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

Session 2 (Day 2)

Government Objectives in Regulating the Digital Economy

Almaty, Kazakhstan

May 2023

Overview

01

Recap Policy Objectives

02

Reality Check

03

Best Practice

04

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

ADB   CAREC   CAREC

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Summing Up

The Moratorium

CPTPP   RCEP

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.

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.

Before the
Office of the United States Trade Representative
Washington, D.C.

In re Request for Comments on Significant
Foreign Trade Barriers for the 2023 National
Trade Estimate Report

Docket No. USTR–2022–0013

**COMMENTS OF
THE COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION
REGARDING FOREIGN TRADE BARRIERS TO U.S. EXPORTS
FOR 2023 REPORTING**

Customs Duties on Electronic Transmissions

Indonesia issued Regulation No.17/PMK.010/2018 (Regulation 17) in 2018.[426] The Regulation amends Indonesia's Harmonized Tariff Schedule (HTS) Chapter 99 to add: "Software and other digital products transmitted electronically." This makes Indonesia the only country in the world that has added electronic transmissions to its HTS. This unprecedented step to imposing customs requirements on purely digital transactions will impose significant and unnecessary compliance burdens on nearly every enterprise, including many SMEs. The policy is also in conflict with Indonesia's commitment under the WTO's moratorium on customs duties on electronic transmissions, dating back to 1998[427] and most recently reaffirmed in June 2022.[428]

The Moratorium

MENTERI KEUANGAN
REPUBLIK INDONESIA

SALINAN

Salinan sesuai dengan aslinya
Kepala Biro Umum
u.b.
Kepala Bagian T.U. Kementerian

Arif Bintarto Yuwono
NIP 197109121997031001

No	Pos Tarif/ HS Code	Uraian Barang	Description of Goods	Bea Masuk/ Import Duty
(1)	(2)	(3)	(4)	(5)
	99.01	Peranti lunak dan barang digital lainnya yang ditransmisikan secara elektronik	Software and other digital product transmitted electronically	
10827	9901.10.00	- Peranti lunak sistem operasi	- Operating system software	0%
10828	9901.20.00	- Peranti lunak aplikasi	- Application software	0%
10829	9901.30.00	- Multimedia (audio, video atau audio visual)	- Multimedia (audio, video or audio visual)	0%
10830	9901.40.00	- Data pendukung atau penggerak sistem permesinan	- Supporting or driver data, including design for machinery system	0%
10831	9901.90.00	- Peranti lunak dan barang digital lainnya	- Other software and digital product	0%

MENTERI KEUANGAN REPUBLIK INDONESIA,

ttd.

SRI MULYANI INDRAWATI

CPTPP

RCEP

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.

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.

Data Flows

An example of a restriction on cross border data flows

2023 National Trade Estimate Report on

FOREIGN TRADE BARRIERS

KENYA

Kenya's 2019 Data Protection Act (DPA) includes unclear provisions governing the cross-border transfer of personal information. The DPA requires that data controllers provide proof that personal data will be secure as a condition for transferring the data outside Kenya but does not describe what would constitute proof. The DPA also requires consent of the data subject as a condition for the cross-border transfer of any "sensitive personal data," a broad category of information. Additionally, the Act empowers the Data Commissioner to prohibit the cross-border transfer of certain categories of data, creating uncertainty for businesses operating in Kenya that depend on cross-border data flows. The 2021 Data Protection (General) Regulations require the processing of personal data "for the purposes of actualizing a public good" to be processed through a server and data center located in Kenya, or that at least one copy of the personal data be stored in a data center located in Kenya.
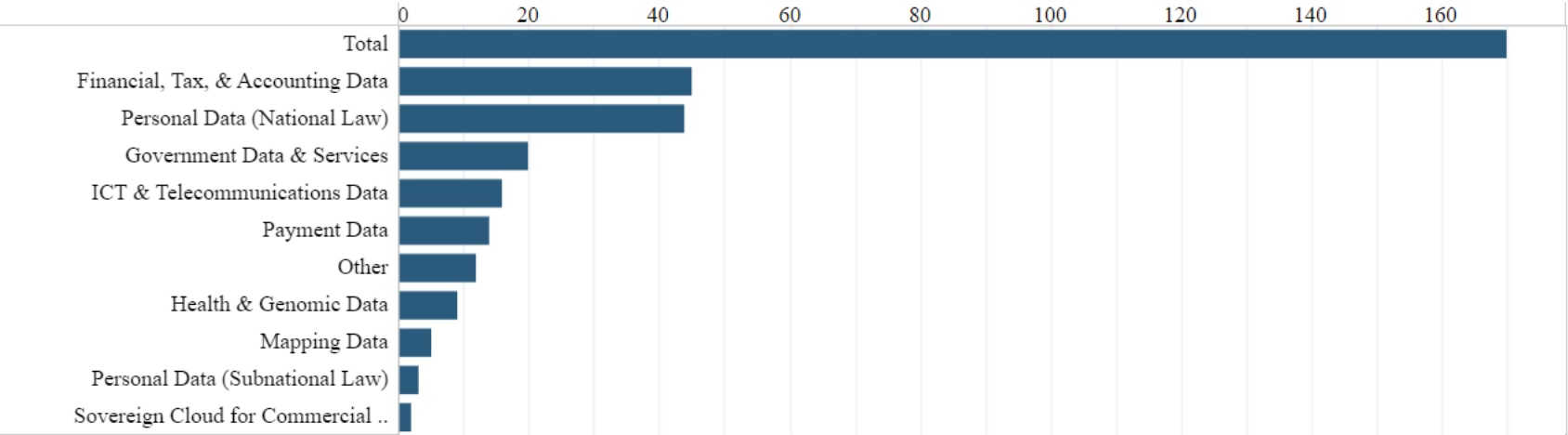
Data Flows

