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The Digital Trade Data Heist: Trade Agreement Limits on Data Transfer and Storage Regulation Could Undercut Data Governance

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The Emergent Data Governance Ecosystem



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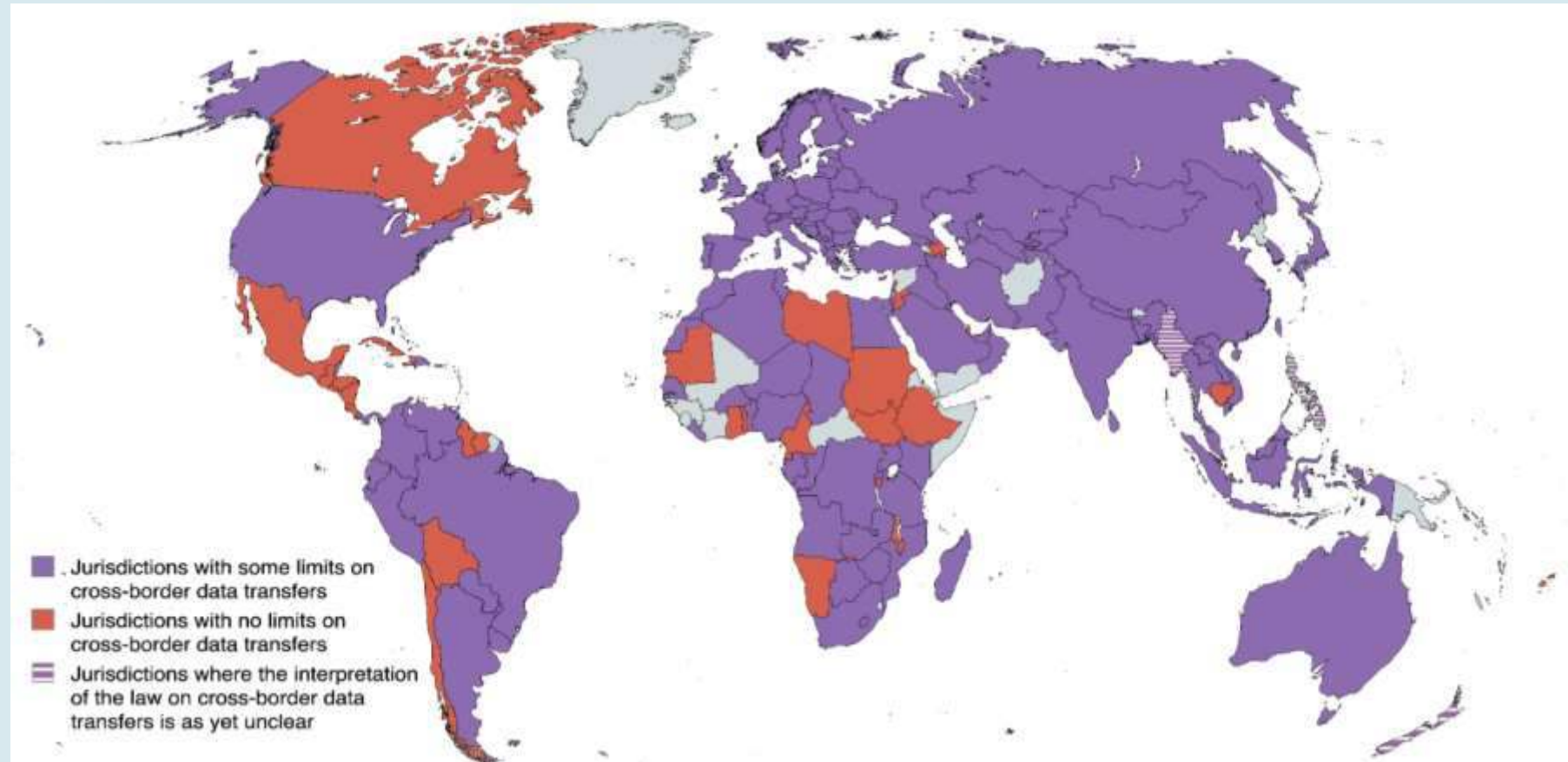


- In the United States and around the world, governments are developing regulations on how data is collected, transferred, and stored—**shaping the future of the digital economy.**
- Examples of areas of regulatory activity include:
 - ✓ Personal data protection
 - ✓ National security-related data regulation
 - ✓ Tax policy
 - ✓ AI regulation
 - ✓ Much more: Insurance law, accounting and financial regulation, competition policy...
- Many of these policies affect how data can be transferred or where it can be stored.

