisely what turns KORUS 2.0 into a doctrinally credible and geopolitically striking “pioneering” treaty.

VI.4.2 Dual-Track Framework as the Enabler of Legitimacy

The successful exportability of KORUS 2.0 depends on its ability to harmonize divergent regulatory identities while establishing predictable rules.²²⁸⁾ A dual-track framework enables this equilibrium. Binding obligations can be consolidated in areas of consensus—such as cross-border data flows, cybersecurity cooperation, and source-code protection — while more contentious domains like artificial intelligence ethics, platform accountability, and digital services taxation can be addressed through soft-law mechanisms.²²⁹⁾

This approach is not arbitrary; it is grounded in established legal principles.²³⁰⁾ WTO jurisprudence consistently applies the principle of proportionality to mediate between liberalization and regulatory autonomy.²³¹⁾ In *Brazil-Retreaded Tyres*, the Appellate Body held that environmental measures must represent the “least trade-restrictive means” consistent with their

economy-framework-agreement-defa/ (laying groundwork for regional digital rules).

227) Agreement on Technical Barriers to Trade arts. 13–15, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 120. (establishing the TBT Committee to monitor and harmonize standards).

228) Burri, *supra* note 5, at 343–44 (arguing that predictable rules are necessary to sustain legitimacy in digital trade governance).

229) USMCA, *supra* note 9, arts. 19.11, 19.15–19.16; DEPA, *supra* note 9, Modules 4 & 8 (using soft-law mechanisms for digital inclusion and AI ethics).

230) Neha Mishra, *Building Bridges: International Trade Law, Internet Governance and the Regulation of Data Flows*, 19 J. INT’L ECON. L. 263, 293–95 (2016) (arguing that proportionality supplies doctrinal grounding for reconciling regulatory divergence in digital trade).

231) Joost Pauwelyn, *Rule Dynamics in Trade and Investment Law: Rule Change, Creation and Removal in the WTO and Investor-State Arbitration*, 13 J. INT’L ECON. L. 563, 571–73 (2010).

objective. In *U.S.—Shrimp*, it upheld marine conservation measures so long as they were applied in a non-arbitrary and transparent manner.²³²⁾ Likewise, In *EC—Asbestos*, the Appellate Body upheld a French ban on asbestos under GATT Article XX(b), confirming that members may adopt divergent regulatory measures when necessary to protect human health, so long as such measures are not applied in an arbitrary or unjustifiable manner.²³³⁾ Collectively, these precedents demonstrate that international economic law legitimizes regulatory pluralism by disciplining it through proportionality and non-discrimination, not by demanding uniformity.²³⁴⁾

Regional treaty practice reinforces this incrementalism. Frameworks like CPTPP and USMCA codify binding rules on data flows and source code, whereas DEPA employs modular cooperation on emerging areas such as AI and digital identity.²³⁵⁾ Similarly, historic protocols and side letters in NAFTA provided NAFTA’s side letters and protocols functioned as “dual tracks” of obligation and experimentation, later consolidated in USMCA.²³⁶⁾ By analogy, a Digital KORUS can entrench firm disciplines where consensus exists while institutionalizing soft-law cooperation in unsettled domains.²³⁷⁾

Lastly, domestic legal practice points in the same direction. In *Vermont Yankee*, the U.S. Supreme Court affirmed that agencies may proceed “step by step,” recognizing incrementalism as a legitimate mode of governance.²³⁸⁾ Korea’s Constitutional Court has likewise applied proportionality without abandonment of core values.²³⁹⁾ Together, these doctrines show that

232) *Brazil—Retreaded Tyres*, supra note 119, ¶¶ 140–43; Appellate Body Report, *U.S.—Shrimp*, supra note 122, ¶¶ 129–32.

233) Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc. WT/DS135/AB/R, ¶¶ 172–74 (adopted Apr. 5, 2001).

