DIGITAL TRADE GOVERNANCE IN THE ASIA-PACIFIC REGION: IMPLICATIONS FOR THE WTO NEGOTIATIONS

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ABSTRACT

This paper provides a systematic study of digital trade governance in the Asia-Pacific region. It starts with a brief review of the current landscape of digital trade agreements in the region and relevant discussions at the World Trade Organization (hereinafter "WTO"). This provides an important context for understanding the Asia-Pacific approach to digital trade governance. The paper then provides a detailed analysis of the key aspects of this approach, including the progressive broadening of topics covered by trade agreements, the promotion of inclusive growth, and the shifting of focus in digital trade negotiations. This analysis draws on three important trade agreements in the region, namely, the Comprehensive and Progressive Agreement for Transpacific Partnership (CPTPP), the Regional Comprehensive Economic Partnership (RCEP) and the Digital Economy Partnership Agreement (DEPA). Furthermore, the paper discusses

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the implications of the Asia-Pacific approach on ongoing WTO negotiations. It argues that this pragmatic and incremental approach could serve as a plausible model for digital trade negotiations, especially among countries with diverse digital capabilities and policy preferences.

KEYWORDS: *digital trade governance, Asia-Pacific trade agreements, joint statement initiative, WTO negotiations*

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I. INTRODUCTION

Digital technologies supported global economic activities during the COVID-19 pandemic, and remain critical for economic recovery and development in the post-pandemic era.[1] Meanwhile, the transition to a digital economy worldwide has generated new challenges for international trade, demanding the establishment of a comprehensive, fair, and effective global governance framework for digital trade.[2] However, discussions at the World Trade Organization (hereinafter "WTO") made little progress. Thus, countries have shifted forums and utilised bilateral and regional trade venues to advance the development of digital trade rules at these sub-multilateral levels.[3]

The Asia-Pacific region has become a pioneer in digital trade governance. The region's flourishing digital economy has led to the development of extensive policies and legislation related to digital trade,[4] as well as active regional cooperation exemplified by mega-regional trade agreements—i.e. the Comprehensive and Progressive Agreement for Transpacific Partnership (hereinafter "CPTPP") and the Regional Comprehensive Economic Partnership (hereinafter "RCEP")—and by dedicated digital trade agreements, such as the Digital Economy Partnership Agreement (hereinafter "DEPA") between Chile, New Zealand, and Singapore. These trade agreements not only boast distinctive features but

[1] *Leveraging Digital Trade to Fight the Consequences of COVID-19*, ORG. FOR ECON. COOP. & DEV. [hereinafter OECD] (July 7, 2020), https://www.oecd.org/coronavirus/policy-responses/leveraging-digital-trade-to-fight-the-consequen ces-of-covid-19-f712f404/.
[2] This article uses the term "digital trade" and "e-commerce" interchangeably as they are not differentiated in most trade agreements.
[3] Mira Burri, *Towards a New Treaty on Digital Trade*, 55(1) J. WORLD TRADE 77, 80 (2021).
[4] Deborah Elms, *Digital Trade in the Asia-Pacific*, HINRICH FOUND. (Dec. 23, 2020), https://www.hinrichfoundation.com/research/wp/digital/digital-trade-asia-pacific/.

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also incorporate several principles that are agreeable to the two largest digital economies—the US and China, which are likely to shape global rules on digital trade going forward.

A growing body of scholarship has explored country-based regulatory approaches to digital trade and the reform of WTO rules.[5] However, only a few studies have offered a systematic analysis of digital trade governance in the Asian-Pacific region.[6] To fill this gap, this article seeks to explore the region's approach to digital trade issues. Section II outlines the current landscape of digital trade governance in the Asia Pacific in response to the new challenges triggered by the data-driven economy. Section III then discusses negotiations on digital trade rules under the WTO framework to assess the major divides between members. Section IV provides a detailed analysis of the Asia-Pacific approach to digital trade governance, with a focus on the main challenges faced in the WTO plurilateral negotiations. Section V discusses how the Asia-Pacific approach could advance relevant negotiations at the WTO. Section VI sets forth the conclusion.

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

The rapid advance of digital technologies over the past two decades has transformed the traditional ways of trade by creating new types of goods for trade and new modes of transaction, marking the advent of the "era of digital trade". Digital trade is among the most dynamic sectors in the global economy. It has been growing faster than traditional trade in goods and services, and has contributed to post-pandemic economic growth and recovery.[7] At the same time, the exponential growth of digital trade has brought with it a raft of challenges which have in turn generated regulatory concerns. For instance, digital technologies have posed threats to privacy and security,[8] resulting in a number of restrictive data policies (i.e. restrictions

[5] *See generally* Henry Gao, *Digital or Trade? The Contrasting Approaches of China and US to Digital Trade*, 21(2) J. INT'L ECON. L. 297 (2019); Susan Ariel Aaronson & Patrick Leblond, *Another Digital Divide: The Rise of Data Realms and Its Implications for the WTO*, 21(2) J. INT'L ECON. L. 245 (2018); Andrew D. Mitchell & Neha Mishra, *Regulating Cross-Border Data Flows in a Data-Driven World: How WTO Law Can Contribute*, 22(3) J. INT'L ECON. L. 389 (2019); Ines Willemyns, *Agreement Forthcoming? A Comparison of EU, US, and Chinese RTAs in Times of Plurilateral E-Commerce Negotiations*, 23(1) J. INT'L ECON. L. 221 (2020).

[6] *See generally* Neha Mishra & Ana Maria Palacio Valencia, *Digital Services and Digital Trade in the Asia Pacific: An Alternative Model for Digital Integration?*, 31(2) ASIA PAC. L. REV. 489 (2023); Stephanie Honey, *Asia-Pacific Digital Trade Policy Innovation*, *in* ADDRESSING IMPEDIMENTS TO DIGITAL TRADE 217 (Ingo Borchert & L. Alan Winters eds., 2021); Rolf H. Weber, *Digital Trade and E-Commerce: Challenges and Opportunities of the Asia-Pacific Regionalism*, 10(2) ASIAN J. WTO & INT'L HEALTH L. & POL'Y 321 (2015).

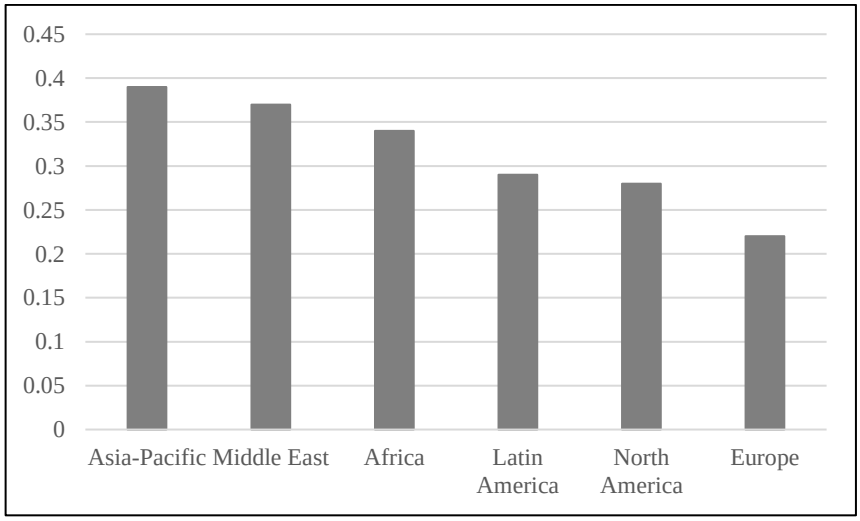
[7] Rachel F. Fefer et al., *Digital Trade and U.S. Trade Policy*, CONG. RSCH. SERV., summary (Dec. 9, 2021), https://sgp.fas.org/crs/misc/R44565.pdf.

[8] Mitchell & Mishra, *supra* note 5, at 390.

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on the flow of data across borders or its storage and processing) throughout the world (see Figure 1). These policies can generate regulatory uncertainties, complexities and costs for cross-border data transfer, thereby creating barriers to digital trade for companies.[9] They may also reduce firms' capacity to take advantage of network economies of scale which may otherwise be achieved through centralised storage and processing of data.[10] Thus, these restrictive policies and governmental responses in return have caused potential impediments to digital trade.

