

Analysing E-Commerce Norms In Free Trade Agreements

Notes For WTO'S Plurilateral Negotiations

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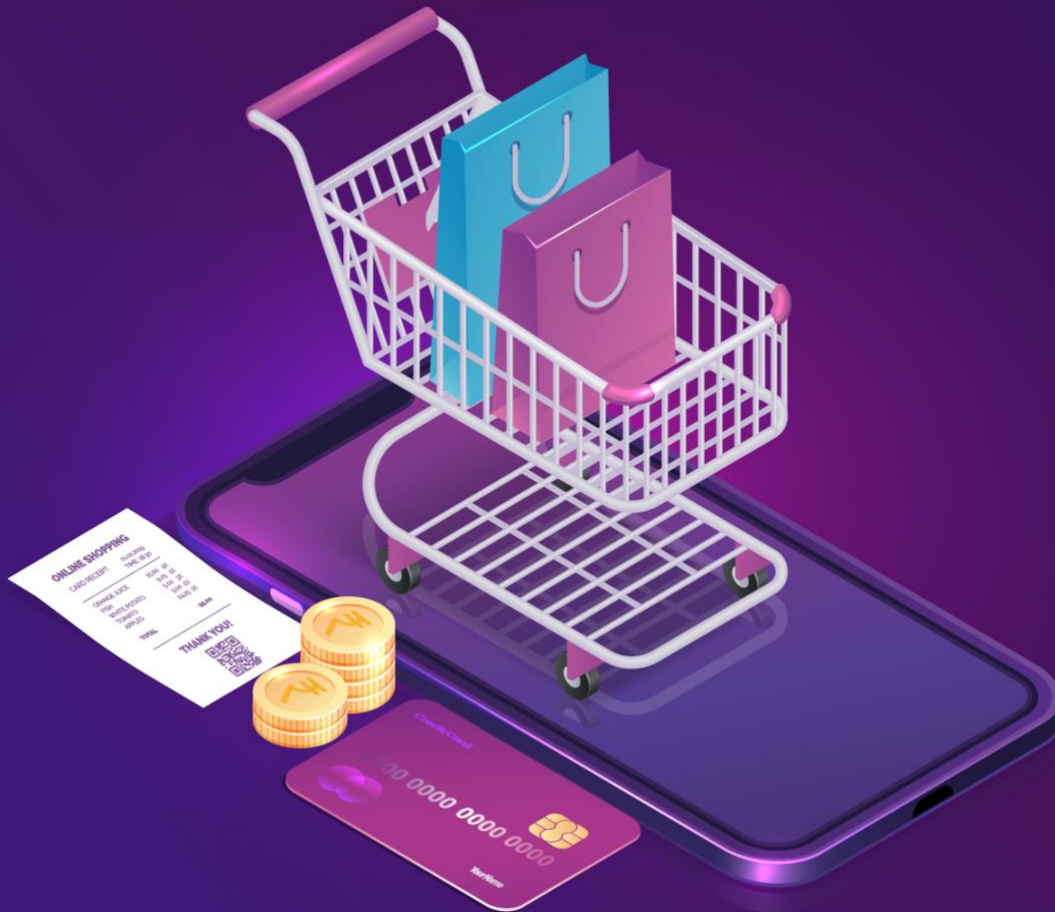


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Analysing E-Commerce Norms in Free Trade Agreements: Notes for WTO's Plurilateral Negotiations

The multilateral discussions on electronic commerce (e-commerce) at the World Trade Organisation (WTO), which began in 1998, have had a passive journey of over two decades.¹ It was only recently in 2019 that 83 WTO Members agreed to initiate plurilateral negotiations towards a potential e-commerce framework.² Meanwhile, digital trade through free trade agreements (FTAs) became prominent, since it allowed Members, especially developed countries, to push for the level of commitments suitable to their trade policy. As of 2019, close to 78 FTAs have their own e-commerce chapters.³

The growth of e-commerce in FTAs

From 2000 onwards, recognising the importance of electronic trade, a few countries began introducing limited e-commerce provisions in their FTAs.⁴ Since then there has seen a significant growth in the size and scope of e-commerce provisions in FTAs. A brief overview of this growth of e-commerce chapters in FTAs is set out below:

Year	Particulars of FTAs
2001	The New Zealand-Singapore Closer Economic Partnership was the first FTA to have an e-commerce provision recognising paperless trading. ⁵

¹ For more context, please see our piece titled 'E-commerce Related Discourse at the WTO: Brief History and Subsequent Developments', [here](#).

² World Trade Organisation, Joint Statement on Electronic Commerce, WT/L/1056, (25th Jan., 2019), available at, https://trade.ec.europa.eu/doclib/docs/2019/january/tradoc_157643.pdf.

³ Marc D. Froese, *Digital Trade and Dispute Settlement in RTAs: An Evolving Standard*, J. World Trade, (Sept., 2019), available at, <https://poseidon01.ssrn.com/delivery.php?ID=003089126006010097103091002111109076041005046053051061071097115004024078027075071009124023057017126029014126071065025004031093058039007032031094025030007080028019071020052091096070106125086101088084107101101081096116085103077006116074026106091099114&EXT=pdf> (hereafter, Marc D. Froese, *Digital Trade and Dispute Settlement in RTAs*) (last accessed on 29th June, 2020).

