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# Digital services and digital trade in the Asia Pacific: an alternative model for digital integration?

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## ABSTRACT


This article explores digital integration in the Asia Pacific through a comparative analysis of four preferential trade agreements (PTAs): (i) the Comprehensive and Progressive Trans-Pacific Partnership Agreement (CPTPP); (ii) the Regional Comprehensive Economic Partnership Agreement (RCEP); and two-digital only agreements: (iii) the ASEAN Ecommerce Agreement; and (iv) the Digital Economy Partnership Agreement. This article argues that although Asia/ASEAN-led PTAs such as RCEP and ASEAN E-Commerce Agreement appear less ambitious at first sight, when compared to digital trade chapters in PTAs led by western states such as the CPTPP, they are both relevant and appropriately suited to foster digital trade integration in the region. Viewed from the perspective of New Asian Regionalism, these agreements contribute substantially to the global economic order by leveraging the collective power of the Asia-Pacific through a pragmatic, incremental approach. By combining soft law mechanisms with specific legal obligations, these PTAs have better-addressed variations in digital development levels and policy preferences across countries, eventually leading to meaningful consensus-building and long-term engagement in complex areas of digital regulation.

## KEYWORDS

Free trade agreements; e-commerce; digital trade; ASEAN; digital integration

## I. Introduction

The Asia-Pacific region is at the epicentre of enormous digital growth and transformation. Six of the ten fastest-growing markets for ecommerce in the world are in this region (namely India, Philippines, China, Malaysia, Indonesia and Korea).<sup>1</sup> Studies have also estimated that ecommerce revenue growth would be almost 200 per cent in Southeast Asia.<sup>2</sup> The Asia-Pacific region has rapidly adopted and implemented digital technologies and

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<sup>1</sup>APEC Electronic Commerce Steering Group, Asia-Pacific Economic Cooperation Secretariat, *Regulations, Policies and Initiatives on E-Commerce and Digital Economy for APEC MSMEs' Participation in the Region* (March 2020) 7 <[www.apec.org/docs/default-source/publications/2020/3/regulations-policies-and-initiatives-on-e-commerce-and-digital-economy/220ecsgregulations-policies-and-initiatives-on-e-commerce-and-digital-economy-for-apec-msmes-particip.pdf?sfvrsn=63b748d7\\_1](http://www.apec.org/docs/default-source/publications/2020/3/regulations-policies-and-initiatives-on-e-commerce-and-digital-economy/220ecsgregulations-policies-and-initiatives-on-e-commerce-and-digital-economy-for-apec-msmes-particip.pdf?sfvrsn=63b748d7_1)> accessed 11 December 2022.

<sup>2</sup>Lurong Chen, 'Improving Digital Connectivity for E-Commerce: A Policy Framework and Empirical Note' in Lurong Chen and Fukunari Kimura (eds), *E-commerce Connectivity in ASEAN* (Economic Research Institute for ASEAN and East Asia,

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services, including cloud services and digital platforms, online payment solutions, and 5G-powered connectivity driving Internet of Things, immersive technology applications, and augmented reality platforms.<sup>3</sup>

Several technology companies originating in Asia have established their presence in the region and are at the forefront of driving digital trade growth. For instance, the Indonesian firm Gojek now operates in Vietnam, Thailand, Singapore, and the Philippines, offering an on-demand multi-service platform consisting of digital payments, online motorcycle taxi service, app-based grocery shopping, food and medicine delivery, and app-based beauty and house-cleaning services.<sup>4</sup> Further, in addition to the success of the Chinese company Alibaba and its various subsidiaries,<sup>5</sup> other companies like WeChat, Tokopedia, and Viettel have seen enormous growth over the last decade.<sup>6</sup>

Increasing digital integration is one of the critical factors driving digital economy growth in the Asia Pacific and governments in this region have strived to promote it through regional cooperation and rulemaking. Digital integration is a complex and multi-dimensional process, entailing integration across various domains including regulatory structures/policy designs, digital technologies and business processes along the supply chain, free movement of digital services, data, capital, ideas and talent, and the presence of integrated physical/virtual infrastructure to enable reliable interconnectivity across networks.<sup>7</sup> As Mitchell and Mishra argue, digital integration is not merely about removing digital trade barriers; it also entails 'extensive technology, legal and policy coordination across countries'.<sup>8</sup>

The approach of the Asian countries towards digital integration can be seen as one of the flagship initiatives in 'New Asian Regionalism'. It denotes Asia-Pacific's strong contribution to the evolution of a New Regional Economic Order (NREO) and a marked development of Third Regionalism, as Chaisse and Hsieh argue in the introductory article of this issue.<sup>9</sup> Chaisse and Hsieh define New Asian regionalism as 'a new normative integration process that has evolved with the Association of Southeast Asian Nations (ASEAN) Plus Six framework, which underpins Asia's acceding economic power'.<sup>10</sup>

Several recent preferential trade agreements (PTAs) in the Asian region, including the Regional Comprehensive Economic Partnership Agreement ('RCEP'), now contain detailed

2020) 7 <[www.eria.org/uploads/media/E-commerce-Connectivity-in-ASEAN/6\\_Chapter-2\\_Improving-Digital-Connectivity-for-E-commerce\\_A-Policy-Framework-and-Empirical-Note.pdf](http://www.eria.org/uploads/media/E-commerce-Connectivity-in-ASEAN/6_Chapter-2_Improving-Digital-Connectivity-for-E-commerce_A-Policy-Framework-and-Empirical-Note.pdf)> accessed 11 December 2022.

<sup>3</sup>World Economic Forum, *Advancing Digital Trade in Asia* (October 2020) 7 <[www3.weforum.org/docs/WEF\\_GFC\\_Advancing\\_Digital\\_Trade\\_in\\_Asia\\_2020.pdf](http://www3.weforum.org/docs/WEF_GFC_Advancing_Digital_Trade_in_Asia_2020.pdf)> accessed 11 December 2022.

<sup>4</sup>Dashveenjit Kaur, 'Gojek Sees Profitability Ahead After a Decade of Rapid' *Techwire Asia* (16 November 2020) <<https://techwireasia.com/2020/11/gojek-sees-profitability-ahead-after-a-decade-of-rapid-growth/>> accessed 11 December 2022.

<sup>5</sup>Rainer Zitelmann, 'The Jack Ma Story: Why Thinking Big Is More Important than Technical Knowledge' *Forbes* (4 November 2019) <[www.forbes.com/sites/rainerzitelmann/2019/11/04/the-jack-ma-story-why-thinking-big-is-more-important-than-technical-knowledge/](http://www.forbes.com/sites/rainerzitelmann/2019/11/04/the-jack-ma-story-why-thinking-big-is-more-important-than-technical-knowledge/)> accessed 11 December 2022.

<sup>6</sup>Qianyu Han, 'Why the Gojek and Tokopedia Merger Is Set to Fuel Alibaba and Tencent's competition in Southeast Asia' *KrAsia* (11 June 2021) <<https://kr-asia.com/why-the-mint-of-goto-is-set-to-fuel-alibaba-and-tencents-competition-in-southeast-asia>> accessed 11 December 2022. See generally 'Emerging Giants in Asia Pacific' *KPMG* (2022) <<https://assets.kpmg/content/dam/kpmg/xx/pdf/2022/07/emerging-giants-in-Asia-Pacific.pdf>> accessed 11 December 2022.

<sup>7</sup>United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP), *Digital Trade Integration in Preferential Trade Agreements* (13 May 2020) 1 <[www.unescap.org/resources/digital-trade-integration-preferential-trade-agreements](http://www.unescap.org/resources/digital-trade-integration-preferential-trade-agreements)> accessed 11 December 2022.

<sup>8</sup>Ibid.

<sup>9</sup>Julien Chaisse and Pasha Hsieh, 'Rethinking Asia-Pacific Regionalism and New Economic Agreements' (2023) *Asia Pacific Law Review* 1, 3, 10.

<sup>10</sup>Ibid.

provisions on electronic commerce (ecommerce) or digital trade.<sup>11</sup> The Asian model of digital integration, embedded in these PTAs, is tailored to address the varied political and economic circumstances and the scale of digital development across parties.<sup>12</sup> These PTAs also reflect the preference of several Asian states for an incremental and pragmatic approach, building upon long-standing cooperation, gradually developing consensus on essential issues, and incorporating sufficient regulatory autonomy to accommodate the diversity of digital development and ideological preferences.<sup>13</sup>

In this article, we find that the above features, characteristic of New Asian Regionalism, have enabled dynamism in normative trade integration on digital issues.<sup>14</sup> For instance, the trajectory of the Association of Southeast Asian Nations ('ASEAN') in fostering digital integration well demonstrates this approach, as discussed later in the article. Further, although certain Asian countries are also members of western-led initiatives including the Comprehensive and Progressive Trans-Pacific Partnership Agreement ('CPTPP') and, more recently, the Indo-Pacific Economic Framework (IPEF),<sup>15</sup> the Electronic Commerce Chapter of the RCEP and ASEAN E-Commerce Agreement present a more pragmatic and feasible model for Asian digital integration. For instance, both these agreements provide more domestic policy space for digital regulation and avoid binding provisions in sensitive areas including data localization or source code disclosure, where domestic policy preferences vary. Instead, they advocate consultation-based mechanisms and soft law norms or guidelines for contentious areas.

To explore the role of Asia Pacific in the Third Regionalism movement vis-à-vis digital trade, we evaluate and contrast provisions on digital trade in four prominent Asia-Pacific PTAs: (i) CPTPP; (ii) RCEP; and two-digital only agreements: (iii) *ASEAN E-Commerce Agreement*; and (iv) *Digital Economy Partnership Agreement* ('DEPA'). We argue that the initiatives led by Asian countries often appear less ambitious at first sight; for instance, the CPTPP electronic commerce chapter (initially US-led) contains more obligations as compared to the RCEP chapter, and the same is true when we contrast the ASEAN E-commerce Agreement with DEPA (where Singapore is currently the only Asian party).<sup>16</sup> These differences, however, denote the unique characteristics of new Asian Regionalism.

This alternative model of digital integration premised on the fundamental aspects of New Asian Regionalism, is important from a global perspective for two reasons.

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<sup>11</sup>We use the terms 'digital trade' and 'electronic commerce' interchangeably in the article; experts however argue that 'digital trade' is broader than traditional e-commerce and also refers to the use of technologies in supply chain management, trade logistics, efficient communication mechanisms and data exchange systems. See UNESCAP, *Asia Pacific Trade and Investment Report* (10 November 2016) 103 <[www.unescap.org/sites/default/files/aptir-2016-ch7.pdf](http://www.unescap.org/sites/default/files/aptir-2016-ch7.pdf)> accessed 11 December 2022.

<sup>12</sup>Further, Chaisse and Hsieh argue that these new Asian approaches form a core part of New Regional Economic Order and can be seen as a much-needed response to the inadequacy of Washington Consensus or the Brussels effect. See Chaisse and Hsieh (n 9) 1, 5, 12.

<sup>13</sup>See generally Pasha Hsieh, *New Asian Regionalism in International Economic Law* (CUP, 2022).

