

THE GLOBAL TRADE LAW JOURNAL

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The Rise of Artificial Intelligence, Big Data, and the Next Generation of International Rules Governing Cross-Border Data Flows and Digital Trade—Part II

Frank J. Schweitzer, Ian Saccomanno, and Naoto Nelson Saika*

In this two-part article, the authors discuss the proliferation of barriers to cross-border data flows and the current global legal architecture that governs the digital economy, including current World Trade Organization and trade agreement disciplines applicable to such barriers. This article also addresses new digital trade initiatives and concludes with an outlook regarding ongoing U.S. efforts to negotiate new agreements that aim to strike an appropriate balance between facilitating digital trade and international data flows and preserving the space of governments to regulate in the public interest.

This two-part article is divided into eight sections. The first part was published in the March-April 2024 issue of *The Global Trade Law Journal* and covered the first four sections of the article, addressing the proliferation of barriers to cross-border data flows and the current global legal architecture that governs the digital economy. This second part contains the fifth, sixth, seventh, and eighth sections.

The fifth section discusses current trade agreement disciplines relevant to data flows, including the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and the United States-Mexico-Canada Agreement (USMCA). The sixth section considers new trade initiatives, including the Indo-Pacific Economic Framework (IPEF), the U.S.-Taiwan Initiative, the EU's Digital Trade Agreements and implications of the EU's data privacy laws, new digital trade agreements in the Asia-Pacific, and emerging work in other international fora. The seventh section analyzes the U.S. political dynamic, the implications of the lack of

U.S. trade promotion authority, and offers an outlook for pending negotiations. Finally, the eighth section contains key takeaways.

Modern Trade Agreement Disciplines on Digital Trade

Disciplines Relevant to Data Flows and Digital Trade Have Emerged in Modern Trade Agreements, Including the CPTPP and the USMCA

With the perceived relevance of the World Trade Organization's (WTO's) functions for rule making and dispute resolution diminishing, the importance of regional and bilateral initiatives increases.¹ Digital trade rules have been a feature of U.S. Free Trade Agreements (FTAs) for nearly two decades. All U.S. FTAs signed since 2003 have included chapters on electronic commerce, starting with the U.S.-Singapore FTA. Disciplines on digital trade set forth in this first generation of FTAs covering digital trade rules, however, were limited in scope, in most cases dealing only with customs duties and discriminatory measures targeting digital products such as software and videos.

The first FTA to include a robust digital trade chapter was the Trans-Pacific Partnership (TPP), which the United States and 11 other countries signed in 2016. The TPP included groundbreaking new disciplines addressing data localization, cross-border data flows, and forced technology transfer, while also updating e-commerce disciplines found in prior agreements. The United States withdrew from the TPP in 2017,² but the 11 remaining parties implemented the agreement (which is now known as the CPTPP).³ Since its conclusion in 2016, China, Costa Rica, Ecuador, Taiwan, Ukraine, the United Kingdom, and Uruguay have applied to join, and numerous other countries have expressed interest.⁴ In July 2023, the United Kingdom became the first new country to sign the agreement since its original negotiation.⁵

As it grows to cover a wider swath of the global economy (and the United States continues to build on its provisions in other agreements), the principles in the CPTPP's digital trade chapter will become increasingly central to how governments manage digital trade. The CPTPP's digital trade chapter served as the template for subsequent U.S. agreements, including the USMCA and the

U.S.-Japan Digital Trade Agreement (U.S.-Japan DTA), both of which updated the CPTPP rules in important ways. This second generation of digital trade agreements addresses a wide range of issues, from electronic signatures to online consumer protection and cybersecurity. The most commercially significant and politically sensitive provisions deal with the core issues of cross-border data flows, localization, forced technology transfer, and treatment of electronic transmissions.

