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Centre for International  
Governance Innovation

SPECIAL REPORT

# An International Intellectual Property and Digital Trade Strategy for Canada

Jeremy de Beer





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# About the Author

**Jeremy de Beer** is a CIGI senior fellow and a full professor of law at the University of Ottawa's Faculty of Law, where he creates and shapes ideas about technology innovation and intellectual property (IP) as well as global trade and development. An award-winning professor recognized for exceptional contributions to research and law teaching, Jeremy helps solve practical challenges related to innovation in the digital economy, life sciences industries and the clean technology sector. He is also an author or editor of five books, including *Innovation and Intellectual Property: Collaborative Dynamics in Africa*, and has published more than 50 peer-reviewed chapters and articles.

At CIGI, Jeremy provides expertise on the rise of trade regionalism and its implications for Canada's innovation and IP strategy. Jeremy has a history of successfully leading international projects. He is the co-founder and director of the Open African Innovation Research network and co-led the Trade Environment Technology Exchange, which worked with the Canada-European Union Comprehensive Economic Trade Agreement negotiators to help Canadian and EU governments achieve greater understanding and convergence of policy measures.

As a practising lawyer and expert adviser, Jeremy has argued numerous cases before the Supreme Court of Canada, advised businesses and law firms, and consulted for agencies ranging from national governments to the United Nations. Jeremy holds a B.A. and an LL.B. from the University of Saskatchewan, and a B.C.L. from the University of Oxford.

# Acronyms and Abbreviations

<b>AfCFTA</b>	African Continental Free Trade Area	<b>R&amp;D</b>	research and development
<b>AI</b>	artificial intelligence	<b>RCEP</b>	Regional Comprehensive Economic Partnership
<b>ASEAN</b>	Association of Southeast Asian Nations	<b>RTAs</b>	regional trade agreements
<b>CETA</b>	Canada-European Union Comprehensive Economic and Trade Agreement	<b>TK</b>	traditional knowledge
<b>CIDA</b>	Canadian International Development Agency	<b>TPP</b>	Trans-Pacific Partnership
<b>CIPO</b>	Canadian Intellectual Property Office	<b>TRIPS Agreement</b>	Agreement on Trade-Related Aspects of Intellectual Property Rights
<b>CPTPP</b>	Comprehensive and Progressive Agreement for Trans-Pacific Partnership	<b>UNECA</b>	United Nations Economic Commission for Africa
<b>CUSMA</b>	Canada-United States-Mexico Agreement	<b>WIPO</b>	World Intellectual Property Organization
<b>DSI</b>	digital sequence information	<b>WTO</b>	World Trade Organization
<b>EPO</b>	European Patent Office		
<b>FTAs</b>	free trade agreements		
<b>GCIG</b>	Global Commission on Internet Governance		
<b>GDPR</b>	General Data Protection Regulation		
<b>GIs</b>	geographical indications		
<b>IP</b>	intellectual property		
<b>Mercosur</b>	Mercado del Sur		
<b>NAFTA</b>	North American Free Trade Agreement		
<b>Open AIR</b>	Open African Innovation Research		
<b>PAIPO</b>	Pan-African Intellectual Property Organization		







# Executive Summary

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Canada must complement its domestic intellectual property (IP) and digital strategies with an international strategy aligned with changing global economic conditions and geopolitical scenarios. A forward-looking international strategy requires revisiting assumptions underlying twentieth-century trade negotiations.

Priorities regarding trade in traditional goods and services must be reconsidered in light of the regulation of intangibles via IP, innovation, data, privacy, cybersecurity and related digital policies. In these areas, Canada must think more strategically and holistically about the principles guiding IP policy and the practical means of implementing a digital charter.

Many IP and digital trade rules are no longer made at classic multilateral institutions such as the United Nations and the World Trade Organization (WTO); rulemaking now happens through mega-regional trade deals. In North America, Europe and much of Asia, legal and economic frameworks for cooperation are set. The focus in these regions should be on leveraging alliances to shape soft laws and exploit specific windows for impact.

Africa and, to a lesser extent, Latin America are the regions of the world presenting the most strategic opportunities for Canada. In these regions, there is a chance to support both hard and soft rulemaking. Countries other than Canada are already negotiating or implementing new trade deals there, so the timeline for engagement is tight. Furthermore, countries other than Canada are already shaping soft laws such as administrative practices, industry policies and technical standard setting.

On topics where hard rules are well established globally — such as patents, copyrights, trademarks and designs — Canada should push back against further upward ratcheting of IP rights. On topics where new international rules are emerging — such as data governance, cyber policy, trade secrets, competition law, and Indigenous peoples' knowledge and culture — Canada should ally with and lead countries and regions that share similar strategic interests. The more countries that Canada can get on its side in the short term, the better off it will be when opportunities arise to renegotiate or elaborate on recent agreements in North America, Europe and the Asia-Pacific regions.

# Introduction

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Successful strategies to support an economy driven by intangibles at home and abroad are integral to Canadians' economic prosperity, technological innovation, cultural industries and overall well-being. While the right policies will not solve all of Canada's challenges, the wrong approach could leave Canada behind or, worse, set Canada back.

IP rights are well-established legal and economic tools to govern knowledge. In determining appropriate IP strategies, Canada must carefully calibrate the kind and amount of protection domestic law provides and shape international norms to suit its interests. It is well accepted that while some IP protection is good, more is not necessarily better. This principle is especially true for countries with Canada's profile: a net importer of IP and payer of royalties; a healthy but heavily resource-driven economy; and strong in research and development (R&D) but weak in sustaining global businesses. At the same time, no one credibly argues that Canada can or should abandon IP acquisition to drive business and generate wealth. Calibration, therefore, requires analysis of the policy levers and parameters in global IP and trade systems.<sup>1</sup>

In this context, the lines between IP and other aspects of digital trade are blurring. While typically covered by different rules in different chapters of trade agreements, each impacts the other in inextricable ways. Both issues involve, fundamentally, trade in knowledge. Data is fast becoming the most valuable source of information, and information is one of the essential inputs to create knowledge.<sup>2</sup> IP is the commodified form of this knowledge. In effect, therefore, IP law is already the predominant tool for the commercialization of data.

When core international IP norms became entrenched in the twentieth century, most IP trade was in knowledge-embedded goods: copyright-protected cultural products such as books, records, cassettes, CDs and DVDs; trademark-branded consumer goods of all kinds; and patent-protected products manifesting inventions. Some adjustments were made in the mid-twentieth century for cross-border broadcast signals and later for global electronic commerce.

Now, in the twenty-first century, much IP is traded digitally. Physical counterfeiting, piracy and reverse-engineering of hard goods are still relevant issues. However, more IP than before is traded digitally via, for example, streaming copyrighted content, accessing copyrighted or technologically protected databases, sharing patented or secret algorithms or gene sequence information, or electronically exchanging confidential data. Trade in digital services has become inseparable from control over information and trade secrets.

Cyber-policy issues — such as personal information protection, electronic contracting and data localization, and control over source code and interactive computer services — are intertwined with IP issues because they often regulate the same activities (i.e., cross-border flows of data, information and knowledge). All of these issues now impact not just certain industries but actors across sectors and throughout the entire economy. In these ways, IP and digital trade are interrelated, not distinct, issues.

Moreover, the development of more specific international rules governing data is almost sure to track the trajectory of IP norms, which, over previous decades, has become the

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<sup>1</sup> Daniel Gervais, ed, *Intellectual Property, Trade and Development*, 2nd ed (Oxford: Oxford University Press, 2014).

<sup>2</sup> Jennifer Rowley, "The wisdom hierarchy: representations of the DIKW hierarchy" (2007) 33:2 *J Information Science* 163, DOI: <10.1177/0165551506070706>.

template for control over the knowledge economy through what Peter Drahos and John Braithwaite call “information feudalism.”<sup>3</sup> In other words, the same trends seen in the 1990s, when many IP rules were locked in globally, are likely to repeat in other areas of digital trade.

While there are surely some aspects of IP and digital trade that do not overlap and raise different concerns, both issues must be considered together to create a coherent international strategy for Canada.

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3 Peter Drahos & John Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy?* (Abingdon, UK: Earthscan, 2002).





# Canada's Current National Strategies

Realizing the importance of IP late, but better than never, Canada announced a national IP strategy in 2018.<sup>4</sup> The Intellectual Property Strategy has three parts — IP awareness, strategic tools and legislation — supported by a budget of CDN\$85 million over the first three years and CDN\$10 million annually after that.<sup>5</sup>

Awareness raising involves educational and advisory programs, including support for IP legal clinics that several leading experts recommend.<sup>6</sup> Statistics Canada is gathering and trying to use data to enable more informed decision making,<sup>7</sup> and the Canadian Intellectual Property Office (CIPO) is modernizing its learning tools and resources.

- 4 Innovation, Science and Economic Development Canada, News Release, "Government of Canada Launches Intellectual Property Strategy" (26 April 2018), online: *Government of Canada* <[www.canada.ca/en/innovation-science-economic-development/news/2018/04/government-of-canada-launches-intellectual-property-strategy.html](http://www.canada.ca/en/innovation-science-economic-development/news/2018/04/government-of-canada-launches-intellectual-property-strategy.html)>.
- 5 Innovation, Science and Economic Development Canada, "Intellectual Property Strategy" (last modified 28 May 2020), online: *Government of Canada* <[www.ic.gc.ca/eic/site/108.nsf/eng/home](http://www.ic.gc.ca/eic/site/108.nsf/eng/home)>.
- 6 Giuseppina D'Agostino, "From Start-up to Scale-up: A Report on the Innovation Clinic in Canada" CIGI, Special Report, 17 April 2019, online: <[www.cigionline.org/publications/start-scale-report-innovation-clinic-canada](http://www.cigionline.org/publications/start-scale-report-innovation-clinic-canada)>; Myra J Tawfik, "Addressing a Gap in Canada's Global Innovation Strategy" CIGI, Special Report, 12 September 2016, online: <[www.cigionline.org/publications/addressing-gap-canadas-global-innovation-strategy](http://www.cigionline.org/publications/addressing-gap-canadas-global-innovation-strategy)>.
- 7 Statistics Canada, "Survey of Intellectual Property Awareness and Use (IPAU)" (last modified 7 November 2019), online: *Statistics Canada* <[www.statcan.gc.ca/eng/survey/business/5291](http://www.statcan.gc.ca/eng/survey/business/5291)>.



A team of experts will build capacity across government programs, and resources will be provided specifically to support Indigenous peoples' engagement in IP discussions.

Strategic tools for IP growth include more efficient dispute resolution procedures, a new IP online marketplace for exploring and exchanging IP rights, and coordination with standard-setting processes. A flagship pilot project is among the strategy's most expensive investments; CDN\$30 million has been given to a collective that will assist Canadian data-driven clean technology businesses with IP needs.<sup>8</sup>

The third aspect of the national IP strategy (amendments to key IP legislation) reforms or clarifies several areas of IP law. To limit patent and copyright trolling (i.e., legal threats based on weak claims intended to extort cheap settlements instead of expensive opposition), regulations prescribe requirements for patent demand letters and notices of alleged copyright infringement. Minor legislative tweaks also protect IP licensees in bankruptcy proceedings, clarify standard-essential patent licence rights and affirm a narrow defence for research involving patented inventions.