⁴ See Rolf H. Weber, *The Expansion of E-Commerce in Asia-Pacific Trade Agreements*, 10th Septembers, 2015, available at, <http://www.ictsd.org/opinion/the-expansion-of-e-commerce-in-asia-pacific-trade-agreements> (last accessed on 29th June, 2020).

⁵ See *Agreement between New Zealand and Singapore on a Closer Economic Partnership*, 1st January, 2001, available at, <https://wits.worldbank.org/GPTAD/PDF/archive/NewZealand-Singapore.pdf>.

2003	The Singapore-Australia FTA was the first to have an elaborate e-commerce chapter with provisions on customs duties, data protection, consumer protection, among others. ⁶
2004	The United States (US) entered into its first FTAs with e-commerce provisions, namely the US-Singapore FTA and the US-Chile FTA.
2006	Other countries such as Thailand and Republic of Korea (Korea) followed suit, entering into FTAs with Australia and Singapore respectively. ⁷
2006	Notably, India, which is against the inclusion of e-commerce provisions, entered into a Comprehensive Economic Cooperation Agreement with Singapore in 2006 with its own e-commerce chapter. ⁸
2008	EU entered into its first FTA with e-commerce provisions with the CARIFORUM states. ⁹
2015	Even China, which is opposed to extensive e-commerce provisions, entered into an FTA with Korea in 2015 with limited e-commerce provisions.
2016	The first FTA between two developing countries with an e-commerce chapter was signed between Costa Rica and Columbia.
2019	Over 78 FTAs have e-commerce provisions.

⁶ See *Singapore-Australia Free Trade Agreement*, 17th February, 2003, available at, <https://wits.worldbank.org/GPTAD/PDF/archive/Singapore-Australia.pdf> (last accessed on 25th June, 2020).

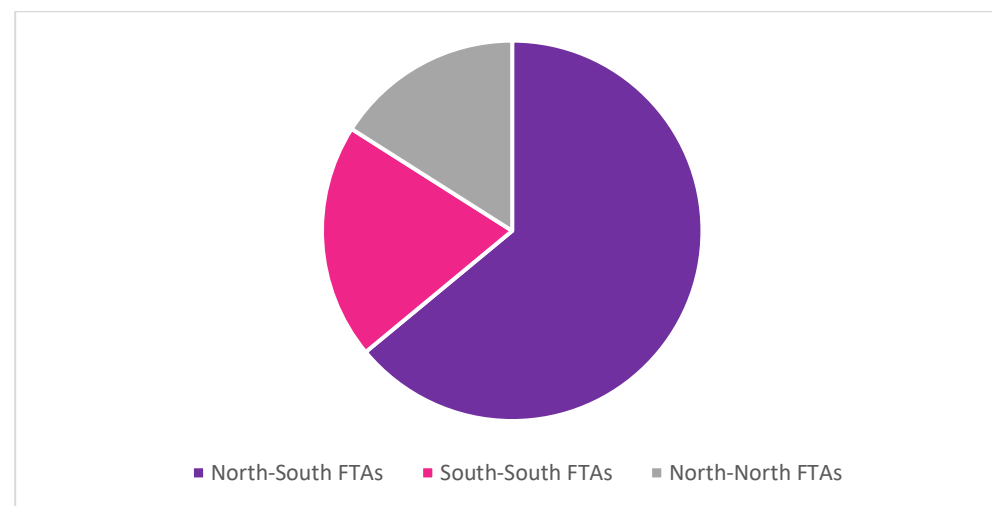
⁷ See *Korea-Singapore Free Trade Agreement*, 2nd March, 2006, available at, <https://www.enterprisesg.gov.sg/-/media/esg/files/non-financial-assistance/for-companies/free-trade-agreements/korea-singapore-fta/legal-text/ksfta20legal20text1.pdf>; *Thailand-Australia Free Trade Agreement*, 1st January, 2005, available at, https://www.wipo.int/edocs/lexdocs/treaties/en/au-th/trt_au_th.pdf (last accessed on 25th June, 2020).

⁸ See *Singapore-India Comprehensive Economic Cooperation Agreement (the agreement does not grant the Most Favoured Nation status and the National Treatment for digital products)*, available at, <https://dot.gov.in/sites/default/files/India%20Singapore%20CECA%2001.08.2005.pdf> (last accessed on 25th June, 2020).

⁹ See *EU-CARIFORUM Economic Partnership Agreement*, available at, <https://ec.europa.eu/world/agreements/downloadFile.do?fullText=yes&treatyTransId=12969>.