Prohibiting Customs Duties on “Electronic Transmissions” and Underlying Content

The CPTPP prohibits the imposition of customs duties on “electronic transmissions” among the CPTPP Parties.⁶ This provision goes beyond the WTO moratorium by making the prohibition permanent, and by clarifying that the prohibition extends to “content transmitted electronically” (not only to the transmissions themselves). Commitments of this kind can play an important role in ensuring the seamless global flow of data, software, media, and other digital content. Earlier FTAs such as the Korea-United States Free Trade Agreement (KORUS) included similar prohibitions but applied them only to “digital products” (e.g., computer programs, videos, and sound recordings), rather than extending them to all electronic transmissions and their contents.⁷ The U.S.-Japan DTA mirrors the CPTPP’s approach, whereas the USMCA reverts to the earlier FTA practice, applying the prohibition only to “digital products” produced for commercial sale.⁸

Cross-Border Data Flows

The CPTPP requires Parties to “allow the cross-border transfer of information by electronic means, including personal information,” when such transfers are for business purposes.⁹ Cross-border data flow obligations represent a major advance given the critical importance of international data transfers in nearly every segment of the modern economy, including services, research and development, manufacturing, and even agriculture. However, the CPTPP’s data flow obligation contains an exception that allows Parties to restrict cross-border data flows “to achieve a legitimate public policy objective,” provided that the measure (1) is not applied in a manner that would constitute arbitrary or unjustifiable discrimination or a disguised restriction on trade; and (2) does not impose

restrictions greater than are required to achieve the objective. The CPTPP does not define what constitutes a “legitimate public policy objective” and governments could potentially seek to justify a wide range of restrictions under this exception.

The USMCA and the U.S.-Japan DTA include similar data flow obligations. However, these agreements go further by providing that Parties may not “prohibit or restrict” cross-border data flows (whereas the CPTPP merely requires Parties to “allow” such data flows).¹⁰ The scope of prohibited conduct therefore appears broader under the USMCA and the U.S.-Japan DTA (i.e., these agreements arguably prohibit measures that impose limits or conditions on international data transfers but fall short of an outright ban on such measures). These agreements also extend obligations related to cross-border data flows in the financial services sector.¹¹ However, both the USMCA and the U.S.-Japan DTA replicate the CPTPP’s exception for data flow restrictions taken in furtherance of “legitimate public policy objectives.”

Data Localization Requirements

The CPTPP prohibits a Party from requiring businesses “to use or locate computing facilities in that Party’s territory as a condition for conducting business in that territory.”¹² However, the obligation includes a broad exception for localization measures that a Party imposes to achieve a “legitimate public policy objective,” mirroring the exception to the data flow obligation.

The USMCA and the U.S.-Japan DTA go further than the CPTPP rule on data localization. Both agreements replicate the CPTPP’s prohibition on data localization measures, but they do not provide an exception for measures taken to achieve a “legitimate public policy objective.”¹³ In addition, the USMCA and the U.S.-Japan DTA prohibit data localization measures in the financial services sector, whereas the CPTPP did not do so.¹⁴ Nevertheless, governments could still seek to justify data localization measures under the security and general exceptions applicable to these agreements.

Forced Disclosure of Software Source Code and Algorithms

Another novel provision in the CPTPP prohibits a Party from requiring “the transfer of, or access to, source code of software owned by a person of another Party, as a condition for the import, distribution, sale or use of such software, or of products containing

such software, in its territory.”¹⁵ This obligation is intended to address the concern that source code obtained in such a manner could be disclosed to unauthorized recipients, including business competitors and particularly state-owned enterprises. In the CPTPP, this obligation extends only to “mass-market software,” and does not apply to software used for critical infrastructure or to government measures relating to patent applications or granted patents.

The USMCA and the U.S.-Japan DTA both expand the scope of this obligation to cover source code for all software, as well as “an algorithm expressed in that source code.”¹⁶ However, these agreements include broad exceptions allowing a regulatory body or judicial authority of a Party to require companies “to preserve and make available the source code of software, or an algorithm expressed in that source code, to the regulatory body for a specific investigation, inspection, examination, enforcement action, or judicial proceeding, subject to safeguards against unauthorized disclosure.”

Exceptions

The digital trade provisions of these agreements are subject to general and security exceptions. All three agreements incorporate by direct reference to certain of the general exceptions contained in the WTO’s General Agreement on Trade in Services (GATS) Article XIV, namely the exceptions for measures (1) necessary to protect public morals or to maintain public order; (2) necessary to protect human, animal, or plant life or health; and (3) necessary to secure compliance with laws or regulations that are not inconsistent with the provisions of the agreement.¹⁷ The security exceptions in these agreements are broader than those found in the GATS, allowing a party to take measures “that it considers necessary for the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.”¹⁸

The commitments made under these FTAs described above represent an important evolution of international trade rules and have the potential to avert costly impediments to the flow of data among like-minded states. However, the effectiveness of these provisions remains to be seen. As noted above, many of the core obligations on data flows and localization include exceptions for

measures that promote a “legitimate public policy objective,” and the scope of these exceptions is not clearly defined. Moreover, the security exceptions of these agreements arguably provide even greater leeway than WTO rules for Parties to justify measures that impede or restrict cross-border data flows or digital trade. These novel digital trade provisions and corresponding exceptions have yet to be tested through dispute settlement, and it is unclear whether they will capture all forms of digital trade protectionism.

