Chapter 10

The new rules on digital trade in Latin America: regional trade agreements

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Abstract

While recent technological advances have supported an increase in digital trade, this growth has occurred with a lack of clear and defined rules. This deficiency has become an issue for Latin American countries. With the multilateral trade regime impasse, more complex regional and bilateral agreements have emerged. The formulation of digital trade regulation raises many questions. In this chapter we deal with the new rules on digital trade in regional trade agreements (RTAs) recently negotiated by Latin American economies. In this work, special emphasis is given to comparing the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and the United States-Mexico-Canada Agreement (USMCA), the most advanced RTAs regarding these issues.

** The contents of this chapter are the sole responsibility of the authors and are not meant to represent the position or opinions of the WTO or its members.*

Introduction

The emergence of digital trade is a new phenomenon that governments are not sure how to confront. In this context, many Latin American countries are dealing with international commitments where they do not have domestic regulation. The main concern is how these regulations are created in international agreements and what challenges they represent for the countries. As Wolfe (2018) indicates, "the digital trade story is about how states are learning to solve the problems of state responsibility for something that does not respect their borders while still allowing 21st century commerce to develop".

Given that digital trade is a recent topic and has appeared in an open World Trade Organization (WTO) new era, direct trade restrictions on digital trade have not yet evolved, so there is little need to liberalize it in the traditional sense. Rather, the focus is on preventing countries from adapting non-digital trade protection measures in this new area (Ciuriak & Ptashkina, 2018, p. 6), as well as facilitating the growth of digital trade.

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Government policies can impede digital trade due to differences in regulatory frameworks, some for legitimate or defensible reasons like privacy, consumer protection and national security, and others for reasons considered less legitimate, like protectionism or the promotion of domestic businesses (Monteiro and Teh, 2017). These policy and regulatory frictions limit the cross-border flows of digital goods, services and data, and the potential gains of digitization for trade and growth are not automatically translated to developing economies (Suominen, 2017a, 2017b). As such, there is a need for clear digital trade provisions in trade agreements to create certainty through new rules.

Currently, digital trade has been seen as of particular concern for developed and large economies, but developing economies, like Chile and Mexico, are increasingly affected and active in this domain. The failure of the WTO to develop clear rules for digital trade has meant that the focus has moved to the bilateral and regional levels, where new norms are being proposed and experimented with. The most developed set of norms can be found in the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and the United States-Mexico-Canada Free Trade Agreement (USMCA).

In this chapter, we first examine the WTO and global digital trade regulations. The second section examines regional agreements, Asia-Pacific Economic Cooperation (APEC) and the CPTPP, and the effects on the Pacific Alliance. CPTPP has been considered as key due to its inclusion of a comprehensive set of new digital trade rules and for its effect on countries in the region. We also include a legal analysis of the USMCA

provisions and compare the USMCA with the CPTPP, in order to understand the ways in which new regulations for digital trade are likely to be interpreted. Finally, some concluding remarks are presented.

The WTO and global digital trade regulations

International digital trade presents a challenge due to the lack of clearly defined global rules, meaning that there is no coherent set of guidelines for countries to ensure the free flow of digital trade internationally (Suominen, 2017a). The last major round of negotiations of the WTO to have been completed, the Uruguay Round, predated the rise of digital trade, and, since then, no real progress has been made to update the rules. The need, however, has been present in the multilateral agenda since 1998, when the WTO Work Programme on Electronic Commerce was created to examine all trade issues relating to digital trade. Although the group was not mandated to create a set of rules, there is a general perception that it has made no substantive progress, and multilateral efforts have stalled (Monteiro and Teh, 2017; Wu, 2017). Although the WTO held a ministerial meeting in Argentina in December 2017, which produced a Joint Statement on Electronic Commerce, there is little indication that the idea will be successful (Meltzer, 2018). Ciuriak and Ptashkina (2018) indicate that the WTO has been largely on the sidelines in shaping the framework for digital and digitally enabled trade.

The "multilateral regulatory framework on e-commerce is incomplete" (Giordano, Ramos Martínez, Michalczewsky and Ramos, 2017, p. 54). Wu (2017) argues that the limitations of existing WTO rules push members to establish additional legal obligations to govern digital trade. The issues that need to be resolved include definitions of what constitutes digitally traded products and non-physical digital goods and services, how to update WTO classifications challenged by technological advances, improving market access, securing and facilitating cross-border data flows, implementing consumer-related regulatory measures like protecting personal data, stopping unsolicited electronic messages and safeguarding the right to be forgotten, as well as improving security, and finally, facilitating trade through digital means like electronic documentation. Callo-Müller (2019) specifically highlights the need for consumer protection and data protection regulations.

