

# Enabling trust, trade flows, and innovation: the DEPA at work

BY STEPHANIE HONEY



## Introduction

If you asked the average person in the street to define “digital trade”, they might mention buying something on Alibaba or Amazon. They are probably less likely to talk about the myriad of other kinds of cross-border activity which look less like our conventional notions of “trade”, for example, digital services like cloud computing or online accounting or buying digital goods that were once physical products like e-books. They might also exclude digital platforms that stream music or movies, or the enabling of other kinds of trade using e-payments, digital documents, or blockchain.

Three significant trends have emerged in the last decade across different forms of digital trade. First, there has been a significant increase in both volume and value. This can be seen through the proxy of data flows, sometimes called the “lifeblood” of digital trade. Global internet traffic was 100 gigabytes per second in 2002. This traffic is predicted to be more than one and a half thousand times that rate in 2022.<sup>1</sup>

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Even as far back as 2016, an estimated 12 percent of global goods trade was undertaken via e-commerce platforms.<sup>2</sup> According to recent estimates, the “digital economy” comprises 15.5 percent of world GDP, with the value of e-commerce sales perhaps twice that share.<sup>3</sup>

The second trend involves many new regulations for the digital economy. Some are specifically focused on trade, but often they are incoherent in scope and effect. As a result, the third trend is becoming more prevalent: the rise in many kinds of digital trade restrictions. These range from regulations that curb cross-border data transfers to rules constraining the use of certain technologies, or sometimes simply a mismatch in standards or systems. They are, in effect, grit in the machinery of digital trade.<sup>4</sup>

The COVID-19 pandemic has exacerbated these trends. According to one estimate, COVID has accelerated the digitalisation of business operations by up to a decade.<sup>5</sup> Despite lockdowns and social distancing, many businesses have been able to move online to buy and sell goods and services. They carry on working remotely and manage trade flows with technologies like electronic documentation. Equally, businesses without a digital presence have struggled to survive. In 2020 alone, the number of internet users increased by more than 316 million people, with social media (an important part of the trade ecosystem) increasing by half a billion.<sup>6</sup>

Six months into the pandemic, however, a new kind of digital trade agreement, known as the Digital Economy Partnership Agreement (DEPA), was ratified with – very fittingly – the electronic signatures of three small, open, Asia-Pacific economies: New Zealand, Singapore and Chile.

The move towards more digital governance is also becoming more widespread, with many recent free trade agreements (FTAs) including “e-commerce” chapters and provisions. Six months into the pandemic, however, a new kind of digital trade agreement, known as the Digital Economy Partnership Agreement (DEPA), was ratified with – very fittingly – the electronic signatures of three small, open, Asia-Pacific economies: New Zealand, Singapore and Chile.

This paper explores several policy options for digital trade governance. It outlines the innovative features of the DEPA approach and details its goal to realise the full potential of digital trade for businesses, while also safeguarding policy space for governments. The paper also reflects on the DEPA’s scope of impact, given that many of its provisions are “soft law” rather than legally binding rules – and whether flexibility might in fact be an advantage in this fast-moving area.

## Innovations in structure and substance

The DEPA is novel in both structure and content. It is the only stand-alone, open-access trade agreement that is digital-only, modular in structure, and with a very broad scope.

### Digital-only

The DEPA is a dedicated digital trade agreement, reflecting the high levels of internet penetration and ubiquity of digital business models and mobile-first consumers in the Asia-Pacific region.<sup>7</sup> Although the WTO Agreements provide basic foundations, a global rules architecture for digital trade is lacking. Instead, at least prior to the DEPA, governments have grappled with setting digital trade rules through a patchwork of e-commerce provisions and chapters in FTAs. Half of the FTAs concluded between 2000 and 2019 include at least a few digital provisions, but often with very different levels of coverage and ambition.<sup>8</sup> As a digital-only agreement, the DEPA stands apart.

### Modular structure

Second, the DEPA is designed in modules. The agreement is comprised of sixteen thematic modules that are intended to work together, such as “Business and Trade Facilitation” and “Digital Identities.” However, they could equally be plucked out and used individually in an FTA or even in the current Joint Statement Initiative negotiations on e-commerce in the WTO. The model could be described as a novel way to deal with new issues.

