**The New Rules on Digital Trade in Latin American**

**Regional Trade Agreements**

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**Abstract**

While recent technological advances have allowed an increase in digital trade, this growth has occurred with a lack of clear and defined rules. This deficiency has become an issue for Latin American countries. With the multilateral trade regime impasse, more complex regional and bilateral agreements have emerged. The formulation of digital trade regulation raises many questions. In this article we deal with the new rules on digital trade in regional trade agreements recently negotiated by Latin American economies. In this work, special emphasis is given to comparing the CPTPP and USMCA, the most advanced regional trade agreements regarding these issues.

**Key Words**

Digital trade – regional trade agreements – USMCA – CPTPP – Pacific Alliance

**Introduction**

The emergence of digital trade is a new phenomenon that governments are not sure how to confront. In this context, many Latin American countries are dealing with international commitments where they do not have domestic regulation. The main concern is how these regulations are created in international agreements and which challenges they represent for the countries. As ([Wolfe, 2018](#_ENREF_18)) indicates, “the digital trade story is about how states are learning to solve the problems of state responsibility for something that does not respect their borders while still allowing 21st century commerce to develop”.

Given that digital trade is a recent topic and has appeared in an open post-World Trade Organisation (WTO) era, direct trade restrictions on digital trade have not yet evolved, so there is little need to liberalise it in the traditional sense. Rather, the focus is on preventing countries adapting non-digital trade protection measures to this new area ([Ciuriak & Ptashkina, 2018, p. 6](#_ENREF_4)), as well as facilitating the growth of digital trade.

Yet, despite the benefits that digital trade produces, national government policies can produce interface issues caused by differences in regulatory frameworks for various reasons, some legitimate or defensible like privacy, consumer protection and national security, and others that are considered less so, like protectionism or the promotion of domestic businesses ([Monteiro & Teh, 2017](#_ENREF_12)). The result of these policy and regulatory frictions is that the cross border flows of digital goods, services and data is limited and the possible gains of digitization for trade and growth are not automatically translated to developing economies ([Suominen, 2017a](#_ENREF_16), [2017b](#_ENREF_17)). As such, there is a need for clear digital trade provisions in trade agreements to create certainty through new rules.

Currently, digital trade has been seen as of particular concern to developed and large economies, but developing economies, like Chile and Mexico, are increasingly affected and active in this domain. The failure of the WTO to develop clear rules for digital trade has meant that the focus has moved to the bilateral and regional level, where new norms are being proposed and experimented with. The most developed set of norms can be found in the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and Unites States-Mexico-Canada Free Trade Agreement (USMCA).

In this article, we first examine the WTO and global digital trade regulations. The second section examines regional agreements, APEC and the CPTPP and the effects on the Pacific Alliance. CPTPP has been considered as key due to its inclusion of a comprehensive set of new digital trade rules and for its effect on countries in the region. We include a legal analysis of the USMCA provisions and compare the USMCA with the CPTPP, in order to understand the ways in which new regulations towards digital trade are likely to be interpreted. Finally, some concluding remarks are presented.

**The WTO and global digital trade regulations**

International digital trade presents a challenge due to the lack of clearly defined global rules, meaning that there is no coherent set of guidelines for countries to ensure the free flow of digital trade internationally ([Suominen, 2017a](#_ENREF_16)). The last major round of negotiations of the WTO to have been completed, the Uruguay Round, predated the rise of digital trade, and, since then, no real progress has been made to update the rules. The need, however, has been present in the multilateral agenda since 1998, when the WTO Work Programme on Electronic Commerce was created to examine all trade issues relating to digital trade. Although the group was not mandated to create a set of rules, there is a general perception that it has made no substantive progress and multilateral efforts have stalled ([Monteiro & Teh, 2017](#_ENREF_12); [Wu, 2017](#_ENREF_19)). Although the WTO held a ministerial meeting in Argentina in December 2017, which produced a Joint Statement on Electronic Commerce, there is little indication that the idea will be successful ([Meltzer, 2018](#_ENREF_10)). [Ciuriak and Ptashkina (2018)](#_ENREF_4) indicate that the WTO has been largely on the side-lines in shaping the framework for digital and digitally enabled trade.

