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**Using trade agreements to foster trade in digital services**

**Ms. Deborah Elms**, Founder, Executive Director, Asian Trade Centre

\*The views expressed are those of the author and do not necessarily reflect the views of UNCTAD.





ASIAN TRADE CENTRE

## Using Trade Agreements to Foster Trade in Digital Services

**Dr Deborah Elms**  
Executive Director, Asian Trade Centre  
[elms@asiantradecentre.org](mailto:elms@asiantradecentre.org)

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# Existing Digital Services Commitments Poor

- Three challenges to existing global digital services commitments:
  - Overall services coverage can be quite thin, with many “missing” or uncovered service sectors and subsectors
  - Often limited commitments to services trade under “Mode 1”
  - No rules governing trade in data or wide range of digital trade-related issues that increasingly matter to services
- Current WTO services schedules coincide with launch of public “World Wide Web” in 1995
- Given high levels of uncertainty at time, many governments reluctant to bind commitments for Mode 1
- Extremely limited progress at WTO in creating greater consistency in rules or further liberalization
- Hence, Asian governments increasingly moving to bilateral and regional arrangements to cover digital trade and services



# Fours Ways of Managing Digital in Asian FTAs

- To embed coverage in bilateral free trade agreements (FTAs)
  - In practice, many bilateral FTAs in Asia continue to have limited services sector coverage
  - Many do not include provisions on other elements of digital services like data rules, intellectual property rights in the digital sphere, digital investment provisions, etc
- To include digital services more explicitly in regional FTAs
  - Increasingly popular approach including through ASEAN, the Regional Comprehensive Economic Partnership (RCEP), and Comprehensive and Progressive Trans-Pacific Partnership (CPTPP)
- To create a “stand-alone” digital trade arrangement
  - One with Chile, New Zealand and Singapore called the Digital Economy Partnership Agreement (DEPA)
- To create a deeper set of rules for digital trade attached to an existing FTA
  - Several in place with Singapore and Australia, South Korea, and the United Kingdom

# E-Commerce and Digital Trade



- Typically, digital trade and the digital economy means goods and services as well as data and supporting policies
  - In trade agreements, e-commerce remains the “umbrella” term
- When working on e-commerce trade, important to remember *not* just about goods
  - Can also include broad range of services (plus telecoms and financial services), investment, data rules and regulations, intellectual property rights adjustments for digital, standards related to digital, online consumer protection, MSMEs, development, capacity building, and so forth
- Digital trade is a cross-cutting or horizontal topic and needs to be effectively managed
- Perhaps use of e-commerce as reference term limits focus on importance of digital services and, therefore, coverage of services

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# Digital Trade Rules Vary in Each

- Digital not just about e-commerce chapter
- Also enabling provisions for e-commerce goods trade
  - Such as paperless trade commitments, e-signatures, digital submissions of documentation and so forth
- Services delivered digitally
  - May include specific commitments for digital trade
  - Rules in telecommunications and/or financial services chapters too
- Specific sectoral commitments on some aspects of digital trade, including services that are supplied via digital means
- Intellectual property rights adjustments for digital environment



# Three Specific Agreements to Watch

- Comprehensive and Progressive Trans-Pacific Partnership (CPTPP)
  - In force since late 2018
  - Australia, Canada, Japan, Mexico, New Zealand, Peru, Singapore and Vietnam
  - Accession talks underway with UK, possible China/Taiwan/Ecuador
- Digital Economy Partnership Agreement (DEPA)
  - Chile, New Zealand and Singapore
  - “Modular” approach to a digital-only deal
  - Accession of Korea underway, China asked to join
- Digital Economy Agreement (DEA)
  - Australia and Singapore
  - DEAs also signed: SG/UK and SG/Korea
  - Updated and extended existing FTA with digital provisions
  - Innovative use of MOUs to address newest issues not yet “ripe” for inclusion in agreement rules

