

21-22 Digital Agreements: What's Covered, What's Possible

Gary Clyde Hufbauer and Megan Hogan

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INTRODUCTION

Since the turn of the century, rapidly expanding digital flows have significantly contributed to world economic growth. [One estimate](#) suggests that digital flows may have accounted for almost 5 percent of global GDP in 2015.¹ [Another](#) suggests that digital flows increased global GDP by at least \$2.8 trillion in 2014.

COVID-19 accelerated the revolution in 2020, as businesses and consumers increasingly “went digital” in everything from online education and work to shopping. The [e-commerce share](#) of global retail trade rose from 14 percent in 2019 to 17 percent in 2020.

Digital flows encompass a long list of activities, from online education to streaming services to performance data on refineries, factories, and offices. Examples include Zoom meetings, Google search results, Spotify music, and Netflix shows. Digital flows contribute to global GDP growth through online purchases of commercial goods (e-commerce); the provision and purchase of services, such as consulting, accounting, and telemedicine; and daily flows of data among the global subsidiaries of multinational corporations. Equally important are digital flows of information of interest to consumers—information such as property listings or car sales that, before the advent of digital search engines, could be reached only through costly, time-consuming searches.

Many countries, particularly the United States, have enormous commercial and cultural interests in preserving the freedom of cross-border digital traffic. Strong international agreements can keep digital highways open, but agreements reached so far allow ample room for ideological and protectionist obstacles. A new and better agreement is necessary to safeguard the growth of digital flows.

Gary Clyde Hufbauer, nonresident senior fellow at the Peterson Institute for International Economics, was the Institute's Reginald Jones Senior Fellow from 1992 to January 2018.

Megan Hogan, research analyst at the Peterson Institute for International Economics, is the founder and codirector of DisinfoLab, a student-led research lab based at the College of William & Mary's Global Research Institute.

¹ Older reports reflect similar findings. A [2014 report](#) from the United States International Trade Commission estimated that “the removal of foreign barriers to digital trade in digitally intensive industries would [have resulted] in an estimated increase of 0.1-0.3 percent (\$16.7 billion-\$41.4 billion) in US GDP in 2011.” A [2012 report](#) from the Boston Consulting Group estimated that the potential from liberalizing barriers to internet access and digital trade across the Group of Twenty (G20) countries may have been as high as \$4.2 trillion.

Six international digital agreements have been concluded thus far:

- Chapter 14 of the Trans-Pacific Partnership (TPP), now incorporated in the 11-country [Comprehensive and Progressive Trans-Pacific Partnership \(CPTPP\)](#) (2016).
- Chapter 19 of the [US-Mexico-Canada Agreement \(USMCA\)](#), which replaced the North America Free Trade Agreement (NAFTA) (2019).
- The [US-Japan Digital Trade Agreement](#), which is very similar to Chapter 19 of the USMCA (2019).
- Revised Chapter 14 of the [Singapore-Australia Free Trade Agreement \(SAFTA\)](#) (2020).
- The [Digital Economic Partnership Agreement \(DEPA\)](#) between Singapore, New Zealand, and Chile (ratified by the first two) (2020).
- Chapter 12 of the 16-country [Regional Comprehensive Economic Partnership \(RCEP\)](#) agreement (2020).

Most digital agreements are chapters of larger trade agreements, and the rules in these agreements are not limited to digital commerce. Online activities covered by existing digital agreements include cross-border data flows, digital communications, digital identities, artificial intelligence, and website access. However, because these agreements allow countries to invoke various exceptions (to maintain “public order,” “morals,” and “national security”), they allow for the interruption of large swaths of digital activity. Weak digital agreements therefore have negative implications for an increasingly interconnected—and digital—global economy.

Under negotiation are at least two other digital pacts: the 71-country World Trade Organization (WTO) E-Commerce [“Joint Statement Initiative” \(JSI\)](#), a plurilateral agreement, and an Indo-Pacific pact led by Australia in which [seven countries](#) (Australia, Singapore, Japan, South Korea, Canada, New Zealand, and Chile) have expressed strong interest and that has invited the United States to join. Given the diversity of the parties to the JSI, which differ widely in their economic and socio-political structures, economic interests, and perspectives on digital freedom, a JSI is unlikely to be sufficient to curb barriers to digital trade. The Indo-Pacific agreement has greater ambition than the JSI. As the only other digital trade agreement under negotiation, and the only agreement composed primarily of like-minded governments, it is the best vehicle for making progress on digital trade rules.