234) Burri, supra note 14, at 343–44 (noting that WTO jurisprudence disciplines regulatory pluralism through proportionality and non-discrimination, rather than requiring uniformity).

235) Comprehensive and Progressive Agreement for Trans-Pacific Partnership arts. 14.11, 14.17, Mar. 8, 2018, 57 I.L.M. 645; United States–Mexico–Canada Agreement arts. 19.11, 19.16, July 1, 2020; Digital Economy Partnership Agreement, Modules 6 (Digital Identity), 8 (Artificial Intelligence) (2020).

236) North American Free Trade Agreement, U.S.–Can.–Mex., Dec. 17, 1992, 32 I.L.M. 289, side letters and protocols; USMCA, supra note 9, ch. 31 (dispute settlement).

237) Wolfgang Alschner, *The Evolving Digital Trade Order: Towards Rulemaking 2.0*, 22 J. INT’L ECON. L. 707, 712–14 (2019).

238) *Vermont Yankee*, 435 U.S. at 524.

sequencing and dual-track regulation are not mere political compromises but accepted modes of governance in both domestic and international law.²⁴⁰⁾

By embedding this dual track design, KORUS 2.0 would avoid both the paralysis of consensus and the rigidity of premature legalization.²⁴¹⁾ More importantly, it would demonstrate to Indo-Pacific states that treaty law can be simultaneously firm and flexible, transforming bilateral compromise into a generalizable design principle for regional digital governance.²⁴²⁾

VI.4.3 Institutional Innovation as the Mechanism of Scalability

Exportability also requires a treaty architecture capable of adaptation.²⁴³⁾ A Joint U.S.-Korea Digital Committee would provide this institutional innovation.²⁴⁴⁾ Its mandate would extend beyond periodic consultations; it would serve as the treaty's update engine, ensuring that KORUS 2.0 remains both legally sound and technologically responsive.²⁴⁵⁾

The Committee's functions could operate along three dimensions. First, interpretive authority. By issuing interpretive notes and model protocols, the Committee would clarify how existing treaty provisions apply to emerging technologies such as generative AI, quantum computing, and cross-border digital identity.²⁴⁶⁾ This process prevents disputes from escalating to arbitration

239) Constitutional Court [Const. Ct.], 2005Hun-Ka14, Aug. 30, 2007 (S. Kor.) (recognizing informational self-determination while applying proportionality balancing).

240) Neha Mishra, *Building Bridges: International Trade Law, Internet Governance and the Regulation of Data Flows*, 19 J. INT'L ECON. L. 263, 293-95 (2016).

241) Wolfgang Alschner, *The Evolving Digital Trade Order: Towards Rulemaking 2.0*, 22 J. INT'L ECON. L. 707, 712-14 (2019).

242) Sungjoon Cho & Jürgen Kurtz, *Convergence and Divergence in International Economic Law and Politics*, 29 EUR. J. INT'L L. 169, 175-78 (2018) (arguing that pluralist treaty design can supply generalizable governance models).

243) Burri, *supra* note 5, at 341-42 (emphasizing the need for adaptive treaty design to maintain durability in digital trade law).

244) Marrakesh Agreement Establishing the World Trade Organization art. IV(5), Apr. 15, 1994, 1867 U.N.T.S. 154 (describing how committees can institutionalize ongoing interpretation and oversight).

245) See Joost Pauwelyn, *Is It International Law or Not, and Does It Even Matter?*, 12 Int'l L. Stud. Rev. 147, 154-58 (2019) (discussing institutionalized flexibility through treaty committees).