✓	Provision is identical (or very close to identical)
✓ (+)	Provision article is more comprehensive
✓ (-)	Provision article is less comprehensive
✗	No similar provision articles

# Comparison of CPTPP/DEPA/DEA

NO.↓	Digital Trade Provisions	DEA	DEPA	CPTPP
1	Commitments to facilitate digital trade	✓	✓	✓
2	No customs duties on electronic transmissions	✓ Article 5	✓ Article 3.2	✓ Article 14.3
3	Non-discrimination of digital products	✓ Article 6	✓ Article 3.3	✓ Article 14.4
4	Domestic electronic transactions framework	✓ Article 8	✓ Article 2.3	✓ Article 14.5
5	Electronic authentication and signatures	✓ (+) Article 9	✗	✓ (-) Article 14.6
6	Paperless trading	✓ (+) Article 12	✓ (+) Article 2.2	✓ (-) Article 14.9
7	Electronic invoicing	✓ (+) Article 10	✓ (-) Article 2.5	✗
8	Electronic payments	✓ Article 11	✓ Article 2.7	✗
9	Express shipments	✓ Article 13	✓ Article 2.6	✓ Article 5.7
10	Online consumer protection	✓ Article 15	✓ Article 6.3	✓ Article 14.7
11	Cooperation on competition policy	✓ Article 16	✓ Article 8.4	✗
12	Personal information protection	✓ (-) Article 17	✓ (+) Article 4.2	✓ (-) Article 14.8

13	Unsolicited commercial electronic messages	✓ (+) Article 19	✓ (-) Article 6.2	✓ (-) Article 14.14
14	Submarine telecommunications cable systems	✓ Article 22	✗	✗
15	Location of computing facilities for financial services	✓ Article 25	✗	✗
16	Data innovation	✓ (-) Article 26	✓ (+) Article 9.4	✗
17	Open government data	✓ Article 27	✓ Article 9.5	✗
18	Source code	✓ (+) Article 28	✗	✓ (-) Article 14.17
19	Digital identities	✓ Article 29	✓ Article 7.1	✗
20	Standards and conformity assessment for digital trade	✓ Article 30	✗	✗
21	Artificial intelligence	✓ (+) Article 31	✓ (-) Article 8.2	✗
22	FinTech and RegTech Cooperation	✓ (+) Article 32	✓ (-) Article 8.1	✗
23	Dispute settlement	✓ (+) Article 21	✓ (+) Article 14	✓ (-) Article 14.18



# What Explains Specific Variations?



- Part of the variation between these three agreements is about timing: older models tend to have less comprehensive commitments
  - Not all commitments are equal—some are currently “cooperation” only
- Similarities come from past experiences working together
- Differences from diverse objectives:
  - Create stand-alone FTA
  - Modernize and update an existing FTA
  - Design digital-only deal with the intention of replicating provisions elsewhere by members and non-members
- Bottom line: lots of ways to get to a solution to provide greater consistency in digital trade rules suitable for the future

# Example of RCEP = 15 Members Across Asia



RCEP in force in July 2022 for all but Indonesia, Myanmar and Philippines

# Trade in Services

- Many services firms already operate in RCEP countries
- Many also currently invest in member states
- *But* access and protection not guaranteed
- Rules can shift quite suddenly, leaving firms with little recourse and limited warning
- RCEP can help limit risk and improve stability for firms
- Like all trade agreements, services commitments have rules plus country-specific commitments or schedules



# Managing Services



- Services commitments build on existing FTAs
  - But underlying FTAs have weak services chapters and commitments
- Complication: methods used by members to create schedules of commitments
  - Half used “positive” list scheduling and half used “negative” list reservations
  - Can be difficult for firms to untangle
  - Commitment for all to become negative listing in time
- Chapter contains helpful language on consistency, limited qualifications and licensing requirements, should not be “trade restrictive”
- Prohibitions on “performance requirements” for services included
  - Examples: number of branches, local staff, equity requirements

