

Policy Brief No. 171 — January 2022

The Digital Economy Partnership Agreement Should Canada Join?

Dan Ciuriak and Robert Fay

Key Points

- The Digital Economy Partnership Agreement (DEPA) provides the most comprehensive template yet for a regional trade agreement tailored for the digitally transformed economy. However, areas remain underdeveloped, and the interface with non-economic issues remains to be articulated.
- The DEPA lays groundwork for discussions on critical areas that go beyond the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). Joining the DEPA early would allow Canada to participate in developing it so that it meets small, open economies' needs.
- Intellectual property (IP), at the heart of the digital economy, is an area that the DEPA is largely silent on and requires urgent attention.
- Finally, Canada should push for a broader lens on cooperation that goes beyond the DEPA.

Introduction

With the rise of the intangibles economy and the increase in the share of global commerce taking place in digital form or facilitated by digital platforms, it is becoming increasingly important to update the rules-based framework to accommodate and facilitate digital trade, while addressing the regulatory issues associated with the flow of data across borders and the virtual cross-border operations of multinational enterprises (MNEs).

This work will not be a matter of simply transposing regulations developed for the tangibles economy to the intangibles economy, since new issues are raised by the shift of economic activity and social interaction online. These include, *inter alia*:

- market regulation to address issues of competition in a context of winner-take-most economics and novel concerns raised by digital platforms;
- looming challenges in the regulation of artificial intelligence (AI), and the implications for IP frameworks of AI systems being assigned creative rights;
- sovereignty and national security concerns that are intrinsic to the online world;

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- the taxation of MNEs operating in markets on a purely virtual basis; and
- the myriad issues related to data ranging from privacy to economic value and, ultimately, to ownership and custodial obligations.

In the borderless world of cyberspace, all these issues have their international dimensions.

While it is far from clear that data and the digital economy more generally are “treaty-ready” (Ciuriak 2018), governments around the world are not waiting. Data and digital trade chapters have been incorporated in regional agreements, such as the CPTPP, the Canada–United States–Mexico Agreement (CUSMA), and the Regional Comprehensive Economic Partnership (RCEP), and in stand-alone agreements, such as the US–Japan Digital Trade Agreement and Singapore's digital economy agreements (DEAs) with Australia, South Korea and the United Kingdom.

The most interesting DEA is the DEPA, developed by Chile, New Zealand and Singapore, the group that launched the Pacific Three Closer Economic Partnership (P3 CEP) negotiations that eventually grew into the CPTPP. Like the P3 CEP, the DEPA is seen as a template for a much larger agreement, including possibly for the World Trade Organization (WTO) itself. Already, South Korea and China have formally applied to accede (Asian Trade Centre 2021); others are likely to follow.

Canada expressed its interest in joining the DEPA in December 2020, conducted domestic consultations on joining over the course of 2021, and has entered exploratory talks to this end with the incumbent members. The substantive content of the DEPA consists mostly of imported CPTPP measures; accordingly, joining would have limited immediate impact on Canada's existing digital trade policies. However, there are numerous areas in the DEPA that remain underdeveloped and other DEA areas that are not addressed. Joining early would allow Canada to participate in the development of governance of digital trade in a way that meets the needs of Canada as a small, open economy; this would also avoid Canada finding itself in the difficult position it faced when applying to join the CPTPP late in the game. This policy brief addresses the areas where further development of the agreement would be particularly significant in adapting trade agreements to the modern digitally transformed and data-driven

intangibles economy, and sets out the rationale for Canada to join the DEPA and to participate in its further elaboration and development.

Deconstructing DEPA: Areas for Further Development

The DEPA is comprised of 16 modules, which, for the most part, adopt or refine existing measures addressing digital trade facilitation.¹ The most important textual source is the CPTPP, to which all three DEPA members are party. Module 1 sets out the scope of the agreement, its relationship to other agreements and provides general definitions; modules 2 through 9 cover the substantive provisions; modules 10 through 12 introduce cooperation measures; module 13 addresses the critical exceptions that carve out policy space for the members; and the remaining modules, 14 through 16, cover administrative matters, including transparency, dispute settlement, and the final provisions addressing issues such as entry into force, accessions and withdrawals from the treaty, and so forth. The following sections review the substantive modules with particular attention to areas likely to be a focus of future development.

