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Digital Trade Governance in the Asia-Pacific Region

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DIGITAL TRADE GOVERNANCE IN THE ASIA-PACIFIC REGION

Xiaomeng Qu*

ABSTRACT

This paper provides a systematic study of digital trade governance in the Asia-Pacific region. It starts with a brief review of the current landscape of digital trade agreements in the region and existing rules and ongoing negotiations at the WTO. This provides an important context for understanding the Asia-Pacific approach to digital trade governance. The paper then provides a detailed analysis of the key components of the three most recent trade agreements in the region, namely, the CPTPP, RCEP and DEPA. It discusses the agreements' breadth and depth of topics, negotiation pattern and regulatory framework, including their approach to addressing some major emerging issues in digital trade governance. The paper argues that these Asia-Pacific agreements have developed a pragmatic and incremental approach to digital trade governance by focusing on matters of the greatest economic significance to them while at the same time, gradually promoting consensus building on controversial and emerging issues. This approach provides a plausible model for negotiations of digital trade regulation at the multilateral level.

KEYWORDS: *Digital trade governance, Asia-Pacific trade agreements, regional integration, international cooperation*

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I. INTRODUCTION

Digital technologies supported global economic activities during the COVID-19 pandemic, and remain critical for economic recovery and development in the post-pandemic era.¹ Meanwhile, the transition to a digital economy worldwide has generated new challenges for international trade, demanding the establishment of a comprehensive, fair, and effective global governance framework for digital trade.² However, due to the divergence of regulatory philosophy and approaches among governments, progress in formulating multilateral digital trade rules within the framework of the WTO has been slow. Thus, countries have shifted forums and utilised bilateral, plurilateral and regional trade venues to promote regulatory cooperation on digital trade rules at these sub-multilateral levels.³

The Asia-Pacific region has become a pioneer in digital trade governance. The region's flourishing digital economy has led to the development of extensive policies and legislation related to digital trade,⁴ as well as active regional cooperation exemplified by mega-regional trade agreements – i.e. the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and the Regional Comprehensive Economic Partnership (RCEP) – and by dedicated digital trade agreements, such as the Digital Economy Partnership Agreement (DEPA) between Chile, New Zealand, and Singapore. These trade agreements not only boast distinctive features but also incorporate several principles that are agreeable to the two largest digital economies – the US and China, which are likely to shape global rules on digital trade going forward.

A growing body of scholarship has explored country-based regulatory approaches to digital trade and the reform of WTO rules.⁵ However, only a few studies have offered a systematic analysis of digital trade governance in the Asian-Pacific region.⁶ To fill this gap, this article seeks to explore the region's approach to digital trade issues. Section II starts by briefly reviewing the current landscape of

¹ OECD, *Leveraging Digital Trade to Fight the Consequences of COVID-19* (1 July 2020), <https://www.oecd.org/coronavirus/policy-responses/leveraging-digital-trade-to-fight-the-consequences-of-covid-19-f712f404/>.

² This article uses the term 'digital trade' and 'e-commerce' interchangeably in this article as they are not differentiated in most trade agreements.

³ Mira Burri, 'Towards a New Treaty on Digital Trade' (2021) 55(1) *Journal of World Trade* 77, 80.

⁴ Deborah Elms, *Digital Trade in the Asia-Pacific* (December 2020), <https://www.hinrichfoundation.com/research/wp/digital/digital-trade-asia-pacific/>.

⁵ See, eg. Henry Gao, 'Digital or Trade: The Contrasting Approaches of China and US to Digital Trade' (2018) 21(2) *Journal of International Economic Law* 197; Susan Ariel Aaronson and Patrick Leblond, 'Another Digital Divide: The Rise of Data Realms and its Implications for the WTO' (2018) 21 *Journal of International Economic Law* 245; Andrew D. Mitchell and Neha Mishra, 'Regulating Cross-Border Data Flows in a Data-Driven World: How WTO Law Can Contribute' (2019) 22 *Journal of International Economic Law* 389; Ines Willems, 'Agreement Forthcoming? A Comparison of EU, US, and Chinese RTAs in Times of Plurilateral E-Commerce Negotiations' (2020) 23 *Journal of International Economic Law* 221.

⁶ See, eg. Neha Mishra and Ana Maria Palacio Valencia, 'Digital services and digital trade in the Asia Pacific: an alternative model for digital integration?' (2023) 31(2) *Asia Pacific Law Review* 489; Stephanie Honey, 'Asia-Pacific digital trade policy innovation' in Ingo Borchert and L. Alan Winters (eds), *Addressing Impediments to Digital Trade* (CEPR Press, 2021) 217.

digital trade governance in the Asia Pacific in response to the new challenges triggered by the data-driven economy. Section III then discusses the regulation of digital trade under the WTO and the relevant WTO negotiations to assess the major disagreements and opportunities for cooperation among governments. This is followed in Section IV by a detailed analysis of the breadth and depth of topics, negotiation patterns and regulatory frameworks, as well as key emerging issues in digital trade governance in the Asia-Pacific, focusing on the CPTPP, RCEP and DEPA. Section V concludes by offering some observations on how the regulatory experience in the Asia-Pacific may facilitate international cooperation on digital trade regulation.

II. CURRENT LANDSCAPE OF DIGITAL TRADE AGREEMENTS IN THE ASIA-PACIFIC

The rapid advance of digital technologies over the past two decades has transformed the traditional ways of trade by creating new types of goods for trade and new modes of transaction, marking the advent of the ‘era of digital trade’. Digital trade is among the most dynamic sectors in the global economy. It has been growing faster than traditional trade in goods and services, and has contributed to post-pandemic economic growth and recovery.⁷ At the same time, the exponential growth of digital trade has brought with it a raft of challenges which have in turn generated regulatory concerns. For instance, digital technologies have posed threats to privacy and security,⁸ resulting in a number of restrictive data policies (i.e. restrictions on the flow of data across borders or on its storage and processing) throughout the world (see Figure 1). These policies can generate regulatory uncertainties, complexities and costs for cross-border data transfer, thereby creating barriers to digital trade for companies.⁹ They may also reduce firms’ capacity to take advantage of network economies of scale which may otherwise be achieved through centralised storage and processing of data.¹⁰ Thus, these restrictive policies and governmental responses in return have caused potential impediments to digital trade.

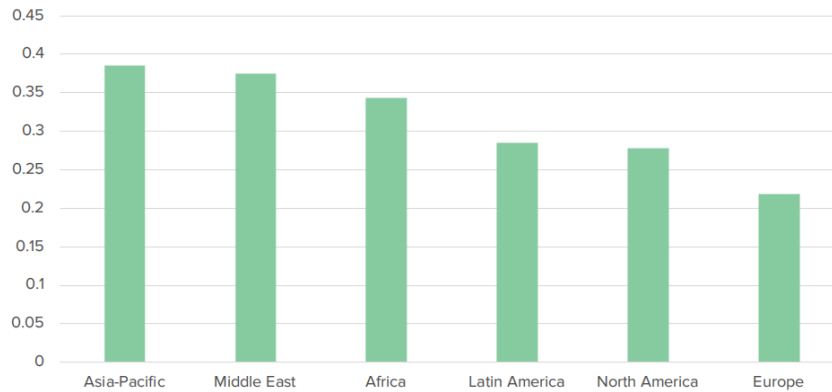
Figure 1 Average Digital Trade Restrictiveness Index by World Region

⁷ Congressional Research Service, *Digital Trade and U.S. Trade Policy* (9 December 2021), <https://sgp.fas.org/crs/misc/R44565.pdf>.

⁸ Mitchell and Mishra, above n 5, 389

⁹ Nigel Cory, *Cross-Border Data Flows: Where Are the Barriers, and What Do They Cost?*, Information Technology & Innovation Foundation (1 May 2017), <https://itif.org/publications/2017/05/01/cross-border-data-flows-where-are-barriers-and-what-do-they-cost/>.

¹⁰ OECD, ‘A Preliminary Mapping of Data Localisation Measures’ (OECD Publishing, 2022) 14.



Source: WTO Digital Trade.¹¹ Lower numbers indicate more open policy stances.

