



## **DATA AND DIGITAL SERVICES IN THE INDO-PACIFIC REGION: CURRENT TRADE REGULATION AND ONGOING INITIATIVES**

**PROF. DR. IUR. MIRA BURRI**

**25 OCTOBER 2022, QUEEN'S INSTITUTE ON TRADE POLICY**

## TALK POINTS

- **sketch developments in the dynamic field of global digital trade governance**
- **current FTAs in the Indo-Pacific regions addressing digital trade**
- **ongoing initiatives: IPEF and outlook**

## **BACKGROUND: CONTEMPORARY DIGITAL TRADE POLICY**

## EXTENDED SCOPE OF DIGITAL TRADE

- **e-commerce < digital trade: from trade 2.0 to trade 4.0**
- **next to online sale of goods and services:**
- **global value chains (GVCs)**
- **servicification**
- **data flows: data must cross borders:**
  - cross-border data flows now generate more economic value than traditional flows of traded goods
  - cross-border data flows fuel digital innovation



## NEW DIGITAL TRADE BARRIERS

- **localization measures**
- data privacy and protection measures
- intellectual property related measures
- censorship
- cybersecurity
- **rise of digital protectionism and demands for data sovereignty**
- **data:**
  - US International Trade Commission, Digital Trade in the U.S. and Global Economies: <http://www.usitc.gov/publications/332/pub4415.pdf>
  - digital trade restrictiveness index: <https://ecipe.org/dte/>
  - **new digital fragmentation report:** <https://www.globaltradealert.org/reports/gta-29-report>

## **RULE-FRAMEWORKS FOR DIGITAL TRADE: HIGHLY DYNAMIC LANDSCAPE**

## FTAs AS DIGITAL TRADE RULE-MAKING VENUES

- 370+ FTAs concluded between 2000 and 2022
  - 138 FTAs include provisions that are related to digital trade
  - 106 FTAs have dedicated digital trade chapters
  - **only 43** agreements contain rules on data flows
  - privacy protection has become a trade topic (116 FTAs contain provisions)
- 
- TAPED codes 112 items (e-commerce, data-dedicated provisions, new data economy issues, cross-cutting issues and IP)
  - for data, see: <https://unilu.ch/taped>

**taped.**

trade agreement provisions on e-commerce and data flows

## DEVELOPMENTS AT THE MULTILATERAL LEVEL: WTO NEGOTIATIONS ON ELECTRONIC COMMERCE

- **the Joint Statement Initiative:** launched in 2019 for an agreement on e-commerce
- 86 participating WTO members
- progress made on important issues and there is negotiation momentum
- still heterogeneity across proposals, e.g.:
  - EU proposal: **follows the new digital trade template with safeguards for data protection plus clarifications on telecom and computer and related services**
  - US proposal: **follows the USMCA + DTA**
  - China proposal: **focused on trade in goods, protective of national sovereignty**
- **legal form of the agreement uncertain** (major opposition to variable geometry under the WTO architecture, in particular from India and South Africa)



