

Trade Regulation, and Digital Trade

May, 2017

By Petros C. Mavroidisⁱ

1. The WTO: Neither Transactional, Nor Policy-Oriented

In 1998, the WTO (World Trade Organization) established a Working Group on Electronic Commerce (e-commerce).ⁱⁱ Almost twenty years later, the group has nothing to show in terms of achievements, other than a few papers discussing the general, potential applicability of multilateral rules on some forms of digital trade. True, even the minutes reflecting the outcome of WTO Ministerial Conferences include a few lines on “e-commerce”, but this is where the buck stops.ⁱⁱⁱ

The WTO attitude is neither transactional, nor policy-oriented, as we explain in more detail later. It is haphazard. One cannot understand when going through all this mass of information regarding e-commerce, that the WTO has made publicly available, what the WTO-think on digital trade is. In the meantime, digital trade is progressing fast. According to data provided by the McKinsey Global Institute in 2016, the growth is explosive: international data flows are forty five times higher in 2014 than they were in 2005.^{iv}

Under the circumstances, one might wonder whether international rules are necessary at all. Digital trade grows fast anyway. And yet, a number of issues arise that impede further progress, and that require solutions preferably at the multilateral level: data localization, geo-blocking are the latest in a series of examples on this front. The WTO Work Programme has not managed to address similar issues head on. It has not managed to integrate them in a wider thinking about digital trade either.

Some free trade areas (FTAs) have managed to fare better on this front. There are, of course, a number of reasons why this has been the case ranging from homogeneity of players involved (who share similar concerns) to negotiating costs. It is submitted that one reason why FTAs succeed where WTO has failed lies in that it is easier to bring together the trade and regulatory communities in a forum consisting of like-minded players. Digital trade is not about trade exclusively. There is an important regulatory dimension that covers issues such as privacy, security etc. This issue must be considered as well. The trading community will discuss how it applies to infra-firm flows for which there is no associated payment flow. We will end up thus, with a PPM (process and production method) analogue set of issues. Production

function matters in this discussion (e.g., is data secure? How ensure security? etc.). The regulatory community will be discussing this latter set of issues.

In Section 2, I briefly discuss where WTO stands now on digital trade. In Section 3, equally briefly I discuss some illustrative FTA-examples, and finally, in Section 4 I provide scaffolding for a more structured discussion on digital trade in the WTO.

2. Multilateral Regulation of Digital Trade

I divide this discussion in two parts: what is the coverage of digital trade at the WTO-level as rules now stand, followed by a brief discussion of the Work Programme. I kick off this Section with semantics.

2.1 What is Digital Trade

Official WTO documents use the term “e-commerce” (instead of digital trade), which is routinely defined as

Production, distribution, marketing, sale or delivery of goods and services by electronic means.

Thus expressed, the term covers not only end-to-end delivery of services, like internet and other telecoms, but also other services that can be transmitted in digitized form. The legal regime applicable to these transactions is that provided in the various national schedules of commitments under GATS (General Agreement on Trade in Services). Recall nonetheless, that in US-Gambling, the Appellate Body (AB) endorsed “technological neutrality”, that is, the means of supply of a service does not matter. Digitally transmitted services are covered by commitments entered even when digital supply was not an option at the moment when the commitment had been entered.

And what about goods sold on the internet? Well, it all depends on their characterization as goods or services. A book sold say on Amazon will be subjected to the tariff concessions of the importing state. Panels have yet to decide whether a song sold on Amazon, if downloaded and saved, should be characterized as good or service.

Finally note that, in literature, the term “digital Trade” seems to be associated with a wider coverage than “e-commerce” as explained above. Branstetter (2016) for example, includes the following definition.

... the full range of electronic commerce issues, from online commercial transactions to the ancillary aspects of protection of intellectual property rights, privacy, and the protection of national interests.

This wider understanding of the term is more in line with expressed business interests.