Regional agreements: APEC-CPTPP, Pacific Alliance and UMSCA

Due to the failure of the WTO to successfully work towards a set of multilateral digital trade rules, RTAs have become the focus of efforts to develop digital trade rules (Meltzer, 2018). As a result, "RTAs are sometimes viewed as a laboratory enabling countries to design new provisions and address new issues and challenges" (Monteiro and Teh, 2017, p. 70).

When combined with regional integration schemes like the Pacific Alliance (PA) and the APEC forum, RTAs can facilitate intraregional trade and support the creation of large, integrated digital markets (and the creation of digital giants) that enable local firms to reap economies of scale and thus lower operating costs, as well

as encourage investment and the creation of start-ups. In order for economies to benefit from the changes brought about by the digital economy, it is necessary to establish transparent rules, freedom of innovation, a level playing field and interoperability among economies (Suominen, 2017a, 2017b).

Ciuriak and Ptashkina (2018, p. 15), however, argue that the RTA-driven development of new digital trade rules has probably reached its limits and will probably come to an end with the finalisation of the major agreements currently under negotiation. Moreover, RTAs do not always tackle the full range of problems associated with the changes to global trade, and they tend to avoid certain intractable and politically sensitive issues (Wu, 2017).

Wu (2017) dispels the myth that robust digital trade regulations are only demanded by large developed countries. Although countries in Latin America and the Caribbean have shown a commitment to expanding digital trade opportunities, the lack of common regional rules for digital trade limits the scope for expansion in trade within the region (Meltzer, 2018). Specifically, the opportunities that are created by online cross-border data flows depend on regulations to give consumers and companies the confidence to participate in these interactions, protection of the freedom of data flows across borders and cooperation between countries to protect against and limit negative externalities and possible protectionist measures (Meltzer, 2016).

The capacity of the region to capitalize on developments in digital trade is dependent on the modernization of the region's regulatory framework (Giordano et al., 2017). The authors find that the types and depth of commitments in RTAs in Latin America (16 intraregional and 19 extra-regional agreements) vary widely, with greater inclusion of digital trade facilitation, some rules regarding market access and near exclusion of user protection commitments. Using CPTPP as benchmark, they conclude that only 13 per cent of the actual commitments on digital trade-related provisions included in their agreement were to be replaced by those included in CPTPP.

Although all RTAs that include Latin American countries have worked on issues related to the digital economy, Patiño, Rojas and Agudelo (2018, p. 36) highlight that the most recent ones, in particular the CPTPP and the Pacific Alliance, put special emphasis on trade and development aspects related to the internet and digital trade.

APEC-CPTPP

The Trans-Pacific Partnership (TPP) was originally considered to be the nucleus of a future Asia Pacific RTA that would cover the APEC zone (Stephenson and Robert in Callo-Müller, 2019). All the current members of the CPTPP are members of APEC, and the group represents just over half of all APEC members. As a consensus-based space for dialogue, APEC's commitment to the digital trade economy is built on non-binding agreements and cooperation between its members, rather than on binding agreements like RTAs, as is the case of the Pacific Alliance Additional Protocol (PAAP) and the CPTPP. However, despite this fact and that not all the topics present in the CPTPP are addressed, the discussion panels and the work of the expert groups have served as the basis for the creation of

public policies in APEC countries and the incorporation of key topics into trade agreements entered into by member states. As such, there is a convergence between the topics looked at by APEC and the CPTPP (Observatorio Estratégico de la Alianza del Pacífico, 2017).

The group has a number of initiatives that focus on digital trade. These include the Electronic Commerce Steering Group, based on the principles established in the 1998 APEC Blueprint for Action on Electronic Commerce, which works to promote digital trade through predictable, transparent and consistent legal, regulatory and policy environments. Its work to strengthen privacy protection and to promote cross-border privacy rules via the voluntary Cross-Border Privacy Rules and System, and the Privacy Recognition Processors System programme stands out (APEC Electronic Commerce Steering Group, 2017). Also important is the Paperless Trading Subgroup, which looks to facilitate paperless trading and the use of electronic documents, and the Data Privacy Pathfinder, which looks to secure cross-border flows of personal information (Suominen, 2017a).