<sup>14</sup>*Ibid*, 12.

<sup>15</sup>The IPEF is an initiative launched by the Biden administration in the US to create rules of the twenty-first century across four pillars: Fair and resilient trade; supply chain resilience; infrastructure, clean energy and decarbonization; and tax and anti-corruption. See 'FACT SHEET: In Asia, President Biden and a Dozen Indo-Pacific Partners Launch the Indo-Pacific Economic Framework for Prosperity' *The White House* (23 May 2022) <<https://web.archive.org/web/20220531202744/https://www.whitehouse.gov/briefing-room/statements-releases/2022/05/23/fact-sheet-in-asia-president-biden-and-a-dozen-indo-pacific-partners-launch-the-indo-pacific-economic-framework-for-prosperity/>> accessed 11 December 2022.

<sup>16</sup>A distinction must be made between the digital trade initiatives of Singapore with non-Asian countries, which are often far more liberalising (given Singapore's state of digital development and size of economy), and ASEAN initiatives with the rest of the world.

First, it demonstrates the collective capacity for global leadership by Asian countries in enabling cross-border digital trade. Second, it provides a viable model for digital trade integration among countries with varying levels of digital development, and particularly relevant for regional blocs consisting of similarly placed developing countries.

## II. Digital services and digital trade in Asia-Pacific PTAs: key disciplines and emerging trends

This section compares and evaluates key provisions on electronic commerce or digital trade and services in four preferential trade agreements ('PTA'): the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* ('CPTPP') Agreement; the *Regional Comprehensive Economic Partnership* ('RCEP') Agreement; the *ASEAN Agreement on E-Commerce* ('ASEAN E-Commerce Agreement'); and the *Digital Economy Partnership Agreement* ('DEPA').

Before delving into these specific treaties, it may be helpful to place these PTAs in the larger universe of electronic commerce chapters in PTAs.<sup>17</sup> The US-Jordan FTA was the first treaty to contain an electronic commerce chapter in 2000,<sup>18</sup> and such rules are now included in at least 110 PTAs.<sup>19</sup> Another helpful source to examine the universe of electronic commerce chapters is the TAPED dataset, developed by the researchers at the University of Lucerne. This portal contains a list of electronic commerce or digital trade provisions in PTAs and codes various attributes of each provision including its scope and binding value.<sup>20</sup>

While several countries have signed PTAs with Electronic Commerce Chapters, the front-runners of PTAs containing comprehensive rules on digital trade have usually been countries with an open, liberalized approach towards digital trade.<sup>21</sup> In particular, Singapore, Australia, Japan, New Zealand, US, and Chile have proactively signed several trade treaties with comprehensive electronic commerce chapters. These PTAs typically contain commitments across various areas including customs duties on electronic transmissions, cross-border data flows and data localization, non-discrimination of digital products and market access, online consumer protection, spam control, cybersecurity cooperation, source code/algorithm disclosure, transparency, and international regulatory cooperation.

While the four treaties discussed in this section exist in this larger universe, they make unique, well-defined contributions to digital trade law. The CPTPP is an important trendsetter and often touted as the benchmark for the modern generation of PTAs,

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<sup>17</sup>It is outside the scope of this article to engage in a detailed discussion of electronic commerce chapter across all PTAs. See generally Mira Burri and Rodrigo Polanco, 'Digital Trade Provisions in Preferential Trade Agreements: Introducing a New Dataset' (2020) 23(1) *Journal of International Economic Law* 187; Mark Wu, 'Digital Trade-Related Provisions in Regional Trade Agreements: Existing Models and Lessons for the Multilateral Trade System' (November 2017) <<http://e15initiative.org/wp-content/uploads/2015/09/RTA-Exchange-Digital-Trade-Mark-Wu-Final-2.pdf>> accessed 2 March 2023.

<sup>18</sup>Burri and Polanco (n 17) 193.

<sup>19</sup>Binit Agarwal and Neha Mishra, 'Addressing the Global Data Divide Through Digital Trade Law' (2022) 14(2) *Trade, Law & Development* <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4276764](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4276764)> accessed 11 December 2022.

<sup>20</sup>University of Lucerne, 'TAPED Dataset' <[www.unilu.ch/en/faculties/faculty-of-law/professorships/burri-mira/research/taped/](http://www.unilu.ch/en/faculties/faculty-of-law/professorships/burri-mira/research/taped/)> accessed 11 February 2023.

<sup>21</sup>*Ibid.*

especially for liberalized digital economies.<sup>22</sup> Provisions in several recent PTAs (especially on data flows and related issues) are either inspired or directly transplanted from the CPTPP.<sup>23</sup>

The DEPA is exemplary as the first digital economy agreement or DEA, with disciplines covering several atypical, emerging areas of digital trade.<sup>24</sup> The DEPA as the front-runner among DEAs makes a unique contribution. As this article argues in detail below, it represents a broader vision of digital trade and therefore contains more comprehensive disciplines in atypical areas (e.g. emerging digital technologies), incorporates flexible implementation mechanisms, and often refers to high-level principles on difficult or sensitive issues.<sup>25</sup>

The RCEP, while following the general schematic of CPTPP, offers softer, flexible disciplines especially on data regulation.<sup>26</sup> This approach symbolizes the achievable compromise when authoritarian digital economies are involved in a digital trade deal.

Finally, the ASEAN E-Commerce Agreement is significant as a long-term consolidated policy effort to bring together countries at different stages of digital development.<sup>27</sup> As this article argues, ASEAN remains inspiration for regional trade bodies in Africa and South America. We now turn to the background and a comparative evaluation of disciplines in these four FTAs.

## **A. Background to the agreements**

The CPTPP is a PTA between 11 diverse economies, majority of which are in the Asian region, namely, Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam. The Agreement entered into force in 2018. It largely incorporates the provisions of the Trans-Pacific Partnership Agreement ('TPP'), which was previously being negotiated between the current CPTPP Parties and the US before the latter withdrew from it.<sup>28</sup> Until then, the US played a central role in shaping the electronic commerce chapter of the TPP. This leadership is reflected in the agreement's approach to rulemaking and the focus of its provisions. In June 2021, the CPTPP commenced formal accession negotiations with the United Kingdom.<sup>29</sup> The RCEP, which entered into force in January 2022, has the highest membership from the region and was led by Asian countries i.e. 15 countries, including all the ASEAN member countries, plus Australia, China, Japan, New Zealand, and South Korea (see [Table 1](#)).

<sup>22</sup>See generally 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.

<sup>23</sup>Manfred Elsig and Sebastian Klotz, 'Data-Related Provisions in Preferential Trade Agreements: Trends and Patterns of Diffusion' in Mira Burri (ed), *Big Data and Global Trade Law* (CUP, 2021) 42.

<sup>24</sup>Stephanie Honey, 'Enabling Trust, Trade flows, and Innovation: The DEPA at Work' <[www.hinrichfoundation.com/research/article/digital/enabling-trust-trade-flows-and-innovation-depa-at-work/](http://www.hinrichfoundation.com/research/article/digital/enabling-trust-trade-flows-and-innovation-depa-at-work/)> accessed 23 February 2023.

<sup>25</sup>Peter Lovelock, 'Chapter 2: The New Generation of "Digital" Trade Agreements: Fit for Purpose?' *PECC* (2021) <[www.pecc.org/state-of-the-region-reports/287-2020-2021/888-chapter-2-the-new-generation-of-digital-trade-agreements-fit-for-purpose](http://www.pecc.org/state-of-the-region-reports/287-2020-2021/888-chapter-2-the-new-generation-of-digital-trade-agreements-fit-for-purpose)> accessed 27 February 2023. See Section IIB.

<sup>26</sup>Thomas Streinz, 'RCEP's Contribution to Global Data Governance' (19 February 2021) <[www.afronomiclaw.org/category/analysis/rceps-contribution-global-data-governance-0](http://www.afronomiclaw.org/category/analysis/rceps-contribution-global-data-governance-0)> accessed 12 February 2023.

<sup>27</sup>UNESCAP (n 7).

<sup>28</sup>'Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)' (Australian Government – Department of Foreign Affairs and Trade) <[www.dfat.gov.au/trade/agreements/in-force/cptpp/comprehensive-and-progressive-agreement-for-trans-pacific-partnership](http://www.dfat.gov.au/trade/agreements/in-force/cptpp/comprehensive-and-progressive-agreement-for-trans-pacific-partnership)> accessed 11 December 2022.

<sup>29</sup>*Ibid.*

**Table 1.** Membership in the CPTPP, RCEP, ASEAN E-Commerce Agreement and DEPA.

Countries	CPTPP	RCEP	ASEAN E-Commerce Agreement	DEPA
Australia	✓	✓		
Brunei Darussalam	✓	✓	✓	
Cambodia		✓	✓	
Canada	✓			
Chile	✓			✓
China		✓		
Indonesia		✓	✓	
Japan	✓	✓		
Laos*		✓	✓	
Malaysia	✓	✓	✓	
Mexico	✓			
Myanmar		✓	✓	
New Zealand	✓	✓		✓
Peru	✓			
Philippines		✓	✓	
Singapore	✓	✓	✓	✓
South Korea**		✓		
Thailand		✓	✓	
Viet Nam	✓	✓	✓	

The DEPA was the first DEA in the world. It came into force in 2021 and signed by Chile, Singapore, and New Zealand. It is organized in a unique modular structure, divided into 16 modules, and is open to all WTO members and addresses multiple new-age issues in digital technologies. These areas comprise emerging trends and technologies, digital inclusion, and innovation and the digital economy, in addition to the more conventional areas covered in the CPTPP, the USMCA or other PTAs of western liberal economies. All parties to the DEPA are also CPTPP members.

Recent years have seen countries take an increased interest in DEAs, distinguishable from PTAs that deal with all aspects of trade (and often investment) issues. DEAs have become attractive for countries singularly focused on digital trade as a topic for negotiations, and that wish to avoid traditional PTA negotiations that get derailed due to cross-sectoral trade-offs.<sup>30</sup> Further, the focus on digital trade means that many controversial issues and challenges related to physical trade (e.g. agricultural subsidies) can be sidestepped. Also, DEAs are probably more liberal in their approach because the countries involved with them are mostly small, developed countries (with the exception of Chile) that find it more beneficial to support free digital trade.

Other DEAs include the *Australia – Singapore Digital Economy Agreement* ('SADEA')<sup>31</sup> and the *US – Japan Digital Trade Agreement*.<sup>32</sup> Singapore also recently concluded negotiations on the digital economy agreement with South Korea and the United Kingdom.<sup>33</sup>

<sup>30</sup>Rachelle Taheri, Olivia Adams, and Pauline Stern, 'DEPA: The World's First Digital-Only Trade Agreement' *Asia Pacific Foundation of Canada* (7 October 2021) <[www.asiapacific.ca/publication/depa-worlds-first-digital-only-trade-agreement](http://www.asiapacific.ca/publication/depa-worlds-first-digital-only-trade-agreement)> accessed 27 February 2023.

<sup>31</sup>Australia – Singapore Digital Economy Agreement (6 August 2020).