Business and Trade Facilitation (Module 2)

Module 2, “Business and Trade Facilitation,” addresses the technical aspects of cross-border e-commerce, including providing for e-versions of trade administration documents, maintenance of domestic legal regimes for e-transactions consistent with international conventions, e-invoicing and expedited frameworks for express shipments. These areas have already been well developed through agreements such as the CPTPP.

Two areas where future development is signalled are in logistics and e-payments.

On logistics, the DEPA provides for information sharing of best practices in areas such as last-

mile deliveries, including on-demand and dynamic routing solutions; the use of electric, remote-controlled and autonomous vehicles; and federated (also referred to as “smart”) lockers that facilitate pickup of online purchases.

On e-payments, the DEPA sets out a number of principles to be applied on a “best endeavours” basis. The main issue for trade agreements will be promoting interoperability and ensuring that e-payment regulatory measures aiming at safety, efficiency, trust and security are proportionate to the risks. One area that may be of great importance for cross-border trade in the future but that is not touched on in the agreement is that of e-currencies, which are only now being rolled out on a trial basis and are subject to intense scrutiny by central banks.

Treatment of Digital Products and Related Issues (Module 3)

DEPA’s module 3 provides for non-discrimination of digital products from competing suppliers, entrenches the current WTO moratorium on application of tariffs on digital products, and addresses the treatment of encrypted digital products.

Two areas where further work is needed for the development of the digital economy are the sharing of the benefits of the digital economy as it pertains to tariffs on digital products, and encryption.

The DEPA defines digital products as distinct from electronic transmissions and affirms the existing WTO commitment to no tariffs on digital products. However, the acceptability of this treatment to developing countries is contingent on a fair sharing of the taxation rights on the digital economy. Not all developing economies have signed on to the Inclusive Framework on BEPS (base erosion and profit shifting) developed by the Organisation for Economic Co-operation and Development (OECD) in collaboration with the Group of Twenty (G20). This framework assigns a certain amount of taxation rights on the operations of MNEs to the markets in which they operate, irrespective of whether they have a physical (and taxable) presence in those markets. As Dan Ciuriak and Akinyi J. Eurallyah (2021) have argued, the amount of taxation rights transferred under the Inclusive Framework is small relative to the extent of tax avoidance, and the Inclusive Framework does not even broach the issues related to the value of data as an asset (which is separate

¹ See www.mfat.govt.nz/assets/Trade-agreements/DEPA/DEPA-Signing-Text-11-June-2020-GMT-v3.pdf.

from any current monetization). This issue will need to be addressed if the DEPA is to ultimately evolve into a truly multilateral agreement.

The DEPA also delves into encryption. There is an important nexus between data protection, privacy, and lawful access regimes that provide for government access to personal data held by the private sector. The DEPA provides for such access. The OECD's Committee on Digital Economy Policy is currently exploring "the possibility of developing, as a matter of priority, high-level policy guidance for government access to personal data held by the private sector."² This is an important issue, as it has been raised as a rationale for complete exclusion of private sector providers of telecommunications equipment or business services from particular markets.

Data Issues (Module 4)

The DEPA incorporates existing CPTPP commitments on cross-border data and data localization. The main issues in this area for further elaboration lie in the framing of the national security and sovereignty exceptions that will ultimately define the de facto scope of free flow of data across borders.

Importantly, the CPTPP measures, which the DEPA adopts, were conceived before the age of the Internet of Things (IoT). The IoT likely changes matters considerably, especially for the "backbone infrastructure" sectors (telecommunications, transportation, energy and finance). These areas have traditionally faced stronger restrictions on international market access on national security grounds, even in the pre-digital environment.

The DEPA also delves into the issue of personal information protection with a basic requirement that parties put in place a privacy framework; it also provides a list of principles for consideration by national authorities. Ultimately, however, the privacy regimes are outside the framework of the trade agreement.

The value of DEAs will ultimately depend on the ability to define reasonable disciplines on national security exceptions and on the coherence and alignment of national privacy measures.

