

RE-THINKING THE PACIFIC'S E-COMMERCE STRATEGY: PUTTING COOPERATION, DIGITAL SOVEREIGNTY AND DEVELOPMENT AT THE CORE



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TERMS OF REFERENCE

Pacific Islands Regional E-Commerce Strategy and Digital Sovereignty Project

To provide an analysis of the Pacific Islands Regional E-Commerce Strategy and its impacts on digital sovereignty in the Pacific. The analysis will aid in understanding the cross-cutting implications of the strategy and the ongoing trade negotiations at both a plurilateral and regional level and what these mean for development. The project aims to support better informed engagement with officials and the public about the future of digital trade and development in the Pacific Islands.

The specific scope of the work is the following:

1. Providing an assessment of the Pacific Regional E-commerce strategy as a tool to build digital sovereignty among the Pacific Island Countries (PICs);
2. Using the current texts of MSGFTA3 and WTO E-commerce negotiations to highlight potential problematic positions for PICs' digital development (and if appropriate where they are counter to the Pacific Regional E-commerce strategy);
3. Providing recommendations for PIC digital development in regards to trade agreements.

Acknowledgements

This report was prepared as South Pacific countries cautiously emerge from the constraints of a lengthy Covid-19 pandemic. Unlike the methodology adopted in her previous reports, the author was unable to travel and conduct interviews with officials, ministers, other experts and members of various Pacific communities and has worked only from available documents. That creates obvious limitations, especially the opportunity to discuss inferences from documents with those involved. Hopefully, those discussions can occur in the Pacific region, and in Geneva, once life in the region assumes a new normality.

Trade rules are central to the terms of reference. This analysis draws on the author's work over a number of years with officials, digital experts, academics and trade negotiators on e-commerce and digital trade developments in, and affecting, the Global South. There is a difficult balance between ensuring the accuracy of technical content and making it understandable to lay audiences. For that reason, the more detailed discussion of trade rules is set out in footnotes. The author would be pleased to respond to questions or requests for further information and analysis.

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ABBREVIATIONS

AI	Artificial Intelligence
AML/CFT	Anti-money laundering and countering financing of terrorism
ASEAN	Association of South East Asian Nations
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
EU	European Union
FIC	Forum Island Country
FTA	Free trade agreement
GVC	global value chain
ICT	information and communications technology
IMF	International Monetary Fund
IPEF	Indo-Pacific Economic Framework
LDC	Least-developed country
MSGFTA3	The third Melanesian Spearhead Group Free Trade Agreement
OTA	Online travel agencies
PACER-+	The Pacific Agreement for Closer Economic Relations - Plus
PIFS	Pacific Islands Forum Secretariat
REM	Regional E-commerce Markets
RBNZ	Reserve Bank of New Zealand
US	United States of America
SME	small and medium enterprise
TDB	Tonga Development Bank
TPPA	Trans-Pacific Partnership Agreement
UNCTAD	United Nations Conference on Trade and Development
VAT	Value added tax
WTO	World Trade Organization

1. OVERVIEW

In August 2021 the Pacific Islands Forum Secretariat published a Regional E-Commerce Strategy and Roadmap for Pacific Island Countries, sponsored by the Australian Aid Program.¹ The Strategy is unequivocally optimistic that e-commerce will be a “game-changer” for Pacific Island Countries to achieve “unprecedented levels of inclusive, sustainable development in a post-COVID-19 Blue Pacific” - despite acknowledging that the previous magic bullet, trade liberalisation, failed to achieve the promised integration of the Islands’ economies into global value chains.

Pacific E-commerce Strategy: *The adoption and diffusion of electronic commerce (E-commerce) in the Forum Island Countries (FICs) is poised to become a game-changing catalyst for unprecedented levels of inclusive, sustainable development in a post-COVID-19 Blue Pacific, with physical distancing and travel restrictions in place, digital technologies will become an integral part of the new normal. Future-proofing a Blue Pacific will require E-commerce to flourish. ...*

Despite trade liberalization, successfully integrating the FICs into the global value chains (GVC) continues to be a constant uphill battle. E-commerce is, however, changing the narrative in the Pacific region. By mitigating the ‘tyranny of distance’ and the digital divide gap, E-commerce opens new cross-border trade opportunities, presenting proven and innovative solutions to a perpetual problem. For Micro, Small and Medium Enterprises (MSMEs) in the region, E-commerce can not only effectively facilitate cross-border trade with minimal red tape and overhead costs, but it can also significantly reduce transaction times and marketing costs, thereby enhancing competitiveness.²

In his Foreword to the Strategy, the Pacific Islands Forum Secretary General Henry Puna recognised a number of barriers that Pacific Islands face: weak policy and regulatory environments, poor logistics, difficult and costly access to online marketplaces, inadequate trade facilitation practices for small parcels, and limited and costly internet connectivity. These are real and pressing problems. There is an understandable concern that, unless these challenges can be effectively addressed, Pacific Island Countries will become even more marginalised in what is often described as the digital 21st century.

However, these obstacles and strategies to overcome them do not exist in a vacuum. The digital ecosystem in which e-commerce takes place is complex, multifaceted and constantly changing. It is currently dominated by a small number of powerful near-monopolies or oligopolies, mostly domiciled in the United States or China. It is also increasingly governed by international trade agreements that reinforce this unlevel global marketplace.

Maximising the potential benefits of digital technologies and minimising the risks to developing countries is particularly challenging for small island states like the Pacific Island Countries. This review of the Pacific E-commerce Strategy argues for the alternative approach promoted by the United Nations Conference for Trade and Development (UNCTAD) in several recent reports on digital economy strategies for developing countries - that regional, South-South and trilateral South-South-North cooperation, in which e-commerce is one element of a holistic digital ecosystem, offers a preferable pathway to developing a realistic, workable and development-focused strategy for the Pacific region in ways that it can control.

¹ Pacific Islands Forum, *Pacific Regional E-commerce Strategy and Roadmap*, August 2021, <https://www.forumsec.org/2021/10/29/pacific-regional-e-commerce-strategy-and-roadmap-approved/>

² Pacific E-commerce Strategy p.14

1.1. Re-thinking E-commerce

The Pacific E-commerce Strategy approaches e-commerce as a series of commercial transactions between businesses and consumers on a potentially level digital playing field. As a result, it fails to address critical contextual factors. The UNCTAD *Digital Economy Report* for 2021³ highlights a number of realities that an effective, equitable and durable e-commerce strategy for developing countries needs to recognise and respond to.

- (i) Online commercial activities or e-commerce are part of an integrated digital ecosystem and data regime. People and communities, businesses, governments, and even the environment engage with and/or are affected by digital technologies, activities and data. This occurs across a range of inter-related commercial, social, political and personal spheres. Different social, cultural, ethical, and environmental requirements and sensitivities will arise, for example, when dealing online with the wholesale supply of bottled water or agricultural produce, cross-border education and health services, payments and transfer of offshore remittances through non-traditional financial providers, digitalised fisheries and mining operations, tourism bookings, media and entertainment, or professional services. Governments need the capacity to regulate accordingly.

An e-commerce strategy for the Pacific needs to be holistic; it cannot treat e-commerce as purely commercial transactions in a silo that is detached from its broader context.

- (ii) Data holds the key to the digitalised economy and innovation. Access to, control of, and the ability to add value to data are pre-requisites for digital development, which includes e-commerce. Developing countries must have the right and ability to decide how data sourced from within their territory is collected, where it is stored, the ways it is used, how it is regulated and taxed, and which countries' jurisdictions do and should apply to its collection and use. For small island states that cannot do this on their own, it makes sense to develop a shared regional data infrastructure that provides scale and efficiency alongside control and pools (non-personal) data and human and financial resources, while collectively developing a robust data protection regime.

A regional digital development strategy needs to combine data sovereignty and digital governance strategies with support for technological innovation that creates the benefits of scale that cannot be generated nationally. South-South and trilateral cooperation are essential to help develop *regional* data strategies that are development focused and realistic about what can be achieved, learning lessons from countries that faced similar challenges. And they must retain the policy space to do that.

- (iii) There is a growing understanding in many countries that the largely unregulated private control of data, and of data-driven technologies, services and products, carries substantial risks, including to security, political stability, human rights and cultural identity. Governments are scrambling to develop precautionary regimes that can address and anticipate these issues, whilst continuing to support innovation and benefit from digitalisation. While lessons can be learned from all countries, there are growing calls in the Global South and among

³ UNCTAD, *Digital Economy Report 2021. Cross-border data flows and development. For whom the data flow*, United Nations, New York

indigenous peoples for data sovereignty and data governance regimes that respect and reflect their cultural beliefs and social systems.

There are important lessons to learn from the experiences of other countries, in particular developing countries⁴ and indigenous peoples⁵, to develop regimes for digital regulation and governance that are appropriate to Pacific Island Countries' cultures and societies.

- (iv) The digital domain is not a level playing field or an open marketplace. A small number of the world's richest corporations⁶ control the digital technologies and software, online platforms and marketplaces, payment systems, search engines, social media and advertising, and above all the collection, processing and application of data that informs the algorithms that drive them all. They set the terms for participation and exclusion, frequently at the expense of developing countries and small and medium enterprises (SMEs). Some of these corporations also control participation through integrated logistics and supply chains, either by direct ownership or exclusive contracts for transport, distribution and fulfilment centres. A growing number of lawsuits for anti-competitive practices in the United States of America (US) and European Union (EU) have imposed multi-billion dollar damages,⁷ which the "big tech" transnationals seem to factor into their business model.

The abilities of these corporations to dictate the terms for Pacific Island Countries to access and participate in most digital activities, including e-commerce, carries the potential to deepen, rather than reverse, the existing development asymmetries. Their dominance in the digital ecosystem not only distorts competition; it privatises control over knowledge and information that serves both public and private purposes, creates new dependencies, and puts fundamental rights at risk. Models like India's new Open Network for Digital Commerce are being designed to provide open access alternatives to this dependency.⁸ Such initiatives reinforce the potential for South-South cooperation in developing e-commerce networks that are designed to meet developing countries' realities.

National and regional digital strategies for the Pacific, including for e-commerce, need to minimise the risks of capture, exploitation and deeper dependency on dominant tech companies, and explore innovative and appropriate alternatives that maximise regional integration and control by drawing on initiatives underway in the Global South.

- (v) The digital domain is becoming a focal point for geopolitical tension between the US (and its allies such as Australia, New Zealand and Japan), the Peoples' Republic of China, and to some extent the EU. Whose digital technologies, corporations and regulatory regime will gain ascendancy in the 21st century is becoming as important a marker of hegemonic power as old military forms of dominance. Both the US and China are presently courting the Pacific

⁴ See Part 6.

⁵ Stephanie Russo Carroll et al, "The CARE Principles for Indigenous Data Governance", *Data Science Journal*, 19(1), 43, <https://datascience.codata.org/articles/10.5334/dsj-2020-043/>

⁶ Jonathan Ponciano, "The world's largest tech companies in 2022", *Forbes*, 12 May 2022, <https://www.forbes.com/sites/jonathanponciano/2022/05/12/the-worlds-largest-technology-companies-in-2022-apple-still-dominates-as-brutal-market-selloff-wipes-trillions-in-market-value/?sh=301ed7a34488>

⁷ Sara Morrison and Shirin Ghaffary, "The case against Big Tech", *Vox*, 8 December 2021, <https://www.vox.com/recode/22822916/big-tech-antitrust-monopoly-regulation>

⁸ Government of India, "ONDC Project", Press Information Bureau, Ministry of Commerce and Industry, 6 April 2022, <https://pib.gov.in/Pressreleaseshare.aspx?PRID=1814143>

Island Countries. These tensions were highlighted by China's recent presence in the Pacific region, which were reported to include proposals on data and e-commerce and a free trade area,⁹ and the US's launch of the Indo-Pacific Economic Framework (IPEF) in which digital and data regimes are a key element.

Competing digitalisation regimes and the related power over data will add to superpower tensions that are already evident in the region, with donors, consultants and regional and international organisations pushing the region to adopt their preferred agendas. Those tensions will intensify as Pacific Island Countries are pressured to negotiate binding digital trade rules and/or adopt digital networks that reflect the US's hands-off or China's state-centred model. As rule-takers in this arena, Pacific Islands Countries could be left with overlapping and potentially conflicting obligations.¹⁰

The Pacific Islands' digital sovereignty strategy, including for e-commerce, needs to assert and maintain the region's independence and avoid being caught in a dysfunctional web of major powers' competing digital regimes and trade rules. That includes avoiding capture by aid donors and becoming locked into one network of competing and potentially incompatible data regimes, platforms, servers, markets, fintech providers and training programmes that are designed by the protagonists to advance their interests.

- (vi) Free trade agreements have become a favoured vehicle of the US and its allies and the EU to promote the digital model that best serves their geopolitical and corporate interests to the exclusion of other stakeholders and competing non-commercial priorities. That includes rules that cement their corporations' control over data and software and seek to shield them from new regulations that might require the sharing of data and technologies, reduce their market dominance, and prevent abusive practices. The Pacific region's major aid donors Australia and New Zealand are strong advocates of these rules in free trade agreements (FTAs) and the World Trade Organization (WTO). The adoption of these rules would seriously restrict the policy space for digital development in the Pacific region - and even undermine some of the measures that the E-commerce Strategy itself proposes.¹¹

Many of those constraints already exist in trade in services provisions of the Pacific Agreement for Closer Economic Relations-plus (PACER-plus) with Australia and New Zealand. If the third Melanesian Spearhead Group Free Trade Agreement (MSGFTA3) was ever to enter into force, its e-commerce and trade in services obligations would impose even more severe constraints. The Pacific E-commerce Strategy urges the six Pacific Islands members of the WTO¹² to join an unmandated "Joint Statement Initiative" (JSI) plurilateral negotiation on e-commerce whose draft texts currently incorporate the preferences of the US, EU and China, but no development agenda.¹³ It urges all Pacific Island Countries' to prepare to negotiate binding and enforceable digital trade rules based on these models. There is no attempt to

⁹ Kate Lyons (2022), "Deal proposed by China would dramatically expand security influence in the Pacific", *The Guardian* 26 May 2022, <https://www.theguardian.com/world/2022/may/26/deal-proposed-by-china-would-dramatically-expand-security-influence-in-pacific>

¹⁰ This is especially so in the key areas of data, source codes, local content and technology transfer.

¹¹ UNCTAD 2021 p.144

¹² Fiji, Papua New Guinea, Samoa, Solomon Islands, Tonga, Vanuatu

¹³ "Electronic Commerce negotiations. Updated consolidated negotiating text", INF/ECOM/62/Rev.2/, 8 September 2021, https://www.bilaterals.org/IMG/pdf/wto_plurilateral_ecommerce_draft_consolidated_text_september_2021.pdf

explain the supposed benefits for Pacific governments in doing so, especially when, without those constraints, they can experiment with different approaches to digitalisation and e-commerce and retain the sovereign autonomy to adapt as circumstances evolve in this uncertain and unstable digital world.

Pacific Island Countries need to retain their policy and regulatory space, free from the coercive constraints of digital trade rules that are not designed to offer any benefits to them. Australia and New Zealand should suspend or agree to remove those obligations in PACER-Plus that restrict the options for Pacific Islands Countries to develop innovative, development-focused digital sovereignty and data regimes.

- (vii) The UNCTAD *Digital Economy Report* 2021 observes how today's thinking about the fundamental issue of cross-border data flows is strongly dominated by anglophone authors from developed countries and is closely entwined with support for businesses that have large data flows and seek to secure their competitive advantage.¹⁴ That comment also rings true of many donor-sponsored projects and the advice of donor-country consultants – and UNCTAD's own Rapid E-trade Readiness Assessments,¹⁵ which adopt the narrow approach to e-commerce that is criticised in UNCTAD's 2021 *Digital Economy Report*.

The impact of these biases is evident in various of the recommendations of the Pacific E-commerce Strategy, especially to negotiate international trade rules and to train Pacific Islands officials to do so, and that one of two governance bodies, the Development Partners Sub-committee, that is meant to act as the "implementation powerhouse" for the Pacific's E-commerce Strategy should be composed of donors who advocate for these rules.¹⁶

Donors, especially Australia and New Zealand, need to support and fund alternatives that genuinely advance Pacific Islands Countries digital development interests, rather than their own agendas.

- (viii) A formal agreement will be necessary if Pacific Island Countries are to pool their data, share servers, platforms, payment systems and infrastructure, and develop a coherent regulatory framework. A development-oriented regional digital agreement needs to be a very different instrument from coercive digital trade rules and enable the Pacific Islands Countries to exercise their digital sovereignty for their own benefit.

The appropriate starting point may be the scoping study that the Pacific E-commerce Strategy proposed to inform the Pacific Islands' decision-makers on how to proceed towards a regional e-commerce agreement that serves their interests. That study should identify priorities for a holistic approach to digital development, including e-commerce, that is based on Pacific needs, values and aspirations set out in the region's core documents; examine options to achieve those priorities through cooperation and collaboration regionally, South-South and South-South-North; and assess the risks that trade agreements pose to the policy and regulatory space to achieve those developments, including how to re-negotiate or suspend existing obligations under PACER Plus with Australia and New Zealand.

¹⁴ UNCTAD 2021 pp.58-59

¹⁵ UNCTAD has conducted assessments on that model for most of the Pacific Islands Countries. <https://unctad.org/topic/ecommerce-and-digital-economy/etrade-readiness-assessments-of-LDCs>

¹⁶ Pacific E-commerce Strategy, pp. 52-53

A scoping study to develop a genuinely development-driven regional development strategy that is informed by South-South and South-South-North cooperation requires political will among Pacific Island Countries to rethink the current strategy and support for that reorientation from traditional country donors and international institutions. Such a strategy should also open the doors to new partnerships, resourcing and capacity building arrangements.

1.2 E-commerce in context

The terms of reference seek an assessment of the Pacific Regional E-commerce Strategy as a tool to build digital sovereignty among the Pacific Island Countries. The Pacific Aid for Trade Strategy 2020-2025, which sits alongside the E-commerce Strategy, defines e-commerce as “a specific way of trading whose efficiency is boosted through the application of electronic means made possible by the enhancement of digital connectivity.” As with the Pacific E-commerce Strategy it foresees “an unprecedented opportunity to narrow connectivity distances and trade costs among Forum Members, and between the Blue Continent and the rest of the world.”¹⁷

Isolating the economic or commercial aspects of the Pacific’s digital ecosystem marginalises or excludes a range of inter-related social, cultural, political and development considerations of equal importance to Pacific Island Countries. The four guiding principles of the Pacific E-commerce Strategy - regionalism, putting private sector at the core, sovereignty and partnership - are said to be “anchored to those of the Framework for Pacific Regionalism”.¹⁸ However, the Strategy’s approach to them does not reflect the Framework’s holistic values and regional collective actions.

When the Forum leaders adopted the Framework they emphasised the “cultural and traditions, language, social values, and religious freedoms and beliefs that bind citizens and communities together, providing sustenance, social stability, and resilience”, as well as the “significant challenges, including complex vulnerabilities, dependencies and uncertainties that arise for countries and communities as our region changes with modernity, the processes of globalisation, and the damaging effects of climate change”.¹⁹ That Framework obliges advisers and policy makers to identify and robustly assess the opportunities and challenges, benefits and risks, in pursuing a particular digital strategy.

UNCTAD 2021: *This multidimensional character of data, from the economic and non-economic perspective, highlights important aspects and views on data and data flows, which cannot be addressed in a disconnected manner. Policymakers therefore need to look holistically at cross-border data flows, considering all the different dimensions.*²⁰

Even looking through a purely commercial lens, the E-commerce Strategy assumes a model of e-commerce where individualised business to business (B2B), business to consumer (B2C), or consumer to consumer (C2C) transactions take place on a relatively level playing field and are conducted

¹⁷ Pacific Islands Forum Secretariat, *Pacific Aid for Trade Strategy (PAFTS) 2022-2025*, <https://www.forumsec.org/wp-content/uploads/2020/04/Pacific-Aid-for-Trade-Strategy-2020-2025.pdf>

¹⁸ E-commerce Strategy p.27

¹⁹ Pacific Islands Forum Secretariat, *The Framework for Pacific Regionalism 2014*, 1. https://www.forumsec.org/wp-content/uploads/2018/02/Framework-for-Pacific-Regionalism_booklet.pdf

²⁰ UNCTAD 2021 p.73

through a neutral medium of digital technologies. This glosses over the many regulatory challenges and problems in digital markets. As discussed in Part 3, 4 and 5, those markets are currently characterised by massive economies of scale and scope, as well as network externalities, which have resulted in powerful near-monopolies and oligopolies that dominate the digital ecosystems cloud servers, search engines, platforms, digital marketplaces, payment systems and data, and their ability to preference their own commercial interests and dictate the terms for participation by Pacific Island businesses, consumers and governments.