Wu (2017) argues that it is nations belonging to the APEC that most frequently push for the inclusion of privacy-related provisions in RTAs. The author highlights that the APEC ministers have already endorsed the APEC Privacy Framework, which looks to protect the data of individual natural persons, as part of its work to "deal with deficiencies in the policies and regulatory frameworks on electronic commerce and seek to promote the free flow of information and data across borders" (Patiño et al., 2018). Although it has been a useful reference for policymakers of APEC members when drafting domestic privacy regulations, it is not legally binding (APEC Electronic Commerce Steering Group, 2017). On an interesting side note, Elms and Nguyen (2017) state that the TPP data privacy rules originated in the APEC Policy Framework, indicating a complex and at times reciprocal causal relationship between APEC and the CPTPP.

However, despite the importance afforded to the topic in APEC, there are as of yet no APEC-wide agreements that cover digital trade, and the grouping has made little progress in creating a new regulatory framework (Asian Trade Centre, 2016).

APEC is also relevant in the creation of norms, especially digital privacy rules, which were the basis for the provisions in the CPTPP regarding this topic. However, being a voluntary organization, its norms are not binding. As such, APEC depends wholly on the willingness of the parties to use the work of the various organizations and work groups as the foundation for their own domestic public policies and regulations.

Meltzer (2018) identifies the CPTPP as key due to its inclusion of a comprehensive set of new digital trade rules and for its effect on countries in the region, as Chile, Mexico and Peru are either signatories or have ratified the agreement. For these countries, it is the most robust set of rules for this type of trade and includes a binding commitment to allow the free flow of data, prohibits data localization requirements that could function as an impediment to entering the market,

permits the use of all devices on the internet and requires all groups to adopt privacy protection regulations (Giordano et al., 2017). Meltzer (2018) indicates that the agreement covers 12 different digital trade-specific provisions and groups them under the topic of market access, digital trade facilitation and the protection of users.

However, despite the progressiveness of the agreement, Wolfe (2018) indicates that not all the provisions in the CPTPP have the same language, with some being aspirational and others obligatory. Applying the analytical scheme of Horn, Mavroidis and Sapir (2010), WTO+, which are areas where RTAs go beyond WTO obligations, and WTO-X, which are areas not currently covered by the WTO, Wolfe (2018) indicates that the majority of the digital trade provisions in the CPTPP are WTO-X, with the exception of making the WTO moratorium on custom duties on digital trade permanent. Another issue is the legal enforceability of the provisions. Some are aspirational with vague enforceability or look to promote only dialogue and cooperation, so not all provisions in the CPTPP are legally enforceable.

Pacific Alliance

Despite the shortcomings of the CPTPP, it has become a model for other agreements, including the PA and the North American Free Trade Agreement (NAFTA) renegotiations (Meltzer, 2018). According to Michalczewsky and Ramos (2017), the PA agreements regarding digital trade found in the PAAP most closely match the provisions found in the CPTPP when compared to other Latin America intraregional or extra-regional RTAs.

The provisions related to customs duties, consumer protection, personal data protection, paperless commerce, spam and cooperation with SMEs are consistent between the PAAP and the CPTPP (Observatorio Estratégico de la Alianza del Pacífico, 2017). According to Michalczewsky and Ramos (2017), this similarity could arise because the agreements were negotiated at the same time and Chile, Mexico and Peru are members of both the PA and the CPTPP. Also relevant is that fact that Australia, Canada, New Zealand and Singapore are associate members of the PA, as well as States that participated in the negotiations of the original TPP. Due to this participation in TPP negotiations, and its high standards in digital trade, this agreement's text is used as a benchmark for the PAAP (Observatorio Estratégico de la Alianza del Pacífico, 2017).

The PAAP prohibits the imposition of customs duties on digital trade, but permits internal taxes and other charges, as well as mandating the adoption of measures to protect against unsolicited electronic commercial messages and requiring a simple commitment of the parties to consider negotiating a cross-border flow of information provision (Wu, 2017). Interestingly, the PAAP is one of the very few RTAs to incorporate specific provisions on the use and location of computing facilities (Monteiro and Teh, 2017). The agreement also promotes interoperability among the regulatory frameworks of the member countries, promotes the inclusion of small and medium-size enterprises (SMEs) in digital trade, and is working with the objective to generate a regional digital market, cybersecurity and

common public-private dialogues (Suominen, 2017a).

