



**QUEEN'S INSTITUTE ON TRADE POLICY**

**DIGITAL TRADE GOVERNANCE:  
THE APPROACHES OF CANADA AND THE US**

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**18 NOVEMBER 2021**

## TALK POINTS

- **sketch developments in the dynamic field of digital trade governance**
- **explore the approaches of the US and Canada**
  - in FTAs
  - in the WTO
- **identify points of convergence and divergence**
- **identify implications for Canada's domestic policies**

## **BACKGROUND: CONTEMPORARY DIGITAL TRADE**

## THE DIGITAL ECONOMY: KEY WORDS IN THE TRADE POLICY JARGON

- next to online sale of goods and services:
- 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: **from trade 2.0 to trade 4.0**



## DATA AS THE 'NEW OIL'

- 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

## NEW DIGITAL TRADE BARRIERS

- localization measures
- data privacy and protection measures
- intellectual property related measures
- censorship
- cybersecurity
  
- **rise of digital protectionism and demands for data sovereignty**
  
- data: US International Trade Commission, Digital Trade in the U.S. and Global Economies: <http://www.usitc.gov/publications/332/pub4415.pdf>  
digital trade restrictiveness index: <https://ecipe.org/dte/>

# REGULATORY FRAMEWORKS OF RELEVANCE FOR DIGITAL TRADE

## WTO AND DIGITAL TRADE: FAILED ADAPTATION?

- **WTO rules: regulate all trade / far-reaching non-discrimination principles / high level of legalization**
- **the 1998 WTO E-Commerce Programme: great forward oriented thinking >> no action for 2 decades**
- no agreement even on basic issues; 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**



# DEVELOPMENTS IN FREE TRADE AGREEMENTS

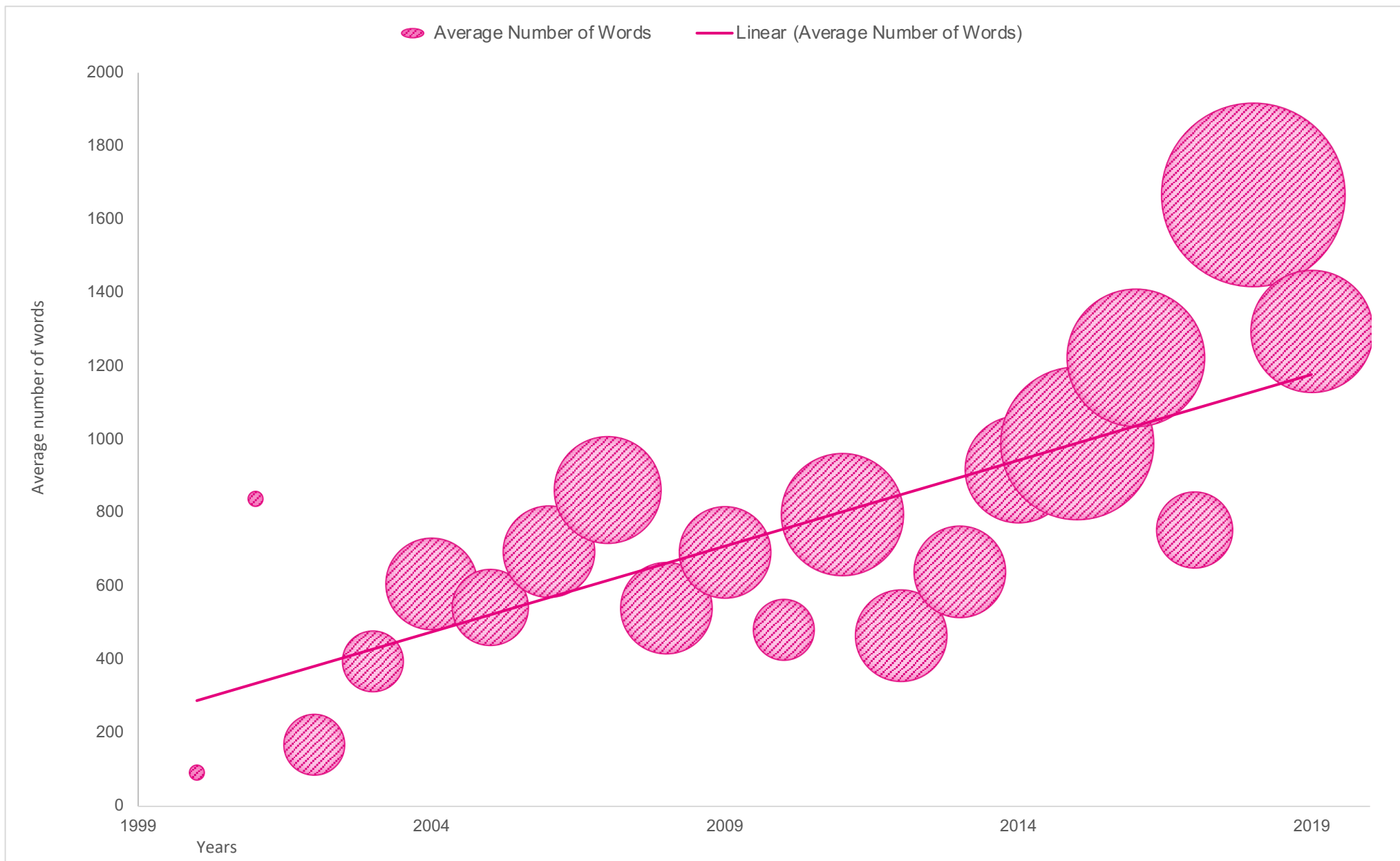
## FTAs AS DIGITAL TRADE RULE-MAKING VENUES

