



THE CANADIAN  
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## Potential WTO Negotiations on E-commerce

**CANADIAN BAR ASSOCIATION  
BUSINESS LAW, COMMODITY TAX, CUSTOMS AND TRADE, COMPETITION LAW, INTELLECTUAL  
PROPERTY LAW, TAXATION LAW AND INTERNATIONAL LAW SECTIONS**

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## **PREFACE**

The Canadian Bar Association is a national association representing 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the CBA Business Law, Commodity Tax, Customs and Trade, Competition Law, Intellectual Property, Taxation Law and International Law Sections, with assistance from the Advocacy Department at the CBA office. The submission has been reviewed by the Law Reform Subcommittee and approved as a public statement of the CBA Business Law, Commodity Tax, Customs and Trade, Competition Law, Intellectual Property Law, Taxation Law and International Law Sections.

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# Potential WTO Negotiations on E-commerce

## I. INTRODUCTION

The CBA Business Law, Commodity Tax, Customs and Trade, Competition Law, Intellectual Property, Taxation Law and International Law Sections, (collectively, the CBA Sections) welcome the opportunity to comment on Global Affairs Canada's consultations on Canada's potential future World Trade Organization (WTO) negotiations on e-commerce.

The CBA is a national association representing over 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. We promote the rule of law, access to justice, effective law reform and bring practical expertise on how the law touches the lives of Canadians every day.

Subject to our comments below, we believe there are benefits to an agreement on e-commerce at the WTO that increases market access, eliminates barriers to digital trade and safeguards personal information and consumer protection. This can be accomplished by bringing the full scope of digital trade under the aegis of WTO disciplines and ensuring that digital trade is subject to horizontal obligations of national treatment and non-discrimination, while allowing countries to adopt domestic regulatory regimes that are not disguised restrictions on trade.

International trade is increasingly driven by cross-border transfer of data, digital goods and services. However, unnecessary barriers and legal uncertainty undermine the global digital economy's potential, particularly for small and medium-sized enterprises (SMEs) and consumers. Common rules could remove technical and logistical barriers by facilitating interoperability and regulatory cooperation on issues like e-payments, parcel delivery, e-signatures, online digital identity, logistical bottlenecks and virtual dispute resolution (B2B and B2C).

In addition, an e-commerce agreement could foster international cooperation and coordination to address harms of a global digital economy such as disinformation in political campaigns, fake news, hate crimes, cyber-bullying and cyber-crime.

However, a narrow approach focused on barrier removal and legal certainty could exacerbate important social, geopolitical and legal challenges. Unchecked growth of the digital landscape could accelerate inequalities.

Growing calls for regulation to address the unintended consequences of the digital world's rapid evolution and impact on our daily lives underscore the need for transparency and broad engagement. Cooperation must address a wide range of issues and include different voices. The WTO could build on existing work of the United Nations Conference on Trade and Development (UNCTAD) and the EU's Digital Single Market strategy and cooperation with Latin America and the Caribbean.

Generally, however, a WTO e-commerce agreement should avoid unwarranted restrictions on competition, and any restrictions should be no broader than necessary to address legitimate matters.

## **II. CUSTOMS PROCEDURES AND TRADE FACILITATION**

Customs procedures and trade facilitation are currently addressed in the WTO Trade Facilitation Agreement. Full implementation of this agreement will facilitate e-commerce by increasing transparency and streamlining cross-border formalities such as single window initiatives.

Nonetheless, customs issues particular to e-commerce are not currently included in the WTO Trade Facilitation Agreement. Foremost among these is the *de minimus* threshold for payment of duties and tax (i.e. the value below which goods can be shipped into a country before duties and taxes are assessed).

This is now an important competitive issue for Canada due to its agreement to raise its *de minimus* threshold in the Canada-United States-Mexico Agreement (CUSMA). If CUSMA comes into effect, Canada's will raise its *de minimus* threshold to \$150 CDN, which will presumably apply to all e-commerce shipments into Canada. If the *de minimus* threshold remains comparatively low in other countries, Canada's e-commerce businesses will be disadvantaged compared with their foreign competitors selling into Canada.