FIGURE 1: Average Digital Trade Restrictiveness Index by World Region



Source: Ferracane, M. F. (Ed.). 2022. Digital Trade Integration Database. European University Institute et al.,[11] lower numbers indicate more open policy stances.

Due to the lack of global rules to facilitate and liberalise digital trade (as will be discussed in Section III), governments have resorted to free trade agreements (hereinafter "FTAs") to advance and experiment with new rules and disciplines.[12] The FTAs initially included a handful of relevant

[9] Nigel Cory, *Cross-Border Data Flows: Where Are the Barriers, and What Do They Cost?*, INFO. TECH. & INNOVATION FOUND. (May 1, 2017), https://itif.org/publications/2017/05/01/cross-border-data-flows-where-are-barriers-and-what-do-they-cost/.
[10] *A Preliminary Mapping of Data Localisation Measures*, OECD 14 (2022), https://www.oecd-ilibrary.org/trade/a-preliminary-mapping-of-data-localisation-measures_c5ca3fed-en.
[11] *Digital Trade: Opportunities and Challenges*, WORLD TRADE ORG. [hereinafter WTO], 8 (Feb. 28, 2023), https://www. wto.org/english/tratop_e/devel_e/digital_trade2022_e.pdf.
[12] Mark Wu, *Digital Trade-Related Provisions in Regional Trade Agreements: Existing Models and*

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provisions and then expanded the scope to include dedicated chapters, and then to separate agreements on digital trade. By the end of 2023, there were 214 FTAs containing provisions on digital trade, with 122 having dedicated chapters.[13] The US initially took earnest steps to negotiate extensive digital trade provisions, leading through the inclusion of chapters on e-commerce or digital trade in the Trans-Pacific Partnership Agreement (hereinafter "TPP") and the US–Mexico–Canada Agreement.[14] More recently, countries in the Asia-Pacific region have assumed the initiative in shaping digital trade rules.

The Asia-Pacific's active role in digital trade rule-making is not surprising given the fast-growing e-commerce market, the predominance of large technology companies, rapid adoption and implementation of digital technologies and services, as well as the high levels of internet penetration and mobile-first consumers in the region.[15] The region has seen the boom of digital trade even in advance of the Covid-19 pandemic, which only accelerated these trends. Meanwhile, as shown in Figure 1, the region has the highest level of restrictiveness in the world.

The Singapore–New Zealand Closer Economic Partnership Agreement[16] was the first FTA in the region to include digital trade rules, particularly on paperless trading, the transfer of financial information and data processing within its financial services commitments. The Singapore–Australia FTA[17] was the first to include a stand-alone chapter on e-commerce, followed by the US–Singapore FTA,[18] the US–Australia FTA,[19] the ASEAN–Australia–New Zealand FTA,[20] and the US–Korea FTA.[21] A trajectory can be traced from these provisions and chapters through to the US-led TPP in 2015 and

Lessons for the Multilateral Trade System, INTER-AM. DEV. BANK [IDB] & INT'L CTR. TRADE & SUSTAINABLE DEV. [ICTSD], 2 (2017), https://rtaexchange.org/pdf/Digital%20Trade%20Related%20Provisions%20in%20RTA_%20WU.pdf.

[13] Mira Burri et al., *The Evolution of Digital Trade Law: Insights from TAPED*, 23 WORLD TRADE REV. 190, 194 (2024).

[14] United States–Mexico–Canada Agreement, Nov. 30, 2018, 134 Stat. 11, 57 I.L.M. 1152.

[15] *See generally Advancing Digital Trade in Asia*, WORLD ECON. F. (Oct. 15, 2020), https://www3.weforum.org/docs/WEF_GFC_Advancing_Digital_Trade_in_Asia_2020.pdf.

[16] Agreement between New Zealand and Singapore on a Closer Economic Partnership, N.Z.-Sing., Nov. 14, 2000, https://www.mfat.govt.nz/assets/Trade-agreements/Singapore-NZ-CEP/NZ-Singapore-CEP-full-text.pdf.

[17] Singapore–Australia Free Trade Agreement, Austl.-Sing., Feb. 17, 2003, http://www.austlii.edu.au/au/other/dfat/treaties/2003/16.html.

[18] United States–Singapore Free Trade Agreement, Sing.-U.S., May 6, 2003, https://ustr.gov/sites/default/files/ uploads/agreements/fta/singapore/asset_upload_file708_4036.pdf.

[19] United States–Australia Free Trade Agreement, Austl.-U.S., May 18, 2004, https://ustr.gov/trade-agreements/free-trade-agreements/australian-fta/final-text.

[20] Agreement Establishing the ASEAN–Australia–New Zealand Free Trade Area, Feb. 27, 2009, 2672 U.N.T.S. 3.

[21] United States–Korea Free Trade Agreement, S. Kor-U.S., June 30, 2007, https://ustr.gov/sites/default/files/uploads/Countries%20Regions/africa/agreements/pdfs/FTAs/South%20Korea%20FULL.pdf.

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its successor the CPTPP in 2018[22] where the e-commerce chapter remains unchanged. The e-commerce provisions in the (CP)TPP have influenced the corresponding rules in the RCEP in 2020, which has a seven-member overlap with the CPTPP. While there are a few differences, particularly in data flows and data localisation (as will be discussed in Section IV), most provisions are similar or identical across the two regional trade agreements (hereinafter "RTAs").[23] Ultimately, the trajectory led to the conclusion of the DEPA in mid-2020. Its primary textual source is the CPTPP, to which all three DEPA members are party.[24]

These rule-making efforts have been primarily led by countries with significant commercial benefits to reap when barriers to digital trade are reduced, as well as by those seeking an active role in making international trade rules, such as Singapore, Australia, Japan, and New Zealand.[25] At the same time, however, these agreements have been tailored to address different political and economic situations and the scale of digital development among the countries involved. Specifically, digitally advanced countries, such as Singapore and Australia, adopt an open and liberal approach towards digital trade by shaping rules that eliminate or reduce cross-border and domestic barriers, building trust in the digital space and facilitating digital trade in the RTAs.[26] Meanwhile, the majority of Asia-Pacific economies approach digital trade inversely in the absence of robust domestic frameworks.[27] They begin by making a cooperative or moderately ambitious commitment to these high-standard RTAs and subsequently develop appropriate domestic procedures to facilitate the implementation of new regional rules and commitments.[28] Several Asia-Pacific countries, such as Vietnam, Malaysia, Brunei and even major digital economies, i.e. Japan and China, adopted this approach to facilitate economic and regulatory reforms in a pragmatic and incremental manner.[29] This approach is therefore characterised as

[22] Gao, *supra* note 5, at 305.
[23] ASIAN DEVELOPMENT BANK [hereinafter ADB], THE REGIONAL COMPREHENSIVE ECONOMIC PARTNERSHIP AGREEMENT: A NEW PARADIGM IN ASIAN REGIONAL COOPERATION? 63 (2022).
[24] Dan Ciuriak & Robert Fay, *The Digital Economy Partnership Agreement: Should Canada Join?*, 171 CTR. INT'L GOVERNANCE INNOVATION POL'Y BRIEF 3 (2022), https://www.cigionline.org/static/documents/PB_no.171.pdf.
[25] Mishra & Valencia, *supra* note 6, at 492.
[26] *Digital Economy Agreements*, MINISTRY OF TRADE & INDUS. SING., https://www.mti.gov.sg/Trade/Digital-Economy-Agreements (last visited June 11, 2024); *Digital Trade Strategy*, AUSTL. GOV'T, DEP'T FOREIGN AFF. & TRADE (Apr. 11, 2022), https://www.dfat.gov.au/trade/services-and-digital-trade/e-commerce-and-digital-trade/digital-trade-strategy.
[27] Deborah Elms & Nick Agnew, *Digital Trade in Asia* 2 (Robert Schuman Ctr., Working Paper No. 2022/51, 2022).
[28] *Id.*
[29] *See, e.g.*, Chien-Huei Wu, *ASEAN at the Crossroads: Trap and Track Between CPTPP and RCEP*, 23(1) J. INT'L ECON. L. 97, 106, 110 (2020); *CPTPP Brings Vietnam Direct Economic Benefits and Stimulate Domestic Reforms, WB Report Says*, WORLD BANK (Mar. 9, 2018), https://www.worldbank.org/en/news/press-release/2018/03/09/cptpp-brings-vietnam-direct-economic-benefits-and-stimulate-domestic-reforms-wb-report-says; Cissy Zhou, *China "Needs" Trade Pact Like CPTPP to*