Due to the lack of global rules to facilitate and liberalise digital trade (as will be discussed in Section III), governments have resorted to free trade agreements (FTAs) to advance and experiment with new rules and disciplines.¹² The US-Jordan FTA of 2000 was the first FTA featuring specific e-commerce provisions, i.e. provisions on paperless trading.¹³ Such rules are now included in at least 167 FTAs.¹⁴ The regulatory framework of digital trade governance has also become more comprehensive and refined, developing from a few provisions on digital trade in FTAs, to stand-alone chapters in FTAs, and then to separate agreements on digital trade. The US initially took earnest steps to establish substantial rules for digital trade, leading through the inclusion of chapters on e-commerce or digital trade in the Trans – Pacific Partnership Agreement (TPP) and the US – Mexico – Canada Agreement¹⁵. More recently, countries in the Asia-Pacific region have assumed the initiative in setting rules for digital trade.

The Asia-Pacific’s active role in digital trade rule-making is not surprising given the fast-growing e-commerce market, the predominance of large technology companies, rapid adoption and implementation of digital technologies and services, as well as the high levels of internet penetration and mobile-first consumers in the region.¹⁶ The region has seen the boom of digital trade even in advance of the Covid-19 pandemic, which only accelerated these trends. Meanwhile, as shown in Figure 1, the region has the highest level of restrictiveness in the world.

The Singapore – New Zealand Closer Economic Partnership Agreement¹⁷ was the first FTA in the region to include digital trade rules, particularly on paperless

¹¹ WTO, *Digital Trade: Opportunities and Challenges* (28 February 2023), https://www.wto.org/english/tratop_e/devel_e/digital_trade2022_e.pdf.

¹² Mark Wu, *Digital Trade-Related Provisions in Regional Trade Agreements: Existing Models and Lessons for the Multilateral Trade System*, IDB and ICTSD (2017), https://rtaexchange.org/pdf/Digital%20Trade%20Related%20Provisions%20in%20RTA_%20WU.pdf.

¹³ United States – Jordan Free Trade Agreement, effective on 17 December 2001.

¹⁴ Mira Burri, ‘The Impact of Digitalization on Global Trade Law’ (2023) 24(3) *German Law Journal* 551.

¹⁵ United States – Mexico – Canada Agreement, effective on 1 July 2020.

¹⁶ See generally, World Economic Forum, World Economic Forum, *Advancing Digital Trade in Asia* (15 October 2020), <https://www.weforum.org/publications/advancing-digital-trade-in-asia/#:~:text=Digital%20trade%20in%20Asia%20had,of%20digital%20trade%20rule%20making.>

¹⁷ Singapore-New Zealand Closer Economic Partnership Agreement, effective on 1 January 2001.

trading, the transfer of financial information and data processing within its financial services commitments. The Singapore-Australia FTA¹⁸ was the first to include a stand-alone chapter on e-commerce, followed by the US – Singapore FTA¹⁹, the US – Australia FTA²⁰, the ASEAN – Australia – New Zealand FTA²¹, and the US – Korea FTA²².

A trajectory can be traced from these provisions and chapters through to the US-led TPP in 2015 and its successor the CPTPP in 2018²³ where the e-commerce chapter remains unchanged. The e-commerce provisions in the (CP)TPP have influenced the corresponding rules in the RCEP in 2020, which has a seven-member overlap with the CPTPP. While there are a few differences, particularly on data flows and data localisation (as will be discussed in Section IV), most provisions are similar or identical across the two regional trade agreements (RTAs).²⁴ Ultimately, the trajectory led to the conclusion of the DEPA in mid-2020. Its primary textual source is the CPTPP, to which all three DEPA members are party.²⁵ These efforts have been primarily led by countries with significant commercial benefits to reap when barriers to digital trade are reduced, as well as by those seeking an active role in making international trade rules, such as Singapore, Australia, Japan, and New Zealand.²⁶ At the same time, however, these agreements have been tailored to address different political and economic situations and the scale of digital development among the countries involved. Specifically, digitally advanced countries, such as Singapore and Australia, adopt an open and liberal approach towards digital trade by shaping rules that eliminate or reduce cross-border and domestic barriers, building trust in the digital space and facilitate digital trade in the RTAs.²⁷ Meanwhile, the majority of Asia-Pacific economies approach digital trade inversely in the absence of robust domestic frameworks.²⁸ They begin by making a cooperative commitment in these high-standard RTAs and subsequently develop appropriate domestic procedures to facilitate the implementation of new regional rules and commitments.²⁹ Several Asia-Pacific countries, such as Vietnam, Malaysia, Brunei and even major digital economies, i.e. Japan and China, adopted this approach to facilitate economic and regulatory reforms in a pragmatic and incremental manner.³⁰ This approach is

¹⁸ Singapore-Australia Free Trade Agreement, effective on 28 July 2003.

¹⁹ United States – Singapore Free Trade Agreement, effective on 1 January 2004.

²⁰ United States – Australia Free Trade Agreement, effective on 1 January 2005.

²¹ ASEAN-Australia – New Zealand Free Trade Area, effective on 10 January 2010.

²² United States – Korea Free Trade Agreement, effective on 15 March 2012.

²³ Gao, above n 5, 305.

²⁴ Asian Development Bank, ‘The Regional Comprehensive Economic Partnership Agreement: A New Paradigm in Asian Regional Cooperation?’ (ADB publications, 2022) 63.

²⁵ Dan Ciuriak and Robert Fay, ‘The Digital Economy Partnership Agreement: Should Canada Join?’ (2022) Centre for International Governance Innovation, Policy Brief No. 171, 3.

²⁶ Mishra and Valencia, above n 6, 492.

²⁷ Ministry of Trade and Industry Singapore, *Digital Economy Agreements*, <https://www.mti.gov.sg/Trade/Digital-Economy-Agreements>; Australia Government, Department of Foreign Affairs and Trade, *Digital Trade Strategy* (1 April 2022), <https://www.dfat.gov.au/trade/services-and-digital-trade/e-commerce-and-digital-trade/digital-trade-strategy>.

²⁸ See Neha Mishra, ‘The Role of the Trans-Pacific Partnership Agreement in the Internet Ecosystem: Uneasy Liaison or Synergistic Alliance?’ (2017) 20 *Journal of International Economic Law* 31.

²⁹ Deborah Elms and Nick Agnew, *Digital Trade in Asia*, RSC Working Paper (2022), <https://cadmus.eui.eu/handle/1814/74730>.

³⁰ See, eg, Chien-Huei Wu, ‘ASEAN at the Crossroads: Trap and Track between CPTPP and RCEP’ (2020) 23(1)

therefore characterised as ‘pragmatic incrementalism’,³¹ building on longstanding collaboration, progressively developing consensus on key issues, and integrating adequate regulatory autonomy to accommodate the diversity of digital development and ideological preferences.³²

While there is a clear trend of regulatory cooperation on digital trade governance in the Asia-Pacific region, major FTAs have arguably played a different role in this endeavour. The CPTPP serves as a significant trendsetter and is commonly considered as the benchmark for the modern generation of FTAs.³³ Digital trade provisions in several recent FTAs, especially those addressing data flow issues, are either inspired by or directly borrowed from the CPTPP.³⁴ The RCEP is led by Asia-Pacific countries and boasts the largest membership in the region. While sharing a lineage with earlier Asia-Pacific e-commerce chapters, such as those in the CPTPP, it offers softer and more flexible disciplines, especially on data flows. The DEPA is exemplary as the first stand-alone agreement dedicated to digital trade, with a unique modular structure and disciplines covering various emerging areas of digital trade.

In short, faced with the regulatory challenges triggered by the digital economy, digital trade rules in Asia-Pacific FTAs have become increasingly extensive and rigorous. They not only deal with traditional e-commerce topics but also key issues related to data governance, aiming to remove impediments and promote the growth of digital trade. Thus, it is widely regarded that these FTAs can serve as stepping-stones to the development of sensible solutions to challenges driven by the data-driven economy and more generally of digital trade rules at the multilateral level.³⁵ We will discuss these rules in detail in Section IV. Prior to that, the next section offers an overview of the current state of WTO law and negotiations with regard to digital trade.

III. DIGITAL TRADE REGULATION UNDER THE WTO

Since its creation in 1995, the WTO’s rulebook has largely remained unchanged and therefore has become ill-equipped to address contemporary challenges posed by the digital transformation.³⁶ At the same time, the development of case law at the WTO, in cases such as *US – Gambling* and *China – Publications and Audiovisual Products*,³⁷ has provided some guidance for how digital trade issues may be

Journal of International Economic Law 97; World Bank, *CPTPP Brings Vietnam Direct Economic Benefits and Stimulate Domestic Reforms*, *WB Report Says* (9 March 2018), <https://www.worldbank.org/en/news/press-release/2018/03/09/cptpp-brings-vietnam-direct-economic-benefits-and-stimulate-domestic-reforms-wb-report-says>; Cissy Zhou, *China “needs” trade pact like CPTPP to force it into domestic reform, says former commerce minister*, *SCMP* (11 March 2021), <https://www.scmp.com/economy/global-economy/article/3125005/china-needs-trade-pact-cptpp-force-it-domestic-reform-says>.