The US, Australia and Singapore played a major role in the proliferation of FTAs with e-commerce provisions.¹⁰ Notably, more than 30 countries first entered into an FTA with e-commerce provisions with one of these three countries.¹¹ As is evident from the figure below, not only have developed countries and emerging economies participated in such FTAs, even developing countries (DCs) have played an active role. However, there is no participation of least developed countries (LDCs) in such FTAs with e-commerce provisions.¹² The share of FTAs with e-commerce chapters by development status is given below:

Figure 1: E-Commerce chapters in FTAs by development status



Source: Marc D. Froese¹³

¹⁰ Mark Wu, *Digital Trade-Related Provisions in Regional Trade Agreements: Existing Models and Lessons for the Multilateral Trade System*, International Centre for Trade and Sustainable Development (ICTSD) and the Inter-American Development Bank (IDB), at 7 (Nov., 2017), available at, <http://e15initiative.org/wp-content/uploads/2015/09/RTA-Exchange-Digital-Trade-Mark-Wu-Final-2.pdf> (hereafter, Mark Wu, *Digital Trade-Related Provisions in Regional Trade Agreements*) (last accessed on 29th June, 2020).

¹¹ *Id.*

¹² Mark Wu, *Digital Trade-Related Provisions in Regional Trade Agreements*, *supra* note 10, at 8.

¹³ Marc D. Froese, *Digital Trade and Dispute Settlement in RTAs*, *supra* note 3, at 20.

Scope of e-commerce chapters

The scope of the e-commerce provisions in FTAs have become broader over the years. While initially they included limited provisions on electronic signatures and paperless trading, the recent FTAs address wide-ranging issues, including important issues such as data protection, access to source code, cross-border data flow and data localization.¹⁴ Other standard issues include customs duties, market access, national treatment, electronic authentication, consumer protection, etc. Yet, most FTAs differ in the standard of commitments set by their e-commerce chapters. Overall, there are four differing approaches that emerge from e-commerce chapters in FTAs:

- (i) *Highly liberalized approach*: A few recent FTAs like the Singapore-Australia FTA, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and the US-Canada-Mexico Agreement (USMCA) have e-commerce provisions with the highest standards of liberalisation. These are mostly advocated by developed countries like the US, even when other parties include smaller developing countries. The provisions in these FTAs generally contain liberalised commitments requiring free flow of data, prohibition on imposition of customs duties and prohibiting data localization norms, among others.
- (ii) *Minimalist approach*: Conversely, the Regional Comprehensive Economic Partnership (RCEP), to which China is a party, has adopted a more minimalist regime skirting issues such as market access, non-discrimination and data flows.¹⁵
- (iii) *Neutral approach*: EU's FTAs fall between TPP and the RCEP, with stronger commitments than the RCEP.¹⁶ For instance, EU's FTAs gives greater importance to issues of data privacy and data protection, compared to the RCEP.

¹⁴ See Victor de Prado, *Current Landscape of E-Commerce Trade Rules*, World Trade Organisation, at 7 (2017), available at, https://unctad.org/meetings/en/Presentation/dtl_eWeek2017p46_VictordoPrado_en.pdf (last accessed on 29th June, 2020).

¹⁵ Ciuriak, Dan, and Maria Ptashkina, *The Digital Transformation of International Trade*, Interamerican Development Bank and International Centre for Trade and Sustainable Development, at 15 (2018), available at, <http://e15initiative.org/wp-content/uploads/2015/09/RTA-Exchange-Digital-Trade-Ciuriak-and-Ptashkina-Final.pdf> (hereafter, Ciuriak & Ptashkina, *The Digital Transformation of International Trade*) (last accessed on 29th June, 2020).

¹⁶ Ciuriak, Dan, and Maria Ptashkina, *The Digital Transformation of International Trade*, *supra* note 15, at 15.

- (iv) *China's approach*: China's bilateral FTAs generally aligns with its domestic laws. They usually do not include extensive provisions on e-commerce and have weak protections for norms such as consumers protection and data privacy.¹⁷

Due to these differing approaches, the FTAs are establishing multiple parallel e-commerce regimes of their own. We take a look at the first three approaches through a comparative analysis of the FTAs in the next section.

Comparative analysis of e-commerce provisions in FTAs: Lessons for the plurilateral negotiations

For our examination, we have chosen three FTAs namely the CPTPP, which has retained the e-commerce chapter of the TPP, the RCEP and the EU-Japan FTA. We have excluded the USMCA from our analysis since it contains commitments similar to those in the CPTPP. While the RCEP is yet to be signed, the negotiating countries announced the completion of the negotiations in November 2019 and their intention to sign the agreement in 2020.¹⁸ The reasons for analysing these three FTAs are: the large geographical scope they cover, participation of major economies and the differing standards set by their e-commerce provisions. For our analysis, we have selected a few prominent issues namely, customs duties; cross-border data flow; protection of personal data and privacy; data localisation; and prohibition on disclosure of source code. An overview of the position adopted by the three FTAs for each issue is set out below:

Provisions	CPTPP	EU-Japan FTA	RCEP
Non-imposition of customs duties	Prohibits customs duties on electronic transmissions.	Prohibits customs duties on electronic transmissions.	Prohibits customs duties on electronic transmissions. Allows Members to adjust this provision based on the outcome under the

¹⁷ Arpita Mukherjee & Avantika Kapoor, *Trade Rules in E-Commerce: WTO and India Working Paper*, No. 354, at 21, (Mar., 2018), available at, https://think-asia.org/bitstream/handle/11540/8054/Working_Paper_354.pdf?sequence=1 (last accessed on 29th June, 2020).

