Summer, 2021
Vol. XIII, No. 1

Trade, Law *and* Development

Trade and Technology: Rebooting Global Trade for the Digital Millennium

ISSN: 0976 - 2329
eISSN: 0975 - 3346

TL&D

Trade, Law *and* Development

Vol. 13, No. 1 2021

Published by

The Registrar, National Law University, Jodhpur
ISSN : 0976-2329 | eISSN : 0975-3346

Trade, Law *and* Development

Marta Soprana, *The Digital Economy Partnership Agreement (DEPA): Assessing the Significance of the New Trade Agreement on the Block*
13(1) TRADE L. & DEV. 143 (2021)

THE DIGITAL ECONOMY PARTNERSHIP AGREEMENT (DEPA): ASSESSING THE SIGNIFICANCE OF THE NEW TRADE AGREEMENT ON THE BLOCK

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Scholarly work on the most recent regulatory approach to digital trade by WTO members, the Digital Economy Partnership Agreement (DEPA), is still rather limited. Attempting to fill the gap in literature, this article seeks to assess the significance of this first stand-alone, monothematic trade agreement which is entirely and exclusively dedicated to measures affecting trade in the digital economy. It does so by comparing DEPA with five of the most recently concluded preferential trade agremeents in order to analyse areas of convergence between the agreements, identify new elements introduced by DEPA and pinpoint potential limits to its coverage of digital trade issues. The article also discusses the pros and cons of negotiating such a sui generis trade agreement.

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I. INTRODUCTION

When trade negotiators concluded the Uruguay Round negotiations that gave birth to the World Trade Organization (WTO), technologies like Blockchain, Artificial Intelligence (AI), cloud computing, and 3-D printing were relegated mainly to the realm of academic research, still several years away from finding widespread commercial application.

However, increased access to the internet, growth in computing power, investments in research and development, improvements in information technology infrastructure (e.g., higher broadband speed, commercialisation of personal computers), and an exponential increase in data production and processing quickly led to a technological revolution that had a profound impact on the production, consumption, and trade of goods and services. The so-called Fourth Industrial Revolution[1] ushered in a new era, characterised by the emergence of the data-driven economy and a shift towards digital trade. As a result, in order to capitalise on the opportunities offered by the digital economy, governments started to adopt and implement a series of new policies with potentially significant trade restrictive effects.

Concerns about the legal and policy implications of these technological advances for international trade, uncertainty about the applicability of WTO agreements to these potential new barriers to trade, and lack of significant progress in multilateral negotiations led WTO members to start including specific disciplines on electronic commerce and digital trade in their preferential trade agreements (PTAs). The Digital Economy Partnership Agreement[2] (DEPA) constitutes the most recent development in the regulatory approach to digital trade by WTO members, as the first stand-alone agreement entirely and exclusively dedicated to measures affecting trade in the digital economy. However, since the agreement was signed a short while ago, in mid-2020, scholarly work dedicated to assessing its role and significance in the development of a digital trade governance framework is — understandably — still rather limited.[3]

Attempting to fill this gap in literature, this article aims to explore the potential role of the DEPA in international trade with a view to determining to what extent this agreement represents a departure from previous attempts at regulating digital trade

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[1] KLAUS SCHWAB, THE FOURTH INDUSTRIAL REVOLUTION (2017).

[2] Digital Economy Partnership Agreement, Chile-N.Z.-Sing., June 11, 2020, [2020] NZTS [hereinafter DEPA].

[3] Stephanie Honey, *Asia-Pacific Digital Trade Policy Innovation*, *in* ADDRESSING IMPEDIMENTS TO DIGITAL TRADE 217 (Ingo Borchert and Alan L Winters eds., 2021) [hereinafter Honey]; Mira Burri, *Towards a New Treaty on Digital Trade*, 55 J. WORLD TRADE 77 (2021).

in PTAs, and what lessons can be drawn from the negotiation of a stand-alone, self-contained, monothematic *sui generis* trade agreement.

In order to do so, this study first provides a synopsis of the existing literature on digital trade regulation under international trade law with a view to describing the role of PTAs in the design of new rules on digital trade and provides a better understanding of the context which led to the emergence of an agreement like the DEPA. An in-depth comparative assessment between the DEPA and a sub-set of recent PTAs containing specific disciplines on digital trade follows, in order to identify the key features that make DEPA stand out among the agreements under examination, in terms of structure, membership and scope, and to assess the degree of convergence and divergence on a few specific issues. This paper then proceeds with an evaluation of the significance of the DEPA, with an assessment of the advantages and disadvantages of negotiating a stand-alone, self-contained, monothematic trade agreement — regardless of relevant WTO disciplines — covering digital trade. Concluding remarks follow.

II. DIGITAL TRADE REGULATION UNDER INTERNATIONAL TRADE LAW

This article builds on the increasingly growing body of scholarly work on digital trade rules in PTAs. The first PTA to include a provision on e-commerce — more specifically, on paperless trading — was signed in 2000 between New Zealand and Singapore.[4] Since then, there has been a significant growth in the number of PTAs with specific provisions or chapters on e-commerce and digital trade, whose nature, scope and depth have been dissected in several studies. Some scholars have reached their conclusions by delving into the analysis of comprehensive datasets, like the WTO repository of Regional Trade Agreements (RTAs) or the Design of Trade Agreements (DESTA) database.[5] Other scholars have instead focused their analytical efforts on individual agreements or geographical sub-groups of PTAs.[6]

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[4] Agreement on a Closer Economic Partnership, N.Z.-Sing., Nov. 14, 2000, [2001] NZTS [hereinafter ANZSCEP].

[5] Jose-Antonio Monteiro & Robert Teh, *Provisions on Electronic Commerce in Regional Trade Agreements* (WTO, Staff Working Paper ERSD-2017-11, 2017) [hereinafter Monteiro & Teh]; Mira Burri & Rodrigo Polanco, *Digital Trade Provisions in Preferential Trade Agreements: Introducing a New Dataset*, 23 J. INT'L ECON. L. 187 (2020) [hereinafter Burri & Polanco]; Mark Wu, *Digital Trade-Related Provisions in Regional Trade Agreements: Existing Models and Lessons for the Multilateral Trade System* (Int'l Ctr. for Trade & Sustainable Dev., Inter-Am. Dev. Bank, 2017) [hereinafter Wu]; Manfred Elsig & Sebastian Klotz, *Digital Trade Rules in Preferential Trade Agreements: Is There a WTO Impact?* (World Trade Institute, Working Paper No. 4/2020, 2020).

[6] Inkyo Cheong, *E-Commerce in Free Trade Agreements and the Trans-Pacific Partnership*, *in* DEVELOPING THE DIGITAL ECONOMY IN ASEAN (Lurong Chen & Fukunari Kimura eds.,

Existing literature shows that digital trade coverage in PTAs has evolved over time, both from a quantitative and a qualitative perspective. First of all, the number of PTAs addressing trade-related aspects of the digital economy has progressively increased. Empirical work carried out by Monteiro and Teh showed that more than one fourth of all PTAs notified to the WTO, in force as of May 2017, contained at least one provision that explicitly mentioned e-commerce.[7] This trend continued, as evidenced by the fact that among the thirty new PTAs entered into force in the period 2017-2020,[8] several included disciplines on digital trade, such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP),[9] the Turkey-Singapore Free Trade Agreement (TRSFTA),[10] the EU-Japan Economic Partnership Agreement (EU-Japan EPA),[11] and the Regional Comprehensive Economic Partnership (RCEP)[12]. The Trade Agreements Provisions on Electronic Commerce and Data (TAPED), a new dataset introduced in 2020 by Burri and Polanco, confirms that in the 2010s, the number of PTAs incorporating specific digital trade provisions has significantly increased, resulting in over half of all 346 PTAs concluded between 2000 and October 2019 having provisions related to digital trade.[13]

2019); Henry Gao, *Regulation of Digital Trade in US Free Trade Agreements: From Trade Regulation to Digital Regulation*, 45 LEGAL ISSUES ECON. INTEGRATION 47 (2018); Pierre Sauvé & Marta Soprana, *The Evolution of the EU Digital Trade Policy*, *in* LAW AND PRACTICE OF THE COMMON COMMERCIAL POLICY (Michael Hahn & Guillaume Van der Loo eds., 2020) [hereinafter Sauvé & Soprana]; Robert Wolfe, *Learning About Digital Trade: Privacy and E-Commerce in CETA and TPP*, 18 WORLD TRADE REV. S63 (2019); Honey, *supra* note 3.

