



**National Training
On preparing to negotiate a potential CAREC-wide FTA**

Session 1 (Day 2)

Introduction to Digital Trade Provisions in FTAs

Almaty, Kazakhstan

May 2023



Overview

01

**Policy
Objectives**

02

**Context and
History**

03

**Low Hanging
Fruits**

04

The Tough Stuff

05

**The Situation in
CAREC**

06

**Summing
Up**

01

Policy Objectives

Digital Economy Objectives

Stimulate growth

Formalize the economy

Reduce corruption

Industrial policy

Raise productivity

Boost innovation

Increase safety and trust

Attract foreign investment

Create jobs

Improve service delivery

Foster national champions

Economic diversity

Digital Trade Goals

Improve transparency

Eliminate transport costs

Lower entry barriers

Bridge the digital divide

Improve efficiency

Facilitate SME participation

Increase confidence

Promote inclusion

Lower trade costs

Beat economic geography

Boost digital uptake

Promote creativity

Article 12.2: Principles and Objectives

1. The Parties recognise the economic growth and opportunities provided by electronic commerce, the importance of frameworks that promote consumer confidence in electronic commerce, and the importance of facilitating the development and use of electronic commerce.
2. The objectives of this Chapter are to:
 - (a) promote electronic commerce among the Parties and the wider use of electronic commerce globally;
 - (b) contribute to creating an environment of trust and confidence in the use of electronic commerce; and
 - (c) enhance cooperation among the Parties regarding development of electronic commerce.

Policy Objectives | Scope



RCEP

Article 12.3: Scope³

1. This Chapter shall apply to measures adopted or maintained by a Party that affect electronic commerce.
2. This Chapter shall not apply to government procurement.
3. This Chapter shall not apply to information held or processed by or on behalf of a Party, or measures related to such information, including measures related to its collection.
4. Article 12.14 (Location of Computing Facilities) and Article 12.15 (Cross-Border Transfer of Information by Electronic Means) shall not apply to aspects of a Party's measures that do not conform with an obligation in Chapter 8 (Trade in Services) or Chapter 10 (Investment) to the extent that such measures are adopted or maintained in accordance with:
 - (a) Article 8.8 (Schedules of Non-Conforming Measures) or Article 10.8 (Reservations and Non-Conforming Measures);
 - (b) any terms, limitations, qualifications, and conditions specified in a Party's commitments, or are with respect to a sector that is not subject to a Party's commitments, made in accordance with Article 8.6 (Most-Favoured-Nation Treatment) or Article 8.7 (Schedules of Specific Commitments); or
 - (c) any exception that is applicable to the obligations in Chapter 8 (Trade in Services) or Chapter 10 (Investment).
5. For greater certainty, measures affecting the supply of a service delivered electronically are subject to the obligations contained in the relevant provisions of:
 - (a) Chapter 8 (Trade in Services); and
 - (b) Chapter 10 (Investment),
 including Annex II (Schedules of Specific Commitments for Services), Annex III (Schedules of Reservations and Non-Conforming Measures for Services and Investment), as well as any exceptions that are applicable to those obligations.

³ For greater certainty, the Parties affirm that the obligations under this Chapter are without prejudice to any Party's position in the WTO.

Overview

01

**Policy
Objectives**

02

**Context and
History**

03

**Low Hanging
Fruit**

04

The Tough Stuff

05

**The Situation in
CAREC**

06

**Summing
Up**

Context and History

Digital Economy Defined



What

Who

Telecommunications networks and connectivity infrastructure.

Information, communications and computing services .

The result of multi-device connectivity.

Now dominated by mobile devices and sensors.

Few large equipment vendors plus 1000s of smaller manufacturers

Telecos and millions of other providers across many other sectors.

Google Android and Apple iOS. WeChat and Alibaba, Shopify, AWS, Microsoft

Makers of consumer tech and IoT sensors, cameras and equipment.

“ all cross-border transactions that are either digitally ordered (i.e., cross-border e-commerce), digitally facilitated (by platforms), or digitally delivered ”

“ digitally enabled transactions of trade in goods and services that can either be digitally or physically delivered, and that involve consumers, firms, and governments ”

“ The cross-border supply of goods, products, services and solutions that are instrumental to or avail themselves of online connectivity. ”

**Digital Trade
Defined**

Early Efforts



- › Starting in 1997, the US included provisions in FTAs on electronic commerce.
- › US-Jordan FTA was the first to include an e-commerce article.
- › U.S. sought to export its regulatory approach via APEC, OECD, and through bilateral engagement.