The “multilateral regulatory framework on e-commerce is incomplete” ([Giordano et al., 2017, p. 54](#_ENREF_7)). [Wu (2017)](#_ENREF_19) argues that the limitations of existing WTO rules push existing members to establish additional legal obligations to govern digital trade. The issues that need to be resolved include definitions of what constitutes digitally traded products and non-physical digital goods and services, how to update WTO classifications challenged by technological advances, improving market access, securing and facilitating cross-border data flows, implementing consumer-related regulatory measures like protecting personal data, stopping unsolicited electronic messages and safeguarding the right to be forgotten, as well as improving security, and finally, facilitating trade through digital means like electronic documentation. [Callo-Müller (2019)](#_ENREF_3) specifically highlights the need for consumer protection and data protection regulations.

**Regional agreements: APEC-CPTPP, Pacific Alliance and UMSCA**

Due to the failure of the WTO to successfully work towards a set of multilateral digital trade rules, regional and bilateral trade agreements (RTAs) have become the focus of efforts to develop digital trade rules ([Meltzer, 2018](#_ENREF_10)). As a result, “RTAs are sometimes viewed as a laboratory enabling countries to design new provisions and address new issues and challenges” ([Monteiro & Teh, 2017, p. 70](#_ENREF_12)).

When combined with regional integration schemes like the Pacific Alliance (PA) and the Asia-Pacific Economic Cooperation Forum (APEC), RTAs can fulfil two goals of digital trade. On the one hand, they fuel and facilitate intra-regional digital trade, and on the other, they help develop economies of scale for local digital companies. Both are achieved by creating large, integrated digital markets that allow for the creation of digital giants, and they lower operating costs for companies, incentivising investment and the creation of start-ups. In order for economies to benefit from the changes brought about by the digital economy, it is necessary to establish transparent rules, freedom of innovation, a level playing field and interoperability among economies. ([Suominen, 2017a](#_ENREF_16), [2017b](#_ENREF_17)).

[Ciuriak and Ptashkina (2018, p. 15)](#_ENREF_4), however, argue that the RTA-driven development of new digital trade rules has probably reached its limits and will probably come to an end with the finalisation of the major agreements currently under negotiation. Another issue is that RTAs do not always tackle the full range of problems associated with the changes to global trade, and they tend to avoid certain intractable and politically sensitive issues ([Wu, 2017](#_ENREF_19)).

[Wu (2017)](#_ENREF_19) dispels the myth that robust digital trade regulations are only demanded by large developed countries. Focusing on the region, although Latin America and the Caribbean have shown a commitment to expanding digital trade opportunities, there is a lack of a common regional approach for such a project, which directly impedes the capacity of the region to benefit from the changing trade situation ([Meltzer, 2018](#_ENREF_10)). The author indicates that a lack of common regional rules for digital trade limits the scope for expansion in trade within Latin America ([Meltzer, 2018](#_ENREF_10)). Specifically, the opportunities that are created by online cross-border data flows depend on regulations to give consumers and companies the confidence to participate in these interactions, protection of the freedom of data flows across borders, and cooperation between countries to protect against and limit negative externalities and possible protectionist measures ([Meltzer, 2016](#_ENREF_9)).

The capacity of the region to capitalise on developments in digital trade is dependent on the modernisation of the region’s regulatory framework ([Giordano et al., 2017](#_ENREF_7)). This unevenness of rules is indicated by [Giordano et al. (2017)](#_ENREF_7), who study the inclusion of digital trade provisions in RTAs in Latin America (16 intraregional and 19 extra-regional agreements). They find that the types of commitments and depths vary widely, with greater inclusion of digital trade facilitation, some rules regarding market access and near exclusion of user protection commitments. The authors compare the actual and potential commitments if the digital trade related provisions of the CPTPP were fully implemented, and find that actual commitments only correspond to 13% of potential obligations.

Although all RTAs that include Latin American countries have worked on issues related to the digital economy, [Patiño, Rojas, and Agudelo (2018, p. 36)](#_ENREF_15) highlight that the most recent ones, in particular the CPTPP and the Pacific Alliance, put special emphasis on trade and development aspects related to the internet and digital trade.

