

E-commerce in Trade Agreements: RCEP v. CPTPP

Henry Gao

Conference on RCEP: A New Paradigm in Asia's Trading Architecture

3-4 May

A large yellow triangle is positioned in the bottom right corner of the slide, pointing towards the top right.

CPTPP V RCEP: OVERALL

- | | |
|--|---|
| <ul style="list-style-type: none"> • CPTPP 18 Articles: • Definitions • Scope and General Provisions • Customs Duties • Non-Discriminatory Treatment of Digital Products • Domestic Electronic Transactions Framework • Electronic Authentication and Electronic Signatures • Online Consumer Protection • Personal Information Protection • Paperless Trading • Principles on Access to and Use of the Internet for Electronic Commerce • Cross-Border Transfer of Information by Electronic Means • Internet Interconnection Charge Sharing • Location of Computing Facilities • Unsolicited Commercial Electronic Messages • Cooperation • Cooperation on Cybersecurity Matters • Source Code • Dispute Settlement | <ul style="list-style-type: none"> • RCEP 17 Articles: • SECTION A: GENERAL PROVISIONS • Definitions • Principles and Objectives • Scope • Cooperation • SECTION B: TRADE FACILITATION • Paperless Trading • Electronic Authentication and Electronic Signature • SECTION C: CREATING A CONDUCIVE ENVIRONMENT FOR ELECTRONIC COMMERCE • Online Consumer Protection • Online Personal Information Protection • Unsolicited Commercial Electronic Messages • Domestic Regulatory Framework • Customs Duties • Transparency • Cyber Security • SECTION D: PROMOTING CROSS-BORDER ELECTRONIC COMMERCE • Location of Computing Facilities • Cross-border Transfer of Information by Electronic Means • SECTION E: OTHER PROVISIONS • Dialogue on Electronic Commerce • Settlement of Disputes |
|--|---|

Types of provisions

- 1. E-commerce infrastructure:
 - electronic signatures and authentication, and e-contracts
- 2. Regulatory barrier: US
- 3. Consumer/trust: EU
- 4. Regulatory autonomy: China

Popularity of provisions

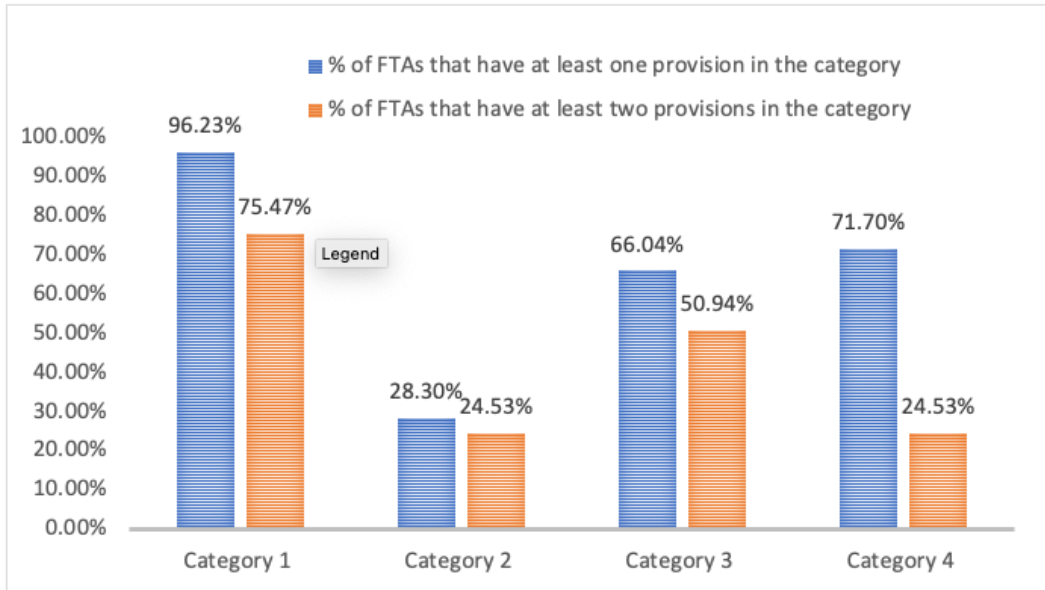


Chart 1: Percentage of FTAs with at least one provision in each category.

