

Chapter 5

Data Policies for AEC Post-2025 Vision

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5.

Data Policies for AEC Post-2025 Vision

Mira Burri and María Vásquez Callo-Müller

1. A Paradigm Shift: Data-Driven Trade

The digitalisation of the global economy has brought about a significant shift in international trade, with data being the driving force of this transformation. The Association of Southeast Asian Nations (ASEAN) regional digital ecosystem is an excellent example of this development, with industry behemoths such as Grab, Carousell, and Momo, establishing networks for the commercialisation of digital goods and services, and making the ASEAN region the world's fastest-growing internet market (Google, Temasek, and Bain & Company, 2020). As economic transactions increasingly migrate to online platforms, data is collected, processed, and held by public and private organisations on a regular basis. Technologies that are critical for growth and innovation, such as artificial intelligence (AI), are also highly dependent on data inputs. Therefore, policy choices regarding data governance can, in many ways, condition the future of the data-driven economy, and concomitantly, international trade.

The increased dependence on data, however, has raised new issues concerning trust, privacy, data sharing, intellectual property, and national security. For instance, data collection, data use, and data transfer have an impact on individuals' privacy. This has been widely acknowledged by policymakers and governments have responded in a variety of ways. For external safeguards, states have sought new ways to assert control over data by prescribing diverse measures that localise the data, its storage, or suppliers, so as to keep it within the state's sovereign territory. For internal safeguards, government efforts around the world have concentrated on the adoption or reform of data protection laws. The reform initiatives are, however, fragmented as they reflect different societies' understandings of constitutional values, relationships between citizens and the state, and the role of the market, to name but a few issues. National security concerns about data have also escalated recently, showcasing that beyond privacy concerns, data (as well as access to and control of data) have become a major geopolitical and geoeconomic factor.

Against this backdrop, global data governance rule-making has occurred predominantly in preferential trade venues. This is despite notable efforts to overcome the stalemate at the multilateral forum of the World Trade Organization (WTO), through the negotiations of the Joint Statement Initiative on Electronic Commerce (E-Commerce JSI). The foremost data governance issues that have arisen in preferential trade agreements (PTAs) are data protection, cross-border data flows, and data localisation. These issues are key to the regulation of the data-driven economy, both domestically and internationally.

In this paper we analyse how ASEAN economic and regional integration addresses issues of data governance, with a focus on cross-border data flows and data localisation. We leave aside the issue of data protection, as the evidence in PTAs reveals that there is much more consensus towards agreeing on rules for privacy protection in PTAs than on the issues of cross-border data flows and data localisation (Burri, Vásquez Callo-Müller, and Kugler, 2024). The analysis that we undertake in the next sections seeks to feed into current efforts to devise the ASEAN Economic Community (AEC) Post-2025 Vision. Section 2 presents an overview of the digital and data-related instruments in the AEC Blueprint 2025. It showcases that ASEAN has developed several initiatives to ease data flows as part of regional integration efforts. This drive to promote seamless digital markets in ASEAN is also reflected in the current negotiations towards an ASEAN Digital Economy Framework Agreement (DEFA), which is dealt with in Section 3. Against the background of the policy efforts as part of the AEC Blueprint 2025 and the negotiations towards the DEFA, Section 4 outlines the data governance models that have emerged from PTAs. Our emphasis is placed on the ASEAN PTAs, which should also clarify the relevant details of the negotiation of data policies in the DEFA. Finally, Section 5 suggests concrete policy options to be considered in the AEC Post-2025 agenda. It particularly highlights the flexibilities found in some PTAs, which can potentially bridge the differences between the most advanced models of data governance and less developed ones, particularly in countries with limited capacity for negotiation and in the early stages of developing their own domestic data governance frameworks. This can be especially useful for a diverse region such as ASEAN.

2. Digital and Data Instruments in the ASEAN Economic Community Blueprint 2025

The AEC Blueprint 2025 (ASEAN, 2015), which outlines the main goals of ASEAN economic integration, already contains different elements regarding digital and data governance. For instance, it lists amongst its five key characteristics a competitive and dynamic ASEAN in addition to enhanced connectivity and sectoral cooperation (ASEAN, 2015:12, 21). Important elements within these broad aspirations encompass the need to consider global mega trends and emerging trade-related issues (such as cross-border data flows), improving various sectors (such as telecom and information and communication technology (ICT), as well as the promotion of e-commerce (ASEAN, 2015:21,23,24). The implementation of these characteristics and elements is still ongoing, as noted by the 2021 Mid-Term Review of the AEC 2025 (the Mid-Term Review) (ASEAN, 2021a). However, in the effort to understand how data governance policies could evolve in a Post-AEC 2025 Vision, it is important to take stock of some of the outcomes thus far.