³¹ Julien Chaisse and Pasha Hsieh, ‘Rethinking Asia-Pacific Regionalism and New Economic Agreements’ (2023) 31 *Asia Pacific Law Review* 451, 460.

³² Mishra and Valencia, above n 6, 491.

³³ See generally Mishra, above n 28.

³⁴ Manfred Elsig and Sebastian Klotz, ‘Data-Related Provisions in Preferential Trade Agreements: Trends and Patterns of Diffusion’ in Mira Burri (eds), *Big Data and Global Trade Law* (Cambridge University Press, 2021) 42.

³⁵ Burri, above n 3, 80.

³⁶ *Ibid.*, 78.

³⁷ Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (US – Gambling), WT/DS285/AB/R, adopted 7 April 2005; Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment*

addressed.³⁸ The most significant progress made in the two cases is the confirmation of the applicability of WTO rules, particular the General Agreement on Trade in Services (GATS) rules and specific commitments, to e-commerce and digital services.³⁹ Such judicial interpretation, however, did not touch on a number of key issues related to digital trade, such as the classification of the content of certain electronic transmissions, development-related issues and imposition of customs duties on electronic transmissions.⁴⁰ Therefore, it does not provide a solution to the absence of political consensus on how digital trade rules may be developed at the WTO. Overall, the existing regulatory framework of the WTO, including the relevant case law, has proved to be inadequate in dealing with new issues brought about by digital trade.⁴¹

The WTO Membership realised early on the implications of digital technologies for trade and have made many attempts and efforts to advance the liberalization of e-commerce and to create global rules on digital trade. Multilateral cooperation can be traced back to 1998, when the Members adopted the Declaration on Global Electronic Commerce.⁴² The Declaration called for a provisional moratorium on customs duties on electronic transmissions and the establishment of a work programme.⁴³ Pursuant to the Declaration, in September 1998, the General Council adopted the Work Programme on Electronic Commerce and required relevant WTO bodies to examine all trade-related issues relating to global e-commerce, and to update the rules if needed.⁴⁴ Since then, the cooperation on e-commerce has continued, but has not reached any decision on the substantive disciplines.⁴⁵

The major disagreements among main players, particular the US, the EU and China, have centred on issues relating to data flows and localisation. The US, being the leader of global digital economy, has the most advanced internet technology and many leading digital firms, such as Facebook, Google, and Microsoft, that offer digital products and services. The business models of these companies heavily rely on data flows. Therefore, the US favors free flow of data and bans government regulations requiring data localisation in all trade agreements, seeking to limit digital protectionism and enhance the access of its tech giants to the global market.⁴⁶ Compared to the US, the EU has adopted a different approach to data flows. The key

Products, WT/DS363/AB/R, adopted 19 January 2010.

³⁸ Burri, above n 3, 79. See also, Sacha Wunsch-Vincent and Arno Hold, 'Towards coherent rules for digital trade: Building on efforts in multilateral versus preferential trade negotiations' in Mira Burri and Thomas Cottier (ed), *Trade Governance in the Digital Age* (Cambridge University Press, 2012) 179; Shin-Yi Peng, 'Renegotiate the WTO Schedules of Commitments: Technological Development and Treaty Interpretation (2012) 45(2) *Cornell International Law Journal* 403.

³⁹ Wunsch-Vincent and Hold, above n 38, 182.

⁴⁰ See generally, Wunsch-Vincent and Hold, above n 38.

⁴¹ See, eg. Jane Kelsey, 'How a TPP-Style E-commerce Outcome in the WTO would Endanger the Development Dimension of the GATS Acquis (and Potentially the WTO)' (2018) 21(2) *Journal of International Economic Law* 273; Nivedita Sen, 'Understanding the Role of the WTO in International Data Flows: Taking the Liberalization or the Regulatory Autonomy Path?' (2018) 21(2) *Journal of International Economic Law* 323.

⁴² WTO, Declaration on Global Electronic Commerce, WT/MIN (98)/DEC/2, 25 May 1998.

⁴³ *Ibid.*

⁴⁴ WTO, Work Programme on Electronic Commerce: Ministerial Decision, WT/L/274, 30 September 1998.

⁴⁵ Henry Gao, 'Across the Great Wall: E-commerce Joint Statement Initiative Negotiation and China' in Shin-Yi Peng, Ching-Fu Lin and Thomas Streinz (eds), *Artificial Intelligence and International Economic Law* (Cambridge University Press, 2021) 299-300.

⁴⁶ Gao, above n 5, 300-308.

for the EU is protection for privacy in light of a long-standing tradition of endorsing the protection of personal data and privacy as a fundamental right.⁴⁷ These strict data protection policies have been criticised by the US as digital protectionism in defense of the EU firms and digital market. The EU finally refined its position in 2018 by achieving a compromise between trade and privacy, so that it would agree to a horizontal clause on free flow of data and a ban on data localisation requirement, while at the same time, retaining the right to regulate personal data.⁴⁸ Unlike the US and EU, China prioritises data security and sovereignty, adopting stringent regulations to restrict cross-border data flows and localise data in China to ensure stability and security in domestic society.⁴⁹ In addition, China focuses on promotion and facilitation of cross-bordered trade in goods enabled by the internet, a sector in which Chinese companies like JD.com and Alibaba have already become global leaders. The other leading Chinese internet companies that provide digital services, i.e. Tencent and Baidu, primarily cater to the domestic market and do not share the demands by their US counterparts for rules on cross-border digital trade.⁵⁰ Consequently, China has taken a cautious and somewhat reserved approach to data governance in trade agreements. Overall, the varying priorities of these major players create significant challenges to negotiating digital trade rules at the WTO, thereby causing governments to resort to FTAs for such negotiations, as noted in Section II.

The most notable accomplishment under the ambitious Work Programme might be the moratorium on customs duties on electronic transmissions, which has been temporarily extended every two years at the WTO Ministerial Conference since 1998. The last extension was agreed in June 2022 at the 12th Ministerial Conference. However, members remained divided on whether to implement a permanent moratorium or to impose customs duties on electronic transmissions. As several developing members, such as India, South Africa and Indonesia, still hold to the imposition of customs duties, a consensus to make the moratorium permanent at the 13th Ministerial Conference is unlikely.⁵¹

As e-commerce acquired growing prominence in the global economy, governments, led by the US, have been resorting to the WTO to find common ground on important e-commerce issues since 2016.⁵² A group of 76 Members, accounting for over 90 per cent of global trade, initiated exploratory work together toward future WTO negotiations on e-commerce in 2019. They issued a Joint Statement, announcing their intention to commence plurilateral negotiations on e-commerce open for other Members to join, which is widely known as the Joint Statement Initiative (JSI).⁵³ The JSI marked a significant turning point in e-commerce discussions in the WTO as it developed an alternative way (i.e. the plurilateral route) to advance the

⁴⁷ Aaronson and Leblond, above n 5, 258–262.

⁴⁸ European Commission, ‘Horizontal Provisions for Cross-border Data Flows and for personal Data Protection (in EU trade and Investment Agreements)’, published on 18 May 2018.

⁴⁹ Aaronson and Leblond, above n 5, 263–268.

⁵⁰ Gao, above n 5, 317.

⁵¹ WTO, *WTO members intensify discussion on e-commerce moratorium* (18 July 2023), https://www.wto.org/english/news_e/news23_e/ecom_18jul23_e.htm.

⁵² See Kelsey, above n 41, 274.

⁵³ WTO, Joint Statement on Electronic Commerce, WT/L/1056, 25 January 2019. The JSI has grown to include 90 members by 23 October 2023.

negotiations in the absence of progress under the formal Work Programme (i.e. the multilateral track). The Members can now bring new issues, such as free flow of data, data localisation and transfer or access to source code, into the WTO negotiation agendas through JSI e-commerce negotiation.⁵⁴ It therefore provided hope for the WTO to remaining relevant in the ongoing, global efforts to advance digital trade rules and regulatory cooperation. It may also provide an opportunity for governments to reinvigorate the negotiation function of the WTO as well as Members' confidence in the multilateral trading system.