1.3 Regionalism through South South cooperation

In response to growing fractures and tensions, the UNCTAD *Digital Economy Report 2021* called for the development of a global data governance regime that is based on holistic principles that can strengthen the autonomy of developing countries, outside the narrow and inappropriate international trade arena.²¹ It also recognised that achieving this is a long way off. In the interim, UNCTAD urged the development of regional models that can build on South-South and trilateral South-South-North cooperation.

*UNCTAD 2018: For developing countries ... it is extremely difficult to enter and adapt to digitized industrialization on their own. They will first have to develop their digital infrastructure and incorporate a new component in their existing industrial policies which focuses on digitization ... that includes ICT infrastructure along with digital skills; data infrastructure and cloud computing infrastructure. ... South-South cooperation, in the form of regional digital cooperation, is essential.*²²

That approach built upon UNCTAD's previous report in 2018 *South-South Digital Cooperation for Industrialization: A Regional Integration Agenda*, which identified several closely inter-related components as being essential to digital regional integration:²³

- **communications networks**, built around institutions, skills and practices for the Internet as the main tool to collect and transmit information flows. Those networks need to assist countries to harness smart devices and interconnection through the Internet of Things.
- **software packages** that provide computing services remotely as a general utility to all Internet users. That includes mass market Internet software (eg operating systems) and Internet applications (eg social media and search engines), along with **cloud computing infrastructure** that provides computer-related services such as storage, networks, computing, and running softwares and apps and reduces the need for land-based infrastructure.
- **Data platforms** that collect, collate and combine unrefined data to form Big Data, which can be processed, analysed and exploited for commercial and public purposes.

The 2018 report recognises that most developing countries cannot achieve this at a national level, and that regional digital strategies and South-South cooperation are necessary to support national

²¹ UNCTAD 2021 p. 174

²² UNCTAD, *South-South Digital Cooperation for Industrialization: A Regional Integration Agenda*, New York, 2018, p.14

²³ UNCTAD 2018, pp.6-7

digitalisation efforts. It sets out a 10 point agenda for South-South cooperation, to be adapted to reflect the level and pace of digital development of countries within the particular region.²⁴

1. Building a data economy:
2. Building cloud computing infrastructure
3. Strengthening broadband infrastructure:
4. Promoting E-commerce in the region:
5. Promoting regional digital payments:
6. Progressing a Single Digital Market:
7. Sharing experiences on E-government
8. Forging partnerships for building smart cities:
9. Promoting digital innovations and technologies:
10. Building statistics for measure digitization

That 10 point agenda overlaps with many items in the Pacific E-commerce Strategy. But UNCTAD emphasises the importance of cooperation to strengthen national and regional digital sovereignty, whereas the Pacific Strategy's focus on trade liberalisation and partnerships would deepen the region's dependency on big tech corporations and partisan donors.

In line with the terms of reference, this review examines tensions that arise from the Pacific E-commerce Strategy's approach, especially its promotion of e-commerce and digital trade liberalisation rules, with reference to three key elements of UNCTAD's 10-point plan: the data economy; promoting e-commerce; and digital payments. Part 7 presents a sample of recent innovations to show the value to Pacific Island Countries of an alternative cooperation-based approach with the Global South and through triangular South-South-North relationships.

²⁴ UNCTAD 2018, pp. 14-20

PART 2. TRADE RULES VS DIGITAL SOVEREIGNTY

This review has been asked to analyse, in particular, how trade rules in existing and proposed agreements would impact on the digital sovereignty of Pacific Islands Countries. Before addressing the three specific issues, it is important to explain the emerging legal landscape of digital trade rules. As originally conceived, free trade involves a reciprocal exchange of tariff liberalisation commitments for mutual benefits.²⁵ The digital domain does not fit that model of reciprocal trade-offs. Nor are the rules simply, or even primarily, about trade. They are designed to restrict the autonomy of states to decide for themselves how to regulate the digital domain behind the border, a fundamental attribute of state sovereignty.

2.1 The contested arena of digital trade rules

UNCTAD Trade and Development Report 2018: Contemporary trade agreements which seek deep integration among nations by going much beyond trade restrictions at the border and increasingly focusing on domestic rules and regulations, not only reduce policy space but are likely to produce welfare-reducing outcomes. The rules negotiated under these agreements are shaped to a significant extent by rent-seeking, self-interested behaviour on the export side and empower politically well-connected firms.²⁶

The decision to bring rules for the digital domain under the rubric of “trade” was a strategic move by the US in the late 1990s. Discussions on international rules for the Internet initially took place in specialised organisations, notably the International Telecommunications Union whose multistakeholder approach sought to balance diverse and sometimes conflicting considerations. The US shifted these discussions to the international trade arena where it and other powerful states dominate the rule making, and which focuses on liberalisation and market-based regulation, prioritises the interests of large corporations, commonly operates behind closed doors and generally results in binding and enforceable obligations.

The model of e-commerce rules first developed through the Trans-Pacific Partnership Agreement (TPPA) was explicitly designed by the US to lock in the dominance of its technology corporations.²⁷ That template has been replicated in other free trade or digital economy agreements involving Australia, New Zealand, the US, Singapore and Japan. As a result, the rules approach data, digital technologies and services through a narrow commercial lens that subordinates other considerations.

However, the TPPA-template is not the only approach. Some developing countries have opted for trade rules that retain their regulatory flexibility as part of a comprehensive, or at least more balanced, digital development strategy.²⁸ Some regional and bilateral trade negotiations restrict their scope to genuinely trade-related rules, such as e-signatures, electronic documentation and customs

²⁵ UNCTAD 2021, p.144

²⁶ UNCTAD *Trade and Development Report 2018. Power, Platforms and the Free Trade Delusion*, UNCTAD, New York, 2018.

²⁷ Based on the USTR, “The Digital-2-Dozen”, <https://ustr.gov/about-us/policy-offices/press-office/reports-and-publications/2016/digital-2-dozen>

²⁸ ASEAN Digital Masterplan 2025, ASEAN, 2021, <https://asean.org/book/asean-digital-masterplan-2025/>

facilitation,²⁹ or encourage cooperation instead of binding and enforceable rules.³⁰ Other countries have eschewed the trade model.³¹ A majority of WTO developing country members have declined to participate in the (unmandated) plurilateral negotiations on e-commerce (see Part 2.3).

Some recent trade agreements show that even developed country governments have become more cautious about constraining their policy and regulatory space through their e-commerce or digital trade rules.³² This reflects a growing concern that the narrow lens of e-commerce or digital trade rules lacks the balance of public policy and regulatory considerations that a holistic approach requires.

UNCTAD 2021 Cross-border data flows are not trade and need to be governed holistically, factoring in all dimensions.³³ ... [R]egulating cross-border data flows from only the trade perspective will not account for other factors related to privacy or security, which may most likely lead to inappropriate regulation. Understanding how different dimensions of data complement or come into tension with each other is crucial to a holistic analysis of data and data policy, including for cross-border data flows.³⁴

Leading US economist Dani Rodrik describes an international regime of binding and enforceable trade rules as “utterly inadequate” to address what he considers the three principal challenges: geopolitics and national security, individual privacy, and economics.

Rodrik 2020: The international trade regime we have, expressed in the rules of the World Trade Organization and other agreements, is not of this world. ... it is utterly inadequate to face the three main challenges these technologies pose.³⁵

In this unstable and contested environment, there is no need for small island states that have very little leverage to enter into such negotiations - and every reason not to.

2.2 How trade rules close policy space

The main e-commerce or digital trade rules developed by the US (and supported by the EU subject to its priority to protect personal privacy) aim to consolidate the global competitiveness of their major digital corporations. The most contentious rules:

²⁹ TPPA Art 14.6 requires acceptance of e-authentication arrangements agreed between parties to a transaction; Art 14.14 on accepting electronic documents (paperless trading) is an endeavour provision; Parties are required to maintain a legal framework governing electronic transactions consistent with UNCITRAL model law on electronic commerce (Art 14.5) These rules in the MSGFTA3 are more contingent. Adoption of international model laws or measures, for example on electronic transactions or electronic authentication, is “as soon as practicable”, and e-signatures and paperless trading initiatives are “where possible”.

³⁰ Regional Comprehensive Economic Partnership Agreement, entered into force 1 January 2022, <https://rcepsec.org/legal-text/>; ASEAN Agreement on Electronic Commerce 2019, <https://agreement.asean.org/media/download/20190306035048.pdf>

³¹ Republic of Rwanda, National Data Revolution Policy, April 2017, <https://statistics.gov.rw/file/5410/download?token=r0nXaTAv>

³² For example, the ability of national regulators to examine source codes to investigate breaches of national laws. USMCA Article 19.16.2

³³ UNCTAD 2021 p.142

³⁴ UNCTAD 2021 p.73

³⁵ UNCTAD 2021 p.144 quoting Dani Rodrik “The coming global technology fracture”, Project Syndicate, 8 September 2020, <https://www.project-syndicate.org/commentary/making-global-trade-rules-fit-for-technology-by-dani-rodrik-2020-09>

- (i) enshrine the right for foreign companies to transfer data out of the source country, often to any destination of their choice;³⁶
- (ii) prohibit requirements to store data in the source country, and sometimes even preventing requirements to keep a local copy of data that is transferred offshore;³⁷
- (iii) protect source code,³⁸ and sometimes algorithms,³⁹ from mandatory disclosure even to regulatory agencies;
- (iv) guarantee rights for digital services suppliers to operate entirely from offshore with no local presence⁴⁰ and not be required to take a particular legal form if they do have a presence;⁴¹
- (v) prevent requirements for foreign digital operators to use some locally produced software or other digitalised content;⁴²
- (vi) ban tariffs on imports of digitalised products that would attract tariffs if they were physical goods;⁴³
- (vii) prohibit requirements to transfer technology or employ or train local people in positions where they might learn proprietary knowledge;⁴⁴ and
- (viii) guarantee foreign states and their corporations the right to comment, and hence lobby, on proposed new regulations that could affect them, have their views considered, and require governments to explain the reasons for their final choice of law and regulation.⁴⁵

There are exceptions that can be raised as defences if governments are alleged to have breached these rules. However, their scope is limited and contestible. For example, the “data localisation” rules ((i) and (ii) above) often have an exception for “legitimate public policy objectives”, but that is subject to many conditions.⁴⁶ Invoking protections for public morals or personal privacy in the standard

³⁶ eg TPPA/CPTPP Article 14.11

³⁷ eg TPPA/CPTPP Article 14.13

³⁸ TPPA/CPTPP Article 14.17

³⁹ Eg USMCA Article 19.16.1

⁴⁰ eg TPPA/CPTPP Article 10.6, subject to listing in the annex of non-conforming measures

⁴¹ Eg TPPA/CPTPP Article 10.5(b)

⁴² eg TPPA/CPTPP Article 14.4; Article 9.10.1(b) if a condition of foreign investment, subject to listing in the annex of non-conforming measures

⁴³ Eg TPPA/CPTPP Article 14.3

⁴⁴ Eg TPPA/CPTPP Article 9.10.1(f), subject to listing in the annex of non-conforming measures

⁴⁵ eg TPPA/CPTPP Article 26.2.2 ‘to the extent practicable’; Joint Initiative on Services Domestic Regulation, Reference Paper on Services Domestic Regulation, INF/SRD/1, 27 September 2021, [14] to [18], again ‘to the extent practicable’ and the manner of implementation is to either be by publication of the text or documents that provide sufficient detail to enable corporations and parties to assess how their impacts might be affected, depending on which process is consistent with their legal system.

⁴⁶ The provision in the MSGFTA3 that requires unrestricted cross-border data flows is an “endeavour” obligation not to have “unnecessary” barriers, which is cross-referenced to “legitimate public policy concerns” (Art 6.61). “Endeavour” is a positive obligation and a Party may be required to show that it has made efforts to comply with the provision. Both “unnecessary” and “legitimate” are contestible terms. That creates uncertainty, for example, if a digital corporation established in one Party that does not apply similar restrictions pressurises its host government to object to measures adopted by another MSG party as unnecessary or not legitimate.

Much more stringent data transfer rules are in the TPPA,⁴⁶ Australia and New Zealand’s recent FTAs,⁴⁶ and the JSI which the Pacific E-commerce Strategy encourages Pacific WTO Members to join. A party must allow the cross-border transfer of information, including personal information, by Internet for the purpose of a business and must not require a service provider to use a local computing facility, such as a local server, as a condition of conducting its business.

A government is allowed to deviate from the data transfer (and non-disclosure of source code) rules for a “legitimate public policy objective” (TPPA Art 14.11.3); but the “legitimacy” of an objective can be challenged. The government’s choice of how to achieve that objective must not be more restrictive than required to do so, which favours light-handed regulation and

general exception is subject to a multi-layered test.⁴⁷ Law-makers would have to second guess how a dispute panel of trade experts, who are unlikely to have any experience in or empathy for the non-commercial objectives, would interpret them. In New Zealand, the Waitangi Tribunal inquired into whether the TPPA's e-commerce rules violated Māori rights under Te Tiriti o Waitangi. It found that these cumulative uncertainties and legal risks could have chilling effect on the future adoption of policy and regulation to protect Māori data sovereignty and governance.⁴⁸

It is far from inevitable that these e-commerce rules will become the global norm. Recent negotiations reflect divergent preferences among the US, China and EU.⁴⁹ Most developing countries have taken a precautionary approach to protect their ability to regulate the largely unregulated digital ecosystem and its dominant players. The digital trade chapter in the Regional Comprehensive Economic Partnership (RCEP), which includes the 10 ASEAN members, China, Australia, New Zealand, Japan and South Korea, is unenforceable.⁵⁰ Its data transfer and location rules have a totally self-judging security exception. The chapter has no rule against requirements to disclose source codes and algorithms, nor on local content, and the exclusion for government procurement is broadly defined.

The Pacific E-commerce Strategy ignores these important nuances. It not only ignores the constraints on governments, it also makes no attempt to explain why these trade rules are necessary for Pacific Islands Countries to build a sustainable, development-focused digital infrastructure, or how they might impact on technology transfer, improve digital skills, provide markets for digital products and inputs developed domestically, address oligopolistic anti-competitive behaviour and reduce dependency, or provide stable, affordable and equitable access to digital platforms and marketplaces. Instead, it uncritically advocates for them.

2.3 PACER-Plus, MSGFTA3 and Joint Statement Initiative

The Pacific E-commerce Strategy refers approvingly to two existing agreements – PACER Plus and the MSGFTA3 – when proposing the negotiation of a regional agreement on E-commerce. These two agreements impose, or propose, significant constraints on Pacific Island Countries' sovereignty over data and the digital domain, and have no development dimension.

again is open to challenge. Further, the way it is applied must not amount to arbitrary or unjustifiable discrimination or a disguised restriction on trade, which is problematic where there are clear benefits to domestic firms. For the example of digital services taxes, see Jane Kelsey, John Bush, Manuel Montes and Joy Ndubai, "How Digital Trade Rules Would Impede Taxation of the Digital Economy in the Global South", Third World Network, 2020, <https://www.bilaterals.org/?how-digital-trade-rules-would>

⁴⁷ Eg. General Agreement on Trade in Services, Article XIV(c)(ii) requires these measures to be "necessary" to achieve that objective, not constitute arbitrary or unjustifiable discrimination or a disguised preference for nationals. The privacy exception must also be necessary to secure compliance with laws to protect individual privacy that are themselves to be consistent with the agreement.

⁴⁸ Waitangi Tribunal, *The Report on the Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, Wai 2522, 2021, https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_178856069/CPTTP%20W.pdf

⁴⁹ Regional Comprehensive Economic Partnership, signed 15 November 2020, entered into force 1 January 2022, United States-Mexico-Canada Agreement, signed 30 November 2018 entered into force 1 July 2020; EU proposal on digital trade in the negotiation for a FTA with Australia, 10 October 2018, https://trade.ec.europa.eu/doclib/docs/2018/december/tradoc_157570.pdf

⁵⁰ RCEP, Chapter 12.

Measure 4.2.2 Negotiate a regional agreement on E-commerce to promote transparency, and predictability of domestic and cross-border E-commerce.

A regional E-commerce agreement can facilitate cross-border E-commerce transactions, help creating trust at regional level, and deepen cooperation on strategic priorities such as those identified in this Strategy. FICs have negotiated several regional trade agreements, but except for the MSG-TA, these did not include rules on E-commerce. The Pacific Agreement for Closer Economic Relations Plus Agreement (PACER Plus) does not contain specific E-commerce provisions but includes provisions on matters relating to E-commerce. These include rules and commitments on trade in services that encompass digitally-enabling services such as telecommunications, computer, or payment services, as well as a vast array of digitally-enabling services, including professional other business services, distribution services, and other Pacer Plus measures including trade facilitation.⁵¹

MSGFTA3

The MSGFTA3 was negotiated by Fiji, Solomon Islands, Papua New Guinea, and Vanuatu, but has only been signed by the Fiji and Solomon Islands. It seems unlikely to ever enter into force. As the E-commerce Strategy notes, this is the only free trade agreement involving Pacific Island Countries that has comprehensive e-commerce provisions.⁵² The objectives of its E-commerce section are purely commercial. However, most of the e-commerce rules have more flexible language than found in developed country agreements and provide more policy space in the application of its core rules.⁵³

Regrettably, these flexibilities are negated by a trade in services provision that is designed to protect the freedom of the big tech operators. That provision adopts the EU's favoured approach to restrict digital policy and regulation where it would limit access to the country's market or provide local preferences, across a whole gamut of digitalised services.⁵⁴ Table 1 shows that all four countries proposed to make commitments for all sub-sectors of computer and related services⁵⁵ when they are delivered across the border from another party, and to a large extent by foreign investors. In addition, they made extensive commitments on telecommunications services, advertising,⁵⁶ retail and wholesale distribution, air transport sales and computer reservation systems, among others; the implications of that are explained with reference to PACER Plus below.

⁵¹ Pacific E-commerce Strategy p. 41

⁵² MSGFTA3 Part 7. Electronic Commerce and Computer Services within Chapter 6. Trade in Services

⁵³ Notably, Art 6.74.2 allows governments a leeway for 2 years after the agreement enters into force during which to adopt an "appropriate" regulatory regime or build its capacity to implement one, during which time it can delay giving effect to a specific sectoral commitment. That would include "appropriate" digital regulation. There is no similar transition in PACER Plus.

⁵⁴ MSGFTA3 Article 6.63

⁵⁵ "Computer and related services" (C&RS) is a specific sub-sector of services (#CPC84) which governments can make subject to the chapter's core rules on market access and non-discrimination. The historical definition of C&RS is outdated and there is disagreement on whether it includes more recent innovations like search engines, digital platforms and social media. Those, mainly developed countries, who favour an expansive interpretation argue that existing commitments are technologically neutral, even if governments would not have made those commitments at the time if they were aware of the future technology and its risks. Many developing countries have objected to that interpretation in the WTO, saying it would undermine the intention of schedules that each member can decide which services to commit.

⁵⁶ Except Vanuatu.