An example of a smaller, but still significant issue is the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) requirement<sup>1</sup> that member countries not deny the legal validity of a signature solely on the basis that the signature is in electronic form. The CPTPP requirement is weakened because it allows for derogations from the law in “circumstances otherwise provided for under its law”. This is, however, important for e-commerce businesses and companies that facilitate e-commerce transactions. For example, the Canada Border Services Agency maintains that a *wet ink* signature is required to permit a customs broker to act as agent for an e-commerce purchaser even though this is not a legal requirement.

### **III. NON-APPLICATION OF CUSTOMS DUTIES ON ELECTRONIC TRANSMISSIONS OR DIGITAL PRODUCTS**

WTO Member States currently abide by a customs duties moratorium on electronic transmissions. Each moratorium is for two years and has been continuously renewed since its implementation. Presumably, the moratorium has remained temporary because some Member States are uncertain about limiting their ability to apply customs and duties on electronic transmissions or digital products in the future. A temporary moratorium creates uncertainty and may become more problematic as new technologies allow countries to effectively track electronic transmissions and impose duties.

Further, since Canada has committed to not apply customs duties to electronic transmissions or digital products under regional free trade agreements (CUSMA and CPTPP), it is unlikely to apply duties against countries that are not party to these agreements. Therefore, if other countries adopt customs duties, Canadian e-commerce businesses will be disadvantaged.

Canada should pursue an agreement on the non-application of customs duties on electronic transmissions or digital products (including digital services). In this regard, we recommend Canada explicitly state whether it considers a specific digital product a good or a service.

This approach is consistent with Canada’s positions in CUSMA and other recently negotiated trade agreements. In addition, the *Customs Act*, as currently drafted, is ill-suited to address the imposition of duties on anything other than physical goods delivered by conventional means.

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<sup>1</sup> See Article 14.6 of the Trans-Pacific Partnership text, incorporated by reference in the CPTPP.

#### **IV. MARKET ACCESS FOR GOODS AND SERVICES**

The current WTO framework, where trade in *goods* is covered by the General Agreement on Tariffs and Trade (GATT) and trade in *services* is covered by the General Agreement on Trade in Services (GATS), is inadequate to impose comprehensive market access disciplines such as national treatment and non-discrimination due to the basic limitations of the GATS, definitional uncertainties and e-commerce developments.

The horizontal disciplines on market access to goods imposed under the GATT apply only to a limited subset of e-commerce products that have a physical form. Other disciplines that aim to address non-tariff barriers such as technical regulations are applicable only to products and not services. For example, the Agreement on Technical Barriers to Trade specifically excludes services. While this is not often raised in the context of an e-commerce agreement, we believe the WTO should consider if e-commerce services would benefit from more generally applicable national treatment rules and other technical barriers to trade-like disciplines (e.g. the requirement to use international standards where available).

A key feature of the GATS is that national treatment is not a general horizontal obligation. Rather, the national treatment obligation will only apply to a member country that has assumed specific commitments, both on a sectoral and mode of supply-specific basis. While the GATS includes general disciplines on domestic regulation, these apply only if a specific commitment is undertaken.

Under its current structure, the GATS is characterized by definitional uncertainties and an outdated classification of services. For example, the functional difference between cross-border delivery and consumption abroad is unclear and could impact the ability of an e-commerce business to access a particular market if commitments are undertaken only with respect to one mode of supply, and the service is considered to fall within the other mode. Current GATS trade in services classifications also create uncertainty by failing to address e-commerce market access – as new business models (such as search engines) may offer services in multiple services classifications.

Canada should pursue a WTO e-commerce agreement on market access. This would avoid unnecessary regulatory burdens, facilitate trade and be consistent with Canada's approach in the CUSMA, the CPTPP and other recent trade agreements.

## V. FLOW OF INFORMATION ACROSS BORDERS

Data and information flows are key components of trade. E-commerce data flows are more fluid, frequent and borderless than traditional trade. Given varying privacy, intellectual property and security concerns, it is difficult to determine when data is subject to domestic law and which cross-border enforcement is appropriate.<sup>2</sup>

In Canada and the Asia-Pacific region, the CPTPP supports the digital economy and addresses data flow matters such as online personal information and consumer protection, location of computing facilities and cooperation on cybersecurity matters.

