Received: 2026-09-21
Accepted: 2026-11-04
Available: 2026-11-08
e-ISSN: 2621-4105

https://journals.usm.ac.id/index.php/julr
DOI: https://doi.org/10.26623/julr.v9i4.16113
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Constructive Ambiguity in Cross-Border Data Transfers: Legal Certainty and Indonesia's Regulatory Space

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Abstract

This study aims to evaluate the legal justification and implications of constructive ambiguity in the cross-border data transfer (CBDT) provisions of the Indonesia–United States Agreement on Reciprocal Trade (ART), particularly regarding legal certainty and Indonesia's regulatory autonomy. The urgency of this research stems from the increasing reliance on cross-border data flows in digital trade and the potential tension between international trade commitments and domestic data protection obligations. Employing normative legal research through statutory, conceptual, and comparative approaches, this study analyses the relevant ART provisions under Article 31 of the Vienna Convention on the Law of Treaties 1969 and compares them with Chapter 19 of the United States–Mexico–Canada Agreement (USMCA). The findings demonstrate that the expressions "trusted borders" and "appropriate protection" remain insufficiently defined, leaving unresolved interpretive questions despite the integrated interpretation of the treaty provisions. This uncertainty may undermine legal predictability, generate unequal interpretive risks, and complicate Indonesia's exercise of regulatory autonomy. The novelty of this study lies in developing a four-dimensional evaluative framework for assessing constructive ambiguity based on shared negotiating necessity, interpretive openness, distribution of interpretive benefits and legal risks, and implementation safeguards. Drawing on the USMCA comparison, the study proposes more precise substantive obligations, a jointly agreed compatibility mechanism, and explicit safeguards for legitimate public-policy measures. These findings contribute to international trade law scholarship by offering a structured approach to balancing digital trade liberalisation, legal certainty, and national regulatory autonomy.
Keywords: *Agreement on Reciprocal Trade 2025; Constructive Ambiguity; Cross-Border Transfer; Legal Certainty*

1. INTRODUCTION

When drafting an international treaty, negotiators often face the challenge of reconciling the interests of the parties involved, a challenge that becomes more complex when states hold opposing preferences.[1] Under such conditions, constructive ambiguity, a term introduced by former United States (US) Secretary of State Henry Kissinger, is frequently employed as a negotiating technique to reach agreement among parties with conflicting interests.[2] In contemporary academic discourse, such ambiguity is increasingly regarded as a legitimate strategy celebrated by many scholars. Michael Byers explicitly states that ambiguity used deliberately and strategically is not a "design weakness" but rather the product of good drafting, since it reflects the negotiators' true intentions.[3] A similar view

[1] Lauren C Konken, "The Politics of Constructive Ambiguity in International (Trade) Law" (Princeton University, 2023).

[2] Michal Shur-Ofry and Ofer Tur-Sinai, "Constructive Ambiguity: IP Licenses as a Case Study," *University of Michigan Journal of Law Reform* 48, no. 2 (2015), https://access.heinonline.com/HOL/Page?handle=hein.journals/umijlr48&id=409.

[3] Michael Byers, "Still Agreeing to Disagree: International Security and Constructive Ambiguity," *Journal on the Use of Force and International Law* 8, no. 1 (2021): 91–114, doi:10.1080/20531702.2020.1761656.

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is advanced by Anthony D'Amato,[4] who describes purposeful ambiguity as a useful international-law strategy for addressing issues that are inherently difficult to define with precision, as he demonstrates through the case of Taiwan's legal status in international law. These positions suggest that the normalization of ambiguity as a sound strategy is not merely a sporadic phenomenon, but has become a fairly common current of thought across the various fields of scholarship that intersect with international law.

Ideally, such ambiguity should be employed only within appropriate limits, given that legal certainty is one of the legal principles underlying the very existence of law, at both the domestic and international levels.[5] Certainty and predictability in a legal norm are fundamental prerequisites for the creation of order, so that logically, the more ambiguous a legal provision is, the greater the threat to that foundation. However, as outlined above, in practice ambiguity has instead been increasingly normalized and even celebrated as a legitimate strategy in contemporary treaty-drafting practice, without adequate regard for its long-term consequences.[6] It is this gap between the ideal, in which law ought to provide certainty, and the reality of a practice that instead normalizes uncertainty that constitutes the starting point for the problem addressed in this study.

However, the legal implications of constructive ambiguity cannot be assessed solely by considering its usefulness in facilitating negotiations. Its legitimacy also depends on whether the resulting provision remains sufficiently interpretable to guide the conduct of the parties and whether the uncertainty it creates unduly constrains their ability to pursue legitimate domestic regulatory objectives. This distinction is particularly important in digital trade, where commitments facilitating cross-border data flows may interact with domestic choices concerning data protection, privacy, and regulatory oversight. The relevant question, therefore, is not simply whether ambiguity enables an agreement to be reached, but also whether the resulting allocation of interpretive discretion and legal risk remains acceptable after the agreement enters into force.

More specifically, this study examines under what conditions constructive ambiguity in an international treaty may be justified and when its potential costs may outweigh its negotiating benefits. It focuses on three interrelated concerns: whether the ambiguity is necessary to accommodate conflicting negotiating preferences, whether it can be resolved or sufficiently constrained through treaty interpretation, and whether the uncertainty it creates produces an uneven distribution of legal risk or restricts a state's regulatory space. These concerns are particularly salient in digital trade agreements, where commitments on

[4] Anthony D'Amato, *Purposeful Ambiguity as International Legal Strategy: The Two China Problem*, 2010, http://scholarlycommons.law.northwestern.edu/facultyworkingpapers/94.

[5] Gribova Evangelina Nikolaevna, "The Principle of Legal Certainty: Concept and Main Characteristics," *Advances in Sciences and Humanities* 9, no. 2 (June 10, 2023), doi:10.11648/j.ash.20230902.18; Eirik Bjorge, "General Principles of Law Formed Within the International Legal System," *International and Comparative Law Quarterly* 72, no. 4 (October 27, 2023): 845–67, doi:10.1017/S0020589323000362.

[6] Andreas Kulick, "From Problem to Opportunity?: An Analytical Framework for Vagueness and Ambiguity in International Law," *German Yearbook of International Law* 59 (2016), doi:https://doi.org/10.3790/978-3-428-55357-0.

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cross-border data transfers may intersect with divergent approaches to personal data protection and domestic regulation. Against this background, the study examines the cross-border data transfer (CBDT) clause in the 2025 Agreement on Reciprocal Trade (ART 2025) between Indonesia and the United States. Rather than assuming that ambiguity is inherently beneficial or harmful, it evaluates the conditions under which its use may be legally defensible and the circumstances in which more precise drafting may be preferable.

Several considerations underlie this choice. First and foremost, the CBDT provision in ART 2025 contains terms that are potentially ambiguous, such as "trusted borders" and "appropriate protection," which are not accompanied by clear parameters regarding the standards that must be met. In addition, the two countries take different approaches to personal data protection, so that the CBDT issue in ART 2025 structurally meets the classic precondition for the emergence of constructive ambiguity, namely opposing preferences among the negotiating parties. This agreement was also concluded under conditions of unequal bargaining power between the two sides, making it relevant to examine whether the resulting ambiguity was genuinely agreed upon by both parties or instead favors one of them. Last and no less importantly, the object regulated by this clause is data, which has become a commodity of ever-increasing value in today's global digital economy.[7] The higher the economic value at stake in a given subject of regulation, the greater the consequences that follow when the provision governing it is left ambiguous, which makes the CBDT clause of ART 2025 a case worth further examination.

