

the rise of digital trade: the role of e-commerce and data in the pandemic and beyond

An abstract, low-angle photograph of a modern building facade with sharp, angular white surfaces and large blue-tinted windows, creating a geometric pattern against a clear blue sky.

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deep transformations in trade due to digitization

- **global value chains (GVCs)**
- **servicification**
- **data flows**
- **data must cross borders:**
 - cross-border data flows now generate more economic value than traditional flows of traded goods
 - cross-border data flows fuel digital innovation
- **e-commerce < digital trade**



- like other factors of production, such as natural resources and human capital, it is increasingly the case that **much of modern economic activity, innovation and growth cannot occur without data**
- the transformative potential is great and refers not only to new 'digital native' areas, such as search or social networking but also to 'brick-and-mortar' businesses

- localization measures
 - data privacy and protection measures
 - intellectual property related measures
 - censorship
 - cybersecurity
-
- **rise of digital protectionism and the surge for data sovereignty**

trade policy responses to the digital transformation

- regulates **all trade** in goods and services, intellectual property protection
- broad membership: 164 members
- far-reaching rules based on the **principles of non-discrimination: most-favoured-nation (MFN) and national treatment (NT)**
- deep intervention into domestic legal systems: 'tying' regulators' hands to the mast
- unique and (largely) effective dispute settlement mechanism
- **high level of legalization**

Information Technology Agreement (ITA):

- covers 97% of trade in IT products; zero tariffs
- ITA II adopted in 2015; 200 new product lines added

GATS rules for telecommunication services:

- far-reaching commitments
- ***Annex on Telecommunications*** and the ***Reference Paper***: liberal regime for telecommunication networks and telecom services; competition law-like rules

GATS rules for computer and related services:

- far-reaching commitments; low barriers to trade and market access
- covering key sectors, such as data processing and data base services

WTO and digital trade: failed adaptation

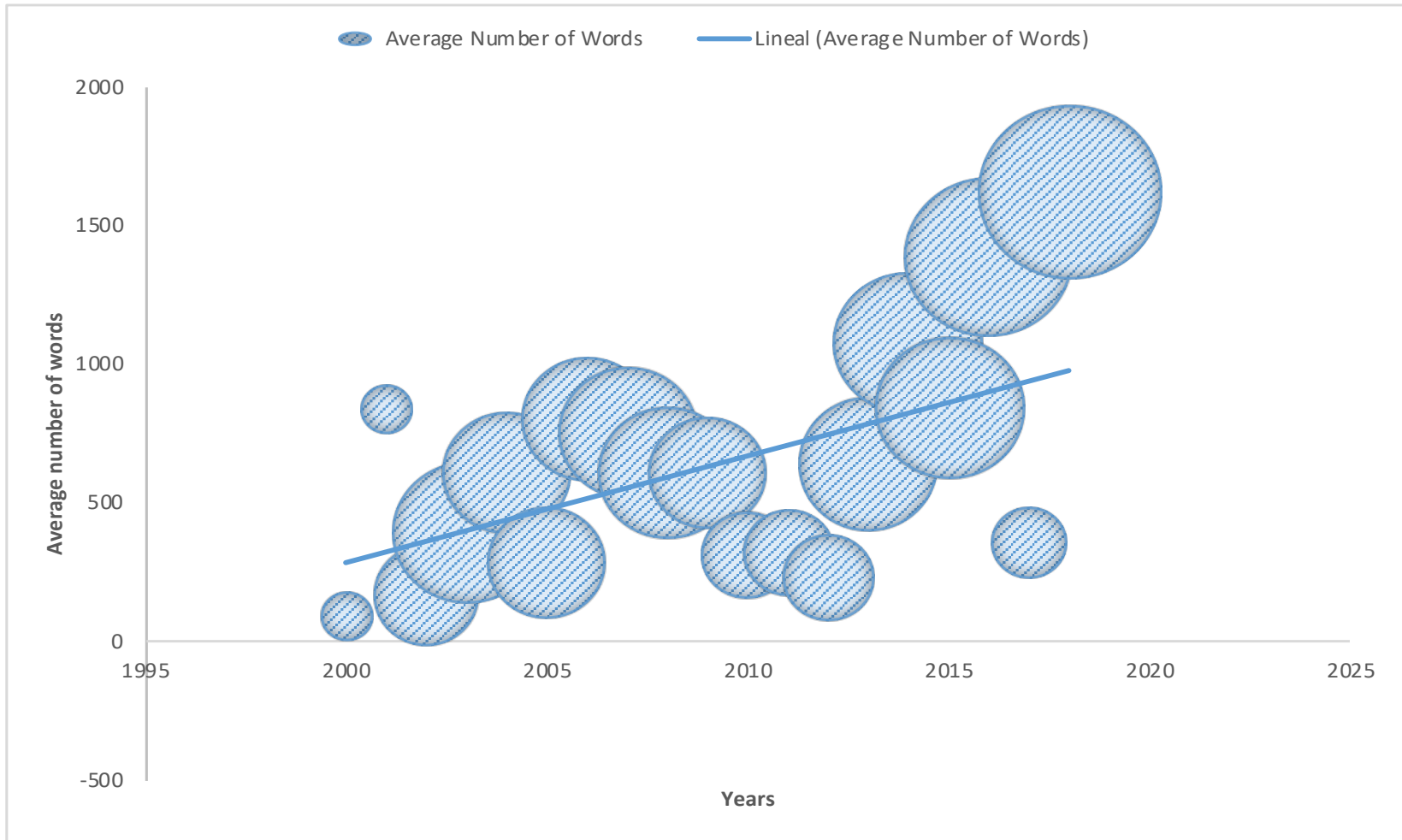
- **the 1998 WTO E-Commerce Programme:** great forward-oriented thinking
>> no action
- **no agreement even on basic issues, such as that the WTO rules apply to trade online let alone on more complex matters, such as classification:** goods vs. services;
telecom vs. audiovisual vs. computer-related services
- **some compensation through the case-law**
(*US-Gambling*; *China-Audiovisual Products*)
- >> venue-shopping triggered

