

# Digital Trade, E-Commerce, the WTO and Regional Frameworks

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## 1. Digital trade and trade agreements

The digitalization of trade is a reality, and yet the regulation of the world trading system as embedded in the World Trade Organization (WTO) only tangentially, if at all, touches upon this issue. True, digitalization of the economy, the fourth industrial revolution as it is colloquially referred to, is a recent phenomenon, and to some extent post-dates the conclusion of the Uruguay round agreements (1994). True also, however, is the reality that the world trading system has shown a remarkable inability to adjust to modern business realities in its multilateral rule architecture. To the extent these transformations are being reflected in new rules, they are being introduced in regional or bilateral frameworks, albeit in an incomplete fashion. It is also the case that the world is witnessing several different regimes around data and information economy developing in the world today – most notably in the US, Europe, and China. As always, part of the reason that international frameworks have not been born stems from the fact that international rules rarely occur before domestic regulatory and legal regimes are well developed.

In a world where the regulation of information and digital technology within national systems is in flux, and major jurisdictions are in tension, international frameworks might be expected to develop between jurisdictions that have the most confidence in each other, the most experience, or the greatest trade flows. At the same time, multilateral frameworks can offer the greatest transparency and predictability to the largest number of countries and stakeholders. The essays in this volume help us consider such possibilities. We start, however, with the observation that nothing much has happened at the WTO on digital trade with the exception of a recurring decision, adopted during practically every Ministerial Conference, to continue exempting from trade restrictions products traded electronically

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(the so-called ‘e-commerce’ decisions). In essence, there is a renewed commitment every two years to continue negotiating, and every two years recognition is given to the fact that nothing much has happened in the previous two years. However, in very recent months – in a period when the WTO is facing several institutional crises about its future operations – there are a few new signs of interest in digital matters. For example, there has been an expansion in coverage of digital trade in the recently negotiated new North America trade agreements, and new discussions among some WTO members about expanded WTO efforts around digital trade.

What do WTO rules and cases tell us today? We believe there are important foundations. For example, technological neutrality, a principle now well-established in WTO case law, obliges WTO members to treat like services in an even-handed manner irrespective of the means of supply. In *US–Gambling*,<sup>1</sup> the Appellate Body found that, the absence of specific commitment with respect to Internet gambling notwithstanding, the United States still had an obligation to accept Internet gambling since it had promised to impose no barriers under Mode 1.

Yet this hardly answers the question of how to think about the many forms of digital commerce and consequences. What about 3D printing and all other products that come into being through digital cross-border transference? As things stand, there is at least uncertainty as to their treatment under WTO law. WTO rules are predicated on an absolute dichotomy between those dealing with goods and those focusing on services trade. And yet, 3D printing tests the legitimacy of this distinction. Think of a US company engaging in 3D for a client in Switzerland. Is a service being exported when recourse to 3D is made, or a good being imported? Digital trade, more than anything else, tests the legitimacy of the distinction between the GATT and the GATS. Staiger (2018) expressed recently, similar thoughts on this score.

The papers included in this volume cover many important dimensions of digital trade – from an assessment of the scale and scope of digitalization and cross-border developments to particular rules covered in regional or other arrangements. Our invited authors explain what Marsh (2012) first termed “the new industrial revolution”, and the challenges it poses for the world trading system as we now know it. It took time for the digital economy to have an impact on the real economy, but it is now being increasingly felt.

The digital economy is altering patterns of production and patterns of trade. The WTO has yet to address the issue of digital trade in comprehensive manner. For now, all we have at the WTO level is a Moratorium exempting goods and services traded digitally from duties. The absence of multilateral movement, however, does not mean that countries have given up negotiating trade agreements and, in fact,

<sup>1</sup> *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285.

digital trade provisions are appearing in various frameworks – mostly regional. Free-trade areas (FTAs) continue to multiply, and digital trade consistently figures across the subject areas negotiated therein, albeit with varying degrees of specificity and coverage. Remarkably, it features not only when FTAs are being negotiated across ‘homogeneous’, advanced players (those possessing digital technology), but also across ‘heterogeneous’ players, contributing thus to the narrowing of the ‘digital divide’.