On the promotion of e-commerce, the Mid-Term Review highlights the conclusion of the ASEAN Agreement on Electronic Commerce, which entered into force in December 2021. The Mid-Term Review also notes other efforts undertaken to promote e-commerce, including the ASEAN Digital Integration Framework and its Action Plan (2019–2025), the ASEAN Digital Integration Index, the Guidelines on Accountabilities and Responsibilities of E-Marketplace Providers, the ASEAN Online Business Code of Conduct, and the ASEAN Guidelines on Cross-Border Business-to-Consumer Complaints, amongst others (ASEAN, 2021a:16). Regarding improving ICT infrastructure, the Mid-Term Review also mentions other notable achievements, particularly those corresponding to the sub-area of data governance. These include the ASEAN Framework on Digital Data Governance and the ASEAN Framework on Personal Data Protection. Moreover, other achievements regarding data governance are found in the 2021 Bandar Seri Begawan Roadmap (ASEAN, 2021b) instrument that was published after the Mid-Term Review.

The 2021 Bandar Seri Begawan Roadmap, endorsed at the 20th AEC Council in 2021, sets out concrete steps to develop an enabling environment for a robust ASEAN digital economy. These steps are planned to be undertaken in three periods: (i) recovery (2021–2022); (ii) acceleration (2022–2024); and (iii) transformation (2025). During the current period of acceleration, the Bandar Seri Begawan Roadmap sets important goals related to data policies, which, amongst other things, require the implementation of the ASEAN Cross-Border Data Flow mechanism by 2025 (ASEAN, 2021b: 8–9). The Workplan similarly seeks to deepen cooperation on Agreement commitments and not to require the localisation of computing facilities, which will be operationalised by a notification mechanism on data localisation requirements (ASEAN, 2021b:14–15). Another relevant objective is that all ASEAN Member States (AMS) have frameworks for the protection of personal data by 2025 (ASEAN, 2021b: 44–45). Furthermore, the Bandar Seri Begawan Roadmap emphasises the need to promote and monitor the adoption of implementation guidelines of the ASEAN Data Management Framework and the ASEAN Model Contractual Clauses. Both initiatives were developed by the ASEAN Working Group on Digital Data Governance chaired by Singapore.

For the transformation phase, the Bandar Seri Begawan Roadmap establishes the goal of working towards the ASEAN DEFA, which is discussed in detail in Section 3. It is however worth noting that all the above-mentioned initiatives, including the launch of negotiations towards the DEFA, showcase the commitment and entrepreneurship of ASEAN as a region to advance policies that strongly support digitalisation and cross-border data flows. Yet, whilst all these frameworks and roadmaps are comprehensive and capture the different policy reforms that are required for digitalisation to truly enable growth and innovation, a recurrent criticism is the limited capacity to enforce them. This challenge is due to their largely soft (non-binding) nature. This means that all these initiatives promote cooperation, capacity building, and experience-sharing (ASEAN, 2021b:18). They, however, do not entail legally binding and enforceable obligations. The Mid-Term Review of AEC 2025 notes the need for a shift in approach. Specifically, the Mid-Term Review advocates for regional guidelines and high-level principles [that need] to be translated into stronger commitments and for soft cooperation activities to have clearer targets towards regulatory coherence, or even regional strategies on convergence, common ASEAN frameworks, regional platforms, and infrastructure (ASEAN, 2021b: 33). These suggestions are not limited to intra-ASEAN relations, but are also applicable to ASEAN relations with other partners, where deeper cooperation is desirable (ASEAN, 2021b: 18). We provide an overview of these instruments in Table 5.1.

Table 5.1. The ASEAN Instruments on Data Governance

Name of the instrument	Year of signature
ASEAN Framework on Personal Data Protection	2016
ASEAN ICT Master Plan 2016–2020	2016
Master Plan on ASEAN Connectivity (MPAC) 2025	2016
ASEAN Work Programme on Electronic Commerce 2017–2025	2017
ASEAN Framework on Digital Data Governance	2018
ASEAN Digital Integration Framework	2018
ASEAN Digital Integration Framework Action Plan 2019–2025	2019
ASEAN Agreement on Electronic Commerce	2019
Work Plan on the Implementation of ASEAN Agreement on E-Commerce	2019
ASEAN Comprehensive Recovery Framework	2020
ASEAN Digital Masterplan 2025	2021
ASEAN Data Management Framework	2021
Bandar Seri Begawan Roadmap	2021
ASEAN Model Contractual Clauses for Cross-Border Data Flows	2021
Implementing Guidelines for ASEAN Data Management Framework and Cross-Border Data Flows	2021
ASEAN–EU Joint Guide on Model Contractual Clauses for Data Transfers	2023
Boracay Digital Declaration	2023
ASEAN Digital Economy Framework Agreement	2023

ASEAN = Association of Southeast Asian Nations, EU = European Union, ICT = information and communications technology.

Source: Authors' research.

3. The Digital Economy Framework Agreement

The 2021 Bandar Seri Begawan Roadmap outlines an important instrument for ASEAN digital integration: the DEFA. Formal negotiations towards the DEFA were launched during the 43rd ASEAN Summit in September 2023 (ASEAN, 2023a), with the first negotiation round taking place in December of the same year. The DEFA has significant potential for ASEAN (ASEAN, 2023b). It will constitute the world's first region-wide Digital Economy Agreement (ASEAN 2023c: 12) and, moreover, it is expected to unlock \$2 trillion¹ by 2030 in the region's digital economy (ASEAN, 2023c: 3). Sections 3.1 and 3.2 provide an overview of the objectives and scope of the DEFA and then explain its significance as the first region-wide Digital Economy Agreement (DEA).