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"pragmatic incrementalism", [30] based on the gradual development of cooperation, progressively developing consensus on key issues, and integrating adequate regulatory autonomy to accommodate the diversity of digital development and ideological preferences.[31]

While there is a clear trend of regulatory cooperation on digital trade governance in the Asia-Pacific region, major RTAs have arguably played a different role in this endeavour. The CPTPP serves as a significant trendsetter and is commonly considered the benchmark for the modern generation of FTAs. [32] Digital trade provisions in several recent FTAs, especially those addressing data flow issues, are either inspired by or directly borrowed from the CPTPP.[33] The RCEP, while sharing a lineage with earlier Asia-Pacific e-commerce chapters like those in the CPTPP, introduces softer and more flexible disciplines, especially on data flows. This approach symbolizes the achievable compromise when diverse economies are involved in a digital trade negotiation.[34] The DEPA is exemplary as the first stand-alone agreement dedicated to digital trade. It establishes new approaches and collaboration in digital trade issues and addresses new topics brought about by digitalisation.[35]

In short, faced with the regulatory challenges triggered by the digital economy, digital trade negotiations in the Asia-Pacific region have become increasingly inclusive and extensive. Diverse economies have been involved in the negotiations and achieved consensus on a broad range of issues, representing real progress in regional cooperation and rule-making. Thus, it is widely regarded that these FTAs can serve as stepping-stones to the development of sensible solutions to challenges driven by the data-driven economy, and more generally, formulation of digital trade rules at the multilateral level.[36] The Asia-Pacific approach to digital trade governance will be discussed in detail in Section IV. Prior to that, the next section offers an overview of digital trade negotiations at the WTO and outlines the key challenges the negotiations face.

Force It into Domestic Reform, Says Former Commerce Minister, SOUTH CHINA MORNING POST (Mar. 11, 2021), https://www.scmp.com/economy/global-economy/article/3125005/china-needs-trade-pact-cptpp-force-it-domestic-reform-says.

[30] Julien Chaisse & Pasha Hsieh, *Rethinking Asia-Pacific Regionalism and New Economic Agreements*, 31(2) ASIA PAC. L. REV. 451, 460 (2023).

[31] Mishra & Valencia, *supra* note 6, at 491.

[32] *See generally* Mishra, *supra* note 27.

[33] Manfred Elsig & Sebastian Klotz, *Data Flow-Related Provisions in Preferential Trade Agreements: Trends and Patterns of Diffusion*, *in* BIG DATA AND GLOBAL TRADE LAW 42, 56 (Mira Burri ed., 2021).

[34] Mishra & Valencia, *supra* note 6, at 493.

[35] *Digital Economy Agreements*, *supra* note 26.

[36] Burri, *supra* note 3, at 80.

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III. DIGITAL TRADE NEGOTIATIONS AT THE WTO

Since its creation in 1995, the WTO's rulebook has largely remained unchanged and therefore has become ill-equipped to address contemporary challenges posed by digital transformation.[37] The WTO Membership has made many attempts and efforts to advance the liberalization of e-commerce and to create global rules on digital trade. Multilateral cooperation can be traced back to 1998 when the Members adopted the Declaration on Global Electronic Commerce.[38] However, the WTO is amid a "legislative crisis", which is evident in its struggles to negotiate digital trade rules.[39] The Work Programme on E-Commerce, despite its ambitious goals,[40] has made little to no substantive progress in its negotiations,[41] with the only exception being the moratorium on customs duties for electronic transmissions. [42] Consequently, economies interested in digital trade have turned to bilateral and regional agreements to promote the development of norms and rules, as noted in Section II.

More recently, seventy-six Members, accounting for over 90% of global trade, announced the launch of the Joint Statement Initiative (hereinafter "JSI") on E-commerce in 2019, aiming to "commence WTO negotiations on trade-related aspects of electronic commerce".[43] The JSI on E-commerce is significant as it provides an alternative plurilateral track for Members to advance the negotiations among a broad membership, despite the challenges the WTO encounters in its multilateral negotiation function.[44] It therefore provides the hope of enabling unified rules on and approaches to digital trade to be adopted.

The JSI has accomplished a great deal in negotiations and shown that

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[37] *Id.* at 78; Weber, *supra* note 6, at 323-26.

[38] WTO, Ministerial Declaration on Global Electronic Commerce, WTO Doc. WT/MIN (98)/DEC/2 (1998).

[39] Andrew D. Mitchell & Elizabeth Chin, *The WTO Joint Statement Initiative on E-commerce: Navigating Digital Trade Rules in a Fragmented World*, 57(6) J. WORLD TRADE 971, 972 (2023).

[40] The Work Programme on E-Commerce was launched in 1998 to examine all trade-related issues relating to global e-commerce, and to update the rules if needed. *See* WTO, *Work Programme on Electronic Commerce*, WTO Doc. WT/L/274 (Sept. 30, 1998).

[41] Henry Gao, *Across the Great Wall: E-commerce Joint Statement Initiative Negotiation and China*, *in* ARTIFICIAL INTELLIGENCE AND INTERNATIONAL ECONOMIC LAW 295, 299-300 (Shin-yi Peng et al. eds., 2021).

[42] The moratorium is scheduled to expire every two years unless Members agree to extend it at the biennial Ministerial Conference (MC). It was recently renewed at MC13. However, WTO Members remained divided on whether to implement a permanent moratorium or to impose customs duties on electronic transmissions. *See WTO Members Intensify Discussion on E-Commerce Moratorium*, WTO (July 18, 2023), https://www.wto.org/english/news_e/news23_e/ecom_18jul23_e.htm. (last visited June 17, 2024).

[43] WTO, *Joint Statement on Electronic Commerce*, WTO Doc. WT/L/1056 (Jan. 25, 2019). The Joint Statement Initiative [hereinafter JSI] has grown to include ninety members by 23 October, 2023.

[44] For more discussions of benefits of the JSI on E-commerce, see Mitchell & Chin, *supra* note 39, at 975-80.

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compromise outcomes are possible. Convergence has been achieved on several issues, including online consumer protection, electronic signatures and authentication, spam, open government data, electronic contracts, transparency, paperless trading, cybersecurity, open internet access, electronic transaction frameworks, electronic invoicing, and "single windows".[45] This demonstrates the ability of the JSI to accommodate different approaches to digital trade issues and to set a baseline for global rules and norms.[46]

However, three major issues remain to be resolved. Firstly, members have not achieved consensus on the challenging but important issues of cross-border data flow and data localisation.[47] For instance, the US, Japan and Singapore support cross-border data flow to facilitate trade in the digital economy.[48] They support reducing barriers to the transnational transfer of data, with exceptions for achieving legitimate public policy objectives (as will be discussed in Section IV). By contrast, the EU, China and Korea hold a cautious attitude towards the free flow of data. They allow parties to enact and implement measures that may impede cross-border data flow for the protection of personal privacy and security interests.[49] It should be noted that the US withdrew its longstanding digital trade demands at the WTO in 2023 as these proposals might hinder domestic policy considerations of strengthening regulation of big tech firms.[50] More recently, it also imposed a limitation on data transfer to "countries of concern", particularly China, over national security concerns.[51] Given that the US will remain "an active participant" in the WTO e-commence talks, this move may affect the positions of its allies such as Australia and Japan, creating an opportunity to find common ground and bridge traditional divides in future negotiations.