**Asia-Pacific Economic Cooperation-CPTPP**

The Trans Pacific Partnership (TPP) was originally considered to be the nucleus of a future Asia Pacific RTA that would cover the Asia-Pacific Economic Cooperation (APEC) zone (Stephenson and Robert in ([Callo-Müller, 2019](#_ENREF_3)). All the members of the now CPTPP are members of APEC and that this group represents just over half of all APEC members. As a consensus based space for dialogue, APEC’s commitment to the digital trade economy is built on non-binding agreements and cooperation between its members, rather than on binding agreements like RTAs, as is the case of the Pacific Alliance Additional Protocol (PAAP) and the CPTPP. However, despite this fact and that not all the topics present in the CPTPP are addressed, the discussion panels and the work of the expert groups have served as the basis for the creation of public policies in APEC countries and the incorporation of key topics into trade agreements entered into by member states. As such, there is a convergence between the topics looked at by APEC and the CPTPP ([Observatorio Estratégico de la Alianza del Pacífico, 2017](#_ENREF_13)).

The group has a number of initiatives that focus on digital trade. These include the Electronic Commerce Steering Group, based on the principles established in the 1998 APEC Blueprint for Action on Electronic Commerce, which works to promote digital trade through predictable, transparent and consistent legal, regulatory and policy environments. Its work to strengthen privacy protection and to promote cross-border privacy rules via the voluntary Cross-Border Privacy Rules and System, and the Privacy Recognition Processors System programme stands out ([APEC Electronic Commerce Steering Group, 2017](#_ENREF_1)). Also important is the Paperless Trading Subgroup that looks to facilitate paperless trading and the use of electronic documents, and the Data Privacy Pathfinder, that looks to secure cross-border flows of personal information ([Suominen, 2017a](#_ENREF_16)).

[Wu (2017)](#_ENREF_19) argues that it is nations belonging to the APEC that most frequently push for the inclusion of privacy related provisions in RTAs. The author highlights that the APEC ministers have already endorsed the APEC Privacy Framework that looks to protect the data of individual natural persons, as part of its work to “deal with deficiencies in the policies and regulatory frameworks on electronic commerce and seek to promote the free flow of information and data across borders” ([Patiño et al., 2018](#_ENREF_15)). Although it has been used as a useful reference for policy makers of APEC members when drafting domestic privacy regulations, it is not legally binding ([APEC Electronic Commerce Steering Group, 2017](#_ENREF_1)). On an interesting side note, [Elms and Nguyen (2017)](#_ENREF_5) state that the TPP data privacy rules originated in the APEC Policy Framework, indicating a complex and at times reciprocal causal relationship between APEC and the CPTPP.

However, despite the importance afforded to the topic in APEC, there are as of yet no APEC-wide agreements that cover digital trade, and the grouping has made little progress in creating a new regulatory framework ([Asian Trade Centre, 2016](#_ENREF_2)).

APEC is also relevant in the creation of norms, especially in digital privacy rules, which were the basis for the provisions in the CPTPP regarding this topic. However, being a voluntary organisation, its norms are not binding. As such, APEC depends wholly on the willingness of the parties to use the work of the various organisations and work groups as the foundation for their own domestic public policies and regulations.

[Meltzer (2018)](#_ENREF_10) identifies the CPTPP as key due to its inclusion of a comprehensive set of new digital trade rules and for its effect on countries in the region, as Mexico, Chile and Peru are either signatories or have ratified the agreement. For these countries, it is the most robust set of rules for this type of trade and includes a binding commitment to allow the free flow of data, prohibits data localisation requirements that could function as an impediment to entering the market, permits the use of all devices on the internet and requires all groups to adopt privacy protection regulations ([Giordano et al., 2017](#_ENREF_7)). [Meltzer (2018)](#_ENREF_10) indicates that the agreement covers 12 different digital trade specific provisions and groups them under the topic of market access, digital trade facilitation and the protection of users.

However, despite the progressiveness of the agreement, [Wolfe (2018)](#_ENREF_18) indicates that not all the provisions in the CPTPP have the same language, with some being aspirational and others obligatory. Applying the analytical scheme of [Horn, Mavroidis, and Sapir (2010)](#_ENREF_8) of WTO+, which are areas where RTAs go beyond WTO obligations, and WTO-X, which are areas not currently covered by the WTO, [Wolfe (2018)](#_ENREF_18) indicates that the majority of the digital trade provisions in the CPTPP are WTO-X, with the exception of making the WTO moratorium on custom duties on digital trade permanent. Another issue is the legal enforceability of the provisions. Some are aspirational with vague enforceability or look to promote only dialogue and cooperation, so not all provisions in the CPTPP are legally enforceable.