Some of the papers in this collection focus on the significant conceptual issues that are being triggered as a result of digitalization and cross-border trade. For example, Anupam Chander and Joshua Meltzer emphasize the privacy and security issues that are raised by digital trade and the emerging world of connected devices and the internet of things. Of these two authors, Chander may be somewhat more explicitly optimistic about the adaptive characteristics of the WTO system. Meltzer’s focus is more explicitly on the significance of the issues for domestic regulatory regimes. A number of other papers in the collection discuss the regulation of digital trade in the realm of FTAs, both with respect to their specific features and, by implication, the potential consequences for the world trading system. This type of comparison is important because the experimentation on rule frameworks is most robust through these bilateral and regional frameworks. Wolfe observes, for example, that digital trade is an example of how states are in fact learning how to solve the problem of state responsibility while allowing twenty-first century commerce to flourish. Our readers may be left wondering why the discussions at the WTO level remain nascent. The essay by Usman Ahmed offers some insight and direction.

The papers in this volume discuss the challenges for the WTO regime, but do not deal in a comprehensive manner with the reasons behind the inability to establish a multilateral framework at the WTO or elsewhere. Indeed, this could be a quixotic task as the reasons vary from stakeholder preferences within WTO members to the more general challenge that digital trade rules (and many other issues) are hostage to a certain generalized inertia around negotiations and reform. With this in mind, we now turn to a more detailed presentation of the featured papers.

## 2. Presentation of the papers

We divide the papers into three categories: those dealing with conceptual issues, those detailing the regulation of digital trade in FTAs, and, finally, the papers aiming to draw lessons from this discussion for the WTO.

### 2.1 *Conceptual issues*

*Anupam Chander* underlines the need for regulating the internet. In his view, even while offering substantial improvements in our lives, the Internet of Things will require significant regulatory oversight. He explains how ubiquitous smart

objects will raise questions of privacy, security, standards, and interoperability. The coming of this smart world, he argues, will also put pressure on trade law, as dispute settlement mechanisms are invoked to assess whether a particular government measure is legitimate regulation or simply disguised protectionism. The coming of the Internet of Things complicates the elegant distinctions at the heart of international trade law, particularly between goods and services, while it reveals that trade law always recognized the complexity of a world where goods embedded services. And it further reveals, he claims, that the international trade regime may yet prove more adaptable than might have been expected.

*Joshua Meltzer* explains why the inherently global nature of the internet is in tension with regulation that is typically focused on domestic goals: the regulatory challenge is to find ways for cross-border data flows and local regulation to co-exist, as governments' willingness to commit to digital trade rules will be affected by the impact of such rules on the achievement of domestic regulatory goals. In the privacy context, for example, the author notes that the uncertainty as to how EU (European Union) personal data are protected in third countries has led to the restrictions on transfers of personal data outside of the EU. The EU approach to privacy has led to hesitancy by the EU in accepting commitments to cross-border data flows in the Trade in Services (TiSA) negotiations and in the US–EU Transatlantic Trade and Investment Partnership (TTIP) negotiations. EU hesitancy with digital trade rules is also reflected in the recently finalized Japan–EU FTA, which does not include commitments to cross-border data flows, but does include a commitment to revisit this issue within three years of entry into force of the agreement.<sup>2</sup> He observes that balancing between international trade commitments and their impact on domestic regulatory flexibility is not a challenge specific to digital trade. Indeed, this has been a key challenge for WTO jurisprudence over the last 20 years. In the digital trade context, the challenge is at once more acute and less bounded. It is more acute because cross-border data flows are happening more rapidly and in greater quantities than has occurred with trade in goods or services. This raises the prospect for regulators that cross-border data flows have greater potential to undermine the achievement of domestic regulatory goals than traditional trade in goods. This is a challenge to which the WTO eventually will have to respond.

*Norman Zhang* poses a hypothetical WTO challenge to the Passenger Name Records (PNR) Transfer Agreements the European Union has signed with the United States (as well as Australia and Canada). These agreements ask, head on, the question of whether national security-related concerns can adequately be taken care of within the current WTO regime, as embedded in the GATS (General Agreement on Trade in Services). The focus, in his view, will be on a possible citation of GATS Art. XIV National Security Exception by the EU, and the

<sup>2</sup> <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1891>.

viability of such a defense. Because of the absence of case law on this issue so far, Zhang in his paper attempts to synthesize an acceptable standard for assessing a GATS National Security Exception citation.