2.2 As Things Stand

WTO does not regulate head on e-commerce (or digital trade) but electronically transmitted services are covered by the GATS to the extent that commitments to liberalize the pertinent service sector have been made.^v Indeed, WTO adjudicating bodies have resolved disputes dealing with electronically transmitted services.

In US-Gambling, the AB held that the US was violating its commitments regarding the supply of internet gambling. In China-Publications and Audiovisual Products, it was upheld that the electronic distribution of music was covered. In China-Electronic Payment Services, the AB held that the Chinese electronic payments regime was in violation of nondiscrimination. Finally, in Mexico-Telecoms, the Panel held that Mexico was violating its commitments on telecoms by imposing supra-competitive termination rates.

The TRIPs (Trade-related Intellectual Property Rights) Agreement as well, is relevant to this discussion. IP rights have typically a territorial dimension, and it is precisely this characteristic of IP rights that might obstruct supply of digitalized services. Since TRIPs embeds a minimum standard of protection of IP rights, WTO members remain free to enact higher standards of protection to the extent that they observe nondiscrimination. Nothing of course, stops WTO members from signing agreements to by-pass national idiosyncratic elements.

2.3 Work Programme

The Work Programme aims to bring e-commerce under the multilateral disciplines. At the moment of writing, it is clear that we are far away from even a modest agreement.

Since the end of the Uruguay round agreement, the ITA (Information Technology Agreement, I and II) have been concluded. This agreement has liberalized trade by eliminating duties in products such

as computers, semiconductors, or telecommunications equipment. Note that the number of the initial participants (29) grew significantly and reached 81, accounting for about 97% of world trade in IT goods.

3. FTAs and Digital Trade

Digital trade occupies space in the majority of free trade areas (FTAs) signed in the post-Uruguay round era.

3.1 Here, There and Everywhere

Take the European Union (EU) FTAs for example. Its agreement with Canada (CETA), Korea (KOREU), but also its agreements with more heterogeneous partners (like EU-Vietnam) all contain chapters dealing head on with digital trade (e-commerce).

The EU is not alone in this. US follows a similar path. The now (almost) defunct TPP, for example, contains provisions aiming to facilitate digital trade. There are some obvious starting points, like the provision to abolish duties on digital goods. There are also some more hotly debated issues that found their way into the text. The TPP, for example, takes a strong stance against data localization (not allowed to require the establishment of local computing facilities as a condition of doing business).

TISA (Trade in Services Agreement), the most ambitious plurilateral agreement^{vi} negotiated between a few WTO members outside the confines of the WTO, when finalized, will include an Annex on E-Commerce, which would cover open networks, unsolicited commercial communication, interactive computing, and wider international cooperation in this area.

3.2 Advantage FTAs

FTAs go thus consistently further than the multilateral regime does when it comes to addressing digital trade.^{vii} Issues like data localization for example, which have not entered the WTO jargon, are commonplace in the regulation of digital trade under the aegis of FTAs.

Why are trading partners prepared to do things bilaterally (or plurilaterally) and not multilaterally? After all, standard theory would suggest that deals should be easier when there is more to exchange. Regulation nevertheless, unlike tariffs cannot be dwindled down. To the extent that it exists for good reasons, it is nonnegotiable. The key is thus, to bring around the table regulators and the trading

community. To sensitize the former to the trade impact of their measures, and the latter to the well-founded of the intervention.

This is what a close-knit group of like-minded players can do. Examples abound: from the US-Regulatory Cooperation Council to the instruments for regulatory cooperation in CETA.^{viii}

4. A Role for the WTO

WTO should change course. Mindful of its limits, it should approach this discussion in functional manner, working on its strengths rather than embarking on a Work Programme with no compass where to go.

4.1 Advantage FTAs

WTO should attempt to address three questions:

- What is being delivered?
- Who delivers electronically?

These two questions will help identify the relevance of the WTO on digital trade, both with respect to the GATT and the GATS.

4.2 Next Steps

The next question for WTO should be what can be done to further liberalize digital trade. In that, WTO should function originally as complement to FTAs, and substitute for their efforts when gains can be multilateralized.