WTO Work Program



- › Launched in 1998, the WTO work program on e-commerce parceled out different parts of the e-commerce to different WTO bodies for discussions which in effect lasted decades and never really went anywhere.

WTO JSI



- › Launched in 2017 by over 70 countries, with a clear view to starting negotiations.
- › Negotiations were launched in 2019.
- › Now over 100 countries participating in this plurilateral initiative.

Modern FTAs



- › Starting with the CPTPP, e-commerce chapters started including binding provisions.
- › These were subject to broad carveouts and exceptions.
- › USMCA is probably the most ambitious FTA on digital trade to date.

Overview

01

**Policy
Objectives**

02

**Context and
History**

03

**Low Hanging
Fruit**

04

The Tough Stuff

05

**The Situation in
CAREC**

06

**Summing
Up**

Low Hanging Fruit



Cooperation and Dialogue



Trade Facilitation



Online Business Environment



Article 14.15: Cooperation

Recognising the global nature of electronic commerce, the Parties shall endeavour to:

- (a) work together to assist SMEs to overcome obstacles to its use;
- (b) exchange information and share experiences on regulations, policies, enforcement and compliance regarding electronic commerce, including:
 - (i) personal information protection;
 - (ii) online consumer protection, including means for consumer redress and building consumer confidence;
 - (iii) unsolicited commercial electronic messages;
 - (iv) security in electronic communications;
 - (v) authentication; and
 - (vi) e-government;
- (c) exchange information and share views on consumer access to products and services offered online among the Parties;
- (d) participate actively in regional and multilateral fora to promote the development of electronic commerce; and
- (e) encourage development by the private sector of methods of self-regulation that foster electronic commerce, including codes of conduct, model contracts, guidelines and enforcement mechanisms.

Low Hanging Fruit | Example

Article 12.4: Cooperation

1. Each Party shall, where appropriate, cooperate to:
 - (a) work together to assist small and medium enterprises to overcome obstacles in the use of electronic commerce;
 - (b) identify areas for targeted cooperation between the Parties which will help Parties implement or enhance their electronic commerce legal framework, such as research and training activities, capacity building, and the provision of technical assistance;
 - (c) share information, experiences, and best practices in addressing challenges related to the development and use of electronic commerce;
 - (d) encourage business sectors to develop methods or practices that enhance accountability and consumer confidence to foster the use of electronic commerce; and
 - (e) actively participate in regional and multilateral fora to promote the development of electronic commerce.
2. The Parties shall endeavour to undertake forms of cooperation that build on and do not duplicate existing cooperation initiatives pursued in international fora.



CPTPP

Article 14.9: Paperless Trading

Each Party shall endeavour to:

- (a) make trade administration documents available to the public in electronic form; and
- (b) accept trade administration documents submitted electronically as the legal equivalent of the paper version of those documents.

RCEP

Article 12.5: Paperless Trading

1. Each Party shall:
 - (a) work towards implementing initiatives which provide for the use of paperless trading, taking into account the methods agreed by international organisations including the World Customs Organization;⁴
 - (b) endeavour to accept trade administration documents submitted electronically as the legal equivalent of the paper version of such trade administration documents; and
 - (c) endeavour to make trade administration documents available to the public in electronic form.
2. The Parties shall cooperate in international fora to enhance acceptance of electronic versions of trade administration documents.



Article 14.6: Electronic Authentication and Electronic Signatures

1. Except in circumstances otherwise provided for under its law, a Party shall not deny the legal validity of a signature solely on the basis that the signature is in electronic form.
2. No Party shall adopt or maintain measures for electronic authentication that would:
 - (a) prohibit parties to an electronic transaction from mutually determining the appropriate authentication methods for that transaction; or
 - (b) prevent parties to an electronic transaction from having the opportunity to establish before judicial or administrative authorities that their transaction complies with any legal requirements with respect to authentication.
3. Notwithstanding paragraph 2, a Party may require that, for a particular category of transactions, the method of authentication meets certain performance standards or is certified by an authority accredited in accordance with its law.
4. The Parties shall encourage the use of interoperable electronic authentication.