Recent reports suggest that, the JSI has accomplished a great deal in negotiations and parked 12 provisions on 'trust, openness and trade facilitation', including online consumer protection; electronic signatures and authentication; spam; open government data; electronic contracts; transparency; paperless trading; cybersecurity; open internet access; electronic transaction frameworks; electronic invoicing; and 'single windows'.⁵⁵ These measures are generally uncontroversial as they are largely based on the provisions under the Agreement on Trade Facilitation. At the same time, however, members have not achieved convergence on key issues such as data flow and data localisation.⁵⁶

The challenges in reaching a consensus within the JSI indeed mirror the broad divergences among WTO members on these issues. Major members can generally be grouped into two categories based on their positions on data flows and data localisation. The first group, consisting of the majority of advanced economies such as the EU, Japan, Australia, Canada and Singapore, is open to cross-border data flows to facilitate trade in the digital economy.⁵⁷ They support reducing barriers to the international transfer of data, with exceptions for achieving legitimate public policy objectives or protecting personal data and privacy (as will be discussed in Section IV). By contrast, the second group, comprising numerous developing countries like China, India, Russia and South Africa, holds a cautious attitude towards the free flow of data while prioritising data security and sovereignty.⁵⁸ They have imposed strict restrictions on data flows, and in some cases, advocated data localisation requirements to protect national security and advance data sovereignty.⁵⁹

It should be noted that the US recently withdrew its longstanding digital trade demands at the WTO as these proposals might hinder domestic policy considerations of strengthening regulation of big tech firms.⁶⁰ The US's current review of its digital

⁵⁴ Sen, above n 41, 339-341.

⁵⁵ Joint Initiative on E-commerce, *E-commerce co-convenors: "We must lock in the credible package that we have in our hands"* (27 October 2023), https://www.wto.org/english/news_e/news23_e/jsec_27oct23_e.htm.

⁵⁶ Joint Initiative on E-commerce, *E-commerce co-convenors set out roadmap for concluding negotiations in early 2024* (30 November 2023), https://www.wto.org/english/news_e/news23_e/jsec_30nov23_e.htm.

⁵⁷ See generally, Katya Garcia-Israel and Julien Grollier, 'Electronic Commerce Joint Statement: Issues in the Negotiations Phase' (CUTS International, Geneva, 2019).

⁵⁸ See generally, Nigel Cory and Luke Dascoli, *How Barriers to Cross-Border Data Flows Are Spreading Globally, What They Cost, and How to Address Them*, Information Technology & Innovation Foundation (19 July 2021), <https://itif.org/publications/2021/07/19/how-barriers-cross-border-data-flows-are-spreading-globally-what-they-cost/>.

⁵⁹ *Ibid.*

⁶⁰ David Lawder, *US drops digital trade demands at WTO to allow room for stronger tech regulation*, Reuters (26 October 2023), [https://www.reuters.com/world/us/us-drops-digital-trade-demands-wto-allow-room-stronger-tech-regulation-2023-10-25/#:~:text=WASHINGTON%2C%20Oct%2025%20\(Reuters\),her%20office%20said%20on%20Wednesday](https://www.reuters.com/world/us/us-drops-digital-trade-demands-wto-allow-room-stronger-tech-regulation-2023-10-25/#:~:text=WASHINGTON%2C%20Oct%2025%20(Reuters),her%20office%20said%20on%20Wednesday).

trade policies may lead to the introduction of restrictive measures on data flows, ‘balancing the right to regulate in the public interest and the need to address anticompetitive behavior in the digital economy’.⁶¹ In addition, as the US will remain ‘an active participant’ in the WTO e-commerce talks, this move may affect the positions of its allies such as Australia, Japan and Korea, potentially leading to changes in their collective approach in future negotiations. It could also prompt further discussions among allies to pursue shared objectives with developing country groups, ultimately fostering international cooperation on addressing challenges posed by the ever-evolving digital economy.

The divide between positions on data flows and data localisation also exists in the Asia-Pacific region. Developed countries support the EU position, including Japan, Korea, Australia, Singapore and New Zealand,⁶² while the Chinese position is shared by developing countries (e.g. Vietnam, Indonesia and Malaysia) and LDCs (e.g. Cambodia, Laos and Myanmar).⁶³ The disagreements between the two groups have to do with their varying levels of digital development, diverging policy preferences, and the disparity in regulatory capacities among countries in the region. Compared to policies focused on economic growth and innovation driven by data flows, many developing countries have chosen to restrict cross-border data to protect privacy and national security, due to the lack of adequate digital infrastructure and robust regulatory framework.⁶⁴ In the meantime, they seek to develop their regulatory and institutional capacities that would allow them to preserve policy space to pursue development objectives aligned with their national interests and needs.⁶⁵

Despite these major disagreements, the Asia-Pacific countries have made significant progress on regional cooperation and achieved fruitful results in digital trade governance. The Asia-Pacific trade agreements, particularly the CPTPP, RCEP and DEPA, are examined below.

IV. DIGITAL TRADE PROVISIONS IN ASIA-PACIFIC TRADE AGREEMENTS

The digital trade rules in Asia-Pacific FTAs have evolved significantly over the past two decades. This section offers a comprehensive analysis of three recent RTAs from three aspects: (1) scope and depth; (2) negotiation pattern and regulatory framework; and (3) evolving key issues. We argue that these agreements have demonstrated a pragmatic and incremental approach to digital trade in the region to accommodate the diversity of digital development and policy preferences among the parties.

⁶¹ Ibid.

⁶² Salesforce, *Data Beyond Borders 2.0* (2021), <https://accesspartnership.com/wp-content/uploads/2021/10/data-beyond-borders-2.pdf?hsCtaTracking=af68d435-0681-4b39-b0e6-e0e46daebb56%7Ce2313c09-e424-4588-af89-2fba76053580>.

⁶³ Li Xirui, *The Prospects for Liberalizing Cross-Border Data Flows between China and ASEAN*, Asia Global Online (15 March 2023), <https://www.asiaglobalonline.hku.hk/prospects-liberalizing-cross-border-data-flows-between-china-and-asean>; UNDP, *Enabling Cross-Border Data Flow: ASEAN and Beyond* (11 February 2021), <https://www.undp.org/publications/enabling-cross-border-data-flow-asean-and-beyond>.

⁶⁴ UNDP, above n 63, 11.

⁶⁵ Li, above n 63.

A. *The Evolving Scope and Depth of Digital Trade Governance*

1. *Scope: Covering More New Topics*

As noted in Section II, earlier FTAs in the region only included a few provisions on e-commerce, whereas more recent agreements tend to devote a separate chapter to digital trade (e.g. CPTPP and RCEP) and a stand-alone digital trade agreement (i.e. DEPA). This approach focuses on negotiating and formulating new digital trade rules in a pragmatic manner, although it does not address some of the questions left under the WTO such as the classification of digital products.

The CPTPP and RCEP cover a wider range of issues related to digital trade and share common ground on numerous issues, including customs duties on electronic transmissions, electronic authentication and signatures, domestic electronic transactions framework, personal information protection, online consumer protection, paperless trading, spam, cooperation and cybersecurity.⁶⁶ Besides, there is a general convergence on data flows and localisation issues (as will be discussed in Section IV.C), whereas WTO members hold divergent views as discussed above.

In addition to the consistency in coverage, the DEPA extends beyond either CPTPP or RCEP.⁶⁷ It represents a broader conception of ‘digital trade’ whereas CPTPP governs measures that ‘affect trade by electronic means’ and RCEP includes measures that ‘affect electronic ecommerce’. DEPA, by contrast, applies to measures that ‘affect trade in the digital economy’.⁶⁸ Therefore, DEPA contains more comprehensive disciplines than CPTPP and RCEP, encompassing not just traditional issues relating to data flows and digital trade facilitation, but also several new-age issues, including emerging trends and technologies (Module 8), innovation and the digital economy (Module 9), small and medium enterprises cooperation (Module 10), and digital inclusion (Module 11), thus enhancing DEPA’s ability to tackle potential barriers to digital trade.