Meanwhile, a data strategy for Canada is still to be developed and deployed. To its credit, the Government of Canada has an elaborate "Digital Charter" based on core principles: universal access; control and consent; open and modern digital government; data and digital for good; free from hate and violent extremism; safety and security; transparency, portability and interoperability; a level playing field; strong democracy; and strong enforcement and real accountability.<sup>9</sup>

While the Digital Charter may or may not become an effective framework to guide domestic policy, it is even less clear how such a framework will practically impact key data governance issues being debated globally. The Digital Charter must be translated into strategy-driven laws and policies.<sup>10</sup> In particular, the framework must be integrated with competition policy, IP and digital trade agendas that are being created right now through international economic agreements.<sup>11</sup>

Better strategic alignment across these areas is crucial, but is currently suboptimal. Moving forward requires a better understanding of the constraints imposed by recent international agreements and the opportunities presented by geopolitical and global economic trends.

8 Innovation, Science and Economic Development Canada, News Release, "Minister Bains announces support to help Canadians turn innovative ideas into job-creating businesses" (1 August 2019), online: *Government of Canada* <[www.canada.ca/en/innovation-science-economic-development/news/2019/08/minister-bains-announces-support-to-help-canadians-turn-innovative-ideas-into-job-creating-businesses.html](http://www.canada.ca/en/innovation-science-economic-development/news/2019/08/minister-bains-announces-support-to-help-canadians-turn-innovative-ideas-into-job-creating-businesses.html)>.

9 Innovation, Science and Economic Development Canada, "Canada's Digital Charter: Trust in a digital world" (last modified 8 June 2020), online: *Government of Canada* <[www.ic.gc.ca/eic/site/062.nsf/eng/h\\_00108.html](http://www.ic.gc.ca/eic/site/062.nsf/eng/h_00108.html)>.

10 Teresa Scassa, "Why Canada needs a national data strategy" (15 January 2019), online (blog): *Policy Options* <<https://policyoptions.irpp.org/magazines/january-2019/why-canada-needs-a-national-data-strategy/>>.

11 CIGI, "A National Data Strategy for Canada: Key Elements and Policy Considerations" CIGI, CIGI Papers No 160, 12 February 2018, online: <[www.cigionline.org/publications/national-data-strategy-canada-key-elements-and-policy-considerations](http://www.cigionline.org/publications/national-data-strategy-canada-key-elements-and-policy-considerations)>.

# New International Constraints on IP and Digital Trade

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Promises to trading partners obliged Canada to overhaul key aspects of almost every area of IP over the last decade. These promises now tie Canada's hands in significant ways, narrowing the legal and policy room to manoeuvre.

The first area for major reform was copyright. In 2012, the Copyright Act was amended to implement two World Intellectual Property Organization (WIPO) Internet Treaties, which had been signed more than 15 years earlier. The implementation process spanned many years, as numerous bills died with minority government election cycles, and was fraught with political controversies and policy dilemmas.<sup>12</sup> The significant implications of these treaties for Canada, such as the scope of the right to make content available online, are still being worked out in the courts.<sup>13</sup>

The Canada-European Union Comprehensive Economic and Trade Agreement (CETA) required Canada to fundamentally reshape other areas of IP law, notably trademarks. Canada eliminated a core requirement that a trademark be in use before it is registered, which experts worry undermines the basic tenets of the Canadian trademark system and risks a range of problems, such as squatting and trolling.<sup>14</sup> Bringing Canada's trademark systems into compliance with CETA and the other international agreements incorporated by reference also meant major changes to CIPO practices and technical infrastructure.

A related area of business branding — the protection of geographical indications (GIs) — has also been overhauled in a way that “favours European-based GIs and provides fewer benefits for domestic rights holders.”<sup>15</sup> Canada appealed the European Union on this topic in CETA, but the United States pushed back during renegotiation of the North American Free Trade Agreement (NAFTA). The resulting provisions in the Canada-United States-Mexico Agreement (CUSMA) are a messy compromise that Canada could do little to avoid.<sup>16</sup>

The 2020 CUSMA, 2017 CETA and, in between, the 2018 Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) combined to also require changes to patent, data protection and trade secrecy laws. These areas of IP are most crucial for data ownership

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12 Michael A Geist, ed, *From “Radical Extremism” to “Balanced Copyright”: Canadian Copyright and the Digital Agenda* (Toronto: Irwin Law, 2010).

13 *Entertainment Software Assoc v Society of Composers*, 2020 FCA 100.

14 Bitu Amani & Carys Craig, “The ‘Jus’ of Use: Trademarks in Transition” [2018] 30:2 IPJ 217.

15 Bassem Awad & Marsha Cadogan, “CETA and the Future of Geographical Indications Protection in Canada” CIGI, CIGI Papers No 131, 25 May 2017, online: <[www.cigionline.org/publications/ceta-and-future-geographical-indications-protection-canada](http://www.cigionline.org/publications/ceta-and-future-geographical-indications-protection-canada)>.

16 Jeremy de Beer, “International Intellectual Property after the New NAFTA” CIGI, CIGI Papers No 235, 6 January 2020 [de Beer, “International Intellectual Property”], online: <[www.cigionline.org/publications/international-intellectual-property-after-new-nafta](http://www.cigionline.org/publications/international-intellectual-property-after-new-nafta)>.



and control over data-intensive technologies such as artificial intelligence (AI),<sup>17</sup> as well as the highest-priority biomedical innovation challenges such as addressing pandemics.<sup>18</sup>

In the area of patents, Canada was on the cusp of losing its limited flexibility to curtail “evergreening” of pharmaceutical patents, until Democratic Party lawmakers in the United States surprisingly stepped in to demand a protocol deleting certain pharmaceutical patent provisions.<sup>19</sup> Canada was similarly assisted when, after the United States pulled out of the Trans-Pacific Partnership (TPP), the remaining parties suspended provisions requiring patent term extensions for unreasonable delays in processing applications. However, the United States won this point shortly after when the provisions were reinserted into CUSMA, and Canada had already agreed in CETA to extend the patent term for unreasonable delays in marketing approvals. The net effect of all these developments is an entirely new and rather unpredictable IP regime of “supplementary protection” certificates.

Data protection is among the least understood and most underappreciated area of IP. The international agreements Canada has signed impose significant constraints in respect of undisclosed pharmaceutical and agrochemical test data.<sup>20</sup> The benchmark set by the 1994 WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) required an unspecified term of protection against “unfair commercial use” of data that took “considerable effort” to collect. NAFTA set the term at five years. CUSMA maintains that term for pharmaceuticals but doubles it to 10 years for agrochemicals. The CPTPP also sets the minimum term at 10 years for agrochemicals, while CETA sets the minimum term at six years for pharmaceuticals. CUSMA also cuts out the qualitative threshold by protecting all undisclosed data submitted to regulators, regardless of considerable effort or, in fact, any effort whatsoever in its collection. Another unexpected assist from the US Democrats saved Canada the burden of extending data protection from eight years to 10 for biologics (i.e., next-generation biology-based medicines).

While on the topic of protecting data, CUSMA reflects the growing strategic importance of trade secrets.<sup>21</sup> CUSMA ratchets up TRIPS obligations by expanding criminal sanctions for counterfeiting and piracy to also cover trade secret theft. CUSMA also makes trade secrecy a key focus of cooperation, enforcement and capacity-building efforts. This trend is crucial to acknowledge, as trade secrecy is a key tool to facilitate ownership of and control over data.<sup>22</sup>

Data governance norms already locked into international trade law are found not only in IP chapters. The CPTPP’s chapter on electronic commerce and CUSMA’s chapter on digital trade both deal with the key issue of data localization. Data localization laws restrict where data can be stored, routed or processed, usually requiring these activities to occur locally within a jurisdiction.<sup>23</sup> Many governments have imposed data

17 James W Hinton, “Canada Needs to Own Critical IP and Data Assets to Inspire Generational Economic Prosperity” CIGI, Opinion, 26 March 2020, online: <[www.cigionline.org/articles/canada-needs-own-critical-ip-and-data-assets-inspire-generational-economic-prosperity](http://www.cigionline.org/articles/canada-needs-own-critical-ip-and-data-assets-inspire-generational-economic-prosperity)>.

18 Jeremy de Beer & E Richard Gold, “International Trade, Intellectual Property, and Innovation Policy: Lessons from a Pandemic” in Colleen M Flood et al, eds, *Vulnerable: The Law, Policy and Ethics of COVID-19* (Ottawa: University of Ottawa Press, 2020) 579.

19 de Beer, “International Intellectual Property”, *supra* note 16.

20 *Ibid.*

21 *Ibid.*

22 Teresa Scassa, “Data Ownership” CIGI, CIGI Papers No 187, 4 September 2018 at 11–12, online: <[www.cigionline.org/sites/default/files/documents/Paper%20No.187\\_2.pdf](http://www.cigionline.org/sites/default/files/documents/Paper%20No.187_2.pdf)>; Jeremy de Beer, *Ownership of Open Data: Governance Options for Agriculture and Nutrition* (Wallingford, UK: Global Open Data for Agriculture & Nutrition, 2016), online: <[www.godan.info/sites/default/files/documents/Godan\\_Ownership\\_of\\_Open\\_Data\\_Publication\\_lowres.pdf](http://www.godan.info/sites/default/files/documents/Godan_Ownership_of_Open_Data_Publication_lowres.pdf)>.

23 Jyoti Panday & Jeremy Malcolm, “The Political Economy of Data Localization” (2018) 11:2 Open Source J Sociopolitical Studies 511, DOI: <10.1285/i20356609v11i2p511>.

localization rules such as British Columbia's and Nova Scotia's laws requiring public institutions to store and access most personal information only within Canada.<sup>24</sup>

According to Canadian negotiators, there is no official analysis of whether existing laws would survive scrutiny under CUSMA.<sup>25</sup> Even if Canadian laws are compliant, based on certain exceptions, the mere existence of arguments and ambiguity can create a regulatory chill. Canada is at least politically, if not legally, constrained.

Data localization critics highlight economic inefficiency. The free flow of data that comes with e-commerce and digital trade can reduce distance barriers to trade,<sup>26</sup> exploit economies of scale<sup>27</sup> and grant access to the latest innovative technologies.<sup>28</sup> Empirically, tight data regulations are associated with a significant decrease in productivity in data-intensive industries such as communications, business services and financial services.<sup>29</sup> Critics also challenge the notion that data localization laws protect privacy. Rather than the location of data, some argue that lawmakers should focus on access to data and applicable laws.<sup>30</sup>

On the other hand, proponents argue that data localization laws promote privacy and avoid foreign surveillance.<sup>31</sup> These rules assist law enforcement, as the mutual legal assistance treaty network is not effective at handling a high volume of requests or providing quick access.<sup>32</sup> Also, at least in advanced countries such as Canada, data localization does not restrict trade because local computing infrastructure already exists.<sup>33</sup> An additional argument for data localization restrictions is that open cross-border data flows favour large, foreign incumbent firms with disproportionate capacity to commercially exploit data compared to Canadian firms.

