The E15 Initiative

Strengthening the multilateral trading system

SHOULD THERE BE NEW MULTILATERAL RULES FOR DIGITAL TRADE?

Mira Burri, World Trade Institute

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1. 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 – bringing distant geographical locations within instantaneous reach, groups of millions of people organised within hours, and encyclopaedias and virtual libraries produced on a collaborative basis. These modifications are by no means quantitative only – 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) – but also have a qualitative character and significantly impact on many separate areas of society as well as on 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 that 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, WIPO) or entirely new institutional solutions (such as the Internet Corporation for Assigned Names and Numbers, ICANN). It should also be borne in mind that in cyberspace, local regulatory actions cannot be neatly isolated and often have worldwide spillovers (Bellia et al., 2011).

It should be underscored in this context that whereas 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 documented intensified trend of "servicification".

At the same time, as digital technologies are increasingly mobilised within nation states as key drivers of innovation and growth, the danger of regulatory activism and of often burdensome and imbalanced 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 the so far fruitless multilateral efforts, there have been some advances in bilateral and regional venues - not only in terms of further trade liberalisation 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, currently 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, the associated opportunities and risks. Considering the growing importance of digitally-fuelled innovation, the urgency of putting together the elements of 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 with regard to the burgeoning 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 as well as being able to anticipate impending tests further down the road, so that digital trade is facilitated and fostered?

2. Mapping key issues and identifying challenges

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

2.1. What we have

The law of the WTO, despite the lack of response presently, and possibly in the short- to medium-term, possesses intrinsic flexibility and resilience, both in the substance and in the 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 159 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 (e.g. Gervais, 2012; Sell, 2003).

The GATT combined with the Information Technology Agreement (ITA), which represents about 97 per cent of world trade in information technology (IT) products and secures elimination of duties, provide a comprehensive framework for trade with digital products and one of the deepest modes of liberalisation. The TRIPS offers an equally broad palette of tools for protecting intellectual property pertinent to IT, specifically addressing computer programmes and granting them protection as literary works under the Berne Convention (Article 10:1 TRIPS). Under the 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), that may have the (as yet untapped) potential to deal with many of the 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, often dubbed the "jewel in the crown" of the WTO architecture (e.g. 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 Products*[4]) had a substantial Internet-related element, and have had an impact on the law of the WTO, in 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,

1 It should be noted from the outset 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. Neither 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 2 April 2004.

3 Panel Report, *United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services (US - Gambling)*, WT/DS285/R, adopted 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 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 12 August 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 21 December 2009.

working parties and review bodies, this "hidden" governance performs important functions in issue-framing, information dissemination, networking, norm elaboration and interpretation, and regulatory learning, whose effects are greater than often conventionally perceived (Lang and Scott, 2009). This has been exemplified in the present context 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 the debates on likely regulatory responses.

Painting this bright picture of the WTO's "adaptive governance" traits (Cooney and Lang, 2007) and its inherent 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 challenge. Indeed, there are multiple sources of worry and scepticism.

Some relate to the ways WTO rules, in particular the 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 upon 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 EU as the major stakeholders in the opposing camps, is the pre-eminent example in this context (Burri, 2008; Singh, 2008).

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

This fragmentation of fora 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.

2.2. Where action is needed

Starting small, one can first list those issues that have so far been thematised 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 leading to a clear-cut solution. As noted earlier, the WTO E-Commerce Programme has been an important initiative in marking both the significance of digital trade and its multiple effects upon multilateral trade rules.

It has however failed in "converting thinking into action" (Wunsch-Vincent and Hold, 2012: 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*,[5] which at least clarified that the GATS applies to digital services[6] but there is plenty still to be settled.

There is for instance still no agreement on a permanent duty-free moratorium on electronic transmissions and their content. The moratorium has only been temporarily extended several times; the last time for a period of two years following a decision taken during the Geneva Ministerial Conference in 2011 (WTO, 2011a). In addition, there is some disagreement as to 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 for download over the Internet.[7]

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 the GATT, services falling under the GATS, or perhaps some other, unique category. To be sure, this is not a technical

5 See supra note 2.

6 As also confirmed by *China – Audiovisual Products*, supra note 3.

7 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 the GATS specific commitments as a more sensible and efficient way to liberalise electronic commerce.