¹⁸ See New Zealand Foreign Affairs & Trade, *RCEP Overview*, available at, <https://www.mfat.govt.nz/en/trade/free-trade-agreements/agreements-under-negotiation/regional-comprehensive-economic-partnership-rcep/rcep-overview/> (last accessed on 29th June, 2020).

			WTO's work programme on electronic commerce. ¹⁹
Cross-border transfer of information	Allows cross-border transfer of information by electronic means. Excludes financial services and service suppliers from the ambit.	Adopts an adequacy decision under which EU and Japan's domestic law regulates data flow.	Allows cross-border transfer of information by electronic means. Gives parties indisputable right to adopt measures in the interests of their essential security interests.
Protection of personal data and privacy	Obligates parties to adopt a legal framework to protect personal information of users of e-commerce.	Adequacy decision regulates data privacy and protection.	Obligates parties to adopt a legal framework to protect personal information of users of e-commerce.
Data localization	Prohibits parties from requiring the use of or locating of computing facilities in that party's territory as a condition for conducting business.	Specific provision absent. Adequacy decision does not require specific authorization for data transfer from EU to Japan.	Prohibits parties from requiring the use of or locating of computing facilities in that party's territory as a condition for conducting business. Gives parties indisputable right to adopt measures in the interests of their essential security interests.
Prohibition on disclosure of source code	Prohibits parties from requiring the transfer of, or access to, the source code of software.	Prohibits parties from requiring the transfer of, or access to, the source code of software.	Provision absent.

¹⁹ Through the declaration on global e-commerce adopted by the WTO Members in 1998, they called upon the General Council to establish a comprehensive work programme on e-commerce to examine all trade-related issues concerning e-commerce. The work programme allocated four WTO bodies to examine specific trade-related issues concerning e-commerce, namely the Council for Trade in Services; Council for Trade in Goods; Council for Trade-Related Aspects of Intellectual Property (TRIPS) and the Committee for Trade & Development. Under these bodies and in the General Council, Members have been undertaking discussions on various issues related to e-commerce, including on the issue of prohibition on the imposition of customs duties. For more information, please see our first piece in the series on 'Digital Trade' titled E-commerce Related Discourse at the WTO: Brief History and Subsequent Developments', [here](#).

These issues have become crucial to the on-going plurilateral negotiations on e-commerce at the WTO, mainly due to a lack of consensus among Members.²⁰ A detailed comparative analysis of the provisions in the FTAs and the positions adopted by Members in the plurilateral e-commerce negotiations is set out below:

1. Non-imposition of customs duties

CPTPP	EU-Japan FTA	RCEP
<p>Article 14.3.1 of the CPTPP requires parties to not impose customs duties on electronic transmissions, including content transmitted electronically between a person of one party to a person of another party. Paragraph 2 further clarifies that no party will be precluded from imposing taxes, fees or other charges on “content” transmitted electronically, so long as such taxes, fees or charges are imposed in a manner consistent with the CPTPP.</p>	<p>Article 8.72 of the EU-Japan FTA merely provides that the Parties shall not impose customs duties on electronic transmissions.</p>	<p>Article 12(1) of the negotiated e-commerce chapter of RCEP provides that “each Party shall maintain its current practice of not imposing customs duties on electronic transmissions between the Parties”. However, the provision further allows parties to adjust their practice based on the outcome of the WTO Ministerial Decisions on customs duties, “within the framework of the Work Programme on Electronic Commerce” (Work Programme). This</p>

²⁰ 76 Members of the WTO announced their intention to initiate plurilateral negotiations on e-commerce at the World Economic Forum in Davos in January, 2019. Since then Members have held six negotiating rounds in 2019 to discuss issues for an e-commerce framework. For more information, please see our first piece in the series on ‘Digital Trade’ titled E-commerce Related Discourse at the WTO: Brief History and Subsequent Developments’, [here](#).

		<p>does not include any decision taken at the plurilateral negotiations taking place outside the mandate of the Work Programme. The provision further clarifies that no Party will be precluded from imposing taxes, fees or other charges “on electronic transmissions” in a manner consistent with the agreement.</p>
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The e-commerce chapters of most FTAs prohibit the imposition of customs duties for electronic transmissions. However, the RCEP is unique in allowing Members to unilaterally alter this commitment based on the outcome of the WTO’s Work Programme. Australia and China, parties to the RCEP, have included a similar provision in their FTA.²¹ At the WTO’s Work Programme, Members have been extending the moratorium on customs duties for electronic transmissions since 1998 when the Work Programme was adopted. However, there is still no consensus on retaining the moratorium permanently. Most DCs and LDCs, particularly India and South Africa, have raised concerns about revenue loss and impact on industrialization due to the loss of use of tariff as a critical trade policy instrument.²² In fact, even according to UNCTAD the moratorium on customs duties results in a revenue loss of almost 92% for developing countries, compared to 8% loss for developed countries.²³ Consequently,

²¹ See *Australia-China Free Trade Agreement*, art. 12.3, 20th December, 2015, available at, <https://www.dfat.gov.au/sites/default/files/chafta-agreement-text.pdf>.