Table 1: Selected trade in services commitments

	Cook Islands	FSM	Fiji	Kiribati	Marshall Islands	Nauru	Niue	Palau	PNG	Samoa	Solomon Islands	Tonga	Tuvalu	Vanuatu
Computer and related services														
PACER Plus														
	1,2,3	1,2,3		1,2,3	1,2,3	1,2,3	1,2,3	1,2,3		1,2,3	1,2,3	1,2,3	1,2,3	1,2,3
WTO														
									1*,2*,3*	1,2,3		1,2,3		1,2,3
MSGFTA3														
			1,2,3*						1,2,3*		1,2,3			1,2,3
Telecommunications email, online information, data base retrieval etc														
PACER Plus														
				1,2,3						1,2,3	1,2,3	1,2,3		1,2,3
WTO														
										1,2,3		1,2,3		1,2,3
MSGFTA3														
			1,2,3						1,2,3		1,2,3			1,2,3
Advertising														
PACER Plus														
	1,2,3	1,2,3		1,2,3	1,2,3	1,2,3	1,2,3	1,2,3		1,2,3	1,2,3	1,2,3	1,2,3	1,2,3
WTO														
												1,2,3		
MSGFTA3														
			1,2,3						1,2,3					
Wholesale distribution														
PACER Plus														
	1,2,3	1,2,3			1,2,3	1,2,3	1,2,3			1*,2*,3*	1,2,3	1,2	1*,2*,3*	1,2,3*
WTO														
												1,2		1,2
MSGFTA3														
			1*,2*,3*						1,2,3*		1,2,3			1,2
Retail distribution														
PACER Plus														
	1,2,3				1*,2*,3*	1,2,3						1*,2*	1*,2*,3*	1,2,3*
WTO														
												1,2		1,2
MSGFTA3														
			1,2,3						1,2,3*		1,2,3			1,2
Tourism: hotels														
PACER Plus														
	1,2,3	1,2,3		1,2,3	1*,2*,3*	1,2,3	1,2,3	1,2,3		1,2,3*	2,3	1,2	2*,3*	1,2,3*
WTO														
			1,2,3						1,2,3	1,2,3		1,2,3*		1,2,3*
MSGFTA3														
			1,2,3						1,2,3*		2,3			1,2,3*
Tourism: Travel agencies														
PACER Plus														
	1,2,3	1,2,3		1,2,3	1,2,3	1,2,3	1,2,3			2,3	1,2,3	1,2,3	1,2,3	1,2,3
WTO														
										2,3		1,2,3		1,2,3
MSGFTA3														
									1,2,3*					1,2,3
Sales and marketing of air transport														
PACER Plus														
	1,2,3	1,2,3		1,2,3	1,2,3	1,2,3	1,2,3	1,2,3		1,2,3	1,2,3	1,2,3	1,2,3	1,2,3
WTO														
										1,2,3				1,2,3
MSGFTA3														
									1,2,3*		1,2,3			1,2,3
Computer reservation systems														
PACER Plus														
	1,2,3	1,2,3		1,2,3	1,2,3	1,2,3	1,2,3	1,2,3		1,2,3	1,2,3	1,2,3	1,2,3	1,2,3
WTO														
										1,2,3		1,2,3		
MSGFTA3														
									1,2,3*		1,2,3			

Key: 1 = mode 1 Cross border, 2 = mode 2 consumption abroad, 3 = commercial presence

* denotes a partial or conditional commitment

Blank indicates no commitment

Dark shading indicated that country is not a party to the agreement

Hatched shading indicates that country has not signed the agreement

Cross-hatched shading indicates that country has signed but not ratified the agreement

Source: compiled by author from texts of the agreements.

If the MSGFTA3 did enter into force, it would severely restrict the participating governments' abilities to regulate data, digital platforms, technologies and a whole range of services and negate the caution that is evident in the e-commerce section. Governments would then have to fall back on the limited exclusions and exceptions.⁵⁷ The four MSG governments may have considered the risks were limited in an agreement just between them. But their willingness to adopt these rules creates a dangerous precedent that could make it more difficult for them to reject similar rules in agreements with developed countries that would have a much more significant impact. Australia and New Zealand might even use the MSGFTA3 text as the starting point for the first review of PACER-Plus, with fewer flexibilities.

If the MSGFTA3 did come into force it could create a further precedent, which has significant revenue implications for the parties. Since 1998 the WTO has maintained a temporary moratorium on tariffs on electronic transmissions. The US, Australia, New Zealand, Japan and some other developed countries have made that ban on tariffs permanent in their recent FTAs. The MSGFTA3 uses a less obvious route of designating digital products that are delivered across the border as services that are not subject to customs duties.⁵⁸ The effect is the same.

A number of developing countries have opposed the renewal of that moratorium in the WTO;⁵⁹ rolling it over for 2 more years was one of the last matters agreed at the June 2022 ministerial conference. Recent research by a senior economist at UNCTAD calculated the revenue losses to date, and predicted future revenue impacts on developing countries which would result from this ban as more and more products are digitalised and transmitted across the border.⁶⁰

Her report estimates that in the period 2017-2020 developing countries and LDCs lost \$56 billion of tariff revenue, of which \$48 billion was lost by the developing countries and \$8 billion by the least developed countries. This loss of tariff revenue is from the imports of just 49 products (at HS six-digit). Fiji is the only Pacific Island Country assessed; the study estimates, based on applied tariffs, that Fiji lost US\$9 million tariff revenue as a result of the moratorium in 2020 and US\$28 million in 2017-2020.⁶¹

The study concludes that, with no clarity on the definition of electronic transmissions and thereby on the scope of the moratorium, the continuation of the WTO moratorium on customs duties on electronic transmissions could lead to substantial tariff revenue losses for developing and least developed countries in the future. Yet it ended up becoming permanent in the proposed MSGFTA3.

⁵⁷ Discussed in section 2.2

⁵⁸ MSGFTA3 Article 6.60: *The Parties agree that deliveries of digital products by electronic means shall be considered as the provision of services within the meaning of Part 2 (Cross-border Supply) of this Chapter, which cannot be subject to customs duties.*

⁵⁹ "With MC12 nigh, WTO still not close on reform, e-commerce moratorium", *Inside US Trade*, 24 May 2022, <https://insidetrade.com/daily-news/mc12-nigh-wto-still-not-close-reform-e-commerce-moratorium> (paywall)

⁶⁰ Rashmi Banga, 'WTO Moratorium on Customs Duties on Electronic Transmissions: How much tariff revenue have developing countries lost?', South Centre Research Paper No. 157, 3 June 2022, https://www.southcentre.int/wp-content/uploads/2022/06/RP157_WTO-Moratorium-on-Customs-Duties-on-Electronic-Transmissions_EN.pdf

⁶¹ Banga, Table 2, page 10

PACER Plus

PACER Plus does not have a developed e-commerce chapter, perhaps because it pre-dates the conclusion of the TPPA text that both countries have since promoted. However, its rules on trade in services strongly reflect the interests of Australia and New Zealand and have similar implications for Pacific Island Countries as the MSGFTA3. The exceptionally broad commitments by the six Pacific WTO members far exceed their WTO commitments. Even more concerning is the adoption of equally extensive obligations in favour of Australian and New Zealand services firms by Pacific Islands Countries that are not even WTO members.

A brief explanation of trade in services is necessary to understand these implications. Trade in services chapters or sections in trade agreements apply to “measures” that “affect” the supply of a service. A “measure” includes a law, regulation, rule, procedure, decision, administrative action or practice and it just has to “affect” the supply or supplier of the service, not directly target it. A digital or digitalised service will usually be supplied from across the border (mode 1) or by a firm from one party that has established a commercial presence in another party (mode 3).⁶² The most relevant sectors are:

- computer and related services;
- telecommunications;
- cultural services, including entertainment, libraries and archives;
- advertising, market research and opinion polling;
- professional services like legal, tax, accounting, engineering and construction;
- social services like health and education;
- technical testing, research and development;
- services related to agriculture, fisheries, forestry, mining;
- wholesale, retail, agency distribution services
- transportation services, including selling and marketing air services and computer reservation systems; and
- financial services, including insurance, banking, financial and currency trading, payment and electronic transmission, asset management, financial information and advisory services.

A party to an agreement sets out in a schedule which of these services it commits to the two main rules: market access,⁶³ which means not restricting the quantum of a service, including banning its supply, or requiring supply through a joint venture; and non-discrimination (national treatment) which means not giving preferences to local competitors⁶⁴ or restricting foreign suppliers of a service. It can make different commitments on different ways of delivering the services, eg across the border or by commercial presence in the country.

There is a strong logical argument that this should only apply to services as they that existed when governments made those commitments; otherwise they become a blank cheque. Australia and New Zealand are among the countries that for the “technological neutrality” of commitments, meaning they apply even to services and technologies that were unforeseeable when they were made.

⁶² That can include a foreign firm established in the first country, which then gets the benefit of the agreement.

⁶³ This describes a positive list approach to schedules. A negative list approach requires the party to list what is not subject to the rules.

⁶⁴ In recent agreements, including PACER Plus and MSGFTA3, subsidies are excluded. That is not the case in the WTO’s General Agreement on Trade in Services (GATS).

Applied to computer and related services, for example, these rules could prevent laws or regulations that restrict data flows, require sharing of source code and algorithms, limit market dominance or market share, require employment of locals or transfer of technology, tax digital operators over a certain size or for specific activities, require cross-border suppliers to have a local presence, invest only through a joint venture, have a majority of directors or senior managers who are nationals, etc.

Table 1 shows that all fourteen Pacific Islands parties have promised not to restrict market access and not to give local preferences on the most important services for digital sovereignty: computer and related services, advertising services, air transport sales and computer reservation services, and many tourism, wholesale and retail distribution services. These commitments apply whether the services are provided by Internet from outside the country or, in most cases, through a commercial presence in the country. What is especially notable in these schedules is that negotiators were focused on protecting existing areas of sensitivity, such as local shops, hotels, tour operators, without foresight as to how digital service delivery might pose different threats. Additional, extensive commitments on trade in financial services are discussed in Part 5 below.

Joint Statement Initiative on E-commerce

Both the Pacific E-Commerce Strategy and the Pacific Aid for Trade Strategy call on the Pacific's WTO Members to participate in negotiations for a Joint Statement Initiative on Electronic Commerce (JSI), whose co-convenors are Australia, Singapore and Japan. Neither report describes the status of the JSI accurately. The Pacific Aid for Trade Strategy refers to the JSI negotiations for "*multilateral e-commerce rules under WTO auspices*"⁶⁵ and the Pacific E-commerce Strategy suggests that several of the Pacific's WTO members "*may consider participating actively in the Joint Statement Initiative on E-commerce currently being discussed in the framework of the WTO twelfth Minister Conference (MC12)*".⁶⁶

Measure 4.2.1 Develop FIC negotiators' skills on E-commerce laws and regulations to support negotiation and implementation of future digital trade agreements and E-commerce provisions in FTAs.

*Except for the yet-to-enter-into-force Melanesian Spearhead Group Trade Agreement (MSG-FTA), provisions on E-commerce are absent from the trade agreements which FICs are party to. E-commerce provisions are becoming core features to all major FTAs, and E-commerce agreements are also being adopted by regions, such as the Association of Southeast Asian nations (ASEAN). Several FICs may consider participating actively in the Joint Statement Initiative on E-commerce currently being discussed in the framework of the WTO twelfth Minister Conference (MC12). The current text includes provisions on e-authentication and e-signatures, unsolicited commercial messages, customs duties, free flow of data, data localisation requirements and source code. WTO discussions will eventually feed into the formulation of national and regional strategies and legal texts on E-commerce.*⁶⁷

The JSI negotiation is neither multilateral in the WTO sense (the current 86 participants are just over half the WTO's membership) nor under official WTO auspices. It is known as a Joint Statement Initiative precisely because the proponents were denied a mandate by the WTO membership at the

⁶⁵ Pacific Aid for Trade, p.7 at para 25; see also E-commerce Strategy p.41

⁶⁶ Pacific E-commerce Strategy, Measure 4.2.1, p. 41

⁶⁷ Pacific E-commerce Strategy, Measure 4.2.1, p. 41

11th Ministerial Conference in Buenos Aires in 2017, and was not referred to in the 12th Ministerial Conference declaration. The negotiating text has not been made public. A leaked version of the September 2021 consolidated text shows the participants are far from agreement on the major issues.⁶⁸ They may never agree, given the participation of the US, the EU and China who are all pushing their own, often inconsistent templates. The text contains very few proposals from those developing countries that are in the room. Further, there is no legitimate pathway for that new plurilateral agreement to be adopted in the WTO without consensus support of all WTO Members.⁶⁹

Both reports also fail to acknowledge, let alone engage with, the concerns that have led half the WTO Members, including a majority of developing countries, to eschew the negotiations. No Pacific Island Countries are participating. South Africa and India have led developing countries' opposition to JSIs on two grounds: they would allow sub-groups of powerful WTO members to develop their own "global rules" and further marginalise the priorities of developing countries; and the rules being proposed would have a negative impact on the digital development options of the Global South.⁷⁰

2.4 Scoping a regional e-commerce agreement

The Pacific E-commerce Strategy says negotiation of a regional e-commerce agreement should be preceded by a scoping study to inform Pacific Islands' decision makers on how to proceed.

*Pacific E-commerce Strategy: Negotiate a regional agreement to promote transparency and predictability of domestic and cross-border e-commerce. ... Prior to this, studies to scope E-commerce in the region, and its implication on trade-related disciplines, should be undertaken to enable decision makers to decide on embarking on further trade negotiations.*⁷¹

As recent UNCTAD reports emphasise, the nature of digital technologies and data, as well as demands on resources, skills and regulatory capacity, strongly favour a regional approach. A formal agreement makes sense if Pacific Island Countries are to pool their data, share servers and platforms, and develop a coherent regulatory framework. However, the Strategy assumes that such an agreement should follow the general form of coercive (binding and enforceable) trade rules like MSGFTA3, PACER Plus and the JSI. Indeed, Pacific officials are already being trained to undertake such negotiations. Part 7 proposes an alternative model of agreement and a scoping study that can develop that option.

⁶⁸ WTO, Electronic Commerce negotiating text, 2021

⁶⁹ The legal issues are quite complex and discussed in Jane Kelsey, "The Illegitimacy of Joint Statement Initiatives and their Systemic Implications for the WTO", *Journal of International Economic Law* 25, 2022, 1-23

⁷⁰ Discussed in Kelsey 2022.

⁷¹ Pacific E-commerce Strategy p.41

PART 3. DATA SOVEREIGNTY

Data is central to any digital development strategy, including for e-commerce. In the digital 21st century, data holds the key to innovations, to the development of ever-more sophisticated software and algorithms, and to more efficient technologies, products and services. How to access, control, and utilise data generated within the region for its own benefit – exercising data sovereignty – is perhaps the greatest challenge, but one that is not addressed in the Pacific E-commerce Strategy.

3.1 The power of data

Constant advances in digital technologies, services and products are apparent everyday: inventories and distribution networks, money trading and financial exchanges, purchasing and payment of services, additive manufacturing of 3-D products, AI, drones and robotics, smart devices, targeted advertising and marketing, video streaming, e-health and online education.

Many of these activities have parallels in the non-digital economy. The critical difference is not the digital technology itself, but the role of data and adding value to it. A major driver for adding value to data is the “network effect” – the more users on the platform and the more they interconnect with each other, the greater the reach and scale of the platform’s activities and the more accurate and sophisticated the software, algorithms and artificial intelligence they can generate.

The “market” for data is opaque and unorthodox: the sources provide their data (and their exposure to advertising), usually unwittingly, as the price for using online services “for free”. That data can be a by-product of primary economic or social activities, such as using devices or commercial transactions, where people make information available voluntarily, although often with little real choice. Data is also captured without consent from observed activities, such as tracking of devices, social media communications, online searches, or the sharing of content or other users information.

Some data will be used for development of algorithms, for example to recommend hotel options in online searches, that insurers use to make risk assessments, or for making immigration assessments or hiring decisions by employers. As a platform generates exponentially more data, the algorithms become more sophisticated. They may be used in-house or packaged and onsold to third parties such as advertisers and marketers, political pollsters, manufacturers or service providers.

UNCTAD: To date, developing countries have been more consumers than producers in the data-driven economy or are likely to be taken advantage of. Remaining digital divides, in particular with respect to capacity to use data-driven approaches in economic development, give developed countries a head start in creating data insights and value while data flows freely across borders.⁷²

The people and businesses who are the source of the raw data do not own it. Those who operate the private digital platforms usually consider they have property in the data they collect and exclusive rights to control where it is located and over the algorithms they create with it⁷³ - the antithesis of

⁷² UNCTAD 2021 p.59

⁷³ Government of Switzerland, “Creation of trusted data spaces, based on digital self-determination. Report by DETEC and FDFA to the Federal Council”, Federal Department of the Environment, Transport, Energy and Communications and Federal

data sovereignty. As UNCTAD observes, most data generated in the digital ecosystem is controlled by major technology corporations from the US and China and flows to servers and digital hubs in countries of their choosing.⁷⁴ In practice “free flow of data” is a one way data flow that deepens development asymmetries.

The more data an entity has, the greater its ability to develop sophisticated algorithms that enhance its market power. A recent Swiss government report observes how the data generated through the dynamic network effect is harnessed by dominant “proprietors” to squeeze out digital competitors who lack access to equivalent sources of data and opportunities to add value. Those players leverage that advantage to extend their dominance beyond their original sector and field of activity, and can secure extensive control over entire distribution chains.⁷⁵

3.2 Data as a public good

Information and ideas have an intrinsically public quality.⁷⁶ The UNCTAD 2021 report emphasises the intrinsic tension between proprietary approaches to data and the ability to harness data for social and public purposes and that innovative strategies are needed to address that tension.

UNCTAD 2021: Digital goods, including data when they are of a public good nature, are essential for unlocking the full potential of digital technologies. ... [W]here larger data sets have been more openly available, this can lead to significant use for social value and potentially strong development impacts. ... The notion of data as a “public good” may also provide an important approach for alliances of countries and development-oriented organisations to come together to support cross-border data sharing. As the previous successes of open government data have shown, useful data are often available within governments, as well as within firms. However, making them available requires additional activities and support, as well as appropriate tools, to support the development outcome. ... Alternative forms of data governance are emerging to enable the sharing of data for public interest purposes ... These include data cooperatives, data commons, data collaboratives, data trust, indigenous data sovereignty and data marketplaces.⁷⁷

Public good data is not just data that is held directly by public agencies. Public private partnerships or IT contractors may operate systems that pool public and private data, including for transportation, electricity or water utilities, hospital and health-related services, pension schemes, fisheries management, weather forecasting and disaster response, education and tourism. Depending on the terms of the arrangement, private firms may send that data offshore and use it for their own commercial purposes. Governments may even have to pay to access that data to inform their public policy decisions. Most e-commerce chapters in trade agreements exclude “information held or

Department of Foreign Affairs, 30 March 2022, 8. <https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-87780.html>. English translation on file with author.

⁷⁴ UNCTAD 2021 p.157

⁷⁵ Government of Switzerland, p.9

⁷⁶ UNCTAD 2018 p.7

⁷⁷ UNCTAD 2021 p.178

processed by or on behalf of a party” from the rules, including on the location and control of data;⁷⁸ but that exclusion may not cover hybrid situations where public private data are combined.⁷⁹

Data collected from purely private sources can also be important to inform public policy and development decisions, but would fall outside that protection. An example is what some call the “datafication” of food production. Tech firms offer apps to local farmers (or fishers and foresters) that provide information, such as weather or soil conditions, to support production. In return, they take the users’ data, and supplement it by drones and AI, to develop algorithms that are worth far more than the “free” services they provide. That software and data are unlikely to be made available to assist policy-makers on matters like climate change or disaster resilience. Global agritech firms often partner with smart phone telcos that sell adviser apps for a fee. When farmers use the smart phones to sell through online retailers and by-pass traditional markets they generate further valuable data for agritech firms, but need to pay for the advice generated from their data.

While this brings benefits for producers and production, it also has downside risks and flow-on consequences. If a shift to online sales leads local wholesale and retail markets close down, producers can become captive of online sellers who dictate prices and terms that are especially onerous for small operators. In some developing countries, small and indigenous farmers and fishers have become indebted to agritech firms in similar ways to old agribusinesses like Syngenta, Cargill and Monsanto (now Bayer), who are themselves buying up agritech firms.⁸⁰ Governments may find the information they need for policy and planning, including food security and climate change, are unavailable or only at a very high price.

These risks can be mitigated when local enterprises control their data and pool it to support digital innovation and digital development. That form of digital self-determination requires access to data and locally informed software development, skills and investment, realistically operating through regional cooperatives. The Pacific Island Farmers Organisation Network has been exploring those opportunities, while recognising the difficulties and need to manage expectations.⁸¹ Aside from problems of resourcing and skills, strategies that facilitate the development of these kinds of data repositories and value adding software require a degree of autonomy and flexibility that the digital trade rules seek to remove.

3.3 Data protection regimes

Data is not just a matter of commerce and public purposes. Information flows have positive and negative impacts on people, private businesses, governments and communities in all aspects of daily life, including their social relationships, jobs, privacy, human rights, politics and democracy, and

⁷⁸ See, eg. TPPA Chapter 14.2.3(b)

⁷⁹ The standard “public services” exclusion in trade in services chapters, including PACER-Plus, would not protect data-related measures that affect the supply of those services unless they are provided as public monopolies and do not operate commercially. The MSGFTA3 expands the meaning of “services in the exercise of governmental authority” to cover any “activities forming part of a social security or public retirement plans or the public provision of health, education or water services” (MSGFTA3 Art 6.2). Those services are increasingly digitalised and their delivery, or at least their IT systems, are often contracted out to foreign firms.

