“Digital” Free Trade Agreements: Comparing DEA, DEPA and CPTPP

This Issue Paper looks at the latest generation of “digital” trade agreements

The global pandemic is increasingly pushing firms of all sizes to migrate online. While many governments have been urging companies to quickly become part of the digital economy, their own efforts to create a supportive policy framework for digital trade has been a slow process.

Many governments have inconsistent or incomplete policies at the domestic level. Many of these gaps are reinforced and expanded when thinking about cross-border trade in digital services and e-commerce goods. Absent clear rules to handle the myriad challenges that can arise when engaging in digital trade, governments have been striking out on their own. The net result has the potential to dramatically tangle up digital trade in the future.

Fortunately, governments are recognizing potential problems and increasingly trying to coordinate policy solutions and responses. This is especially true across Asia, where many governments are leading domestic, bilateral, regional and global efforts to bring about consistency in digital policies.

Overview: CPTPP, DEPA, DEA

The CPTPP, with negotiations starting in 2010, has the longest track record of the three agreements. Active members include Australia, Canada, Japan, Mexico, New Zealand, Singapore and Vietnam. The DEPA was signed between Chile, New Zealand and Singapore in June 2020. (Chile is also a member of the CPTPP, but has not yet completed domestic-level ratification.) The newest agreement, the DEA between Australia and Singapore, was signed and released on August 6, 2020.

The CPTPP is a comprehensive trade agreement, with hundreds of pages of legal texts and thousands of pages of additional country-specific schedules. Digitally relevant commitments are embedded across the document. The CPTPP digital provisions, like the rest of the agreement, is now in force.

DEPA, by contrast, is the first “digital only” trade agreement. The articles were designed to be modular, to be picked up and slotted into a wide range of future trade arrangements. The DEPA has not yet entered into force.

Finally, the DEA, while released as another example of a “digital only” deal, is intended to update an existing bilateral trade agreement between Australia and

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2 The full text of DEPA is available at: https://www.mfat.govt.nz/assets/Uploads/DEPA-Signing-Text-11-June-2020-GMT.PDF
Singapore. The structure is therefore closer to a traditional free trade agreement than the DEPA. The agreement will come into force when both parties have completed domestic level procedures.

**Key Elements and Definitions:**

1. **Commitments to facilitate digital trade**

   All three of the agreements have commitments to facilitate trade, making it possible for the parties involved to engage in more extensive promises in a digital-only set of talks.

2. **No customs duties on electronic submissions**

   Neither party shall impose customs duties on electronic transmissions, including content transmitted electronically. However, it does not preclude members from imposing internal taxes, fees, or other charges on content transmitted electronically.

3. **Non-discrimination of digital products**

   Non-discriminatory treatment of imported digital products is another fundamental measure to support an open digital economy between the FTA members. Equal treatment of digital products ensures healthy market competition and provides better quality and more affordable choices for consumers.

4. **Domestic electronic transactions framework**

   Domestic electronic transactions framework refers to the domestic legal frameworks governing electronic transactions adopted by FTA members. These frameworks should be consistent with the principles of the UNCITRAL Model Law on Electronic Commerce adopted in 1996 or the United Nations Convention on the Use of Electronic Communications in International Contracts (2005). Individual parties are encouraged to avoid unnecessary regulatory burdens on electronic transactions and facilitate the participation of interested stakeholders in the development of the domestic legal framework. These agreements facilitate enforcement of the FTA rules governing electronic transactions between the FTA parties and provides clear regulations for conducting cross-border business in those countries.

5. **Electronic authentication and signatures**

   The provision refers to a mutual recognition of electronic processes of identity verification and validity of electronic signatures. Unless they do not meet certain performance standards or are not certified by an accredited authority, the FTA parties should not prohibit electronic authentication methods or deny the legal validity of the e-signatures. This provides flexibility for users of authentication technologies and e-signatures, facilitates trade processes and eases the efficiency of transactions.

6. **Paperless trading**

   The FTA parties should ensure there is a transparent platform that provides access to all measures related to electronic commerce and make trade administration documents available to the public in electronic form. Unless there is a legal requirement for the printed version, each party should accept trade administration documents submitted electronically as the legal equivalents. This increases the effectiveness of trade administration documents’ processing.

7. **Electronic invoicing**

   The importance of electronic invoicing is recognized for its increased efficiency, accuracy and reliability of commercial transactions. Each party should ensure that the implementation of measures related to e-invoicing in its jurisdiction are designed to support cross-border interoperability.

8. **Electronic payments**

   Parties shall support the development of efficient, safe and secure cross-border payments, in particular those provided by non-bank, non-financial institution and
FinTech enterprises. Specific regulations on electronic payments must be adopted by the parties to enable greater interoperability between electronic payments systems at the same time, providing safe and secure products available to third parties.