- **from the 349 PTAs concluded between 2000 and 2020, 185 PTAs include provisions related to digital trade**
- **first e-commerce provision:** Article 7, Jordan-US FTA, signed 24 October 2000
- **first e-commerce chapter:** Singapore-Australia FTA (SAFTA), signed 17 February 2003
- **first general provisions on data flows:** Korea-US FTA (KORUS), signed 30 June 2007
- all agreements in 2019 and 2020 have digital trade provisions
- for data, see: <https://unilu.ch/taped>

taped.

trade agreement provisions on e-commerce and data flows

digital trade provisions in FTAs



- **3 FTA chapters to follow:**
 - dedicated e-commerce chapters
 - services chapters
 - IP chapters
- **addressing digital governance is a cross-sector issue**
- **WTO+ provisions**
- **but more importantly WTO extra issues**
- **data flows as a new negotiation topic**

Comprehensive and Progressive Agreement for Transpacific Partnership (CPTPP)

- the CPTPP chapter on e-commerce is the most comprehensive template
- identical with the TPP e-commerce chapter and in essence US-driven
- **substance:**
 - ban on customs duties on electronic transmissions, including content transmitted electronically
 - non-discriminatory treatment of digital products
 - a legal framework governing electronic transactions consistent with the principles of the *UNCITRAL Model Law on Electronic Commerce* 1996 or the *UN Convention on the Use of Electronic Communications in International Contracts* 2005
 - electronic authentication and electronic signatures
 - online consumer protection
 - paperless trading
 - spam
 - source code
 - net neutrality
 - cooperation, including on cybersecurity

Comprehensive and Progressive Agreement for Transpacific Partnership (CPTPP)

- **specific provisions on data flows:**
 - **explicit ban on data protectionism:** ‘Each Party shall allow the cross-border transfer of information by electronic means, including personal information, when this activity is for the conduct of the business of a covered person’
 - **localization measures prohibited**
 - **restrictions are permitted only for legitimate purposes** if they do not amount to ‘arbitrary or unjustifiable discrimination or a disguised restriction on trade’
 - **policy space of domestic data protection regimes**

- after CPTPP, a similar hard rule on data flows has been incorporated into other trade agreements: the 2016 **Chile-Uruguay** FTA, the 2016 **updated Singapore-Australia** FTA (SAFTA), the 2017 **Argentina-Chile FTA**, the 2018 **Singapore-Sri Lanka** FTA, the 2018 **Australia-Peru** FTA, the 2018 **United States-Mexico-Canada Agreement** (USMCA), the 2018 **Brazil-Chile** FTA, and in the 2019 **Australia-Indonesia FTA**
- **dedicated digital trade deals:**
 - **US-Japan Digital Trade Agreement (DTA)**
 - **Digital Economy Partnership Agreement (DEPA)** between Chile, NZ and Singapore

- Parties recognize the economic and social benefits of protecting the personal information of users of digital trade and the contribution that this makes to enhancing consumer confidence in digital trade.
- Each Party shall adopt or maintain a legal framework that provides for the protection of the personal information of the users of digital trade. **In the development of its legal framework for the protection of personal information, each Party should take into account principles and guidelines of relevant international bodies, such as the APEC Privacy Framework and the OECD Recommendation of the Council concerning Guidelines governing the Protection of Privacy and Transborder Flows of Personal Data (2013).**
- A Party may comply with this obligation by adopting or maintaining measures such as a comprehensive privacy, personal information or personal data protection laws, sector-specific laws covering privacy, or laws that provide for the enforcement of voluntary undertakings by enterprises relating to privacy.
- **The Parties recognize that these key principles include: limitation on collection; choice; data quality; purpose specification; use limitation; security safeguards; transparency; individual participation; and accountability.**

repositioning of the EU on data flows language

- earlier EU agreements (incl. CETA) contain essentially GATS-level commitments and cooperation provisions on e-commerce / no data flows language
- in the 2018 **EU-Japan Economic Partnership Agreement**, and in the Modernisation of the Trade part of the **EU-Mexico Global Agreement**, the Parties commit to 'reassess' within three years of the entry into force of the agreement, the need for inclusion of provisions on the free flow of data into the treaty
- the currently negotiated EU trade deals (**AU, NZ, Tunisia**) have data flows rules; **yet, coupled with the high standard of data protection under the EU GDPR** and including a number of safeguards (a revision clause plus a provision on the right to regulate)

- **emergence of a specific trade regime tailored to digital products and services**
- **digital trade not so much about market access but about interfacing domestic regimes, so as to provide interoperability and some certainty**
- **agreement on digital trade enablement issues, such as paperless trading, electronic contracts, custom duties moratorium**
- **disagreement on data flows vs. the protection of privacy and national security**

moving forward ...

- **form:** Reference Paper or Data Economy Agreement (as a multilateral or plurilateral deal); sequencing and graduation of obligations as a way to achieve political feasibility
- **contents:**
 - agreement on electronic contracts; electronic authentication and trust services; consumer protection; spam; custom duties moratorium
 - transparency and technological neutrality
 - non-discrimination of digital products
 - limitations on localization measures; free flow of data but room for domestic privacy rules
 - need to find reconciliation mechanisms in the sense of art. XIV GATS and art. XX GATT
- the ongoing WTO Joint Statement Initiative (2019) unlikely to yield comprehensive results for adequate governance of the data-driven economy

- **thank you for your attention !**
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