

LET'S GET DIGITAL – CANADIAN GOVERNMENT CONSULTS ON MODEL DIGITAL TRADE POLICY

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Canada's Push for Leadership in Digital Trade

In Canada and globally, consumers and businesses are engaging in online trade and commerce at increasing rates. For example, Canadian consumers poured \$84.4 billion in 2020 into online e-commerce, up from \$57.4 billion in 2018 - a 47% increase.^[1] But, barriers to digital trade remain, and the digital transformation of how goods and services are exchanged has led governments, including Canada, to consider enhanced regulation of international digital trade transactions.^[2] Most recently, Canada has engaged in two consultation processes to better understand the views of interested stakeholders in the future trajectory of Canada's digital trade policy.

The Canadian Government has several policy objectives aimed to position Canada as a global leader in international digital trade, including the development of a Model Canadian Digital Trade Policy ("**Model Policy**"). A Model Policy would enable Canada to work with a broad range of trade partners and allow Canadian businesses of various sizes to benefit from increased certainty and predictability of digital trade rules.^[3]

What is digital trade?

Digital trade refers to digitally-enabled transactions for goods and services that are digitally or physically delivered.^[4] Put differently, digital trade involves some element of digital technology, but it does not require a digital delivery or a purely digital good or service. Digital trade can encompass the digital purchase and physical delivery of goods, such as clothing or groceries. Or digital trade may refer to the digital purchase and digital delivery of a service such as a Netflix subscription or video game subscription like Xbox Game Pass.

But digital trade isn't only about e-commerce or streaming. Digital trade involves creating stable e-supply chains, removing barriers to cross-border information sharing between jurisdictions, and co-operating on cybersecurity and privacy issues.

The digitization of trade helps increase the scale, scope and speed of trade, allowing new goods and services to be brought to a larger number of globally-connected businesses and consumers. Particularly, digital trade is valuable to small-and medium-sized enterprises as it assists in overcoming traditional barriers to growth by

facilitating online payments, creating alternative funding mechanisms like crowdfunding and permitting the use of cloud-based technologies, all of which enables increased cross-border financing and exchange of information.^[5]

The growing importance of digital trade for businesses has led countries to adopt international trade policies to facilitate trade and ensure consumers have access to goods and services.^[6] For example, the European Union (“EU”) has developed a “Model Digital Trade Title” which will feature as an addition to any future free trade agreements negotiated by the EU.^[7] The Canadian Government, with their proposed Model Policy, is recognizing the need to enable greater access to digital goods and services and modernize their trade policies to adapt to a rapidly changing digital world.

Where does Canada currently stand on International Digital Trade Agreements?

Canada is currently a party to two international trade agreements that contain digital trade chapters, namely the *Canada-United States-Mexico Agreement* (“CUSMA”) and the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* (“CPTPP”). Both agreements contain chapters that provide obligations and commitments to facilitate international digital trade. For example, both chapters include provisions for consumer protections,^[8] technological co-operation,^[9] protection of personal information,^[10] cooperation on cybersecurity^[11] and protection of source code.^[12]

Many of the provisions contained in the CUSMA and CPTPP chapters on international digital trade, such as the prohibitions against imposing customs duties on electronic goods and services and the non-discriminatory treatment of digital products,^[13] align with World Trade Organization (“WTO”) trade liberalization and non-discrimination obligations.^[14] These agreements codify traditional WTO international trade obligations in the digital context, while also addressing new concerns that arise with the growth of Internet use and potential problems that arise specifically with digital trade.^[15]

Where is Canada headed on international digital trade?

Currently, Canada has two initiatives to bolster its position as a leader in global digital trade. First, Canada requested to join the Digital Economic Partnership Agreement (“DEPA”). Second, Canada conducted public consultations to develop a Model Policy.

