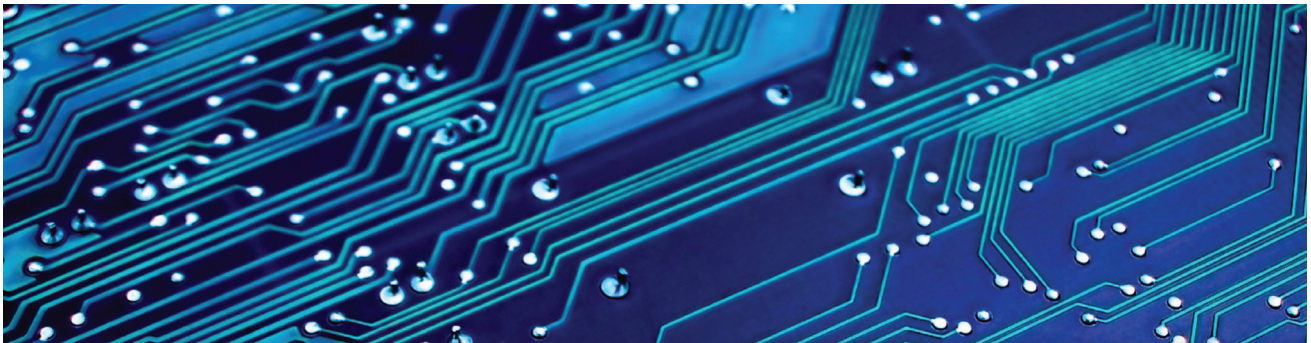




The **E15** Initiative

STRENGTHENING THE GLOBAL TRADE SYSTEM



Should There Be New Multilateral Rules for Digital Trade?

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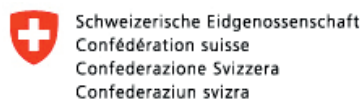
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ABSTRACT

This think piece addresses the interface between the global trading system and the digital environment. In recent years, the role of digital technologies as a key driver of innovation has dramatically increased, and thus the question of whether current trade rules are adapted to the realities of digital trade and innovation has become a critical one. As digital technologies, and above all the Internet, enter a more advanced stage of evolution and of integration into societal life, the matter is likely to transcend issues of market access, elimination of tariffs, or the classification of a digital good or service, and to revolve around how the entire international trade governance system is to face the digital challenge.

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LIST OF ABBREVIATIONS

ACTA	Anti-Counterfeiting Trade Agreement
CPC	Central Product Classification
EU	European Union
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
ICANN	Internet Corporation for Assigned Names and Numbers
ICT	Information and Communications Technology
IEL	International Economic Law
IP	Intellectual Property
IT	Information Technology
ITA	Information Technology Agreement
MFN	Most-Favoured-Nation
NTBs	Non-Tariff Barriers
ODCs	Other Duties and Charges
OECD	Organisation for Economic Co-operation and Development
PIPA	Protect IP Act
PTA	Preferential Trade Agreement
SOPA	Stop Online Piracy Act
TISA	Trade in Services Agreement
TPP	Trans-Pacific Partnership
TRIPS	Trade-related Aspects of Intellectual Property Rights
TTIP	Transatlantic Trade and Investment Partnership
US	United States
USITC	United States International Trade Commission
USTR	United States Trade Representative
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

INTRODUCTION

Digital technologies have had, and continue to have, profound effects on multiple facets of societal life. The changes range from the trivial to the momentous--from online shopping, through the emergence of new global value chains and transactions, to the very ways we work and write, create, distribute, and access information. They bring distant geographical locations within instantaneous reach, organize millions of people within hours, and produce encyclopaedias and virtual libraries on a collaborative basis. These modifications are by no means only quantitative--pertaining, for instance, to the number of Internet users or to the contribution of online trade to gross domestic product (GDP) and economic growth (OECD 2013; UNCTAD 2012; USITC 2013) They also have a qualitative character and significantly affect many separate areas of society, as well as society as a whole (Benkler 2006; Chander 2013).

