

# Trade Policy

May 16, 2020

Christopher Balding

# Services, Telecommunications, and E-Commerce in Trade Agreements

# CPTPP Services Articles

- **Article 10.3: National Treatment**
  - 1. Each Party shall accord to services and service suppliers of another Party treatment no less favourable than that it accords, in like circumstances, to its own services and service suppliers.
  - 2. For greater certainty, the treatment to be accorded by a Party under paragraph 1 means, with respect to a regional level of government, treatment no less favourable than the most favourable treatment accorded, in like circumstances, by that regional level of government to service suppliers of the Party of which it forms a part.
- **Article 10.4: Most-Favoured-Nation Treatment**
  - Each Party shall accord to services and service suppliers of another Party treatment no less favourable than that it accords, in like circumstances, to services and service suppliers of any other Party or a non-Party.

# CPTPP Services Articles

- **Article 10.5: Market Access**
- No Party shall adopt or maintain, either on the basis of a regional subdivision or on the basis of its entire territory, measures that:
- (a) impose limitations on:
  - (i) the number of service suppliers, whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirement of an economic needs test;
  - (ii) the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test;
  - (iii) the total number of service operations or the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test;<sup>3</sup> or
  - (iv) the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test; or
- (b) restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service.

# CPTPP Services Articles

- **Article 10.9: Recognition**
- 1. For the purposes of the fulfilment, in whole or in part, of a Party's standards or criteria for the authorisation, licensing or certification of service suppliers, and subject to the requirements of paragraph 4, it may recognise the education or experience obtained, requirements met, or licences or certifications granted, in the territory of another Party or a non-Party. That recognition, which may be achieved through harmonisation or otherwise, may be based on an agreement or arrangement with the Party or non-Party concerned, or may be accorded autonomously.
- 2. If a Party recognises, autonomously or by agreement or arrangement, the education or experience obtained, requirements met, or licences or certifications granted, in the territory of another Party or a non-Party, nothing in Article 10.4 (Most-Favoured-Nation Treatment) shall be construed to require the Party to accord recognition to the education or experience obtained, requirements met, or licences or certifications granted, in the territory of any other Party.

# CPTPP Services Articles

- *Engineering and Architectural Services*
- 5. Further to paragraph 3, the Parties recognise the work in APEC to promote the mutual recognition of professional competence in engineering and architecture, and the professional mobility of these professions, under the APEC Engineer and APEC Architect frameworks.
- 6. Each Party shall encourage its relevant bodies to work towards becoming authorised to operate APEC Engineer and APEC Architect Registers.
- 7. A Party shall encourage its relevant bodies operating APEC Engineer or APEC Architect Registers to enter into mutual recognition arrangements with the relevant bodies of other Parties operating those registers.

# CPTPP Telecommunications Articles

- **Article 13.3: Approaches to Regulation**
- 1. The Parties recognise the value of competitive markets to deliver a wide choice in the supply of telecommunications services and to enhance consumer welfare, and that economic regulation may not be needed if there is effective competition or if a service is new to a market. Accordingly, the Parties recognise that regulatory needs and approaches differ market by market, and that each Party may determine how to implement its obligations under this Chapter.
- 2. In this respect, the Parties recognise that a Party may:
- (a) engage in direct regulation either in anticipation of an issue that the Party expects may arise or to resolve an issue that has already arisen in the market;
- (b) rely on the role of market forces, particularly with respect to market segments that are, or are likely to be, competitive or that have low barriers to entry, such as services provided by telecommunications suppliers that do not own network facilities;<sup>2</sup> or

# CPTPP Telecommunications Articles

- **Article 13.4: Access to and Use of Public Telecommunications Services<sup>3</sup>**
- 1. Each Party shall ensure that any enterprise of another Party has access to and use of any public telecommunications service, including leased circuits, offered in its territory or across its borders, on reasonable and non-discriminatory terms and conditions.
- 2. Each Party shall ensure that any service supplier of another Party is permitted to:
  - (a) purchase or lease, and attach terminal or other equipment that interfaces with a public telecommunications network;
  - (b) provide services to individual or multiple end-users over leased or owned circuits;
  - (c) connect leased or owned circuits with public telecommunications networks and services or with circuits leased or owned by another enterprise;