Surprisingly, global data flows are currently addressed in traditional bilateral or multilateral agreements. Given the limitations of this approach, the WTO platform could improve cross-border data flow regulation. In particular, the WTO could set the framework to make different privacy requirements interoperable across jurisdictions and create an agreement facilitating the movement of data<sup>3</sup> (similar to the Information Technology Agreement).

## VI. TAXATION OF DIGITAL PRODUCTS

Long-term solutions to the challenges arising from the digitalisation of the global economy are critical. The allocation of taxing rights in the cross-border context is the central issue.

The Base Erosion and Profit-Shifting (BEPS) Action Plan (2013) of the Organization for Economic Cooperation and Development (OECD) identified the digital economy as Action 1 and established a dedicated Task Force on the Digital Economy (TFDE). The Action 1 report delivered in October 2015 to the G20 Finance Ministers highlighted key issues, including challenges of *ring-fencing* the digital economy, exacerbation of the risk associated with income-shifting via intangibles, and broader issues on nexus and income allocation. VAT/GST guidelines were developed but there was no consensus on policy options for income tax.

In March 2017, G20 Finance Ministers committed to work through the TFDE (now the Inclusive Framework on BEPS and expanded to include more than 125 countries). In March 2018, the Inclusive Framework interim report on the tax challenges of digitalization was released. All

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<sup>2</sup> Bertrand De La Chapelle & Paul Fehlinger, "Jurisdiction on the Internet: From Legal Arms Race to Transnational Cooperation" (2016), GCIG Paper No. 28. Waterloo, ON: CIGI and Chatham House, [online](#).

<sup>3</sup> WTO Conference on the Use of Data in the Digital Economy, » Use of Data in Digital Economy Conference" (2-3 October 2017), Conference Notes, [online](#).

members agreed to work toward a consensus-based solution by 2020 (although in the interim, several countries have responded with unilateral measures such as diverted profits taxes, digital services taxes and reduced thresholds for nexus to taxation). To that end, a policy note (January 2019) and a public consultation document<sup>4</sup> (February 2019) were issued and public consultations were held in March 2019.

In March 2019, the International Monetary Fund (IMF) released *Corporate Taxation in the Global Economy*, a study on the digital economy. Among other issues, the study considers the allocation of taxing rights amongst countries. It does not make specific recommendations, as that is not the role of the IMF, but it is an important analysis of the framework on which recommendations from others could be assessed.

Any agreement at the WTO on the taxation of digital products should consider the significant and ongoing work at the OECD and other organizations. Harmonization of international tax measures is important to clarify key goals, including avoidance of double taxation, neutrality and simplicity, development of dispute resolution mechanisms and minimization of unilateral measures.

The scope of tax-related measures, if any, proposed in potential WTO negotiations is unclear. To the extent taxation of digital products forms part of the discussion, we encourage active monitoring of developments at the OECD and other organizations to avoid inconsistent outcomes.

With respect to VAT or transaction-based taxation, Canada's recently negotiated trade agreements reserve to each party the ability to impose "internal taxes, fees or other charges" on digital products transmitted electronically, provided such tax would not be imposed inconsistently with those trade agreements.

To the extent member states seek to impose internal taxes, it would be ideal if these taxes were generally consistent and did not amount, in aggregate, to a punitive amount or trade barrier.

In the absence of a consensus-based solution, Canada could explore, as a temporary measure in particular, whether it should enact unilateral measures such as a VAT-type digital services tax.

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<sup>4</sup> See *Addressing Tax Challenges of Digitalisation of the Economy*, [online](#).

## VII. INTELLECTUAL PROPERTY RIGHTS

For intellectual property (IP) rights, a WTO agreement would be beneficial to address licensing IP rights from a rights owner to a third party, barriers to the online environment, measures to counter pirating and support for SMEs. Properly defining ownership of IP is crucial. As information is transmitted across jurisdictions, ownership of copyright, trademarks, patents and other IP must be clearly defined to prevent potential disputes.