The changes brought about by digital technologies have unsurprisingly triggered regulatory responses at all levels of governance, which affect, to varying degrees, the existing regimes for telecommunications, audiovisual media services, and copyright, to mention but a few (Primo Braga 2005; Drake and Wilson 2008). National policies were the first to be redesigned, but because of the inherent "globalness" of the digital environment, many of the solutions need to be situated at the international level--either framed as an add-on to existing agreements (such the Internet Treaties adopted in 1996 under the World Intellectual Property Organization, or WIPO) or as entirely new institutional solutions (such as the Internet Corporation for Assigned Names and Numbers, or ICANN). It should also be borne in mind that local regulatory actions cannot be neatly isolated in cyberspace, and often have worldwide spillovers (Bellia et al. 2011).

It should be underscored that while it is evident that digital technologies have had an impact on the economy as well as on social and cultural practices, they have at least equally strongly affected the law and patterns of governance in general (Bellia et al. 2011; Burri and Cottier 2012; Goldsmith and Wu 2008). Legal institutions face various challenges, related, among other things, to design and enforcement. Many of the existing rules no longer provide appropriate answers. Digital technology undermines, for instance, traditional perceptions of copyright and exclusivity. It renders classic distinctions between goods and services obsolete, as these are now commonly integrated, especially with the intensified trend of "servicification."

At the same time, as digital technologies are increasingly mobilized within nation states as key drivers of innovation and growth, the danger of regulatory activism and often burdensome and unbalanced regulation is also clear and

present. As recent evidence shows, there has been a wave of measures, both in domestic and external policies, which protect local industries and may significantly inhibit free digital trade (USITC 2013).

International economic law (IEL) has so far not reacted in a forward-looking manner to the digital revolution (Burri and Cottier 2012). If we look at the rules and commitments under the auspices of the World Trade Organization (WTO) as the mainstay of IEL, no real advance whatsoever has been made since the Uruguay Round (1986-1994), and very little can be expected even in a successful post-Doha scenario. In contrast to so far fruitless multilateral efforts, there have been some advances in bilateral and regional venues not only in terms of further trade liberalization, but also in terms of overcoming analogue-digital disparities and creating new rules. Yet, even here, the developments have only been incremental, catching up with technological advances in discrete fields--where some business interests were pressing--while still falling short of true regulatory innovation. The mega-regional trade deals of the Trans-Pacific Partnership (TPP) Agreement and the Transatlantic Trade and Investment Partnership (TTIP) Agreement, now under negotiation, may offer some new approaches and more detailed and better structured templates for addressing digital trade. Yet, the claim remains valid that we are still only at the beginning of finding and defining an appropriate transnational and international regulatory framework governing digital technologies, and their associated opportunities and risks. Considering the growing importance of digitally fuelled innovation, the urgency of putting together such a regulatory framework has only increased.

In asking whether there is a need for new multilateral trade rules addressing digital trade, it is perhaps useful to discern two types of sub-questions that can be raised, which necessarily call for different types of reform. The first relates to incremental adjustment of the WTO Agreements to remedy the existing problems of inadequacy, inconsistency, and legal uncertainty in electronic commerce. The second set of questions is bolder and demands more innovative legal engineering. As digital technologies, and above all the Internet, enter a more advanced stage of evolution and of integration into societal life, the critical question is likely to transcend issues of market access, elimination of tariffs, or the concrete classification of a digital good or service, and will ask how fit the entire international trade governance system is to face the digital challenge. How can the entire rule structure be made sustainable and capable of anticipating impending tests further down the road so that digital trade can be facilitated and fostered?

MAPPING KEY ISSUES AND IDENTIFYING CHALLENGES

In addressing these questions and contemplating the elements of an appropriate WTO reform, we should not forget the merits of the existing system too quickly.¹

WHAT WE HAVE

The WTO law, despite a lack of response presently, and possibly in the short to medium term, possesses intrinsic flexibility and resilience, both in the substance and procedural mechanisms that could appropriately accommodate some, if not all, changes brought about by digital trade. The WTO is much more than the admittedly stalling Doha round of negotiations. Powerful principles, such as the most-favoured nation (MFN) obligation, which apply equally to all 160 WTO Members and operate under the General Agreement on Tariffs and Trade (GATT), the General Agreement on Trade in Services (GATS), and the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS), could potentially address technological developments better than new made-to-measure regulatory acts, often adopted as a reaction to strong vested interests, especially in the intellectual property (IP) domain (Gervais 2012; Sell 2003).