The PAAP is not, however, a simple copy of the CTPP and has been called "a hybrid product that aims to balance the creation of a business-friendly environment (US style) with the need to safeguard consumer and data protection (EU style)" (Callo-Müller, 2019, p. 200). Despite the similarity and the fact that the PAAP replicates two thirds of the standards of the CPTPP, "the PAAP does not include core issues such as a suitable domestic legal framework, guaranteeing freedom of internet access, and avoiding measures that could increase transaction costs (localization of data servers, source codes). It also leaves out cooperation around cyber security, a key factor in building the confidence needed for consumers and companies to get involved in online transactions" (Michalczewsky and Ramos, 2017). The PAAP has no intellectual property chapters, and it lacks norms on internet service provider liability. Neither does it include TPP-style provisions for interoperability, meaning that is does not go as far as the TPP and its successor, but further than the current RTA between the PA members and with the European Union and the United States (Callo-Müller, 2019). Also missing is a dispute settlement mechanism. In general terms, the PAAP develops the topics found in the TPP and CPTPP in less depth (Observatorio Estratégico de la Alianza del Pacífico, 2017).

"Regional rules have emerged to fill the gap left by the absence of multilateral solutions."

USMCA

Chapter 19 of the USMCA regulates digital trade, but does not apply to government procurement or to measures related to information held or processed by or on behalf of government (Article 19.2(3)). One exception to this exemption for government-controlled information is for "open government data", which Article 19.18 defines as "government information", including data that a Party chooses to make available to the public. Article 19.18 requires Parties to "endeavour to ensure that the information is in a machine-readable and open format and can be searched, retrieved, used, reused, and redistributed". "Government information" is defined as "non-proprietary information, including data, held by the central government".

Article 19.11(1) bans restrictions on "the cross-border transfer of information, including personal information, by electronic means if this activity is for the conduct of the business of a covered person". "Personal information" is defined as "information, including data, about an identified or identifiable natural person".

Article 19.11(2) provides an exception to the obligation in Article 19.11(1), for measures that are:

> [N]ecessary to achieve a legitimate public policy objective, provided that the measure:
>
> **(a)** is not applied in a manner which would constitute a means of arbitrary

> or unjustifiable discrimination or a disguised restriction on trade; and
>
> **(b)** does not impose restrictions on transfers of information greater than are necessary to achieve the objective.

This exception uses language from GATT Article XX, which has also been incorporated into the General Agreement on Trade in Services (GATS), and other WTO Agreements. WTO jurisprudence on this language serves as a source of guidance on how to interpret USMCA Article 19.11(2). The party invoking the exception in Article 19.11(2) would have the burden of proof to show that the exception qualifies under this language.

The annex provides a more detailed analysis of how a dispute settlement panel is likely to interpret USMCA Article 19.11(2). The context indicates that many public policy objectives are likely to qualify as "legitimate". Articles 19.11(2) (a) and (b) are likely to be interpreted in a manner that is similar to interpretations of the same terminology in WTO jurisprudence.

USMCA versus CPTPP

It appears that the CPTPP is less restrictive towards measures taken by national governments, based on the following differences: (1) CPTPP has an explicit recognition that Parties may have their own regulatory requirements, whereas USMCA does not; (2) CPTPP requires Parties to allow cross-border information transfer, whereas USMCA bans prohibitions and restrictions; and (3) USMCA applies a necessity test to justify public policy restrictions, whereas there is no necessity test in CPTPP.

CPTPP Article 14.11 is significantly different from USMCA Article 19.11. First, CPTPP Article 14.11(1) provides that, "The Parties recognise that each Party may have its own regulatory requirements concerning the transfer of information by electronic means". USMCA Article 19.11 excludes this provision, indicating less tolerance for different approaches to managing cross-border data flows (Casalini & González, 2019; Scassa, 2018).

Second, CPTPP Article 14.11(2) provides that, "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". This contrasts with the USMCA Article 19.11 equivalent, which bans prohibitions and restrictions, which is arguably a stronger wording for this obligation, particularly in light of the wording of the exception.