**Pacific Alliance**

Despite the shortcomings of the CPTPP, it has become a model for other agreements, including the PA and the NAFTA renegotiations ([Meltzer, 2018](#_ENREF_10)). According to [Michalczewsky and Ramos (2017)](#_ENREF_11), the PA agreements regarding digital trade found in the PAAP most closely match the provisions found in the CPTPP when compared to other Latin America intraregional or extra-regional PTAs. The provisions related to customs duties, consumer protection, personal data protection, paperless commerce, spam and cooperation with SMEs are consistent between the PAAP and the CPTPP ([Observatorio Estratégico de la Alianza del Pacífico, 2017](#_ENREF_13)). According to [Michalczewsky and Ramos (2017)](#_ENREF_11), this similarity could be due to two factors: that the agreements were negotiated at the same time, and that Mexico, Chile and Peru are members of both the PA and the CPTPP. Also relevant is that fact that Australia, Canada, New Zealand and Singapore are associate members of the PA as well as states that participated in the negotiations of the original TPP. It is for this reason that the CPTPP, with its high standards in digital trade, is positioned as a frame of reference for the PAAP ([Observatorio Estratégico de la Alianza del Pacífico, 2017](#_ENREF_13)).

The PAAP prohibits the imposition of customs duties on digital trade, but permits internal taxes and other charges, as well as mandating the adoption of measures to protect against unsolicited electronic commercial messages and a simple commitment of the parts to consider negotiating a cross-border flow of information provision ([Wu, 2017](#_ENREF_19)). Interestingly, the PAAP is one of the very few RTAs to incorporate specific provisions on the use and location of computing facilities ([Monteiro & Teh, 2017](#_ENREF_12)). The agreement also promotes interoperability among the regulatory frameworks of the member countries, promotes the inclusion of SMEs in digital trade, and is working towards a regional digital market, cyber security and common public-private dialogues ([Suominen, 2017a](#_ENREF_16)).

The PAAP is not, however, a simple copy of the CTPP and has been called “a hybrid product that aims to balance the creation of a business-friendly environment (US style) with the need to safeguard consumer and data protection (EU style)” ([Callo-Müller, 2019, p. 200](#_ENREF_3)). Despite the similarity and the fact that the PAAP replicates two thirds of the standards of the CPTPP, [Michalczewsky and Ramos (2017)](#_ENREF_11) indicate that “the PAAP does not include core issues such as a suitable domestic legal framework, guaranteeing freedom of internet access, and avoiding measures that could increase transaction costs (localization of data servers, source codes). It also leaves out cooperation around cyber security, a key factor in building the confidence needed for consumers and companies to get involved in online transactions” ([Michalczewsky & Ramos, 2017](#_ENREF_11)). The PAAP has no intellectual property chapters and it lacks norms on Internet service provider liability. Neither does it include TPP style provision for interoperability, meaning that is does not go as far as the TPP and its successor, but further than the current RTA between the PA members and with the USA and the EU ([Callo-Müller, 2019](#_ENREF_3)). Also missing is a dispute settlement mechanism. In general terms, the PAAP develops the topics found in the TPP and CPTPP in less depth ([Observatorio Estratégico de la Alianza del Pacífico, 2017](#_ENREF_13)).

**USMCA**

Chapter 19 of the USMCA regulates digital trade, but not to government procurement or to measures related to information held or processed by or on behalf of government (Article 19.2(3)). One exception to this exemption for government-controlled information is for “open government data”, which Article 19.18 defines as “government information”, including data that a Party chooses to make available to the public. Article 19.18 requires Parties to “endeavour to ensure that the information is in a machine-readable and open format and can be searched, retrieved, used, reused, and redistributed.” “Government information” is defined as “non-proprietary information, including data, held by the central government.”

Article 19.11(1) bans restrictions on “the cross-border transfer of information, including personal information, by electronic means if this activity is for the conduct of the business of a covered person.” “Personal information” is defined as “information, including data, about an identified or identifiable natural person”.

Article 19.11(2) provides an exception to the obligation in Article 19.11(1), for measures that are:

necessary 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 necessary to achieve the objective.

This exception uses language from GATT Article XX, which has also been incorporated into the General Agreement on Trade in Services (GATS), and other WTO Agreements. WTO jurisprudence on this language serves as a source of guidance on how to interpret USMCA Article 19.11(2).