## VIABILITY OF A WTO AGREEMENT ON ELECTRONIC COMMERCE

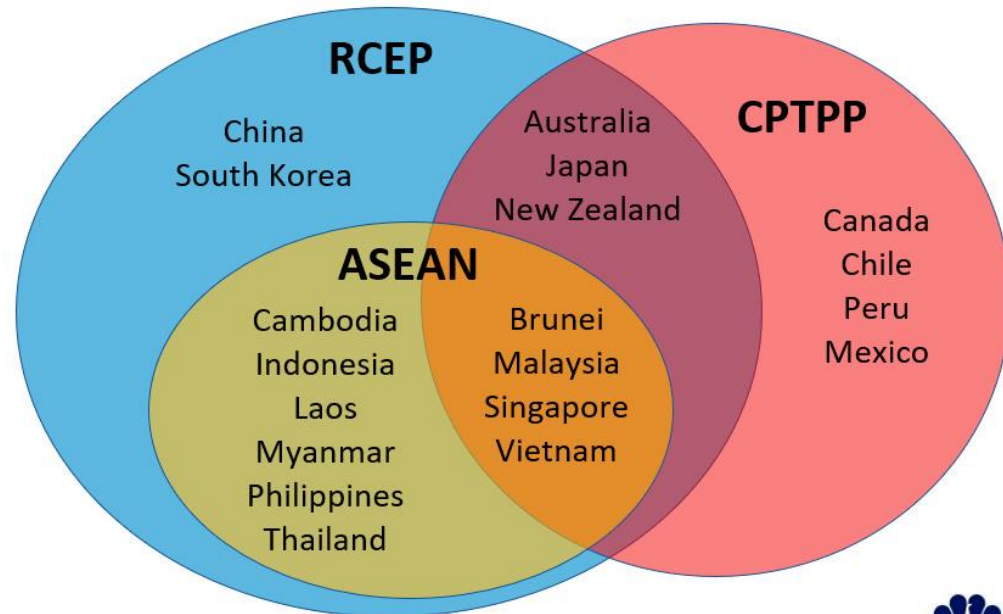
- **agreement on discrete digital trade facilitation issues:** spam; electronic authentication and signatures
- **nearing agreement** on consumer protection; open government data; electronic contracts
- **doable issues:** e-invoicing; cybersecurity; open internet access; paperless trading and electronic transaction framework
- level of market access commitments still uncertain; source code as well
- **limitations on localization measures and cross-border data flows remain highly contentious**
- carve-outs and escape clauses?

## FTAs AS RULE-MAKING VENUES FOR DIGITAL TRADE

- addressing digital governance as a cross-sector issue
- WTO-plus and WTO-extra provisions
- **3 FTA chapters are relevant:**
  - dedicated e-commerce chapters >> **new templates for digital trade**
  - services chapters
  - IP chapters

# FTA DIGITAL TRADE MODELS IN THE INDO-PACIFIC REGION

## Trade groupings involving Asia Pacific nations



SOURCE: The Economist Intelligence Unit



+ EU and bilateral deals

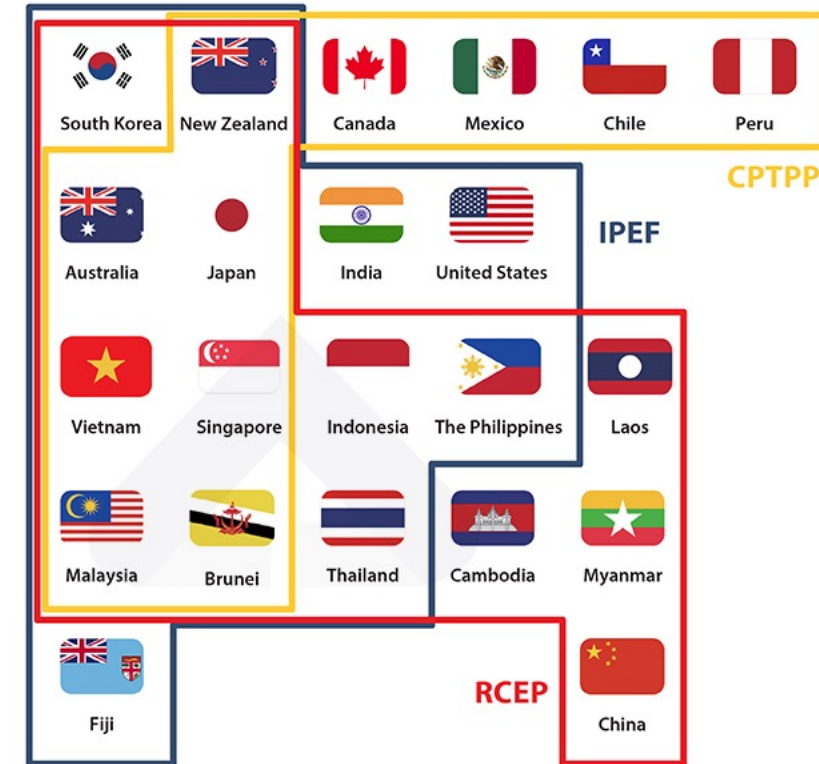
## IPEF vs Other Major Asia-Pacific Strategic and Trade Deals

US Treaty Partner<sup>1</sup>

Quadrilateral Security Dialogue<sup>2</sup> (Quad)

Association of Southeast Asian Nations (ASEAN)

