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## Modernising international trade law for the digital economy: Towards a multidimensional and multistakeholder approach<sup>1</sup>

By Professor Andrew D. Mitchell, Director, Global Economic Law Network and Director of Studies, International Economic Law, Melbourne Law Masters and Neha Mishra, Doctoral Candidate, Melbourne Law School, The University of Melbourne

The extraordinary growth of the digital economy requires the adaptation of international trade rules to a new world of trade in digital services and data flows. Being a multilateral trade institution with 164 members, the World Trade Organization (WTO) is a key player in the global regulatory framework for digital trade. However, WTO agreements, which are now over three decades old, do not anticipate the needs of a digitalised economy. This article explores if and how WTO rules can be reformed to better adapt to the modern-day digital environment, considering the highly complex political economy of digital trade, and specifically focusing on the WTO's General Agreement on Trade in Services (GATS).

### Complex political economy of digital trade

The governance framework for digital trade is extremely complex, involving institutions in different fields of practice such as trade, human rights, internet governance, and economic development. Consequently, the political economy underlying digital trade is also nuanced, as reflected in the various positions taken by different groups on issues such as privacy, cybersecurity, consumer protection, digital development and inclusion, and internet governance.

We categorise the predominant policy approaches of WTO members to digital trade as: (a) a market-based approach, favouring choice for the technology industry, including co-regulatory and self-regulatory mechanisms, and balancing various interests in digital trade, primarily from a commercial perspective (United States (US), Japan); (b) an interventionist approach, favouring more regulation on digital issues such as privacy, cybersecurity and online consumer protection, while acknowledging the general benefits arising from free flow of data and digital services (European Union (EU) as a prime example, but also Australia and Canada); and (c)



a guarded approach, emphasising the importance of retaining sovereign control over cyberspace, and ensuring maximum gains from digital trade for local players (China, Russia, Indonesia, and now arguably Germany and France).

These divergent approaches have resulted in conflicting rules in electronic commerce (e-commerce) chapters of different preferential trade agreements (PTAs), increasing legal uncertainty and fragmentation of the legal framework governing the digital economy. For example, the proponents of the market-based approach have adopted expansive rules on e-commerce in their PTAs (eg *United States–Mexico–Canada Agreement*, *Japan–Mongolia Economic Partnership Agreement*), while EU e-commerce chapters usually have more limited scope, particularly due to concerns about data privacy (eg *EU–Japan Economic Partnership Agreement*). In contrast, Chinese PTAs usually do not address any of the contemporary issues in digital trade such as data flows or data localisation (eg *China–Australia Free Trade Agreement*).

## Rebooting digital trade reforms

The WTO was an early starter in e-commerce, establishing a [Work Programme on Electronic Commerce](#) in 1998. However, differences between members, particularly the EU and the US, restricted progress for almost two decades. WTO members have now started re-engaging on issues pertaining to digital trade. Since the Ministerial Conference in December 2017, 72 WTO members have been discussing relevant issues pursuant to a [Joint Statement on Electronic Commerce](#), notwithstanding differences in their PTAs. This initiative involves not only digital leaders such as the US, EU, and Japan, but also China (now a major player in the global digital market) and several developing countries, including least developed countries (LDCs) (several of whom have clubbed together as ‘Friends of eCommerce for Development’). Within this framework, members are currently evaluating whether WTO agreements are suited to the digital economy, and the best means to plug gaps in the existing architecture.

## Addressing the multidimensional nature of digital trade

The exploratory work under the Joint Statement initiative covers several areas, including: (a) ensuring free flow of information and prohibiting data localisation requirements; (b) improving business and consumer trust through regulations on spam, online consumer protection, data protection, cybersecurity, forced technology



transfer, encryption technologies, and involuntary disclosure of source code and algorithms; (c) facilitating electronic transactions and improving trade facilitation and logistics for e-commerce; (d) enhancing market access commitments in relevant sectors; and (e) addressing the digital divide through targeted aid and technical assistance.

