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Treatment of Cross-Border Data Flows: The Role of Trade Agreements

Submitted by: United States



**Symposium on APEC Supporting the WTO
Negotiations on Trade Related Aspects of
E-Commerce
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Treatment of cross-border data flows: the role of trade agreements

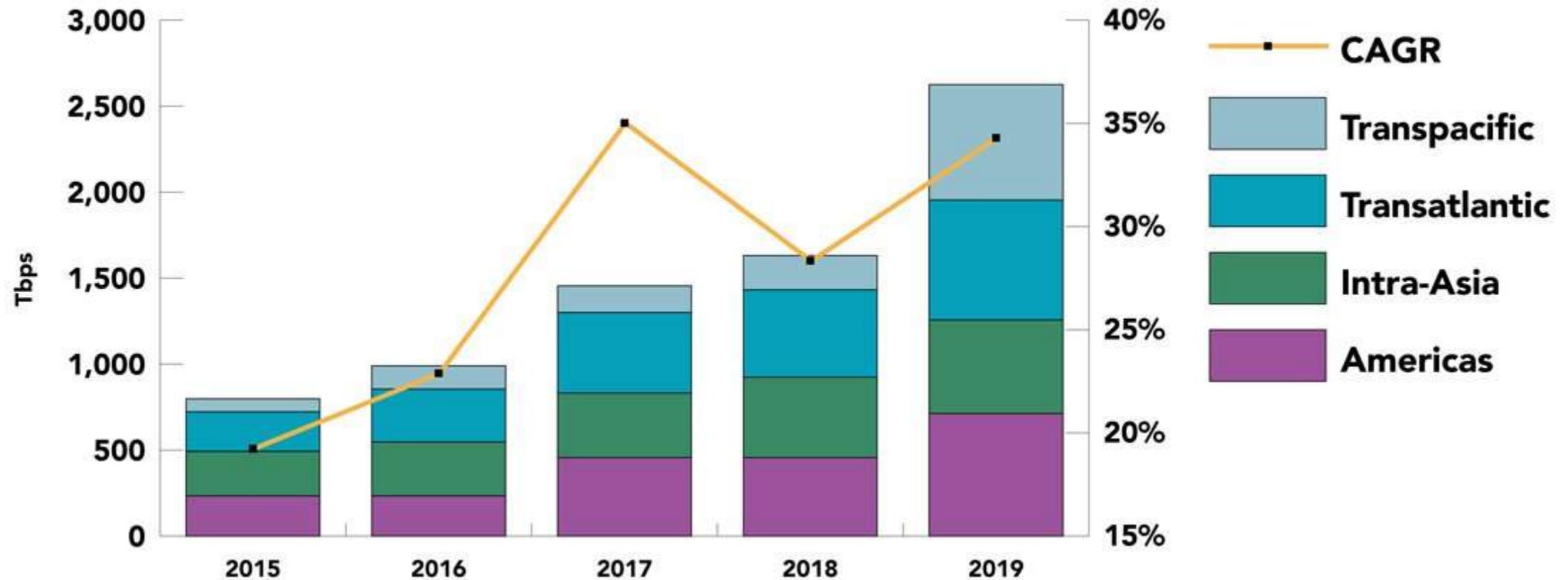
March 24, 2021

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Precursor to the Internet – a Global Network, 1869



Submarine cable capacity growth (source: subtelforum)



Data Flow Trends

Global flows of trade and finance are flattening, while data flows are soaring



1994 GATS: FINANCIAL SERVICES UNDERSTANDING

“No Member shall take measures that prevent transfers of information or the processing of financial information, including transfers of data by electronic means...where such transfers of information, processing of financial information or transfers of equipment are necessary for the conduct of the ordinary business of a financial service supplier.

Nothing in this paragraph restricts the right of a Member to protect personal data, personal privacy and the confidentiality of individual records and accounts so long as such right is not used to circumvent the provisions of the Agreement.”

EU: GATS Market Access and National Treatment Limitations

B. Computer and Related Services (CPC 84)

	Limitations on market access	Limitations on national treatment
Data Processing Services (CPC 8432)	1) None 2) None 3) None	1) None 2) None 3) None
Computer time-sharing (CPC 8433)	1) None 2) None 3) None	1) None 2) None 3) None