²² World Trade Organization, Work Programme on Electronic Commerce, *Communication from India and South Africa*, WT/GC/W/798 (11th Mar., 2020), available at, https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009DP.aspx?language=E&CatalogueIdList=262031,254708,240766,240755,240689,240551,240484,240132,239982,239968&CurrentCatalogueIdIndex=0&FullTextHash=371857150&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True.

²³ UNCTAD, *Growing Trade in Electronic Transmissions: Implications for the South*, UNCTAD Research Paper No. 29, UNCTAD/SER.RP/2019/1/Rev.1, at 7 (Feb., 2019), available at, https://unctad.org/en/PublicationsLibrary/ser-rp-2019d1_en.pdf (hereafter, UNCTAD Report).

even at the plurilateral negotiations, while most proposals submitted by both developing countries and developed countries agreed that the moratorium should continue, countries are still debating on its permanency mainly due to revenue loss to developing countries.²⁴

2. Cross-border transfer of information

CPTPP	EU-Japan FTA	RCEP
<p>Article 14.11.2 of the CPTPP provides that “each party shall allow the cross-border transfer of information by electronic means, including personal information, when this activity is for the conduct of the business of a covered person”. “Covered person” includes, a covered investment as defined in the CPTPP; an investor of a party excluding an investor in a financial institution; or a service supplier of a party as defined in the CPTPP.²⁵</p> <p>However, each party has the leeway to adopt measures to achieve legitimate public policy</p>	<p>Article 8.81 of the EU-Japan FTA states that the “parties shall reassess within three years of the date of entry into force of this Agreement the need for inclusion of provisions on the free flow of data into this Agreement.”</p> <p>The reason for this provision was to allow Japan to put in place strong safeguards to protect data similar to those in the EU. Pursuantly, in January 2019, the European Commission adopted its adequacy decision on Japan (Adequacy Decision), approving the standards of protection</p>	<p>Article 16.2 states that “A Party shall not prevent cross-border transfer of information by electronic means, where such activity is for the conduct of the business of covered person.”</p> <p>Similar to the CPTPP, a covered person includes covered investment as defined in the chapter on Investment; an investor of a party excluding an investor in a financial institution or a financial service supplier; and a service supplier of a party as defined in the chapter on Trade in Services. Parties to</p>

²⁴ Yasmin Ismail, *E-commerce in the World Trade Organization: History and latest developments in the negotiations under the Joint Statement*, International Institute for Sustainable Development, at 17, (Jan., 2020), available at, <https://www.iisd.org/sites/default/files/publications/e-commerce-world-trade-organization-.pdf> (last accessed on 29th June, 2020).

²⁵ *Comprehensive and Progressive Agreement for Trans-Pacific Partnership Agreement*, art. 14.1., available at, <https://ustr.gov/sites/default/files/TPP-Final-Text-Electronic-Commerce.pdf> (hereafter, *CPTPP*).

<p>objective. However, such measures: should not be applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade; and does not impose restrictions on transfers of information greater than are required to achieve the objective.²⁶</p>	<p>adopted by Japan. This allowed the free flow of data between the EU and Japan.²⁷</p> <p>Japan adopted Supplementary Rules under the Act on Protection of Personal Information, applicable to the data transferred from the EU. These rules are binding on “business operators” who are persons providing personal information database for use in business.²⁸ On the EU side, the Regulation (EU) 2016/679 is applicable. This defines ‘controller’ as a natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data.²⁹ The definitions on both sides do not exclude financial institutions or financial service suppliers, unlike the CPTPP.</p>	<p>the RCEP are allowed to adopt measures necessary to achieve a legitimate public policy objective, provided that the measure is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade. The RCEP also allows parties to adopt any measure necessary for the protection of its essential security interests and “such measures shall not be disputed by other Parties”.</p>
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²⁶ *Id.*, art. 14.11.3.

²⁷ European Commission, *Commission Implementing Decision of 23.01.2019* (23rd Jan., 2019), available at, https://ec.europa.eu/info/sites/info/files/draft_adequacy_decision.pdf (hereafter, Adequacy Decision).

²⁸ See The Act on Protection of Personal Information, art. 2(5), available at, https://www.ppc.go.jp/files/pdf/Act_on_the_Protection_of_Personal_Information.pdf.

²⁹ Regulation (EU) 2016/679 of the European Parliament and of the European Council (27th Apr., 2016), available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0679&from=EN>.

Both the CPTPP and the RCEP exclude financial institutions and financial service suppliers from the definition of a “covered person”, thereby having no obligation upon Members to allow free flow of data for such institutions. This has drawn the ire of financial service providers, including online payment services which is essential for e-commerce.³⁰ Moreover, the RCEP also grants an unquestionable and unilateral right to parties, to adopt measures in the interests of security. Any future plurilateral e-commerce framework may have to address these two issues.

At the WTO’s plurilateral negotiations, while most Members agreed to allow free flow of data, China argued that due to the complexity and sensitivity of the issue, Members should be free to regulate data flow and no WTO commitments should exist for such issues.³¹ China also argued that data flow “should be subject to the precondition of security which concerns each and every Member’s core interests”.³² Even Korea argued for retaining Members’ right to adopt measures necessary in the interest of security.³³ Brazil’s proposal argued that, apart from legitimate public policy objectives, no exceptions should be allowed for protecting public morals or public order, safety, security, privacy, war or emergency purposes. Similarly, developed countries like Japan and United States argued for allowing exceptions only for legitimate public policy objectives.³⁴ The differing positions between China and the United States may slow down the progress of the plurilateral negotiations until a middle ground is achieved.