# CPTPP Telecommunications Articles

- **Article 13.4: Access to and Use of Public Telecommunications Services**
- 4. Notwithstanding paragraph 3, a Party may take measures that are necessary to ensure the security and confidentiality of messages and to protect the privacy of personal data of end-users of public telecommunications networks or services, provided that those measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade in services.
- 5. Each Party shall ensure that no condition is imposed on access to and use of public telecommunications networks and services, other than as necessary to:
  - (a) safeguard the public service responsibilities of suppliers of public telecommunications networks and services, in particular their ability to make their networks or services generally available to the public; or
  - (b) protect the technical integrity of public telecommunications networks or services.

# CPTPP Telecommunications Articles

- **Article 13.7: Treatment by Major Suppliers of Public Telecommunications Services**
- Each Party shall ensure that a major supplier in its territory accords suppliers of public telecommunications services of another Party treatment no less favourable than that major supplier accords in like circumstances to its subsidiaries, its affiliates or non-affiliated service suppliers regarding:
  - (a) the availability, provisioning, rates or quality of like public telecommunications services; and
  - (b) the availability of technical interfaces necessary for interconnection

# CPTPP E-Commerce Articles

- **Article 14.3: Customs Duties**
  - 1. No Party shall impose customs duties on electronic transmissions, including content transmitted electronically, between a person of one Party and a person of another Party.
- **Article 14.4: Non-Discriminatory Treatment of Digital Products**
  - 1. No Party shall accord less favourable treatment to digital products created, produced, published, contracted for, commissioned or first made available on commercial terms in the territory of another Party, or to digital products of which the author, performer, producer, developer or owner is a person of another Party, than it accords to other like digital products.

# CPTPP E-Commerce Articles

- **Article 14.10: Principles on Access to and Use of the Internet for Electronic Commerce**
- Subject to applicable policies, laws and regulations, the Parties recognise the benefits of consumers in their territories having the ability to:
- (a) access and use services and applications of a consumer's choice available on the Internet, subject to reasonable network management;<sup>7</sup>
- (b) connect the end-user devices of a consumer's choice to the Internet, provided that such devices do not harm the network; and
- (c) access information on the network management practices of a consumer's Internet access service supplier.

# CPTPP E-Commerce Articles

- **Article 14.11: Cross-Border Transfer of Information by Electronic Means**
- 1. The Parties recognise that each Party may have its own regulatory requirements concerning the transfer of information by electronic means.
- 2. 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.
- 3. 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.

# Data Flows and Trade Policy

Cross-border data flows underlie today's globally connected world and are essential to conducting international trade and commerce. Data flows enable companies to transmit information for online communication, track global supply chains, share research, and provide cross-border services. One study estimates that digital commerce relying on data flows drives 22% of global economic output, and that global GDP will increase by another \$2 trillion by 2020 due to advances in emerging technologies.

Cross-border data flows are central to trade and trade negotiations as organizations rely on the transmission of information to use cloud services, and to send nonpersonal corporate data as well as personal data to partners, subsidiaries, and customers...for example, new consumer rights to control their personal data may impact how companies can use such data. To enable international data flows and trade, the United States has aimed to eliminate trade barriers and establish enforceable international rules and best practices that allow policymakers to achieve public policy objectives, including promoting online security and privacy.