**Figure 1 – DEPA modules**

|                  |   |
|------------------|---|
| <b>Module 1:</b> | Initial Provisions and General Definitions  |
| <b>Module 2:</b> | Business and Trade Facilitation (including paperless trading, domestic electronic transactions framework, logistics, electronic invoicing, express shipments, and electronic payments)                                  |
| <b>Module 3:</b> | Treatment of Digital Products and Related Issues (including customs duties on electronic transmissions, non-discriminatory treatment of digital products, and commitments on technology products that use cryptography) |
| <b>Module 4:</b> | Data Issues (including personal information protection, cross-border transfer of information and location of computing facilities)  |
| <b>Module 5:</b> | Wider Trust Environment (including cybersecurity cooperation and online safety and security)  |
| <b>Module 6:</b> | Business and Consumer Trust (including spam, online consumer protection, and access to the internet)  |
| <b>Module 7:</b> | Digital Identities  |
| <b>Module 8:</b> | Emerging Trends and Technologies (including financial technology, artificial intelligence, government procurement, and competition policy cooperation)  |

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|                   |   |
|-------------------|---|
| <b>Module 9:</b>  | Innovation and the Digital Economy (including public domain, data innovation, and open government data) |
| <b>Module 10:</b> | Small and Medium Enterprises Cooperation  |
| <b>Module 11:</b> | Digital Inclusion   |
| <b>Module 12:</b> | Joint Committee (including a raft of institutional arrangements)  |
| <b>Module 13:</b> | Transparency  |
| <b>Module 14:</b> | Dispute Settlement  |
| <b>Module 15:</b> | Exceptions  |
| <b>Module 16:</b> | Final Provisions (including processes for entry into force, amendments, accession, and withdrawal)      |

### Wide scope

Third, the agreement has a far broader scope than previous digital rules. Brought into the DEPA's focus are several digital economy topics that do not, at first blush, appear to be about trade. These issues include, for example, artificial intelligence, online safety, and open government data. This reflects a new way of thinking about 'trade in the digital economy' rather than the more limited scope of previous rules confined to data flows and border measures.

The DEPA responds by seeking to put in place rules and frameworks that create a more enabling digital environment overall.

From a business perspective, the nature of the regulatory and policy settings for the various elements of a cross-border transaction – from data flows to payments to documentation to consumer protection – can all impact how and whether trade takes place. The DEPA responds by seeking to put in place rules and frameworks that create a more enabling digital environment overall.

The corollary is that, in some less traversed areas such as digital identities or artificial intelligence (AI), the emphasis is on establishing a platform for collaboration rather than binding hard law at this stage. The intent? For regulations to evolve along with understanding of technology and policy, and to retain flexibility to adapt rules to local conditions where needed.

The DEPA's overall institutional design is similarly collaborative and agile. The agreement establishes a Joint Committee to oversee "further ways to enhance the digital economy partnership." There is also a mechanism to amend the agreement to accommodate new issues. The latter is not specified but could conceivably include the trade-related dimensions of technologies, such as additive manufacturing, 3D printing or cryptocurrencies.

### What is in the DEPA?

The modules of the DEPA can be grouped under three broad headings:

1. Enabling trusted data flows
2. Facilitation of end-to-end digital trade
3. Creating a platform for enhanced innovation and participation in the digital economy

Bookending these groups of issues are a preamble and a set of exceptions. The former underscores the centrality of digital technology in the modern economy and the need for a holistic approach to the issues. The exceptions leave governments to continue to regulate in the public interest in sensitive areas. These areas include security, prudential measures (such as those taken by governments to control financial risk or capital reserves), tax and the balance of payments, as well as standard WTO/GATT exceptions such as those for environmental measures.

### Enabling trusted data flows

Data flows are fundamental to digital trade, and trusted data flows are increasingly important. Engaging in digital trade, whether buying a book on an e-commerce platform or streaming a videogame, can not happen without cross-border data flows. Governments are increasingly regulating these flows, often to limit them or to require firms to keep data on a server in-market (“forced data localisation”). The rationale for these regulations can be grounded in protecting personal privacy or data, fostering cybersecurity, or facilitating law enforcement. While these objectives may be valid at face value, the design of the restrictions is not always fit for purpose or friendly to trade.

The DEPA’s approach on data issues largely restates the provisions in the Comprehensive and Progressive Agreement on Trans-Pacific Partnership (CPTPP), an 11-member FTA among Pacific Rim countries, to which Singapore, New Zealand and Chile are all party.

The CPTPP default is that data (“information”) flows and data storage should not be restricted. However, in both the CPTPP and DEPA there are exceptions to these free flows. The exceptions are for government measures aimed at achieving “legitimate public policy objectives”, which are not further defined. These exceptions must also not be a disguised restriction on trade, discriminate arbitrarily, or be more restrictive than required (again, not further defined). This lack of definition provides policy space for governments to regulate in the public interest, although they equally leave scope for ambiguous and inherently less trade-friendly approaches.