Module 8 is especially noteworthy because it introduces a range of emerging issues that require attention from policymakers, such as in the areas of financial technology (FinTech) and Artificial Intelligence (AI) technologies, which have not been extensively addressed in previous international trade agreements. For the governance of AI technologies, for instance, the parties agree to “promote the adoption of ethical and governance frameworks that support the trusted, safe, and responsible use of AI technologies (AI Governance Frameworks)”, taking into consideration “internationally recognised principles or guidelines, including explainability, transparency, fairness and human-centred values”.⁶⁹ The inclusion of AI technologies can be seen as an agile response to the new challenges triggered by digital technologies. As AI becomes more prevalent, efforts to address the potential risks associated with its widespread use could impact international trade.⁷⁰

⁶⁶ Asian Development Bank, above n 24, 66.

⁶⁷ *Ibid.*, 67.

⁶⁸ CPTPP, art 14.2.2; RCEP, art 12.3.1; DEPA, art 1.1.1.

⁶⁹ DEPA, arts 8.2.3, 8.2.4.

⁷⁰ Marta Soprana, ‘The Digital Economy Partnership Agreement (DEPA): Assessing the Significance of the New

The scope of digital trade provisions in Asia-Pacific FTAs are likely to become broader, as they all include the amendment procedure. In addition, the DEPA explicitly acknowledges in the preamble that ‘the digital economy is evolving and therefore this Agreement and its rules and cooperation must also continue to evolve’. This is because the parties realise that the development of technology and the related business models have far outpaced the regulatory approaches in this fast-moving area. This mismatch can be quite stark and is likely to continue, particularly for innovative technologies.⁷¹ Being characterised as a ‘living agreement’, the DEPA is expected to keep pace with rapid technological changes that are taking place in practice, such as the Internet of Things (IoT) and blockchain, and group such ideas for future cooperation.

2. Depth: Higher Standards on Traditional Digital Trade Issues

Generally, digital trade rules in the Asia-Pacific are more ambitious on traditional digital trade issues. The three RTAs incorporate considerably more detail and/or more operative language in areas such as paperless trading, electronic transactions, personal information protection, online consumer protection, cybersecurity and transparency,⁷² thus introducing more legal requirements to the parties and strengthening the enforceability of the agreements.

Taking the paperless trading as an example. Trade costs, encompassing customs, transportation, and logistics expenses, constitute a primary obstacle to companies seeking to engage in trade. A substantial share of these costs arises from the time and financial resources dedicated to paperwork and the repeated submission of the same information, as mandated by various customs authorities for export or import.⁷³ Therefore, all three of the RTAs include disciplines on paperless trading. At one end of the spectrum lies the CPTPP which simply requires parties to ‘endeavour to’ make electronic versions of trade administration documents available to the public, and to accept electronic versions of these documents as the legal equivalent of paper documents.⁷⁴ The RCEP contains the same ‘best endeavour’ language but adds a requirement for further cooperation in this regard.⁷⁵ The DEPA extends beyond these provisions by turning the best-endeavour provisions into binding obligations to enhance enforceability as well as providing more details on the language and format of electronic versions of trade administration documents. The DEPA also deals with issues not covered by the other two agreements such as provisions on establishing single electronic windows and developing data exchange systems for paperless trading.⁷⁶

Another example concerns the protection of consumers. Given the widespread internet usage and prevalence of mobile-first consumers in the region, comprehensive provisions on consumer protection are critical for enhancing consumer trust. Therefore, the CPTPP requires parties to adopt laws to protect consumers from

Trade Agreement on the Block’ (2021) 13(1) *Trade, Law and Development* 143, 161.

⁷¹ Honey, above n 6, 229.

⁷² See Mishra and Valencia, above n 6, 496-508.

⁷³ See Elms, above n 4, 25.

⁷⁴ CPTPP, art 14.9.

⁷⁵ RCEP, art 12.5.

⁷⁶ DEPA, art 2.2.

fraudulent and deceptive commercial activities. It also acknowledges the importance of cooperation between national consumer protection agencies for enhancing consumer welfare.⁷⁷ The RCEP takes a step further to require the parties to publish information regarding the remedies that consumers can pursue and guidance on how businesses can comply with legal requirements.⁷⁸ The DEPA takes an even more ambitious approach by setting out more detailed guidance for consumer protection laws and requiring the parties to make the laws publicly available and easily accessible.⁷⁹

In short, the expanding scope of recent Asia-Pacific RTAs and enhanced depth of rules on traditional digital trade issues can be seen as necessary responses to the practical needs of the Asia-Pacific region. Moreover, this evolution of RTAs also aligns with the Asian approach of incremental pragmatism, which advances rules on additional digital trade issues while incorporating new-age issues on a gradual basis.

B. Changing Trends in the Negotiation Patterns and Regulatory Framework

1. Negotiation Pattern: A Trend of Negotiation on Digital-only Trade Agreements

In contrast to the CPTPP and RCEP, DEPA is the world's first digital-only trade agreement. Such efforts to negotiate digital-only trade agreements have been on the rise in the Asia-Pacific,⁸⁰ suggesting a shift from the traditional FTA negotiations which cover a wider range of trade-related issues. Negotiations dedicated to a specific trade issue such as digital trade have at least two major benefits.

Firstly, such negotiations can help parties to avoid cross-sectoral trade-offs, as exemplified in more traditional FTA negotiations.⁸¹ During FTA negotiations, countries typically address multiple subject matters concurrently, and are more likely to have divergent interests across different areas. As a result, achieving a meaningful outcome in FTAs that is acceptable to all parties may require compromising across a range of issues covered by the entire package. The scope of the DEPA implies that, without the need to accommodate other interests in areas beyond digital trade such as agricultural subsidies, it is easier for the parties to delve into approaches that will achieve regulatory coherence on all major and emerging issues relating to the digital economy.

Moreover, such negotiations can be more efficient, and better adapted to the fast-changing nature of digital technologies. This efficiency of negotiation is evidenced by the negotiation process of the CPTPP, RCEP and DEPA. The CPTPP concluded in 2018 after more than a decade of negotiations since the original round in 2008, the RCEP was signed in late 2020 after eight years of talks, and the DEPA was signed in

⁷⁷ CPTPP, art 14.7.

⁷⁸ RCEP, art 12.7.

⁷⁹ DEPA, art 6.3.

⁸⁰ See, eg, United States – Japan Digital Trade Agreement, effective on 1 January 2020; Singapore – Australia Digital Economy Agreement, effective on 8 December 2020; Korea-Singapore Digital Partnership Agreement, effective on 14 January 2023.

⁸¹ Rachele Taheri, Olivia Adams and Pauline Stern, *DEPA: The World's First Digital-Only Trade Agreement*, Asia Pacific Foundation of Canada (7 October 2021), <https://www.asiapacific.ca/publication/depa-worlds-first-digital-only-trade-agreement#:~:text=In%20June%202020%2C%20Chile%2C%20New,in%20joining%20this%20novel%20pact.>

June 2020 after merely one year of negotiation. In this sense, the stand-alone digital trade agreement signifies a positive departure from the rigidities of traditional FTA negotiations, which often require years or even decades to achieve outcomes.

2. Regulatory Framework: Open, Flexible and Inclusive

a. Open

These recent Asia-Pacific RTAs are structured as open agreements with ‘open accession’ processes.⁸² This approach provides room for furthering regional economic integration and expanding the global influence of these agreements. For example, since taking effect in 2018, several countries have applied to join the CPTPP, including the UK, China, Taiwan, Ecuador, Costa Rica, Uruguay and Ukraine.⁸³ With the UK being the first European country and first new member to join CPTPP in July 2023, CPTPP goes beyond its geographic limitation. Similarly, only a few months after the DEPA became effective for New Zealand and Singapore – and before Chile has even concluded its domestic ratification processes – both Canada and South Korea had initiated consultations on accession. China, Costa Rica, and Peru also have submitted formal requests to accede to DEPA.⁸⁴ In addition, Hong Kong⁸⁵ and Sri Lanka have applied for RCEP membership, while Bangladesh is contemplating joining the trade bloc too.⁸⁶

The primary motivations for joining these RTAs are economic growth and enhanced market access. For example, the UK’s accession to the CPTPP is anticipated to help its cutting-edge tech sector go global and open up more markets in financial and professional services.⁸⁷ In China’s case, seeking membership in the CPTPP and DEPA aligns with its goals of further deepening domestic reforms and increasing openness to international markets. This move is expected to ‘help China strengthen its cooperation in the global digital economy with members of the agreement and promote innovation and sustainable development’.⁸⁸ Similarly, Costa Rica, representing Latin America, aims to expand trade in Asia through joining the CPTPP.⁸⁹ The pursuit of these economic goals through RTAs, however, brings about the need for significant changes of domestic regulations. For countries like the UK, which lack digital trading systems, these advanced rules offer an essential framework

⁸² CPTPP, art 30.4; RCEP, art 20.9; DEPA, art 16.4.