¹ In this chapter, \$ refers to US dollars.

3.1. Digital Economy Framework Agreement's Objectives and Scope

As stated in the Framework for Negotiating the ASEAN Digital Economy Framework Agreement (DEFA Framework), adopted in September 2023 (ASEAN, 2023d), the DEFA has the objectives to provide a coherent, harmonised, collaborative, and rules-based approach to ASEAN's cooperation in the digital ecosystem to establish an open, secure, interoperable, competitive, and inclusive regional digital economy in the broader AEC-building agenda (ASEAN, 2023d:1). It aims to build upon the ASEAN Agreement on Electronic Commerce and the ASEAN Digital Integration Framework. The DEFA, moreover, will not detract from relevant terms and conditions in other ASEAN and ASEAN-plus agreements (ASEAN, 2023d:2, Principle 8). On the contrary, it intends to have broader and deeper engagement and will seek to improve on existing commitments (ASEAN, 2023d:1, Principle 3). Whilst this may appear ambitious, the negotiations will most likely accommodate differences in the level of development across ASEAN Member States, creating a structure that can cater to different levels of readiness.

In terms of scope, the DEFA will cover a broad range of digital trade issues. The DEFA Framework lists the following elements: digital trade; cross-border e-commerce; payments, and e-invoicing; digital ID and authentication; online safety and cybersecurity; cross-border data flows and data protection; competition policy; cooperation on emerging topics; and talent mobility and cooperation (ASEAN, 2023d:2).² The Framework thus explicitly states that the DEFA will cover data governance issues (and in particular, cross-border data flows), which advances the initiatives that ASEAN has previously developed on the subject, as explained in Section 2.

The DEFA negotiations are framed ambitiously and expected to be concluded by 2025. They run in parallel with other advancements at the multilateral level, specifically, the current negotiations for an E-Commerce JSI under the auspices of the WTO. The E-Commerce JSI negotiations include provisions on personal data protection, but they do not currently include provisions on the banning of data localisation requirements; nor do they cover cross-border data flows (WTO, 2024a; 2024b). In fact, it has been acknowledged that the proposals on data flows and localisation, in addition to source code, although these represent important issues for many participants, will require substantially more time for discussions as divergent approaches and sensitivities remain (Department of Foreign Affairs and

² See Elements/Scope and Coverage.

Trade, Australia et al., 2023). Currently 91 WTO Members,³ which account for over 90% of global trade, are participating in E-Commerce JSI negotiations, which are co-convened by Australia, Japan, and Singapore. All ASEAN Member States are party to these negotiations, except for Viet Nam.

3.2. Digital Economy Framework Agreement as a Region-Wide Digital Economy Agreement

It has been explicitly stated in preparatory studies for the DEFA negotiations that it is its intention to become the first region-wide DEA (ASEAN, 2023c:3). DEAs are, in fact, a significant development in digital trade and data regulation. They are dedicated agreements covering only digital trade. Currently, there are, at least, five such agreements: the US–Japan Digital Trade Agreement (DTA); the Digital Economy Partnership Agreement (DEPA); the Singapore–Australia DEA (SADEA); the UK–Singapore DEA, and the Republic of Korea, henceforth Korea–Singapore DEAs. Of those, only two – the US–Japan DTA and DEPA – are stand-alone agreements. The other three DEAs (SADEA, UK–Singapore, and Korea–Singapore) are part of, and upgrade, an existing PTA. However, there is no indication that the negotiations of these DEAs included issues beyond digital trade. It should also be noted that the driving force behind the proliferation of DEAs is Singapore, which has participated in four out of the five DEAs, and is currently negotiating similar agreements with the European Union (EU) and European Free Trade Association (EFTA) (European Commission and Ministry of Trade and Industry, Singapore, 2023; EFTA and Government of Singapore, 2024).⁴ This indicates Singapore’s strong interest in digital trade and its legal entrepreneurship in this area.

DEAs contain innovative provisions on data not found in traditional PTAs. Next to provisions on enabling cross-border data flows or prohibitions of data localisation requirements, all DEAs have provisions on open government data. They generally require that it is anonymised, has descriptive metadata, is machine readable, and is in open format that allows it to be searched, retrieved, used, reused, and redistributed.⁵ Provisions on open data not only help to promote good practices in government, but may also constitute an invaluable resource for data-based innovation. DEAs also include provisions