⁸⁰ Jane Kelsey, “TiSA . Not our Future. When everything is a service, a Trade in Services Agreement affects Everyone”, *International Union of Foodworkers*, February 2018, esp pp. 18-25, <https://pre2020.iuf.org/w/sites/default/files/TISANotourFuture.pdf>

⁸¹ “Innovation: Global pandemic promotes innovative solutions for farmer organisations”, June 2021, Pacific Farmer Organisations, <https://pacificfarmers.com/global-pandemic-prompts-digital-solutions-for-farmer-organisations/>

security. National and regional data strategies require a balancing exercise that is based on an understanding that can integrate these different facets.

Data protections within a robust system of data governance are integral and indivisible aspects of a Pacific digital development strategy and its sub-set of e-commerce. Growing awareness of these impacts has fuelled demands for data self-determination, which is given different meanings depending on the country and context. In Switzerland, data self-determination is an issue of individual rights, especially rights to privacy and freedom of choice, and to prevent misuse in profiling and discrimination.⁸² Some developing countries like India have adopted data sovereignty as a national policy that treats non-personal data that is sourced locally as a national asset to be harnessed for digital development to counter the digital divide.⁸³ Digital rights groups say no one should “own” data; it is a commons that should be available for the broader public good, subject to protections.⁸⁴ The United Nations Rapporteur on the right to privacy has recognised indigenous data sovereignty and indigenous data governance as integral to the UN Declaration on the Rights of Indigenous Peoples, where data is understood as the repository of indigenous peoples’ collective spiritual essence and identity that they have a duty to protect.⁸⁵

All of these meanings have some resonance for Pacific Island Countries. But their goals and rules for data protection must be shaped by the Pacific’s cultural norms, customary laws, identity and social relationships. That regime needs to be developed at the same time as the digital infrastructure, platforms and payment systems, not after the fact. And it must not to be constrained by trade in services commitments in PACER-Plus and the WTO, or digital trade rules and trade in services in future agreements.

These risks were brought home in the report of New Zealand’s Waitangi Tribunal in late 2021. The Tribunal found the e-commerce chapter of the TPPA breached the Crown’s obligations to provide active protection to mātauranga Māori (Māori knowledge), the essence of Māori identity, control of which is guaranteed to Māori under Te Tiriti o Waitangi. The TPPA’s rules on data and source codes, especially, would constrain New Zealand’s future ability to adopt a Tiriti-based Māori data sovereignty and Māori data governance regime.⁸⁶ Despite that finding, New Zealand has adopted similar rules in subsequent agreements.⁸⁷

It is unrealistic to expect Pacific Island Countries to address these challenges at a national level. While a regional approach is more feasible, and provides more scale and leverage to design a regime that is fit for purpose, it is still resource intensive, requires capital investment and training, and must respect national sovereignty. It also assumes that individual countries are not fettered by free agreement commitments or succumb to pressure from donors to adopt their preferred data governance regime. Part 6 looks to experiences elsewhere to identify possible alternative ways forward.

⁸² Government of Switzerland p.14

⁸³ Government of India, Draft National e-Commerce Policy, *India’s Data for India’s Development*, 2019, https://dpiit.gov.in/sites/default/files/DraftNational_e-commerce_Policy_23February2019.pdf; Republic of Rwanda 2017.

⁸⁴ Just Net Coalition. The Delhi Declaration for a Just and Equitable Internet 2014, <https://justnetcoalition.org/delhi-declaration>; Association for Proper Internet Governance, Development Oriented E-commerce Proposals, <http://www.apig.ch/Development%20proposals.pdf>

⁸⁵ United Nations Human Rights Council, Report of the Special Rapporteur on the Right to Privacy, A/73/45712, 17 October 2018, paras 72-75

⁸⁶ Waitangi Tribunal (Wai 2522) 2021

⁸⁷ New Zealand United Kingdom Free Trade Agreement, signed 28 February 2022

PART 4. DIGITAL DEVELOPMENT AND ONLINE TRADING

To harness the economic and social gains of digitalisation within this environment Pacific Island Countries need to establish a regional e-commerce infrastructure that can maximise the benefits for Pacific businesses, consumers and communities, while addressing known obstacles and maintaining a precautionary approach. That requires all participating countries to retain their policy and regulatory autonomy.

4.1 Big Tech platforms

The Pacific E-commerce Strategy proposes a number of enabling measures for Pacific businesses to expand their presence in national, regional and international markets. Many of those measures rely explicitly or implicitly on relationships with powerful global technology companies such as Amazon, AliBaba or Google who provide infrastructure to buyers and sellers, act as buyers and sellers themselves, advertise and facilitate advertising, operate their own fintech and often logistics and distribution systems.⁸⁸ The Strategy promotes the benefits of these relationships, but fails to alert Pacific governments to the risks.

Developed and developing countries have become increasingly captive to mega technology corporations that operate from offshore and have no effective local presence. Their elaborate corporate structures are designed to put the companies and their data beyond the legal jurisdiction and/or practical reach of regulators, tax and competition authorities, privacy, human rights and consumer bodies and of governance in general.⁸⁹

These companies are not shy of using their market power to resist new policies, laws and taxes which they believe would impact on their business model and/or profitability or create an undesirable precedent. Google, Facebook and Amazon all threatened to, or did, withdraw services from Australian users over government proposals to make the corporations pay media outlets for use of content.⁹⁰ While the Australian government remained resolute, the final regulatory arrangements are opaque.⁹¹ Similar threats will be more potent in countries that become over-dependent on a small number of major suppliers and have little leverage. Carrying out those threats could see access to digital marketplaces terminated, disrupt payment systems that are predominantly online, and leave families and communities that increasingly communicate through digital platforms disconnected.

Far from enabling digital development, the aggressive business model of the technology giants consigns small businesses to a precarious presence in online marketplaces. Their model precludes technology transfer, the training of locals, and priority for local products and services, except as a market entry or expansion strategy. Customer (and other) data that should help develop local

⁸⁸ Eg. Pacific E-Commerce Strategy, Measures 2.3.1, 3.22, 3.4.1, 3.4.2

⁸⁹ Jane Kelsey, "How might digital trade agreements constraint regulatory autonomy: The case of regulating alcohol marketing in the digital age", *New Zealand Universities Law Review* 29, 2020, 153-179 at 167-174

⁹⁰ Alex Hern, "Google threatens to leave Australia – but its poker face is slipping", 22 January 2021, <https://www.theguardian.com/technology/2021/jan/22/google-threatens-leave-australia-but-poker-face-slipping>; "Facebook aware of mass pages closure despite saying it was 'inadvertent': Report", *NZ Herald*, 8 May 2022, <https://www.nzherald.co.nz/world/facebook-aware-of-mass-pages-closure-despite-saying-it-was-inadvertent-report/VAE3J7H5BR5RZTWCMSHERH2QXZI/>

⁹¹ Morgan Meaker, "Australia's stand-off against Google and Facebook worked – sort of", *The Wire*, 25 February 2022, <https://www.wired.co.uk/article/australia-media-code-facebook-google>

products and activities are transferred offshore, beyond the control of source countries and without compensation - a process UNCTAD refers to as “data colonialism”.⁹² There is no reason to believe they would act differently in the Pacific.

Even developed countries are grappling with many of these challenges as policy makers and regulators play a constant, and sometimes futile, game of catch-up with the major digital corporations and their innovations. In 2022 the European Parliament provisionally agreed on two new laws targeted at the tech giants: a Digital Services Act to protect users of online intermediaries and platforms, such as online marketplaces, social networks, content-sharing platforms, app stores, and online travel and accommodation platforms; and a Digital Markets Act to rein in online platform operators that act as gatekeepers in digital markets and as private rule-makers in relation to those platforms.⁹³ Paradoxically, the EU’s approach to e-commerce or digital trade rules seeks to fetter such regulation of digital corporations.

4.2 Digital Marketplaces

The Pacific E-commerce Strategy recommends partnerships with the main digital marketplaces as means of enabling Pacific businesses.

Measure 3.4.1 Develop partnerships with leading B2B and B2C marketplaces to accelerate the development of cross-border E-Commerce solutions for Pacific merchants and vendors.

Global E-commerce marketplaces (Alibaba, Amazon, Shopee, Etsy) have very limited Pacific businesses listed, partly due to stringent conditions required from sellers, in particular for logistics and payment. In other regions, these players offer training, incubation programmes to accelerate online transition, something not readily available in the Pacific. Acceleration and support programmes, in partnership with regional business organizations can bridge the gaps between the perceived and actual difficulties of selling online on global marketplaces.⁹⁴

Those expectations need a reality check. The difficulties for Pacific businesses selling online in these marketplaces are not just “perceived” – stringent conditions and overbearing behaviour are very real, especially for SMEs. Over the past decade the EU has fined Google 8.2 billion Euro for anticompetitive practices.⁹⁵ These include a finding by European Court of Justice that “Google abused its dominant position by favouring its own comparison shopping service over competing comparison shopping services”. Other EU cases have investigated Google’s anti-competitive use of data and its digital advertising business.⁹⁶ There are similar EU investigations into Amazon, Apple and Facebook.⁹⁷

⁹² UNCTAD 2021, p.59

⁹³ Digital Services Act 2022 and the Digital Markets Act 2022 <https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package>

⁹⁴ Pacific E-commerce Strategy p.39

⁹⁵ Charles Riley and Ivana Kottasova, “Europe hits Google with a third, \$1.7 billion antitrust fine”, *CNN Business*, 20 March 2019 <https://edition.cnn.com/2019/03/20/tech/google-eu-antitrust/index.html>

⁹⁶ “Google loses challenge against EU antitrust ruling, \$2.8bln fine”, *Reuters*, 11 November 2021.

<https://www.reuters.com/technology/eu-court-upholds-eu-antitrust-ruling-against-google-2021-11-10/>

⁹⁷ Simon van Dorpe, “Facebook caught as Europe expands Big Tech antitrust probes”, *Politico*, 4 June 2021, <https://www.politico.eu/article/facebook-antitrust-eu-uk-investigations/>

Amazon's online retail dominance faces challenges even in the US, which takes a hands-off approach to its big tech companies. The Judiciary Committee of the House of Representatives found Amazon's third party marketplace exercised dominant market power over many small and medium sized businesses by controlling access, price and terms of sale, and through search algorithms.⁹⁸ An Amazon policy in 2021 prevented sellers even accessing the names and addresses of their customers. One study found sale-related fees range from 6% to 45% of each product's selling price, with the average seller paying about 15%.⁹⁹ Research into Amazon's cumulative fees charged in 2020 reported an average of 30% fee for each sale an independent business made on its site.¹⁰⁰ Amazon also has a conflict of interest in selling its own products alongside those from third party sellers, and has exploited its access to competing sellers' data and information to produce similar products, which Amazon then gave higher placements through the search algorithm.

There is every reason to expect similar behaviour towards Pacific retailers, assuming that Amazon was even interested in the market. Amazon has zero concern for the well-being of its suppliers; it aims to capture consumers by making products cheaper and more convenient.¹⁰¹ In areas that it decides to service, the same consumers belong to communities whose shopkeepers, markets and small businesses would be unable to compete with the convenience and cut-throat pricing that Amazon demands from its suppliers.¹⁰²

4.3 A regional E-commerce marketplace

A related proposal in the Pacific E-commerce Strategy is to develop a regional e-commerce marketplace. This is an attractive option if participating Pacific Islands Countries can retain control of the infrastructure and the data, and avoid capture by the Amazons and AliBabas.

The Strategy says it would be led (and presumably owned and controlled) by the private sector. What the measure describes is not a typical private sector tech business model, which suggests a level of coordination and support that would require a degree of government involvement. For example, a Pacific-owned regional marketplace assumes its ability to access and exercise some control over data. Individual sellers, whether sole traders or collectives, would also want access to relevant data analytics for their planning and strategic development.

⁹⁸ "Investigation of Competition in Digital Markets", US House of Representatives, Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, 2020.

⁹⁹ "Amazon Seller Fees. Cost of Selling on Amazon in 2022", Fit Small Business, <https://fitsmallbusiness.com/amazon-seller-fees/>

¹⁰⁰ Stacy Mitchell and Ron Knox, "How Amazon Exploits and Undermines Small Businesses, and Why Breaking It Up Would Revive American Entrepreneurship", Institute for Local Self-Reliance, June 2021, <https://ilsr.org/fact-sheet-how-breaking-up-amazon-can-empower-small-business/>

¹⁰¹ Jeb Sprague and Sreerekha Sathia, "Transnational Amazon: Labor Exploitation and the Rise of E-commerce in South Asia", in Jake Alimahomed-Wilson and Ellen Reese, *The Cost of Free Shipping: Amazon in the Global Economy*, Pluto Press, 2020,

¹⁰² The MSGFTA3 has an unusual Emergency Safeguard Measures (Article 6.68) that allows governments to adopt measures that would otherwise breach their obligations where there are "problematic market conditions in specific sectors, to correct structural problems with the market, the threat of service sectors disappearing, including payments or transfers for transactions and exchange transactions". This provision is referred to in other Articles (6.63, 6.66, 6.67) as applying to the balance of payments, but the wording is much broader - it applies to any commitments on cross-border services or commercial establishment, including those relating to digitally enabled or enabling services. However, the measures must not discriminate between the parties (presumably meaning the other parties); they must avoid "unnecessary" damage to commercial, economic and financial interests of other parties; not exceed those "necessary" to deal with the circumstances for which they are adopted; and be temporary and "where practical" be phased out progressively as the situation improves. There is no similar safeguard in PACER-Plus.

Measure 3.4.2 Support the expansion of leading national marketplaces towards the creation of a private sector-led Regional E-commerce Marketplace (REM)

The lack of Pacific-based merchants on global E-commerce marketplaces is persisting. However, national E-commerce marketplaces in Fiji, New Caledonia, and Samoa have pursued sub-regional expansion strategies towards becoming REMs. A REM is a web-based system that links multiple businesses and actors together to a central marketplace for the purpose of trading or collaboration and facilitating exchanges of different types of resources such as information, goods and services. A REM initiative can mitigate the numerous existing entry barriers faced by firms and governments. Advantages include sharing of fixed costs of establishment and maintenance of the E-commerce system, creating economics of scale and scope with respect to the access to logistics and banking services, and personnel training; an increase in the opportunities for cross-selling. As the REM is established and evolves it can be linked into global marketplaces. The platform can also be used to test international shipments especially for high potential products in agriculture, handicraft sectors, with the expectations that shipping costs are progressively reduced. Eventually, the platform should promote the transition of Pacific business towards global marketplaces.¹⁰³

To ensure that can happen, governments would need to ensure a REM can retain or at least freely access data generated in and with the region. A requirement that this data is provided to sellers or the REM may be considered a “measure” that “affects” the cross-border supply of computer and related services in PACER-Plus and contravene the data localisation rules proposed in new e-commerce or digital trade agreements.

4.4 Fulfilment centres

The Pacific E-commerce Strategy actively promotes the use of fulfilment centres in principal export markets to overcome the region’s under-developed logistics infrastructure and specifically refers to existing e-commerce players such as Alibaba and Amazon. A closer look reveals similar problems to the online marketplaces.

Measure 3.2.2 Incentivize for the development of fulfilment centres for Pacific products in main export markets by private sector operators.

Underdeveloped logistics infrastructure in the Pacific is a major barrier in developing cross-border E-commerce, especially to sell to major international markets. Fulfilment centres enable E-commerce merchants to outsource warehousing and shipping. This relieves the online business from the need related to the storing of products and managing the inventory. It also reduces transport costs (as products are sent in bulk for the most expensive part of the journey) and increase speed of delivery. Major E-commerce players (Alibaba, Amazon) already propose their own fulfilment centres or offer the possibility to utilise third-party centres such as ShipBob Inc. Increasing the uptake of fulfilment services can boost competitiveness of Pacific E-commerce business, and blended finance mechanisms can be useful to achieve this objective.¹⁰⁴

¹⁰³ Pacific E-commerce Strategy p. 39

¹⁰⁴ Pacific E-commerce Strategy p.38

Amazon operates more than 150 fulfilment centres, sortation centres and delivery stations and delivery mechanisms internationally.¹⁰⁵ “Fulfilment by Amazon” invites sellers to give Amazon full responsibility for storage in warehouses, shipping, returns processing, VAT application and customer care. That package deal has obvious attractions for smaller Pacific businesses. But one-stop marketplaces quickly become gatekeepers that set the terms for independent sellers to access,¹⁰⁶ and may even leave them out of pocket. Researchers report the margin Amazon has been extracting from independent sellers through fees for advertising, referrals and shipping has risen significantly over the past decade, from US\$19 for every \$100 sales in 2014 to US\$34 in 2021, leaving some small businesses trading at a loss.¹⁰⁷ The research says complaints about Amazon’s practices led to retribution; fear of retaliation reinforces Amazon’s power over its sellers, especially SMEs.

4.5 Online Travel Agencies

Perhaps the most significant digital platform for Pacific Island Countries, aside from remittance transfers through fintech, relates to tourism. The same story of big tech dominance applies to Online Travel Agencies, albeit with different players. A duopoly of Expedia Group (which owns Expedia, Hotels.com, Travelocity, Orbitz, Trivago and Hotwire) and Booking Holdings (which owns Priceline, Kayak and Booking.com) has dominated the online market for years. Small hotels that seek bookings on these OTAs can face onerous commissions. Standard rates have increased from around 10% in the early 2000s to between 15% and 30% of the value of the reservation by 2020. Higher placement on the list pages costs more.¹⁰⁸

Google is now competing with them, offering streamlined trip planning across hotels, flights and other tools.¹⁰⁹ As the world’s largest search engine, Google has been described as “the defacto gatekeeper for online travel planning – a superpower status the OTAs have never enjoyed. When you search for a flight or a hotel, Google controls what appears at the top of a search engine results page.” Again, Google’s own products get priority. “Increasingly, no matter where you begin to plan a trip online, all roads lead to more Google products. Google recently increased its review volume exponentially, and made Google ratings more prominent in its search, maps and hotel listings.”¹¹⁰

Amazon is just entering the hospitality business. Their massive data bases will take online tourism to another level and further marginalise those who are not priorities in online searches.

Individual PICs have no leverage over OTAs. They need to be regulated regionally and preferably delivered regionally too. One option for the Pacific is to collaborate in the development of a viable

¹⁰⁵ “Amazon bullies partners and vendors, says antitrust subcommittee”, CNBC, 6 October 2020, <https://www.cnbc.com/2020/10/06/amazon-bullies-partners-and-vendors-says-antitrust-subcommittee.html>

¹⁰⁶ Griffin Davis, “Amazon Allegedly Exploits Small Businesses Through Hefty Fees! Third-Party Sellers Pay \$34 per \$100 Sale?”, *Tech Times*, 3 December 2021, <https://www.techtimes.com/articles/268914/20211203/amazon-allegedly-exploits-small-businesses-through-hefty-fees-third-party.htm>

¹⁰⁷ It is unclear whether these figures are solely for the US market. Kim Lyons, Amazon charges sellers fees that are high enough to offset losses from Prime, a new report says, 3 December 2021, *The Verge*, <https://www.theverge.com/2021/12/3/22813872/amazon-profit-small-business-fees-sellers-prime>

¹⁰⁸ Hotel Price Reporter, <https://www.hotelpricereporter.com/blog/ota-rate/>

¹⁰⁹ Suzanne Rowan Kelleher, “Google And Amazon’s Disruption Of The Online Travel Industry Is Looking Inevitable,” <https://www.forbes.com/sites/suzannerowan/kelleher/2019/06/30/google-and-amazons-disruption-of-the-online-travel-industry-is-looking-inevitable/?sh=67adbf48e0f>

¹¹⁰ David Easton, “OTA Commission Rates: The complete guide to OTA fees”, 22 October 2020, <https://www.hotelpricereporter.com/blog/ota-rate/>

open regional platform of the kind being developed in India (see Part 6), which could provide equitable listings of small and large local tourism providers and is widely promoted within and beyond the region is an attractive option to explore.

Again, free trade agreements may pose obstacles unless they can be neutralised. Moves to give preferences to a fledgling regional entity or require some joint-venture arrangements would likely breach individual countries' market access obligations and national treatment rules under PACER Plus and at the WTO, and for some WTO members their most-favoured-nation obligations as well. As Table 1 shows, most Pacific WTO Members have made trade in services commitments on tourism, including hotels and tour agents, in cross-border mode (mode 1) which is how OTAs operate. In PACER Plus seven Pacific Island Countries have commitments on cross-border delivery of services (mode 1) for hotels, tour agencies, advertising and air transport sales and computer reservation systems. All participating countries in MSGFTA3 proposed such commitments.