162 countries have passed national personal data protection laws. About 75% of all countries have adopted conditions on the cross-border transfer of data.



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The Evolving U.S. Data Governance Ecosystem

U.S. policymakers have been very active in recent years, adopting data governance policies. Some of the most salient examples include:

- The Protecting Americans' Data from Foreign Adversaries Act of 2024 (data broker legislation)
- Executive Order 14117 – Preventing Access to Americans' Bulk Sensitive Personal Data and United States Government-Related Data by Countries of Concern
- New cybersecurity requirements for U.S. government cloud computing contractors
- Montana's 2023 Genetic Information Privacy Act
- 2023 amendment to California's Confidentiality of Medical Information Act



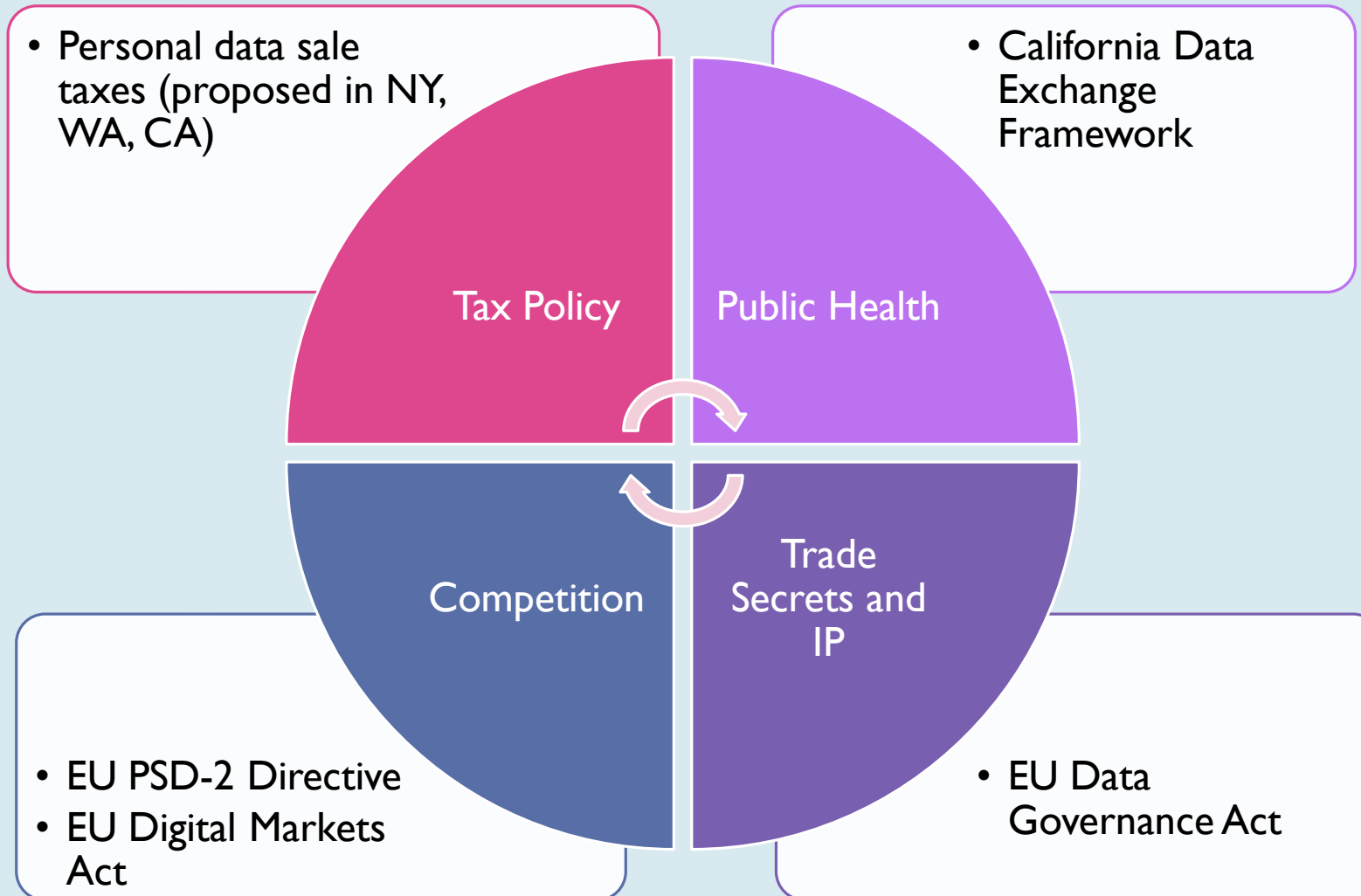
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Data Regulation Beyond Personal Information Protection and National Security Policies