246) *Id.* (authorizing committees to clarify obligations).

while cultivating a shared interpretive practice that may later be codified through formal annexes.²⁴⁷⁾

Second, dynamic rule management. The Committee could oversee living annexes that contain modular provisions on fast-moving issues. Instead of reopening the core treaty text, parties could add, revise, or sunset annex provisions through streamlined procedures.²⁴⁸⁾ Coupled with dynamic review clauses, this ensures that treaty obligations evolve in sync with technology rather than lagging behind it.²⁴⁹⁾

Third, external linkage. To avoid regulatory insularity, the Committee could draw on international standards as references. Provisions on AI might reference OECD or G7 principles, while cybersecurity measures could defer to evolving ISO or NIST standards.²⁵⁰⁾ Incorporating such references by design allows KORUS 2.0 to automatically align with global best practices, reducing the need for frequent renegotiation while maintaining flexibility for domestic implementation.²⁵¹⁾

Taken together, these functions transform the Committee into more than just a bureaucratic forum; it becomes the institutional hinge that makes KORUS 2.0 scalable.²⁵²⁾ By blending binding obligations with an update function built into the treaty architecture, the Committee ensures that modernization becomes a continuous process of rule-based adaptation.²⁵³⁾ This design allows

247) Joost Pauwelyn, *Rule Dynamics in Trade and Investment Law: Rule Change, Creation and Removal in the WTO and Investor-State Arbitration*, 13 J. INT'L ECON. L. 563, 571–73 (2010).

248) *DEPA*, supra note 9, Modules 6 & 8.

249) Comprehensive and Progressive Agreement for Trans-Pacific Partnership art. 27.2, Mar. 8, 2018, 57 I.L.M. 645 (providing for periodic review by a Joint Committee); EU-Japan Economic Partnership Agreement, art. 8.81, Feb. 1, 2019, 2019 O.J. (L 330) 3 (requiring regular review of digital trade commitments).

250) OECD, *Recommendation of the Council on Artificial Intelligence* (May 22, 2019); G7, *Hiroshima AI Process Comprehensive Policy Framework* (Dec. 2023), <https://www.g7hiroshima.go.jp/en/topics/ai.html>; Int'l Org. for Standardization [ISO], *ISO/IEC 27001: Information Security Management* (2013); Nat'l Inst. of Standards & Tech. [NIST], *Artificial Intelligence Risk Management Framework 1.0* (2023).

251) Neha Mishra, *Building Bridges: International Trade Law, Internet Governance and the Regulation of Data Flows*, 19 J. INT'L ECON. L. 263, 293–95 (2016).

252) Wolfgang Alschner, *The Evolving Digital Trade Order: Towards Rulemaking 2.0*, 22 J. INT'L ECON. L. 707, 712–14 (2019) (arguing that institutional design can make bilateral innovations scalable).

253) *DEPA*, supra note 9, Modules 6 & 8.

other jurisdictions to follow the KORUS model with confidence that its legal framework will remain durable, credible, and future-proof.²⁵⁴⁾

VI.4.4 A Normative Pathfinder for the Region

KORUS 2.0 is more than just an update to a trade agreement between Korea and the U.S.—it offers a blueprint for a new governance paradigm in the Indo-Pacific. In a region increasingly fragmented by divergent digital regulations, data localization mandates, and claims of digital sovereignty, KORUS 2.0 stands out as a principled alternative to techno-nationalism. By ensuring fairness, transparency, and accountability into digital trade rules, it creates a balanced framework that promotes openness while respecting legitimate ethical and security concerns.²⁵⁵⁾

The implications extend well beyond Seoul and Washington. As global negotiations on e-commerce remain stalled at the WTO, a modernized KORUS can reinvigorate rulemaking in digital trade by demonstrating that bilateral frameworks can serve as laboratories of multilateralism.²⁵⁶⁾ By blending firm treaty commitments with cooperative “soft-law” mechanisms, KORUS 2.0 illustrates how international economic law can navigate emerging technologies—such as artificial intelligence, cross-border data governance, and platform accountability—without sacrificing democratic oversight or national identity.²⁵⁷⁾

254) ASEAN, *Digital Economy Framework Agreement (DEFA) Scoping Document* (2023), <https://asean.org/digital-economy-framework-agreement-defa/> (noting the importance of adaptable treaty models for regional diffusion); Neha Mishra, *Building Bridges: International Trade Law, Internet Governance and the Regulation of Data Flows*, 19 J. INT'L ECON. L. 263, 293–95 (2016).