3. Protection of personal data and privacy

³⁰ Mark Wu, *Digital Trade-Related Provisions in Regional Trade Agreements*, *supra* note 10, at 23.

³¹ World Trade Organization, Joint Statement on Electronic Commerce, *Communication from China*, INF/ECOM/19 (24th Apr., 2019), available at, https://docs.wto.org/dol2fe/Pages/FE_Search/DDFDocuments/253560/q/INF/ECOM/19.pdf.

³² *Id.* at 4.

³³ World Trade Organization, Joint Statement on Electronic Commerce, *Communication from Republic of Korea*, INF/ECOM/31, (9th May, 2019).

³⁴ See Katya Garcia-Israel and Julien Grollier, *Electronic Commerce Joint Statement: Issues in the Negotiations Phase*, CUTS International, at 16 (Oct., 2019), available at, <http://www.cuts-geneva.org/pdf/1906-Note-RRN-E-Commerce%20Joint%20Statement2.pdf> (hereafter, Katya Garcia-Israel and Julien Grollier, *Electronic Commerce Joint Statement: Issues in the Negotiations Phase*) (last accessed on 29th June, 2020).

CPTPP	EU-Japan FTA	RCEP
<p>Article 14.8.2 of the CPTPP obligates each party to “adopt or maintain a legal framework that provides for the protection of the personal information of the users of electronic commerce.” In doing so, each Party is required to take into account principles and guidelines of relevant international bodies. This provision further states that parties should publish information on the protections available to the users of e- commerce including how “(a) individuals can pursue remedies; and (b) business can comply with any legal requirements.”</p>	<p>With the adoption of the Adequacy Decision, data protection between EU and Japan is governed by Regulation (EU) 2016/679 on the EU side and Supplementary Rules on the Japanese side. Both sets of regulations now provide extensive rules for protecting data transferred between the EU and Japan, including rules for onward transfer to a third country.³⁵ Japan has also provided safeguard for access of personal data by Japanese authorities for law enforcement and national security purposes, which will be limited to what is necessary.³⁶ In case of any violations, both sets of rules provide for oversight by an independent body, and administrative and judicial reforms.³⁷</p>	<p>Article 9 of the RCEP requires countries to “adopt or maintain a legal framework which ensures the protection of personal information of the users of electronic commerce.” It provides further clarification that a Party may adopt or maintain measures such as comprehensive privacy, personal information protection laws and regulations, sector-specific laws covering protection of personal information, or laws that provide for the enforcement of contractual obligations assumed by enterprises relating to protection of personal information. In doing so, the parties are required to take into account international standards, principles and</p>

³⁵ European Commission, *European Commission Adopts adequacy Decision on Japan, Creating the World’s Largest Area of Safe Data Flows*, Press Release, January 23, 2019, available at, https://ec.europa.eu/commission/presscorner/detail/en/IP_19_421 (last accessed on 25th June, 2020).

³⁶ *Id.*

³⁷ European Commission, *EU-Japan Adequacy Decision, Fact Sheet* (Jan., 2019), available at, https://ec.europa.eu/info/sites/info/files/research_and_innovation/law_and_regulations/documents/adequacy-japan-factsheet_en.pdf.

		<p>guidelines. The provision further provides that Parties shall publish information on protections available to users including how “(a) individuals can pursue remedies; and (b) business can comply with any legal requirements.”</p>
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The Adequacy Decision adopted by EU and Japan provides strong data protection norms, when compared to CPTPP and RCEP’s comparatively weaker obligation on countries to adopt data protection norms without giving any specifics. The approach adopted by the EU in pressing for stronger data protection norms is also reflected in EU’s proposal at the plurilateral e-commerce negotiations. The EU’s textual proposal urges Members to recognise that “protection of personal data and privacy is a fundamental right” and therefore, adopt relevant safeguards.³⁸ It further states that “nothing in the agreed disciplines and commitments shall affect the protection of personal data and privacy afforded by the Members’ respective safeguards.” The US’s approach is the promotion of free data flow with minimal restrictions.³⁹ In its proposal, while the US argues for enactment of regulations to protect personal data, it clarifies that “any restrictions on cross-border flows of personal information should be necessary and proportionate to the risks presented”.⁴⁰ China on the other hand explicitly argues for exclusion of any WTO commitments on issues of data flow and data protection.⁴¹ It focusses on the need to respect Members’ policy objectives on internet sovereignty, data security and privacy

³⁸ World Trade Organization, Joint Statement on Electronic Commerce, *EU Proposal for WTO Disciplines and Commitments Relating to Electronic Commerce*, INF/ECOM/22 (26th Apr., 2019), available at, http://trade.ec.europa.eu/doclib/docs/2019/may/tradoc_157880.pdf (last accessed on 29th June, 2020).