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[45] *E-Commerce Co-Convenors: "We Must Lock in the Credible Package That We Have in Our Hands"*, WTO (Oct. 27, 2023), https://www.wto.org/english/news_e/news23_e/jsec_27oct23_e.htm.
[46] Mitchell & Chin, *supra* note 39, at 978.
[47] *E-Commerce Co-Convenors Set out Roadmap for Concluding Negotiations in Early 2024*, WTO (Nov. 30, 2023), https://www.wto.org/english/news_e/news23_e/jsec_30nov23_e.htm.
[48] *See generally* Katya Garcia-Israel & Julien Grollier, *Electronic Commerce Joint Statement: Issues in the Negotiations Phase*, CUTS INT'L GENEVA (2019), https://www.cuts-geneva.org/wp-content/uploads/2023/09/1906-Note-RRN-E-Commerce-Joint-Statement2.pdf.
[49] *Id*. For a detailed discussion of the digital divide between the US, the EU and China, see Aaronson & Leblond, *supra* note 5; Henry Gao, *Data Sovereignty and Trade Agreements: Three Digital Kingdoms*, *in* DATA SOVEREIGNTY: FROM THE DIGITAL SILK ROAD TO THE RETURN OF THE STATE 213, 213 (Anupam Chander & Haochen Sun eds., 2023).
[50] David Lawder, *US Drops Digital Trade Demands at WTO to Allow Room for Stronger Tech Regulation*, REUTERS (Oct. 26, 2023), https://www.reuters.com/world/us/us-drops-digital-trade-demands-wto-allow-room-stronger-tech-regulation-2023-10-25/#:~:text=WASHINGTON%2C%20Oct%2025%%2020(Reuters),her%20office%20said%20on%20Wednesday.
[51] *Executive Order on Preventing Access to Americans' Bulk Sensitive Personal Data and United States Government-Related Data by Countries of Concern*, THE WHITE HOUSE (Feb. 28, 2024), https://www.whitehouse.gov/briefing-room/presidential-actions/2024/02/28/executive-order-on-preventing-access-to-americans-bulk-sensitive-personal-data-and-united-states-government-related-data-by-countries-of-concern/.

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The second challenge is the divide on customs duties on electronic transmissions.[52] While most members favour making the moratorium permanent, there is a lack of consensus. The members can generally be grouped into two categories. The first group, consisting of a majority of advanced economies such as the US, Japan, Canada, Singapore, Australia, and Korea, supports making the moratorium permanent.[53] In contrast, the second group, including China, Turkey, and Saudi Arabia, calls for preserving the status quo. Specifically, it suggests that each member should maintain its current practice of not imposing customs duties on electronic transmissions, following the most recent WTO Ministerial Decision.[54] This divide reflects underlying tensions between developed and developing states.

Another key challenge pertains to development issues. The JSI on E-commerce includes a broad range of economies participating in the negotiations, including major economies like the US, the EU and China, as well as many developing countries and Least Developed Countries (hereinafter "LDCs"). Thus, addressing the digital divide between developed and developing countries is important for the JSI on E-commerce. As observed by the co-convenor of the initiative, the provisions on development, along with those on customs duties on electronic transmissions, are significant. They will have a "crucial influence on whether the e-commerce initiative in which currently ninety members participate would be successful".[55]

While the above issues also exist in the Asia Pacific, countries in this region have made significant progress on regional cooperation and achieved fruitful results in digital trade rule-making, particularly the extensive digital trade provisions in the CPTPP, RCEP and DEPA. The Asia-Pacific approach to digital trade governance is examined below, with a focus on the three main challenges encountered in the JSI negotiations.

IV. ASIA-PACIFIC APPROACH TO DIGITAL TRADE GOVERNANCE

As noted in Section II, the Asia Pacific has adopted a pragmatic and incremental approach to digital trade governance. This section discusses this approach from three major aspects: (1) expanding the scope of issues covered by digital trade provisions on a gradual basis; (2) fostering inclusive growth in digital trade; and (3) shifting the focus of negotiations from difficult issues to those with the greatest economic significance to the parties. This approach seems to serve as a plausible model for accommodating the

[52] Mitchell & Chin, *supra* note 39, at 980.
[53] Garcia-Israel & Grollier, *supra* note 48, at 9, 15.
[54] Mitchell & Chin, *supra* note 39, at 984.
[55] *E-Commerce Co-Convenors Set out Roadmap for Concluding Negotiations in Early 2024*, *supra* note 47.

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diversity of digital development and policy preferences among the parties.

A. Expanding the Digital Trade Topics Progressively

Compared to previous FTAs in the Asia-Pacific region, the recent RTAs are expansive in scope. The CPTPP and RCEP cover a wider range of digital trade topics and share common ground on numerous issues, including electronic authentication and signatures, domestic electronic transactions framework, personal information protection, online consumer protection, paperless trading, spam, cooperation and cybersecurity.[56] They also include provisions on data flow and customs duties (as will be discussed in Section IV.C), whereas WTO members hold divergent views as discussed above. In addition to the consistency in coverage, the DEPA extends beyond either CPTPP or RCEP.[57] It represents a broader conception of "digital trade" whereas CPTPP governs measures that "affect trade by electronic means" and RCEP includes measures that "affect electronic commerce". DEPA, by contrast, applies to measures that "affect trade in the digital economy".[58] Therefore, DEPA contains more comprehensive disciplines than CPTPP and RCEP, encompassing not just traditional issues that have not been extensively addressed in previous international trade agreements: e-invoicing, e-payments, competition in digital markets, data innovation, open government data, digital identities, Artificial Intelligence technologies, financial technology, small and medium enterprises cooperation, logistics, and digital inclusion.

A widely used strategy among the above RTAs to cover a broad range of topics is the adoption of the "soft law" approach. That means issues are incorporated as weak commitment, using non-binding or binding and vague language.[59] Soft law commitments are often general declarations of intent and agreement on cooperation, lacking specific measures that governments will (or will not) take.[60] While these may not be as impactful as more stringent outcomes, they do at least establish a basic consensus on how to deal with these issues and support the emergence of more binding rules on

[56] ADB, *supra* note 23, at 66.
[57] *Id.* at 67.
[58] Comprehensive and Progressive Agreement for Trans-Pacific Partnership art. 14.2.2, Mar. 8, 2018, 3346 U.N.T.S. [hereinafter CPTPP]; Regional Comprehensive Economic Partnership, art. 12.3.1, Jan. 1, 2022, https://www.dfat.gov.au/trade/agreements/in-force/rcep/rcep-text [hereinafter RCEP]; Digital Economy Partnership Agreement, art. 1.1.1, June 11, 2020, https://www.mti.gov.sg/-/media/MTI/Microsites/DEAs/Digital-Economy-Partnership-Agreement/Digital-Economy-Partnership-Agreement.pdf [hereinafter DEPA].
[59] Emily Jones et al., *Norm Entrepreneurship in Digital Trade: The Singapore-Led Wave of Digital Trade Agreements*, 23(2) WORLD TRADE REV. 208, 212 (2024). For a detailed discussion, see Gregory C. Shaffer & Mark A. Pollack, *Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance*, 94 MINNESOTA L. REV. 706, 712-17 (2010).
[60] *Id.* at 12.

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these issues over time.[61]

This deliberate approach is therefore well-suited for Asia-Pacific countries to accommodate the diversity of digital development. For example, it has been used in the area of paperless trading. Given the varying capacities among members,[62] the CPTPP and RCEP include only brief, non-binding commitments that require parties to "endeavour to" make trade administration documents available in electronic form and to accept electronic versions of these documents as legal equivalent to paper versions. [63] By contrast, the DEPA transforms these best-endeavour commitments into binding obligations as its participating parties are digitally advanced and already have paperless trade systems in place.[64] Therefore, it can be argued that this soft law approach facilitates achieving some level of agreement in the RTAs, especially when countries are at different stages of implementing the obligations.

The soft law approach is also employed in policy areas where Asia-Pacific countries have very different regulatory approaches. For instance, cybersecurity plays a critical role in enabling digital trade by providing a secure trading environment. However, Asia-Pacific countries have distinct approaches to governance cybersecurity.[65] Thus, the three RTAs all contain non-binding commitments to cooperate in the area of cybersecurity, although there are minor variations in the wording of the commitments. Specifically, they simply provide that the parties recognise the importance of building national capabilities for computer security incident responses and using existing collaboration mechanisms to cooperate on matters related to cybersecurity.[66] Thus, it can be seen as a pragmatic approach to account for these regulatory disparities.