Article 12.6: Electronic Authentication and Electronic Signature

1. Except in circumstances otherwise provided for under its laws and regulations, a Party shall not deny the legal validity of a signature solely on the basis that the signature is in electronic form.⁵
2. Taking into account international norms for electronic authentication, each Party shall:
 - (a) permit participants in electronic transactions to determine appropriate electronic authentication technologies and implementation models for their electronic transactions;
 - (b) not limit the recognition of electronic authentication technologies and implementation models for electronic transactions; and
 - (c) permit participants in electronic transactions to have the opportunity to prove that their electronic transactions comply with its laws and regulations with respect to electronic authentication.
3. Notwithstanding paragraph 2, each Party may require that, for a particular category of electronic transactions, the method of electronic authentication meets certain performance standards or is certified by an authority accredited in accordance with its laws and regulations.
4. The Parties shall encourage the use of interoperable electronic authentication.

Overview

01

**Policy
Objectives**

02

**Context and
History**

03

**Low Hanging
Fruit**

04

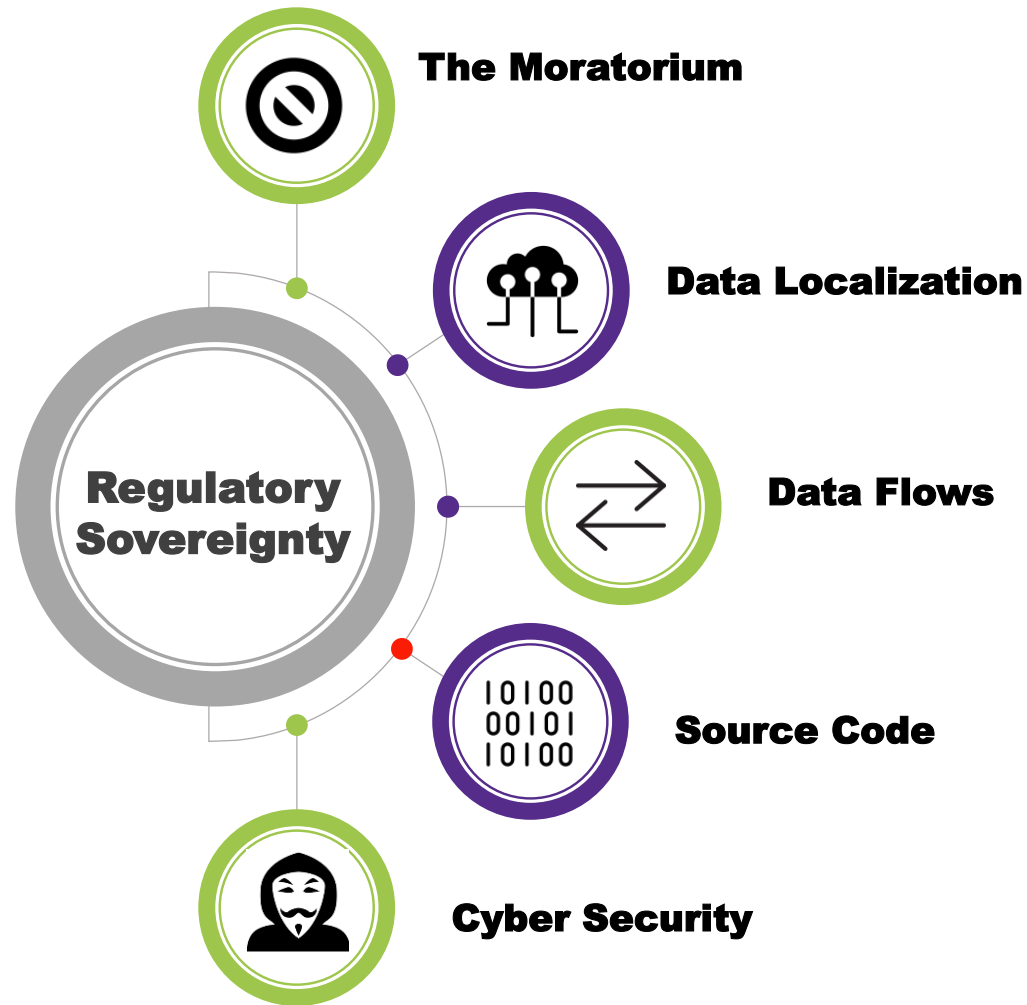
The Tough Stuff

05

**The Situation in
CAREC**

06

**Summing
Up**



The Tough Stuff | Example

CPTPP

Article 14.3: Customs Duties

1. No Party shall impose customs duties on electronic transmissions, including content transmitted electronically, between a person of one Party and a person of another Party.
2. For greater certainty, paragraph 1 shall not preclude a Party from imposing internal taxes, fees or other charges on content transmitted electronically, provided that such taxes, fees or charges are imposed in a manner consistent with this Agreement.