GATT, combined with the Information Technology Agreement (ITA), which represents about 97% of world trade in information technology (IT) products and secures elimination of duties, provides a comprehensive framework for trade in digital products and one of the deepest modes of liberalization. The TRIPS Agreement offers an equally broad palette of tools for protecting intellectual property pertinent to IT, specifically addressing computer programs and granting them protection as literary works under the Berne Convention (Article 10:1 TRIPS). Under GATS, which appears

to be the most pertinent set of rules in online trade cases, despite the "cultural exception" debates during the Uruguay Round (Burri 2008), no services sector is excluded a priori. The existing rules and commitments for telecommunications services are particularly advanced, addressing not only the opening of markets, but also some critical competition issues, access, and interconnection (Bronckers and Larouche 2008), which ensure a fairly liberal regime for the key infrastructure layer. There are also horizontally applicable provisions, such as those regarding transparency (Article III GATS) and domestic regulation (Article VI GATS), which may have the (as yet untapped) potential to deal with many digital trade concerns.

In terms of evolution of norms and the presence of embedded mechanisms of adaptation, the WTO possesses the unrivalled advantage of a sophisticated and relatively efficient dispute settlement mechanism, often dubbed the "jewel in the crown" of its architecture (for example, Davey 2005). We find strong evidence in the WTO jurisprudence for both the adeptness of the dispute settlement system and for the relevance of electronic commerce in trade conflicts. Indeed, all key GATS cases so far (Mexico – Telecoms;² US – Gambling;³ and China – Publications and Audiovisual Products⁴) have had a substantial Internet-related element, and have had an impact on WTO law, clarifying its norms and advancing it further. While certainly less visible and less discussed, the non-judicial governance at the WTO should not be underestimated. Unfolding in many committees, working parties, and review bodies, this "hidden" governance performs important functions in framing issues, disseminating information, networking, elaborating and interpreting norms, and imparting regulatory learning, whose effects are greater than often conventionally perceived (Lang and Scott 2009). This has been exemplified by the WTO Work Programme on Electronic Commerce (WTO 1998), which despite yielding few tangible results (Wunsch-Vincent 2008), has shown the multi-directional impact of digital technologies on international trade law and informed debates on likely regulatory responses.

Painting this bright picture of WTO's "adaptive governance" traits (Cooney and Lang 2007) and its potential to address new developments, including far-reaching digitally induced transformations, does not, however, mean that the multilateral trade regime is fit to deal with the digital trade

3 Panel Report, United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services (US – Gambling), WT/DS285/R, adopted on 10 November 2004; Appellate Body Report, United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services (US – Gambling), WT/DS285/AB/R, adopted on 7 April 2005.

4 Panel Report, China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products (China – Publications and Audiovisual Products), WT/DS363/R, adopted on 12 Aug 2009; Appellate Body Report, China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products (China – Publications and Audiovisual Products), WT/DS363/AB/R, adopted on 21 Dec 2009.

1 It should be noted from that this paper does not address all questions related to digital trade. It does not cover the interface between electronic and non-electronic commerce, which raises questions of customs duties and other formalities when goods cross borders. Nor does it include GATS Mode 4 questions related to the free movement of persons.

2 Panel Report, Mexico – Measures Affecting Telecommunications Services (Mexico – Telecoms), WT/DS204/R, adopted on 2 April 2004.

challenge. Indeed, there are multiple sources of worry and scepticism.

Some relate to the ways WTO rules, in particular GATS provisions, were designed, allowing WTO Members to tailor their commitments. Others relate to old (pre-Internet) and increasingly unconnected to practical reality classifications of goods, services and sectors, based on which these commitments were made. Many of the contentious issues, which often block e-commerce negotiations, stem from more fundamental divergences. The “cultural exception” dilemma, which has put the US and the European Union (EU) as the major stakeholders in opposing camps, is a pre-eminent example (Burri 2008; Singh 2008).