In addition, this approach is proper for fast-evolving policy areas characterised by rapid technological innovation. Given that the development

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[61] Mitchell & Chin, *supra* note 39, at 979; Honey, *supra* note 6, at 230.

[62] *Paperless Trade Facilitation in 2019: Global and Asia-Pacific State of Play*, UN TRADE & DEV. [hereinafter UNCTAD] (Feb. 25, 2020), https://unctad.org/news/paperless-trade-facilitation-2019-global-and-asia-pacific-state-play; Sung Heun Ha & Sang Won Lim, *The Progress of Paperless Trade in Asia and the Pacific: Enabling International Supply Chain Integration*, ADB (Oct. 2014), https://www.adb.org/sites/default/files/publication/152775 /reiwp-137.pdf.

[63] CPTPP, *supra* note 58, art. 14.9; RCEP, *supra* note 58, art. 12.5. The RCEP also include additional soft commitments to "work towards s implementing initiatives which provide for the use of paperless trading" and "cooperate in international for a" in this regard.

[64] DEPA, *supra* note 58, art. 2.2. For paperless trade in the three countries, see *UN Global Survey on Digital and Sustainable Trade Facilitation*, UN, https://www.untfsurvey.org/ (last visited June 17, 2024).

[65] Kevin Socquet-Clerc et al., *Cybersecurity Governance in Southeast Asia* (Oct. 27, 2023), GENEVA CTR. FOR SEC. SECTOR GOVERNANCE, https://www.dcaf.ch/cybersecurity-governance-southeast-asia-brief; Debora Christine, *Cyber Resilience of Countries in Asia-Pacific* (July 2, 2020), https://unu.edu/macau/blog-post/cyber-resilience-countries-asia-pacific.

[66] CPTPP, *supra* note 58, art 14.16; RCEP, *supra* note 58, art. 12.13; DEPA, *supra* note 58, art. 5.1. DEPA adds a clause on the importance of workforce development in cybersecurity.

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of technological innovation has far outpaced policy-making, there is considerable uncertainty as to what "good" or "effective" regulation looks like at this stage, even in a domestic context.[67] Soft law commitments on emerging issues can retain flexibility for parties to experiment with various domestic policies and foster dialogue and coordination among them.[68] One specific example in this regard is the governance of AI technologies. Instead of enforcing binding obligations, the DEPA parties focus on developing ethical governance frameworks and promoting the adoption of principles for the responsible use of AI.[69] As observed by leading commentators, this move indicates that there is a willingness to include new issues as a means to limit regulatory divergence and create a platform for cooperation.[70]

In short, the three RTAs significantly broaden the range of digital trade topics by incorporating issues as soft law commitments, which are non-binding and encourage cooperation. These commitments will gradually foster consensus on a broad range of issues, thereby providing the essential grounding for establishing more binding rules in the future.

B. Fostering Inclusive Growth in Digital Trade

The second aspect of Asia-Pacific's pragmatic and incremental approach focuses on promoting inclusive growth in digital trade. This is achieved through two key strategies: offering special and different treatment to the developing world and enhancing digital inclusion for small and medium-sized enterprises (hereinafter "SMEs") as well as marginalized individuals.

The Asia Pacific is the most dynamic region in the world with countries at various stages of development. Apart from certain developed countries like Japan, Australia, and Singapore, it includes many developing countries and twelve Least LDCs.[71] These countries usually have underdeveloped digital infrastructure and a weak regulatory environment for digital trade. Therefore, tackling the digital divide between countries and taking account of the development needs of developing nations, particularly the LDCs, are essential elements of digital trade governance in the Asia-Pacific region. The CPTPP and RCEP include special and different treatment mechanisms to gradually address these concerns. They allow for staged implementation of commitments by developing countries and LDCs with due regard to the time needed for them to develop their regulatory frameworks and relevant digital

[67] Jones et al, *supra* note 59, at 12.
[68] Stephanie Honey, *Enabling Trust, Trade Flows, and Innovation: the DEPA at Work*, HINRICH FOUND. 1, 4 (2021), https://www.wita.org/wp-content/uploads/2021/07/The-DEPA-at-work-Hinrich-Foundation-white-paper-Stephanie-Honey-July-2021-RV.pdf.
[69] DEPA, *supra* note 58, art. 8.2.
[70] Burri et al., *supra* note 13, at 18.
[71] *UN List of Least Developed Countries*, UNCTAD, https://unctad.org/topic/least-developed-countries/list (last visited June 17, 2024).

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infrastructure.[72] In addition, they require technical assistance and capacity building to help these less-developed members implement their obligations and accelerate economic development.[73] Furthermore, given its highest membership from the region, the RCEP requires the parties to identify areas for targeted cooperation, in order to help parties implement or enhance their relevant legal frameworks, such as research and training activities, capacity building, and the provision of technical assistance.[74] The lack of comparable provisions in the DEPA may be attributed to the parties having relatively strong digital sectors. Overall, this inclusive approach could incentivise developing and least-developed countries to participate in digital trade negotiations and gradually help bridge the digital divide.

The second strategy relates to digital inclusion for SMEs and marginalised individuals. SMEs in the Asia-Pacific region represent more than 98% of all businesses and contribute significantly to economic growth, employment, and innovation in the region.[75] While new digital tools and technologies have created new opportunities for SMEs to reach out to suppliers and customers globally, various sociocultural, infrastructure and regulatory challenges have made it difficult for these businesses to participate in digital trade.[76] In response, the recent Asia-Pacific RTAs incorporate provisions that assist SMEs to take advantage of trade opportunities under the Agreements.[77] The DEPA stands out for the inclusion of stakeholder engagement. It acknowledges the fundamental role of SMEs in maintaining dynamism and enhancing competitiveness in the digital economy, and requires parties to convene a Digital SME Dialogue where stakeholders can provide their input on issues related to digital trade.[78] This also reflects the fact that creating effective policies in this economic domain, perhaps more than in any other, requires a level of technical or specialised expertise, which can be found within the technology or business sector itself. In addition, given that digital technologies have enhanced the economic participation of disadvantaged groups,[79] the DEPA includes commitments to ensure that the benefits of the digital economy are more widely shared. These

[72] CPTPP, *supra* note 58, Ch. 14 nn. 5, 8, art. 14.18; RCEP, *supra* note 58, Ch. 12 nn. 4-7, 9-11 and 13.
[73] CPTPP, *supra* note 58, Ch. 21; RCEP, *supra* note 58, Ch. 15.
[74] RCEP, *supra* note 58, art. 12.4.
[75] Elms, *supra* note 4, at 27.
[76] *Id.*
[77] CPTPP, *supra* note 58, Ch. 24; RCEP, *supra* note 58, Ch. 14; DEPA, *supra* note 58, Module 10. In addition, the CPTPP and RCEP all require parties to endeavour to "work together to o assist SMEs to overcome obstacles to its use" in the e-commerce chapter respectively. *See* CPTPP, *supra* note 58, art. 14.15(a); RCEP, *supra* note 58, art. 12.4(a).
[78] DEPA, *supra* note 58, art. 10.1, 10.4.
[79] *See* Ali Parry et al., *Are Digital Advances and Inclusive Growth Compatible Goals? Implications for Trade Policy in Developing Countries*, *in* ADAPTING TO THE DIGITAL TRADE ERA: CHALLENGES AND OPPORTUNITIES (Maarten Smeets ed., 2021).

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commitments are largely not present in other trade agreements. Specifically, the DEPA requires the parties to cooperate on addressing barriers to accessing digital economy opportunities and promoting the participation of various groups, including women, rural populations, low socio-economic groups and Indigenous Peoples in digital trade activities.[80]

To sum up, the participation of developing and the least developed countries, SMEs, and disadvantaged groups is essential for the development of digital trade in the Asia-Pacific region. To achieve that objective, the RTAs provide special and different treatment to the less developed parties and facilitate digital economy opportunities for SMEs and marginalized individuals. This approach could progressively narrow development gaps and promote inclusive growth, ensuring that all parties and stakeholders in the region can share the benefits of the digital trade.