<sup>32</sup>Agreement between the United States of America and Japan concerning Digital Trade (7 October 2019).

<sup>33</sup>Singapore and Republic of Korea conclude negotiations on a Digital Economy Agreement' *Ministry of Trade and Industry, Singapore* (15 December 2021) <[www.mti.gov.sg/-/media/MTI/Newsroom/Press-Releases/2021/12/Singapore-and-the-Republic-of-Korea-conclude-negotiations-on-a-Digital-Economy-Agreement.pdf](http://www.mti.gov.sg/-/media/MTI/Newsroom/Press-Releases/2021/12/Singapore-and-the-Republic-of-Korea-conclude-negotiations-on-a-Digital-Economy-Agreement.pdf)> (accessed 16 September 2022); The United Kingdom – Singapore Digital Economy Agreement (14 June 2022).

Two non-exclusive explanations may be offered as to why countries are signing bilateral DEAs rather than requesting accession to the DEPA.<sup>34</sup> First, accession into the DEPA requires the approval of every existing member, thereby deterring new parties as it causes delays and may require trade-offs in additional negotiations with other DEPA members to enter the agreement. Second, countries may resort to bilateral DEAs because they offer flexibility for incremental developments in digital economy rules, as seen in the new issues addressed in the negotiations between Singapore and the United Kingdom. This approach allows them to keep pace with the rapid technological changes that take place on the ground (for e.g. the Singapore-UK agreement deals with lawtech, AI, blockchain, etc.). More broadly, digital economy bilateralism allows them to tailor the negotiation outcomes to their mutual needs and interests, despite the concerns this approach brings for the rising fragmentation of the digital economy.

ASEAN comprises ten Southeast Asian countries: Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam. While Singapore is a highly developed member, other members such as Laos and Cambodia are Least Developed Countries ('LDCs'). Other ASEAN members lie in between the spectrum of digital development with Malaysia, Vietnam and Indonesia being relatively strong and fast-growing digital economies. In November 2000, ASEAN members envisioned the *e-ASEAN Framework Agreement* aiming to create a favourable environment for ecommerce to flourish in the region.<sup>35</sup> The scope of this agreement was ambitious and premised on the following fundamental requirements: establishing interoperable national information infrastructures; adopting domestic regulatory and legislative frameworks supporting ecommerce; liberalising and facilitating trade in ICT goods, services and investments; building capacity; digitalizing government services; and enabling inter-governmental cooperation.<sup>36</sup>

The ASEAN members incrementally built upon this initiative through the *ASEAN Economic Community ('AEC') Blueprint 2015* to achieve full implementation of the e-ASEAN Framework Agreement.<sup>37</sup> Accordingly, ASEAN members increased the scope of their agenda by committing to adopt best practices in implementing telecommunications and competition policies, fostering domestic legislation on ecommerce, and facilitating mutual recognition of digital signatures in ASEAN.<sup>38</sup>

The subsequent *AEC Blueprint 2025* was more ambitious in setting out the agenda for facilitating cross-border e-commerce transactions, e.g. harmonizing laws for consumer protection and online dispute resolution, enabling interoperable and secure e-

<sup>34</sup>In this context, Soprana questions whether DEPA meets the test under Article V of GATS or if parties should incorporate this instead as additional commitments under GATS art XVIII. While this article does not delve into this issue, this question is increasingly relevant due to the emerging network of DEAs. See Marta Soprana, 'The Digital Economy Partnership Agreement (DEPA): Assessing the Significance of the New Trade Agreement on the Block' (2021) 13(1) Trade, Law & Development 145, 167.

<sup>35</sup>e-ASEAN Framework Agreement (24 November 2000) (no longer in force).

<sup>36</sup>Ibid, Arts 4, 5, 6, 7, 8, 9; See generally Pichet Durongkaveroj, 'An Overview of e-ASEAN Initiative' (ITU Workshop on Creating Trust in Critical Network Infrastructures, Seoul, 20–22 May 2002) <[www.itu.int/osg/spu/ni/security/workshop/presentations/cni.24.pdf](http://www.itu.int/osg/spu/ni/security/workshop/presentations/cni.24.pdf)> accessed 11 December 2022.

<sup>37</sup>ASEAN Secretariat, *ASEAN Economic Community Blueprint* (20 November 2007) 23 <[www.asean.org/wp-content/uploads/images/archive/5187-10.pdf](http://www.asean.org/wp-content/uploads/images/archive/5187-10.pdf)> accessed 11 December 2022; The other three objectives included: (1) an ASEAN single market and production base (2) a region of equitable economic development (3) a region fully integrated into the global economy.

<sup>38</sup>Ibid.



identification and authorization schemes, and encouraging the development of a coherent and comprehensive framework for personal data protection.<sup>39</sup> New goals were added to this digital integration agenda in the *ASEAN Digital Integration Framework*, signed in 2018, the *ASEAN E-Commerce Agreement* signed in 2018, and the subsequent *Digital Integration Framework Action Plan*.<sup>40</sup>

The ASEAN E-Commerce Agreement, which entered into force in 2021, deals exclusively with electronic commerce matters.<sup>41</sup> ASEAN parties entered into this agreement to increase collaboration on e-commerce issues and pave the way for a common digital market in ASEAN.<sup>42</sup> In 2021, the ASEAN developed a work plan to accelerate the implementation of the ASEAN E-Commerce Agreement, taking into account the different development levels of ASEAN countries ('ASEAN E-Commerce Agreement Implementation Work Plan').<sup>43</sup>

Featuring the incremental pragmatism that characterizes New Asian Regionalism, ASEAN members expect to commence negotiations on a regional DEA or the *Digital Economy Framework Agreement* (DEFA) by 2025.<sup>44</sup> DEFA's aim would be to support the establishment of an open, secure, interoperable, competitive and inclusive regional digital economy. This agreement would address ASEAN's cooperation in the digital ecosystems, including developing a digital-ready workforce, and preparing micro, small and medium enterprises for digital transformation. By design, the agreement is also expected to consider the digital and development gaps of ASEAN members.<sup>45</sup>

In terms of membership (see Table 1), Singapore is party to all the four treaties above. Brunei Darussalam, Malaysia, and Vietnam are parties to the CPTPP, RCEP and ASEAN E-Commerce Agreement, while New Zealand is party to the CPTPP, RCEP and DEPA. Australia and Japan are signatories of the CPTPP and RCEP, whereas Cambodia, Indonesia, Laos, Myanmar, the Philippines, and Thailand are participants of the RCEP and the ASEAN E-Commerce Agreement. Further, Chile is party to the CPTPP and DEPA. Finally, Canada is only party to the CPTPP.

## ***B. Comparative evaluation of digital trade provisions in the cptpp, RCEP, DEPA and ASEAN E-Commerce agreement***

### ***1. Scope of the electronic commerce provisions***

The provisions in the E-Commerce Chapters of the CPTPP and RCEP Agreements apply to measures affecting electronic commerce, except for government procurement measures and information held or processed by or on behalf of a party (i.e. covering government

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<sup>39</sup>ASEAN Secretariat, *ASEAN Economic Community Blueprint 2025* (November 2015) 24 <[https://asean.org/wp-content/uploads/2021/08/AECBP\\_2025r\\_FINAL.pdf](https://asean.org/wp-content/uploads/2021/08/AECBP_2025r_FINAL.pdf)> accessed 11 December 2022.

<sup>40</sup>ASEAN Digital Integration Framework (August 2018); ASEAN Digital Integration Framework Action Plan (DIFAP) 2019–2025 (September 2019).

<sup>41</sup>See Section I for background on ASEAN.

<sup>42</sup>ASEAN Agreement on E-Commerce (22 January 2019) (AAEC).

<sup>43</sup>ASEAN, *Work Plan on the Implementation of ASEAN Agreement on Electronic Commerce* (9 September 2021) <[https://asean.org/wp-content/uploads/2022/03/Work-Plan-E-commerce-Agreement\\_endorsed\\_logo.pdf](https://asean.org/wp-content/uploads/2022/03/Work-Plan-E-commerce-Agreement_endorsed_logo.pdf)> accessed 11 December 2022 (ASEAN E-Commerce Workplan).

<sup>44</sup>ASEAN, *Bandar Seri Begawan Roadmap: An ASEAN Digital Transformation Agenda to Accelerate ASEAN's Economic Recovery and Digital Economy Integration* (18 October 2021) 7 <[https://asean.org/wp-content/uploads/2021/10/Bandar-Seri-Begawan-Roadmap-on-ASEAN-Digital-Transformation-Agenda\\_Endorsed.pdf](https://asean.org/wp-content/uploads/2021/10/Bandar-Seri-Begawan-Roadmap-on-ASEAN-Digital-Transformation-Agenda_Endorsed.pdf)> accessed 11 December 2022.

<sup>45</sup>Ibid, 8.

data).<sup>46</sup> The provisions on data transfer and data localization do not apply to financial institutions and services.<sup>47</sup>

The electronic commerce chapters in the CPTPP and RCEP are both subject to other chapters on trade in services and investment.<sup>48</sup> This means that provisions relating to cross-border transfer of information, data localization, and non-discriminatory treatment of digital products (in the case of CPTPP) must be read in conjunction with other relevant provisions, including sector-specific commitments made by the parties in various service sectors.<sup>49</sup> For example, while Art. 14.4 in the CPTPP Electronic Commerce Chapter prohibits discrimination against foreign digital services and service suppliers, Australia has reserved its right to maintain any measure relating to the audio-visual services sector.<sup>50</sup> Similarly, in the RCEP, Singapore has reserved the right to adopt or retain any measure affecting the supply of telecommunication services.<sup>51</sup>

The ASEAN E-Commerce Agreement also contains a carve-out for government procurement<sup>52</sup> and data-related provisions do not apply to financial services and service suppliers.<sup>53</sup> Moreover, the commitments under the ASEAN E-Commerce Agreement are without prejudice to the rights and obligations of the members under any other ASEAN Agreement to which they are parties, including the ASEAN Trade in Services Agreement.<sup>54</sup>

Amongst the four agreements, the DEPA has the broadest scope and applies to any measures affecting trade in the digital economy,<sup>55</sup> with the term 'trade in the digital economy' being undefined.<sup>56</sup> This may be attributed primarily to the fact that while the other agreements seek to carry a much larger number of countries, DEPA is essentially a three-party agreement as of today. The provisions in DEPA do not apply to services supplied in the exercise of governmental power, financial services (except 'Electronic Payments' in Article 2.7), government procurement (except 'Government Procurement' in Article 8.3), and information held or processed by or on behalf of a Party (except 'Open Government Data' in Article 9.5).<sup>57</sup> Below we compare these four agreements across various categories of provisions.

## ***2. Provisions on digital trade facilitation: electronic transactions, authentication, paperless trading, and payments***

Digital trade facilitation is central to enabling cross-border e-commerce and particularly significant for developing countries aiming to become more digital economy-friendly

<sup>46</sup>Comprehensive and Progressive Agreement for Trans-Pacific Partnership (8 March 2018), Arts 14.2.2–14.2.3 (CPTPP); Regional Comprehensive Economic Partnership (15 November 2020), Arts 12.3.1–12.3.3 (RCEP); RCEP additionally clarifies that the commitments of the Parties in the WTO shall prevail over those under the RCEP.