Although the policy debate over data localization continues, certain norms are already set. The CPTPP prohibits data localization laws, subject to somewhat ambiguous exceptions for legitimate public policy objectives and for certain government and financial data.<sup>34</sup>

24 Anupam Chander & Uyên P Lê, "Data Nationalism" (2015) 64:3 Emory LJ 677, online: <<http://law.emory.edu/elj/content/volume-64/issue-3/articles/data-nationalism.html>>.

25 Michael Geist, "'We Don't Have Any Specific Analysis': CUSMA Negotiators Surprising Admission on Key Privacy Issues" (27 February 2020), online (blog): Michael Geist <[www.michaelgeist.ca/2020/02/we-dont-have-any-specific-analysis-cusma-negotiators-surprising-admission-on-key-privacy-issues/](http://www.michaelgeist.ca/2020/02/we-dont-have-any-specific-analysis-cusma-negotiators-surprising-admission-on-key-privacy-issues/)>.

26 Susan Lund & James Manyika, "Defending Digital Globalization" (20 April 2017), online (blog): McKinsey Global Institute <[www.mckinsey.com/mgi/overview/in-the-news/defending-digital-globalization](http://www.mckinsey.com/mgi/overview/in-the-news/defending-digital-globalization)>.

27 Daniel Castro, *The False Promise of Data Nationalism* (Washington, DC: Information Technology & Innovation Foundation, 2013) at 10, online: <[www2.itif.org/2013-false-promise-data-nationalism.pdf](http://www2.itif.org/2013-false-promise-data-nationalism.pdf)>.

28 Chander & Lê, *supra* note 24 at 728.

29 Matthias Bauer, Martina F Ferracane & Erik van der Marel, "Tracing the Economic Impact of Regulations on the Free Flow of Data and Data Localization" CIGI, Global Commission on Internet Governance (GCIG) Series Paper No 30, 10 May 2016 at 10–14, online: <[www.cigionline.org/publications/tracing-economic-impact-regulations-free-flow-data-and-data-localization](http://www.cigionline.org/publications/tracing-economic-impact-regulations-free-flow-data-and-data-localization)>.

30 W Kuan Hon, *Data Localization Laws and Policy: The EU Data Protection International Transfers Restriction Through a Cloud Computing Lens* (Cheltenham, UK: Edward Elgar, 2017) at 150.

31 Andrew Clement, "Canadian Network Sovereignty: A Strategy for Twenty-First-Century National Infrastructure Building" CIGI, Data Governance in the Digital Age Essay Series, 16 May 2018 at 26–33, online: <[www.cigionline.org/sites/default/files/documents/Data%20Series%20Special%20Reportweb.pdf](http://www.cigionline.org/sites/default/files/documents/Data%20Series%20Special%20Reportweb.pdf)>.

32 Panday & Malcolm, *supra* note 23 at 516.

33 Jesse Hirsh, "USMCA May Have Closed the Door on Data Localization Too Soon" CIGI, Opinion, 26 October 2018, online: <[www.cigionline.org/articles/usmca-may-have-closed-door-data-localization-too-soon](http://www.cigionline.org/articles/usmca-may-have-closed-door-data-localization-too-soon)>.

34 Michael Geist, "Data Rules in Modern Trade Agreements: Toward Reconciling an Open Internet with Privacy and Security Safeguards" CIGI, Data Governance in the Digital Age Essay Series, 16 May 2018 at 99–103, online: <[www.cigionline.org/sites/default/files/documents/Data%20Series%20Special%20Reportweb.pdf](http://www.cigionline.org/sites/default/files/documents/Data%20Series%20Special%20Reportweb.pdf)>; James McLeod, "Data localization concerns in USMCA may be overblown", *Financial Post* (4 October 2018), online: <<https://business.financialpost.com/technology/data-localization-concerns-in-usmca-may-be-overblown>>.

CUSMA narrows the policy flexibility by removing the public policy exception.<sup>35</sup> All of this happened before policy makers even knew enough about data and its different governance models to make it treaty-ready.<sup>36</sup> The bottom line is well put by Patrick Leblond: “it is not at all clear how much policy flexibility the CPTPP and CUSMA will ultimately allow the federal and provincial governments in adopting new laws and regulations to, among various objectives, protect people’s privacy, prevent algorithmic bias, protect critical infrastructure, ensure national security or promote domestic innovation.”<sup>37</sup>

Returning to copyright issues, where a decade of IP reforms to implement international obligations began, CUSMA extends the term of protection by 20 years. Canada’s resistance to this term extension in the TPP, coordinated with allies such as New Zealand, was successful but is now moot after CUSMA requires the same thing. Estimates put the economic cost at hundreds of millions of dollars per year,<sup>38</sup> on top of significant cultural costs.<sup>39</sup>

How all of these changes will play out in legal and economic terms is anyone’s guess. In its formal CUSMA economic impact assessment, the Government of Canada found that uncertainties about transition periods, royalty rates, particular IP rights and legal frameworks made quantitative assessment difficult.<sup>40</sup> There is no doubt these major reforms will cost Canada money; the question is how much. On the possible economic effects of CUSMA’s data provisions, a study by Dan Ciuriak and others<sup>41</sup> declined to make estimates due to, among other things, uncertainty about the ultimate framework for data regulation worldwide. Even more valuable than royalty flows and economic impacts now, however, may be the loss of domestic policy flexibilities to develop Canada’s own long-term international IP and digital trade strategy.<sup>42</sup>

35 Michael Geist, “How Canada Surrendered Policy Flexibility for Data Localization Rules in the USMCA” (10 October 2018), online (blog): Michael Geist <[www.michaelgeist.ca/2018/10/how-canada-surrendered-policy-flexibility-for-data-localization-rules-in-the-usmca/](http://www.michaelgeist.ca/2018/10/how-canada-surrendered-policy-flexibility-for-data-localization-rules-in-the-usmca/)>.

36 Dan Ciuriak, “Digital Trade: Is Data Treaty-Ready?” CIGI, CIGI Papers No 162, 21 February 2018, online: <[www.cigionline.org/publications/digital-trade-data-treaty-ready](http://www.cigionline.org/publications/digital-trade-data-treaty-ready)>.

37 Patrick Leblond, “Digital Trade at the WTO: The CPTPP and CUSMA Pose Challenges to Canadian Data Regulation” CIGI, CIGI Papers No 227, 9 October 2019 at 7, online: <[www.cigionline.org/publications/digital-trade-wto-cptpp-and-cusma-pose-challenges-canadian-data-regulation](http://www.cigionline.org/publications/digital-trade-wto-cptpp-and-cusma-pose-challenges-canadian-data-regulation)>.

38 Howard Knopf, “Canada Can Stand Its Ground on Copyright in NAFTA Renegotiations” CIGI, Opinion, 9 August 2017, online: <[www.cigionline.org/articles/canada-can-stand-its-ground-copyright-nafta-renegotiations](http://www.cigionline.org/articles/canada-can-stand-its-ground-copyright-nafta-renegotiations)>.

39 Paul Heald, “Copyright Term Extension Is a Tax on Consumers” (24 February 2020), online (podcast): *The LawBytes Podcast* <[www.michaelgeist.ca/2020/02/lawbytes-podcast-episode-40/](http://www.michaelgeist.ca/2020/02/lawbytes-podcast-episode-40/)>.

40 Global Affairs Canada, *The Canada-United States-Mexico Agreement: Economic Impact Assessment* (2020) at 56–57, online: Global Affairs Canada <[www.international.gc.ca/trade-commerce/assets/pdfs/agreements-accords/cusma-aceum/CUSMA-impact-repercussion-en.pdf](http://www.international.gc.ca/trade-commerce/assets/pdfs/agreements-accords/cusma-aceum/CUSMA-impact-repercussion-en.pdf)>.

41 Dan Ciuriak, Ali Dadkhah & Jingliang Xiao, “Quantifying CUSMA: The Economic Consequences of the New North American Trade Regime” (2020) CD Howe Institute Working Paper at 7, online: <[www.cdhowe.org/sites/default/files/attachments/research\\_papers/mixed/WorkingPaper\\_Ciuriak-Dadkhah-Xiao\\_2020\\_0.pdf](http://www.cdhowe.org/sites/default/files/attachments/research_papers/mixed/WorkingPaper_Ciuriak-Dadkhah-Xiao_2020_0.pdf)>.

42 Jeremy de Beer & Michael Geist, “Developing Canada’s Intellectual Property Agenda” in Jean Daudelin & Daniel Schwanen, eds, *Canada Among Nations 2007: What Room for Manoeuvre?* (Montreal: McGill-Queen’s University Press, 2008) 159.

# Thinking Ahead about IP and Data Internationally

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During the first 150 years of its existence as a country, Canada has generally improvised IP positions in response to pressures from colonial powers or trading partners.<sup>43</sup> As a result, Canada is now locked into the latest rules set by international economic agreements such as CETA, the CPTPP and CUSMA.

While the United States turned to Asia to start TPP negotiations in 2008, the same year Canada was looking to Europe for economic partnership. CETA came to fruition in less than 10 years, but by the time Canada sought to join the TPP negotiations in 2012, key decisions had already been made. A condition of Canada's late entry was the inability to renegotiate settled issues, which included the framework for an IP chapter.

The US withdrawal from the TPP after the 2016 presidential election was a lucky break for Canada and like-minded countries. This development is what enabled suspension of the most problematic provisions in the CPTPP. Canada's strategy was pragmatic, knowing it would need these bargaining chips as leverage in NAFTA renegotiations.<sup>44</sup> Canada caught another lucky break when US political disharmony led to a protocol deleting some of the most damaging CUSMA provisions.<sup>45</sup>

Counting on such luck in future international IP negotiations is not a wise strategy. While CUSMA's new high-water mark is now the starting point, there remains an opportunity to mitigate the damage domestically and learn from this mistake internationally. Canada needs an international IP strategy to guide its future engagement in the global governance of knowledge.

The time has come for strategic foresight that anticipates multiple plausible global economic conditions and geopolitical scenarios that may shape the future of global knowledge governance.<sup>46</sup> The European Patent Office was preparing in 2007 with scenarios for the global IP regime in 2025, with numerous prescient insights to prepare the organization and others then paying attention.<sup>47</sup> IP Australia performed a similar exercise in 2017, exploring megatrends, scenarios and their strategic implications.<sup>48</sup> Academics have been actively trying to foresee futures for key organizations such as WIPO as well as IP

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43 Jeremy de Beer, "Introduction" in Oonagh E Fitzgerald, Valerie Hughes & Mark Jewett, eds, *Reflections on Canada's Past, Present and Future in International Law* (Waterloo: CIGI Press, 2018) 353.

44 Jeremy de Beer, "Intellectual Property Chapter of USMCA Proves Canada's Pragmatism" CIGI, Opinion, 5 October 2018, online: <[www.cigionline.org/articles/intellectual-property-chapter-usmca-proves-canadas-pragmatism](http://www.cigionline.org/articles/intellectual-property-chapter-usmca-proves-canadas-pragmatism)>.

45 de Beer, "International Intellectual Property", *supra* note 16.