⁸³ Jeffrey J. Schott, *Which countries are in the CPTPP and RCEP trade agreements and which want in?*, PIIE (23 July 2023), <https://www.piie.com/research/piie-charts/which-countries-are-cptpp-and-rcep-trade-agreements-and-which-want>.

⁸⁴ Wu Jinhua, *Korea is first nation to sign global digital trade deal DEPA* (12 June 2023) <https://www.korea.net/NewsFocus/policies/view?articleId=233916>.

⁸⁵ Julien Chaisse, *Hong Kong’s Case for RCEP Membership*, East Asia Forum (7 May 2022), www.eastasiaforum.org/2022/05/07/hong-kongs-case-for-rcep-membership/.

⁸⁶ Suhasini Haidar, *Sri Lanka, Bangladesh mull over joining RCEP bloc* (15 October 2023), <https://www.thehindu.com/news/international/four-years-after-india-pulled-out-of-rcep-talks-sri-lanka-bangladesh-want-to-join/article67423400.ece>.

⁸⁷ Department for International Trade, *UK Accession to CPTPP: The UK’s Strategic Approach* (22 June 2021), <https://www.gov.uk/government/publications/uk-approach-to-joining-the-comprehensive-and-progressive-agreement-for-trans-pacific-partnership-cptpp>.

⁸⁸ Su-Lin Tan, *China’s interest in DEPA digital trade pact raises questions about “domestic reforms” and what could be the next big multilateral deal*, SCMP (5 November 2021), <https://www.scmp.com/economy/china-economy/article/3154887/chinas-interest-depa-digital-trade-pact-raises-questions>.

⁸⁹ Kosuke Shimizu, *Costa Rica wants to join CPTPP, president says*, Nikkei Asia (30 July 2022), <https://asia.nikkei.com/Politics/International-relations/Indo-Pacific/Costa-Rica-wants-to-join-CPTPP-president-says>.

for shaping the emerging digital trade regulations.⁹⁰ In contrast, for countries with more established domestic frameworks, such as China, adapting to these advanced digital trade rules would require regulatory and policy reform, particularly around contentious issues such as cross-border data flows.⁹¹ In this way, the membership expansion will gradually increase the global reach of digital trade rules in current Asia-Pacific trade agreements and consequently their global influence, leading to regional and global economic integration in the long run.

b. Flexible

Another feature of the regulatory framework is an emphasis on flexibility. The three RTAs all contain ‘soft law’ or ‘best endeavour’ commitments rather than legally binding rules on various issues. For some traditional issues, such as paperless trading, obligations are couched in soft non-binding language that grant governments policy space and retain flexibility to adapt rules to local conditions where needed. Provisions on newer issues, such as digital entities, AI technologies, data innovation and open government data, are designed in a similarly flexible manner.⁹² The DEPA, in particular, incorporates soft law norms and guidelines on these new-age issues in light of the rapid evolution of digital technology. This approach offers flexibility by focusing on the establishment a platform for collaboration at this stage, thus allowing regulations to evolve along with technological advancements and policy impacts, and allowing for the adaptation of rules to meet local needs where necessary.⁹³ Moreover, for issues requiring the collective effort of the parties, the three agreements also adopt a soft approach. For instance, the three RTAs do not create enforceable obligations on cybersecurity due to its complexity and transnational nature, but focus on building national capabilities for computer security incident response and promoting cooperation matters related to cybersecurity,⁹⁴ thereby leaving sufficient space for national policy and international cooperation. Overall, this soft approach allows parties to implement the agreements flexibly and address emerging and difficult issues on a gradual basis. Of course, these non-binding obligations and collaborative provisions are likely to transition to binding ‘hard law’ as digital technologies continue to develop and parties become collectively more experienced in their regulatory responses.

In addition, compared to the other two agreements, the DEPA exhibits a unique flexibility because of its modular structure. Signatories can choose to accept some modules in light of their conditions rather than accept the entire agreement, providing more choices for developing countries to engage in cooperation on digital trade governance. In addition, while the sixteen modules of DEPA are intended to work together, individual elements can be plucked out and used in other agreements or even in the WTO process, serving as a building block for other agreements.⁹⁵ Indeed, the built-in flexibility was intended to ‘generate new ideas and approaches that can be

⁹⁰ Department for International Trade, above n 87.

⁹¹ Tan, above n 88.

⁹² DEPA, arts 7.1, 8.2, 9.4, 9.5.

⁹³ Stephanie Honey, ‘Enabling trust, trade flows, and innovation: the DEPA at work’ (Hinrich Foundation, 2021) 4.

⁹⁴ CPTPP, art 14.16; RCEP, art 12.13; DEPA, art 7.1

⁹⁵ Honey, above n 6, 234-35.

used by Members in the WTO negotiations, and by other countries negotiating free trade agreements or engaging in international digital economy or digital trade work'.⁹⁶ In this way, DEPA introduces a pragmatic and incremental approach to build consistency in digital trade rules, which may help to streamline the spaghetti bowl of digital trade provisions in FTAs, and expand Asia-Pacific-led rules towards broader multilateral outcomes.

c. Inclusive

Inclusiveness is the third trend in the recent Asia-Pacific RTAs, which is reflected in two major features. The first feature concerns the special and different treatment for the developing world. The Asia-Pacific is the most dynamic region in the world with countries at various stages of development. It includes many developing countries, and 12 out of 46 Least LDCs.⁹⁷ These countries usually have underdeveloped internet infrastructure and a weak regulatory environment for digital trade. Therefore, the CPTPP and RCEP allow for staged implementation of commitments by developing countries and LDCs with due regard to time needed for them to develop their regulatory frameworks and relevant digital infrastructure.⁹⁸ Moreover, they require the parties to undertake and strengthen technical assistance and capacity building to help these less developed economies to catch up in the digital space.⁹⁹ For example, RCEP explicitly targets the three LDCs (i.e. Cambodia, Laos and Myanmar) and developing countries (e.g. Vietnam) to help them implement their obligations and take advantage of the benefits of the agreement.¹⁰⁰ The lack of comparable provisions in the DEPA may be attributed to the parties having relatively strong digital sectors. Overall, this inclusive approach helps bring together countries at different stages of development.

The second feature relates to special consideration for SMEs and disadvantaged people. The growth of digital trade has opened up new opportunities for SMEs to access the market and for the participation of disadvantaged groups in economic activity (via employment).¹⁰¹ In response, the recent Asia-Pacific RTAs incorporate provisions that assist SMEs to take advantage of trade opportunities under the Agreements.¹⁰² The DEPA stands out for the inclusion of stakeholder engagement. It requires parties to convene a Digital SME Dialogue with the private sector, non-governmental organisations, academics and others stakeholders,¹⁰³ reflecting the fact that creating effective policies in this economic domain, perhaps more than in any other, requires a level of technical or specialised expertise, which can be found within

⁹⁶ New Zealand Ministry of Foreign Affairs and Trade, *Overview*, <https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/digital-economy-partnership-agreement-depa/overview/>.

⁹⁷ UNCTAD, *UN list of least developed countries*, <https://unctad.org/topic/least-developed-countries/list>.

⁹⁸ CPTPP, fn 5 and 8 in Ch 14, art 14.18; RCEP, fn 4-7, 9-11 and 13 in Ch 12.

⁹⁹ CPTPP, Ch 21; RCEP, Ch 15.

¹⁰⁰ RCEP, arts 5-10, 14, 15.

¹⁰¹ See Ali Parry, Adelia Jansen van Rensburg, Wilma Viviers and Emmanuel Orkoh, 'Chapter 13: Are digital advances and inclusive growth compatible goals? Implications for trade policy in developing countries' in Maarten Smeets (ed), *Adapting to the digital trade era: challenges and opportunities* (2021), https://www.wto.org/english/res_e/publications_e/adtera_e.htm.

¹⁰² CPTPP, Ch 24; RCEP, Ch 14; DEPA, Module 10. In addition, the CPTPP and RCEP all require parties to endeavour to 'work together to assist SMEs to overcome obstacles to its use' in the e-commerce chapter respectively. See CPTPP, art 14.15(a); RCEP, art 12.4(a).