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In parallel, tech industry interests have pushed for so-called “digital trade” rules for the global economy.



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- In the early 2010s, tech interests immersed themselves in Washington policy circles to develop the “digital trade” agenda.
- A key element of this strategy is pushing for the adoption of rules on *cross-border data flows* and *location of computing facilities*.

Trade jargon to common English dictionary:

- Cross-border data flows = Ban on government regulation of international data transfers
- Location of computing facilities = Ban on requirements related to where data can be stored



Outcomes of the U.S. Industry Digital Trade Agenda



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Trans-Pacific
Partnership (2016)

- First attempt to craft far-reaching digital trade rules at a multi-party level.
- When the U.S. abandoned the deal, the remaining countries adopted these rules via the **Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)**.

U.S.-Mexico-
Canada
Agreement (2018)

- Triggered by the renegotiation of the **North American Free Trade Agreement (NAFTA)**, the USMCA is the only agreement ratified by the U.S. Congress with a digital trade chapter.
- Public debate revolved around other issues: Auto sector, Rules of Origin, Labor, Environment and Intellectual Property. Almost no debate on the digital chapter.

U.S.-Japan Digital
Trade Agreement
(2019)

- Almost identical terms to **USMCA**.
- Executive agreement not ratified by the U.S. Congress.

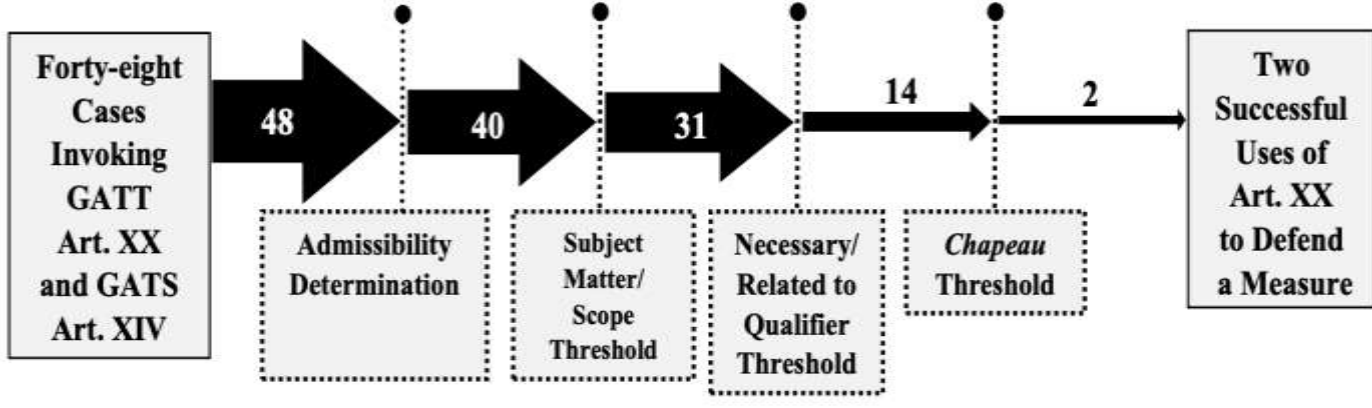
Agreement	USMCA	Mercosur	EU- New Zealand
Obligations			
Blanket prohibition on governments limiting data flows?	Yes	No	No
Prohibition on regulation applies broadly, not only to data moving between signatory countries?	Yes	Yes	No — limits on regulation apply to data flowing between the signatory countries only
Gives rights to companies/private parties?	Yes	Yes	No
Forbids data localization requirements?	Yes	Yes	Yes
Exceptions			
Defending countries must prove public interest policies meet a narrow trade pact necessity test and must satisfy a proportionality test that assesses their trade restrictiveness?	Yes	No	No (in the case of personal data and privacy)
Public interest policies must not arbitrarily or unjustifiably discriminate between countries?	Yes	Yes	Yes