Wider Trust Environment (Module 5)

The DEPA broaches, but does not develop, the issue of cybersecurity, limiting itself to a few words on cooperation. This is obviously just a placeholder at the present time. Cybersecurity promises to be a major area for future policy making, because, although it is not inherently a cross-border issue, it connects powerfully with national security, particularly in the context of the IoT, as noted above. Decoupling and repatriation of international supply chains in the fifth-generation (5G) mobile telecommunications networks over cybersecurity concerns is but one example of the importance that governments have attached to this issue. Other highly relevant initiatives outside the DEPA are the G20's initiative on "free flow with trust" (Chen et al. 2019) and the abortive US push for "clean networks," and so forth (Girard 2020a).

Business and Consumer Trust (Module 6)

The DEPA touches on online consumer protection, including CPTPP commitments on unsolicited messages. These issues are not inherently cross-border in nature. Nevertheless, with an increasing share of retail e-commerce delivered directly to the consumer, it bypasses retail businesses for which traditional consumer protection measures have been put in place, and, while most regulatory measures will be developed in other fora dealing with the internet, DEPA can usefully link consumer protection more closely with these measures to deal with emerging issues.

Digital Identities (Module 7)

The development of regimes for digital identities, individual and corporate, is of truly major importance for digital and digitally enabled commerce. Digital identity will take on more importance with the advent of the metaverse that links virtual and augmented reality with social media and other applications. The DEPA contains commitments to promote the interoperability between the parties' respective regimes for digital identities, including best endeavours to foster technical interoperability

2 See www.oecd.org/digital/trusted-government-access-personal-data-private-sector.htm.

or common standards, and comparable levels of protection of digital identities.

Most of the work in this area will be done in specialized fora; however, the DEPA could serve as an important vehicle for addressing trade interfaces.

Emerging Trends and Technologies (Module 8)

This is one of the most important areas for the DEPA and in future iterations of the agreement will likely be broken out into its major parts, which separately address, respectively, financial technology (fintech), AI, government procurement and competition policy. The thin treatment of these highly complex areas in the current version of the DEPA speaks to the inadequate groundwork completed thus far for a digital trade agreement — and, by the same token, to the ample scope for future development.

As regards fintech, the DEPA restricts itself to promoting cooperation at the industry level between the parties. The major international market access issues are likely to be about access to data controlled by entrenched domestic financial institutions. This issue is not broached by the DEPA.

As regards AI, the booming trade in “smart” devices is testimony that trade in AI has developed with seemingly little interference from non-tariff barriers, notwithstanding the plethora of potential issues ranging from standards to trust, dual use, and societal impacts in areas such as jobs (Ciuriak and Rodionova 2021). Module 8 of the DEPA acknowledges the economic and social importance of ethical governance frameworks for AI technologies and incorporates “best endeavours” commitments to promote trusted, safe and responsible use of AI technologies, taking into consideration “internationally recognised principles or guidelines, including explainability, transparency, fairness and human-centred values” (article 8.2).

At the same time, as the international tensions over technology escalate and as AI improves, the continued trade in AI is likely to face more severe hurdles — on both the export restriction side and the market acceptance side. The DEPA is silent on these issues. The DEPA is also silent on how to enforce the ethical use of AI, which could include the desire to audit algorithms (for bias, for example).

More generally, the IP landscape has evolved considerably since IP protection was embedded in multilateral trade rules through the 1995 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). Notable developments include the following:

- Public goods issues have become far more significant, with the major issues of the day — the pandemic, climate change and the regulation of data — all having major public goods characteristics. While the highest-profile topic of a TRIPS waiver for IP related to vaccines for COVID-19 is not a digital economy issue per se, similar issues will be confronted in reconciling public imperatives and private rights in IP in areas central to the digital economy.
- Trade secrets have become a much more important component of the AI protection tool kit; unlike other forms of IP, trade secrets are not transparent and are indefinite in terms of the life of protection. Moreover, they raise important issues in the movement of personnel between companies as to what is “human capital” belonging to the employee and what is protected IP.
- Profound new issues have emerged with AI now having been named as an innovator on a patent by two jurisdictions (Naidoo 2021; Currey and Owen 2021), alongside more general issues of AI agency.
- IP is at the heart of the data-driven economy, inducing strategic behaviour with far higher stakes than was evident to the drafters of the TRIPS agreement, and leading to market failures that require rectification if competitive markets are to remain the norm.
- An attractive feature of the digital economy is the empowerment of households and micro enterprises to monetize their assets — whether in terms of the sharing economy or in reselling merchandise through online thrift shops. In the latter regard, takedown notices have been issued against thrift shops, calling into question the viability of this business mode (Sato 2021).