## 2.2 *Digital trade in FTAs*

*Robert Wolfe* states that it is a truth universally acknowledged that every ambitious twenty-first century trade agreement is in want of a chapter on electronic commerce. In this context, one of the most politically sensitive and technically challenging issues is personal privacy, including cross-border transfer of information by electronic means, use and location of computing facilities, and personal information protection. States are learning to solve the problem of state responsibility for anything that does not respect their borders while still allowing twenty-first century commerce to develop. He then performs a comparison of the Canada–European Union Comprehensive Economic and Trade Agreement (CETA) and the Trans-Pacific Partnership (TPP). In his view, this comparison allows us to see the evolution of the issues thought necessary for an e-commerce chapter, since both include Canada. The comparison also allows us to see the differing priorities of the US and the EU, since they are each signatory to one of the agreements, but not to the other. He concludes by identifying a few important generalizations about why we see a mix of aspirational and obligatory provisions in free trade agreements. Wolfe suggests that the reasons are that governments are learning how to work with each other in a new domain, and learning about the trade implications of these issues.

*Evan Kim* discusses the e-commerce chapters in South Korea's FTAs, which cover a wide range of issues, ranging from non-discrimination to electronic signatures. Across the agreements, the country's provisions on consumer protection, paperless trading, and data protection are uniquely consistent, while those on other issues are not. With the aid of a framework (Framer v. Follower) that captures the dynamics of bilateral negotiations, he argues that in Korea's case, the more consistent the particular set of provisions is portfolio-wide, the more likely it was for Korea to have prioritized the relevant issue and actively pushed its preferred terms in the FTAs. He provides an overview of Korea's e-commerce chapters, and he explains his Framer-Follower framework that drives his main analysis. He then analyzes each issue included in Korea's e-commerce chapters using the framework.

## 2.3 *Lessons for the WTO*

*Usman Ahmed* deplores the current state of affairs at the WTO. In his view, there is real urgency to begin to tackle some of the challenges of digital trade through regulatory cooperation. Trade negotiators are trying to tackle some of these problems, but are limited by the structure, the processes, and the history of the trade regime. Regulatory cooperation arrangements no doubt have shortcomings, but when they

result in a mutual recognition agreement, they can address fundamental regulatory challenges with a concrete and enforceable regime. He argues that mutual recognition agreements are not easy to achieve due to concerns about information asymmetry, but technology, transparency, and vigilance can help to improve trust and enable domestic regulators to approve the processes of their foreign counterparts. The proliferation of mutual recognition agreements on thorny issues related to digital trade could help bring certainty to the digital ecosystem and unlock the full growth potential of the digital economy.

*Neeraj R.S.* attempts to explore the challenges in, and possibility of, situating a multilateral digital trade agreement within the legal framework of the WTO. He first discusses the broad challenges that digitization poses for the international legal framework for trade regulation. He argues that the traditional classification of products into goods and services under the WTO system is structurally incompatible with the digital economy. He also argues that striking the appropriate balance between trade liberalization and the pursuit of legitimate public policy objectives in a digital trade agreement will be uniquely challenging, since certain features that are intrinsic to the digital industry and market structure require a treatment that is fundamentally different from the ‘balancing methods’ used in other multilateral agreements that the WTO has facilitated. He then surveys the efforts that have been undertaken to regulate digital trade as manifested in FTAs, as well as proposals made by WTO members under the WTO Work Program on Electronic Commerce. Acknowledging that the Trans-Pacific Partnership (TPP) agreement is being used as a benchmark while developing rules to regulate digital trade, he argues that future negotiations for a multilateral digital trade policy will not benefit from using the TPP as a benchmark. The TPP does not, in his view, reconcile systemic tensions between the digital economy and the extant WTO system, or address the domestic regulatory challenges that are unique to the digital ecosystem while trying to achieve a balanced outcome.

### 3. Brief concluding remarks

The post second world war history of multilateralism has seen a gradual expansion of international rules beyond tariff reductions to increasingly internal areas of economic activity. Digital trade is now implicating still more areas which, importantly, are sensitive for nations and places where national regulatory approaches differ markedly and are in flux. This is occurring in the context of the failure to advance even the well-identified WTO negotiating agenda for the post Uruguay Round period, let alone the areas such as digital trade and e-commerce which are well recognized but raise complex and new conceptual and practical issues. The essays in this volume help us consider some of the areas around which there might be a need to develop greater shared understandings and approaches if multilateral rules are to develop. Importantly the essays in this volume also clarify some of the experimentation that is occurring in regional arrangements. These essays

underscore the urgency of action, the characteristics of frameworks developed to date, and by implication the importance of these for the multilateral system.

## References

- Marsh, P. (2012) *The New Industrial Revolution: Consumers, Globalization, and the End of Mass Production*, New Haven, CT: Yale University Press.
- Staiger, R. W. (2018) 'On the Implications of Digital Technologies for the Multilateral Trading System', World Trade Report 2018, World Trade Organization, Geneva, Switzerland, p. 150.