“Cross-border data flows” refers to the movement or transfer of information between computer servers across national borders. Cross-border data flows are part of, and integral to, digital trade and facilitate the movement of goods, services, people, and finance. A 2017 analysis estimated that global flows of goods, services, finance, and people increased world gross domestic product (GDP) by at least 10% in the past decade, adding \$8 trillion between 2005 and 2015. Effective and sustainable digital trade relies on data flows that permit commerce and communication but that also ensure privacy and security, protect intellectual property, and build trust and confidence. Impeding cross-border data flows, including through some privacy regulations, may decrease efficiency and reduce other benefits of digital trade, resulting in the fracturing, or so-called balkanization, of the internet.

One study of U.S. companies found that data localization rules (i.e., requiring organizations to store data on local servers) were the most-cited digital trade barrier. Some governments advocate privacy or security policies that require data localization and limit cross-border data flows. However, many industry stakeholders argue that blocking cross-border data flows and storing data domestically does not make such data more secure or private.

There are ***no comprehensive multilateral rules*** specifically about privacy or cross-border data flows. However, the United States and other countries have begun to address these issues in negotiating new and updated trade agreements, and through international economic forums and organizations such as the Asia-Pacific Economic Cooperation (APEC) forum and the Organisation for Economic Co-operation and Development (OECD).

The statement did not define the scope of any potential agreement. After the meeting, the EU noted data localization measures among the potential new rules to be discussed when negotiations officially launch in March 2019.<sup>33</sup> The U.S. Trade Representative's (USTR's) statement emphasized the need for a high-standard agreement that includes enforceable obligations. Although some experts note that harmonization or mutual recognition is unlikely given divergent legal systems, privacy regimes, and norms of the parties, a common system of rules to allow for cross-border data flows while ensuring privacy protection is reportedly under discussion.

- **Exporting Personal Data Under EU GDPR**

- Under the GDPR, a few options exist to transfer personal data in or out of the EU and ensure that privacy is maintained.
- 1. An organization may use specific Binding Corporate Rules (BCRs) or Model Contracts approved by the EU;
- 2. An organization may comply with domestic privacy regimes of a country that has obtained a mutual adequacy decision from the EU, which means that the EU has deemed that a country's laws and regulations provide an adequate level of data protection; currently, fewer than 15 jurisdictions are deemed adequate by the EU;<sup>53</sup> or
- 3. A U.S.-based organization may enroll in the bilateral U.S.-EU Privacy Shield program for transatlantic transfer of personal data.

China's trade and internet policies reflect state direction and industrial policy, limiting the free flow of information and individual privacy. For example, the requirement for all internet traffic to pass through a national firewall can impede the cross-border transmission of data.<sup>58</sup> China's 2015 counterterrorism law requires telecommunications operators and internet service providers to provide assistance to the government, which could include sharing individuals' data. Citing national security concerns, China's Internet Sovereignty policies, Cybersecurity Law, and Personal Information Security Specification impose strict requirements on companies, such as storing data domestically; limiting the ability to access, use, or transfer data internationally; and mandating security assessments that provide Chinese authorities access to proprietary information.

U.S. data flow policy priorities are articulated in USTR's Digital 2 Dozen report, first developed under the Obama Administration,<sup>65</sup> and the White House's 2017 National Security Strategy. Both Administrations emphasize the need for protection of privacy, the free flow of data across borders, and an interoperable internet. These documents establish the U.S. position that the free flow of data is not inconsistent with privacy protection. Recent free trade agreements translate the U.S. position into binding international commitments.

- CPTPP, contains the strongest binding trade agreement commitments on digital trade in force globally. CPTPP includes provisions on cross-border data flows and personal information protection. The text specifically states that the parties “shall allow the cross-border transfer of information.”<sup>70</sup> The agreement allows restrictive measures for legitimate public policy purposes if they are not discriminatory or disguised trade barriers. The agreement also prohibits localization requirements for computing facilities, with similar exceptions.



# China Rare Earths

What are the incidents that precipitated  
the shift in policy?

What are the trade issues? What about national treatment, non-discrimination, and export controls?

What does the WTO say about Chinese trade practices?

What is the strength of non-Chinese countries case that China is engaging in unfair practices?

What are the politics of the trade conflict  
here?