[7] Monteiro & Teh, *supra* note 5, at 71.

[8] World Trade Organization, *RTAs Currently in Force (by Year of Entry into Force (1948-2021), Regional Trade Agreements Database*, https://rtais.wto.org/UI/charts.aspx.

[9] Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Mar. 8, 2018, [2018] ATS 23, https://www.dfat.gov.au/trade/agreements/in-force/cptpp/comprehensive-and-progressive-agreement-for-trans-pacific-partnership [hereinafter CPTPP].

[10] Free Trade Agreement, Sing.-Turk., Nov. 14, 2015, https://www.enterprisesg.gov.sg/esghome/non-financial-assistance/for-singapore-companies/free-trade-agreements/ftas/singapore-ftas/trsfta.

[11] Agreement for an Economic Partnership, EU-Japan, 2018 O.J. (L 330) [hereinafter EU-Japan EPA].

[12] Regional Comprehensive Economic Partnership Agreement (RCEP), Nov. 15, 2020, [2020] ATNIF 1, https://www.dfat.gov.au/trade/agreements/not-yet-in-force/rcep [hereinafter RCEP].

[13] TAPED covers PTAs currently in force and notified to the WTO as well as agreements that were notified, those that are signed but not yet in force, and those for which the negotiation has been completed and the text made available. Burri and Polanco, *supra* note 5, at 192–193.

The proliferation of PTAs with digital trade-related provisions can be ascribed primarily to "the slow pace at which the multilateral trading system is updating trade rules for the digital era".[14] The stalemate in the Doha Development Round negotiations has affected the international framework for digital trade regulation, as the Members have failed to update their services commitments under the General Agreements on Trade in Services (GATS) since the mid-1990s, when the agreement was first concluded, thus limiting its application to digital trade issues.[15] (Several scholars agree that the GATS is the agreement most likely to cover measures affecting digital trade.[16]) Moreover, although in 1998 the WTO Members launched the Work Programme on Electronic Commerce with the purpose of examining all trade-related issues relating to global electronic commerce, they refrained from designing it as a formal negotiating forum. [17] Therefore, governments resolved to use PTAs to advance their digital trade agenda, turning them into "laboratories in which to experiment with and adopt elements of a nascent regulatory regime governing electronic transactions and digital trade".[18]

The scope and depth of digital trade coverage in PTAs has also evolved over time. As PTAs become more complex, deeper, and cover multiple policy areas, evidence shows that earlier agreements were more likely to include only a few provisions on electronic commerce (e.g., EU-Serbia FTA), whereas more recent PTAs tend to devote specific sections within their chapters on cross-border trade in services (e.g., EU-Vietnam FTA, EU-Japan EPA) or entire chapters (e.g., CPTPP) to digital trade.[19] Likewise, some studies suggest that PTAs signed in the last decade, and especially in the last five years, tend to cover a wider range of topics related to digital trade and contain more complex and textually dense provisions than earlier PTAs.[20] For example, Chapter 16 of the EU-Canada Comprehensive Economic and Trade Agreement (CETA),[21] whose negotiations were concluded in 2014, has a total of seven articles on electronic commerce as opposed to the seventeen

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[14] Wu, *supra* note 5, at 2.

[15] Joshua P Meltzer, *Governing Digital Trade*, 18 WORLD TRADE REV. s23, s38–s39 (2019).

[16] *Id.*; Susan Ariel Aaronson & Patrick Leblond, *Another Digital Divide: The Rise of Data Realms and Its Implications for the WTO* 21 J. INT'L ECON. L. 245 (2018); Sam Fleuter, *The Role of Digital Products Under the WTO: A New Framework for GATT and GATS Classification* 17 CHI. J. INT'L L. (2016), https://chicagounbound.uchicago.edu/cjil/vol17/iss1/5.

[17] WTO General Council, *Work Programme on Electronic Commerce*, WTO Doc. WT/L/274 (Sept. 30, 1998).

[18] Sauvé & Soprana, *supra* note 6, at 285.

[19] Burri & Polanco, *supra* note 5, at 194; Dana Smillie, *Regional Trade Agreements*, WORLD BANK (Apr. 5, 2018), https://www.worldbank.org/en/topic/regional-integration/brief/regional-trade-agreements.

[20] Monteiro & Teh, *supra* note 5, at 6–8; Burri & Polanco, *supra* note 5, at 195.

[21] Comprehensive Economic and Trade Agreement, Can.-E.U, Oct. 30, 2016, 2017 O.J. (L 11).

contained in Chapter 12 of RCEP,[22] which was signed in 2020. Similar observations can be drawn with respect to individual provisions. For instance, a comparison between Article 128 of the EU-Georgia FTA[23] and Article 8.80 of the EU-Japan EPA[24] on cooperation in electronic commerce shows a widening of the areas of potential cooperation, with cybersecurity, electronic government, intellectual property, and challenges for small and medium-sized enterprises (SMEs) appearing only in the latter.

Existing literature also offers useful insights on the type of countries that participated in the negotiations of digital trade rules in PTAs. Monteiro and Teh observed that, as of May 2017, only a handful of agreements negotiated between developed countries incorporated e-commerce provisions, as most of these agreements (63 per cent) were negotiated between developed and developing countries (North-South PTAs) and the rest (33 per cent) between developing countries (South-South PTAs).[25] Burri and Polanco reached similar conclusions, detecting a slight increase in the percentage of PTAs with digital trade provisions negotiated between developing countries as of October 2019.[26]

Available research on recent developments in digital trade regulation found some convergence on several topics most commonly addressed in PTAs. They include data and consumer protection regulations; rules on paperless trade, electronic authentication and digital signatures; provisions on cross-border data flows and data localisation; calls for a moratorium on the imposition of customs duties on electronic transmissions; provisions on cooperation on e-commerce; and definitions of e-commerce and digital product.[27]

III. DIGITAL TRADE PROVISIONS IN PTAS: A COMPARISON

The DEPA was signed in June 2020 by Chile, New Zealand and Singapore, three small trade-dependent countries.[28] It entered into force on January 7, 2021. The parties intended for this new agreement to complement the WTO negotiations on

[22] RCEP, *supra* note 12.
[23] EU-Georgia Deep and Comprehensive Free Trade Area, E.U-Geor., June 27, 2014, 2014 O.J. (L 261) 4, art. 128.
[24] EU-Japan EPA, *supra* note 11, art. 8.8.
[25] Monteiro & Teh, *supra* note 5, at 6.
[26] Burri & Polanco, *supra* note 5, at 194.
[27] Monteiro & Teh, *supra* note 5; Burri & Polanco, *supra* note 5; Wu, *supra* note 5.
[28] New Zealand Ministry of Foreign Affairs and Trade, *The Digital Economy Partnership Agreement is A New Initiative with Chile and Singapore* (2021), https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/digital-economy-partnership-agreement/overview/ [hereinafter NZ MFAT, DEPA Overview].

e-commerce, building on the digital economy work underway within Asia-Pacific Economic Cooperation (APEC), the Organization for Economic Cooperation and Development (OECD) and other international fora, and to generate new ideas and approaches for multilateral and bilateral negotiations related to the international digital economy or digital trade work. [29]

In order to better understand how the DEPA fits into the current trend in digital trade regulation in international trade law, it is useful to compare it to some of the most recent PTAs signed by WTO Members. This enables a frame of reference for understanding to what extent the DEPA represents a novelty in digital trade regulation, and whether this unique trade arrangement can act as a potential basis for further development in this area of international economic law.

