

Navigating US-China Relations: How Can Canada Position Itself Among Competing Digital Trade Regimes?

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Issue

Given the absence of a global consensus on digital trade, three key competing regimes governing privacy, competition and cross-border data flows have emerged that reduce Canada's digital policy flexibility. To maximize benefits from the digital economy, Canada should strategically position itself amongst these three key regimes.

Background

Digital trade refers to all cross-border trade transactions that are either digitally ordered, digitally facilitated, or digitally delivered (Organization for Economic Co-operation and Development [OECD] 2020a). Underpinning digital trade is the management of cross-border data flows and data privacy. For innovative firms, data is not only a means of production, but also a valuable economic asset in and of itself that can be used to improve business analytics and supply chain management, among others. Since 2015, cross-border data flows have exceeded the value of cross-border merchandise trade and it is estimated to reach a value-added of USD 11 trillion by 2025 (OECD 2020b). The COVID-19 pandemic has demonstrated the importance of the digital sphere, accelerating the need to establish global norms and rules (Vlassis 2020). Thus, Canada should better position itself at the forefront of digital trade issues and play an essential role in driving an international consensus on digital trade that is consonant with Canadian values and interests.

The three major digital trade regimes

United States (US)

The US takes a laissez-faire approach to governing digital trade, reflecting the early days of its development, where there were few government regulations. While digital provisions within free trade agreements (FTAs) have strengthened, they continue to enforce free movement. The digital trade provisions within the Canada-US-Mexico free trade agreement (CUSMA) reflect the US approach of reducing barriers to facilitate an open regime. For example, CUSMA bans duties on electronic transmissions, discrimination against foreign digital products, restrictions on cross-border data flows, forced localization requirements, and forced transfer of source codes (Government of Canada 2019). Privacy has not traditionally been a principal policy pretext for digital trade issues for US policymakers. This is unsurprising since the dominant players in global tech are US-based firms that benefit from relaxed privacy laws and strong intellectual property (IP) protection for their proprietary data stores. However, this may be changing under the Biden administration - as demonstrated by the 2021 Group of Seven (G7) Digital and Technology Ministerial Declaration where G7 leaders agreed to deepen cooperation on data protection and competition (Rahill 2021; Feiner 2021).

China

The Chinese approach digital trade more cautiously. The most important element for the Chinese regime is extensive barriers to international data flows (United Kingdom [UK] Office for Science 2020). China’s data governance regime can be seen through the Regional Comprehensive Economic Partnership (RCEP). Under RCEP, Parties can deem restrictive data policies necessary, free from scrutiny by other Parties; data localization can be justified under certain conditions; and although member countries commit to take into account data protection standards, none are explicitly referenced (Streinz 2021). RCEP also excludes digital trade chapters from state-to-state dispute settlement provisions. As a result, Parties are free to pursue privacy and data protection framework and retain highly restrictive digital regimes with minimal regulatory constraints or external challenges.




European Union (EU)

The EU data regime is centred around fundamental individual rights such as privacy and data protection. It includes a single harmonized digital market across the EU that provides stability for business operators and enables the free flow of personal data (UK Office for Science 2020). As such, broad alignment with EU standards is required to enable the international free flow of personal data with the EU. This can often present a barrier between the EU and countries that adopt alternative approaches to data protection (UK Office for Science 2020). The EU’s digital priorities are visible within the Comprehensive Economic and Trade Agreement (CETA). CETA protects the free flow of data across borders, improves market access and transparency, addresses digital trade barriers, and includes provisions on the protection of personal information (Government of Canada 2017). However, CETA fails to address data localization. Although it is non-binding, CETA also provides a framework for domestic competition legislation aimed at preventing harmful anti-competitive conduct.

Canada’s Policy Space and Position

CUSMA and the CPTPP oppose the use of data localization requirements and constrain Canada’s ability to require foreign firms to use domestic computing facilities when operating in Canada (Phull 2019; de Beer 2020; Ciuriak 2019). Additionally, CUSMA, the CPTPP and CETA each required changes to

Figure 1: Summary of the Three Competing Regimes

| | Data Protection and Privacy | Competition Law | International Policy |
|---|--|---|--|
|  | No comprehensive federal law; not historically prioritized | Data is not typically seen as a competition issue | Promotes free data flow |
|  | Some rules for businesses, but not for government | Unclear if data is considered a competition issue; may support domestic and state-owned companies | Extensive barriers to international data flows |
|  | Fundamental individual rights | Data can be considered a competition issue | Free data flow within EU and certain states |

Source: Re-created from United Kingdom Office for Science 2020.