Third, CPTPP Article 14.11(3) differs from USMCA Article 19.11(3) in that the former does not use the term "necessary", whereas that latter uses the term "necessary", not once, but twice. CPTPP Article 14.11(3) provides:

> Nothing in this Article shall prevent a Party from adopting or maintaining measures inconsistent with paragraph 2 to achieve a legitimate public policy objective, provided that the measure:
>
> **(a)** is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade; and
>
> **(b)** does not impose restrictions on transfers of information greater than are required to achieve the objective.

The CPTPP language makes the relevance of WTO jurisprudence regarding the term "necessary" doubtful. Moreover, the term "required" sets a lower bar than the term "necessary". The result is that the USMCA provisions strengthen the obligation and weaken the exception, thereby changing the balance between the rights of governments to regulate cross-border data flows in the public interest and the rights of big data to engage in cross-border data mining that facilitates the development of new technologies, particularly those based on artificial intelligence.

Conclusion

This review has examined digital trade rules in key Latin American RTAs: the CTPP, PA and UMSCA. These regional rules have emerged to fill the gap left by the absence of multilateral solutions. These RTAs are among the most advanced in the regulation of digital trade, particularly in the key areas of privacy, access to information and data flows. However, the CPTPP and USMCA have diverged in their terminology, resulting in distinct approaches to managing cross-border data flows and divergence in the relevance of WTO jurisprudence to key exceptions. The end result of the absence of multilateral rules is to set the stage for a "spaghetti bowl" of rules in the region on this topic.

Annex

USMCA Article 19.11(2) does not provide an illustrative list of legitimate objectives. However, USMCA Chapter 19 recognizes the importance of laws governing electronic transactions (Article 19.5), online consumer protection (Article 19.7), personal information protection (Article 19.8), regulations for spam (Article 19.13), security in electronic communications (Article 19.14), cybersecurity (Article 19.15), as well as intellectual property rights, criminal laws and law enforcement (Article 19.17), so these are likely to qualify as a legitimate objective. USMCA Chapter 11 incorporates Article 2.2 of the TBT Agreement, so its list of legitimate objectives is also part of the interpretative context of Article 19.11(2): national security requirements; the prevention of deceptive practices; and the protection of human health or safety, animal or plant life or health, or the environment. For the purposes of, inter alia, Chapter 19, paragraphs (a), (b) and (c) of GATS Article XIV are incorporated into and made part of the USMCA, *mutatis mutandis*. GATS Article XIV(a) permits measures "necessary to protect public morals or to maintain public order", GATS Article XIV(b) permits measures "necessary to protect human, animal or plant life or health", and GATS Article XIV(c) permits measures "necessary to secure compliance with laws and regulations… including those relating to (i) the prevention of deceptive and fraudulent practices…; (ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data…; (iii) safety". Given the incorporation and application of these provisions, these should all qualify as legitimate objectives as well. However, in the context of Article 19.11(2), the application of GATS Article XIV provisions would have to be applied in a manner that is consistent with the language used in Article 19.11(2), particularly the language regarding necessity and the incorporation of language from the GATS Article XIV

chapeau, which omits the GATS language regarding discrimination "between countries where like conditions prevail".

The Appellate Body in *US – Gambling*[1] interpreted the term "necessary" in GATS Article XIV(a) to mean the same as the term "necessary" in GATT Article XX. Thus, the term "necessary" has been given the same interpretation in similarly worded exceptions in covered agreements that apply to different sectors (goods and services). While USMCA Article 19.11(2) addresses a more specific sector, *US – Gambling* indicates that this is not an obstacle to applying the same interpretation to the term "necessary". As the Appellate Body noted in *US – Stainless Steel (Mexico)*,[2] WTO members cite WTO jurisprudence in legal arguments in dispute settlement proceedings and take the jurisprudence into account when enacting or amending national legislation. WTO members also take the jurisprudence into account in trade negotiations. Thus, the interpretation of identical terms should be similar, given the similarities in the language that is used in the GATT, GATS and USMCA provisions, the fact that all three are exceptions and the similar contexts of these provisions.