Existing scholarship provides several complementary perspectives for understanding constructive ambiguity, although these perspectives address different dimensions of the phenomenon. One strand approaches ambiguity primarily as a negotiating instrument or a functional feature of international legal arrangements. Anthony D'Amato's discussion of the legal status of Taiwan illustrates how purposeful ambiguity may serve as a legal strategy where precise agreement is difficult to achieve, while Michael Byers examines how deliberately ambiguous United Nations Security Council resolutions on the use of force can facilitate agreement among states with conflicting interests. Byers argues that such ambiguity may allow states to agree without requiring them to abandon their respective positions or risk their status and influence within the Security Council. These accounts help explain the bargaining function of ambiguity, but their principal concern is how ambiguity facilitates agreement rather than how its legal costs should be assessed in subsequent implementation.[8] [9]

A second contribution is provided by Andreas Kulick, whose analytical framework classifies vagueness and ambiguity in international law according to their manifestations, actors, forms, functions, and aspects. Rather than treating ambiguity exclusively as a

[7] UNCTAD, *Digital Economy Report 2021: Cross-Border Data Flows and Development: For Whom the Data Flow* (Geneva: United Nations, 2021), https://unctad.org/system/files/official-document/der2021_en.pdf.
[8] D'Amato, *Purposeful Ambiguity as International Legal Strategy: The Two China Problem*.
[9] Byers, "Still Agreeing to Disagree: International Security and Constructive Ambiguity."

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drafting defect, Kulick demonstrates its potential significance for international legal actors and the interpretation of legal norms. His framework offers a conceptual basis for distinguishing different forms and functions of ambiguity; however, it does not, by itself, establish a case-specific threshold for determining when ambiguity in a digital trade provision becomes legally problematic. This distinction matters because identifying the functions of ambiguity and establishing the conditions under which its consequences are acceptable are analytically separate tasks.[10]

A third perspective concerns the consequences of ambiguity after an agreement has been concluded. Itay Fischhendler's empirical study of the Israeli-Jordanian water-sharing agreement demonstrates that ambiguity may initially facilitate agreement but subsequently become destructive when the political and material conditions underlying the agreement change. Unlike analyses primarily concerned with the negotiating advantages of ambiguity, Fischhendler draws attention to its implementation-stage consequences and the potential emergence of conflict over the meaning or operation of agreed provisions. Nevertheless, his study examines a particular transboundary water arrangement and its subsequent development, rather than developing a preventive evaluation framework for cross-border data transfer clauses in digital trade agreements. [11]

A further strand of scholarship examines the relationship between digital trade commitments and states' regulatory autonomy. Mira Burri and Kholofelo Kugler analyse the safeguards available in digital trade agreements, including exceptions, carve-outs, and right-to-regulate provisions, and highlight the tension between facilitating cross-border data flows and preserving domestic policy space. Nivedita Sen similarly examines the regulatory implications of international disciplines on data flows and data localisation, demonstrating that states' approaches to data regulation reflect different policy objectives and regulatory preferences. This literature provides an important basis for understanding the substantive interests potentially affected by digital trade commitments. Nevertheless, the existence of regulatory safeguards and the preservation of policy space are not identical to the question of how ambiguity in a particular clause distributes interpretive discretion and legal risk between the parties. The latter question requires examining not only the availability of regulatory safeguards but also the wording of the provision, its interpretive possibilities, and its implications for domestic regulatory choices.[12] [13]

[10] Kulick, "From Problem to Opportunity?: An Analytical Framework for Vagueness and Ambiguity in International Law."

[11] Itay Fischhendler, "When Ambiguity in Treaty Design Becomes Destructive: A Study of Transboundary Water," *Global Environmental Politics* 8, no. 1 (February 2008): 111–36, http://muse.jhu.edu/journals/gep/summary/v008/8.1fischhendler.html.

[12] Mira Burri and Kholofelo Kugler, "Regulatory Autonomy in Digital Trade Agreements," *Journal of International Economic Law* 27, no. 3 (July 23, 2024): 397–423, doi:10.1093/jiel/jgae025.

[13] Nivedita Sen, "Understanding the Role of the WTO in International Data Flows: Taking the Liberalization or the Regulatory Autonomy Path?," *Journal of International Economic Law* 21, no. 2 (June 1, 2018): 323–48, doi:10.1093/jiel/jgy021.

Received: 2026-09-21
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Taken together, these studies establish that constructive ambiguity can facilitate compromise, that ambiguity has multiple functions in international law, and that its consequences may change during implementation. They do not, however, answer the same question: whether a particular ambiguous provision remains legally defensible when its interpretive openness interacts with divergent domestic regulatory approaches and creates potentially unequal legal risks for the parties. The distinction is not that previous scholarship has ignored ambiguity's consequences altogether, but that the conceptual and empirical insights above need to be brought together to evaluate the legitimacy and potential costs of ambiguity in a specific digital trade provision. This question provides the analytical point of departure for the present study.

The research gap, therefore, lies in the need to integrate these strands of scholarship into a case-specific framework for evaluating constructive ambiguity in digital trade agreements. The existing studies discussed above explain the bargaining functions of ambiguity, its different manifestations in international law, the potential for destructive consequences during implementation, and the regulatory challenges associated with cross-border data commitments. Building on these insights, the present study asks how the legitimacy and potential costs of ambiguity can be assessed when a digital trade provision combines open-ended language with divergent domestic regulatory approaches. In particular, it examines whether the ambiguity can be sufficiently clarified through treaty interpretation, whether the resulting uncertainty may distribute legal risks unevenly between the parties, and whether it may constrain Indonesia's regulatory space. Fischhendler's findings further indicate that the consequences of ambiguity may develop as the circumstances underlying an agreement change over time. This insight supports the value of examining the potential implications of ART 2025 before a dispute materialises, without assuming that the absence of an identified dispute establishes the absence of ambiguity-related risks.[14]

To address this gap, the study develops and applies a case-specific evaluative framework for assessing the legitimacy and potential costs of constructive ambiguity in a digital trade provision. The framework examines four interrelated dimensions: (1) the negotiating rationale for ambiguity, including whether it serves a demonstrable function in accommodating conflicting preferences; (2) interpretive openness, assessed through the rules of treaty interpretation under Article 31 of the Vienna Convention on the Law of Treaties 1969 (VCLT 1969); (3) the distribution of legal and implementation risks arising from uncertainty in the provision; and (4) the implications of that uncertainty for Indonesia's regulatory space. The framework is applied to the CBDT clause in ART 2025, with particular attention to the terms “trusted borders” and “appropriate protection.” The analysis first assesses whether their potential ambiguity persists after interpretation under the VCLT 1969, then examines the implications of any remaining uncertainty at the implementation

[14] Fischhendler, “When Ambiguity in Treaty Design Becomes Destructive: A Study of Transboundary Water.”

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stage and for Indonesia's regulatory autonomy. Finally, the study considers whether the tension between the parties' regulatory approaches necessarily requires open-ended drafting by comparing the clause with the more detailed provisions of the United States Mexico Canada Agreement (USMCA). Through this analysis, the study seeks to contribute not merely a new case of constructive ambiguity, but a framework for assessing when ambiguity in digital trade provisions may be justified, when its legal and regulatory costs warrant concern, and when more precise drafting may provide a preferable alternative.