³ Albania; Argentina; Australia; Austria; Bahrain, Kingdom of; Belgium; Benin; Brazil; Brunei Darussalam; Bulgaria; Burkina Faso; Cabo Verde; Cameroon; Canada; Chile; China; Colombia; Costa Rica; Côte d’Ivoire; Croatia; Cyprus; Czech Republic; Denmark; Ecuador; El Salvador; Estonia; Finland; France; Gambia; Georgia; Germany; Greece; Guatemala; Honduras; Hong Kong, China; Hungary; Iceland; Indonesia; Ireland; Israel; Italy; Japan; Kazakhstan; Kenya; Korea, Republic of; Kuwait, the State of; Kyrgyz Republic; Lao, People’s Democratic Republic of; Latvia; Liechtenstein; Lithuania; Luxembourg; Malaysia; Malta; Mauritius; Mexico; Moldova, Republic of; Mongolia; Montenegro; Myanmar, Republic of the Union of; Netherlands; New Zealand; Nicaragua; Nigeria; North Macedonia; Norway; Oman; Panama; Paraguay; Peru; Philippines; Poland; Portugal; Qatar; Romania; Russian Federation; Saudi Arabia, Kingdom of; Singapore; Slovak Republic; Slovenia; Spain; Sweden; Switzerland; Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu; Thailand; Türkiye; Ukraine; United Arab Emirates; United Kingdom; United States; Uruguay.

⁴ EFTA Member States are Iceland, Liechtenstein, Norway, and Switzerland.

⁵ Article 20, US–Japan DTA; Article 27, SADEA; Article 9.5, DEPA; Article 8.61–H, UK–Singapore DEA; and Article 14.26, Korea–Singapore DEA.

on aspects that affect the broader framework in which data-driven businesses operate. For instance, they contain provisions on competition policy related to the digital economy; digital identities; digital inclusion; fintech and lawtech cooperation; AI governance; standardisation; interoperability; and mutual recognition regarding electronic means.⁶ Some of these issues have permeated into PTAs' digital trade chapters, showcasing the influence of DEAs on PTAs and the interrelatedness of global data governance frameworks. For example, the India–UAE Comprehensive Economic Partnership Agreement of 2022 includes provisions on digital identities.⁷ The New Zealand–UK Free Trade Association, in addition to the provisions on digital identities, also includes language on AI.⁸

Despite the apparent forward-looking policies found in DEAs, it is important to note that some of the key commitments can be subject to exceptions. For instance, all DEAs contain commitments not to prohibit cross-border data flows, yet these provisions are subject to exceptions for legitimate public policy reasons. Similarly, all DEAs prohibit data localisation requirements as a condition for market access or conducting business in the territory of the other party/parties. However, these provisions are also subject to exceptions. Moreover, the majority of DEAs provisions are of a soft law character, and in some cases, some provisions are explicitly excluded from the dispute settlement mechanism, which reduces their normative value.

Despite these conditionalities, DEAs reveal a tendency for legal innovation, as they include new issues that otherwise have not appeared in digital trade negotiating agendas. The intention of the DEFA negotiations to follow a DEA template can be thus linked to the inclusion of novel areas that could accelerate the already existing ASEAN regional digital integration, building upon the ASEAN instruments on data governance, as detailed in Table 5.1. However, it should be noted once again that whilst DEAs are broad in scope, they are also largely of soft law nature. This should not be seen as failure to reach binding and enforceable commitments, but as a starting point for dedicated digital trade integration and a platform for closer cooperation on contemporary and future data economy issues. One of the interesting aspects of DEAs, such as the DEPA between Chile, New Zealand, and Singapore, is that they are living agreements. An example of this is the adoption of the Protocol to the DEPA in 2023 (New Zealand Foreign Affairs and Trade, 2023), which, amongst other things, subjects the provisions on cross-border transfer of information, location of computer facilities, and non-discrimination of digital products to dispute resolution under the treaty, reinforcing their legal bindingness.

⁶ See the relevant provisions on cooperation on competition policy in Article 16, Australia–Singapore DEA; Article 8.4, DEPA, Article 8.61-U, UK–Singapore DEA; and Article 14.27, Korea–Singapore DEA. On digital identities, see Article 9.7, India–UAE CEPA and Article 14.36, Korea–Singapore DEA. On digital inclusion, see Article 11.1, DEPA (covering also inclusion of Indigenous Populations) and Article 8.61-P, UK–Singapore DEA. On fintech, see Article 32, SADEA; Article 8.1, DEPA; and Article 14.29, Korea–Singapore DEA. On AI, see Article 31, SADEA; Article 8.2, DEPA; Article 8.61-S, UK–Singapore DEA; and Article 14.28, Korea–Singapore DEA. On standards and conformity assessment procedures, see Article 30, SADEA; Article 8.61-D, UK–Singapore DEA; and Article 14.32, Korea–Singapore DEA. On lawtech, see Article 8.61-T, UK–Singapore DEA.

⁷ See Article 9.7, India–UAE CEPA.

⁸ See Article 15.19(3)(a), New Zealand–UK DEA.

An additional remark should be made at this point. Whilst the intention of the DEFA is to follow the DEA model, not all ASEAN Member States are party to existing DEAs. In fact, the only ASEAN Member State party to DEAs is Singapore. This shows that whilst it is important to analyse how the DEFA will match most advanced DEAs templates, it is similarly important to understand what the scope of digital trade commitments, and specifically, data-related provisions, is in ASEAN PTAs. This is an aspect that should also inform an AEC Post-2025 Vision, and which we explore in Section 4.