255) See generally Henry Gao, *Digital Trade Integration and the Rise of Digital Sovereignty*, 25 J. Int'l Econ. L. 1, 4–8 (2022) (analyzing the tension between openness and digital sovereignty in global trade governance).

256) Peter A. Petri & Michael G. Plummer, *Rethinking Trade Agreements for the Digital Era*, Brookings Institution (Mar. 2022), <https://www.brookings.edu> (arguing that bilateral and regional digital trade agreements can pioneer rules later adopted multilaterally).

257) See U.S.–Korea Free Trade Agreement, U.S.–S. Kor., June 30, 2007, art. 15.8, <https://ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text> (committing parties to maintain transparency in electronic commerce regulation); see also OECD, *Recommendation of the Council on Artificial Intelligence* ¶¶ 2–3 (2019), <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0449> (outlining ethical and democratic governance principles for AI); Susan Aaronson, *Data Is Different: Why the World Needs a New Approach to Governing Cross-Border Data Flows*, 24 J. World Trade 125, 132–35 (2023).

Ultimately, the promise of a Digital KORUS lies in its capacity to show that law, not technology alone, should shape the digital landscape of the twenty-first century. Beyond its legal modernization, a Digital KORUS 2.0 carries significant geopolitical and economic weight.²⁵⁸⁾ Politically, it would integrate Korea within the normative architecture of the U.S.-led Indo-Pacific digital order while offering a balanced alternative to China's data sovereignty model.²⁵⁹⁾ Economically, it would stabilize the regulatory environment for AI and data-driven services, reducing compliance barriers for Korean and U.S. technology firms.²⁶⁰⁾ In this light, Digital KORUS 2.0 is not merely a legal update; it is a strategic framework that connects market access with democratic digital governance.

VII. CONCLUSION

The modernization of KORUS should no longer be viewed as an aspirational reform but as a natural stage in its legal evolution.²⁶¹⁾ Originally negotiated in 2007 and lightly amended in 2018, the agreement was crafted for an economic landscape largely dominated by goods and traditional services.²⁶²⁾ However, it has shown itself to be incapable of addressing the complexities of today's economy, which is characterized by cross-border data flows, algorithmic governance, cybersecurity risks, and dominance of major platforms.²⁶³⁾ Maintaining KORUS in its current form would likely lead to increased uncertainty, bilateral tensions, and a dependence on extra-

258) See Mireya Solís, *A Digital Trade Agreement for the Indo-Pacific: Strategic Context and Design Considerations*, Brookings Institution (2023), <https://www.brookings.edu/articles/a-digital-trade-agreement-for-the-indo-pacific>.

259) China-Cyberspace Administration, *Data Security Law of the People's Republic of China* (June 10, 2021) (illustrating state-centric sovereignty model).

260) Korea Ministry of Science & ICT, *AI Ethics Guidelines* (Dec. 2020) (promoting interoperability and responsible innovation).

261) Burri, *supra* note 5, at 559 (noting that older FTAs require modernization to address digital economy challenges).

262) Office of the U.S. Trade Representative, *United States-Korea Free Trade Agreement (KORUS)* (2007), <https://ustr.gov/trade-agreements/free-trade-agreements/korus-fta> (last visited Sept. 6, 2025).