Digital Economic Partnership Agreement

In May 2022, Canada announced that it had submitted a formal request to join DEPA. DEPA is the world’s first digital-only trade agreement.^[16] As a flexible, living agreement, membership to DEPA will allow Canada to position itself as a leader in the global digital economy and to ensure a “seat at the table for international rule making.”^[17] This means that Canadian businesses will have clear rules on digitally-enabled trade and will be

able to benefit from new economic opportunities.^[18] Currently, the three DEPA parties are New Zealand, Chile and Singapore. Canada's aim in joining DEPA is to strengthen international engagement on digital trade and to use the flexible DEPA arrangement to "help address fast-evolving digital economy issues of interest to businesses, workers and consumers."^[19] The flexibility built into DEPA will facilitate its growth and continued relevance, and South Korea, a major technological economy, has also asked to join the agreement.^[20]

DEPA and the digital trade-related chapters contained within CUSMA and CPTPP share similarities. DEPA covers issues related to data exchange and data protection, consumer trust, and incorporates the CPTPP chapters on non-discriminatory treatment, regulatory coherence, and cross-border trade, to name a few.^[21]

But, unlike other agreements, DEPA is a "living agreement" which allows the parties to make continual updates and modifications.^[22] The DEPA may be modified by consensus of the Joint Committee, a committee consisting of government representatives of each signatory party.^[23] The Joint Committee is charged with considering any matters relating to the implementation, operation, and any amendment to the DEPA.^[24] Having a Joint Committee empowered to make changes to the DEPA avoids the need to negotiate, sign, ratify and implement an entirely new agreement to implement a change or addition.^[25] The flexibility inherent in the DEPA is particularly valuable in the context of the rapidly evolving digital context and is an improvement on other agreements which can quickly be rendered obsolete by new technological advances.

In March 2021, Canada held public consultations on its possible accession to DEPA, which concluded in May 2021. Industry stakeholders, non-governmental organizations, provinces and territories, and traditionally under-represented groups were encouraged to provide input regarding Canada's request to join.^[26] The DEPA parties have since established a Working Group for Canada to begin DEPA accession negotiations.^[27]

Canada's Model International Digital Trade Policy

On July 15, 2022, Canada had launched a public consultation to develop a Model Policy. Some topics, among others, that were considered for inclusion were:

- electronic transaction frameworks;
- prohibition on customs duties on digital products transmitted electronically;
- electronic cross-border transfer of information;
- open government data;
- competition policies; and
- protecting personal information.^[28]

Many of these topics are already included in the CUSMA, CPTPP, and DEPA. Canada's Model Policy will likely be similar to the CUSMA and CPTPP. However, some topics in Canada's list of considerations for the Model Policy

are new and potentially controversial, such as preventing the proliferation of disinformation online, subsidies, bridging infrastructure gaps and the digital divide to improve access to digital resources amongst all regions of the globe.

Global Affairs Canada solicited input from Canadians on the proposed Model Policy until September 13, 2022. Participation in the consultation process was an important opportunity for Canadian businesses and industry to inform Canada's digital trade policy including the new Model Policy, which will be used as a basis to shape future agreements, obligations and partner countries.

McMillan will continue to monitor and provide updates on the development of Canada's international digital trade policies.

[1] "Online shopping by Canadians in 2020: Results from the Canadian Internet Use Survey" (June 22, 2021), online: Statistics Canada - [Digital economy and society statistics](#).

[2] "[Digital Trade](#)" (last visited November 1, 2022), online: Organisation for Economic Co-operations and Development.

[3] "[Background: Developing a model Canadian digital trade agreement](#)" (last modified March 31, 2022), online: Government of Canada.

[4] "[Digital Trade](#)" (last visited November 1, 2022), online: Organisation for Economic Co-operations and Development.

[5] "[Digital Trade](#)" (last visited November 1, 2022), online: Organisation for Economic Co-operations and Development.

[6] For example, the United States and Mexico have agreed to the digital trade chapter in the new Canada-United States-Mexico Agreement. See "[Canada-United States-Mexico Agreement \(CUSMA\)](#)" (last accessed November 1, 2022), online: Government of Canada.

[7] "[Digital trade in EU trade agreements](#)" (last accessed November 1, 2022), online: European Commission.

[8] Canada-United States-Mexico Agreement, Canada and United States and Mexico, 30 November 2018, CTS 2020/5, 2020/6, art 19.7; Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Australia, Canada, Japan, Mexico, New Zealand, Singapore, Vietnam, Peru, 8 March 2018, art 14.7.