4. Data-Driven Policies and the ASEAN Preferential Trade Agreements

Data policies are at the heart of current digital trade policymaking for a simple reason: digital trade depends on the seamless movement of data across borders. Domestic policies affecting data flows, which in practice may require that certain data (or a copy of it) must be stored on servers in the country where the data was originally collected, or other measures of data localisation, can concomitantly affect and reduce trade flows. As explained in Section 1, data flow restrictions can be applied for a variety of reasons, including privacy but also emerging national security concerns.⁹ When such restrictions go beyond legitimate public policy reasons and are of a discriminatory nature, they can entail a significant cost for enterprises, which can face limitations, for instance, to use cloud storage services or other third-party services (e.g. software) that would significantly affect their operations. Interestingly and importantly, the costs are borne not only by foreign businesses but also by local ones.

The impact of divergent regulatory requirements for personal data protection and for cross-border data flows has led countries to pursue different mechanisms to promote interoperability, so that the fragmentation of regulatory regimes is tempered and does not restrict trade. Some efforts to minimise cross-border data flow friction are reflected in trade agreements, which have emerged as laboratories for data-related policies. Since the adoption of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) in 2018, to which four AMS are signatories (Brunei Darussalam, Malaysia, Singapore and Viet Nam), we have witnessed a keen interest shared by governments around the world to regulate digital trade and data with specifically designed treaty templates. The CPTPP template was an important baseline of these efforts that sought to facilitate digital trade and to enable cross-border data flows. The CPTPP model has been replicated and expanded by subsequent agreements. This is true also for the United States, an original party to the trans-Pacific partnership, which confirmed the liberal US approach to digital trade, as initiated by its 2001 Digital Agenda. The renegotiated North American Free Trade Agreement, which is now referred to as the United States–

⁹ It should be noted that some ASEAN countries have significant data localisation requirements in place – for instance, for online (cyberspace) service suppliers (Viet Nam) and for providers of public services (Indonesia).

Mexico–Canada Agreement (USMCA) follows all critical lines of the CPTPP regarding facilitating digital trade and ensuring unhindered data flows. Beyond these similarities, the USMCA goes CPTPP-plus in some respects by (i) including algorithms in the ban on requirements for the transfer of, or access to, source codes; (ii), limiting the liability of interactive computer services providers for third-party content; and (iii), providing for open government data.

Whilst there is a trend for going CPTPP-plus, this is not true for all stakeholders involved. The EU, for instance, has been a relatively late mover on digital trade issues, and now that it has defined its template,¹⁰ this differs in important aspects from the provisions described above. On the one hand, the EU digital trade chapters converge with the CPTPP/USMCA model to cover issues such as software source code, facilitation of electronic commerce, online consumer protection, spam, and open government data. On the other hand, they do not include provisions on non-discrimination of digital products and, in reflection of the EU stance on trade and culture, consistently exclude audiovisual services from the scope of the application of the digital trade chapter. Beyond this, and critically for the regulation of the data-driven economy, the EU is willing to permit data flows only if coupled with the high data protection standards of the EU General Data Protection Regulation. So, whilst the EU and its partners seek to ban data localisation measures and subscribe to a free data flow, these commitments are conditioned: first, by a dedicated article on data protection, which clearly states that: Each Party recognises that the protection of personal data and privacy is a fundamental right and that high standards in this regard contribute to trust in the digital economy and to the development of trade, (e.g. EU–New Zealand FTA, Art. 12.5 (1)) followed by a paragraph on data sovereignty. Several other safeguards are included too – such as a review possibility that can be linked to new restrictions, as well as a broadly defined right to regulate. Similarly, under the Regional Comprehensive Economic Partnership (RCEP), one sees a more flexible and pragmatic framework that allows developments at different speeds that reflect varieties and sensibilities across the different countries. For instance, whilst the RCEP includes many of the issues around the facilitation of digital trade, its language is more cautious on data governance issues. Whilst the RCEP electronic commerce chapter includes a ban on localisation measures, as well as a commitment to free data flows, there are clarifications that protect the RCEP parties policy space for a variety of reasons, including a self-judging test for the protection of essential security interests.

ASEAN PTAs, on the other hand, fall short of the digital trade commitments found in RCEP, which includes all ASEAN countries as well as Australia, China, Japan, Korea, and New Zealand. Although most digital trade rules in RCEP are soft cooperation commitments, they do cover various aspects relevant to digital markets and their regulation, including important provisions relating to digital trade facilitation and conditional cross-border data flows. Table 5.2 highlights the gaps in key data provisions amongst ASEAN PTAs.

¹⁰ Representative of the new EU approach are the adopted agreements with the United Kingdom (Trade and Cooperation Agreement) and with New Zealand, as well as the draft digital trade chapters of the currently negotiated deals with Australia and Tunisia.