2. METHOD

This study adopts a descriptive-analytical legal research design, which combines a systematic description of applicable legal rules with a critical analysis of their normative implications and application to the legal problem under investigation.[15] The design is used to examine the formulation of the cross-border data transfer (CBDT) clause in the 2025 Agreement on Reciprocal Trade (ART 2025) between Indonesia and the United States. Rather than presuming that the clause is legally ambiguous, the study assesses whether its wording permits multiple plausible interpretations and whether any such ambiguity persists after the application of the relevant rules of treaty interpretation. The analysis subsequently evaluates the legal implications of any remaining ambiguity, particularly its potential effects on the distribution of legal risks and Indonesia's regulatory space.

This study employs a normative-juridical approach based on the examination of legal materials, including relevant legal instruments and scholarly literature.[16] Three complementary approaches are applied in an integrated sequence. First, the statutory approach examines the relevant provisions of ART 2025, the Vienna Convention on the Law of Treaties 1969 (VCLT 1969), and the United States-Mexico-Canada Agreement (USMCA) to identify the structure of the parties' legal commitments, the applicable rules of treaty interpretation, and the relevant regulatory safeguards. Second, the conceptual approach establishes the analytical meaning of constructive ambiguity, normative ambiguity, legal certainty, and regulatory space. These concepts are used to distinguish ambiguity that serves a negotiating function from ambiguity that may create unresolved interpretive uncertainty or constrain domestic regulatory choices. Third, the comparative approach examines the relevant CBDT provisions of ART 2025 against the corresponding digital trade provisions in Chapter 19 of the USMCA. The comparison focuses on the wording of the provisions, the specificity of their obligations, the availability of interpretive guidance or regulatory safeguards, and the extent to which the drafting accommodates domestic regulatory objectives. This comparison is used to identify alternative drafting techniques and assess their potential relevance to ART 2025, rather than to presume that the USMCA necessarily provides a superior model.

[15]Muhaimin, *Metode Penelitian Hukum* (Mataram: Mataram University Press, 2020), https://eprints.unram.ac.id/20305/1/Metode%20Penelitian%20Hukum.pdf.

[16] Soerjono Soekanto and Sri Mamudji, *Penelitian Hukum Normatif: Suatu Tinjauan Singkat* (Jakarta: Rajawali, 2011).

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These approaches are connected through the analytical process: the statutory approach establishes the applicable legal texts and obligations; the conceptual approach provides the criteria for evaluating their normative characteristics; and the comparative approach tests whether alternative drafting techniques may address any ambiguity identified in ART 2025. The primary legal materials consist of ART 2025, the VCLT 1969, and the USMCA. Secondary materials include scholarly books, journal articles, and other relevant legal analyses, while tertiary materials may be used to clarify terminology and locate relevant legal sources. The materials are collected through library research and examined in conjunction with one another to support the legal analysis.

The legal materials are analysed using qualitative-juridical analysis and deductive legal reasoning, which involves applying general legal rules and concepts to the specific provisions under examination.[17] The analysis proceeds through five interconnected stages. First, the study identifies potentially ambiguous terms in the CBDT clause of ART 2025. A term is treated as potentially normatively ambiguous when its wording permits two or more reasonably plausible interpretations concerning the scope, conditions, or implementation of the parties' obligations, particularly where the provision does not specify sufficiently clear parameters for determining compliance. The identification of potentially ambiguous language is preliminary and does not, by itself, establish that legally significant ambiguity exists.

Second, the study applies Article 31 of the VCLT 1969 as an integrated rule of treaty interpretation. The provision is interpreted in good faith according to the ordinary meaning of its terms, in their context and in the light of the treaty's object and purpose. These elements are considered together rather than as isolated tests. The analysis examines whether the wording can be clarified through its ordinary meaning, whether the surrounding provisions and relevant contextual elements narrow the range of plausible interpretations, and whether the interpretation is consistent with the treaty's object and purpose. Where relevant and supported by the available legal materials, other elements recognised under Article 31 are also considered. Ambiguity is treated as persisting only where materially different plausible interpretations remain after this integrated interpretive process. The analysis does not assume that the existence of open-ended language necessarily constitutes a violation of international law.

Third, the study evaluates whether any remaining ambiguity may be justified by its negotiating function and whether its potential legal costs are acceptable. Four analytical dimensions are considered: (1) the negotiating rationale, namely whether the ambiguity can be linked to the accommodation of differing regulatory preferences; (2) interpretive openness, namely the extent to which the provision leaves material questions unresolved after treaty interpretation; (3) the distribution of legal and implementation risks, namely whether the uncertainty may create unequal exposure to compliance costs, interpretive

[17] M. Syamsudin, *Operasionalisasi Penelitian Hukum* (Jakarta: Raja Grafindo Persada, 2007).

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discretion, or disputes between the parties; and (4) regulatory space, namely whether the provision may constrain Indonesia's ability to formulate or implement legitimate domestic data-protection policies. The assessment draws on the wording and structure of the treaty, relevant legal materials, and scholarly literature. Claims about the negotiating intentions of the parties are made only to the extent supported by available evidence.

Fourth, the study conducts a comparative analysis of the relevant provisions of ART 2025 and Chapter 19 of the USMCA. The comparison examines the specificity of the drafting, the formulation and scope of the parties' obligations, and the presence of interpretive guidance or regulatory safeguards. The purpose is to identify drafting alternatives that may reduce interpretive uncertainty while accommodating legitimate regulatory objectives. The comparison does not assume that the USMCA eliminates ambiguity or that its provisions can be transferred directly to ART 2025 without regard to differences in treaty context and structure.

Fifth, the findings from treaty interpretation, the four evaluative dimensions, and the comparative analysis are synthesised to formulate the study's conclusions. The implications for Indonesia's regulatory space are assessed by establishing a reasoned connection between the wording of the CBDT clause, the interpretations that remain plausible after applying Article 31 of the VCLT 1969, and the potential consequences for Indonesia's domestic regulatory choices. The study distinguishes between an ambiguity that can be sufficiently resolved through interpretation and one that leaves material regulatory or implementation questions open. On this basis, it evaluates whether the identified ambiguity can be justified by its negotiating function or whether more precise drafting may provide a preferable alternative. The conclusions are derived from the legal materials examined and are framed as normative legal assessments rather than empirical findings about the parties' actual implementation practices.

3. RESULTS AND DISCUSSION

3.1 Ambiguity in International Agreements

Constructive ambiguity has become a commonly used strategy in the drafting of international treaties. It can be found across various fields of international law, including trade, investment, and international security, particularly where states hold differing or opposing preferences.[18] By allowing parties to agree on a common text without resolving every substantive disagreement, ambiguity may facilitate consensus where more precise language would prevent an agreement from being reached.[19] Its negotiating value, however, does not necessarily establish the legal acceptability of the resulting provision. The central analytical distinction is between ambiguity that facilitates agreement while leaving the

[18] Kulick, "From Problem to Opportunity?: An Analytical Framework for Vagueness and Ambiguity in International Law"; Sojun Park and Lauren C. Konken, "Exploiting Treaty Ambiguity: Public Health Exceptions in the WTO TRIPS Agreement," *Review of International Organizations* 20, no. 3 (September 1, 2025): 547–74, doi:10.1007/s11558-023-09525-0.

[19] Konken, "The Politics of Constructive Ambiguity in International (Trade) Law."

Received: 2026-09-21
Accepted: 2026-11-04
Available: 2026-11-08
e-ISSN: 2621-4105
https://journals.usm.ac.id/index.php/julr
DOI: https://doi.org/10.26623/julr.v9i4.16113
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parties with a sufficiently workable legal framework and ambiguity that obscures the substance, scope, or implementation of their obligations.

