CAMP

Why Canada Should Delete Restrictive Digital Trade Rules from CUSMA

Executive Summary

Six years after its ratification in 2020, the Canada-United States-Mexico Agreement (CUSMA, T-MEC, or USMCA) is coming up for its six-year review in July 2026. Canada must work to retain the beneficial aspects of the agreement without missing the opportunity to shed provisions born out of a bygone era of foreign relations. Core to that opportunity is Canada reasserting its interest and ability to regulate digital markets and platforms and standing up to the enormous concentration of wealth and power in the hands of a few major U.S. technology companies.

Since ratification, Canadian efforts to regulate digital markets have met a familiar tactic of threats to upend the trade relationship between Canada and the United States. This pushback goes beyond the characteristics of any one bill, and future resistance to regulation on trade grounds will determine whether Canada can enforce our own competition laws, protect privacy, set terms for cloud and data infrastructure, or hold platforms accountable for their harmful design.

The source of these constraints are articles of CUSMA's digital trade chapter, Chapter 19. Bureaucratic labels like non-discriminatory treatment of digital products and the cross-border transfer of information via electronic mask restrictions on Canada's ability to have a say over the companies that dominate our digital sphere. As the costs of Big Tech's dominance continue to mount, Canada needs a free hand to ensure digital markets serve the public interest.

Heading into the summer review, Canada's position on CUSMA must accomplish two things: it must defend the policy space needed to govern digital markets, and remove the specific provisions that have been used to foreclose it. To do so, CAMP recommends:

- **Removing Articles 19.4, 19.11, 19.12, 19.16, and 19.17** from CUSMA's digital trade chapter, used to block or chill Canadian digital regulation. Their removal is the precondition for full autonomy in digital markets.
- **Preserving and advancing domestic digital policy** including legislation on privacy protections, online harms, and fraud prevention and resist any future trade commitments that constrain action on these priority areas.
- **Asserting Canadian data sovereignty** by ensuring Canadian data protection law applies to Canadians' data regardless of where it is processed or stored.

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CUSMA's role in reinforcing Big Tech's dominance

This summer, representatives from Canada, the United States and Mexico will gather to meet the requirement for review six years after of the Canada-United States-Mexico Agreement (CUSMA, USMCA, or T-MEC) on free trade. Though most coverage has focused on retaining the tariff-free trade of goods that has shielded Canada from the brunt of recent U.S. trade policy, less appreciated are the rules in the agreement governing trade in services and the cross-border operation of digital companies.

This lack of attention is to the detriment of Canadians who are largely unaware that their ability to have a say over how companies operate online has been effectively curtailed by CUSMA, and to the opportunity to push back against these harmful provisions. If Canada wishes to succeed and grow in markets beyond the physical movement of goods, it needs a playing field not already tilted towards dominant incumbents. While the most recent iteration of CUSMA-driven pushback has centered on the supposed discriminatory treatment of American streaming platforms under the Online Streaming Act, there is little stopping this playbook extending to all efforts to regulate the aspects of our digital lives that are dominated by a handful of Big Tech firms.[1]

The 2020 ratification of CUSMA, and particularly its chapter on digital trade, was a major victory for U.S. Big Tech. These digital trade provisions are part of a larger strategy by Big Tech companies to pre-empt laws and regulation by encoding their interests in international agreements that limit the ability of policymakers to govern effectively. While our focus is on their effect on Canada, these provisions bind lawmakers in the U.S. as much as they do here. At home and abroad, these provisions will continue to frustrate all parties' attempts to enact and enforce competition laws, improve privacy legislation, and address the harmful byproducts of the designs of online platforms.[2]

Until they are removed, CUSMA's Chapter 19 articles will allow the interests of Big Tech to supersede those of Canadian citizens and businesses, entrenching their existing position and limiting potential responses. Several articles are particularly important to maintaining Big Tech's hold over Canadian markets.

How digital trade rules cost Canadians

The bureaucratic titles of the above articles mask their harmful and restrictive power over the policymaking process in the signatory countries. Each article relates to a different element of the digital sphere that Canadians could reasonably desire a say over, from competition, to privacy, to online harms, and it is worth understanding how each article restricts the freedom of policymakers to respond on each front.