Figure 1 summarizes common provisions in five of the six concluded agreements (text of the US-Japan Digital Trade Agreement is very similar to the USMCA) and shows how Chinese and US priorities differ. The following sections of this Policy Brief group several provisions under five heads: Good Housekeeping, Consumer Protection and Personal Information, Chinese Red Lines, Standard Exceptions, and US Sticking Points.

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Figure 1
Chinese and US digital trade priorities make a future international agreement unlikely

Compatibility of US and Chinese digital trade priorities with existing trade agreements

Chinese priorities	CPTPP	USMCA	SAFTA	DEPA	RCEP
Domestic computing facilities as a condition of trade	⊘ Not compatible In most cases	⊘ Not compatible In most cases	⊘ Not compatible In most cases	⊘ Not compatible In most cases	✓ Authorized In some cases
Disclosure of source code as a condition of trade	⊘ Not compatible	⊘ Not compatible	⊘ Not compatible	? No commitment	✓ Authorized In some cases
Dispute settlement for e-commerce differences	✓ Authorized Between members	? No commitment	? No commitment	✓ Authorized Between members	? No commitment
Can restrict cross-border data and investment flows	✓ Authorized In some cases	✓ Authorized In some cases	✓ Authorized In some cases	✓ Authorized In some cases	✓ Authorized In some cases

US priorities

Digital platforms not liable for third-party content	? No commitment	✓ Compatible	? No commitment	? No commitment	? No commitment
Digital service taxes do not discriminate against US firms	✓ Compatible	✓ Compatible	✓ Compatible	? No commitment	? No commitment

CPTPP = Comprehensive and Progressive Agreement for Trans-Pacific Partnership

USMCA = United States-Mexico-Canada Agreement

SAFTA = South Asian Free Trade Area

DEPA = Digital Economy Partnership Agreement

RCEP = Regional Comprehensive Economic Partnership

Note: China’s priorities reflect exceptions and omissions in RCEP Chapter 12 from CPTPP Chapter 14.

US priorities reflect new provisions in USMCA Chapter 19 not present in the North American Free Trade Agreement (NAFTA).

Source: Chapter 19 of USMCA; SAFTA; DEPA; CPTPP; RCEP.

GOOD HOUSEKEEPING

“Good Housekeeping” provisions are basic and generally uncontroversial provisions. They are critical for efficient digital trade.

The core Good Housekeeping features include the following:

- Customs duties, fees, or other charges should not be imposed on electronic transmissions.
- Digital products should not be subject to discriminatory treatment.
- Electronic signatures and authentication should be enabled.
- The authorities should accept paperless trade documentation.

All six existing digital agreements include these provisions, but “national security” can be invoked to override them. Given the popularity of these provisions, it seems likely that the WTO E-Commerce JSI and almost certainly the nascent Indo-Pacific pact will include them. A prohibition on customs duties is unclear; however, India, Indonesia, South Africa, and several other developing countries would like to impose duties on technology giants.

CONSUMER AND PERSONAL INFORMATION PROTECTION

Years of frequent and severe international data breaches and misuses of data have prompted the inclusion of provisions protecting consumer and personal information in digital trade agreements. So far, however, they have not set minimum standards of protection or been mandatory. Instead, protection provisions are framed as calls for national action rather than binding rules. According to these provisions, each party should adopt or maintain (1) consumer protection laws that prohibit fraudulent and deceptive commercial activity and unsolicited messages (spam) and (2) a legal framework that protects the personal information of digital trade users.

Good Housekeeping provisions are popular with digital platforms and business users; individual users now demand more vigorous action on Consumer and Personal Information Protection. Recent polling found that [80 percent of registered voters in the United States](#) agree that the federal government needs to curb the influence of big technology companies “that have grown too powerful and now use our data to reach too far into our lives.” China’s new [Personal Information Protection Law](#) reflects frustration within both the government and [Chinese society at large](#) over internet fraud, data collection, and data theft by Chinese technology companies.