For comparison purposes, the following discussion focuses on five PTAs that, negotiated and concluded in the last five years, offer an overview of the latest developments in the regulation of the digital trade under international trade law: (i) the CPTPP; (ii) the EU-Japan EPA; (iii) the United States-Mexico-Canada Agreement (USMCA); (iv) the Digital Economy Agreement between Australia and Singapore (DEA); and (v) the RCEP.

In force since 2018, CPTPP is a free trade agreement (FTA) between eleven WTO members from the Asia-Pacific region (Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, Peru, New Zealand, Singapore and Vietnam).[30] This agreement reflects the intention of the participants to the negotiations of the Trans-Pacific Partnership (TPP) agreement to strike a deal even without the United States, whose administration pulled out of TPP right before the official signing. At the time of its conclusion, the CPTPP agreement was considered the most advanced PTA on digital trade regulation and has been used as a framework of reference for some of the agreements that were later signed by other countries in the Asia-Pacific region.

Among the several PTAs concluded or currently negotiated by the European Union (EU) containing provisions related to electronic commerce, the EU-Japan EPA has entered into force most recently, in February 2019.[31] It is also one of the last agreements negotiated by the EU to not include the horizontal provisions on data protection drafted in 2018 that, heavily influenced by the adoption of the

[29] *Id.*
[30] CPTPP, *supra* note 9.
[31] European Commission, EU-Japan Trade Agreement Enters into Force (Jan. 31, 2019), https://ec.europa.eu/commission/presscorner/detail/en/IP_19_785.

General Data Protection Regulation (GDPR), are likely to represent a watershed in the EU digital trade policy approach moving forward.[32]

In November 2018, the United States, Canada, and Mexico signed an FTA (the USMCA), with the purpose of amending the North American Free Trade Agreement (NAFTA), by preserving key elements of the long-lasting trading relationship among the three partners and, at the same time, incorporating new and updated provisions to address 21st century trade issues, including digital trade.[33]

In early 2020, Australia and Singapore concluded the negotiations of the DEA. Tasked with upgrading the digital trade arrangements between Australia and Singapore under CPTPP and the Singapore-Australia Free Trade Agreement (SAFTA), the DEA is supported by seven memoranda of understanding which facilitate cooperation initiatives on data innovation, artificial intelligence, e-invoicing, e-certification for agriculture experts in imports, trade facilitation, personal data protection, and digital identity.[34]

In November 2020, 15 countries[35] from the Asia-Pacific region concluded the negotiations of the RCEP. India, one of the original negotiating partners, refrained from signing RCEP, indicating that a few outstanding issues prevented it from staying on board. The agreement is yet to enter into force.

Two observations transpire from a quick comparison between the six agreements under consideration. First of all, the DEPA is neither the oldest nor the newest agreement within the group. The CPTPP, the USMCA, and the EU-Japan EPA were concluded before the signature of the DEPA, whereas the RCEP negotiations ended after it. The DEA is a peculiar case: with negotiations quite close to those of the DEPA, the agreement was (electronically) signed by Australia

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[32] Sauvé & Soprana, *supra* note 6.

[33] Agreement between the United States of America, the United Mexican States, and Canada, OFFICE OF THE US TRADE REPRESENTATIVE (Jan. 7, 2020), https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between; Government of Canada, A New Canada-United States-Mexico Agreement, (Government of Canada, (Jan. 20, 2021), https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/index.aspx?lang=eng.

[34] Australian Government Department of Foreign Affairs and Trade, Australia-Singapore Digital Economy Agreement, 2020, https://www.dfat.gov.au/trade/services-and-digital-trade/australia-and-singapore-digital-economy-agreement [hereinafter DEA].

[35] Members to RCEP include ASEAN members (Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam) and Australia, China, Japan, New Zealand and Republic of Korea.

and Singapore in August 2020, two months after the signature of the DEPA, but was the first to enter into force — on December 8, 2020.[36] Secondly, the parties to the DEPA are also signatories to some of the other PTAs under examination in this study. Indeed, Singapore is a member of the highest number of agreements (CPTPP, DEA, DEPA and RCEP), followed by New Zealand (CPTPP, DEPA and RCEP), and Chile (CPTPP and DEPA). Therefore, in light of the above, it is likely that disciplines contained in the DEPA may have been significantly influenced by earlier agreements of which Chile, New Zealand and Singapore are also members.

A. Structure, Membership and Scope: Why the DEPA Stands Out

At a closer inspection, the DEPA stands out among the agreements under examination for four main reasons related to its structure and membership. First of all, as opposed to other international trade agreements that cover digital trade issues either in specific sections within chapters on cross-border trade in services or in separate chapters on electronic commerce, the DEPA is the first stand-alone agreement entirely dedicated to digital trade. While the CPTPP, the RCEP, the USCMA and the EU-Japan EPA addressed e-commerce and digital trade issues as a sub-set of more comprehensive trade negotiations including intellectual property rights, technical barriers to trade, services, and rules of origin, members of the DEPA focused exclusively on negotiating disciplines on digital trade. Indeed, out of the five PTAs under consideration, three dedicate a specific chapter on electronic commerce (CPTPP, Chapter 14; and RCEP, Chapter 12) or digital trade (USMCA, Chapter 19). One, the EU-Japan EPA, includes provisions specifically dedicated to e-commerce in Section F of its Chapter 8 on Trade in Services, Investment Liberalisation and Electronic Commerce.[37] The remaining agreement, the DEA, which is entirely devoted to disciplining digital trade, constitutes an interesting hybrid. Concluded a few months after DEPA, it followed the same 'single topic' negotiating approach adopted by its predecessor, but it cannot be considered a stand-alone agreement like the DEPA since in practice it is part of the upgraded FTA between Australia and Singapore, SAFTA.[38] Indeed, though negotiated as a separate agreement from the Australia-Singapore FTA that was concluded in 2003, the provisions contained in the DEA replace the provisions of Chapter 14 of the SAFTA on e-commerce. The DEPA, on the other hand, has not been (and is most likely not going to be) incorporated in any other PTA previously signed by any of its parties.

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[36] Further information on the timelines of negotiation of the DEPA and the DEA is available at *Digital Economy Agreements*, MINISTRY OF TRADE AND INDUSTRY SINGAPORE, https://www.mti.gov.sg/Improving-Trade/Digital-Economy-Agreements.

[37] EU-Japan EPA, *supra* note 11, ch. 8.

[38] DEA, *supra* note 34.

Secondly, the DEPA is organised in a modular structure. The first eleven modules, dedicated to substantive matters, cover initial provisions and general definitions (Module 1), business and trade facilitation (Module 2), treatment of digital products and related issues (Module 3), data issues (Module 4), wider trust environment (Module 5), business and consumer trust (Module 6), digital identities (Module 7), emerging trends and technologies (Module 8), innovation and the digital economy (Module 9), small and medium enterprises cooperation (Module 10), and digital inclusion (Module 11). The remaining five modules address the operationalisation of the agreement and the resolution of disputes, with disciplines on the establishment of a Joint Committee and contact points (Module 12), transparency (Module 13), dispute settlement (Module 14), exceptions (Module 15), and final provisions (Module 16). It should be noted that in the five PTAs under examination provisions on transparency, dispute settlement and exceptions are typically found outside the chapters or sections on electronic commerce or digital trade, in separate dedicated chapters.

Moreover, the DEPA gives other countries the opportunity to join the agreement through a process of accession,[39] whilst also providing for the opportunity of withdrawal.[40] In December 2020, Canada expressed its interest in acceding to the DEPA, citing the alignment of the agreement with Canada's international and domestic policy objectives, its wider scope and its complementarity to the WTO Joint Statement Initiative (JSI) on electronic commerce, as main motivations behind its inclination to join.[41] Some commentators have called on the United States to follow suit.[42] The authority to consider and approve the terms of accession, including the period for the deposit of an instrument of accession, lies with the Joint Committee, a body established under Article 12.1 DEPA that consists of government representatives of each party.[43]

[39] DEPA, *supra* note 2, art. 16.4.
[40] *Id.* art. 16.5; The withdrawal comes into effect six months after the date the written notice of withdrawal is received by the Depository of the Agreement, a role the Parties have assigned to New Zealand.
[41] Government of Canada, Global Affairs, *Background: Canada's Possible Accession to the Digital Economy Partnership Agreement* (Mar. 18, 2021) https://www.international.gc.ca/trade-commerce/consultations/depa-apen/background-information.aspx?lang=eng.
[42] Susan Ariel Aaronson, *The One Trade Agreement Biden Should Sign Up for Now,* BARRON'S (Mar. 2021) https://www.barrons.com/articles/the-one-trade-agreement-biden-should-sign-up-for-now-51614607309.
[43] DEPA, *supra* note 2, art. 12.2 & art. 16.4.