RCEP

Article 12.11: Customs Duties

1. Each Party shall maintain its current practice of not imposing customs duties on electronic transmissions between the Parties.
2. The practice referred to in paragraph 1 is in accordance with the *WTO Ministerial Decision of 13 December 2017* in relation to the Work Programme on Electronic Commerce (WT/MIN(17)/65).
3. Each Party may adjust its practice referred to in paragraph 1 with respect to any further outcomes in the WTO Ministerial Decisions on customs duties on electronic transmissions within the framework of the Work Programme on Electronic Commerce.
4. The Parties shall review this Article in light of any further WTO Ministerial Decisions in relation to the Work Programme on Electronic Commerce.
5. For greater certainty, paragraph 1 shall not preclude a Party from imposing taxes, fees, or other charges on electronic transmissions, provided that such taxes, fees, or charges are imposed in a manner consistent with this Agreement.



The Moratorium



CPTPP

Article 14.13: Location of Computing Facilities

1. The Parties recognise 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.
2. 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.
3. Nothing in this Article shall prevent a Party from adopting or maintaining measures inconsistent with paragraph 2 to achieve a legitimate public policy objective, provided that the measure:
 - (a) is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade; and
 - (b) does not impose restrictions on the use or location of computing facilities greater than are required to achieve the objective.

RCEP

Article 12.14: Location of Computing Facilities

1. The Parties recognise 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.
2. 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 Party's territory.¹¹
3. Nothing in this Article shall prevent a Party from adopting or maintaining:
 - (a) any measure inconsistent with paragraph 2 that it considers necessary to achieve a legitimate public policy objective,¹² 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; or
 - (b) any measure that it considers necessary for the protection of its essential security interests. Such measures shall not be disputed by other Parties.



CPTPP

Article 14.11: Cross-Border Transfer of Information by Electronic Means

1. The Parties recognise that each Party may have its own regulatory requirements concerning the transfer of information by electronic means.
2. 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.
3. Nothing in this Article shall prevent a Party from adopting or maintaining measures inconsistent with paragraph 2 to achieve a legitimate public policy objective, provided that the measure:
 - (a) is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade; and
 - (b) does not impose restrictions on transfers of information greater than are required to achieve the objective.

RCEP

Article 12.15: Cross-border Transfer of Information by Electronic Means

1. The Parties recognise that each Party may have its own regulatory requirements concerning the transfer of information by electronic means.
2. A Party shall not prevent cross-border transfer of information by electronic means where such activity is for the conduct of the business of a covered person.¹³
3. Nothing in this Article shall prevent a Party from adopting or maintaining:
 - (a) any measure inconsistent with paragraph 2 that it considers necessary to achieve a legitimate public policy objective,¹⁴ 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; or
 - (b) any measure that it considers necessary for the protection of its essential security interests. Such measures shall not be disputed by other Parties.



Source Code

The Tough Stuff | Example

04

CPTPP

Article 14.17: Source Code

1. 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.
2. For the purposes of this Article, software subject to paragraph 1 is limited to mass-market software or products containing such software and does not include software used for critical infrastructure.
3. Nothing in this Article shall preclude:
 - (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.
4. This Article shall not be construed to affect requirements that relate to patent applications or granted patents, including any orders made by a judicial authority in relation to patent disputes, subject to safeguards against unauthorised disclosure under the law or practice of a Party.

USMCA

Article 19.16: Source Code

1. No Party shall require the transfer of, or access to, a source code of software owned by a person of another Party, or to an algorithm expressed in that source code, as a condition for the import, distribution, sale or use of that software, or of products containing that software, in its territory.
2. This Article does not preclude a regulatory body or judicial authority of a Party from requiring a person of another Party to preserve and make available the source code of software, or an algorithm expressed in that source code, to the regulatory body for a specific investigation, inspection, examination, enforcement action, or judicial proceeding,⁶ subject to safeguards against unauthorized disclosure.



CPTPP

Article 14.16: Cooperation on Cybersecurity Matters

The Parties recognise the importance of:

- (a) building the capabilities of their national entities responsible for computer security incident response; and
- (b) using existing collaboration mechanisms to cooperate to identify and mitigate malicious intrusions or dissemination of malicious code that affect the electronic networks of the Parties.

RCEP

Article 12.13: Cyber Security

The Parties recognise the importance of:

- (a) building the capabilities of their respective competent authorities responsible for computer security incident responses including through the exchange of best practices; and
- (b) using existing collaboration mechanisms to cooperate on matters related to cyber security.