46 Jeremy de Beer, "With Foresight, Canada Could Shape Intellectual Property Norms and Practices" CIGI, Opinion, 30 April 2018, online: <[www.cigionline.org/articles/foresight-canada-could-shape-intellectual-property-norms-and-practices](http://www.cigionline.org/articles/foresight-canada-could-shape-intellectual-property-norms-and-practices)>.

47 European Patent Office (EPO), *Scenarios for the Future* (Munich: EPO, 2007).

48 IP Australia, *IP Australia and the Future of Intellectual Property: Megatrends, scenarios and their strategic implications* (Canberra: IP Australia, 2017), online: <[www.ipaustralia.gov.au/sites/default/files/ip\\_australia\\_and\\_the\\_future\\_of\\_intellectual\\_property.pdf](http://www.ipaustralia.gov.au/sites/default/files/ip_australia_and_the_future_of_intellectual_property.pdf)>.

systems generally.<sup>49</sup> A small-scale symposium on future scenarios for patents took place in Canada in 2017 as a useful input to Canada's IP strategy released the following year.

Canada's capacity for a full strategic foresight exercise<sup>50</sup> has not been exploited in this field, but waiting is no longer an option. The global policy frameworks for Canada's digital future are being set right now.

In combination, Canada's domestic IP Strategy and Digital Charter serve both to emphasize the urgency of an integrated international strategy and to set out basic parameters to develop such a strategy. Admittedly, the IP Strategy is explicit on action points but implicit when it comes to principles, whereas the Digital Charter is the inverse: mostly principles with few specifics. An effective international IP/digital trade strategy would be a hybrid of the two domestic approaches. It would set out overarching aims and guiding principles while also suggesting specific action items.

The strategy would guide the discussions of federal government departments and the decisions of Cabinet. The strategy would also guide intergovernmental policy discussions at the federal and provincial levels, given overlapping constitutional jurisdiction over many key issues. Indirectly, a pan-Canadian strategy could also shape the work of quasi-government bodies, independent agencies and public-private partnerships, such as standard-setting bodies, granting councils and research enterprises.

Canada can transition from a reactive to proactive international IP and digital trade strategy by taking two key steps. First, Canada needs to know where to find allies to work with. Second, Canada needs to identify the pillars of an international IP and digital trade strategy. The remaining sections of this special report address these two points (i.e., who to engage, and how).

49 Jeremy de Beer & Sara Bannerman, "Foresight into the Future of WIPO's Development Agenda" (2010) 2:1 WIPO J 211; Jeremy de Beer, Alexandra Mogyoros & Sean Stidwill, "Present Thinking About the Future of Intellectual Property: A Literature Review" (2014) 11:1 SCRIPTed 69, DOI: <10.2966/scip.110114.69>.

50 Policy Horizons Canada, online: Policy Horizons Canada <<https://horizons.gc.ca/en/home/>>.





# Mega-Regional Opportunities

As the author of this special report explained in a recent policy brief: “Since the mid-1990s, after TRIPS and the WIPO Internet Treaties, increased awareness, capacity and organization among developing countries and non-governmental organizations have created a ‘de facto geopolitical moratorium’ on upward ratcheting of IP norms at the global multilateral level.”<sup>51</sup> In place of multilateral institutions, mega-regional economic agreements have emerged as the epicentre of IP and knowledge governance.<sup>52</sup>

While progress on digital trade is being pursued at conventional multilateral institutions, such as the “Osaka Track” toward WTO negotiations on trade-related aspects of electronic commerce, success is far from certain. Decades of experience with the now “dead and buried” Doha Round<sup>53</sup> does not bode well for a digital trade agenda at the WTO. Even if negotiations succeed, it has been persuasively argued that Canada is better off pushing for a distinct international regime separate from the WTO.<sup>54</sup> It remains to be seen whether a new plurilateral regime, as suggested by Patrick Leblond and Susan Ariel Aaronson,<sup>55</sup> or a patchwork approach in more general trade agreements, as explored by Mira Burri,<sup>56</sup> for instance, emerges.

Either way, interregional engagement is the apparent path forward on both IP and other digital trade issues. Following this path requires a deeper assessment of regional constraints and opportunities.

## North America’s New Floor and Narrow Windows

With the ratification and implementation of CUSMA, the new floor for IP and digital trade rules in North America seems set. A quarter century passed between the first NAFTA and its renegotiation, and even that was triggered by unprecedented political instability south of the Canadian border. While the possibility of more wild cards in the future cannot be ruled out, another wholesale renegotiation of North America’s core economic framework agreement seems unlikely soon.

More plausible is ongoing tinkering with particular IP issues, which has been the established pattern for US pressure on Canada in the area of IP. Attempts to leverage mechanisms such as section 301 of the Trade Act of 1974, under which the United States Trade Representative has put Canada on watchlists or priority watchlists for putative

51 Jeremy de Beer, “The Rise of Mega-Regionalism: Revealing Canada’s Blind Spots” CIGI, Policy Brief No 140, 11 October 2018 at 3 [de Beer, “The Rise of Mega-Regionalism”], online: <[www.cigionline.org/publications/rise-mega-regionalism-revealing-canadas-blind-spots](http://www.cigionline.org/publications/rise-mega-regionalism-revealing-canadas-blind-spots)>.

52 Pedro Roffe & Xavier Seuba, eds, “Current Alliances in International Intellectual Property Lawmaking: The Emergence and Impact of Mega-Regionals” (2017) International Centre for Trade and Sustainable Development & Center for International Intellectual Property Studies Paper Series: Global Perspectives and Challenges for the Intellectual Property System, Issue 4, online: <[https://boris.unibe.ch/140871/8/ceip-icts\\_issue\\_four\\_final\\_0.pdf](https://boris.unibe.ch/140871/8/ceip-icts_issue_four_final_0.pdf)>.

53 Antoine Martin & Bryan Mercurio, “Doha Dead and Buried in Nairobi: Lessons for the WTO” (2017) 16:1 J Intl Trade L & Policy 49.

54 Leblond, *supra* note 37.

55 Patrick Leblond & Susan Ariel Aaronson, “A Plurilateral ‘Single Data Area’ Is the Solution to Canada’s Data Trilemma” CIGI, CIGI Papers No 226, 25 September 2019.

56 Mira Burri, “The Governance of Data and Data Flows in Trade Agreements: The Pitfalls of Legal Adaptation” (2017) 51:1 UC Davis L Rev 65.



IP deficiencies, will continue. While the watchlist itself may not be formally recognized by the Government of Canada, US political pressure has led to Canadian law reforms, such as the enactment of anti-counterfeiting issues and the extension of copyright terms for sound recordings. The new Intellectual Property Rights Committee established by CUSMA could offer US lobbyists additional inroads into Canadian policy.<sup>57</sup>

In North America, digital trade cannot be extricated from cybersecurity policy and intelligence gathering more generally. Unlike in the European Union, the protection of privacy and personal information is not a dominant policy pretext for digital trade issues in the United States. This is unsurprising, since the dominant players in surveillance capitalism — “a new form of information capitalism [that] aims to predict and modify human behaviour as a means to produce revenue and market control”<sup>58</sup> — are US-based companies.

Although the digital game is already rigged in North America, Canada can still be somewhat creative in playing it. There is, for example, a review of CUSMA scheduled at least every six years and, unless renewed, a sunset to the agreement in 16 years. Ordinarily, such unsettling provisions could be potentially disastrous. However, Canada may gain an advantage leading up to the reviews by building alliances and shaping norms globally, whether or not the United States continues its political retreat from globalism. The more countries Canada can get on its side in the short term, the better off it will be in eventual renegotiations with the United States.

## European (Dis)Unity and the United Kingdom

The withdrawal of the United Kingdom from the European Union has significant implications for international economic law, including IP and digital trade.<sup>59</sup> A sure thing on the international agenda is negotiation of a CETA-style deal with the United Kingdom. The key for Canada in this process is to not ratchet up IP standards and digital trade policy restrictions any more than they already are. Maintaining the regulatory floor where it is will be extremely difficult because Canadian negotiations with the United Kingdom are likely to take place after or, at best, alongside discussions between the United Kingdom and the United States. In this context, it is likely that the floor is not CETA but CUSMA, maybe more.

An illustrative complication for Canada is that the United Kingdom may push back against the power of US-based big tech platforms. Among the specific dilemmas is what to do about section 230 of the US Communications Decency Act, which immunizes providers of interactive computer services from liability for publishing others' content and gives technology firms a safe harbour in the United States. CUSMA cements this approach internationally. When the United States pushed the benefits of a new digital chapter of CUSMA in a US-UK working group on trade and investment, UK officials seemed concerned about the advantages this approach gives US technology companies.<sup>60</sup> Yet Canadian commentators have argued such provisions protect free speech.<sup>61</sup> Ironically, US President

57 de Beer, “International Intellectual Property”, *supra* note 16 at 11–12.

58 Shoshana Zuboff, “Big Other: Surveillance Capitalism and the Prospects of an Information Civilization” (2015) 30:1 J Information Technology 75 at 75, DOI: <10.1057/jit.2015.5>; Shoshana Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power* (New York: PublicAffairs, 2019).

59 Oonagh E Fitzgerald & Eva Lein, eds, *Complexity's Embrace: The International Law Implications of Brexit* (Waterloo: CIGI Press, 2018); Luke McDonagh, “UK Patent Law and Copyright Law after Brexit: Potential Consequences” CIGI, *Brexit: The International Legal Implications Series Paper No 3*, 21 November 2017, online: <[www.cigionline.org/publications/uk-patent-law-and-copyright-law-after-brexit-potential-consequences](http://www.cigionline.org/publications/uk-patent-law-and-copyright-law-after-brexit-potential-consequences)>.

60 Department for International Trade, *UK-US Trade & Investment Working Group 24–25 July 2017 Full Readout* (Department for International Trade, 2017).

61 Michael Geist, “Why the USMCA will enhance online free speech in Canada”, *Policy Options* (4 October 2018), online: *Policy Options* <<https://policyoptions.irpp.org/magazines/october-2018/why-the-usmca-will-enhance-online-free-speech-in-canada/>>.

Donald Trump, upset about Twitter's actions against him personally, issued an executive order attempting to change US law and undermine US foreign policy.<sup>62</sup> Canada, meanwhile, cannot count on the United States continuing to self-inflict harm internationally. Also, the difficulty of determining a Canadian strategic position on this particular issue shows precisely why a coherent IP/digital trade strategy is so important (i.e., to guide Canada's priorities). Otherwise, Canada will be left merely reacting to others' approaches.

Meanwhile, the European Union remains a force in the rest of the world. It has a robust trade agenda, including IP and digital trade issues. GIs are always a priority for the European Union, especially when dealing with former colonies of EU member states. Counterfeiting and piracy are also used as cover stories for stronger IP protection, with the European Union now resorting to similar pressure tactics as the United States with its own version of a watchlist of IP-delinquent countries.

While the European Union is keen to push the cybersecurity agenda, the predominant digital trade issue is privacy. The European Union's efforts to establish the General Data Protection Regulation (GDPR) as a model for data regulation is, in part, a pushback against US hegemony in big tech. The GDPR is also an excellent example of extraterritorial norm making through standards because anyone doing business in/with the European Union must comply. While Canada lacks the global clout to do the same alone, it can work with partners to play a role creating a cross-regional "zone" for trusted data exchange.<sup>63</sup> Meanwhile, expect the European Union to continue promoting this approach as a template for data governance in its international economic partnerships.