<sup>47</sup>CPTPP, *ibid*, Arts 14.11.2, 14.13.2 each read with Art 14.1 'covered person'; RCEP, *ibid*, Arts 12.15.2, 12.14.2 each read with Art 12.1(b).

<sup>48</sup>CPTPP also includes a 'Financial Services' Chapter.

<sup>49</sup>CPTPP (n 46), Arts 14.2.4–14.2.5; RCEP (n 46), Arts 12.3.4–12.3.5.

<sup>50</sup>CPTPP (n 46), Annex II – Australia's Schedule.

<sup>51</sup>Except for certain sectors and subsectors, namely, 'Basic Telecommunication Services', 'Mobile Services', 'value-added Network services', See RCEP (n 46), Annex III – Schedule of Singapore 68.

<sup>52</sup>AAEC (n 42), Art 3.

<sup>53</sup>*Ibid*, Arts 7.4(c), 7.6(c).

<sup>54</sup>*Ibid*, Art 4.

<sup>55</sup>Digital Economy Partnership Agreement (12 June 2020), Art 1.1.1 (DEPA).

<sup>56</sup>Stephanie Honey, 'Asia-Pacific Digital Trade Policy Innovation' in Ingo Borchert and Alan L Winters (eds), *Addressing Impediments to Digital Trade* (CEPR Press, 2021) 227.

<sup>57</sup>DEPA, Art 1.1.2.

in the short to medium run. Expectedly, both the CPTPP and RCEP contain several provisions on digital trade facilitation. In the case of RCEP, China has been a strong advocate of such provisions in various fora including the WTO.<sup>58</sup> This is in line with the Asian approach of incremental pragmatism, which strongly focuses on achieving immediate consensus on issues that are of the highest economic relevance. The CPTPP and the RCEP also contain provisions on electronic transactions, requiring the Parties to maintain domestic laws governing electronic transactions based on international conventions such as the *UNCITRAL Model Law on Electronic Commerce 1996* or the *United Nations Convention on the Use of Electronic Communications in International Contracts*.<sup>59</sup> Further, Article 14.6 CPTPP and Article 12.6 RCEP require the legal validation of electronic signatures and encourage the use of interoperable electronic authentication mechanisms.

The CPTPP contains soft commitments on paperless trading, in which Parties endeavour to make electronic versions of trade administration documents available to the public and accept the electronic forms of these documents as the legal equivalent of paper documents.<sup>60</sup> While the RCEP contains the same provision, it additionally requires Parties to 'work towards implementing initiatives which provide for the use of paperless trading ...' and cooperate in international fora in this regard.<sup>61</sup> Both the CPTPP and RCEP (in contrast to DEPA, as explained below) do not address the facilitation of electronic payments and invoices. Such provisions have become common in some recent PTAs, but otherwise absent in the majority of treaties.<sup>62</sup> Certain RCEP parties may also have been reluctant to adopt these disciplines, given the sensitivity of the electronic payments sector in some jurisdictions and the limited capacity of LDCs in the RCEP to comply with international standards, e.g. the PEPPOL standard for e-invoicing. Examples of these legal and policy sensitivities include the legal status of cryptocurrencies and other emerging fintech, the licensing or approval requirements for financial services providers, including e-money services across different jurisdictions, and data localization restrictions.

The ASEAN E-Commerce Agreement requires parties to maintain laws governing electronic transactions, by taking into account relevant international conventions and model laws but provides for a temporal leeway for Parties to adopt such laws 'as soon as practicable' (arguably accounting for the needs of its LDC members).<sup>63</sup> Further, parties are required to accept the legal validity of electronic signatures,<sup>64</sup> 'maintain, or adopt as soon as practicable, measures based on international norms for electronic authentication ...' and encourage interoperability in this regard.<sup>65</sup> With respect to paperless trading, art 7.1 requires parties to facilitate 'the use of electronic versions of trade administration documents' and 'exchange of electronic documents through the use of ICT'. Further, ASEAN members recognize the importance of and agree to encourage the use of 'safe

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<sup>58</sup>See generally Henry Gao, 'Digital or Trade? The Contrasting Approaches of China and US to Digital Trade' (2018) 21(2) *Journal of International Economic Law* 297.

<sup>59</sup>CPTPP (n 46), Art 14.5.1; RCEP (n 46), Art 12.10.1; The RCEP allows Parties to also take into account other applicable international conventions and model laws.

<sup>60</sup>CPTPP (n 46), Art 14.9.

<sup>61</sup>RCEP (n 46), Art 12.5.1.

<sup>62</sup>Agrawal and Mishra (n 19).

<sup>63</sup>AAEC (n 42), Art 12.

<sup>64</sup>Except in circumstances otherwise provided for under its laws and regulations.

<sup>65</sup>AAEC (n 42), Art 7.2.

and secure, efficient, and interoperable e-payment systems'.<sup>66</sup> The ASEAN member States have also agreed to establish the 'ASEAN Single Window' initiative, a regional electronic platform that enables the electronic exchange of custom-related documents among member States, thereby expediting cargo and customs procedures.<sup>67</sup>

As expected, the DEPA contains provisions on domestic electronic transactions consistent with the CPTPP, but it also includes an additional soft provision encouraging parties to adopt the *UNCITRAL Model Law on Electronic Transferable Records* (2017).<sup>68</sup> Unlike the above PTAs, DEPA does not contain explicit provisions on cross-border electronic authentication and electronic signatures. With respect to paperless trading, however, it includes elaborate provisions, mandating the parties to make publicly available electronic versions of all existing publicly available trade administration documents,<sup>69</sup> in either English or any other official language of the WTO.<sup>70</sup> Further, it requires parties to accept electronic versions of trade administration documents as legal equivalent of their paper forms.<sup>71</sup> The paperless trading provision also extends to issues such as establishing single electronic windows to facilitate data exchange systems, including import/export data and sanitary and phytosanitary certificates (considerably enhancing the utility of these provisions).<sup>72</sup> The DEPA contains a detailed framework for electronic payments, wherein parties 'agree to support the development of efficient, safe and secure cross border electronic payments', and foster the adoption of international standards, promote interoperability of the payment infrastructure, and encourage competition in the domain.<sup>73</sup>

In contrast to the other examined agreements, the DEPA was the first agreement to contain explicit commitments on electronic invoicing that *inter alia* obligate the Parties to ensure that 'the implementation of measures related to e-invoicing in its jurisdiction is designed to support cross-border interoperability', by basing their measures on international standards, guidelines or recommendations.<sup>74</sup> Besides DEPA, the *Australia – Singapore Digital Economy Agreement* ('Australia – Singapore DEA') also includes similar provisions on electronic invoicing.<sup>75</sup> This approach of establishing common digital standards for ecommerce is characteristic of DEAs.

### 3. Customs duties on electronic transmissions

Provisions on customs duties on electronic transmissions are important to enable digital trade, as they provide certainty to companies engaged in cross-border electronic transactions that they do not have to pay any tariffs or border taxes. WTO members have agreed to a moratorium on customs duties on electronic transmissions since 1995 (usually renewed during the WTO Ministerial Conference held every alternate year). However, to date, certain developing countries, especially India and South Africa, have

<sup>66</sup>Ibid, Art 9.

<sup>67</sup>Agreement to Establish and Implement the ASEAN Single Window (9 December 2005).

<sup>68</sup>DEPA (n 55), Art 2.3.

<sup>69</sup>Ibid, Art 2.2.1.

<sup>70</sup>Ibid, Art 2.2.2.

<sup>71</sup>Except where there is a contrary domestic or international legal requirement or doing so would reduce the effectiveness of trade administration – DEPA (n 55), Art 2.2.3.

<sup>72</sup>DEPA (n 55), Arts 2.2.4–2.2.5.

<sup>73</sup>Ibid, Art 2.7.

<sup>74</sup>Ibid, Art 2.5.2.

<sup>75</sup>Ibid, Art 10.2; Australia – Singapore Digital Economy Agreement (6 August 2020).

argued in favour of abandoning this moratorium as it adversely affects tariff revenues of developing countries, especially with the massive growth of the domestic digital economy.<sup>76</sup> This policy divergence is also visible in PTAs.

The CPTPP permanently prohibits the imposition of customs duties on electronic transmissions, including content transmitted electronically.<sup>77</sup> This is unsurprising, given the substantial involvement of the US during the TPP negotiations, and other players such as Australia, Canada, and Japan in the CPTPP negotiations, who have consistently supported the moratorium. The RCEP also prohibits the imposition of customs duties on electronic transmissions, but in contrast to the CPTPP, it provides space for parties to adjust this practice in accordance with further outcomes in the WTO Ministerial Decisions within the Framework of the Work Programme on Electronic Commerce (thus, creating legal uncertainty for businesses).<sup>78</sup> Both the CPTPP and RCEP allow parties to impose internal taxes, fees or charges on electronic transmissions in a manner consistent with the respective Agreements.<sup>79</sup> The DEPA includes provisions on customs duties that are identical to the CPTPP.<sup>80</sup> The ASEAN E-Commerce Agreement does not address the issue of customs duties on electronic transmissions. All ASEAN member countries, however, currently comply with the WTO Moratorium on customs duties on electronic transmissions.<sup>81</sup>

#### ***4. Promoting business trust: source code disclosure and non-discrimination of digital products***

Providing trust-based solutions for digital service providers is an essential element of digital trade. This could include basic provisions on non-discriminatory access to foreign markets (thereby, enabling them to operate seamlessly in different markets) but increasingly includes more complex issues such as protecting proprietary interests of technology companies by protecting their source code and algorithms from illegal disclosure. Asian countries have often contested any provisions restricting governmental access to source code or algorithms, especially by China, as they view this as a restriction on reverse engineering of technologies and meaningful technological development.<sup>82</sup> Further, governments justify the need to access source code for implementing legitimate policy objectives of cybersecurity and data protection.<sup>83</sup> On matters like this, the Asian model expectedly provides for higher flexibility.

In considering various factors that enable business trust, the CPTPP is relatively stronger than the RCEP. The CPTPP explicitly prohibits parties from requiring businesses to disclose the source code of software (notably, the CPTPP does not refer to algorithms, unlike certain other recent PTAs including the USMCA) as a condition for its importation, distribution or sale in its territory.<sup>84</sup> This is a significant clause because it deals not only with transfer of knowledge as a non-tariff barrier to digital trade but also potential

<sup>76</sup>Submission from India and South Africa, 'The Moratorium on Customs Duties on Electronic Transmissions: Need for Clarity on its Scope and Impact', WTO Doc WT/GC/W/833 (8 November 2021).

<sup>77</sup>CPTPP (n 46), Art 14.3.1.

<sup>78</sup>RCEP (n 46), Arts 12.11.1, 12.11.3.

<sup>79</sup>CPTPP (n 46), Art 14.3.2; RCEP (n 46), Art 12.11.5.

<sup>80</sup>DEPA (n 55), Art 3.2.