Table 5.2. Data-Related Provisions in the Association of Southeast Asian Nations Preferential Trade Agreements

Name of Agreement	Date of entry into force	Provision, chapter or entire agreement	Data protection	Cross-border data flows	Data localisation prohibited	Data innovation	Digital inclusion	Open gov. data	AI	Dispute settlement applicable to e-commerce chapter
ASEAN–China Framework Agreement (as amended)	2003									
ASEAN–China Trade in Goods Agreement	2005									
ASEAN–China Trade in Services Agreement	2007									
ASEAN–Japan CEPA (as amended)	2008	Provision		X*						
ASEAN–India Framework Agreement (2010)	2010									
ASEAN–Australia–New Zealand FTA (as amended)	2018	Chapter	X	X***	X***		X	X		Yes
ASEAN–Korea Trade in Goods Agreement	2019									
ASEAN–India (Goods)	2019									
ASEAN–India (Services)	2019									
ASEAN–Hong Kong FTA	2020	Provision								
ASEAN Agreement on Electronic Commerce	2021	Entire agreement	X		X**					Yes
ASEAN Trade in Services Agreement	2021	Provision		X*						
RCEP	2022	Chapter	X	X***	X***					No****

AI = artificial intelligence, ASEAN = Association of Southeast Asian Nations, CEPA = Comprehensive Economic Partnership Agreement, e-commerce = electronic commerce, FTA = Free Trade Association, gov = government, RCEP = Regional Comprehensive Economic Partnership.

Notes:

(a) **Yellow**: Soft provision; **Green**: Hard provision.

(b) *Only for financial services and/or telecom services.

(c) *** Subject to domestic law; *** Subject to exceptions; **** Explicitly excluded from dispute settlement

Source: Author's research, based on Burri, Vásquez Callo-Müller, and Kugler (2024).

Based on an overview of ASEAN PTAs, it is possible to argue that they do not currently meet the scope of the RCEP data governance provisions. To date, the only agreement that has been amended to cover more digital and data governance issues than RCEP is the ASEAN–Australia–New Zealand Free Trade Agreement (AANZFTA), the upgrade of which was signed in August 2023. One notable change in the upgraded AANZFTA is that it explicitly makes the dispute settlement chapter applicable to the e-commerce chapter, which was not the case in the original agreement. Additionally, to account for the varying levels of readiness of AMS regarding certain provisions, such as banning localisation requirements for computer facilities and cross-border data flows, the dispute settlement chapter only applies to those provisions 3 years after the upgraded agreement comes into effect. It is also worth noting that the dispute settlement chapter is not currently applicable to Cambodia, the People's Democratic Republic of Lao (Lao PDR), and the Republic of the Union of Myanmar.¹¹ These provisions in the AANZFTA shed light on the different strategies that can be adopted in ASEAN PTAs to reach an agreement on key issues, such as notably sequencing commitments (i.e. phasing-in certain obligations over time). The flexibilities incorporated in the AANZFTA also reflect the current proposals in the context of the E-Commerce JI negotiations, which provides, amongst other things, a provision for special and differential treatment (SDT) for least developed countries and mechanisms for capacity building.

To be sure, AMS may consider going even beyond the commitments of AANZFTA. ASEAN PTAs can strive to better reflect the elements included in ASEAN instruments on data governance, which are very detailed and focus on the operationalisation of key issues, such as cross-border data flows. For example, they could explicitly reference ASEAN instruments on data governance, in a similar way that the USMCA refers to international instruments, such as the Asia-Pacific Economic Community Cross-border Privacy Rules System. This could raise awareness of the relevant ASEAN frameworks amongst policymakers and create a platform for discussion and exchange to make them interoperable with other countries or regional frameworks. Moreover, a heightened level of ambition for ASEAN PTAs also seems to be necessary given the provisions included in DEAs – provisions, which currently do not form part of key ASEAN PTAs. Table 5.3 clarifies the existing gaps between the more advanced frameworks found in DEAs and key ASEAN PTAs.

¹¹ Article 20, of Chapter 10, of Upgraded AANZFTA.

Table 5.3. Data-Related Provisions in Key ASEAN Preferential Trade Agreements vis-à-vis Digital Economy Agreements

Name of Agreement	Date of entry into force	Provision, chapter or entire agreement	Data protection	Cross-border data flows	Data localisation prohibited	Data innovation	Digital inclusion	Open gov. data	AI	Dispute settlement applicable to e-commerce chapter
ASEAN–Australia–New Zealand FTA (as amended)	2010	Chapter	X	X***	X***		X	X		Yes
ASEAN Agreement on Electronic Commerce	2021	Entire agreement	X		X**					Yes
RCEP	2022	Chapter	X	X***	X***					No****
Digital Economy Partnership Agreement (DEPA)	2020	Entire agreement	X	X***	X***	X	X	X	X	Yes*****
Singapore–Australia Digital Economy Agreement	2020	Entire agreement	X	X***	X***	X		X	X	Yes
Singapore–UK DEA	2022	Entire agreement	X	X***	X***	X	X	X	X	Yes
Korea–Singapore DEA	2023	Entire agreement	X	X***	X***	X		X	X	Yes

AI = artificial intelligence, ASEAN = Association of Southeast Asian Nations, DEA = Digital Economy Agreement, FTA = Free Trade Agreement, Gov = government, RCEP = Regional Comprehensive Economic Partnership.