## Inaction in Asia

The Asia-Pacific region was the world's hot spot for regional and mega-regional economic agreements during the past several decades. As the Association of Southeast Asian Nations (ASEAN)<sup>64</sup> possibly expands to "plus three"<sup>65</sup> or "plus six"<sup>66</sup> and trade negotiations with the European Union progress, it is plausible that norm setting will become a greater focus for European-Asian mega-regional integration. If this happens, the CPTPP and CETA will be the benchmarks for rulemaking.

When it comes to international economic law in the Asia-Pacific, the elephant in the room is the now-stalled Regional Comprehensive Economic Partnership (RCEP) — a mega-region stretching from India to Japan, including China, all of ASEAN and all of the "plus six." The latest leaked information on IP issues in RCEP, from 2015, is outdated.<sup>67</sup> Even then, it seemed that knowledge governance in Asia would be based not on distinct priorities but on standard terms.<sup>68</sup>

What happens with the RCEP and other action in the Asia-Pacific region will be impacted by China's trade relations with the United States and growing influence beyond the

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62 Donald J Trump, "Executive Order on Preventing Online Censorship" (28 May 2020), online: *White House* <[www.whitehouse.gov/presidential-actions/executive-order-preventing-online-censorship/](http://www.whitehouse.gov/presidential-actions/executive-order-preventing-online-censorship/)>.

63 Leblond & Aaronson, *supra* note 55.

64 Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam.

65 All of the above plus China, Japan and South Korea.

66 All of the above plus Australia, India and New Zealand.

67 Kimberlee G Weatherall, "RCEP IP Chapter Leaked 15 Oct 2015 — Weatherall Section by Section Comments in Brief" (2016) Working Paper, online: <<http://works.bepress.com/kimweatherall/35/>>.

68 Kung-Chung Liu & Julien Chaisse, eds, *The Future of Asian Trade Deals and IP* (London, UK: Hart, 2019); Peter K Yu, "The RCEP and Trans-Pacific Intellectual Property Norms" (2017) 50:3 *Vanderbilt J Transnational L* 673, online: <<https://heinonline.org/HOL/Pfh=hein:journals/vantl50&i=707>>; Christoph Antons & Reto M Hilty, eds, *Intellectual Property and Free Trade Agreements in the Asia-Pacific Region* (Berlin: Springer-Verlag, 2015).

region. Decades of pressure on China to improve IP enforcement may be backfiring, as the country has itself become a global IP powerhouse and influential actor around the world.

In 2019, China took over the top spot as the world's most prolific filer of international patent applications.<sup>69</sup> According to the most recent statistics, 1.5 million patent applications were filed in China (46.4 percent of the world total), which is as much as the combined total filed in the next 10 busiest IP offices. Of the 14 million patents now in force worldwide, 2.4 million (about 17 percent) are in China; of the 49.3 million trademarks in force, 19.6 million (about 40 percent) are in China.<sup>70</sup> Concerns about the quality of Chinese patents<sup>71</sup> may undermine the usefulness of these statistics as a measure of innovation, but the real problem is the litigation threat posed by these IP rights worldwide.

Maybe more important than China's rise in IP filings is its growing political influence over IP and digital trade issues in other regions. The Belt and Road Initiative is bringing massive infrastructure upgrades, and along with them political power, along the ancient Silk Road and rim of the Indian Ocean.<sup>72</sup> In addition, Chinese investment in Africa has been swelling for two decades.<sup>73</sup> While many questions exist about what China will do with this influence in areas such as IP<sup>74</sup> and standard setting in telecommunications and AI, there is no doubt many countries share an interest with Canada in countering China's growing influence.

Given the CPTPP, there is little Canada can do to set entirely new IP and digital trade rules in the Asia-Pacific region. Indeed, other countries are already moving forward on digital trade<sup>75</sup> via, for example, the Digital Economy Partnership Agreement between Chile, New Zealand and Singapore, and the Australia-Singapore Digital Economy Agreement. Both agreements, concluded in 2020, are already building on the baseline set by the CPTPP. Critics argue the "new" approach does little to counter the market dominance of large technology companies, fails to close the digital divide, and offers weak promises of dialogue on the concerns of small and medium-sized enterprises, Indigenous peoples, women and marginalized communities.<sup>76</sup>

Canada must be aware of this context in its medium-term trade negotiations in the region, which include exploratory discussions with ASEAN and (formerly) with China, and negotiations with India. Canada can also benefit from IP and digital trade capacity building in the region, starting with rising powers such as Vietnam. In this way, Canada can leverage alliances to exert influence through soft law measures, as

69 World Intellectual Property Organization (WIPO), Press Release, PR/2020/848, "China Becomes Top Filer of International Patents in 2019 Amid Robust Growth for WIPO's IP Services, Treaties and Finances" (7 April 2020), online: WIPO <[www.wipo.int/pressroom/en/articles/2020/article\\_0005.html](http://www.wipo.int/pressroom/en/articles/2020/article_0005.html)>.

70 WIPO, *WIPO IP Facts and Figures 2019* (Geneva: WIPO, 2019) at 9–12.

71 Mark Liang, "Chinese Patent Quality: Running the Numbers and Possible Remedies" (2012) 11:3 *John Marshall Rev Intellectual Property L* 478.

72 Alex He, "The Belt and Road Initiative: Motivations, Financing, Expansion and Challenges of Xi's Ever-Expanding Strategy" CIGI, CIGI Papers No 225, 11 September 2019, online: <[www.cigionline.org/publications/belt-and-road-initiative-motivations-financing-expansion-and-challenges-xis-ever](http://www.cigionline.org/publications/belt-and-road-initiative-motivations-financing-expansion-and-challenges-xis-ever)>.

73 McKinsey & Company, *Dance of the lions and dragons: How are Africa and China engaging, and how will the partnership evolve?* (McKinsey & Company, 2017).

74 Peter Drahos, "China, the TPP and Intellectual Property" (2016) 47:1 *IIC – Intl Rev Intellectual Property & Competition L* 1, DOI: <10.1007/s40319-015-0432-y>.

75 Deborah Elms, "Designing Next Generation Trade Agreements for the Digital Economy" (28 January 2020), online: *Asian Trade Centre* <<http://asiantradecentre.org/talkingtrade/designing-next-generation-trade-agreements-for-the-digital-economy>>; Deborah Elms, "Unpacking the Digital Economy Partnership" (28 January 2020), online: *Asian Trade Centre* <<http://asiantradecentre.org/talkingtrade/unpacking-the-digital-economy-partnership-agreement-depa>>.

76 Jane Kelsey, "DEPA lacks added value" (10 April 2020), online: *East Asia Forum* <[www.eastasiaforum.org/2020/04/10/depa-lacks-added-value/](http://www.eastasiaforum.org/2020/04/10/depa-lacks-added-value/)>.





discussed below. New Zealand is another logical ally Canada has cooperated well with to, for example, hold the line on copyright term extension in the CPTPP.<sup>77</sup>

## Latin America and the Caribbean

As in Asia, some South American countries (Chile and Peru) are CPTPP members. Both are part of the Pacific Alliance, which also includes Mexico (another CPTPP member), Colombia, and numerous associated and observer states. This group is typically more interested in building economic ties than the other bloc in the region, Mercado del Sur (Mercosur), which tends to focus on strengthening sociopolitical ties among Argentina, Brazil, Paraguay and Uruguay.<sup>78</sup> Several Pacific Alliance members already have regional trade agreements (RTAs) with TRIPS-plus IP standards.<sup>79</sup> These standards are not more burdensome than Canada's existing CUSMA commitments, but Canada should not pressure its prospective partners to make the same mistakes it did vis-à-vis the United States in CUSMA.

Canada is negotiating with Mercosur toward an economic partnership, but the European Union was quicker, having already reached an agreement in principle. This development means that despite the fact no Mercosur countries are CPTPP members, IP and digital trade norms in the region are no longer up for grabs.<sup>80</sup> Notably, the EU agreement extends the term of copyright to life plus 70 years. It also contains extensive provisions on both GIs and trade secrets. Numerous grandfathering and other exceptions are provided for South America's former European colonies, but the pushback falls well short of what the United States achieved in CUSMA.

As most South American countries are keen to promote the protection of Indigenous traditional knowledge (TK), they convinced the European Union to agree to some general language around access and benefit sharing. At WIPO and the Conference of the Parties to the Convention on Biological Diversity, the group of Latin American countries and the European Union tend to take opposite positions on the issue. Canada, however, has recently reoriented its attitudes about Indigenous peoples' participation in the global knowledge governance system, so it could find willing partners in this area to build on the EU-Mercosur agreement.

On data localization in Latin America, the Mercosur countries (in light of the agreement in principle reached with the European Union) in particular are creating or modifying their data laws to align with the GDPR.<sup>81</sup> For example, Brazil enacted GDPR-modelled legislation in 2018 to facilitate cross-border data transfers to and from the European Union.<sup>82</sup>

Overall, the opportunities being pursued with partners in South and Central America — via the Pacific Alliance and Mercosur and the recently negotiated Canada-Chile

<sup>77</sup> de Beer, "International Intellectual Property", *supra* note 16; de Beer, "The Rise of Mega-Regionalism", *supra* note 51.

<sup>78</sup> Plus Venezuela, which, however, is suspended.

<sup>79</sup> Yi Shin Tang & João Paulo Teodoro Hernandez, "The Politics and Outcomes of Preferential Trade Strategies: Evidence from TRIPS-Plus Provisions in US-Latin America Relations" (2016) 50:6 J World Trade 1061.

<sup>80</sup> Félix Vacas Fernández, "The Protection of Intellectual Property in MERCOSUR" in Marcílio Toscano Franca Filho, Lucas Lixinski & María Bélen Olmos Giupponi, eds, *The Law of MERCOSUR* (Oxford: Hart, 2010) 317.

<sup>81</sup> Paulina Bojalil, Michael Egan & Carlos Vela-Trevino, "Data Privacy Reform Gains Momentum in Latin America" (2 February 2019), online (blog): *Abierto al público* <<https://blogs.iadb.org/conocimiento-abierto/en/data-privacy-reform-gains-momentum-in-latin-america/>>.

<sup>82</sup> Andrada Coos, "Data Protection Regulations in Latin America" (28 March 2019), online (blog): *Endpoint Protector* <[www.endpointprotector.com/blog/data-protection-regulations-in-latin-america/#:~:text=In%20August%202018%2C%20it%20passed,personal%20data%20privacy%20in%20Brazil](https://www.endpointprotector.com/blog/data-protection-regulations-in-latin-america/#:~:text=In%20August%202018%2C%20it%20passed,personal%20data%20privacy%20in%20Brazil)>.