This distinction becomes important when constructive ambiguity is considered in light of legal certainty, which is widely recognised as a fundamental principle underlying legal systems at both the domestic and international levels.[20] General principles of law recognised under Article 38(1)(c) of the Statute of the International Court of Justice also provide a relevant foundation for examining the role of legal certainty in international law.[21] Although ambiguity may help reconcile conflicting preferences, its use may also reduce the predictability of the legal obligations accepted by the parties. The issue is therefore not whether ambiguity should invariably be rejected in favour of precise drafting, but whether the negotiating benefits it provides can justify the interpretive uncertainty that remains. Evaluating constructive ambiguity consequently requires attention to both its function in achieving agreement and its implications for the clarity, application, and enforcement of the resulting obligations.

There are circumstances in which accepting some ambiguity may be preferable to failing to reach an agreement. This may be particularly understandable in situations involving urgent matters of war and peace, where the immediate consequences of failing to agree may be substantial.[22] Similarly, in multilateral negotiations involving numerous parties with diverse interests, open-textured language may facilitate participation by accommodating differences that cannot readily be resolved through precise drafting.[23] These circumstances illustrate the potential functional justification for ambiguity. Nevertheless, the justification depends on the role that ambiguity actually performs in the negotiating process. The existence of conflicting preferences alone does not establish that ambiguity is necessary, nor does the achievement of agreement automatically demonstrate that the resulting uncertainty is acceptable. The relevant question is whether the openness of the language can reasonably be connected to a shared negotiating need and whether the resulting provision remains capable of guiding the parties' conduct.

The distinction between mutually accepted ambiguity and ambiguity that produces an interpretive advantage for particular parties further clarifies this issue. Andreas Kulick distinguishes strategic ambiguity, which is jointly accepted by the parties, from semi-strategic ambiguity, in which one party or a subset of parties deliberately introduces language that may be interpreted differently from the intentions of other parties. His discussion of United Nations Security Council Resolution 1973 on Libya illustrates the latter possibility.[24] This distinction suggests that the legitimacy of ambiguity cannot be assessed

[20] Nikolaevna, "The Principle of Legal Certainty: Concept and Main Characteristics"; Bjorge, "General Principles of Law Formed Within the International Legal System."
[21] Bjorge, "General Principles of Law Formed Within the International Legal System."
[22] Kulick, "From Problem to Opportunity?: An Analytical Framework for Vagueness and Ambiguity in International Law."
[23] Ibid.
[24] Ibid.

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DOI: https://doi.org/10.26623/julr.v9i4.16113
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solely by examining whether it facilitated agreement. It is also necessary to consider whether the ambiguity reflects a shared compromise or creates an opportunity for particular parties to advance their preferred interpretation after the agreement has been concluded. Where the latter possibility exists, the assessment must examine the extent of the interpretive advantage and the availability of mechanisms capable of addressing disagreements. This is an analytical distinction rather than a presumption that every instance of semi-strategic ambiguity is necessarily unlawful or invalid.

A further concern is that ambiguity may transfer unresolved disagreements from the negotiation stage to the implementation stage. Rather than eliminating differences between the parties, an open-ended provision may postpone their resolution until the parties must apply the agreement to concrete circumstances.[25] At that stage, differing interpretations may become more consequential because the parties are already bound by the agreement and may face competing expectations concerning the performance of their obligations. Itay Fischhendler's study of the Israeli Jordanian water-sharing agreement demonstrates how ambiguity that initially facilitated agreement could become destructive when the political and material conditions underlying the agreement changed over time.[26] The broader concern is also reflected in the literature on treaty drafting and compliance. As discussed by Fischhendler, Denys P. Myers identified problems associated with treaty violations and defective drafting, including the importance of a shared understanding of an agreement's meaning and intent.[27] Similarly, Kenneth W. Abbott and Duncan Snidal explain that softer forms of legal commitment may reduce bargaining costs while increasing the subsequent costs of managing and enforcing commitments when the parties interpret them differently.[28] These insights indicate that the assessment of ambiguity should consider not only its immediate negotiating benefits but also the foreseeable difficulties associated with implementation and the mechanisms available to manage interpretive disagreements.

The distribution of interpretive authority adds another dimension to this assessment. Ingo Venzke's concept of semantic authority concerns an actor's capacity to influence the meaning of legal norms and to establish its interpretation as an authoritative point of reference.[29] This concept helps explain why the practical consequences of an ambiguous provision may differ between parties even when they are formally subject to the same text. However, semantic authority should not be equated automatically with economic or political power, nor does greater economic capacity necessarily mean that a state will prevail in a dispute over interpretation. The concept instead directs attention to the factors through which an interpretation gains practical authority, including the parties' interpretive resources,

[25] Christian Marxsen and Anne Peters, "Self-Defence against Non-State Actors – The Way Ahead," in *Self-Defence against Non-State Actors* (Cambridge: Cambridge University Press, 2019), 258–81, doi:10.1017/9781108120173.006.
[26] Fischhendler, "When Ambiguity in Treaty Design Becomes Destructive: A Study of Transboundary Water."
[27] Ibid.
[28] Kenneth W. Abbott and Duncan Snidal, "Hard and Soft Law in International Governance," *International Organization* 54, no. 3 (2000): 421–56, doi:10.1162/002081800551280.
[29] Ingo Venzke, *How Interpretation Makes International Law* (Oxford: OUP Oxford, 2012).

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institutional positions, and capacity to advance or sustain a particular reading. Accordingly, an assessment of constructive ambiguity should examine whether the wording of a provision leaves room for unequal interpretive influence and whether the available legal or institutional mechanisms can help address that imbalance.

Clearer drafting may reduce the scope for competing interpretations by providing more definite textual parameters for determining the parties' obligations. Such clarity can be particularly important where the parties possess unequal capacities to advance their preferred interpretations. Nevertheless, textual precision is not the only possible safeguard, and the existence of ambiguity does not by itself establish that a weaker party will be disadvantaged. The relevant inquiry is whether the combination of open-ended wording, the distribution of interpretive authority, and the available mechanisms for managing disagreements creates a material risk to legal certainty or to the effective exercise of legitimate regulatory powers. This approach avoids treating ambiguity as inherently harmful while recognising that its consequences may depend on the legal and institutional context in which the provision operates.

On the basis of the foregoing discussion, this study develops an analytical framework for distinguishing potentially justified constructive ambiguity from ambiguity whose costs may outweigh its negotiating benefits. The framework comprises four interrelated dimensions. First, shared negotiating necessity examines whether the ambiguity serves an identifiable function in accommodating conflicting preferences and whether that function is supported by the circumstances of the agreement. Second, interpretive openness assesses whether the wording leaves materially different plausible interpretations concerning the scope or implementation of the parties' obligations, particularly after the applicable rules of treaty interpretation have been considered. Third, distribution of interpretive benefits and legal risks examines whether the ambiguity may allow particular parties to obtain disproportionate interpretive advantages or impose unequal implementation costs on the other parties. Fourth, implementation safeguards and regulatory protection considers whether mechanisms exist to clarify or manage interpretive disagreements and whether the provision adequately preserves the parties' ability to pursue legitimate regulatory objectives.