C. Redirecting Focus in Digital Trade Negotiations

The third aspect of the Asia-Pacific's pragmatic and incremental approach concerns the shifting focus of negotiations in RTAs. The parties generally make moderately ambitious commitments on traditionally difficult issues and redirect their focus to rapidly reach consensus on issues of significant economic significance.

1. Traditional Divides: Customs Duties and Data Flows —

(a) Customs Duties on Electronic Transmissions — As with the WTO negotiations, the policy divergence on customs duties for electronic transactions is also visible in the Asia-Pacific region. Two types of provisions on customs duties emerged in recent RTAs. The first type of provisions, including the CPTPP and DEPA, prohibits the imposition of customs duties on electronic transmissions.[81] This is unsurprising, given the significant involvement and leadership of the US in the TPP negotiations, and other parties such as Australia, Canada, and Japan in the CPTPP negotiations. These countries have consistently supported the permanent moratorium on customs duties in the WTO negotiations and maintained that the moratorium is crucial for digital trade flows.[82] The DEPA contains provisions on customs duties that are identical to those in the CPTPP, as its parties—Singapore, New Zealand, and Chile—also advocate for a permanent moratorium on customs duties.[83] However, in response to concerns from some WTO

[80] DEPA, *supra* note 58, art. 11.1.
[81] CPTPP, *supra* note 58, art. 14.3; DEPA, *supra* note 58, art. 3.2.
[82] Mishra & Valencia, *supra* note 6, at 500.
[83] WTO, *Work Programme on Electronic Commerce: Broadening and Deepening the Discussions on the Moratorium on Imposing Customs Duties on Electronic Transmissions, Communication from Australia; Canada; Chile; Colombia; Hong Kong, China; Iceland; Republic of Korea; New Zealand; Norway; Singapore; Switzerland; Thailand and Uruguay*, WTO Doc. WT/GC/W/799/Rev.1 (June 29, 2020)

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Members about potential government revenue losses due to the moratorium, the CPTPP and DEPA permit the imposition of internal taxes, fees and other charges on electronic transmissions in a manner consistent with the respective Agreements.[84] The parties hold that non-discriminatory internal taxes, due to the broader tax base, are more appropriate for the digital economy and could serve as potential alternative sources of government revenue.[85] This provision thus can be seen as a compromise outcome among developed and developing countries.

The RCEP introduces the second type of provisions that also prohibit the imposition of customs duties on electronic transmissions.[86] However, given that the majority of its members are developing and the least developed countries, the RCEP gives more policy space to the parties by allowing them to adjust their practices concerning any further outcomes in the WTO Ministerial Decisions within the framework of the Work Programme on Electronic Commerce.[87] While these commitments on customs duties are less ambitious than those in the CPTPP and DEPA, they represent progress in reaching broadly acceptable outcomes among countries with divergent policy preferences.

(b) Cross-Border Data Flows and Data Localization — Another traditional divide in digital trade concerns data flows and data localisation. Data are fundamental to the digital economy, and data flows underpin digital trade. Therefore, cross-border data flows and data localisation have been key issues in Aisa-Pacific FTAs negotiations over the past decade. Similar to the discussions at the WTO, countries in the region hold diverse views on these issues, driven by different regulatory priorities—from promoting economic growth and innovation to protecting privacy, to pursuing data security objectives.[88] These differing priorities lead to varied approaches to data regulation. Developed countries, such as Japan, Korea, Australia, Singapore, and New Zealand, generally endorse the free flow of data with sectoral data localisation measures.[89] Conversely, developing countries like China, Indonesia, and Vietnam tend to enforce more restrictive data flow limitations and support broader data localisation requirements.[90] To solve this "old

[84] CPTPP, *supra* note 58, art. 14.3; DEPA, *supra* note 58, art. 3.2.
[85] WTO, *supra* note 83, paras. 4.1-4.2.
[86] RCEP, *supra* note 58, art. 12.11.
[87] *Id.*
[88] *Data Beyond Borders 2.0*, SALESFORCE (2021), https://accesspartnership.com/wp-content/uploads/2021/10/data-beyond-borders-2.pdf?hsCtaTracking=af68d435-0681-4b39-b0e6-e0e46daebb56%7Ce2313c09-e424-4588-af89-2fba76053580.
[89] *Id. See also Data Governance Regulation in the G20*, DIGIT. POL'Y ALERT (Nov. 7, 2023), https://digitalpolicyalert.org/report/fragmentation-risk-in-g20-data-governance-regulation.
[90] ENABLING CROSS-BORDER DATA FLOW: ASEAN AND BEYOND, https://www.undp.org/publications/enabling-cross-border-data-flow-asean-and-beyond (last visited June 16, 2024); Nigel Cory & Luke Dascoli, *How Barriers to Cross-Border Data Flows Are Spreading Globally, What They Cost, and How to Address Them* (July 19, 2021), https://itif.org/publications/2021/07/19/how-

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divide", the recent Asia-Pacific RTAs adopt a gradual approach to data flows, which are reflected in three major respects.

The first respect relates to article-specific exceptions. They all commit to enabling cross-border data flows and prohibiting data localisation for business purposes, while at the same time establishing wide exceptions for measures intended to achieve "legitimate public policy objectives".[91] This exception clarifies that the CPTPP, RCEP and DEPA do not prevent parties from adopting or maintaining inconsistent measures in pursuit of a legitimate public policy objective, providing that such measure is not "applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade."[92] This text is similar to the language in general exceptions outlined in Article XX of the General Agreement on Tariffs and Trade and Article XIV of the General Agreement on Trade in Services, which allow WTO members to adopt trade-restrictive measures for certain legitimate regulatory objectives such as the promotion and protection of other social values and interests. However, it differs from the WTO norms as it does not provide an illustrative list of "legitimate public policy objectives", thereby preserving wide regulatory autonomy for the implementing parties to pursue development objectives aligned with their national interests and needs. While the vague language used in the exceptions might be susceptible to misuse,[93] it facilitates reaching consensus among countries at various stages of development in the region. As Shin-Yi Peng and Han-Wei Liu observed, the negotiators might have deliberately maintained this vagueness to create "constructive ambiguity". This strategy provides flexibility in pursuing policy objectives within an evolving and potentially controversial policy area.[94] In addition, reflecting on the policy priorities amongst certain members, particularly China, Vietnam and Indonesia,[95] the RCEP introduces an additional exception. The exception allows the party to implement inconsistent measures that "it considers

barriers-cross-border-data-flows-are-spreading-globally-what-they-cost/.

[91] CPTPP, *supra* note 58, arts. 14.11, 14.13; RCEP, *supra* note 58, arts. 12.14, 12.15; DEPA, *supra* note 58, arts. 4.3, 4.4.

[92] The wording of the exceptions varies across the three regional trade agreements (RTAs). However, a detailed comparison is outside the scope of the article. For more discussions of the public policy objective exception, see Mishra & Valencia, *supra* note 6, at 504; Susannah Hodson, *Applying WTO and FTA Disciplines to Data Localization Measures*, 18(4) WORLD TRADE REV. 579, 602-03 (2019).

[93] Mitchell & Mishra, *supra* note 5, at 407.

[94] Shin-Yi Peng & Han-Wei Liu, *The Legality of Data Residency Requirements: How Can the Trans-Pacific Partnership Help?*, 51(2) J. WORLD TRADE 183, 196 (2017). Another possible reason behind such vague language lies in the disagreement between the parties on the scope of such objectives. For a detailed discussion, see Neha Mishra, *The Role of the Trans-Pacific Partnership Agreement in the Internet Ecosystem: Uneasy Liaison or Synergistic Alliance?*, 20(1) J. INT'L ECON. L. 31, 37 (2017).

[95] These countries have enacted laws and regulations that place restrictions on data flows to safeguard national sovereignty and security. *See* ENABLING CROSS-BORDER DATA FLOW: ASEAN AND BEYOND, *supra* note 90; Cory & Dascoli , *supra* note 90.