The products of Big Tech's digital trade agenda in CUSMA

Article	Title	Summary	Consequences
19.4	Non-Discriminatory Treatment of Digital Products	Regulatory policies that apply to all firms, but could have outsized impacts on dominant firms are deemed illegal trade barriers	Hampers development and enforcement of competition laws, frustrates procurement and industrial strategy to boost Canadian tech firms
19.11	Cross-Border Transfer of Information by Electronic Means	Parties cannot pass any law that limits the ability of data, including personal information, to be transferred across borders	Restricts Canada's ability to determine what data is created about Canadians and how it can be used and sold, compounds difficulty of stronger privacy laws
19.12	Location of Computing Facilities	Contracts cannot specify the location for the hardware infrastructure that will be used to store and process data	Keeps the Canadian digital economy dependant on U.S. controlled infrastructure, allows circumvent privacy and data protection laws.
19.16	Source Code	Constrains the circumstances where regulators can review the algorithms that drive online platform behaviour	Prevents regulation that involves audits of source code to ensure compliance, and limits the right to repair
19.17	Interacive Computer Services	Limits the liability of platforms for the content they curate and serve to Canadians	Challenges regulatory regimes that impose duties of care on platform operators and limits the civil recourse of Canadians

Non-discrimination clauses and imported U.S. content moderation law block policymaking and law enforcement

Non-discrimination clauses like article 19.4 are intended to protect the products and firms of foreign trade partners from undue regulatory burden and ensure they are held to the same standards as domestic firms. But the lopsided nature of digital markets means CUSMA's application of non-discrimination to digital trade creates major barriers to the effective regulation of entrenched monopolies. Because of the dominance of these companies in their respective markets, the current iteration of CUSMA allows Big Tech to claim any regulation in response to that dominance imposes a disproportionate and discriminatory cost on them.[3]

Non-discrimination principles are leveraged across the world by Big Tech to challenge efforts to govern digital platforms.[4] Countries are increasingly turning to regulation to impose obligations on digital platforms to address online harms and protect fair competition in digital markets. The EU's Digital Markets Act (DMA), for example, specifically targets large and dominant firms in a market, imposing responsibilities and conduct obligations to prevent the abuse of that dominance. By framing the response to clear dominance as discriminatory, Big Tech attempts to weaponize trade agreements to water down or avoid regulation.[5]

In Canada, the Online Streaming Act (OSA) has come under fire as discriminatory under the digital trade articles of CUSMA.[6] The OSA obliges foreign streaming services to pay a 5% levy on their Canadian revenue to fund the development of Canadian content. American firms dominate the online streaming market in Canada, with Netflix, Amazon, Disney, and Paramount controlling over 65% of the market in terms of total subscriptions in 2024.[7] Similar obligations exist for Canadian media companies, and domestic players like Bell and Rogers have even argued that the OSA is more favourable to U.S. platforms.[8] However, as long as the U.S. administration and industry interests are united in their opposition to any regulation, CUSMA can channel industry pushback into economic attacks, as it has with the OSA.[9]

U.S. tech firms have also used CUSMA as protection against responsibility for the effects of their products on Canadians. CUSMA 19.17 seeks to shield the operators of online platforms from liability for the content that appears on their platforms. It is an attempt to project the expansive legal protections that online platforms have exploited in the U.S. to shield themselves from accountability for user actions as well as for their decisions about platform design, and their business relationships with advertisers.

Google, Meta and Twitter lawyers have already relied on 19.17 as a benchmark to interpreting Canadian laws.[10] 19.17 hasn't proved to be a blanket legal protection; Canadian courts have still managed to find platforms liable for conduct.[11] This has largely been due to Canadian judges' ability to distinguish between platforms' capacities as mere intermediaries and as distribution systems, and to recognize that knowledge and intent play a role in liability. Nonetheless, legal defense based on 19.17 remains a litigation strategy and could be used to block enforcement of any law that imposes liability for the content these platforms curate and serve.[12]

These clauses will continue to frustrate Canadian attempts to regulate online platforms. The recently proposed nationwide anti-fraud strategy could impose duties of care and reporting obligations on a range of actors, including banks, telecoms, and online platforms. Because of their dominance in online advertising, Big Tech, especially Meta, are disproportionately implicated in the spread of scams and frauds originating from online advertising. CUSMA's non-discrimination and intermediary liability will provide ammunition to frustrate regulatory efforts, including those to stem the tide of scams online.