Whether calls for national action without minimum standards and binding rules will be sufficient for the WTO E-Commerce JSI or the nascent Indo-Pacific pact to pass muster with the broad public remains to be seen. Having enacted data and privacy protection legislation in [128 of the 194](#) United Nations Conference on Trade and Development (UNCTAD) countries,² consumer advocates and legislatures may insist on binding minimum levels of protection in new digital agreements. However, standards for personal data protection differ widely across countries, as do enforcement measures, so agreement on a common minimum will be difficult. Currently, [the United States and the European Union](#) are trying to agree on a pact for personal data protection in transatlantic transmission.

CHINESE RED LINES

By far the largest economy in the region, China anchors the RCEP agreement of 16 Asian members. The text of that agreement almost certainly reflects China’s wishes and gives an excellent indication of Chinese “Red Lines” in digital trade. As one of the major digital powers, China wields considerable influence in the

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2 UNCTAD was established in 1964 as a forum for developing countries to debate and shape rules governing international commerce.

WTO JSI negotiations. Chinese Red Lines therefore threaten to restrict the growth of digital flows. Their inclusion in an agreed JSI would strengthen ideological and protectionist obstacles to digital trade.

The electronic commerce chapters of the RCEP (Chapter 12) and the CPTPP (Chapter 14) are similar. Their similarity is unsurprising, as six Asian countries—Australia, Japan, Malaysia, New Zealand, Singapore, and Vietnam—are members of both. The RCEP chapter, however, includes more exceptions and omissions than the CPTPP chapter. The following provisions in the RCEP either modify or erase the digital commitments covered by CPTPP Chapter 14:

- RCEP members are given substantial scope to require localization of computing facilities and restrict cross-border data flows with respect to services and investment (Article 12.3).
- RCEP members are allowed to require localization of computing facilities to achieve legitimate public policy objectives and to protect essential security interests (Article 12.14).
- RCEP members can require disclosure of source code as a condition of doing business in a member’s territory.
- RCEP members can restrict cross-border data flows to achieve legitimate public policy objectives and protect essential security interests (Article 12.15). Other agreements also allow such a restriction, but potentially broad Chinese invocation of “legitimate objectives” and “national security” is worrisome.
- RCEP prohibition on customs duties with respect to electronic transmissions ceases to apply if the WTO Ministerial Decisions prohibiting such duties are not renewed (Article 12.11).
- RCEP Chapter 19 (Dispute Settlement) does not apply to Chapter 12 (Electronic Commerce); differences between members are to be addressed by consultations in good faith (Article 12.17).

As evidenced by these differences, the RCEP differs from the CPTPP and most other digital trade agreements in that it does little to restrain government interference in the digital market, through either regulation or censorship, and it opens the door for customs duties and other taxes if the WTO moratorium is not renewed. These features were included largely at the insistence of China, the world’s [leading practitioner](#) of digital surveillance. Localization requirements and customs duties on electronic transmissions are clearly protectionist; restrictions on cross-border data flows are political in nature. China regularly blocks digital communication and websites it deems insidious.

STANDARD EXCEPTIONS

E-commerce and digital trade often intersect with government priorities on market regulation and security. To accommodate those priorities, digital agreements often draw on concepts from the long history of trade agreements covering goods and services.

The six existing digital trade agreements include several Standard Exceptions:

- National security measures, as determined by each party, can override all other commitments in digital agreements.

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- Exceptions spelled out in Article XIV of the General Agreement on Trade in Services (GATS)—to protect public morals; protect the life and health of humans, animals, and plants; secure compliance with laws and regulations; prevent deceptive practices; and protect the privacy of individuals—can override other provisions in digital agreements.
- Both government procurement and information held or processed by governments are exempted from digital commitments.
- Agreements covering investment, trade in services, and financial services take precedence over digital commitments in the event of conflicting provisions.

Through the operation of these Standard Exceptions, the concluded digital agreements provide ample “policy space” for the preferences of member countries. The exceptions mean that digital commitments can be overridden and best endeavors ignored. Whether digital agreements ensure an open digital highway will therefore depend to a large extent on the good behavior by signatory governments, especially China, given the wide scope of Chinese Red Lines.

US STICKING POINTS

The US-Mexico-Canada Agreement (USMCA), negotiated at the insistence of President Donald Trump to replace the North American Free Trade Agreement (NAFTA), entered into force July 2020. Chapter 19 of the USMCA (Digital Trade) spells out provisions without predecessors in the pre-digital NAFTA (ratified in 1994). Most Chapter 19 provisions were drawn from the Trans-Pacific Partnership, but with significant differences. Just as the RCEP text reflects China’s digital trade aspirations, USMCA Chapter 19 provides insight into US Sticking Points in digital trade agreements. It states that (1) digital platforms should not be liable for content posted by third parties, (2) digital platforms should be free to delete postings by third parties, and (3) digital service taxes (DSTs) that discriminate de facto against US technology firms should be prohibited.