New Digital Trade Initiatives

Disciplines on Data Flows and Digital Trade Continue to Proliferate, Including in the IPEF, the U.S.-Taiwan Initiative, the EU’s Digital Trade Agreements, Digital Trade Agreements in the Asia-Pacific, and Emerging Work in Other International Fora

The United States and other leading economies are currently seeking to negotiate new digital trade rules in various fora, including those discussed below.

Indo-Pacific Economic Framework

In May 2022, the United States and other Indo-Pacific countries agreed to launch “collective discussions towards future negotiations” for the IPEF.¹⁹ At the insistence of the United States, the proposed IPEF is not a comprehensive trade agreement and will not cover market access for goods or services. The United States and 13 other countries have adopted joint Ministerial Statements on their negotiating objectives for the four “pillars” of the IPEF: (1) trade, (2) supply chains, (3) clean economy, and (4) fair economy.²⁰

The trade pillar includes a digital trade chapter, among other objectives. The Ministerial Statement describes the digital trade objectives in broad terms, as follows:

1. “building an environment of trust and confidence in the digital economy,”
2. “enhancing access to online information and use of the Internet,”
3. “facilitating digital trade,”
4. “addressing discriminatory practices,” and

5. advancing “resilient and secure” digital infrastructure and platforms.²¹

The Office of the United States Trade Representative (USTR) shared a summary of what it had proposed for the digital trade chapter in April 2023, which includes five more specific provisions for implementing the objectives of the Ministerial Statement:

1. “provisions addressing data protection, consumer protection, and artificial intelligence that support inclusive growth by promoting trust in the digital economy,”
2. “provisions that promote access to the Internet and online services,”
3. “provisions designed to avoid unfair trade practices, while recognizing the need for Parties to be able to address legitimate public policy objectives,”
4. “provisions aimed at ensuring an effective legal framework for electronic transactions that is consistent with international best practices,” and
5. “provisions promoting the security of the Internet and ICT [information and communication technology] infrastructure.”²²

Notably, both the Ministerial Statement and the chapter summaries avoid clear references to the core digital trade disciplines found in the USMCA and similar agreements (e.g., prohibitions on data localization measures, restrictions on cross-border data flows, and customs duties on electronic transmissions). As of the writing of this article, negotiations on these issues remain ongoing, and the negotiating text has not been disclosed. The parties completed negotiations on the supply chains, clean economy, and fair economy pillars of the agreement in November 2023.²³

Negotiations on the trade pillar will stretch into 2024 amid disagreements on the labor, environment, and digital trade chapters. The United States is reportedly struggling to convince the other parties to accept strong commitments in these areas. In the past, USTR has relied on offering increased market access to obtain these costly regulatory concessions from other parties. However, the IPEF does not contain any market access commitments, making it unclear how the United States intends to obtain substantial concession on these chapters. Besides the disagreements between the parties, the Biden administration’s new uncertainty over how

the United States should approach data policy has been a notable barrier to completing the digital trade chapter. Now that the United States is heading into its national elections, a near-term resolution to these difficult trade-offs will become more difficult.

U.S.-Taiwan Initiative

In August 2022, the United States and Taiwan reached agreement on a negotiating mandate for a proposed “U.S.-Taiwan Initiative on 21st-Century Trade.”²⁴ Like the IPEF, the initiative is not a comprehensive FTA and will not involve negotiations on market access. The negotiating mandate covers various “trade areas,” including digital trade. The United States and Taiwan will negotiate “outcomes in digital trade that benefit workers, consumers and businesses, including SMEs [small- and medium-sized enterprises], through the adoption of provisions that (1) build consumer trust in the digital economy, (2) promote access to information, (3) facilitate the use of digital technologies, (4) promote resilient and secure digital infrastructure, (5) address discriminatory practices in the digital economy and (6) promote cooperation on competition policy.”²⁵

Negotiations are occurring in stages, with the United States and Taiwan signing a first phase agreement on June 1, 2023, covering customs administration, good regulatory practices, services domestic regulation, anticorruption, and SMEs.²⁶ Proposed chapters on agriculture, standards, digital trade, labor, environment, state-owned enterprises, and non-market policies are still to be negotiated as of the writing of this article.