- 353 PTAs concluded between 2000 and 2021
  - 194 PTAs include provisions that are related to digital trade
  - 90 PTAs have dedicated e-commerce chapters
  - **only 33** agreements rules on data flows
  - privacy protection has become a trade topic in particular in recent PTAs
- 
- for data, see: <https://unilu.ch/taped>

**taped.**

trade agreement provisions on e-commerce and data flows

## DENSITY OF DIGITAL TRADE RULES



- **2002 new US Trade Promotion Authority (TPA)**
- a central innovation of the **new fast-track trade promotion authority is its instruction to the USTR to conclude trade agreements that anticipate and prevent the creation of new trade barriers that may surface in the digital trade environment**
- **strong lobbying:** powerful alliances of US business associations that represent high-tech firms (e.g. Information Technology Industry Council) and associations that represent classical content producing firms (e.g. Motion Picture Association of America)
- **concurrent bilateral, regional and multilateral approach**

## US FTAs

- **the agreements reached by the US since 2002 with Australia, Bahrain, Chile, Morocco, Oman, Peru, Singapore, the Central American countries, Panama, Colombia and South Korea, all contain critical provisions in the broader field of digital trade**
- diffusion of the US template: e.g. Singapore–Australia, Thailand–Australia, Thailand–New Zealand, New Zealand–Singapore, India–Singapore, Japan–Singapore and South Korea–Singapore
- **3 PTA chapters are relevant:**
  - **dedicated e-commerce chapters**
  - services chapters
  - IP chapters

**COMPREHENSIVE AND PROGRESSIVE AGREEMENT FOR  
TRANSPACIFIC PARTNERSHIP (CPTPP)**

## CPTPP: E-COMMERCE CHAPTER

- the CPTPP chapter on e-commerce is the most comprehensive so far
- 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**

## CPTPP: E-COMMERCE CHAPTER

- **specific rules on data:**
  - **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’
  - **low standards of data privacy protection**



## POST-CPTPP DEVELOPMENTS

- similar hard rules on data flows incorporated in other trade agreements, largely following the same wording:
- 2016 **Chile-Uruguay** FTA
- 2016 **updated Singapore-Australia** FTA (SAFTA)
- 2017 **Argentina-Chile** FTA
- 2018 **Singapore-Sri Lanka** FTA
- 2018 **Australia-Peru** FTA
- **2018 United States-Mexico-Canada Agreement (USMCA)**
- 2019 **Brazil-Chile** FTA
- 2019 **Australia-Indonesia** FTA
- **2019 Japan-US Digital Trade Agreement**
- **2020 DEPA: Chile, New Zealand, Singapore**

## USMCA

- **replicates and extends the CPTPP chapter:** the same broad scope of application; ban customs duties on electronic transmissions and binds the parties for non-discriminatory treatment of digital products; electronic contracts, electronic authentication and signatures, and paperless trading
- **ban on data localization and incorporates a hard rule on free information flows**
- **new elements:**
  - **inclusion of ‘algorithms’**, the meaning of which is ‘a defined sequence of steps, taken to solve a problem or obtain a result’ and has become part of the ban on requirements for the transfer or access to source code (Article 19.16)
  - **‘interactive computer services’**: Parties pledge not to ‘adopt or maintain measures that treat a supplier or user of an interactive computer service as an information content provider in determining liability for harms related to information stored, processed, transmitted, distributed, or made available by the service, except to the extent the supplier or user has, in whole or in part, created, or developed the information’
  - **open government data**

## USMCA (2018): ART. 19.8: PERSONAL INFORMATION PROTECTION

- 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.**

## USMCA (2018): ART. 19.8: PERSONAL INFORMATION PROTECTION

- **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.**
- The Parties also recognize the importance of ensuring compliance with measures to protect personal information and ensuring that **any restrictions on cross-border flows of personal information are necessary and proportionate to the risks presented.**
- Each Party shall endeavor to adopt non-discriminatory practices in protecting users of digital trade from personal information protection violations occurring within its jurisdiction.
- Each Party shall publish information on the personal information protections it provides to users of digital trade, including how: (a) individuals can pursue remedies; and (b) business can comply with any legal requirements.
- Parties may take different legal approaches to protecting personal information, each Party should encourage the development of mechanisms to promote compatibility between these different regimes.