Other



## CPTPP: E-COMMERCE CHAPTER

- the CPTPP chapter on e-commerce set out a comprehensive template for digital trade
- identical with the TPP e-commerce chapter and in essence US-driven
- **substance:**
  - ban on customs duties on electronic transmissions, including content transmitted electronically
  - non-discriminatory treatment of digital products
  - a legal framework governing electronic transactions consistent with the principles of the *UNCITRAL Model Law on Electronic Commerce* 1996 or the *UN Convention on the Use of Electronic Communications in International Contracts* 2005
  - electronic authentication and electronic signatures
  - online consumer protection
  - paperless trading
  - **spam**
  - **source code**
  - **net neutrality**
  - cooperation, including on **cybersecurity**

## CPTPP: E-COMMERCE CHAPTER

- **specific rules on data:**
  - **explicit ban on data protectionism:** ‘Each Party shall 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’
  - **localization measures prohibited**
  - **restrictions are permitted only for legitimate purposes** if they do not amount to ‘arbitrary or unjustifiable discrimination or a disguised restriction on trade’
  - **low standards of data privacy protection**

## CPTPP vs. USMCA

- **replicates and extends the CPTPP chapter:** the same broad scope of application; ban customs duties on electronic transmissions and binds the parties for non-discriminatory treatment of digital products; electronic contracts, electronic authentication and signatures, and paperless trading
- **ban on data localization and a hard rule on free information flows**
- **new elements:**
  - **inclusion of ‘algorithms’**, the meaning of which is ‘a defined sequence of steps, taken to solve a problem or obtain a result’ and has become part of the ban on requirements for the transfer or access to source code (Article 19.16)
  - **‘interactive computer services’**: Parties pledge not to ‘adopt or maintain measures that treat a supplier or user of an interactive computer service as an information content provider in determining liability for harms related to information stored, processed, transmitted, distributed, or made available by the service, except to the extent the supplier or user has, in whole or in part, created, or developed the information’
  - **open government data**

## POST-CPTPP DEVELOPMENTS: DIFFUSION

- similar rules in other trade agreements:
- 2016 **Chile-Uruguay FTA**
- 2016 **updated Singapore-Australia FTA (SAFTA)**
- 2017 **Argentina-Chile FTA**
- 2018 **Singapore-Sri Lanka FTA**
- 2018 **Australia-Peru FTA**
- 2018 **United States-Mexico-Canada Agreement (USMCA)**
- 2019 **Brazil-Chile FTA**
- 2019 **Australia-Indonesia FTA**
- 2019 **Japan-US Digital Trade Agreement**
- 2020 **DEPA: Chile, New Zealand, Singapore**
- 2021 **Korea-Singapore DEA (negotiations substantially concluded)**
- 2022 **UK-Singapore DEA**
  
- **UK, China and Taiwan wish to join the CPTPP**



## LEGAL INNOVATION: NEW DIGITAL ECONOMY AGREEMENTS (DEAs)

- 2019 Japan-US Digital Trade Agreement
  - 2020 Singapore-Australia DEA
  - 2020 DEPA: Chile, New Zealand, Singapore
  - 2021 Korea-Singapore DEA (negotiations substantially concluded)
  - 2022 UK-Singapore DEA
- 
- DEAs often but not always linked to a trade agreement

## US-JAPAN DIGITAL TRADE AGREEMENT (DTA)

- the US approach confirmed also by the DTA, signed on 7 October 2019, alongside the US–Japan Trade Agreement
- **the DTA replicates almost all provisions of the USMCA and the CPTPP**, including the new USMCA rules on open government data, source code and interactive computer services **but notably covering also financial and insurance services as part of the scope of agreement**
- **new provision on ICT goods that use cryptography**: Article 21 DTA specifies that for such goods designed for commercial applications, neither party shall require a manufacturer or supplier of the ICT good as a condition to entering the market to: (a) transfer or provide access to any proprietary information relating to cryptography; (b) partner or otherwise cooperate with a person in the territory of the Party in the development, manufacture, sale, distribution, import, or use of the ICT good; or (c) use or integrate a particular cryptographic algorithm or cipher (similar to Annex 8-B, Section A.3 of the CPTPP Chapter on technical trade barriers)
- **things missing in the DTA when compared to the USMCA**: rules on paperless trading, net neutrality and the mention of data protection principles
- **the US proposal under the JSI negotiations is a combination of the USMCA + DTA**