Canada’s patent, data protection, and trade secrecy laws (de Beer 2020). These areas of IP are most crucial for data ownership and control over data intensive technologies, such as artificial intelligence and biomedical technologies (de Beer 2020). While these concessions were made to achieve gains in other areas of the economy (de Beer 2018), they have limited Canada’s short-term rent-capturing ability and Canada’s policy flexibility to develop its own digital trade strategy.

The 2019 Digital Charter provides a broad roadmap of 10 core principles that outline Canadian digital trade interests. These principles seek to strengthen Canada’s data protection and privacy laws while also ensuring that Canadian firms can take advantage of the digital economy (Government of Canada 2020). Based on these principles, the Digital Charter Implementation Act (DCIA) seeks to introduce actionable policies; however, it has been criticized for lacking both clear guidance and connections with on-going global digital trade discussions (de Beer 2020).

Canada’s data privacy and protection policies, in particular the Personal Information Protection and Electronic Documents Act (PIPEDA) and the Privacy Act, regulate how the private and public sectors, respectively, collect, utilize, and disclose personal information (Office of the Privacy Commissioner of Canada 2019; Government of Canada 1985). These Acts, paired with the DCIA indicate Canada’s interest in data privacy. Although the DCIA distinguishes Canada’s data protection approach from the EU’s General Data Protection Regulation (GDPR) by applying a principle-based data protection approach that is founded on consumer-protection and outlining algorithmic accountability requirements, the

two approaches are nonetheless closely aligned (Piovesan, Corriveau and Xu 2020).

Central to Canada's approach to competition policy is its Competition Bureau and associated Competition Act which governs most business conduct and aims to prevent anti-competitive practices (Government of Canada 2018). The Competition Bureau's 2020-2024 Strategic Vision outlines the leadership role that Canada should play, both domestically and internationally, to adapt competition policy to the impact of the global digital economy (Competition Bureau of Canada 2020). Additionally, while the DCIA seeks to secure fair competition in the online marketplace, it has not yet substantiated any laws or policies in this area (de Beer 2020).

Next steps

Considering Canada's economic and security relations with the US, EU and other like-minded partners and that Canada's digital trade interests differ substantially from China's, it is unlikely that Canada would adopt or promote China's digital trade regime. The EU digital trade regime shows signs of promise for cooperation, particularly on privacy laws. While Canada's commitments through CUSMA have limited its digital policy flexibility, the US remains Canada's most important trading partner. If Canada pursues any digital trade policies that conflict with those of the US, Canada will need to carefully consider their impact on Canada-US cross border data flows.

Canada should be more proactive in declaring and projecting its digital interests globally. While the pending DCIA demonstrates Canada's interest in strengthening data protection and competition law, moving forward Canada should use the Digital Charter to introduce clear and strategic laws and policies to address these digital trade issue areas (de Beer 2020; Ciuriak 2019). Once its policies are refined, Canada can take both defensive and offensive measures to ensure that the Canadian economy is well positioned for the future.

Defensively, Canada's digital trade concessions via international agreements limit its ability to take advantage of the digital economy (de Beer 2020). Therefore, Canada should consider protecting its remaining policy flexibility within existing and future international agreements. On the other hand, Canada should take a more offensive approach to digital trade issues. The G7, OECD, and World Trade Organization (WTO) present opportunities

for Canada to directly influence the global digital agenda and limit protectionist policies.

Leading up to the 2021 Cornwall Summit and by leveraging the OECD's work on digital trade, G7 leaders have worked to advance the agenda for WTO reforms on the issue of digital trade (G7 2021a). The G7 has sought to address two key areas of digital trade that are of importance to Canada: first, privacy and data protection laws as a means to create trust and increase participation within the digital economy; second, further regulatory cooperation to facilitate greater competition (G7 2021b). Canada should leverage future G7 and WTO engagements, such as the upcoming 12th WTO Ministerial Conference (MC12) and the Future Tech Forum hosted by the UK in September 2021 (G7 2021b). These fora can provide opportunities to reshape global digital norms with the objective of replacing provisions within existing international agreements, such as CUSMA, that limit Canada's policy flexibility.

Canada should also project its digital trade interests through the Digital Economy Partnership Agreement (DEPA). Thus far, DEPA has addressed numerous digital trade concerns and it plans to promote interoperability between different global data regimes and create competition policies to regulate big data firms (Ministry of Trade and Industry Singapore 2021; Aaronson 2021). Canada began exploratory discussions with DEPA parties in February 2021 and is currently conducting consultations with the public. As an early DEPA member, Canada would play a valuable role in the future developments of the agreement (Government of Canada 2021). DEPA could create a critical mass of states with shared digital economy goals and norms that can provide greater leverage when negotiating with larger states (Nagy 2019; Heisler 2021) and could be used in WTO negotiations (Greenleaf 2019).