The treatment of IP in the data-driven, digital economy is an area that should be considered and further developed, perhaps through module 12’s joint committee mechanism (discussed below).

As regards government procurement, the DEPA promotes cooperation on digitization of procurement processes. However, perhaps the most important future issue in this area — the use by nations of procurement as a tool for industrial policy in a context of high stakes — is not broached. Similarly, as regards competition policy, the DEPA restricts itself to promoting cooperation between competition authorities without broaching the thorny issues raised by the revealed propensity for anti-competitive behaviour in the digital economy.

Innovation and the Digital Economy (Module 9)

The DEPA recognizes that data is important for innovation and acknowledges the importance of regulatory “sandboxes” to work out the regulatory requirements. However, it does not begin to address the issues related to providing open data: in particular, the fact that the government bears the costs of collection, classification and curation, while the private sector reaps the benefits, in a context where the biggest beneficiaries are likely to be the largest data-driven firms operating at large scales — namely, the global superstar firms.

General Exceptions and Essential Security Interests (Module 13)

The DEPA incorporates the General Agreement on Tariffs and Trade (GATT) and General Agreement on Trade in Services (GATS) articles for general exceptions that provide for non-conforming measures adopted to meet legitimate public policy goals (article 13.1), and for exceptions for essential security interests (article 13.2), with the now standard practice of dropping the list of circumstances in which the security exceptions could be triggered, including the mention of an emergency. The determination of what are essential security interests is self-judging by the party making the determination.

As regards legitimate public policy goals, the GATT/GATS language was developed in a pre-digital age. This raises questions as to whether the DEPA provides adequately for domestic policy space. Certain areas are clearly anticipated (for example, in the measures addressing fintech cooperation). However, Canada and other nations are actively reviewing and updating rules governing *inter alia* personal privacy, data governance, digital identities and consumer-

directed finance. It is important that DEPA not constrain possible policy choices (Fay 2020).

As regards the national security exceptions, given the exposure to cybersecurity threats across the entire cyber landscape, and the frequent resort to national security claims to restrict cross-border digital transactions, investment and access to data, the DEPA framing provides no certainty of digital market access; indeed, the value of the commitments of the DEPA will thus ultimately be determined by actual practice. This is one area where DEPA parties could lead the way in elaborating reasonable limits to the application of these measures.

Cross-Cutting Issues: Standards, Cooperative Mechanisms and Interaction with Other Trade Agreements

Standards

In its preamble, the DEPA recognizes the role of standards, and in particular appeals to the use of “open standards, in facilitating interoperability between digital systems and enhancing value-added products and services.” However, it fails to recognize that standards and IP go hand in hand, that standards are used to embed both technology and values into the use of technologies, and that standard setting itself is subject to vested interests. Although the appeal to “open” standards may be a tacit recognition of vested interests, the appeal to open standards does not mitigate their influence. The DEPA should do more than promote internationally recognized standards or appeal to open standards and instead should help to define standards that meet the values of the parties. DEPA could create a single data zone where trustworthy data would circulate freely between like-minded countries based on the shared values (Girard 2020b).

Cooperative Mechanisms

In their assessment of the impact of the North American Free Trade Agreement’s update on

Mexico, the present authors emphasized that the cooperative mechanisms built into it are likely to be very important for the parties to take full advantage of the agreement (Ciuriak and Fay 2021). As a partnership agreement, the DEPA acknowledges the importance of cooperation and has many provisions to this effect. For example, article 8.4 relates to cooperation in competition policy; article 10.4 promotes a “digital dialogue” among small and medium-sized enterprises that recognizes the need for a multi-stakeholder approach that can be used in other areas; article 11.1 promotes cooperation on digital inclusion that is essentially multi-stakeholder in nature; and module 12 provides for collaboration on future issues with the establishment of a “Joint Committee,” which among other things will “consider ways to further enhance digital economy partnership between the Parties” (article 12.2(c)). Article 12.5 acknowledges areas where cooperation may take place including information exchanges and formal cooperation such as mutual recognition, equivalence or harmonization.