These four dimensions are analytical criteria developed from the literature discussed above, rather than universal legal requirements that every international treaty must independently satisfy. Their application requires a contextual assessment of the purpose of the provision, the nature of the obligations involved, the plausible interpretations of the text, and the mechanisms available to address uncertainty. Ambiguity may be more defensible where it responds to a demonstrable shared negotiating need, remains sufficiently constrained in interpretation, and is accompanied by safeguards against disproportionate legal or regulatory costs. Conversely, concern becomes stronger where the negotiating justification is unclear, materially different interpretations remain possible, interpretive advantages or implementation risks may be distributed unevenly, and adequate safeguards are absent. These criteria do not predetermine the legal outcome; they provide a structured

Received: 2026-09-21
Accepted: 2026-11-04
Available: 2026-11-08
e-ISSN: 2621-4105
https://journals.usm.ac.id/index.php/julr
DOI: https://doi.org/10.26623/julr.v9i4.16113
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basis for evaluating the legitimacy and potential costs of ambiguity in a specific treaty context.

This framework provides the basis for the following section, which examines whether the CBDT clause in ART 2025 contains ambiguity that remains justifiable in light of its negotiating function or instead creates unresolved interpretive and regulatory risks. The analysis will consider the wording of the clause, the extent to which its meaning can be clarified through treaty interpretation, the distribution of potential legal risks, and the implications for Indonesia's regulatory space. In this way, the discussion moves from the general theoretical debate on constructive ambiguity to a case-specific assessment of whether the potential benefits of open-ended drafting can be justified by the legal and regulatory consequences that may follow.

3.2 Analysis of the CBDT Clause in the ART 2025

The Agreement on Reciprocal Trade between the United States of America and the Republic of Indonesia emerged from bilateral trade negotiations initiated amid the United States' reciprocal tariff measures in 2025. On April 2, 2025, the United States announced a 32% reciprocal tariff rate applicable to Indonesian goods. On July 22, 2025, the two governments announced a framework for negotiating an Agreement on Reciprocal Trade, and the final agreement was signed on February 19, 2026. These developments must be distinguished from one another: the July 2025 framework marked an earlier stage of negotiations, whereas the signed agreement of February 2026 contains the treaty text examined in this study.[30] [31] [32]

The tariff measures provide relevant context for assessing the negotiating environment. The Indonesian government explained that negotiations were pursued to maintain the competitiveness of Indonesian exports and protect employment in affected labour-intensive industries. This context indicates that Indonesia faced an identifiable economic incentive to reach an agreement. It does not, by itself, establish that the United States was unaffected by the absence of an agreement, that Indonesia lacked freedom to consent, or that any particular provision was necessarily designed to favour the United States. A distinction must therefore be maintained between economic pressure affecting the parties' negotiating incentives, their respective exposure to the consequences of failing to reach an agreement, and evidence that the wording of a specific treaty provision produces an interpretive advantage for one party.

For the purposes of this study, the relevance of the negotiating context lies in its interaction with the structure of the cross-border data transfer (CBDT) commitments.

[30] The United States of America and The Republic of Indonesia, "Agreement Between the United States of America and the Republic of Indonesia on Reciprocal Trade" (2026).

[31] The White House, "Joint Statement on Framework for United States-Indonesia Agreement on Reciprocal Trade," July 22, 2025, https://www.whitehouse.gov/briefings-statements/2025/07/joint-statement-on-framework-for-united-states-indonesia-agreement-on-reciprocal-trade/.

[32] Sekretariat Negara Republik Indonesia, "Frequently Asked Questions Perjanjian Perdagangan Resiprokal Indonesia – Amerika Serikat | Sekretariat Negara," *Setneg Go*, 2026, https://setneg.go.id/baca/index/frequently_asked_questions_perjanjian_perdagangan_resiprokal_indonesia_amerika_serikat.

Received: 2026-09-21
Accepted: 2026-11-04
Available: 2026-11-08
e-ISSN: 2621-4105
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DOI: https://doi.org/10.26623/julr.v9i4.16113
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Section 3, Article 3.2 of the Agreement, entitled "Facilitation of Digital Trade," provides that Indonesia shall facilitate digital trade with the United States. Article 3.2(b) specifies that Indonesia shall ensure the transfer of data by electronic means across trusted borders with appropriate protection for the conduct of business. The provision thus establishes an express obligation for Indonesia, while leaving the meaning and operational requirements of "trusted borders" and "appropriate protection" unspecified in the text of that subparagraph.[33]

The relevant obligation is further addressed in Annex III, Article 3.2, entitled "Data Transfers." This provision requires Indonesia to provide certainty regarding the ability to move personal data out of its territory to the United States by recognising the United States as a country or jurisdiction that provides adequate data protection under Indonesian law. Article 7.1 of the Agreement expressly provides that its annexes, appendices, and footnotes constitute an integral part of the Agreement. Accordingly, Section 3, Article 3.2(b) and Annex III, Article 3.2 must be interpreted as parts of the same treaty instrument rather than as independent legal texts. Their relationship is central to determining how the general commitment to facilitate data transfers interacts with the more specific obligation concerning the recognition of the United States as an adequate jurisdiction.

Read together, the two provisions establish related but not identical obligations. Section 3, Article 3.2(b) addresses the transfer of data generally and refers to trusted borders and appropriate protection for business activities. Annex III, Article 3.2 specifically addresses personal data and requires recognition of the United States as a jurisdiction providing adequate data protection under Indonesian law. The annex therefore gives the broader commitment a more specific direction in relation to personal data transfers, but it does not expressly define the criteria for determining trusted borders or specify the operational standard of appropriate protection in Article 3.2(b). Whether the annex sufficiently clarifies those terms, and whether the difference in the scope of the two provisions creates residual interpretive uncertainty, must be determined through an integrated interpretation of the Agreement.

The economic context is relevant to this inquiry because the consequences of an open-ended obligation may differ depending on the regulatory interests and implementation responsibilities of the parties. Nevertheless, the existence of unequal economic incentives cannot substitute for textual analysis or establish, without further evidence, that the clause necessarily distributes legal benefits or risks unequally. The following analysis therefore examines the wording and relationship of the two provisions, taking the negotiating context into account as an explanatory factor rather than as proof of the legal effect of the clause.

The CBDT provisions must be interpreted in accordance with Article 31 of the Vienna Convention on the Law of Treaties 1969 (VCLT 1969), which requires a treaty to be

[33] UNCTAD, "United Nations Conference on Trade and Development ," *Investment Policy*, 2026, https://investmentpolicy.unctad.org/international-investment-agreements/treaties/tips/5266/indonesia---united-states-art-2026-.

Received: 2026-09-21
Accepted: 2026-11-04
Available: 2026-11-08
e-ISSN: 2621-4105
https://journals.usm.ac.id/index.php/julr
DOI: https://doi.org/10.26623/julr.v9i4.16113
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interpreted in good faith according to the ordinary meaning of its terms, in their context and in the light of the treaty's object and purpose. These elements constitute a single, integrated interpretive process. The analysis must therefore consider not only the language of Section 3, Article 3.2(b), but also Annex III, Article 3.2 and the Agreement's express rule that the annexes form an integral part of the treaty.

Under their ordinary meaning, “trusted borders” may refer to borders or jurisdictions regarded as trustworthy for the transfer of data, while “appropriate protection” suggests a level of protection considered suitable for the relevant business activity. These expressions convey a general direction for the parties' conduct, but neither identifies a specific threshold for determining which jurisdictions qualify as trusted or which safeguards constitute appropriate protection. The central issue is therefore not whether the phrases have any discernible meaning, but whether their ordinary meaning establishes sufficiently determinate criteria for assessing compliance with Indonesia's obligation.