³⁹ Congressional Research Service, *Internet Regimes and WTO E-Commerce Negotiations*, at 9 (28th Jan., 2020), available at, <https://fas.org/sgp/crs/misc/R46198.pdf> (hereafter, *Internet Regimes and WTO E-Commerce Negotiations*) (last accessed on 29th June, 2020).

⁴⁰ World Trade Organization, Joint Statement on Electronic Commerce, *Communication from the United States*, INF/ECOM/23, at 5 (26th Apr., 2019) (hereafter, *Communication from the United States*).

⁴¹ World Trade Organization, Joint Statement on Electronic Commerce, *Communication from China*, INF/ECOM/19 (24th Apr., 2019), available at, https://docs.wto.org/dol2fe/Pages/FE_Search/DDFDocuments/253560/q/INF/ECOM/19.pdf (hereafter, *Communication from China*).

protection. Therefore, its proposal states that Members should adopt “measures that they consider appropriate and necessary” to protect personal information.⁴² These three approaches taken by the EU, US and China have been the main differing points in the plurilateral negotiations so far and countries fear that it may be the most difficult issue on which to reach a consensus.⁴³

4. Data localisation

CPTPP	EU-Japan FTA	RCEP
<p>Article 14.13.2 of the CPTPP provides that “no Party shall require a covered person to use or locate computing facilities in that Party’s territory as a condition for conducting business in that territory.” However, the provision recognises that each party may have its own regulatory requirements regarding the use of computing facilities, including requirements that seek to ensure the security and confidentiality of communications. To that end, paragraph 3 gives parties the right to adopt measures to achieve a legitimate public policy objective. However, such measures should not (a) “be applied in a manner</p>	<p>The EU-Japan FTA does not have a formal data localisation norm. However, an adequacy ruling under the General Data Protection Regulation (GDPR) implies that data transfer from the EU to Japan does not require specific authorization.</p>	<p>Article 15.2 of the RCEP states that “No Party shall require a covered person to use or locate computing facilities in that Party’s territory as a condition for conducting business in that territory”. Like the CPTPP, this provision recognises that each Party may have its own measures regarding the use or location of computing facilities, including requirements that seek to ensure the security and confidentiality of communications. Consequently, each Party has a right to adopt measures</p>

⁴² *Id.* at para 3.9.

⁴³ *Internet Regimes and WTO E-Commerce Negotiations, supra* note 39, at 22.

<p>which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade”; and (b) “impose restrictions on the use or location of computing facilities greater than are required to achieve the objective.”⁴⁴</p>		<p>necessary to achieve a legitimate public policy objective, provided that the measure is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade. The RCEP allows parties to adopt any measure necessary for the protection of its essential security interests and “such measures shall not be disputed by other Parties.”</p>
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Among the three FTAs, the RCEP’s provision is unique as it allows countries to indisputably adopt measures necessary for the protection of its essential security interests. This implies that parties to the RCEP may be free to adopt trade-restrictive measures allowing data localization. The issue of data localisation is moot at the WTO’s plurilateral negotiations. While most developed countries are in favour of prohibiting data localisation, China maintains its reservations to any WTO commitments on this issue. The US’s proposal suggests a blanket prohibition as per which “[N]o Party shall require a covered person to use or locate computing facilities in that Party’s territory as a condition for conducting business in that territory,” without any exceptions.⁴⁵ Similarly, the EU’s proposal states that cross-border data flows shall not be restricted by: requiring the use of computing facilities in the territory of the Member; requiring the localization of data in the Member’s territory for storage or processing;

⁴⁴ *CPTPP*, supra note 25, art. 14.13.3.

⁴⁵ *Communication from the United States*, supra note 40, at 5.

and making cross-border data transfer contingent upon the localizing data or computing facilities.⁴⁶ Other countries such as Japan, Singapore and the Republic of Korea suggested exceptions based on legitimate public policy objectives.⁴⁷ Similar to the data flow and data protection issues, countries may have difficulty reaching a consensus on this issue as China may press for a clause similar to the RCEP with an indisputable security exception.

5. Prohibition on disclosure of source code

CPTPP	EU-Japan FTA	RCEP
<p>Article 14.7 of the CPTPP provides that “No party shall require the transfer of, or access to, source code of software owned by a person of another Party, as a condition for the import, distribution, sale or use of such software, or of products containing such software, in its territory.” There is a further clarification that “software” is limited to mass-market software or products containing such software and does not include software used for critical infrastructure. However, the provision clarifies that nothing in this provision precludes</p>	<p>Like the TPP, Article 8.73 of the EU-Japan FTA also allows a partial prohibition on disclosure of source code of software. It states that “A Party may not require the transfer of, or access to, source code of software owned by a person of the other Party.” It further states that nothing “shall prevent the inclusion or implementation of terms and conditions related to the transfer of or granting of access to source code in commercially negotiated contracts, or the voluntary transfer of</p>	<p>RCEP does not contain a provision on source code. However, Article 18 of the RCEP recognises the need to have dialogue with various stakeholders on emerging issues including the issue of source code. The provision further states that the parties shall take into account any recommendation arising out of the dialogue discussion in the context of the General Review of this Agreement. It appears that the Parties</p>

⁴⁶ World Trade Organization, Joint Statement on Electronic Commerce, *EU Proposal for WTO Disciplines and Commitments Relating to Electronic Commerce*, INF/ECOM/22 (26th Apr., 2019), available at, http://trade.ec.europa.eu/doclib/docs/2019/may/tradoc_157880.pdf (hereafter, *EU Proposal for WTO Disciplines and Commitments Relating to Electronic Commerce*).