Overall, while the WTO dispute settlement system partially clarifies and updates rules, judicial transplants cannot replace political consensus on the substance of a complex and highly technical domain such as digital trade. As the Doha negotiations continue to make little progress, the multilateral venue of rule-making is being seriously undermined, and this triggers forum-shopping (WTO 2011)--bilaterally, regionally, and through new plurilateral initiatives within clubs of countries, unaffiliated to any international organization, such as the Anti-Counterfeiting Trade Agreement (ACTA) (Blakeney 2013).

This fragmentation of forums and rules is not an optimal vehicle for seamless and instantaneous data flows, and for future-oriented digital trade as an important pillar of knowledge economies.

WHERE ACTION IS NEEDED

Starting small, one can first list those issues that have been raised in WTO discussions, mostly under the auspices of the WTO Work Programme on Electronic Commerce, but which for various reasons have not been addressed in a satisfactory manner to yield clear-cut solutions. As noted, the WTO E-Commerce Programme has been an important initiative in marking both the significance of digital trade and its multiple effects on multilateral trade rules.

It has, however, failed in “converting thinking into action” (Wunsch-Vincent and Hold 2012,p. 181). Even on simple issues, such as confirming the applicability of WTO rules and commitments to electronically traded services, no results have been achieved at the negotiation table. This failure has been somewhat compensated by the US – Gambling case, which at least clarified that the GATS applies to digital services, but there is plenty still to be settled.⁵

There is, for instance, still no agreement on a permanent duty-free moratorium on electronic transmissions and their content. The moratorium has been temporarily extended several times; the last time for a period of two years, following a decision taken during the Bali Ministerial Conference in 2013 (WTO 2013a). In addition, there is some disagreement on the moratorium’s exact coverage, in particular whether it also applies to the content of the transmissions--that is, the songs, videos, or films that are being sold or downloaded over the Internet.⁶

Diverse classification issues have been particularly contentious from the very outset of the Work Programme on E-commerce. On the one hand, WTO Members have so far been unable to agree whether digital products traded electronically are goods falling under GATT, services falling under GATS, or perhaps some other, unique category. To be sure, this is not a technical decision, but a highly political matter, which may have serious implications for all Internet-related sectors of the economy. The stakes are high since the GATT provides for a much more liberalized regime, while GATS, with its positive list type of commitments, permits more flexibility for the state, including forms of protectionism.

Even in the unlikely situation that this question is settled and GATS is found to be applicable, the question of which specific commitments apply--those on audiovisual, value-added or basic telecommunications, or computer-related services--remains unanswered. Here too, the classification of new or existing electronic services under one of these categories would mean a completely different treatment, and a set of corresponding obligations ranging from levels of full commitment for value-added telecommunications and computer-related services to virtually non-existent obligations for audiovisual services. Since the existing commitments are made on the basis of the W/120 list (WTO 1991) by reference to the Central Product Classification (CPC) List in its provisional, and now largely outdated, 1991 version, there is plenty of room for speculation on the applicability of a particular classification category, generating a great deal of uncertainty. The same is true of the debates on whether GATS Mode 1 (cross-border supply) or Mode 2 (consumption abroad) is relevant; on the implementation of the principle of technological neutrality; and on the applicability of the “likeness” test criteria to products and services available online and offline. This is a non-exhaustive list of the unresolved questions in the e-commerce domain.⁷ It is nonetheless

5 | As also confirmed by China – Publications and Audiovisual Products.

6 | Mattoo and Schuknecht (2000) have argued that the debate on the ban on duties may be missing the point, since if a WTO Member has made a national treatment commitment for a particular sector, then all discriminatory taxes are already prohibited, and vice versa. If there is no national treatment obligation, the state remains free to impose discriminatory internal taxes other than customs duties, which again renders the value of the ban small. Mattoo and Schuknecht recommend expansion of GATS specific commitments as a more sensible and efficient way to liberalize electronic commerce.