4.6 Local digital content

Another option recognised in the Pacific E-commerce Strategy is to develop online content. Local content can take many different forms, including advertising of local goods and services, social interactions and communications, development of purpose-built apps and cultural content, including in local languages, making component parts, repair and installation services, and other activities. These are important initial steps to develop capacity and build a critical mass of competencies for a digital industry and service sectors.

Measure 2.3.1 Promote development of online local content by the private sector

Together with affordability and reliability, internet demand is determined by the relevance of internet contents to its users. Relevance is driven by the availability of local content which provides an incentive to go online. From a private sector perspective, websites and social media (mainly Facebook) are the two main channels for promoting business through the development of local content. Except for the hospitality and travel sectors, the websites of businesses are quite simple and are mainly used to promote goods and services. The development of additional local content by both companies and non-private sector entities can increase the share of business operations conducted digitally in any given sector. More local content will generate more demand for internet use, which should increase profitability of the telecommunications sector and reduce the need for subsidies, especially in rural areas.¹¹¹

Measure 2.3.1 assumes that local content will be adopted by websites and social media platforms, especially Facebook. But Facebook is not a passive receptive platform on which local content producers can ply their wares. It is driven by algorithms, has user rules that determine what appears where, applies terms and conditions that can change without warning, and gives priority to inhouse products.

Were Pacific governments to *require* the use of domestic content or provide incentives that are not available to content-making counterparts, say in Australia or New Zealand, they could breach the non-discrimination (national treatment) obligations on computer and related services and specific services sectors, such as advertising, under PACER-plus. Proposals in the JSI go further, drawing on TPPA rules

¹¹¹ Pacific E-Commerce Strategy p.35

that say governments cannot give preference to locally created digital products,¹¹² require a cross-border platform or investor¹¹³ to use such content, or require a foreign investor to transfer technology or employ someone in a position where they gain technological or proprietary knowledge.¹¹⁴

Another important opportunity for local digital entrepreneurs and IT specialists is through public procurement, where they can provide culturally appropriate software and apps to central and local governments, and service their computer hardware. Most government IT systems are contracted. Small procurement projects may involve preferences for local suppliers. These contracts fall outside the thresholds for the government procurement rules in most FTAs. However, dominant suppliers of hardware will often require the use of their own or specified software and servicing personnel.

Regional procurement arrangements may help to provide the scale that encourages development of local skills and services. But larger projects are more likely to fall foul of the procurement rules in FTAs.¹¹⁵ Government procurement chapters usually require non-discrimination above a certain threshold for purchasing conducted by listed agencies.¹¹⁶ To date, developing countries, including Pacific Island Countries, have been cautious about adopting such obligations and where they do, the thresholds are likely to protect preferences for smaller businesses. A regional strategy needs to ensure that procurement on a larger scale remains a viable option.

¹¹² TPPA/CPTPP Art 14.4 Non-discriminatory treatment of digital products:

¹¹³ TPPA/CPTPP Art 9.10.1(c) and (h)(i) Performance Requirements

¹¹⁴ TPPA/CPTPP Art 9.10.1(f) and (4) Performance Requirements

¹¹⁵ The services and e-commerce chapters of many FTAs, including PACER-plus, routinely exclude government procurement *processes*, but only where the products or services being bought are for internal and non-commercial use (ie not for resale) (see, eg. TPPA Chapter 14.2.3(a)). That exclusion usually does not extend to the *terms* of the contracts, such as requirements to use inputs or offsets that favour local suppliers, which would greatly benefit Pacific tech entrepreneurs. The exclusion of public procurement in the MSGFTA3 e-commerce chapter is arguably more comprehensive, because there is no definition limited to “process” (MSGFTA3 Art 6.72).

¹¹⁶ See, eg. TPPA Chapter 15

PART 5. FINTECH

Finance is one of the most unlevel playing fields in the Pacific region. The profit-driven model of traditional commercial banks targets high value, low volume business when the overwhelmingly need of Pacific peoples and businesses is for accessible services that enable small value, high volume transactions at low cost.¹¹⁷ This mismatch has left many people and small businesses in urban and remote areas, as well as offshore remittance workers, exploited and/or unbanked.

5.1 The region's financial services deficit

The New Zealand Reserve Bank (RBNZ) reports there has been an even faster decline in intermediation and correspondent services provided by traditional banks in the Pacific region than globally: from 2011 to 2019 they fell globally by 22%, but by 48% in Melanesia and 44% in Polynesia, with a further 11% fall in Melanesia and 9% in Polynesia in 2019 compared to 3% globally.¹¹⁸

This lack of commitment from foreign commercial banks makes the disruptive potential of fintech services very attractive.¹¹⁹ Yet there are systemic barriers to the uptake of e-finance in Pacific Island Countries. The Pacific E-commerce Strategy identifies regulatory gaps, low financial and technological literacy among lawmakers and policymakers, and limited digital infrastructure. From the users' side, there are issues of cost and trust. There are also supply problems in attracting providers to develop appropriate regional solutions for domestic and cross-border transactions.¹²⁰

The Pacific E-commerce Strategy proposes a range of fintech services and payment options for the region.¹²¹ Other institutions, notably the International Monetary Fund, have also reviewed the region's needs.¹²² Unfortunately, Pacific Islands governments have limited capacity to regulate even the existing financial services sector. Fintech is both higher risk and less well understood. It is therefore crucial to move cautiously in adopting new technologies, products, and services so as to limit mistakes and to retain the regulatory space to pre-empt or address them.

There are also tensions between regional and national approaches. Regionalism offers some economies of scale and scope in the development and roll out of fintech systems and regulatory regimes. New challenges, such as contagious pandemics and financial crises, as well as chancy financial innovations, require dexterity and the sharing of information and expertise regionally. At the same time, the banking situation varies between Pacific Islands, making a sub-regional approach sensible for some issues. Moreover, central banks have legal responsibilities for their country's monetary and exchange rate policies and financial stability.

¹¹⁷ Sonja Davidovich et al, *Strategy for FinTech Applications in the Pacific Island Countries*, IMF, 2019, 12; <https://www.imf.org/-/media/Files/Publications/DP/2019/English/sfapicea.ashx>

¹¹⁸ Reserve Bank of New Zealand, *Correspondent Banking in the Pacific. Te tariwai hononga a pēke o Te Moana-nui-a-Kiwa*, 1 July 2021, pp. 1-2 <https://www.rbnz.govt.nz/-/media/ReserveBank/Files/Publications/Information-releases/2021/correspondent-banking-in-the-pacific.pdf?revision=ed56a3f5-d4eb-49eb-a278-f909b719b058>

¹¹⁹ Brian Knight, "FinTech: Who Regulates it and Why it Matters", Milken Institute, 2016, <https://milkeninstitute.org/sites/default/files/reports-pdf/FinTech-Who-Regulates-It-and-Why-It-Matters2.pdf>

¹²⁰ Pacific E-commerce Strategy p.47

¹²¹ Pacific E-commerce Strategy pp.42-44

¹²² Davidovich 2019 p.ix

This section examines three fintech initiatives that the Pacific E-commerce Strategy and IMF reports both discuss, with particular reference to the trade in financial services rules: the regional regulatory sandbox; interoperability; and mobile money, digital currency and digital wallets. It also examines an issue that neither addresses in detail - financial data.

5.2 Regulatory foundations for fintech

As with the digital development generally, fintech requires a balanced public policy and regulatory regime. The IMF's 2019 Strategy for fintech in Pacific Island Countries is more nuanced than the Pacific E-commerce Strategy, advising that innovative technologies can help address the challenges facing the Pacific, *if managed well and bearing in mind the risks.*¹²³

*IMF: A well-designed public policy approach supported by development partners would help build trust in technology, develop a new tech-savvy generation, and lay the foundations for a stronger, more competitive, and technology-driven economy.*¹²⁴

The IMF identifies four areas requiring action: developing innovative payment systems, improving means of personal identification, credit sharing information, and risk assessment and management. It also spells out a number of pre-conditions. These include a favourable market and regulatory infrastructure, with competition policies that “enable an even playing field and healthy competition and address potential risks of market concentration and abuse by market participants”,¹²⁵ and to encourage “collaboration among market participants, identify and close regulatory gaps, and enhance financial literacy”.¹²⁶ Other regulatory challenges are to “safeguard the integrity of financial systems by identifying, understanding, and mitigating the risks of criminal misuse of fintech, and by using technologies to strengthen compliance with anti-money laundering and combating the financing of terrorism (AML/CFT) measures.”¹²⁷

As with the digital domain generally, trade in services agreements constrain how governments can regulate the finance sector. The standard definition of financial services in the WTO and FTAs, including PACER Plus and the MSGFTA3, covers every conceivable financial service and product and those not yet conceived of, because the definition is not exhaustive.¹²⁸ The rules aim to limit the regulation of those financial services. They were developed in the later 1980s and 1990s by the US to benefit the international operations of its banks, insurance companies, money brokers, currency traders and credit raters,¹²⁹ not to protect the users of those services or their host countries.

These agreements pose significant legal and practical challenges for financial regulators. As a brief explanation, the core rules involve promises not to treat firms of the other party and their financial services or products less well than local counterparts or to restrict their access to the market. That would include regulations or licenses that ban or cap certain services, restrict a firm's size, exclude

¹²³ Davidovich 2019 pp.1, 9-10

¹²⁴ Davidovich 2019 p.13

¹²⁵ Davidovich 2019 pp.10-11

¹²⁶ Davidovich 2019 p. x

¹²⁷ Davidovich 2019 p. 2

¹²⁸ The standard definition is non-exhaustive and includes the broad range of insurance and related services, banking and lending services, other financial services like asset management and derivatives trading, and specifically covers payment and money transmission, foreign exchange, money broking, settlement and clearing services.

¹²⁹ Jane Kelsey, *Serving Whose Interests? The political economy of trade in services agreements*, Routledge, UK, 2008, 158-61

them from certain activities or reserve activities for local providers, require joint ventures or limit foreign ownership. Those rules apply to the cross-border supply of financial services by entities of the other party to the agreement that have no local presence in the “market” country, and are likely to capture rules that require financial data to be held locally or the presence of a legal entity that could be investigated and prosecuted for breach of financial regulations or consumer protections.

As a hypothetical example, an ANZ bank branch that was legally established in Samoa, or a local Samoan mobile money operator, that supply their financial services into Tonga via the Internet could not be required to have a local presence in Tonga that would bring it under Tongan jurisdiction or to retain data sourced from Tonga within the country.

Importantly, these rules only apply to sub-sectors of financial services that a country has committed in its schedule, and are subject to any limitations on those commitments that the government inscribes in its schedule.¹³⁰ A government could also seek to rely on one of the exceptions discussed below.¹³¹

UNCTAD 2018. Advancing the economy from cash to cashless payments is not easy, especially for countries which do not have well-regulated financial sectors. Success in widespread use of digital payments requires a strong regulatory framework to supervise commercial banks, financial institutions and other e-money institutions and rules around consumer data protection, competition issues as well as legal provisions around payment clearing and settlement systems. Developing countries need to be extremely careful in their trade negotiations as well as investment treaties for preserving their policy space for regulating their digital payment platforms.¹³²

UNCTAD’s 2018 regional digital integration strategy stresses the need for a strong supervisory framework, rules on data protection and competition, and payment and clearing systems. It urges extreme caution against governments restricting their policy space to regulate digital payment platforms – a subsector on which all Pacific Islands Countries made commitments to the benefit of Australian and New Zealand financial service providers in PACER-Plus for a commercial presence (foreign investor), and the Cook Islands, Niue, Solomon Islands, Tonga, Tuvalu and Vanuatu made for cross-border supply of the service (see Table 2).

There are also important equity issues to address. It is not enough to talk of building trust, improving literacy and better access to technology. The benefits of fintech have to be shared fairly, which requires some realignment of an unlevel playing field. The IMF’s suggested policy options include subsidising Internet access for low income households; setting up Internet hubs; an employment strategy to include vocational training and start-up funding for local software and application development; and seed money and employment and study exchange programmes.¹³³ Aside from issues of funding, these need fertile ground to succeed and may require local preferences that run foul of trade in financial services commitments.

¹³⁰ Recent agreements propose negative lists whereby countries have to say what is not covered; whatever is not listed is subject to the rules, making it even harder to protect regulatory space in the rapidly changing fintech world.

¹³¹ See notes 140 and 141

¹³² UNCTAD 2018 p. 18

¹³³ Davidovich 2019 p.13

Table 2. Selected trade in financial services commitments

Agreement	Cook Islands	FSM	Fiji	Kiribati	Marshall Islands	Nauru	Niue	Palau	PNG	Samoa	Solomon Islands	Tonga	Tuvalu	Vanuatu
Payment and money transfers														
PACER Plus														
	1,2,3	3		3	3	3	1,2,3	3		2,3	1,2,3	1,2,3	1*,2,3*	1,2,3*
WTO														
									1,2,3*	3		1,2,3		1,2,3*
MSGFTA3														
			3						3		1,2,3			1,2,3*
Financial data transfer and processing														
PACER Plus														
	1,2,3	3		1,2,3	1,2,3	1,2,3	1,2,3	1,2,3		1,2,3	1,2,3	1,2,3	1*,2,3*	1,2,3*
WTO														
										1,2,3		1,2,3		1,2,3*
MSGFTA3														
			1,2,3						3		1,2,3			1,2,3*
Accepting deposits from public														
PACER Plus														
	1,2,3	3		3	3	1,3	1,2,3	3		2,3	1,2,3	1,2,3	1*,2,3*	1,2,3*
WTO														
									1,2,3*	3		1,2,3		1,2,3*
MSGFTA3														
			3						1,2,3		1,2,3			1,2,3*
Trading in foreign exchange														
PACER Plus														
	1,2,3	3		3	3	3	1,2,3	3		2,3	1,2,3	1,2,3	1*,2,3*	1,2,3*
WTO														
										3		1,2,3		1,2,3*
MSGFTA3														
			3						1,2,3		1,2,3			1,2,3*
Auxiliary incl credit reference and analysis														
PACER Plus														
	1,2,3	3		1,2,3	1,2,3	1,2,3	1,2,3	1,2,3		1,2,3	1,2,3	1,2,3	1*,2,3*	1,2,3*
WTO														
										1,2,3		1,2,3		1,2,3*
MSGFTA3														
			1,2,3						3		1,2,3			1,2,3*
Settlement and claims														
PACER Plus														
	1,2,3	3		3	3	3	1,2,3	3		2,3	1,2,3	1,2,3	1*,2,3*	1,2,3*
WTO														
										3		1,2,3		1,2,3*
MSGFTA														
			3						3		1,2,3			1,2,3*

Key: 1 = mode 1 Cross border, 2 = mode 2 consumption abroad, 3 = commercial presence

* denotes a condition on this commitments

Blank indicates no commitment

Dark shading indicated that country is not a party to the agreement

Hatched shading indicates that country has not signed the agreement

Cross-hatched shading indicates that country has signed but not ratified the agreement

Source: compiled by author from texts of the agreements.

Previously, governments might have looked to options like universal service obligations to ensure access to financial services or required joint ventures between foreign and local or state-owned banks. These measures potentially conflict with trade in financial services commitments under PACER Plus (and MSGFTA3) relating to commercial establishment of foreign financial service providers. They are also much less feasible for financial services that are provided across the border. India has replaced such measures with an active programme for "financial inclusion" to address very similar

problems to those identified in Pacific Island Countries, including government-owned commercial Regional Rural Banks, self-help groups and cooperatives, and other financial inclusion initiatives.¹³⁴

5.3 Regulating financial data

Regulating financial data raises particularly difficult challenges. Data is the driver for fintech, as for the wider digital domain. Who controls financial data controls fintech, builds its algorithms and constructs blockchains to enable digital currencies. These innovations enable services that both the IMF and Pacific E-commerce reports refer to, such as identification and verification through e-signatures and facial recognition, direct transfers that bypass traditional intermediaries, and credit assessments. Those, and other digitally-enabled financial services, can improve access and potentially reduce costs for Pacific people and businesses, provide access to banking and other financial services for “unbanked” people and remove the need to rely on usurious traditional banks.

They also introduce new risks. The IMF remarks on the potential for information sharing on matters like credit scoring to provide more private options for borrowers and reduce demands for state-based lending. But it stresses the importance of a holistic and culturally situated approach to regulating credit assessments. A range of existing and alternative data might be collected to inform the credit modelling process, for example in assessing creditworthiness for a bank loan - such as mobile phones and utility payment records, tax and corporate registries, mobile money payment history, and criminal records. Credit models could also draw on consumers’ online activities on social media or digital commerce sites. The IMF warns that this kind of “digital footprint” data should be used with great caution because “an unanticipated bias of artificial intelligence algorithms used to process and analyze the data can hurt certain user groups”. Consumers must have control over their data, which should be shared only with their explicit consent and for the intended purpose.¹³⁵

It has been hard enough to establish regulatory frameworks for financial data that protect individuals’ privacy and rights *before* this sophisticated technology and digital financial services emerged. Today’s challenges are far greater. Data may be held by foreign firms outside the country or the region. The fintech providers may have no local presence or might take a legal form, such as a branch or representative office, that does not make them subject to national regulation. Protecting these firms’ right to do so is a major objective of contemporary digital trade rules.

Likewise, the rules can prevent regulators from requiring access to source codes and algorithms to assess their integrity or cultural or gender bias.¹³⁶ Conducting this kind of scrutiny on a national level is likely to be beyond individual Pacific countries’ regulatory capacity. As similar issues are likely to arise across the region, working towards a shared regulatory framework that enhances their digital sovereignty is crucial. Building those regional competencies in a timely manner will require support from other countries that are developing those skills and have analysed the same or similar technologies, services and products from a developing country perspective.

¹³⁴ Badar Alam Iqbar and Shaista Sami (2017), “Role of banks in financial inclusion in India”, *Accounting and Management* 62(2) <https://www.elsevier.es/es-revista-contaduria-administracion-87-articulo-role-banks-in-financial-inclusion-S0186104217300104>

¹³⁵ Davidovich 2019 pp.25-26

¹³⁶ Eg. TPPA Art 14.17

Similar challenges apply to protecting the financial system itself. Monetary, exchange rate and balance of payments policies require prompt and reliable access to data about the nature, quantum and location of financial transactions. That is why some countries' central banks require financial service providers to hold data within the territory.¹³⁷

Financial regulators need ready and reliable access to information about and from financial service suppliers so they can assess financial stability and risk, and prevent or respond to failures. Whether they can access financial data will depend on where it is, who controls it, and which jurisdiction it comes within. In the TPPA negotiations, the Secretary of the US Treasury Jack Lew insisted the US kept the right to require financial services data to be held locally. That is because the US Treasury was unable to access essential information from Lehman Bros in London and Hong Kong when the firm collapsed in 2007 at the start of the global financial crisis.¹³⁸ Some recent FTAs have weakened that protection.¹³⁹

Other regulatory issues are also important. The ability to test the integrity of financial data is key to ensuring AML/CFT compliance. Tax authorities need access to data about, and held by, financial service suppliers. Again, ensuring compliance with these obligations and regulatory requirements is problematic when the supplier is operating from a different jurisdiction and even a copy of the relevant data is not held inside the country.

Trade rules on financial services, including the storage and processing of financial data, affect what a Pacific government or regional authority can do. As Table 2 shows, almost all parties to PACER-plus have made full commitments not to discriminate or limit the market for cross-border "provision and transfer of financial information and financial data processing and related software by suppliers of other financial services". That would stop them from preventing or restricting data transfers or restricting the transfer of certain categories of financial data, unless they can come within one of the unclear exceptions or convince Australia and New Zealand to waive or renegotiate those commitments given the change of conditions. Three of the four participants in the MSGFTA3 made similar trade in financial services commitments there.

The MSGFTA3 includes an additional far-reaching obligation, also found in the TPPA, not to prevent a financial services supplier of the other Party from transferring information into and out of the country to wherever it wants in the ordinary course of its business - effectively a *carte blanche* for all data transfers. Arguably, this would still allow a requirement to hold a copy of that information in the country. The parties would be required to adopt "adequate" safeguards to protect privacy and fundamental rights, but there is no minimum standard and this only refers specifically to *personal* data.

¹³⁷ These requirements are subject to vigorous debate. See <https://www.accesspartnership.com/financial-service-data-transfers-the-worst-offenders/>; Jyoti Panday and Srikanth Lakshmanan, "Unpacking RBI's Quest to Have All Payment Data Stored Within India's National Boundaries", *The Wire*, 27 October 2018, <https://thewire.in/business/rbi-payment-data-localisation-india>

¹³⁸ Rachel Fefer, "TPP Financial Services Data Flows", CRS Insight, 3 June 2016. <https://sgp.fas.org/crs/row/IN10498.pdf>

¹³⁹ Article 11.7.2 of the NZ UK FTA allows a local storage and processing requirement for the purposes of regulation and supervision, where the government cannot ensure access, but it needs to give the finance company time to remedy a failure. That may be too late for an emergency situation. The approach taken also needs to be the least restrictive approach available.