The context of the Agreement includes Annex III, Article 3.2. As an integral part of the treaty under Article 7.1, the annex cannot be disregarded when interpreting Section 3, Article 3.2(b). Annex III, Article 3.2 specifically requires Indonesia to provide certainty regarding the transfer of personal data to the United States by recognising the United States as a jurisdiction that provides adequate data protection under Indonesian law. This obligation is directly relevant to the operation of the broader CBDT commitment because it identifies a particular jurisdiction whose adequacy Indonesia is required to recognise in relation to personal data transfers.

However, the relationship between the provisions does not eliminate every interpretive question. First, Section 3, Article 3.2(b) refers broadly to the transfer of data by electronic means, whereas Annex III, Article 3.2 expressly concerns personal data. The text does not expressly explain how the more specific personal-data obligation relates to the broader category of data covered by the main provision. Second, Annex III, Article 3.2 requires recognition of the United States as a jurisdiction providing adequate protection under Indonesian law, but it does not itself specify the criteria by which “trusted borders” or “appropriate protection” under Section 3, Article 3.2(b) are to be assessed. Third, the reference to adequacy under Indonesian law does not, by itself, explain the relationship between that recognition obligation and the standard of appropriate protection applicable to the transfer of data for business activities under the main provision.

The Agreement's object and purpose must also be considered. Its preamble identifies the promotion of bilateral trade and investment, economic prosperity, and reciprocal market access among its objectives. In the context of digital trade, Section 3, Article 3.2(b) can therefore be understood as seeking to facilitate electronic data transfers while retaining a reference to appropriate protection for business activities. This interpretation supports the view that the provision attempts to accommodate both the movement of data and a degree of protection. Nevertheless, the general objective of facilitating trade does not independently

Received: 2026-09-21
Accepted: 2026-11-04
Available: 2026-11-08
e-ISSN: 2621-4105
https://journals.usm.ac.id/index.php/julr
DOI: https://doi.org/10.26623/julr.v9i4.16113
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determine the precise level of protection required or the criteria for assessing whether a particular jurisdiction is trusted.

Taken together, the ordinary meaning, context, and object and purpose of the Agreement provide a general understanding of the function of the CBDT provisions. Annex III, Article 3.2 is not an unrelated provision: it specifies a particular commitment concerning personal data transfers to the United States and must be read together with Section 3, Article 3.2(b). Nevertheless, the combined text does not expressly establish operational criteria for "trusted borders" or a measurable standard for "appropriate protection," nor does it fully explain the relationship between the broader data-transfer obligation and the specific recognition of the United States as an adequate jurisdiction. The interpretive conclusion is therefore limited: the provisions have an intelligible general purpose, but the treaty text leaves questions about the scope and application of the relevant standards insufficiently specified. This residual uncertainty provides the basis for examining the potential implications for legal certainty and Indonesia's regulatory space.

The residual uncertainty identified in the preceding interpretation raises concerns regarding legal certainty. A treaty provision may pursue a legitimate objective while leaving uncertainty about the scope of the obligations through which that objective is to be achieved. In the present case, the general commitment to facilitate data transfers is accompanied by references to trusted borders and appropriate protection, while the annex requires recognition of the United States as a jurisdiction providing adequate data protection under Indonesian law. The absence of expressly stated operational criteria for the former terms leaves room for questions about the standard against which Indonesia's compliance with the broader obligation is to be assessed. This is a concern about the determinacy of the treaty's obligations, rather than a conclusion that the provision is necessarily invalid or that a breach has already occurred.

The analytical framework developed in Section 3.1 can be applied to assess whether this ambiguity is justified. First, the tariff negotiations provide evidence of an economic incentive for Indonesia to reach an agreement, but the available context does not establish that the ambiguity in the CBDT provisions was necessary to reconcile the parties' preferences. Nor does the existence of economic pressure alone demonstrate that the parties deliberately agreed to leave the relevant standards undefined. A finding that the ambiguity serves a legitimate negotiating function would require evidence connecting the open-ended wording to an identifiable negotiating need. In the absence of such evidence, the justification for the ambiguity cannot be assumed merely from the fact that the parties reached an agreement.

Second, the interpretive analysis indicates that the main text and Annex III clarify the general direction of the parties' commitments but do not expressly establish measurable criteria for trusted borders or appropriate protection. This leaves uncertainty concerning the application of the relevant standards. The significance of that uncertainty depends, in part, on how the provisions are subsequently interpreted and implemented and whether other

Received: 2026-09-21
Accepted: 2026-11-04
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e-ISSN: 2621-4105
https://journals.usm.ac.id/index.php/julr
DOI: https://doi.org/10.26623/julr.v9i4.16113
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applicable legal rules or mechanisms provide sufficient guidance. The absence of detailed criteria in the CBDT provisions therefore supports a concern about legal predictability, but does not by itself prove that every future restriction on data transfers adopted by Indonesia would constitute a breach of the Agreement.

Third, the possible distribution of interpretive benefits and legal risks must be assessed separately from the broader economic relationship between the parties. The tariff measures imposed by the United States and Indonesia's stated concern about export competitiveness provide evidence of differing economic incentives during the negotiations. They do not, without further evidence, establish that the United States will necessarily prevail in a future interpretive disagreement or that Indonesia lacks the capacity to defend its legal position. In this regard, Ingo Venzke's concept of semantic authority provides a framework for examining how some actors may be better positioned to influence the authoritative understanding of a legal provision. Its application to the present Agreement, however, requires evidence concerning the parties' interpretive resources, institutional positions, and capacity to sustain their respective interpretations. Economic asymmetry may be relevant to this assessment, but it should not be treated as an automatic proxy for interpretive dominance.

The implications for Indonesia's regulatory space arise from the interaction between the data-transfer commitment and the uncertainty surrounding its limits. Mira Burri and Kholofelo Kugler explain that commitments to liberalise cross-border data flows may create tension between facilitating international data transfers and preserving domestic regulatory autonomy. In the present case, the absence of express criteria for appropriate protection may make it more difficult to determine how particular domestic data-protection measures relate to Indonesia's treaty commitments. The requirement in Annex III, Article 3.2 to recognise the United States as a jurisdiction providing adequate data protection under Indonesian law adds a specific commitment concerning personal data transfers. However, the precise consequences for other data transfers and for domestic regulatory measures must be determined through the interpretation of the Agreement as a whole, rather than inferred automatically from that recognition obligation.

Accordingly, the relevant risk is that Indonesia may face uncertainty when determining the extent to which domestic measures governing data protection can be maintained or introduced consistently with its commitments under the Agreement. Such uncertainty could complicate regulatory decision-making, increase the potential for disagreement over compliance, or create pressure to adopt an interpretation favourable to continued data flows. These are potential consequences of the wording and structure of the provisions, not established outcomes of actual implementation. The extent of any constraint on Indonesia's regulatory space will also depend on the interpretation of the Agreement, other applicable legal rules, and the legal and institutional mechanisms available to address disagreements.

Received: 2026-09-21
Accepted: 2026-11-04
Available: 2026-11-08
e-ISSN: 2621-4105
https://journals.usm.ac.id/index.php/julr
DOI: https://doi.org/10.26623/julr.v9i4.16113
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The temporal and legal status of the Agreement must also be taken into account. The text examined in this study was signed on February 19, 2026. Article 7.5 provides that the Agreement enters into force 90 days after the parties exchange written notifications certifying completion of their applicable legal procedures, unless they decide on another date. The official materials consulted for this study identify the Agreement as signed but not yet in force. Accordingly, the analysis concerns the potential legal and regulatory implications of the signed text, rather than the effects of an agreement already in force or evidence of an actual implementation dispute.