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 liberalised regime, while the 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 the GATS is found to be applicable, the question of which specific GATS 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 and a great deal of uncertainty is generated. The same is true for the debates on whether GATS Mode 1 (cross-border supply) or Mode 2 (consumption abroad) is relevant, on 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.[8] It is nonetheless illustrative of the lack of progress even on basic issues, which naturally unmasks 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 the ways forward has been felt even under the ITA and the much less controversial efforts to expand its coverage (Lee-Makiyama, 2011).

While the WTO Work Programme on Electronic Commerce is still ongoing and the periodic reports claim a "reinvigoration" of the 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 in fact reduce the level of existing commitments (Tuthill and Roy, 2012). The situation is exacerbated by an unfortunate mismatch between the positions of the key stakeholders, the US and the EU, which has blocked more expeditious solution-finding so far (Burri, 2008; Weber and Burri, 2012).

As noted earlier, the above lists the "leftovers" of the WTO Work Programme on E-Commerce. To be sure, since the Programme was launched in 1998, the picture has changed in many critical respects. The significance of digital trade, both in its contribution to the economic growth of many countries and the preoccupation of governments with digital trade-related policies, has grown exponentially (OECD, 2013; 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 various deep societal implications (WTO, 2011b). There is also a new palette of measures that inhibit digital trade. A recent review conducted by the United States International Trade Commission (USITC) compiled a useful taxonomy of such measures (2013). Some of them can be grouped under the 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.

2.3. Sketching ways forward

As signalled at the beginning of this paper, one can identify two tiers of questions, which call for different types of WTO reform. The first will address the first set of problems as 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.[9] This adjustment has so far failed due to lack of political consensus. The standstill in the WTO in this regard has been compensated by bilateral and regional initiatives. The series of preferential trade agreements (PTAs) concluded

8 For full reference, see e.g. Mitchell, 2001; Wunsch-Vincent, 2008.

9 As opposed to changes in the GATS provisions.

by the US with a number of partners since 2004[10] has established a template, which addresses some of the first-tier questions. This template has been replicated in other, non-US, agreements (such as Australia–Singapore, Chile–Australia, Korea–Singapore). A critical element of this approach is the adoption of a GATT-like negative list approach (i.e. 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 too. 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, 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 those of the US Digital Millennium Copyright Act (DMCA) (Okediji, 2009; Yu, 2013). As the SOPA and PIPA initiatives[11] and ACTA, in its initial form, failed to gain support domestically, it is possible to envision that some of their provisions will be applied through the PTA channels. Strong counter-pressures are also observable, however, as the USTR position on the inclusion of provisions on copyright limitations and exceptions in the TPP reveals.[12]

Overall, the existing experiments with PTAs provide for some minimal and geographically limited harmonisation 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 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 organisation as well.

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

(a) Continuation and reinvigoration of the WTO Work Programme on Electronic Commerce

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

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

11 Respectively, Stop Online Piracy Act (SOPA), H.R. 3261, introduced in the United States House of Representatives on 26 October 2011, and Protect IP Act (Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act, or PIPA), S. 968, introduced in the United States 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 SOPA in an effort to raise awareness. Many academics, corporations and civil society representatives also opposed SOPA. Soon afterwards, both the House and Senate bills were dropped.

12 "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 U.S. copyright system, and appear in both our law and jurisprudence. The balance sought by the U.S. 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).

The principles include:

1. transparency for all ICT relevant rules;
2. promotion of open networks, network access and use, including promotion of interoperability;
3. ensuring unhindered cross-border information flows;
4. no local infrastructure or local presence requirements;
5. no restriction of foreign participation in ICT services sectors, through establishment or other means;
6. efficient and non-discriminatory use of spectrum;
7. legally distinct and functionally independent regulatory authorities;
8. unrestricted and unburdensome authorisation and licence procedures;
9. ensuring interconnection; and
10. international co-operation, in particular for bridging the digital divide and increased digital literacy.

Subscribing to these principles can be a first and an 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 well 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).