Lastly, Canada should promote its digital trade interests by pursuing soft law measures with smaller, rising nations and alliances such as those in Africa, Asia-Pacific and Latin America (de Beer 2020), including in the Organisation Internationale de la Francophonie.

Recommendations

The following five recommendations are in line with Minister Garneau's mandate letter stating that Canada should reinforce its engagement within existing international institutions, while also placing itself at the forefront of global governance on emerging issues. In order for Global Affairs to achieve these recommendations they will need to collaborate with the Treasury Board of Canada Secretariat, the Department of Finance Canada, and Innovation, Science, and Economic Development Canada.

1. **Canada should build upon the Competition Bureau's Strategic Vision on digital trade and the Digital Charter Implementation Act to establish a position on competition law with actionable laws and policies.** Canada should develop a clear position on competition law that will help Canadian firms take advantage of the digital economy. The Government of Canada should continue to consult with the Canadian tech industry, experts (including at the Centre for International Governance Innovation), and the public to determine an approach to competition law that will be most beneficial to Canada, including further studies on the feasibility of an open-data regime.
2. **To maximize benefits from digital trade, Canada should protect its remaining policy flexibility in the digital trade space.** Specifically, as part of negotiations Canada should avoid making further concessions on data protection and privacy, competition law, and the free flow of data in both existing and future international trade agreements.
3. **Canada should take advantage of the momentum within the G7 and OECD for WTO reform leading up to the MC12 to ensure Canadian firms become increasingly competitive globally.** Within these fora, Canada should advocate for a more open and equitable data-sharing regime where data is either free or the value of the marginal costs of production and dissemination. However, a more open data sharing regime should also be paired with strong data privacy laws. Given that Canada's data privacy interests, as outlined in the DCIA, align closely with GDPR provisions, Canada should work with the EU to shape the global standard.
4. **Canada should join DEPA.** Through DEPA, Canada can develop frameworks for data protection, competition law, and data flows that are both beneficial to Canada and attractive to smaller states, such as by establishing a degree of policy flexibility (Ciuriak and Ptsashkina 2018).
5. **Canada should promote its digital trade interests by pursuing soft law measures.** This can be accomplished by setting standards and best practices through greater capacity building (i.e. research partnerships) and engagement with these smaller, rising nations. Canada should take advantage of its Francophonie culture to engage with countries within the Organisation Internationale de la Francophonie.

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References

- Aaronson, Susan A. 2021. *The One Trade Agreement Biden Should Sign Up For Now*. <https://www.barrons.com/articles/the-one-trade-agreement-biden-should-sign-up-for-now-51614607309>.
- Ciuriak, Dan. 2019. “The Data-driven Economy: Implications for Canada’s Economic Strategy”. CIGI Policy Brief No. 151. <https://www.cigionline.org/publications/data-driven-economy-implications-canadas-economic-strategy>.
- Ciuriak, Dan and Maria Ptsashkina. 2018. *Started the Digital Trade Wars Have: Delineating the Regulatory Battlegrounds*. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3098982.
- Competition Bureau of Canada. 2020. *Competition in the digital age: The Competition Bureau’s Strategic Vision for 2020-2024*. [https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Strategic-Vision-2020-24-En.pdf/\\$file/Strategic-Vision-2020-24-En.pdf](https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Strategic-Vision-2020-24-En.pdf/$file/Strategic-Vision-2020-24-En.pdf).
- de Beer, Jeremy. 2018. “Intellectual Property Chapter of USMCA Proves Canada’s Pragmatism.” <https://www.cigionline.org/articles/intellectual-property-chapter-usmca-proves-canadas-pragmatism>.
- de Beer, Jeremy. 2020. “An International Intellectual Property and Digital Trade Strategy.” https://www.cigionline.org/publications/international-intellectual-property-and-digital-trade-strategy-canada?fbclid=IwAR1f_m50HFm4leMo9nr3hpE31yfArR3gSuOIwvY8zzq4FFSZdgvHtzD08mM.
- Feiner, Lauren. 2021. *Big Tech critic Tim Wu joins Biden administration to work on competition policy*. <https://www.cbc.com/2021/03/05/big-tech-critic-tim-wu-joins-biden-administration-to-work-on-competition-policy.html>.
- Group of 7. 2021a. “G7 Trade Ministers’ Meeting – Chair’s Statement.” <https://www.g7uk.org/g7-trade-ministers-meeting-chairs-statement/>.
- Group of 7. 2021b. “G7 Digital and Technology - Ministerial Declaration.” <https://www.gov.uk/government/publications/g7-digital-and-technology-ministerial-declaration>.
- Government of Canada. 2017. *Chapter Summaries*. www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/chapter_summary-resume_chapitre.aspx?lang=eng#a15.
- Government of Canada. 2018. *The Competition Act*. <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04267.html>.
- Government of Canada. 2019. *Canada-US-Mexico Agreement*. <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/text-texte/toc-tdm.aspx?lang=eng>.
- Government of Canada. 2020. *Fact Sheet: Digital Charter Implementation Act, 2020*. <https://www.ic.gc.ca/eic/site/062.nsf/eng/00119.html>.
- Government of Canada. 2021. *Background: Canada’s possible accession to the Digital Economy Partnership Agreement*. <https://www.international.gc.ca/trade-commerce/consultations/depa-apen/background-information.aspx?lang=eng>.
- Government of Canada. 1985. *Privacy Act*. <https://laws-lois.justice.gc.ca/ENG/ACTS/P-21/index.html>.
- Greenleaf, Graham. 2019. *G20 makes declaration of ‘Data Free Flow With Trust’: Support and dissent*. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3514407.
- Heisler, Jay. 2021. “Smaller Economies See Big Opportunities in Digital Trade Pact.” VOA News, April 21. <https://www.voanews.com/economy-business/smaller-economies-see-big-opportunities-digital-trade-pact>.
- Ministry of Trade and Industry Singapore. 2021. *Improving Trade: The Digital Economy Partnership Agreement*. <https://www.mti.gov.sg/Improving-Trade/Digital-Economy-Agreements/The-Digital-Economy-Partnership-Agreement>.
- Nagy, Stephen R. 2020. “Middle Power alignment in the Indo-Pacific: Securing agency through Neo-middle Power Diplomacy.” Paper presented at U.S. Naval War College and East Asia Security Centre Conference 2019. East Asia Security Centre, International Christian University, August.