The US position on platform liability and content is evolving. Under current law (the Communications Decency Act of 1996, Section 230), internet platforms such as Facebook and Twitter are immune from US liability for content posted by third parties and are not required to post material from third parties. The USMCA extends these immunities to Canada and Mexico. New legislation that modifies Section 230 would therefore override the USMCA, requiring an amendment for both it and the US-Japan trade agreement.

Though it is unlikely that Canada, Mexico, or Japan would object to such an amendment, the United States should refrain from incorporating similar language into future digital agreements, even if Congress does not modify Section 230. Platform immunity is a highly contentious issue abroad, as no other digital agreement similarly protects the technology giants. However, liability suits could become an indirect form of censorship, particularly in countries following China’s lead. International accords will not restrain China and like-minded autocracies. Provisions akin to Section 230 should thus be left to the discretion of individual countries, not incorporated in digital agreements.

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Through a network of provisions, the USMCA also prohibits DSTs that de facto discriminate against US tech companies. Other digital agreements are ambiguous but seem open to DSTs that are arguably nondiscriminatory, at least de jure. DST issues are likely to stand in the way of an agreed WTO JSI; they may also obstruct US membership in the nascent Indo-Pacific pact. However, DST issues may be [resolved within the Organization for Economic Cooperation and Development \(OECD\)](#) before a JSI is concluded.

LIMITED POTENTIAL OF THE WTO E-COMMERCE JSI

The WTO's Joint Statement Initiative on E-Commerce—a potential plurilateral agreement—has engaged 71 of the 164 WTO members, a high level of interest. But because it includes the major digital powers—China, the European Union, Japan, the United Kingdom, and the United States—their vastly different perspectives are not likely to be bridged.

In December 2020, the WTO released a heavily bracketed text produced by individual JSI members. The contributors essentially tabled provisions from their own digital agreements but were far from reaching a common text. It seems unlikely that a JSI agreed to by 71 members would discipline government practices that already threaten to restrict digital flows. The United States and the European Union are trying to resolve differences over [cross-border flows of personal data](#). If they find a solution, however, it may not be acceptable to other WTO members. Meanwhile, compulsory source code disclosure, localization requirements for computing facilities, restricted data flows, customs duties on e-commerce, internet taxes, and strong state control of internet access pose the greatest barriers to digital trade. Chinese Red Lines are unlikely to be curbed within an agreed JSI. As noted in a [previous blog](#), either a small core group of high-ambition countries needs to emerge from the group of 71 or the level of ambition needs to be scaled back to Good Housekeeping measures and Standard Exceptions while voicing aspirations on other issues.

HIGHER AMBITION FOR AN INDO-PACIFIC DIGITAL AGREEMENT

An Indo-Pacific digital agreement promises higher ambition than the WTO JSI. Even where the text may be similar to the JSI or RCEP provisions, Indo-Pacific countries should be less inclined to invoke exceptions and more faithful to the spirit of key elements, including nondiscriminatory treatment, source code rights, anti-localization goals, and information freedom commitments. Moreover, Indo-Pacific countries may hold similar views on the proper content of national laws dealing with consumer protection and personal information and might even inscribe minimum standards in their pact.

Despite these similarities, US Sticking Points pose an obstacle to an Indo-Pacific digital agreement. Trade agreements other than the USMCA and the US-Japan Digital Trade Agreement do not provide platform immunities or prohibit DSTs. In fact, many agreements open a window for DSTs that do not discriminate de jure against US technology firms. Article 15.5 of the Digital Economic Partnership Agreement (DEPA) between Singapore, New Zealand, and Chile—

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three countries that have expressed interest in joining an Indo-Pacific pact—even invites DSTs. The United States is unlikely to join an Indo-Pacific agreement that fails to recognize at least its DST Sticking Point.