## DIGITAL ECONOMY PARTNERSHIP AGREEMENT (DEPA)

- the 2020 DEPA between Chile, New Zealand, and Singapore, all parties to the CPTPP, is not conceptualized as a purely trade agreement but one that is meant to address the broader issues of the digital economy; **its scope is wide, open and flexible**
- **modular approach / flexibility**
- the type of rules varies across the different modules: all rules of the CPTPP are replicated, **some of the USMCA rules, such as the one on open government data (but not source code), and some of the US–Japan DTA provisions, such as the one on ICT goods using cryptography; no rules on interactive computer services**
- **new unknown to previous agreements elements:** e.g. artificial intelligence (AI), digital inclusion, digital identities
- **enhanced cooperation; yet, many norms of soft legal nature**

## REGIONAL COMPREHENSIVE ECONOMIC PARTNERSHIP (RCEP): RULES ON DATA FLOWS

- RCEP entered into force for: **Australia, New Zealand, Brunei Darussalam, Cambodia, China, Japan, Laos, Singapore, Thailand, Vietnam, Republic of Korea and Malaysia**
- **ban on localization measures (art. 12.14) as well as a commitment to free data flows (art. 12.15)**
- **while the RCEP is almost a mirror image of the CPTPP, there are clarifications that give RCEP members a lot policy space:**
  - ‘For the purposes of this subparagraph, **the Parties affirm that the necessity behind the implementation of such legitimate public policy shall be decided by the implementing Party**’ (footnote to art. 12.14.3(a))
  - + the article does not prevent a party from taking ‘**any measure that it considers necessary for the protection of its essential security interests. Such measures shall not be disputed by other Parties**’ (art. 12.14.3(b))
  - **similar policy space protected with regard to data flows (art. 12.15)**

## INDO-PACIFIC ECONOMIC FRAMEWORK FOR PROSPERITY (IPEF)

- launched by the US in 2022
- to take the form of an executive agreement, bypassing Congress, and will not advance any new market access commitments
- IPEF is divided into four pillars: **Connected economy** (Trade), **Resilient economy** (Supply Chains), **Clean economy** (clean energy), and **Fair economy** (tax and anti-corruption)
- **Pillar 3:**
  - Digital economy:** (1) trusted and secure cross-border data flows; (2) inclusive, sustainable growth of the digital economy; and (3) the responsible development and use of emerging technologies
  - Transparency and good regulatory practices,** including online
  - Competition policy:** adopting or maintaining competition and consumer protection laws to ensure open, fair, transparent, and competitive markets, **including digital markets**
  - Trade facilitation:** digitalization of trade facilitation measures; promote electronic processing of customs data and documentation; electronic payments

## INDO-PACIFIC ECONOMIC FRAMEWORK FOR PROSPERITY (IPEF): INITIAL THOUGHTS

- the ambition of the digital trade undertakings could be undermined by the fact that there is no market access carrot of the Indo-Pacific countries
- mixing the labour standards and environmental regulations (added because of domestic US pressure) might disincentivize uptake from ASEAN members and India
- the US could sweeten the digital trade deal by adding digital-specific infrastructure, capacity building, investment incentives, and cybersecurity training
- if the US is serious about getting any commitments on digital trade in IPEF, it should decouple digital trade from labour and environment
- the heterogeneity of the different participating countries may be hard to reconcile and lead to minimal commitments

.

## HIGHLIGHTING TRENDS IN GLOBAL DIGITAL TRADE RULE-MAKING

- emergence of a specific trade regime tailored to digital products and services
- digital trade not so much about market access but about interfacing domestic regimes, so as to provide interoperability and some certainty
- legal innovation: CPTPP / USMCA / DEAs
- value of international trade law (if not through the WTO) increased for digital trade and data flows
- agreement on digital trade enablement issues, such as paperless trading, electronic contracts, custom duties moratorium
- disagreement on data flows vs. the protection of privacy and national security
- the regulatory framework is still patchy and likely to continue in preferential (bloc-building manner) rather than multilaterally

**thank you.**

**contact: [mira.burri@unilu.ch](mailto:mira.burri@unilu.ch)**