¹⁰³ DEPA, art 11.1.

the technology or business sector itself. In addition, another contribution of DEPA to inclusive growth lies in its emphasis on the involvement of the minorities, which is largely missing in other trade agreements. Specifically, the DEPA requires the parties to remove barriers and to promote participation of all groups, especially women, rural populations, low socio-economic groups and Indigenous Peoples in digital trade activities, helping them to contribute to, and benefit from the digital economy.¹⁰⁴ This DEPA-like provision on digital inclusion can also be beneficial for addressing the growing digital divide across the world, and for regional and even global sustainable development.

In short, the changes in negotiation pattern and regulatory framework reflect a pragmatic and gradual approach in the Asia-Pacific, that is, focusing on the negotiation of digital trade issues while gradually promoting regional and even global economic integration through the expansion of membership and the bridge of the digital divide. For emerging or contentious digital trade issues, the three RTAs adopt a soft law approach so as to leave policy space for governments to maintain their preferred regulatory approaches as well as the flexibility for implementation of commitments that reflects their different stages of economic development and digital transformation.

C. Evolving Key issues in the Digital Trade Governance

1. Old Divide: Cross-border Data Flows and Data Localisation

Cross-border data flows are the lifeblood of the digital economy. Therefore, cross-border data flows and data localisation have been key issues in digital trade negotiations over the past decade, and, as mentioned earlier, WTO members are widely divided on these issues. To solve this ‘old divide’, the CPTPP, RCEP and DEPA all incorporate provisions to facilitate the cross-border data flows and prohibit data localisation requirements for conducting business.¹⁰⁵ However, in practice, the effectiveness of these provisions differs significantly due to the scope of exceptions and the accessibility of dispute settlement procedures.

With regard to the exceptions, recognising that each member may have its own regulatory requirements, the CPTPP and DEPA allow parties to adopt measures inconsistent with these provisions in order to ‘achieve a legitimate public policy objective’, provided that such measure is not ‘applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade’, and does not ‘impose restrictions on transfers of information greater than are required to achieve the objective’.¹⁰⁶ This text is similar to the language in general exceptions outlined in Article XX of the General Agreement on Tariffs and Trade and Article XIV of the GATS, which allow WTO members to adopt trade-restrictive measures for certain legitimate regulatory objectives such as the promotion and protection of other social values and interests. However, it differs from

¹⁰⁴ Ibid.

¹⁰⁵ CPTPP, arts 14.11, 14.13; RCEP, arts 12.14, 12.15; DEPA, arts 4.3, 4.4.

¹⁰⁶ CPTPP, arts 14.11, 14.13; DEPA, arts 4.3, 4.4.

the WTO norms as it does not provide an illustrative list of ‘legitimate public policy objective’. One possible reason behind such design lies in the disagreement between the parties on the scope of such objectives. For example, in the TPP negotiations, while the US firmly supported mandatory cross-border flows without any exceptions, several countries involved in the negotiations called for sufficient regulatory space to restrict data flows for various domestic policy objectives, such as privacy protection emphasised by Australia, New Zealand, and Canada, national security prioritised by Vietnam, and public morality raised by Singapore.¹⁰⁷ Accordingly, such vaguely worded exception can be seen as a deliberate policy balance between facilitating data flows and the preservation of policy space. Overall, this approach safeguards governments’ regulatory autonomy on issues relating to cross-border data flows, although it could also lead to legal uncertainty.¹⁰⁸

While the RCEP contains a similar exception, it also introduces a self-judging element, where the implementing party has the exclusive authority to determine whether ‘the implementation of such legitimate public policy’ is necessary.¹⁰⁹ This means the implementing party is not required to prove that there are no less trade-restrictive alternative measures reasonably available to achieve the same objectives, which contrasts with the stringent standards of necessity requirement in the WTO framework.¹¹⁰ Therefore, this approach provides more flexibility for policy space, which is particularly advantageous for countries at different stages of development in the Asia-Pacific region. In addition, RCEP introduces an additional exception, which allows the party to adopt any measure restricting cross-border data flows or requiring data localisation if ‘it consider necessary for the protection of its essential security interests’.¹¹¹ This is consistent with policy priorities amongst certain countries in the Asia-Pacific region, in particular China, Vietnam and Indonesia, which have enacted laws and regulations that place restrictions on data flows to safeguard national sovereignty and security.¹¹² Accordingly, while based on the framework of CPTPP, the RCEP reflects to a greater extent the policy preferences of the region, as it was established primarily under the leadership of Asia-Pacific countries. Like the public policy objective exception under the CPTPP, the RCEP provides no further clarification on what would constitute an ‘essential security interest’ and makes the necessity of the measure self-judging. Moreover, it provides that ‘[s]uch measures cannot be disputed by other Parties’,¹¹³ which further strengthens regulatory autonomy for governments.

In addition, it is worth noting that while the RCEP sets out the widest exceptions among the three RTAs, it establishes the Dialogue on Electronic Commerce, a forum for an ongoing conversation on data transfer that can be convened by the RCEP joint

¹⁰⁷ Mishra, above n 28, 37. The positions of these countries in the TPP negotiations are consistent with their stances in multilateral negotiations.

¹⁰⁸ Burri, above n 3, 86.

¹⁰⁹ RCEP, arts 12.14.3(a), 12.15.3(a).

¹¹⁰ See, eg, US – Gambling, above n 37. For a detailed discussion on the necessity test, see Ming Du, ‘The Necessity Test in World Trade Law: What Now?’ (2016) 15(4) *Chinese Journal of International Law* 817.

¹¹¹ RCEP, arts 12.14.3(b), 12.15.3(b).

¹¹² Cory and Dascoli, above n 58; Li, above n 63; UNDP, above n 63.

¹¹³ RCEP, arts 12.14.3(b), 12.15.3(b).

Committee.¹¹⁴ It thus providing an opportunity for the parties to narrow the scope of exceptions in future discussions and cooperation. Overall, the extensive exceptions in the RCEP offer considerable discretion for the parties to determine a proper scope of exceptions, thus leaving the door open for potential abuse or misuse of these exceptions. However, at the same time, this approach also reflects the pragmatism of RCEP – accommodating countries with varying levels of digital development and policy preferences regarding digital regulation.

Turning to the application of dispute settlement mechanism, the CPTPP, RCEP and DEPA have taken variable approaches. Under the CPTPP, not only are the provisions on data flows and data localisation subject to the dispute settlement provisions of the Agreement, but so is the entire e-commerce chapter.¹¹⁵ By contrast, the chapter on dispute settlement do not apply to the e-commerce chapter in the RCEP,¹¹⁶ which means the binding obligations on data flows and localisation do not have real possibility of being enforced. Instead, RCEP parties can engage in consultations in good faith when there are differences among parties regarding the interpretation and implementation of the e-commerce chapter, and can refer disagreements to the RCEP Joint Committee if the consultations fail.¹¹⁷ While the DEPA initially also excluded rules on cross-border data flows and data localisation from the scope of dispute settlement,¹¹⁸ the parties signed a protocol on 15 July 2023 to subject these issues to a rules-based dispute settlement mechanism, thereby reinforcing the legal certainty and enforceability of these rules.¹¹⁹

In short, the three recent Asia-Pacific RTAs all include provisions that generally support the free flow of data across borders and prohibit data localisation requirements for conducting business. However, they incorporate exceptions and/or non-litigation requirements in light of diverging digital development and policy preferences in the region, thereby achieving a compromise between reducing trade barriers and preserving the policy space. Meanwhile, they leave flexibility for narrowing the scope of exceptions on trust-based consultations in the future.

2. New Focuses: Promoting Efficiency, Trust and Interoperability

In allowing the parties sufficient flexibilities, the RTAs have shifted the focus to issues that have the greatest economic significance to them. The promotion of efficiency, maintenance of trust and interoperability of systems and platforms are all issues that have become increasingly important to digital trade in recent years, and the recent Asia-Pacific RTAs reflect this in their rules.

The first group of rules relates to the facilitation of digital trade such as electronic transactions, paperless trading and transparency, electronic authentication and signature,¹²⁰ as well as electronic invoicing and payments.¹²¹ These rules are central to promoting the efficiency of digital trade and particularly significant for

¹¹⁴ RCEP, art 12.16.

¹¹⁵ CPTPP, art 14.18.

¹¹⁶ RCEP, art 12.17.3.

¹¹⁷ *Ibid*, art 12.17.1.

¹¹⁸ DEPA, Annex 14-A, article 14A.1.

¹¹⁹ Protocol to the DEPA, art 8.

¹²⁰ CPTPP, art 14.6; RCEP, art 12.6.