Lastly, described as "the world's first 'digital only' trade agreement that establishes digital trade rules and digital economy collaborations",[44] and the "first of its kind agreement representing a new form of economic engagement and trade in the digital era",[45] the DEPA addresses a wider range of trade-related aspects of the digital economy than PTAs usually cover. The agreement addresses issues that other PTAs (including those under examination in this study) also cover, such as customs duties on electronic transactions, paperless trading, personal information protection, online consumer protection, and unsolicited commercial electronic messages, as well as new topics such as emerging trends and technologies, innovation and the digital economy, small and medium enterprises, and digital inclusion.

B. Coverage: The Wider Scope of the DEPA

The DEPA applies to measures[46] adopted or maintained by the parties that affect trade in the digital economy.[47] Although the agreement offers no further definition of 'trade in the digital economy', some scholars have observed that it reflects a wider conception of what constitutes 'digital trade' under other agreements.[48] Services supplied in the exercise of governmental authorities, financial services (except for Article 2.7 on electronic payments), government procurement (except for Article 8.3) and information held or processed by or on behalf of a party, or measures related to that information, including measures related to its collection (except for Article 9.5 on open government data) are excluded from the scope of application of the Agreement.[49]

1. Recurring Provisions on Digital Trade: How the DEPA Builds on Previous PTAs

At a closer look, it emerges that there is a general convergence among these six agreements on several issues, with all agreements covering general definitions, customs duties on electronic transmissions, cross-border transfer of information

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[44] Ayman Falak Medina, *Singapore's Digital Economy Partnership Agreement*, ASEAN BUSINESS NEWS (Feb. 3, 2021), https://www.aseanbriefing.com/news/singapores-digital-economy-partnership-agreement/.

[45] Ministry of Industry and Trade of Singapore, *Digital Economy Partnership Agreement* (DEPA), INFOCOMM MEDIA DEVELOPMENT AUTHORITY, (Jun. 8, 2020), https://www.imda.gov.sg/-/media/Imda/Files/News-and-Events/Media-Room/Media-Releases/06/DEPA-Signing-Infographic.pdf?la=en.

[46] For the purposes of this Agreement, measures include any law, regulation, procedure, requirement or practice, see DEPA, *supra* note 2, art. 1.3.

[47] *Id.* art. 1.1.

[48] Honey, *supra* note 3, at 227.

[49] DEPA, *supra* note 2, art. 1.1(2).

by electronic means, unsolicited commercial electronic messages (i.e., spam), online consumer protection, electronic authentication and electronic signature, and cooperation. Other common provisions that appear in almost all the agreements — with the exception of the EU-Japan EPA — are paperless trading, domestic electronic transactions framework, personal information protection, and location of computing facilities.

Most of these recurring provisions can be found in the first six modules of the DEPA, on initial provisions and general definitions (Module 1), business facilitation (Module 2), treatment of digital products and related issues (Module 3), data issues (Module 4), wider trust environment (Module 5) and business and consumer trust (Module 6).

As explained below in more detail, while some provisions reflect a high degree of convergence, both in content and language, between the DEPA and the different PTAs under examination, in many other cases, discrepancies emerge with respect to the actual scope, depth, and language of each provision.

Definitions

Although all the agreements under examination set out to provide definitions to better clarify their scope of application and — possibly — reduce interpretative opacity, marked differences emerge as to the list of definitions included in each agreement, their location and wording. At one end of the spectrum lie the DEPA and the DEA, which provide the widest range of definitions,[50] and at the other end lies the EU-Japan EPA, which limits the list of definitions to 'electronic authentication' and 'electronic signature'.[51] This could be partly explained by the fact that this agreement has more limited coverage of e-commerce provisions in comparison to the other PTAs.

Departing from the common practice of having a single provision on definitions, the DEPA presents definitions in multiple articles scattered across different sections of the agreement. This may be ascribed to the fact that, as the only 'stand-alone agreement' (among existing PTAs) covering the widest range of issues on digital trade and being organised in a modular structure, its negotiators may have found it more practical to refer to specific definitions in each relevant module.

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[50] They include customs duties, computing facilities, digital products, electronic invoicing, electronic payments, electronic transmission or transmitted electronically, personal information, trade administration documents, and unsolicited commercial electronic message. *See* DEPA, *supra* note 2, arts. 1.3, 2.1, 3.1, 4.1, 6.1 & 9.1; DEA, *supra* note 34, art. 1.

[51] EU-Japan EPA, *supra* note 11, art. 8.71.

The most frequent definitions found in the agreements under consideration are 'electronic authentication', [52] 'computing facilities' [53] and 'digital products', [54] although some differences emerge with respect to their texts. For example, while the DEPA defines computing facilities as "computer servers and storage devices for processing or storing information for commercial use",[55] the DEA expressly excludes "computer servers or storage devices of or used to access financial market infrastructures".[56] Among the terms that have elicited the least convergence among the PTAs under consideration are 'algorithms' and 'interactive computer services' (found only in the USMCA), 'FinTech' and 'RegTech' (defined solely by the DEA), as well as 'electronic records', 'open data', 'open standard' and 'single window' (found only in the DEPA).

Customs Duties on Electronic Transmissions

All agreements but one call for a permanent moratorium on the imposition of customs duties on electronic transmissions.[57] RCEP is the only agreement to indicate that the practice of not imposing customs duties on electronic transmissions may be adjusted on the basis of future outcomes of the Ministerial Decisions on customs duties on electronic transmissions within the framework of the Work Programme on Electronic Commerce.[58] The WTO General Counsel agreed on the latest extension of the moratorium in December 2019, extending it until the 12th Ministerial Conference, which was originally planned for June 2020 but, due to the pandemic, is now projected to take place in Geneva in December 2021. Therefore, in the (unlikely) event that WTO Members do not extend the moratorium on customs duties on electronic transmissions at the next Ministerial Conference, RCEP members may also decide to revisit the practice of not imposing such duties within their group.

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[52] *See* CPTPP, *supra* note 9, art. 14.1; DEA, *supra* note 34, art. 1; RCEP, *supra* note 12, art. 12.1; EU-Japan EPA, *supra* note 11, art. 8.71; United States-Mexico-Canada Agreement, art. 19.1, Sept. 30, 2018 (H.R./5430) (2019) [hereinafter USMCA].

[53] *See* CPTPP, *supra* note 9, art. 14.1; DEA, *supra* note 34, art. 1; DEPA, *supra* note 2, art. 4.1; RCEP, *supra* note 12, art. 12.1; USMCA, *supra* note 52, art. 19.1.

[54] *See* CPTPP, *supra* note 9, art.14.1; DEA, *supra* note 34, art. 1; DEPA, *supra* note 2, art. 3.1; USMCA, *supra* note 52, art. 19.1.

[55] DEPA, *supra* note 2, art. 4.1.

[56] DEA, *supra* note 34, art. 1 defines 'financial market infrastructures' as "systems in which financial services suppliers participate with other financial services suppliers, including the operator of the system, used for the purposes of: (i) clearing, settling or recording of payments, securities or derivatives; or (ii) other financial transactions".

[57] *See* CPTPP, *supra* note 9, art. 14.1; DEA, *supra* note 34, art. 5; DEPA, *supra* note 2, art. 3.2; USMCA, *supra* note 52, art. 19.3; EU-Japan EPA, *supra* note 11, 8.72.