These agreements have a number of exceptions and exclusions, but they are hard to navigate, uncertain and/or limited. These include conditional carveouts for monetary and exchange rate policies¹⁴⁰ and seemingly circular prudential exception.¹⁴¹

5.4 A regional regulatory sandbox

Successive financial crises have increased awareness in both developed and developing countries that new types of financial products, services and technologies may bring unforeseen and often unforeseeable risks. The Pacific E-commerce Strategy observes that central banks take a relatively conservative approach to regulation out of concern about the disruptive power and destabilising impacts on financial services if they are not properly regulated.¹⁴²

As a response, the Strategy endorses both a Regional Regulatory Sandbox, the guidelines for which took effect in March 2020,¹⁴³ and the establishment of innovation offices to support fintech enter the market.¹⁴⁴ The following comments focus only on the sandbox.

***Sandbox Guidelines:** The objective of the sandbox is to foster responsible innovation that improves efficiency, nurtures new opportunities, provides safeguards and robust risk mitigation, and achieves the mandates of financial inclusion by improving the access, use and quality of financial services for people living in the participating countries.¹⁴⁵*

Creating a controlled regional environment provides the opportunities for users, government authorities and financial systems, as well as for financial services providers, to assess potential benefits and reduces the potential risks from financial innovations. The “sandbox” offers that kind of

¹⁴⁰ The exclusion for “services in the exercise of governmental authority” in trade in services chapters usually covers a central bank or monetary authority or by any other public entity in pursuit of monetary or exchange rate policies, and services conducted by a public entity for the account or with the guarantee or using the resources of the government. This definition is not exhaustive so it is unclear what else it might cover.

¹⁴¹ There is a standard prudential exception in both PACER-plus (Art 11.4) and the MSGFTA3 (Art 6.33): a government can adopt a measure that breaches its obligations in the financial services chapter for prudential reasons, including to protect individuals or ensure the protection and stability of the financial system - provided it is not using those measure to circumvent those obligations. This seemingly circular proviso creates considerable uncertainty and puts an onerous burden of proof on a government to show it is not trying to circumvent the chapter’s restrictions.

The MSGFTA3 has an additional Special Exception (Art 6.68) that says the entire chapter – which in that agreement includes the e-commerce, cross-border services and telecommunications provisions - does not apply to activities conducted by a central bank or monetary authority or by any other public entity in pursuit of monetary or exchange rate policies and prudential stability. This overlaps with, but is broader than, the prudential exception and significantly omits the problematic anti-circumvention proviso. It is unclear how the two provisions are meant to inter-relate.

That uncertainty is complicated further by several other provisions in the MSGFTA3. Articles that prevent restrictions on current payments (Art 6.66) and capital movements (Art 6.67) say the prudential exception and restrictions to safeguard balance of payments do not apply to them. But those provisions and the current payments and capital movements provisions all refer to “Article 6.68 Restrictions to Safeguard Balance of Payments”, which is in fact the title of Article 6.69. The broader Article 6.68 Special Exceptions is not restricted to balance of payments, and not referred to in any of these other provisions.

These may just be drafting errors, but they have serious implications for the powers of central banks and financial regulators. They also highlight the limited capacity of negotiators and officials to understand such complex texts and their implications.

¹⁴² Pacific E-commerce Strategy p.43

¹⁴³ Alliance for Financial Inclusion and Pacific Islands Regional Initiative, Pacific Regional Regulatory Sandbox Guidelines, March 2020, <https://www.pirisandbox.org/>

¹⁴⁴ Pacific E-commerce Strategy p.43, para 5.1.2

¹⁴⁵ Sandbox p. 6

laboratory while ensuring that each country's regulators retain their authority over decisions on what products and which providers to approve, and protects them from liability.¹⁴⁶

The sandbox guidelines target applicants that have an interest in applying technology in an innovative way to support or offer financial services that are regulated, or likely to be regulated, in some form in the participating countries.¹⁴⁷ Approved experimenters must be financial services providers with registered businesses in at least one jurisdiction globally. While the main focus is on Pacific-based applicants, international financial services providers based outside the Pacific who operate in Pacific jurisdictions, or even those with no regional presence, are encouraged to apply. Governments may require the company and/or its service to be incorporated in its jurisdiction.¹⁴⁸

Neither the Pacific E-commerce Strategy nor the Guidelines addresses several significant concerns. One emerges from the IMF report on fintech options for the Pacific Island Countries.¹⁴⁹ While the regulatory sandbox allows financial service providers to simulate and test their innovative financial products, services, and business models in a controlled environment, the IMF warns this is resource intensive and can be complex and costly, with the costs outweighing the benefits. It also suggests that most regulatory questions do not need a live testing environment. The IMF advised Pacific Island Countries to undertake a feasibility assessment before deciding whether to proceed.

There is another reason to question what level of reassurance the sandbox can deliver. It became clear from the Global Financial Crisis that financial innovators are constantly creating new products that are opaque and designed to bypass regulatory oversight. It may not be feasible to process them through the sandbox simply because they are only known about once it is too late. The default option, that there is no attempt to identify and regulate them, is equally unacceptable. The Pacific's financial regulators may be able to achieve much the same results by building on their relationships with counterparts elsewhere. South-South or triangular cooperation can provide short-cuts to understand emerging financial innovations so that regulators can identify their potential benefits and means to regulate them, while warning governments and users against more toxic financial products and services.

The experimental approach of the sandbox is premised on the need for prudence, flexibility and caution in the high-risk, volatile and speculative financial services environment. That once again raises the spectre of the trade agreements. Rules on trade in financial services and on e-finance have their origin in US attempts to use trade negotiations to minimise financial regulation.¹⁵⁰ They seriously restrict governments' ability to take a precautionary approach and to actively regulate new financial services, products and technologies. The hands-off approach encouraged by those rules has been directly linked to the kind of untried and risky financial products and services at the centre of the 2007 global financial crisis.¹⁵¹

Table 2 shows that Pacific Island Countries have made extensive commitments on trade in financial services in PACER-plus, especially for commercial establishments (foreign investment), but also many

¹⁴⁶ Sandbox p. 4

¹⁴⁷ Sandbox p. 7

¹⁴⁸ Sandbox p. 7

¹⁴⁹ Davidovich 2019 p.14

¹⁵⁰ Jane Kelsey, "How a TPP-Style Outcome in the WTO Would Endanger the Development Dimension of the GATS Acquis (and Potentially the WTO)", *Journal of International Economic Law* 21, 2018, 273-295

¹⁵¹ Joseph Stiglitz, *Report of the Commission of Experts of the President of the United Nations General Assembly on Reforms of the International Financial and Monetary System*, United Nations, New York, 2009, p.87.

in cross-border payment systems, settlement and clearing services, payment and money transfers, accepting deposits, trading in foreign exchange, credit assessment, and more. Restrictive regulations would need to rely on the prudential exception,¹⁵² which is not designed to cover interventions to protect against the unknown. The burden of proving a prudential threat rests on the state that is regulating and the exception must not have been adopted to avoid the obligation it applies to.

The MSGFTA3 has a further rule that is usually only found in agreements between developed countries that seriously restricts the ability of a Party to regulate a “new” financial service or product, including a new technology to provide an existing service or product.¹⁵³ This requirement to allow such services and products appears to contradict the precautionary objectives of the Sandbox.

5.5 Interoperability

Most Pacific Island Countries have high dependency on tourism and remittances that often involve frequent small value cross-border transactions. The non-Compact states rely heavily on Australian and New Zealand banks to facilitate domestic and cross-border payments and currency exchange, including through correspondent banking services between one bank and another.

In 2021, the RBNZ rang warning bells about the decline of correspondent banking in the Pacific region.¹⁵⁴ Withdrawal of those services impacts on small Pacific Island Countries disproportionately. The Reserve Bank cautioned that “contraction in the network has reached a critical level where some domestic Pacific banks may find themselves cut off from safe, reliable, affordable access to the global financial system”.¹⁵⁵ The National Bank of Tuvalu, according to the IMF in 2021, risked losing its only corresponding banking relationship with an Australian bank.¹⁵⁶

Measure 5.2.1 *Improve interoperability between payment service providers at national level (e.g. between banks, between [mobile network operators] or between banks and [mobile network operators] through payment system infrastructure, technical and regulatory reforms.*

Measure 5.2.2 *Partner with the major international banks in the Pacific to improve the quality of digital financial services available to businesses and consumers (internet banking, payment gateways, etc).*¹⁵⁷

This situation poses serious problems of availability, access and affordability for Pacific communities, Pacific businesses, and local Pacific banks, and Pacific workers offshore. The Pacific E-commerce Strategy hopes that greater availability and use of mobile network options can stem or reverse the

¹⁵² See note 141

¹⁵³ MSGFTA3 Article 6.32 and 6.35. Discussed below in relation to digital currencies. This rule is usually only found in agreements between developed countries. It aims to prevent a Party from regulating a “new” financial service or product, including a new technology to provide an existing service or product (MSGFTA3 Article 6.32 and 6.35) The rule was first devised by the US as a way to stop governments from regulating financial innovations and was adopted by a small number of developed countries in the WTO in 1995 through the “Understanding on Commitments on Financial Services” https://www.wto.org/english/tratop_e/serv_e/finance_e/finance_e.htm.

¹⁵⁴ RBNZ 2021

¹⁵⁵ RBNZ 2021, p.2

¹⁵⁶ IMF, *Tuvalu: Staff Concluding Statement of the 2021 Article IV Mission*, April 2021 at [6],

<https://www.imf.org/en/News/Articles/2021/04/26/mcs042621-tuvalu-staff-concluding-statement-of-the-2021-article-iv-mission>

¹⁵⁷ Pacific E-Commerce Strategy p.44

declining commitment of traditional commercial banks to the region. That seems unduly optimistic given the reasons the RBNZ identifies for the major banks' retreat from these relationships:

- high compliance costs to meet international rules on anti-money laundering and terrorism financing;
- unattractive commercial conditions and low profitability in small, low income markets with large volumes of low value payments;
- low appetite for transactional and reputational risk in a region with use of offshore banking licenses, high perceived corruption scores, and historical inclusion on Financial Action Task Force watchlists, leading to “de-risking”; and
- under-development of regulatory compliance capabilities among Pacific banks and other financial institutions and of pre-requisites such as ID among users.¹⁵⁸

These commercial banks are unlikely to change their profit-centred business model without very significant financial incentives.

5.6 Mobile money, digital currencies and digital wallets

Transforming this traditional financial services landscape would require a major disruption to the status quo that is supported by secure, stable and ethical alternatives and robust regulatory frameworks. This regulatory framework is lacking in many Pacific Island Countries. Building it up at a national level will require more time than is realistically available.

There is also a tension between competition and ensuring effective services nationally and regionally. The RBNZ warns that the current contraction of commercial banks could result in the concentration of payments services “through a few fragile channels” that reduce competition and increase financial risk and potential for disruption. Yet robust competition can be difficult to achieve given the network effect in payment systems. Concentration might even be desirable in some small countries, in which case the payment system may need to be regulated like a public utility.

At the same time, the form and regulation of one country's payment system cannot be viewed in isolation. The IMF stressed the need for a regional approach to promote transparency and greater interoperability in cross-border payments and harmonise regional policy developments and approaches to cross-border data transfers and payments systems.¹⁵⁹

The RBNZ was concerned that a near-complete loss of correspondent banking relationships could force payments flows into riskier networks with people resorting to unregulated payment options outside the formal banking sector that have weak regulatory compliance capabilities.¹⁶⁰ Policy makers may take risks and try new fintech services that other countries are more cautious to try and those responses may differ across the Pacific. This makes structured processes of cooperation and learning from experiences in developing countries that face similar challenges especially important.

¹⁵⁸ RBNZ 2021, pp.3-4

¹⁵⁹ Davidovich 2019 p. x

¹⁶⁰ RBNZ 2021, p.5

Mobile money

The Pacific E-commerce Strategy promotes mobile money, digital currencies and digital wallets, in cooperation with traditional banks or as stand-alone providers. These more disruptive forms of fintech rely on technologies, providers and services that do not conform to traditional business models or to regulatory structures that assume a local presence and a specific legal form.¹⁶¹

The Pacific region already has some positive working examples, although their specific models and purposes mean they should not be generalised from. One such initiative addresses the vital matter of remittances. In recent decades, families, communities, governments and the broader economy of many Pacific Island Countries have become dependent on remittance flows, especially from Australia and New Zealand. The traditional finance sector exploited a lack of competition to extract excessively high fees for transmitting them.

Tonga's 'Ave Pa'anga Pau, launched in 2017 and operated through government-owned Tonga Development Bank (TDB), is a positive example of a cheap, convenient and trustworthy remittance pathway.¹⁶² Remittance workers register for a secure account then buy vouchers from TDB, which pays the corresponding amount to recipients in Tonga, to a maximum of NZD10,000. They currently charge a commission of 4.5%, which compares to 9% from Western Union and 16% from banks.¹⁶³ Payments are made by Internet and held in an account that Regional Australia Bank, a customer-owned Australian bank, and government-majority owned Kiwi Bank in New Zealand provide to TDB. Importantly, the potential risks are limited through the participation of government-owned banks and central bank oversight. Support for such projects is a good example of aid projects that are a win-win for donors, who benefit from the migrant workforce, and recipient countries and communities that benefit from remittances.

Other fintech providers are delivering money transfer services for their customers through smartphones and electronic wallets. Digicel and Vodafone support several forms of electronic wallet, including KlickEx, which offers "lower fees and great exchange rates" to the telcos' customers.¹⁶⁴ The potential risks are mitigated by the reasonably robust internal systems of the established telcos.

However, the rapid growth of private mobile money has not been accompanied by effective regulatory frameworks and consumer protections. Their business models and delivery methods allow them to bypass regulatory frameworks that are designed for the traditional banking system. While their services support innovation and may broaden access and reduce costs, they can carry high risks, especially where the actual operators are offshore with minimal traceability, compliance monitoring or enforcement, and where users have low levels of financial literacy.

Indonesia's experience with 'pay later' services shows how mobile phone financiers that use slick marketing, and lack effective regulation, create deep debt traps for those they target, especially the poor and those with limited financial literacy.

¹⁶¹ Knight 2016

¹⁶² Tonga Development Bank, "'Ave Pa'anga Pau", <https://www.tdb.to/ave-paanga-pau.html>

¹⁶³ "'Ave Pa'anga Pau. Fast and reliable money transfers to Tonga", <https://www.avepaanga.co.nz>

¹⁶⁴ "About us", <https://digicel.klickexpacific.com/about/aboutus.aspx>; see also "About us" <https://vodafone.klickexpacific.com/about/aboutus.aspx>

In Indonesia, 'pay later' services leave some drowning in debt

<https://www.aljazeera.com/economy/2022/6/28/for-indonesias-poor-pay-later-services-exact-heavy-price>

Buy now, pay later services take off in Southeast Asian country where most people don't have a bank account.

Ubud, Indonesia – Nadhea Putri's mounting debt began with a single mobile phone purchase.

Putri, who lives in Kuala Kapuas, Central Kalimantan, about 1,600km from Jakarta, had dreamed of upgrading to a newer model for months but did not have enough cash.

Then, earlier this year, the 21-year-old university student noticed an option to buy now, pay later (BNPL) offered on the checkout page of her favourite online shopping app. It took her less than 24 hours to activate the payment method, and the phone – which cost nearly five times her monthly earnings – was finally hers in February.

More than four months later, Putri is still struggling to pay back the balance, along with mounting interest.

"I'm too scared to even use my new phone now," Putri told Al Jazeera, asking to use a pseudonym to protect her anonymity. "Every day, debt collectors call me more than 20 times. I feel terrorised, but I can't tell my parents. I don't want to burden them."

BNPL, which lets customers pay for goods in instalments at varying rates of interest, has helped to plug a significant lending gap in Indonesia. Credit card penetration in the country is notoriously low, sitting at a meagre 6 percent in 2021, with nearly 65 percent of Indonesia's 275 million population remaining unbanked.

As the country's population has moved increasingly online in recent years, digital payment methods like BNPL have experienced a surge in usage. Indonesia's mobile internet penetration, at 68 percent in 2021, is now among the highest in the region and is projected to hit 79 percent by 2025.

Smartphone users like Putri have been drawn to BNPL as a quick and easy way to purchase items they might otherwise not be able to afford.

"I took a picture of my identity card and uploaded it on Shopee to activate my SPaylater," Putri said, referring to the BNPL service offered by e-commerce platform Shopee.

"It's very simple. After it got verified, I could use the credit to make payments on the platform." ...

Like Putri, Maisaroh, who lives in Subang, West Java, is neck-deep in BNPL debt.

"I used the Shopee app very regularly," Maisaroh, 30, said. "We live far away from the city, so online shopping makes it easier for me. I don't even need to go outside to shop; the products will be delivered to my doorstep."

Hoping to make extra money, Maisaroh then began using BNPL to purchase goods to resell to her neighbours.

"In the beginning, everything went well, and I could even make a little profit," she said. "Then, a family member fell ill, and the money that was meant to pay for our monthly debt had to be used to pay for the medical treatment."

When her husband's monthly salary of about \$200 proved inadequate to keep the family afloat and meet the BNPL repayments, Maisaroh purchased more items to resell in the hope of making enough money to pay back their debts, only to make the problem worse.

"We can't even make ends meet," Maisaroh said. "How could we pay for those? Then we downloaded many lending apps to try to borrow more money, to buy us some time. But it's been almost six months since the whole thing started, and now I have more than 30 million Indonesian rupiah [\$2,024] in debt." ...

Ligwina Hananto, founder and CEO of QM Financials, which provides financial literacy programs across the region, said the lack of knowledge is putting people at risk.

"When not accompanied by proper financial education, financial inclusion can result in predatory inclusion," Hananto told Al Jazeera. "The lack of financial literacy among Indonesians, especially those living in rural areas, may put many in vulnerable positions. Particularly when it comes to unsecured loans with high interest rates."

"Now, people can get loans from various fintech applications. Without understanding the actual risks and consequences, the cultural shame associated with having debts can quickly wear off," Hananto added.

Trade rules that prevent requirements for local presence, or presence in a particular legal form, will heighten those risks. Tables 2 shows a number of countries already have financial services commitments on cross-border services for payments and transfers under PACER plus; these constraints would be reinforced by the rule against requiring a local presence proposed in the JSI.

Digital currencies

The stakes increase further with digital currencies like Bitcoin that operate through blockchain. Many digital currencies known as cryptocurrencies lack the security of redemption against fiat currencies or backing of real assets, with no transparent treasury or clearing house that can be held accountable. Facebook, now Meta, is perhaps the most controversial example. In 2019 Facebook unsuccessfully tried to launch a cryptocurrency called Libra with the express goal of bypassing formal financial regulators. Mired in controversy, Libra was later renamed Diem, then effectively shut down in 2022.¹⁶⁵

Governments generally have not been able to regulate cryptocurrencies effectively. Some countries' central banks have decided to issue their own digital currencies,¹⁶⁶ and El Salvador and the Central African Republic have even recognised Bitcoin as an official currency,¹⁶⁷ but these are controversial experiments. Although investing money with a bank is not risk-free, the volatility and lack of regulation of most digital currencies make them much higher risk for users, especially where there is low financial literacy. Their operation outside the formal monetary system and central bank oversight also raises systemic risks to monetary policy and AML/CFT concerns.

Although the rules on trade in financial services were never developed with these instruments in mind, trading in them could fall within the definition of financial services. They would also then potentially qualify as “new financial services” or products under the rule in the MSGFTA3 that would restrict their regulation, should that agreement ever enter into force.¹⁶⁸

“New financial services” are defined as those not already being supplied in the Party, say Fiji, but which are already being supplied in the territory of another Party, say Vanuatu, including by a financial service supplier from outside the region that is legally established in Vanuatu. If Fiji's laws do not already prevent that “new” service or product being supplied – for example, because Fiji is unaware of it or the associated risks – Fiji must allow the Vanuatu supplier to sell it in Fiji. While Fiji could require the supplier to take a particular legal form and seek authorisation, that could only be withheld for prudential reasons, including uncertainty about the risks. This assumes that Fiji's financial regulators are fleet-footed and knowledgeable enough to impose those requirements on the new financial service, technology or product *before* the supplier wants to sell it in Fiji. Very few developing countries have adopted this understanding at the WTO where it was developed. It inexplicably found its way into the MSGFTA3.