EU Digital Trade Agreements

Specialized digital trade chapters have emerged in EU trade agreements in recent years, seeking to reduce barriers to digital trade, cross-border data flows, and e-commerce. While beginning with a chapter that only contained commitments to enable cross-border e-commerce,²⁷ the EU’s disciplines have since grown to include stronger commitments on cross-border data flows and prohibitions of data localization requirements (among other digital trade topics). This evolution in the EU’s approach is timely, as the growth of artificial intelligence (AI) and other data-intensive activities have created a need for digital trade chapters that go beyond the original, narrower focus on e-commerce.²⁸

Like the CPTPP and its related agreements, this new EU digital trade chapter includes commitments to not restrict cross-border data flows. The EU approach, however, includes broad public policy and data privacy exceptions to its data flows language. A key question for governments and businesses worldwide will be how to reconcile agreements committing to the EU approach and agreements committing to derivations of the CPTPP approach. Managing this tension will become increasingly important as the two sets of models begin to overlap in the Asia-Pacific.

To note some examples of the EU's efforts, the European Union has recently begun including the full digital trade chapter in FTAs, and it can be found in the recently concluded trade agreements with New Zealand,²⁹ Chile,³⁰ and the United Kingdom.³¹ The European Union is also working to incorporate the new digital trade commitments into other trade agreements in the Asia-Pacific, strengthening its digital trade partnerships and policy reach throughout the region. The European Union recently concluded non-binding Digital Partnership Agreements with Japan,³² Korea,³³ and Singapore,³⁴ and then announced negotiations for a Digital Trade Agreement (DTA) with Singapore in July 2023.³⁵ The DTA negotiations would add a modern digital trade chapter to the EU-Singapore FTA, which currently includes only the older measures on e-commerce. The EU-Singapore joint statement announcing the DTA negotiations highlighted how the partners “can play a leading role in setting high-standard digital trade rules between our regions and raising the ambition of global digital standards,” connecting the EU's aspiration to promote its approach to digital trade standards with Singapore's digital trade leadership in Asia.³⁶ Following the unveiling of the Singapore negotiations, the European Union went on to launch DTA negotiations with Korea³⁷ and concluded an agreement on cross-border data flow protections with Japan in October 2023, announcing that “[a]n important element of the deal is the removal of costly data localization requirements[.]”³⁸ The European Union has also recently resumed negotiating an FTA with Thailand, in which EU negotiators have proposed including the EU's digital trade chapter.³⁹

EU Data Privacy Law

Building a legal system that enables free flow of data that is also consistent with differing data privacy regimes has been challenging for governments. The EU's General Data Protection Regulation

(GDPR) has taken a particularly strong position on prioritizing privacy over data flows, restricting the transfer of personal data outside of the European Union except to specific countries that the European Union has determined provide adequate data protection. This has led to friction with the United States, with EU courts repeatedly issuing rulings in recent years that have restricted data flows between the two economies over such data privacy concerns.⁴⁰ In July 2023, a new EU-U.S. Data Privacy Framework (DPF)⁴¹ was established to resolve the conflicting approaches to data privacy and was endorsed in a new adequacy decision (but still may be subject to further review).⁴² The new DPF is intended to facilitate trans-Atlantic data flows by enhancing trust in data governance: it enables U.S. industries to comply with EU data protection law (i.e., GDPR) while being subject to U.S. laws relating to foreign intelligence surveillance. The new arrangement will also lead to organizations being able to transmit data between the United States, the United Kingdom, and Switzerland, all of which have similar arrangements administered alongside the EU-U.S. DPF.⁴³