Free Trade Agreement<sup>83</sup> — indicate a shift in Canada’s trade priorities away from India and China to a region where opportunities might offer quick rewards.<sup>84</sup>

## The Emerging African Continent

### Why Africa?

The Business Council of Canada’s report, *Why Africa?*, makes a bulletproof case for building Canada’s economic ties to the world’s fastest-growing continent. The scale of growth is substantial, the population is young, the workforce is expanding, the middle class is booming, and economic and technological connectivity is rising. McKinsey & Company put it this way: “Global business leaders who misunderstand Africa run the risk of missing out on one of the 21st century’s great growth opportunities.”<sup>85</sup> As Ciuriak notes in his assessment of opportunities for Canada in Africa, which underlies the Business Council’s report: “[t]he major economies are all targeting Africa,”<sup>86</sup> including China, the European Union, Russia and the United States.

Canadian businesses and scholars have been advocating an Africa strategy for years.<sup>87</sup> Yet, apart from mining interests, Africa continues to be a “nascent” trade partner with Canada.<sup>88</sup> Canada does not currently have free trade agreements (FTAs) with any African countries and, according to Rosemina Nathoo,<sup>89</sup> there are no discernible plans to implement such agreements in the foreseeable future.

Closer ties can be built through traditional strengths such as diplomacy and developmental assistance, which will help to build sustainable relationships that will further economic interests.<sup>90</sup> Greater engagement with Africa must entail a shift away from viewing Africa only as a recipient of humanitarian assistance, to a viable trade and business partner.<sup>91</sup> If Canada is to take part in the “Africa rising” moment and compete with other international actors, a more concerted and strategic effort will be necessary, with a broader economic and political outlook focused on mutual benefit.<sup>92</sup>

Opportunities in Africa should not, however, be viewed only through the lens of physical resource extraction. The “next” Africa is emerging as a powerhouse in possibly

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83 Global Affairs Canada, “Canada’s 2019 Trade Policy Review Opening Statement” (12 June 2019), online: *Government of Canada* <[www.international.gc.ca/world-monde/international\\_relations-relations\\_internationales/wto-omc/2019-06-12-trade\\_review-examen\\_commerciales.aspx?lang=eng](http://www.international.gc.ca/world-monde/international_relations-relations_internationales/wto-omc/2019-06-12-trade_review-examen_commerciales.aspx?lang=eng)>.

84 Kevin Carmichael, “Resources Alone Won’t Advance Canada-India Ties” CIGI, Opinion, 29 October 2018, online: <[www.cigionline.org/articles/resources-alone-wont-advance-canada-india-ties](http://www.cigionline.org/articles/resources-alone-wont-advance-canada-india-ties)>.

85 Acha Leke, Mutsa Chironga & Georges Desvaux, “Africa’s overlooked business revolution”, *McKinsey Quarterly* (15 November 2018), online: *McKinsey & Company* <[www.mckinsey.com/featured-insights/middle-east-and-africa/africas-overlooked-business-revolution](http://www.mckinsey.com/featured-insights/middle-east-and-africa/africas-overlooked-business-revolution)>.

86 Dan Ciuriak, *Assessing Export Opportunities for Canada in Africa* (Ciuriak Consulting Inc, 2019).

87 Rohinton P Medhora & Yiagadeesen Samy, eds, *Canada-Africa Relations: Looking Back, Looking Ahead* (Waterloo: CIGI Press, 2013); Victoria Schorr & Paul Hitschfeld, “Canadian Trade and Investment in Africa” in Medhora & Samy, *ibid*, 133.

88 Lily Sommer & David Luke, “Canada’s Progressive Trade Agenda: Engaging with Africa to Support Inclusive Gains under the African Continental Free Trade Area” (2019) 25:3 *Canadian Foreign Policy J* 241 at 248, DOI: <10.1080/11926422.2018.1542603>.

89 Rosemina Z Nathoo, “Canada’s Progressive Trade Agenda: Is It a Development Opportunity for Africa?” (2019) 25:3 *Canadian Foreign Policy J* 230 at 233, DOI: <10.1080/11926422.2018.1564933>.

90 David J Hornsby, “Changing Perception into Reality: Canada in Africa” (2014) 69:3 *Intl J: Canada’s J Global Policy Analysis* 334 at 349, DOI: <10.1177/0020702014540867>.

91 Nathoo, *supra* note 89.

92 Hornsby, *supra* note 90 at 336.



surprising fields, most notably technology and innovation.<sup>93</sup> Arguably the best way to build relationships for the future of knowledge and innovation in Africa is via research partnerships. The Open African Innovation Research partnership (Open AIR) is one example. Open AIR has been forging partnerships, building capacity and exploring future scenarios in the fields of IP, innovation and digital trade for more than 15 years.<sup>94</sup> Recognizing Africa's role in the global knowledge economy will yield dividends as Canada and the rest of the world seize African opportunities in coming years.

The Canadian government stated its desire to increase overseas exports by 50 percent by 2025 —an objective that will require a global economic strategy centred on emerging markets where Canada currently underperforms.<sup>95</sup> African markets fall into this category. Despite high rates of growth and increasing bilateral trade, overall trade with Africa still accounts for an extremely small share of Canadian trade — just 1.1 percent of imports and 0.6 percent of exports in 2016.<sup>96</sup>

### Evolving Canada-Africa Relations

Over the last half century, various Canadian governments have prioritized different agendas in Africa. The government of Pierre Trudeau placed an emphasis on diplomacy, building relationships through participation in multilateral organizations such as the Commonwealth and La Francophonie.<sup>97</sup> The policy of the Brian Mulroney government centred on famine aid and the anti-apartheid movement, resulting in a ban on non-military trade with South Africa in 1986.<sup>98</sup> The Liberal government of the 1990s, under the leadership of Prime Minister Jean Chrétien and Foreign Minister Lloyd Axworthy, focused on human security, engaging in a number of conflict resolution and peace initiatives.<sup>99</sup> However, this period was also marked by a severe decline in aid, falling to less than half of the average annual amount from 1982 to 1992.<sup>100</sup>

In the latter years of Chrétien's tenure and through to the Paul Martin government, Canada refocused its Africa policy on development, increasing aid and African representation on the priority country list of the Canadian International Development Agency (CIDA).<sup>101</sup> These policies were largely reversed by Stephen Harper, whose government prioritized commercial interests in the extractive sector over development assistance, human security and diplomatic relations.<sup>102</sup> Harper cut the number of African countries on CIDA's list from 20 to only seven.<sup>103</sup>

93 Jake Bright & Aubrey Hruby, *The Next Africa: An Emerging Continent Becomes a Global Powerhouse* (New York: Thomas Dunne Books/St. Martin's Press, 2015).

94 Open African Innovation Research (Open AIR), online: Open AIR <<https://openair.africa>>.

95 Business Council of Canada, *Why Africa? Building Canada's economic ties to the world's fastest-growing continent* (Business Council of Canada, 2020) at 1, online: <<https://thebusinesscouncil.ca/wp-content/uploads/2020/02/Why-Africa-Report.pdf>>.

96 Statistics Canada, "Trade in goods by importer characteristics, by enterprise employment size and country of origin" (2016), online: Statistics Canada <[www5.statcan.gc.ca/cansim/a26?lang=eng&id=2280104](http://www5.statcan.gc.ca/cansim/a26?lang=eng&id=2280104)>.

97 Grant Dawson, "Player, partner and friend: Canada's Africa policy since 1945" (2013) 50:3 Intl Politics 412 at 416, DOI: <10.1057/ip.2013.8>.

98 Chris Brown, "Canadian Nation Building in Africa: Building Whose Nation?" in Medhora & Samy, *supra* note 87 at 84 [Brown, "Canadian Nation Building"].

99 *Ibid* at 85.

100 Stephen Brown, "Canadian Aid to Africa" in Medhora & Samy, *supra* note 87 at 182.

101 Brown, "Canadian Nation Building", *supra* note 98 at 85.

102 *Ibid*; Hornsby, *supra* note 90 at 340.

103 Brown, "Canadian Nation Building", *supra* note 98 at 85.

Since the election of Justin Trudeau in 2015, political rhetoric has once again pointed to a reinvigorated engagement with Africa. The Canadian government outlined several key priorities, among them the objective of increasing economic ties and providing developmental assistance, with a particular focus on 10 countries.<sup>104</sup> The strengthening of economic ties was linked with opportunities for Canadian businesses to access new markets, specifically in extractive industries.<sup>105</sup> In 2016, Canada signed and ratified foreign investment promotion and protection agreements with Cameroon, Guinea, Mali and Senegal, with the goal of fostering business arrangements in these countries where Canada has significant mining investments.

### The African Continental Free Trade Area

At the forefront of Africa's trade policy agenda in recent years has been the deepening of regional integration through the negotiation and implementation of the African Continental Free Trade Area (AfCFTA). Given the potential transformational impact of the AfCFTA, there is no time like the present for Canada to re-engage with Africa and diversify its international trade agenda.<sup>106</sup>

The AfCFTA was signed in March 2018 and officially came into force in April 2019 after being ratified by 22 states. The agreement now has 54 of 55 state signatories (excluding only Eritrea), 30 of which have approved ratification. Although still in its infancy, the AfCFTA will constitute the largest free trade area since the establishment of the WTO in 1994.<sup>107</sup>

It has been estimated that the removal of tariffs and other non-tariff barriers will increase intra-African trade by 40 to 50 percent between 2020 and 2040.<sup>108</sup> Notably, the AfCFTA is intended to utilize trade and integration as tools for *inclusive* economic development. In succinct terms, the United Nations Economic Commission for Africa has described what must be the primary objective of the AfCFTA: "to change lives [and] reduce poverty."<sup>109</sup>

With phase one done, negotiations concerning phase two of the agreement are currently under way on the topics of IP rights, investment and competition policy. The deadline for the draft text arising out of phase two was initially scheduled for January 2020 but has now been extended to January 2021.<sup>110</sup> The global pandemic makes a further pushback likely, but Canada's window for engagement is closing quickly.

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104 Government of Canada, "Canada and Sub-Saharan Africa" (last modified 10 January 2020), online: *Government of Canada* <[www.international.gc.ca/world-monde/international\\_relations-relations\\_internationales/africa-afrique/index.aspx?lang=eng](http://www.international.gc.ca/world-monde/international_relations-relations_internationales/africa-afrique/index.aspx?lang=eng)>.

105 *Ibid.*

106 Samuel Ojo Olorunfoba & Komi Tsowou, "Afro-continental free trade areas and industrialisation in Africa: Exploring Afro-Canadian partnership for economic development" (2019) 25:3 *Canadian Foreign Policy J* 237 at 240, DOI: <10.1080/11926422.2019.1650381>.

107 Tralac, "African Continental Free Trade Area (AfCFTA) Legal Texts and Policy Documents", online: *Tralac* <[www.tralac.org/resources/by-region/cfta.html](http://www.tralac.org/resources/by-region/cfta.html)>.

108 United Nations Economic Commission for Africa (UNECA), "An empirical assessment of the African Continental Free Trade Area modalities on goods" (November 2018) at 3, online: *UNECA* <[www.uneca.org/sites/default/files/PublicationFiles/brief\\_assessment\\_of\\_afcfta\\_modalities\\_eng\\_nov18.pdf](http://www.uneca.org/sites/default/files/PublicationFiles/brief_assessment_of_afcfta_modalities_eng_nov18.pdf)>.

109 *Ibid.* at xxi.