The party invoking the exception in Article 19.11(2) would have the burden of proof to show that: (1) the measure is necessary to achieve a legitimate public policy objective; (2) the measure’s restrictions on transfers of information are not greater than are necessary to achieve the objective; and (3) the measure is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade.

USMCA Article 19.11(2) does not an illustrative list of legitimate objectives. However, USMCA Chapter 19 recognizes the importance of laws governing electronic transactions (Article 19.5), online consumer protection (Article 19.7), personal information protection (Article 19.8), regulations for spam (Article 19.13), security in electronic communications (Article 19.14), cybersecurity (Article 19.15), as well as intellectual property rights, criminal laws and law enforcement (Article 19.17), so these are likely to qualify as a legitimate objectives. USMCA Chapter 11 incorporates Article 2.2 of the TBT Agreement, so its list of legitimate objectives is also part of the interpretative context of Article 19.11(2): national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. For the purposes of, inter alia, Chapter 19, GATS Article XIV (a), (b), and (c) are incorporated into and made part of the USMCA, *mutatis mutandis*. GATS Article XIV(a) permits measures “necessary to protect public morals or to maintain public order”), GATS Article XIV(b) permits measures “necessary to protect human, animal or plant life or health”), and GATS Article XIV(c) permits measures “necessary to secure compliance with laws and regulations… including those relating to (i) the prevention of deceptive and fraudulent practices…; (ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data…; (iii) safety.” Given the incorporation and application of these provisions, these should all qualify as legitimate objectives as well. However, in the context of Article 19.11(2), the application of GATS Article XIV provisions would have to be applied in a manner that is consistent with the language used in Article 19.11(2), particularly the language regarding necessity and the incorporation of language from the GATS Article XIV chapeau, which omits the GATS language regarding discrimination “between countries where like conditions prevail.”

The Appellate Body in *US – Gambling* interpreted the term “necessary” in GATS Article XIV(a) to mean the same as the term “necessary” in GATT Article XX. Thus, the term “necessary” has been given the same interpretation in similarly worded exceptions in covered agreements that apply to different sectors (goods and services). While USMCA Article 19.11(2) addresses a more specific sector, *US – Gambling* indicates that this is not an obstacle to applying the same interpretation to the term “necessary”. As the Appellate Body noted in *US – Stainless Steel (Mexico)*, WTO Members cite WTO jurisprudence in legal arguments in dispute settlement proceedings and take the jurisprudence into account when enacting or amending national legislation. WTO Members also take the jurisprudence into account in trade negotiations. Thus, the interpretation of identical terms should be similar, given the similarities in the language that is used in the GATT, GATS and USMCA provisions, the fact that all three are exceptions and the similar contexts of these provisions.

The context of USMCA Article 19.11(2) is not identical to that of GATS Article XIV and GATT Article XX. The term “legitimate public policy objective” is broader in USMCA Article 19.11(2) because it encompasses a wider range of objectives, some of which are specific to digital trade. Nevertheless, given the similar wording and context, GATT and GATS jurisprudence suggests the following analysis would be appropriate. First, the party invoking the exception must make a *prima facie* case that the policy goal at issue in its measure qualifies as a “legitimate public policy objective”. Once it is established that the policy goal fits the exception, the party would then have to prove that the measure is “necessary” to achieve the policy goal. This analysis takes place in light of the level of risk that a Member has set for itself. To demonstrate that the measure is necessary involves weighing and balancing a series of factors. First, the greater the importance of the interests or values that the challenged measure is intended to protect, the more likely it is that the measure is necessary. GATT Article XX jurisprudence has addressed the importance of human life and health (*EC – Asbestos*) and environmental protection (*Brazil – Retreaded Tyres*), and would be relevant at this stage of the analysis. Second, the greater the extent to which the measure contributes to the end pursued, the more likely that the measure is necessary. In *Brazil – Retreaded Tyres*, the Appellate Body noted that if a party is seeking to demonstrate that its measures are “necessary” it should seek to establish that need through “evidence or data, relevant to the past or present”, to establish that the contested measures contribute to the attainment of the pursued objectives. However, this requirement can be met with qualitative evidence. Third, the less WTO-inconsistent the challenged measure is, the more likely it would be considered necessary. The final issue is whether a WTO-consistent alternative measure, which the Member concerned could reasonably be expected to employ, is available, or whether a less WTO-inconsistent measure is reasonably available. The analysis of the availability of less-restrictive alternative measures would be relevant to the requirement in USMCA Article 19.11(2) that the measure’s restrictions on transfers of information are not be greater than are necessary to achieve the objective.