For IP licensing of patents or other IP rights from a rights owner to another party, a framework agreement could address:

- use of blockchain in e-commerce including the secure storage of information across multiple platforms and payment of royalties or other licence fees
- forced licensing or transfer of ownership for access to certain markets (e.g. China)
- distribution licenses for authorized sellers of products online in jurisdictions other than where the IP owner is located (e.g. use of trademarks owned by a third party, or the sale of a patented invention through a third-party distributor selling or promoting goods and services through e-commerce)
- standardization of government fees for licensing of specific intellectual property rights, including recordals

To reduce barriers to the online environment, an agreement should address the high cost of securing IP rights and disclosure of patentable subject matter and related grace periods. It should also encourage the use of international agreements to lower costs to IP owners (e.g. the Madrid Protocol for trademark registration may be of interest when negotiating an e-commerce agreement across multiple jurisdictions).

For countermeasures to pirating, counterfeiting and theft of IP, discussions could include:

- protection of online creative content (music, photos, graphics, videos, etc.)
- standardization of fines or penalties for infringement<sup>5</sup>
- cybersecurity to protect trade secrets (e.g. confidential graphics, source code, object code, algorithms, programs, data flow charts, logic flow charts, user manuals, database content and data structures)
- international enforcement of injunctions<sup>6</sup>
- scope of service provider responsibility to remove content

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<sup>5</sup> For example, the U.S. Copyright Act has special provisions for protection against site disabling.

<sup>6</sup> See *Equustek Solutions Inc. v. Jack*, 2018 BCSC 610, [online](#).

To support companies, especially SMEs, to use and enforce IP rights, discussions could include:

- protection and penalties for IP infringement
- protection and penalties for copying a website's content and *look and feel*<sup>7</sup>
- protection of codes and databases by copyright and patents
- education and support for e-commerce, including how to protect online businesses (e.g. registering trademarks, trade names, domain names, copyright, websites, IP insurance, implementing fingerprints in licensed materials)
- notice of IP rights (e.g. proper marking with symbols, watermarks, registration numbers)
- information on how to find and use material in the public domain, how to communicate when it is acceptable to use trademarks owned by others, or when it is not acceptable to use hyperlinks
- potential regulation of meta-tagging and take-down notices<sup>8</sup>
- standardizing language for online agreements, non-disclosure agreements, controlled or conditional access systems, and encryption agreements. (e.g. model codes in the U.S.)
- enforcement of IP rights, counterfeiting and infringement on the *dark web*
- rules for enforcement of online agreements (e.g. would there be a governing body overseeing international arbitration or mediation to settle disputes?)

The World Intellectual Property Organization (WIPO) has a comprehensive regulation on e-commerce and intellectual property rights. Involving WIPO in negotiations may be beneficial.

## VIII. TRANSPARENCY OF LAWS, POLICIES AND REGULATIONS

Transparency of laws, policies and regulations helps create a predictable e-commerce environment. Making e-commerce laws, policies and regulations readily available to businesses and consumers would also increase the accountability of governments, organizations and administrative authorities. Given the complex nature of e-commerce and transborder data flows, transparency is a key consideration.

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<sup>7</sup> See *United Airlines, Inc. v. Cooperstock*, 2017 FC 616, [online](#).

<sup>8</sup> However, meta-tagging competitor's information is a commercially used marketing strategy (see *Vancouver Community College v. Vancouver Career College (Burnaby) Inc.*, 2017 BCCA 41, [online](#)) and management or monitoring take downs would be heavily burdensome on the WTO.

The Canadian government promotes transparency through access to information legislation<sup>9</sup> and a government-maintained website ([open.canada.ca](http://open.canada.ca)). A similar centralized and accessible platform for WTO members and consumers would help achieve transparency. Further, an agreement with enforceable obligations for access to information of e-commerce legislation would improve regulatory predictability and facilitate enforcement. We also suggest that any agreement include a mechanism for filing complaints or notices of transparency or accountability deficiencies by WTO members or businesses.