7 | For full references, see Mitchell (2001); Wunsch-Vincent (2008).

illustrative of the lack of progress even on basic issues, which naturally unmask political disagreement and lack of critical mass to endorse a future-oriented digital trade strategy under the multilateral framework of the WTO. This lack of agreement on ways forward has been felt even under the ITA and the much-less controversial efforts to expand its product and membership coverage (Lee-Makiyama 2011).

While the WTO Work Programme on Electronic Commerce is still ongoing and periodic reports claim a “reinvigoration” of efforts to move ahead, progress is extremely slow. There is even some anxiety expressed by WTO Members that any “update” or change of classification schemes may reduce the level of existing commitments (Tuthill and Roy 2012). The situation is exacerbated by an unfortunate mismatch in the positions of the key stakeholders, the US and the EU, which has blocked more expeditious solution-finding (Burri 2008; Weber and Burri 2012).

As noted, the above lists the “leftovers” of the WTO Work Programme on E-Commerce. To be sure, the picture has changed in many critical ways since the Programme was launched in 1998, The significance of digital trade — in its contribution to economic growth and as a source of government preoccupation with digital trade-related policies — has grown exponentially (OECD2013; USITC 2013). New, previously unknown or not fully developed technological applications, such as mobile telephony or cloud computing, have become important platforms for business and innovation with deep societal implications (WTO 2011b). There is also a new palette of measures that inhibit digital trade. A recent review conducted by the US International Trade Commission (USITC) compiled a useful taxonomy of such measures (2013). Some of them can be grouped under so-called “digital trade localization measures” or “localization barriers to trade,” and encompass, among others, requirements for localization of data servers, certain local content policies, or discrimination against not locally based digital services or providers. The divergent approaches to data privacy and IP protection—both too strong and non-existent (which is equal to permission for piracy)—that different countries have adopted disrupt digital trade, increase the cost of doing business, and hinder innovation.

SKETCHING WAYS FORWARD

As signalled earlier, one can identify two tiers of questions, which call for different types of WTO reform. The first will address the first set of problems defined above, which demand only an incremental adjustment of WTO law, in particular in the field of services regulation, and which can be addressed to a large extent through changes in the modes of committing.⁸ This adjustment has so far failed due to lack of political consensus. The standstill in the WTO on this has been compensated by bilateral and regional initiatives.

A series of preferential trade agreements (PTAs) concluded by the US with a number of partners since 2004 has established a template, which addresses some of the first-tier questions.⁹ This template has been replicated in other, non-US, agreements (such as Australia–Singapore, Chile–Australia, Korea–Singapore). A critical element is the adoption of a GATT-like negative list approach for services liberalization (everything is committed for except what is excluded), which renders many of the politically sensitive and complicated classification debates less relevant (Wunsch-Vincent 2008; Wunsch-Vincent and Hold 2012).

Far-reaching specific GATS commitments could possibly address the questions raised in the framework of the E-commerce Work Programme appropriately. This is the case, for example, when members broadly schedule entire services sectors at the two-digit CPC level, covering all existing services and also anticipating newly developed ones. This is an endeavour that is politically feasible for some relevant sectors, such as computer and related services. For others, such as audiovisual services, the political will is largely absent.

The second tier of more complex, “deeper integration” issues, such as privacy, and data and consumer protection, has also been addressed in PTAs (Wunsch-Vincent and Hold 2012). Some key IP questions raised in the digital environment, including enforcement and intermediaries’ liability, have been taken up (albeit not comprehensively), basically providing for a type and level of protection similar to that in the US Digital Millennium Copyright Act (DMCA) (Okediji2009; Yu 2013). As the Stop Online Piracy Act (SOPA) and the Protect IP Act (PIPA) initiatives and the ACTA, in its initial form, failed to gain support domestically, it is possible to envision that some of their provisions will be applied through PTA channels.¹⁰ Strong counter-pressures are also observable, however, as the Office of the United States Trade Representative (USTR) position on the inclusion of provisions on copyright limitations and exceptions in the TPP reveals.¹¹