<sup>81</sup>ASEAN E-Commerce Workplan (n 43) 31.

<sup>82</sup>Lorand Laskai and Adam Segal, 'The Encryption Debate in China' *Carnegie* (30 May 2019) <<https://carnegieendowment.org/2019/05/30/encryption-debate-in-china-pub-79216>> accessed 27 February 2023.

<sup>83</sup>Jyh-An Lee, 'Hacking into China's Cybersecurity Law' (2018) 53 *Wake Forest Law Review* 57.

<sup>84</sup>CPTPP (n 46), Art 14.17.1.

misappropriation of intellectual property. The provision excludes software used for critical infrastructure and allows parties to require modification of the source code to achieve compliance with its domestic laws.<sup>85</sup> However, 'critical infrastructure' is usually defined ambiguously, which means that this prohibition may not apply to software in several sectors.<sup>86</sup>

The CPTPP provides for the non-discriminatory treatment of all digital products.<sup>87</sup> This means that CPTPP parties are forbidden from according to digital products from another Party less favourable treatment than what it accords to 'other like digital products' from domestic service suppliers (national treatment) as well as 'like digital products' from non-parties (most-favoured nation treatment). Aligned with the CPTPP, the DEPA also contains a provision on the non-discriminatory treatment of digital products.<sup>88</sup> However, due to various policy concerns around indigenous data, the DEPA omits the provision prohibiting forced disclosure of source codes.

Both the RCEP and ASEAN E-Commerce Agreement do not contain either of these two provisions. This is consistent with policy preferences amongst certain countries in the Asia-Pacific region, including China, that usually do not commit to non-discrimination obligations in the digital sector to preserve their policy space to protect their domestic digital sector. Further, governmental access to proprietary information is common in countries such as China and Vietnam and was a predominant reason why the US had pushed for this provision on source code disclosure during the TPP negotiations.

### ***5. Promoting online consumer trust: consumer protection, privacy and spam***

The other key trust component in digital trade relates to the users of digital trade. In that regard, most PTAs contain different kinds of provisions to protect online consumers from cybercrimes, privacy breaches, and other cyber-threats.

The CPTPP and the RCEP both contain provisions aiming at enhancing consumer trust. For instance, both the treaties require parties to adopt consumer protection laws supporting consumers engaged in online commercial activities.<sup>89</sup> They also acknowledge the importance of cooperation between national bodies in charge of consumer protection for fostering consumer welfare.<sup>90</sup> The RCEP further mandates parties to publish information regarding the remedies available to online consumers, and explain how businesses can comply with legal requirements.<sup>91</sup> Both agreements also incorporate a provision requiring the respective Parties to adopt laws and regulations for the protection of personal data of users of electronic commerce.<sup>92</sup> However, in doing so, the CPTPP encourages its Parties to consider the standards and guidance of relevant international bodies in framing such laws (with a broad meaning ascribed to what constitutes a framework for personal information protection), while the RCEP obligates the same.<sup>93</sup>

<sup>85</sup>Ibid, Arts 14.17.2, 14.17.3(b).

<sup>86</sup>Neha Mishra, 'The Role of the Trans-Pacific Partnership Agreement in the Internet Ecosystem: Uneasy Liaison or Synergistic Alliance?' (2017) 20(1) *Journal of International Economic Law* 31, 49.

<sup>87</sup>CPTPP (n 46), Art 14.4.1.

<sup>88</sup>DEPA (n 55), Art 3.3.

<sup>89</sup>CPTPP (n 46), Art 14.7.2; RCEP (n 46), Art 12.7.2.

<sup>90</sup>CPTPP (n 46), Art 14.7.3; RCEP (n 46), Art 12.7.3.

<sup>91</sup>RCEP (n 46), Art 12.7.4.

<sup>92</sup>CPTPP (n 46), Art 14.8.2; RCEP (n 46), Art 12.8.1.

<sup>93</sup>CPTPP (n 46), Art 14.8.2; RCEP (n 46), Art 12.8.2.

On similar lines (although through more loosely worded provisions), the ASEAN E-Commerce Agreement requires member countries to maintain laws ensuring the protection of online consumers, and protection of personal information of users of electronic commerce.<sup>94</sup> With respect to online consumer protection, it specifies that such protection must be similar to the level of protection provided for consumers using other forms of commerce.<sup>95</sup> Analogous to the CPTPP and RCEP, it acknowledges the importance of cooperation between national bodies in this regard.<sup>96</sup>

The DEPA contains the most detailed provisions on online consumer protection and data protection.<sup>97</sup> Unlike the above treaties, it explicitly requires parties to adopt rules that 'require, at the time of delivery, goods and services provided to be of acceptable and satisfactory quality, consistent with the supplier's claim ...' and 'provide consumers with appropriate redress'.<sup>98</sup> It also explains what may constitute 'fraudulent, misleading or deceptive conduct'.<sup>99</sup> It further requires parties to make its consumer protection laws and regulation publicly available and easily accessible,<sup>100</sup> and contains a 'best endeavour' commitment on exploring the benefits of various complementary mechanisms, including alternative dispute resolution, for aiding the resolution of claims arising out of electronic commerce transactions.<sup>101</sup>

Similarly, in contrast to the above, the DEPA contains a detailed provision on the protection of personal information of users of electronic commerce and digital trade. First, the DEPA recognizes certain high-level principles of data protection (collection limitation, data quality, purpose specification, use limitation, security safeguards, transparency, individual participation and accountability) that should underpin the legal framework protecting personal information;<sup>102</sup> it does not provide any explanation of these terms, although these concepts are drawn from data protection law.<sup>103</sup> Second, it requires parties to adopt non-discriminatory practices in protecting users of electronic commerce from personal data violations.<sup>104</sup> The CPTPP also includes a similar provision but it is not binding.<sup>105</sup> It further mandates parties to publish relevant laws on personal information protection<sup>106</sup> and encourages the adoption of data protection trustmarks by businesses.<sup>107</sup> Moreover, it obligates Parties to 'pursue the development of mechanisms to promote compatibility and interoperability' between their respective regimes.<sup>108</sup> In the DEPA, data protection is clubbed with provisions on data flows in the same module, indicating the tailored approach of this agreement to foster a robust regulatory framework for the digital economy.

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<sup>94</sup>AAEC (n 42), Arts 7.3(b), 7.5(a).

<sup>95</sup>Ibid, Art 7.3(b).

<sup>96</sup>Ibid, Art 7.3(c).

<sup>97</sup>DEPA (n 55), Art 6.3.3.

<sup>98</sup>Ibid, Art 6.3.4.

<sup>99</sup>Ibid, Art 6.3.3.

<sup>100</sup>Ibid, Art 6.3.5.

<sup>101</sup>Ibid, Art 6.3.8.

<sup>102</sup>These include 'collection limitation', 'data quality', 'purpose specification', 'use limitation', 'security safeguards', 'transparency', 'individual participation', and 'accountability'.

<sup>103</sup>DEPA (n 55), Art 4.2.3.

<sup>104</sup>Ibid, Art 4.2.4.

<sup>105</sup>CPTPP (n 46), Art 14.8.3.

<sup>106</sup>DEPA (n 55), Art 4.2.5.

<sup>107</sup>Ibid, Art 4.2.8.

<sup>108</sup>Ibid, Art 4.2.6.

With respect to unsolicited electronic commercial messages or spam, the CPTPP, RCEP and DEPA contain identical commitments. The Parties are *inter alia* required to adopt measures allowing users from blocking spam, obtaining their consent while receiving any spam, and providing for the minimization of spam.<sup>109</sup> It is however unclear why the ASEAN E-Commerce Agreement is silent on spam.

## 6. Internet access and open data

Open access to the internet and various internet-based applications are central to enabling digital innovation and cross-border trade opportunities in digital markets. Further, open data initiatives also enable digital innovation, particularly for small or medium enterprises ('SMEs') that might use open datasets to provide customized digital solutions.

The CPTPP contains provisions recognizing the importance of access to and use of the Internet and its related services and applications for facilitating electronic commerce.<sup>110</sup> A similar provision is however not contained in the RCEP. Neither the CPTPP nor the RCEP contains explicit provisions on open government data. The ASEAN Agreement on E-Commerce also does not explicitly address matters related to open government data. The DEPA, meanwhile, directly deals with open government data albeit in the form of soft provisions, requiring that parties endeavour to ensure that government information, to the extent of it being made publicly available, is made available as open data.<sup>111</sup> The DEPA also promotes cooperation among Parties on identifying ways to enhance access to and use of government data to generate business opportunities.<sup>112</sup> The divergence across the various PTAs (for instance, the lack of provisions on open internet access and open government data in RCEP) is a balancing act of Asian incrementalism and reflects policy preferences of the countries involved in the negotiations, and particularly those leading the negotiations.

## 7. Cross-border data flows and data localization

Cross-border data flows are central to digital trade flows. Therefore, unsurprisingly, several PTAs contain data-related provisions to enable such flows. The CPTPP, RCEP and DEPA contain provisions enabling the cross-border transfer of data by electronic means for the conduct of the business of a 'covered person'; they also contain provisions prohibiting data localization requirements for conducting business.<sup>113</sup> However, the applicability of these provisions varies considerably in practice in CPTPP and DEPA due to the scope of the exceptions and the availability of dispute settlement procedures (see section below).

The CPTPP allows Parties to adopt or maintain measures inconsistent with these provisions for achieving a 'legitimate public policy objective', as long such measure: *first*, is not 'applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination, or a disguised restriction on trade'; and *second*, does not impose restrictions 'greater than are required to achieve the objective'.<sup>114</sup> This text is borrowed from the

<sup>109</sup>CPTPP (n 46), Art 14.14.1; RCEP (n 46), Art 12.9.1; DEPA (n 55), Art 6.2.1.

<sup>110</sup>CPTPP (n 46), Art 14.10.

<sup>111</sup>DEPA (n 55), Art 9.5.2.

<sup>112</sup>Ibid, Art 9.5.3.

<sup>113</sup>CPTPP (n 46), Arts 14.11.2, 14.13.2; RCEP (n 46), Arts 12.15.2, 12.14.2.

<sup>114</sup>CPTPP (n 46), Arts 14.11.3, 14.13.3.



language in general exceptions contained in Article XX of the *General Agreement on Tariffs and Trade* ('GATT') and Article XIV of the GATS. These exceptions are also mirrored in the DEPA.<sup>115</sup>

While the RCEP also contains an exception similar to the CPTPP and DEPA, it also contains a self-judging element, wherein the implementing party has the sole prerogative to decide the necessity behind the legitimate public policy objective.<sup>116</sup> Further, RCEP allows for the adoption of a measure restricting cross-border electronic transfer of information, or requiring data localization, if the Party 'considers it necessary for the protection of its essential security interests'; such a measure cannot be disputed by the other parties.<sup>117</sup> This variation in language arguably reflects the pragmatism of RCEP, accommodating countries with diverging policy preferences on digital regulation (for example China and Vietnam, which have consistently adopted a stringent cyber-sovereignty approach as opposed to Australia and Japan, which support the free flow of data). Yet, this provision creates considerable uncertainty for digital businesses that engage in cross-border electronic transactions in the RCEP countries on a regular basis. For instance, several data localization measures prevalent in Asian countries cannot be challenged under the RCEP.