Asia-Pacific Digital Trade Agreements

Singapore and other economies in the Asia-Pacific have participated in various digital trade initiatives since the CPTPP, both extending the reach of CPTPP standards and establishing new principles. The most significant of these new digital trade initiatives is the Digital Economy Partnership Agreement (DEPA) signed among Singapore, Chile, and New Zealand in June 2020.⁴⁴ The parties envision DEPA as a new, flexible approach for the digital era that will continue to evolve as new opportunities and issues emerge in the sector.⁴⁵ It will serve as a living agreement with global ambitions, whereby accession by other countries that meet the standards established are welcomed. Korea concluded negotiations to join the DEPA in June 2023, while China, Canada, Costa Rica, and Peru are formally seeking membership.⁴⁶ Key features of the DEPA cover:

1. Digital identities,
2. Paperless trade,
3. E-invoicing,
4. Fintech and e-payments,
5. Personal information protection,
6. Cross-border data flow,
7. Open government data,

8. Data innovation and regulatory sandboxes,
9. AI,
10. Online consumer protection,
11. Small and medium enterprise cooperation, and
12. Digital inclusivity.

The other avenue for this work has been to add updated digital chapters to existing FTAs, including:

1. The Singapore-Australia FTA in 2020 (the Australia-Singapore Digital Economy Agreement),⁴⁷
2. The Korea-Singapore FTA in 2022 (the Korea-Singapore Digital Partnership Agreement),⁴⁸
3. The UK-Singapore FTA in 2022 (the UK-Singapore Digital Economy Agreement),⁴⁹ and
4. The European Free Trade Association (EFTA)-Singapore FTA, for which negotiations began in 2023.⁵⁰

Australia and New Zealand then carried similar language on digital trade into new FTAs with the United Kingdom, which were important steps to the UK's accession to the CPTPP.⁵¹

As this web of overlapping bilateral and multilateral digital commitments grow, there will be opportunities for convergence⁵² or the prospects of further fracture and greater divergence. As discussed above, Singapore and other countries in the Asia-Pacific are adding digital trade chapters to their FTAs with the European Union. The EU's prioritization of data privacy commitments may nudge Asia-Pacific policies in new directions.⁵³ The European Union is also pursuing fully incorporating the DTAs into existing FTAs, which would make the commitments an integral part of those FTAs and subjecting them to the FTA dispute settlement procedures. The EU's approach contrasts with the narrower DEPA approach that has sometimes been favored in the Asia-Pacific, possibly increasing the complexity of the negotiations.

Other International Fora

The G7 Trade Ministers agreed on a set of Digital Trade Principles in 2021, expressing their shared concerns about “situations where data localisation requirements are being used for protectionist and discriminatory purposes” and the need to “address unjustified obstacles to cross-border data flows[.]”⁵⁴ At the same

time, the Principles emphasized the importance of “continuing to address privacy, data protection, the protection of intellectual property rights, and security.”⁵⁵ Continuing to build on that work, the G7 Digital and Tech Ministers’ Meeting in April 2023 endorsed a new cooperation mechanism, the Institutional Arrangement for Partnership, to operationalize the planned work.⁵⁶ The ministers also endorsed an action plan for AI governance and began new discussions on generative AI, bringing AI into digital trade policy.⁵⁷

Several other digital trade initiatives loom on the horizon, including: the Asia-Pacific Economic Cooperation (APEC) discussions on digital standards harmonization;⁵⁸ the Global Cross-Border Privacy Rules (CBPR) Forum (an expansion of the APEC CBPR that was launched in 2022);⁵⁹ the OECD Digital Economy Ministerial Meetings, which recently issued the Declaration on Government Access to Personal Data Held by Private Sector Entities;⁶⁰ and U.S. bilateral dialogues, including with India,⁶¹ Japan,⁶² and the United Kingdom.⁶³

U.S. Political Dynamics, Lack of Trade Promotion Authority, and the Future Path of Negotiations

The Future of U.S.-Led Disciplines Related to Data Flows Is Uncertain. The Current U.S. Political Dynamics, Rising Interest in Regulating the Movement of Cross-Border Data, the Lack of U.S. Trade Promotion Authority, and Emerging International Tensions Obscure the Outlook for Pending Negotiations

The U.S. Debate on Digital Trade and Cross-Border Data Flows

The multitude of global, regional, and bilateral initiatives provide opportunities to extend digital trade obligations and extend disciplines related to cross-border data flows. However, there is some uncertainty about the specific objectives the United States is now pursuing. Consistent with prior administrations, the Biden administration has expressed concern about restrictive foreign government policies that affect U.S. exports of digital products and services and inhibit cross-border data flows.⁶⁴ However, the Biden administration has not articulated a clear position and has questioned whether past agreements strike an appropriate balance

between facilitating data flows and protecting the right of governments to regulate in the public interest.⁶⁵

