AUSTRALIA-SINGAPORE DIGITAL TRADE AGREEMENT–SETTING NEW BENCHMARKS IN TRADE GOVERNANCE

Australia has achieved its most comprehensive deal on digital trade. The government has put down clear markers for other bilateral and regional trade negotiations, including with the EU; and taken a global leadership role, along with Singapore, in signalling vital directions for the WTO negotiations on Electronic Commerce (e-commerce).

What is the Digital Economy Agreement?

The Australia-Singapore Digital Economy Agreement (DEA) is a key new pillar of the bilateral Comprehensive Security Partnership signed in 2016. It also updates and replaces the e-commerce chapter in the Singapore/Australia Free Trade Agreement (SAFTA) originally signed in 2003. Two decades later, how much further have the two parties managed to go in extending the digital trade architecture?

This agreement is *not* about market access, and for example leaves untouched the SAFTA text and schedules of commitments on cross-border trade in services. Rather, the DEA's goal is to go further in digital trade rule-making than the original SAFTA.

The text moves away from the increasingly antiquated, unhelpfully narrow notion of "e-commerce" in international trade negotiation. The coverage is more comprehensive on issues related to data flows, and in facilitating wide-spread bilateral technological and regulatory cooperation for the digital age. Importantly, this helps shift the focus of international rule-making to the issues in greatest need of updating.

In this article, I go straight to the objectives which tend to be highest priority for regional business yet also the most fraught in the global inter-governmental struggle to reduce regulatory heterogeneity and build interoperability in digital trade.

Allowing Commercial Traffic in Data

One key objective is to achieve interoperability with respect to regulations protecting personal data privacy. The DEA's Article 17 encourages development of mechanisms to

promote compatibility between the parties' regimes including via international frameworks. While not new, the innovation lies in provision of more details on the principles to which such regimes should abide. It also specifically supports the APEC Cross-Border Privacy Rules as a valid mechanism to facilitate cross-border data flows.

Article 23.2 affirms the freedom of commercial cross-border data flows, including of personal information. Exceptions apply for legitimate public policy objectives (LPPOs) as long as there is no unjustifiable discrimination or disguised restriction on trade nor restrictions greater than required to achieve the objective.

This language goes beyond the Comprehensive and Progressive Trans-Pacific Partnership (CPTPP) for example, because it is inclusive of financial services. What is important here is the continued alignment of the DEA with the US/Mexico/Canada Agreement (USMCA). Australia and Singapore, as chair and co-convenor respectively of the WTO negotiations on E-Commerce, thereby reaffirm their positions that this model of trade governance is best practice.

The same is not quite true of Article 24. Like the USMCA, it bans data localisation requirements as a condition for conducting business in the parties' territory. Unlike the USMCA, but like the original SAFTA chapter, it continues to allow exceptions for LPPOs. Possibly Australia and Singapore have retained this flexibility in order to offer the text as a potential means of solving problems in the WTO.

The DEA also introduces a separate provision disciplining data localisation requirements for financial services. There is no broad exception for LPPOs, but specific prudential exceptions do apply.

No Customs Duties on E-Transactions

Another objective is how to make the WTO Moratorium on Customs Duties on E-Transactions permanently binding. This soft law device, currently extended only until the next WTO Ministerial Meeting, faces opposition from members with protectionist digital industrial policies. Tariffs are a protectionist instrument used till now only for trade in goods. The notion that they might ever be imposed on e-services brings great anxiety to Australian and Singaporean services industries. The original SAFTA and the new DEA, like CPTPP and USMCA, ban customs duties on e-transactions - but do not preclude internal taxes. The application of trade-related disciplines to digital services taxation looms as the next contentious multilateral agenda item.

No Discrimination against Digital Products

The DEA bans less favourable treatment for digital products except broadcasting (digital products are defined as computer programmes, text, video, image or sound recordings that are digitally encoded and transmitted electronically). It permits subsidies and government grants. This is not new, either. But such text continues to cross a red line for the EU: with whom Australia has always otherwise been aligned in the WTO on retaining freedom for domestic support of creative and cultural services content. It's time now to move trade

policy mindsets from the analogue to the digital age. So watch this space in the Australia-EU FTA negotiations.

Protect Intellectual Property (IP)

The DEA bans any requirement for access to software source code as a precondition for market access. This goes well beyond the original SAFTA chapter which only applied to mass market software. Furthermore, by including bespoke software the new discipline will have special benefits to SME exporters. The DEA also contains an innovative MFN-forward commitment: if either party enters a similar agreement with a third party, the DEA provision automatically applies to the software source code algorithms of the third party.

This includes evolving algorithms so this provision meets industry requests in effectively granting IP for artificial intelligence (AI). The EU, which appears to remain hesitant on AI, especially in financial services, will no doubt take note.

Facilitate Trade by Building Digital Trust

This is the nuts and bolts part of the Agreement. Mutual recognition of digital identities, e-authentication and e-signatures, e-invoicing, paperless trading, express shipments, online facilitation of e-payments, consumer protection, spam, open government data, submarine telecommunications connection, cybersecurity: the DEA inches forward incrementally on multiple fronts of regulatory cooperation. The Agreement shows how Australia and Singapore (both in leadership roles in the WTO negotiations on E-Commerce) are jointly shaping the enabling environment for global digital trade.

This includes international digital standards development and compliance as the fundamental enabling bedrock for digital market access. The two parties have agreed to work more intensively in international fora and to identify priorities for further bilateral and regional work. This is high priority for regional business and the DEA at last gives the matter full attention.

Intensify Regulatory Cooperation

Regulatory cooperation is critical to building mutual confidence in regulatory regimes across jurisdictions. It is essential to paving the way for mutual recognition of equivalence and greater harmonisation across borders. The DEA makes big strides forward on the regulatory cooperation front. It contains new provisions on cooperation on competition policy and on efforts to counter terrorism financing and money laundering. It is accompanied by seven agency-level MoUs, setting out a detailed bilateral agenda for sharing information and developing regulatory best practices on a broad scale, including experimenting in regulatory sandboxes for joint data innovation, and developing ethical frameworks for AI.

Where to next?

Australia is negotiating separate bilateral trade agreements with the EU27 and with the UK. Based on experience negotiating e-services issues with the EU28 for the plurilateral Trade in Services Agreement (in deep freeze under the current US Administration), Australian stakeholders know the EU red lines and anticipate that digital trade, together with geographic indicators, will be the key deal breakers in bilateral negotiations with the EU, but probably not with the UK.

The DEA strongly reasserts long-standing Australian and Singaporean positions on cross-border data flows and data localisation, with full support from both business communities. This bolsters both governments' positions in the WTO negotiations on E-Commerce. Australia, as chair of those negotiations, can take the high ground on commercial cross-border flows of personal data and wait till the US Administration is ready to hammer it out with the EU.

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