Overall, the existing experiments with PTAs provide for some minimal and geographically limited harmonization, but they are not capable of addressing the key digital trade challenge and of ensuring free digital flows globally. On the other hand, they prove that trade agreements can be a suitable venue for tackling the broader questions that digital trade poses. Yet, PTAs are most often the result of asymmetrical power bargains—developing countries may be seriously disadvantaged when striking those deals, adopting US-centric models, or unwillingly reducing future regulatory space in key areas. More recently, there has been a growing consensus in different constituencies that the umbrella of the WTO offers

8 | As opposed to changes in GATS provisions.

9 | The US agreements are with Australia, Bahrain, Chile, Morocco, Oman, Peru, Singapore, the Central American countries, and more recently with Panama, Colombia, and South Korea.

the most appropriate venue to create rules if not on all, then at least on critical, aspects of digital trade. Viewed from the perspective of the WTO as the main pillar of global economic law, meeting these challenges can be framed as a matter of maintaining the relevance of the organization as well.

There are different paths to achieve this, which are related to different legal and, above all, political challenges.

Continuation and Reinvigoration of the WTO Work Programme on Electronic Commerce

The WTO Work Programme on E-commerce informs ongoing debates. Recently, there have been some attempts at its "reinvigoration" (WTO 2011a, 2011b). Most notably, the US and the EU have put forward some general principles for e-commerce (WTO2011a). Without prejudice to any existing rules and commitments, these principles are intended to function as a basic harmonization framework to be applied by governments and their agencies in a technologically neutral manner, and integrated into future bilateral and multilateral trade disciplines.

The principles include the following objectives.

- Making all information and communications technology (ICT) relevant rules transparent.
- Promoting open networks, network access and use, including promotion of interoperability.
- Ensuring unhindered cross-border information flows.
- Having no local infrastructure or local presence requirements.
- Having no restriction on foreign participation in ICT services sectors, through establishments or other means.
- Ensuring efficient and non-discriminatory use of spectrum.
- Setting up legally distinct and functionally independent regulatory authorities.
- Instituting unrestricted and less burdensome authorization and licence procedures.
- Ensuring interconnection.
- Ensuring international co-operation, in particular for bridging the digital divide and increased digital literacy.

¹⁰ The Stop Online Piracy Act (SOPA), H.R.3261, introduced in the US House of Representatives on 26 October 2011, and the Protect IP Act (Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act, or PIPA), S.968, introduced in the US Senate on 12 May 2011. On 18 January 2012, the English version of Wikipedia and some 7,000 other websites coordinated a service blackout, or posted links and images in protest against the SOPA, in an effort to raise awareness. Many academics, corporations, and civil society representatives also opposed it. Soon afterwards, both the House and Senate bills were dropped.

Subscribing to these principles can be a first and important step in ensuring that a level of legal certainty is provided and businesses can engage in cross-border digital trade. Agreement on these principles among more WTO Members can provide a healthy basis for further discussions, as well as precluding regulatory races to the bottom or to the top in regional and bilateral venues, or in unilateral state actions, which have been particularly palpable in the case of China (USITC 2013).

WTO Members could subscribe to these principles, for instance, by agreeing upon a Reference Paper for Digital Trade, which would then be included as an additional commitment in the respective Members' schedules (Article XVIII GATS). The Reference Paper could be coupled with an Annex or a Protocol, which specifies an increased level of commitments and how they are applied among the parties (as this format worked relatively well for the opening up of the telecommunications services sector; Bronckers and Larouche 2008; NFTC 2012).

Extension of the Information Technology Agreement

Next to the far-reaching commitments for telecommunications services made with the Agreement on Basic Telecommunications and the Reference Paper, the ITA has been one of the significant developments since the conclusion of the Uruguay Round and it marked a great success for the ICT industry. The ITA provides for zero tariffs for a number of IT products covering some 97% of global trade in these products (presently committed to by 76 Members).¹² The ITA operates on an MFN basis, so that benefits are extended to all WTO Members. Since the signing of the ITA during the 1996 Singapore Ministerial Conference (albeit initially excluding some consumer goods), it has provided for advanced liberalization, and the increased exchange of IT goods has facilitated a rapid pace of innovation in the sector (Lee-Makiyama 2011; WTO 2013). But not all countries have been "winners" and the agreement has typically favoured industrialized countries as first-movers (Ernst 2013).