Notes:

(a) **Yellow**: Soft provision; **Green**: Hard provision

(b) ** Subject to domestic law; *** Subject to exceptions; **** Explicitly excluded from dispute settlement; ***** Explicitly excludes cross-border data flows.

Source: Author's research, based on Burri, Vásquez Callo-Müller, and Kugler (2024).

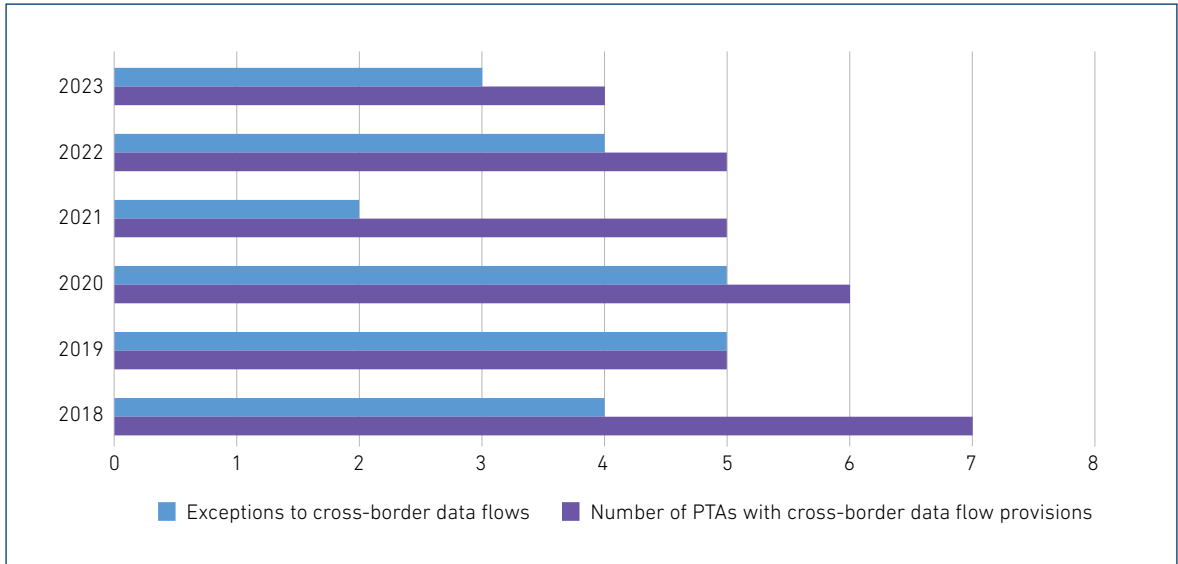
A final issue that should be mentioned regarding data-related commitments in ASEAN PTAs is their level of implementation at the national level. More efforts should be made to gather information about this aspect, which is of crucial importance to interface international and domestic regulatory frameworks. So far, such evidence is largely absent in policy and academic research.

5. Adapting an ASEAN Economic Community Post-2025 Vision for Data-Driven Trade: Policy Implications and Recommendations

As mentioned at the beginning of this paper, ASEAN has made considerable efforts to promote policies that support digitalisation and the data-driven economy. The AEC 2025 agenda has set the characteristics or broad aspirational goals that AMS wish to achieve, as well as the elements that should help them achieve these goals. Moreover, ASEAN has, over the years, adopted a myriad of instruments that have a digital component, and which, for the most part, are voluntary. The soft nature of these instruments highlights the difficulty of agreeing on binding rules on digital and data issues, reflecting the different stances and different levels of development of ASEAN countries in this regard. This difficulty extends to ASEAN PTAs, which except for the amended AANZFTA, have fallen short of the commitments included in modern DEAs and other relevant PTAs, such as RCEP.

To bolster the digital environment across the ASEAN region and to unleash the potential of digital trade, it is crucial to embrace a thorough strategy encompassing the reconsideration of data-related commitments in ASEAN PTAs. Part of this effort is already occurring with the negotiations towards the DEFA, which is expected to have cross-border data flows and data localisation provisions, in addition to a comprehensive set of digital trade rules. One pivotal aspect of cross-border data flow and data localisation commitments involves adopting flexibilities to bridge the gaps between the level of ambition, and the capacity to liberalise data markets across negotiating parties. Recognising the diverse needs and capacities of AMS, these flexibilities could encompass (i) tailored exceptions; (ii) limited application of dispute settlement to data-related commitments; (iii) SDT mechanisms, including longer periods of implementation; and (iv) capacity building. Such approaches can alleviate concerns regarding sovereignty, privacy, and technological readiness whilst promoting consensus and agreement on these critical issues.