[58] *See* RCEP, *supra* note 12, art. 12.11.

Regulating Cross-Border Data Flows and Localisation Requirements

The CPTPP, the DEA, the DEPA and the USMCA support the unfettered flow of data across borders, permitting restrictions to the cross-border transfer of information by electronic means, including personal information, only in order to achieve a legitimate policy objective, provided that these measures are not a disguised restriction to trade or constitute a means of arbitrary or unjustifiable discrimination, and do not impose restrictions on transfer of information greater than are required to achieve the objective.[59] RCEP introduces an additional exception, the protection of essential security interests. The agreement establishes that the parties can adopt or maintain any measure restricting the cross-border transfer of information by electronic means if they consider it necessary for the protection of its essential security interests.[60] Adding that "such measures shall not be disputed by other Parties" and providing no further clarification on what would constitute an 'essential security interest', RCEP offers ample margin of discretion to its signatories on the legal interpretation of this provision, leaving the door open for potential abuse and misuse of this exception. The introduction of this exception might be ascribable to the fact that the RCEP is the only agreement, among those under examination, whose membership includes China, a country that identifies the safeguard of national security as a primary objective of its approach to data regulation.[61]

The EU and Japan, on the other hand, did not indicate how they intended to discipline the cross-border data flows in their EPA, simply agreeing to reassess the need for inclusion of provisions on the free flow of data into their agreement, within three years from its entry into force.[62] However, in light of the fact that the EU has already signalled its intention to ensure that the fundamental right to privacy is not undermined by trade disciplines, a reassessment of the EU-Japan EPA may lead to the inclusion of a set of horizontal provisions for cross border data flows and personal data protection that the EU is projected to include in its

[59] *See* CPTPP, *supra* note 9, art. 14.11; DEA, *supra* note 34, art. 23; DEPA, *supra* note 2, art. 4.3; USMCA, *supra* note 52, art. 19.11.
[60] RCEP, *supra* note 12, art. 12.15.
[61] China's 2017 Cybersecurity Law, formulated with the specific intent of safeguarding cyberspace sovereignty and national security (Article 1), established that "any person or organization using networks … must not use the Internet to engage in activities endangering national security, national honor, and national interests", The Cyber Security Law of the People's Republic of China, art. 12, (2017); Rogier Creemers et al., *Translation: Cybersecurity Law of the People's Republic of China (Effective June 1, 2017)*, NEW AMERICA (June 28, 2018), http://newamerica.org/cybersecurity-initiative/digichina/blog/translation-cybersecurity-law-peoples-republic-china/ [hereinafter Creemers et al.].
[62] *See* EU-Japan EPA, *supra* note 11, art. 8.81.

new PTAs.[63]

Apart from the EU-Japan EPA, all the agreements under examination contain disciplines prohibiting localisation requirements as a condition for market access. The USMCA establishes the most stringent regime, offering no exception to the prohibition of using or locating computing facilities in a party's territory as a condition for conducting business in that territory.[64] The CPTPP, the DEA, the DEPA and the RCEP, on the other hand, permit the localisation requirements of computing facilities to pursue legitimate policy objectives, subject to the condition that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade.[65] However, as in the case of the provision on the cross-border transfer of information by electronic means, the RCEP is the only agreement to make explicit reference to the protection of essential security interests as a justification for the imposition of restrictions on the location of computing facilities.[66] (Again, this could be attributable to the fact that China is among the parties to the RCEP.) The DEA, on the other hand, is the only agreement containing a separate provision on the location of computing facilities for financial services, although under the CPTPP the obligations contained in Article 14.11 are subject to relevant provisions, exceptions and non-conforming measures of Chapter 11 on financial services.[67]

It should be noted that the DEPA prefaces both Article 4.3 and Article 4.4. with a declaration that the parties affirm their level of commitments relating to cross-border data flows and location of computing facilities in particular through the disciplines established in the two articles, but not exclusively.[68] This suggests, that for the signatories to the DEPA, other disciplines may contribute to determine their level of commitment on the regulation of data flows across-borders.

Building Trust in Online Transactions

In order to build trust in online transactions, all parties to the agreements under examination agreed to address the issue of unsolicited commercial electronic messages (spam), and ensure online consumer and personal information protection, albeit with some differences. For example, while the DEPA, like the CPTPP and the RCEP, requires parties to adopt or maintain measures that enable consumers

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[63] Sauvé & Soprana, *supra* note 6, at 296.
[64] *See* USCMA, *supra* note 52, art. 19.12.
[65] *See* CPTPP, *supra* note 9, art. 14.13; DEA, *supra* note 34, art. 24; DEPA, *supra* note 2, art. 4.4; RCEP, *supra* note 12, art. 12.14.
[66] RCEP, *supra* note 12, art. 12.14(3).
[67] *See* DEA, *supra* note 34, art. 25; CPTPP, *supra* note 9, art. 14.2(5).
[68] DEPA, *supra* note 2, art. 4.3 & art. 4.4.

to reduce or prevent unsolicited commercial electronic messages sent other than to an electronic mail address, or otherwise provide for the minimisation of these messages, the DEA and the USMCA couched a similar provision in 'best endeavour' language.[69] The EU-Japan EPA, on the other hand, did not address the issue of minimisation of spam, calling for the parties to ensure that "commercial electronic messages are clearly identifiable as such, clearly disclose on whose behalf they are made, and contain the necessary information to enable recipients to request cessation free of charge and at any time".[70]

All the agreements under examination also recognise that, in order to build consumer trust in the digital world, it is important to protect consumers from fraudulent, misleading and deceptive commercial activities,[71] as well as unfair contract terms, and unconscionable conduct when they engage in electronic commerce.[72] The DEPA, however, provides the most detailed and prescriptive disciplines on this issue, going as far as mandating the parties to "adopt or maintain laws or regulations that: (a) require, at the time of delivery, goods and services provided to be of acceptable and satisfactory quality, consistent with the supplier's claims regarding the quality of the goods and services; and (b) provide consumers with appropriate redress when they are not".[73]

Interestingly, the EU-Japan EPA offers no prescriptive disciplines on consumer protection beyond a mere recognition of the significance of adopting consumer protection measures. On the other hand, the most recent agreements within the representative group under examination, the DEA, the DEPA and the RCEP, include references to greater cooperation, increased transparency and dispute resolution for online consumer protection.

While the EU-Japan EPA does not include a specific provision on personal data protection in the e-commerce section of its Chapter on Trade in Services,[74] all other PTAs call for the parties to adopt or maintain a legal framework that ensures the protection of personal information of persons engaged in digital trade, with the CPTPP, the DEA and the USMCA citing principles and guidelines on data

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[69] *See* CPTPP, *supra* note 9, art. 14.14; RCEP, *supra* note 12, art. 12.9; DEA, *supra* note 34, art. 19; DEPA, *supra* note 2, art. 6.2; USMCA, *supra* note 52, art. 19.13.

[70] *See* EU-Japan EPA, *supra* note 11, art. 8.79.

[71] *See* CPTPP, *supra* note 9, art. 14.7; DEA, *supra* note 34, art. 15; DEPA, *supra* note 2, art. 6.3; RCEP, *supra* note 12, art. 12.7; USMCA, *supra* note 52, art. 19.7; EU-Japan EPA, *supra* note 11, art. 8.78.

[72] *See* DEA, *supra* note 34, art. 15.

[73] *See* DEPA. *supra* note 2, art. 6.3(4).