¹¹ "For the first time in any US trade agreement, the United States is proposing a new provision, consistent with the internationally-recognized '3-step test', that will obligate Parties to seek to achieve an appropriate balance in their copyright systems in providing copyright exceptions and limitations for purposes such as criticism, comment, news reporting, teaching, scholarship, and research. These principles are critical aspects of the US copyright system, and appear in both our law and jurisprudence. The balance sought by the US TPP proposal recognizes and promotes respect for the important interests of individuals, businesses, and institutions who rely on appropriate exceptions and limitations in the TPP region." See USTR (2012).

¹² The ITA is purely a tariff-cutting mechanism. While the Declaration provides for the review of non-tariff barriers, there are no binding commitments. There are three basic principles that one must abide by to become an ITA participant: (1) all products listed in the Declaration must be covered; (2) all must be reduced to a zero tariff level; and (3) all other duties and charges (ODCs) must be bound at zero.

Negotiating the expansion of the ITA has been a long process that started soon after its adoption; updating it appears particularly urgent now that the composition of ICT trade has radically changed and significant parts of it are not covered by the ITA (Lee-Makiyama 2011). Making the ITA “future-proof,” however, requires more than an extension of its product coverage and the number of signatories¹³ (WTO 2012). In a post-Internet age, the digital economy has changed and made other areas of trade policy much more relevant--notably, non-tariff barriers (NTBs) and services trade (Lee-Makiyama 2011). Remaining within the scope and aim of the ITA, this may involve some minimal negative harmonization, such as in the field of electromagnetic compatibility and interference, as well as including computer-related and telecommunications services, which are already substantially liberalized (Lee-Makiyama 2011). This will solve some, but not all, problems of facilitating trade in the contemporary Internet environment.

Tackling Digital Trade as Part of the Trade in Services Agreement

The second possible path for moving ahead and making WTO law a better fit for the digital age is through the Trade in Services Agreement (TISA), which, in contrast to the ITA, is likely to be designed as a plurilateral agreement on a non-MFN basis (that is, non-participating WTO Members do not profit). The TISA is meant to provide deeper market access in the services sector, where liberalization is still quite low despite the expectation of substantial gains from trade.

The TISA has been supported by both the US and the EU, and other countries that are part of the “really good friends of trade in services” group, and there is some progress already. If one is in search of swift solutions, the plurilateral approach may make more sense, as it would bind only those states that are ready to make the concessions and may diminish the cost of bargaining across issue areas. It may also be sensible to address services questions as a whole, rather than by taking a piecemeal approach. It is, for instance, apparent from some submissions made during the Doha talks that new types of barriers to digital trade--the lack of access to technology distribution channels and information networks--have been felt in the areas of aviation, tourism, and logistics. Accesses on a commercial basis to information networks, subject to transparent, reasonable, and objective criteria, and the elimination of anti-competitive practices and unfair competition, have been tabled as prerogatives in this context (WTO 2001).

Yet, it is fair to point out that the plurilateral approach may have negative effects too, as it could increase fragmentation of rules and consequently reduce, rather than enhance, legal certainty. It is, for instance, still unclear how the TISA will relate to the existing specific commitments made under GATS. To be sure, even if some agreement were to be reached, a positive list-based TISA operating on a non-MFN basis would still fail to deliver a suitable framework for the digital economy. Bits are not able to discern diverging regulations when crossing borders.