¹²¹ DEPA, arts 2.5, 2.7.

many Asia-Pacific developing countries aiming to transition towards a digital economy in the short to medium term.

The second set of rules concerns the promotion of online consumer trust. While consumers in Asia tend to allow digital trade to grow without complaints, these are some areas of increasing concern that may break down trust in the digital space.¹²² For instance, in the area of consumer protection, issues like fraudulent and misleading practices, inaccurate marketing and unclear return/refund policies can diminish consumer trust. Customers also concern about cyber attacks, data privacy and security in light of the increase in digital transactions and the vast collection/exchange of personal data. Therefore, these RTAs have significantly developed substantive rules concerned with building trust in digital systems, including rules directed at online consumer protection and cybersecurity, as discussed above, as well as personal information (or privacy) protection¹²³ and spam.¹²⁴

Another set of rules becoming increasingly significant for policymakers relates to the interoperability of systems, software and operating platforms. Interoperability allows traffic to run effectively across different types of networks (e.g. from telecoms to banking to logistics and so on).¹²⁵ It matters most to the digital payment, which is at the center of digital trade expansion and serves as a key enabling factor for digital commerce. Governments in the Asia-Pacific region have played a proactive role in advancing digital payment methods, leading the region to become the leader in the global digital payment market and commanding over half of the total market share in 2023.¹²⁶ Due to the complex process of cross-border e-payment, policymakers have worked on the interoperability issue to promote seamless fund transfers between different payment systems and instruments for all participants, such as consumers, businesses and governments, in the payment system.¹²⁷ For example, the DEPA requires parties to adopt regulations that enable greater interoperability between electronic payments systems.¹²⁸ It also extends the concept of interoperability building to issues such as digital invoicing, personal information protection and digital identities.¹²⁹ Similarly, the CPTPP and RCEP incorporate rules on interoperability building in the area of electronic authentication.¹³⁰

In summary, the key issues in digital trade governance have evolved from data flows to concerns around improving the efficiency of digital trade, enhancing trust in digital systems and enabling greater interoperability. The three RTAs all contain the western-led liberal rules on free flow of data across borders and prohibition on data

¹²² World Economic Forum, above n 16, 14.

¹²³ CPTPP, art 14.8; RCEP, art 12.8; DEPA, art 4.2.

¹²⁴ CPTPP, art 14.14; RCEP, art 12.9; DEPA, art 6.2.

¹²⁵ TRPC, 'Australia-Singapore Digital Economy Cooperation on Standards: Research Report' (September 2020) 29.

¹²⁶ Research and Markets, *Exploring the Future of Digital Payments in Asia-Pacific: Trends and Projections for 2023 and Beyond* (7 November 2023), <https://www.prnewswire.com/news-releases/exploring-the-future-of-digital-payments-in-asia-pacific-trends-and-projections-for-2023-and-beyond-301980132.html#:~:text=In%20a%20remarkable%20achievement%2C%20the,15%25%20between%202023%20and%202030.>

¹²⁷ Elms, above n 4, 21-24.

¹²⁸ DEPA, art 2.7.

¹²⁹ Ibid, arts 2.5.2, 4.2.6, 7.1.1.

¹³⁰ CPTPP, art 14.6.4; RCEP, art 12.6.4.

localisation. In addition, the Asia-Pacific policymakers devote extensive attention to issues that are of the highest economic relevance and that can bring immediate and substantive benefits to businesses, such as issues on digital trade facilitation, consumer trust and interoperability building.

In light of the above, it is reasonable to conclude that the Asia-Pacific has developed a pragmatic and incremental approach to digital trade governance, that is, gradually developing consensus on contentious and emerging issues while focusing on issues that are of the highest economic relevance and can achieve immediate consensus. This approach is important to the regional growth of digital trade as it can harmonise relevant rules within the region and accommodate countries with diverging digital development and policy preferences on digital governance. Specifically, the emphasis on binding obligations and tightly worded exceptions in traditional FTAs that could be adjudicated before a trade tribunal would prevent developing parties from reaching a trade agreement due to their lack of proper infrastructure and weak regulatory capacity. Given the active participation of developing countries and LDCs in the digital trade activities and their struggle for digital transformation,¹³¹ the Asia-Pacific approach to digital trade governance is expected to have significant implications for the multilateral trading system.

V. Conclusion

Digital trade plays a crucial role in fostering global economic growth and prosperity. As the same time, however, it has generated a range of regulatory challenges for policymakers. As the most dynamic region in the digital trade arena, the Asia-Pacific region leads as a global pioneer in technology innovation, digital businesses and digitalised communities. Unsurprisingly, it has also been at the forefront of shaping digital trade policies. Faced with the lack of global trade rules on digital trade and the practical needs of data regulation, several countries in the Asia-Pacific region have proactively negotiated various FTAs containing comprehensive rules on digital trade, which culminated in the conclusion of the CPTPP, RCEP and DEPA.

After decades of development, the Asia-Pacific exhibits three features in digital trade governance. First, the above trade agreements extend considerably further in terms of scope and depth to develop more ambitious rules on traditional digital trade issues as well as approaches to address emerging issues in digital economy. Second, by separating the negotiation of digital-only agreements from more traditional, multi-subject FTA negotiations, parties are able to respond more quickly to the fast-growing digital sector, and at the same time, the trade agreements become more open, flexible and inclusive in order to achieve both regional and global economic integration. Finally, as regards key issues, Asia-Pacific countries address the old divide by adopting the general principles of allowing cross-border data flows and prohibiting data localisation, but preserving sufficient policy space for parties' domestic data regulation. Meanwhile, they have shifted focus to issues that improve the efficiency of

¹³¹ See generally, Smeets, above n 101.

digital trade, enhance the trust in digital systems and enable greater interoperability, thereby yielding the highest economic benefits at a fast pace. Overall, the Asia-Pacific region has developed a pragmatic and incremental approach to digital trade governance that accommodates the varying needs of countries at the different stages of digital development and with different policy preferences on data regulation. While focusing on some of the most economically significant matters, this approach allows flexible implementation and encourages regulatory cooperation on contentious and emerging issues, thus developing consensus on a gradual basis.

As the Asia-Pacific region is acquiring leadership in the global digital market, its pragmatic, incremental approach is likely to influence other FTAs or digital trade agreements at bilateral and plurilateral levels, especially those involving developing countries at different stages of development. Expansive and deep commitments in trade agreements are unlikely to be acceptable to many developing countries due to the lack of proper infrastructure and regulatory capacity. In addition, this approach could be used to facilitate the negotiation of digital trade rules at the WTO, which remains the only multilateral forum for deliberation, negotiation and development of digital trade rules at the global level and the only forum in which the US is currently engaged. In light of the Asia-Pacific approach, WTO members may agree to the commitments on cross-border data flow and prohibition of data localisation provided that a delicate balance is achieved by allowing governments to retain the policy space needed for their domestic regulatory priorities. More consideration must also be given to development issues. The special and different treatment provisions and inclusiveness provisions (i.e. technical assistance and capacity building provisions) included in the Asia-Pacific agreements discussed in this paper are a good start in that direction.

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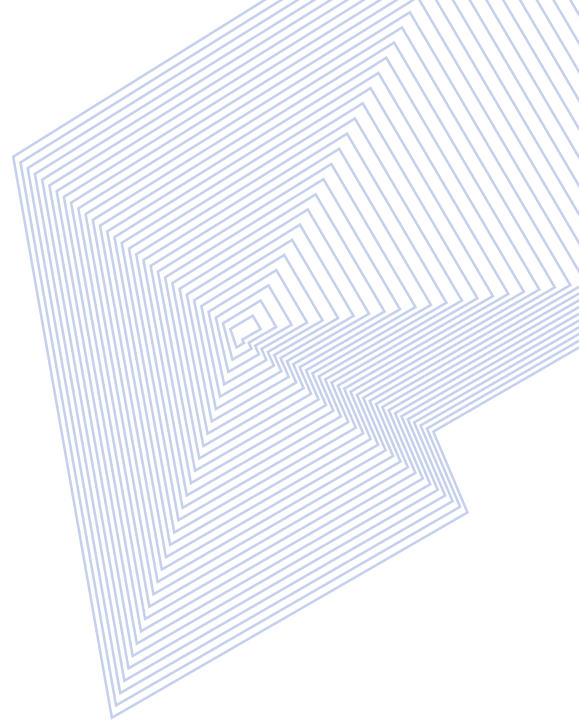
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