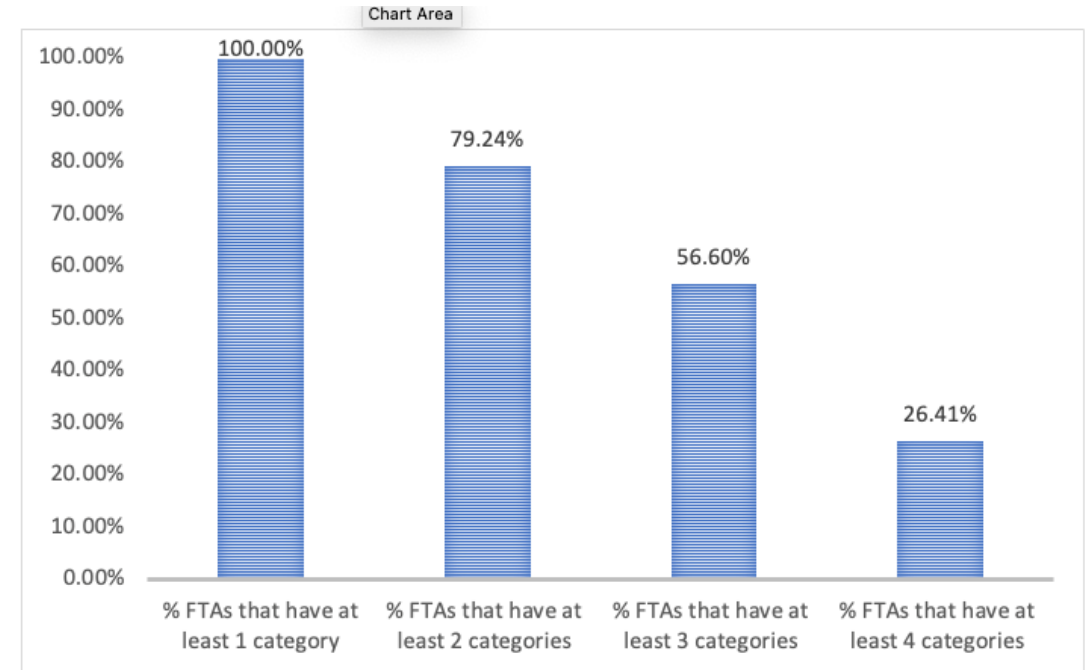


Chart 2: Percentage of FTAs with provisions in at least one to all categories.

Non-Discriminatory Treatment of Digital Products

Article 14.4: Non-Discriminatory Treatment of Digital Products

1. No Party shall accord less favourable treatment to digital products created, produced, published, contracted for, commissioned or first made available on commercial terms in the territory of another Party, or to digital products of which the author, performer, producer, developer or owner is a person of another Party, than it accords to other like digital products.⁴

2. Paragraph 1 shall not apply to the extent of any inconsistency with the rights and obligations in Chapter 18 (Intellectual Property).

3. The Parties understand that this Article does not apply to subsidies or grants provided by a Party, including government-supported loans, guarantees and insurance.

4. This Article shall not apply to broadcasting.

digital product means a computer programme, text, video, image, sound recording or other product that is digitally encoded, produced for commercial sale or distribution, and that can be transmitted electronically;^{2, 3}

Cross-border data transfer rules

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 localization

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.**



Source code

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.

Dispute settlement

Article 14.18: Dispute Settlement

1. With respect to existing measures, Malaysia shall not be subject to dispute settlement under Chapter 28 (Dispute Settlement) regarding its obligations under Article 14.4 (Non-Discriminatory Treatment of Digital Products) and Article 14.11 (Cross-Border Transfer of Information by Electronic Means) for a period of two years after the date of entry into force of this Agreement for Malaysia.
2. With respect to existing measures, Viet Nam shall not be subject to dispute settlement under Chapter 28 (Dispute Settlement) regarding its obligations under Article 14.4 (Non-Discriminatory Treatment of Digital Products), Article 14.11 (Cross-Border Transfer of Information by Electronic Means) and Article 14.13 (Location of Computing Facilities) for a period of two years after the date of entry into force of this Agreement for Viet Nam.

Article 12.17: Settlement of Disputes

1. In the event of any differences between Parties regarding the interpretation and application of this Chapter, the Parties concerned shall first engage in consultations in good faith and make every effort to reach a mutually satisfactory solution.
2. In the event that the consultations referred to in paragraph 1 fail to resolve the differences, any Party engaged in the consultations may refer the matter to the RCEP Joint Committee in accordance with Article 18.3 (Functions of the RCEP Joint Committee).
3. **No Party shall have recourse to dispute settlement under Chapter 19 (Dispute Settlement) for any matter arising under this Chapter. As part of any general review of this Agreement undertaken in accordance with Article 20.8 (General Review), the Parties shall review the application of Chapter 19 (Dispute Settlement) to this Chapter. Following the completion of the review, Chapter 19 (Dispute Settlement) shall apply to this Chapter between those Parties that have agreed to its application.**