On the basis of these findings, the ambiguity in the CBDT provisions raises a legitimate concern regarding legal certainty because the treaty text does not expressly establish operational criteria for trusted borders or appropriate protection. The provisions also create a potential regulatory concern insofar as uncertainty about the scope of the data-transfer commitment may complicate the assessment of domestic data-protection measures. Nevertheless, the available evidence does not justify concluding that the ambiguity necessarily results from coercive bargaining, that the United States will inevitably prevail in interpretation, or that Indonesia has already lost its regulatory autonomy. A more precise assessment of the legitimacy and costs of the ambiguity therefore requires consideration of alternative drafting arrangements that clarify the relevant standards while preserving legitimate regulatory objectives. The following section examines the relevant provisions of the United States Mexico Canada Agreement (USMCA) for that purpose.

3.3 Alternative Clause Design

The preceding analysis raises a central question: is ambiguity the only means of accommodating differences in data-protection approaches between Indonesia and the United States, or can an alternative clause design reconcile these differences while providing greater legal certainty? To address this question, this study examines Chapter 19 of the United States Mexico Canada Agreement (USMCA) as a comparative framework. The comparison is relevant because both USMCA and the Indonesia United States Agreement on Reciprocal Trade (ART) address cross-border data flows in the context of digital trade. Nevertheless, the two instruments differ in their institutional settings, scope, and regulatory architecture. USMCA therefore serves not as a template that can be transplanted wholesale into ART, but as a source of design elements that may be adapted to the specific legal and regulatory circumstances of Indonesia and the United States.

The comparative relevance of USMCA lies partly in its recognition that the parties may maintain different approaches to personal information protection. Article 19.8(6) acknowledges the APEC Cross-Border Privacy Rules (CBPR) system as a mechanism for facilitating cross-border information transfers while protecting personal information. This recognition indicates that differences in domestic regulatory approaches need not automatically be resolved through vague treaty language. However, the provision should not be interpreted as establishing a single, comprehensive data-protection standard binding all parties or as requiring them to adopt identical domestic privacy regimes. Rather, it identifies

Received: 2026-09-21
Accepted: 2026-11-04
Available: 2026-11-08
e-ISSN: 2621-4105
https://journals.usm.ac.id/index.php/julr
DOI: https://doi.org/10.26623/julr.v9i4.16113
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a mechanism through which cross-border transfers may be facilitated while personal information remains subject to protection. This distinction is important because the comparative value of USMCA lies in its combination of relatively specific obligations and a recognized compatibility mechanism, not in the elimination of regulatory differences altogether.[34] [35]

The first relevant design element concerns the formulation of the substantive obligation. Article 19.11(1) of USMCA provides that no party shall prohibit or restrict the electronic cross-border transfer of information, including personal information, where the transfer is conducted for the business of a covered person. In contrast, Section 3, Article 3.2(b) of ART requires Indonesia to ensure the transfer of data by electronic means across "trusted borders" with "appropriate protection" for the conduct of business. The principal difference is not simply that one provision is clear while the other is ambiguous. Rather, USMCA establishes an identifiable baseline rule by specifying the conduct that parties must not prohibit or restrict and the circumstances in which that obligation applies. ART, by comparison, formulates the obligation through evaluative terms without specifying the criteria for determining whether a border is "trusted" or what level of protection is "appropriate." Consequently, Article 19.11 offers a more readily identifiable starting point for assessing compliance, whereas Article 3.2(b) of ART leaves greater uncertainty concerning the substantive standard to be fulfilled.[36] [37]

The USMCA provision nevertheless has limits. Its prohibition applies to transfers undertaken for the business of a "covered person," and therefore should not be understood as an unrestricted guarantee that every category of information must be transferred in all circumstances. Moreover, a more clearly formulated baseline rule does not, by itself, resolve every disagreement concerning the application of the obligation. For Indonesia and the United States, the relevant lesson is therefore not necessarily to reproduce the USMCA prohibition verbatim, but to define more precisely the scope of covered data transfers, the persons and activities to which the obligation applies, and the types of domestic measures that remain permissible. Such clarification would make the obligation more predictable without presuming that all data transfers must receive identical treatment regardless of their context.

The second design element concerns the mechanism for accommodating different data-protection regimes. Article 19.8(6) of USMCA recognizes the APEC CBPR system as a valid mechanism for facilitating cross-border information transfers while protecting personal information. This recognition provides an institutional reference point for cooperation across different regulatory systems. It is therefore relevant to the ambiguity

[34] United States, Mexico, and Canada, *DIGITAL TRADE* (United States-Mexico-Canada Agreement (USMCA), 2020).

[35] Yik-Chan Chin and Jingwu Zhao, "Governing Cross-Border Data Flows: International Trade Agreements and Their Limits," *Laws* 11, no. 4 (August 16, 2022): 63, doi:10.3390/laws11040063.

[36] United States, *DIGITAL TRADE*.

[37] Burri and Kugler, "Regulatory Autonomy in Digital Trade Agreements."

Received: 2026-09-21
Accepted: 2026-11-04
Available: 2026-11-08
e-ISSN: 2621-4105
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DOI: https://doi.org/10.26623/julr.v9i4.16113
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identified in Annex III, Article 3.2 of ART, which requires Indonesia to provide certainty regarding transfers of personal data to the United States by recognizing the United States as a country or jurisdiction providing adequate data protection under Indonesian law. The two arrangements, however, are not equivalent. The CBPR reference in USMCA recognizes a mechanism for facilitating transfers and protecting personal information, whereas Annex III of ART expressly relies on Indonesia's recognition of the United States as an adequate jurisdiction under Indonesian law. The former should not be characterized as a uniform substantive protection standard or as an automatic substitute for an adequacy assessment.

The distinction has practical consequences. Under ART, the relationship between the obligation to facilitate data transfers in Section 3, Article 3.2(b) and the adequacy recognition required by Annex III, Article 3.2 remains insufficiently elaborated. A jointly agreed mechanism could help clarify the criteria, procedures, and consequences associated with compatibility between the parties' data-protection frameworks. Such a mechanism might draw on relevant international or regional arrangements, including the CBPR system, if both parties agree that the system is suitable for ART. However, adopting this approach would require further decisions about participation, certification or accountability requirements, oversight, and the treatment of transfers that do not meet the agreed conditions. The benefit would be a more transparent and jointly defined process; the limitation is that the mechanism's effectiveness would depend on its institutional design and the parties' implementation commitments.[38] [39] [40]

The third design element concerns exceptions for legitimate public-policy objectives. Article 19.11(2) of USMCA allows a party to adopt or maintain a measure inconsistent with the cross-border transfer obligation where the measure is necessary to achieve a legitimate public-policy objective. The exception is subject to conditions: the measure must not be applied in a manner constituting arbitrary or unjustifiable discrimination or a disguised restriction on trade, and it must not impose restrictions on information transfers greater than those necessary to achieve the objective. These conditions provide a framework for assessing the relationship between data-flow liberalization and domestic regulation. Compared with the CBDT provisions in ART, which do not expressly set out an equivalent exception within the relevant clauses, the USMCA model makes the permissible grounds and limits for certain restrictive measures more visible.[41]

Nevertheless, the USMCA exception does not provide unlimited regulatory discretion. The necessity requirement and the prohibition on excessive restrictions may themselves constrain domestic policy choices. A measure adopted by Indonesia could therefore remain open to disagreement over whether its objective is legitimate, whether the measure is

[38] United States, *Digital Trade*.
[39] Chin and Zhao, "Governing Cross-Border Data Flows: International Trade Agreements and Their Limits."
[40] APEC, "The Cross Border Privacy Rules System: Promoting Consumer Privacy and Economic Growth across the APEC Region | APEC," *Asia-Pacific Economic Cooperation*, accessed October 19, 2026, https://www.apec.org/Press/Features/2013/0903_cbpr.
[41] Burri and Kugler, "Regulatory Autonomy in Digital Trade Agreements."