(b) Extension of the ITA

Next to the further-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 marked a great success for the ICT industry. The ITA provides for zero tariffs for a number of IT products covering some 97 per cent of global trade in these products (presently committed to by 76 Members).[13] 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 liberalisation and the increased exchange of IT goods has facilitated the rapid pace of innovation in the sector (Lee-Makiyama, 2011; WTO, 2013), although not all countries have been "winners" and the ITA has typically favoured industrialised countries as first-movers (Ernst, 2013).

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[14] and the number of signatories[15] (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 harmonisation, such as in the field of electromagnetic compatibility and interference, as well as including computer-related and telecommunications services, which are already substantially liberalised (Lee-Makiyama,

13 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.

14 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 the higher, chapter-by-chapter basis may be impractical, as they also cover various non-ICT products.

15 The list of non-participating countries includes several important emerging markets like Argentina, Brazil, South Africa, Russia, Mexico and Chile.

2011). This will solve some, but not all, problems of facilitating trade in the contemporary Internet environment.

(c) Tackling digital trade as part of the TISA

The second possible path for moving ahead and making the 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 (i.e. non-participating WTO Members do not profit). The TISA is meant to provide deeper market access in the services sector, where in fact liberalisation is still quite low, despite the substantial gains from trade expected.

The TISA has been supported by both the US and the EU, and other countries that are part of the group "Really good friends of trade in services", 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, namely the lack of access to technology distribution channels and information networks, have been felt in the areas of aviation, tourism, and logistics. Access 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 a prerogative in this context (e.g. WTO, 2001).

Yet, it is fair to point out that the plurilateral approach may have negative effects too, as it would in fact increase the rule fragmentation and consequently reduce rather than enhance legal certainty. It is for instance still unclear how TISA would relate to the existing specific commitments made under the 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 regulation while crossing borders.

Interested stakeholders have suggested that in order to accommodate the reality of seamless digital trade flows, it would make sense to adopt a negative list type of committing, so that there is flexibility as to future innovation in the field of digital services. Provisions that relate to the 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). With regard to 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 the 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 evolving policy formulation (IDEA, 2013). A "framework convention" would provide for legal certainty as 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 would fit into the existing WTO institutional architecture and processes.

(d) Creating a discrete Digital Economy Trade Agreement

Another more comprehensive and further-reaching approach would be to create a specifically dedicated Digital Economy Trade Agreement (DETA). This is a broader undertaking, which would tackle all issues related to digital trade. The DETA would cover all the first and second "deep integration" tiers of questions, as raised and discussed earlier under a separate cover, possibly under a plurilateral design. To fully realise the benefits of digital trade, it would make sense to ensure that "critical mass" is achieved and a substantial part of trade is covered, as well as that that the core MFN principle of free trade and of the WTO is preserved. Focusing on selected digital trade relevant sectors may facilitate reaching a political consensus and agreeing upon a negative list scheduling, as opposed to under the TISA "all-services-included" approach. While some groups, such as the 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 that a DETA will gain sufficient support considering the TISA negotiations running in parallel. If TISA fails to deliver, however, DETA remains a viable fall-back.

3. Conclusion and recommendations

By looking at the available data, which shows the ever increasing contribution of the digital economy to growth and development, prioritisation of this topic in any 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 what changes are necessary to the existing international trade rules, so that it can thrive. Two elements must be stressed in this context and these are the availability of interoperable networks without undue constraints to doing business and the possibility for data to flow over these networks in the least restrictive manner feasible (IDEA, 2013). WTO law, as discussed above, provides some remedies to both these essential elements of digital trade. However, there are many challenges, which are not addressed at all or not appropriately so.

Against the backdrop of the preceding analysis of the present state of affairs, the number one priority seems to be the demand for an increased level of legal certainty for those 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 as well as 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 mobilised 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 CPC.

The wave of new-generation barriers to digital trade, including localisation requirements and/or undue privacy, IP, and security requirements (USITC, 2013) must be adequately addressed. While the national sensitivities are clearly recognisable 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, 2011b) and seek their effective implementation.

The formula for realising these objectives is still open. The 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 multilateralised. The debate must however go beyond a search for a solution, which accommodates the *demandeurs* (typically the US, the EU and Japan) but also adequately engages developing countries and emerging economies.

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