The context of USMCA Article 19.11(2) is not identical to that of GATS Article XIV and GATT Article XX. The term "legitimate public policy objective" is broader in USMCA Article 19.11(2) because it encompasses a wider range of objectives, some of which are specific to digital trade. Nevertheless, given the similar wording and context, GATT and GATS jurisprudence suggests the following analysis would be appropriate. First, the party invoking the exception must make a *prima facie* case that the policy goal at issue in its measure qualifies as a "legitimate public policy objective". Once it is established that the policy goal fits the exception, the party would then have to prove that the measure is "necessary" to achieve the policy goal. This analysis takes place in light of the level of risk that a WTO member has set for itself. To demonstrate that the measure is necessary involves weighing and balancing a series of factors. First, the greater the importance of the interests or values that the challenged measure is intended to protect, the more likely it is that the measure is necessary. GATT Article XX jurisprudence has addressed the importance of human life and health (*EC – Asbestos*[3]) and environmental protection (*Brazil – Retreaded Tyres*[4]), and would be relevant at this stage of the analysis. Second, the greater the extent to which the measure contributes to the end pursued, the more likely that the measure is necessary. In *Brazil – Retreaded Tyres*, the Appellate Body noted that if a party is seeking to demonstrate that its measures are "necessary", it should seek to establish that need through "evidence or data, relevant to the past or present", to establish that the contested measures contribute to the attainment of the pursued objectives. However, this requirement can be met with qualitative evidence. Third, the less WTO-inconsistent the challenged measure is, the more likely it would be considered necessary. The final issue is whether a WTO-consistent alternative measure, which the WTO member concerned could reasonably be expected to employ, is available, or whether a less WTO-inconsistent measure is reasonably available. The analysis of the availability of less-

restrictive alternative measures would be relevant to the requirement in USMCA Article 19.11(2) that the measure's restrictions on transfers of information are not be greater than are necessary to achieve the objective.

The party invoking the exception may point out why alternative measures would not achieve the same objectives as the challenged measure, but it is under no obligation to do so in order to establish, in the first instance, that its measure is "necessary". If the other party raises a WTO-consistent alternative measure that, in its view, should have been taken, the party invoking the exception would be required to demonstrate why its challenged measure nevertheless remains "necessary" in light of that alternative or, in other words, why the proposed alternative is not, in fact, "reasonably available". If the party invoking the exception demonstrates that the alternative is not "reasonably available", in light of the interests or values being pursued and the party's desired level of protection, it follows that the challenged measure must be "necessary" (*US – Gambling*).

In *Brazil – Retreaded Tyres*, the Appellate Body decided that an alternative measure cannot be considered to be "reasonably available" when it is simply of a theoretical nature, for example, when the respondent cannot adopt it or imposes an undue burden on that member, such as "prohibitive costs or major technical difficulties". In this case, the alternative of collecting tyre waste and incinerating it in special facilities was rejected. In addition, the alternative measure must maintain the respondent's right to achieve the desired level of protection with respect to the pursued objective. For a proposed alternative to be viable, it must be less trade-restrictive and make at least an equivalent contribution to the protection of human, animal or plant life or health. Once a viable alternative has been proposed, it is for the respondent to demonstrate why such a measure is not reasonably within his reach. In the USMCA context, this could raise the issue of whether the availability of alternatives might be different for Mexico, given its level of economic and technological development.

The requirement that the measure is not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade should be similar to that in the GATT Article XX and GATS Article XIV *chapeau*, minus the analysis of "countries where like conditions prevail". The GATT Article XX and GATS Article XIV *chapeau* prohibits both *de jure* and *de facto* discrimination. Footnote 5 in USMCA Article 19.11(2) would be relevant to determining whether the discrimination is arbitrary or unjustifiable: "A measure does not meet the conditions of this paragraph if it accords different treatment to data transfers solely on the basis that they are cross-border in a manner that modifies the conditions of competition to the detriment of service suppliers of another Party". In *Brazil – Retreaded Tyres*, the Appellate Body held that there is arbitrary or unjustifiable discrimination when the reasons given for this discrimination bear no rational connection to the objective, or would go against that objective. In USMCA Article 19.11(2), the relevant objective would be the legitimate policy objectives noted above.

Endnotes

[1] Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005.

[2] Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/ DS344/AB/R, adopted 20 May 2008.

[3] Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001.

[4] Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/ DS332/AB/R, adopted 17 December 2007.