Preventing source code disclosure defeats effective regulation of algorithms

CUSMA imposes barriers to reviewing the source code and algorithms that define how digital systems operate. 19.16 prevents governments from requesting source code or algorithms except in the cases of "specific" enforcement actions or judicial proceedings. To be sure, source code can represent sensitive intellectual property, and it must be handled with care. But while the framing may be to prevent forced technology transfers, the effects are much broader. CUSMA challenges Canada's ability to enact its commitments to giving consumers and producers a right to repair, as well as the ability to regulate and monitor important digital systems.[13]

The scope of "source code" and "algorithms" is problematically broad, and pre-empts even less invasive types of systematic regulatory review, which in many cases may be conducted through access to technical interfaces and APIs, or through the use of sandboxes to simulate system behaviour.[14] In many cases, it is specifically the algorithms themselves that warrant scrutiny, as these algorithms structure the digital markets that consumers interact with on a daily basis.

The effect of 19.16 is that understanding and regulation of digital platforms is hampered because their operation remains a black box to authorities. To craft regulations that mitigate harmful by-products of digital markets, policymakers must understand how these systems operate.

This issue will become more acute as automated decision-making and AI technologies are increasingly adopted at scale. AI systems already function as black boxes, generating outputs non-deterministically. Visibility into their operations is only made partially possible by reviewing model weights and parameters, or through controlled testing. If Canada wants to retain its ability to regulate and enforce laws on issues like surveillance pricing, AI bias, online harms, or fraud and scams, we must preserve our ability to understand these systems.

The free flow of data cements Big Tech's control over Canadian data

CUSMA article 19.11 prohibits governments from passing laws that limit cross-border flows of data. 19.11 is one of the most permissive statutes governing cross-border data in existence, an outlier even among trade agreements, containing only very narrow exemptions, and explicitly including personal information.[15] This article means that Canadians' data can be moved and exploited without the coverage of Canadian data protection laws, and without guarantee of equivalent protections.[16]

Canada's data protection regime is showing its age, generally unable to address use of sensitive personal data, including biometric data, for targeted advertising, artificial intelligence training, and resale by data brokers. So long as CUSMA's digital trade chapter applies, efforts to strengthen and enforce these laws will face be subject to the trade agreement's chilling effect.[17]

Article 19.12 also prevents the Canadian government from passing laws or advancing policy that requires data to be stored in Canada. Uncertainty as to whether data stored in the U.S. is adequately protected has led businesses to consider such requirements, but they are effectively prohibited. While some U.S.-based companies have begun proactively offering data localization and other security measures to allay concerns about access to sensitive data, this is strictly voluntary and can be revoked or ignored. While data residency is only one dimension of data sovereignty, its absence limits opportunities for buildout and the emergence of domestic tech infrastructure and firms. These restrictions undermine Canada's ability to advance its digital sovereignty interests systematically; while procurement contracts for government are excluded, policy-level directives to advance and coordinate such tactics may be foreclosed.

Preserving Canada's autonomy in digital markets

If Canadian policymakers hope to promote competition in digital markets, address online harms including scams and fraud, and protect our privacy, then we must remove the constraints imposed on us by Big Tech's digital trade agenda. Aside from goals of increasing trade and promoting economic growth, these articles cement the dominance of Big Tech platforms at a time when the autonomy of countries around the world is threatened.

Canada should push to remove key articles of Chapter 19 in the upcoming six-year review of CUSMA, including articles 19.4 on non-discrimination, 19.11 on permitting the free flow of data, 19.12 on the location of computing facilities, 19.16 on protections on source code, and 19.17 on interactive computer services.

Canada can have free trade without trading away our ability to set the terms on how these important companies operate within our borders. Today, Canadians urgently need updated privacy laws, laws that create a duty of care for harms faced online, and greater control over their data and devices. To address the dominance of these companies and the byproducts of that dominance, we must be able to legislate on issues that matter to Canadians and preserve our democratic and public interests.

Concessions made in an era where we could count on stability from our partners no longer make sense in an increasingly erratic geopolitical environment. The promise of free trade cannot be a Trojan Horse for the domination of Canada's policy autonomy.

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