Overview

01

**Policy
Objectives**

02

**Context and
History**

03

**Low Hanging
Fruit**

04

The Tough Stuff

05

**The Situation in
CAREC**

06

**Summing
Up**

The Situation in CAREC



Azerbaijan has not yet entered into any FTAs with e-commerce or digital trade chapters. In terms of its domestic legislative and regulatory frameworks, it enacted an e-commerce law in 2005 and created its first electronic payment system in 2008, but the sector is described as being “limited by a lack of clear and effective legislation”. A 2017 law sought to promote cashless transactions, but its impact has been limited.



China is a party to RCEP and is also participating in the WTO Joint Statement Initiative on e-commerce. China is one of the largest e-commerce markets in the world and is also a world leader in digital payments. China has also applied to join the CPTPP. China has a thriving digital ecosystem and boasts some of the world’s leading and most innovative countries in virtually all areas of the digital economy.



Georgia’s Deep and Comprehensive Free Trade Area and the underlying Association Agreement handles e-commerce together with services in Chapter 6 but does not contain provisions of the kind typically found in a modern FTA e-commerce or digital trade chapter. Georgia is participating in the WTO Joint Statement Initiative on e-commerce. New e-commerce legislation is being prepared to closer align Georgia with EU rules.



Kazakhstan has not yet concluded an FTA with an e-commerce chapter but is participating in the WTO JSI on e-commerce. The government has recognized the growth potential of the sector and has enacted legislative reform, improved postal services and exempted e-commerce companies from some taxes. Online payments and delivery, as well as lacking consumer confidence are deemed to be the biggest bottlenecks to future growth.



The Kyrgyz Republic has not yet concluded an FTA with an e-commerce chapter and also appears not to be participating in the WTO JSI on e-commerce. In 2020 the Kyrgyz Republic ranked 97th out of 152 countries in UNCTAD’s B2C ECommerce Index. Lack of consumer confidence is a big constraint as well as low levels of financial inclusion. A national eCommerce law was passed in 2021 and came into effect June 2022.

The Situation in CAREC



Mongolia's EPA with Japan has a dedicated chapter on e-commerce that is similar although not identical to the CPTPP chapter on e-commerce. Mongolia is also participating in the WTO JSI on e-commerce. The e-commerce ecosystem in Mongolia is described as suffering many of the same constraints that similarly placed countries suffer: lack of consumer confidence, underdeveloped logistics networks and inconsistent laws on delivery, payment and taxation.



Pakistan has not yet concluded an FTA with an e-commerce chapter and is also not participating in the WTO JSI on e-commerce. The main constraints to e-commerce development here are lack of connectivity infrastructure and low digital adoption rates. Also, the large size of the informal sector and the lack of financial inclusion are big constraints.



Tajikistan has not yet concluded an FTA with an e-commerce chapter and also appears not to be participating in the WTO JSI on e-commerce. Infrastructure constraints which also constrain digital uptake appears to be the biggest bottleneck to e-commerce growth here. E-commerce is still a niche market in Tajikistan.



Turkmenistan has not yet concluded an FTA with an e-commerce chapter and as a non-WTO member is also not participating in the JSI on e-commerce. The development of e-commerce is still in its early stages in Turkmenistan with the country currently lacking specific laws or regulations to govern the e-commerce sector or online payments.



Uzbekistan has not yet concluded an FTA with an e-commerce chapter and as a non-WTO member is also not participating in the JSI on e-commerce. However, the government has recognized the strategic importance of the sector and has invested significantly in both upgrading infrastructure, developing skills and updating the legal and regulatory frameworks governing e-commerce, online payments etc.

Overview

01

**Policy
Objectives**

02

**Context and
History**

03

**Low Hanging
Fruit**

04

The Tough Stuff

05

**The Situation in
CAREC**

06

**Summing
Up**

01



E-commerce has started to play a more important role in international trade agreements, with broad consensus on a small set of largely uncontroversial rules.

02



However, given the strategic importance of the digital economy most governments are cautious about over-committing themselves or overly constraining their regulatory autonomy.

03



Different countries within CAREC are at different stages of development regarding both the size of their domestic e-commerce markets and their legislative and regulatory readiness.

04



Growing domestic e-commerce markets and connecting with all the opportunities presented by the digital economy requires broad-based reform across a large range of policy areas.

05



E-commerce chapters in FTAs offer something of a roadmap for countries to embark on these reforms and also represent international best practices.



Thank you!