¹⁶⁵ Cristina Lago, “Facebook's Novi digital wallet has big regulatory burdens ahead”, *Techmonitor*, 20 August 2021, <https://techmonitor.ai/policy/facebook-novi-digital-wallet-libra-diem>

¹⁶⁶ Marco Quiroz-Gutierrez, “These 9 countries are trying to establish their own digital currencies to beat crypto”, *Fortune*, 14 January 2022, <https://fortune.com/2022/01/13/9-countries-central-digital-currencies-crypto/>

¹⁶⁷ “Bitcoin Becomes Official Currency in Central African Republic”, BBC, 27 April 2022, <https://www.bbc.com/news/world-africa-61248809>

¹⁶⁸ See note 153

Digital wallets

Contactless payments avoid the need to hold and have access to cash or use consumer banking, provided that users have access to smart devices and connectivity. They are secure and operate through sophisticated algorithms. But again there are downsides to relying on partnerships with the major payment platforms that the Pacific E-commerce Strategy does not address.¹⁶⁹

Measure 5.1.5 Operationalise partnerships with leading payment solutions providers for the creation of Pacific digital wallets with simple functionalities.

As the result of low use of digital payment solutions by consumers and businesses, the share of electronic transactions remains limited in the Pacific. Simple payment solutions need to be deployed to have a clear impact on the daily lives of low and moderate-income groups in the Pacific, including rural communities, women, MSMEs, and labour mobility workers. For this to happen, user-friendly gateways are needed, couple with policy that protects retailers and customers. Besides promoting the emergence of new fintech providers, partnerships with leading global providers such as Facebook Pay, Apple Pay and PayPal should be promoted through regional initiatives to ensure access conditions are adequate to FICs' capacities.¹⁷⁰

Providers like Apple Pay or AliPay are integrated into the digital ecosystem of search engines, advertising, ordering, shipping and payments that allows them to set the terms of participation and effectively exclude competitors. As with their digital platforms and marketplaces, their anti-competitive practices have been found to block actual and potential competition, including from local providers.

In May 2022, for example, an investigation was launched into whether ApplePay had breached the EU's competition rules by establishing a closed ecosystem around its devices and operating systems, restricting the ability of potential competitors to reach customers using Apple devices.¹⁷¹ That followed fines for similar behaviour in the US.¹⁷² China's central bank and other financial regulators have taken action to stem "serious rule violations in areas such as regulatory arbitrage, unfair competition and damaging consumers' interests" by the major Internet platforms engaged in financial business.¹⁷³

Facebook Pay has its own problems. Established in late 2019, it aims to provide a global reach for those with a Facebook account to make purchases and money transfers across its in-house platforms Messenger and Facebook, with WhatsApp and Instagram to come. Facebook effectively prints its own money instead of central banks, giving the private company enormous power as well as potentially undermining money laundering and terrorist financing laws.¹⁷⁴ In 2021 Facebook sought to introduce a new digital wallet Novi, again using a blockchain-enabled digital currency. Novi offers free

¹⁶⁹ Adam Levitin, "Pandora's Digital Box. The Promise and Perils of Digital Wallets", *University of Pennsylvania Law Review*, 166(2), 2018, 305-376. <https://www.jstor.org/stable/45154936>

¹⁷⁰ Pacific E-commerce Strategy p.43

¹⁷¹ European Commission, "Antitrust: Commission sends Statement of Objections to Apple over practices regarding Apple Pay", 2 May 2022, https://ec.europa.eu/commission/presscorner/detail/en/IP_22_2764

¹⁷² "Judge orders Apple to loosen grip on payments in Epic battle", *DW*, 11 September 2021, <https://www.dw.com/en/judge-orders-apple-to-loosen-grip-on-payments-in-epic-battle/a-59149794>

¹⁷³ "China orders fintech companies to stick to the rules as clampdown widens", *CNBC*, 29 April 2021, <https://www.cnbc.com/2021/04/30/china-orders-fintech-companies-to-stick-to-the-rules-as-clampdown-widens.html>

¹⁷⁴ Lago 2021.

consumer payments and cheaper retail payments to undercut competitors – in return for data and building its market share.¹⁷⁵ Regulators have been especially cautious about Novi in light of the earlier saga with Libra. There is also mistrust of Facebook’s libertarian anti-state ideology.¹⁷⁶

Given these experiences, Pacific Islands governments need to exercise extreme caution about promoting partnerships with entities that operate digital currencies, unless they have implemented robust regulatory regimes – something even central banks, financial regulators and competition authorities in the EU and US are struggling to establish. Would the trade agreements hinder this? It is unclear whether non-traditional digital wallets qualify as financial services for the purposes of FTAs. If they do, then the same regulatory constraints would apply. Governments that have made commitments on payment and money transmission services (see Table 2), and potentially those that promised not to regulate “new financial services” in the MSGFTA3, would have to rely on the unpredictable prudential defence and other exceptions.¹⁷⁷

It may be counter-argued that a formal partnership would allow financial regulators a degree of control in situations where these services would be offered anyhow. But it is unrealistic to imagine equitable partnerships between individual Pacific Island Countries and these technology giants. Regional options might be more feasible, drawing on lessons and precedents established in other developing countries.

The overall message on fintech is the need for Pacific governments, financial regulators and central banks to exercise utmost caution when looking to unregulated digital providers and instruments to fill the current financial services deficit. That caution should be accompanied by the best possible available advice from regulators and advisers who do not have a conflict of interest, drawing on experiences of other developing countries.

Further, governments that have not signed up to trade in financial services commitments are able to explore their options and adopt financial regulations that they see appropriate, and liberalise or tighten them based on the circumstances and their experience. Once they adopt the financial services rules, the governments lose that flexibility to various degrees depending on their commitments, and have to fall back on exceptions that are limited and legally uncertain.

¹⁷⁵ Lago, 2021

¹⁷⁶ Pinja Vuorinen, “The Unrealizable Libertarian Dream”, *Berkeley Economic Review*, 18 March 2020, <https://econreview.berkeley.edu/the-unrealizable-libertarian-dream/>

¹⁷⁷ See note 141

PART 6. A COOPERATION-BASED REGIONAL STRATEGY

This report has emphasised the value of a digital development and data sovereignty strategy for the Pacific region that is based on cooperation, both South South and South-South-North, in place of the current Pacific E-commerce Strategy that will reinforce the dominance technology companies and constrain Pacific Islands Countries through coercive trade rules. A second theme has been the need for a regional strategy that promotes holistic digital development, recognising that e-commerce has social, cultural, economic, environmental and commercial dimensions.

This alternative approach relies heavily on Pacific Island Countries learning from and collaborating with developing countries that are in the forefront of digital development initiatives, without attempting to replicate them, along the lines UNCTAD suggested in its 2018 report on regional digital integration. Those alliances and relationships should aim to enable the sharing of digital networks, platforms, open source software and technologies and the experiences of regulatory agencies and assessments of novel financial products. The UNCTAD also highlights the potential for South-South cooperation in research, knowledge creation and training, especially for young entrepreneurs, and incentivising digital start-ups that encourage innovation, especially by SMEs.

UNCTAD 2018: South-South investments in digital technologies can foster technology transfers and innovations if they allow source-code sharing and encourage tailoring of the digital technologies from open source codes to their needs and requirements.¹⁷⁸

Building such relationships plays to Pacific Island Countries' strengths. Implementation of this approach need not be as resource intensive as the current Strategy, especially if other developing countries and regions are prepared to include the Pacific region in their initiatives, share technology, and provide advice and training, and if time and resources are not wasted on negotiating free trade agreements. The remainder of Part 6 canvasses a sample of innovations that might be feasible and appropriate in the Pacific context.

6.1 Data regimes: Rwanda and India

Data, and more specifically control or sovereignty over data to enable its utilisation and protection, have been a central concern in this report. Other developing countries have been addressing those same concerns.

Rwanda's innovative "digital revolution strategy" shows what a least-developed African country with a population of 14 million can do. Some time ago Rwanda decided to transform its agriculture based economy to a digital one.¹⁷⁹ A foundational principle is data sovereignty, "whereby structured and unstructured national data is entirely accessed by our own country and subject to the laws of the country in which it is located. Such data should also be hosted locally or out of the country upon agreed terms".¹⁸⁰ This strategy builds on prior investment in data development, especially in technology infrastructure, legal and policy frameworks and research institutions that "enable the data ecosystem to thrive".

¹⁷⁸ UNCTAD 2018 p.20

¹⁷⁹ Republic of Rwanda 2017

¹⁸⁰ Republic of Rwanda 2017 p.3

***Rwanda:** With a vision to build an innovation-data-enabled industry to harness rapid social economic development, Rwanda has launched a Data Revolution Policy (DRP) which will be executed in a span of five years from 2017 to 2022. With the objective of building big data and analytics capabilities, the DRP focuses on establishing standards and principles for data management; establishing an institutional governance framework for data; addressing concerns of security/privacy and data sovereignty; defining the role of the private sector and partnerships; and establishing a data portal warehouse. The National Institute of Statistics is responsible for implementing the DRP alongside other development partners.*

To implement DRP, Rwanda has already enacted legal, policy and regulatory regimes guiding access to information in general and personal data protection, privacy and confidentiality matters. ... The DRP embraces the principle of national data sovereignty whereby Rwanda retains exclusive sovereign rights on her national data with control and power over her own data. In conformity with this principle, Rwanda, however, remains open under agreed terms and governed by Rwandan laws, to host her sovereign data in a cloud or a co-located environment in data centres within or outside Rwanda. Further, the DRP recognizes the importance of building a strong collaborative framework between Government and the private sector players at local, regional and international levels.¹⁸¹

Pacific Island Countries could develop a relationship with Rwanda to learn from their experience and identify strategies and technologies that can build the Pacific's own capacity based on self-determination.

India's draft National e-Commerce Policy *India's Data for India's Development* "aims to create a framework for achieving holistic growth of the e-commerce sector along with existing policies of Make in India and Digital India."¹⁸² The central pillars of the e-Commerce strategy are access to data by business, effective regulation, and empowering consumers to retain control of the data they generate and own. "In light of the increasing importance of data protection and privacy, the National e-Commerce Policy ... aims to regulate cross-border data flow, while enabling sharing of anonymised community data".

The size of India's population and the data it generates, as well as its large highly skilled digital workforce, makes the development of local data storage facilities and infrastructure a realistic option. That does not transpose easily to individual Pacific Island Countries. But there is scope for development of regional data networks that are premised on data sovereignty which ensure safe storage and accessibility of public, financial and other data and provides backup in the case of national disasters or technology failures.

6.2 Regional Strategies: ASEAN and African Union

The UNCTAD *Digital Economy Report 2021* urges the development of a functioning global governance structure for data. The prospects for that are remote, as competing regimes have become vehicles for super-power rivalries, and concerns over security, jurisdictional coverage and enforcement are

¹⁸¹ UNCTAD 2018a p.90, Box 3.1

¹⁸² Government of India 2019

reflected in a push for greater data localisation.¹⁸³ In the absence of holistic global rules to advance a development agenda, it makes sense for developing countries to build regional strategies that they can implement collectively and at a national level.

*UNCTAD 2021: Regional approaches may be useful as a steppingstone towards global data governance, which should be the ultimate goal, given that dealing with cross-border data flows is a global challenge. Moreover, regional approaches that include members at similar levels of digital development are likely to have an easier way than those in which significant power imbalances emerge.*¹⁸⁴

The Association of South East Asian Nations (ASEAN) and the African Union are both useful examples. ASEAN has been evolving a flexible regional strategy that can cater for its diverse membership that ranges from parties to the TPPA/CPTPP to LDCs to states like Indonesia that maintain data localisation requirements.¹⁸⁵ The approach emphasises cooperation to explore options, without being locked into rigid constraints through enforceable trade agreements – a position also reflected in the non-binding e-commerce chapter of the ASEAN-led RCEP. In 2019 ASEAN adopted an aspirational Agreement on E-Commerce,¹⁸⁶ which entered into force in December 2021, and aims to balance cross-border data flows with national public policy priorities. This agreement sits alongside a Framework for Personal Data Protection whose non-binding principles require consent to the offshore transfer of personal information or reasonable steps to protect it consistent with the framework’s principles.

The African Union Digital Transformation Strategy (2020-2030) has a strong development focus; again it is regional to be implemented at a national level.¹⁸⁷ While conditions in Africa are very different from the Pacific Islands, they face a similar lack of supervisory frameworks and data storage, processing and handling facilities. The strategy seeks to enable free flow of non-personal data, but also promotes the development of data centre infrastructure to achieve cost savings, as well as data sovereignty, that focuses especially on personal data.

6.3 Data spaces: Switzerland

A holistic approach to data governance and management frameworks requires public authorities to find an optimal balance of efficiency, access, affordability, incentives and protections, and avoid capture by one or other donor’s geopolitical and commercial goals. They also need realistic mechanisms to monitor compliance by those who are operating in and into their territory and using their data and ways to enforce them.

An interesting model to reflect on is the Swiss government’s development of “data spaces”, which seek to balance diverse, and sometimes competing, interests in particular sectors - a goal that sits comfortably with the Framework for Pacific Regionalism. Switzerland currently operates data spaces in priority sectors that overlap with priorities for e-commerce in the Pacific: mobility/transport, energy, finance, health and education. Importantly, these sectoral data spaces do not operate in silos; there is interoperability between sectors, where relevant, and geographically.

¹⁸³ Government of Switzerland p.37

¹⁸⁴ UNCTAD 2021 p.166

¹⁸⁵ UNCTAD p.161, ASEAN 2021

¹⁸⁶ ASEAN Agreement on Electronic Commerce 2019, <https://agreement.asean.org/media/download/20190306035048.pdf>

¹⁸⁷ African Union, Digital Transformation Strategy for Africa (2020-2030), <https://au.int/sites/default/files/documents/38507-doc-dts-english.pdf> ; see also UNCTAD 2021 p.157

At their core is a commitment to digital self-determination – for Switzerland, that combines the individual sense of knowledge, freedom of choice and making one’s own decisions, with the collective well-being of a society and culture whereby non-personal data is shared as a public good, and is available to solve problems and advance democracy.¹⁸⁸ The model is based on five core principles of transparency, control, equity, accountability/ responsibility, and efficiency. These principles are prioritised differently for sectors depending on the purposes being pursued, the nature and sensitivity of the data, and the structure of the relevant market. The aim is to ensure a balance of the economic, commercial and social dimensions of that sector, while recognising the challenges specific to each. Data spaces must also be designed in an environmentally and socially responsible manner, with sustainability an important aspect of the “data society as a whole”.

Switzerland seems remote from the realities confronting the Pacific Island Countries. It is a wealthy European nation with extensive commercial interests that capitalise on data, especially in the finance and health sectors. But this strategy was developed in response to familiar trends: the concentration of data in the hands of a small number of actors in an increasing number of sectors; the inability or unwillingness of many private providers to relinquish control over data so as to protect their competitiveness; the public sector’s lack of know-how, infrastructure, resources and legal framework; and mistrust among a growing number of people who fear manipulation and abuse of data and loss of privacy.¹⁸⁹ The Swiss government was also determined to withstand pressures to align with one or other superpower’s “dogmatic demands”,¹⁹⁰ and instead develop a strategy that maximises both the social and economic benefits of data.

The “data space” regulates access to, and processing and reuse of, data. This is supported by a data infrastructure that uses shared interfaces and standards. Its governance structure defines the conditions under which data can be exchanged and sets the roles, obligations and rights of all actors.¹⁹¹ Seeking to replicate this at regional and national levels in the Pacific would be unrealistic. But there is value in thinking cohesively about digitalisation in key sectors, taking a holistic approach to the principles and objectives in the Framework for Pacific Regionalism.¹⁹² Piloting one or two projects with donor support from Switzerland would be a valuable North-South aid project. Existing “data spaces” that could provide useful learning include:

- **energy sector**, which aims to fundamentally transform the electricity and gas, mobility, health supply and building sectors, and improve the stability, security of energy supply through better forecasting and planning; and support the development of renewable energies, in response to climate change and the goal of net zero emissions;¹⁹³ and
- **mobility/transport**, which aims to achieve smooth functioning of the transport system as a whole and drive innovation to improve the system and increase efficiency by developing a state-operated data networking infrastructure on national mobility that is also available to transport customers.

¹⁸⁸ Government of Switzerland pp.14-15

¹⁸⁹ Government of Switzerland, p.3 and p.13

¹⁹⁰ Government of Switzerland p.39

¹⁹¹ Government of Switzerland p.17

¹⁹² PIFS, 2014, p.1

¹⁹³ Government of Switzerland pp.26-32

To pursue data spaces, the Pacific Island Countries would need to retain or regain their sovereign ability to require that data relevant to that sector is retained within the region.

6.4 Digital infrastructure: Rwanda and India

An autonomous, functioning digital infrastructure that is not captive of big tech or foreign patrons may sound beyond the reach of Pacific countries. But, again, there are examples and potential allies to draw upon.

In the wake of Covid 19's severe economic impact, Rwanda built on the foundations discussed above to develop a rapid economic recovery plan to expand e-commerce through online platforms to buy and sell products and services.¹⁹⁴ The policy report highlights five specific recommendations:

1. Review transaction fees, potentially removing fees on small transactions or smoothing the transitions between fee amounts.
2. Increase access to and use of smart phones.
3. Reduce the cost of Internet and improving geographical coverage by improving the structure of the provider market.
4. Expand exports through e-commerce: eg subsidised airfreight space and strong seller protections.
5. Expand exports through e-commerce: eg targeted support for new SME exporters.

In 2022 the Indian government launched the pilot phase of its Open Network for Digital Commerce (ONDC) that aims to promote open networks for all aspects of exchange of goods and services over digital or electronic networks.¹⁹⁵ The ONDC offers a set of protocols and a technology-based solution that allows everybody to trade on a common platform. The platform will enable buyers and sellers to connect and transact with each other online, no matter what other application they use. It will feature apps in local languages for both buyers and sellers, with special emphasis on small merchants and rural consumers.

The initiative is designed to end the dominance of Amazon and Walmart that together control about half of India's e-commerce trade and benefit a few big sellers via predatory pricing, preferential treatment and squeezing supplier margins.¹⁹⁶ By April 2022 over 20 organisations had invested into the ONDC, including the State Bank of India, several other Indian banks, as well as retailers and venture capital firms.¹⁹⁷ The ONDC is to be based on open-sourced methodology, using open specifications and open network protocols independent of any specific platform.¹⁹⁸

The Pacific region is not India. Nor does it have the resources India can call on to support this initiative. But India is at the forefront of innovations to build viable alternatives to the dominance of the big tech players, assert their sovereignty over data generated in the territory, develop non-proprietary source code, and create systems of inter-operability that are appropriate to the culture, society and economy. Fiji could propose a Pacific-India partnership on the ONDC as a pilot project for the digital trade pillar of the IPEF. Australia and New Zealand could even support and fund them.

¹⁹⁴ Republic of Rwanda, "Rwanda's Post Covid-19 Economic Recovery. The role of e-commerce", Institute of Policy Analysis and Research, July 2021

¹⁹⁵ Government of India, 2022

¹⁹⁶ Krishna N Das, "India to launch open e-commerce network to take on Amazon, Walmart", *Reuters*, 28 April 2022, <https://www.reuters.com/world/india/india-launch-open-e-commerce-network-take-amazon-walmart-2022-04-28/>

¹⁹⁷ Krishna N Das, 2022

¹⁹⁸ Government of India, 2022

PART 7. RESTORING POLICY SPACE AND PACIFIC GOVERNANCE

This review has raised fundamental concerns about the Pacific E-commerce Strategy's methodology and proposals. A key theme has been the need to ensure that Pacific Island Countries, nationally and regionally, retain the policy and regulatory space to develop an appropriate and effective holistic digital development strategy that is consistent with their broader Framework for Pacific Regionalism and the forthcoming 2050 Strategy for the Blue Pacific Continent.

That requires a clear understanding of the risks associated with the adoption of trade rules that constrain governments' options and an accurate explanation of the current state of play regarding the development of such rules. The failure of the Pacific E-commerce Strategy to do this raises questions about the role of donors and consultants who are pushing Pacific Island Countries to adopt those agreements and the overall objectives, governance and implementation of a regional digital strategy.