[74] Disciplines on personal data protection are scattered throughout different parts of the agreement, *see* EU-Japan EPA, *supra* note 11, art. 14.43 on the right of information, and art. 8.3 on general exceptions.

protection and cross-border data flows developed by the APEC and the OECD as reference.[75] Interestingly, the DEA, the DEPA, and the RCEP, the most recent among the agreements under examination and whose negotiations the United States was never involved with, use more prescriptive language ("shall take into account the principles and guidelines of relevant international bodies") than the CPTPP and the USMCA ("should take into account"). Differences also emerge with respect to the publication of information on personal data protection. For example, while the CPTPP simply encourages its parties to do so ("should publish"),[76] the DEA, the DEPA, the USMCA and the RCEP include a mandatory requirement for publication ("shall publish information")[77]. Moreover, the latter calls for the parties to "encourage juridical persons to publish, including on the internet, their policies and procedures related to the protection of personal information".[78] The DEPA extends the scope of its disciplines on personal information protection to include the issue of 'data protection trustmarks'. More specifically, it calls for the parties to encourage their adoption by business "to help verify conformance of personal data protection standards and best practices", mandates them to exchange information and share best practices of this type of certifications, and encourages them to mutually recognise the other parties' data protection trustmarks "as a valid mechanism to facilitate" cross-border data flows.[79]

Facilitating Digital Trade

In order to facilitate digital trade, all the agreements under examination, with the exception of the EU-Japan EPA, include disciplines on paperless trading and the establishment of a domestic electronic transactions framework. The first attempt to design rules for the regulation of digital trade in a PTA dates back to 2000, when New Zealand and Singapore agreed to include a provision on paperless trading in their bilateral trade agreement, in order to facilitate the implementation of the APEC Blueprint for Action on Electronic Commerce.[80] Unsurprisingly, successive agreements, which both New Zealand and Singapore are parties to, also include a provision addressing paperless trading, albeit with various degrees for

[75] Both DEA and USCMA emphasise APEC Cross-Border Privacy Rules (CBPR) System in particular, *see* CPTPP, *supra* note 9, art. 14.8; DEA, *supra* note 34, art. 17; DEPA, *supra* note 2, art. 4.2; RCEP, *supra* note 12, art. 12.8; USCMA, *supra* note 52, art. 19.8.
[76] CPTPP, *supra* note 9, art. 14.8(4).
[77] DEA, *supra* note 34, art. 17(5); DEPA, *supra* note 2, art. 4.2(5); RCEP, *supra* note 12, art. 12.8(3); USMCA, *supra* note 52, art. 19.8(5).
[78] *See* RCEP, *supra* note 12, art. 12.8(4).
[79] *See* DEPA, *supra* note 2, arts. 4.2 (8), (9) & (10).
[80] *See* ANZSCEP, *supra* note 4, art. 12.

scope and depth.[81] For example, at one end of the spectrum lies the CPTPP, with a short provision couched in best endeavour language on the public availability of trade administration documents in electronic form and the their legal equivalency between trade administration documents submitted electronically and their paper version. The USMCA contains the same provision.[82] At the other end of the spectrum lie the DEA and the DEPA, whose disciplines on paperless trading extend to other issues, including the establishment and maintenance of a single window and data exchange systems.[83]

In addition to paperless trading, another common provision among the PTAs under examination aimed at facilitating digital trade, refers to the establishment of a domestic electronic transaction framework. More specifically, the signatories to the CPTPP, the DEA, the RCEP and the USMCA pledged to avoid unnecessary barriers to electronic commerce, agreeing to maintain a domestic legal framework consistent with the principles of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Commerce (1996) or the United States Convention on the Use of Electronic Communications in International Contracts (2005).[84] Notably, the DEA extends its coverage to include 'electronic transferable records' (e.g., electronic bill of lading), calling for the parties to endeavour to take into account model legislative texts such as the UNICTRAL Model Law on Electronic Transferable Records (2017), when developing mechanisms to facilitate the use of these records.

2. New Topics Covered by the DEPA

The DEPA addresses some new issues related to the regulation of digital trade that have not been addressed extensively (if at all) in previous agreements. Four modules merit particular attention, namely emerging trends and technologies (Module 8), innovation and digital economy (Module 9), small and medium enterprises cooperation (Module 10), and digital inclusion (Module 11).

The DEPA dedicates an entire module to the issue of emerging trends and technologies, establishing disciplines on three topics covered also by the DEA,

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[81] *See* CPTPP, *supra* note 9, art. 14.9; DEA, *supra* note 34, art. 12; DEPA, *supra* note 2, art. 2.2; RCEP, *supra* note 12, art. 12.5.

[82] *See* USMCA, *supra* note 52, art. 19.9.

[83] While DEA, *supra* note 34, art. 12 & DEPA, *supra* note 2, art. 2.2 are almost identical in coverage and language, they differ substantially on one aspect. Recalling the obligations in the WTO Trade Facilitation Agreement, DEPA mandates the Parties to establish or maintain a single window, whereas DEA couches this obligation in soft language, simply inviting the Parties to 'endeavour to' do so.

[84] USMCA refers only to the UNCITRAL Model Law; *see* CPTPP, *supra* note 9, art. 15.4; DEA, *supra* note 34, art. 8; RCEP, *supra* note 12, art. 12.10; USMCA, *supra* note 52, art. 19.5.

namely promotion of cooperation on financial technology (FinTech), artificial intelligence, and competition policy in the digital markets,[85] as well as digitisation of procurement process. Article 8.2 of the DEPA establishes that the parties shall endeavour to promote the adoption of AI Governance Frameworks (i.e., ethical and governance frameworks that support the trusted, safe and responsible use of AI technologies), taking into consideration internationally recognised principles or guidelines, including explainability, transparency, fairness and human-centered values.[86] Never before has an international trade agreement addressed issues related to a specific type of technology underpinning the digital economy. This appears to result from the acknowledgment that, with artificial intelligence having grown increasingly widespread, efforts to mitigate the potential risks arising from its use on a larger scale may have a bearing on international trade and that, as pointed out by one of the leading tech companies in the world, the international alignment of AI governance frameworks is crucial in facilitating the adoption and use of AI technologies across different jurisdictions.[87] Yet, since Article 8.2 is couched in a rather soft, best endeavour language, it cannot be considered a binding commitment to develop AI governance frameworks, but rather a signalling tool. In contrast, Article 8.1 on financial technology and Article 8.3 on government procurement contain stronger language, calling on the parties to promote cooperation between firms in the FinTech sectors, endorse the development of FinTech solutions for business or financial sectors, and cooperate to better understand how greater digitisation of procurement processes, and of goods and services impacts on existing and future international government procurement commitments. However, it should be noted that since the DEPA is considered a 'living agreement' that is "able to evolve and adapt as new technologies emerge, and new challenges arise", the parties could change the scope and depth of Module 8 on emerging trends and technologies in the future through the amendment procedure set in Article 16.3.[88]

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[85] *See* DEA, *supra* note 34, art. 32 on FinTech and RegTech Cooperation, DEA, art. 31 on Artificial intelligence, and DEPA, *supra* note 2, art. 16 on Cooperation on Competition Policy.

[86] DEPA does not further elaborate on the concept of 'human-centered values'. Evidence suggests that most sets of principles and guidelines for artificial intelligence recently adopted by public and private entities across the world also do not offer in-depth clarifications about what these values are. Jessica Fjeld et al., *Principled Artificial Intelligence: Mapping Consensus in Ethical and Rights-Based Approaches to Principles for AI,* Berkman Klein Centre for Internet & Society, 60 (2020).

[87] *Building a Responsible Regulatory Framework for AI*, GOOGLE AI https://ai.google/static/documents/building-a-responsible-regulatory-framework-for-ai.pdf.

[88] New Zealand Ministry of Foreign Affairs and Trade, DIGITAL ECONOMY PARTNERSHIP AGREEMENT - NATIONAL INTEREST ANALYSIS 18, 43 (2020).

Likewise, in Module 9 on innovation and digital economy, which "encourages the sharing of a wide range of data and its use for projects to promote innovation",[89] the signatories to the DEPA expand on two issues also covered by the DEA[90] — data innovation and open government data — and introduced (non-binding) disciplines on a new topic, public domain. Indeed, besides recognising the importance of a rich and accessible public domain, and of informational materials, such as publicly accessible databases of registered intellectual property rights that assist in the identification of subject matter that has fallen into the public domain, Article 9.3 of the DEPA offers no binding commitments on how to ensure accessibility of the public domain.