110 African Union, Directorate of Information and Communication, "Key Decisions of the 32nd Ordinary Session of the Assembly of the African Union" (February 2019), online: <[https://archives.au.int/bitstream/handle/123456789/2754/2019\\_February%20Summit\\_keyDecision\\_E.pdf?sequence=1&isAllowed=y](https://archives.au.int/bitstream/handle/123456789/2754/2019_February%20Summit_keyDecision_E.pdf?sequence=1&isAllowed=y)>.

## AfCFTA Phase Two Negotiations: Issues and Interests

### ***A Catalyst for Socio-Economic Development***

It is rare to read any commentary on the AfCFTA that does not underscore the importance of using IP rights and competition policy as a tool for broad and inclusive development in Africa.<sup>111</sup> This must be the primary objective informing both the negotiations and the agreement itself. In terms of Canada's involvement in Africa, a diverse trade and investment strategy will help to support substantive gains for large sectors of the population, including sectors that have historically been excluded such as women and minority groups.<sup>112</sup> Lily Sommer and David Luke propose one concrete way that Canada can contribute directly to this objective: through technical assistance and sharing of best practices to monitor the implementation of the agreement and ensure it is not having an adverse impact on vulnerable groups.<sup>113</sup>

### ***Legal Certainty Across Jurisdictions***

It is well known that the pre-AfCFTA framework for IP was one of “fragmented sub-regional IP and economic organisations, which have created conflicting and overlapping IP systems.”<sup>114</sup> This approach “undermines the use of scarce resources and of legal certainty.”<sup>115</sup> The governance framework is equally fragmented in the field of IP. Different organizations administer IP in French-speaking and English-speaking countries; multiple uncoordinated IP initiatives are being led by the regional economic communities; and there is misalignment between the AfCFTA, the proposed Pan-African Intellectual Property Organization (PAIPO) and Agenda 2063.<sup>116</sup>

The AfCFTA offers an opportunity for greater consistency and certainty for business. With the successful implementation of the AfCFTA, it will be easier for partners in Canada to engage with African partners on transnational investment projects.<sup>117</sup> If Canada can provide technical assistance for the implementation of the agreement — given its expertise and experience in this area — this will also have the added benefit of positioning Canada well for an FTA with the AfCFTA once the union has been established.<sup>118</sup> Canada may also be uniquely positioned to bridge gaps between Francophone and Anglophone countries and regional IP organizations in Africa. The AfCFTA can be a vehicle to support this aim, but only if it is part of a coherent Canadian engagement strategy.

### ***Transparent Processes***

Both “procedural and substantive failures around IP issues in various contexts have contributed significantly to the backlash against trade agreements generally.”<sup>119</sup> For this

111 Amaka Vanni, “What Should the AfCFTA’s IP Agenda Be?” (21 January 2019), online: *Afronomics Law* <[www.afronomicslaw.org/2019/01/21/what-should-the-afctas-ip-agenda-be/](http://www.afronomicslaw.org/2019/01/21/what-should-the-afctas-ip-agenda-be/)>.

112 Sommer & Luke, *supra* note 88 at 248.

113 *Ibid.*

114 Vanni, *supra* note 111.

115 Abrie du Plessis, “The proposed AfCFTA Protocol on Intellectual Property Rights” (17 May 2019), online (blog): *TralacBlog* <[www.tralac.org/blog/article/14066-the-proposed-afcta-protocol-on-intellectual-property-rights.html](http://www.tralac.org/blog/article/14066-the-proposed-afcta-protocol-on-intellectual-property-rights.html)>.

116 Caroline Ncube et al, “A Principled Approach to Intellectual Property Rights and Innovation in the African Continental Free Trade Agreement” in David Luke & Jamie MacLeod, eds, *Inclusive Trade in Africa: The African Continental Free Trade Area in Comparative Perspective* (London, UK: Routledge, 2019) 177 at 180–81 [Ncube et al, “A Principled Approach”].

117 Sommer & Luke, *supra* note 88 at 248.

118 Business Council of Canada, *supra* note 95 at 8.

119 Ncube et al, “A Principled Approach”, *supra* note 116 at 178.

reason, many scholars and commentators are highly attentive to the issue of inclusivity and transparency in the negotiation process. Article 3(e) of the agreement refers to “sustainable and inclusive socio-economic development,” but it remains to be seen how this will be reflected in the phase two negotiation process. Some scholars have criticized phase two for being too exclusive and opaque up to this point in time. In response, commentators have emphasized the importance of an open and transparent negotiation process — one that includes all affected stakeholders.<sup>120</sup> Yet over-consultation presents its own risks. For example, Nigeria’s ratification of the AfCFTA was actually delayed because of its robust and extensive consultation with various stakeholders.<sup>121</sup>

There is a real opportunity for Canada to support the process of the AfCFTA’s phase two. Many national negotiators lack the experience or capacity to delve into the details of complex areas such as IP. Canadian and African experts have already proven the potential of collaboration by proposing an initial framework for the IP protocol.<sup>122</sup> More Canadian engagement could help in the final stages of negotiations and, as importantly, in the implementation phase thereafter.

### ***Balancing Protection and Access***

Substantively, an effective IP framework must strike an appropriate balance between the protections it creates and the access it affords. Emmanuel Kolawole Oke writes the AfCFTA must succeed where the PAIPO failed: it must avoid an overreliance on IP rights that has the effect of disproportionately restricting access to goods for members of society.<sup>123</sup> Oke focuses on IP rights with respect to knowledge goods such as medicines, books and seeds, and specifically the implications of overly stringent protections for seed and plant varieties on the protection of human rights, such as the right to food. On patents, Amaka Vanni recommends resisting any pressure to expand the subject matter, scope or duration of patent protection and instead focusing on the examination of capacity building to ensure high-quality vetting of applications.<sup>124</sup> In such ways, through the AfCFTA, Africa can craft a new path for knowledge governance,<sup>125</sup> and that path could align well with the interests of Canada.<sup>126</sup>

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120 Vanni, *supra* note 111; Ohio Omiunu, “Mainstreaming Social Concerns into the AfCFTA Negotiation Process” (23 January 2019), online (blog): *Afronomics Law* <[www.afronomicslaw.org/2019/01/23/mainstreaming-social-concerns-into-the-afcfta-negotiation-process/](http://www.afronomicslaw.org/2019/01/23/mainstreaming-social-concerns-into-the-afcfta-negotiation-process/)>; Babatunde Fagbayibo, “A Case for Democratic Legitimacy of the AfCFTA Process” (16 January 2019), online (blog): *Afronomics Law* <[www.afronomicslaw.org/2019/01/16/a-case-for-democratic-legitimacy-of-the-afcfta-process/](http://www.afronomicslaw.org/2019/01/16/a-case-for-democratic-legitimacy-of-the-afcfta-process/)>.

121 Fagbayibo, *supra* note 120.

122 Caroline Ncube et al, “Intellectual Property Rights and Innovation: Assessing Regional Integration in Africa (ARIA VIII)” (2017) Open AIR Working Paper No 5, online: <<https://openair.africa/wp-content/uploads/2020/05/WP-5-Intellectual-Property-Rights-and-Innovation-Assessing-Regional-Integration-in-Africa-ARIA-VIII-1.pdf>>.

123 Emmanuel Kolawole Oke, “The Harmonisation of IP Law in Africa: The AfCFTA, PVP Laws, and the Right to Food” (19 April 2019), online (blog): *Afronomics Law* <[www.afronomicslaw.org/2019/04/19/the-harmonisation-of-ip-law-in-africa-the-afcfta-pvp-laws-and-the-right-to-food/](http://www.afronomicslaw.org/2019/04/19/the-harmonisation-of-ip-law-in-africa-the-afcfta-pvp-laws-and-the-right-to-food/)>.

124 Vanni, *supra* note 111.

125 Ncube et al, “A Principled Approach”, *supra* note 116 at 179.

126 de Beer & Geist, *supra* note 42.

## Indigenous Knowledge

Commentators also illustrate the importance of incorporating protections for TK, genetic resources and folklore. As Nilce Ekandzi writes, the AfCFTA is an opportunity to shift IP rights from a primarily economic- or business-oriented approach to one focused on human rights and the protection of Indigenous peoples/local communities.<sup>127</sup> Abrie du Plessis adds that the phase two negotiations “present an opportunity to review the progress made and to consider the next steps” with respect to TK, genetic resources and folklore, and constitutes an area in which “Africa could play a leadership role.”<sup>128</sup>

This prerogative is also linked with other objectives of the AfCFTA. As Ekandzi points out, the protection of these assets will provide stakeholders with a higher level of legal certainty that is desirable for both commercial and non-commercial endeavours.<sup>129</sup> These protections will also require a higher standard for the ethical practices of corporations, which furthers the goals of the AfCFTA insofar as this encourages more inclusive development and the protection of Indigenous peoples/local communities.<sup>130</sup> As Vanni writes, the AfCFTA is also an opportunity to confront definitional issues with respect to TK, local peoples, local communities and Indigenous peoples.<sup>131</sup>

A core contribution Canada might make in this field is to broaden perspectives on Indigenous peoples’ innovation. Canada has made empowering its own Indigenous population part of its domestic IP strategy.<sup>132</sup> Aiming to create a more inclusive IP system, Canada is supporting Indigenous IP awareness and capacity building, collecting data on the use of IP by Indigenous businesses and entrepreneurs, and supporting the engagement of Indigenous peoples in international law and policy discussions. At the same time, Canada’s trade diversification strategy seeks to ensure that Indigenous peoples in Canada can benefit from trade and investment.

To achieve this aim, there is significant potential to link Indigenous peoples in Canada and Africa.<sup>133</sup> However, truly empowering Indigenous peoples in the digital economy means connecting discussions of TK with the topic of data sovereignty, a state responsibility to ensure the integrity and security of, and recognize the sensitivity associated with, Indigenous peoples’ data.<sup>134</sup> Canadian priorities (and legal obligations) around reconciliation and decolonization align well with the interests of many African countries in this regard.<sup>135</sup>

127 Nilce Ekandzi, “The Importance of Traditional Knowledge and Traditional Cultural Expressions in the AfCFTA” (9 September 2019), online (blog): *Afronomics Law* <[www.afronomicslaw.org/2019/09/09/the-importance-of-traditional-knowledge-and-traditional-cultural-expressions-in-the-afcfta/](http://www.afronomicslaw.org/2019/09/09/the-importance-of-traditional-knowledge-and-traditional-cultural-expressions-in-the-afcfta/)>.

128 du Plessis, *supra* note 115.

129 Ekandzi, *supra* note 127.

130 *Ibid.*

131 Vanni, *supra* note 111.

132 Government of Canada, “Indigenous peoples and intellectual property”, online: *Government of Canada* <[www.ic.gc.ca/eic/site/108.nsf/eng/00004.html](http://www.ic.gc.ca/eic/site/108.nsf/eng/00004.html)>.

133 Chidi Oguamanam, “The ABS Canada Initiative: Scoping and Gauging Indigenous Responses to ABS” in Chidi Oguamanam, ed, *Genetic Resources, Justice and Reconciliation: Canada and Global Access and Benefit Sharing* (Cambridge, UK: Cambridge University Press, 2018) 3 at 7.