Moreover, even if other Indo-Pacific countries are willing to accommodate US wishes, an agreement is not guaranteed. The Biden administration’s prioritization of [domestic investment](#) and “[worker-centric](#)” trade policies, as well as the potential need for Congressional approval, pose obstacles to US entry. In a [speech](#) ahead of the final Senate vote on the [Infrastructure Investment and Jobs Act](#), Secretary of State Anthony Blinken stated that the United States will continue to focus on making a “generational investment” in its own competitiveness before pursuing new trade deals.

However, the waiting period for a resumption of trade negotiations may not extend past the November 2022 Congressional elections. The Senate has already passed President Biden’s \$1 trillion infrastructure plan. Meanwhile, a scaled down version of the \$3.5 trillion “human infrastructure” plan seems likely to be enacted on a party-line vote (all Democrats, no Republicans) later in 2021, provided that President Biden can strike a compromise with Senators Joe Manchin (D-WV) and Kyrsten Sinema (D-AZ). If President Biden is so inclined, he could resume trade negotiations after the November 2022 elections, claiming that these bills have ensured the requisite “generational investment” proclaimed by Secretary Blinken. This prospect was previewed by Vice President Kamala Harris, who announced that the United States [was willing to host](#) the Asia-Pacific Economic Cooperation (APEC) meetings in 2023. Ted Osius, the new president and CEO of the US-ASEAN Business Council, said in [an interview with Morning Trade](#) that he was optimistic that the Biden administration would soon launch talks with members of the Association of Southeast Asian Nations (ASEAN) on a digital trade agreement, based on conversations with officials on both sides.

Yet the path to an Indo-Pacific pact is far from clear. Republicans are [favored](#) to capture the House of Representatives in 2022; if they do, the prospects for renewing Trade Promotion Authority (TPA)—a prerequisite for Congressional ratification of trade agreements—are dim. Without TPA, President Biden could still negotiate agreements that do not change US law, but agreements that require Congressional ratification would be difficult. Although the United States could agree to many digital provisions without changing US law, it is not evident that the Biden administration is inclined to do so.

US Trade Representative (USTR) Katherine Tai poses a potential obstacle to an Indo-Pacific digital agreement. Since assuming office in March, she has consistently pressed a worker-centric agenda that requires that trade agreements “[first and foremost](#)” uplift the US middle class. She has spoken with trade ministers from eight countries in the Indo-Pacific region about the potential of a digital agreement to uplift small- and medium-sized businesses, but she worries that an Indo-Pacific pact would principally benefit technology giants. Rather than pursuing an Indo-Pacific pact, she may choose to prioritize issues more closely related to middle-class workers, such as corporate surveillance of employees.

Still, an Indo-Pacific agreement is not off the table. In an interview on August 19, 2021, Tai said the United States is “[actively working](#)” with other countries to establish digital trade rules, calling digital trade a “[very high priority](#)” for the Biden administration. In a [letter to Tai](#) on September 10, 2021, more than a dozen industry and business groups—including the US Chamber of Commerce, the

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Semiconductor Industry Association, and the Information Technology Industrial Council—called on the Biden administration to develop digital trade rules in the Indo-Pacific region.

CONCLUSIONS

Existing digital trade agreements do too little to discipline government practices that threaten to restrict digital flows. Governments can override Good Housekeeping provisions by invoking a national security exception. Consumer and Personal Information Protection provisions fail to specify minimum standards of protection and are not mandatory. Chinese Red Lines threaten cross-border digital freedom—and by extension, digital trade. Blinken’s prioritization of domestic investment threatens the formation of an Indo-Pacific digital agreement, which is necessary to keep transpacific digital highways open and establish digital norms for future negotiations. EU insistence on its General Data Protection Regulation (GDPR) with respect to personal information could be another Red Line. US Sticking Points, coupled with USTR Tai’s “worker-centric” agenda and Secretary Blinken’s insistence on “generational investment” first, could prove to be other obstacles.

The world economy is better off thanks to digital trade: The exponential expansion of digital flows since 2005 has partially [compensated](#) for lethargic growth in global conventional trade and foreign direct investment flows. Although the United States has mounted an effort in the WTO to preserve the freedom of cross-border digital traffic, an agreed JSI is unlikely to achieve this goal, given that China, the European Union, the United States, and other digital powers find it almost impossible to bridge their differences on digital freedom. A strong Indo-Pacific digital agreement appears to be the best option. If such an agreement is concluded during the Biden administration, it would benefit the US economy for decades to come.

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