Another new issue that the DEPA addresses are small and medium-sized enterprises (SMEs). The DEPA dedicates an entire module to enhancing trade and investment opportunities for SMEs in the digital economy through increased cooperation among the parties, greater transparency, and outreach activities aimed at promoting the benefits of the agreement.[91] This suggests that its parties have recognised that, although the digital economy has opened up enormous opportunities for SMEs by reducing geographical barriers and transaction costs, without adequate support, SMEs may not be able to take advantage of these opportunities.

A similar rationale may have driven the parties to the DEPA to introduce disciplines on digital inclusion, a novel issue that even the DEA has not addressed. With a view to ensuring that all people and businesses can participate and benefit from the digital economy, Chile, New Zealand and Singapore decided to include a specific module, whose purported intent is to ensure that the parties cooperate to remove barriers to the participation in the digital economy of women, rural populations, low socioeconomic groups and indigenous peoples; promote inclusive and sustainable economic growth; share experiences and best practices on digital inclusion; and develop programmes to promote participation of all groups in the digital economy.[92] Although being couched in'best endeavour' language may limit the likelihood of compliance, it can still be a remarkable signal that the parties to the DEPA consider digital inclusion an important aspect of the development of the digital economy.

C. The Limits of the DEPA's Coverage

[89] *Id.* at 19.
[90] *See* DEA, *supra* note 34, art. 26 & art. 27.
[91] DEA, *supra* note 34, art. 36 also covers SMEs, albeit in less detail than the DEPA.
[92] DEPA offers no definition of the term 'low socioeconomic group'. *See* DEPA, *supra* note 2, art. 11.1.

Applying to measures affecting trade in the digital economy, the DEPA allegedly constitutes the most comprehensive agreement among those under examination, covering a wider range of issues than those typically found in most PTAs. However, there are a few issues that this agreement does not touch upon, even though previous agreements have addressed them in some form. In particular, the DEPA lacks specific disciplines on source code, electronic authentication, and capacity building.

Stemming from concerns that mandatory requirements for the transfer of knowledge could be used as potential barriers to trade and/or lead to misappropriation of intellectual property,[93] all agreements under examination, except the DEPA and the RCEP, include a provision prohibiting the forced transfer of or access to source code as a condition for granting market access.[94] Since China is among the countries, together with Russia and India, that have recently introduced regulations requiring companies to disclose proprietary information to gain approval from regulatory agencies,[95] it is unsurprising that the RCEP, which China is a signatory to, does not address the source code issue. However, the absence of a provision on source code in the DEPA is rather remarkable, considering that the transfer of knowledge and intellectual property rights are a key feature of innovation in the digital economy, and all three parties to the agreement have signed other PTAs that prohibit the imposition of trade-restrictive measures related to the disclosure, transfer of and access to source code. Among the agreements under consideration in this study, DEPA is also the only one not to include a specific provision on electronic authentication and electronic signatures. All other agreements contain provisions mandating the parties not to adopt or maintain legislation that would prevent the parties to an electronic transaction from mutually determining the appropriate electronic authentication for their transactions, or from having the opportunity to establish before judicial or administrative authorities that their transaction complies with any legal requirements with respect to electronic authentication and electronic signatures.[96] Barring the EU-Japan EPA, these agreements also call on the parties to encourage the use of inter-operable electronic authentication. Interestingly, no similar provision appears in the DEPA, although this is actually the first agreement to be

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[93] Neha Mishra, *International Trade Law Meets Data Ethics: A Brave New World* 53 N.Y.U. J. INT'L L. & POL'Y 18 (2021); OFFICE OF THE U.S.T.R., FINDINGS OF THE INVESTIGATION INTO CHINA'S ACTS, POLICIES, AND PRACTICES RELATED TO TECHNOLOGY TRANSFER, INTELLECTUAL PROPERTY, AND INNOVATION UNDER SECTION 301 OF THE TRADE ACT OF 1974 43 (2018).

[94] *See* CPTPP, *supra* note 9, art. 14.7; DEA, *supra* note 34, art. 28; USMCA, *supra* note 52, art. 19.16; EU-Japan EPA, *supra* note 11, art. 8.73.

[95] Creemers et al., *supra* note 61.

[96] *See* CPTPP, *supra* note 9, art. 14.6; DEA, *supra* note 34, art. 9; RCEP, *supra* note 12, art. 12.6; USMCA, *supra* note 52, art. 19.6; EU-Japan EPA, *supra* note 11, art. 8.77.

signed electronically by the parties (as per Article 16.9). While DEPA contains an article on 'digital identities', which the agreement does not define, its language suggests that the scope of these new disciplines cover aspects other than electronic authentication and electronic signatures.

Notably, missing from the DEPA are also disciplines on capacity building akin to those included in the DEA and the RCEP, which were concluded a few months after the DEPA. Article 37 of the DEA establishes that the parties endeavour to cooperate on capacity building concerning digital connectivity, SME digital transformation, data protection regimes, and mechanisms to facilitate the cross-border transfer of information. Given the timing of the negotiations of both the DEPA and the DEA and the similarity in level of development among the signatories of the two agreements,[97] one may expect to find an analogous provision in the DEPA. However, the agreement has no specific article related to capacity building, nor does it mention the latter as an area for targeted cooperation as the RCEP does in Article 12.4.[98] The only reference to this issue appears in Article 2.5, where the parties to the DEPA agreed to endeavour to generate awareness and build capacity for e-invoicing, in order to support or facilitate the adoption of e-invoicing by businesses. The lack of a provision on capacity building may derive from the fact that the three signatories of the DEPA are economically advanced countries with high levels of digital readiness[99] and less in need of building capacity to address the challenges of the digital economy. However, without references to capacity building, some developing countries or least developed countries may be discouraged from thinking about joining the DEPA, since they may need reassurance that the parties to the agreement would assist them in reducing the digital divide and in building the necessary capacity to fully implement the provisions included in the agreement. On the other hand, one could argue that, since the New Zealand government indicated that the DEPA is "open to other WTO members to join if they meet its high quality standards",[100] *de facto* countries

[97] Australia, Chile, New Zealand and Singapore are all developed countries and Members of the OECD, which also include Austria, Belgium, Canada, Colombia, Costa Rica, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, South Korea, Latvia, Lithuania, Luxembourg, Mexico, the Netherlands, Norway, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States.

[98] According to the RCEP, *supra* note 12, art. 12.4, "each Party shall, where appropriate, cooperate to: … identify areas for targeted cooperation between the Parties which will help Parties implement or enhance their electronic commerce legal framework, such as research and training activities, capacity building, and the provision of technical assistance".

[99] CISCO, CISCO GLOBAL DIGITAL READINESS INDEX 2019 (2020).

[100] David Parker, *Digital Trade Agreement Timely Response to COVID-19*, New Zealand (June 12 2020), http://www.beehive.govt.nz/release/digital-trade-agreement-timely-response-covid-19.

with digital capacity constraints may find it impossible to become a party to the agreement. However, considering that the DEPA has been described as a 'living agreement'[101] that the parties may amend,[102] it is possible that, should countries interested in joining the agreement be less digitally ready than Chile, New Zealand and Singapore, the latter could agree in amending the DEPA to include disciplines aimed at supporting acceding members in building their digital capacity and allow them to accede.