9. Express shipments

To increase trade and facilitate air express shipments, each party shall ensure its customs procedures are predictable, consistent, and transparent. Expedited customs procedures will be in place for air express shipments while maintaining appropriate customs control and selection.

10. Online consumer protection

Parties must protect consumers from misleading and deceptive commercial activities, unfair contract terms and unconscionable conduct when they engage in electronic commerce. Misleading, fraudulent or deceptive actions may include misrepresentation of material fact, failure to deliver products or services to a consumer after the consumer is charged or charging the consumer’s financial, internet, or other accounts without authorization.

11. Cooperation on competition policy

Sharing of experiences in enforcing competition law and in developing and implementing competition policies to address the challenges that arise from the digital economy is to be promoted among the parties.

12. Personal information protection

Parties should proactively protect personal information by designing a legal privacy framework to prevent a misuse of individual information of consumers engaged in electronic commerce. Parties shall take into account the principles and guidelines of relevant international bodies, such as the APEC Cross-Border Privacy Rules (CBPR) System and the OECD Guidelines Governing Protection of Privacy and Trans-Border Flows of Personal Data.

13. Unsolicited commercial electronic messages

FTA parties must endeavor to adopt or maintain measures that enable consumers to reduce or prevent unsolicited commercial electronic messages. Suppliers of unsolicited commercial electronic messages may be subject to legal actions.

14. Submarine telecommunications cable systems

The parties recognize the importance of submarine telecommunications cable systems, and the expeditious and efficient installation, maintenance, and repair of these systems, to national, regional and global telecommunications connectivity. Parties will engage in activities to promote awareness of submarine telecommunications cable systems and make information available on the location of submarine telecommunications cable systems to inform mapping and charting.

15. Localization of computing facilities for financial services

Parties are not allowed to use or locate computing facilities in the party’s territory as a condition for conducting business in that territory; given that financial regulatory authorities of the covered financial person have immediate, direct, complete and ongoing access to information processed or stored on computing facilities located outside of the party’s territory.

16. Data innovation

The importance of digitalization and the use of data in the digital economy will be promoted and supported by means of collaborating on data-sharing projects using regulatory sandboxes where applicable. Research and industry practices related to data innovation will be shared among FTA parties.

17. Open government data

Government information will be made available to public in a machine readable and open format that allows it to be searched, retrieved, used, reused, and redistributed. Parties recognize the economic and social benefits of government information. Public access to government
data will be viewed as an enhancement to research opportunities and to generating businesses.

18. Source code
Access to or transfer of source code of software owned by a person of the other party will not be required as a condition for import, distribution, sale or use of such software, or of products containing such software, in its territory. However, a government agency, regulatory body or a judicial authority may request for available source code of software for investigation, inspection, examination, enforcement action, judicial, or administrative proceeding purposes, subject to safeguards against unauthorized disclosure.

19. Digital identities
To promote regional and global connectivity, FTA parties shall pursue to develop compatible digital identity regimes. Common standards and frameworks are to be developed to foster technical interoperability and in developing comparable protection of digital identities in legal frameworks.

20. Standards and conformity assessment for digital trade
Trade barriers can be reduced and a well-functioning of digital economy can be fostered by developing and adopting standards that support digital trade. Industry participants will be involved in the process to identity, develop and test cross-border projects that demonstrate standards that support digital trade.

21. Artificial Intelligence (AI)
Industry practices and research related to AI technologies will be shared. Responsible use of AI technology by businesses and across the community will be promoted. AI Governance Frameworks will consider principles or guidelines from internationally-recognized ones.

22. FinTech and RegTech Cooperation
Collaboration among parties will be encouraged on FinTech and RegTech through FTA parties’ respective policy and trade promotion agencies and regulators. FinTech and RegTech enterprises are encouraged to explore new business opportunities in the other party's territory. The FTA parties will cooperate on the development of standards for open banking.

23. Dispute settlement
Dispute settlement varies depending on the agreement. Since the CPTPP and DEA are part of a larger, comprehensive FTA, the dispute settlement mechanisms for digital trade are, in part, incorporated elsewhere. The DEPA has a separate dispute settlement mechanism for embedded modules in the arrangement.

The DEA explicitly addresses disputes related to financial services that will be resolved based on the respectable article violations, and shall seek the views of financial services experts, as necessary. Parties may at any time agree to voluntarily undertake any alternative methods of dispute resolution, such as good offices or conciliation, and mediation.
DEA, DEPA and CPTPP Digital Provisions Compared

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<tr>
<th>NO.</th>
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<th>DEA</th>
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<th>CPTPP</th>
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