⁴⁷ Katya Garcia-Israel and Julien Grollier, *Electronic Commerce Joint Statement: Issues in the Negotiations Phase*, *supra* note 34, at 12.

<p>(a) “the inclusion or implementation of terms and conditions related to the provision of source code in commercially negotiated contracts;” or (b) “a Party from requiring the modification of source code of software necessary for that software to comply with laws or regulations which are not inconsistent with this Agreement.”</p>	<p>or granting of access to source code for instance in the context of government procurement.”</p>	<p>to the RCEP have left open the debate on source code, and there may be an inclusion of such a provision based on future dialogue.</p>
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At WTO’s plurilateral negotiations, most countries agreed to prohibit the disclosure of source code of software, but the exceptions differed. While many developing countries and emerging economies did not comment on this issue, Singapore proposed that this obligation should not apply to software used for critical infrastructure, similar to the CPTPP’s clause.⁴⁸ However, there is no understanding of what critical infrastructure implies under the CPTPP or in Singapore’s proposal. Among the developed countries, the EU proposed that the prohibition against transfer of or access to source code should be without prejudice to requirements by a court, tribunal or by a competition authority to remedy a violation of competition law; protection and enforcement of intellectual property rights; and protection of essential national security interests.⁴⁹ The United States proposed exceptions in cases of legal investigations or enforcement action.⁵⁰ China did not comment on this issue, however, an absence of any provision to the effect in the RCEP gives an indication of China’s position in the future.

⁴⁸ Katya Garcia-Israel and Julien Grollier, *Electronic Commerce Joint Statement: Issues in the Negotiations Phase*, *supra* note 34, at 10.

⁴⁹ *EU Proposal for WTO Disciplines and Commitments Relating to Electronic Commerce*, *supra* note 46, at 3.

⁵⁰ *Communication from the United States*, *supra* note 40, at 6.

Key takeaways for a plurilateral e-commerce framework

It is evident from our analysis that significant challenges exist before a coherent plurilateral framework can be established. The CPTPP, RCEP and the EU-Japan FTA reflect many points of convergences as well as divergences which can be useful for a plurilateral framework on e-commerce in the future:

- (1) The disparities between Members on data related issues poses the greatest challenge for a potential plurilateral e-commerce framework. The US is demanding minimal restrictions on issues of data flow and data privacy, as reflected in the CPTPP. Whereas China is supporting an exclusion of any WTO commitments on such issues or the indisputable right to adopt measures in the interests of security, as reflected in the RCEP. Since the plurilateral negotiations have already alienated many DCs and most LDCs, it might be in the interest of Members to try and find a middle ground on issues of data to make progress towards a future e-commerce framework.
- (2) The EU-Japan FTA could be a point of convergence for the plurilateral e-commerce negotiations. The CPTPP's approach, which reflects the highest standard of liberalisation especially on data localisation and data privacy, may not be acceptable to countries like China which has constantly pressed for regulatory freedom on such issues. On the other end of the spectrum, the US or the EU may never agree to an RCEP approach due to weaker commitments on issues of customs duties, data flow and a completely absent obligation on the issue of source code. The EU-Japan FTA reflects a neutral ground as it focusses on engaging with Members' domestic regulatory policies on data flow and data protection. Simultaneously, it ensures that there is no dilution of obligations on market access. Countries like China may show more willingness to engage on such terms. While this may pose initial hiccups, especially for developing countries without strong domestic data protection norms, it could be an acceptable solution for most Members.

- (3) Many developing countries like China and Côte d'Ivoire have argued for more inclusive negotiations on e-commerce to accommodate the needs of DCs and LDCs.⁵¹ The RCEP, which includes many smaller South Asian DCs and LDCs, reflects the standard of commitments acceptable to these countries to some extent. The RCEP also provides a longer timeframe to smaller economies to fulfil the e-commerce commitments. Therefore, Members to the plurilateral negotiations should encourage dialogue with smaller DCs and LDCs and explore provisions on special and differential treatment on various issues.

There remains a long way to go before a plurilateral e-commerce framework can be established. Until then, FTAs may continue to act as the main platform for countries to engage in digital trade.

This white paper has been authored by Kruthi Venkatesh, a consultant working with Ikigai Law, with inputs from Nehaa Chaudhari, Director (Public Policy), Ikigai Law.

⁵¹ See *Communication from China*, *supra* note 38; World Trade Organization, Joint Statement on Electronic Commerce, *Communication from Côte d'Ivoire*, INF/ECOM/49 (16th Dec., 2019), available at, <https://webcache.googleusercontent.com/search?q=cache:QrDwBQIXzysJ:https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx%3Ffilename%3Dq:/INF/ECOM/49.pdf+&cd=1&hl=en&ct=clnk&gl=in>.