The New Rules on Digital Trade in Latin American Regional Trade Agreements

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Introduction

Due to the failure of the WTO to successfully work towards a set of multilateral digital trade rules, regional and bilateral trade agreements have become the focus of efforts to develop digital trade rules.

"Lack of clarity and gaps in regulation, coupled with the slow pace at which the issues is being addressed in multilateral forums, has led countries to start including e-commerce provisions in Preferential Trade Agreements (PTA), so as to establish a level playing field among partners" (Giordano, et al. 2017).

"RTAs are sometimes viewed as a laboratory enabling countries to design new provisions and address new issues and challenges" (Monteiro and Teh 2017).

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).

Objective

Review how digital trade is being incorporated into trade agreements.

Identify the main challenges for APEC´s Latin American economies in the drafting of digital trade provisions.

Analyze the inclusion of digital trade provisions into CP TPP, Pacific Alliance and USMCA.

Digital trade global regulations

The WTO and global digital trade regulations

Need for multilateral regulations have 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.

WTO ministerial meeting in Argentina in December 2017, Joint Statement on Electronic Commerce.

WTO trade rules, in principle, are technologically neutral and can apply to any mode of delivery, a fact confirmed by WTO dispute panels (Ciuriak and Ptashkina 2018; Wu 2017).

"The extent to which these multilateral rules apply to digital trade is not always clear" and the result is that the "multilateral regulatory framework on e-commerce is incomplete" (Giordano, et al. 2017).

APEC

APEC's commitment to the digital trade economy is built on non-binding agreements and cooperation between its members	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.
	Paperless Trading Subgroup looks to facilitate paperless trading and the use of electronic documents, and Data Privacy Pathfinder, looks to secure cross-border flows of personal information
	APEC Privacy Framework 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"

Key stakeholders

USA	Offensive and seeks maximum openness to take advantage of the competitive advantage of its technological firms.
	Approach is more formal and has binding power.
EU	More defensive and champions regulation to minimise costs and challenges posed by digital trade.
	Approach is more flexible and non-binding.
China	Does not share a commitment to open digital borders and hard commitments do not extend beyond those that make up WTO agreements and the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Commerce of 1996.

(Ciuriak and Ptashkina 2018).

Regional trade agreements – CP TPP

CP TPP

- Key due to its inclusion of a comprehensive set of new digital trade rules
- Binding commitment to allow the free flow of data, prohibits data localisation requirements that could function as an impediment to entering the market, permits the use of all devices on the internet and it requires all groups to adopt privacy protection regulations
- Covers 12 different digital trade specific provisions, grouped under the topic of market access, digital trade facilitation and the protection of users.
- Not all the provisions in the CPTPP have the same language, with some being aspiration and others obligatory.
- Majority of the digital trade provisions are WTO-X, with the exception of making the WTO moratorium on custom duties on digital trade permanent.

Regional trade agreements – Pacific Alliance

Pacific Alliance

- Pacific Alliance Additional Protocol (PAAP) most closely match the provisions found in the CPTPP
  - This similarity could be due to two factors: that the agreements were negotiated at the same time, and that Mexico, Chile and Peru are members of both the PA and the CPTPP.
- 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 a simple commitment of the parts to consider negotiating a cross-border flow of information provision
- Promotes interoperability among the regulatory frameworks of the member countries, promotes the inclusion of SMEs in digital trade, and is working towards a regional digital market, cyber security and common public-private dialogues

Regional trade agreements – USMCA

USMCA

- Regulated by Chapter 19
- 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.
- USMCA Article 19.11 bans prohibitions and restrictions, which is arguably a stronger wording for this obligation, particularly in light of the wording of the exception.
- 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.

Final Remarks

WTO CHAIRS PROGRAMME

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