The ASEAN E-Commerce Agreement includes weaker provisions on cross-border data flows (also not subject to dispute settlement – see below), wherein the member countries agree to only work towards 'eliminating or minimizing barriers to the flow of information across borders, including personal information' subject to safeguards to ensure security and confidentiality of information', and 'legitimate public policy objectives'.<sup>118</sup> The Agreement also contains a restriction on data localization but is 'subject to their respective laws and regulations' clause, making the extent of the restriction potentially very broad and unclear.<sup>119</sup> These provisions can potentially enable data flows in the ASEAN region, giving effect to one of the strategic priorities of the ASEAN Framework on Digital Data Governance, adopted in 2018.<sup>120</sup>

ASEAN countries have also recently developed the Model Contractual Clauses for Cross-Border Data Flows ('ASEAN MCC'). The MCCs are non-binding contractual terms and conditions that provide guidance for transferring personal data, while complying with the ASEAN Member States' legal and regulatory requirements. The ASEAN E-Commerce Agreement Implementation Work Plan has provided for the implementation of ASEAN MCCs to progress towards unimpeded cross-border data flows.<sup>121</sup> This approach is gradual as compared to the CPTPP, which outlines broad commitments on data flows and data localization.

## 8. Regulatory cooperation, cybersecurity and emerging issues in digital innovation

Cybersecurity is an important building block for digital trade. Yet, most PTAs tend to take a softer approach towards addressing cybersecurity issues, leaving sufficient space for

<sup>115</sup>DEPA (n 55), Art 4.3.

<sup>116</sup>RCEP (n 46), Arts 12.15.3(a), 12.14.3(a).

<sup>117</sup>Ibid, Arts 12.15.3(b), 12.14.3(b).

<sup>118</sup>AAEC (n 42), Art 7.4(b).

<sup>119</sup>Ibid, Art 7.6(b).

<sup>120</sup>ASEAN Telecommunications and Information Technology Ministers Meeting, *Framework on Digital Data Governance* (2018) <[https://asean.org/wp-content/uploads/2012/05/6B-ASEAN-Framework-on-Digital-Data-Governance\\_Endorsedv1.pdf](https://asean.org/wp-content/uploads/2012/05/6B-ASEAN-Framework-on-Digital-Data-Governance_Endorsedv1.pdf)> accessed 11 December 2022.

<sup>121</sup>ASEAN E-Commerce Workplan (n 43) 38.

national policy flexibility. The CPTPP and RCEP contain soft commitments on cybersecurity focused on building national capabilities for ‘computer security incident’ responses and promoting cooperation among Parties to develop a uniform and integrated approach in cybersecurity matters.<sup>122</sup> Both these treaties also promote cooperation between Parties on various matters related to electronic commerce, including inter alia assistance to SMEs and participation in regional and international platforms for the development of electronic commerce.<sup>123</sup>

Similarly, in the ASEAN E-Commerce Agreement, the member countries acknowledge the importance of the development of national capacities for addressing cybersecurity issues through the exchange of best practices, and emphasize collaboration mechanisms for cooperation on these matters.<sup>124</sup> They have agreed to cooperate in various areas including information and communication technologies (‘ICT’) infrastructure, ‘education and technology competency’, ‘intellectual property rights’, ‘competition’, and ‘logistics to facilitate e-commerce’.<sup>125</sup> This indicates a broad scope of digital cooperation in the ASEAN region.

The DEPA is the most comprehensive on issues of regulatory cooperation and cybersecurity. In addition to recognizing the importance of cybersecurity infrastructure and cooperation, it calls for cooperation on several other matters not covered in other PTAs: digital identities, emerging trends and technologies, open government data, enhancing digital trade opportunities for SMEs, digital inclusion, and the implementation of DEPA. For instance, DEPA parties have agreed to cooperate on digital identities, recognizing that it can increase connectivity and thus endeavour to promote interoperability of government-run digital identity mechanisms.<sup>126</sup> Digital identities are digital derivatives based on initial physical identification or verification of physical identity documents. Further, DEPA parties have agreed to foster cooperation in fintech,<sup>127</sup> competition law enforcement in digital markets,<sup>128</sup> exchange of information and best practices to enhance inter alia SMEs’ access to capital and credit, and participation in government procurement activities.<sup>129</sup> The DEPA stands out in recognizing the role of digital inclusion in digital trade, including participation of women, rural populations, low socio-economic groups and indigenous people in the digital economy.<sup>130</sup>

The DEPA also mandates cooperation for facilitating the implementation of its text in domestic jurisdiction.<sup>131</sup> It provides for the establishment of a Joint Committee comprising representatives of each Party that would inter alia aid such cooperation.<sup>132</sup> Besides the DEPA, the SADEA also includes similar provisions on such new-age issues: competition policy in the digital economy (Article 16), open data government (Article 27), digital identities (Article 29), and Fintech (and RegTech) (Article 32).

<sup>122</sup>CPTPP (n 46), Art 14.16; RCEP (n 46), Art 12.13.

<sup>123</sup>CPTPP (n 46), Arts 14.15(a), 14.15(d); RCEP (n 46), Arts 12.4.1(a), 12.4.1(e).

<sup>124</sup>AAEC (n 42), Art 8.1.

<sup>125</sup>Ibid, Art 6.

<sup>126</sup>DEPA (n 55), Art 7.1.

<sup>127</sup>Ibid, Art 8.1(a).

<sup>128</sup>Ibid, Art 8.4.2.

<sup>129</sup>Ibid, Art 10.2.

<sup>130</sup>Ibid, Art 10.3.

<sup>131</sup>Ibid, Art 12.5.

<sup>132</sup>Ibid, Art 12.1.

Other novel and notable disciplines that are discussed in the DEPA include 'Artificial Intelligence' and 'Data Innovation'. For instance, DEPA parties recognize the importance of developing 'ethical governance frameworks for the trusted, safe, and responsible use of AI technologies', and endeavour to support such adoption.<sup>133</sup> It also recognizes the importance of data regulatory sandboxes and data sharing mechanisms in the context of data innovation.<sup>134</sup> Moving forward, it remains to be seen how DEPA parties will implement these provisions.

### **9. Application of dispute settlement**

Ultimately, the enforceability of provisions in PTAs is contingent on whether those disciplines can be adjudicated before a trade tribunal, when a dispute arises. Several recent PTAs with electronic commerce or digital trade chapters contain a binding dispute resolution mechanism, although certain countries in the Asia Pacific (including China and several ASEAN countries) have preferred the non-application of dispute settlement procedures to digital trade provisions.<sup>135</sup> This is also reflected in the different PTAs studied in this paper and is a key element of the Asian vision of digital trade regulation.

By leaving ecommerce out of dispute settlement, the commitments are converted into negotiable promises, allowing ample policy flexibility. Froese argues that this approach is distinctly Asian.<sup>136</sup> For instance, the commitments contained in the Electronic Commerce Chapter of the CPTPP are subject to the dispute settlement provisions of the Agreement<sup>137</sup> but RCEP parties do not have the recourse to dispute settlement for matters arising under the Electronic Commerce Chapter.<sup>138</sup> Instead, RCEP parties can only engage in good faith consultations when there is a conflict amongst the parties in the interpretation and application of its Electronic Commerce Chapter,<sup>139</sup> and refer the matter to the 'RCEP Joint Committee' should the consultations fail.<sup>140</sup>

Similarly, aligned with Asian practice, the ASEAN E-Commerce Agreement requires member countries to encourage the use of alternative dispute resolution to resolve disputes emanating from electronic commerce transactions.<sup>141</sup> Article 15 provides for the applicability of the ASEAN Protocol on Enhanced Dispute Settlement Mechanism (2004) for disputes concerning the interpretation and implementation of the Agreement.

In the DEPA, Module 14 deals exclusively with dispute settlement matters, which covers disputes arising from the interpretation or implementation of the Agreement, and when a Party considers a domestic measure to be inconsistent with the Agreement.<sup>142</sup> Under the DEPA, parties can agree to undertake voluntarily any alternative methods of dispute resolution, such as good offices, conciliation, mediation, and arbitration.<sup>143</sup> Certain provisions, however, are excluded from the scope of Module 14, and thus

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<sup>133</sup>Ibid, Arts 8.2.2, 8.2.3.

<sup>134</sup>Ibid, Art 9.4.

<sup>135</sup>Marc Froese, 'Digital Trade and Dispute Settlement in RTAs: An Evolving Standard?' (2019) 53(5) *Journal of World Trade* 783.

<sup>136</sup>Ibid.

<sup>137</sup>However, Malaysia and Vietnam were given two years relaxation with regard to several key obligations – Art 14.18.

<sup>138</sup>RCEP (n 46), Art 12.17.3.

<sup>139</sup>Ibid, Art 12.17.1.

<sup>140</sup>Ibid, Arts 12.7.2, 18.3.

<sup>141</sup>AAEC (n 42), Art 5.2.

<sup>142</sup>DEPA (n 55), Art 14.3.

<sup>143</sup>Ibid, Arts 14.4, 14.5, 14.6.

have limited enforceability: Article 3.3 (Non-Discriminatory Treatment of Digital Products), Article 3.4 (ICT Products that Use Cryptography), Article 4.3 (Cross-Border Transfer of Information by Electronic Means), and Article 4.4 (Location of Computing Facilities).<sup>144</sup> Currently all DEPA parties are also CPTPP members; hence, the dispute settlement mechanism under the CPTPP is available to DEPA parties.

### 10. Transparency

Across jurisdictions, businesses, particularly MSMEs, face several challenges in both getting access to and possessing sufficient awareness of the regulatory frameworks applicable to their activities.<sup>145</sup> The CPTPP, RCEP, DEPA and ASEAN E-Commerce Agreement deal with transparency disciplines at multiple depth levels.

The CPTPP clearly follows the United States' legacy and offensive interest in increased overall transparency for businesses with a dedicated chapter dealing with transparency disciplines.<sup>146</sup> Out of the four agreements, the CPTPP provisions on transparency are the deepest in terms of commitments and scope.

The ASEAN E-commerce agreement mandates members to publish all measures of general application pertaining to or affecting the application of the agreement.<sup>147</sup> At the same time, it offers flexibility to developing and LDCs countries by allowing them to make these measures publicly available when publishing them is not practicable for the member. In addition, the ASEAN agreement acknowledges the relevance of transparency in consumer protection measures for ecommerce and other measures designed to build consumer confidence without prescribing a specific approach on this subject matter.<sup>148</sup> The importance of transparent measures for consumer protection is also acknowledged in the CPTPP,<sup>149</sup> DEPA<sup>150</sup> and RCEP.<sup>151</sup> Using soft-law language, the ASEAN agreement also requires ASEAN members to engage with national and international stakeholders to promote the exchange of information, and to receive feedback and inputs regarding avenues to develop ecommerce.<sup>152</sup>

Perhaps following the path set in the GATS agreement for cross-border trade in services and adapting more closely to the CPTPP Transparency Chapter, the DEPA deals with transparency in a more specific way than the ASEAN E-Commerce Agreement. As with the CPTPP, DEPA's dedicated transparency obligations cover five key areas: the publication of measures; administrative procedures regarding the application of measures; the review of final administrative actions; and a broad notification commitment to other DEPA parties of proposed or actual measures that materially affect the operation of DEPA or substantially affect a party's interests under the agreement. DEPA specifically mandates parties to publish or make available, in print or over the internet, all those laws, regulations, procedures and administrative rulings of general application regarding any

<sup>144</sup>Ibid, Art 14A.1.