7.1 Geopolitical rivalries

The development of digital development strategies is not a neutral or benign process. Developing countries, especially small island states, have little negotiating coin and often become by-standers in geopolitically-charged rulemaking arenas.¹⁹⁹ The disproportionate influence of developed countries over emerging digital strategies and trade rules creates the potential for developing countries to be caught up in rivalries between three currently competing regimes:²⁰⁰

- the US's hands-off approach that is reflected in the TPPA and has been enthusiastically promoted by Australia, New Zealand, Singapore and Japan;
- the EU's dual priorities to advance its corporate interests while protecting the right to privacy; and
- China's focus on national security, while expanding opportunities for its digital marketplaces, payments systems and technology.

None of these models is designed for the circumstances or needs of the Pacific region.

Yet, Pacific Island Countries can expect to face even stronger pressure to adopt the US-led approach following the US launch of its Indo-Pacific Economic Framework (IPEF), which explicitly aims to counter China's influence in the Asia-Pacific (now redefined as the Indo-Pacific) region and has digital trade as a key pillar.²⁰¹ The Biden Administration's plan to host Pacific Islands leaders in Washington DC later in 2022 is part of that strategy.²⁰² In May 2022 Fiji announced it will participate in the IPEF process.²⁰³ How much room there will be for Fiji to leverage the US promise of a new model towards a development-oriented digital regime that is not based on old-style FTAs remains to be seen.

At the same time, China's Foreign Minister has been travelling the region promoting a five-year action plan for 2022-2026 that spans security, maritime and agriculture, health and education, an economic

¹⁹⁹ UNCTAD 2021 p.59

²⁰⁰ UNCTAD 2021 p.59

²⁰¹ US White House, Statement on Indo-Pacific Economic Framework for Prosperity, 23 May 2022, <https://www.whitehouse.gov/briefing-room/statements-releases/2022/05/23/statement-on-indo-pacific-economic-framework-for-prosperity/>

²⁰² "United States to invite Pacific leaders to White House, ramp up diplomatic ties", *Radio NZ*, 2 May 2022, <https://www.rnz.co.nz/news/world/466312/united-states-to-invite-pacific-leaders-to-white-house-ramp-up-diplomatic-ties>

²⁰³ "Fiji joins US-led Indo-Pacific economic initiative on eve of Chinese visit", *Financial Times*, 27 May 2022. <https://www.ft.com/content/b9c268f3-3012-4dee-9dbc-137707965c89>

limb that includes digital technologies, as well as the training of diplomats.²⁰⁴ Media reports also referred to e-commerce, data and a free trade area.²⁰⁵

Pacific Island Countries are adept at mediating such rivalries. Despite that, there is a very real danger they may end up trying to implement incoherent digital and e-commerce strategies and incompatible technologies, platforms and payment systems. That risk reinforces the need to ensure that digital and data sovereignty are central tenets of any Pacific regional digital strategy.

7.2 External self-interest

These geopolitical pressures are inevitably linked to aid programmes and the influence of donors. The UNCTAD *Digital Economy Report 2021* cautions that solutions to problems of size, scale and distance, financial and regulatory capacity, knowledge and technological infrastructure should not be driven by the self-interest of donors.

*UNCTAD 2021: As long as developing countries are not able to drive their own development in the digital sphere, limited capabilities and financial means create a new dependency [and undermine] a country's ability to make its own decisions in shaping policies on data and data flows – their digital sovereignty.*²⁰⁶

The UNCTAD report also warns about the influence of the tech industry and its lobbyists over developing countries' digital strategies and regulation.²⁰⁷ What UNCTAD refers to as “digital colonialism” “involves actions by major technology firms to shape the policy debate in their favour through lobbying, investment in infrastructure, and donations of hardware and software to developing countries”.²⁰⁸

This risk would be heightened by so-called “transparency” provisions in recent trade agreements that entitle the relevant foreign companies and foreign governments to comment on a country's proposed new regulations.

MSGFTA3 Article 6.77.3: *Each Party shall endeavour to provide as much opportunity as possible for interested parties and persons to comment on proposed measures that may affect trade or employment.*

The MSGFTA3 has an “endeavour” obligation to give other state parties and their corporations prior notice of, and opportunities to comment on, proposed new measures. Similar but stronger “transparency” provisions have been included in the JSIs on domestic regulation of services and on investment facilitation. Pacific governments can already choose to do this, if they consider it appropriate to their democracy. But they should not be bound to do so - and must retain the right to shut down that lobbying power where it becomes overbearing. The “transparency” rules seek to foreclose that option.

²⁰⁴ China-Pacific Countries Five-Year Action Plan on Common Development (2022-2026) (draft), on file with author

²⁰⁵ Lyons 2022

²⁰⁶ UNCTAD 2021 pp.59-60

²⁰⁷ UNCTAD 2021 pp.27-28

²⁰⁸ UNCTAD 2021 pp.59-60

A regional digital development strategy and consistent national regimes needs to recognise and navigate these competing interests when dealing with donors, investors and consultants. There are also nuances when dealing with international organisations, such as UNCTAD itself. The Rapid e-Trade Readiness Assessments prepared by UNCTAD for most Pacific Island Countries promote the kind of approach that UNCTAD's *Digital Economy Report 2021* rejects as being narrow and inappropriate, given the need for a multifaceted approach that balances commercial and non-commercial factors.²⁰⁹ That methodology provided the framework for the Pacific E-commerce Strategy.

7.3 Donors' digital trade rules

The UNCTAD 2021 report notes how the newly developed e-commerce or digital trade rules, especially on the right to control data, reflect the self-interest of the countries promoting them.²¹⁰ Those same countries provide aid and capacity building for developing countries. The Pacific E-commerce Strategy and the Pacific Aid for Trade Strategy 2020-2025 are clear examples of this: the E-commerce strategy was sponsored by the Australian Government's E-commerce Aid-for-Trade Fund as part of its aid for trade strategy.

*Pacific E-commerce Strategy. It is therefore critical for FIC trade negotiators to become familiar with such provisions and be ready to negotiate their possible inclusion in future FTAs they could become party to. Subregional training can also be considered, for example using the existing momentum in the MSG-FTA to create additional know-how and skills for negotiating future digital trade agreements and implementing existing E-commerce provisions in FTA.*²¹¹

As discussed earlier, both strategies call on the Pacific's WTO Members to participate in the unmandated plurilateral JSI negotiations on e-commerce of which Australia, Singapore and Japan are co-convenors and in which the US, the EU, Japan, Australia and New Zealand, as well as China, are actively involved. They further call on all Pacific Island Countries to prepare to negotiate similar rules in their FTAs. A regional training course for Pacific officials was held in March 2022 "to help them proactively engage with negotiations and implementation of E-commerce rules", funded again by AusAid.²¹² It seems likely that this training programme takes the same uncritical approach as the Pacific E-commerce Strategy.

This review agrees with the Pacific E-commerce Strategy that Pacific Islands officials need to be familiar with developments in current digital trade negotiations as they come under pressure to participate. However, that training needs to enable officials and their governments to assess whether it is in their countries' interests to participate and if they decide they should take part, to identify what aspects of their regulatory space they would seek to protect.

These trade rules were never designed with Pacific countries' interests in mind. The extensive commitments that Pacific Island Countries made in PACER Plus on computer and related services, and cross-border supply of advertising, hotel and air transport reservations, and key financial services,

²⁰⁹ UNCTAD 2021 p.144

²¹⁰ UNCTAD 2021 p.152

²¹¹ Pacific E-commerce Strategy p. 41

²¹² PIFS "New Grant paves the way for Forum E-commerce Unit", 28 March 2022, <https://www.forumsec.org/2022/01/17/new-grant-paves-the-way-for-forum-e-commerce-unit/>

among others (see Table 1), strongly suggest that the Pacific’s negotiators were not provided with adequate independent advice on very complex legal issues and the future implications of these commitments in a digitalised world.

The MSGFTA3 text also shows the unmistakable influence of both the US and EU models. The structure of the agreement, and the “understanding” on computer and related services, are straight from the EU’s template.²¹³ All four countries have scheduled comprehensive commitments to the cross-border supply of most services with respect to both market access and non-discrimination. As this review has explained, those features, and the radical provision on “new financial services”, would severely restrict the available regulatory options were the agreement to enter into force. Although the participating countries might have assumed it was low-risk to adopt such sweeping commitments among themselves, foreign firms established in those countries would be major beneficiaries, including when they supply services to one MSG country across the border from another.²¹⁴ Even without entering into force, they are likely to be cited as precedents for future negotiations with other countries.

7.4 Rethinking the Pacific’s digital governance

The governance proposals set out in Part 4 of the Pacific E-commerce Strategy,²¹⁵ repeated in Figure 1, would perpetuate these concerns.

Figure 1: Proposed E-commerce governance structure



²¹³ Article 6.63 adopts a version of the “understanding” on computer and related services that the EU seeks to include in all its FTAs. This seeks to future proof a commitment to C&RS across data processing, data hosting or data base services; consultancy, design, support, technical assistance etc for computers and computer systems; all services related to computer programmes; maintenance and repair; and training. It is equivalent to signing a blank cheque not to regulate a swathe of as-yet unknown and unknowable digital services, technologies and products. See Jane Kelsey, *Understanding the European Union’s Understanding on Computer and Related Services*, Third World Network, 2019, https://www.twn.my/title2/FTAs/Services/Full%20report%20for%20TD%20series_FORMAT_Ver6-FIN-09012020.pdf

²¹⁴ MSGFTA3 Article 6.2 and 6.13

²¹⁵ Pacific E-commerce Strategy pp.52-53

The peak body to oversee the E-commerce Strategy is the Pacific *Trade* Ministers, serviced by *trade* officials, with day to day implementation through the Forum Secretariat's *trade* team. Trade Ministers would receive their reports through the Pacific *Aid for Trade* Strategy Working Group.

The main operative mechanism is a Pacific E-commerce Committee to be chaired by the PIFS Secretary General, with the two co-chairs drawn from the *private sector* and the "*development partners*". The other members of the committee are the E-commerce Focal Points from each of the Forum Island Countries; however, the Strategy acknowledges "they will need to be constantly provided targeted capacity building to strengthen and sustain national capacities on E-commerce".²¹⁶ Representatives of the implementing agencies and funding partners would attend as observers. There is an obvious real risk under this structure that donors and the private sector will exercise undue influence over the implementation of the Pacific's E-commerce Strategy.

An additional "Development Partners Sub-committee" would comprise donors, regional and international development agencies and banks, and managers of donor-funded E-commerce facilities. This sub-committee, described as "*the implementation powerhouse*",²¹⁷ would place donors, with their own policy, regulatory and commercial interests, in an extremely powerful position to influence decisions and filter advice provided to Ministers. That influence is heightened by proposals for a Multi-Donor Fund to support the coordination work of the governance arms and the Strategy that is undertaken by the PIFS.

The remaining sub-committee is from the private sector. There is a crucial role for the local private sector, including women entrepreneurs and SMEs, in developing and implementing the region's digital development strategy. Equally, there is a real risk that sub-committee members, and working groups it might establish, will include powerful voices from the local subsidiaries of offshore commercial operators, such as the Australian and New Zealand banks, telcos, logistics firms, and training providers, who have their own interests to advance.

The digital development strategy advanced in this review would require a more balanced multi-stakeholder style of governance to coordinate regional initiatives, to develop the relationships and cooperation initiatives suggested in Part 6, and to implement the outcomes. The centrality of digitalisation to national and regional development in the 21st century warrants an entity of its own that evolves over time.

As a first step, Pacific Island Countries could resolve among themselves to establish a Pacific Regional Digital Committee to provide organisational and governance arrangements that are much more fit for purpose. That could be overseen by Ministers responsible for Digital Development, supported by national level committees, with a broad based remit that reflects the balance in the Framework for Pacific Regionalism and forthcoming 2050 Strategy for the Blue Pacific Continent. The Pacific Islands Forum, with Australia and New Zealand as active members and donors, has firmly nailed its colours to the market liberalisation model and is not an appropriate home for such a governance arrangement. The current major donors – especially China, Australia, New Zealand, the US and EU – and the international institutions could help to defuse the geopolitical tensions in the region by collectively

²¹⁶ Pacific E-commerce Strategy p. 53

²¹⁷ Pacific E-commerce Strategy p. 53

supporting this initiative, and mitigate the risk that the Pacific region becomes captive of the self-interest of one or the other, or worse becomes paralysed by seeking to accommodate them all.

7.5 A way forward

The Pacific E-commerce Strategy promotes a model of regional integration using e-commerce platforms, technologies and services that are controlled by big tech corporations and assumes that benefits of regional integration will flow from further trade agreements despite acknowledging the failure of the trade liberalisation model in the past. Even though Pacific Islands Forum Members have endorsed and begun to implement the E-commerce Strategy, there is still time for Pacific Islands governments to reconsider key elements before it is taken further.

The particular focus in this review has been on building the Pacific's self-determination in relation to data, online trading, and fintech, and the negotiation of e-commerce or digital trade rules. That has been underpinned by a more fundamental shift in approach to look instead towards evolving development-based models that aim to replace dependency with self-determination and coercive trade rules with South-South cooperation and collaboration.

Measure 4.2.2: Negotiate a regional agreement on E-commerce to promote transparency, and predictability of domestic and cross-border E-commerce.
A regional E-commerce agreement can facilitate cross-border E-commerce transactions, help creating trust at regional level, and deepen cooperation on strategic priorities such as those identified in this Strategy. ... Prior to this, studies to scope E-commerce in the region, and its implication on trade-related disciplines, should be undertaken to enable decision makers to decide on embarking on further trade negotiations.²¹⁸

A formal agreement, as proposed by the Pacific E-commerce Strategy, will be necessary if Pacific Island Countries are to pool their data, share servers and platforms, and develop a coherent regulatory framework. However, the Strategy seems to assume that this should take the form of digital trade rules along the lines of the MSGFTA3 and JSI. There is no reason for a regional strategy to take that approach and consequently limit what a digital strategy might look like – indeed, the UNCTAD 2021 report shows why it should not.

A development-oriented regional digital agreement needs to be a very different instrument that enables the Pacific Island Countries to exercise control over their data, platforms, payment systems, and infrastructure for the broader public good. It should also set the foundations for cooperation, collaboration and partnerships with other developing countries from whom the Pacific region can benefit and learn.

The obstacles that trade rules pose to that initiative can be worked around, provided Australia and New Zealand are prepared to accept that PACER-Plus should not be deployed to prevent Pacific Islands Countries from adopting a cooperation based approach that advances a development-based model of digital regional integration.

²¹⁸ Pacific E-commerce Strategy p. 41

The appropriate starting point may be the Pacific E-commerce Strategy proposal for a scoping study to inform Pacific Islands' decision makers on how to proceed towards a regional e-commerce agreement that serves their interests. Rather than approaching this through the models of trade agreements favoured by traditional rule-makers-cum-donors, this should adopt a three-pronged approach:

- 1) identify priorities for a holistic approach to digital development, including e-commerce, that is based on Pacific needs, values and aspirations set out in the region's core documents;
- 2) examine options to achieve those priorities through cooperation and collaboration regionally, South-South and South-South-North; and
- 3) assess the risks that trade agreements pose to the policy and regulatory space to achieve those developments, and how to suspend and then revise existing obligations under PACER Plus with Australia and New Zealand.

Achieving this requires the political will among Pacific Island Countries to rethink the current strategy. It also assumes that the parties to trade agreements that foreclose the policy and regulatory space for Pacific Islands Countries will agree to set them aside. Ideally, existing donors will be prepared to support alternative initiatives that genuinely advance Pacific Island Countries digital development interests, rather than their own agendas, and the geopolitical powers competing to influence the region will put its development interests first. A more relational model of cooperation and collaboration with other developing countries, and on a South-South-North basis, also opens the door to developing alternative partnerships to resource the Pacific's digital development, including e-commerce, and reduce dependency on existing donors.

PART 8. RECOMMENDATIONS

This report has reviewed a number of the Pacific E-commerce Strategy's proposals through a development lens and identified alternative approaches and initiatives that could provide a more sustainable and equitable digital development strategy for the nations of the Pacific region.

Regional strategies are needed to address the challenges of scale and interoperability, encourage common standards, and share technologies and infrastructure. They must also be holistic enough to serve countries' social, cultural, development, economic and democratic priorities and avoid privileging commerce over these broader considerations, and robust enough to withstand the mounting geopolitical turbulence in the region, including around digital and data regimes.

Pacific governments must be able to protect their sovereign right and responsibility to regulate the digital domain, including data, in the broad public interest. That includes not entering into coercive trade agreements that constrain their authority to do so and suspending and then revising existing agreements, such as PACER Plus, which already do that.

With that in mind, this review makes the following recommendations:

1. **The Pacific E-commerce Strategy and Roadmap and Pacific Aid for Trade Strategy 2020-2025 need to be revisited** to form part of a holistic digital development strategy that reflects the values espoused in the Framework for Pacific Regionalism. There should be particular focus on measures relating to data, marketplaces, and fintech that balance their economic, social, cultural, commercial and political dimensions.
2. **A revised strategy that delivers the needs of Pacific peoples, communities and governments needs to be informed by principles of cooperation and relationships with other developing countries** and, where appropriate, triangular South-South-North relationships, and not reinforce dependencies on foreign technology corporations, such as Google, Facebook, Amazon or Alibaba, or on developed country donors and institutions.
3. **E-commerce must be reconceived outside the narrow lens of trade rules**, which are utterly inappropriate for a development and values-based digital strategy. The decisions that Pacific Island Countries make on participating in trade negotiations must be informed by robust analyses of the potential impacts of digital trade rules on their development and their sovereignty, recognising that the more of those rules they adopt, the more constraints will be placed on their options and the more difficult it will be to remedy problems and failures when they occur.
4. **Competing superpowers of the US, and its allies, and China must refrain from pressuring Pacific Islands Countries to adopt the digital regimes of one or the other.** Control over the location and use of data, the choice of digital technologies, the nationality of service and technology providers, and the approach to regulation are crucial to maximising the independence of Pacific nations. They must not be fettered by conflicting obligations that are not in their interests, including through trade agreements or arrangements that are designed according to the model of one superpower or the other.
5. **A revised digital development strategy needs to establish control over data as a priority and a means for asserting and implementing regional data sovereignty.** Consistent with the South-South cooperation approach, this should draw on experiences from other developing countries, such as India and Rwanda, and could seek donor support from a developed country like Switzerland to examine the merits its model of integrated data spaces in areas like transport or energy.

6. **Regulatory cooperation should draw on experiences from countries and regions in the Global South** that have more advanced digital regimes, including the ASEAN and the African Union regions. Although the precautionary objective of the regulatory sandbox is prudent, and its regional basis could be helpful to small island states with limited regulatory capacity, it will not capture the more dangerous financial innovations that actively bypass regulatory oversight. Nor will it assess the risks associated with dependency on existing platforms, marketplaces, payment systems that are controlled by dominant technology transnationals like Amazon, Apple, Alibaba, Facebook. More may be gained by investing that research capacity and resource into collaborative research on those products, technologies and services underway in other developing countries.
7. **Australia, New Zealand and the EU need to stop pressing their agendas onto Pacific Island Countries** through their aid funding, appointment of consultants, training programmes for trade officials, and pressure to adopt trade rules that are designed by and for their economic and commercial interests. If donors genuinely have Pacific Island Countries' development interests at heart they should provide no-strings funding to support a genuine digital development strategy, including cooperation and partnership arrangements with other developing countries with whom they can collaborate.
8. **Digital-related commitments by Pacific Island Countries in PACER-Plus need to be suspended and revised.** Australia and New Zealand need to set aside the sweeping trade in services obligations that Pacific Island Countries adopted in PACER Plus at a time when the implications of digitalisation could not reasonably have been understood. If Pacific Island Countries want to act according to those commitments because they believe it will benefit them, they should be free to do so without the threat of a dispute. Equally, they should be free to choose a different path.
9. **Develop a regional digital governance and implementation mechanism that is independent of the PIFS, starting with a regional digital Ministers' committee.** The broader digital development strategy, including the e-commerce element, should be overseen by a new group of Forum Island Country Ministers' and officials that operates independently of donors and their influence, and replaces the current structure of Trade Ministers', trade officials in the Pacific Islands Forum Secretariat, and private sector and donor sub-committees.
10. **Launch a scoping study to examine options for a holistic digital development strategy that is based on Pacific needs, values and aspirations.** The study should draw on lessons and experiences from developing countries that are more advanced in addressing these challenges and examine the potential South-South and South-South-North partnerships to share technologies, knowledge, regulatory models, innovations and training. A relational cooperative model based on Pacific values, in place of a market model supported by coercive trade rules, offers the Pacific region a much sounder foundation for the 21st century than the current Pacific E-commerce Strategy.

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