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necessary for the protection of its essential security interests"; "such measures cannot be disputed by other Parties."[96] Similarly, the constructive ambiguity and non-disputable characteristic in this exception is a deliberate choice aimed at reaching a pragmatic consensus on complex issues. To date, the effectiveness of the two types of exceptions has yet to be tested.

The second respect involves channels for clarifying the scope of the exceptions. Although the exceptions for data flows and data localisation are considered broad, the RTAs offer three mechanisms that allow parties to clarify and potentially narrow the scope of these exceptions. The first mechanism is the dispute settlement process, adopted by the CPTPP and DEPA,[97] enabling the panel to interpret the ambiguous language and clarify the application requirements of the exceptions. The second mechanism concerns establishing a committee where the dispute settlement process is unavailable. For instance, the RCEP excludes the e-commerce chapter from dispute settlement but establishes a Joint Committee.[98] The committee is tasked with discussing "differences that may arise regarding the interpretation or application of this Agreement" and issuing "interpretations of the provisions of this Agreement as it may deem appropriate and necessary". The final mechanism, adopted by the RCEP, involves a dialogue that provides a forum for ongoing conversations on data transfer issues.[99] These setups illustrate an incremental approach to determining the proper scope of exceptions among countries with varying policy preferences regarding digital regulation.

The third respect concerns amendments and reviews of the Agreements. All three RTAs permit the parties to modify the Agreement by consensus,[100] which can be used to facilitate the development of data-related issues based on further discussions. The DEPA exemplifies the potential of this approach. Initially, it excluded rules on cross-border data flows and data localisation from the scope of dispute settlement.[101] However, following further negotiations, the parties agreed to a protocol that subjected these issues to a rules-based dispute settlement mechanism, aimed at reinforcing the legal certainty and enforceability of these rules.[102] Additionally, the RCEP includes a general review mechanism that mandates periodic evaluations (every five years after the date of entry into force) of the implementation and

[96] RCEP, *supra* note 58, arts. 12.14.3(b), 12.15.3(b).
[97] CPTPP, *supra* note 58, art. 14.18; Protocol to the Digital Economy Partnership Agreement, art. 8, July 15, 2024, https://www.mfat.govt.nz/assets/Trade-agreements/DEPA/DEPA-Protocol-signed-version.pdf [hereinafter Protocol to the DEPA]. However, Malaysia and Vietnam are not subject to dispute settlement regarding its obligations on data transfer.
[98] RCEP, *supra* note 58, arts. 12.17, 18.3.
[99] RCEP, *supra* note 58, art. 12.16.
[100] CPTPP, *supra* note 58, art. 30.2; RCEP, *supra* note 58, art. 20.4; DEPA, *supra* note 58, art. 16.3.
[101] DEPA, *supra* note 58, Annex 14-A, art. 14A.1.
[102] Protocol to the DEPA, *supra* note 97, art. 8.

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effectiveness of the Agreement, to update and enhance the outcomes of the Agreement.[103] Overall, these kinds of discussion-based processes enable the parties to reach consensus on some sensitive issues and develop more stringent rules progressively. They appear to be practical ways of engaging developing countries in digital trade cooperations at their own pace.

All in all, the three recent Asia-Pacific RTAs adopt less ambitious commitments on data transfer and data localisation issues. While they generally support the free flow of data across borders and prohibit data localisation for conducting business, they incorporate broad exceptions for measures aimed at achieving domestic policy objectives. Meanwhile, they leave flexibility for refining the scope of exceptions and developing relevant provisions on an ongoing basis. This strategy embodies a feasible compromise in digital trade negotiations involving countries with diverging policy preferences.

2. New Focuses: Promoting Efficiency, Trust and Interoperability — In allowing the parties sufficient flexibility, the RTAs have shifted the focus to negotiating issues that have the greatest economic significance to them. The promotion of efficiency, maintenance of trust and interoperability of systems and platforms are all issues that have become increasingly important to digital trade in recent years, and the recent Asia-Pacific RTAs reflect this in their rules.

The first group of rules relates to the facilitation of digital trade, including several key areas: (1) domestic electronic transactions framework, which seeks to promote the development of compatible domestic legal frameworks across jurisdictions.[104] Regional cooperation in this area could promote a uniform regulatory environment conducive to digital commerce; (2) paperless trading, which focuses on advancing the digitalisation of transactions among private entities and governments as well as between governments.[105] This initiative will help in reducing transaction times and lowering costs associated with trade processes; [106] (3) electronic authentication and signature, which offer considerable flexibility for the use of authentication technologies and e-signatures, [107] thereby streamlining trade processes and enhancing the efficiency of transactions; [108] and (4) electronic invoicing and payments, which enable swift and accurate exchange of invoicing and payment information electronically, [109] and therefore can significantly enhance the speed and reliability of business

[103] RCEP, *supra* note 58, art. 20.8.
[104] CPTPP, *supra* note 58, art. 14.5; RCEP, *supra* note 58, art. 12.10; DEPA, *supra* note 58, art. 2.3.
[105] Jones et al., *supra* note 59, at 16.
[106] CPTPP, *supra* note 58, art. 14.9; RCEP, *supra* note 58, art. 12.5; DEPA, *supra* note 58, art. 2.2.
[107] WORLD ECONOMIC FORUM, *supra* note 15, at 10.
[108] CPTPP, *supra* note 58, art. 14.6; RCEP, *supra* note 58, art. 12.6. The DEPA does not make commitments in this policy area.
[109] Jones et al, *supra* note 59, at 17-18.

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operations.[110] On the whole, negotiations on these policy areas are crucial for promoting the efficiency of digital trade, which is particularly significant for many developing countries in the Asia-Pacific region as they are endeavourin to transition towards a digital economy in the short to medium term.[111]

The second set of rules concerns the promotion of online consumer trust. As noted, the Asia-Pacific region is featured by widespread internet usage and a prevalence of mobile-first consumers. While consumers in the region tend to allow digital trade to grow without complaints, these are some areas of increasing concern that may break down trust in the digital space.[112] For instance, in the area of consumer protection, issues like fraudulent and misleading practices, inaccurate marketing and unclear return/refund policies can diminish consumer trust. Customers are also concerned about cyberattacks, data privacy and security in light of the increase in digital transactions and the vast collection/exchange of personal data. Therefore, these RTAs have significantly developed substantive rules concerned with building trust in digital systems, including rules directed at online consumer protection, [113] cybersecurity (as discussed above), as well as personal information (or privacy) protection[114] and spam.[115]

Another set of rules becoming increasingly significant for policymakers relates to the interoperability of systems, software and operating platforms. Interoperability allows traffic to run effectively across different types of networks (e.g. from telecoms to banking to logistics and so on).[116] It matters most to digital payment, which is at the center of digital trade expansion and serves as a key enabling factor for digital commerce. Governments in the Asia-Pacific region have played a proactive role in advancing digital payment methods, leading the region to become the leader in the global digital payment market and commanding over half of the total market share in 2023. [117] Due to the complex process of cross-border e-payment, policymakers have worked on the interoperability issue to promote seamless

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[110] DEPA, *supra* note 58, arts. 2.5, 2.7. These topics are novel aspects of the DEPA.
[111] *See generally* Smeets, *supra* note 79.
[112] WORLD ECONOMIC FORUM, *supra* note 15, at 14.
[113] CPTPP, *supra* note 58, art. 14.7; RCEP, *supra* note 58, art. 12.7; DEPA, *supra* note 58, art. 6.3.
[114] CPTPP, *supra* note 58, art. 14.8; RCEP, *supra* note 58, art. 12.8; DEPA, *supra* note 58, art. 4.2.
[115] CPTPP, *supra* note 58, art. 14.14; RCEP, *supra* note 58, art. 12.9; DEPA, *supra* note 58, art. 6.2.
[116] *Australia-Singapore Digital Economy Cooperation on Standards: Research Report,* TRPC (2020), https://www.dfat.gov.au/sites/default/files/australia-singapore-digital-trade-standards-research-report.pdf.
[117] *Exploring the Future of Digital Payments in Asia-Pacific: Trends and Projections for 2023 and Beyond,* PR NEWSWIRE (Nov. 7, 2023, 11:30 AM), https://www.prnewswire.com/news-releases/exploring-the-future-of-digital-payments-in-asia-pacific-trends-and-projections-for-2023-and-beyond-301980132.html#:~:text=In%20a%20remarkable%20achievement%2C%20the,15%25%20between%202023%20and%202030. *See also* Rolf H. *Weber, Financial Inclusion as a Public Policy Issue in the Global Digital Economy*, 19(1) ASIAN J. WTO & INT'L HEALTH L. & POL'Y 231, 246 (2024).