4.2.1 Building Bridges to the Hothouses of Regulation

Cutting edge issues are easier discussed across like-minded players. Think of the discussion on consumer privacy encryption, which has been taking place in TPP, for example, but is not in the radar screen of the WTO Work Programme.

Think also of the data localization issue for example. TiSA negotiations almost collapsed because of this issue. The EU, because of legal constraints, could not subscribe to the recipe advanced.^{ix} This issue is being discussed in various bilateral fora, and has yet to find its way into the WTO Work Programme.

And then there are issues, which have not been resolved even in more intense integration processes. Geo-blocking has been plaguing the EU quest for a unified digital market in the European continent. Recently, the Commission has proposed a regulation that will constitute the first step only towards eliminating obstacles to market integration.^x

The WTO has a lot to learn from these discussions. How do that?

4.2.2 Complements and Substitutes

WTO could complement these efforts by designing an osmosis mechanism. Issues that for example, have found similar or identical solutions in various FTAs could be debated as potential multilateral regulation. In doing that, WTO could become the multilateral substitute for regulation at the FTA-level.

In the meantime, it can provide an information-exchange regime, where good ideas and regulatory solutions agreed at the FTA-level could find a forum to be discussed by potentially interested players. Those keen could mimic the best regulatory examples. Others would have additional food for thinking their next regulatory interventions.

Reference

1. Bollyky, Tom, and Petros C. Mavroidis. 2017. Trade, Social Preferences and Regulatory Cooperation, the New WTO Think, *Journal of International Economic Law*, 20: 1-30
2. Branstetter, Lee. 2016. TPP and Digital Trade, pp. 72-81 in Jeffrey J. Schott and Cathleen Cimino-Isaacs (eds.), *Assessing the Trans-Pacific Partnership*, vol. 2, *Innovations in Trading Rules*, Peterson Institute of International Economics: Washington DC.
3. Hoekman, Bernard M., and Petros C. Mavroidis. 2015. WTO 'à la carte' or WTO 'menu du jour'? Assessing the Case for Plurilateral Agreements, *European Journal of International Law*, 26: 319-343.
4. Mishra, Neha. 2017. The Role of the Trans-Pacific Partnership Agreement in the Internet Ecosystem: Uneasy Liaison or Synergistic Alliance, *Journal of International Economic Law*, forthcoming.

ⁱEdwin B. Parker Professor of Law at CLS, New York City, and Professor of Law at the University of Neuchâtel (Switzerland). For helpful discussions, I am indebted to Bernard M. Hoekman, and Robert Wolfe.

ⁱⁱ WTO Doc. WT/MIN(98)/DEC/2 of 25 May 1998.

ⁱⁱⁱ One can find all these documents (both members' proposals, as well as WTO Secretariat background papers) in the WTO webpage https://www.wto.org/english/tratop_e/ecom_e/ecom_e.htm

^{iv} See also Information Economy Report (2015), *Unblocking the Potential of E-Commerce for Developing Countries*, UNCTAD: Geneva, Switzerland.

^v In light of our discussion above, there is no need to elaborate any further on the regime regarding trade in goods.

^{vi} Hoekman and Mavroidis (2015) discuss the workings of plurilateral agreements.

^{vii} Mishra (2017) for example discusses TPP

^{viii} Bollyky and Mavroidis (2017) discuss this issue in more detail.

^{ix} In C-362/14 (*Max Schrems v. Facebook*), the Court held that a Commission decision to allow for free flow of data cannot undermine the powers of national supervisory authorities to review whether transfer of data complies with the requirements of the EU directive regulating this issue (and essentially discuss the consistency of transfer with protection of fundamental rights). Eventually, in February 2016 the EU and US reached an agreement, the implementation status of which is still uncertain. Branstetter (2016) refers to CGE studies quantifying the negative impact on investment resulting from data localization requirements.

^x COM (2016) 289.