These discussions are welcome and touch upon important areas for potential reform of WTO rules. A multidimensional and comprehensive framework on e-commerce would be far preferable to patchy reforms of an outdated GATS framework. However, the first step towards more comprehensive reform will be to arrive at a common understanding of GATS classification of digital services, in order to clarify members' existing GATS commitments. For example, while several WTO members have made agreed in GATS to liberalise computer and related services, debate exists as to whether certain digital services such as cloud computing and internet platforms fall within the scope of these GATS commitments.

As data-driven sectors and micro-multinationals have multiplied, new issues have arisen that are not explicitly covered by GATS. To address such issues, new rules are required to balance competing policy objectives, such as the free flow of data and digital services, and promoting a stable, secure and coherent regulatory framework for data flows (including adequate privacy and security laws, and other regulations that promote consumer trust in the digital environment). Thus, in addition to new WTO provisions on free flow of data and prohibitions on data localisation, WTO rules are essential to promote a sound regulatory environment for e-commerce. More coherent and binding provisions are also needed to assist developing countries and LDCs to integrate into the global digital marketplace, particularly through technical assistance.

### **The WTO as a platform for digital trade rules**

While the WTO is not the appropriate institution to set technical standards on internet policy issues (such as data/network security) or prescribe standards for data protection, WTO agreements can be effective in: (i) promoting non-discriminatory and transparent regulations; (ii) requiring members to adopt basic regulations to promote a secure and open digital trade environment; (iii) offering mechanisms to develop interoperability between regulatory frameworks or regulatory cooperation, where harmonisation is not possible or desirable; and (iv) offering support to developing countries and LDCs.



Although PTAs deal with many of these issues, the WTO is a more suitable platform for undertaking long-term reform as it allows better representation of the views of developing countries and LDCs while minimising the formation of divided regional blocs. The most judicious approach for reform would be the negotiation of a new WTO agreement on digital trade, containing detailed obligations on e-commerce that go beyond PTA e-commerce chapters. A new agreement could incorporate far-reaching, cross-cutting obligations on data flows and digital services. The existing plurilateral negotiations might lead in this direction. Another possible interim approach would be to use the existing mechanisms within GATS, for example by adopting a Reference Paper on Electronic Commerce (adopted by individual WTO members as 'additional commitments' under GATS art XVIII) or negotiating dedicated domestic disciplines on e-commerce under the 'domestic regulation' provisions in GATS art VI.

### **The need for a multi-stakeholder approach in digital trade**

In reforming digital trade rules, multi-stakeholder participation is required, given the unique relationship between businesses, governments and consumers in the digital economy. Increased dialogue and coordination among governments, industry, international organisations, and civil society (at domestic and transnational levels) would help develop a coherent regulatory framework for digital trade. Institutional coordination could be achieved through WTO consultations with other relevant international organisations such as the United Nations Conference on Trade and Development, International Telecommunications Union, Organisation for Economic Co-operation and Development, and the Asia-Pacific Economic Cooperation forum. Informal liaison to with internet governance bodies such as the Internet Engineering Task Force, Internet Society, Internet Corporation for Assigned Names and Numbers, and Internet Governance Forum would also enable a more comprehensive understanding of policy issues in the digital space. Although an unconventional approach, the WTO has already shown openness to this model through initiatives such as eTrade for All, the Enhanced Integrated Framework, and the Electronic World Trade Platform.

Given the significance of the WTO in the global governance framework, WTO members should continue deliberating on relevant e-commerce issues, working towards a multidimensional and multistakeholder regime for governing digital trade issues. This dialogue will be fundamental in promoting the growth of an open and



trusted digital economy, while facilitating the inclusion of developing countries in the global marketplace.

<sup>1</sup> Adapted from the authors' article, '[Data at the Docks: Modernising International Trade Law for the Digital Economy](#)', published in *Vanderbilt Journal of Entertainment & Technology Law*, Vol. 20 (4), 2018.