Influential U.S. constituencies such as labor unions have also strongly criticized digital trade rules based on the CPTPP and USMCA model, arguing that “[m]isbranding constraints on government regulatory authority as ‘e-commerce’ or ‘digital trade’ agreements has helped them to evade scrutiny and quietly undermine certain worker protections, policies that constrain entities’ size or market power and promote fair competition, and civil rights, privacy and liability policies[.]”⁶⁶ They have specifically criticized provisions that “[u]ndermine consumer privacy and data security by prohibiting limits on data flows or rules on the location of computing facilities.”⁶⁷ U.S. labor unions have argued that these agreements “create a nearly absolute right to unfettered cross-border flows,” and that new digital trade rules in the IPEF “must rebalance these commitments to provide meaningful policy space to protect worker and consumer privacy, reduce digital offshoring or the privatization of government data services, and provide specific exemptions and exclusions for sensitive categories of data (e.g., financial, health, biometric) where there may be sound reasons to restrict cross border data flows.”⁶⁸ Similar arguments were repeated in a “worker-centered” digital trade agenda proposed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO).⁶⁹ These views are noteworthy, given the Biden administration’s stated emphasis on ensuring that workers’ views are reflected more prominently in U.S. trade policy. Concerns about the broad protections granted for digital trade expanded into the AI space in 2023, as political attention came to focus on developing new domestic AI regulations. For example, in December 2023, U.S. Trade Representative Katherine Tai highlighted the recent proliferation of large language models and noted the leading role of large U.S. companies in AI development in explaining “why our posture on the rules that apply to data flows, data localization and source code is so important[.]”⁷⁰

The Biden administration first delayed completion of IPEF’s digital trade chapter and then withdrew support for proposals at the WTO E-Commerce Joint Statement Initiative working group on rules to preserve cross-border data flows, restrict data localization requirements, and prohibit forced transfers of source code. USTR contends that these shifts were driven by the lack of a stable political

coalition supporting the past stance of the United States and the administration needs more policy space for debate.⁷¹

U.S. Trade Promotion Authority

The Biden administration's lack of trade promotion authority adds to the murky prospects of concluding new international deals with commercially meaningful commitments on cross-border data flows and digital trade. The U.S. Constitution gives Congress exclusive authority to impose duties and "regulate Commerce with foreign Nations,"⁷² while it empowers the president to conduct foreign affairs and negotiate treaties with the advice and consent of the U.S. Senate.⁷³ Recognizing this framework and the need for the U.S. government to credibly negotiate trade agreements with foreign nations, Congress has periodically enacted special, expedited procedures to consider trade agreements negotiated by the executive branch.⁷⁴ Such legislation, now commonly known as "trade promotion authority," or "TPA," represents a delegation of authority from Congress to the president. The most recent TPA legislation, enacted in 2015, expired in July 2021. Historically, Congress has not undertaken the difficult task of enacting new TPA legislation on its own initiative; rather, it has done so in response to pressure from the executive branch.⁷⁵ New trade promotion authority does not appear to be a priority of the Biden administration. Without the TPA in effect, the administration would necessarily need to focus on agreements that do not require congressional approval. The executive branch has often engaged in executive agreements⁷⁶ in situations where such agreements' commitments do not change U.S. law, but the constitutional authority underlying this approach is subject to debate.⁷⁷

To that end, the Biden administration has pursued the IPEF and the U.S.-Taiwan Initiative as executive agreements that limit congressional involvement. Members of Congress have responded critically, raising both objections to the process and policy disagreements.⁷⁸ Congress is now beginning to push back against the Biden administration's approach with the recent United States-Taiwan Initiative on 21st-Century Trade First Agreement Implementation Act,⁷⁹ which implemented the first phase of the U.S.-Taiwan Initiative into law as if it was negotiated as an FTA under the TPA and imposed strict oversight requirements on future negotiations with Taiwan. Similar legislation may emerge covering other agreements

like the IPEF if leaders are unable to find a more conventional TPA compromise.