## US-JAPAN DIGITAL TRADE AGREEMENT (DTA)

- the US approach confirmed also by the DTA, signed on 7 October 2019, alongside the US–Japan Trade Agreement
- **the DTA replicates almost all provisions of the USMCA and the CPTPP**, including the new USMCA rules on open government data, source code and interactive computer services but notably covering also financial and insurance services as part of the scope of agreement
- **new provision on ICT goods that use cryptography**: Article 21 DTA specifies that for such goods designed for commercial applications, neither party shall require a manufacturer or supplier of the ICT good as a condition to entering the market to: (a) transfer or provide access to any proprietary information relating to cryptography; (b) partner or otherwise cooperate with a person in the territory of the Party in the development, manufacture, sale, distribution, import, or use of the ICT good; or (c) use or integrate a particular cryptographic algorithm or cipher (similar to Annex 8-B, Section A.3 of the CPTPP Chapter on technical trade barriers)
- **things missing in the DTA when compared to the USMCA: rules on paperless trading, net neutrality and the mention of data protection principles**

## REPOSITIONING OF THE EU ON DATA FLOWS COMMITMENTS

- 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**)
- **the EU model has been recently endorsed in the post-Brexit Trade and Cooperation Agreement (TCA) with the UK**

## REGIONAL COMPREHENSIVE ECONOMIC PARTNERSHIP (RCEP): RULES ON DATA FLOWS

- **ban on localization measures (art. 12.14) as well as a commitment to free data flows (art. 12.15)**
- **while the RCEP is almost a mirror image of the CPTPP, there are clarifications that give RCEP members a lot policy space:**
  - **‘For the purposes of this subparagraph, the Parties affirm that the necessity behind the implementation of such legitimate public policy shall be decided by the implementing Party’ (footnote to art. 12.14.3(a))**
  - **+ the article does not prevent a party from taking ‘any measure that it considers necessary for the protection of its essential security interests. Such measures shall not be disputed by other Parties’ (art. 12.14.3(b))**
  - **similar policy space protected with regard to data flows (art. 12.15)**

## DIGITAL ECONOMY PARTNERSHIP AGREEMENT (DEPA)

- the 2020 DEPA between Chile, New Zealand, and Singapore, all parties to the CPTPP, is not conceptualized as a purely trade agreement but one that is meant to address the broader issues of the digital economy; its scope is wide, open and flexible
- **modular approach**
- the type of rules varies across the different modules: all rules of the CPTPP are replicated, **some of the USMCA rules, such as the one on open government data (but not source code), and some of the US–Japan DTA provisions, such as the one on ICT goods using cryptography; no rules on interactive computer services**
- **new unknown to previous agreements elements:** e.g. artificial intelligence (AI), digital inclusion, digital identities



## NEW WTO NEGOTIATIONS ON ELECTRONIC COMMERCE

- **the Joint Statement Initiative:** new initiative in 2019 for an agreement on e-commerce
- 86 participating WTO members
- progress made on provisions that seek to enable e-commerce (such as e-contracts, paperless trading, spam, electronic signatures and electronic authentication; also on consumer protection and open government data)
- **yet, on key issues, such as notably free flow of data – serious divergences amongst stakeholders**
- legal form of the agreement unclear
- Canada's proposal: **follows the CPTPP**
- US proposal: **follows the USMCA + DTA**

## IMPLICATIONS FOR CANADA'S DOMESTIC POLICIES

- **constrained domestic policy space due to the commitments on data flows and non-discrimination of digital products (USMCA + CPTPP)**
- **constrained space on cultural policies:**
- the cultural exemption under the USMCA allows the US or Mexico to retaliate ('may take a measure of equivalent commercial effect'); all retaliation disputes are to be resolved under the USMCA but not under the WTO
- Annex 15-D requires Canada to (1) rescind the Canadian Radio-television and Telecommunications Commission regulatory policy that stopped the simultaneous substitution policy for broadcasts (the main problem being the Super Bowl) and (2) enable US home shopping broadcast services to be authorized for distribution in Canada (the main problem being the QVC)
- **'interactive computer services' commitments may limit Canadian policies for platform regulation**
- **constrained space for domestic privacy protection policies / potential difficulties to meet the EU standards of 'essentially equivalent' data protection framework, when updating Canada's Adequacy decision**

**thank you.**

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