Tailored exceptions for cross-border data flow and data localisation provisions allow countries to carve out policy space for limiting the free flow of data, including for sensitive data or data protection. These exceptions have become more detailed and expansive over the years, providing more policy space for the parties to trade agreements. To illustrate this point, in the last few years, most trade agreements with cross-border data flow provisions include exceptions within the same clause, as showcased in the Figure 5.1.

Figure 5.1. Exceptions in Cross-Border Data Flows Provisions in Preferential Trade Agreements

PTA = Preferential Trade Agreement.

Source: Author's research, based on Burri, Vásquez Callo-Müller, and Kugler (2024).

Moreover, these data flows-specific exceptions are layered with the other applicable horizontal exceptions that might be included in the general exceptions chapter of a PTA. These often include general exceptions such as in Article XX of the General Agreement on Tariffs and Trade 1994 and Article XIV of the General Agreement on Trade in Services, which in some cases are stated to apply *mutatis mutandis* or are replicated in full in the relevant section of the treaty. Some treaties devise specific legitimate public policy exceptions that are textually more open than the WTO counterparts. Increasingly, there is also a specific personal data protection exception. Additionally, countries can add security exceptions, which could also be made in reference to Article XXI of the General Agreement on Tariffs and Trade 1994 or Article XIVbis of the General Agreement on Trade in Services *mutatis mutandis* or reproduced in the treaty. These exceptions relate to the essential security interests of a country, including in times of war. All such exceptions safeguard policy space and can be invoked by a country in the event of a legal challenge/dispute.

Parties to a treaty can also decide on the non-applicability of dispute settlement chapters, either indefinitely or for a period. This can allow a country to protect eventual data restrictions for public policy purposes against legal challenges. This is the case even when the data flows provision itself is a binding commitment. For example, in RCEP, the electronic commerce chapter, which has hard commitments on cross-border data flows, is (at the moment) not subject to dispute settlement. RCEP's dispute settlement chapter will apply to the parties that have agreed to its application after the 5-yearly general review.

As mentioned in the previous sections, parties can also decide to review the application of dispute settlement provisions to cross-border data flow and localisation provisions after some time. For example, in the case of DEPA, it was only with the adoption of the 2023 Protocol that the parties decided to subject the provisions on cross-border transfer of information and location of computer facilities to dispute resolution under the treaty, reinforcing their legal bindingness. Similarly, in the case of the AANZFTA, it is only with the Second Protocol to upgrade the AANZFTA, signed on 21 August 2023, that parties to the treaty decided to make the electronic commerce chapter subject to dispute settlement.

In addition, AMS can also consider adding review clauses to delay the entry into force of certain obligations and/or to monitor them. These clauses are particularly common in EU FTAs. For example, in the EU–Japan and EU–Mexico FTAs, the parties included a review period to include provisions on cross-border data flows three years after the entry into force of the agreement, which indeed materialised in the treaty with Japan in 2023. In more recent EU treaties, the data flows/data localisation commitments include a future-oriented review clause in which the parties agree to periodically review and assess the implementation of these obligations. Review clauses may or may not be linked to monitoring mechanisms embedded in the agreement. Certain agreements, such as DEPA, have a Joint Committee and Contact Points with far-reaching competences. In general, institutionalised mechanisms strengthen the cooperation amongst the parties, contribute to legal certainty, and may offer pragmatic avenues to operationalise the agreement.

AMS can also consider including SDT provisions for least developed members, as a strategy to mitigate or phase-in the more stringent obligations. This could be, for example, those related to bans on data localisation. By including these type of provisions countries that still grapple with the lack of clarity over what the trade-offs of engaging in cross-border data flows and data localisation requirements are, may be more likely to agree to these provisions. In RCEP, for example, Cambodia, Lao PDR and the Republic of the Union of Myanmar (all least developed countries) are allowed up to 8 years to implement the cross-border data flows and data localisation provisions, whilst Viet Nam is permitted up to 5 years. SDT for least developed countries can also include forms of capacity building and regulatory exchange.

Next to incorporating flexibilities to facilitate a political agreement on data-related issues, the AEC Post-2025 Vision should continue to promote the ASEAN instruments that already exist on data governance, as detailed in Table 5.1. This is the case, for instance, for the ASEAN model contractual clauses, which are a concrete mechanism to promote cross-border data flows. By incorporating such mechanisms into the DEFA, AMS can promote the interoperability of these instruments with other similar regional efforts, such as those taking place in Europe. This can be done by referencing these instruments in cross-border data flows provisions, or by adding a protocol to data protection and cross-border data flows to the DEFA, which recognises key ASEAN instruments on data governance to facilitate data protection and promote cross-border data flows.

To conclude, the scope and depth of data-related provisions in DEFA and future ASEAN PTAs will influence the potential to deepen interoperability of data policies at the ASEAN regional level. Therefore, it is important to be innovative as well as pragmatic in fostering digital markets integration and the interoperability of data policies. Member States should leverage the considerable efforts made in the past to promote streamlined digital trade operations in ASEAN that ensure legal predictability.

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