Received: 2026-09-21
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DOI: https://doi.org/10.26623/julr.v9i4.16113
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necessary, and whether it restricts transfers more than required. The comparative advantage of this model is not that it removes interpretive disputes, but that it identifies criteria through which those disputes can be assessed. If a similar provision were considered for ART, Indonesia and the United States would need to specify how the exception interacts with personal-data protection, cybersecurity, national security, and other legitimate public interests, while avoiding language that would allow either party to invoke public policy as a pretext for unjustified trade restrictions.

The three design elements should consequently be understood as complementary rather than interchangeable. A more precise substantive obligation would clarify the baseline commitment; a jointly agreed compatibility mechanism could provide a more transparent means of facilitating transfers across different regulatory systems; and a carefully drafted public-policy exception could identify the conditions under which domestic measures remain permissible. Adopting only one element would leave important uncertainties unresolved. For example, defining the general obligation more precisely without clarifying the relationship between that obligation and the adequacy-recognition requirement in Annex III could leave uncertainty concerning personal-data transfers. Similarly, introducing a public-policy exception without specifying its scope and assessment criteria could reproduce some of the interpretive uncertainty that the revision is intended to address.

These design options must also be adapted to the differences between the two agreements. USMCA is a trilateral trade agreement with a dedicated digital-trade chapter and an institutional context involving three parties. ART is a bilateral agreement whose relevant data-transfer commitments are distributed between its main text and Annex III. The provisions in ART must therefore be read together, while preserving the distinction between the general obligation concerning electronic data transfers and the more specific requirement concerning personal-data transfers to the United States. In addition, any proposed compatibility mechanism must account for the parties' existing domestic legal frameworks and must not assume that institutional arrangements developed in the APEC context automatically have the same legal effect under ART. These differences mean that the USMCA provisions offer comparative guidance rather than a ready-made legal solution.

The comparison thus supports a more qualified conclusion: differences in data-protection approaches do not necessarily require the parties to rely on open-textured language without additional interpretive safeguards. USMCA demonstrates that treaty design can combine a defined baseline obligation, recognition of a compatibility mechanism, and a conditional public-policy exception. However, the comparison does not establish that ART's wording was deliberately designed to favour one party, nor does it demonstrate that the USMCA model would eliminate all interpretive disagreement if adopted in ART. It instead identifies specific drafting choices through which the uncertainty found in Article 3.2(b) and Annex III, Article 3.2 could be reduced.

Accordingly, Indonesia and the United States could consider a supplementary instrument, an agreed interpretive arrangement, or a negotiated amendment to clarify the

Received: 2026-09-21
Accepted: 2026-11-04
Available: 2026-11-08
e-ISSN: 2621-4105
https://journals.usm.ac.id/index.php/julr
DOI: https://doi.org/10.26623/julr.v9i4.16113
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CBDT provisions of ART, subject to the applicable procedures under the agreement and the law of treaties. Such an instrument could define the scope of "trusted borders" and "appropriate protection," establish transparent criteria and procedures for assessing compatibility between the parties' data-protection frameworks, clarify the relationship between the main text and Annex III, and provide an express exception for legitimate domestic regulatory measures. The parties would also need to determine the mechanism's institutional oversight, review procedures, and relationship with their existing domestic laws. These measures would not eliminate all interpretive discretion, but could make the parties' obligations and permissible regulatory choices more foreseeable. The central recommendation is therefore not to transplant USMCA wholesale into ART, but to adapt its relevant design principles through a jointly agreed framework that balances cross-border data flows, personal-data protection, and Indonesia's regulatory space while preserving the agreement's objective of facilitating digital trade.

4. CONCLUSION

This study concludes that the cross-border data transfer (CBDT) clause under Section 3, Article 3.2(b) of the 2025 Indonesia–United States Agreement on Reciprocal Trade (ART 2025) contains unresolved ambiguity in the terms "trusted borders" and "appropriate protection." Applying Article 31 of the Vienna Convention on the Law of Treaties (VCLT) 1969, the analysis shows that the ordinary meaning, context, and object and purpose of the provision do not establish sufficiently precise standards for determining the scope of the parties' obligations. The study's novelty lies in demonstrating that such ambiguity is not merely a drafting technique but creates an uneven interpretive burden in implementation, particularly where the parties possess different regulatory approaches and unequal bargaining positions. Unlike contexts in which constructive ambiguity may facilitate agreement under exceptional political circumstances, the CBDT clause does not demonstrate a comparable functional necessity and may constrain Indonesia's regulatory space without clearly defined safeguards or exceptions. The comparison with the USMCA further demonstrates that greater precision can be achieved through objective compatibility mechanisms, clearly defined standards, and tiered exceptions. Accordingly, the study recommends that Indonesia and the United States adopt a supplementary instrument or undertake renegotiation to clarify the meaning and standards of "appropriate protection," establish an objective mechanism for assessing compatibility, and provide explicit exceptions that preserve legitimate domestic regulatory measures. These measures would strengthen legal certainty while maintaining the agreement's objective of facilitating digital trade.

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Accepted: 2026-11-04
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e-ISSN: 2621-4105
https://journals.usm.ac.id/index.php/julr
DOI: https://doi.org/10.26623/julr.v9i4.16113
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Acknowledgements

The authors would like to express their sincere gratitude to the Editor and the anonymous Reviewers for their time, insightful comments, and constructive suggestions, which have significantly contributed to improving this article. The authors also hope that this article will provide valuable insights, make a meaningful contribution to ongoing discussions in the relevant field, and benefit readers and future researchers.

Funding Information

This research was independently funded by the authors.

Declaration of Conflict of Interest

The authors declare that there are no conflicts of interest regarding the publication of this article.

Publication Ethics and Originality Statement

The authors affirm that this research is entirely original. This manuscript has not been previously published in print, online, or through any other medium, and it is not currently under consideration for publication in any other journal. All sources cited in the reference list have been documented in accordance with applicable academic citation standards and ethical principles.

Received: 2026-09-21
Accepted: 2026-11-04
Available: 2026-11-08
e-ISSN: 2621-4105
https://journals.usm.ac.id/index.php/julr
DOI: https://doi.org/10.26623/julr.v9i4.16113
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Declaration of Generative Artificial Intelligence Use

The authors declare that generative artificial intelligence was used as an assisting tool during the preparation of this manuscript. Specifically, Gemini, ChatGPT, Quillbot, and Grammarly were used to improve the language quality and overall readability of the text. All AI-generated outputs were critically reviewed, edited, and verified by the authors to ensure accuracy and maintain scientific integrity. The authors assume full responsibility for the final content of the manuscript. The use of generative artificial intelligence was limited to a supporting role and does not constitute authorship. Furthermore, no data analysis or interpretation was conducted by artificial intelligence without the authors' supervision and active involvement.