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Comments

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At a time when international trade is stagnating, e-commerce figures are dazzling, registering double-digit growth rates for the past few years globally and in every major country. Latin America is no exception to this trend. Yet, as this chapter and others in this volume point out, policy and regulatory frameworks for e-commerce vary across countries, reflecting local exigencies and governance capacities to keep up with this very dynamic sector. Moreover, a focus on creating a harmonized regime for the governance of e-commerce quickly bleeds into more contentious "behind the border" matters related to the policy space national authorities require to balance imperatives such as unfettered commerce, the privacy and security of citizens and their data and indeed the ability of countries to safeguard the quality of their democracy.

In the absence of a meaningful multilateral framework in this regard, regional trade agreements (RTAs) are forging ahead. In Latin America alone, as this chapter shows, the Asia-Pacific Economic Cooperation-Comprehensive and Progressive Trans-Pacific Partnership (APEC CPTPP), Pacific Alliance and the United States-Mexico-Canada Agreement (USMCA) have provisions for e-commerce. The differences are instructive, and the chapter is correct in its conclusion that the USMCA indicates "less tolerance for different approaches to managing cross border data flows". Worryingly, the chapter is also correct in surmising that in the absence of multilateral rules, RTAs establish precedent and practice that might eventually become the multilateral norm.

There are two areas in particular where the seeming technocratic e-commerce-related provisions of the USMCA mask deeper and more sensitive issues of power and national sovereignty. One is data localization; the other is the capacity of national authorities to hold multinational digital platforms accountable for the content they carry.

The treatment of data localization in the Trans-Pacific Partnership (TPP) and USMCA is instructive. Where the TPP equivocated on the location of computing facilities, the USMCA provision on the matter (Article 19.12) is short and not so sweet, at least for those who read more into data localization policies than simply the enabling of trade: "No Party shall require a covered person to use or locate computing facilities in that Party's territory as a condition for conducting business in that territory."

Once data is seen only through a commercial lens and not as an aspect

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of personal protection and privacy, the logic of ever more openness makes sense. But examples abound of the non-economic dimensions of data, lost when data is treated strictly through the trade agreement medium. A Canadian who legally purchases cannabis online with his credit card might be denied entry into the United States for having bought a substance banned in the United States, just because the "shadow" of the financial transaction was not localized. Or, if the smart city partnership in Toronto with Sidewalk Labs, a subsidiary of Alphabet, had proceeded (it was called off in May 2020), Canadians may well have desired that the detailed data about their city and their lives in it remain in the country (Hirsh, 2018; Scassa, 2018).

Ironically, the human rights community is concerned about forced data localization in countries with authoritarian regimes (Centre for Internet and Society, 2019). But it is safe to say that the categorical language on data localization in the USMCA is not driven by potential human rights violations in Canada, Mexico or the United States.

There are multiple dimensions to this issue. Reductionism to commerce might be good for commerce and result in welfare gains to countries but also misses potential welfare losses.

The USMCA also uses the "safe harbour" provision to liberate digital platforms from responsibility for the content they carry. Free speech advocates see this as desirable (Geist, 2018). Others look at the "weaponization" of platforms like Facebook, Twitter and YouTube during recent votes such as the 2016 presidential election in the United States and the Brexit referendum and the livestreaming of the terror attacks in Christchurch, New Zealand, in March 2019 as indications that the unwillingness or inability of digital platforms or governments to regulate content has important social and political consequences.

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There is currently an ongoing lively discussion on how content on digital platforms might be best managed (Etlinger, 2019). Safety must be balanced with freedom of speech. Models of content regulation ranging from none to purely government-imposed to self-regulating and public-private partnerships (such as Facebook's Oversight Board (Klonick, 2019)) are currently being evaluated. It is entirely likely that one size does not fit all in this case, and that the political economic process in different countries might arrive at different solutions.

Given that in the Western world the major platforms are based in the United States, and that they command attention in the political discourse in the country, the laissez-faire approach taken towards these companies in the United States is

understandable. The projection of this political economy, via RTAs, into other countries removes their ability to view this situation differently. In effect, the RTA entry point is used to manage policy space for areas that go well beyond e-commerce.

Traditionally, one of the arguments for the "spaghetti bowl" of RTAs has been their potential to deal rapidly and creatively with new issues, serving as "hot houses" in which policy approaches are tried before they are dropped or modified and moved into the multilateral sphere. It is equally possible that RTAs act as a ratcheting mechanism, locking-in norms and practices negotiated by powerful players (whose power is even further enhanced in a regional setting) that stand to become a multilateral standard.

Although the authors of the Latin America chapter do not quite say as much, their analysis points to precisely this risk.

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