263) Aaronson, *supra* note 15, at 41-42 (describing the challenges posed by cross-border data flows, algorithmic governance, and cybersecurity risks).

territorial frameworks such as the GDPR, or the de facto standards set by powerful companies.²⁶⁴⁾ To effectively update KORUS, however, we need a strategy that is fundamentally different from simply pushing for maximalist positions. Any meaningful reforms must be grounded in legal realist perspective, connecting national identities with the need for harmonized baselines.²⁶⁵⁾

This Note emphasizes three key contributions. First, it has highlighted the deficiencies of KORUS, particularly in its electronic commerce chapter, which lacks the substance needed to address pivotal issues in digital trade. In contrast, the recent jurisprudence of the WTO and the practices within agreements like USMCA, CPTPP, and DEPA indicate that binding rules on data flows, source code, and cybersecurity are not only feasible but increasingly regarded as the hallmark of modern trade law.²⁶⁶⁾ Secondly, this Note has proposed a legally realistic model of treaty modernization. Rather than insisting on “all or nothing,” it recommends sequencing: beginning with an annex that locks in consensus rules while binding habits of cooperation, and progressing toward a comprehensive digital chapter once technical alignment and political trust permit.²⁶⁷⁾ This methodology combines obligations with soft-law mechanisms, ensuring that the agreement remains flexible and responsive to changing circumstances.²⁶⁸⁾ At each stage, the approach is animated by a jurisprudential commitment to “fit”: rules tailored to reconcile liberalization with principled exceptions, experimentation with predictability.²⁶⁹⁾

The potential benefits of a Digital KORUS extend far beyond the immediate bilateral

264) GDPR, *supra* note 133; see also Chander & Lê, *supra* note 22, at 690 (warning against reliance on de facto standards imposed by dominant platforms absent treaty-level rules).

265) Gao, *supra* note 13, at 72–73 (arguing for legal realism and harmonized baselines in digital trade agreements).

266) USMCA, *supra* note 9, arts. 19.11–19.16; CPTPP, *supra* note 9, arts. 14.11, 14.17; DEPA, *supra* note 9, Modules 6 & 8; *Brazil—Retreaded Tyres*, *supra* note 119, ¶¶ 140–43; U.S.—Shrimp, *supra* note 122, ¶¶ 129–32.

267) Neha Mishra, *Building Bridges: International Trade Law, Internet Governance and the Regulation of Data Flows*, 19 J. INT’L ECON. L. 263, 293–95 (2016) (arguing sequencing is a doctrinally legitimate strategy for digital trade).

268) Wolfgang Alschner, *The Evolving Digital Trade Order: Towards Rulemaking 2.0*, 22 J. INT’L ECON. L. 707, 712–14 (2019) (describing layered governance as a solution to brittleness in digital trade law).

269) Susan Ariel Aaronson, *Data Is Different: Why the World Needs a New Approach to Governing Cross-Border Data Flows*, 44 WORLD TRADE REV. 35, 41–43 (2020) (calling for treaty rules that reconcile liberalization with principled exceptions).

relationship.²⁷⁰⁾ When well structured, it could serve as a pioneering text for the WTO's e-commerce work program, a useful model for IPEF partners seeking legitimacy-sensitive liberalization, and a geopolitical signal that the rules governing the Indo-Pacific will be shaped by those who are active in building and regulating digital infrastructure - not merely imposed by external regulatory forces.²⁷¹⁾ By recognizing and embedding constitutional differences between Korea's ethics-first orientation and the United States' innovation-first pluralism into a coherent framework, a Digital KORUS would illustrate that international economic law can govern complex socio-technical systems while honoring national identities.²⁷²⁾

Looking ahead, future research should pursue at least three avenues. First, the architecture of Indo-Pacific digital governance remains unsettled. The interaction of Digital KORUS with DEPA, IPEF, and ongoing WTO negotiations will influence whether modular, annex-based frameworks or more comprehensive chapters become the leading design.²⁷³⁾ Second, the harmonization of AI ethics across jurisdictions should be a focus of deeper investigation. Existing soft law instruments, such as OECD AI principles and the G7 Hiroshima AI Process provide useful templates, but there are challenges related to their integration into binding treaty texts without solidifying contested values.²⁷⁴⁾ Third, the evolution of trade dispute resolution in digital contexts needs thoughtful examination. WTO and FTA panels will soon face critical questions regarding proportionality, algorithmic transparency, and data protection exceptions, making it essential to consider whether the current legal framework is sufficient or in need of reform.²⁷⁵⁾

Although the global trade landscape has shifted from optimism of liberalization to a focus on

270) Burri, *supra* note 5, at 345 (arguing that bilateral modernization can catalyze plurilateral and multilateral rulemaking).