Emerging International Tensions

Apart from the general policy considerations discussed here, increasing geopolitical tensions, particularly between the United States and China, are also informing the U.S. policy debate and could move the United States away from its traditional focus on free flow of data. The DATA Act, introduced to the House of Representatives in February 2023, would require the executive branch to take certain actions to protect the personal data of U.S. persons, including by restricting data transfers to persons associated with China.⁸⁰ Another recent bill, the RESTRICT Act, approaches the issue by giving the executive branch authority to restrict specific ICT products and services linked to countries of concern.⁸¹ This would limit digital trade by blocking specific digital transactions and business holdings, rather than a broad curtailing of data flows. Another bipartisan bill, reintroduced in June 2023, is seeking to “create new protections against Americans’ sensitive personal information being sold or transferred to high-risk foreign countries.”⁸² This legislation would require the Secretary of Commerce to identify categories of personal data that, if exported, could harm U.S. national security. Bulk transfers of data to high-risk countries would require a license, and such licenses would be presumptively denied.

Debates about the safety of digital trade and data flows between the United States and China are also beginning to affect AI policy, with another recently introduced bill seeking to expand the current semiconductor export controls to include remote or cloud-based use of covered semiconductors.⁸³

Majority support has not yet coalesced around any of these bills, but they are suggestive of evolving views among some members of Congress on the security implications for the United States of cross-border data flows.

Where the United States Will Go with Trade Negotiations

As of the writing of this article, the Biden administration has not explained the specific legal reasoning behind the policy shift for rules governing cross-border data flows reversal, nor has it put forward a new digital policy agenda. While some advocacy groups and politicians on the American left have welcomed the move,⁸⁴

many other members of Congress from both parties (as well as the business community) have strongly criticized the Biden administration for both the change in policy and its lack of transparency.⁸⁵ Such significant bipartisan criticism suggests the policy change may lack sufficient support to be politically sustainable, though it is also now questionable whether the traditional U.S. approach has enough support to continue.

The challenging politics in the United States and lack of trade promotion authority further complicate the potential legal architecture of current initiatives like the IPEF, which does not contemplate commitments on market access. The promise of duty-free access to the U.S. market has been critical for securing binding commitments in key areas, including digital trade, in past agreements. Moreover, new digital trade rules might be of limited value for certain industries that remain locked out of key markets due to unresolved services market access barriers. Market access commitments also play an essential role in the enforcement of trade agreements: WTO and FTA dispute settlement mechanisms allow a complaining party to suspend market access concessions (e.g., by raising tariffs) where a dispute settlement panel finds that a party has violated its obligations. It is unclear what incentives could substitute for market access, raising questions as to the level of ambition that can be achieved and whether any resulting digital trade rules could be effectively enforced.

Key Takeaways

- Cross-border data flows are central to international commerce and innovation and will become increasingly important as the digital economy continues to grow and mature.
- Government measures that prohibit or impede the movement of international data are also increasing in response to shifting national domestic policy priorities, rising geopolitical tensions and national security concerns, and the effect of emerging technologies like AI.
- The efficacy and functionality of the current mix of legal regimes regulating international data movement remain to be seen, and the future international legal architecture governing digital trade and cross-border data flows will be shaped by many factors.

- The wide range of stakeholders and states implicated by current rules and the various initiatives at play may make it challenging to achieve significant outcomes on a global level.
- National policy makers and trade negotiators need to bridge two gaps for meaningful international rules: (1) whether trade agreements should include data flow obligations or not, and (2) determining the appropriate regulatory space for states to accommodate legitimate public policy and national security objectives.
- In the current climate, reaching consensus and then forging the particulars of agreements that calibrate the appropriate balance will be difficult.

Notes

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3. See "Comprehensive and Progressive Agreement for Trans-Pacific Partnership Text and Resources," New Zealand Foreign Affairs & Trade, <https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/cptpp/comprehensive-and-progressive-agreement-for-trans-pacific-partnership-text-and-resources>.

4. See Jeffrey J. Schott, "Which Countries Are in the CPTPP and RCEP Trade Agreements and Which Want In?" July 27, 2023, <https://www.piie.com/research/piie-charts/which-countries-are-cptpp-and-rcep-trade-agreements-and-which-want>.