# Two Ways of Making Services Commitments in RCEP

## Positive List

Cambodia, China, Laos, Myanmar, New Zealand, Philippines, Thailand and Vietnam

## Negative List

Australia, Brunei, Indonesia, Japan, Korea, Malaysia and Singapore

# Scheduling Services



- Under a "positive list" if a specific sector or method of delivering services is included, sector is opened for RCEP competition
  - Put simply, if a sector is listed, it's opened somehow
- Under "negative list" if a member did not list a service in the Non-Conforming Measures annex, it is *automatically* opened to member countries
  - If you *don't* see your sector listed (or scheduled) it is opened for RCEP competition
  - Negative lists automatically open new sectors for RCEP competition
  - Note, however, often sweeping nature of existing reservations
- Both approaches may still be subject to some internal restrictions, like the potential need for licenses or professional requirements (like local suppliers of the service)
- RCEP members agreed to switch all schedules to negative lists after 8 years

# Example: Cambodia's Positive Schedule

Modes of Supply: 1) Cross-border Supply 2) Consumption abroad 3) Commercial presence 4) Presence of natural persons

Sector or Subsector	Limitations on Market Access	Limitations on National Treatment	Additional Commitments
<p>a) Legal Services (CPC 861)</p> <p>Foreign legal consultancy on law of jurisdiction where service supplier is qualified as a lawyer (including home country law, third country law, and international law)</p>	<p>(1) None</p> <p>(2) None</p> <p>(3) None</p> <p>(4) Unbound except as indicated in the horizontal commitments.</p>	<p>(1) None</p> <p>(2) None</p> <p>(3) None</p> <p>(4) Unbound except as indicated in the horizontal commitments.</p>	
<p>b) Accounting, auditing, bookkeeping services (CPC 862)</p> <p>- Accounting, auditing, bookkeeping (CPC 86211, 86212, 86220)</p>	<p>(1) Must have commercial presence in Cambodia for auditing services.</p> <p>(2) None</p> <p>(3) None</p> <p>(4) Unbound except as indicated in the horizontal commitments.</p>	<p>(1) None</p> <p>(2) None</p> <p>(3) None</p> <p>(4) Unbound except as indicated in the horizontal commitments.</p>	

# Example: Malaysia's Negative List

6.	Sector	:	Real estate services on a fee or contract basis
	Subsector	:	-
	Level of Government	:	Central and Regional
	Obligations Concerned	:	National Treatment (Article 8.4 and Article 10.3) Local Presence (Article 8.11)
	Description	:	<u>Trade in Services and Investment</u>  Only registered persons and authorised foreigners registered with the Board of Valuers, appraisers, estate agents, and property managers can provide real estate services for a fee or on contract basis.
	Measures	:	<i>Valuers, Appraisers and Estate Agents Act 1981 [Act 242]</i> <i>Valuers, Appraisers and Estate Agents Rules 1986 [P.U. (A) 64/1986]</i> <i>Valuation and Property Services Rules 1999 [P.U.(A) 382/99]</i>



# Conclusions



- Asian governments increasingly using trade agreements as one mechanism to tackle newer issues
- Digital trade, including digitally delivered services, makes up a growing share of overall trade flows in the region
- Past commitments failed to capture many digital services or provide consistent rules of managing trade in services
- A variety of trade arrangements, including stand-alone digital only agreements, are one way forward
- But, as these approaches apply only to members, they also can discriminate against non-members by providing less access and fewer consistent rules
- Digital trade does not recognize geographic boundaries: having a global agreement would be clearly best solution to future challenges

# Questions?

The ATC is the premier regional thought leader, advocate and educator for trade in the Asia-Pacific. We are trade policy and supply chain subject matter experts uniquely positioned to meet the trade related needs of businesses—small and large—and governments—regional and foreign—operating across the region.



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[info@asiantradecentre.org](mailto:info@asiantradecentre.org)  
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