<sup>145</sup>See generally OECD, 'SMEs Going Digital: Policy Challenges and Recommendations' (2020) <[https://goingdigital.oecd.org/data/notes/No15\\_ToolkitNote\\_DigitalSMEs.pdf](https://goingdigital.oecd.org/data/notes/No15_ToolkitNote_DigitalSMEs.pdf)> accessed 1 March 2023.

<sup>146</sup>CPTPP (n 46), ch 26.

<sup>147</sup>AAEC (n 42), Art 7.3 (a).

<sup>148</sup>Ibid, Art 7.3 (a).

<sup>149</sup>CPTPP (n 46), Art 14.7.1.

<sup>150</sup>DEPA (n 55), Art 6.3.1.

<sup>151</sup>RCEP (n 46), Art 12.7.

<sup>152</sup>AAEC (n 42), Art 11.

matter covered in the agreement. This transparency obligation extends not only to measures in force, but also to proposals that a party attempts to adopt with the added flexibility of ‘when possible’.

As for transparency in data protection measures, DEPA recognizes it as one of the principles underpinning national legal frameworks in this area. DEPA further mandates parties to publish information on the personal information protections each member provides to users of electronic commerce, including remedies available to individuals and how businesses can comply with legal requirements.<sup>153</sup> These provisions replicate the scope of transparency disciplines on data protection regimes in the CPTPP.<sup>154</sup> As for transparency obligations regarding the publication of consumer protection laws, DEPA provides a general obligation to make them publicly available and easily accessible.

The RCEP ecommerce chapter specifies transparency obligations regarding the publication of information on consumer protection<sup>155</sup> and personal information protection for users of electronic commerce.<sup>156</sup> RCEP’s Chapter 17 – General Provisions and Exceptions – also incorporates significant disciplines on transparency that apply to measures on electronic commerce. Chapter 17 covers transparency commitments for the publication of measures, review/appeal of administrative decisions, the administration of proceedings, and the provision of information requested by a party regarding measures by the other party. Unlike CPTPP and DEPA there are no direct commitments to inform<sup>157</sup> or notify<sup>158</sup> other treaty parties of measures that might affect the operation of the agreement or affect the other party’s interest.<sup>159</sup>

### **11. Overall assessment of the approaches to rulemaking**

While the above treaties deal with many common areas, except for DEPA, which also covers emerging issues in digital regulation, there are several differences in the articulation of disciplines in these common areas. For instance, while the CPTPP and DEPA contain several far-reaching commitments including on non-discrimination of digital products and source code disclosure, both the RCEP and ASEAN E-Commerce agreements avoid such disciplines. Similarly, although provisions on data flows and data localization are binding in the CPTPP and DEPA (subject to a legitimate public policy exception),<sup>160</sup> the RCEP and ASEAN agreements adopt a much more muted approach as a safe compromise to preserve regulatory autonomy of parties.<sup>161</sup> Further, the absence of a binding dispute settlement mechanism in both the RCEP and the ASEAN agreements indicates the clear preference of several Asian countries for consensus and non-litigation, especially for certain sensitive aspects such as data localization measures.

Being a first-of-its-kind DEA, the DEPA presented disciplines in several new areas such as AI ethics, electronic invoicing, digital identities, fintech, and so on. This suggests the evolution of the digital trade agenda for digitally advanced countries. It also remains

<sup>153</sup>DEPA (n 55), Art 6.3 (5), (6).

<sup>154</sup>CPTPP (n 46), Art 14.8.

<sup>155</sup>RCEP (n 46), Art 12.7.4.

<sup>156</sup>Ibid, Art 12.8.3.

<sup>157</sup>CPTPP (n 46), Art 26.5.1.

<sup>158</sup>DEPA (n 55), Art 13.5.1.

<sup>159</sup>RCEP (n 46), Art 17.4.

<sup>160</sup>CPTPP (n 46), Arts 14.11.3, 14.13.3; DEPA (n 55), Art 4.3.

<sup>161</sup>RCEP (n 46), Arts 12.15.3(a), 12.14.3(a); AAEC (n 42), Art 7.4(b)–7.6(b).

possible that Asian countries will address these issues in other fora such as APEC and soft law mechanisms under the aegis of ASEAN. Yet, reflective of their pragmatic incrementalism, several Asian countries are unlikely to rapidly adopt such a comprehensive digital trade agenda, at least in their future PTAs.

### III. Digital trade integration in the Asia Pacific and what we can learn from it

A comparative evaluation of the provisions across different digital trade and DEAs in the Asia Pacific demonstrates the diversity of provisions on digital trade. As we explain above, these differences are driven by various factors. One factor is the underlying goals of the agreement, for example, long-term economic integration in the ASEAN framework vis-à-vis the aims of promoting *inter alia* digital trade with strategic partners in the CPTPP and RCEP — megaregional arrangements of this third regionalism wave. The political preferences of the participants in the agreement are another factor (e.g. determined by their level of development, political ideologies, and who is leading the negotiations). Singapore, Chile Australia, and New Zealand have been leading the opening up of the digital economy through PTAs while China and Vietnam, for instance, have been taking a more measured approach, primarily to safeguard domestic policy flexibility on matters affecting state control of the internet and data sovereignty.

The prevailing model of digital trade integration in the Asia-Pacific region is better reflected in the Electronic Commerce Chapter of the RCEP and ASEAN E-Commerce Agreement rather than the (formerly) US-driven CPTPP or DEPA. The latter reflects Singapore's liberalising approach to digital trade but not necessarily other ASEAN/Asian countries. Across the various categories of provisions discussed above, these two agreements are significantly less ambitious and liberalising than the CPTPP and DEPA. Yet, these two agreements are important to the growth of digital trade in Asia Pacific and provide a sustainable and pragmatic negotiating choice, given the economic and political diversity across countries in the region. They present an incremental approach, based on the gradual development of cooperation and trust among digital trade partners while recognizing that certain issues, such as cyber-policy preferences, are non-negotiable before trade bodies.

The above-measured approach also considers practical implementation and compliance issues for developing countries and LDCs in Asia. For instance, the AEC Blueprint 2015, as discussed earlier, met with limited success in ASEAN due to differences in internet connectivity across countries, inadequate digital infrastructure, and lack of ecommerce regulations in many developing ASEAN countries.<sup>162</sup> These issues have been addressed

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<sup>162</sup>For example, the Ookla Net Index Rankings (July 2014) depicted significant differences in the average download speeds in the ASEAN Member States, the highest (for Broadband) being in Singapore (69.68 Mbps) and some of the lowest in Indonesia (4.54 Mbps for Broadband), Laos (3.76 Mbps) and the Philippines (3.4 Mbps). See Bambang Irawan 'AEC Blueprint 2025 Analysis' (14 March 2017) CIMB ASEAN Research Institute 1/19, 4 <[www.cariasean.org/AEC\\_Blueprint\\_2025\\_Analysis/AEC\\_Volume1\\_Paper19.pdf](http://www.cariasean.org/AEC_Blueprint_2025_Analysis/AEC_Volume1_Paper19.pdf)> accessed 11 December 2022. A 2004 UNESCAP study showed that even when countries used the United Nations Commission on International Trade Law Model Law on Electronic Commerce (1996) as guidance for enacting domestic e-commerce laws, total legal interoperability could not be enabled (possibly) because certain provisions are omitted or modified during national implementation. See UNESCAP, *Harmonized Development of Legal and Regulatory Systems for E-Commerce in Asia and the Pacific: Current Challenges and Capacity Building Needs* (ST/ESCAP/2348, 2004) 17 <<https://repository.unescap.org/bitstream/handle/20.500.12870/2805/ESCAP-2004-RP-Harmonized-development-legal-regulatory-systems-e-commerce-AsiaPacific.pdf?sequence=1&isAllowed=y>> accessed 11 December 2022.

in subsequent ASEAN frameworks on a gradual basis. Similarly, regarding cross-border data flows, the long-term approach under the ASEAN framework, including the adoption of the ASEAN MCCs, can enable data flows in the ASEAN region, but not through binding provisions as in CPTPP.

The ASEAN agreement and RCEP account for the short-term regulatory deficit in the developing countries and LDCs of the region. The agreements provide these countries with longer implementation periods and either keep ecommerce issues outside the scope of the compulsory dispute settlement mechanism (as in RCEP) or discourage its use (as in ASEAN agreement). Further, by providing more policy space for countries to regulate certain aspects of the internet (e.g. online censorship) that are sensitive and non-negotiable, the agreements have gained more political currency in the region. Had the RCEP contained more tightly worded exceptions that could be adjudicated before a trade tribunal (like in the CPTPP or, more generally, in the WTO agreements), then the parties would have either not reached any agreement at all or breached the agreement in practice despite agreeing to its terms. As Hsieh argues, the approach taken in ASEAN and under the RCEP is politically more amenable and development friendly as compared to the CPTPP, which is a distinctively western-led model.<sup>163</sup>

The implication of this approach is evident in the number of countries that signed the RCEP (15), making it the largest trade bloc in history.<sup>164</sup> Two more countries (Bangladesh<sup>165</sup> and Hong Kong<sup>166</sup>) have also applied to join it, while India, keen on joining it, opted out at the last moment.<sup>167</sup> Another clear result of this incremental approach is that parties tend to target issues that matter to them the most economically, while allowing for slower progress on ideologically sensitive issues (e.g. data protection<sup>168</sup>). For instance, several Asia-Pacific countries (in contrast to their western counterparts) have collaborated intensively to achieve cross-border interoperability in electronic payments and other financial services to support the rapid scaling of fintech in Asia.<sup>169</sup> The ASEAN has also pursued regional ecommerce work streams, resulting in a slow but robust implementation of fintech laws, digital export promotion programs, and financial programmes for SMEs.<sup>170</sup> The Asia-Pacific led trade agreements recognize the success of this approach in enabling the technological advancement of East Asia and attempt to institutionalize it.

<sup>163</sup>Hsieh (n 13) 261; Thomas Streinz, 'Digital Megaregulation Uncontested? TPP's Model for the Global Digital Economy' in Benedict Kingsbury et al (eds), *Megaregulation Contested: Global Economic Ordering After TPP* (OUP 2019) 312.

<sup>164</sup>RCEP: Asia Pacific Countries form World's Largest Trading Bloc' *BBC* (16 November 2020) <[www.bbc.com/news/world-asia-54949260](http://www.bbc.com/news/world-asia-54949260)> accessed 27 February 2023.