5. See “Accession protocol of the UK to the CPTPP,” Gov. UK, July 17, 2023, <https://www.gov.uk/government/publications/accession-protocol-of-the-uk-to-the-cptpp>.
6. CPTPP Article 14.3.
7. KORUS Article 15.3.
8. U.S.-Japan DTA Article 7; USMCA Article 19.3.
9. CPTPP Article 14.11.
10. U.S.-Japan DTA Article 11; USMCA Article 19.11.
11. USMCA Article 17.17 sets out a specific obligation to allow cross-border transfers of information in the financial services sector, subject to certain exceptions. In the U.S.-Japan DTA, financial services are covered by the general data flow obligation in Article 11.
12. CPTPP Article 14.13.
13. U.S.-Japan DTA Article 12; USMCA Article 19.12.
14. U.S.-Japan DTA Article 13; USMCA Article 17.19.
15. CPTPP Article 14.17.
16. U.S.-Japan DTA Article 17; USMCA Article 19.16.
17. CPTPP Article 29.1.3; U.S.-Japan DTA Article 3.1; USMCA Article 32.1.2.
18. CPTPP Article 29.2; U.S.-Japan DTA Article 4; USMCA Article 32.2.
19. See “Statement on Indo-Pacific Economic Framework for Prosperity,” White House, May 23, 2022, <https://www.whitehouse.gov/briefing-room/statements-releases/2022/05/23/statement-on-indo-pacific-economic-framework-for-prosperity/>.
20. The 14 countries participating in the IPEF discussion are Australia, Brunei Darussalam, Fiji, India, Indonesia, Japan, Republic of Korea, Malaysia, New Zealand, Philippines, Singapore, Thailand, the United States, and Vietnam. Except for India, which declined to join the Ministerial Statement on the trade pillar, all 14 countries will participate in negotiations for all four pillars, at least at first. See “United States and Indo-Pacific Economic Framework Partners Announce Negotiation Objectives,” Office of the U.S. Trade Representative, September 9, 2022, <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2022/september/united-states-and-indo-pacific-economic-framework-partners-announce-negotiation-objectives>.
21. Ministerial Text for Trade Pillar of the Indo-Pacific Economic Framework for Prosperity, [https://ustr.gov/sites/default/files/2022-09/IPEF%20Pillar%201%20Ministerial%20Text%20\(Trade%20Pillar\)_FOR%20PUBLIC%20RELEASE%20\(1\).pdf](https://ustr.gov/sites/default/files/2022-09/IPEF%20Pillar%201%20Ministerial%20Text%20(Trade%20Pillar)_FOR%20PUBLIC%20RELEASE%20(1).pdf); see also “Trade Pillar,” Office of the U.S. Trade Representative, <https://ustr.gov/trade-agreements/agreements-under-negotiation/indo-pacific-economic-framework-prosperity-ipef/trade-pillar>.
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25. *Id.*

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64. See, e.g., “USTR Releases 2023 National Trade Estimate Report on Foreign Trade Barriers,” Office of the U.S. Trade Representative, March 31, 2023, <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2023/march/ustr-releases-2023-national-trade-estimate-report-foreign-trade-barriers>.

65. For example, in a November 2021 speech on digital trade, Ambassador Katherine Tai stated that USTR is asking “big and consequential questions” about its digital trade policy, including how to “balance the right of governments to regulate in the public interest, with the need for rules that guard against behavior that discriminates against American workers and businesses[.]” See “Remarks of Ambassador Katherine Tai on Digital Trade,” Office of the U.S. Trade Representative, November 3, 2021, <https://ustr.gov/about-us/policy-offices/press-office/speeches-and-remarks/2021/november/remarks-ambassador-katherine-tai-digital-trade-georgetown-university-law-center-virtual-conference>. In addition, during her Senate confirmation process, Ambassador Sarah Bianchi (Deputy USTR for Asia, Services, and Investment) contended that “existing digital trade agreements fail to acknowledge the critical role of workers in the digital economy.” See Responses to Questions for the Record, June 24, 2021, <https://www.finance.senate.gov/imo/media/doc/DUSTR%20Nominee%20Bianchi%20Confirmation%20QFRs.pdf>.

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74. A typical trade promotion authority legislation commits Congress to vote on bills implementing trade agreements within a fixed time period, with limited debate, without amendment, and subject to an up-or-down vote, once the president submits an implementing bill.

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