Finally, it is important to make a few considerations about standards, an issue that, although present in the DEPA, the agreement does not address with a specific provision as the DEA does. Considering that Australia and Singapore negotiated these two agreements more or less around the same time, it is somewhat surprising to find that there is no discipline equivalent to Article 30 of the DEA on standards and conformity assessment for digital trade in the DEPA. Indeed, although the parties to the DEPA explicitly "recognise the role of standards, in particular open standards, in facilitating interoperability between digital systems and enhancing value-added products and services", [103] nowhere in the agreement have its signatories indicated, for example, that they intend to "actively participate in the work of relevant regional and international bodies relating to the development and adoption of standards that support digital trade" or "exchange information to facilitate the acceptance of conformity assessment results with a view to supporting digital trade", as Australia and Singapore did in the DEA.[104] However, as Honey points out, by putting greater emphasis on 'interoperability', implying that coherence can be achieved even when standards or systems are technically different, the DEPA sets a more achievable goal in the short term than the DEA, which focuses on a 'compatibility' approach that would require a more forced convergence around systems or standards to properly work.[105]

IV. NEGOTIATING A STAND-ALONE *SUI GENERIS* AGREEMENT ON DIGITAL TRADE: ADDITIONAL OBSERVATIONS

Currently, the DEPA remains a *sui generis* agreement in the landscape of international trade agreements. With (plurilateral) negotiations on trade-related aspects of electronic commerce still underway at the WTO under the JSI on electronic commerce,[106] and uncertainty surrounding the legal architecture, scope

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[101] Honey, *supra* note 3, at 229.
[102] *See* DEPA, *supra* note 2, art. 16.3.
[103] *Id.* Preamble.
[104] *See* DEA, *supra* note 34, art. 30.
[105] Honey, *supra* note 3, at 233.
[106] World Trade Organization, Joint Statement on Electronic Commerce, WT/L/1056 (Jan. 25, 2019).

and depth of the final outcome, the DEPA is the only international trade agreement in force today that is exclusively and specifically dedicated to digital trade.

Should other countries find inspiration from the DEPA and be inclined to negotiate a similar type of agreement, it would be useful to use this opportunity to discuss some potential benefits arising from negotiating a stand-alone *sui generis* agreement on digital trade, a frontier issue at the cutting edge of trade governance, as well as possible drawbacks.

First of all, negotiating a stand-alone trade agreement on a single topic — e.g., digital trade — might offer some benefits with respect to the scope and depth of the final outcome. When negotiating PTAs, countries generally discuss multiple subject matters at the same time, with the parties involved being more likely to have rather diverging interests across the different areas. Consequently, in PTAs reaching a meaningful outcome that can be accepted by all parties involved may require sacrificing the scope and/or depth of the final agreement. However, focusing on a single topic may help remove any potential need to reduce the width and breadth of the agreement in order to reach a compromise on other negotiating areas. The wider scope of the DEPA in comparison to the other trade agreements under examination suggests that, freed from concerns about how accommodating other interests in areas outside digital trade, such as trade remedies, or agriculture, could impact the final text of the agreement, DEPA negotiators may have found it easier to delve more in detail on how to best address all the issues relevant to the digital economy and facilitate and promote digital trade.

In the same vein, negotiating a stand-alone trade agreement like the DEPA may prove useful to better adapt to the changing nature of trade in the digital world. A *sui generis* agreement like the DEPA allowed negotiators to focus on the specific needs of trade in the digital economy, extending the scope of negotiations beyond the traditional goods and services dichotomy under the WTO framework and enabling the incorporation of WTO-plus and WTO-extra issues that may otherwise not have been discussed. It generated new ideas and approaches to negotiating FTAs or engaging in digital trade work, offering new insights on how to best address a subject matter that is evolving at a rapid pace.[107] A stepping stone or a building block for the development of multilateral rules on digital trade,[108] the DEPA provides an understanding of the scope and depth that a stand-alone agreement on this topic could reach when all the parties involved are interested in achieving a high-level and meaningful outcome.

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[107] NZ MFAT, DEPA Overview, *supra* note 28.
[108] Honey, *supra* note 3, at 234-35.

In addition, aggregating like-minded countries to push policy-making in a specific area might be easier if the negotiating outcome is expected to result in a monothematic, stand-alone agreement. Indeed, countries that share an interest in advancing the trade policy agenda in the digital economy, but are unwilling or unable to reach a deal on other trade-related areas, may find it more appealing to join the DEPA than to negotiate PTAs covering multiple subject matters beyond digital trade. DEPA negotiators seemed to acknowledge this, offering other like-minded countries the opportunity to join the agreement at any time after its entry into force. However, an accession process like that established by the DEPA, which prevents acceding members from substantially renegotiating the agreement, may in fact dissuade countries with no interest in being simple rule-takers rather than rule-makers from joining. Multilateral negotiations on digital trade would allow to minimise this issue.

The DEPA experience suggests that there can also be some drawbacks associated with signing a separate agreement on trade in the digital economy alone. Firstly, there is a potential for overlap and inconsistency with existing PTAs, especially since the distinction between trade in services and digital trade can often be blurred. While negotiating a stand-alone agreement on the digital economy may allow to better address certain nuances of the intersection between law and technology, the lack of concurrent negotiations on aspects of digital trade typically addressed in the trade in services chapters of PTAs could prove problematic since digital trade and trade in services are intertwined. This could be particularly problematic for countries with insufficient negotiating capacity and limited ability to fully assess the impact new disciplines on digital trade introduced with a single-topic, stand-alone agreement could have on commitments and obligations arising from other existing trade agreements they are parties to.

Secondly, negotiating a *sui generis* trade agreement like the DEPA raises some questions about its legal standing within the WTO framework. In particular, it is unclear whether this type of agreement could or should be notified under Article V of the GATS, or whether, instead, (some of) its disciplines could be inscribed by the parties in their GATS schedules as additional commitments under Article XVIII.[109] Indeed, as the latter covers a wide range of measures affecting trade in services that are not subject to scheduling obligations under market access and national treatment set forth in Articles XVI and XVII of the GATS, it is possible that (several) disciplines negotiated under the DEPA or a similar *sui generis* agreement covering digital trade could fall under the scope of application of Article XVIII of the GATS. Greater doubts, however, remain as regards the first option, considering that, for an economic integration agreement (EIA) to qualify as a Most

[109] Rudolf Adlung & Hamid Mamdouh, *Plurilateral Trade Agreements: An Escape Route for the WTO?*, 52 J. WORLD TRADE 85, 106 (2018).

Favoured Nation exception under Article V of the GATS, it has to have 'substantial sectoral coverage' (in terms of number of sectors, volume of trade affected and modes of supply) and must provide for the absence or elimination of substantially all discrimination. Indeed, it remains unclear to what extent the DEPA or a similar agreement could meet either condition when the parties do not engage in the negotiation of specific commitments. This is not a secondary issue because, as Sieber-Gasser points out, in the absence of PTAs notifications, the WTO could lose control over the numerous different trade agreements, their interaction among each other and with the WTO.[110]

V. CONCLUDING REMARKS

The DEPA is rather unique in the landscape of international trade agreements. Organised in a modular structure, it is the first trade agreement to be completely and exclusively dedicated to addressing issues related to trade in the digital economy. Sharing most similarities in scope with the DEA between Australia and Singapore, and building heavily on the CPTPP, the DEPA covers numerous topics that are traditionally found in chapters and sections on electronic commerce and introduces disciplines on several issues that, while particularly relevant to the digital economy, had yet to be addressed comprehensively or adequately in PTAs. Among them are digital inclusion, artificial intelligence, and small and medium enterprises.

As comprehensive as the DEPA is, in comparison to other PTAs, its coverage of digital trade issues has some limits. Particularly striking, for an agreement that was designed to influence and contribute to multilateral trade negotiations on digital trade, is the absence of disciplines on capacity building. For many developing and least developed countries, reducing the digital divide is paramount to ensure they can benefit from the opportunities offered by the digital economy, and they are likely to require capacity building and technical assistance in order to achieve this goal. Thus, by not including any reference to capacity building, the DEPA falls a bit short of providing the most comprehensive template for multilateral rules on digital trade.

In order to advance the digital trade policy agenda, there are some potential advantages of negotiating a *sui generis* agreement like the DEPA, mainly related to the opportunity to increase the scope and depth of the outcome and attract like-minded countries. Yet, concerns about potential inconsistencies with existing commitments and obligations arising from existing PTAs and uncertainty about the legal standing under the WTO framework may hinder the desirability of

[110] Charlotte Sieber-Gasser, *The Scope of GATS V: Towards More Flexibility for the South*, Postgraduate and Early Professionals/Academics Conference of the Society of International Economic Law (PEPA/SIEL), University of Hamburg, 7 (Jan. 27, 2012).

negotiating stand-alone, monothematic agreements to shape the future of digital trade governance.