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fund transfers between different payment systems and instruments for all participants, such as consumers, businesses and governments, in the payment system.[118] For example, the DEPA requires parties to adopt regulations that enable greater interoperability between electronic payment systems.[119] It also extends the concept of interoperability building to issues such as digital invoicing, personal information protection and digital identities.[120] Similarly, the CPTPP and RCEP incorporate rules on interoperability building in the area of electronic authentication.[121]

In summary, countries within the Asia-Pacific have redirected the focus of digital trade negotiations to facilitate the conclusion of the RTAs when countries at varying stages of digital development are involved. This strategy embodies a pragmatic method for achieving acceptable compromises on sensitive issues and focusing on establishing rules and frameworks on issues that hold significant economic relevance.

To date, the RTAs have fostered a more conducive digital trade environment, significantly boosting the e-commerce markets in the Asia-Pacific region.[122] For example, under the CPTPP, the members' e-commerce sales grew 26% annually from 2017 through 2025, with further growth expected.[123] A 2023 survey indicates that most firms find CPTPP's e-commerce provisions beneficial and its enforcement "very relevant".[124] Although not fully implemented, the CPTPP has significantly enhanced the digital trade ecosystem, doubling the number of new service providers in many areas such as payment, finance, and logistics since 2016, especially in emerging markets.[125] This development enables regional businesses, particularly SMEs and traditional businesses to reach foreign customs and expand their e-commerce exports. Given these developments, it is reasonable to conclude that the pragmatic and incremental approach adopted by the Asia-Pacific region in these RTAs could be a plausible model for digital trade negotiations involving countries with diverging digital development and policy preferences on digital trade governance. This approach also has important implications for ongoing digital trade discussions at the WTO, which will be discussed below.

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[118] Elms, *supra* note 4, at 21-24.
[119] DEPA, *supra* note 58, art. 2.7.
[120] *Id.* arts 2.5.2, 4.2.6, 7.1.1.
[121] CPTPP, *supra* note 58, art. 14.6.4; RCEP, *supra* note 58, art. 12.6.4.
[122] *See, e.g.*, Kati Suominen, *The Implementation of the CPTPP's E-Commerce Chapter in 2023 and toward CPTPP* 2.0, CTR. FOR STRATEGIC AND INT'L STUD. (Feb. 13, 2024), https://www.csis.org/analysis/implementation-cptpps-e-commerce-chapter-2023-and-toward-cptpp-20; *RCEP's Impact on Digital Trade the Focus of Major Asia House Dialogue*, ASIA HOUSE (June 24, 2022), https://asiahouse.org/news-and-views/rceps-impact-on-digital-trade-the-focus-of-major-asia-house-dialogue/.
[123] Suominen, *supra* note 122, at 4.
[124] *Id.* at 12.
[125] *Id.* at 6.

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V. IMPLICATIONS FOR THE WTO NEGOTIATIONS

The co-convenors of WTO E-commerce talks recently emphasised the need to "balance ambition and inclusion but also prioritize pragmatism",[126] and encouraged members to "exercise maximum flexibility and accept compromises to achieve the overreaching goal of revitalizing the multilateral system". [127] This suggests that the ongoing discussions will focus on accommodating the capacities and needs of the members, possibly necessitating a moderation of the initial ambitions to secure a more broadly acceptable outcome. Meanwhile, members should prioritise the most viable issues at this stage to expedite the conclusion of the JSI negotiations. This strategy aligns with the Asia-Pacific approach that champions a pragmatic yet moderately ambitious way for digital trade negotiations. Thus, WTO Members could draw on the experiences from the Asia-Pacific region to navigate the challenges faced in the negotiations and successfully conclude the agreement.

First, a two-phase approach could be considered to bridge the divide regarding customs duties on electronic transmissions. The initial phase involves negotiating a permanent moratorium on these customs duties, as established in the CPTPP and DEPA. However, achieving broad support for this proposal may be challenging due to the contentious nature of past discussions within the E-Commerce Work Programme, as previously mentioned. If a majority of the JSI members are reluctant to commit to this, a secondary option would be to introduce a temporary moratorium that defers to the broader WTO membership, similar to the approach adopted in the RCEP. This alternative could be more practical in achieving the recent objective of the JSI talks, which aim to identify flexible rule-making solutions to ensure the success of the e-commerce initiative.[128]

Second, adopting less ambitious commitments, coupled with certain exceptions, may facilitate consensus on data flow and data localisation issues. This approach has been effective in the Asia-Pacific region, allowing governments the necessary policy space to address domestic regulatory priorities. The proposed agreement could generally promote the free flow of data and restrict data localisation while simultaneously including exceptions for public policy objectives. This exception, lacking a strict definition or an enumerative list, grants significant regulatory autonomy. Members may then implement restrictions to protect personal privacy, cultural integrity, and national security. Moreover, the mechanism for refining the scope of these exceptions could be the dispute resolution system, given its significance to

[126] WTO, *supra* note 47.
[127] *Co-Convenors Mark Recent Round of E-Commerce Negotiations an Important Milestone*, WTO (Mar. 14, 2024), https://www.wto.org/english/news_e/news24_e/ecom_14mar24_e.htm.
[128] WTO, *supra* note 47.

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the multilateral trading system. For developing and least developed countries requiring additional time and policy flexibility to enhance their digital infrastructure and craft domestic policies, tailored relaxations could be considered. For instance, similar to provisions in the CPTPP, Malaysia and Vietnam are exempt from dispute settlement concerning their commitments on several matters, including cross-border data flows or data localization, to pragmatically address their specific needs.[129]

Third, special and different treatment provisions could be introduced to bolster the development dimension of the JSI negotiations given that "inclusiveness is one of its main pillars".[130] Indeed, the WTO has a history of crafting special provisions that grant developing countries special rights and allow other members to treat them more favourably.[131] Such provisions not only aid developing countries but also benefit developed countries by fostering economic and social opportunities through enhanced economic development and inclusion in the developing world. To support the special needs of developing and least developed members, the JSI agreement should include measures like staggered implementation, technical assistance, and capacity building. These measures would facilitate these countries' compliance with and commitment to more comprehensive digital trade regulations. The implementation of technical assistance and capacity building could adopt a soft law approach, tailored to the varied needs and priorities of the recipient countries. This flexibility would encourage broader acceptance of binding commitments on digital trade issues among these.

VI. CONCLUSION

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

After decades of evolution, the Asia-Pacific region has developed a pragmatic and increment approach to digital trade governance, manifesting

[129] CPTPP, *supra* note 58, art. 14.18.
[130] WTO, *supra* note 45.
[131] *Special and Differential Treatment Provisions*, WTO, https://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm (last visited June 16, 2024).

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in three key ways. First, it has progressively broadened the range of digital trade issues encompassed by RTAs, predominantly employing a soft law approach. Secondly, it has promoted inclusive growth in digital trade by addressing the special needs of developing countries, SMEs, and disadvantaged groups, ensuring the benefits are widely shared. Lastly, it has strategically redirected focus in negotiations from contentious issues, such as customs duties, data flows, and data localisation, to areas of significant economic importance to the involved parties. This approach helps to build consensus and foster cooperation among diverse participants, leading to more sustainable and effective solutions. While not the only model for digital trade governance, this approach offers a viable one for the WTO to address the major challenges in relevant negotiation.

As the Asia-Pacific region increasingly asserts its leadership in the global digital market, its pragmatic and incremental approach is likely to influence other FTAs or digital trade agreements at both bilateral and plurilateral levels. This influence is particularly relevant in negotiations that include countries with varying digital capabilities and regulatory frameworks.

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