Encouraging transparency and accountability at the WTO level may have the additional benefit of encouraging transparency in developing countries that may not otherwise prioritize these objectives.

## **IX. ONLINE CONSUMER PROTECTION AND CHOICE**

Federally, the *Competition Act* imposes civil and criminal penalties for deceptive and misleading marketing practices, price-fixing and promotional contests. The *Criminal Code* prohibits some types of promotional activity including contests and lotteries. Provincially and territorially, consumer protection laws set out consumer rights for certain types of agreements (including e-commerce agreements) and prohibit specified unfair practices. Québec's *Charter of the French Language* requires that French be the everyday language of business in Québec and separate legislation requires consumer contracts to be in French.

The consumer protection landscape in Canada is complex and a WTO agreement may interfere with existing consumer protection legislation. A WTO e-commerce agreement on consumer protection may also add layers of compliance for businesses.

Any WTO agreement on online consumer protection and choice should consider the complex nature of the consumer protection landscape in Canada, particularly because a WTO agreement could interfere with existing consumer protection legislation and add to the compliance burden of businesses in Canada.

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<sup>9</sup> *Access to Information Act* (R.S.C., 1985, c. A-1), the *Privacy Act* (R.S.C., 1985, c. P-21), as well as the federal *Guidelines on the Proactive Disclosure of Contracts*, [online](#).

## **X. PERSONAL INFORMATION PROTECTION**

E-commerce relies heavily on the flow of data across borders, including the transfer of personal information. Canada's current federal privacy laws do not prohibit the transfer of personal information across borders and outside of Canada. They protect personal information primarily through contract, and organizations comply with their legal obligations by including contractual provisions that contemplate, among other things, security safeguards and restrictions on the use of personal information. A WTO e-commerce agreement could harmonize privacy and data protections laws across jurisdictions and reduce the need for complex contract provisions.

The harmonization of privacy and data protection laws could also promote predictability and consistency on the collection and use of personal information. A WTO agreement could also propose standards for how artificial intelligence and machine-learning technologies might use and transfer personal information. However, consistent monitoring and enforcement of the terms of such an agreement would be critical.

## **XI. REGULATORY COOPERATION**

A WTO agreement on e-commerce could increase transparency, reduce duplication of regulatory supervision and promote compliance. For example, monitoring and enforcement of e-commerce legislation on anti-money laundering, anti-corruption and privacy can improve with regulatory cooperation.

As e-commerce grows and its supporting technologies develop, compliance will be more challenging for SMEs and consumers may suffer. Regulatory cooperation will be essential for monitoring and enforcing local privacy and intellectual property laws and e-commerce legislation on anti-money laundering, and anti-corruption. However, an agreement would have to consider how to allocate the costs of regulatory enforcement.

## **XII. CONCLUSION**

Thank you for the opportunity to comment on potential future WTO negotiations on e-commerce. Please let us know if have any questions or if we can assist further.

### **XIII. SUMMARY OF KEY RECOMMENDATIONS**

1. Canada should pursue an agreement on the non-application of customs duties on electronic transmissions or digital products (including digital services).
2. WTO should consider if e-commerce services would benefit from more generally applicable national treatment rules and other technical barriers to trade-like disciplines.
3. Canada should pursue an agreement on market access to avoid unnecessary regulatory burdens, facilitate trade and be consistent with Canada's approach in recent trade agreements.
4. WTO should set framework to make different privacy requirements interoperable across jurisdictions and create an agreement facilitating the movement of data.
5. WTO should consider significant and ongoing work at the OECD and other organizations for any agreement on taxation of digital products.
6. WTO agreement would be beneficial to address licensing IP rights from a rights owner to a third party, barriers to the online environment, measures to counter pirating and support for SMEs.
7. Make e-commerce laws, policies and regulations readily available to businesses and consumers to increase accountability of governments, organizations and administrative authorities.
8. WTO agreement on online consumer protection and choice should consider complex nature of the consumer protection landscape in Canada
9. WTO agreement could harmonize privacy and data protections laws across jurisdictions and reduce the need for complex contract provisions.