<sup>165</sup>Asif Muztaba Hassan, 'Will Bangladesh Benefit by Joining RCEP?' *The Diplomat* (5 November 2021) <<https://thediplomat.com/2021/11/will-bangladesh-benefit-by-joining-rcep/>> accessed 27 February 2023.

<sup>166</sup>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/](http://www.eastasiaforum.org/2022/05/07/hong-kongs-case-for-rcep-membership/)> accessed 27 February 2023.

<sup>167</sup>Rahul Mishra, 'Why India Pulled out of the RCEP Free Trade Deal' *DW* (11 June 2019) <[www.dw.com/en/why-india-pulled-out-of-the-rcep-free-trade-deal/a-51137128](http://www.dw.com/en/why-india-pulled-out-of-the-rcep-free-trade-deal/a-51137128)> accessed 27 February 2023.

<sup>168</sup>María Vásquez Callo-Müller, 'How to Build Interoperability? – Conceptualizing the Asia–Latin America Relationship for the Data Economy' (América Latina y Asia: entre la revolución digital y la globalización cuestionada, Montevideo, December 2019) <[www.cepal.org/sites/default/files/events/files/publicacion\\_aladi\\_cepai\\_duran.pdf](http://www.cepal.org/sites/default/files/events/files/publicacion_aladi_cepai_duran.pdf)> accessed 27 February 2023.

<sup>169</sup>Dashveenjit Kaur, 'Five Southeast Asian Nations to Link Their QR Code Payment Systems. Here's What It Means for Travelers' *TechWire Asia* (19 July 2022) <<https://techwireasia.com/2022/07/five-southeast-asian-nations-to-link-their-qr-code-payment-systems-heres-what-it-means-for-travelers/>> accessed 27 February 2023.

<sup>170</sup>Kati Suominen, 'Integration, Interoperability and Inclusion in East Asia' *East Asia Forum* (24 August 2022) <[www.eastasiaforum.org/2022/08/24/integration-interoperability-and-inclusion-in-east-asia/](http://www.eastasiaforum.org/2022/08/24/integration-interoperability-and-inclusion-in-east-asia/)> accessed 27 February 2023.

Moving forward, several countries in the Asia-Pacific region are likely to be looking to expand the scope of their digital trade cooperation to new areas. Several modules in the DEPA may be instructive in that regard as they set high-level frameworks without providing prescriptive requirements in areas such as electronic invoicing, digital inclusion, digital identities, e-payments, emerging technologies and fintech. In fact, the Chinese government has already made a request to accede to the DEPA.<sup>171</sup> The trade pillar of the IPEF may also borrow ideas from the building blocks of DEPA to enable trusted and open digital and data flows in the digital economy and facilitate secure digital technologies.<sup>172</sup> These developments could amplify the significance of DEPA in setting the path for digital trade governance, especially since IPEF constitutes 40 per cent of the global GDP.

An area that remains under-addressed in the digital trade integration initiatives is capacity building and technical assistance for developing countries and LDCs in relation to digital trade. This could be a central area for discussion in the coming years, especially as more LDCs and developing countries transition towards a digital economy. Larger or more developed nations should incentivise these efforts by providing technical and regulatory support, and ensuring that such agreements do not turn out to be one-sided.<sup>173</sup>

At the same time, there is extensive policy space available in trade agreements such as the RCEP or ASEAN instruments through broader and self-judging exceptions, the exclusion of electronic commerce provisions from dispute settlement or non-binding requirements to adopt domestic regulatory frameworks. These tools should not become a cover for backsliding into digital protectionism.

Rather, governments must thus use the flexibility provided in this model of digital trade integration for the right reasons i.e. to facilitate the incremental development of trust-based solutions for digital trade transactions, including enabling data flows necessary for cross-border digital trade, removing unnecessary barriers to digital trade, and developing interoperable regulatory frameworks. Incremental reforms would also call for governmental support and investment in the technology sector to participate in the global market. Chile, which is part of both CPTPP and DEPA, is an example of the benefits that well-implemented trade agreements can bring to the digital sector. In the last few years, the country has emerged as a leading Latin American and global technology hub, with the digital sector accounting for a quarter of its GDP.<sup>174</sup>

Further, governmental restrictions on digital trade must be based on consensus between the treaty parties and consistent with international norms to the greatest extent possible, instead of unilateral measures. These international norms are referred to in the concerned PTA<sup>175</sup> and other applicable treaties, including regional instruments

<sup>171</sup>China to Fully Prepare for Joining DEPA After Major Progress: MOFCOM' *Global Times* (22 August 2022) <[www.globaltimes.cn/page/202208/1273592.shtml](http://www.globaltimes.cn/page/202208/1273592.shtml)> accessed 11 December 2022.

<sup>172</sup>See generally The White House (n 15).

<sup>173</sup>See generally Agrawal and Mishra (n 19), discussing a model for give and take between developing and developed countries based on mutual needs and preferences.

<sup>174</sup>Ricardo Navarro, 'Chile Is a Technological Reference When It Comes to Foreign Partnerships' *Forbes* (18 March 2020) <[www.forbes.com/sites/forbestechcouncil/2020/03/18/chile-is-a-technological-reference-when-it-comes-to-foreign-partnerships/?sh=1dfc58172b6b](http://www.forbes.com/sites/forbestechcouncil/2020/03/18/chile-is-a-technological-reference-when-it-comes-to-foreign-partnerships/?sh=1dfc58172b6b)> accessed 27 February 2023; John Bartlett, 'Why Indian Startup Founders Are Flocking to Chile' *Rest of the World* (29 March 2022) <<https://restofworld.org/2022/india-startup-founders-chile/>> accessed 27 February 2023; 'Chile Positions Itself as Latin America's Tech Hub Par Excellence' *Marca Chile* (19 August 2022) <<https://marcachile.cl/en/business-exports/chile-positions-itself-as-latin-americas-tech-hub-par-excellence/>> accessed 27 February 2023.

<sup>175</sup>See, eg RCEP (n 46), Art 12.6.2.



on data protection and cybersecurity. None of this is possible without the parties' genuine political will and commitment to creating a mutually beneficial framework for digital trade through PTAs and other DEAs.

The next question is whether the Asian model of digital trade integration can be relevant for the rest of the world, especially other regional blocs consisting of developing countries at different stages of development. Several developing countries are now graduating towards digitalizing their economy and face considerable regulatory deficit and uncertainty regarding regulating their domestic digital markets. For instance, expansive commitments in PTAs, akin to the digital trade provisions of the CPTPP, are unlikely to be acceptable to many developing countries facing such uncertainties. For example, many African and small Caribbean countries would have difficulty in making commitments on data protection and other regulatory areas with their limited resources and weak regulatory capacity.<sup>176</sup>

Further, even if certain developing countries agree to commit to extensive commitments in PTAs (for instance, to avail market access in developed countries), they may not be able to satisfy the requirements in practice, which could lead to future disputes and weak implementation of the PTA. Therefore, the alternative offered by the Asian model can be relevant to several developing countries/their regional blocs as it facilitates an incremental and gradual approach towards liberalising digital trade and data flows. Further, with the Asian region, particularly, the Asia Pacific, progressively becoming a leader in the global digital market, it remains highly likely that their policy approach would more substantially influence the design of future digital trade rules in the long run. This shift in digital policymaking could provide a platform for the collective voices of developing countries in other parts of the world, including Africa and Latin America.

#### IV. Conclusion

Digital trade is pivotal to the economic growth and prosperity of the Asia-Pacific region. Several countries in the Asia Pacific, including ASEAN members, have proactively negotiated various PTAs containing comprehensive rules applicable to digital trade and digital services. In this article, we investigated whether such rules provide an alternative model for enhancing opportunities for digital trade and facilitating digital trade integration. In this assessment, we evaluated and contrasted key digital trade and digital services provisions in two megaregional PTAs, the CPTPP and RCEP, and two digital-only agreements, the DEPA and ASEAN E-Commerce agreements.

The diversity in the quality and depth of digital trade rules across these agreements reflects the asymmetry of digital development and different policy priorities across countries in the Asia Pacific. However, these PTAs also demonstrate a path forward towards a pragmatic and incremental model of digital trade integration, especially between diverse groups of developing countries with variable regulatory capacities

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<sup>176</sup>Michael Pisa, Pam Dixon, and Ugonma Nwankwo, 'Why Data Protection Matters for Development: The Case for Strengthening Inclusion and Regulatory Capacity' *CGDev* (December 2021) <[www.cgdev.org/sites/default/files/why-data-protection-matters-for-development.pdf](http://www.cgdev.org/sites/default/files/why-data-protection-matters-for-development.pdf)> accessed 27 February 2023; Patrice Dutil and Julie Williams, 'Regulation Governance in the Digital Era: A New Research Agenda' (2017) 60 *Canada Public Administration* 562; 'Assessment of Digital Trade and E-commerce Readiness and Associated Capacity-building Needs in Six Member States of the Organisation of Eastern Caribbean States (OECS)' (A-Z Information Jamaica, Research Report, 2021) 29 <[https://production-new-commonwealth-files.s3.eu-west-2.amazonaws.com/migrated/inline/OECS%20report\\_final.pdf](https://production-new-commonwealth-files.s3.eu-west-2.amazonaws.com/migrated/inline/OECS%20report_final.pdf)> accessed 26 March 2023.

and digital development levels. Gradually expanding the areas and scope of digital regulatory cooperation in existing and new instruments remains important for Asia-Pacific countries. Similarly, parties must not abuse the flexibility in certain PTAs, such as the RCEP, to backslide into digital protectionism. Despite limitations, as outlined in this article, the Asian model remains insightful for several developing countries, struggling to find a middle path between full liberalization of their domestic digital economy and inward-looking digital/cyber sovereignty measures to protect domestic interests.

Our analysis of the digital integration model of the Asia Pacific takes us back to the theme of this special issue, focusing on the contribution of New Asian Regionalism to Third Regionalism and the impetus towards establishing NREO. It goes without saying that the western-led liberal trade order is under immense pressure. While the western trade liberalization efforts helped advance world trade to historically unprecedented levels, today, they are flailing. A combination of weakening geo-economic power; ideological inconsistency within Western countries; undue focus on exporting advanced rules, which most countries do not have the capacity to implement; economic de-globalization; and emerging cracks in the international trade institutions are responsible for this failure.<sup>177</sup> The digital world is no different. While several leading digital powers continue to engage in tech wars and re-shoring (or friend-shoring), especially post-Covid-19, many developing countries and LDCs struggle to achieve meaningful digital transformation.

The model offered by ASEAN and other Asian countries for digital integration is far from perfect; the flexibilities in certain PTAs can easily be misused to adopt harmful protectionist policies. However, several initiatives, primarily driven by ASEAN, provide a guide for developing countries trapped in a digital divide. Therefore, as regards digital trade, we conclude there is a visible move towards 'New Asian Regionalism' and its impact on Third Regionalism, which is likely to have a lasting effect on the global economic order. While it remains uncertain if an NREO will emerge specifically in the digital realm because developing countries often face distinct digital development problems, it seems that Asian countries would be well-suited to make a solid contribution to such an economic agenda.

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