An area where the DEPA could facilitate such work is on the issues surrounding IP, standard setting and competition. In a related area, in module 8 the agreement notes that “in view of the cross-border nature of the digital economy, the Parties further acknowledge the benefits of developing mutual understanding and ultimately ensuring that such frameworks are internationally aligned, in order to facilitate, as far as possible, the adoption and use of AI technologies across the Parties’ respective jurisdictions” (article 8.2(1)). Although it is important to be aligned with international efforts, these frameworks have been defined with vested interests, and signatories could undertake work with a view to determining whether these frameworks are suitable for small, open economies.

Given that one of the DEPA’s goals is to bring together like-minded countries, which could then form the nucleus for broader multilateral agreement, the DEPA could set out a mechanism for an integrated discussion of the wide range of topics where issues remain largely unresolved, including privacy, competition, standard setting and so on. Currently, there is no body to take on this role. One option is to discuss the idea of supporting the creation of a Digital Stability Board (Fay 2019).

Interaction with Other Trade Agreements

The proliferation of DEAs is creating a new “spaghetti bowl” of overlapping agreements with different provisions on allowable exceptions in critical areas related to data localization and cross-border data flows that cannot be subject to dispute settlement. These interlinkages need to be assessed, so that it can be determined which agreement would apply in case of dispute under any particular set of circumstances (for example, CUSMA and the CPTPP differ in their treatment of these issues).

New Areas

At a time of rapid developments in the digital economy and digital regulation, it is important that the DEPA stay abreast of international best practice in order for it to represent the vehicle for a broadly applied multilateral agreement. Already, agreements such as the Australia-Singapore DEA have introduced new elements (for example, measures on submarine cables), while China’s new suite of data security and privacy laws have elaborated new regulatory distinctions concerning types of data.

Conclusions and Recommendations

Canada should join the DEPA. Joining early would give Canada the opportunity to participate in the development of this agreement in a way that meets the needs of Canada as a small, open economy, and avoid putting Canada into the difficult position it faced when applying to join the CPTPP late in the game.

Many of the provisions adopted in the DEPA are similar to those in the CPTPP, so Canada would in these instances essentially agree to provisions already in force. At the same time, the DEPA lays the groundwork for discussions on critical areas that underpin the digital economy and go beyond the CPTPP. Canada can influence these discussions and ensure that new provisions meet the values that Canada holds. At the same time, Canada can work

with like-minded countries to bring these values to a broader range of countries, countries that may be seeking an alternative to values being defined by and based on the interests and concerns of the governments and firms of the major data realms.

One area in particular that requires urgent attention is the treatment of the intangible assets — IP and data — that are at the heart of the digital economy. The DEPA is largely silent on both the valuation of and the regulatory issues surrounding these intangible assets.

Canada will also need to critically examine the interplay between the growing number of agreements that broach the regulation of international commerce in digital space, including the DEPA, the CPTPP, CUSMA and RCEP, as well as the EU templates for digital economy measures in trade agreements, and their alignment with a future WTO 2.0 tailored for the digital age.

Finally, Canada should push for a broader lens on cooperation that goes beyond the DEPA. The substantive regulation of the digital economy and its interface with society is being conducted for the most part outside the negotiations toward digital economy trade agreements. Agreements reached outside the context of trade negotiations can materially affect the balance of benefits achieved in trade agreements — and, conversely, measures agreed in trade negotiations can constrain policy space in non-trade areas. Given the rapid movement in these areas, a new international forum is required to work out and bring together work on standards, regulations, laws and policies that underpin the data-driven economy.

Acknowledgements

This brief was prepared on behalf of the Centre for International Governance Innovation in response to requests for comments made by the Government of Canada on the DEPA text as it currently exists, as well as for views on how the DEPA could be updated to advance international digital trade and address any trade barriers.

Acronyms and Abbreviations

5G	fifth generation
AI	artificial intelligence
BEPS	base erosion and profit shifting
BoC	Bank of Canada
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
CUSMA	Canada-United States-Mexico Agreement
DEAs	digital economy agreements
DEPA	Digital Economic Partnership Agreement
fintech	financial technology
G20	Group of Twenty
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
IoT	Internet of Things
IP	intellectual property
IPC	Information and Privacy Commissioner of Ontario
MNEs	multinational enterprises
OECD	Organisation for Economic Co-operation and Development
P3 CEP	Pacific Three Closer Economic Partnership
RCEP	Regional Comprehensive Economic Partnership
TRIPS	Trade-Related Aspects of Intellectual Property Rights
WTO	World Trade Organization

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