The party invoking the exception may point out why alternative measures would not achieve the same objectives as the challenged measure, but it is under no obligation to do so in order to establish, in the first instance, that its measure is “necessary”. If the other party raises a WTO-consistent alternative measure that, in its view, should have been taken, the party invoking the exception would be required to demonstrate why its challenged measure nevertheless remains “necessary” in the light of that alternative or, in other words, why the proposed alternative is not, in fact, “reasonably available”. If the party invoking the exception demonstrates that the alternative is not “reasonably available”, in the light of the interests or values being pursued and the party’s desired level of protection, it follows that the challenged measure must be “necessary” (*US – Gambling*).

In *Brazil – Retreaded Tyres*, the Appellate Body decided that an alternative measure cannot be considered to be “reasonably available” when it is simply of a theoretical nature, for example when the respondent cannot adopt it or imposes an undue burden on that Member, such as “prohibitive costs or major technical difficulties”. In this case, the alternative of collecting tyre waste and incinerating it in special facilities was rejected. In addition, the alternative measure must maintain the respondent’s right to achieve the desired level of protection with respect to the pursued objective. For a proposed alternative to be viable, it must be less trade-restrictive and make at least an equivalent contribution to the protection of human, animal or plant life or health. Once a viable alternative has been proposed, it is for the respondent to demonstrate why such a measure is not reasonably within his reach. In the USMCA context, this could raise the issue of whether the availability of alternatives might be different for Mexico, given its level of economic and technological development.

The requirement that the measure is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade should be similar to that in the GATT Article XX and GATS Article XIV chapeau, minus the analysis of “countries where like conditions prevail.” The GATT Article XX and GATS Article XIV chapeau prohibits both *de jure* and *de facto* discrimination. Footnote 5 in USMCA Article 19.11(2) would be relevant to determining whether the discrimination is arbitrary or unjustifiable: “A measure does not meet the conditions of this paragraph if it accords different treatment to data transfers solely on the basis that they are cross-border in a manner that modifies the conditions of competition to the detriment of service suppliers of another Party.” In *Brazil – Retreaded Tyres*, the Appellate Body held that there is arbitrary or unjustifiable discrimination when the reasons given for this discrimination bear no rational connection to the objective, or would go against that objective. In USMCA Article 19.11(2), the relevant objective would be the legitimate policy objectives noted above.

**USMCA versus CPTPP**

CPTPP Article 14.11 is significantly different from USMCA Article 19.11. First, CPTPP Article 14.11(1) provides that, “The Parties recognise that each Party may have its own regulatory requirements concerning the transfer of information by electronic means.” USMCA Article 19.11 excludes this provision, indicates less tolerance for different approaches to managing cross border data flows (Scassa 2018; Casalini & González 2019).

CPTPP Article 14.11(2) provides that, “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.” This contrasts with the USMCA Article 19.11 equivalent, which bans prohibitions and restrictions, which is arguably a stronger wording for this obligation, particularly in light of the wording of the exception.

CPTPP Article 14.11(3) differs from USMCA Article 19.11(3) in that the former does not use the term “necessary”, whereas that latter uses the term “necessary”, not once, but twice. CPTPP Article 14.11(3) provides:

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.

The CPTPP language makes the relevance of WTO jurisprudence regarding the term “necessary” doubtful. Moreover, the term “required” sets a lower bar than the term “necessary”. The result is that the USMCA provisions strengthen the obligation and weaken the exception, thereby changing the balance between the rights of governments to regulate cross-border data flows in the public interest and the rights of big data to engage in cross-border data mining that facilitates the development of new technologies, particularly those based on artificial intelligence.

**Final Remarks**

This review has examined digital trade rules in key Latin American RTAs: the CTPP, PA and UMSCA. These regional rules have emerged to fill the gap left by the absence of multilateral solutions. These RTAs are among the most avanced in the regulation of digital trade, particularly in teh key areas of privacy, access to information and data flows. However, the CPTPP and USMCA have diverged in their terminology, resulting in distinct approaches to managing cross border data flows and divergence in the relevance of WTO jurisprudence to key exceptions. The end result of the absence of multilateral rules is to set the stage for a spaghetti bowl of rules in the region on this topic.

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