The DEPA also reiterates the CPTPP commitments to prohibit customs duties on electronic transmissions and not to discriminate in the treatment of digital products from different markets. These commitments are important for creating a level playing field for digital exports and enhancing predictability for businesses seeking to trade into overseas markets.

Trust in data flows and in the subsequent layers of digitally enabled transactions is an increasingly important issue for both governments and participants in the digital economy. Internet users want confidence about the way that data is collected and used, about the security of financial transactions, and about whether they are adequately protected against fraud, being misled, or receiving unsatisfactory goods or services.

The DEPA addresses such concerns through several provisions, including those related to personal information protection, cybersecurity, online safety, unsolicited electronic communications (“spam”), and online consumer protection. In short, the DEPA seeks to find common ground where regulatory approaches are absent or increasingly divergent, and where clear guard-rails will help businesses address consumer concerns and shore up the broader social license for digital trade.

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On personal information protection, for example, the DEPA requires economies to adopt robust legal frameworks (a requirement that goes beyond the ‘best endeavors’ approach in CPTPP). It also innovates by setting out agreed principles that should underpin such privacy frameworks. These principles include collection limitation, purpose specification, use limitation, transparency, and accountability.

The DEPA also includes modules on the “Wider Trust Environment” and on “Business and Consumer Trust.” The first of these is less ambitious than the second. The ‘Wider Trust Environment’ Module includes cybersecurity (a critical foundation for all digital activity) but does not go much beyond the headline concept of greater collaboration.

There is also a provision on “Online Safety and Security.” This is likewise modest in ambition. It recognizes the importance of a safe and secure online environment but merely commits members to “endeavor to cooperate to advance collaborative solutions to global issues.” Given growing concern over the impact of harmful online behavior and content, there is certainly a case to prioritize more active cooperation.

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On the other hand, “Business and Consumer Trust” includes provisions that break new ground. On spam, the DEPA signatories are obliged to maintain measures against unsolicited electronic communications and collaborate in developing responses.

As for consumer protection, international rules in this area are rare despite being a cornerstone of online consumer confidence. The DEPA requires signatories to protect consumers through relevant laws and sets out an illustrative list of the kinds of commercial conduct that should be prohibited. These behaviors include making false claims, failing to deliver promised products that have been paid for, or debiting consumers’ accounts without authorization. The agreement also requires the DEPA Parties to provide consumers with appropriate redress if needed, breaking new ground with a mandate to explore the benefits of “alternative dispute resolution mechanisms.” The latter are not specified but could potentially include automated processes or online mediation, for example.

### **Facilitating end-to-end digital trade**

End-to-end facilitation of digital trade is the DEPA’s second focus area. Several digital elements can contribute to the facilitation of physical goods trade. These include the use of electronic documentation and border processes (“paperless trade”), e-invoicing, e-payments, and digitally enabled logistics. The DEPA offers gold-standard operative provisions in many of these areas. The focus throughout is on collaboration aimed at fostering interoperable systems across DEPA members.

One unfortunate omission, however, is electronic signatures. Mandating their acceptance would facilitate more efficient trade transactions and lower costs for business.

The DEPA also mandates the use of frameworks for electronic transactions. These frameworks include using best endeavours to adopt the international models that have been developed under United Nations auspices, thus smoothing out cross-border discrepancies. One unfortunate omission, however, is electronic signatures. Mandating their acceptance would facilitate more efficient trade transactions and lower costs for business.

### **Paperless trade**

The DEPA provisions on paperless trade should generate tangible benefits for exporters. For many businesses, especially smaller operators, the cumbersome physical paperwork mandated by trade impedes efficiency and subsequent

growth. This may be a particular challenge in e-commerce, where shipments tend to be in small parcels rather than large containers, vastly increasing the paperwork required.

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The DEPA encourages the use of electronic and, ideally, machine-readable versions of existing trade administration documents, such as customs declarations, bills of lading, electronic sanitary or phytosanitary certificates, or certificates of origin. In most situations, DEPA members are obliged to accept these electronic documents as equivalent to paper versions, except where there are strong legal or other justifications to the contrary. This is an enormous breakthrough for businesses of all sizes.

That is not all. The agreement also fosters efforts towards the seamless interoperability of digital “Single Windows” (online facilities to submit trade information) and systems to exchange data and electronic records. Where possible, the DEPA applies international or open standards and model laws.

### **E-invoicing**

E-invoicing can enhance the accuracy and efficiency of transactions, save costs, and facilitate easier tax reporting across jurisdictions.