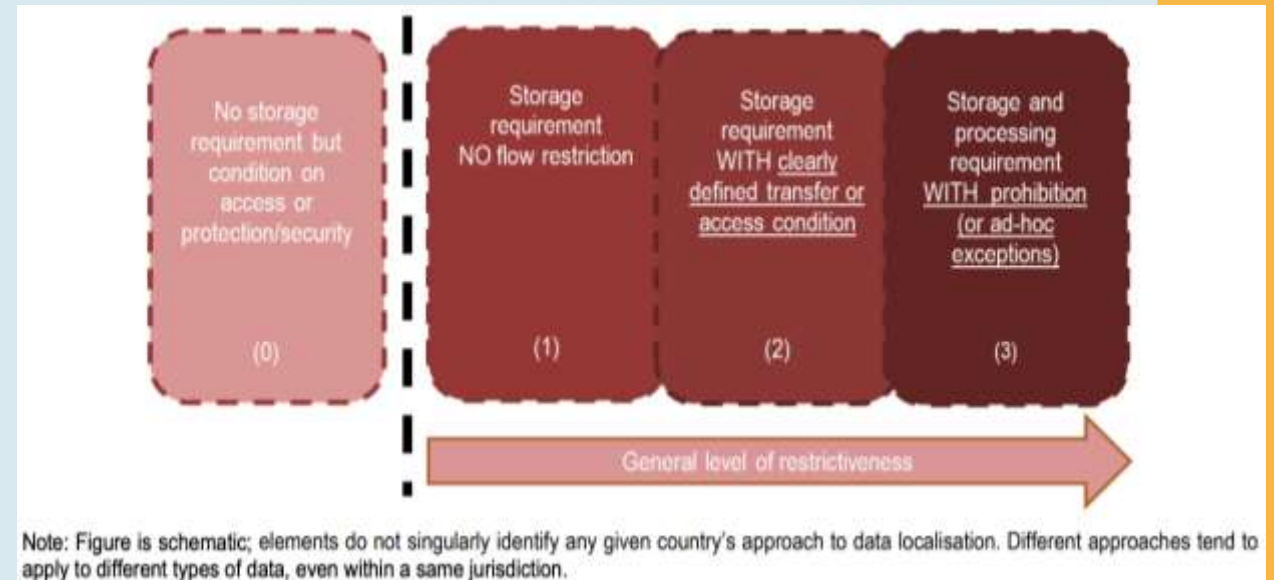
The USMCA model includes by far more restrictive and far-reaching cross-border data flows and location of computing facilities constraints compared to other agreements.

Figure 1. The Pathway for the Two Instances of Respondents Successfully Invoking the General

Exceptions Defense



So-called “public policy” exceptions based on the WTO’s general exceptions undermine countries’ capacities to choose their desired level of data protection.



Source: OECD

WTO rules against U.S. in Hong Kong labelling dispute

By Reuters

December 21, 2022 11:19 AM EST · Updated 2 years ago



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WTO says Trump's US steel tariffs broke global trade rules

9 December 2022

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Natalie Sherman & Jonathan Josephs
Business reporters



US President Donald Trump sparked a wave of trade fights after he announced tariffs on steel and aluminium

The World Trade Organization (WTO) has found that tariffs on steel and aluminium imports that were imposed by the US under former President Donald Trump violate global trade rules.

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WTO panels have interpreted the scope of national security exceptions narrowly. This means that data-security measures would not be protected from trade pact-based challenges.