Interested stakeholders have suggested that it would make sense to adopt a negative list-type of committing to accommodate the reality of seamless digital trade flows, so that there is flexibility with future innovation in the field of digital services. Provisions that relate to data flows must also be framed as “horizontal,” and not applied on a sector-by-sector basis, as they affect a great number of sectors as part of the networked economy (IDEA 2013). On the increased level of measures adopted domestically to protect key public interests, such as privacy and national security, there has been broad recognition that some of them may be legitimate and fully justified. Others, however, inhibit digital trade unduly. Nation states are still in the process of figuring out appropriate levels of protection and the balance between conflicting objectives, such as market innovation and protection of privacy (Brown and Marsden 2013). It has been suggested that a “framework convention” may be an appropriate construction to deal with these moving targets and allow policy to evolve (IDEA 2013). A framework convention would provide for legal certainty as the parties would agree on some binding obligations, which can then be renegotiated over time (Matz-Luck 2009). It is, however, unclear how such a tool will fit into the existing WTO institutional architecture and processes.

Creating a discrete Digital Economy Trade Agreement

Another more comprehensive approach would be to create a dedicated Digital Economy Trade Agreement (DETA). This is a broader undertaking that will tackle all issues related to digital trade. A DETA would cover the first and second tiers of questions, possibly under a plurilateral design. To fully realize the benefits of digital trade, it would make sense to ensure that a “critical mass” is achieved and a substantial part of trade is covered, as well as to preserve the core MFN principle of free trade. Focusing on selected digital trade-relevant sectors may facilitate reaching a political consensus and agreeing on a negative list, as opposed to the “all-services-included” approach under the TISA. While some groups, such as the National Foreign Trade Council (NFTC 2012), have mentioned a DETA as an option capable of addressing the challenges of digital trade, it is hard to envision at this stage how it will gain sufficient support with the TISA negotiations proceeding in parallel. If TISA fails to deliver, however, a DETA remains a viable fall back.

¹³ Hindley and Dreyer (2008) have argued that to ensure full product coverage, WTO Members should commit by category on the four-digit level and not by product on a six- or eight-digit basis. It should be noted that commitments on a higher, chapter-by-chapter basis may be impractical, as they also cover various non-ICT products. The list of non-participating countries includes several important emerging markets like Argentina, Brazil, South Africa, Russia, Mexico, and Chile.

CONCLUSION AND RECOMMENDATIONS

By looking at the available data, which shows the ever-increasing contribution of the digital economy to growth and development, prioritization of this topic in international trade negotiations is well justified. While the benefits of digital trade are now better understood and largely acknowledged, there is still a lack of deep understanding of the workings of Internet-based commerce and the changes that are necessary to existing international trade rules so that it can thrive. Two elements must be stressed, and these are the availability of interoperable networks without undue constraints on doing business, and the possibility of data flowing through these networks in the least restrictive manner possible (IDEA 2013). WTO law, as discussed, provides some remedies to both these essential elements of digital trade. However, there are many challenges, which have not been addressed at all or addressed not so appropriately.

Against the backdrop of the analysis, the number one priority seems to be the demand for an increased level of legal certainty for businesses engaged and willing to engage in digital trade. This will involve, at a minimum, a clear recognition that all WTO rules apply to online trade in goods and services, and an extension of the duty-free moratorium or making it permanent.

The classification jungle is particularly detrimental to legal certainty and predictability. WTO Members' political will must be mobilized to overcome old divergences and move towards future-oriented services regulation. The negative list approach is strongly advised--as a less-optimal alternative, commitments at a two-digit CPC level can be made, possibly using updated versions of the classification.

The wave of new-generation barriers to digital trade, including localization requirements and/or undue privacy, IP, and security requirements (USITC 2013), must be adequately addressed. While national sensitivities are clearly recognizable and partially justified, regulatory activism should be disciplined. WTO Members should, as a minimum, commit to the general principles of e-commerce as elaborated by the US and the EU (WTO 2011a) and seek their effective implementation.

The formula for realizing these objectives is still open. PTA experiences must be carefully analysed to see what works better and what is absolutely indispensable for contemporary Internet commerce. The TPP and TTIP negotiations may provide more ambitious and detailed templates for digital

economy rules, which can then be multilateralized. The debate must, however, go beyond the search for a solution, which accommodates the demanders (typically the US, EU, and Japan) and also adequately engage developing countries and emerging economies.

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