134 Chidi Oguamanam, “Indigenous Data Sovereignty: Retooling Indigenous Resurgence for Development” CIGI, CIGI Papers No 234, 5 December 2019 [Oguamanam, “Indigenous Data Sovereignty”]; Chidi Oguamanam, “ABS: Big Data, Data Sovereignty and Digitization” in Chidi Oguamanam, ed, *Genetic Resources, Justice and Reconciliation: Canada and Global Access and Benefit Sharing* (Cambridge, UK: Cambridge University Press, 2018) 196.

135 Compare Oguamanam, “Indigenous Data Sovereignty”, *supra* note 134; Caroline B Ncube, “Decolonising Intellectual Property Law in Pursuit of Africa’s Development” (2016) 8:1 WIPO J 34.



## Data Localization in Africa

Across Africa, data localization laws are becoming more prevalent. Such laws now exist in 17 African countries, including major players such as Egypt, Nigeria and South Africa.<sup>136</sup> However, much of the commentary surrounding these laws expresses concern over the potential negative impacts of data localization.<sup>137</sup> In particular, there are concerns about how data localization legislation can function as a barrier to trade in smaller countries and how the costs of compliance with this legislation for firms and companies can result in increased consumer costs.<sup>138</sup>

When it comes to data governance in Africa, Canada and others have an urgent need to react to the influence of China. Aaronson and Leblond identify three distinct data “realms” represented by the approaches of the United States, the European Union and China, and note how countries in Africa face a choice between the European or Chinese approaches.<sup>139</sup> At least at the WTO, the “Africa group” so far aligns with China in opposing the liberalization of data flows and data localization limitations.<sup>140</sup> In 2017, the Africa group also took issue with the assumption that WTO commitments in the Uruguay Round automatically apply to new technologies such as three-dimensional printing, robotics, drone delivery and AI, and opposed negotiating new rules on electronic commerce as premature.

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<sup>136</sup> Deloitte, *Privacy is Paramount: Personal Data Protection in Africa* (Deloitte, 2017).

<sup>137</sup> Mona Farid Badran, “Economic impact of data localization in five selected African countries” (2018) 20:4 Digital Policy, Regulation & Governance 337.

<sup>138</sup> Ethan Loufield & Shweta Vashisht, “Data Globalization vs. Data Localization” (6 February 2020), online (blog): Center for Financial Inclusion <[www.centerforfinancialinclusion.org/data-globalization-vs-data-localization](http://www.centerforfinancialinclusion.org/data-globalization-vs-data-localization)>.

<sup>139</sup> Susan Ariel Aaronson & Patrick Leblond, “Another Digital Divide: The Rise of Data Realms and its Implications for the WTO” (2018) 21:2 J Intl Economic L 245 at 270, DOI: <10.1093/jiel/jgy019>.

<sup>140</sup> *Ibid* at 271.





# The Pillars of an International IP and Digital Trade Strategy

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Having canvassed the regions *where* IP and digital trade opportunities exist, it is necessary to set out *how* Canada can promote its own interests around the world. Engagement with hard and soft laws are the two pillars of an international IP and digital trade strategy for Canada.

The negotiation of new hard rules via bilateral or, more likely, mega-regional economic agreements should be the priority in places where such opportunities exist. The most obvious and rewarding region for this kind of Canadian engagement is Africa, although there are also timely opportunities in Latin America and the Caribbean.

The relevant legal frameworks in North America, Europe and the Asia-Pacific region are already set through CUSMA, CETA and the CPTPP. So, in these regions (and, indeed, everywhere), soft law measures such as standard setting make more sense for Canada to pursue. Capacity-building partnerships for IP and digital trade are also key to Canada's future success and can be ramped up in Latin America and the Caribbean, Southeast Asia and throughout Africa.

## Hard Rules

With comprehensive economic partnership agreements done in the trans-Atlantic (CETA), trans-Pacific (CPTPP) and North American (CUSMA) contexts, Canada's best chance to shape the formal rules of IP and digital trade lie in Latin America and Africa. These are not the only places in which Canada has opportunities, but these are the places where the opportunity and need for leadership are greatest. The windows for influence are narrowing quickly, as other countries are already moving in, but it is not yet too late for Canada.

Where formal rules are concerned, Canada can separate its interests into two categories: well-established fields and new territory.

In well-established fields of IP, such as patents, copyrights, trademarks and designs, Canada's primary objective should be defensive. Canada should aim to stop, or at least slow, the upward ratcheting of protection in these fields. Canada should work to preserve existing policy flexibilities, especially by promoting limitations and exceptions from which it currently benefits.

Canada has made efforts to protect its own made-in-Canada norms. An example, adopted in the CPTPP and CUSMA, is an annex that allows Canada to preserve its approach to copyright liability for internet intermediaries. The core provisions of these IP chapters require parties to enact US-style "notice-and-takedown" systems, or even "notice-and-shutdown," terminating internet access for repeat infringers. Intermediaries must also accommodate standard technical measures (i.e., upload filters, developed by copyright owners and service providers, such as those triggering enormous controversy in the European Union lately).<sup>141</sup>

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<sup>141</sup> de Beer, "International Intellectual Property", *supra* note 16 at 4.

Canada won a carve-out from these obligations, but only to protect *itself*. Only parties that already had a system such as Canada's in place at the time of signing could keep it.

In effect, this approach prevents Canadian norms from spreading elsewhere. This is exactly the opposite of what Canada should be trying to achieve. If other countries were able to follow Canada's approach, it would both promote the values underpinning Canada's Digital Charter abroad and offer Canada additional safeguards against further attempts to erode the made-in-Canada solution in future negotiations.

At the same time, Canada would do well to watch where the puck is going, not where it has been. When it comes to new territory for IP, there are even more opportunities for Canadian influence. The most notable areas concern the interface between IP and competition law, the balance between trade secrecy and open innovation, the protection of Indigenous TK, and various forms of data governance.

One good example of nascent but fast-evolving IP and digital trade norms is the topic of digital sequence information (DSI). The future of biotechnology lies not in access to physical samples of genetic material from plants, animals and humans. DSI — genomic, proteomic, phenotypic and related data — is already being transmitted instantaneously around the world with the click of a mouse. In combination with computational biology, aided by AI, the implications of this transformation are enormous. Cross-border exchanges of DSI can completely alter the way R&D happens, as witnessed in the context of pandemic vaccine research, for instance. While Canada's best prospects lie in promoting and partnering in global open science networks,<sup>142</sup> different rules are being debated for global governance. That said, ownership of and access to DSI are still simmering on the international agenda, and numerous different governance models remain in play.<sup>143</sup> Meanwhile, Canada is consulting on a strategy. Only by acting quickly and decisively can Canada influence norms globally.

## Soft Laws

Where legal rules are already set or otherwise difficult for Canada to shape, Canada can use soft law powers to influence international IP and digital trade in practice. The experience of WIPO offers an example. As WIPO's lead role in international lawmaking faded following the WTO TRIPS Agreement and the proliferation of RTAs, it exerted and maybe even increased its influence in other ways. Due to its vast financial resources and status as a specialized agency of the United Nations, WIPO leveraged a global network of experts to build IP capacity through education, training and awareness raising. WIPO's role in shaping the views of IP teachers, administrators, policy makers, practitioners and others is hard to overstate.<sup>144</sup> Such IP "socialization" has been identified as a key factor shaping the diffusion of IP norms throughout developing countries.<sup>145</sup>

Canada should support soft law making with an inclusive, bottom-up approach. It cannot involve blindly promoting IP protection and transplanting foreign norms into different contexts. Establishing a mutually beneficial relationship between Canada and developing countries depends on understanding, respect and reciprocity. Canada is already promoting these principles through research partnerships.<sup>146</sup> Canada is

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<sup>142</sup> de Beer & Gold, "International Trade, Intellectual Property, and Innovation Policy", *supra* note 18.

<sup>143</sup> Stuart J Smyth et al, "Implications of biological information digitization: Access and benefit sharing of plant genetic resources" (2020) 23:3–4 J World Intellectual Property, DOI: <10.1111/jwip.12151>.

<sup>144</sup> Jeremy de Beer & Chidi Oguamanam, "Intellectual Property Training and Education: A Development Perspective" (2010) International Centre for Trade and Sustainable Development Issue Paper No 31, DOI: <10.13140/RG.2.1.3714.8644>.

<sup>145</sup> Jean-Frédéric Morin & Edward Richard Gold, "An Integrated Model of Legal Transplantation: The Diffusion of Intellectual Property Law in Developing Countries" (2014) 58:4 Intl Studies Q 781, DOI: <10.1111/isqu.12176>.

<sup>146</sup> Open AIR, *supra* note 94.

also increasing investment in trade capacity building generally, deploying networks of experts to respond to requests for technical assistance. Moving forward, Canada can be even more strategic about the regions and topics to prioritize. There is no doubt that more support for capacity building in certain countries in Southeast Asia, Latin America and especially in Africa will pay off in the long term.

Another thing Canada can do is to support standard setting. According to Michel Girard, “Robust global standards and third-party certification programs are essential to anchor big tech platform governance.”<sup>147</sup> He highlights why international digital cooperation is needed, but how there is no global organization ready to fill the void.<sup>148</sup> There are enormous opportunities for Canada to step in here. While at first glance, issues such as standards might seem disconnected from an IP strategy, they are not. As just one example of overlap, it is impossible to separate standard setting from the rules governing standards-essential patents.<sup>149</sup> Of course, this is also a way to imbed Canadian values — such as those articulated in the Digital Charter — into technology design globally. This can also promote the adoption and use of Canadian technologies abroad.

In such ways, showing soft law power must be part of Canada’s overall international IP and digital trade strategy.

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147 Michel Girard, “Global Standards for Digital Cooperation” CIGI, Opinion, 28 October 2019, online: <[www.cigionline.org/articles/global-standards-digital-cooperation](http://www.cigionline.org/articles/global-standards-digital-cooperation)>.

148 Michel Girard, “Standards for Digital Cooperation” CIGI, CIGI Papers No 237, 16 January 2020.

149 Michael Murphree & Dan Breznitz, “Standards, Patents and National Competitiveness” CIGI, GCIG Series Paper No 40, 30 September 2016.









# Conclusion

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An international IP and digital trade strategy for Canada would plan for both hard and soft law measures to promote Canadian interests in the global knowledge economy of the future. In areas where IP rules are well established — such as patents, copyrights, trademarks and designs — Canada should defend against further upward ratcheting of IP rights. In areas where new IP rules are emerging — such as data governance, trade secrets, competition law, and Indigenous peoples' knowledge and culture — Canada should ally with countries and regions that share similar strategic interests.

Implementing this strategy, therefore, requires identifying regions of the world where Canada is likely to have the clearest opportunities for synergies. This means revisiting assumptions about and relationships with key trading partners of the past, especially the United States, the European Union and certain Asian countries.

Instead, Canada should look to the next frontiers for economic integration. Africa is undoubtedly the region of the world presenting the most strategic opportunities for Canada, but the timeline for engagement is tight. By doing so, Canada can complement its domestic IP and digital strategies with international strategy aligned with changing global economic conditions and geopolitical scenarios.

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