When enabled for use across borders, electronic invoicing can benefit many businesses, especially smaller firms. E-invoicing can enhance the accuracy and efficiency of transactions, save costs, and facilitate easier tax reporting across jurisdictions. In New Zealand, a move to e-invoicing could more than halve the cost of processing invoices and save businesses more than US\$3 billion over ten years.<sup>11</sup> Currently only a handful of countries around the world mandate e-invoicing.<sup>12</sup>

The DEPA breaks new ground not only by explicitly recognising the value of e-invoicing, but by requiring each economy to design measures that support interoperability, including by using international standards where possible. Mandating the members to work together in promoting interoperable e-invoicing systems is also novel. Eventually, this should mean that e-invoices issued in one DEPA country can be actioned more quickly, cheaply, and easily in another – and ideally in other markets too.

E-payments are another cornerstone of the DEPA, which recognizes the critical role they play in enabling broader digital trade transactions. The agreement outlines a set of principles to inform the regulatory approaches that DEPA members might adopt – principles that are focused on enhancing transparency, security, and interoperability. Transparency is enabled by the timely publication of relevant regulations, and adoption of risk-based approaches to implementing regulations. Interoperability is facilitated by using international standards and technical mechanisms, such as application programming interfaces (API), where possible. Overall, businesses are empowered to use a wider range of innovative payment solutions. New commercial opportunities also open for innovators.

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### Digital identities

Finally, interoperable digital identities for businesses as well as individuals, are potentially important foundational structures for digital trade. Digital identities provide a mechanism to enhance the security and efficiency of financial transactions and improve connectivity, trust, and inclusion across the board. With broad adoption, digital identities may unlock an estimated value equivalent to 3 to 13 percent of GDP by 2030.<sup>13</sup>

However, members may have very different approaches to the design and operation of digital identities. Singapore has a well-established centralised system for national digital identity. New Zealand is still developing its policy and regulatory settings, but it will likely establish a system very different from that of Singapore.<sup>14</sup> The DEPA strives for interoperability within the distinct regimes for digital identity. It recognizes the many different layers involved, including for technical standards, legal frameworks and regulatory effects, policies, security standards, and user adoption. While this adaptation process will take time, success will make a tangible difference to the “red tape” faced by businesses in the region and boost connectivity amongst firms.

### Fostering innovation and inclusion

Fostering innovation and facilitating opportunities for broader participation in the digital economy is integral to the DEPA. These elements go well beyond the types of issues covered in earlier digital trade provisions. The DEPA acknowledges that these dimensions of “trade in the digital economy” require further work and deeper understanding before international trade rules can or should be developed.

### Fostering innovation and emerging technologies

The DEPA includes modules on both “Emerging Trends and Technologies” and “Innovation.” Both aim to respond to new technologies and business models, while encouraging innovation and creativity.

The increasing ubiquity of AI and innovative financial technologies (fintech) raises important policy issues around data flows, competition, and the unintended consequences of these ground-breaking technologies. On the other hand, creating an enabling environment for AI and fintech potentially has a large payoff. According to one estimate, the potential additional economic output generated by AI can reach US\$13 trillion by 2030.<sup>15</sup> As for fintech, companies cannot fully succeed in cross-border trade if they cannot be paid in an efficient, seamless, and low-cost manner.

The DEPA mandates or encourages collaboration in these areas. On AI, it encourages DEPA members to adopt ethical and governance frameworks that establish an agreed list of core principles. Among the core principles: AI should be transparent, fair, explainable, and grounded in human-centred values. On fintech, the DEPA recognises that effective cooperation will require the involvement of business. It promotes cooperation between firms in the sector, and between entrepreneurs and start-up talents.

The DEPA identifies two further emerging areas for deeper cooperation among members. These are government procurement and competition policy. For procurement, digitisation can help to support broader objectives, such as open, fair, and inclusive procurement markets; the DEPA mandates a closer look at how this can be achieved. On competition policy, members are encouraged to consider

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cooperation in agreed areas including the development of competition policies in digital markets, capacity-building for competition officials, and cooperation on competition law enforcement in digital markets.

With an increasingly open and enabling cross-border digital environment, more innovative business models, products and services can emerge. The agreement recognises the importance of a rich and accessible public domain and establishes a framework for future data-sharing projects and data sandboxes. The goal is an environment that enables firms to experiment with innovative business models. The DEPA also encourages an open approach to government data and cooperation as well as public access, all of which can create opportunities for businesses to develop new products and services.

### **Fostering greater participation**

Finally, the DEPA strives for greater inclusion in digital trade, in particular for small and medium-sized enterprises (SMEs). Digital trade can create new, streamlined, and more efficient ways for small businesses to connect with markets and customers. This potential is boosted when the rules are coherent and interoperable across as many economies as possible.