[9] Canada-United States-Mexico Agreement, Canada and United States and Mexico, 30 November 2018, CTS 2020/5, 2020/6, art 19.14, Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Australia, Canada, Japan, Mexico, New Zealand, Singapore, Vietnam, Peru, 8 March 2018, art 14.15.

[10] Canada-United States-Mexico Agreement, Canada and United States and Mexico, 30 November 2018, CTS 2020/5, 2020/6, art 19.8, Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Australia, Canada, Japan, Mexico, New Zealand, Singapore, Vietnam, Peru, 8 March 2018, art 14.8.

[11] Canada-United States-Mexico Agreement, Canada and United States and Mexico, 30 November 2018, CTS

- 2020/5, 2020/6, art 19.15; Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Australia, Canada, Japan, Mexico, New Zealand, Singapore, Vietnam, Peru, 8 March 2018, art 14.16.
- [12] Canada-United States-Mexico Agreement, Canada and United States and Mexico, 30 November 2018, CTS 2020/5, 2020/6, art 19.16, Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Australia, Canada, Japan, Mexico, New Zealand, Singapore, Vietnam, Peru, 8 March 2018, art 14.17.
- [13] Canada-United States-Mexico Agreement, Canada and United States and Mexico, 30 November 2018, CTS 2020/5, 2020/6, art 19.3 and 19.4. Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Australia, Canada, Japan, Mexico, New Zealand, Singapore, Vietnam, Peru, 8 March 2018, art 14.3 and 14.4.
- [14] General Agreement on Tariffs and Trade, 30 October 1947, Article II and Article III, UNTS 187 (entered into force 1 January 1948) Art. 1.
- [15] [“Digital trade chapter summary”](#) (last modified June 17, 2019), online.
- [16] Rachele Taheri, Olivia Adams & Pauline Stern, “DEPA: The World’s First Digital-Only Trade Agreement” (October 7, 2021), online: Asia Pacific Foundation of Canada [DEPA: The World's First Digital-Only Trade Agreement](#).
- [17] “Background: Canada’s possible accession to the Digital Economy Partnership Agreement” (last modified August 25, 2022), online: Government of Canada <international.gc.ca/trade-commerce/consultations/depap-en/background-information.aspx?lang=eng>.
- [18] [“Minister Ng announces Canada’s request to join the Digital Economy Partnership Agreement”](#) (last modified May 22, 2022), online: Government of Canada.
- [19] [“Minister Ng announces Canada’s request to join the Digital Economy Partnership Agreement”](#) (last modified May 22, 2022), online: Government of Canada.
- [20] Rachele Taheri, Olivia Adams & Pauline Stern, “DEPA: The World’s First Digital-Only Trade Agreement” (October 7, 2021), online: Asia Pacific Foundation of Canada [DEPA: The World's First Digital-Only Trade Agreement](#); see also [“Korea leading in technologies that have potential for future growth, says OECD”](#) (last accessed November 1, 2022), online.
- [21] [“Background: Canada’s possible accession to the Digital Economy Partnership Agreement”](#) (last modified August 25, 2022), online: Government of Canada.
- [22] [“Background: Canada’s possible accession to the Digital Economy Partnership Agreement”](#) (last modified August 25, 2022), online: Government of Canada.
- [23] Digital Economic Partnership Agreement, Chile, New Zealand, Singapore, 12 June 2020, art 12.1.
- [24] Digital Economic Partnership Agreement, Chile, New Zealand, Singapore, 12 June 2020, art 12.2.
- [25] Laura Barnett, [“Canada’s Approach to the Treaty-Making Process”](#) (April 1, 2021), online: Library of Parliament.
- [26] [“Minister Ng announces Canada’s request to join the Digital Economy Partnership Agreement”](#) (last

modified May 22, 2022), online: Government of Canada.

[27] "[Background: Canada's possible accession to the Digital Economy Partnership Agreement](#)" (last modified August 25, 2022), online: Government of Canada.

[28] "[Background: Developing a model Canadian digital trade agreement](#)" (last modified March 31, 2022), online: Government of Canada.

by [Lisa Page](#), [Jonathan O'Hara](#), [Adelaide Egan](#) (Articling Student)

A Cautionary Note

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