ITIF | INFORMATION TECHNOLOGY & INNOVATION FOUNDATION

How Barriers to Cross-Border Data Flows Are Spreading Globally, What They Cost, and How to Address Them

By Nigel Cory and Luke Dascoli | July 19, 2021

Number of Barriers by Data Type*

Global Totals

Altogether, there were 144 data-localization measures in force around the world as of July 2021. Some of these enacted policies affect more than one type of data, so the total count of barriers by data type is greater than the sum of the enacted barriers.

Data Localization

CPTPP   **RCEP**

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.

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.

Data Localization

THE WALL STREET JOURNAL.

MARKETS | FINANCIAL REGULATION

PayPal to Exit Turkey After Regulator Denies Payments License

Move likely reverberate across small businesses in nation's burgeoning online marketplace

PayPal refuses to comply with an order to localize all Turkish client data in Turkey and has its bank license withdrawn.

Source Code

CPTPP

USMCA

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.

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.

Source Code

2023 National Trade Estimate Report on

FOREIGN TRADE BARRIERS

EUROPEAN UNION

The Commission proposed an Artificial Intelligence (AI) Act in April 2021 with the aim of providing a risk-based approach to regulating the development, deployment, and use of AI-driven products, services, and systems. Drafts of the AI Act require the disclosure of source code without strong, consistent, and transparent protection schemes for innovative and proprietary information embedded in the source code that is of particular economic value to small businesses.

Other Measures

Fiscal Restrictions

- Tariffs
- Trade Defense
- Taxation
- Subsidies
- Public Procurement

Establishment Restrictions

- Investment Restrictions
- IP Rights
- Competition Policy
- Business mobility

Restrictions on Data

- Intermediate Liability
- Content Access

Trading Restrictions

- QRs on Trading
- Standards
- Online Sales and Transactions

ADB CAREC CAREC

01 Tariffs

Even small tariffs impose a burden.

02 Trade Defense

Mostly anti-dumping duties

03 Taxation

Preferential tax regimes and LCRs

04 Subsidies

Particularly in the area of export finance

05 Public Procurement

Domestically supplied digital goods and services

Establishment Restrictions

01

Investment Restrictions

Investment screening procedures.

02

IP Rights

Discriminatory patent regimes

03

Competition Policy

Particularly in the telecoms sector

04

Business Mobility

Quotas and labor market tests

Restrictions on Data

01

Intermediate Liability

Safe harbor, and "notice-and-takedown" regimes.

02

Content Access

Discriminatory restrictions on access to content

Trading Restrictions

01

QRs on Trading

Import bans and non-automatic import licensing

02

Standards

Duplicative national standards

03

Online Sales & Transactions

This slide is 100% editable. Adapt it to your needs and capture your audience's attention.

Overview

01	**02**	**03**	**04**
Recap Policy Objectives	Reality Check	Best Practice	Summing Up

Best Practice 03

Open
- Net Neutrality
- Competition
- Privacy protection
- Digital literacy
- Freedom of expression
- Multistakeholder approach
- Cybersecurity
- Access and affordability
- Accountability and transparency
- International cooperation

Interoperable
- Harmonization of rules and regulations
- Data flow and localization policies
- Digital identity and trust
- Consistency in consumer protection rules
- Harmonize and simplify tax rules
- Strengthen and harmonize intellectual property rights
- Cross-border cooperation
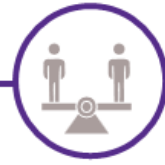
Non-Discriminatory
- Equal treatment
- Market access
- Non-discriminatory taxation
- Public procurement
- Inclusivity and digital divide
- Capacity building
- Multilateral agreements

Minimally Trade-Restrictive
- Necessity and proportionality
- Transparency
- Alignment with international standards
- Regulatory impact assessment
- Comment and notice procedures
- Periodic review

ADB CAREC CAREC

Open

- Net Neutrality
- Competition
- Privacy protection
- Digital literacy
- Freedom of expression
- Multistakeholder approach
- Cybersecurity
- Access and affordability
- Accountability and
- transparency
- International Cooperation

03 Best Practice

Interoperable

- Harmonization of rules and regulations
- Data flow and localization policies
- Digital identity and trust
- Consistency in consumer protection rules
- Harmonize and simplify tax rules
- Strengthen and harmonize intellectual property rights
- Cross-border cooperation

ADB CAREC CAREC

Non-Discriminatory

- Equal treatment
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Best Practice 03

Minimally Trade-Restrictive

- Necessity and proportionality
- Transparency
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07 Summing-Up

01 The digital economy is rapidly just becoming "the economy" so that any regulatory interventions are likely to have far-reaching and often unanticipated consequences.

02 Governments have a right to regulate this important sector and to do so in a way that furthers their many-faceted policy objectives.

03 Regulating the digital economy should ideally follow best practices but only to the extent these align with domestic political and policy priorities.

04 When regulating the digital economy, governments and policymakers are ultimately and primarily accountable only to their own citizens and people.

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