The DEPA fosters inclusion in several ways. First, the agreement recognises that SMEs need access to information, capital and credit, digital tools, technology, and commercial opportunities. Hence members are required to establish a website that includes the text of the DEPA along with information related to data and privacy regulations, regulatory sandboxes, technical standards, and government procurement opportunities.

The DEPA also offers an SME Dialogue to foster connections and information exchange between small businesses, policymakers, and the broader business community. This engagement by and with businesses will be key to co-designing digital rules that are fit-for-purpose. It also creates an important platform for systemic engagement with a business sector that can otherwise be challenging for policymakers to reach.

Other under-represented parts of the community are also stakeholders of the DEPA. Such groups may include women, rural populations, low-income communities, and Indigenous peoples. The agreement mandates cooperation in efforts to increase their participation, including through sharing of best practices, programmes to build digital skills, and strengthening the evidence base for policymaking.

### **What is not in the DEPA?**

The DEPA carves out new ground in many areas, as discussed above, but it is not a kitchen sink. For example, it does not include rules to protect against forced disclosure of source code and algorithms. This is an issue of potential commercial interest, but also one where governments may want to retain a level of oversight. Nor is the DEPA as ambitious as it could be on financial services. Financial services are excluded from the prohibition on “forced data localisation” discussed above; in other words, DEPA members can require financial services data to be stored locally. This adds compliance costs for business and may reduce innovation in this important enabling technology.

The most notable omission, however, is that the DEPA does not include market access commitments on digital services or equipment. These would typically

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be found in a more comprehensive FTA aimed at opening markets for goods and services – but this agreement is a unique, *sui generis*, model. In a practical negotiating sense, this omission allowed the Parties to avoid the complexities around meeting the standard requirements for WTO-consistent FTAs under GATT Article XXIV and GATS Article V.

At least for the current members, this omission is not material in economic terms. As noted above, Singapore, New Zealand, and Chile are all members of the CPTPP, which includes market access commitments in relevant areas. Should the DEPA expand to a broader group of members, however, the lack of a market access element may be considered a shortcoming.

### An example for others to follow

What is the value of the DEPA model, given the relatively small size of the founding members? The DEPA's significance lies less in its current economic heft and more in its potential demonstration effect. As noted above, the modular structure of the agreement is intended to enable other countries to make use of the DEPA's cutting-edge provisions in particular areas. But the DEPA members aspire to much more: a building block to broader outcomes. The DEPA is structured as an open agreement which others are encouraged to join. Only a few months after its entry into force for New Zealand and Singapore – and before Chile has even concluded its domestic ratification processes – both Canada and Korea had begun domestic consultations on accession.

It would seem logical for others at the cutting edge of digital policymaking to join too. Likely candidates could include other members of the CPTPP, such as Australia, Japan, Malaysia, Viet Nam, and Mexico. The United States would seem an obvious choice, too: it is not a CPTPP member, but was instrumental in the design of its digital provisions.<sup>16</sup> The DEPA could eventually form the basis of a much broader and perhaps global set of rules and understandings about how to optimise digital trade.

Absent this kind of building-block approach, or progress in the current WTO negotiation, we may see a further fragmentation of digital trade rules. In that context, the conclusion of a digital-forward agreement between Singapore and Australia soon after the DEPA was signed, and the subsequent launch of other digital-forward negotiations among Singapore, Korea, the United Kingdom and even reportedly Viet Nam, is notable. Even if each individual agreement may be highly ambitious, this multiplication of bespoke digital-only agreements may in fact work against a seamless, "borderless" digital economy.

### Conclusion

The DEPA is a 'living agreement' designed to deepen mutual understanding of the digital economy and to be responsive to emerging technologies, business models, and regulatory challenges. Engagement among members and with the business community can in effect enable the co-design of more agile governance models for digital trade. This marks a welcome departure from the rigidities of traditional trade policymaking that typically require years or even decades to reach outcomes, even in more focused settings such as the current WTO negotiations.

That does not mean that the DEPA is perfect. On the contrary, there is much work ahead to put flesh on the bones in important areas with rapid technological progress and business uptake, such as AI. As noted above, it may also prove to be the case that new market access commitments among an expanded DEPA

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membership would amplify the benefits of the DEPA even further. Given the importance of digital technologies to modern trade, however, and the desire around the world to streamline the complexities of digital trade regulation, joining the DEPA merits serious consideration.

The full text of the DEPA can be accessed [here](#).

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