GATS National Treatment Rule – Article XVII

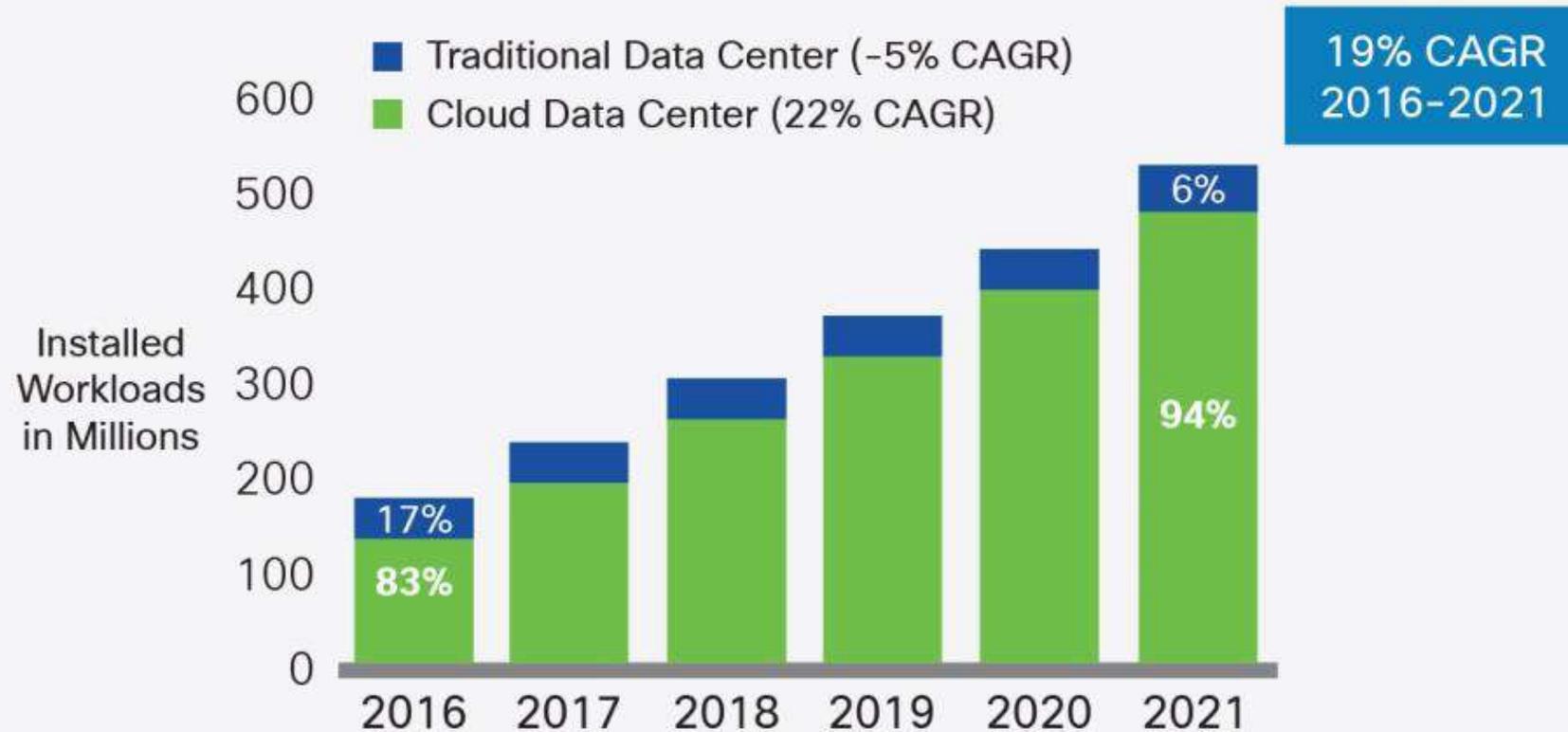
In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.

GATS General Exceptions: Article XIV

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:

- (a) necessary to protect public morals or to maintain public order;
- (b) necessary to protect human, animal or plant life or health;
- (c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:
 - i. the prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts;
 - ii. the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts;
 - iii. safety;

Evolution of Data Processing



Source: Cisco Global Cloud Index, 2016-2021.

Addressing Data Localization in Trade Rules (USMCA)

No Party shall require a covered person to use or locate computing facilities in that Party's territory as a condition for conducting business in that territory.

USMCA Data Flow Rule

1. Neither Party shall prohibit or restrict the cross-border transfer of information, including personal information, by electronic means, if this activity is for the conduct of the business of a covered person.
2. Nothing in this Article shall prevent a Party from adopting or maintaining a measure inconsistent with paragraph 1 that is necessary to achieve a legitimate public policy objective, provided that the measure:

USMCA Data Flow Rule (continued)

- (a) is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade; and
- (b) does not impose restrictions on transfers of information greater than are necessary to achieve the objective.

* A measure does not meet the conditions of this paragraph if it accords different treatment to data transfers solely on the basis that they are cross-border in a manner that modifies the conditions of competition to the detriment of a covered person.

Addressing Trust Issues: Consumer Protection and Privacy

- Each Party shall adopt or maintain consumer protection laws to proscribe fraudulent and deceptive commercial activities that cause harm or potential harm to consumers engaged in online commercial activities.
- Each Party shall adopt or maintain a legal framework that provides for the protection of the personal information of the users of digital trade.

Addressing Cybersecurity Challenges - USMCA

The Parties recognize that threats to cybersecurity undermine confidence in digital trade. Accordingly, the Parties shall endeavor to:

- (a) build the capabilities of their national entities responsible for cybersecurity incident response; and
- (b) strengthen existing collaboration mechanisms for cooperating to identify and mitigate malicious intrusions or dissemination of malicious code that affect electronic networks and use those mechanisms to swiftly address cybersecurity incidents, as well as the sharing of information for awareness and best practices.

Given the evolving nature of cybersecurity threats, the Parties recognize that risk-based approaches may be more effective than prescriptive regulation in addressing those threats. Accordingly, each Party shall endeavor to employ, and encourage enterprises within its jurisdiction to use, risk-based approaches that rely on consensus-based standards and risk management best practices to identify and protect against cybersecurity risks and to detect, respond to, and recover from cybersecurity events.