271) IPEF, *supra* note 222; see also Gao, *supra* note 16, at 75.

272) Aaronson, *supra* note 15, at 44–45 (explaining that digital trade governance must accommodate national regulatory identities while building legitimacy-sensitive liberalization).

273) DEPA, *supra* note 9; IPEF, *supra* note 222; see also Burri, *supra* note 14, at 345 (arguing that bilateral digital treaties can interact with multilateral negotiations to shape governance architecture).

274) OECD, *supra* note 45; G7, *Hiroshima AI Process Comprehensive Policy Framework* (Dec. 2023), <https://www.g7hiroshima.go.jp/en/topics/ai.html> (proposing cross-border AI governance principles for adoption by G7 members).

275) *Brazil—Retreaded Tyres*, *supra* note 119, ¶¶ 210–12; *U.S.—Shrimp*, *supra* note 122, ¶¶ 129–32.

protectionism and industrial policy, the modernization of KORUS with digital provisions is still very important.²⁷⁶⁾ Even as traditional tariff cuts lose political support, digital trade rules are becoming the new frontier of economic integration.²⁷⁷⁾ They are shaping the flows of data, algorithms, and platforms that define commerce in the twenty-first century.²⁷⁸⁾ Modernizing KORUS is not just a small change; it is a strategic renewal. It revitalizes a treaty that has lost relevance since the renegotiations during the Trump era.²⁷⁹⁾ It also reaffirms KORUS's role as a guiding framework amid the decline of free trade in multilateral agreements. In this way, a Digital KORUS would maintain the agreement's legitimacy and importance by updating it to address the areas where global interdependence is now most significant.²⁸⁰⁾

The overarching lesson from KORUS is that treaty law cannot and must not remain static.²⁸¹⁾ In the dynamic field of digital trade, stability is achieved not through rigidity, but through well-designed adaptability.²⁸²⁾ By anchoring the modernization process in legal realism, sequencing reforms carefully, and innovating layered governance, a Digital KORUS can become more than a bilateral update; it has the potential to serve as a foundational pillar for the law of digital trade in the Indo-Pacific and beyond.²⁸³⁾ The legitimacy of this initiative – and of the trade law

276) See generally Hyerim Kim, *Why South Korea Should Pursue a Digital Trade Deal with the U.S.*, Korea Economic Inst. of Am. (Oct. 28, 2025), <https://keia.org/the-peninsula/why-south-korea-should-pursue-a-digital-trade-deal-with-the-u-s/>

277) See Deborah Elms, *Comparing Digital Rules in Trade Agreements*, Asia Bus. Trade Ass'n (July 24, 2019), <https://asiantradecentre.org/talkingtrade/comparing-digital-rules-in-trade-agreements> (noting that digital provisions have become a defining feature of modern FTAs).

278) See Mira Burri, *Towards a New Treaty on Digital Trade*, 55 J. World Trade 77, 83-85 (2021)

279) See United States-Korea Free Trade Agreement (KORUS) Amendments, Sept. 3, 2018, Off. U.S. Trade Representative, <https://ustr.gov/trade-agreements/free-trade-agreements/korus-fta/korus-modifications> (summarizing 2018 revisions that primarily addressed automotive and pharmaceutical sectors rather than digital trade).