- Organization for Economic Co-operation and Development. 2020a. *Handbook on Measuring Digital Trade*. OECD, WTO and IMF. <https://www.oecd.org/sdd/its/Handbook-on-Measuring-Digital-Trade-Version-1.pdf>.
- Organization for Economic Co-operation and Development. 2020b. *Measuring the Economic Value of Data and Cross-Border Data Flows: A Business Perspective*. OECD Digital Economy Papers, no. 297. <https://www.oecd.org/sti/measuring-the-economic-value-of-data-and-cross-border-data-flows-6345995e-en.htm>.
- Office of the Privacy Commissioner of Canada. 2019. *PIPEDA in brief*. https://www.priv.gc.ca/en/privacy-topics/privacy-laws-in-canada/the-personal-information-protection-and-electronic-documents-act-pipeda/pipeda_brief/.
- Phull, Chetan. 2019. *Big Data Law in Canada*. Toronto, ON: Smartblock Law Professional Corporation. <https://www.smartblocklaw.com/blog/big-data-law-in-canada>.
- Piovesan, Carole, Noel Corriveau and Ellen Xu. 2020. "Canada: Privacy Law For The Digital Economy: The New Digital Charter Implementation Act." November 29. <https://www.mondaq.com/canada/privacy-protection/1010638/privacy-law-for-the-digital-economy-the-new-digital-charter-implementation-act>.
- Rahill, Colin. 2021. "The State of Privacy under a Biden Administration: Federal Cybersecurity Legislation, Strict Regulatory Enforcement, and a New Privacy Shield with the EU." *Jolt Digest*, February 20. <https://jolt.law.harvard.edu/digest/the-state-of-privacy-under-a-biden-administration-federal-cybersecurity-legislation-strict-regulatory-enforcement-and-a-new-privacy-shield-with-the-eu>.
- Streinz, Thomas. 2021. "RCEP'S Contribution to Global Data Governance." *Afronomics Law*, February 19. <https://www.afronomicslaw.org/category/analysis/rceps-contribution-global-data-governance-0>.
- United Kingdom Government Office for Science. 2020. *The future of citizen data systems: Evidence and scenarios for global data systems*. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/927547/GOS_The_Future_of_Citizen_Data_Systems_Report__2_.pdf.
- Vlassis, Antonios. 2020. "Online Platforms and Culture: The Winning Actors of the Great Lockdown? (Global Watch on Culture and Digital Trade, N°4)". International Federation of Coalitions for Cultural Diversity. https://www.researchgate.net/publication/341649530_Online_Platforms_and_Culture_The_Winning_Actors_of_the_Great_Lockdown_Global_watch_on_culture_and_digital_trade_n4.