280) See United States-Korea Free Trade Agreement, arts. 15.7-15.9, Apr. 17, 2012, S. TREATY DOC. No. 112-14 (mandating that parties refrain from unnecessary barriers to electronic information flows across borders); Junghyun Park, *Digital Trade Agreements: Korea's Experience* 4-8 (Sept. 12, 2023), https://uncitral.un.org/sites/uncitral.un.org/files/pages/RCAP/day_2_law_track_2_mr._junghyun_park.pdf (explaining how KORUS served as an early model for subsequent digital-trade frameworks).

281) Burri, *supra* note 5, at 559 (arguing that digital trade requires modernization of older FTAs).

282) Aaronson, *supra* note 15, at 42-43 (emphasizing adaptability, not rigidity, as the basis for stable digital governance).

283) Gao, *supra* note 13, at 75 (describing how bilateral and regional agreements can serve as pathfinders for Indo-Pacific and multilateral digital trade law).

as a whole – depends on our ability to realize these aspirations.²⁸⁴⁾

[국문초록]

디지털 KORUS FTA를 향하여:
데이터, 인공지능, 전자상거래 거버넌스를 위한 법제도 개혁

김광우

2007년 체결되고 2018년에 개정된 한·미 자유무역협정(KORUS)은 디지털 시대 이전에 협상된 결과로, 데이터 이동, 인공지능, 플랫폼, 사이버보안에 관한 규정을 포함하고 있지 않다. 미국과 한국이 디지털 혁신 및 규제 분야에서 주도적 역할을 수행하고 있는 현 시점에서, 이러한 공백은 KORUS를 시대에 뒤떨어진 협정으로 만들고 있다.

본 논문은 KORUS가 디지털 무역을 위한 신뢰할 수 있는 규범적 틀로 현대화될 수 있는지 그 가능성을 검토한다. 필자는 개혁이 시급하면서도 가능하다고 주장하지만 단순히 다른 협정의 진보된 조항을 이식하는 방식이 아니라 각국의 규제 맥락을 반영한 법적 현실주의에 기초해야 한다고 본다. CPTPP, USMCA, DEPA의 비교 분석을 통해 KORUS에 그대로 적용하기 어려운 이유를 밝히고, “디지털 KORUS 2.0”을 위한 단계적 모델을 제안한다. 이 모델은 데이터 및 소스코드 분야에서는 구속력 있는 규범을, 인공지능 및 플랫폼 거버넌스 분야에서는 연성법적 협력 방안을 결합함으로써 한·미 협력을 인도-태평양 디지털 거버넌스의 중심에 위치시키고자 한다.

주제어: 한·미 자유무역협정(KORUS), 디지털 무역, 인공지능 규제, 데이터 이동(Data Flows), 플랫폼 거버넌스, 사이버보안, 인도-태평양 디지털 거버넌스

284) *Id.* (warning that the legitimacy of trade law hinges on its ability to adapt to socio-technical transformations).

[Abstract]

Toward a Digital KORUS FTA: Legal Reforms for Data, AI, and E-Commerce Governance

Kwang Woo Kim

The United States–Korea Free Trade Agreement (KORUS), signed in 2007 and amended in 2018, was negotiated in a pre-digital era and contains no provisions on data flows, AI, platforms, or cybersecurity. This gap has left KORUS increasingly outdated, even as the United States and Korea have become leaders in digital innovation and regulation. This Note explores the extent to which the KORUS Free Trade Agreement can be reinterpreted and restructured to serve as a credible framework for digital trade governance between the United States and Korea. It argues that reform is both urgent and possible, but only if grounded in legal realism and structured to reflect domestic regulatory contexts. Through comparative analysis of CPTPP, USMCA, and DEPA, it demonstrates why advanced digital provisions cannot simply be transplanted into KORUS. Instead, it proposes a layered model for a “Digital KORUS 2.0”: binding rules on data and source code combined with soft-law cooperation on AI and platform governance, positioning U.S.–Korea cooperation at the center of Indo-Pacific digital governance.

Keywords: KORUS FTA, digital trade, AI regulation, data flows, platform governance, cybersecurity, Indo-Pacific digital governance